

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

CHRISTOPHER COLSON, ON HIS  
OWN BEHALF AND ON BEHALF  
OF THOSE SIMILARLY SITUATED,

CASE NO.: 3:09-CV-850

Plaintiffs,

vs.

CABLEVIEW COMMUNICATIONS  
OF JACKSONVILLE, INC.,

Defendant. /

**PLAINTIFF'S RENEWED MOTION FOR AN ORDER PERMITTING  
SUPERVISED NOTICE OF THIS ACTION TO POTENTIAL OPT-IN  
PLAINTIFFS AND CONDITIONAL CERTIFICATION OF THIS CASE AS A  
COLLECTIVE ACTION AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff, CHRISTOPHER COLSON ("Plaintiff"), requests the entry of an Order for conditional certification of this collective action and permitting under supervision, notice to all similarly situated employees who were employed by Defendant, CABLEVIEW COMMUNICATIONS OF JACKSONVILLE, INC. ("CABLEVIEW" or "Defendant"), over the last three (3) years who were subjected to Defendant's illegal pay practice of failing to pay full and proper overtime compensation for all hours worked in excess of forty (40) in a workweek. Thus, as discussed below, Plaintiff requests conditional certification in the instant matter and states as follows:

**MOTION FOR AN ORDER PERMITTING COURT SUPERVISED NOTICE  
TO EMPLOYEES OF THEIR OPT-IN RIGHTS**

1. Section 16(b) of the Fair Labor Standards Act of 1938 (“FLSA”) provides, among other things, that an action to recover unpaid minimum wages or unpaid overtime compensation may be maintained against any employer in any federal or state court of competent jurisdiction by any one or more employees for and on behalf of himself or themselves and other employees similarly situated. See 29 U.S.C. § 216(b).

2. As stated in Plaintiff’s Complaint and Amended Complaint, (Docs. No. 1, 52) Plaintiff was a satellite installer/technician who received a predetermined amount of pay according to the job performed, i.e. paid him a “piece rate,” and is authorized by the FLSA to sue in his own name on behalf of himself and other employees similarly situated. Plaintiff has brought this action on behalf of all current and former similarly situated satellite installers/technicians who worked overtime hours for Defendant within the last three (3) years and who did not receive full and proper payment of “time and a half” wages for all overtime hours worked based on Defendant’s misclassification of its installers as independent contractors.

3. Plaintiff knows that his claim is typical of the claims of other former and current similarly situated satellite installers employed by Defendant, and typical of the claims of all members of the representative class described below. *See* Affidavit of CHRISTOPHER COLSON at ¶ 11, attached as Exhibit 1.

4. The representative class consists of all current and former satellite installers/technicians who worked for Defendant at any time within the last three (3) years, and who were subjected to Defendant’s illegal practice of not paying full and

proper overtime compensation for all overtime hours worked. As a result of such compensation practices, each satellite installer/technician did not receive full and proper payment of time and one half of his/her regular rate of pay for all hours worked over forty (40) in one or more workweeks for Defendant. The named Plaintiff, as well as seven (7) additional “opt-in Plaintiffs,” have filed an Affidavit/Declarations in support of this Motion.

5. Simply put, all other satellite installers/technicians are owed full and proper payment of overtime wages and the right to participate in this litigation. Defendant has acted or refused to act on grounds applicable to satellite installers/technicians, thereby making the identical relief appropriate with respect to their current and former satellite installers as a whole. Moreover, the common questions of law and fact predominate over any questions affecting only Plaintiff, and a collective action is superior to other available methods for the fair and equitable adjudication of the controversies between the representatives described above and the named Defendant. And, although the class of current and former satellite installers is identified and certain, the individual members of the class cannot be completely identified and notified of their right to join this action absent access to Defendant’s books and records.

WHEREFORE, Plaintiff, CHRISTOPHER COLSON, respectfully requests that the Court permit and supervise notice to all current and former satellite installers who did not receive full and proper payment of time and one half wages for all overtime hours worked during his/her employment with Defendant.

## MEMORANDUM OF LAW

### I. INTRODUCTION

The FLSA authorizes employees to bring an action on behalf of themselves and others similarly situated. *See* 29 U.S.C. § 216(b). The FLSA provides, in part, that:

An action to recover the liability [for unpaid overtime] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other similarly situated. *No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.*

*See id.* (emphasis added).

Defendant, CABLEVIEW COMMUNICATIONS OF JACKSONVILLE, is a full service cable contracting company that has a nationwide network. *See* Defendant's website at [www.cableview.net](http://www.cableview.net). It provides cable installation and related services in Florida (Jacksonville, Sarasota, St. Augustine, Lake City) North Carolina, Virginia, Maryland, Texas, and Kentucky. *Id.* As part of its services, CABLEVIEW employed, and continues to employ, several hundred satellite installers to install and service its products to consumers. *See* Affidavit of Christopher Colson at ¶ 11. Plaintiff, and those similarly situated to him, who have joined, and wish to join this action, are those installers. *See id.* at ¶¶ 7-12.

Plaintiff is a former satellite installer whose predetermined payment was based on the job he performed. *See* Affidavit of CHRISTOPHER COLSON at ¶¶ 4-6. In this regard, Plaintiff, and those similarly situated to him performed the primary duty of

installing Defendant's products. *See id.* at ¶ 11. During their employment with Defendant, Plaintiff, and other similarly situated satellite installers, regularly worked in excess of forty (40) hours per workweek. *See id.* at ¶¶ 9, 11. Notwithstanding the actual overtime hours worked by Plaintiff and other similarly situated installers, Defendant did not pay full and proper overtime compensation for all overtime hours worked in excess of forty (40) within a workweek. *See id.* at ¶¶ 6-10. Instead, Defendant paid Plaintiff, and these similarly situated individuals, a set amount, based on their job performed (commonly referred to as "piece rate") with no provisions for overtime hours worked over forty (40) per week in one or more workweeks. *See id.* at ¶¶ 4-6, 11. Thus, as a result, Plaintiff and other similarly situated satellite installers did not receive full and proper compensation for all hours worked over forty (40) each workweek. *See id.* Defendant can not dispute that it did not pay overtime compensation to its installers.

Plaintiff asserts that Defendant's above compensation policies violate the FLSA's overtime provisions requiring the payment of time and one half overtime compensation for each hour worked over forty (40) in a workweek. That is, because Defendant paid its hundreds of installers by piece rate without additional compensation to pay installers for all hours worked over forty, Plaintiff maintains that such compensation practices demonstrate a common policy that violated the law and adversely affected the rights of each member of this collective action. *See Ayers v. SGS Control Servs., Inc.*, 2004 WL 2978296, at \*1, 2004 U.S. Dist. LEXIS 25646 at \*4 (S.D.N.Y.2004). *See also Scholtisek*, 229 F.R.D. 381, at 390. ("[w]hat is important is that these employees were allegedly subject to a common practice or scheme on [their employer's] part").

Therefore, Plaintiff seeks this Court's authorization to facilitate notice to each of Defendant's installers who was subjected to the illegal pay practices described above at any time within the last three (3) years.

## II. APPLICABLE STANDARDS FOR COLLECTIVE ACTIONS

### A. Authority to Send Class Notice

FLSA class actions operate much differently than the typical class action suits under Rule 23 of the Federal Rules of Civil Procedure. Under 29 U.S.C. § 216(b) of the FLSA, an employee belonging to a similarly situated class of plaintiffs must "opt-in" to the class by filing a written consent with the Court in order to be bound by the outcome of the case. Without signing and filing such an express consent, employees are not bound by the outcome of the litigation. *See id.* This is just the exact opposite of traditional Rule 23 class actions in which a plaintiff initiating a class action automatically represents every member of the class that has not expressly "opted-out."

In *Hoffman-La Roche, Inc. v. Sealing*, 110 S. Ct. 482 (1989), the Court ruled that not only did trial courts have authority to compel defendant-employers to provide names and addresses of potential plaintiffs through the pretrial discovery process, but that this authority also included sending court-authorized consent forms to potential plaintiffs. *See id.* There, the Court addressed the issue of whether the district court may play any role on prescribing the terms and conditions of communication from the named plaintiffs to the potential members of the class on whose behalf the collective action has been brought. *See id.* The Court determined that district courts have discretion in appropriate cases to implement 29 U.S.C. §216(b), by facilitating notice to potential plaintiffs. *See id.*

at 486. This authority arises from the Court’s broad discretionary power to manage the process of joining multiple parties in an orderly manner. *See id.*

Trial court involvement in the notice process is inevitable in cases with numerous plaintiffs where written consent is required by statute. Thus, it lies within the discretion of the trial court to begin its involvement early, at the point of the initial notice, rather than at some later time. *See id.* Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action. *See id.* at 487. Additionally, the benefits of the class action provisions of 29 U.S.C. §216(b), “...depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.” *Id.* at 486.

The question of notification in a FLSA class action arose again in *Dybach v. State of Florida, Department of Corrections*, 942 F.2d 1562 (11th Cir. 1991), where the Eleventh Circuit found that an adult probation officer was non-exempt and therefore entitled to overtime compensation for all hours worked over forty (40) in multiple workweeks. *See id.* The Eleventh Circuit also held that the district court had authority to issue an order requiring notice to “similarly situated” employees of the defendant affording them the opportunity to “opt-in.” *Id.*

**B. The Eleventh Circuit Uses a Two-Tiered Approach**

The Eleventh Circuit utilizes a two-tiered approach to certification of an opt-in class pursuant to 29 U.S.C. § 216(b). *See Hipp v. Liberty Nat’l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001 ) (stating that the two-tiered approach “appears to be an

effective tool for district courts in this circuit adopt it in future cases.”). Under this two-tiered approach, the court makes an initial determination, based solely upon the pleadings and any affidavits, whether notice of the action should be given to potential class members. *See id.* at 1218. Because the court has minimal evidence at this stage of the proceedings, this determination is made using a *fairly lenient standard, and typically results in conditional certification of a representative class. See id.* (emphasis added). Thereafter, a second, more rigorous factual determination is made as to whether the potential opt-in plaintiffs are similarly situated. *See id.*

There are questions of law or fact common to Defendant’s other satellite installers and the claims of the named Plaintiff in the instant matter. Indeed, Plaintiff’s claims are typical of the claims of the other individuals in his position. For purposes of defining the “similarly situated class” pursuant to 29 U.S.C. § 216(b), Plaintiff need only demonstrate that the defined class is comprised of representatives who are similarly situated to Plaintiff with regard to Defendant’s payroll practices and record keeping requirements. *See* 29 U.S.C. § 216(b); *Dybach v. State of Fla. Dept. of Corrections*, 942 F.2d 1562 (11th Cir. 1991). There is no requirement of “strict symmetry” or “absolute identity;” rather, potential class members must meet only a “sufficiently similar” standard. *Glass v. IDS Financial Services, Inc.*, 778 F. Supp. 1029, 1081 (D. Minn. 1991) (an allegation that a single decision, policy or plan precipitated the challenged action was sufficient to define the class). As indicated above and in the attached Declarations, Plaintiff has sufficiently satisfied the standard, if not, exceeded the standard.

C. **Courts Focus on a Common Scheme or Plan and do not Require Many Opt-ins to Have Already Joined When Determining Whether to Grant Notice**

1. **Common Scheme or Plan**

In determining whether to grant notice of a collective action, Courts focus on whether Plaintiffs were victims of a common scheme or plan that violated the law. Plaintiff need not conclusively demonstrate that he and the other putative class members are, in fact, similarly situated. Rather, he must show that he “and potential plaintiffs together were victims of a common policy or plan that violated the law.” *Rubery v. Buthna-Bodhaige, Inc.*, 569 F. Supp. 2d 334 (W.D.N.Y. 2008) *citing* *Ayers v. SGS Control Servs., Inc.*, 2004 WL 2978296, at \*1, 2004 U.S. Dist. LEXIS 25646 at \*4 (S.D.N.Y.2004). *See also* *Scholtisek*, 229 F.R.D. 381, at 390 (“[w]hat is important is that these employees were allegedly subject to a common practice or scheme on [their employer's] part”). Moreover, “it would be inappropriate...to require plaintiff to meet a more stringent standard than that typically applied at the early stages of litigation” before discovery is complete. *Chowdhury v. Duane Reade, Inc.*, 2007 WL 2873929, at \*3, 2007 U.S. Dist. LEXIS 73853 at \*10-\*11 (S.D.N.Y.2007), *citing* *Prizmic v. Armour, Inc.*, 2006 WL 1662614, 2006 U.S. Dist. LEXIS 42627 (E.D.N.Y.2006) (“[o]nly after discovery has been completed should the Court engage in a second more heightened stage of scrutiny”).

In this case, Plaintiffs have presented substantiated allegations that they were victims of a common scheme or plan. Plaintiffs have submitted affidavits/declarations substantiating that they were similarly situated. All Plaintiffs were installers, paid a piece

rate salary<sup>1</sup>, worked similar hours, and not paid proper overtime. *See Generally* Exhibits 1-8.

## 2. Number of Opt-In Plaintiffs Required

In determining whether to grant a Motion for Class Notice, typically Courts do not require a high number of Opt-in Plaintiffs to have already joined the case. *See Ackley v. City of Fort Lauderdale*, Case No.: 0:-07-cv-60960, at Doc. 45(S.D.Fla. Jan., 24, 2008)(Granting Motion for Class Notice with Plaintiff and **two (2)** Opt-in Plaintiffs); *See e.g., Dietrich v. Liberty Square*, 230 F.R.D. 574, 579 (N.D. Iowa 2005)(**two (2)** affidavits provide sufficient factual basis for similarly situated inquiry); *See also Beck v. Desoto Health and Rehab*, case No.: 2:06-CV-226-FTM-34DNF, at Docs. 23, 34 (M.D. Fla. Jan. 24, 2007)(Granting Class Notice Motion with only **one (1)** opt-in); *See also Titre v. Platinum Partners, LLC et al* Case Number: 0:08-cv-61254 at Doc. 42 (S.D. Fla. Oct. 16, 2008)(Granting Class Notice with **eleven (11)** Opt-ins); *Larry Guerra v. Big Johnson Concrete Pumping, Inc.*, CASE NO.: 05-14237 (S.D. Fla. May 17, 2006)(Granting Class Notice Motion where there was only **one (1)** Opt-in Plaintiff); *Davis v. Precise Communications, Inc.*, 2009 WL 812276 (N.D.Ga. March 27, 2009)(Granting Class Notice Motion with only **three (3)** opt-in Plaintiffs).

As noted below, thirteen (13) Opt-in Plaintiffs have joined the named Plaintiff from several states in which the Defendant operates. Based on applicable FLSA

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<sup>1</sup> Defendant previously argued that the Opt-in Plaintiffs in the case received a salary instead of “piece rate pay.” *See* Doc. 24 at pp.4,5. However, Defendant clearly overlooks the language in the Opt-ins’ declarations that confirm that they received piece rate compensation and merely used the word “salary” to describe their method of pay. Defendant is aware that all installers received piece rate pay and will certainly not dispute the same.

jurisprudence, Plaintiff have shown that others are willing to participate if the case is certified. In addition, Plaintiff has shown that the number of putative Opt-in Plaintiffs is large enough to justify certification. Indeed, Defendant employed **hundreds** of satellite installers in Florida, North Carolina, Virginia, Maryland, Texas, and Kentucky. It has numerous facilities throughout these states that usually consist of approximately eight (8) to forty (40) installers at each site. *See* Affidavit of Christopher Colson at ¶ 11 attached as Exhibit “1” (45 similar installers in Woodbridge, Virginia); Declaration of Kimberly Kerns at ¶ 8 attached as Exhibit “2” (30 similar installers in Woodbridge, Virginia); and Declaration of Rodney Ivey at ¶ 8 attached as Exhibit “3” (30 similar installers in Greensboro, North Carolina); and the other Declarations attached as Exhibit “4-9.” These Affidavit/Declarations demonstrate that between thirty to forty-five (30-45) installers worked at the multiple locations of Cableview across several states, totaling hundreds of installers over the last three (3) years. During different times over the last three (3) years, each of these installers installed satellites for CABLEVIEW COMMUNICATIONS OF JACKSONVILLE. *See* Affidavit of Christopher Colson at ¶ 11. These installers were paid a predetermined amount based on the job performed (“piece rate”), and regularly worked more than forty (40) hours per workweek. *See Id.* Notwithstanding the overtime hours worked by Plaintiff and other similarly situated satellite installers, Defendant did not fully and properly compensate them for all overtime hours worked in each workweek. *Id.* Instead, Defendant paid Plaintiff, and those similarly situated to him, a predetermined amount, based on the job performed with no provisions for all the hours worked over forty (40) per week in one or more workweeks.

*See Id.* As a result of this practice, Defendant regularly failed to pay its installers proper overtime compensation owed.

Plaintiff has submitted the following collection of Affidavits/Declarations/Exhibit in support of this motion as:

- Exhibit 1      Affidavit of Christopher Colson
- Exhibit 2      Declaration of Kimberly Kerns
- Exhibit 3      Declaration of Rodney Ivey
- Exhibit 4      Declaration of Donnell Minor
- Exhibit 5      Declaration of Christopher Kennedy
- Exhibit 6      Declaration of Michael Parrish
- Exhibit 7      Declaration of Antwan Washington
- Exhibit 8      Declaration of David Colson
- Exhibit 8-A    David Colson check stub dated May 8, 2009

Based upon a review of the declarations from the named Plaintiff and several other opt-in Plaintiffs, specific facts based on personal observation have been provided to support their belief that other employees are interested in opting in. *See Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1097 (11th Cir. 1996). In addition, allowing class notification to a potential class as large as several hundred plus class members will definitely avoid multiple lawsuits where numerous employees have allegedly been harmed by the same violation. *See Prickett v. Dekalb County*, 349 F.3d 1294, 1297 (11<sup>th</sup> Cir. 2003). Also, these Affidavit/Declarations demonstrate by specific knowledge that other similarly

situated employees, installers, will continue to join this case following this motion. *See* Affid. Colson, at ¶ 12.

Plaintiffs have currently joined to form a group of similarly situated employees comprised from the following locations:

- |     |                     |                            |
|-----|---------------------|----------------------------|
| 1.  | Christopher Colson  | Jacksonville, Florida      |
| 2.  | Kimberly Kerns      | Woodbridge, Virginia       |
| 3.  | Rodney Ivey         | Greensboro, North Carolina |
| 4.  | Donnell Minor       | Woodbridge, Virginia       |
| 5.  | Christopher Kennedy | Greensboro, North Carolina |
| 6.  | Michael Parrish     | Greensboro, North Carolina |
| 7.  | Antwan Washington   | Greensboro, North Carolina |
| 8.  | Stephen NeSmith     | Jacksonville, Florida      |
| 9.  | David Colson        | Jacksonville, Florida      |
| 10. | Sammy Cosby         | Jacksonville, Florida      |
| 11. | Mathew Prescott     | Jacksonville, Florida      |
| 12. | Stephen Hagler      | Greensboro, North Carolina |
| 13. | Justin Leib         | Jacksonville, Florida      |
| 14. | Eric Cross          | Jacksonville, Florida      |

Based upon the Complaint allegations and the above-referenced Declarations, Plaintiff has satisfied the applicable burden of persuasion and there can be no doubt that a colorable basis exists for determining that others similarly situated to Plaintiff exist.

Here, a collective action (as they are termed under the FLSA) is sought as the Defendant has acted or refused to act on grounds generally applicable to the class (Defendant's current and former satellite installers who were subjected to Defendant's practice of not paying full overtime compensation for all hours worked over forty (40) in a workweek), thereby making appropriate the same relief with respect to the class as a whole. Additionally, questions of law or fact common to all "piece rate" employees who worked for Defendant predominate over any questions affecting only individual

members. Thus, a collective action is superior to other available methods for the fair and efficient adjudication of this controversy.

**D. Numerous Courts Have Granted Collective Actions in Similar Cases**

Applicable FLSA jurisprudence demonstrates precedence for conditional certification of collective actions based on failure to pay cable installers overtime pay who were paid piece rate salaries. See *James Douglas v. Satellites Unlimited, Inc.*, (Arbitration before Dispute Solutions, Inc. (December 3, 2008) (Heirs, David); Order Granting Conditional Certification and Supervised Notice attached as Exhibit "9;" See *Brasfield v. Source Broadband Services, LLC*, 2009 WL 1748552 (W.D.Tenn. 2009)(conditionally certifying nationwide class of cable installers); See also *Balarezo v. NTH Connect Telecom, Inc.*, 2008 WL 1944116 (N.D.Cal. 2008)(conditionally certifying nationwide class of cable installers who received piece rate and no overtime); *Sjoblom v. Charter Communications, LLC*, 2007 WL 4560541 (W.D.Wis. 2007); *Monroe v. FTS USA, LLC*, 2009 WL 736003 (W.D.Tenn. 2009)(conditionally certifying nationwide class of cable installers who were paid pursuant to piece-rate system without compensation for non-productive work hours and overtime hours); *Goudie v. Cable Communications, Inc.*, 2008 WL 4628394 (D.Or. 2008)(conditionally certifying nationwide class of cable technicians who received piece rate and no overtime); *Brennan v. Qwest Communications Intern., Inc.*, 2008 WL 819773 (D.Minn. 2008)(conditionally certifying class of network technicians who install, maintain, repair and test cable and equipment for telephone, cable television, and internet service for unpaid overtime).

In fact, Judge Presnell in the Orlando Division recently conditionally certified a class of cable installers with similar allegations where Defendant opposed the motion for certification based on the same arguments made by the Defendant at hand. *See Parilla v. Allcom Construction and Installation Services, LLC*, Case No.: 6:08-cv-01967-GAP-GJK at Doc. 69 (Fla.M.D., Sept. 14, 2009). Order attached as Exhibit “10.”

Other courts routinely grant conditional certification of nationwide FLSA collective actions based upon a defendant’s policy of misclassifying a category of employees. *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, 527 F. Supp. 2d 1053, 1071 (N.C. Ca. 2007) (conditionally certifying **nationwide** FLSA class where plaintiffs established defendant’s classification policy was “uniform for all putative class members.”); *see also Wong v. HSBC Mortg. Corp. (USA)*, 2008 U.S. Dist. LEXIS 21729 (N.D. Ca. 2008).

In sum, Plaintiff has submitted substantial evidence in support of its Motion. Based upon a review of the Affidavit/Declarations from the named Plaintiff and several other opt-in Plaintiffs, specific facts based on personal observation have been provided to support their belief that other employees are interested in opting in. In addition, allowing class notification to a potential class as large as **several hundred** plus class members will definitely avoid multiple lawsuits where numerous employees have allegedly been harmed by the same violation. *See, Hoffman-LaRoche*, 493 U.S. at 470 (“The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.”).

### III. FACTORS IRRELEVANT TO THE COURT'S CONSIDERATION

#### A. The "Merits" of Plaintiff's Claim are not Considered When Determining Whether to Grant Notice

Plaintiff anticipates Defendant will argue notice should not proceed based upon the only possible defense it may have to this action – that Plaintiff and his co-employees are somehow exempt from the overtime requirements of the Fair Labor Standards Act or have no claim due to a misclassification of the installers as “independent contractors.” Although Plaintiff believes this defense will ultimately fail based upon the facts that will emerge during discovery, such arguments regarding the factual nature of Plaintiff’s claims and Defendant’s defenses thereto are *irrelevant* at this stage of the notification process. At this “conditional certification” stage, courts *do not weigh the merits* of the underlying claims in determining whether potential opt-in plaintiffs may be “similarly situated.” See *Kreher v. City of Atlanta*, 2006 WL 739572, at \*4 (N.D. Ga. Mar. 20, 2006) (citing *Young v. Cooper Cameron Corp.*, 229 F.R.D. 50, 54 (S.D.N.Y. 2005) (“The focus of [the conditional certification] inquiry is not whether there has been an actual violation of law, but rather on whether the proposed plaintiffs are “similarly situated under 29 U.S.C. § 216(b) with respect to their allegations that the law has been violated) and *Gjurovich v. Emmanuel’s Marketplace, Inc.*, 282 F. Supp. 2d 91, 96 (S.D.N.Y. 2003) (“Once the Plaintiff makes a colorable claim for relief, the *only* inquiry necessary is whether the potential plaintiffs to be notified are similarly situated to the named plaintiff..”).

In *Kreher*, the court concluded that too high a burden would be placed on the plaintiffs at the preliminary notice stage if they were required to submit evidence of a

highly particularized nature, as the defendant suggested. *See id.* at 2006 WL 7398272, at \* 4. As such, the *Kreher* court concluded that although the plaintiffs' declarations lacked some details, they established the existence of other employees employed in similar positions and subject to similar policies, warranting the court's decision to grant the plaintiffs' motion under the "fairly lenient standard" applied in the Eleventh Circuit. *Id.* at \*4; *see also Leuthold v. Destination America*, 224 F.R.D. 462, 468 (N.D. Cal. 2004) ("Defendants' arguments in their opposition brief focus on the more stringent second tier analysis and raise issues that may be more appropriately addressed on a motion for decertification after notice is given to the proposed class."); *Mooney*, 54 F.3d at 1214 (Recognizing that at the second stage of the *Lusardi* approach, or the opt-in or merits stage, with more information, the court can then make a factual determination on the similarly situated question, and decide whether to allow the representative action to proceed to trial or to decertify the class and dismiss, without prejudice, the opt-in plaintiffs); *Goldman v. Radioshack Corp.*, No. Civ.A. 2:03-CV-032, 2003 WL 21250571, at \*8 (E.D.Pa. Apr. 16, 2003) ("A fact-specific inquiry is conducted only after discovery and a formal motion to decertify the class is brought by the defendant."); *Felix De Asencio v. Tyson Foods, Inc.*, 130 F.Supp.2d 660, 663 (E.D. Pa. 2001) ("While this information [submitted by Defendant] may play a more significant role after discovery and during an analysis of the second and final similarly situated tier, Plaintiffs have advanced sufficient evidence to meet their low burden at this first tier of the similarly situated question."). Thus, setting Defendant's anticipated factual/legal arguments aside

for purposes of Plaintiff's Stage I Motion, Plaintiff clearly has met his burden of proof on the "similarly situated" prong under *Hipp*.

Defendant overstates the nature/importance of the purported "individualized" defenses which Defendant maintains makes the national class of misclassified superintendents unmanageable. Defendant attempts to avoid conditional certification with a deluge of facts irrelevant at this stage of the proceedings. *Scott v. Heartland Home Fin., Inc.*, 2006 U.S. Dist LEXIS 28839 (M.D. Fla. 2006) ("[a]t the notice stage, however, it is not appropriate for the Court to address the merits of the Plaintiff's claims or weigh the evidence. Accordingly, variations in specific duties, job locations, working hours, or the availability of various defenses are examples of factual issues that are not considered at this stage.").

**B. Courts do not Consider the Need for Discovery During Stage I**

It has been consistently recognized that discovery at the first notice stage is unnecessary for the similarly situated determination. *See Grayson*, 79 F.3d at 1099 (holding that a district court *may*, but its not required to hold an evidentiary hearing prior to making its section 216(b) decision particularly where the Defendant's rights are not substantially affected) (emphasis added); *Lloredo v. Radioshack Corp.*, 2005 WL 1156030, at \*1 (S.D. Fla. May 12, 2005) (refusing to examine discovery in making its first stage similarly situated determination); *see also Harrison v. Enterprise Rent-A-Car Co.*, 1998 U.S. Dist. LEXIS 13131, at \*13 (July 1, 1998) (holding that the fact that subsequent discovery may prove the original plaintiffs and the opt-in plaintiffs are not after all "similarly situated" does not defeat conditional class certification); *Schwed v.*

*Gen. Elec. Co.*, 159 F.R.D 373, 375 (N.D.N.Y. 1995) (“Even where later discovery proves the putative class members to be dissimilarly situated, notice . . . prior to full discovery is appropriate as it may further the remedial purpose of the [FLSA]”).

An examination of discovery is not appropriate because at this stage the Court is not making a *factual determination* regarding whether the putative class members are “similarly situated.” See *Pendelbury*, at \*3 (stating that a factual determination of the similarly situated question is not appropriate at this time because of the early stages of the litigation); *Brown v. Money Tree Mortgage, Inc.*, 222 F.R.D. 676, 682 (D. Kan. 2004) (“[T]he court will examine the individual plaintiffs’ disparate factual and employment setting, as well as various defenses available to the defendant which appear to be individual to each plaintiff, during the ‘second stage’ analysis after the close of discovery.”); *Goldman v. Radioshack Corp.*, 2003 WL 21250571, at \*8 (E.D. Pa. Apr. 16, 2003) (“A fact-specific inquiry is conducted only after discovery and a formal motion to decertify the class is brought by the defendant.”).

Moreover, discovery is not necessary because courts at this stage do not resolve factual disputes or make credibility determinations. See *Scott v. Heartland Home Finance*, 2006 WL 1209813, at \*3 (N. D. Ga. May 3, 2006) (citing *Severtson v. Phillips Beverage Co.*, 141 F.R.D 276, 279 (D. Minn. 1992)); *Camper v. Home Quality Mgmt., Inc.*, 200 F.R.D. 516, 520 (D. Md. 2000) (“Factual disputes do not negate the appropriateness of court facilitated notice.”). In *Scott*, the court held that it was not appropriate for the court to address the merits of plaintiffs’ claims or weigh evidence and thus refused to consider the Defendant’s arguments regarding the variation in specific job

duties, locations, working hours, or the availability of various exemptions. 2006 WL 1209813, at \*3; (citing *Pendelbury*, 2005 WL 82500, at \*3 (factual matters regarding the applicability of exemptions to employees not appropriate at notice stage); *Moss v. Crawford & Co.*, 201 F.R.D. 398, 410 (W.D. Pa. 2000) (“[V]ariations in the plaintiffs’ duties, job locations and hourly billing rates do not differentiate the collective class to the extent that it defeats the primary objectives of a section 216(b) action.”).

Through the allegations in the Complaint, and the Affidavit/Declarations submitted to this Court, Plaintiff has provided sufficient evidence to warrant notice of this lawsuit be sent to all other installers for Defendant around the country. Because the “similarly situated” determination at the notice stage is preliminary, Defendant will not be prejudiced by the facilitation of notice because they can later argue that Plaintiff and the putative class members are not in fact “similarly situated” enough to proceed collectively to trial. Accordingly, Plaintiff’s Stage I Motion should be granted at this time.

**IV. PLAINTIFF’S NOTICE IS ACCURATE AND SHOULD BE POSTED AT ALL OF DEFENDANT’S LOCATIONS NATIONWIDE**

Plaintiff’s proposed judicial notice is “timely, accurate, and informative.” *See Hoffmann-La Roche*, 493 U.S. at 172. As such, the proposed notice achieves the ultimate goal of providing employees accurate and timely notice concerning the pendency of the collective action, and should be adopted. Plaintiff also requests that, in addition to permitting Plaintiff to notify the potential class members by mail, this notice be posted at each of Defendant’s locations at which installers are employed to further the broad remedial purpose of the FLSA. *See Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D.

474, 493 (E. D. Cal. Apr. 19, 2006 )(finding that first class mail, combined with posting provided for the “best notice practicable” to the potential class); *Veliz v. Cintas Corp.*, 2004 WL 2623909, at \*2 (N.D. Cal. Nov. 12, 2004) (requiring employer to post notice and consent forms in all of its work sites); *Johnson v. Am. Airlines, Inc.*, 531 F. Supp. 957, 961 (N.D. Tex. 1982) (finding direct mail and posting on company bulletin boards reasonable).

V. **LIMITED DISCOVERY OF NAMES AND ADDRESSES OF THE PUTATIVE CLASS IS NECESSARY TO CARRY OUT NOTICE**

The opt-in provision of the FLSA requires some procedure for identifying and notifying potential class members. *Morden v. T-Mobile USA, Inc.*, 2006 WL 1727987, at \*3 (W. D. Wash. June 22, 2006)(compelling the defendant to produce the names and addresses of potentially similarly situated employees despite the fact that no conditional class certification motion was pending before the court). “The first step is to identify those employees who may be similarly situated and who may therefore ultimately seek to opt in to the action.” *Id.* As such, early discovery of a mailing list is routinely disclosed in FLSA collective actions because the lists are necessary to facilitate notice. *See Hoffmann-La Roche*, 493 U.S. at 165; *see also Dietrich v. Liberty Square*, 230 F.R.D. 574, 581 (N.D. Iowa 2005); *Gieseke v. First Horizon Home Loan Corp.*, 408 F. Supp. 2d 1164, 1169 (D. Kan. Jan. 10, 2006).<sup>2</sup> Thus, if Plaintiff’s Motion is granted, the Defendant

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<sup>2</sup> The names and addresses of potential class members are discoverable during the regular course of discovery even absent judicial notice because current and former installers are critical fact witnesses to this lawsuit. *Hoffmann-La Roche* acknowledged the existence of “alternative bases for the discovery, for instance that the employees might have knowledge of other discoverable matter.” 493 U.S. at 160; *see also Barton v. The Pantry, Inc.*, 2006 WL 2568462 (M.D.N.C. Aug. 31, 2006) (ordering defendant to produce a list of plaintiffs’ co-workers prior to conditional certification).

should likewise be ordered to provide Plaintiff with a list of all putative class members' names and addresses to carry out notice.

## VI. PROPOSED NOTICE

The Notice proposed by Plaintiff is typical and has been approved many times in the Middle District. It almost mirrors the form approved by Judge Presnell in *Parrilla v. Allcom*, Case No.: 6:08-cv-01967-GAP-GJK at Doc. 69. *See also Simpkins v. Pulte Home Corp.*, 2008 WL 3927275 at p. 9 (M.D.Fla. 2008); *citing Cox v. Appliance Direct, Inc.*, 6:08-cv-216-ACC-DAB, docs 66 and 69; *Gutescu v. Carey Intern., Inc.*, 2003 WL 25586749 at p. 18 (S.D.Fla. 2003)(similar notice form issued). Also included in the notice is a basic statement of the law against retaliation by an employer if a putative plaintiff joins the case. *Id.* In addition, no statement regarding a potential Plaintiff's liability for costs should be included in the notice. *See Littlefield v. Dealer Warranty Services, LLC*, 2010 WL 173796 (E.D.Mo. Jan. 15, 2010)(denying Defendant's request that the notice inform potential plaintiffs of the possible costs they might incur by joining the lawsuit, because this notice might discourage plaintiffs from joining the litigation).

Plaintiff argues that that there is no plausible reason that Defense counsel should be listed on the notice form. What information can Defense counsel honestly and ethically provide to a putative class member with questions regarding the case? Plaintiff argues that there is no possible utility that could be gained by identifying defense counsel. *Compare Ahle v. Veracity Research Co.*, 2009 WL 3103852 (D.Minn.)(The Court finds the decisions that have questioned any possible utility that could be gained by identifying defense counsel to be more soundly reasoned); *citing Cryer v. Intersolutions*,

*Inc.*, No. 06-2032, 2007 WL 1053214, at \*304 (D.D.C. Apr. 7, 2007) (“The Court also sees no reason to include defense counsel on the class notice. Defense counsel does not play a role in managing the distribution of the notice or the gathering of consent forms. Including additional lawyers only creates the potential for confusion of those who receive the notice.”), and *Morden v. T-Mobile USA, Inc.*, No. C05-2112RSM, 2006 WL 2620320, at \*4 (W.D.Wash. Sept. 12, 2006) (holding that the request to include defense counsel’s contact information has “ ‘no basis in law or logic’ ”)

The overwhelming majority of Courts use a three year statute of limitations period because it is apparent that the issue of whether a willful or reckless violation has occurred (which will decide whether a two or three year statute of limitation period applies) will not likely be decided until at trial. *See Simpkins v. Pulte Home Corp.*, 2008 WL 3927275 at p. 9 (M.D.Fla. 2008)(the determination whether that standard is met in this case is fact determinative and will not be made at the conditional certification stage). In addition, Plaintiff has sufficiently alleged in its Complaint that a willful violation has occurred to warrant reference to the FLSA’s three-year statute of limitations. *See Longcrier v. HL-A Co., Inc.*, 595 F.Supp.2d 1218, 1242 (S.D.Ala.2008) (approving the inclusion of a three-year statute of limitations in a court-facilitated notice when the plaintiffs adequately alleged willfulness); *See also Cryer v. Intersolutions, Inc.*, No. 06-2032, 2007 WL 1053214, at \*3 (D.D.C. Apr. 7, 2007)(applying a three-year statute of limitations for purposes of defining the initial class period in a court-facilitated notice when a plaintiff had sufficiently alleged willful conduct). Where Plaintiff has alleged a willful violation, however, “it is prudent to certify a broader class of plaintiffs that can be limited

subsequently, if appropriate, during the second phase of the collective certification process.” *Anglada v. Linens ‘N Things, Inc.*, No. 06-CV-12901, 2007 WL 1552511, at \* 8 (S.D.N.Y. May 29, 2007).

## **VII. PROPOSED REGION FOR NOTICE**

Plaintiff proposes that the Court-supervised notification include any CABLEVIEW COMMUNICATIONS OF JACKSONVILLE sites for the **entire nation**. Plaintiff has demonstrated that there are several hundred similarly situated installers that were paid on a similar basis and are willing to join Plaintiff’s claim for overtime. In addition, Plaintiffs have already joined this case from four different states (Florida, Maryland, North Carolina and Virginia).

Plaintiff seeks an Order requiring: (1) Defendant produce to Plaintiff a list of all similarly situated satellite installers who were paid by the job performed from August 10, 2006 through the present within thirty (30) days; (2) the proposed “Notification” letter, attached as Exhibit 11, to be sent to all similarly situated employees in the nation and posted at all CABLEVIEW COMMUNICATIONS OF JACKSONVILLE offices where installers are present; and (3) the proposed “Notice of Consent to Join” form, attached as Exhibit 12, which similarly situated employees can complete, sign, and filed with the Court within sixty (60) days of receipt of list of all similarly situated satellite installers from Defendant.

## **VII. CONCLUSION**

Plaintiff has met his burden to facilitate notice to potential class members under Eleventh Circuit precedent. Accordingly, Plaintiff respectfully requests that this Court

permit and supervise notice to all current and former intrastate satellite installers drivers who did not receive full and proper payment of time and one half wages for all overtime hours worked for Defendant.

**CERTIFICATE OF GOOD FAITH**

Plaintiff's counsel conferred with Defendant's counsel in an effort to resolve this Motion prior to its filing, but the parties were unable to resolve same.

Respectfully submitted this January 22<sup>nd</sup>, 2010.

**s/ CARLOS LEACH**

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Florida bar No.: 0540021

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 22, 2010 a true and correct copy of the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to: all counsel of record.

**s/ CARLOS LEACH**

CARLOS LEACH, ESQUIRE