UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ANTHONY BARONE, on behalf of, Himself and all others Similarly situated	:	
Plaintiff,	:	
v.	:	Civil No. 3:17-CV-01545(VLB)
LAZ PARKING LTD, LLC,	:	
Defendant.	:	

RULING GRANTING PLAINTIFF'S MOTIONS FOR CONDITIONAL CERTIFICATION OF FLSA COLLECTIVE ACTION AND FOR NOTICE PURSUANT TO 29 U.S.C. § 216(b)

Plaintiff Anthony Barone and Opt-In Plaintiff Benjamin Lhota seek an order granting conditional certification in this Fair Labor Standards Act ("FLSA") collective action. Plaintiffs seek unpaid overtime wages on behalf of current and former employees working at defendant LAZ Parking Ltd. LLC, in similar but differently titled, salary paid assistant manager positions. Plaintiffs also request this Court to supervise notice to potential opt-in plaintiffs pursuant to FLSA, 29 U.S.C. § 216(b). (Dkt. #49-1 at 8-9). Plaintiffs seek an order requiring the defendant to produce the "names, addresses, telephone numbers, dates of employment, locations of employment, and work and personal e-mail addresses" of all persons employed

by defendant as Assistant Managers since September 13, 2014. (Dkt. #49-1 at 19).

Based on the Court's review of the record as well as the controlling law, plaintiffs' motion for conditional certification is **GRANTED**. Plaintiffs' motion for notice is also **GRANTED**, subject to the modifications set forth below.

I. FACTS

Defendant LAZ Parking LTD, LLC ("LAZ") manages or leases over 2,600 parking garages across the United States. (Dkt. #49-1 at 8).

Plaintiff Barone worked as an assistant manager ("AM") for LAZ from approximately January of 2016 through July of 2016. During that time, Barone alleges that he worked, on average, 50 hours per week without receiving overtime compensation. (Dkt. #49-1 at 7-8). Plaintiff Lhota was hired by LAZ as an AM for a portion of 2015. Lhota alleges that he worked, on average, 60 to 65 hours per week without receiving overtime compensation. (Dkt. #49-1 at 7-8).

Plaintiffs allege that defendant violated the FLSA by misclassifying them as exempt and by failing to compensate them for overtime. (Dkt. #46). Plaintiff Barone was located in Pennsylvania at Bryn Mawr Hospital. (Dkt. #49-1 at 4 n.3). Plaintiff Lhota was located in Chicago where he worked at multiple hotels. (Dkt. #49-1 at 4 n.4). Together, Barone and

Lhota worked in about four of the ten markets defendant operates within. (Dkt. #49-1 at 4; Dkt. #50 at 4).

According to the defendant, the individual HR Business Partners in each region determine the exemption status for the employees in the region. (Dkt. #50 at 1). However, corporate job descriptions and job postings for AMs classify AMs as exempt. (Dkt. #49-1 at 5). Plaintiffs assert that while they were working as AMs the defendant misclassified them as "exempt" employees, thereby allowing the defendant to avoid paying overtime even though the plaintiffs worked more than 40 hours per week. (Dkt. #49-1 at 12-13). Plaintiffs seek conditional certification on behalf of all similarly situated current and former employees who hold or held salary paid assistant manager positions.[1] (Dkt. #49).

Defendant opposes conditional certification for three reasons. First, defendant argues that plaintiffs cannot allege a common policy that violates the law. (Dkt. #50 at 1-2). Second, defendant argues that the corporate policies do not accurately describe the day-to-day job responsibilities of the AMs thereby

[1] On September 13, 2017, Terrell Day filed a complaint with the District of Connecticut alleging violations of the FLSA. Plaintiff Lhota joined the litigation on the same day as an opt-in plaintiff. Plaintiff Barone joined the litigation on September 26, 2017. On April 30, 2018, Plaintiff Day voluntarily withdrew himself from the case and Plaintiff Barone was substituted as a named Plaintiff. As of June of 2018, Plaintiffs Barone and Lhota are the only plaintiffs joined in this action. (Dkt. #49).

defeating any binding agent for the collective. (Dkt. #50 at 2-4). Third, defendant argues there is no uniform classification policy. (Dkt. #50 at 5-6).

II. DISCUSSION

A. The Applicable Legal Standard

In the Second Circuit Court of Appeals, conditional certification is "discretionary" and managerial in nature. Myers v. Hertz Corp., 624 F.3d 537, 555 n. 10 (2d Cir. 2010); Williams v. TSU Global Services, Inc., No. 18-cv-72 (RRM)(ST), 2018 WL 6075668, at *3 (E.D.N.Y. 2018). "Because it is discretionary, a motion for conditional certification involves a far more lenient standard than a motion for class certification under Rule 23 of the Federal Rules of Civil Procedure." Williams, 2018 WL 6075668, at *3 (internal citations and quotations omitted). There is a two-step process in place for conditional certification of collective actions under FLSA:

> The first step involves the court making an initial determination to send notice to potential opt-in plaintiffs who may be "similarly situated" to the named plaintiffs with respect to whether a FLSA violation has occurred. The court may send this notice after plaintiffs make a "modest factual showing" that they and potential opt-in plaintiffs "together were victims of a common policy or plan that violated the law". . . . The "modest factual showing" cannot be satisfied simply by "unsupported assertions," but 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. 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. The action may be "de-certified" if the record reveals that they are not, and the opt-in plaintiffs' claims may be dismissed without prejudice.

Myers, 624 F.3d at 555 (internal citations omitted).

Under this "modest" standard, plaintiffs must show that other exempt AMs were victims of a common, unlawful policy. Id. "As long as a plaintiff asserts a plausible basis for [his] claim, the merits of that claim are irrelevant to the similarly situated inquiry at the conditional class certification phase." Holbrook v. Smith & Hawken, Ltd., 246 F.R.D. 103, 106 (D. Conn. 2007). Thus, when considering whether opt-in plaintiffs exist, the court is not determining the possibility of success of plaintiffs' case, or even if the opt-in plaintiffs are, in fact, similarly situated to the plaintiff. Myers, 624 F.3d at 555 ("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.").

Both parties agree that the modest standard described in Myers applies to this case but they disagree over whether and to what extent the Second Circuit's ruling in Glatt v. Fox Searchlight Pictures Inc., 811 F.3d 528 (2d Cir. 2015) affects

that standard. A brief explanation is necessary to put their arguments in perspective.

Prior to 2015, some district courts within the Second Circuit applied a "modest-plus" standard, which increases the level of scrutiny as more evidence is added to the record. However, "the overwhelming case law in this Circuit clearly [held] that 'a heightened standard is not appropriate during the first stage of the conditional certification process and should only be applied once the entirety of discovery has been completed.'" Amador v. Morgan Stanley & Co., LLC., No. 11-cv-4326 (RJS), 2013 WL 494020, at *4 (S.D.N.Y. 2013)(*quoting* Winfield v. Citibank, NA., 843 F. Supp.2d 397, 402 n.3 (S.D.N.Y. Feb. 9, 2012)(class decertified in Ruiz v. Citibank, NA, 93 F. Supp. 3d 279 (S.D.N.Y. March 19, 2015)); Cunningham v. Elec. Data Sys. Corp., 754 F. Supp. 2d 638, 645 (S.D.N.Y. Dec. 13, 2010); Gortat v. Capala Bros., No. 07-cv-3629 (ILG), 2010 WL 1423018, at *10 (E.D.N.Y. Apr. 9, 2010), aff'd, 568 F. App'x 78 (2d Cir. 2014)(summary order).

In 2015 the Second Circuit decided Glatt v. Fox Searchlight Pictures Inc., 811 F.3d 528 (2d Cir. 2015). In Glatt, the plaintiffs, who had worked as unpaid interns, claimed that the defendants violated the FLSA by failing to pay them as employees during their internships. "[T]he district court concluded that [the plaintiffs] had been improperly classified as unpaid

interns rather than employees and granted their partial motion for summary judgment." Glatt, 811 F.3d at 533. On appeal, the Second Circuit was asked to determine "under what circumstances an unpaid intern must be deemed an 'employee' under the FLSA and therefore compensated for his work." Id. After articulating a new test for determining whether an internship creates an employment relationship, the Second Circuit vacated the district court's decision and remanded the case for further proceedings.

One of the certified questions in Glatt was whether a higher standard applies to motions to conditionally certify an FLSA collective made after discovery. The Second Circuit stated that it did "not need to decide that question, however, because in light of the new test for when an internship program creates an employment relationship, we cannot, on the record before us, conclude that the plaintiffs in [the] proposed collective are similarly situated, even under the minimal pre-discovery standard." Id. at 540. However, the Second Circuit left open the possibility that a renewed motion for conditional collective certification could still succeed on remand. Id. at 540 n. 7.

As both parties seem to agree, Glatt did not adopt or create a higher standard for motions to conditionally certify an FLSA collective. Instead, Glatt reaffirmed the standard that was described in Myers. See Varghese v. JP Morgan Chase & Co., No. 14-cv-1718 (PGG), 2016 WL 4718413, at *6 (S.D.N.Y. Sept. 9,

2016) ("[w]hile Glatt articulates a 'new test for when an internship program creates an employment relationship,' that decision does not alter the standard for determining whether court-authorized notice is appropriate")(internal citations omitted).

After Glatt, most of the district courts within the Second Circuit have continued applying the modest standard, notwithstanding the fact that the parties have conducted limited discovery on certification issues.[2] See Griffin v. ALDI, Inc., No. 5:16-cv-354 (LEK/ATB), 2017 WL 1397320, at *4 (N.D.N.Y. Feb. 22, 2017)(although the parties conducted discovery for three months, the court stated it would "not apply a more rigorous standard of review than prevailing Second Circuit authority indicates is appropriate."); Jing Fang Luo v. Panarium Kissena, Inc., No. 15-cv-3642(WFK)(ST), 2016 WL 11263668, at *4 n.4 (E.D.N.Y. Nov. 23, 2016)(declining to apply the "modest plus"

[2] However, some district courts within the Second Circuit have applied a "modest-plus" standard. *See* Brown v. Barnes & Noble, Inc., No. 1:16-cv-07333 (RA)(KHP), 2018 WL 3105068, at *6 (S.D.N.Y. Jun. 25, 2018)("when there has been substantial discovery, some courts in this Circuit have imposed a 'modest plus' standard for determining whether plaintiffs have sufficiently demonstrated that they and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law.")(emphasis added); Gallart v. Valley Nat'l Bancorp, No. 17-cv-1886 (FB)(SMG), 2018 U.S. Dist. LEXIS 148388, at *3 (E.D.N.Y. Aug. 30, 2018); Korenblum v. Citigroup, Inc., 195 F. Supp. 3d 475, 481 (S.D.N.Y. 2016)(applying a "modest plus" standard but acknowledging that "by and large,[], district courts in this Circuit have expressly declined to apply any increased scrutiny until discovery closes in full."). Even under the "modest plus" standard, the court may not draw negative "inferences of any sort where evidence is lacking because the plaintiffs may not have received discovery on the issue." Korenblum, 195 F. Supp. 3d at 482.

standard where only a limited amount of discovery was conducted on certification issues); Varghese, 2016 WL 4718413, at *6; and Kucker v. Petco Animal Supplies Stores, Inc., No. 14-cv-9983(DF), 2016 WL 237425, at *9 (S.D.N.Y. Jan. 19, 2016).

Defendant LAZ argues that the ruling in Glatt illustrates that the standard described in Myers is real. (Dkt. #50 at 21). LAZ argues that under Glatt, "where the plaintiff's claim requires consideration of individual aspects of the employee's experience to determine liability, conditional certification – even at this pre-discovery stage – is not appropriate." (Dkt. #50 at 17). LAZ characterizes Glatt as "controlling authority," and criticizes plaintiffs for relying "almost entirely on cases decided before the Second Circuit's order in Glatt." (Dkt. #50 at 21; Dkt. #54 at 7 n.8). LAZ argues that the Court should focus on cases that were decided after Glatt, primarily Brown, 2018 WL 3105068, at *7, which actually applied a heightened standard,[3] and Rosario v. Compass Group, Inc., No. 3:15-cv-241

[3] To the extent that the defendant argues that Brown illustrates how the courts have applied the modest standard after Glatt, it should be noted that the court in Brown applied a heightened standard, rather than the modest standard that was described in Myers. Brown, 2018 WL 3105068, at *7. Indicating that the application of the heightened standard influenced the outcome, the court stated that "the question of whether plaintiffs made a sufficient factual showing justifying conditional certification is, admittedly, a close question because most of the precedent in this District has called for a lenient standard in reviewing a motion for conditional certification. However, this case has a unique procedural position: the parties completed six months of discovery targeted to conditional certification." Id. at *18. Unlike the plaintiffs in Brown, the plaintiffs in this case have not stated that they will "not be seeking any more information on whether future opt-in plaintiffs are similarly situated to plaintiffs. . . ." Brown, 2018 WL 3105068, at *18.

(MPS), 2016 WL 471249 (D. Conn. Feb. 5, 2016), which the Court will address in the analysis section of this ruling.

The Court sees no reason to discount or disregard the cases that were decided before Glatt. Nothing in Glatt purports to modify the standard that was described in Myers. Indeed, even after Glatt, courts within the Second Circuit have continued to cite and rely upon decisions that pre-date Glatt, when deciding motions for conditional certification. *See* Sarikaputar v. Veratip Corp., No. 1:17-cv-00814 (ALC) (SDA), 2018 WL 4109348, at *1 n. 2 (S.D.N.Y. Aug. 29, 2018); McArthur v. Edge Fitness, LLC, No. 3:17-cv-01554 (JAM), 2018 WL 3302591 (D. Conn. July 5, 2018); Griffin, 2017 WL 1397320; and Varghese, 2016 WL 4718413.

B. Analysis

For the purpose of resolving the collective certification motion, the Court treats the facts alleged by the plaintiffs as true. Sarikaputar, 2018 WL 4109348, at *1 n. 2. The plaintiffs allege that when they worked as AMs they worked more than 40 hours per week but were not paid overtime. (Dkt. #49-1 at 8). Plaintiffs testified that, while working as AMs, they spent a substantial amount of time working in non-exempt capacities (*i.e.* parking cars, working the cash register, etc.). (Barone Dep. 31; Lhota Dep. 33, 35-36).

The plaintiffs testified that, while working as AMs, they performed substantially the same jobs as each other and as to

other AMs with whom they had worked alongside. (Barone Dep. 31-32; Lhota Dep. 25-26, 162-67). In this regard, Barone testified that he worked with an AM quite regularly when he was at Lankenau Hospital and frequently observed AMs in the Southeastern Pennsylvania, Philadelphia Region. (Barone Dep. 31-32). Lhota testified that, as an AM, he worked the same shift as another AM, who performed the same duties, and he worked with and observed other AMs who performed the same duties. (Lhota Dep. 163-67).[4]

Defendant LAZ designated Eric Daigle as its Rule 30(b)(6) witness. After reviewing the defendant's job posting library,

[4] Defendant LAZ relies heavily on Rosario v. Compass Group, USA, Inc., a case in which the Honorable Michael P. Shea denied plaintiffs' motion for conditional certification. 2016 WL 471249 (D. Conn. Feb. 5, 2016). In doing so, Judge Shea found that the plaintiffs failed to prove a common policy, noting that "the uniform classification of AMs as exempt is insufficient, *on its own*, for the Court to grant conditional certification." Id. at *4 (emphasis added). The evidence showed that, at each of defendant's locations, employees monitored the job duties performed by exempt AMs to determine if their positions should remain exempt. Id. Judge Shea also held that the plaintiffs did not demonstrate that the AMs were similarly situated. Id. One of the opt-in plaintiffs testified that an AM's duties varied based on the staffing and manager at a particular location, noting that her manager told her to create her own job description because, technically, there was no job description. Id. at *2. Two of the opt-in plaintiffs testified that they did not know what other AMs did because the only way to determine the duties of other AMs would be to ask them individually. Id. at *5. Judge Shea ultimately found that the "differences among AMs far outweigh any similarities" as their job duties varied "across and even within locations." Id. The present case differs as the plaintiffs testified that they performed substantially the same duties as one another and as to other AMs with whom they had worked. (Barone Dep. 31-32; Lhota Dep. 25-26, 162-67). Additionally, both plaintiffs testified that they spent a significant amount of time working in non-exempt capacities. (Barone Dep. 31; Lhota Dep. 33, 35-36). The evidence does not reflect that HR personnel monitor the duties of exempt AMs in an ongoing fashion, rather than making a one-time decision as to their location's AM position, to continuously re-assess their exempt status as their duties evolve. (*See* Daigle Dep. 63-64). The plaintiffs have not relied on the uniform classification by itself. The Court finds that, unlike the plaintiffs in Rosario, the plaintiffs have shown enough to satisfy their modest burden.

Daigle testified that he found one overarching job description for assistant manager. (Daigle Dep. 53, 89). Daigle testified that he also found postings for AM positions in Chicago and Pennsylvania, but the majority of the job duties were the same. (Daigle Dep. 53). Daigle testified that the overarching job description for AM has not been updated since 2014 or 2015 and the company does not have different job descriptions for exempt versus non-exempt AMs. (Daigle Dep. 63-64, 89-90). The overarching job description for AM lists the position as "FLSA Status: Exempt." (Dkt. #49-4).

Defendant LAZ has submitted a declaration from Daigle to supplement his deposition testimony. (Dkt. #50-2). Daigle's declaration states that the duties of an AM can be very different from one location to another. (Dkt. #50-2 at ¶7-14). The plaintiffs argue that the court should not consider Mr. Daigle's declaration. At this stage, the Court cannot and will not rely on Daigle's declaration. See Vecchio v. Quest Diagnostics Inc., No. 16-cv-05165 (ER), 2018 WL 2021615, at *4 (S.D.N.Y. Apr. 30, 2018) ("Defendants, however, cite no case law for the proposition that they may rely on their own affidavits to contradict the sworn testimony of plaintiff and other examiners."). At this stage, the Court "should not 'resolve factual disputes, decide substantial issues going to the ultimate merits, or make credibility determinations.'"

Sarikaputar, 2018 WL 4109348, at *1 n. 2 (quoting Jackson v. Bloomberg, LP., No. 13-cv-2001(JPO), 2014 WL 1088001, at *3 (S.D.N.Y. 2014)).

It is not the Court's role now to determine whether all potential plaintiffs performed the exact same job, with the same responsibilities because, at this stage, plaintiffs need not show that all potential opt-in plaintiffs are identical. *See* Ansoralli v. CVS Pharm., Inc., No. 16-cv-1506 (CBA)(RER), 2017 U.S. Dist. LEXIS 20075, at *6 (E.D.N.Y. Feb. 13, 2017) ("Plaintiffs and the putative collective are sufficiently similar in that they were all required to work off-the-clock and were not paid for that time."). "Indeed, courts routinely grant conditional certification despite factual variances between the plaintiff and the putative collective." Id. The plaintiffs have met their modest burden by showing that potential opt-in plaintiffs exist at LAZ who were performing similar duties with similar work hours without being paid overtime wages. See Ofori v. Central Parking Systems of NY, Inc., No. 06-CV-0128 (KAM), 2010 WL 335498, at *1 n. 3 (E.D.N.Y. Jan. 22, 2010)(In order "to meet the modest burden required at the notice stage of conditional certification plaintiff need do no more than demonstrate that he is similarly situated to other Assistant Garage Managers subject to the same policy of being denied

overtime compensation for hours worked in excess of forty per week.").

It is undisputed that 130 AMs are currently exempt and 73 AMS are non-exempt. (Dkt. #50 at 20). The defendant argues that since there are 73 non-exempt AMs there cannot be a common policy. (Dkt. #50 at 6). Although there are AMs who are non-exempt, those AMs were not subject to a common policy that requires exempt AMs to work in non-exempt capacities for more than 40 hours per week without overtime pay. The corporate created job descriptions and job postings for AMs, classifying AMs as exempt, would not apply to non-exempt AMs, thus excluding them from this collective. Therefore, the Court will exclude all non-exempt AMs from discussion.[5] A similar approach was applied in Amhaz v. Booking.com (USA), Inc., No. 17-cv-2120 (GBD) (HBP), 2018 U.S. Dist. LEXIS 144675, at *4 (S.D.N.Y. Aug. 23, 2018).[6] *See also* Ofori, 2010 WL 335498, at *1 n. 3 ("the fact that some

[5] The plaintiffs have sufficiently shown exempt AMs performed similar duties with similar hours. Factual disputes as to what exactly each exempt AM did daily are not to be resolved at this stage. See Taveras v. LSTD, LLC, No. 18-cv-903 (VEC), 2018 U.S. Dist. LEXIS 147021, *6 n.2 (S.D.N.Y. Aug. 28, 2018).

[6] In Amhaz, the plaintiffs argued that all of defendant's assistant managers ("AMs") were similarly situated nationwide because they (i) performed substantially the same duties, (ii) had the same working hours and (iii) were misclassified as exempt under the FLSA. Ahmaz, 2018 U.S. Dist. LEXIS 144675, at *4. However, the AMs who were assigned to the California offices were not considered exempt. Id. The court held that "[g]iven that plaintiffs' FLSA claim is based exclusively on alleged misclassification, it follows that AMs in the California offices are not similarly situated for purposes of conditional certification and all subsequent discussion regarding AMs nationwide will exclude California." Id.

employees with the same job title may have been differently classified as non-exempt and received overtime is irrelevant to the question of whether a group of employees who also possess the Assistant Garage Manager job title but were denied overtime are similarly situated in that they are subject to the same policy of being denied overtime compensation.")(internal quotations omitted).

Defendant LAZ notes that the plaintiffs cannot show that a formal corporate policy exists that binds the collective. While the Court agrees that no written policy exists that explicitly requires all exempt AMs to work more than 40 hours per week without overtime, this is not the end of the inquiry.

> [O]nce a plaintiff has plead that they are victims of a policy or plan, 'the FLSA does not require that a plaintiff identify a formal, facially unlawful policy before obtaining conditional certification of a collective action. To hold otherwise would allow employers to avoid FLSA collective action certification simply by promulgating compliant handbooks and policies, while letting their managers run roughshod over the FLSA's requirements.'

Vecchio, 2018 U.S. Dist. LEXIS 72919, at *23-24 (quoting Ansoralli, 2017 U.S. Dist. LEXIS 20075, at *5).

Defendant also argues that there is no nationwide classification policy in place because regional HR Business Partners make the classification decisions. (Dkt. #50 at 20). The Court does not find this fact to be dispositive. While the HR Business Partners may change an AM's classification from

exempt to non-exempt at a regional level, there is sufficient evidence in the record to suggest that the corporate created job postings and job descriptions classify AMs as exempt first. (Dkt. #49 at Exhibits B, D, F, H, I-P).

At this stage, a fact-specific inquiry into how individual HR Business Partners value the corporate uniform exemption of AMs is inappropriate. See Taveras, 2018 U.S. Dist. LEXIS 147021, *6 n.2 ("The court does not resolve factual disputes or make credibility determinations at the conditional certification stage."); Lynch v. United Servs. Auto. Ass'n, 491 F. Supp. 2d 357, 368 (S.D.N.Y. 2007)("At this procedural stage, the court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations."); Iglesias-Mendoza v. La Belle Farm, Inc., 239 F.R.D. 363, 368 (S.D.N.Y. 2007)("the factual variations defendants rely on do not undercut plaintiffs' allegations of common wage and overtime practices that violate the FLSA.").

Without deciding the merits of plaintiffs' claim, the Court finds that plaintiffs have proffered sufficient evidence that a collective of AMs who performed non-exempt work in excess of 40 hours per week without getting paid overtime exists. See Williams, 2018 WL 6075668 at *3 (plaintiffs' observations regarding the number of hours worked by other drivers provided a colorable basis for believing that plaintiffs and the other

drivers were similarly situated); McArthur v. Edge Fitness, LLC, No. 3:17-CV-01554 (JAM), 2018 U.S. Dist. LEXIS 111748, at *7 (D. Conn. July 5, 2018)("At the first step, a court's decision regarding whether to certify a FLSA collective action does not depend on the merits of a plaintiff's claims if these claims at least meet the threshold standard of plausibility."); Varghese, 2016 WL 4718413, at *7 (Plaintiffs' "experiences, and the observations they made at other Chase branches, support the inference that the failure to pay overtime compensation to ABMs was part of a common policy towards ABMs at Chase."); *see also* Herrera v. 449 Restaurant, Inc., No. 15-cv-6647 (RA)(FM), 2016 WL 3647602, at *2 (S.D.N.Y. Jun. 27, 2016)(on a motion for collective certification, "the burden is so low that even one or two affidavits establishing the common plan may suffice."). At this stage of conditional certification, plaintiffs have met their modest burden so the Court will conditionally certify this case as an FLSA collective action. This collective shall include all persons employed by defendant in the United States in

similar, though differently titled, exempt AM positions since September 13, 2014.[7]

C. Plaintiff's Motion for Notice

Plaintiffs further request that this Court (1) authorize notice by first-class mail and electronic mail to the collective; and (2) order defendant to produce a list of potential opt-in plaintiff's names, addresses, telephone numbers, dates of employment, locations of employment, and work and personal e-mail addresses within 14 days. (Dkt #49 at 18-19).

The Court orders defendant to disclose a list of the names, addresses, and work and personal email addresses of all persons employed as exempt AMs in the United States since September 13, 2014. See Lassen v. Hoyt Livery, Inc., No. 3:13-cv-01529 (JAM), 2014 U.S. Dist. LEXIS 129784, at

7 When the court is merely determining whether to grant conditional certification and the plaintiff has alleged willful violations of the FLSA, the statute of limitations for certifying the class is three years. See 29 U.S.C. § 255(a); see also Castillo v. Perfume Worldwide Inc., No. 17-cv-2972 (JS)(AKT), 2018 U.S. Dist. LEXIS 54573, at *41-42 (E.D.N.Y. Mar. 30, 2018) (allowing notice to be sent to workers employed during the three years prior to the filing of the Complaint and up to the present time). The plaintiffs have sufficiently alleged willful violations by defendant as to allow the Court to grant this three year limitations period for the purposes of the notice. See Dkt. #1; Dkt. #46. "If the court later finds that Defendants' violations were not willful, those outside of the statute of limitations may be removed at that time." D'Antuono v. C&G of Groton, Inc., No. 3:11-cv-33 (MRK), 2011 U.S. Dist. LEXIS 135402, at *17 (D. Conn. Nov. 23, 2011). While notice would normally count back from the court's conditional certification order, issues often arise in cases involving opt-in plaintiffs, so courts "frequently permit notice to be keyed to the three-year period prior to the filing of the complaint." Hamadou v. Hess Corp., 915 F. Supp. 2d 651, 668 (S.D.N.Y. 2013)(allowing notice to be sent to people employed for the three years preceding the Complaint filing date).

*20 (D. Conn. Sept. 17, 2014)(granting the production of names, mailing addresses, and email addresses).

This is not a "massive, national collective" as argued by defendant. (Dkt. #50 at 1). Defendant LAZ currently only has 130 people in the eligible position. Given the size of this collective, the Court orders defendant to provide this information within 21 days. Although defendant has not objected to the amount of information sought, there has been no showing by plaintiff that any additional information is necessary at this time or cannot be obtained after contact with opt-in plaintiffs has been made. See Alli v. Boston Mkt. Co., No. 3:10-cv-4 (JCH), 2011 U.S. Dist. LEXIS 101530, at *18-19 (D. Conn. Sept. 8, 2011) (finding the production of names and mailing addresses to be proper, but denying the production of phone numbers and social security numbers because plaintiff had "no need" for such information).

Conclusion

For the reasons and to the extent set forth above, plaintiff's motion for conditional certification of a FLSA collective action (Dkt. #49) is GRANTED. Defendant shall disclose to plaintiff the names and contact information specified above for potential FLSA opt-in plaintiffs within **21 days**. The notice period—that is, the period during which

individuals may "opt in" the FLSA collective action—shall begin on March 4, 2019, and conclude on May 6, 2019.

SO ORDERED this 11th day of February 2019, at Hartford, Connecticut.

/s/

Robert A. Richardson

United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ANTHONY BARONE, on behalf of, Himself and all others Similarly situated	:	
Plaintiff,	:	
v.	:	Civil No. 3:17-CV-01545(VLB)
LAZ PARKING LTD, LLC,	:	
Defendant.	:	

RULING DENYING DEFENDANT'S MOTION TO LIMIT NOTICE

The plaintiffs brought this action for unpaid wages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. In June of 2018, the plaintiffs filed a motion for conditional certification. (Dkt. #49). After the parties fully briefed the issue, the Honorable Vanessa L. Bryant granted the motion for conditional certification, on June 28, 2019. The defendant now seeks an order excluding any individuals who have signed arbitration agreements from receiving notice of the conditionally certified collective. (Dkt. #79). The plaintiffs oppose the motion. Based on the briefs and the controlling law, the defendant's motion is **DENIED.**

I. Timeliness and Waiver

Plaintiffs argue that the motion to exclude the individuals who signed arbitration agreements from receiving notice raises

an issue that could have and should have been raised while the parties were arguing over conditional certification. As a result, the plaintiffs argue that the defendant has waived the issue. The plaintiffs also argue that the motion is an improper and untimely motion for reconsideration. In response, the defendant argues that the "Court never addressed the arbitration issue. In other words, there is nothing for this Court to reconsider." (Dkt. #82, at 16). The defendant also argues that there is no procedural rule that required the defendant to raise the arbitration agreements in its opposition to the motion for conditional certification. (Dkt. #82, at 15).

By way of relevant background, the plaintiffs filed their motion for conditional certification in June of 2018. In connection with the motion, the parties filed a total of six briefs, focusing primarily on whether the plaintiffs are "similarly situated." (Dkt. #50, 51, 52, 54, 55 and 57). On February 11, 2019, this Court issued a ruling which granted the motion for conditional certification. (Dkt. #58).

On March 5, 2019, the defendant objected to the ruling and requested review by the Honorable Vanessa L. Bryant. (Dkt. #62). Thereafter, both parties submitted briefs. (Dkt. #64-66). On June 28, 2019, the Honorable Vanessa L. Bryant overruled the defendant's objection and granted conditional certification of the FLSA class. (Dkt. #70).

On August 9, 2019, the defendant filed a motion to exclude any individuals who signed arbitration agreements from receiving notice of the conditionally certified collective. (Dkt. #79). In its motion, the defendant relies on In re: JPMorgan Chase & Co., 916 F.3d 494 (5th Cir. 2019), in which the Fifth Circuit Court of Appeals excluded employees who signed arbitration agreements from receiving notice of the conditionally certified collective. *Id.* at 497. Although JPMorgan was decided before the defendant briefed its objection to the Court's ruling (Dkt. #62), neither party mentioned JPMorgan or the arbitration agreements in their briefs. (Dkt. #64, 65 and 66). Thus, the arbitration issue was never before the court. As a result, the Court concludes that the pending motion is not a motion for reconsideration.

The next question is whether the defendant was required to raise the arbitration agreements while opposing the motion for conditional certification. The issue raised in JPMorgan is not new. As the defendant states in its brief,

> the reasoning of JP Morgan is not new. This Court need not look past Hoffman-La Roche[v. Sperling, 493 U.S. 165 (1989)] to come to the same conclusion as the Fifth Circuit did in JPMorgan.

(Dkt. #79 at 9). The plaintiff argues that this statement is an acknowledgement by the defendant that it could have and should have raised the arbitration agreements earlier, such

that the failure to do so constitutes a waiver of the issue. (Dkt. #80, 9-10). The Court concludes that the defendant was not required to raise the arbitration agreements earlier. Indeed, many of the cases cited by the plaintiffs hold that the determination of whether an arbitration agreement is enforceable is best left for step two of the certification process, as opposed to step one. (Dkt. #80, at 11-13). Since the defendant did not waive its right to raise the arbitration agreements, the Court will address the merits of the motion.

For the reasons discussed below, the Court **DENIES** the motion to exclude the individuals who have signed arbitration agreements from receiving notice. However, nothing in this ruling will prohibit the defendant from raising the issue in a motion to compel arbitration or at the second stage of the certification process.

II. Potential exclusion of individuals who signed arbitration agreements at the conditional certification stage

The defendant asks the Court to exclude any individuals who signed arbitration agreements from receiving notice of the collective action. In making its argument, the defendant relies on the Fifth Circuit's decision in In re: JPMorgan Chase & Co., 916 F.3d 494 (5th Cir. 2019).

In JPMorgan, the district court granted a motion for conditional class certification in an FLSA case. Thereafter,

the defendant sought a writ of mandamus to direct the court to exclude any employees who signed arbitration agreements from receiving notice. The Fifth Circuit excluded such individuals from receiving notice. *Id.* at 497 ("we hold that district courts may not send notice to an employee with a valid arbitration agreement unless the record shows that nothing in the agreement would prohibit that employee from participating in the collective action.")(Emphasis added).

Defendant LAZ Parking notes that the Fifth Circuit's decision "is the first circuit court decision to interpret the text of the FLSA and Hoffman-LaRoche in the context of whether those with arbitration agreements should receive notice." (Dkt. #79, at 12). The defendant argues that if the court allows individuals who signed arbitration agreements to receive notice of the collective action, the court would be treating their arbitration "agreements as presumptively unenforceable." (Dkt. #79, at 5). The defendant argues that by seeking to provide notice to the individuals who signed arbitration agreements, the plaintiffs are attempting to "stir up litigation and unjustifiably double the size of the collective" even though the Supreme Court supposedly prohibited such tactics in Hoffman-La Roche v. Sperling, 493 U.S. 165 (1989). (Dkt. #79, at 6). Since the defendant repeats this argument multiple times, (Dkt. #79, at 5, 6 and 14), it should be noted that the majority opinion in

Hoffman-La Roche did not actually raise the concern about stirring up litigation.[1] The concern was raised by the dissenting opinion. In any event, courts have generally rejected the notion that sending notice to individuals with arbitration agreements stirs up litigation. Garcia v. Chipotle Mexican Grill, Inc., No. 16 Civ. 601 (ER), 2019 WL 358503, at *3-4 (S.D.N.Y. Jan. 29, 2019).

Relying largely on cases that pre-date JPMorgan, the plaintiffs argue that courts within the Second Circuit have

[1] As the Honorable Patti B. Saris correctly observed in Romero v. Clean Harbors Surface Rentals USA, Inc., 2019 WL 4280237, at *3 (D. Mass., Sept. 11. 2019),

> [i]n JPMorgan, the Fifth Circuit reasoned that giving notice to workers subject to arbitration agreements "who cannot ultimately participate in the collective 'merely stirs up litigation,' which is what Hoffman-La Roche flatly proscribes." 916 F.3d at 502 (citing Hoffmann-La Roche, 493 U.S. at 181, 110 S.Ct. 482 (Scalia, J., dissenting)). The Court observes, however, that the concern about stirring up litigation was expressed by the Hoffman-La Roche dissent, not the majority opinion. To the extent that the Hoffman-La Roche majority was concerned about trial courts engaging in "the solicitation of claims," it cautioned only that they "must be scrupulous to respect judicial neutrality" and "must take care to avoid even the appearance of judicial endorsement of the merits of the action." Id. at 174, 110 S.Ct. 482. Nowhere in the majority's opinion did it suggest that trial courts were required to make sure that the only workers receiving notice of an FLSA collective action were those actually capable of joining the action.

Id. at *3.

consistently refused to exclude plaintiffs from receiving notice simply because they have signed arbitration agreements. See Gathmann-Landini v. Lululemon USA, Inc., No. 15-cv-6867, 2018 WL 3848922, at *1 n.2 (E.D.N.Y. Aug. 13, 2018); Castillo v. Perfume Worldwide Inc., No. 17-cv-2972 (JS)(AKT), 2018 WL 1581975, at *12 (E.D.N.Y. Mar. 30, 2018); Varghese v. JP Morgan Chase & Co., No. 14-cv-1718 (PGG), 2016 WL 4718413, at *8-9 (S.D.N.Y. Sept. 9, 2016); Morales v. Rochdale Village, Inc., 15 CV 502 (RJD)(RML), 2016 WL 11190525, at *6 (E.D.N.Y. Aug. 15, 2016); Racey v. Jay-Jay Cabaret, Inc., No. 15-cv-8228 (KPF), 2016 WL 3020933, at *5 (S.D.N.Y. May 23, 2016); Guzman v. Three Amigos SJL Inc., 117 F. Supp. 3d 516, 526 (S.D.N.Y. 2015)(since the defendants had not moved to compel arbitration for any of the named plaintiffs, the court found that the "validity of the arbitration clause defense is speculative at this stage."); Romero v. La Revise Assocs., L.L.C., 968 F. Supp. 2d 639, 647 (S.D.N.Y. 2013)("case law makes clear that this sort of merits-based determination should not take place at the first stage of the conditional collective action approval process."); Hernandez v. Immortal Rise, Inc., No. 11-cv-4360 (RRM)(LB), 2012 WL 4369746, at *5 (E.D.N.Y. Sept. 24, 2012); D'Antuono v. C & G of

Groton, Inc., No. 3:11-cv-33 (MRK), 2011 WL 5878045 (D. Conn. Nov. 23, 2011).[2]

The Court agrees with the plaintiffs that the weight of authority within the Second Circuit militates against adopting the Fifth Circuit's approach. As the court observed in Gathmann-Landini, 2018 WL 3848922, at *1 n.2 (E.D.N.Y. Aug. 13, 2018), "[c]ourts in this circuit have consistently moved forward with the first step of FLSA collective actions to determine if plaintiffs are similarly situated, without regard to arbitration agreements made by the plaintiffs."

[2] The defendant argues that most of the cases plaintiffs cite predate the United States Supreme Court's ruling in Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018). (Dkt. #82 at 13). However, all of the cases that the defendant cites in support of excluding the "putative collective members" who signed arbitration agreements also predate Epic. (Dkt. #82 at 14). See Hudgins v. Total Quality Logistics, LLC, No. 16-cv-7331, 2017 WL 514191(N.D. Ill. Feb. 8, 2017); Fischer v. Kmart Corp., No. 13-cv-4116, 2014 WL 3817368 (D.N.J. Aug. 4, 2014); Daugherty v. Encana Oil & Gas (USA), Inc., 838 F. Supp. 2d 1127 (D. Colo. 2011); Morangelli v. Chemed Corp., No. 10-cv-876 (BMC), 2010 WL 11622886 (E.D.N.Y. Jun. 15, 2010). In any event, as one district court within the Second Circuit has observed, "dicta in this district and recent decisions in others contemplate that the Court's holding [in Epic] will have little effect on the approach of permitting a broad class of similarly situated individuals to receive notice of a collective action even if some may be compelled to arbitrate their claims should they decide to opt in." Lijun Geng v. Shu Han Ju Rest. II Corp., No. 18 CV 12220 (PAE)(RWL), 2019 WL 4493429, at *8 (S.D.N.Y. Sept. 9, 2019); see also Thomas v. Papa John's Int'l, Inc., No. 1:17 CV 411, 2019 WL 4743637, at *4 n.1 (S.D. Ohio Sept. 29, 2019).

The defendant relies upon Lanqing Lin v. Everyday Beauty Amore, Inc., No. 18-cv-729 (BMC), 2018 WL 6492741 (E.D.N.Y. Dec. 10, 2018), a 2018 case within the Second Circuit in which a district court decided to exclude plaintiffs who had signed arbitration agreements. In Lanqing Lin, the plaintiffs argued that "employees cannot waive their FLSA rights by contract" and that the question of whether the arbitration agreements are valid and enforceable should be determined at the second step of the certification process. *Id.* at *4. The court stated

> [a]lthough plaintiffs are technically correct that the first step considers only whether other employees are similarly situated as to the existence and application of a common practice or policy – as compared to their ability to recover on the merits or their means to do so – this nuance cannot save them here. Indeed, every case plaintiffs cite in support of this position predates Sutherland [v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013)], which eliminates any persuasive effect they may have otherwise had.

Id.

Although the Court accepts Lanqing Lin as persuasive authority, there are critical differences between Lanqing Lin and the instant case. First, in reaching its conclusion, the court in Lanqing Lin noted that all of the cases cited by the plaintiffs predated Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013)(holding that an employee's ability to proceed collectively under the FLSA can be waived in an arbitration agreement). In contrast, in the instant case, almost all of the

cases that the plaintiffs cite in support of their argument that the arbitration agreements should be addressed later and should not preclude individuals from receiving notice were decided after Sutherland. *See e.g.*, Gathmann-Landini, 2018 WL 3848922 (E.D.N.Y. Aug. 13, 2018); Castillo, 2018 WL 1581975 (E.D.N.Y. Mar. 30, 2018); Varghese, 2016 WL 4718413 (S.D.N.Y. Sept. 9, 2016); Racey, 2016 WL 3020933 (S.D.N.Y. May 23, 2016).

Additionally, the underlying facts in the instant case are different than the facts in Lanqing Lin. In Lanqing Lin, all of the employees worked in New York, such that the validity of their arbitration agreements would be determined by New York law. In the instant case, the members of the collective action work in 30 different states, thereby requiring the court to apply each state's law in order to determine the validity of each arbitration agreement. See Abdullayeva v. Attending Homecare Servc. LLC, 928 F.3d 218, 222 (2d Cir. 2019). In Lanqing Lin, the arbitration agreements were part of the record. Lanqing Lin, 2018 WL 6492741, at *5. In contrast, LAZ Parking has not submitted any signed arbitration agreements for any of the collective class members. LAZ Parking has only submitted a sworn declaration from its VP of People and Culture which "estimates" that "approximately 200" assistant managers have signed arbitration agreements with class action waivers. (Dkt. #79-1, at ¶4). The record does not indicate which members of

the collective supposedly signed arbitration agreements or when they signed them. The record also does not identify any of the facts or circumstances surrounding the formation of the contracts or the state in which each individual resides. Thus, LAZ Parking's reliance on Lanqing Lin is misplaced.

Several district courts have addressed JPMorgan. Within the Second Circuit, at least one district court has refused to follow JPMorgan. See Lijun Geng v. Shu Han Ju Rest. II Corp., No. 18 CV 12220 (PAE)(RWL), 2019 WL 4493429, at *9 (S.D.N.Y. Sept. 9, 2019)("[t]his court believes it appropriate in this case to follow the greater weight of authority endorsing sending notice of a collective action to potential opt-ins who may be party to an arbitration agreement.").

Outside of the Second Circuit, a number of district courts have also refused to follow JPMorgan. Those courts generally conclude that the enforceability of the arbitration agreements should not be determined at stage one of the conditional certification process. Monplaisir v. Integrated Tech Group, LLC, No. C 19-1484 WHA, 2019 WL 3577162, at *3 (N.D. CA., Aug. 6, 2019)("[a]t this stage, all putative collective members remain potential plaintiffs. Thus, to avoid putting the cart before the horse, this inquiry is best left for step two."); Gonzalez v. Diamond Resorts Int'l Mktg., No. 2:18-cv-00979 (APG)(CWH), 2019 WL 3430770, at *5 (D. Nev. July 29, 2019)

("Withholding notice because of the existence of an arbitration agreement presupposes the enforceability of the agreement. . . . [T]he existence of an arbitration agreement goes to an aspect of defendant's defense, and the enforceability of such an agreement is better reserved for stage two."); Bigger v. Facebook, Inc., *appeal filed*, 375 F. Supp. 3d 1007, 1023 (N.D. Ill. March 22, 2019) ("[T]he enforceability of arbitration contracts must be adjudicated on the merits, and the Court does not make merits determinations at the conditional certification stage.") (internal citations and quotations omitted).[3] *See also* Clark v. Pizza Baker, Inc., No. 2:18-CV-157, 2019 WL 4601930, at *7 (S.D. Ohio Sept. 23, 2019)("This Court is more persuaded as to the merits of the approach taken in Bigger v. Facebook than that taken in In re JPMorgan Chase & Co., at least when ruling on a Motion to Strike or Stay and finds that Taylor [v. Pilot Corp., 697 Fed. Appx. 854, 861 n. 3 (6th Cir. 2017)] suggests that the Sixth Circuit would be disinclined to follow the Fifth Circuit's approach.").

Some district courts in other jurisdictions have decided to follow and apply JPMorgan. *See* Compere v. Nusret Miami, LLC, 391

[3]As the defendant notes, Bigger has been appealed to the Seventh Circuit Court of Appeals. However, the decision still remains persuasive authority. The Second Circuit has yet to consider JPMorgan, so all of the cases from other jurisdictions, either following or rejecting JPMorgan, serve as persuasive authority.

F. Supp. 3d 1197, 1205 (S.D. Fla. 2019)("[T]he parties shall also consider the list of individuals to be noticed in light of defendants' contention that many employees have signed arbitration agreements and thus should not receive notice of this action."); McGuire v. Intelident Sols., LLC, 385 F. Supp. 3d. 1261, 1266 (M.D. Fla. July 17, 2019)(where plaintiff did not contest the validity or enforceability of any arbitration agreement, the court held that "OMs who may be subject to a valid arbitration agreement should be excluded from this collective action at this notice stage."); Lea Graham v. Word Enterprises Perry, LLC, No. 18-CV-10167, 2019 WL 2959169, at *5 (E.D. Mich. June 18, 2019)("this court concludes that the 100 employees who are bound to arbitrate may not receive notice of conditional certification if this Court grants it."); Mode v. S-L Distribution Co., LLC, No. 318CV00150RJCDSC, 2019 WL 1232855, at *4 n. 3 (W.D.N.C. Mar. 15, 2019)(describing its decision as being consistent with the Fifth Circuit's ruling in JPMorgan, the court stated that "when the court has yet to determine whether plaintiffs are employees or whether the Distributor Agreements will be upheld, it would be improper to preclude sending notice to those potential plaintiffs whose Distributor Agreements contained arbitration provisions."). However, these decisions appear inconsistent with the approach taken by most of the district courts within the Second Circuit.

The defendant argues that if this Court denies the motion to exclude the individuals who signed arbitration agreements, it would effectively amount to a waiver of the defendant's right to arbitrate. (Dkt. #82 at 4, 6-10). The Court disagrees. The defendant repeatedly relies on the Supreme Court's decision in Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018). In Epic, the Supreme Court found that arbitration agreements that contain waivers of the right to participate in class or collective actions are lawful and enforceable. *Id.* Epic will be informative if the defendant files its motions to compel arbitration or when the parties reach the second stage of the certification process. However, at this moment, the Court lacks sufficient information to determine the validity of the arbitration agreements.[4] The defendant is essentially asking the Court to validate the arbitration agreements, which supposedly have been signed by approximately 200 potential notice recipients across 30 states, without identifying those employees

[4] See Garcia v. Chipotle Mexican Grill, Inc., No. 16 CIV. 601 (ER), 2019 WL 358503, at *4 n. 2 (S.D.N.Y. Jan. 29, 2019) ("[E]ven after Epic, there still will be factual issues concerning the existence of opt-ins' arbitration agreements or their invalidity under "generally applicable contract defenses, such as fraud, duress, or unconscionability." [Epic Systems] at [138 S. Ct.] 1622 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)). Such factual issues concerning opt-ins' arbitration agreements are properly deferred until after the initial stage of certification.").

or providing a copy of the agreements that the employees signed or disclosing any of the facts or circumstances surrounding the manner in which each agreement was formed. (Dkt. #79 at 11). This Court declines to do so at this stage where a motion to compel arbitration has not even been filed.

The defendant also argues that (1) federal policy protects arbitration agreements, (2) providing notice to those with arbitration agreements is an impermissible "solicitation of claims," and (3) requiring notice to be sent would "deprive LAZ of the benefits of arbitration." (Dkt. #79 at 6-10). These arguments have been rejected by courts within the Second Circuit, as evident by the repeated authorization of notice to those with arbitration agreements. *See, e.g.* D'Antuono, 2011 WL 5878045, at *4 ("That the applicability of the arbitration agreements will need to be determined individually should not prevent class certification."); Compare Agarunova v. Stella Orton Home Care Agency, Inc., No. 16-cv-638 (MKB), 2019 WL 1114897, at *3 (E.D.N.Y. Mar. 11, 2019) (denying motion for conditional certification without prejudice where a pending motion to compel arbitration preceded the motion for conditional certification and every potential plaintiff was subject to the arbitration provision). Accordingly, "the interest of judicial economy and, perhaps more importantly, of ensuring that all eligible workers receive notice outweigh the possible negative

effect that some receiving the notice might not have valid claims." Walston v. Edward J. Young, Inc., No. 15-cv-457 (LDW)(AYS), 2016 WL 3906522, at *7 (E.D.N.Y. Feb. 22, 2016).

Since the weight of authority within the Second Circuit is inconsistent with the approach that was taken by the Fifth Circuit in JPMorgan, the Court denies LAZ Parking's motion.[5] "As the Second Circuit has made clear, the FLSA is a remedial statute, and the federal courts should give it a liberal construction." Aros v. United Rentals, Inc., 269 F.R.D. 176, 182 (D. Conn. 2010)(Hall, J.). One purpose of the FLSA notice requirement is "to start a conversation among employees, so as to ensure that they are notified about potential violations of the FLSA and meaningfully able to vindicate their statutory rights." Lijun Geng, 2019 WL 4493429, at *20 (S.D.N.Y. Sept. 9, 2019)(quoting Trinidad v. Pret A Manger (USA) Ltd., 962 F. Supp. 2d 545, 564 (S.D.N.Y. July 11, 2013)); Bittencourt v. Ferrara Bakery and Café, Inc., 15 CV 0499 (JPO)(JCF), 310 F.R.D. 106,

[5] Additionally, this case is unaffected by the Second Circuit's decision in Abdullayeva as there was a pending motion to compel arbitration in that case which the district court denied. 928 F.3d 218 (2d Cir. 2019). The Second Circuit reversed that denial. *Id.* Here, the Court is not in a proper procedural position to compel arbitration based on an arbitration agreement that has not been filed or litigated. Abdullayeva will likely be instructive if a motion to compel is filed but is not instructive regarding notice of conditional certification.

118 (S.D.N.Y. Sept. 25, 2015).[6] See also Oakley v. Servisair, LLC, No. 13 CV 4191 (EN)(VPK), 2017 WL 3017719, at *2 (E.D.N.Y. July 14, 2017). That purpose would be undermined if employees who have signed arbitration agreements are excluded from receiving notice. Excluding such employees from receiving notice would presuppose that the arbitration agreements are valid, even though the employees who signed the agreements may very well have a legitimate challenge to their validity or enforceability. Excluding such employees from receiving notice could foreclose their opportunity to challenge the agreements or to attempt to vindicate their rights, whether in court or arbitration.

III. LAZ Parking has not shown the existence of valid arbitration agreements by a preponderance of the evidence

Had the Court applied JPMorgan, the defendant's motion still would have been denied. In JPMorgan, there was no dispute regarding the existence or enforceability of the arbitration agreements. The Fifth Circuit specifically stated that "if there is a genuine dispute as to the existence or validity of an

[6]Thus, for example, some district courts within the Second Circuit have allowed plaintiffs to obtain contact information for potential class members "even if some recipients of the notice will have claims that are time-barred under the FLSA." Moore v. Eagle Sanitation, Inc., 276 F.R.D. 54, 59 (E.D.N.Y. July 18, 2011)(quoting Cano v. Four M Food Corp., No. 08-CV-3005, 2009 WL 5710143, at *10 (E.D.N.Y. Feb. 3, 2009). But see Ramos v. Platt, 1:13 CV 8957 (GHW), 2014 WL 3639194 (S.D.N.Y. July 23, 2014)(reaching a contrary result).

arbitration agreement, an employer that seeks to avoid a collective action, as to a particular employee, has the burden to show, by a preponderance of the evidence, the existence of a valid arbitration agreement for that employee." JPMorgan, 916 F.3d at 502-03 (emphasis added).

Unlike JPMorgan, it cannot be said that there is no dispute here concerning the existence and enforceability of the arbitration agreements. (Dkt. #83, at 8-15). Therefore, had the Court applied JPMorgan, LAZ Parking would have been required to show the existence of a valid arbitration agreement for each member it seeks to exclude. LAZ Parking has failed to produce sufficient evidence to meet its burden. LAZ Parking has submitted an unsigned and undated document entitled "Agreement to Arbitrate Employment Disputes,"(Dkt. #79-1), along with a sworn declaration from the V.P. of People and Culture, Eric Daigle, "estimat[ing]" that "approximately 200" assistant managers have signed arbitration agreements with class action waivers. (Dkt. #79-1, at ¶4). Mr. Daigle's declaration states that the class action waiver language is "the same or similar" to the language in the unsigned, undated agreement that is attached to his declaration. (Dkt. #79-1, at ¶5). As illustrated by the discussion below, the cases that have applied JPMorgan have generally found such evidence to be insufficient.

In Camp v. Bimbo Bakeries USA, Inc., No. 18-cv-378-SM, 2019 WL 1472586 (D. NH. Apr. 3, 2019), after the court granted conditional certification of an FLSA class, the defendant moved for partial reconsideration. In light of JPMorgan, the defendant argued that it would be inappropriate to send notice of the pending collective to individuals who were subject to arbitration agreements. *Id.* at *3. In denying the motion for reconsideration, the court observed that the parties in JPMorgan did not dispute that approximately 85% of the potential members of the collective were subject to binding arbitration agreements and were thus precluded from participating in the collective action. *Id.* The court stated that

> [g]iven the absence of any disagreement about the existence or enforceability of those arbitration agreements, it is not surprising that the court [in JPMorgan] held that "[w]here a preponderance of the evidence shows that the employee has entered into a valid arbitration agreement, it is error for a district court to order notice to be sent to that employee as part of any sort of certification." [JPMorgan, 916 F.3d] at 503. Here, however, the plaintiffs contest both the existence and enforceability of any arbitration agreements.

Id. The court noted that

> Bimbo Bakeries have not produced even a single executed arbitration agreement signed by a potential member of the collective. Instead, they have merely proffered an untethered "Exemplar Distribution agreement", which consists of a few isolated pages extracted from what Bimbo Bakeries says (in their memorandum, and not by way of affidavit) is a Distribution Agreement executed by "many" potential members of the collective.

Id. (internal citation omitted). The court in Bimbo Bakeries concluded that the defendant failed to meet its burden and, therefore, denied the requested relief.

In Romero v. Clean Harbors Surface Rentals USA, Inc., No. 18-10702-PBS, 2019 WL 4280237 (D. Mass., Sept. 11. 2019), the district court in Massachusetts granted plaintiff's motion to conditionally certify a collective action. Relying upon JPMorgan, the defendant moved for clarification, requesting the court to expressly state that any members of the collective who signed arbitration agreements are not part of the group, "meaning they will not receive notice of the FLSA collective action nor will they be allowed to opt-in to the action." *Id.* at *1. The court observed that

> [t]he Fifth Circuit recognized that workers could not be excluded from receiving notice of an FLSA collective action merely because they signed an arbitration agreement. Instead, it required that district courts conduct a preliminary inquiry into the validity of the arbitration agreements at the conditional certification stage.

Id. at *3.

In support of its claim that the employees entered into valid arbitration agreements, the defendant in Romero produced three sample consulting agreements, a master service agreement ("MSA") which incorporated an arbitration agreement by reference, a sample arbitration agreement, and an affidavit from a Managing Director which stated that the samples of the MSA and

arbitration agreement are representative of those signed by other workers. The court found that such evidence was insufficient to establish by a preponderance of the evidence that the arbitration agreements for all 136 employees are valid. *Id.* at *4. The court stated that "[t]he problem is compounded by the fact that [plaintiff] has no way of meaningfully contesting the validity of the Arbitration Agreement since he does not yet know the identity of any of the Arbitration Workers or the circumstances in which they signed Arbitration Agreements." *Id.* As a result, the court refused to exclude the members of the collective from receiving notice of the collective action. *Id.*[7]

In Lanqing Lin, 2018 WL 6492471, a case which pre-dates JPMorgan but is cited by LAZ Parking, (Dkt. #79, at 6 and 15-16), employees who were employed in New York signed arbitration agreements as a condition of either new or continued employment. *Id.* at *11. The plaintiffs moved for conditional certification and the defendant objected to the proposed scope of the collective. In resolving the issue, the court concluded that

[7] See also Thomas v. Papa John's Int'l, Inc., No. 1:17CV411, 2019 WL 4743637, at *4 (S.D. Ohio Sept. 29, 2019)(finding "insufficient facts in the record" regarding the validity of the arbitration agreements, the Court permitted "notice to be sent to those employees subject to an arbitration agreement with the recognition that the agreements' enforceability will have to be determined at a later stage in the litigation.").

the employees who signed arbitration agreements were not similarly situated to the named plaintiffs.[8] *Id.* at *5. In reaching that conclusion, the court specifically noted that "[t]he relevant record as to these employees is the arbitration agreement. That record is before the Court now and there is no benefit obtained by waiting until step two to decide this issue." *Id.*

Unlike Lanqing Lin, the arbitration agreements that were supposedly signed by the members of the collective in this case are not part of the record. As in Bimbo Bakeries and Romero, LAZ Parking has not provided any of the arbitration agreements that were signed by the members of the collective. Instead, LAZ Parking has submitted a one paged document that is entitled "Agreement to Arbitrate Employment Disputes." (Dkt. #79-1). The document is undated and unsigned. (Dkt. #79-1). LAZ Parking has also submitted a sworn declaration from Eric Daigle which "estimates" that "approximately 200" assistant managers have signed arbitration agreements with class action waivers and asserts that the language of each such waiver is the same or similar to the unsigned, undated agreement that is attached to

[8] This Court has already decided the issue of whether the plaintiffs are similarly situated for conditional certification purposes and LAZ Parking has stated that it is not arguing that the individuals who signed arbitration agreements are not similarly situated. (Dkt. #82, at 5).

Mr. Daigle's declaration. (Dkt. #79-1, at ¶5). LAZ Parking never identifies which employees supposedly signed the arbitration agreements. As in Romero, this omission compounds the problem because the plaintiffs have "no way of meaningfully contesting the validity of the Arbitration Agreement since [they do] not yet know the identity of any of the Arbitration Workers or the circumstances in which they signed Arbitration Agreements." Romero, 2019 WL 4280237, at *4.

As the plaintiffs correctly note, LAZ Parking has not produced (1) any evidence showing how and when the arbitration agreements were presented to the members of the collective action, or (2) any evidence showing whether the agreements were provided to the members of the collective action before or after the lawsuit was filed or after the Court granted conditional certification,[9] or (3) any evidence regarding any other details relating to the formation of the arbitration agreements. (Dkt. #83, at 13). As a result, had the Court applied JPMorgan, it

[9] In Walsh v. Gilbert Enterprises, Inc., C.A. No. 15-472 WES, 2019 WL 2448670 (D. R.I., June 12, 2019), the district court distinguished JPMorgan, noting that the arbitration agreements in JP Morgan "applied to the entire collective action period, whereas the arbitration agreements at issue here only came into existence in February 2016 – nearly three years after the collective action period began in October 2013." *Id.* at *1. LAZ Parking has not submitted any evidence that would allow the Court to determine if the arbitration agreements apply to the entire collective action period or a different period. There is no evidence in the record regarding when the employees signed the arbitration agreements.

would have concluded that LAZ Parking failed to produce sufficient evidence to establish by a preponderance of the evidence that the arbitration agreements are valid and enforceable.

Conclusion

For the above reasons, the defendant's motion is **DENIED**.

This is not a Recommended Ruling. This is a discovery ruling or order which is reviewable pursuant to the "clearly erroneous" statutory standard of review. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); and D. Conn. L. R. 72.2. As such, it is an order of the Court unless reversed or modified by a district judge upon motion timely made.

SO ORDERED this 20th day of October, 2019 at Hartford, Connecticut.

_____/s/_____

Robert A. Richardson
United States Magistrate Judge