IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

Almuiz Altiep and Tafsir Shawkat, individually and on behalf of all others similarly situated Plaintiffs v. **Food Safety Net Services, LTD** Defendant	**Case Number: 3:14-cv-00642-K** Jury Demanded

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PLAINTIFFS' MOTION FOR NOTICE TO POTENTIAL PLAINTIFFS AND CONDITIONAL CERTIFICATION

Respectfully submitted:

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CERTIFICATE OF CONFERENCE

I certify that on May 21, 2014 I conferred with Leslie Byrd, counsel for Defendant, regarding this issue and agreement could not be reached. Thus, the motion is opposed.

By: /s/ Chris R. Miltenberger
Chris R. Miltenberger

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. Notice will be electronically mailed by the ECF system to counsel for Defendant.

By: /s/ Chris R. Miltenberger
Chris R. Miltenberger

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MOTION FOR NOTICE TO POTENTIAL PLAINTIFFS AND CONDITIONAL CERTIFICATION

Plaintiffs Almuiz Altiep and Tafsir Shawkat ("**Plaintiffs**"), individually and on behalf of other similarly-situated current and past employees of Food Safety Net Services, LTD ("**Defendant**" or "**Food Safety**"), file this Motion for Notice to Potential Plaintiffs and Conditional Certification, and would show the Court as follows:

I.
OVERVIEW

This is **not** a motion for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. Rather, this motion is brought pursuant to the collective action provisions of the Fair Labor Standards Act ("**FLSA**"), 29 U.S.C. § 216(b). Under this statute and the case law interpreting it (including several opinions issued by Northern District of Texas judges), individuals may bring "collective actions" on behalf of themselves and on behalf of those "similarly situated." However, in sharp contrast to Rule 23 class cases, collective actions under this statute are **opt-in** rather than opt-out. The

standards applicable to a request for notice to similarly-situated individuals are "lenient" and Plaintiffs are only required to show that similarly situated individuals exist. At this early stage in the case, four individuals have elected to join this suit or opt into it and another individual has indicated his desire to opt-in, but there are other individuals who may not be aware of this suit or of their rights to proceed in this forum. A Notice to Potential Plaintiffs ("**Notice**") will allow a limited group of current and former employees of Defendant ("**Potential Plaintiffs**") to make an informed decision as to whether or not to participate in this case. A proposed form of the Notice is contained in the Appendix of Exhibits as Exhibit L. (App. 82). The proposed Consent Form is Exhibit M. (App. 83-84).

Defendant is in the business of performing laboratory analysis to verify food quality and safety. (Exh. A, App. 2). Defendant is a nationwide company and operates laboratories performing such analysis in San Antonio, Texas, Grand Prairie, Texas, Phoenix, Arizona, Green Bay, Wisconsin, Columbus, Ohio and Covington, Georgia. (*Id.)* Each of these locations is individually referred to as a "**Location**" and together as the "**Locations**". Defendant also has laboratories in Fresno, California and Commerce, California; however those laboratories are not at issue in this lawsuit because overtime is paid to the Lab Technicians in the California laboratories. (*Id.)*

Plaintiffs sued Defendant to recover unpaid overtime wages that were not paid in accordance with the FLSA. At issue are the job positions of "**Lab Technician II**" and "**Lab Technician III**" (singularly hereafter so referred, collectively hereafter referred to as "**Lab Technicians**"). Defendant treats the Lab Technicians as exempt employees, pays them on a salary basis and does not track hours worked or pay overtime to the individuals.

As set forth more fully in the Factual Background section, Plaintiff Shawkat was a Lab Technician II during most of his career with Defendant and Plaintiff Altiep was a Lab Technician II then a Lab Technician III during his career with Defendant. Plaintiffs request that the Court subdivide the potential class members into two subclasses, *i.e.* Lab Technician II and Lab Technician III. As will be explained, each subclass's member performs essentially the same job duties as those in his/her subclass, and each is/was paid on a salary basis in the same manner as those in his/her subclass. Both Lab Technician II and Lab Technician III employees are not exempt under the FLSA.

In support of this Motion, Plaintiffs have submitted:

- Five declarations from former Defendant employees who worked in Defendant's Grand Prairie, Texas facility;
- **National** job descriptions for both the Lab Technician II and Lab Technician III positions;
- Three job postings for the Lab Technician II position posted on the Defendant's **national website**; and
- Two job postings for the Lab Technician III position posted on the Defendant's **national website**.

(Exhs. A-E, G-J, App. 1-25, 28-62) (emphasis added).

As the testimony in the declarations demonstrates, Defendant fails (and has failed in the past) to compensate its Lab Technicians for the actual hours they are required to perform work for Defendant and pays them under an illegal payment plan instead. This payment scheme does not pay overtime to Lab Technicians even though they work beyond 40 hours in a week. Further, the testimony in the declarations demonstrates how each Lab Technician II performs essentially the same job duties as all other Lab Technician IIs and

how each Lab Technician III performs essentially the same job duties as all other Lab Technician IIIs.

The national job descriptions ("**Job Descriptions**") and national job postings ("**Job Postings**") also show the positions were treated as exempt (salary, no overtime) and show the similarity of duties performed by Lab Technician IIs and Lab Technician IIIs in Defendant's laboratories across the country. Further, the declaration of Plaintiff Altiep demonstrates the uniformity of the job duties and the pay plan for Lab Technician IIs and Lab Technician IIIs in each of the Locations across the country.

Although Plaintiffs believe they will be able to establish Defendant's failure to prove an exemption and failure to pay overtime at trial, the merits of the case are *not* at issue in this Motion. As set forth herein, because Plaintiffs readily meet the *lenient* burden applicable at this stage, conditional certification and notice to the Potential Plaintiffs is appropriate. *See, e.g., Black v. Settlepou, P.C.,* No. 3:10-CV-1418-K, 2011 WL 609884, at *3, 5 (N.D.Tex. Feb. 14, 2011)(Kinkeade, J.) (recognizing the lenient standard at the conditional certification stage and granting certification in a salaried paralegal case); *Oliver v. Aegis Commc'ns Grp., Inc.,* No. 3:08-CV-828-K, 2008 WL 7483891, at *2, 4 (N.D. Tex. Oct. 30, 2008) (Kinkeade, J.) (certifying companywide class of employees in seven call centers in six states under lenient standard at conditional certification stage); *Ryan v. Staff Care, Inc.,* 497 F.Supp.2d 820, 824-26 (N.D.Tex. 2007) (Fish, J.) (certifying nationwide class of employees in three subclasses at lenient conditional certification stage). Moreover, because the

recovery for each Potential Plaintiff is eroding daily, the Court should authorize Notice as soon as possible.[1]

II.
FACTUAL BACKGROUND

A. Plaintiffs are Similarly Situated to Other Lab Technician IIs and Lab Technician IIIs Who are Paid on a Salary Basis.

The declarations submitted in the Appendix demonstrate that a group of similarly situated current and former employees exist in that they all have substantially the same job duties and responsibilities and are subject to the same practice of being paid on a salary basis and not being paid overtime pay for overtime work. (Exhs. A-E, App. 2-3, 8-9, 13-14, 18-19, 23). The declarations are from five individuals who worked in Defendant's Grand Prairie facility ("**Grand Prairie Location**") and who were subjected to the illegal payment scheme that is the basis of Plaintiffs' claims. (*Id.*). The declarants are Plaintiff Altief (who worked as a Lab Technician II and Lab Technician III for Defendant) (Exh. A, App. 1), Plaintiff Shawkat (who worked as a Lab Technician I and Lab Technician II for Defendant) (Exh. B, App. 7), opt-in plaintiffs Caroline Graeub and Justin Pahanish (who each worked as a Lab Technician II for Defendant) (Exhs. C, D, App. 12, 17) and "would-be" opt-in plaintiff Timothy Defoe who also worked as a Lab Technician II for Defendant (Exh. E, App. 22(first page)).

Lab Technician IIs have the following job duties and responsibilities: performing and reading test results pursuant to a series of processes, procedures and/or techniques in accordance with Defendant's Methods Manual, Quality Manual, Chemical Hygiene Plan,

[1] The FLSA statute of limitations runs from the date an individual opts into the case. Consequently, for former employees who are no longer being subjected to the illegal practice, every day without notice is a day's pay they lose forever. Plaintiffs therefore request an expedited determination of this Motion.

Safety Manual and its approved laboratory procedures, performing preventative maintenance by daily cleaning and sanitizing equipment, assisting in quality control, and monitoring laboratory conditions and equipment by reporting needed repairs. (Exhs. A, B, C, D, E, App. 2, 8, 13, 18, 23).

Lab Technician IIIs have largely the same job duties and responsibilities as Lab Technician IIs with the added responsibilities of the occasional training of and answering questions from Lab Technicians I employed by Defendant. Exh. A, App. 2-3).

In their declarations submitted in the Appendix, the declarants demonstrate that all Lab Technician IIs and all Lab Technician IIIs had/have substantially the same job duties (Exhs. A, B, C, D, E, App. 2-3, 8, 13, 18, 23).

Each declarant that was a Lab Technician II worked side-by-side with other Lab Technician IIs in the Grand Prairie Location and knows that the duties the other Lab Technician IIs performed were substantially the same duties as the duties declarant performed. (Exhs. A, B, C, D, E, App. 3, 9, 14, 19, 24).

Further, Lab Technician IIs from Defendant's San Antonio laboratory ("**San Antonio Location**") sometimes came to the Grand Prairie Location to work with the declarants who were Lab Technician IIs. (Exhs. A, B, C, D App. 3, 9, 14, 19). From the declarants' interaction with the San Antonio employees, such declarants know that the Lab Technician IIs in San Antonio performed the same duties at the San Antonio Location as the Lab Technician IIs at the Grand Prairie Location. (*Id.)*

Similarly, Declarant Altief (who worked as a Lab Technician III) worked side-by-side with other Lab Technician IIIs in the Grand Prairie Location and knows that the duties the other Lab Technician IIIs performed were substantially the same duties as the

duties he performed. (Exh. A, App. 3). Additionally, Lab Technician IIIs from the San Antonio Location sometimes came to the Grand Prairie Location and worked with Declarant Altief and other Lab Technician IIIs. (*Id.)* From his interaction with the San Antonio employees, Declarant Altief knows that the Lab Technician IIIs in San Antonio performed the same duties at the San Antonio Location as the Lab Technician IIIs at the Grand Prairie Location. (*Id.)*

During the time each Plaintiff was a Lab Technician II or III, each Plaintiff routinely worked in excess of 40 hours per week. (Exhs. A, B, App. 3, 9). Similarly, as the sworn statements from the other declarants indicate, they also worked in excess of 40 hours per week during one or more weeks whether they worked as a Lab Technician II or III. (Exhs. C, D, E, App. 14, 19, 23). Yet, despite working overtime hours, Defendant did not pay these individuals overtime pay. (*Id.)* (Exhs. A, B, C, D, E, App. 3, 9, 14, 19, 23). Rather than pay an hourly wage (and overtime) to the Lab Technicians IIs and Lab Technicians IIIs, Defendant paid them on a salary basis in an amount determined by Defendant. (Exhs. A, B, C, D, E, App. 3, 8, 13, 18, 23). The Job Descriptions list the positions of Lab Technician II and Lab Technician III as "exempt" positions. (Exhs. G, H, App. 28, 34). The Job Descriptions were approved by Defendant's Chief Operating Officer and authored by the Defendant's Director of Human Resources. (*Id.)* Thus, pursuant to Defendant's own documentation the consistent pay practice of denying the employees overtime and treating them as exempt employees is established.

From talking with their co-workers at the Grand Prairie Location, the declarants are aware that Lab Technician IIs and Lab Technician IIIs at the Grand Prairie Location were paid on a salary basis in an amount determined by Defendant and were not paid overtime

pay when they worked more than 40 hours in a week. Exhs. A, B, C, D, E, App. 3-4, 9, 14, 19, 24). Additionally, based on their conversations with employees from the San Antonio Location who came to the Grand Prairie Location to work, the declarants are aware that the Lab Technician IIs and Lab Technician IIIs at the San Antonio Location were not paid overtime and were paid on a salary basis. Exhs. A, B, C, D, E, App. 4, 9-10, 14-15, 19-20).

Declarant Altief is aware that, consistent with the Job Descriptions, the Lab Technician IIs and Lab Technician IIIs at the Phoenix, Arizona, Green Bay, Wisconsin, Covington, Georgia, and Columbus, Ohio Locations were not paid overtime and were paid under the same compensation system as he was paid (*i.e.,* on a salary basis and semi-monthly). (Exh. A, App. 4). Declarant Altief is aware of the manner in which those individuals were paid because he discussed the question of overtime with his supervisors, Darrin Blotz and Niki Shephard. *(Id.)* Both Mr. Blotz and Ms. Shephard told Altief that the Defendant does not pay overtime to Lab Technician IIs and Lab Technician IIIs except at the California laboratories. *(Id.)* Mr. Blotz and Ms. Shephard said all Lab Technician IIs and Lab Technician IIIs who worked for Defendant (except for those working at the California facilities) were paid a salary and not paid overtime. *(Id.)*

B. Defendant's Job Descriptions and Job Postings Show the Similarity of the Job Duties Applicable to Lab Technician IIs and Lab Technician IIIs.

The Job Descriptions for the Lab Technician II and Lab Technician III positions also establish that the job duties at each of the Locations are similar. (Exhs. G, H, App. 28-30, 34-36). Initially the documents themselves do not restrict their applicability to a particular location. (Exhs. G, H, App. 28-33, 34-39). Declarant Altief has reviewed the job

descriptions and declares that based on his knowledge of the company, the job descriptions are applicable companywide. (Exh. A, App. 5).

Declarant Altief has also reviewed the Job Postings for the Lab Technician II and Lab Technician III positions at the San Antonio, Texas, Grand Prairie, Texas, and Covington, Georgia Locations. (Exh. A, App. 4-5). The Job Postings for these positions are located at Exhibits I and J to Plaintiff's Appendix in Support of Motion for Certification. (App. 40-62). The Job Postings show that the duties of the Lab Technician IIs and Lab Technician IIIs at each of those Locations are substantially the same, respectively, and are substantially the same as the job duties Altief performed when employed by Defendant as a Lab Technician II and Lab Technician III, respectively. (Exh. A, App. 4-5).

The Job Postings also are consistent with the Job Descriptions and together show that the duties at each of the Locations are substantially similar.

Declarant Altief believes that the job duties of the Lab Technician IIs and Lab Technician IIIs at the Phoenix, Arizona, Green Bay, Wisconsin, and Columbus, Ohio Locations are substantially the same as shown in the Job Postings and Job Descriptions and are substantially the same as the job duties Altief performed when employed by Defendant. (*Id.*) Declarant Altief bases this belief on conversations he had in December 2011 when he attended training in San Antonio and discussed with Defendant's personnel there the duties of Lab Technician IIs and Lab Technician IIs in Locations across the country. (Exh. A, App. 5).

In addition to the sworn testimony from the five Declarants, Plaintiffs direct the Court to the specific descriptions contained in Defendant's posted Job Postings for Lab

Technician II themselves. (Exh. I, App. 40-42, 45-46, 48-50). Plaintiffs have supplied three Job Postings for the Lab Technician II position at the Grand Prairie, Texas, San Antonio, Texas and Covington, Georgia Locations, respectively, posted on the Defendant's national website. (Exh. I, App. 40-52). These national Job Postings show the uniform nature of the job duties performed by those who hold or have held the position of Lab Technician II in Defendant's laboratories across the country regardless of Location. (*Id.*) Each of these postings describe the essential duties of the position identically:

> **ESSENTIAL RESPONSIBILITIES**
> - Apply aseptic/microbiological techniques in daily workload
> - Independently pursue an assigned series of processes, procedures or techniques in accordance with Food Safety Net Services Methods Manual, Quality Manual, Chemical Hygiene Plan, Safety Manual and approved laboratory procedures
> - Accurately perform and read test results and notify Laboratory Manager of deviations
> - Perform all activities in a neat, safe, hygienic, and efficient manner

(Exh. I, App. 40, 45, 48). These Job Postings are consistent with the Job Descriptions produced by Defendant.

Similarly, Plaintiffs have provided two Job Postings for the position of Lab Technician III at the San Antonio, Texas and Covington, Georgia Locations, respectively, posted on the Defendant's national website. (Exh. J, App. 53-62). These national Job Postings show the uniform nature of the job duties performed by those who hold or have held the position of Lab Technician III in Defendant's laboratories across the country regardless of Location. (*Id.*). Each of these postings describe the essential duties of the position identically:

> **ESSENTIAL RESPONSIBILITIES**
>
> - Apply aseptic/microbiological techniques in daily workload and prepare and analyze samples for indicator organisms, pathogens, and chemistries according to acceptable methods

- Independently pursue an assigned series of processes, procedures, or techniques in accordance with Food Safety Net Services Methods Manual, Quality Manual, Chemical Hygiene Plan, Safety Manual, and approved laboratory procedures
- Accurately perform and read test results and notify Laboratory Manager of deviations
- Prepare media and reagents as needed for daily microbiological testing

Master Trainer Duties (IF ASSIGNED):

- Will report to the Corporate Trainer for assigned duties and conduct all responsibilities outlined
- Specific duties will be assigned

(Exh. J, App. 53-54, 58-59). Again, these Job Postings are consistent with the Job Descriptions produced by Defendant.

The Job Descriptions and the Job Postings, coupled with the testimony of the declarants regarding their first-hand experience with the duties of the Lab Technicians, make it evident that the Lab Technician IIs and Lab Technician IIIs perform similar job duties under similar pay provisions. Accordingly, Notice should be issued to these two similarly-situated groups of individuals in Defendant's Locations across the country.

C. Similarly Situated Potential Opt-in Plaintiffs Exist.

Declarant Altief and the other declarants believe there are many other current and former employees of Food Safety who were Lab Technician IIs and Lab Technician IIIs at the Locations who would be interested in joining or who would join this action for unpaid wages and overtime if they knew about the opportunity to do so. (Exhs. A, B, C, D, E, App. 6, 10-11, 15-16, 20-21, 24). Declarant Altief and the other declarants do not presently know the names, telephone numbers, and addresses of the others because they are no longer employed by Defendant, and, therefore, no longer have access to these people or their contact information. (Exhs. A, B, C, D, E, App. 6, 10-11, 15-16, 20-21, 24). Further, because the declarants who have consented to join this lawsuit are no longer

employed with Food Safety, information about an action to recover unpaid wages is not likely to spread very well by word of mouth. (Exhs. A, B, C, D, E, App. 6, 11, 16, 21, 24). The declarants believe that there is a need for Notice to be sent to all current or former Lab Technician IIs and Lab Technician IIIs of Food Safety formerly or currently employed at the Locations so they will learn of this action. *(Id.)*

Declarants make these statements based on the fact that, while working at Defendant, Plaintiffs and the other declarants got to know many of their co-workers and they discussed their job duties and pay arrangements. (Exhs. A, B, C, D, E, App. 3-5, 9-10, 14-15, 19-20, 24). These other Lab Technicians IIs and Lab Technicians IIIs performed the same job duties as Plaintiffs and the declarants. (Exhs. A, B, C, D, E, App. 3, 9, 14, 19, 24). Plaintiff and the declarants talked with their co-workers about their responsibilities and how they were paid. (Exhs. A, B, C, D, E, App. 3-5, 9-10, 14-15, 19-20, 24). Additionally, Declarant Altief, during training in San Antonio in December 2011 discussed with Defendant's personnel the duties and pay plans of Lab Technicians across the country. (Exh. A, App. 5). Finally, Declarant Altief discussed with his superiors the pay plans for Lab Technician IIs and Lab Technician IIIs in the Locations across the country and was made aware of the uniformity of such pay plans during such discussions. (Exh. A, App. 4).

By presenting testimony from five individuals who worked in either the Lab Technicians II or Lab Technicians III position, and by demonstrating the uniform job duties and pay plan applicable to Lab Technicians IIs and Lab Technicians IIIs, Plaintiffs have met the lenient standard for the Court to conditionally certify this collective action and to issue Notice in this case.

III.
REQUEST FOR CONDITIONAL CERTIFICATION AND § 216(B) NOTICE TO POTENTIAL PLAINTIFFS

The purpose of this Motion is to seek conditional certification and Court-supervised Notice to a group of "Potential Plaintiffs" who worked for Defendant in the past three years and who are defined as:

> **Defendant's current and former employees who had the titles of Lab Technician II and/or Lab Technician III at Defendant's Locations around the country and who were employed by Defendant at any time from February 19, 2011 to the present.**

As shown below, the named Plaintiffs have met the lenient standards for Notice to be issued to Potential Plaintiffs.

A. Collective Actions are Favored Under the Law and the District Court is Authorized to Issue Notice to the Potential Opt-in Plaintiffs.

An employee alleging violations of the FLSA may bring an action on behalf of all "other similarly situated employees." 29 U.S.C. § 216(b). Thus, "Congress has stated its policy that [FLSA] plaintiffs should have the opportunity to proceed collectively." *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). Such collective actions are favored under the law because they benefit the judicial system by enabling the "efficient resolution in one proceeding of common issues of law and fact," and provide plaintiffs with the opportunity to "lower individual costs to vindicate rights by the pooling of resources." *Hoffmann-La Roche*, 493 U.S. at 170.

Unlike a Rule 23 class action, plaintiffs in an action under the FLSA must affirmatively opt in to be covered by the suit. 29 U.S.C. § 216(b); *Thiessen v. Gen. Elec. Capital Corp.,* 267 F.3d 1095, 1102 (10th Cir. 2001). If an individual employee does not opt

in by filing a written consent, he or she will not be bound by the outcome, whether or not it is favorable, and may bring a subsequent private action. *Equal Emp't Opp. Comm'n v. Pan Am World Airways, Inc,* 897 F.2d 1499, 1508 n.11 (9th Cir. 1990).

Because the substantial benefits of FLSA collective actions "depend on employees receiving accurate and timely notice concerning the pendency of the collective action," the FLSA grants the Court authority to manage the process of joining such employees in the action, including the power to authorize notice and monitor preparation and distribution of the notice. *Hoffmann-La Roche*, 493 U.S. at 169-73 ("The broad remedial goal of the statute should be enforced to the full extent of its terms."). "Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and [of] setting [a] cutoff date to expedite disposition of the action." *Id.* at 172; *Reab v. Electronic Arts, Inc.,* 214 F.R.D. 623, 628, 629 (D. Colo. 2002) (conditional certification for notice purposes was appropriate where plaintiffs had made "substantial allegations" and conditional certification would allow "significant economies" to be achieved). The Court is empowered and encouraged to issue notice to Potential Plaintiffs and should do so in this case.

B. The Two-Stage Certification Process is the Standard in The Northern District.

This Court and other district courts considering requests to issue notice to Potential Plaintiffs use a two-stage approach to the conditional certification issue.[2] As the

[2] The Fifth Circuit ruled long ago that Rule 23 cases and Section 216(b) actions are "mutually exclusive and irreconcilable." *LaChapelle v. Owens-Illinois, Inc.,* 513 F.2d 286, 289 (5th Cir. 1975). Nineteen years ago, the Fifth Circuit mentioned the existence (at that time) of two different approaches used by other courts to the certification issue – the two stage approach and the Rule 23 approach. *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995). In the intervening time, the Rule 23 approach mentioned by the

Fifth Circuit noted, the two step approach is the typical manner in which collective actions proceed. *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 915 n.2 (5th Cir. 2008). This Court and other courts in the Northern District of Texas (and the Southern District of Texas as well) use the two-stage approach. *See, Black v. Settlepou, P.C.,* No. 3:10-CV-1418-K, 2011 WL 609884, at *2 (N.D.Tex. Feb. 14, 2011)(Kinkeade, J.)(utilizing the two stage approach); *Oliver v. Aegis Commc'ns Grp., Inc.,* No. 3:08-CV-828-K, 2008 WL 7483891, at *3 (N.D. Tex. Oct. 30, 2008) (Kinkeade, J.); *Ericson v. Texas Apartment Locators, Inc.,* No. 3:06-CV-01431-K, Doc. No. 35, at p.4 (N.D. Tex. Apr. 10, 2007) (Kinkeade, J.) (Exhibit K, App. 63-69); *Ryan v. Staff Care, Inc.*, 497 F. Supp. 2d 820, 824 (N.D. Tex. 2007) (Fish, J.); *Aguilar v. Complete Landsculpture, Inc.,* No. 3:04-CV-0776-D. 2004 WL 2293842, at *1 (N.D. Tex. Oct. 7, 2004) (Fitzwater, J.); *Barnett v. Countrywide Credit Indus., Inc.*, No. Civ.A.3:01-CV-1182-M., 2002 WL 1023161, at *1 (N.D. Tex. May 21, 2002) (Lynn, J.). In *Black,* this Court described the two stage process as follows:

> (1) The "notice stage" consists of examining pleadings and any evidence advanced to determine if an order facilitating notice to potential class members is justified; and, if so, (2) the "de-certification stage," usually following discovery, where the court decides if the class is still comprised of "similarly situated" plaintiffs."

Id. at *2 (citing *Mooney v. Aramco Servs. Co.,* 54 F.3d 1207, 1213-14(5th Cir. 1995).

Mooney court and used by one Colorado district court in *Shushan v. Univ. of Colo.*, 132 F.R.D. 263, 265 (D. Colo. 1990) has been disavowed and abandoned by the Tenth Circuit Court of Appeals and is not the proper certification methodology to use in FLSA collective actions. *Thiessen v. Gen. Elec. Capital Corp*., 267 F.3d 1095, 1105 (10th Cir. 2001). Judge Barbara Lynn of the Northern District of Texas recently, and correctly, noted the two-stage approach (known as the *Lusardi* approach drawing its name from the district court case of *Lusardi v. Xerox Corp.,* 118 F.R.D. 351,359 (D.N.J. 1987) is "the prevailing test among the federal courts . . . ." *Barnett v. Countrywide Credit Indus., Inc.*, No. Civ.A.3:01-CV-1182-M., 2002 WL 1023161, at *1 (N.D. Tex. May 21, 2002).

Under the two-stage approach, once the court makes the preliminary determination that the Potential Plaintiffs are similarly situated, the case proceeds as a collective action throughout discovery. *Mooney,* 54 F.3d at 1214. Discovery is relevant thereafter both as to the merits of the case and for the second step in the collective action procedure where the court evaluates conflicting evidence developed in discovery to test the validity of the preliminary decision made at the notice stage. *Id.* Allowing early notice and full participation by the opt-ins, "assures that the full 'similarly situated' decision is informed, efficiently reached, and conclusive." *Sperling v. Hoffmann-LaRoche Inc.*, 118 F.R.D. 392, 406 (D. N.J.), *aff'd*, 862 F.2d 439 (3d Cir. 1988), *aff'd*, 493 U.S. 165 (1989). Once the opt-in period is complete, this Court will have the benefit of knowing the actual makeup of the collective action. *See Clarke v. Convergys Cust. Mgmt. Grp.*, 370 F. Supp. 2d 601, 605 (S.D. Tex. 2005) (notice informs the "original parties and the court of the number and identity of persons desiring to participate in the suit"). Thus, early Notice will help the Court to manage the case because it can "ascertain the contours of the action at the outset." *Hoffman-La Roche*, 493 U.S. at 172-73.

C. Plaintiffs are Entitled To Notice Based On a Minimal Showing That They are Similarly Situated To Other Employees.

1. The Standard for Notice is a "Lenient" One.

Because the first step takes place prior to the completion of discovery, the standard for notice "is a lenient one." *Mooney,* 54 F.3d at 1214. This Court and other courts in this district have routinely recognized and applied this lenient standard in certifying collective actions and issuing notice to potential plaintiffs. *Black,* 2011 WL 609884 at *3, 5

(recognizing the lenient standard at the conditional certification stage and granting certification in a salaried paralegal case); *Oliver,* 2008 WL 7483891 at *2, 4 (certifying companywide class of employees in seven call centers in six states under lenient standard at conditional certification stage); *Halton-Hurt v. The TJX Companies, Inc.,* No. 3:09-CV-2171, Doc. No. 32, at p. 3 (N.D. Tex. Mar. 6, 2011) (Godbey, J.) (recognizing the lenient standard at the conditional certification stage) (Exhibit K, App. 70-77); *see also*, *Ryan*, 497 F. Supp. 2d at 824-26; *Aguilar*, 2004 WL 2293842 at *1; *Barnett*, 2002 WL 1023161 at *2. To impose a strict standard of proof at the notice stage would unnecessarily hinder the development of collective actions and would undermine the "broad remedial goals" of the FLSA. *Garner v. G.D. Searle*, 802 F. Supp. 418, 422 (M.D. Ala. 1991); *Sperling,* 118 F.R.D. at 407 ("[N]otice to absent class members need not await a conclusive finding of 'similar situations.'"). Only at the **second stage**, at the close of discovery, does the Court make a "factual determination" as to whether the class members are similarly situated. *Mooney*, 54 F.3d at 1214. The lenient standard applicable at the first stage "typically results in 'conditional certification' of a representative class," to whom notice is sent and who receive an opportunity to "opt in." *Id.*

2. Plaintiffs Need Only Make Substantial Allegations Supported by Sworn Statements at the Notice Stage.

At the first stage of the two-stage certification approach, courts determine whether named plaintiffs and potential opt-ins are "similarly situated" based upon the allegations in a complaint supported by sworn statements.[3] *Mooney*, 54 F.3d at 1213-14; *see also, Oliver,*

[3] *See, e.g., Black,* 2011 WL 609884 at *3 (Court finds that allegations in complaint and one affidavit "are substantial allegations such that they meet the low threshold for collective treatment at the 'notice

2008 WL 7483891 at *2 (The review at the notice stage "is usually based upon the pleadings and any affidavits that have been submitted," citing *Mooney* at 1213-1214); *Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1097 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 435 (1996); *Brooks v. Bellsouth Telecom.*, 164 F.R.D. 561, 568 (N.D. Ala. 1995); *Sperling*, 118 F.R.D. at 406-07. The record need only be "sufficiently developed . . . to allow court-facilitated notice" based upon "substantial allegations." *Garner*, 802 F. Supp. at 422; *Sperling*, 118 F.R.D. at 407*; see also Church v. Consol. Freightways, Inc.,* 137 F.R.D. 294, 303-05 (N.D. Cal. 1991).

In the present case, Plaintiffs in Plaintiffs' Original Complaint (ECF No. 1)(the "**Complaint**") alleges that Plaintiffs performed laboratory work as laboratory technicians and were not paid time-and-a-half of their regular rate of pay (overtime pay) for the hours they worked in excess of 40 per week because the company paid them a salary. (Complaint, ¶¶ 20, 24-27). The Complaint also alleges that other individuals performed similar lab work and were also paid a salary. (*Id.* at ¶¶ 20, 28). The allegations in the Complaint have been substantiated by the sworn declarations (pursuant to 28 U.S.C. § 1746) of five individuals. These declarations demonstrate that Plaintiffs performed similar lab duties and worked under the same pay provisions as other individuals who have not yet been notified about the case. Plaintiffs easily have made the "modest factual showing" necessary for the Court to issue notice. *Realite v. Ark Rests. Corp.*, 7 F. Supp. 2d 303, 306 (S.D.N.Y. 1998).

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stage"); *Brown v. Money Tree Mortg. Inc.,* 222 F.R.D. 680, 680-81 (D. Kan. 2004) (two affidavits); *Reab,* 214 F.R.D. at 628 (allegations in complaint); *De Asencio v. Tyson Foods, Inc.,* 130 F. Supp. 2d 660, 663 (E.D. Pa. 2001) (four affidavits); *Camper v. Home Quality Mgmt., Inc.,* 200 F.R.D. 516, 519-21 (D. Md. 2000) (sworn testimony from two deponents and two declarations); *Aguayo v. Oldenkamp Trucking*, No. CV-F 04-6279 ASI LJO., 2005 WL 2436477, at *4 (E.D. Cal. Oct 3, 2005) (allegations in complaint and declaration of the plaintiff demonstrate plaintiff and other class members are similarly situated); C*oreas v. C&S Ranch*, No. L-97-30, at p.3 (S.D. Tex. May 16, 1997)(J. Kazen) (one affidavit sufficient) (Exh. K, App. 78-81).

3. Plaintiffs are "Similarly Situated" to Other Defendant Employees Who Perform as Laboratory Technicians and Were Paid a Salary.

Plaintiffs are similarly situated to other Defendant employees who perform laboratory duties and are paid on a salary basis. To establish that employees are similarly situated, a plaintiff must show that they are "'similarly situated' with respect to their job requirements and pay provisions." *Black,* 2011 WL 609884 at *3 (citing *Allen v. McWane, Inc.,* No. Civ.A.2:06-CV-158(TJ), 2006 WL 3246531 at *2 (E.D.Tex. Nov. 7, 2006) (citations omitted)); *Oliver,* 2008 WL 7483891 at *3 (citations omitted). "The positions need not be identical, but similar." *Barnett,* 2002 WL 1023161, at *1 (internal quotation marks and brackets omitted) (quoting *Tucker v. Labor Leasing, Inc.,* 872 F. Supp. 941, 947 (M.D. Fla.1994)); *see also, Dybach v. State of Fla. Dept. of Corrections.* 942 F.2d 1562, 1567-68 (11th Cir. 1991). [4] An FLSA collective action determination is appropriate when there is a "factual nexus which binds the named plaintiffs and the potential class members together as victims of a particular alleged policy or practice." *Black,* 2011 WL 609884 at *3(citations omitted); *see also Aguilar,* 2004 WL 2293842 at *2 (citing *Crain v. Helmerich and Payne Int'l Drilling Co.,* No. 92-0043, 1992 WL 91946, at *2 (E.D. La. Apr. 16, 1992) (citations omitted)). "A court may only foreclose the plaintiffs' right to proceed collectively *if the action relates to circumstances personal to the plaintiff* rather than any generally applicable policy or practice. *Black,* 2011 WL 609884 at *3 (citing all, 2006 WL 3246531 at *2(citations omitted)) (emphasis added); *see also, Donohue v. Francis Servs., Inc.*, No. 04-170, 2004 WL 1161366 (E.D. La. May 24, 2004) (citations omitted).

[4] The "similarly situated" requirement of § 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder), Rule 42 (severance), or in Rule 23 (class actions). *Grayson*, 79 F.3d at 1096. While evidence of a single decision, policy or plan will meet the similarly situated standard, *Sperling,* 118 F.R.D. at 407, a unified policy, plan, or scheme is not required to satisfy the more liberal "similarly situated" requirement of the FLSA. *Grayson,* 79 F.3d at 1096.

Further, where plaintiffs "adequately allege" that the improper practices and "policies are company-wide . . . notice may be sent company-wide." *White v. MPW Indus. Servs., Inc.*, 236 F.R.D. 363, 374-75 (E.D. Tenn. 2006) (rejecting defendant's argument that "notice should be sent only to present and former employees at MPW's branch locations in Chattanooga, Tennessee and Decatur, Alabama, because Plaintiffs' proof relates only to those particular branches."); *see also, Oliver,* 2008 WL 7483891 at *4 (granting companywide notice to all seven call centers in six states based on declarations showing similar policies in place in four of the seven centers); *Masson v. Ecolab, Inc.*, No. 04 Civ. 4488 (MBM), 2005 WL 2000133, at *15-17 (S.D.N.Y. Aug. 17, 2005) (granting companywide notice to preventive maintenance and repair services workers); *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 197-98 (S.D.N.Y. 2006) (granting company-wide notice to "all carpet installation mechanics").

Further, courts also consider an across-the-board decision to treat a discrete category of employees as not eligible for overtime to be sufficient to warrant conditional certification and notice to all those performing the same or similar work. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1264 (11th Cir. 2008) ("There is nothing unfair about litigating a single corporate decision [to classify employees as exempt] in a single collective action…"); *Kane v. Gage Merch. Servs., Inc.* 138 F. Supp. 2d 212, 215 (D. Mass. 2001) (where defendant treats a discrete class as exempt, notice is warranted); *Lynch v. United Servs. Auto. Ass'n*, 491 F. Supp. 2d 357, 370 (S.D.N.Y. 2007) ("Courts typically authorize . . . notice upon a simple showing that other employees may also have been subjected to the employers' practice of 'misclassifying.'"); *Davis v. Novastar Mortg. Inc.*, 408 F. Supp. 2d 811, 817 (W.D. Mo. 2005) (notice granted because the decision to treat all loan originators as exempt was a

company-wide plan showing the loan originators were similarly situated); *Patton v. Thompson Corp.*, 364 F. Supp. 2d 263, 267 (E.D.N.Y. 2005) (notice granted because plaintiff was classified as exempt and all other employees with the same job title were also classified as exempt). These cases are consistent with the holding by the Supreme Court that notice may be authorized under § 216(b) of FLSA because "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffman-La Roche*, 493 U.S. at 170.

Plaintiffs in the present matter have met the lenient standard of showing that notice to Potential Plaintiffs is appropriate. The evidence detailed in the Factual Background section of this Motion (and not repeated here at length) makes clear that the Plaintiff and the Potential Plaintiffs are victims of the same scheme to deprive them of overtime compensation. (Factual Background, Sections A - C, *supra*). As Defendant employees who were charged with performing laboratory duties, Plaintiffs and the Potential Plaintiffs performed the same or similar work duties. (*Id.*). These individuals were paid on a salary basis which failed to pay them overtime pay for overtime work. (*Id.*). Further, these individuals worked in excess of 40 hours in at least one week during the actionable period and did not receive proper overtime compensation for their hours of work. (*Id.*). Indeed, the national Job Descriptions authored and approved by Defendant's top management show that the Plaintiffs and Potential Plaintiffs (as either Lab Technicians IIs and IIIs), were treated as two classes of similarly job performing employees who were all categorically defined incorrectly as exempt. The evidence shows that Plaintiff and the Potential Plaintiffs were the victims of the same improper practices that deprived them of

overtime pay. Consequently, the Court should permit Plaintiff to send a court-supervised notice to the Potential Plaintiffs because they are similarly situated.

IV.
RELIEF SOUGHT: CONDITIONAL CERTIFICATION, ISSUANCE OF NOTICE TO POTENTIAL PLAINTIFFS, AND DISCLOSURE OF NAMES AND ADDRESSES

To facilitate the Notice process and preserve the rights of those who have not yet opted in, Plaintiffs seek Court-supervised notice and conditional certification for the Potential Plaintiffs. Plaintiffs ask the Court to approve the proposed Notice included in the Appendix. (Exh. L, App. 82). Plaintiffs have also submitted a proposed Consent Form to be submitted to the Court for those wishing to join this action. (Exh. M, App. 83-84). Plaintiffs seek a sixty (60) day opt-in period measured from the date notice is mailed.

Additionally, Plaintiffs seek an Order from this Court requiring Defendant to disclose the names, last known addresses, e-mail addresses, and telephone numbers of the Potential Plaintiffs. Plaintiffs request this information be provided within 11 days from the entry of the Court's Order and in usable electronic form to reduce any delays in sending out the Notices.

Plaintiffs further request that this Court allow the proposed Notice and Consent Forms to be mailed and emailed to the class members. *Beall v. Tyler Technologies, Inc.*, , Civil Action No. 2-08-CV-422 (TJW), 2009 WL 3064689, at *1 (E.D. Tex. 2009) (Ward, J.) (court granted class notice via email and later compelled the employer to produce all email addresses, both personal and work); *see also Davis v. Westgate Planet Hollywood Las Vegas, LLC.*, No. 2:08-CV-00722-RCJ-PAL, 2009 WL 102735, at * 13 (D. Nev. Jan. 12, 2009) (court granted circulation of class notice via both U.S. mail and email); *Lewis v. Wells*

Fargo & Co., 669 F. Supp. 2d 1124, 1128 (N.D. Cal. 2009)(court found that "providing notice by first class mail and email [would] sufficiently assure that potential collective action members receive actual notice of [the] case"); *Cranney v. Carriage Servs.*, No. 2:07-CV-1587-RLH-PAL, 2008 WL 608639, *5 (D. Nev. Feb. 29, 2008)(Defendants ordered to provide addresses and email addresses to Plaintiffs of all employees who meet class description, to email notice to all employees who meet class description, to post notice in conspicuous place in Defendants' locations such as the break room, and to put notice in next three employee newsletters).

Finally, Plaintiffs request that this Court order that the respective Notice and Consent forms be posted at each of Defendant's branches that employ Lab Technician IIs or Lab Technician IIIs in an area readily and routinely available for review by such employees. Posting of the notice at each of Defendant's locations would be absolutely appropriate and not unduly punitive. *See Whitehorn v Wolfgang's Steakhouse, Inc.*, 767 F.Supp.2d 445, 449 (S.D.N.Y. 2011) ("Courts routinely approve requests to post notice on employee bulletin boards and in other common areas, even where potential members will also be notified by mail.") (citing *Malloy v. Richard Fleischman & Assocs. Inc.,* No. 09 Civ. 322(CM), 2009 WL 1585979, at *4 (S.D.N.Y. June 3, 2009) (requiring defendant to "post the notice in each workplace where potential collective action members are employed" within ten business days of date of decision) and citing *Garcia v. Pancho Villa's of Huntington Vill., Inc.,* 678 F. Supp. 2d 89, 96 (E.D.N.Y. 2010) ("[W]hile defendants object to the posting of the Notice at their business locations--and request an order prohibiting it--such a practice has been routinely approved in other cases.")); *see also Cranney,* 2008 WL 608639 at *5 (Defendants ordered to post notice in conspicuous place in Defendants' locations such

as the break room, and to put notice in next three employee newsletters); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 493 (E.D. Cal. April 19, 2006) (ordering notice to be posted at each of defendant's business locations, noting that defendant would face "only a small burden in being required to post the notice", and that "multiple district courts have approved this method of notice").

Plaintiffs further seek the specific relief identified in the Proposed Order submitted with this Motion.

V.
CONCLUSION

Plaintiffs have presented detailed allegations and even more detailed sworn statements and documentary evidence concerning their work with Defendant. Plaintiffs have identified an improper scheme that fails to pay overtime compensation to other individuals who perform work similar to Plaintiffs under the same pay plan as Plaintiffs. Because Plaintiffs have met their burden to show that similarly situated individuals exist who have not been notified about the present suit, the Court should enforce the collective action provisions of the FLSA. The Court should grant Plaintiffs' Motion and enter an Order with the terms set forth in Plaintiffs' proposed Order.