No. _____

IN THE

Supreme Court of the United States

MAXIMUS, INC.,

Applicant,

v.

SHAREY THOMAS, ET AL.,

Respondents.

APPENDIX TO APPLICATION FOR A STAY OF AN ORDER ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

To the Honorable John G. Roberts
Chief Justice of the Supreme Court of the United States
and Circuit Justice for the Fourth Circuit

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SHAREY THOMAS *et al.*,
individually and on behalf
of all others similarly situated,
Plaintiffs,

v. Civil No. 3:21cv498 (DJN)

MAXIMUS, INC,
Defendant.

ORDER
(Granting in Part and Denying in Part Motion for Conditional Certification and Notice and Ordering Further Briefing)

Plaintiffs Sharey Thomas, Jennifer Gilvin, Laura Vick, Shannon Garner, Nyeshia Young and Olga Ramirez ("Plaintiffs") bring this action individually and on behalf of all other similarly situated individuals against Defendant Maximus, Inc. ("Defendant"), alleging violations of Sections 206, 207 and 216(b) of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. § 216(b) ("the FLSA"); the Kansas Wage Payment Act ("KWPA"), Kan. Stat. Ann. § 44-313, *et seq.*; the Kentucky Wage and Hour Act ("KWHA" or "Kentucky Act"), Ky. Rev. Stat. Ann. §§ 337.010, *et seq.*; the Louisiana Revised Statutes ("LWPA" or "Louisiana Wage Payment Act"), La. Rev. Stat. § 23:631, *et seq.*, Louisiana Civil Code, La. Civ. Code Arts. 2315, 2298 (collectively, "Louisiana Law"); Mississippi common law; Missouri common law, Mo. Rev. Stat. §§ 290.500, *et seq.*; Texas common law; and Virginia common law. Plaintiffs assert their FLSA claims as a collective action under § 16(b) of the FLSA, 29 U.S.C. § 216(b), and assert the state law claims as class actions under Federal Rule of Civil Procedure 23. This matter now comes before the Court on Plaintiffs' Opposed Motion for Conditional Certification and Notice to Putative Class Members ("Pl.'s Mot." (ECF No. 28)). For the reasons set forth in the

accompanying Memorandum Opinion, the Court hereby GRANTS IN PART AND DENIES IN PART the Motion.

Further, Defendant requests that the Court certify this matter for interlocutory appeal under 28 U.S.C. § 1292(b) for resolution of the question of whether to adopt *Swales* when reviewing motions for conditional certification under FLSA. (Mem. in Opp'n to Pls.' Mot. for Conditional Collective Certification at 11 (ECF No. 38).) If Defendant still seeks to certify an interlocutory appeal, it should move to do so after reviewing this Opinion, and the Court will evaluate the merits of the motion once it ripens. *See Buffington v. Ovintiv USA Inc.*, 2021 WL 3726194, at *1-2 (D. Col. Aug. 23, 2021) (addressing the defendant's motion to certify an interlocutory appeal to the Tenth Circuit to clarify the FLSA collective certification process post-*Swales* after the district court conditionally certified the collective and after the parties submitted full briefing on the defendant's motion to certify an interlocutory appeal). Thus, Defendant shall have fourteen days from the entry hereof to move to certify an interlocutory appeal. Pursuant to Local Rule 7(F), Plaintiffs shall have fourteen days to respond, and Defendant shall have six days to reply. In the interim, the Court hereby STAYS all aspects of this Order and accompanying Opinion pending resolution of the certification issue, except the production of the personal contact information of the potential plaintiffs.

Finally, during the conference call between the parties and the Court on February 25, 2022, counsel for Plaintiffs raised the issue of tolling the statute of limitations for the putative class members who may join this suit. (Tr. of Conference Call at 7:11-21 (ECF No. 62).) To ensure that this matter is fully briefed, Plaintiffs shall have fourteen days from the entry hereof to move to toll the statute of limitations. Defendant shall have fourteen days to respond, and

Plaintiffs shall have six days to reply, pursuant to Local Rule 7(F).

Let the Clerk file a copy of this Order electronically and notify all counsel of record.

It is so ORDERED.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Dated: February 28, 2022

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SHAREY THOMAS *et al.*,
individually and on behalf
of all others similarly situated,
Plaintiffs,

v. Civil No. 3:21cv498 (DJN)

MAXIMUS, INC,
Defendant.

MEMORANDUM OPINION
(Granting in Part and Denying in Part Motion for Conditional Certification and Notice and Ordering Further Briefing)

Plaintiffs Sharey Thomas, Jennifer Gilvin, Laura Vick, Shannon Garner, Nyeshia Young and Olga Ramirez ("Plaintiffs") bring this action individually and on behalf of all other similarly situated individuals against Defendant Maximus, Inc. ("Defendant"), alleging violations of Sections 206, 207 and 216(b) of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. § 216(b) ("the FLSA"); the Kansas Wage Payment Act ("KWPA"), Kan. Stat. Ann. § 44-313, *et seq.*; the Kentucky Wage and Hour Act ("KWHA" or "Kentucky Act"), Ky. Rev. Stat. Ann. §§ 337.010, *et seq.*; the Louisiana Revised Statutes ("LWPA" or "Louisiana Wage Payment Act"), La. Rev. Stat. § 23:631, *et seq.*, Louisiana Civil Code, La. Civ. Code Arts. 2315, 2298 (collectively, "Louisiana Law"); Mississippi common law; Missouri common law, Mo. Rev. Stat. §§ 290.500, *et seq.*; Texas common law; and Virginia common law. Plaintiffs assert their FLSA claims as a collective action under § 16(b) of the FLSA, 29 U.S.C. § 216(b), and assert their state law claims as class actions under Federal Rule of Civil Procedure 23. This matter now comes before the Court on Plaintiffs' Opposed Motion for Conditional Certification and Notice

to Putative Class Members ("Mot." (ECF No. 28)). For the reasons set forth below, the Court hereby GRANTS IN PART AND DENIES IN PART the Motion.

I. BACKGROUND

A. Factual Background[1]

Defendant, a Virginia multinational corporation, operates call centers throughout the United States and primarily serves federal, state and local governments as a "Citizen Engagement Center." (1st Am. Collective/Class Action Compl. ¶¶ 35-36 ("Am. Compl.") (ECF No. 26).) Plaintiffs and the Putative Class Members[2] work as hourly call-center employees who assist the customers of Defendant's clients. (Am. Compl. ¶ 37.) Plaintiffs bring both this collective action to recover overtime wages, liquidated damages and other penalties pursuant to the FLSA and class actions pursuant to various state laws to recover unpaid straight time, overtime wages and other penalties. (Am. Compl. ¶ 1.)

Specifically, Plaintiffs assert that Defendant maintain and enforce a company-wide policy that requires all hourly call-center employees to get "call-ready"[3] before the start of their first shift, thereby requiring them to engage in unpaid, off-the-clock work every day. (Am. Compl.

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[1] Unless otherwise noted, the Court bases the factual background on Plaintiffs' allegations in their Amended Complaint and their Declarations submitted in support of their Motion for Conditional Certification (ECF Nos. 26, 29). *See Santos v. E&R Servs., Inc.*, 2021 WL 6073039, at *1 n.1 (D. Md. Dec. 23, 2021) (basing factual background on complaint and Plaintiffs' declarations).

[2] The Court refers to the individuals who may be eligible to join this suit but have not yet done so as "putative class members" or "potential plaintiffs."

[3] "Call-ready" means that an employee has logged into their computer and ensured that the necessary computer programs are running correctly so that the employee can take calls, answer emails and handle support tickets. (Am. Compl. ¶ 55; Pls.' Mem. of Law in Supp. Of Pls.' Opposed Mot. for Conditional Certification and Notice to Putative Class Members ("Pls.' Mem.") at 4 n.8 (ECF No. 29).)

¶¶ 54-63.) This process can take thirty minutes or longer. (Am. Compl. ¶ 56.) Likewise, Plaintiffs assert that Defendant required them to log out of their computer programs and shut down their computer after the end of their shifts, a three- to five-minute process, when they had already clocked out. (Am. Compl. ¶¶ 83-84.)

Further, Plaintiffs allege that Defendant allows them one unpaid thirty-minute meal break per day. (Am. Compl. ¶ 64.) However, per Defendant's policy, they may not log out of their computer and phone system until their meal break begins, a process that can take one to three minutes. (Am. Compl. ¶¶ 66, 68.) Similarly, they must return to their computer before the end of their meal break to log back into their computer and phone, a process that also takes one to three minutes. (Am. Compl. ¶¶ 67, 69.) Defendant automatically deducts the thirty-minute meal break period from Plaintiffs' pay, meaning that they are never paid for this shut-down and restart time during their breaks. (Am. Compl. ¶¶ 72-73.) Finally, Plaintiffs claim that Defendant required them to finish every call that they take, including those calls that run past the end of the start of their meal break and the end of their shift. (Am. Compl. ¶ 78-79.) Defendant did not compensate them for these activities, either. (Am. Compl. ¶ 80.)

In total, Plaintiffs claim that they regularly complete one to two hours of unpaid, off-the-clock work beyond their normal forty-hour workweek. (Pls.' Mem. of Law in Supp. of Pls.' Opposed Mot. for Conditional Certification and Notice to Putative Class Members ("Pls.' Mem.") at 10 (ECF No. 29).) Employers subject to FLSA must compensate employees at rates at least one-and-one-half times their regular rates of compensation for all hours worked in excess of forty hours per week. 29 U.S.C. §§ 206-07, 215(a)(2).

B. Procedural History

In July 2021, Plaintiffs filed their original Complaint. (ECF No. 1.) They filed their Amended Complaint on November 2, 2021. (ECF No. 26.) In Count One, Plaintiffs bring a collective action against Defendant under the FLSA. (Am. Compl. ¶¶ 90-120.) In Counts Two through Nine, Plaintiffs bring class actions under the laws of Florida, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Texas and Virginia. (Am. Compl. ¶¶ 121-295.) Based on these claims, Plaintiffs, on their own behalf and on behalf of the Putative Class Members, seek class certification under the FLSA and pursuant to the relevant state laws, unpaid wages, costs and expenses, attorneys' fees, pre- and post-judgment interest, a service award for Plaintiffs and accounting of Defendants' books and records. (Am. Compl. ¶ 296.)

On November 3, 2021, Plaintiffs moved for conditional certification and notice to putative class members pursuant to the FLSA, 29 U.S.C. § 216(b). (Mot. (ECF No. 28).) On November 24, 2021, Defendant filed its Memorandum in Opposition. (Mem. in Opp'n to Pls.' Mot. for Conditional Collective Certification ("Resp.") (ECF No. 38).) On December 3, 2021, Plaintiffs replied to Defendants' Response. (Reply (ECF No. 39).) On February 25, 2022, the Court conducted a conference call with the parties to discuss the instant Motion and next steps. (Tr. of Conference Call ("Tr.") (ECF No. 62).) The Motion for Conditional Certification is now ripe for review.

II. ANALYSIS

A. The FLSA Collective Action Certification Process

Under the FLSA, private plaintiffs may bring a collective action on their own behalf and on behalf of those "similarly situated" to them. 29 U.S.C. § 216(b). According to the statute,

> An action to recover the liability prescribed in [§ 216(b)] 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 employees 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.

Id.

The Supreme Court has highlighted the importance of "employees receiving accurate and timely notice concerning the pendency of [a] collective action, so that they can make informed decisions about whether to participate." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). The Court also emphasized that district courts have discretionary authority to facilitate notice to potential plaintiffs. *Id.* at 174. However, neither the Fourth Circuit nor the Supreme Court has prescribed a process for certification of FLSA collectives. *Ison v. MarkWest Energy Partners, LP*, 2021 WL 5989084, at *2 (S.D.W. Va. Dec. 17, 2021). Rather, like most federal courts across the country, district courts within the Fourth Circuit have "uniformly" followed the approach set forth in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). *Id.* at *3. Under *Lusardi*, district courts undertake a two-step process: (1) the notice stage, also called the conditional class certification stage, and (2) the class decertification stage. *Winks v. Va. Dep't. of Transp.*, 2021 WL 2482680, at *2 (E.D. Va. June 17, 2021) (citation omitted); *Purdham v. Fairfax Cnty. Pub. Schs.*, 629 F. Supp. 2d 544, 547 (E.D. Va. 2009) (citations omitted).

At the notice step, courts evaluate whether the plaintiffs have met their burden of satisfying the "similarly situated" requirement under a somewhat lenient standard. *Winks*, 2021 WL 2482680, at *2 (citation omitted). The Fourth Circuit has yet to establish a definition for "similarly situated." *Yerby v. City of Richmond*, 2020 WL 602268, at *2 (E.D. Va. Feb. 7, 2020) (citation omitted). However, "[t]he primary focus . . . is whether the potential plaintiffs are 'similarly situated with respect to the legal and, to a lesser extent, the factual issues to be

determined.'" *Houston v. URS Corp.*, 591 F. Supp. 2d 827, 831 (E.D. Va. 2008) (citation omitted). Courts aim to determine whether, based on the pleadings and affidavits before them, "the presence of common issues allows the class-wide claims to be addressed without becoming bogged down by individual differences among class members." *Id.* at 832; *see also Amoko v. N&C Claims Serv., Inc.*, 2021 WL 6430992, at *1 (D.S.C. Dec. 29, 2021) (citation omitted) (describing courts' decision-making process at the notice stage). For that reason, the FLSA's certification requirements resemble, but are not identical to, the requirements for class certification under Federal Rule of Civil Procedure. *Houston*, 591 F. Supp. at 832 (citation omitted). Thus, courts consider whether plaintiffs have made "a modest factual showing sufficient to demonstrate that they and potential plaintiffs were victims of a common policy or plan that violated the law." *Choimbol v. Fairfield Resorts, Inc.*, 475 F. Supp. 2d 557, 564 (E.D. Va. 2006) (citations omitted). "Insubstantial differences in job duties, hours worked and wages due that do not materially affect whether a group of employees may be properly classified are not significant to the 'similarly situated' determination." *LaFleur v. Dollar Tree Stores, Inc.*, 30 F. Supp. 3d 463, 468 (E.D. Va. 2014) (citation omitted).

If the court determines that the plaintiffs meet the FLSA's "similarly situated" standard, the court will conditionally certify the collective and authorize notice to similarly situated plaintiffs so that they can opt into the collective action. *Amoko*, 2021 WL 6340992, at *1 (citation omitted). At that point, "the action proceeds as a representative action throughout discovery." *Id.* (citation omitted).

During the second stage of collective certification, the court applies "a more 'stringent' factual determination" to decide whether a putative collective fulfills the "similarly situated" standard. *LaFleur*, 30 F. Supp. 3d at 467 (citations omitted). "If, after discovery, it is apparent

that plaintiffs are not similarly situated, the court may decertify the collective action and dismiss the claims of the opt-in plaintiffs without prejudice." *Id.* at 468 (citation omitted).

As an initial matter, Defendant argues that the Court should not utilize the two-stage certification process outlined above, and, instead, should analyze this case under the Fifth Circuit's newly established framework in *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430 (5th Cir. 2021). (Resp. at 10-11.) Plaintiff counters that district courts within the Fourth Circuit have consistently followed the two-step *Lusardi* framework for twenty years, and no other circuits have followed *Swales*. (Reply at 3-4.) In *Swales*, the Fifth Circuit rejected the two-stage collective certification process. *Swales*, 985 F.3d at 443. Instead, the court held that district courts "should identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated.' And then it should authorize preliminary discovery accordingly." *Id.* at 441.

The Court declines Defendant's invitation to apply this standard and will follow the approach of a litany of other courts within the Fourth Circuit, which have done the same when presented with this issue. *See, e.g.*, *Amoko*, 2021 WL 6340992, at *3 (declining to follow *Swales*, because it did not bind courts within the Fourth Circuit, and because the defendant "ha[d] not presented the court with a single application of *Swales* by a district court within the Fourth Circuit"); *Santos*, 2021 WL 6073039, at *3 (refusing to follow *Swales*, because it was not bound by the Fifth Circuit's decisions, and because the facts that gave rise to *Swales* bore significant differences to the ones at issue); *Ison*, 2021 WL 5989084, at *3 (opting to use the "fairly lenient" two-step certification process "that ha[d] long been applied in [the] district"); *Mazariegos v. Pan 4 Am., LLC*, 2021 WL 5015751, at *4 (D. Md. Oct. 28, 2021) (declining to apply *Swales*, because *Swales* was not binding on Fourth Circuit courts, and because of the

factual differences between *Swales* and the case at bar); *see also Winks*, 2021 WL 2482680, at *2 n.3 (noting that Fourth Circuit has not yet clarified the factual showing necessary to meet FLSA's similarly-situated standard and applying the two-stage analysis without resolving issue of whether *Swales* should apply in the Fourth Circuit).

Likewise, courts in other circuits have refused to follow *Swales*. *See, e.g.*, *In re Albertsons*, 2021 WL 4028428, at *2 (7th Cir. Sept. 1, 2021) (holding that district court did not err in applying two-stage collective certification framework instead of *Swales*, as "district courts have 'wide discretion to manage collective actions'" (citation omitted)); *Branson v. All. Coal,* 2021 WL 1550571, at *4 (W.D. Ky. Apr. 20, 2021) (refusing to follow *Swales*, because of the importance of the district court's role in overseeing the notice process).

Like these courts, the Court sees no compelling reason to deviate from twenty years of established precedent. The Fifth Circuit's decision in *Swales* does not bind this Court. In light of the refusal of multiple district courts within the Fourth Circuit to apply *Swales*, and in the absence of guidance from the Supreme Court or the Fourth Circuit on the issue, the Court will continue to apply the two-stage collective certification process first established in *Lusardi*.

Moreover, the facts and procedural posture in this case diverge from that in *Swales* in a manner that only underscores the importance of conditional certification and early judicial involvement in the notice process. *See Branson*, 2021 WL 1550571, at *4 (electing not to follow *Swales*, partly because so many potential plaintiffs had already opted into the suit, without the court's intervention, and the court sought to exert more oversight over the notice process). *Swales* requires district courts to decide "potentially dispositive, threshold" merits matters — in that case, whether the plaintiffs should have been classified as non-exempt employees rather than independent contractors — before allowing notice to prospective plaintiffs to be sent out.

Swales, 985 F.3d at 441. The *Swales* court reasoned that courts should resolve these matters before authorizing notice, because "alerting those who cannot ultimately participate in the collective 'merely stirs up litigation.'" *Id.* (quoting *In re JP Morgan Chase & Co.*, 916 F.3d 494, 502 (5th Cir. 2019)). However, in this way, the Fifth Circuit appeared to assume that court-facilitated notice constitutes the only method of notifying potential plaintiffs of a FLSA collective action. *Branson*, 2021 WL 1550571, at *4.

By contrast, since the beginning of this litigation, Plaintiffs' counsel has added over 100 opt-in plaintiffs with no judicial intervention or oversight. (ECF Nos. 9-12, 16-17, 20-21, 24-25, 17, 27, 30-32, 35, 37, 40); *see Branson*, 2021 WL 1550571, at *4 (noting that *Swales*' rationale does not apply when plaintiffs' counsel has already added opt-in plaintiffs with no judicial oversight). At this point, the Court lacks sufficient information to determine whether these opt-in plaintiffs' claims bear the legal and factual similarities necessary for inclusion in the collective. Approving the language and communication methods of the notice to potential plaintiffs would enable the Court to fulfill its "managerial responsibility to oversee the joinder of additional parties" and ensure that the notice process does not improperly stir up litigation. *Hoffman-La Roche*, 493 U.S. at 171. Applying the *Swales* framework would ultimately undermine the Court's oversight role in this case. With this background in mind, the Court now turns to the issue of whether the potential plaintiffs constitute similarly situated employees, as the FLSA requires.

B. "Similarly Situated" Potential Plaintiffs

Plaintiffs have made a threshold showing that the potential plaintiffs constitute similarly situated employees. In their Motion for Conditional Certification, Plaintiffs argue that, based on twelve declarations from Defendant's employees across ten different states, they and the Putative

Class Members worked as non-exempt employees of Defendant; that Defendant uniformly subjected them to its company-wide policy requiring off-the-clock, unpaid work; that they performed similar duties; that Defendant paid them an hourly rate; and that Defendant did not provide them with all of their overtime compensation and compensation at their regular rate(s) of pay. (Pl.'s Mem. at 16.) Plaintiffs also highlight that at the time that they filed their Motion, 97 other current former call-center employees had filed pre-notice opt-in consent forms, demonstrating that others had been negatively affected by Defendant's allegedly illegal policies. (Pl.'s Mem. at 18.) Plaintiffs assert that they have met or exceeded the amount of evidence that courts usually require for satisfaction of the similarly-situated standard. (Pl.'s Mem. at 17.)

Defendant responds that evaluations of the Plaintiffs' and the Putative Class Members' claims would require individualized determinations of liability, rendering resolution on a class-wide basis inappropriate. (Resp. at 13-24.) Likewise, Defendant contends that its defenses to each of Plaintiffs' and the Putative Class Members' claims would require individualized evaluations, as well, based on the amount of unpaid, off-the-clock work that each individual completed. (Resp. at 24-26.) In support of its Response, Defendant submitted declarations by 65 customer service representatives ("CSR") from Defendant's call centers in 18 cities and 12 states. (ECF Nos. 38-1 through 38-65.)

In their reply, Plaintiffs emphasize that they have met their lenient burden at this stage, and that courts leave the question of individualized inquiries to the decertification stage, after the parties complete discovery and have a fuller understanding of the facts and legal issues. (Reply at 6-11.) They also take issue with Defendant's submission of "happy camper" declarations from current employees, deeming them "self-serving and conclusory." (Reply at 11.)

The Court agrees with Plaintiffs and finds that they have satisfied their burden at this stage. "The submission of consistent employee declarations . . . has consistently been held as sufficient and admissible evidence of a policy to be considered for conditional class certification." *Hargrove v. Ryla Teleservs., Inc.*, 2012 WL 489216, at *8 (E.D. Va. Jan. 3, 2012), *report and recommendation adopted*, 2012 WL 463442 (E.D. Va. Feb. 13, 2012). "[T]hose declarations must show that the employees have first-hand knowledge of the events described therein." *McNeil v. Faneuil, Inc.*, 2016 WL 11673838, at *3 (E.D. Va. Aug. 3, 2016). Further, because this step requires that the potential plaintiffs to have been "victims of a single decision, policy, or plan[,] . . . plaintiffs must submit some evidence that the alleged FLSA violations were not the product of happenstance or outlier instances of rogue supervisor behavior." *Id.* As discussed previously, the determination as to whether the potential plaintiffs satisfy the similarly-situated inquiry is made using a "fairly lenient standard." *Id.*

Plaintiffs have submitted declarations in support of their allegations that Defendant maintained and enforced a corporate-wide policy that required hourly call center workers to get call-ready before the start of their shifts and work during unpaid meal breaks, as well as finish calls and shut down their computers after the end of their shifts, all of which resulted in them accruing overtime for which Defendant did not properly compensate them under the FLSA. (*See, e.g.*, Decl. of Sharey Thomas ¶¶ 2, 5, 7-8, 16 ("Thomas Decl.") (ECF No. 29-1) (declaration by former hourly CSR employed by Defendant stating that all CSRs receive the same training and must arrive at their call center early to start up their computer, and that she often worked an additional one to two hours each week beyond her regular hours for which she was not paid overtime); Decl. of Jennifer Gilvin ¶¶ 2, 5, 10, 13, 15 ("Gilvin Decl.") (ECF No. 29-2) (declaration by current hourly CSR making similar statements and adding that she had to

finish all calls that ran beyond the end of her shift).) This amounts to the "modest factual showing" needed for conditional certification. *Choimbol*, 475 F. Supp. 2d at 564.

As Plaintiffs correctly posit, the conditional certification step merely requires only a modest factual showing of similarity between Plaintiffs and the Putative Class Members, and the Court need not address merits issues at this first step. (Pl.'s Mem. at 15; Reply at 8-11.) At this point, the Court need not prematurely delve into whether Plaintiffs' claims require individualized treatment that would render a collective action unmanageable.

Concerns about the predominance of individualized nature of Plaintiffs' and the Putative Class Members' claims require merits-based analyses that courts wait to tackle during the decertification stage, after notice to potential plaintiffs is finalized and the parties have completed discovery. *See Wiley v. Asplundh Tree Expert Co.*, 2013 WL 12182398, at *2 (S.D.W. Va. Nov. 1, 2013) ("Defendant's argument of the individualized nature of said claims for overtime compensation is more appropriately decided at step two, after it is known who the class will consist of, and after some of the factual issues can be fleshed out in discovery." (citations omitted)); *Robinson v. Empire Equity Grp., Inc.*, 2009 WL 4018560, at *4 (D. Md. Nov. 18, 2009) (noting that the defendant's arguments regarding the dissimilarities between plaintiffs and putative class members should be addressed at the decertification step so that "factual issues can be fleshed out in discovery" (citation omitted)). Indeed, the cases that Defendants themselves cite regarding the problems that arise from varying work conditions and individualized factual scenarios arose at the decertification stage. (Resp. at 13 (citing *Johnson v. TGF Precision Hair Cutters, Inc.*, 2005 WL 1994286, at *3-4, 8 (S.D. Tex. Aug. 17, 2005); and then citing *Brechler v. Qwest Commc'ns Int'l, Inc.*, 2009 WL 692329, at *3 (D. Ariz. Mar. 17, 2009)).) Moreover, the "happy camper" declarations that Defendant submitted in support of this

argument "are generally entitled to little or no weight" at the initial conditional certification step, "given the risk that the employer secured such declarations through explicit or implicit coercion." *Spencer v. Macado's, Inc.*, 2019 WL 4739691, at *4 (W.D. Va. Sept. 27, 2019). For these reasons, the Court conditionally certifies the class and will order notice to potential class members, as discussed below.

C. Plaintiff's Requested Relief

First, Plaintiffs ask the Court to order Defendant to provide counsel for Plaintiffs with the names, current or last known addresses, email addresses, phone numbers, cell phone numbers and dates of employment for current and former hourly call-center employees who match the description of the conditionally certified class within seven days of the entry of the Court's order conditionally certifying the class. (Pl.'s Mem. at 19.) Additionally, Plaintiffs seek to disseminate the Notice and Consent form to the Putative Class Members via mail, email and text message. (Pl.'s Mem. at 20.) They also request that the Putative Class Members be given the option to execute their consent forms online through an electronic signature service. (Pl.'s Mem. at 24.) Additionally, they request that the Notice and Consent forms be posted in plain view at Defendant's call centers across the country. (Pl.'s Mem. at 24.) Finally, they ask that the Court authorize a 90-day opt-in period, as well as a reminder notice to be sent via email and text message halfway through the period. (Pl.'s Mem. at 24.)[4]

In response, Defendant takes issue with several aspects of Plaintiffs' proposed Notice and Consent requests. First, it contends that the term "hourly call-center employees" is overbroad. (Resp. at 27.) Second, it argues that the Notice must state that Defendant "(1) denies Plaintiffs'

[4] Because the Court grants Plaintiff's Motion for Conditional Certification, it also DENIES Defendant's request for targeted discovery on the proposed collective. (Resp. at 26-27.)

allegations; (2) contends that the lawsuit is without merit; and (3) contends that it has properly paid Plaintiffs and all other current and former customer service representatives all wages and overtime owed under the FLSA." (Resp. at 27.) Third, Defendant assert that Section Three of the proposed Notice should be revised "to state that an individual is eligible to join the lawsuit if: (1) he or she was employed by [Defendant] as an hourly Customer Service Representative at any point within the past three years, *and* (2) was not paid for all hours worked." (Resp. at 28 (emphasis in original).) Fourth, Defendant states that the last sentence of Section 5 of the proposed Notice could mislead readers and discourage individuals from filing separate claims. (Resp. at 28.) It seeks to revise that sentence to say: "Because of the statute of limitations, eligible employees who do **not** join this litigation or choose to file their own separate claims **after** their limitations period has expired, will likely lose their rights to recover overtime for work performed in the past for [Defendant]." (Resp. at 28 (emphasis in original).) Fifth, it requests that Paragraph 5 of the proposed Consent form be deleted, because it lacks relevance to the matter. (Resp. at 28.) Finally, Defendant requests that the Court limit the Notice to one mailing via first-class mail with a sixty-day notice period, and that it modify the proposed schedule to give Defendant fourteen days to provide a notice list to Plaintiffs containing only the names and addresses of the Putative Class Members. (Resp. at 28.) The Court addresses each of these issues in turn.

1. Disclosure of the potential plaintiffs' contact information

"Courts should not modify a plaintiff's proposed notice 'unless such alteration is necessary.'" *Brown v. Energy Servs. Grp. Int'l, Inc.*, 2021 WL 5889707, at *3 (E.D. Va. Dec. 13, 2021) (citation omitted). First, the Court grants Plaintiffs' request for an order directing Defendant to provide Plaintiffs' counsel with the names, current or last known physical

addresses, dates of employment and email addresses for current and former Hourly Call-Center Employees fitting the description of the conditionally certified class. *See*, *e.g.*, *id.* at *3-4 (permitting disclosure of email addresses); *O'Quinn v. TransCanada USA Servs., Inc.*, 469 F. Supp. 3d 591, 610 (S.D.W. Va. 2020) (ordering disclosure of names, physical addresses, email addresses and phone numbers for potential plaintiffs, noting that email constitutes a more reliable form of communication than other methods).

Courts in the Fourth Circuit appear to be split in their approach to ordering disclosure of potential FLSA plaintiffs' phone numbers. *Compare Pecora v. Big M Casino*, 2019 WL 302592, at *5 (D.S.C. Jan. 23, 2019) (denying plaintiffs' request for disclosure of potential plaintiffs' phone numbers, because plaintiffs did not demonstrate a "special need" for the numbers, and because email and text messaging furnish equally reliable communication methods), *with Gregory v. Belfor USA Grp., Inc.*, 2012 WL 3062696, at *6 (E.D. Va. July 26, 2012) (granting plaintiffs' request for disclosure of potential plaintiffs' home and/or mobile numbers without a showing of a "special need" for this information).

However, courts in this District have repeatedly ordered the disclosure of potential plaintiffs' phone numbers in FLSA collective action cases without a showing of special need for this information, especially in recent years, as text messaging has become a ubiquitous form of communication. *See*, *e.g.*, *Brown*, 2021 WL 5889707, at *3-4 (granting disclosure of phone numbers without a special showing); *Allen v. Cogent Commc'ns*, 2014 WL 4270077, at *6 (E.D. Va. Aug. 28, 2014) (same); *Stone v. SRA Intern., Inc.*, 2014 WL 5410628, at *10 (E.D. Va. Oct. 22, 2014) (same); *LaFleur*, 2012 WL 4739534, at *12 (same); *Gregory*, 2012 WL 3062696, at *6 (same); *but see Houston*, 591 F. Supp. 2d at 836 (denying blanket request for disclosure of phone numbers, but noting that if the notice mailed to the putative plaintiffs was returned as

undeliverable, then the plaintiffs could request the phone number of those individuals from the defendants so that the plaintiffs could contact them to obtain a mailing address). Because courts in this District have consistently ordered FLSA defendants to disclose phone numbers and permitted plaintiffs to disseminate notice via text message, the Court grants Plaintiffs' request for the cell phone numbers of the potential plaintiffs. However, as discussed during the conference call between the Court and the parties regarding the instant Motion, the Court will not permit disclosure of the potential plaintiffs' home phone numbers. (Tr. at 6:19-25.) As noted below, the Court will permit counsel for Plaintiffs to text, but not call, the potential plaintiffs, making disclosure of the potential plaintiffs' home phone numbers unnecessary.

Additionally, the Court also denies Plaintiffs' request for an order directing disclosure of the last four digits of potential plaintiffs' Social Security Numbers. *See Allen*, 2014 WL 4270077, at *6 (denying Plaintiffs' request for last four digits of Social Security numbers).

Finally, the Court allows a fourteen-day period from the entry hereof for Defendant to submit the requested contact information to Plaintiffs, because Plaintiffs consent to this modification of its proposal of seven days for disclosure. As to the method of communication, then, the Court grants Plaintiffs' request for an order requiring the disclosure of the names, current or last known physical addresses, dates of employment and email addresses for current and former Hourly Call-Center Employees fitting the description of the conditionally certified class.

2. Communication methods and schedule

The Court authorizes Notice of the instant suit by mail, email and text message, as courts throughout the Fourth Circuit commonly do. *See, e.g.*, *Brown*, 2021 WL 5889707, at *3 (authorizing notice via email, text message and regular mail); *O'Quinn*, 469 F. Supp. at 591

(same). The Court also permits potential plaintiffs to sign their consent forms electronically. *See Gagliastre v. Captain George's Seafood Rest.*, 2018 WL 9848232, at *5 (E.D. Va. Mar. 13, 2018) (permitting electronic signatures on notice and consent forms). The text message sent to potential plaintiffs may include the proposed text and hyperlink to view the court-authorized notice that Plaintiffs request. (Pl.'s Mem. at 21 n.13.) Importantly, however, although counsel for Plaintiffs may text potential plaintiffs to notify them of this suit, they are not permitted to call the potential plaintiffs.

Further, the Court permits a 90-day opt-in period, in line with courts in this circuit and nationwide. *Butler v. DirectSAT*, 876 F. Supp. 560, 575 (D. Md. 2012) ("Notice periods may vary, but numerous courts around the country have authorized ninety day opt-in periods for collective actions."). A reminder Notice may be sent via email and text message halfway through the opt-in period. *See Lupardus v. Elk Energy Servs., LLC*, 2020 WL 4342221, at *9 (S.D.W. Va. July 28, 2020) ("Recipients may overlook the initial notifications, even in three forms, or become sidetracked from filing their consent form, but a second round helps to ensure that putative class members receive the notice and are reminded to act should they wish to do so.") However, the Court does not authorize Plaintiffs to post the Notice at Defendant's call centers across the country, as this method is "too invasive and duplicative," and Plaintiffs have not demonstrated that their three other proposed methods of notifying potential plaintiffs would be ineffective. *Stacy v. Jennmar Corp. of Va., Inc.*, 2021 WL 4787278, at *4 (W.D. Va. Oct. 14, 2021); *see also Graham*, 331 F.R.D. at 622-23 (allowing notice via mail and email, but denying the plaintiffs' request to post notice at the defendant's workplace).

3. Contents of the Notice and Consent form

First, the Court grants Defendant's objection to the use of the term "hourly call-center employees" in the proposed Notice. (Resp. at 27.) To minimize confusion, and to ensure that only hourly CSRs opt in, the Court orders Plaintiffs to use the terms "hourly customer service representatives" instead of "hourly call-center employees" or "Maximus employees."

Second, the Court grants Defendant's request to modify the Notice and Consent form to include Defendant's position on the instant action (Resp. at 27), because Plaintiff agrees to this request. Section 2 of the Notice must clearly state that Defendant "(1) denies Plaintiffs' allegations; (2) contends that the lawsuit is without merit; and (3) contends that it has properly paid Plaintiffs and all other current and former customer service representatives all wages and overtime owed under the FLSA." (Resp. at 27.)

Third, the Court denies Defendant's objection to the statement in Section 3 of the Proposed Notice, which states in relevant part that "You are eligible to join this lawsuit if: . . . . You believe that you were not paid for all hours worked." (Notice at 2; Resp. at 28.) The potential plaintiffs need not know or prove the merits of their claim before they opt into this suit. The use of the word "believe" in the Notice's description of the class is appropriate.

Fourth, the Court grants Defendant's request to modify the last sentence in Section 5, which pertains to the statute of limitations. Currently, this sentence states that "Because of the statute of limitations, eligible workers who do ***not*** join this litigation or choose to file their own separate claims, may lose their rights to recover unpaid wages and overtime for work performed in the past for Maximus." (Notice at 3.) As Defendant correctly points out, this phrasing implies that those who do not join the instant suit or choose to file their own individual suit may lose the opportunity to recover unpaid wages and overtime pay. (Resp. at 28.) Thus, the Court modifies

this sentence according to Defendant's proposed changes so that it reads, "Because of the statute of limitations, eligible employees who do not join this litigation or choose to file their own separate claims after their limitations period has expired will likely lose their rights to recover overtime for work performed in the past for Maximus." (Resp. at 28.)

Fifth, the Court denies Defendant's objections to Paragraph 5 of the proposed Consent Form, which states that "If needed, I authorize the attorneys at the law firms of Anderson Alexander, PLLC and Butler Curwood, PLC to use this consent to re-file my claim in a separate lawsuit or arbitration against Maximus." This paragraph will enable Plaintiffs' counsel to continue to represent the class members, should that become necessary, and has received the approval of other judges in the Richmond Division. *Brown*, 2021 WL 5889707, at *4 (granting plaintiffs' motion for conditional certification and approving notice); (Pls.' Mem. of Law Supporting Mot. for Conditional Certification and Notice Ex. 11 at 4, *Brown*, 2021 WL 5889707 (ECF No. 19-11) ("If needed, I authorize the Plaintiffs' lawyers to use this consent to re-file my claim in a separate lawsuit or arbitration.").) In conclusion, the Court permits in part and rejects in part Plaintiffs' proposed Notice and Consent form, Notice schedule and methods of communication.

CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART Plaintiffs' Motion (ECF No. 28).

Defendant requests that the Court certify this matter for interlocutory appeal under 28 U.S.C. § 1292(b) for resolution of the question of whether to adopt *Swales* when reviewing motions for conditional certification under FLSA. (Resp. at 11.) If Defendant still seeks to certify an interlocutory appeal, it should move to do so after reviewing this Opinion, and the

Court will evaluate the merits of the motion once it ripens. *See Buffington v. Ovintiv USA Inc.*, 2021 WL 3726194, at *1-2 (D. Col. Aug. 23, 2021) (addressing the defendant's motion to certify an interlocutory appeal to the Tenth Circuit to clarify the FLSA collective certification process post-*Swales* after the district court conditionally certified the collective and after the parties submitted full briefing on the defendant's motion to certify an interlocutory appeal). Thus, Defendant shall have fourteen days from the entry hereof to move to certify an interlocutory appeal. Pursuant to Local Rule 7(F), Plaintiffs shall have fourteen days to respond, and Defendant shall have six days to reply. In the interim, the Court hereby STAYS all aspects of this Opinion pending resolution of the certification issue, except the production of the personal contact information of the potential plaintiffs.

Finally, during the conference call between the parties and the Court on February 25, 2022, counsel for Plaintiffs raised the issue of tolling the statute of limitations for the putative class members who may join this suit. (Tr. at 7:11-21.) To ensure that this matter is fully briefed, Plaintiffs shall have fourteen days from the entry hereof to move to toll the statute of limitations. Defendant shall have fourteen days to respond, and Plaintiffs shall have six days to reply, pursuant to Local Rule 7(F).

An appropriate Order shall issue.

Let the Clerk file a copy of this Memorandum Opinion electronically and notify all counsel of record.

It is so ORDERED.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Dated: February 28, 2022

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SHAREY THOMAS *et al.*,
individually and on behalf
of all others similarly situated,
Plaintiffs,

v. Civil No. 3:21cv498 (DJN)

MAXIMUS, INC.,
Defendant.

ORDER
(Certifying Appeal, Denying Motion for Partial Reconsideration and Granting Motion to Strike)

Plaintiffs Sharey Thomas, Jennifer Gilvin, Laura Vick, Shannon Garner, Nyeshia Young and Olga Ramirez ("Plaintiffs") bring this action individually and on behalf of all other similarly situated individuals against Defendant Maximus, Inc. ("Defendant"), alleging violations of Sections 206, 207 and 216(b) of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. § 216(b) ("the FLSA"); the Kansas Wage Payment Act ("KWPA"), Kan. Stat. Ann. § 44-313, *et seq.*; the Kentucky Wage and Hour Act ("KWHA" or "Kentucky Act"), Ky. Rev. Stat. Ann. §§ 337.010, *et seq.*; the Louisiana Revised Statutes ("LWPA" or "Louisiana Wage Payment Act"), La. Rev. Stat. § 23:631, *et seq.*, Louisiana Civil Code, La. Civ. Code Arts. 2315, 2298 (collectively, "Louisiana Law"); Mississippi common law; Missouri common law, Mo. Rev. Stat. §§ 290.500, *et seq.*; Texas common law; and Virginia common law. Plaintiffs assert their FLSA claims as a collective action under § 16(b) of the FLSA, 29 U.S.C. § 216(b), and assert their state law claims as class actions under Federal Rule of Civil Procedure 23.

This matter now comes before the Court on the following motions by both parties:

1. Defendant's Opposed Motion to Amend Order to Provide for Certification of an Interlocutory Appeal (Mot. for Interlocutory Appeal (ECF No. 67));

2. Defendant's Opposed Motion for Partial Reconsideration (Mot. for Partial Reconsideration (ECF No. 65)); and,

3. Plaintiff's Motion to Strike Supplemental Evidence (Mot. to Strike (ECF No. 73)).

For the reasons set forth in the accompanying Memorandum Opinion, the Court hereby:

1. GRANTS Defendant's Motion to Certify an Interlocutory Appeal (ECF No. 67) and CERTIFIES FOR INTERLOCUTORY APPEAL the following question:

> What legal standard should courts apply when deciding whether to certify a collective action under the Fair Labor Standards Act, 29 U.S.C. § 216(b)?

2. AMENDS its February 28, 2022 Order to certify an appeal on this question to the Fourth Circuit;

3. DENIES Defendant's Motion for Partial Reconsideration (ECF No. 65); and,

4. GRANTS Plaintiff's Motion to Strike (ECF No. 73).

Let the Clerk file a copy of this Order electronically and notify all counsel of record.

It is so ORDERED.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Date: May 10, 2022

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SHAREY THOMAS *et al.*,
individually and on behalf
of all others similarly situated,
Plaintiffs,

v. Civil No. 3:21cv498 (DJN)

MAXIMUS, INC.,
Defendant.

MEMORANDUM OPINION
(Certifying Appeal, Denying Motion for Partial Reconsideration and Granting Motion to Strike)

Plaintiffs Sharey Thomas, Jennifer Gilvin, Laura Vick, Shannon Garner, Nyeshia Young and Olga Ramirez ("Plaintiffs") bring this action individually and on behalf of all other similarly situated individuals against Defendant Maximus, Inc. ("Defendant"), alleging violations of Sections 206, 207 and 216(b) of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. § 216(b) ("the FLSA"); the Kansas Wage Payment Act ("KWPA"), Kan. Stat. Ann. § 44-313, *et seq.*; the Kentucky Wage and Hour Act ("KWHA" or "Kentucky Act"), Ky. Rev. Stat. Ann. §§ 337.010, *et seq.*; the Louisiana Revised Statutes ("LWPA" or "Louisiana Wage Payment Act"), La. Rev. Stat. § 23:631, *et seq.*, Louisiana Civil Code, La. Civ. Code Arts. 2315, 2298 (collectively, "Louisiana Law"); Mississippi common law; Missouri common law, Mo. Rev. Stat. §§ 290.500, *et seq.*; Texas common law; and Virginia common law. Plaintiffs assert their FLSA claims as a collective action under § 16(b) of the FLSA, 29 U.S.C. § 216(b), and assert their state law claims as class actions under Federal Rule of Civil Procedure 23.

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2. Defendant's Opposed Motion for Partial Reconsideration (Mot. for Partial Reconsideration (ECF No. 65)); and,

3. Plaintiff's Motion to Strike Supplemental Evidence (Mot. to Strike (ECF No. 73)).

For the reasons set forth below, the Court hereby GRANTS Defendant's Motion to Certify an Interlocutory Appeal (ECF No. 67), DENIES Defendant's Motion for Partial Reconsideration (ECF No. 65), and GRANTS Plaintiff's Motion to Strike (ECF No. 73).

I. BACKGROUND

The Court recites the allegations in Plaintiffs' Amended Complaint for the purposes of background only. Defendant, a Virginia multinational corporation, operates call centers throughout the United States and primarily serves federal, state and local governments as a "Citizen Engagement Center." (1st Am. Collective/Class Action Compl. ¶¶ 35-36 ("Am. Compl.") (ECF No. 26).) Plaintiffs and the Putative Collective Members[1] work as hourly call-center employees who assist the customers of Defendant's clients. (Am. Compl. ¶ 37.) Plaintiffs bring both this collective action to recover overtime wages, liquidated damages and other penalties pursuant to the FLSA and class actions pursuant to various state laws to recover unpaid straight time, overtime wages and other penalties. (Am. Compl. ¶ 1.)

[1] The Court refers to the individuals who may be eligible to join this suit but have not yet done so as "putative collective members," "potential plaintiffs" or "potential opt-in plaintiffs."

Specifically, Plaintiffs assert that Defendant maintains and enforces a company-wide policy that requires all hourly call-center employees to get "call-ready"[2] before the start of their first shift, thereby requiring them to engage in unpaid, off-the-clock work every day. (Am. Compl. ¶¶ 54-63.) This process can take thirty minutes or longer. (Am. Compl. ¶ 56.) Likewise, Plaintiffs assert that Defendant required them to log out of their computer programs and shut down their computer after the end of their shifts, a three- to five-minute process, when they had already clocked out. (Am. Compl. ¶¶ 83-84.)

Further, Plaintiffs allege that Defendant allows them one unpaid thirty-minute meal break per day. (Am. Compl. ¶ 64.) However, per Defendant's policy, they may not log out of their computer and phone system until their meal break begins, a process that can take one to three minutes. (Am. Compl. ¶¶ 66, 68.) Similarly, they must return to their computer before the end of their meal break to log back into their computer and phone, a process that also takes one to three minutes. (Am. Compl. ¶¶ 67, 69.) Defendant automatically deducts the thirty-minute meal break period from Plaintiffs' pay, meaning that they are never paid for this shut-down and restart time during their breaks. (Am. Compl. ¶¶ 72-73.) Finally, Plaintiffs claim that Defendant required them to finish every call that they take, including those calls that run past the end of the start of their meal break and the end of their shift. (Am. Compl. ¶ 78-79.) Defendant did not compensate them for these activities, either. (Am. Compl. ¶ 80.)

In total, Plaintiffs claim that they regularly complete one to two hours of unpaid, off-the-clock work beyond their normal forty-hour workweek. (Pls.' Mem. of Law in Supp. of Pls.'

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[2] "Call-ready" means that an employee has logged into their computer and ensured that the necessary computer programs are running correctly so that the employee can take calls, answer emails and handle support tickets. (Am. Compl. ¶ 55; Pls.' Mem. of Law in Supp. of Pls.' Opposed Mot. for Conditional Certification and Notice to Putative Class Members at 4 n.8 (ECF No. 29).)

Opposed Mot. for Conditional Certification and Notice to Putative Class Members ("Pls.' Mem. in Supp. of Mot. for Conditional Certification") at 10 (ECF No. 29).) Employers subject to the FLSA must compensate employees at rates at least one-and-one-half times their regular rates of compensation for all hours worked in excess of forty hours per week. 29 U.S.C. §§ 206-07, 215(a)(2).

B. Procedural History

On July 30, 2021, Plaintiffs filed their original Complaint. (ECF No. 1.) They filed their Amended Complaint on November 2, 2021. (ECF No. 26.) In Count One, Plaintiffs bring a collective action against Defendant under the FLSA. (Am. Compl. ¶¶ 90-120.) In Counts Two through Nine, Plaintiffs bring class actions under the laws of Florida, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Texas and Virginia. (Am. Compl. ¶¶ 121-295.) Based on these claims, Plaintiffs, on their own behalf and on behalf of the Putative Collective Members, seek class certification under the FLSA and pursuant to the relevant state laws, unpaid wages, costs and expenses, attorneys' fees, pre- and post-judgment interest, a service award for Plaintiffs and accounting of Defendant's books and records. (Am. Compl. ¶ 296.)

On November 3, 2021, Plaintiffs moved for conditional certification and notice to putative collective members pursuant to the FLSA, 29 U.S.C. § 216(b). (Mot. for Conditional Certification (ECF No. 28).) Defendant opposed this Motion, arguing that the Court should not utilize the two-stage certification process that most federal courts apply in FLSA collective actions, pursuant to *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). (Opp'n to Mot. for Conditional Certification at 10-11 (ECF No. 38).) According to Defendant, the Court should apply the one-step process that the Fifth Circuit recently outlined in *Swales v. KLLM Transport Services*, 985 F.3d 430 (5th Cir. 2021). Under that standard, district courts must more strictly

scrutinize whether putative collective members are truly similarly situated at the outset of the case and authorize preliminary discovery, if needed. *Swales*, 985 F.3d at 441. Defendant also made a brief request to certify the question of what legal standard to apply to FLSA collective certification for an interlocutory appeal to the Fourth Circuit. (Opp'n at 11.)

On February 25, 2022, the Court conducted a conference call with the parties. (Tr. of Conference Call ("Tr.") (ECF No. 62).) During the conference call, the Court informed the parties that it planned to conditionally certify the collective using the two-step process, but it was "highly inclined" to certify an interlocutory appeal on the question of what legal standard to apply to FLSA collective certification. (Tr. at 4:17-6:5.) Additionally, during the call, counsel for Defendant informed the Court that it intended to seek leave to supplement the record with evidence obtained during discovery. (Tr. at 4:8-13.) The Court denied counsel's request for leave. (Tr. at 4:14-15.)

A few days after the conference call, the Court granted Plaintiffs' Motion for Conditional Certification and permitted Defendant to move for certification of an interlocutory appeal within fourteen days. (Order, Feb. 28, 2022 ("Feb. 28 Order") at 2 (ECF No. 64).) The Court also stayed all aspects of the February 28 Order and accompanying Memorandum Opinion pending resolution of the certification issue, except the production of the personal contact information of the putative collective members.

Since then, the parties have filed four motions. This Memorandum Opinion addresses three of them, and a separate Memorandum Opinion addresses the fourth, which concerns tolling the FLSA statute of limitations (ECF No. 69)). On March 14, 2022, Defendant moved to amend the Court's February 28 Order to provide for certification of an interlocutory appeal on the following question:

> What legal standard should courts apply when deciding whether to certify a collective action under the Fair Labor Standards Act?

On March 28, 2022, Plaintiffs responded to this Motion (Pl.'s Mem. in Opp'n to Def.'s Mot. for Interlocutory Appeal ("Opp'n to Mot. for Interlocutory Appeal") (ECF No. 75)), and on April 4, 2022, Defendant replied (Def.'s Reply Mem. in Supp of Mot. for Interlocutory Appeal ("Reply in Supp. of Mot. for Interlocutory Appeal") (ECF No. 77)).

Additionally, on March 14, 2022, Defendant moved for partial reconsideration of the Court's oral order denying it leave to supplement the record for the interlocutory appeal. (Mot. for Partial Reconsideration (ECF No. 65).) Plaintiffs responded on March 28, 2022 (Pl.'s Mem. in Opp'n to Mot. for Partial Reconsideration ("Opp'n to Mot. for Partial Reconsideration") (ECF No. 72)), and Defendant replied on April 4, 2022 (Def.'s Reply Mem. in Supp. of Mot. for Partial Reconsideration ("Reply in Supp. of Mot. for Partial Reconsideration") (ECF No. 76)).

Finally, on March 28, 2022, Plaintiff moved to strike the evidence that Defendant sought to add to the record for the interlocutory appeal. (Mot. to Strike (ECF No. 73)). Defendant responded on April 8, 2022 (Def.'s Mem. in Opp'n to Mot. to Strike (ECF No. 79)), and Plaintiffs replied on April 14, 2022 (Pl.'s Reply in Supp. of Mot. to Strike ("Reply in Supp. of Mot. to Strike) (ECF No. 82)).

On April 13, 2022, the parties jointly requested a hearing on the Motion for Partial Reconsideration and the Motion to Strike. (ECF No. 81.)[3] On May 9, 2022, the Court heard argument on these two Motions. All three Motions addressed above are now ripe for review. With this background in mind, the Court will consider each of these three motions in turn.

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[3] The parties also requested a hearing on Plaintiffs' Motion for Equitable Tolling (ECF No. 69), which the Court also addressed during the May 9, 2022 hearing.

II. THE MOTION TO CERTIFY AN INTERLOCUTORY APPEAL

A. Standard of Review

28 U.S.C. § 1292(b) provides that a district judge may certify for interlocutory appeal any "order not otherwise appealable under this section" when the judge is "of the opinion that such order [1] involves a controlling question of law [2] as to which there is a substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The relevant court of appeals may then, "in its discretion, permit an appeal to be taken from such order." § 1292(b). Section 1292(b) "has been construed as granting district courts 'circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable.'" *Difelice v. U.S. Airways, Inc.*, 404 F. Supp. 2d 907, 908 (E.D. Va. 2005) (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 46 (1995)). "[B]ecause § 1292(b) is contrary to the general rule that appeals may be had only after a final judgment, it should be used sparingly and its requirements must be strictly construed." *Id.* (citing *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989)); *see Commonwealth ex rel. Integra Rec LLC v. Countrywide Sec. Corp.*, 2015 WL 3540473, at *3 (E.D. Va. June 3, 2015) (noting the "gravity of the relief sought" in a request for interlocutory certification (internal quotations and citations omitted)).

Ultimately, district courts should adhere to the general principle that § 1292(b) constitutes "a rare exception to the final judgment rule that generally prohibits piecemeal appeals." *Koehler v. Bank of Bermuda, Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996). Indeed, "[e]ven if the requirements of [S]ection 1292(b) are satisfied, the district court has 'unfettered discretion' to decline to certify an interlocutory appeal if exceptional circumstances are absent." *Manion v. Spectrum Healthcare Res.*, 966 F. Supp. 2d 561, 567 (E.D.N.C. 2013) (citations omitted).

B. Analysis

Because § 1292(b) requires Defendant to satisfy all three elements under the Section, the Court will analyze each element in turn.

1. Controlling Question of Law

First, Defendant argues that this case involves a controlling question of law, because it requires only a determination of the proper legal standard to apply, which would materially impact the case. (Def.'s Mem. in Supp. of Interlocutory Appeal at 5-6.) Plaintiffs respond that this case involves a question of fact, and that conditional certification merely allows the Court to exercise its notice-giving function and does not completely dispose of the litigation. (Opp'n to Mot. for Interlocutory Appeal at 5-6.)

The party seeking an interlocutory appeal must first demonstrate that the issue for which the party seeks certification constitutes a "controlling question of law." § 1292(b). "This element may be divided into two requirements: the question must be 'controlling' and must be one 'of law.'" *Integra*, 2015 WL 3540473, at *4. To be "controlling," the Court "must actually have decided [the] question" and resolution of the question must "be completely dispositive of the litigation, either as a legal or practical matter, whichever way it goes." *Id.* (internal quotations and citations omitted). Even if a question proves practically or legally controlling, the Court should certify the question for immediate appeal only if the question presents "an abstract legal issue that the court of appeals can decide quickly and cleanly." *United States ex rel. Michaels v. Agape Senior Cmty.*, 848 F.3d 330, 340 (4th Cir. 2017) (quoting *Mamani v. Berzain*, 825 F.3d 1304, 1312 (11th Cir. 2016) (internal quotations omitted)). Courts should not certify interlocutory appeals when "the question presented turns on whether there is a genuine issue of

fact or whether the district court properly applied settled law to the facts or evidence of a particular case." *Id.* at 341 (internal quotations and citations omitted).

The conditional certification issue involves a controlling question of law. First, the determination of whether *Lusardi* or *Swales* should control whether a court certifies a collective presents a purely legal question. Defendant simply seeks clarity on the proper legal standard for collective certification, not whether the Court appropriately applied the facts to a particular standard.

Second, conditional certification constitutes a controlling issue. A question of law "may be dispositive 'either as a legal *or practical* matter," in the sense that it would "materially affect the outcome" of the litigation. *Hengle v. Asner*, 2020 WL 855970, at *8 (E.D. Va. Feb. 20, 2020) (citations omitted). The conditional certification question may not terminate the litigation as a legal matter. However, as a practical matter, the more "lenient evidentiary standard" for conditional certification may result in individuals who are not similarly situated receiving notice, thereby increasing the size of the collective. *Holder v. A&L Home Care and Training Ctr., LLC*, 552 F. Supp. 3d 731, 747 (S.D. Ohio 2021). A large conditionally certified collective "can exert 'formidable settlement pressure' on a defendant. This pressure, in turn, may materially affect the case's outcome." *Id.* (first citing *Swales*, 985 F.3d at 436; and then citing *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 (2010) (Ginsburg, J., dissenting)).[4] Thus, because this case presents a controlling question of law, it satisfies § 1292(b)'s first requirement for certifying an interlocutory appeal.

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[4] Plaintiffs cite only one case from the Eastern District of Virginia related to a motion to certify an appeal on the proper certification standard under the FLSA. (Opp'n to Mot. for Interlocutory Appeal at 5 (citing *LaFleur v. Dollar Tree Stores, Inc.*, 2014 WL 2121721, at *3 (E.D. Va. May 20, 2014) (declining to grant interlocutory appeal of order denying motion to decertify FLSA collective.) In *LaFleur*, the court declined to grant leave for an interlocutory

B. Substantial Ground for Difference of Opinion

Second, Defendant contends that substantial grounds for difference of opinion exist to merit the certification of an interlocutory appeal. (Def.'s Mem. at 6.) Defendant highlights the lack of guiding precedent on the correct standard to apply for FLSA certification in the Fourth Circuit and nationally, as well as the interlocutory appeals that the Fifth and Sixth Circuits have granted on the issue. (Def.'s Mem. at 7-8.) Plaintiffs disagree and characterize the debate surrounding this issue as "a dialogue among courts about how to best exercise their discretion regarding the manner, timing, and scope of notice." (Opp'n to Mot. for Interlocutory Appeal at 6.)

The party moving for interlocutory certification must demonstrate that a "substantial ground for difference of opinion" exists as to the controlling question of law. § 1292(b). This "'substantial ground' . . . must arise 'out of a genuine doubt as to whether the district court applied the correct legal standard.'" *Wyeth v. Sandoz, Inc.*, 703 F. Supp. 2d 508, 527 (E.D.N.C. 2010) (quoting *Consub Del. LLC v. Schahin Engenharia Limitada*, 476 F. Supp. 2d 305, 309 (S.D.N.Y. 2007)). "[T]he mere presence of a disputed issue that is a question of first impression [in the Fourth Circuit], standing alone, is insufficient to demonstrate a substantial ground for difference of opinion." *Flor v. BOT Fin. Corp* (*In re Flor*), 79 F.3d 281, 284 (2d Cir. 1996) (per

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appeal of an order conditionally certifying a collective action. *LaFleur v. Dollar Tree Stores, Inc.*, 2013 WL 150722, at *2 (E.D. Va. Jan. 11, 2013). The court denied this motion due to the "temporary nature of its conditional order to certify a collective," and the fact that the defendant could seek decertification after discovery closed. *Id.* at *4. This ruling came several years before *Swales*, which recognized the "formidable settlement pressure" that conditional certification places on defendant employers sued under the FLSA. *Swales*, 985 F.3d at 436. Given conditional certification's practical effects on the advancement of litigation, the Court will diverge from *LaFleur* and grant the motion for an interlocutory appeal of the conditional certification order. *Cf. Hengle*, 2020 WL 855970 at *8 (certifying interlocutory appeal even though the questions subject to certification would not completely dispose of the case).

curiam). "Rather, it is the duty of the district judge to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a *substantial* ground for dispute." *Id.* (emphasis supplied) (quotations and alterations omitted).

An absence of unanimity on the question presented alone does not provide a substantial ground for difference of opinion. *Wyeth*, 703 F. Supp. 2d at 527. However, courts have recognized that a substantial ground for difference of opinion exists when resolution of the question presented "is not substantially guided by previous decisions" and the question "is difficult." *DRFP, LLC v. Republica Bolivarina de Venezuela*, 945 F. Supp. 2d 890, 918 (S.D. Ohio 2013) (internal quotations and citations omitted); *see also, e.g.*, *Nat'l Veterans Legal Servs. Program v. United States*, 321 F. Supp. 3d 150, 155 (D.D.C. 2018) (finding substantial ground for difference of opinion, because "there [was] a complete absence of any precedent from any jurisdiction" on the question subject to interlocutory appeal); *Consub Del. LLC*, 476 F. Supp. 2d at 309 ("The requirement that such a substantial ground exist may be met when . . . the issue is particularly difficult and of first impression for the Second Circuit." (internal quotations omitted)); 16 Fed. Prac. & P. Juris. § 3930 (3d ed. 2019) ("The level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case.").

Again, the Court agrees with Defendant and finds that this case also meets the second requirement for certifying an interlocutory appeal. As the Court noted in its Memorandum Opinion conditionally certifying the collective, "neither the Fourth Circuit nor the Supreme Court has prescribed a process for certification of FLSA collectives." (Mem. Op. at 5 (citing *Ison v. MarkWest Energy Partners, LP*, 2021 WL 5989084, at *2 (S.D. W. Va. Dec. 17, 2021)).)

Of course, the fact that a case presents an issue of first impression alone does not merit certification; the question needs to have generated a marked "level of controversy" for a court to grant certification. *Cooke-Bates v. Bayer Corp.*, 2010 WL 4789838, at *4 (E.D. Va. Nov. 16, 2010) (citing *Wyeth*, 703 F. Supp. at 527). The Court finds that the question of the correct standard to apply when certifying a FLSA collective has generated sufficient controversy to justify certification. Indeed, the Fifth Circuit took up the issue on an interlocutory appeal just last year, and the Sixth Circuit accepted an interlocutory appeal from the South District of Ohio on the issue only a few months ago. *Swales*, 985 F.3d at 439; *In re A&L Home Care and Training Ctr. et al.*, No. 21-305 (6th Cir. Feb. 4, 2022), ECF No. 12.

Further, as Defendant points out, several other circuit courts have applied the two-step certification process but also recognize that the FLSA's text does not require it, underscoring the lack of clear guidance on the issue. (Def.'s Mem. in Supp. of Interlocutory Appeal at 7 (first citing *Myers v. Hertz Corp.*, 624 F. 3d 537, 555 (2d Cir. 2010) ("[T]he district courts of this Circuit appear to have coalesced around a two-step method, a method which, while again not required by the terms of FLSA or the Supreme Court's cases, we think is sensible."); and then citing *Zavala v. Wal-Mart Stores, Inc.*, 691 F.3d 527, 536 (3d Cir. 2012) (noting "conditional certification . . . is neither necessary nor sufficient for the existence of a representative action under the FLSA") (internal quotations omitted); and then citing *Camesi v. Univ. of Pittsburgh Med. Ctr.*, 729 F. 3d 239, 243 (3d Cir. 2013) ("Courts in our Circuit follow a two-step process[.]"); and then citing *White v. Baptist Mem. Health Care Corp.*, 699 F.3d 869, 882 (6th Cir. 2012) (recognizing, but not "adopting," the standard used by district courts); and then citing *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1110 (9th Cir. 2018) (referring to the two-step process as "a balancing test with no fulcrum" that offers district courts "no clue as to what kinds

of 'similarity' matter under the FLSA")).) In light of the lack of controlling case law on this issue, in addition to the impact that resolution of this issue could have on the likelihood of settlement and length of litigation, the Court finds that a substantial ground for difference of opinion exists that warrants interlocutory certification.

C. Materially Advance the Termination of the Instant Litigation

Third, Defendant posits that certification of an interlocutory appeal would materially advance the ultimate outcome of the litigation, because resolution of this issue would significantly impact the scope of notice and the size of the collective, which would directly affect the likelihood of settlement. (Def.'s Mem. in Supp. of Interlocutory Appeal at 8-9.) Plaintiffs respond that an interlocutory appeal would not materially advance the litigation, because Plaintiffs would still be entitled to conditional certification, the course and scope of discovery would remain the same, and an interlocutory appeal would unduly delay a trial in this matter. (Opp'n to Mot. for Interlocutory Appeal at 7-8.)

As to § 1292(b)'s third factor, the moving party must establish that certification "may materially advance the ultimate termination of the litigation." § 1292(b). Mere speculation regarding the potential pre-trial and trial expenses and effort to be saved by an interlocutory appeal does not satisfy this requirement. *Integra*, 2015 WL 3540473, at *5. Instead, the Court must examine whether "appellate review might avoid protracted and expensive litigation." *State ex rel. Howes v. Peele*, 889 F. Supp. 849, 852 (E.D.N.C. 1995). The Court should not permit "piecemeal review of decisions that are but steps toward final judgments of the merits . . ., because they can be effectively and more efficiently reviewed together in one appeal from the final judgments." *James v. Jacobson*, 6 F.3d 233, 237 (4th Cir. 1993).

As the Southern District of Ohio found in its opinion certifying an interlocutory appeal on the issue at hand:

> If the [circuit court] defines with any particularity what the similarity standard requires, this would impact the size of the collective and the time it takes to litigate the case. The size of the class and the investments of time and money have a direct bearing on settlement pressure, damages, and how the parties and the Court manage the litigation. So an immediate appeal may move this litigation along.

Holder, 552 F. Supp. 3d at 747.

The Court agrees with this analysis. Reversal of the Court's decision conditionally certifying the class and abrogation of the two-step certification process outcome would require the Court to more closely scrutinize the similarities between the putative collective members — or lack thereof — much earlier in the case, thereby increasing the likelihood that it would decline to issue notice. *See Swales*, 985 F.3d at 434 ("[A] district court must rigorously scrutinize the realm of "similarly situated" workers, and must do so from the outset of the case, not after a lenient, step-one "conditional certification."). On the flipside, if the Fourth Circuit affirms the Court's conditional certification decision and retains the two-step process, notice would issue to a larger group of putative collective members. In either case, the size of the collective depends on the Fourth Circuit's decision and directly bears on the potential outcome of settlement proceedings and the scope of damages. Indeed, that is the very reason that the Court stayed the notice process pending resolution of this issue. (Feb. 28 Order at 2.) For these reasons, the third § 1292(b) factor also weighs in favor of certification.

Because this case satisfies all three statutory factors, the Court will certify its February 28 Order for interlocutory appeal on the question of the proper standard to apply for collective certification under the FLSA.

III. DEFENDANT'S MOTION FOR PARTIAL RECONSIDERATION

Next, Defendant asks the Court to reconsider its oral order denying Defendant leave to supplement the record with evidence obtained during discovery under Rule 54(b), with an eye to allowing the Fourth Circuit to see its evidence of the "potentially dispositive dissimilarities among the Plaintiffs." (Def.'s Mem. in Supp. of Mot. to Reconsider at 5.) Defendant argues that, in *Swales*, the Fifth Circuit relied on a factual record developed with "eleven depositions, over 19,000 documents produced, and even expert evidence." (Def.'s Mem. in Supp. of Mot. to Reconsider at 6 (quoting *Swales*, 985 F.3d at 434, 441).) According to Defendant, supplementation would provide the Fourth Circuit with a similarly developed record so that it can determine the proper legal standard for FLSA certification and ensure that the Court has an adequate record on remand. (Def.'s Mem. in Supp. of Mot. to Reconsider at 7, 7 n.7.)

Plaintiffs respond that no judgment exists for the Court to reconsider, because Defendant did not properly move to supplement the record under the Local Rules. (Opp'n to Mot. for Reconsideration at 2-3.) They urge the Court to treat Defendant's Motion as an attempted end-run around the supplementation requirements of Federal Rule of Appellate Procedure 10 and the Court's previous instruction not to supplement. (Opp'n to Mot. for Partial Reconsideration at 1.) They also argue that even if the Court had issued a judgment that it could reconsider, Defendant has not satisfied Rule 54(b), and that supplementing the record on appeal would be procedurally improper and substantively unfair. (Opp'n to Mot. for Reconsideration at 3-9.)

As discussed above, during the conference call between the parties, the Court orally denied Defendant's request for leave to supplement the record with an evidentiary

appendix. (Tr. at 4:8-16.) The following portion of the conference call transcript reflects this exchange:

> [COUNSEL FOR DEFENDANT]: Our plan was to submit a motion for leave to file an evidentiary appendix, additional information obtained during discovery and the like, as well as a summary of that evidence to kind of just alert for the Court, as well as a short memorandum of law addressing the effect of that discovery on the case at this stage.
>
> THE COURT: All right. I'm not allowing that. You can forget that. That's not going to happen.
>
> [COUNSEL FOR DEFENDANT]: Okay.

(Tr. at 4:8-16.)

The Court will deny Defendant's Motion for Partial Reconsideration of this oral order prohibiting supplementation. To be sure, the Court disagrees with Plaintiffs and finds that its oral order constitutes a "judgment" pursuant to Rule 54(b). Nevertheless, it also finds that Defendant does not satisfy Rule 54(b)'s requirements for reconsideration.

Rule 54(b) gives courts the power to "revise[ ] at any time before the entry of a judgment" any order or decision "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties." Fed. R. Civ. P. 54(b). "Said power is committed to the discretion of the district court." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003). Courts exercise this discretion to fulfill "[t]he ultimate responsibility of the federal courts . . . [which] is to reach the correct judgment under law." *Id.* Rule 54(b) applies to "any [interlocutory] order or decision, however designated," including those not included in a formal written order.

Courts in this district grant motions to reconsider only when:

> the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension . . . [or] a controlling or significant change in the law or facts since the submission of the issue to the Court [has occurred]. Such problems rarely arise and . . . motion[s] to reconsider should be equally rare.

Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983). Courts will not grant motions to reconsider that simply ask it to "rethink what the Court had already thought through — rightly or wrongly." *Shanklin v. Seals*, 2010 WL 1781016, at *3 (E.D. Va. May 3, 2010) (quoting *Above the Belt, Inc.*, 99 F.R.D. at 101)).

Here, Defendant requested leave to supplement the record — albeit without a written brief as required by Local Civil Rule 7(F)(1) — and the Court denied its request, thereby making an interlocutory "judgment" under Rule 54(b). However, the Court will not reconsider its oral order on this request. Defendant does not suggest that the Court materially misunderstood the request during the telephonic conference, or that the Court made a decision outside the adversarial issues. Nor has Defendant alerted the Court of a significant change in the law or facts since it requested leave to supplement the record during the conference call. Thus, the Court will deny the Motion for Partial Reconsideration.

Even if the Court characterized Defendant's Motion to Reconsider purely as a request to supplement the record (rather than as a motion to reconsider the Court's denial of Defendant's first supplementation request), the Court would still deny the Motion. Rule 10(a) of the Federal Rules of Appellate Procedure provides that:

> The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

Further, under Rule 10(e) of the Federal Rules of Appellate Procedure, a district court may supplement or modify on appeal if (1) "any difference arises as to what occurred in the district court;" or (2) "if anything material to either party is omitted from or misstated in the record by error or accident." Fed. R. App. Proc. 10(e)(1)-(2).

"[T]he purpose of Rule 10(e) is not to allow a district court to add to the record on appeal matters that did not occur there in the course of the proceedings leading to the judgment under review." *Rutecki v. CSX Hotels, Inc.*, 2007 WL 1795624, at *4 (S.D. W. Va. June 20, 2007) (citations omitted); *see also Rohrbough v. Wyeth Labs., Inc.*, 916 F.2d 970, 973 n.8 (4th Cir. 1990) (holding that the district court correctly declined to supplement the record on appeal with discovery documents that the plaintiffs had "not filed . . . or brought to the attention of the district court, as it considered the various papers in evaluating the motion for summary judgment" on appeal before the Fourth Circuit). Here, the 5,656 pages of discovery materials that Defendant seeks to add to the record were not before the Court when it reviewed Plaintiffs' Motion for Conditional Certification and issued the February 28 Order conditionally certifying the collective. Thus, the Court declines to reconsider its oral order barring Defendant from supplementing the record.

IV. PLAINTIFF'S MOTION TO STRIKE

Finally, and relatedly, Plaintiffs move to strike Defendant's supplemental discovery material attached to its Memorandum in Support of its Motion for Partial Reconsideration. (Mot. to Strike at 1.) They argue that, even if the Court denies Defendant's Motion for Partial Reconsideration, the materials would still comprise part of the record should the Fourth Circuit grant an interlocutory appeal. (Pl.'s Mem. in

Supp. of Mot. to Strike at 1-2 (ECF No. 74).) Plaintiffs fear that these materials may unfairly skew the Fourth Circuit's review of this case, should the court grant an interlocutory appeal. (Mem. in Supp. of Mot. to Strike at 1.)

Defendant responds that striking the material would be judicially inefficient, because Defendant concedes that, if the Court denies its Motion for Partial Reconsideration, the evidence would not become part of the record on an interlocutory appeal of the conditional certification issue. (Opp'n to Mot. to Strike at 3.) Moreover, Defendant adds, striking the materials would prove inefficient. (Opp'n to Mot. to Strike at 3-4.) If the Fourth Circuit adopts the certification standard set forth in *Swales* on appeal and remands the case to this Court, the new standard would require the Court to "rigorously scrutinize the real of 'similarly situated' workers . . . from the outset of the case, not after a lenient, step-one 'conditional certification." (Opp'n to Mot. to Strike at 3 (quoting *Swales*, 985 F.3d at 434).) Thus, on remand, Defendant would refile the evidence in question. (Opp'n to Mot. to Strike at 3.) Further, Defendant explains, if the Fourth Circuit does not adopt the *Swales* standard, then Defendant would move for decertification and attach the evidence submitted with its Motion for Partial Reconsideration. (Opp'n to Mot. to Strike at 3.) In other words, Defendant contends, the evidence will inevitably become part of the record. (Opp'n to Mot. to Strike at 4.)

The Court agrees with Plaintiffs and will grant the Motion to Strike to preserve the integrity of the record. As discussed above, Rule 10(a) of the Federal Rules of Appellate Procedure provides that "[t]he original papers and exhibits filed in the district court . . . shall constitute the record on appeal in all cases." The Court will deny the Motion for Partial Reconsideration, as discussed above. But, if it does not also strike the

proposed additional evidence, then that evidence would become part of the appellate record, pursuant to Rule 10(a). *See Remgrit Corp v. Remington Arms Co., Inc.*, 7.3d 225 (Table), 1993 WL 362038, at *2 (4th Cir. 1993) (recognizing that an exhibit attached to a motion that the district court denied had become part of the record). The Court never had the opportunity to review the discovery materials that Defendant submitted when addressing the conditional certification motion. As such, they should not become part of the record on appeal. Should Defendant seek to rely on these materials in a motion for decertification or on remand, it may refile them then. For these reasons, the Court will grant the Motion to Strike.

IV. CONCLUSION

For the reasons set forth above, the Court hereby:

1. GRANTS Defendant's Motion to Certify an Interlocutory Appeal (ECF No. 67) and CERTIFIES FOR INTERLOCUTORY APPEAL the following question:

   > What legal standard should courts apply when deciding whether to certify a collective action under the Fair Labor Standards Act, 29 U.S.C. § 216(b)?

2. AMENDS its February 28 Order (ECF No. 64) to certify an appeal on this question to the Fourth Circuit;

3. DENIES Defendant's Motion for Partial Reconsideration (ECF No. 65); and,

4. GRANTS Plaintiff's Motion to Strike (ECF No. 73).

An appropriate Order shall issue.

Let the Clerk file a copy of this Memorandum Opinion electronically and notify all counsel of record.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Date: May 10, 2022

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SHAREY THOMAS *et al.*,
individually and on behalf
of all others similarly situated,
Plaintiffs,

v. Civil No. 3:21cv498 (DJN)

MAXIMUS, INC,
Defendant.

AMENDED ORDER
(Granting in Part and Denying in Part Motion for Conditional Certification and Notice, Staying Case and Certifying Interlocutory Appeal)

Plaintiffs Sharey Thomas, Jennifer Gilvin, Laura Vick, Shannon Garner, Nyeshia Young and Olga Ramirez ("Plaintiffs") bring this action individually and on behalf of all other similarly situated individuals against Defendant Maximus, Inc. ("Defendant"), alleging violations of Sections 206, 207 and 216(b) of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. § 216(b) ("the FLSA"); the Kansas Wage Payment Act ("KWPA"), Kan. Stat. Ann. § 44-313, *et seq.*; the Kentucky Wage and Hour Act ("KWHA" or "Kentucky Act"), Ky. Rev. Stat. Ann. §§ 337.010, *et seq.*; the Louisiana Revised Statutes ("LWPA" or "Louisiana Wage Payment Act"), La. Rev. Stat. § 23:631, *et seq.*, Louisiana Civil Code, La. Civ. Code Arts. 2315, 2298 (collectively, "Louisiana Law"); Mississippi common law; Missouri common law, Mo. Rev. Stat. §§ 290.500, *et seq.*; Texas common law; and Virginia common law. Plaintiffs assert their FLSA claims as a collective action under § 16(b) of the FLSA, 29 U.S.C. § 216(b), and assert the state law claims as class actions under Federal Rule of Civil Procedure 23. This matter now comes before the Court on Plaintiffs' Opposed Motion for Conditional Certification and Notice

to Putative Class Members ("Pl.'s Mot." (ECF No. 28)). For the reasons set forth in the accompanying Memorandum Opinion, the Court hereby GRANTS IN PART AND DENIES IN PART the Motion.

Further, pursuant to the Court's May 10, 2022 Order amending its February 28, 2022 Order ("the February 28 Order") (ECF No. 64)), the Court hereby AMENDS the February 28 Order (ECF No. 64) to CERTIFY AN INTERLOCUTORY APPEAL of the same on the following question:

> What legal standard should courts apply when deciding whether to certify a collective action under the Fair Labor Standards Act, 29 U.S.C. § 216(b)?

Finally, the Court hereby STAYS all aspects of this case pending resolution of the interlocutory appeal, except the production of the personal contact information of the potential plaintiffs.

Let the Clerk file a copy of this Order electronically and notify all counsel of record.

It is so ORDERED.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Dated: May 10, 2022

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

SHAREY THOMAS *et al.*,
individually and on behalf
of all others similarly situated,
Plaintiffs,

v. Civil No. 3:21cv498 (DJN)

MAXIMUS, INC,
Defendant.

AMENDED MEMORANDUM OPINION
(Granting in Part and Denying in Part Motion for Conditional Certification and Notice, Staying Case and Certifying Interlocutory Appeal)

Plaintiffs Sharey Thomas, Jennifer Gilvin, Laura Vick, Shannon Garner, Nyeshia Young and Olga Ramirez ("Plaintiffs") bring this action individually and on behalf of all other similarly situated individuals against Defendant Maximus, Inc. ("Defendant"), alleging violations of Sections 206, 207 and 216(b) of the Fair Labor Standards Act of 1938, as amended 29 U.S.C. § 216(b) ("the FLSA"); the Kansas Wage Payment Act ("KWPA"), Kan. Stat. Ann. § 44-313, *et seq.*; the Kentucky Wage and Hour Act ("KWHA" or "Kentucky Act"), Ky. Rev. Stat. Ann. §§ 337.010, *et seq.*; the Louisiana Revised Statutes ("LWPA" or "Louisiana Wage Payment Act"), La. Rev. Stat. § 23:631, *et seq.*, Louisiana Civil Code, La. Civ. Code Arts. 2315, 2298 (collectively, "Louisiana Law"); Mississippi common law; Missouri common law, Mo. Rev. Stat. §§ 290.500, *et seq.*; Texas common law; and Virginia common law. Plaintiffs assert their FLSA claims as a collective action under § 16(b) of the FLSA, 29 U.S.C. § 216(b), and assert their state law claims as class actions under Federal Rule of Civil Procedure 23. This matter now comes before the Court on Plaintiffs' Opposed Motion for Conditional Certification and Notice

to Putative Class Members ("Mot." (ECF No. 28)). For the reasons set forth below, the Court hereby GRANTS IN PART AND DENIES IN PART the Motion.

I. BACKGROUND

A. Factual Background[1]

Defendant, a Virginia multinational corporation, operates call centers throughout the United States and primarily serves federal, state and local governments as a "Citizen Engagement Center." (1st Am. Collective/Class Action Compl. ¶¶ 35-36 ("Am. Compl.") (ECF No. 26).) Plaintiffs and the Putative Class Members[2] work as hourly call-center employees who assist the customers of Defendant's clients. (Am. Compl. ¶ 37.) Plaintiffs bring both this collective action to recover overtime wages, liquidated damages and other penalties pursuant to the FLSA and class actions pursuant to various state laws to recover unpaid straight time, overtime wages and other penalties. (Am. Compl. ¶ 1.)

Specifically, Plaintiffs assert that Defendant maintains and enforces a company-wide policy that requires all hourly call-center employees to get "call-ready"[3] before the start of their first shift, thereby requiring them to engage in unpaid, off-the-clock work every day. (Am.

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[1] Unless otherwise noted, the Court bases the factual background on Plaintiffs' allegations in their Amended Complaint and their Declarations submitted in support of their Motion for Conditional Certification (ECF Nos. 26, 29). *See Santos v. E&R Servs., Inc.*, 2021 WL 6073039, at *1 n.1 (D. Md. Dec. 23, 2021) (basing factual background on complaint and Plaintiffs' declarations).

[2] The Court refers to the individuals who may be eligible to join this suit but have not yet done so as "putative class members" or "potential plaintiffs."

[3] "Call-ready" means that an employee has logged into their computer and ensured that the necessary computer programs are running correctly so that the employee can take calls, answer emails and handle support tickets. (Am. Compl. ¶ 55; Pls.' Mem. of Law in Supp. of Pls.' Opposed Mot. for Conditional Certification and Notice to Putative Class Members ("Pls.' Mem.") at 4 n.8 (ECF No. 29).)

Compl. ¶¶ 54-63.) This process can take thirty minutes or longer. (Am. Compl. ¶ 56.) Likewise, Plaintiffs assert that Defendant required them to log out of their computer programs and shut down their computer after the end of their shifts, a three- to five-minute process, when they had already clocked out. (Am. Compl. ¶¶ 83-84.)

Further, Plaintiffs allege that Defendant allows them one unpaid thirty-minute meal break per day. (Am. Compl. ¶ 64.) However, per Defendant's policy, they may not log out of their computer and phone system until their meal break begins, a process that can take one to three minutes. (Am. Compl. ¶¶ 66, 68.) Similarly, they must return to their computer before the end of their meal break to log back into their computer and phone, a process that also takes one to three minutes. (Am. Compl. ¶¶ 67, 69.) Defendant automatically deducts the thirty-minute meal break period from Plaintiffs' pay, meaning that they are never paid for this shut-down and restart time during their breaks. (Am. Compl. ¶¶ 72-73.) Finally, Plaintiffs claim that Defendant required them to finish every call that they take, including those calls that run past the end of the start of their meal break and the end of their shift. (Am. Compl. ¶ 78-79.) Defendant did not compensate them for these activities, either. (Am. Compl. ¶ 80.)

In total, Plaintiffs claim that they regularly complete one to two hours of unpaid, off-the-clock work beyond their normal forty-hour workweek. (Pls.' Mem. of Law in Supp. of Pls.' Opposed Mot. for Conditional Certification and Notice to Putative Class Members ("Pls.' Mem.") at 10 (ECF No. 29).) Employers subject to FLSA must compensate employees at rates at least one-and-one-half times their regular rates of compensation for all hours worked in excess of forty hours per week. 29 U.S.C. §§ 206-07, 215(a)(2).

B. Procedural History

On July 30, 2021, Plaintiffs filed their original Complaint. (ECF No. 1.) They filed their Amended Complaint on November 2, 2021. (ECF No. 26.) In Count One, Plaintiffs bring a collective action against Defendant under the FLSA. (Am. Compl. ¶¶ 90-120.) In Counts Two through Nine, Plaintiffs bring class actions under the laws of Florida, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Texas and Virginia. (Am. Compl. ¶¶ 121-295.) Based on these claims, Plaintiffs, on their own behalf and on behalf of the Putative Class Members, seek class certification under the FLSA and pursuant to the relevant state laws, unpaid wages, costs and expenses, attorneys' fees, pre- and post-judgment interest, a service award for Plaintiffs and accounting of Defendants' books and records. (Am. Compl. ¶ 296.)

On November 3, 2021, Plaintiffs moved for conditional certification and notice to putative class members pursuant to the FLSA, 29 U.S.C. § 216(b). (Mot. (ECF No. 28).) On November 24, 2021, Defendant filed its Memorandum in Opposition. (Mem. in Opp'n to Pls.' Mot. for Conditional Collective Certification ("Resp.") (ECF No. 38).) On December 3, 2021, Plaintiffs replied to Defendants' Response. (Reply (ECF No. 39).) On February 25, 2022, the Court conducted a conference call with the parties to discuss the instant Motion and next steps. (Tr. of Conference Call ("Tr.") (ECF No. 62).) The Motion for Conditional Certification is now ripe for review.

II. ANALYSIS

A. The FLSA Collective Action Certification Process

Under the FLSA, private plaintiffs may bring a collective action on their own behalf and on behalf of those "similarly situated" to them. 29 U.S.C. § 216(b). According to the statute,

> An action to recover the liability prescribed in [§ 216(b)] 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 employees 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.

Id.

The Supreme Court has highlighted the importance of "employees receiving accurate and timely notice concerning the pendency of [a] collective action, so that they can make informed decisions about whether to participate." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). The Court also emphasized that district courts have discretionary authority to facilitate notice to potential plaintiffs. *Id.* at 174. However, neither the Fourth Circuit nor the Supreme Court has prescribed a process for certification of FLSA collectives. *Ison v. MarkWest Energy Partners, LP*, 2021 WL 5989084, at *2 (S.D.W. Va. Dec. 17, 2021). Rather, like most federal courts across the country, district courts within the Fourth Circuit have "uniformly" followed the approach set forth in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987). *Id.* at *3. Under *Lusardi*, district courts undertake a two-step process: (1) the notice stage, also called the conditional class certification stage, and (2) the class decertification stage. *Winks v. Va. Dep't. of Transp.*, 2021 WL 2482680, at *2 (E.D. Va. June 17, 2021) (citation omitted); *Purdham v. Fairfax Cnty. Pub. Schs.*, 629 F. Supp. 2d 544, 547 (E.D. Va. 2009) (citations omitted).

At the notice step, courts evaluate whether the plaintiffs have met their burden of satisfying the "similarly situated" requirement under a somewhat lenient standard. *Winks*, 2021 WL 2482680, at *2 (citation omitted). The Fourth Circuit has yet to establish a definition for "similarly situated." *Yerby v. City of Richmond*, 2020 WL 602268, at *2 (E.D. Va. Feb. 7, 2020) (citation omitted). However, "[t]he primary focus . . . is whether the potential plaintiffs are 'similarly situated with respect to the legal and, to a lesser extent, the factual issues to be

determined.'" *Houston v. URS Corp.*, 591 F. Supp. 2d 827, 831 (E.D. Va. 2008) (citation omitted). Courts aim to determine whether, based on the pleadings and affidavits before them, "the presence of common issues allows the class-wide claims to be addressed without becoming bogged down by individual differences among class members." *Id.* at 832; *see also Amoko v. N&C Claims Serv., Inc.*, 2021 WL 6430992, at *1 (D.S.C. Dec. 29, 2021) (citation omitted) (describing courts' decision-making process at the notice stage). For that reason, the FLSA's certification requirements resemble, but are not identical to, the requirements for class certification under Federal Rule of Civil Procedure 23. *Houston*, 591 F. Supp. at 832 (citation omitted). Thus, courts consider whether plaintiffs have made "a modest factual showing sufficient to demonstrate that they and potential plaintiffs were victims of a common policy or plan that violated the law." *Choimbol v. Fairfield Resorts, Inc.*, 475 F. Supp. 2d 557, 564 (E.D. Va. 2006) (citations omitted). "Insubstantial differences in job duties, hours worked and wages due that do not materially affect whether a group of employees may be properly classified are not significant to the 'similarly situated' determination." *LaFleur v. Dollar Tree Stores, Inc.*, 30 F. Supp. 3d 463, 468 (E.D. Va. 2014) (citation omitted).

If the court determines that the plaintiffs meet the FLSA's "similarly situated" standard, the court will conditionally certify the collective and authorize notice to similarly situated plaintiffs so that they can opt into the collective action. *Amoko*, 2021 WL 6340992, at *1 (citation omitted). At that point, "the action proceeds as a representative action throughout discovery." *Id.* (citation omitted).

During the second stage of collective certification, the court applies "a more 'stringent' factual determination" to decide whether a putative collective fulfills the "similarly situated" standard. *LaFleur*, 30 F. Supp. 3d at 467 (citations omitted). "If, after discovery, it is apparent

that plaintiffs are not similarly situated, the court may decertify the collective action and dismiss the claims of the opt-in plaintiffs without prejudice." *Id.* at 468 (citation omitted).

As an initial matter, Defendant argues that the Court should not utilize the two-stage certification process outlined above, and, instead, should analyze this case under the Fifth Circuit's newly established framework in *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430 (5th Cir. 2021). (Resp. at 10-11.) Plaintiff counters that district courts within the Fourth Circuit have consistently followed the two-step *Lusardi* framework for twenty years, and no other circuits have followed *Swales*. (Reply at 3-4.) In *Swales*, the Fifth Circuit rejected the two-stage collective certification process. *Swales*, 985 F.3d at 443. Instead, the court held that district courts "should identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated.' And then it should authorize preliminary discovery accordingly." *Id.* at 441.

The Court declines Defendant's invitation to apply this standard and will follow the approach of a litany of other courts within the Fourth Circuit, which have done the same when presented with this issue. *See, e.g.*, *Amoko*, 2021 WL 6340992, at *3 (declining to follow *Swales*, because it did not bind courts within the Fourth Circuit, and because the defendant "ha[d] not presented the court with a single application of *Swales* by a district court within the Fourth Circuit"); *Santos*, 2021 WL 6073039, at *3 (refusing to follow *Swales*, because it was not bound by the Fifth Circuit's decisions, and because the facts that gave rise to *Swales* bore significant differences to the ones at issue); *Ison*, 2021 WL 5989084, at *3 (opting to use the "fairly lenient" two-step certification process "that ha[d] long been applied in [the] district"); *Mazariegos v. Pan 4 Am., LLC*, 2021 WL 5015751, at *4 (D. Md. Oct. 28, 2021) (declining to apply *Swales*, because *Swales* was not binding on Fourth Circuit courts, and because of the

factual differences between *Swales* and the case at bar); *see also Winks*, 2021 WL 2482680, at *2 n.3 (noting that Fourth Circuit has not yet clarified the factual showing necessary to meet FLSA's similarly-situated standard and applying the two-stage analysis without resolving issue of whether *Swales* should apply in the Fourth Circuit).

Likewise, courts in other circuits have refused to follow *Swales*. *See, e.g.*, *In re Albertsons*, 2021 WL 4028428, at *2 (7th Cir. Sept. 1, 2021) (holding that district court did not err in applying two-stage collective certification framework instead of *Swales*, as "district courts have 'wide discretion to manage collective actions'" (citation omitted)); *Branson v. All. Coal,* 2021 WL 1550571, at *4 (W.D. Ky. Apr. 20, 2021) (refusing to follow *Swales*, because of the importance of the district court's role in overseeing the notice process).

Like these courts, the Court sees no compelling reason to deviate from twenty years of established precedent. The Fifth Circuit's decision in *Swales* does not bind this Court. In light of the refusal of multiple district courts within the Fourth Circuit to apply *Swales*, and in the absence of guidance from the Supreme Court or the Fourth Circuit on the issue, the Court will continue to apply the two-stage collective certification process first established in *Lusardi*.

Moreover, the facts and procedural posture in this case diverge from that in *Swales* in a manner that only underscores the importance of conditional certification and early judicial involvement in the notice process. *See Branson*, 2021 WL 1550571, at *4 (electing not to follow *Swales*, partly because so many potential plaintiffs had already opted into the suit, without the court's intervention, and the court sought to exert more oversight over the notice process). *Swales* requires district courts to decide "potentially dispositive, threshold" merits matters — in that case, whether the plaintiffs should have been classified as non-exempt employees rather than independent contractors — before allowing notice to prospective plaintiffs to be sent out.

Swales, 985 F.3d at 441. The *Swales* court reasoned that courts should resolve these matters before authorizing notice, because "alerting those who cannot ultimately participate in the collective 'merely stirs up litigation.'" *Id.* (quoting *In re JP Morgan Chase & Co.*, 916 F.3d 494, 502 (5th Cir. 2019)). However, in this way, the Fifth Circuit appeared to assume that court-facilitated notice constitutes the only method of notifying potential plaintiffs of a FLSA collective action. *Branson*, 2021 WL 1550571, at *4.

By contrast, since the beginning of this litigation, Plaintiffs' counsel has added over 100 opt-in plaintiffs with no judicial intervention or oversight. (ECF Nos. 9-12, 16-17, 20-21, 24-25, 17, 27, 30-32, 35, 37, 40); *see Branson*, 2021 WL 1550571, at *4 (noting that *Swales*' rationale does not apply when plaintiffs' counsel has already added opt-in plaintiffs with no judicial oversight). At this point, the Court lacks sufficient information to determine whether these opt-in plaintiffs' claims bear the legal and factual similarities necessary for inclusion in the collective. Approving the language and communication methods of the notice to potential plaintiffs would enable the Court to fulfill its "managerial responsibility to oversee the joinder of additional parties" and ensure that the notice process does not improperly stir up litigation. *Hoffman-La Roche*, 493 U.S. at 171. Applying the *Swales* framework would ultimately undermine the Court's oversight role in this case. With this background in mind, the Court now turns to the issue of whether the potential plaintiffs constitute similarly situated employees, as the FLSA requires.

B. "Similarly Situated" Potential Plaintiffs

Plaintiffs have made a threshold showing that the potential plaintiffs constitute similarly situated employees. In their Motion for Conditional Certification, Plaintiffs argue that, based on twelve declarations from Defendant's employees across ten different states, they and the Putative

Class Members worked as non-exempt employees of Defendant; that Defendant uniformly subjected them to its company-wide policy requiring off-the-clock, unpaid work; that they performed similar duties; that Defendant paid them an hourly rate; and that Defendant did not provide them with all of their overtime compensation and compensation at their regular rate(s) of pay. (Pl.'s Mem. at 16.) Plaintiffs also highlight that at the time that they filed their Motion, 97 other current former call-center employees had filed pre-notice opt-in consent forms, demonstrating that others had been negatively affected by Defendant's allegedly illegal policies. (Pl.'s Mem. at 18.) Plaintiffs assert that they have met or exceeded the amount of evidence that courts usually require for satisfaction of the similarly-situated standard. (Pl.'s Mem. at 17.)

Defendant responds that evaluations of the Plaintiffs' and the Putative Class Members' claims would require individualized determinations of liability, rendering resolution on a class-wide basis inappropriate. (Resp. at 13-24.) Likewise, Defendant contends that its defenses to each of Plaintiffs' and the Putative Class Members' claims would require individualized evaluations, as well, based on the amount of unpaid, off-the-clock work that each individual completed. (Resp. at 24-26.) In support of its Response, Defendant submitted declarations by 65 customer service representatives ("CSR") from Defendant's call centers in 18 cities and 12 states. (ECF Nos. 38-1 through 38-65.)

In their reply, Plaintiffs emphasize that they have met their lenient burden at this stage, and that courts leave the question of individualized inquiries to the decertification stage, after the parties complete discovery and have a fuller understanding of the facts and legal issues. (Reply at 6-11.) They also take issue with Defendant's submission of "happy camper" declarations from current employees, deeming them as "self-serving and conclusory." (Reply at 11.)

The Court agrees with Plaintiffs and finds that they have satisfied their burden at this stage. "The submission of consistent employee declarations . . . has consistently been held as sufficient and admissible evidence of a policy to be considered for conditional class certification." *Hargrove v. Ryla Teleservs., Inc.*, 2012 WL 489216, at *8 (E.D. Va. Jan. 3, 2012), *report and recommendation adopted*, 2012 WL 463442 (E.D. Va. Feb. 13, 2012). "[T]hose declarations must show that the employees have first-hand knowledge of the events described therein." *McNeil v. Faneuil, Inc.*, 2016 WL 11673838, at *3 (E.D. Va. Aug. 3, 2016). Further, because this step requires that the potential plaintiffs to have been "victims of a single decision, policy, or plan[,] . . . plaintiffs must submit some evidence that the alleged FLSA violations were not the product of happenstance or outlier instances of rogue supervisor behavior." *Id.* As discussed previously, the determination as to whether the potential plaintiffs satisfy the similarly-situated inquiry is made using a "fairly lenient standard." *Id.*

Plaintiffs have submitted declarations in support of their allegations that Defendant maintained and enforced a corporate-wide policy that required hourly call center workers to get call-ready before the start of their shifts and work during unpaid meal breaks, as well as finish calls and shut down their computers after the end of their shifts, all of which resulted in them accruing overtime for which Defendant did not properly compensate them under the FLSA. (*See, e.g.*, Decl. of Sharey Thomas ¶¶ 2, 5, 7-8, 16 ("Thomas Decl.") (ECF No. 29-1) (declaration by former hourly CSR employed by Defendant stating that all CSRs receive the same training and must arrive at their call center early to start up their computer, and that she often worked an additional one to two hours each week beyond her regular hours for which she was not paid overtime); Decl. of Jennifer Gilvin ¶¶ 2, 5, 10, 13, 15 ("Gilvin Decl.") (ECF No. 29-2) (declaration by current hourly CSR making similar statements and adding that she had to

finish all calls that ran beyond the end of her shift).) This amounts to the "modest factual showing" needed for conditional certification. *Choimbol*, 475 F. Supp. 2d at 564.

As Plaintiffs correctly posit, the conditional certification step merely requires only a modest factual showing of similarity between Plaintiffs and the Putative Class Members, and the Court need not address merits issues at this first step. (Pl.'s Mem. at 15; Reply at 8-11.) At this point, the Court need not prematurely delve into whether Plaintiffs' claims require individualized treatment that would render a collective action unmanageable.

Concerns about the predominance of individualized nature of Plaintiffs' and the Putative Class Members' claims require merits-based analyses that courts wait to tackle during the decertification stage, after notice to potential plaintiffs is finalized and the parties have completed discovery. *See Wiley v. Asplundh Tree Expert Co.*, 2013 WL 12182398, at *2 (S.D.W. Va. Nov. 1, 2013) ("Defendant's argument of the individualized nature of said claims for overtime compensation is more appropriately decided at step two, after it is known who the class will consist of, and after some of the factual issues can be fleshed out in discovery." (citations omitted)); *Robinson v. Empire Equity Grp., Inc.*, 2009 WL 4018560, at *4 (D. Md. Nov. 18, 2009) (noting that the defendant's arguments regarding the dissimilarities between plaintiffs and putative class members should be addressed at the decertification step so that "factual issues can be fleshed out in discovery" (citation omitted)). Indeed, the cases that Defendants themselves cite regarding the problems that arise from varying work conditions and individualized factual scenarios arose at the decertification stage. (Resp. at 13 (citing *Johnson v. TGF Precision Hair Cutters, Inc.*, 2005 WL 1994286, at *3-4, 8 (S.D. Tex. Aug. 17, 2005); and then citing *Brechler v. Qwest Commc'ns Int'l, Inc.*, 2009 WL 692329, at *3 (D. Ariz. Mar. 17, 2009)).) Moreover, the "happy camper" declarations that Defendant submitted in support of this

argument "are generally entitled to little or no weight" at the initial conditional certification step, "given the risk that the employer secured such declarations through explicit or implicit coercion." *Spencer v. Macado's, Inc.*, 2019 WL 4739691, at *4 (W.D. Va. Sept. 27, 2019). For these reasons, the Court conditionally certifies the class and will order notice to potential class members, as discussed below.

C. Plaintiff's Requested Relief

First, Plaintiffs ask the Court to order Defendant to provide counsel for Plaintiffs with the names, current or last known addresses, email addresses, phone numbers, cell phone numbers and dates of employment for current and former hourly call-center employees who match the description of the conditionally certified class within seven days of the entry of the Court's order conditionally certifying the class. (Pl.'s Mem. at 19.) Additionally, Plaintiffs seek to disseminate the Notice and Consent form to the Putative Class Members via mail, email and text message. (Pl.'s Mem. at 20.) They also request that the Putative Class Members be given the option to execute their consent forms online through an electronic signature service. (Pl.'s Mem. at 24.) Additionally, they request that the Notice and Consent forms be posted in plain view at Defendant's call centers across the country. (Pl.'s Mem. at 24.) Finally, they ask that the Court authorize a 90-day opt-in period, as well as a reminder notice to be sent via email and text message halfway through the period. (Pl.'s Mem. at 24.)[4]

In response, Defendant takes issue with several aspects of Plaintiffs' proposed Notice and Consent requests. First, it contends that the term "hourly call-center employees" is overbroad. (Resp. at 27.) Second, it argues that the Notice must state that Defendant "(1) denies Plaintiffs'

[4] Because the Court grants Plaintiff's Motion for Conditional Certification, it also DENIES Defendant's request for targeted discovery on the proposed collective. (Resp. at 26-27.)

allegations; (2) contends that the lawsuit is without merit; and (3) contends that it has properly paid Plaintiffs and all other current and former customer service representatives all wages and overtime owed under the FLSA." (Resp. at 27.) Third, Defendant assert that Section Three of the proposed Notice should be revised "to state that an individual is eligible to join the lawsuit if: (1) he or she was employed by [Defendant] as an hourly Customer Service Representative at any point within the past three years, *and* (2) was not paid for all hours worked." (Resp. at 28 (emphasis in original).) Fourth, Defendant states that the last sentence of Section 5 of the proposed Notice could mislead readers and discourage individuals from filing separate claims. (Resp. at 28.) It seeks to revise that sentence to say: "Because of the statute of limitations, eligible employees who do **not** join this litigation or choose to file their own separate claims **after** their limitations period has expired, will likely lose their rights to recover overtime for work performed in the past for [Defendant]." (Resp. at 28 (emphasis in original).) Fifth, it requests that Paragraph 5 of the proposed Consent form be deleted, because it lacks relevance to the matter. (Resp. at 28.) Finally, Defendant requests that the Court limit the Notice to one mailing via first-class mail with a sixty-day notice period, and that it modify the proposed schedule to give Defendant fourteen days to provide a notice list to Plaintiffs containing only the names and addresses of the Putative Class Members. (Resp. at 28.) The Court addresses each of these issues in turn.

1. Disclosure of the potential plaintiffs' contact information

"Courts should not modify a plaintiff's proposed notice 'unless such alteration is necessary.'" *Brown v. Energy Servs. Grp. Int'l, Inc.*, 2021 WL 5889707, at *3 (E.D. Va. Dec. 13, 2021) (citation omitted). First, the Court grants Plaintiffs' request for an order directing Defendant to provide Plaintiffs' counsel with the names, current or last known physical

addresses, dates of employment and email addresses for current and former Hourly Call-Center Employees fitting the description of the conditionally certified class. *See*, *e.g.*, *id.* at *3-4 (permitting disclosure of email addresses); *O'Quinn v. TransCanada USA Servs., Inc.*, 469 F. Supp. 3d 591, 610 (S.D.W. Va. 2020) (ordering disclosure of names, physical addresses, email addresses and phone numbers for potential plaintiffs, noting that email constitutes a more reliable form of communication than other methods).

Courts in the Fourth Circuit appear to be split in their approach to ordering disclosure of potential FLSA plaintiffs' phone numbers. *Compare Pecora v. Big M Casino*, 2019 WL 302592, at *5 (D.S.C. Jan. 23, 2019) (denying plaintiffs' request for disclosure of potential plaintiffs' phone numbers, because plaintiffs did not demonstrate a "special need" for the numbers, and because email and text messaging furnish equally reliable communication methods), *with Gregory v. Belfor USA Grp., Inc.*, 2012 WL 3062696, at *6 (E.D. Va. July 26, 2012) (granting plaintiffs' request for disclosure of potential plaintiffs' home and/or mobile numbers without a showing of a "special need" for this information).

However, courts in this District have repeatedly ordered the disclosure of potential plaintiffs' phone numbers in FLSA collective action cases without a showing of special need for this information, especially in recent years, as text messaging has become a ubiquitous form of communication. *See*, *e.g.*, *Brown*, 2021 WL 5889707, at *3-4 (granting disclosure of phone numbers without a special showing); *Allen v. Cogent Commc'ns*, 2014 WL 4270077, at *6 (E.D. Va. Aug. 28, 2014) (same); *Stone v. SRA Intern., Inc.*, 2014 WL 5410628, at *10 (E.D. Va. Oct. 22, 2014) (same); *LaFleur*, 2012 WL 4739534, at *12 (same); *Gregory*, 2012 WL 3062696, at *6 (same); *but see Houston*, 591 F. Supp. 2d at 836 (denying blanket request for disclosure of phone numbers, but noting that if the notice mailed to the putative plaintiffs was returned as

undeliverable, then the plaintiffs could request the phone number of those individuals from the defendants so that the plaintiffs could contact them to obtain a mailing address). Because courts in this District have consistently ordered FLSA defendants to disclose phone numbers and permitted plaintiffs to disseminate notice via text message, the Court grants Plaintiffs' request for the cell phone numbers of the potential plaintiffs. However, as discussed during the conference call between the Court and the parties regarding the instant Motion, the Court will not permit disclosure of the potential plaintiffs' home phone numbers. (Tr. at 6:19-25.) As noted below, the Court will permit counsel for Plaintiffs to text, but not call, the potential plaintiffs, making disclosure of the potential plaintiffs' home phone numbers unnecessary.

Additionally, the Court also denies Plaintiffs' request for an order directing disclosure of the last four digits of potential plaintiffs' Social Security Numbers. *See Allen*, 2014 WL 4270077, at *6 (denying Plaintiffs' request for last four digits of Social Security numbers).

Finally, the Court allows a fourteen-day period from the entry hereof for Defendant to submit the requested contact information to Plaintiffs, because Plaintiffs consent to this modification of its proposal of seven days for disclosure. As to the method of communication, then, the Court grants Plaintiffs' request for an order requiring the disclosure of the names, current or last known physical addresses, dates of employment and email addresses for current and former Hourly Call-Center Employees fitting the description of the conditionally certified class.

2. Communication methods and schedule

The Court authorizes Notice of the instant suit by mail, email and text message, as courts throughout the Fourth Circuit commonly do. *See, e.g.*, *Brown*, 2021 WL 5889707, at *3 (authorizing notice via email, text message and regular mail); *O'Quinn*, 469 F. Supp. at 591

(same). The Court also permits potential plaintiffs to sign their consent forms electronically. *See Gagliastre v. Captain George's Seafood Rest.*, 2018 WL 9848232, at *5 (E.D. Va. Mar. 13, 2018) (permitting electronic signatures on notice and consent forms). The text message sent to potential plaintiffs may include the proposed text and hyperlink to view the court-authorized notice that Plaintiffs request. (Pl.'s Mem. at 21 n.13.) Importantly, however, although counsel for Plaintiffs may text potential plaintiffs to notify them of this suit, they are not permitted to call the potential plaintiffs.

Further, the Court permits a 90-day opt-in period, in line with courts in this circuit and nationwide. *Butler v. DirectSAT*, 876 F. Supp. 560, 575 (D. Md. 2012) ("Notice periods may vary, but numerous courts around the country have authorized ninety day opt-in periods for collective actions."). A reminder Notice may be sent via email and text message halfway through the opt-in period. *See Lupardus v. Elk Energy Servs., LLC*, 2020 WL 4342221, at *9 (S.D.W. Va. July 28, 2020) ("Recipients may overlook the initial notifications, even in three forms, or become sidetracked from filing their consent form, but a second round helps to ensure that putative class members receive the notice and are reminded to act should they wish to do so.") However, the Court does not authorize Plaintiffs to post the Notice at Defendant's call centers across the country, as this method is "too invasive and duplicative," and Plaintiffs have not demonstrated that their three other proposed methods of notifying potential plaintiffs would be ineffective. *Stacy v. Jennmar Corp. of Va., Inc.*, 2021 WL 4787278, at *4 (W.D. Va. Oct. 14, 2021); *see also Graham*, 331 F.R.D. at 622-23 (allowing notice via mail and email, but denying the plaintiffs' request to post notice at the defendant's workplace).

3. Contents of the Notice and Consent form

First, the Court grants Defendant's objection to the use of the term "hourly call-center employees" in the proposed Notice. (Resp. at 27.) To minimize confusion, and to ensure that only hourly CSRs opt in, the Court orders Plaintiffs to use the terms "hourly customer service representatives" instead of "hourly call-center employees" or "Maximus employees."

Second, the Court grants Defendant's request to modify the Notice and Consent form to include Defendant's position on the instant action (Resp. at 27), because Plaintiff agrees to this request. Section 2 of the Notice must clearly state that Defendant "(1) denies Plaintiffs' allegations; (2) contends that the lawsuit is without merit; and (3) contends that it has properly paid Plaintiffs and all other current and former customer service representatives all wages and overtime owed under the FLSA." (Resp. at 27.)

Third, the Court denies Defendant's objection to the statement in Section 3 of the Proposed Notice, which states in relevant part that "You are eligible to join this lawsuit if: . . . . You believe that you were not paid for all hours worked." (Notice at 2; Resp. at 28.) The potential plaintiffs need not know or prove the merits of their claim before they opt into this suit. The use of the word "believe" in the Notice's description of the class is appropriate.

Fourth, the Court grants Defendant's request to modify the last sentence in Section 5, which pertains to the statute of limitations. Currently, this sentence states that "Because of the statute of limitations, eligible workers who do ***not*** join this litigation or choose to file their own separate claims, may lose their rights to recover unpaid wages and overtime for work performed in the past for Maximus." (Notice at 3.) As Defendant correctly points out, this phrasing implies that those who do not join the instant suit or choose to file their own individual suit may lose the opportunity to recover unpaid wages and overtime pay. (Resp. at 28.) Thus, the Court modifies

this sentence according to Defendant's proposed changes so that it reads, "Because of the statute of limitations, eligible employees who do not join this litigation or choose to file their own separate claims after their limitations period has expired will likely lose their rights to recover overtime for work performed in the past for Maximus." (Resp. at 28.)

Fifth, the Court denies Defendant's objections to Paragraph 5 of the proposed Consent Form, which states that "If needed, I authorize the attorneys at the law firms of Anderson Alexander, PLLC and Butler Curwood, PLC to use this consent to re-file my claim in a separate lawsuit or arbitration against Maximus." This paragraph will enable Plaintiffs' counsel to continue to represent the class members, should that become necessary, and has received the approval of other judges in the Richmond Division. *Brown*, 2021 WL 5889707, at *4 (granting plaintiffs' motion for conditional certification and approving notice); (Pls.' Mem. of Law Supporting Mot. for Conditional Certification and Notice Ex. 11 at 4, *Brown*, 2021 WL 5889707 (ECF No. 19-11) ("If needed, I authorize the Plaintiffs' lawyers to use this consent to re-file my claim in a separate lawsuit or arbitration.").) In conclusion, the Court permits in part and rejects in part Plaintiffs' proposed Notice and Consent form, Notice schedule and methods of communication.

CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART Plaintiffs' Motion (ECF No. 28).

Further, pursuant to the Court's May 10, 2022 Order amending its February 28, 2022 Order ("the February 28 Order") (ECF No. 64)), the Court hereby AMENDS its February 28, 2022 Memorandum Opinion (ECF No. 63) accompanying the February 28 Order (ECF No. 64)

to CERTIFY AN INTERLOCUTORY APPEAL of its February 28 Order on the following question:

> What legal standard should courts apply when deciding whether to certify a collective action under the Fair Labor Standards Act, 29 U.S.C. § 216(b)?

Finally, the Court hereby STAYS all aspects of this case pending resolution of the interlocutory appeal, except the production of the personal contact information of the potential plaintiffs.

An appropriate Order shall issue.

Let the Clerk file a copy of this Memorandum Opinion electronically and notify all counsel of record.

It is so ORDERED.

/s/
David J. Novak
United States District Judge

Richmond, Virginia
Dated: May 10, 2022

FILED: July 7, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-185
(3:21-cv-00498-DJN)

MAXIMUS, INC.

Petitioner

v.

SHAREY THOMAS; JENNIFER GILVIN; LAURA VICK; NYESHIA YOUNG; OLGA RAMIREZ; JENNIFER SALCIDO; JIMNELLY SALCEDO; BRENDA FOWLER; SHANNON GARNER, individually and on behalf of all others similarly situated

Respondents

O R D E R

Upon consideration of submissions relative to petitioner Maximus, Inc's petition for permission to appeal, the court denies the petition.

Judge Thacker and Judge Heytens voted to deny the motion. Judge Wynn voted to grant the motion.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: August 2, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-185
(3:21-cv-00498-DJN)

MAXIMUS, INC.

Petitioner

v.

SHAREY THOMAS; JENNIFER GILVIN; LAURA VICK; NYESHIA YOUNG; OLGA RAMIREZ; JENNIFER SALCIDO; JIMNELLY SALCEDO; BRENDA FOWLER; SHANNON GARNER, individually and on behalf of all others similarly situated

Respondents

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn, Judge Thacker, and Judge Heytens.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: August 15, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-185
(3:21-cv-00498-DJN)

MAXIMUS, INC.

Petitioner

v.

SHAREY THOMAS; JENNIFER GILVIN; LAURA VICK; NYESHIA YOUNG; OLGA RAMIREZ; JENNIFER SALCIDO; JIMNELLY SALCEDO; BRENDA FOWLER; SHANNON GARNER, individually and on behalf of all others similarly situated

Respondents

O R D E R

Upon consideration of the motion to stay mandate, the court denies the motion.

Entered at the direction of the panel: Judge Wynn, Judge Thacker, and Judge Heytens.

For the Court

/s/ Patricia S. Connor, Clerk

From: Patrick Dillard <Patrick_Dillard@vaed.uscourts.gov>
Sent: Wednesday, August 10, 2022 4:48 PM
To: Francesco A. DeLuca
Cc: Zev Antell; Austin Anderson; craig@butlercurwood.com; Harris Butler; Lauren Braddy; Adriana S. Kosovych; Amy Bharj; Jill Bigler; Chris Page McGinnis; Sherelle Wu; Clif Alexander; Paul DeCamp
Subject: RE: Thomas v. Maximus (3:21cv498)

Counsel,

As I stated yesterday, Judge Novak would like the parties to schedule a settlement conference with Judge Colombell. Should the Fourth Circuit or Supreme Court stay the case, then the settlement conference can be postponed. Judge Novak has reviewed your correspondence here, along with the orders from the Fourth Circuit, and does not believe that delaying the scheduling of a settlement conference is warranted.

Thanks,
Patrick

Patrick F. Dillard
Law Clerk to the Honorable David J. Novak
United States District Judge
United States District Court for the Eastern District of Virginia
Chambers: (804) 916-2270

From: Francesco A. DeLuca <FDeLuca@ebglaw.com>
Sent: Wednesday, August 10, 2022 3:05 PM
To: Patrick Dillard <Patrick_Dillard@vaed.uscourts.gov>
Cc: Zev Antell <zev@butlercurwood.com>; Austin Anderson <austin@a2xlaw.com>; craig@butlercurwood.com; Harris Butler <harris@butlercurwood.com>; Lauren Braddy <lauren@a2xlaw.com>; Adriana S. Kosovych <AKosovych@ebglaw.com>; Amy Bharj <ABharj@ebglaw.com>; Jill Bigler <JBigler@ebglaw.com>; Chris Page McGinnis <CTPage@ebglaw.com>; Sherelle Wu <SWu@ebglaw.com>; Clif Alexander <clif@a2xlaw.com>; Paul DeCamp <pdecamp@ebglaw.com>
Subject: RE: Thomas v. Maximus (3:21cv498)

Patrick,

Respectfully, as Paul stated yesterday, the 4th Circuit has not issued its mandate, and Maximus' position is that it would be premature to proceed with mediation until it has done so. As the District Court and Maximus have noted, the aspects of the case at issue in the 4th Circuit proceedings—which will be the subject of Maximus' petition for a writ of certiorari to the Supreme Court—may be outcome determinative. Thus, Maximus respectfully requests that the District Court postpone scheduling mediation until the 4th Circuit issues its mandate to avoid a potential unnecessary expenditure of the parties' and the District Court's resources. In the event that the Court believes it would be helpful, Maximus

requests permission to brief whether the District Court proceedings should be stayed pending the issuance of the 4th Circuit's mandate and/or the filing of Maximus' petition for a writ of certiorari. Thank you for your time and consideration.

Best,

Fran

EPSTEIN BECKER GREEN

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From: Patrick Dillard <Patrick_Dillard@vaed.uscourts.gov>
Sent: Wednesday, August 10, 2022 11:32 AM
To: Clif Alexander <clif@a2xlaw.com>; Paul DeCamp <pdecamp@ebglaw.com>
Cc: Zev Antell <zev@butlercurwood.com>; Austin Anderson <austin@a2xlaw.com>; craig@butlercurwood.com; Harris Butler <harris@butlercurwood.com>; Lauren Braddy <lauren@a2xlaw.com>; Adriana S. Kosovych <AKosovych@ebglaw.com>; Francesco A. DeLuca <FDeLuca@ebglaw.com>; Amy Bharj <ABharj@ebglaw.com>; Jill Bigler <JBigler@ebglaw.com>; Chris Page McGinnis <CTPage@ebglaw.com>; Sherelle Wu <SWu@ebglaw.com>
Subject: RE: Thomas v. Maximus (3:21cv498)

*** EXTERNAL EMAIL ***

Thank you, Clif. Please coordinate with Judge Colombell's chambers regarding scheduling the settlement conference.

Patrick F. Dillard
Law Clerk to the Honorable David J. Novak
United States District Judge
United States District Court for the Eastern District of Virginia
Chambers: (804) 916-2270

From: Clif Alexander <clif@a2xlaw.com>
Sent: Wednesday, August 10, 2022 11:30 AM
To: Patrick Dillard <Patrick_Dillard@vaed.uscourts.gov>; Paul DeCamp <pdecamp@ebglaw.com>
Cc: Zev Antell <zev@butlercurwood.com>; Austin Anderson <austin@a2xlaw.com>; craig@butlercurwood.com; Harris Butler <harris@butlercurwood.com>; Lauren Braddy <lauren@a2xlaw.com>; Adriana S. Kosovych <AKosovych@ebglaw.com>; Francesco A. DeLuca <FDeLuca@ebglaw.com>; Amy Bharj <ABharj@ebglaw.com>; Jill Bigler <JBigler@ebglaw.com>; Chris Page McGinnis <CTPage@ebglaw.com>; Sherelle Wu <SWu@ebglaw.com>
Subject: Re: Thomas v. Maximus (3:21cv498)

CAUTION - EXTERNAL:

Thank you, Patrick.

Plaintiffs are available on 8/22 as well as 8/31, 9/6, and 9/26 which I understand to also be open on Judge Colombell's calendar.

Clif Alexander
Anderson Alexander, PLLC

AndersonAlexander

819 North Upper Broadway
Corpus Christi, TX 78401
361.452.1279 (O)
361.452.1284 (F)
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From: Patrick Dillard <Patrick_Dillard@vaed.uscourts.gov>
Date: Wednesday, August 10, 2022 at 10:27 AM
To: Clif Alexander <clif@a2xlaw.com>, Paul DeCamp <pdecamp@ebglaw.com>
Cc: Zev Antell <zev@butlercurwood.com>, Austin Anderson <austin@a2xlaw.com>, craig@butlercurwood.com <craig@butlercurwood.com>, Harris Butler <harris@butlercurwood.com>, Lauren Braddy <lauren@a2xlaw.com>, Adriana S. Kosovych <AKosovych@ebglaw.com>, Francesco A. DeLuca <FDeLuca@ebglaw.com>, Amy Bharj <ABharj@ebglaw.com>, Jill Bigler <JBigler@ebglaw.com>, Chris Page McGinnis <CTPage@ebglaw.com>, Sherelle Wu <SWu@ebglaw.com>
Subject: RE: Thomas v. Maximus (3:21cv498)

Counsel,

Judge Novak does not intend to stay this case further at this point. He would like the parties to schedule a settlement conference with Judge Colombell. Please contact his chambers within 24 hours to schedule a settlement conference. Judge Colombell has August 22 available for a settlement conference. If you are available then, Judge Novak would like you to conduct the settlement conference on that date. Otherwise, please schedule the settlement conference to occur within 45 days, if Judge Colombell's schedule permits.

Thanks,
Patrick

Patrick F. Dillard
Law Clerk to the Honorable David J. Novak
United States District Judge
United States District Court for the Eastern District of Virginia
Chambers: (804) 916-2270

From: Clif Alexander <clif@a2xlaw.com>
Sent: Tuesday, August 9, 2022 2:38 PM
To: Paul DeCamp <pdecamp@ebglaw.com>; Patrick Dillard <Patrick_Dillard@vaed.uscourts.gov>
Cc: Zev Antell <zev@butlercurwood.com>; Austin Anderson <austin@a2xlaw.com>; craig@butlercurwood.com; Harris Butler <harris@butlercurwood.com>; Lauren Braddy <lauren@a2xlaw.com>; Adriana S. Kosovych <AKosovych@ebglaw.com>; Francesco A. DeLuca <FDeLuca@ebglaw.com>; Amy Bharj <ABharj@ebglaw.com>; Jill Bigler <JBigler@ebglaw.com>; Chris Page McGinnis <CTPage@ebglaw.com>; Sherelle Wu <SWu@ebglaw.com>
Subject: Re: Thomas v. Maximus (3:21cv498)

CAUTION - EXTERNAL:

Patrick,

Plaintiffs disagree with Mr. DeCamp's position and have opposed any future stay/delay by Maximus.

Clif Alexander
Anderson Alexander, PLLC

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From: Paul DeCamp <pdecamp@ebglaw.com>
Date: Tuesday, August 9, 2022 at 1:34 PM
To: Patrick Dillard <Patrick_Dillard@vaed.uscourts.gov>
Cc: Zev Antell <zev@butlercurwood.com>, Austin Anderson <austin@a2xlaw.com>, craig@butlercurwood.com <craig@butlercurwood.com>, Harris Butler <harris@butlercurwood.com>, Lauren Braddy <lauren@a2xlaw.com>, Clif Alexander <clif@a2xlaw.com>, Adriana S. Kosovych <AKosovych@ebglaw.com>, Francesco A. DeLuca <FDeLuca@ebglaw.com>, Amy Bharj <ABharj@ebglaw.com>, Jill Bigler <JBigler@ebglaw.com>, Chris Page McGinnis <CTPage@ebglaw.com>, Sherelle Wu <SWu@ebglaw.com>
Subject: RE: Thomas v. Maximus (3:21cv498)

Patrick,

Maximus respectfully submits that the Fourth Circuit has not yet issued its mandate. Maximus has filed a timely motion with the Fourth Circuit seeking a stay of the issuance of the mandate pending the outcome of the certiorari petition Maximus will be filing. Maximus submits that this matter is still before the Fourth Circuit and that it would be premature to proceed with matters in the District Court before the Fourth Circuit issues its mandate. Judge Novak has already ordered equitable tolling, so there is no prejudice to any party in allowing the matter to proceed in the appellate courts at this time.

Best regards,

Paul

EPSTEIN
BECKER
GREEN

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From: Patrick Dillard <Patrick_Dillard@vaed.uscourts.gov>
Sent: Monday, August 8, 2022 1:38 PM
To: Zev Antell <zev@butlercurwood.com>; Austin Anderson (austin@a2xlaw.com) <austin@a2xlaw.com>; craig@butlercurwood.com; Harris Butler <harris@butlercurwood.com>; Lauren Braddy <lauren@a2xlaw.com>; Clif Alexander (clif@a2xlaw.com) <clif@a2xlaw.com>; Paul DeCamp <pdecamp@ebglaw.com>; Adriana S. Kosovych <AKosovych@ebglaw.com>; Amy Bharj <ABharj@ebglaw.com>; Chris Page McGinnis <CTPage@ebglaw.com>; Francesco A. DeLuca <FDeLuca@ebglaw.com>; Jill Bigler <JBigler@ebglaw.com>; Sherelle Wu <SWu@ebglaw.com>
Subject: Thomas v. Maximus (3:21cv498)

*** EXTERNAL EMAIL ***

Counsel,

Now that the Fourth Circuit has denied the petition for rehearing, Judge Novak would like the parties to schedule a settlement conference with Judge Colombell to occur within 45 days, if his schedule permits.

Thanks,
Patrick

Patrick F. Dillard
Law Clerk to the Honorable David J. Novak
United States District Judge
United States District Court for the Eastern District of Virginia
Chambers: (804) 916-2270

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