APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23-15650, 24-1979

ANDREW HARRINGTON; KATIE LIAMMAYTRY; JASON LENCHERT; AND DYLAN BASCH,

Plaintiffs-Appellees,

V.

CRACKER BARREL OLD COUNTRY STORE, INC.,

Defendant-Appellant.

Filed July 1, 2025

Before: HAWKINS, CLIFTON, and BADE, Circuit Judges.

OPINION

MICHAEL DALY HAWKINS, Circuit Judge.

The Fair Labor Standards Act of 1938 (the "FLSA") imposes certain minimum-wage and overtime-compensation requirements on employers and allows employees alleging violations of those requirements to litigate their claims collectively with other "similarly situated" plaintiffs. *See* 29 U.S.C. § 216(b). There is a "near-universal practice to evaluate the propriety of the collective mechanism—in particular, plaintiffs' satisfaction of the 'similarly situated' requirement—by way of a two-step 'certification' process." *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1100 (9th Cir. 2018). In a typical case, "plaintiffs will, at some point around the pleading

stage, move for 'preliminary certification' of the collective action, contending that they have at least facially satisfied the 'similarly situated' requirement." *Id.* The "sole consequence" of preliminary certification "is the sending of court-approved written notice" to prospective-plaintiff employees, who may opt to join into the collective action by filing a written consent with the court. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013). Then, at a later stage in the proceedings "after the necessary discovery is complete," defendants may "move for 'decertification' of the collective action on the theory that the plaintiffs' status as 'similarly situated' was not borne out by the fully developed record." *Campbell*, 903 F.3d at 1100.

Here, a group of current and former employees ("Plaintiffs") of Cracker Barrel Old Country Store, Inc. ("Cracker Barrel") filed the underlying lawsuit alleging that Cracker Barrel violated the FLSA in connection with its wages for tipped workers. Following the two-step process just described, the district court granted Plaintiffs' motion for preliminary certification and approved notice to a group of prospective opt-in plaintiffs. The group included employees that may have entered into arbitration agreements with Cracker Barrel as well as out-of-state employees with no apparent ties to Cracker Barrel's operations in Arizona—the forum state.

We granted Cracker Barrel's motion to permit this interlocutory appeal to answer three questions: (1) Did the district court follow the correct procedure in granting preliminary certification? (2) Was the district court required to determine the arbitrability of absent employees' claims prior to authorizing no-

tice? (3) Does *Bristol-Myers Squibb Company v. Superior Court of California* (*Bristol-Myers*), 582 U.S. 255 (2017), apply in FLSA collective actions in federal court such that nationwide notice was inappropriate in this case?

We find no error in the district court's order with regard to the first two questions. As to the third question, we join the majority of our sister circuits reaching the issue and hold that *Bristol-Myers* applies in FLSA collective actions in federal court. Consequently, where the basis for personal jurisdiction in the collective action is specific personal jurisdiction, the district court must assess whether each opt-in plaintiff's claim bears a sufficient connection to the defendant's activities in the forum state. Because the district court authorized nationwide notice on the mistaken assumption that it would not need to assess specific personal jurisdiction on a claim-by-claim basis, we vacate and remand for further proceedings consistent with this opinion.

I. Background.

Plaintiffs are current and former employees of Cracker Barrel who are not subject to the arbitration agreement that Cracker Barrel routinely presents to its employees through an online training program.[1] They allege that Cracker Barrel violated the FLSA in connection with its use of tip credits and wages for tipped employees.

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[1] In a separate memorandum disposition, we affirm the district court's denial of Cracker Barrel's motion to compel arbitration of plaintiff Dylan Basch's claims.

After several rounds of motions to dismiss and amendments to the operative complaint, Plaintiffs sought preliminary certification and authorization to send notice to a collective consisting of "all servers who worked for Cracker Barrel in states where it attempts to take a tip credit ... over the last three years." Cracker Barrel objected on the grounds that notice should not be sent to (1) employees who are subject to Cracker Barrel's arbitration agreement, and (2) employees outside of Arizona to the extent the district court would not have personal jurisdiction over their claims.

The district court granted Plaintiffs' motion and authorized notice over Cracker Barrel's objections. Because questions of fact persisted as to which prospective plaintiffs were bound by Cracker Barrel's arbitration agreement, the district court decided to reserve judgment on that issue until the second stage of proceedings. The district court then concluded that nationwide notice was permissible because the participation of one Arizona-based plaintiff was all that was needed to secure personal jurisdiction over Cracker Barrel for the collective action. Given the novelty of the issues before it, the district court also granted, in part, Cracker Barrel's motion to certify issues for interlocutory appeal, and we granted Cracker Barrel's subsequent petition for permission to bring this appeal.

II. Jurisdiction and Standard of Review.

We have jurisdiction under 28 U.S.C. § 1292(b). We review a district court's management orders in a collective action for abuse of discretion. *Dominguez v. Better Mortg. Corp.*, 88 F.4th 782, 791 (9th Cir.

2023). We review questions of law de novo. *FTC v. Qualcomm Inc.*, 969 F.3d 974, 993 (9th Cir. 2020).

III. Discussion.

We first address Cracker Barrel's challenges of the district court's process for granting preliminary certification and then the scope of the notice.

A. The Preliminary Certification Process.

The first issue on appeal—whether the district court followed a permissible procedure—is easily resolved. Under the FLSA, "workers may litigate jointly if they (1) claim a violation of the FLSA, (2) are 'similarly situated,' and (3) affirmatively opt in to the joint litigation, in writing." *Campbell*, 903 F.3d at 1100 (citing 29 U.S.C. § 216(b)). The FLSA leaves the rest of the collective mechanism procedure open. *See id.* at 1108. As mentioned at the outset of this opinion, there is a generally accepted practice of following a two-step "certification" procedure.[2] *Id.* at 1108–10. In *Campbell*, we discussed the two-step approach at length and approved of its use in this circuit. *Id.*

Relying on a recent decision of the Fifth Circuit, *Swales v. KLLM Transport Services, LLC*, 985 F.3d 430 (5th Cir. 2021), Cracker Barrel now asks us to abandon the two-step approach and instead adopt "a one-step mechanism that rigorously enforces at the outset of the litigation § 216(b)'s 'similarly situated'

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[2] FLSA cases have borrowed the "certification" and "decertification" terminology from the Rule 23 class action context, but we have cautioned that use of those terms is not meant to "imply that there should be any particular procedural parallels between collective and class actions." *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1102 (9th Cir. 2018).

mandate." But our court has already endorsed the two-step approach, and we are bound by that precedent.[3] *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). Accordingly, we hold that the district court did not abuse its discretion by following the two-step approach outlined in *Campbell*.[4]

B. Proposed Notice Recipients.

We next turn to the scope of the notice and address whether the district court permissibly authorized notice to (1) employees that allegedly entered into arbitration agreements with the defendant, and (2) out-of-state employees with no apparent ties to the defendant's activities in the forum state.

1. *Arbitration Agreements.*

Whether a district court may authorize notice to employees that allegedly entered into arbitration agreements with the defendant is an issue of first

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[3] Contrary to Cracker Barrel's contention, *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45 (2025), is not clearly irreconcilable with our decision in *Campbell*. *E.M.D. Sales* held that the preponderance-of-the-evidence standard, rather than the clear-and-convincing-evidence standard, "applies when an employer seeks to show that an employee is exempt from the minimum-wage and overtime-pay provisions" of the FLSA. *Id.* at 49, 54. It said nothing about how a district court should manage a collective action or the procedure it should follow when determining whether to exercise its discretion to facilitate notice to prospective opt-in plaintiffs. Cracker Barrel's motion for leave to file a supplemental brief is denied.

[4] *Campbell* did not address the standard the district court should apply in evaluating a preliminary certification motion. 903 F.3d at 1117. We also do not reach that issue, as Cracker Barrel has challenged only the district court's use of the two-step procedural mechanism.

impression in our circuit. The few circuits that have reached the issue have generally agreed that a district court may not do so if it is undisputed that the absent employees (prospective opt-in plaintiffs) are bound by valid arbitration agreements. *See Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1050 (7th Cir. 2020); *In re JPMorgan Chase & Co.*, 916 F.3d 494, 503 (5th Cir. 2019); *see also Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1012 (6th Cir. 2023). Where the issue remains in dispute, two circuits require district courts to permit discovery and hold an evidentiary hearing prior to preliminary certification. *Bigger*, 947 F.3d at 1050; *In re JPMorgan Chase & Co.*, 916 F.3d at 502–03. In those circuits, if an employer shows by a preponderance of the evidence that certain absent employees have agreed to arbitrate their claims, the district court may not authorize notice to those employees. *See Bigger*, 947 F.3d at 1050; *In re JPMorgan Chase & Co.*, 916 F.3d at 503. *But see Clark*, 68 F.4th at 1011 (disagreeing with the conclusion "that district courts can or should determine, 'by a preponderance of the evidence,' whether absent employees have agreed to arbitrate their claims").

We agree with our sister circuits that it is an abuse of discretion to authorize notice to employees if it is undisputed that their claims are subject to arbitration. Beyond that, we decline to adopt any bright-line rule requiring district courts in all cases to make conclusive determinations regarding the arbitrability of prospective opt-in plaintiffs' claims prior to the dissemination of notice.

As we have recognized, "the proper means of managing a collective action—the form and timing of

notice, the timing of motions, the extent of discovery before decertification is addressed—is largely a question of case management and thus a subject of substantial judicial discretion." *Campbell*, 903 F.3d at 1110 (quotation marks and citation omitted). That is particularly true of "[p]reliminary certification, to the extent it relates to the approval and dissemination of notice." *Id.* at 1110 n.10. Issues regarding the applicability and enforceability of arbitration agreements are often fact intensive and individualized. *See, e.g., Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 513–15 (9th Cir. 2023). It may not be feasible or even possible to make those determinations in the absence of the parties allegedly bound by the agreements. *See Clark*, 68 F.4th at 1011 ("[T]his type of contention—that 'other employees' have agreed to arbitrate their claims—illustrates the impracticability of conclusively determining, in absentia, whether other employees are similarly situated to the original plaintiffs."). Thus, where the existence and validity of an arbitration agreement remains in dispute, a district court is not required to rule on the arbitrability of absent employees' claims prior to authorizing notice. Instead, the district court may reserve that determination until after the prospective plaintiffs have, in fact, opted into the litigation.

Applying these rules to the case before us, there was no abuse of discretion. The district court found that multiple fact issues remained that would need to be resolved before the court could determine which prospective opt-in plaintiffs might be required to arbitrate their claims. And the notice that the district court approved cautions that only employees whose claims are not subject to arbitration may join the litigation. The district court appropriately treated arbi-

trability as one factor in its determination of whether and how to facilitate notice. *See Campbell*, 903 F.3d at 1117 (discussing the "similarly situated" requirement); *see also Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 174 (1989) (explaining that district courts "must be scrupulous to respect judicial neutrality" and "take care to avoid even the appearance of judicial endorsement of the merits of the action" when facilitating notice).

2. *Personal Jurisdiction.*

Finally, we turn to the question of personal jurisdiction and the propriety of nationwide notice.[5]

There are two forms of personal jurisdiction: general and specific. *Daimler AG v. Bauman*, 571 U.S. 117, 126–27 (2014). General "or all-purpose" jurisdiction is available in the forum in which the defendant is "fairly regarded as at home"; for corporate defendants like Cracker Barrel, that typically means the state in which the defendant is incorporated or has its principal place of business.[6] *Id.* at 122, 137. Specific jurisdiction, on the other hand, "focuses on the relationship among the defendant, the forum, and the litigation," *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (internal quotation marks and citation omitted), *i.e.*, whether the suit "arises out of or relates to

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[5] As a preliminary matter, Plaintiffs contend that Cracker Barrel waived any argument that the court lacks personal jurisdiction over it in connection with the claims of non-Arizona employees. The district court rejected Plaintiffs' waiver argument, and we decline to revisit the argument here.

[6] Cracker Barrel is incorporated and has its principal place of business in Tennessee, so it is undisputed that Cracker Barrel is not subject to general personal jurisdiction in Arizona.

the defendant's contacts with the forum," *Daimler*, 571 U.S. at 127 (quotation marks, alteration, and citation omitted).

Bristol-Myers involved the exercise of specific personal jurisdiction in a mass tort action filed in California state court. 582 U.S. at 258. There, hundreds of plaintiffs joined together in a mass action against a nonresident pharmaceutical company alleging injuries resulting from a medication manufactured and sold by the defendant. *Id.* at 258–59. Some of the plaintiffs were California residents, but most were not. *Id.* at 259. Although all plaintiffs claimed the same type of injury, the nonresident plaintiffs' claims bore no connection to California. *Id.* In what it described as a "straightforward application ... of settled principles of personal jurisdiction," the Supreme Court held that the due process clause of the Fourteenth Amendment prohibited a California state court from exercising specific personal jurisdiction over the claims of the nonresident plaintiffs against the nonresident defendant. *Id.* at 268. "The mere fact that *other* plaintiffs were prescribed, obtained, and ingested [the drug] in California—and allegedly sustained the same injuries as did the nonresidents"—could not support the assertion of specific personal jurisdiction over the nonresidents' claims. *Id.* at 265. "What [wa]s needed—and what [wa]s missing ... —[wa]s a connection between the forum and the specific claims at issue." *Id.*

A split among circuit and district courts has emerged regarding whether the *Bristol-Myers* claim-by-claim analysis for specific personal jurisdiction applies in FLSA collective actions. The Third, Sixth, Seventh, and Eighth Circuits hold that it does.

Fischer v. Fed. Express Corp., 42 F.4th 366, 370 (3d Cir. 2022); *Canaday v. Anthem Cos., Inc.*, 9 F.4th 392, 397 (6th Cir. 2021); *Vanegas v. Signet Builders, Inc.*, 113 F.4th 718, 721, 723 (7th Cir. 2024); *Vallone v. CJS Sols. Grp., LLC*, 9 F.4th 861, 865–66 (8th Cir. 2021). The First Circuit holds that it does not. *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 92 (1st Cir. 2022). We align ourselves with the majority.

Our personal jurisdiction analysis in a federal question case begins with two basic principles. First, there must be "an applicable rule or statute that potentially confers jurisdiction over the defendant." *Cox v. CoinMarketCap OPCO, LLC*, 112 F.4th 822, 829 (9th Cir. 2024) (citation modified). Second, the exercise of jurisdiction must be "consonant with the constitutional principles of due process." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002).

"Congress' typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process." *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 409 (2017). Because the FLSA does not contain a service of process provision, Federal Rule of Civil Procedure 4(k)(1)(A) directs us to the law of the forum state—here Arizona. *See* Fed. R. Civ. P. 4(k)(1)(A); *Briskin v. Shopify, Inc.*, 135 F.4th 739, 750 (9th Cir. 2025) (en banc). The Arizona long-arm statute is "co-extensive with the limits of federal due process" under the Fourteenth Amendment. *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1089 (9th Cir. 2023) (internal citation omitted). In a case like this involving specific personal jurisdiction over a nonresident defendant, those limits include *Bristol-Myers*'s requirement that each claim bears a connec-

tion to the defendant's forum contacts. *See Bristol-Myers*, 582 U.S. at 265–68; *see also Vanegas*, 113 F.4th at 729 ("[W]hen the court asserts its jurisdiction through Rule 4(k)(1)(A) service, all it gets is what a state court would have.").

Plaintiffs argue that *Bristol-Myers* does not apply because FLSA collective actions, like class actions, are representative actions in which personal jurisdiction is analyzed at the level of the suit rather than on a claim-by-claim basis. Although we have not yet considered the application of *Bristol-Myers* in a class action, *see Moser v. Benefytt, Inc.*, 8 F.4th 872, 878–79 (9th Cir. 2021), we have made clear that a collective action under the FLSA "is not a comparable form of representative action," *Campbell*, 903 F.3d at 1105. The FLSA collective mechanism "is more accurately described as a kind of mass action, in which aggrieved workers act as a collective of *individual* plaintiffs with *individual* cases." *Campbell*, 903 F.3d at 1105; *see also Vanegas*, 113 F.4th at 725 ("[I]n practice courts treat FLSA collectives as agglomerations of individual claims."). The maintenance of individual party status makes the FLSA collective mechanism analogous to the mass action at issue in *Bristol-Myers*. *See Canaday*, 9 F.4th at 397. And in a case made up of individual claims by individual parties, it logically follows that personal jurisdiction be analyzed on an individual basis rather than at the level of the suit.

Plaintiffs also argue that *Bristol-Myers* does not apply because it is the Fifth Amendment, rather than the Fourteenth Amendment, that constrains personal jurisdiction in federal courts. When analyzing whether the exercise of personal jurisdiction

comports with the Fifth Amendment, they argue, the court need only determine that the defendant has sufficient contacts with the United States as a whole—a standard easily met in a case involving a domestic corporation like Cracker Barrel. But Plaintiffs' argument rests on the faulty premise that the Fourteenth Amendment plays no role in the jurisdictional analysis in this case.[7] *See Walden*, 571 U.S. at 283 ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." (quoting *Daimler*, 571 U.S. at 125, 134)). If the FLSA provided for nationwide service of process, we would undertake a national contacts analysis and concern ourselves only with the due process limits of the Fifth Amendment. *See Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1416 (9th Cir. 1989) (suggesting that "a national service provision is a necessary prerequisite for a court even to consider a national contacts approach"). However, the FLSA contains no such provision, which means that we must look to state law and, in turn, the Fourteenth Amendment. *See Herbal Brands, Inc.*, 72 F.4th at 1089.

In reaching its contrary holding, the First Circuit acknowledged that the Fourteenth Amendment constrains a federal court's personal jurisdiction in FLSA collective actions by virtue of Rule 4(k)(1)(A).

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[7] *Bristol-Myers* clarified that it "concern[ed] the due process limits on the exercise of specific jurisdiction by a State" and left "open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court." 582 U.S. at 268–69. Because our holding rests on the Fourteenth Amendment, we also do not answer that question.

Waters, 23 F.4th at 94. The court reasoned, though, that the Fourteenth Amendment is relevant only to the service of a summons by the original plaintiff. *Id.* at 94–96. Then, once the original plaintiff effects service, "the Fifth Amendment's constitutional limitations limit the authority of the court" as to all other plaintiffs and claims. *Id.* at 96. That approach is "'hard to reconcile with *Bristol-Myers*,' as it would create another 'loose and spurious form of general jurisdiction'" that "would permit later-added claims of any kind—whether under the FLSA or plain old Rule 18 joinder—to sidestep the usual jurisdictional limits." *Vanegas*, 113 F.4th at 729 (citations omitted) (first quoting *Canaday*, 9 F.4th at 401; and then quoting *Bristol-Myers*, 582 U.S. at 264). We have long held that "[p]ersonal jurisdiction must exist for each claim asserted against a defendant." *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004) (citing *Data Disc, Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1289 n.8 (9th Cir. 1977)). Nothing in the text of the FLSA or the nature of the collective action suggests that the framework for the court's personal jurisdiction analysis changes between the original plaintiff's claims and opt-in plaintiffs' claims.

We, therefore, hold that the reasoning of *Bristol-Myers* applies in FLSA collective actions, and the district court erred in its assumption that the participation of a single plaintiff with a claim arising out of Cracker Barrel's business in Arizona was sufficient to establish personal jurisdiction over Cracker Barrel for all claims in the collective action.

IV. Conclusion.

Although we conclude that the district court employed a permissible process for evaluating these threshold questions, we vacate and remand for the district court to reassess its preliminary certification in light of our holding that *Bristol-Myers* applies to FLSA collective actions.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Each party will bear its own costs on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-21-00940-PHX-DJH

ASHLEY GILLESPIE, ET AL.,

Plaintiffs,

V.

CRACKER BARREL OLD COUNTRY STORE INCORPORATED,

Defendant.

Filed March 31, 2023

OPINION AND ORDER

DIANE J. HUMETEWA, United States District Judge.

This action arises out of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. ("FLSA"). Plaintiffs Andrew Harrington ("Harrington"), Katie Liammaytry ("Liammaytry"), Jason Lenchert ("Lenchert"), and Dylan Basch ("Basch") (collectively "Plaintiffs") have filed a Second Amended Motion for Conditional Certification ("Second Motion to Certify") (Doc. 76).[1] Defendant Cracker Barrel Old Country Store Incorporated ("Cracker Barrel") has filed a Motion to Compel Individual Arbitration and Dismiss Second Amended Complaint with Prejudice ("Motion to Dismiss and

[1] The matter is fully briefed. (*See* Response at Doc. 78 and Reply at Doc. 79).

Compel Arbitration") (Doc. 77).[2] The Court must decide whether the matter should be conditionally certified as a collective action under the FLSA notwithstanding Cracker Barrel's Arbitration Agreement. For the following reasons, the Court grants in part Plaintiffs' Second Motion to Certify and denies Cracker Barrel's Motion to Dismiss and Compel Arbitration.

I. Background.

This matter concerns Plaintiffs' ongoing collective efforts against Cracker Barrel for allegedly violating provisions of the FLSA that govern wages for tipped-employees. Plaintiffs have filed three complaints: the "Original Complaint" (Doc. 1), the First Amended Complaint ("FAC") (Doc. 57), and the Second Amended Complaint ("SAC") (Doc. 74). Plaintiffs previously attempted to certify this matter as a collective action under the FLSA, but were unsuccessful due to Cracker Barrel's Arbitration Agreement (the "Agreement") (Doc. 77-3 at 2–6). (*See generally* Doc. 47). For context, the Court provides a brief overview of each complaint.

A. The Original Complaint (Doc. 1) and the Court's 2021 Order (Doc. 47).

The named plaintiffs in the Original Complaint were Ashley (Jade) Gillespie ("Gillespie"), a former Arizona Cracker Barrel employee; Tonya Miller, a current South Carolina Cracker Barrel employee; Tami Brown, a current North Carolina Cracker Barrel employee; and Sarah Mangano, a current Penn-

[2] The matter is also fully briefed (*See* Response at Doc. 80 and Reply at Doc. 81).

sylvania Cracker Barrel employee (collectively the "Original Plaintiffs"). (Doc. 1 at ¶¶ 6–9). In its November 12, 2021, Order (the "2021 Order"), the Court found Cracker Barrel's Arbitration Agreement was valid and enforceable and that the Original Plaintiffs were subject to the Agreement. (Doc. 47 at 9). Accordingly, the Court granted Cracker Barrel's First Motion to Dismiss and Compel Arbitration (Doc. 21) and denied the Original Plaintiffs' First Motion for Conditional Certification (Doc. 8) without prejudice. (Doc. 47). The Original Plaintiffs were dismissed so that they may pursue their claims in arbitration. (*Id.* at 10). However, the Court permitted them leave to file a first amended complaint because some opt-in plaintiffs were capable of voiding the Agreement due to their status as minors. (*Id.*)

B. The First Amended Complaint (Doc. 57) and the Court's 2022 Order (Doc. 73).

The named Plaintiffs in the FAC were Harrington, a former Ohio Cracker Barrel employee; Liammaytry, a former North Carolina Cracker Barrel employee; and Lenchert, a current Florida Cracker Barrel employee (collectively the "FAC Plaintiffs"). (Doc. 57 at ¶¶ 6–8). All of the FAC Plaintiffs were alleged to be minors when they signed the Agreement, but neither of them worked in any of the fourteen Cracker Barrel stores in Arizona. (Doc. 73 at 2, 5). Accordingly, in its July 22, 2022, Order (the "2022 Order"), the Court granted Cracker Barrel's Motion to Dismiss (Doc. 62) for lack of personal jurisdiction. (Doc. 73). It also denied as moot the FAC Plaintiffs' Amended Motion for Conditional Certification (Doc. 58) and Motion for Partial Dismissal (Doc. 60). (*Id.*)

C. The Operative Second Amended Complaint (Doc. 74).

In their SAC—presumably to address the personal jurisdiction concerns and deficiencies of the FAC—Plaintiffs added Basch as a fourth plaintiff with Harrington, Liammaytry, and Lenchert. (Doc. 74 at ¶¶ 6–9). Basch has worked in the Goodyear and Chandler Cracker Barrel restaurants located in Arizona since March 26, 2019, and continues to do so. (Doc. 74-2 at ¶ 2; Doc. 77 at 6). Cracker Barrel records indicate that Basch was born in January 2003 (Doc. 77-1 at ¶ 9), thus he was sixteen-years-old when he joined Cracker Barrel. (Doc. 74-2 at ¶ 4).

Basch was onboarded through Cracker Barrel's routine online employee training program, during which he was presented with Cracker Barrel's Arbitration Agreement through the "ADR[3] Sign-Off" module. (Doc. 77-1 at ¶¶ 3, 6). Cracker Barrel's Human Resources Director explained that "[o]nce an employee is presented with the Arbitration Agreement to read and review, he or she is instructed to 'Please close this document and mark "complete" to signify you have read, understood and will comply with the agreement.['] If the employee closes the [] Agreement, the employee is presented with a screen that allows the employee to click 'Mark Complete.' Once the employee clicks 'Mark Complete,' [Cracker Barrel] makes a record of the date and time at which he or she agreed to comply with the [] Agreement." (*Id.* at ¶ 7).

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[3] ADR stands for "Alternative Dispute Resolution."

Cracker Barrel's records reflect that Basch electronically completed the Agreement on October 19, 2019, seven months after he started employment. (Doc. 77-2). On August 10, 2022, Basch submitted the SAC to this Court with an attached declaration stating: "I have still not seen any such agreement forcing me to arbitrate claims against Cracker Barrel (rather than pursuing in court), but to any extent such an agreement exists, I am canceling or voiding it." (Doc. 74-2) Basch purports to void the Agreement with Cracker Barrel on the basis that he was a minor when he allegedly entered into the Agreement.

Plaintiffs are all current or former tipped-employees and bring the following four counts against Cracker Barrel in the SAC:

> Count I for failure to pay tipped-employees minimum wages for work performed on non-tipped duties that exceed 20% of their work time under 29 U.S.C. §§ 203(m), 206;
>
> Count II for failure to timely inform tipped employees of the tip credit requirements under 29 U.S.C. § 203(m);
>
> Count III for failure to pay tipped-employees minimum wages for "off-the-clock" work under 29 U.S.C. §§ 206, 207; and
>
> Count IV for lack of good faith and willfully violating the FLSA under 29 U.S.C. § 255(a).

(Doc. 74 at ¶¶ 85–105). Plaintiffs bring these Counts on behalf of themselves and other similarly situated employees as a collective action under 29 U.S.C. §§ 206, 216(b). (*Id.* at ¶¶ 76–77).

II. Discussion.

The Court must determine whether Plaintiffs' SAC should be conditionally certified as a collective action under the FLSA notwithstanding Cracker Barrel's Arbitration Agreement. Because it is dispositive, the Court will first consider Cracker Barrel's Motion to Dismiss and Compel Arbitration. Cracker Barrel moves to dismiss the SAC for either lack of personal jurisdiction or failure to state a claim for which relief can be granted. The Court will then turn to Plaintiffs' Second Motion to Certify.

A. Cracker Barrel's Motion to Dismiss and Compel Arbitration (Doc. 77).

Cracker Barrel once again moves to dismiss the SAC and seeks to compel the Plaintiffs to arbitrate their claims. Cracker Barrel argues newly-added plaintiff Basch fails to state a claim for relief because he is subject to the Arbitration Agreement. (Doc. 77 at 6–10). Cracker Barrel further reasons that if Basch is subject to the Agreement, then the Court again lacks personal jurisdiction over Harrington, Liammaytry, and Lenchert's claims because they do not arise out of Arizona. (*Id.* at 5 (citing the Court's 2022 Order (Doc. 73) dismissing the FAC for lack of personal jurisdiction over Harrington, Liammaytry, and Lenchert)). The Court will consider each of Cracker Barrel's arguments in turn.

1. *Whether the Second Amended Complaint Confers Specific Personal Jurisdiction over Cracker Barrel.*

First, Cracker Barrel argues the Court lacks personal jurisdiction over Harrington, Liammaytry, and Lenchert's claims because they were not employed in

Arizona. (Docs. 77 at 5; 81 at 9–10). This Court has already settled various issues pertaining to personal jurisdiction in its 2022 Order. It confirmed it does not have general personal jurisdiction over Cracker Barrel. (Doc. 73 at 5). It also explained it has specific personal jurisdiction over claims against Cracker Barrel when there are allegations by a named plaintiff who worked in an Arizona restaurant. (*Id.* at 3).

For example, the Court explained "the defense of lack of personal jurisdiction was not available to Cracker Barrel when it filed its [F]irst Motion to Dismiss" because "the original complaint included allegations of a Plaintiff who worked in Arizona restaurant" through Gillespie. (*Id.*) The Court indeed found, as Cracker Barrel argues, that "there [were] insufficient connections between [Harrington, Liammaytry, Lenchert], Cracker Barrel, and this forum to justify the exercise of specific personal jurisdiction." (*Id.*) This is because although "Cracker Barrel purposefully directs some activities to Arizona because it operates restaurants here[,]" the claims set forth by Harrington, Liammaytry, and Lenchert "do not arise out of Cracker Barrel's operation of restaurants in Arizona" to establish specific personal jurisdiction. (*Id.* at 5).

In light of the 2022 Order, the addition of Basch—a current Arizona Cracker Barrel employee—as a plaintiff cures the personal jurisdiction deficiencies as to Harrington, Liammaytry, and Lenchert. (*Id.* at 3). The SAC therefore establishes the Court's personal jurisdiction over Cracker Barrel by virtue of Cracker Barrel and Basch's contacts with the forum state.

2. *Whether the Second Amended Complaint States a Claim for Which Relief can be Granted.*

Second, Cracker Barrel argues that Basch should be dismissed for failure to state a claim for which relief can be granted because his claims are subject to arbitration. The Court will first confirm the validity of Cracker Barrel's Arbitration Agreement before examining Basch's efforts to void the agreement.

a. 12(b)(6) Standards.

Though not explicitly stated, the Court construes Cracker Barrel's Motion to Dismiss and Compel Arbitration as a Federal Rules of Civil Procedure 12(b)(6) motion for failure to state a claim because Basch's claim is barred by the Arbitration Agreement. *See e.g.*, *Leal v. Chapman Chevrolet, L.L.C.*, 2007 WL 1576001, at *1–2 (D. Ariz. May 30, 2007). If Basch's claim is arbitrable, the district court "will never reach the merits of the parties' controversy. Rather, [the district court's] jurisdiction is limited to compelling arbitration, *see* 9 U.S.C. § 4, and reviewing any future arbitration award, *see* 9 U.S.C. §§ 9–12." *Id.* at *2 (citations in original).

A motion to dismiss pursuant to Rule 12(b)(6) challenges the legal sufficiency of a complaint. *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011). Complaints must contain a "short and plain statement showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). This requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Dismissal of a complaint for failure to state a

claim can be based on either the "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In reviewing a motion to dismiss, courts will "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But courts are not required "to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

b. Cracker Barrel's Arbitration Agreement is Valid and Enforceable.

This Court has already settled three issues pertaining to Cracker Barrel's Arbitration Agreement in its 2021 Order. First, the Court found that Cracker Barrel's Agreement is valid and enforceable against those employees who are subject to the Agreement. (Doc. 47 at 9). Cracker Barrel employees routinely sign the Agreement as part of an online employee training program.[4] (*Id.* at 8). The Court confirmed that this method of executing the Agreement with employees is procedurally conscionable. (*Id.*) Second,

[4] "As part of this training, employees log on to an online program using their 'personal email address or individual access number along with their confidential password.' The program guides them through several modules, including one that covers the Agreement. 'Once the employee is presented with the arbitration agreement to read and review, he or she is instructed to 'Please close this document and mark 'complete' to signify that you have read, understood and will comply with the agreement.'" (Doc. 47 at 8) (internal citations omitted).

a Cracker Barrel employee who signed the Agreement through this online method cannot void the Agreement "by simply saying 'I forgot.'" (*Id.*) Last, the Court clarified that the Arbitration Agreements that Cracker Barrel executed "with minors can be voided." (*Id.* at 3; *see also id.* at 9 ("Plaintiffs [who] alleged to have been minors during their employment with Cracker Barrel [] are not subject to the [Arbitration] Agreement.")).

According to the first two findings in the 2021 Order, Basch entered into a valid and enforceable Arbitration Agreement with Cracker Barrel. Basch electronically signed the Agreement on October 19, 2019, through the same online method affirmed by the Court as procedurally conscionable. (*Compare* Docs. 77-1 at ¶¶ 4–10; 77-2 at 2, *with* Doc. 47 at 8–9). And although Basch states he does "not recall signing an agreement to arbitrate" (Doc. 74-2 at ¶ 3), this is an insufficient basis to void the Agreement under the 2021 Order. (Doc. 47 at 8).

c. Minor Employees Can Void Cracker Barrel's Arbitration Agreement Within a Reasonable Time After Adulthood.

The remaining issue concerns Basch's efforts to void the Agreement after he turned eighteen-years-old. (*Id.* at 3 (finding that "some opt-in plaintiffs were capable of voiding the Agreement due to their status as minors")). It is undisputed that Basch was a sixteen-year-old minor when he signed Cracker Barrel's Arbitration Agreement in 2019. (Docs. 74-2 at ¶ 4; 77-2). It is also undisputed that any efforts Basch took to void the Agreement took place in August 2022, which is eighteen months after he turned the

majority age. (*See* Doc. 74-2). However, the parties disagree on whether eighteen months is a reasonable time for a minor to effectively disaffirm the Agreement. (Docs. 77 at 10; 80 at 3–5).

Arizona state law allows a person to void a contract that they entered into while a minor, provided they do so within a reasonable time of reaching the majority age. *Almada v. Ruelas*, 96 Ariz. 155, 158 (1964). However, Arizona courts have not explicitly defined what a "reasonable time" means for a minor to effectively disaffirm a contract. What constitutes a "reasonable time" is "answered in view of the peculiar circumstances of each case." *Sims v. Everhardt*, 102 U.S. 300, 309 (1880); *see Hurley v. Southern Cal. Edison Co.*, 183 F.2d 125, 132 (9th Cir. 1950).

At the outset, the Court has already identified two opt-in Plaintiffs that were not subject to arbitration because they entered into Cracker Barrel's Arbitration Agreement as minors. (Doc. 47 at 3 (citing 29-2)). Those opt-in Plaintiffs had voided their Agreements 2–4 years after turning the majority age, which is well over eighteen months. (*See* Doc. 29-2). Accordingly, as a matter of consistency and fairness, the Court finds Basch's eighteen months delay in voiding his Agreement is reasonable. Furthermore, the circumstances particular to Basch do not raise any concerns regarding the length of time that passed before his disaffirmance. In Basch's declaration voiding the Agreement, he states the following:

> At no time during my employment at Cracker Barrel did any manager or [human resources] representative tell me that I was agreeing to arbitrate disputes or waiving any rights to pursue claims in court. Nobody has ever ex-

> plained to me the terms of any alleged agreement to arbitrate.

(Doc. 74-2).

A minor's lack of understanding as to the significance of a contract was an important factor in *Hurley*, 183 F.2d at 132. There, the Ninth Circuit considered the general issue of what constitutes a "reasonable time" for a minor to void a contract under state law.[5] The court held that an individual who disaffirmed a contract fifteen years after reaching the age of majority had done so within a reasonable time because "[he] had no opportunity to exercise any judgment upon the matter until [he] learned he had some interest in [the contract]." *Id.*

Here, considering Basch's averment, eighteen months is a reasonable time for him to disaffirm the Arbitration Agreement. Basch states that no one explained to him that he was waiving his rights to pursue claims in court by signing the Agreement. Therefore, he had "no opportunity to exercise any judgment upon the matter" until learning the significance of the Agreement. *Hurley*, 183 F.2d at 132. When viewing Basch's statements in light most favorable to Plaintiffs, as the Court must upon a motion to dismiss, the Court finds Basch voided his Agreement

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[5] In *Hurley*, the Ninth Circuit noted that both California and Missouri state law recognized the general principle that contracts "were voidable at the election of the minor manifested within a reasonable time after reaching his majority." 183 F.2d at 131. Thus, in issuing its ruling, the circuit court found it "unnecessary to determine which law governs, as the rule with respect to disaffirmance of infant's contracts is the same in either state." *Id.* at 132.

within a reasonable time.[6] (Doc. 80 at 5) (citing *Hurley*, 183 F.2d at 125). Basch is therefore not subject to arbitration.

Last, the Court rejects Cracker Barrel's policy argument that it would be inequitable to allow Basch to void the Agreement on the grounds that he has continued to take the benefits of continued employment with Cracker Barrel after turning the majority age. (Doc. 77 at 8–10). Although Cracker Barrel cites several out-of-state cases[7] to support this argument, it has not identified any law in Arizona recognizing this exception to the general rule that a minor may void a contract within a reasonable time. Moreover,

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[6] The Court finds the out-of-state authorities Cracker Barrel relies on to argue eighteen months is not a reasonable amount of time are distinguishable and, in any event, not binding on this issue of Arizona law. (*See* Doc. 77 at 10) (citing *Norred v. Cotton Patch Cafe, LLC*, 2019 WL 5425479, at *7 (N.D. Tex. Oct. 22, 2019); *Bobby Floars Toyota, Inc. v. Smith*, 269 S.E.2d 320, 323 (N.C. 1980); and *Kelly v. Furlong*, 261 N.W. 460, 462 (Minn. 1935)).

[7] (*See* Doc. 77 at 9 citing *Paster v. Putney Student Travel, Inc.*, 1999 WL 1074120, at *2 (C.D. Cal. June 9, 1999) (rejecting the argument that plaintiff could disaffirm a forum selection clause in a travel contract under California law that she and her mother had signed when she was a minor because she had already gone on the trip and thus experienced the benefits offered); *Bobby Floars Toyota, Inc. v. Smith*, 269 S.E.2d 320, 323 (N.C. 1980) (rejecting disaffirmance where minor plaintiff had continued to use a car he had purchased in a sale of goods contract when he was seventeen after ten months after turning eighteen under North Carolina's state infancy defense); *E.K.D. ex rel. Dawes v. Facebook, Inc.*, 885 F. Supp. 2d 894 (S.D. Ill. 2012) (rejecting disaffirmance of forum selection clause in a contract for a social media account under California's state infancy defense)).

the Court is unpersuaded that such an exception would apply in the context of an employment and/or arbitration agreement where the "benefits" differ in kind from those in the agreements at issue in the cases cited by Cracker Barrel—e.g., purchase of a trip, car, and social media account.

In sum, Basch has stated a claim for which relief can be granted and the Court therefore has personal jurisdiction over Cracker Barrel. The addition of Basch as plaintiff cures the personal jurisdiction deficiencies as to Harrington, Liammaytry, and Lenchert. The Court will accordingly deny Cracker Barrel's Motion to Dismiss and Compel Arbitration.

B. Plaintiffs' Second Motion to Certify.

The Court will now consider Plaintiffs' Second Amended Motion for Conditional Certification. Plaintiffs apply the Ninth Circuit's lenient two-step approach for collective action certification. (Doc. 76 at 10–11). As mentioned, they seek to bring the following counts against Cracker Barrel as an FLSA collective action:

> Count I for failure to pay tipped-employees minimum wages for work performed on non-tipped duties that exceed 20% of their work time under 29 U.S.C. §§ 203(m), 206;
>
> Count II for failure to timely inform tipped employees of the tip credit requirements under 29 U.S.C. § 203(m);
>
> Count III for failure to pay tipped-employees minimum wages for "off-the-clock" work under 29 U.S.C. § 206; and

> Count IV for lack of good faith and willfully violating the FLSA under 29 U.S.C. § 255(a).

(Doc. 74 at ¶¶ 85–105). They propose the following putative class should be certified: "all servers who worked for Cracker Barrel in states where it attempts to take a tip credit, under 29 U.S.C. § 203(m), over the last three years, which is the maximum time-period allowed under ... 29 U.S.C. § 255(a)." (Doc. 76 at 3).[8] Plaintiffs also request the Court to approve their proposed method of notice to the defined collective. (*Id.* at 12–17).

At the outset, Cracker Barrel urges this Court to follow the Fifth Circuit's more stringent standard for collective action certification. (Doc. 78 at 3). It argues Plaintiffs and the defined collective are not similarly situated because Plaintiffs cannot show Cracker Barrel maintains policies that violated the FLSA. (*Id.* at 4–6). As to Plaintiffs' proposed notice, Cracker Barrel contests it will be sent to employees who are subject to arbitration and the Court will not have personal jurisdiction over the claims of opt-in plaintiffs outside of Arizona. (*Id.* at 6–16). Last, Cracker Barrel asks to submit an additional brief to address Plaintiffs' proposed notice procedures as overbroad. (*Id.* at 16).

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[8] The Court notes the proposed putative class in Plaintiffs' Motion to Certify varies from the proposed putative class in their Complaint. *Compare* (Doc. 76 at 3), *with* (Doc. 74 at ¶ 11). For the purpose of this Order, the Court will consider the proposed putative class in Plaintiffs' Motion to Certify as it is most consistent with its Proposed Notice and Consent to Join Forms. *Compare* (Doc. 76 at 3), *with* (Doc. 76-13 at 3).

The Court will first set forth the applicable standard for collective certification under the FLSA. The Court will then determine whether conditional certification of the present matter as a collective action is proper. Finding that it is, the Court will last consider Plaintiffs' proposed form of notice.

1. *Legal Standard for Conditional Certification Under the Fair Labor Standards Act*.

Plaintiffs filed their SAC "on behalf of themselves and other similarly situated employees as a collective action pursuant to the FLSA, 29 U.S.C. §§ 206 and 216(b)." (Doc. 74 at ¶ 76–77). Section 216(b)[9] establishes a mechanism for bringing collective actions under the FLSA. *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1108–09 (9th Cir. 2018) (citing 29 U.S.C. § 216(b)). Section 216(b) provides:

> An action to recover the liability prescribed [this subsection] 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.

29 U.S.C. § 216(b) (emphasis added). "The FLSA does not define the term 'similarly situated' or describe

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[9] Except where otherwise noted, all section references are to the Fair Labor Standards Act, Title 29 of the United States Code.

the process for evaluating the propriety of a collective action." *Sandbergen v. Ace Am. Ins. Co.*, 2019 WL 13203944, at *2 (N.D. Cal. June 17, 2019) (citation omitted). Thus, the Ninth Circuit employs a two-step approach to collective action certification that addresses "preliminary certification" and "decertification." *Campbell*, 903 F.3d at 1100 (citing 1 McLaughlin on Class Actions § 2:16 (14th ed. 2017)) (applying the certification process in the context of the FLSA). These terms have been adopted from Federal Rule of Civil Procedure 23, which governs class actions in federal court. *Id.*

At the first preliminary certification stage, the main focus is for the Court to determine whether the defined collective is "similarly situated," as required by Section 216(b). *Id.* at 1109. The standard is "loosely akin to a plausibility standard, commensurate with the stage of the proceedings." *Id.* Courts continuously describe this stage as "lenient." *See Juvera v. Salcido*, 294 F.R.D. 516, 519–20 (D. Ariz. 2013); *Benedict v. Hewlett-Packard Co.*, 2014 WL 587135, at *6 (N.D. Cal. Feb. 13, 2014); *Schiller v. Rite of Passage, Inc.*, 2014 WL 644565, at *3 (D. Ariz. Feb. 19, 2014). If granted, "preliminary certification results in the dissemination of a court-approved notice to the putative collective action members, advising them that they must affirmatively opt in to participate in the litigation." *Campbell*, 903 F.3d at 1109. Then, the second stage occurs after discovery and allows the employer to move for "decertification" of the collective action if it can show that the Plaintiffs do not satisfy the "similarly situated" requirement in light of further evidence. *Id.* This prompts the court to "take a more exacting look at the plaintiffs' allegations and the record." *Id.*

Cracker Barrel posits this Court should reject the Ninth Circuit approach and instead employ the Fifth Circuit's more stringent standard set forth in *Swales v. KLLM Transp. Servs. LLC*, 985 F.3d 430 (5th Cir. 2021). (Doc. 78 at 3). However, Cracker Barrel provides no argument for this proposition and does not cite to any court within this circuit that has done so. *Cf. Droesch v. Wells Fargo Bank, N.A.*, 2021 WL 1817058, at *4 (N.D. Cal. May 6, 2021) (rejecting *Swales* and following *Campbell*). The Court remains unpersuaded and will adhere to the binding Ninth Circuit approach for collective certification under the FLSA as recently clarified in *Campbell*, 903 F.3d at 1108–09.

2. *Conditional Certification of the Present Matter.*

This matter falls within the first step of the Ninth Circuit's approach to collective actions as Plaintiffs request this Court to conditionally certify this action under the FLSA. The preliminary certification stage entails three requirements: "[i]t is evident from the [FLSA] that workers may litigate jointly if they (1) claim a violation of the FLSA, (2) are 'similarly situated,' and (3) affirmatively opt into the joint litigation, in writing." *Campbell*, 903 F.3d at 1100.

Plaintiffs argue the Court should grant conditional certification because they and the proposed putative class are similarly situated "victims" of Cracker Barrel's nationwide uniform policies and practices that violate the FLSA. (*See* Doc. 76 at 12). Plaintiffs also request the Court to approve their method of notice to the defined collective. (Docs. 76 at 12–17; 76-13 (Proposed Notice Form); 76-14 (Proposed Consent

to Join Form)). The Court will address each of the three conditional certification requirements in turn.

a. Plaintiffs' Fair Labor Standard Act Claims.

For preliminary certification purposes, Plaintiffs' FLSA allegations neither need to be strong nor conclusive. *Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 926 (D. Ariz. 2010). A court's determination to "conditionally certify a proposed class for notification purposes only," and "courts do not review the underlying merits of the action." *Id.*

Plaintiffs are all current or former "tipped employees"[10] for Cracker Barrel who are not subject to Cracker Barrel's Arbitration Agreement. (Doc. 74 at ¶¶ 6–9). Plaintiffs represent that Cracker Barrel pays its tipped employees less than minimum wage under the FLSA's tip credit scheme in most of the states in which it operates. (*Id.* at ¶¶ 22–23). Within the last three years, they claim: (1) they were paid less than minimum wage while spending more than 20% of their work time on non-tipped duties; (2) they did not receive a timely tip credit notice; and (3) they were not compensated for working off-the-clock. (Docs. 76 at 4–7; 74 at ¶¶ 85–105). Thus, Plaintiffs allege (4) Cracker Barrel willfully violated the FLSA under Sections 203(m), 206, 207, and 255(a). (Docs. 76 at 7, 9; 74 at ¶¶ 103–06).

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[10] The FLSA defines a "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. § 203(t).

i. Minimum Wages for Non-tipped Work.

Under Count I, Plaintiffs claim Cracker Barrel violated the FLSA by failing to pay tipped-employees minimum wages for excessive work performed on non-tipped duties. (Doc. 74 at ¶¶ 85–91). "An employer may fulfill part of its [Section 206] minimum wage obligation to a tipped employee with the employee's tips." *Or. Rest. & Lodging Ass'n v. Perez*, 816 F.3d 1080, 1082 (9th Cir. 2016) (citing 29 U.S.C. § 203(m)). This practice is known as taking a "tip credit" under Section 203(m). *Id.* However, tip credits are subject to the Department of Labor's 80/20 rule[11] for dual jobs. *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 630 (9th Cir. 2018) (citing FOH § 30d00(f) (2016) with approval) (finding the Department of Labor's guidance on dual jobs is entitled to *Auer* deference). Therefore, a tipped employee sufficiently states a claim under the FLSA when she alleges her employer failed to pay her the full hourly minimum wage for time spent on non-tipped duties in excess of 20% of the workweek. *Id.* at 615–16, 633.

Plaintiffs state that tipped employees at Cracker Barrel are all assigned various "side-work," none of which are tipped duties or related to the employee's occupation. (Doc. 74 at ¶¶ 28–29). Plaintiffs claim

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[11] The 80/20 rule provides that "[a]n employee who engages in untipped 'work that is not related to the tipped occupation' or spends more than 20% of her workweek on related duties that are not themselves directed toward producing tips must be treated as working in an untipped occupation and paid the full hourly minimum wage." *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 630 (9th Cir. 2018) (citing FOH § 30d00(f) (2016) with approval).

Cracker Barrel has violated the 80/20 rule over the last five years by increasing the amount of non-tipped work that its tipped employees are required to perform. (Doc. 74 at ¶¶ 47–60; *see also* Docs. 76 at 5; 76-6 (copy of Cracker Barrel's policy assigning stocking and cleaning duties to tipped servers)). Plaintiffs have submitted declarations by eight current or former tipped employees stating they have consistently spent more than 20% of their working hours on non-tipped work and have witnessed their coworkers do the same. (*See* Docs. 76-2; 76-3; 76-4; 76-5; 76-9; 76-10; 76-11; 76-12). Plaintiffs argue this excess time should be compensated at minimum wage. (Doc. 76 at 6).

ii. Notification of Tip Credit.

Under Count II, Plaintiffs claim Cracker Barrel violated the FLSA by failing to inform tipped employees of its use of the tip credit scheme. (Doc. 74 at ¶¶ 92–95). Section 203(m) prohibits an employer from taking a tip credit unless it (1) gives employees prior notice of their intent to use a tip credit and (2) allow its employees to retain all the tips they receive. *Or. Rest. & Lodging Ass'n*, 816 F.3d at 1082, 1084; *see* 29 U.S.C. § 203(m)(2)(a).

Plaintiffs represent that Cracker Barrel does not timely inform its servers of its tip credit requirements. (Doc. 76 at 2; 74 at ¶¶ 61–66). Plaintiffs allege that Cracker Barrel only notifies tipped employees of this information on the employee's first paystub, which is two weeks after Cracker Barrel has already taken tip credits. (Doc. 76 at 6). To support this, Plaintiffs include copies of paystubs and declarations from current and former tipped employees of Cracker Barrel. (*See* Docs. 76-1; 76-7).

iii. Minimum Wages for Off-the-Clock Work.

Under Count III, Plaintiffs claim Cracker Barrel violated the FLSA by failing to pay tipped-employees minimum wages for "off-the-clock" work. (Doc. 74 at ¶¶ 96–102). Sections 206 and 207 require an employer to pay its employees for all hours worked and at least one and one-half times their "regular rate" for all hours worked in excess of a forty hour workweek. 29 U.S.C. §§ 206(a)(1), 207(a)(1).

Plaintiffs allege that Cracker Barrel requires or allows employees to work off-the-clock without compensation. (Docs. 76 at 7; 74 at ¶¶ 96–102). For example, Plaintiffs state employees are often required to clock-out before they are done performing various non-tipped duties and before they receive their tips. (Doc. 74 at ¶ 69). They also allege employees are often required to help with non-tipped duties before clocking-in. (*Id.*) Plaintiffs support these allegations with declarations from current and former tipped employees and a former Store Operations Supervisor. (*See* Docs. 76-1; 76-2; 76-3; 76-4; 76-5).

iv. Lack of Good Faith and Willful Violation.

Under Count IV, Plaintiffs claim Counts I–III show Cracker Barrel lacked good faith and willfully violated the FLSA. (Doc. 74 at ¶¶ 103–105). Section 255(a) allows a plaintiff to bring an FLSA "cause of action arising out of a willful violation ... within three years after the cause of action accrued." 29 U.S.C. § 255 (a).

Plaintiffs claim that Cracker Barrel's alleged violations were willful and that Cracker Barrel did not

act in good faith when attempting to comply with the FLSA. (Doc. 74 at ¶¶ 103–105). It represents Cracker Barrel's corporate management has been aware of these ongoing FLSA violations. (Doc. 76 at 5). For example, Plaintiffs include a declaration by a former Store Operations Supervisor from Cracker Barrel's corporate office stating potential pay-related violations were discussed with no remedial efforts. (Docs. 76 at 7–8; 76-1). Plaintiffs further claim Cracker Barrel "purposely limits the labor budget for each store" and "chooses not to track the amount of time servers spend on tipped duties versus non-tipped duties." (Doc. 74 at ¶ 105).

To summarize, Plaintiffs' allegations are sufficient to sustain a collective action under the FLSA.

b. Whether Plaintiffs and the Proposed Putative Class are Similarly Situated.

The second FLSA certification requirement requires Plaintiffs to show they are "similarly situated" with the defined collective under Section 216(b). *See Campbell*, 903 F.3d at 1109. According to the Ninth Circuit, plaintiffs are similarly situated "to the extent they share a similar issue of law or fact material to the disposition of their FLSA claims." *Id.* at 1117. A plaintiff "need ... only show that there is some 'factual nexus which binds the named plaintiffs and the potential class members together[.]'" *Shoults*, 2020 WL 8674000, at *2 (quoting *Stickle v. SCI W. Mkt. Support Ctr., L.P.*, 2009 WL 3241790, at *3 (D. Ariz. Sept. 30, 2009)). The standard is "lenient" and can be satisfied by "substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." *Id.* at *1 (citations omitted).

This can be achieved through similarities "with respect to their job requirements and with regard to their pay provisions." *Wood v. TriVita, Inc.*, 2009 WL 2046048, at *4 (D. Ariz. Jan. 22, 2009).

The burden rests on the plaintiff to establish they are similarly situated to the rest of the proposed class. *Shoults*, 2020 WL 8674000, at *1. The court's determination is "based primarily on the pleadings and any affidavits submitted by the parties." *Kesley v. Ent. U.S.A. Inc.*, 67 F. Supp. 3d 1061, 1065 (D. Ariz. 2014) (internal citation omitted); *see also Campbell*, 903 F.3d at 1109. It is not the court's role to resolve factual disputes, decide substantive issues relating the merits of the claims, or make credibility determinations at this first stage of certification. *See Lee v. Asurion Ins. Servs. Inc.*, 2016 WL 9525665, at *2 (D. Ariz. Dec. 2, 2016) (citing *Colson*, 687 F. Supp. 2d at 926); *see also Thornsburry v. Pet Club LLC*, 2016 WL 11602764, at *2 (D. Ariz. Nov. 22, 2016). Any "disparities in the factual employment situations of any plaintiffs who choose to opt in should be considered during the court's second tier analysis[.]" *Davis v. Westgate Planet Hollywood Las Vegas, LLC*, 2009 WL 102735, at *10 (D. Nev. Jan. 12, 2009). Thus, the plaintiff's burden is low and "the initial determination to certify ... typically results in conditional certification of a representative class." *Curphey v. F&S Mgmt. I LLC*, 2021 WL 487882, at *2 (D. Ariz. Feb. 10, 2021) (internal quotation and citation omitted).

Here, Plaintiffs propose certification of the following putative class: "all servers who worked for Cracker Barrel in states where it attempts to take a tip credit, under 29 U.S.C. § 203(m), over the last

three years, which is the maximum time-period allowed under ... 29 U.S.C. § 255(a)." (Doc. 76 at 3). Plaintiffs argue they are similarly situated with the proposed class because they are all "victims" of Cracker Barrel's uniform policies and practices that violate the FLSA. (*Id.* at 12). For support, they provide declarations of other potential class members "confirming Cracker Barrel's nationwide FLSA violations" and "witness[ing] other servers at their locations being treated the same." (*Id.* at 12).

The Court finds Plaintiffs have met their burden. First, all party plaintiffs are current or former tipped employees for Cracker Barrel that are paid under the tip credit scheme. Thus, they are similarly situated with regard to their pay provisions. *Wood*, 2009 WL 2046048, at *4. Second, all party plaintiffs are "servers" and have the same job duties. Plaintiffs have submitted a declaration by a former Store Operations Supervisor stating Cracker Barrel stores use a "sidework chart created by corporate" that assigns nontipped duties to all servers. (Doc. 76-1 at ¶ 5). Plaintiffs have also provided a copy of the purported "sidework chart." (*see also* Doc. 76-6). Thus, all party plaintiffs are similarly situated with regard to their job requirements. *Wood*, 2009 WL 2046048, at *4.

Cracker Barrel contends Plaintiffs have not met their burden for preliminary certification because they failed to show Cracker Barrel maintains any unlawful common policy or plan. (Doc. 78 at 3–6). It submits its own affidavits and declarations to justify its current policies as compliant under the FLSA. (*Id.*) But, as explained, it is not the court's role to resolve factual disputes, decide substantive issues relating the merits of the claims, or make credibility

determinations at this first stage of certification. *See Lee*, 2016 WL 9525665, at *2. The declarations and affidavits provided by Plaintiffs and potential class members contain substantial allegations that they were "victims" of Cracker Barrel's uniform, nationwide policies. *Shoults*, 2020 WL 8674000, at *2; (*see* Doc. 79 at 4). Plaintiffs have therefore shown sufficient factual nexuses that bind them with the proposed putative class. *Shoults*, 2020 WL 8674000, at *2; *see e.g., Campbell*, 903 F.3d at 1102 ("[A]llegations of a Department-wide policy should suffice to make the [employees] similarly situated[.]").

In sum, Plaintiffs have met their burden in showing they and the defined collective are similarly situated under the lenient standard applicable at the first step of the certification process. All party plaintiffs are current or former tipped servers at Cracker Barrel who are paid under the tip credit scheme and allege the same FLSA violations. Therefore, the Court will conditionally certify the present matter as a collective action under the FLSA for notice purposes.

3. *Approval of Notice.*

The third FLSA certification requirement is "the dissemination of a court-approved notice to the putative collective action members, advising them that they must affirmatively opt in to participate in the litigation." *Campbell*, 903 F.3d at 1109. To effectuate notice to the defined collective, Plaintiffs ask this Court to approve their Proposed Notice and Consent to Join forms (Docs. 76-13; 76-14); authorize Plaintiffs to mail, email, text, and post notices to potential collective members; and require Cracker Barrel to produce information of all current and former servers

who worked at the company within the relevant opt-in period. (Doc. 76 at 1–2, 10–11).

Cracker Barrel argues that Plaintiffs' proposed notice is improper because: (1) notice will be sent to employees who are subject to Cracker Barrel's Arbitration Agreement; and (2) the Court does not have personal jurisdiction over Cracker Barrel for collective action members outside of Arizona. (Doc. 78 at 6–16). Cracker Barrel also asks to submit an additional brief to address Plaintiffs' proposed notice method and procedures as overbroad. (*Id.* at 16). The Court will first address Cracker Barrel's jurisdictional arguments before turning to Plaintiffs' proposed notice procedures.

a. Cracker Barrel's Jurisdictional Arguments.

i. Employees Subject to Arbitration.

First, Cracker Barrel argues that Plaintiffs cannot send notice to servers who are bound by its Arbitration Agreement and Plaintiffs have otherwise failed to identify any servers who are not subject to the Agreement. (Doc. 78 at 6–7). Plaintiffs represent its Proposed Notice and Consent to Join Forms comply with the Court's Prior Orders regarding the enforceability of the Agreement because it "inform[s] potential opt-in plaintiffs that they can only join if they are not subject to arbitration." (Doc. 76 at 2 n.1; *see also* Doc. 76-13 at 1, 2).

At the outset, the Court has clarified which of Cracker Barrel's employees are subject to the Agreement versus those employees who are not. Employees who have signed the Agreement, including through Cracker Barrel's online training program,

while the majority age are subject to the Agreement. (Doc. 47 at 8–9). By contrast, employees are not subject to the Agreement if they: (1) did not sign the Agreement; (2) signed the Agreement when they were a minor and are still a minor; or (3) signed the Agreement when they were a minor and voided the Agreement after turning the majority age.[12] *Id.*; *see supra* Section II.A(2)(b)–(c).

Cracker Barrel cites to *Sandbergend v. Ace American Ins.* for the proposition that notice cannot be sent to servers who are bound by the Agreement. (Doc. 78 at 6–7 citing 2019 WL 13203944). In that case, the California district court held that plaintiffs could not send notice to any potential class members who had signed an arbitration agreement. *Id.* at *4. The plaintiffs had stipulated that any class member who signed the arbitration agreement would proceed with arbitration as the agreement's enforceability was not at issue. *Id.* at *2.

This matter is distinct from *Sandbergend* because the enforceability of Cracker Barrel's Arbitration Agreement *is* at issue. As stated, some Cracker Barrel employees are not bound by the Arbitration Agreement despite having signed it. Thus, "[a]t this stage, all putative collective members remain *potential* plaintiffs." *Monplaisir v. Integrated Tech Grp., LLC*, 2019 WL 3577162, at *3 (N.D. Cal. Aug. 6,

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[12] For example, "at least two of the opt-in Plaintiffs are not subject to arbitration" having disaffirmed their Agreements 2–4 years after turning the majority age (Doc. 47 at 3 (citing 29-2)). Additionally, Basch is not subject to arbitration having disaffirmed his Agreement eighteen months after turning the majority age. *See supra* Section II.A(2).

2019) (emphasis added). Courts in this circuit have continuously held that disputes over which putative class members are subject to arbitration are better addressed at the second stage of the certification process. *See e.g., id.* ("[T]o avoid putting the cart before the horse, this inquiry [of arbitration] is best left for step two"); *Mejia v. Bimbo Bakeries USA Inc.*, 2018 WL 11352489, at *4 n.7 (D. Ariz. May 7, 2018); *Campanelli v. Image First Healthcare Laundry Specialists, Inc.*, 2018 WL 6727825, at *8–9 (N.D. Cal. Dec. 21, 2018); *Delara v. Diamond Resorts Int'l Mktg., Inc.*, 2020 WL 2085957, at *5–6 (D. Nev. Apr. 30, 2020).

In sum, Plaintiffs have met their burden for conditional certification under the similarly situated standard. Even though some notified members of the putative class may be "subject to an enforceable arbitration agreement, [the] court may not preemptively deny FLSA certification or narrow the scope of the proposed collective.... Only after the FLSA plaintiffs join this action, may the court entertain [a] defendants' arbitration-related motions seeking to compel opt-in plaintiffs to arbitrate or to prohibit plaintiffs from proceeding collectively." *Campanelli*, 2018 WL 6727825, at *9. Therefore, conditional certification and notice to the collective are appropriate here despite some notified servers being subject to arbitration.

ii. Personal Jurisdiction in Federal Collective Actions.

Second, Cracker Barrel argues that Plaintiffs cannot send notice to non-Arizona servers because "the Court does not have jurisdiction over opt-in and putative collective members whose claims stem from

non-Arizona activities, i.e., servers who did not work for Cracker Barrel in Arizona." (Doc. 78 at 8). Cracker Barrel cites to *Bristol-Myers Squibb Co. v. Superior Court of California* for support, which involved a mass tort action under California state law. 137 S. Ct. 1773 (2017). There, the Supreme Court required every class member to establish personal jurisdiction over the nonresident defendant by showing a sufficient connection between their individual claims and the forum state. *Id.* at 1781–83. It held that, absent general personal jurisdiction over the defendant, a court does not have personal jurisdiction over state claims by nonresident plaintiffs that do not arise out of the forum. *Id.*

However, the Supreme Court declined to rule on whether this rule applies to a federal court's ability to exercise personal jurisdiction in cases arising out of federal law. *Id.* at 1783–84. Thus far, four circuits have resolved whether *Bristol-Myers* applies to FLSA collective actions. The Third, Sixth, and Eighth Circuits hold it does. *See Fischer v. Fed. Express Corp.*, 42 F.4th 366, 370–71 (3d Cir. 2022); *Canaday v. Anthem Companies, Inc.*, 9 F.4th 392, 397 (6th Cir. 2021); *Vallone v. CJS Sols. Grp.*, LLC, 9 F.4th 861 (8th Cir. 2021). The First Circuit holds it does not. *See Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022).

The Ninth Circuit has yet to address this issue, and district courts within this circuit have "come to varying conclusions." *Wilkerson v. Walgreens Specialty Pharmacy LLC*, 2022 WL 15520004, at *4 (D. Ariz.

Oct. 27, 2022).[13] Majority of the Ninth Circuit district courts have rejected applying *Bristol-Myers* to collection actions arising under the FLSA. *Id.* These cases reason that nothing in the FLSA limits remedies to in-state plaintiffs and so applying *Bristol-Myers* to FLSA claims would be contrary to congressional intent. *See e.g., Swamy*, 2017 WL 51967, at *2. The Court agrees as Section 216(b) allows collective actions to proceed under the FLSA so long as employees are "similarly situated." 29 U.S.C. § 216(b).

Moreover, it is well-settled that the Court has specific personal jurisdiction in this matter over claims against Cracker Barrel because there are allegations by a named plaintiff who worked in an Arizona restaurant. *See supra* Section II.A(1) (citing Doc. 73 at 3) ("The addition of Basch as plaintiff cures the personal jurisdiction deficiencies as to Harrington, Liammaytry, and Lenchert."). Therefore, fol-

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[13] Including *Wilkerson*, four Ninth Circuit district courts have applied *Bristol-Myers* to FLSA collective actions while "at least seven have held the opposite." 2022 WL 15520004, at *4. *Compare Kurtz v. RegionalCare Hospital Partners, Inc.*, 2021 WL 6246619, at *5–6 (E.D. Wash. Sept. 9, 2021); *Carlson v. United Nat. Foods, Inc.*, 2021 WL 3616786, at *4 (W.D. Wash. Aug. 14, 2021); *McNutt v. Swift Transp. Co. of Ariz.*, 2020 WL 3819239, at *7–9 (W.D. Wash. July 7, 2020) *with Arends v. Select Med. Corp.*, 2021 WL 4452275, at *1 (C.D. Cal. July 7, 2021); *Pavloff v. Cardinal Logistics Mgmt. Corp.*, 2020 WL 6828902, at *4 n.2 (C.D. Cal. Oct. 2, 2020); *Cooley v. Air Methods Corp.*, 2020 WL 9311858, at *3 (D. Ariz. Sept. 25, 2020); *Chavez v. Stellar Mgmt. Grp.*, 2020 WL 4505482, at *5–7 (N.D. Cal. Aug. 5, 2020); *Seiffert v. Qwest Corp.*, 2018 WL 6590836, at *1–4 (D. Mont. Dec. 14, 2018); *Swamy v. Title Source, Inc.*, 2017 WL 5196780, at *2 (N.D. Cal. Nov. 10, 2017); *Thomas v. Kellogg Co.*, 2017 WL 5256634, at *1 (W.D. Wash. Oct. 17, 2017).

lowing the majority of district courts within this circuit, the Court declines to apply *Bristol-Myers* to the present FLSA action and will allow Plaintiffs to notify opt-in plaintiffs from outside Arizona. To hold otherwise would be inconsistent with the Court's previous findings.

b. Plaintiffs' Method of Notice.

Last, the Court will review Plaintiffs' proposed notice method and procedures. Cracker Barrel seeks to submit an additional brief to address Plaintiffs' procedures as overbroad. (Doc. 78 at 16). The Court construes this as a request to file a surresponse. But neither the Federal Rules of Civil Procedure nor the District's Local Rules entitle a party to a surresponse as a matter of right as they are "highly disfavored and permitted only in extraordinary circumstances." *Finley v. Maricopa Cty. Sherriff's Office*, 2016 WL 777700, at *1 n.1 (D. Ariz. Feb. 29, 2016); *see also* L.R. Civ. 7.2. Here, there are no extraordinary circumstances that would give rise to allowing Cracker Barrel a surresponse. *Cf. Fitzhugh v. Miller*, 2020 WL 1640495, at *9 (D. Ariz. Apr. 2, 2020) (explaining valid reasons are where the movant raises new arguments in its reply brief). The Court accordingly rejects Cracker Barrel's request and will consider Plaintiffs' proposed method of notice.

Unlike a class action under Rule 23, to participate in a collective action, an employee is required to give her consent in writing to become a party. 29 U.S.C. § 216(b); *see Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (rights in a collective action under the FLSA are dependent on the employee receiving accurate and timely notice about the pendency of the collective action, so that the employee can make

informed decisions about whether to participate). "If an employee does not file a written consent, then that employee is not bound by the outcome of the collective action." *Edwards v. City of Long Beach*, 467 F. Supp. 2d 986, 989 (C.D. Cal. 2006). In an FLSA action, "the court must provide potential plaintiffs 'accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether or not to participate.'" *Adams v. Inter-Con Sec. Sys.*, 242 F.R.D. 530, 539 (N.D. Cal. 2007) (quoting *Hoffmann-La Roche,* 493 U.S. at 170). Thus, "[t]he court may authorize the named FLSA plaintiffs to send notice to all potential plaintiffs and may set a deadline for those potential plaintiffs to join the suit." *Id.* at 535 (citing *Hoffmann-La Roche Inc.*, 493 U.S. at 169). It is within the district court's discretion to "approve the broadest notice possible on conditional certification." *Vega v. All My Sons Bus. Dev. LLC*, 2022 WL 684380, at *3 (D. Ariz. Mar. 8, 2022).

Here, Plaintiffs have submitted their Proposed Notice and Consent to Join forms for approval. (Docs. 76-13; 76-14). They intend to mail, email, and text notices to potential class members as well as have Cracker Barrel post the notice on its employee bulletins. (Doc. 76 at 14–15). Plaintiffs also seek information from Cracker Barrel regarding the potential class members. (*Id.* at 18).

i. Plaintiffs' Proposed Notice and Consent to Join Forms.

First, the Court approves Plaintiffs' Notice and Consent to Joint forms with limited modifications. Plaintiffs' notice allows for an opt-in period of ninety days, which the Court finds appropriate. (Doc. 76 at

16). Plaintiffs say this period is necessary given the high number[14] of potential class members. (Doc. 76 at 16) (citing *Saleh v. Valbin Corp.*, 297 F. Supp. 3d 1025, 1036–37 (N.D. Cal. 2017); *Delara*, 2020 WL 2085957, at *12; *Ziglar v. Express Messenger Systems Inc.*, 2017 WL 6539020, at *6 (D. Ariz. Aug. 31, 2017)). Moreover, the Notice form properly contains an explicit judicial disclaimer stating, "[t]he Court has not ruled which party will prevail in this lawsuit, but has ordered that this notice be sent to you to inform you of your legal rights and ability to make a claim for unpaid wages." (Doc. 76-13 at 2). *See Stanfield v. Lasalle Corr. W. LLC*, 2022 WL 2967711, at *5 (D. Ariz. July 26, 2022) (finding the notice form contained an adequate judicial disclaimer).

Plaintiffs seek to use the three year statutory time period for Cracker Barrel allegedly willful violations of the FLSA. 29 U.S.C. § 225(a). Thus, the class period is three years before the filing of the complaint. *See Delara*, 2020 WL 2085957, at *4 (allowing references to the three-year limitation on willful violations because whether the defendant acted willfully "is a merits question not suitable to resolution at this stage"). The Original Complaint was filed on May 28, 2021. (*See* Doc. 1). Thus, Plaintiffs shall include language in their notice stating the class period starts on May 28, 2018. (*See* Doc. 76-13 at 2).

Last, the Court directs Plaintiffs to delete sections of the notice form, email, and text that advise poten-

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[14] Plaintiffs estimate the potential class, covering a three year time period, is comprised of 100,000–200,000 current and former Cracker Barrel servers among 650 stores nationwide. (Doc. 76 at 14).

tial plaintiffs they may contact Plaintiffs' counsel regarding questions about the collective action or their legal rights. (Doc. 76-13 at 4, 5). This is because potential plaintiffs could construe those sections as suggestions to call Plaintiffs' counsel. *See Stanfield*, 2022 WL 2967711, at *5 (citing *Barrera v. US Airways Grp., Inc.*, 2013 WL 4654567, at *9 (D. Ariz. Aug. 30, 2013) (directing plaintiff to omit the "further information" section because it could be construed as encouragement for potential plaintiffs to call plaintiff's counsel); *see also Wertheim v. State of AZ*, 1993 WL 603552, at *6 (D. Ariz. Sept. 30, 1993)).

ii. Plaintiffs' Proposed Method of Notice.

Second, the Court finds Plaintiffs' proposed methods of mailing, emailing, and texting the notices to potential class members are reasonable. *See Phelps v. MC Commc'ns, Inc.*, 2011 WL 3298414, at *6 (D. Nev. Aug. 1, 2011) (finding notice by mail is sufficient, especially when email notice is also provided); *see e.g.*, *Anthony v. Rise Servs. Inc.*, 2022 WL 3042854, at *3 (D. Ariz. Aug. 2, 2022) (allowing notice by mail, email, and text). However, the Court declines to require Cracker Barrel to post the notice on its employee bulletins. *See Delara*, 2020 WL 2085957, at *7 (finding there is no basis for requiring the defendant to post the notice in the workplace). Apart from citing cases from out of circuit (Doc. 76 at 15–16), Plaintiffs have not identified "a need for a third-party administrator" to effectuate notice and "there is no reason to suspect [Plaintiffs] counsel is incapable of properly handling notice" themselves. *Delara*, 2020 WL 2085957, at *7.

Plaintiffs also propose notice be sent twice during the opt-in period: once on day one of the notice period and another on day forty five. (Doc. 76 at 16). The Court finds a reminder notice halfway through the opt-in period is reasonable. *See Curphey v. F&S Mgmt. I LLC*, 2021 WL 487882, at *5 (D. Ariz. Feb. 10, 2021) (ordering a sixty day opt-in period and a reminder notice halfway through the opt-in period); *see e.g.*, *Delara*, 2020 WL 2085957, at *6 (ordering a ninety day opt-in period and a reminder notice halfway through the opt-in period).

iii. Plaintiffs' Request for Information.

Last, Plaintiffs request Cracker Barrel to, within twenty-one days of the Court's Order, produce the names, mailing addresses, email addresses, cell phone numbers, last four digits of social security numbers, and dates of employment of all current and former servers who have worked for Cracker Barrel during the class period. (Doc. 76 at 17). They explain this information is necessary to locate those current or former servers who may have moved. (*Id.*)

Discovery of the contact information for current and former Cracker Barrel servers is necessary for Plaintiffs to provide those potential class members with notice of the collective action. *See Hoffmann-La Roche*, 493 U.S. at 170 (names and addresses of discharged employees were "relevant to the subject matter of the action and that there were no grounds to limit the discovery under the facts and circumstances of this case."). However, Plaintiffs do not explain why a social security number is necessary to communicate with clients. *Delara*, 2020 WL 2085957, at *4 ("If counsel later needs that information, it can request it of the opt-in plaintiffs and justify the request to

them."). Cracker Barrel shall not provide Plaintiffs with servers' social security numbers. Moreover, the Courts finds twenty-one days is a reasonable time for Cracker Barrel to provide this discovery as courts in this district have allowed as little as fourteen days for production. *See Barrera*, 2013 WL 4654567, at *10 (finding a five day request to produce an electronic list of potential opt-ins burdensome and permitting fourteen days instead).

In sum, the Court approves Plaintiffs' proposed Notice and Consent to Join forms with the following modifications:

> (1) Plaintiffs shall include language stating the class period starts on May 28, 2018.
>
> (2) Plaintiffs shall delete sections of the notice form, email, and text that advise potential plaintiffs they may contact Plaintiffs' counsel regarding questions about the collective action or their legal rights.

The Court also approves Plaintiffs' proposed methods of mailing, emailing, and texting the notices to potential class members, and Plaintiffs are permitted to send one reminder halfway through the opt-in period. Cracker Barrel shall, within twenty-one days of this Order, provide Plaintiffs the names, mailing addresses, email addresses, cell phone numbers, and dates of employment of all current and former servers who have worked for Cracker Barrel from May 28, 2018, to the present. Although Defendant raises issues regarding collective members who are subject to arbitration, such issues may be addressed at the second decertification stage.

III. Conclusion.

It is proper to conditionally certify this collective action under the FLSA for notice purposes. The Court denies Cracker Barrel's Motion to Dismiss and Compel Arbitration because Basch effectively voided Cracker Barrel's Arbitration Agreement and has thus stated a claim for which relief can be granted. Furthermore, the addition of Basch—a current Arizona Cracker Barrel employee—as a plaintiff establishes the Court's personal jurisdiction over Cracker Barrel and cures the personal jurisdiction deficiencies as to Harrington, Liammaytry, and Lenchert.

The Court also grants Plaintiffs' Second Motion to Certify. Plaintiffs have met their low burden for preliminary certification of this matter as a collective action because they allege violations under the FLSA and have sufficiently shown they are similarly situated with the defined collective. Last, Plaintiffs' Proposed Notice and Consent to Join forms, with limited modifications, are a proper means of providing notice to the defined collective.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' Second Amended Motion for Conditional Certification (Doc. 76) is **GRANTED in part**.

IT IS FURTHER ORDERED that Cracker Barrel's Motion to Compel Individual Arbitration and Dismiss Second Amended Complaint with Prejudice (Doc. 77) is **DENIED**.

IT IS FURTHER ORDERED the collective class of potential plaintiffs is conditionally certified under 29 U.S.C. § 216(b) and shall consist of all current and former Cracker Barrel servers who worked for

Cracker Barrel from May 28, 2018, to the present in states where Cracker Barrel pays its employees under the 29 U.S.C. § 203(m) tip credit scheme.

IT IS FURTHER ORDERED that Plaintiffs' Notice and Consent to Join forms (Docs. 76-13; 76-14) shall be written and sent in compliance with the directives in this Order.

IT IS FINALLY ORDERED that within **twenty-one (21)** days of this Order, Cracker Barrel shall provide Plaintiffs the names, mailing addresses, email addresses, cell phone numbers, and dates of employment of all current and former servers who have worked for Cracker Barrel from May 28, 2018, to the present. Cracker Barrel shall provide this discovery in electronic and importable format.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-21-00940-PHX-DJH

ANDREW HARRINGON, ET AL.,

Plaintiffs,

V.

CRACKER BARREL OLD COUNTRY STORE INCORPORATED,

Defendant.

Filed January 30, 2024

OPINION AND ORDER

DIANE J. HUMETEWA, United States District Judge.

On March 31, 2023, the Court conditionally certified this matter as a collective action under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA") (the "Collective Certification Order") (Doc. 82). Pending before the Court are five motions filed by Defendant Cracker Barrel Old Country Store Incorporated ("Cracker Barrel"), each of which concern rulings that stem from the Collective Certification Order:

(1) Cracker Barrel's "Motion for Clarification, or, in the Alternative, Reconsideration" (Doc.

83)[1] ("Motion for Reconsideration") regarding the putative collective definition that was established in the Collective Certification Order;

(2) Cracker Barrel's "Motion to Certify Interlocutory Appeal" (Doc. 84)[2] of four questions arising out of the Collective Certification Order;

(3) Cracker Barrel's "Motion to Strike Plaintiffs' Request for Equitable Tolling" (Doc. 93)[3], where the contended request appeared in Plaintiffs' Response to Cracker Barrel's Motion for Reconsideration (Doc. 90);

(4) Cracker Barrel's Motion to Stay Proceedings Pending Appeal (Doc. 96)[4] of the Collective Certification Order to the Ninth Circuit (Doc. 91);

(5) Cracker Barrel's Motion to Strike Plaintiffs' Notice of Supplemental Authority (Doc.

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[1] The matter is fully briefed. Plaintiffs filed a Response (Doc. 90) in accordance with the Court's April 17, 2023, Order (Doc. 88).

[2] The matter is fully briefed. Plaintiffs did not file a Response, and the time to do so has passed. *See* L.R. Civ 7.2(c) (opposing party has 14 days after service within which to serve and file a responsive memorandum).

[3] The matter is fully briefed. Plaintiffs filed a Response (Doc. 94). Cracker Barrel did not file a reply brief and the time to do so has passed. *See* L.R. Civ. 7.2(c).

[4] The matter is fully briefed. Plaintiffs filed a Response (Doc. 97) and Cracker Barrel filed a Reply (Doc. 98).

101)[5] regarding *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023).

For the following reasons, the Court will modify the putative collective definition, certify for interlocutory appeal questions regarding arbitration and personal jurisdiction in FLSA collective actions, and stay the matter pending the Ninth Circuit's review.

I. Procedural History.[6]

Cracker Barrel filed most of the pending motions within the span of twenty-one days, creating a complex procedural history. Below is a brief overview of the relevant rulings, motions, and arguments:

In August 2022, Cracker Barrel filed its "Motion to Compel Arbitration and Dismiss Second Amended Complaint with Prejudice" (Doc. 77). Plaintiffs Andrew Harrington, Katie Liammaytry, Jason Lenchert, and Dylan Basch (collectively "Plaintiffs") also filed their "Second Amended Motion For Conditional Certification" (Doc. 76). In March 2023, the Court issued its Collective Certification Order, which denied Cracker Barrel's Motion but granted Plaintiffs' Motion. (*See generally* Doc. 82). In so doing, the Court conditionally certified the present action as a collective under Section 216(b) of the FLSA. (*Id.*) The Court defined the following putative collective for no-

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[5] The matter is fully briefed. Plaintiffs filed a Response (Doc. 102). Cracker Barrel did not file a reply brief and the time to do so has passed. *See* L.R. Civ. 7.2(c).

[6] The Court incorporates by reference the Background Section of its Collective Certification Order (Doc. 82 at 2–4), which contains a comprehensive history of Plaintiffs' prior amended complaints (Docs. 1; 57; 74) and prior motions for certification (Docs. 8; 58; 76).

tice purposes: "all current and former Cracker Barrel servers who worked for Cracker Barrel from May 28, 2018, to the present in states where Cracker Barrel pays its employees under the 29 U.S.C. § 203(m) tip credit scheme." (*Id.* at 28).[7] The Court also authorized Plaintiffs' Notice and Consent to Join forms (Docs. 76-13; 76-14) (the "Notice Forms") to be disseminated in compliance with the Court's directives. (Doc. 82 at 19–28).

On April 14, 2023, Cracker Barrel filed its Motion for Reconsideration on the bounds of the putative collective for notice purposes. (Doc. 83). Cracker Barrel concurrently filed a Motion to Certify Interlocutory Appeal (Doc. 84) and a "Motion to Stay Deadlines for Answer and Production of Employee Data" (Doc. 85).

In its April 17, 2023, Order, the Court noted some merit in Cracker Barrel's position on the defined putative collective, and thus ordered the parties to meet and confer on possible stipulated language for the terms of notice. (Doc. 88 at 1). If no agreement could be reached, the Court ordered Plaintiffs to respond to Cracker Barrel's Motion for Reconsideration. (*Id.*) Consequently, the Court stayed the notice deadlines established in the Collective Certification Order pending a ruling on Cracker Barrel's Motion for Reconsideration. (*Id.* at 2).

On April 28, 2023, Plaintiffs filed their Response to Cracker Barrel's Motion for Reconsideration (Doc.

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[7] The Court used the proposed putative collective definition as stated in Plaintiffs' Motion to Certify Class (*see* Doc. 76 at 2). (Doc. 82 at 11 n.8).

90) agreeing to a "slight modification" of the Collective Certification Order. (*Id.* at 1).

On April 30, 2023, instead of waiting for the Court to review the parties' arguments on the Collective Certification Order and rule on the related Motion for Reconsideration, Cracker Barrel appealed the Collective Certification Order to the Ninth Circuit. (Doc. 91). Thereafter, Cracker Barrel moved to strike Plaintiffs' request for equitable tolling as set forth in Plaintiffs' Response to Cracker Barrel's Motion for Reconsideration. (Doc. 93). Cracker Barrel also moved to stay the case pending the appeal of the Collective Certification Order. (Doc. 96).

On June 25, 2023, Plaintiffs filed a notice of new United States Supreme Court authority that relates to issues in the present matter. (Doc. 99). Cracker Barrel moved to strike Plaintiffs' notice. (Doc. 99).

On October 4, 2023, Cracker Barrel's then-counsel moved to withdraw as counsel of record. (Doc. 103). Cracker Barrel has since retained new counsel. (Doc. 105).

II. Discussion.

The Court will address together Cracker Barrel's Motion for Reconsideration and Motion to Strike Plaintiffs' Request for Equitable Tolling because both relate to the bounds of the putative collective. The Court will then turn to Cracker Barrel's Motion to Certify Interlocutory Appeal. The Court will conclude with Cracker Barrel's Motion to Stay Proceedings Pending Appeal and Motion to Strike Plaintiffs' Notice of Supplemental Authority because both relate to whether a stay in this case is proper.

A. Cracker Barrel's Motion for Reconsideration (Doc. 83) and Motion to Strike Plaintiffs' Request for Equitable Tolling (Doc. 93).

Cracker Barrel seeks reconsideration of the putative collective definition due to concerns regarding the scope of data it must produce on the individuals who will be sent notice. Cracker Barrel represents the putative collective currently encompasses 159,934 individuals. (Doc. 83 at 3). Cracker Barrel seeks clarification of the definition "to make sure FLSA conditional certification notice is not sent to individuals whose FLSA claims are already time-barred or who this Court has previously determined cannot join this court action." (*Id.* at 2). First, Cracker Barrel argues the Court should reconsider the time frame of the putative collective in light of the opt-in standard for FLSA collective actions. (*Id.* at 4–6). Cracker Barrel seeks to strike Plaintiffs' request that the statute of limitations be equitably tolled. (*See generally* Doc. 93). Second, Cracker Barrel argues the Court should reconsider the scope of the putative collective so that it expressly excludes servers who signed Cracker Barrel's Arbitration Agreement after turning 18 years old. (Doc. 83 at 10, 6–9).

The Court will set forth the applicable legal standard for motions for reconsideration before turning to Cracker Barrel's arguments.

1. *Legal Standards.*

Motions for reconsideration should be granted only in rare circumstances. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error

or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Similarly, Arizona Local Rule of Civil Procedure 7.2 provides "[t]he Court will ordinarily deny a motion for reconsideration of an Order absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence." L.R. Civ. 7.2(g)(1). The movant must specify "[a]ny new matters being brought to the Court's attention for the first time and the reasons they were not presented earlier." *Id.* Whether to grant a motion for reconsideration is left to the "sound discretion" of the district court. *Navajo Nation v. Norris*, 331 F.3d 1041, 1046 (9th Cir. 2003). Such motions should not be used for the purpose of asking a court "to rethink what the court had already thought through—rightly or wrongly." *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995) (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). A mere disagreement with a previous order is an insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw. 1988).

2. *The Time Frame of the Putative Collective.*

Cracker Barrel first argues the Court should reconsider the time frame of the putative collective because it does not accurately reflect the opt-in standard for FLSA collective actions. The Collective Certification Order defined the putative collective for notice purposes as follows: "all current and former Cracker Barrel servers who worked for Cracker Bar-

rel *from May 28, 2018, to the present* in states where Cracker Barrel pays its employees under the 29 U.S.C. § 203(m) tip credit scheme." (Doc. 82 at 28) (emphasis added). In so defining, the Court settled that Plaintiffs may use the three-year statutory time period for Cracker Barrel's allegedly willful violations of the FLSA. (*Id.* at 25) (citing 29 U.S.C. § 225(a)). Cracker Barrel does not take issue with the Court's decision to do so. The Court further explained that because the original complaint in this matter was filed on May 28, 2021, the putative collective time frame is three years before the filing of the complaint on May 18, 2018. (*Id.*) Cracker Barrel argues this decision was error.

Cracker Barrel posits the time frame should start on March 31, 2020—or, three years before the Court certified this matter as a collective action. (Doc. 83 at 6). Cracker Barrel maintains that collective actions under the FLSA differ from other class actions under Federal Rule of Civil Procedure 23 in that an FLSA opt-in plaintiff's action is considered commenced from the date their opt-in form is filed with the district court. (*Id.* at 4). Cracker Barrel asserts the Court's error resulted in a defined collective that includes an extra 64,216 individuals whose claims would otherwise be time-barred. (*Id.* at 5). In response, Plaintiffs admit that "a three-year statute of limitations from the date a plaintiff opts-in is generally the rule" in FLSA cases. (Doc. 90 at 2). However, Plaintiffs argue the statute of limitations should be equitably tolled due to Cracker Barrel's efforts to prolong case proceedings. (*Id.* at 5–8). Cracker Barrel moves to strike Plaintiffs' request on the basis that it is improper to raise new claims or grounds for relief in a response brief. (Doc. 93 at 2).

The Courts agrees with Cracker Barrel that the Collective Certification Order erred when setting the time frame of the putative collective as three years prior to the filing of the complaint. The Court also finds that Plaintiffs' request for equitable tolling—although procedurally improper—is meritorious. The time frame of the putative collective will be modified accordingly.

a. The Putative Collective Should Reflect the FLSA's Opt-in Standard.

Section 255(a) of the FLSA states that "a cause of action arising out of a willful violation may be *commenced* within three years after the cause of action accrued." 29 U.S.C. § 255(a) (emphasis added). Section 256 further defines when a cause of action has been "commenced" for statute of limitation purposes:

> In determining when an action is commenced for the purposes of section 255 of [the FLSA], an action commenced on or after May 14, 1947 [under the FLSA] shall be considered to be commenced on the date when the complaint is filed; *except that in the case of a collective or class action instituted under the [FLSA],* it shall be considered to be commenced in the case of any individual claimant—
>
> (a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
>
> (b) if such written consent was not so filed or if his name did not so appear—*on the subsequent*

> *date on which such written consent is filed in the court in which the action was commenced.*

Id. § 256 (emphasis added). In other words, in an FLSA collective action such as here, an opt-in plaintiff's action is deemed "commenced" from the date her opt-in form is filed, not from the date the complaint was filed. *Campbell v. City of L.A.*, 903 F.3d 1090, 1104 (9th Cir. 2018) (citing 29 U.S.C. § 256). The Northern District of California has highlighted the FLSA's distinct opt-in standard in *Coppernoll v. Hamcor, Inc.*:

> For purposes of calculating the timeliness of a FLSA claim, the statute of limitations is tolled for each putative class member individually upon filing a written consent to become a party plaintiff. This opt-in standard differs from the opt-out standard in a Rule 23 class action, where the statute of limitations is tolled for all putative class members when the complaint is filed. Thus, without equitable tolling, the statute of limitations on a putative class member's FLSA claim continues to run in the time between the filing of the collective action complaint and the filing of their written consent opting-in.

2017 WL 1508853, at *1 (N.D. Cal. Apr. 27, 2017).

Because this is an FLSA collective suit, the Court should not have applied the opt-out standard; rather, the putative collective should be framed based on the opt-in standard under Section 256. The Collective Certification Order erred when it set the time frame of the putative collective as May 28, 2018, on the basis that an FLSA opt-in plaintiff's action is com-

menced on the date the complaint is filed. (Doc. 82 at 25). Section 256 of the FLSA rather establishes that an FLSA opt-in plaintiff's action is "commenced" from the date her opt-in form is filed. 29 U.S.C. § 256. Plaintiffs certainly concede to this general rule. (Doc. 90 at 2). Therefore, the Court agrees with Cracker Barrel that it is more appropriate to set the time frame of the putative collective as three years before the Court certified this matter as a collective action. The remaining issue, however, is Plaintiffs' request to equitably toll the applicable statute of limitations.

b. Plaintiffs' Request for Equitable Tolling.

Plaintiffs request that the Court toll the statute of limitations on the putative collective's FLSA claims due to (1) Cracker Barrel's efforts to prolong case proceedings and (2) other delays in this case. (Doc. 90 at 5–8). Cracker Barrel moves to strike Plaintiffs' request as procedurally deficient, arguing it is "inappropriate [] to imbed in a response brief." (Doc. 93 at 2). Even so, Cracker Barrel submitted a proposed "Response in Opposition" regarding Plaintiffs' equitable tolling arguments in the event the Court construes Plaintiffs' request as a new motion. (Doc. 93-2). Plaintiffs have no objection to the Court considering Cracker Barrel's Response in Opposition and have submitted a reply brief thereto. (*See* Doc. 94). The Court will address Cracker Barrel's procedural arguments before turning to the merits of Plaintiffs' request for tolling.

i. Plaintiffs' Request for Tolling is Construed as a Motion.

At the outset, to request a new claim for relief for the first time in a response brief is not the appropriate procedure. *See Allen v. Beard*, 2019 WL 2501925, *2 n.3 (S.D. Cal. June 17, 2019) (explaining "a defendant must have 'fair notice' of the claims and the grounds for relief" and so a plaintiff "may not raise new claims or new grounds for relief in opposition to [a] motion") (citing *Pickern v. Pier I Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006)); *Griego v. Cnty. of Maui*, 2017 WL 2882695, at *5 (D. Haw. July 6, 2017) ("The regular briefing protocol for a motion would be undermined if a new motion (other than a mirror-image motion such as a cross- or counter-motion) were countenanced if mentioned in an opposition memorandum."). Plaintiffs indeed recognize they have failed to file a motion for equitable tolling. (Doc. 90 at 8 n.3). Nonetheless, because Cracker Barrel preemptively submitted a Response in Opposition to Plaintiffs' tolling arguments, to which Plaintiffs have replied, any notice concerns are remedied. In the interest of judicial economy, the Court will proceed by construing Plaintiffs' request for equitable tolling as a fully briefed motion.[8] Plaintiffs, however, are admonished for this unconventional procedure.

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[8] (Doc. 90 at 5–8 (Plaintiffs' Request for Equitable Tolling)); (Doc. 93-1 (Cracker Barrel's Response)); (Doc. 94 (Plaintiffs' Reply)).

ii. Plaintiffs' Request for Tolling has Merit.

As to the merits of Plaintiffs' request, "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not as a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 549 U.S. 384, 396 (2007). The Ninth Circuit has stated that courts have discretion to apply equitable tolling on a case-by-case basis, but that such relief is to be applied "sparingly" and in "extreme" scenarios. *Scholar v. Pac. Bell*, 963 F.2d 264, 267 (9th Cir. 1992); *see also Partlow v. Jewish Orphans' Home of Southern Cal., Inc.*, 645 F.2d 757, 760–61 (9th Cir. 1981), *abrogated on other grounds by Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165 (1989) (stating the statute of limitations under Section 255 of the FLSA may be tolled "when equity warrants"). For example, "[e]quitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time." *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999), *as amended* (Mar. 22, 1999). The Court finds the latter warrants tolling here.

Plaintiffs argue equitable tolling should apply from either September 3, 2021—the date Plaintiffs' initial Motion to Certify Class (Doc. 8) was fully briefed—or October 4, 2021—the date the Court granted Cracker Barrel's Motion to Stay Discovery (Docs. 41; 45). (Doc. 90 at 7–8). Plaintiffs point to (1) Cracker Barrel's efforts to prolong the case and (2) the Court's discretionary case management decisions as circumstances beyond their control that give rise to equitable tolling. (*Id.* at 8). Cracker Barrel

contends Plaintiffs cannot rely on their previously failed litigation attempts to seek tolling, as the Court ultimately denied Plaintiffs' initial Motion to Certify Class and dismissed the complaint that was connected to the Court's stay of discovery. (Doc. 93-2 at 4).

The Court agrees with Cracker Barrel that failed litigation efforts are hardly the type of extreme circumstances that justify equitable tolling. However, the Court is persuaded by Plaintiffs' line of authorities that have applied equitable tolling "where the court's discretionary case management decisions have led to procedural delay beyond the control of the putative collective action members." *Koval v. Pac. Bell Tel. Co.*, 2012 WL 3283428, *7 (N.D. Cal. Aug. 10, 2012); (*see* Doc. 90 at 7–8). Those authorities have found delays beyond a plaintiff's control include the time a court requires to rule on a motion to certify a collective action under the FLSA. *See Winningham v. Rafeal's Gourmet Diner, LLC*, 2022 WL 18359485, at *2 (D. Or. Dec. 19, 2022), *report and recommendation adopted*, 2023 WL 197005 (D. Or. Jan. 17, 2023); *Small v. Univ. Med. Ctr. of S. Nevada*, 2013 WL 3043454, at *3 (D. Nev. June 14, 2013); *Helton v. Factor 5, Inc.*, 2011 WL 5925078, *2 (N.D. Cal. Nov. 28, 2011). Here, the Court took under advisement Plaintiffs' Second Motion to Certify Class for six months before conditionally certifying this action as a collective. The Court required an additional ten months to resolve Cracker Barrel's five pending motions, all of which has been delaying the dissemination of notice to the putative collective despite this action being conditionally certified under the FLSA. Given that these delays are outside of Plaintiffs' control, the Court will equitably toll the statute of limitations from September 6, 2022—the date Plaintiffs'

meritorious certification motion became ripe for review—until the date on which notice is sent to the putative collective. *See Winningham*, 2022 WL 18359485, at *2; *Koval v. Pac. Bell Tel. Co.*, 2012 WL 3283428, at *7.

In sum, to account for (1) the applicable three-year statute of limitations under the FLSA, (2) the opt-in standard under the FLSA, (3) the equitable tolling period that will run from September 6, 2022, until the date that notice is disseminated to the putative class, and (4) the policy that the broadest notice possible be approved on conditional certification of FLSA collective actions,[9] the time frame of the putative collective class for notice purposes shall include: all current and former Cracker Barrel servers who worked for Cracker Barrel from *September 6, 2019, to the present* in states where Cracker Barrel pays its employees under the 29 U.S.C. § 203(m) tip credit scheme.

3. *The Scope of the Putative Collective.*

Cracker Barrel next argues the Court erred when it included individuals who are subject to arbitration in the putative collective. (Doc. 83 at 6–10). The Court directly addressed this issue in the Collective Certification Order. (Doc. 82 at 20–21). In denying Cracker Barrel's Motion to Compel Arbitration and Dismiss Second Amended Complaint with Prejudice, the Court further examined Cracker Barrel's Arbitration Agreement and clarified which employees are subject to arbitration versus those who are not:

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[9] (*See* Doc. 82 at 24) (citing *Vega v. All My Sons Bus. Dev. LLC*, 2022 WL 684380, at *3 (D. Ariz. Mar. 8, 2022)).

> Employees who have signed the Agreement, including through Cracker Barrel's online training program, while the majority age are subject to the Agreement. By contrast, employees are not subject to the Agreement if they: (1) did not sign the Agreement; (2) signed the Agreement when they were a minor and are still a minor; or (3) signed the Agreement when they were a minor and voided the Agreement after turning the majority age.

(*Id.* at 20). Due to these nuanced circumstances, the Court found it best to address whether certain opt-in plaintiffs were subject to arbitration at the second stage of the certification process. (*Id.* at 21 (noting other courts in the Ninth Circuit that have found the same)). The Court concluded that—even though some of the notified members of the putative collective may be subject to arbitration—it was improper to reference the Arbitration Agreement in the putative collective definition because "[o]nly after the FLSA plaintiffs join this action, may the court entertain [a] defendants' arbitration-related motions seeking to compel opt-in plaintiffs to arbitrate or to prohibit plaintiffs from proceeding collectively." (*Id.* at 21) (quoting *Campanelli v. Image First Healthcare Laundry Specialists, Inc.*, 2018 WL 6727825, at *9 (N.D. Cal. Dec. 21, 2018)). The Court further acknowledged that other areas of the Notice Forms would sufficiently alert potential opt-in plaintiffs that they can only join the action if they are not subject to arbitration. (*Id.* at 20 (citing Doc. 76-13 at 1, 2)).

Cracker Barrel contends the Court contradicted its prior orders when it did not account for a potential opt-in plaintiff's "arbitration signing status" in

the putative collective for notice purposes. (Doc. 83 at 7). In Cracker Barrel's opinion, by determining which employees are subject to arbitration and which are not, the Court fully resolved the issue of enforceability in this matter and failed to tailor the putative collective definition accordingly. (*Id.*) Cracker Barrel complains that "while 53,750 individuals either have not signed the Agreement or [were] minors at the time of signing, a staggering 108,184 individuals have signed the Agreement as adults and, per the Court's previous Orders, cannot bring their claims in Court and are ineligible to participate." (*Id.*) Cracker Barrel cites to *Droesch v. Wells Fargo Bank* for the proposition that it should be allowed to present evidence on which employees are bound to arbitrate their claims. (*Id.*) (citing 2021 WL 2805604 (N.D. Cal. July 6, 2021)). Cracker Barrel further argues the Court should revise the putative collective to expressly exclude individuals "who signed the [Arbitration] Agreement after turning 18 years old." (*Id.* at 10). This is because any inclusion in the putative collective of individuals who are potentially subject to arbitration "greatly offends" the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"). (*Id.* at 9–10).

In opposition, Plaintiffs contend that the Court did not misapply any of its prior orders because the Collective Certification Order is the first time the Court had addressed the issue of which potential plaintiffs should get notice. (Doc. 90 at 9). They argue that all other prior orders had discussed the enforceability of the Arbitration Agreements as to specific named plaintiffs only. (*Id.*) Plaintiffs further maintain that sorting through which potential opt-in plaintiffs are subject to arbitration is more appropriate for the second stage of the FLSA certification

process due to outstanding factual and legal disputes. (*Id.* at 9–10). The Court agrees with Plaintiffs in all regards.

As noted in Cracker Barrel's primary authority, the Ninth Circuit has not yet considered whether FLSA notice should be provided to individuals who signed arbitration agreements. *See Droesch*, 2021 WL 2805604, *2. So, district courts have taken varying approaches when handling arbitration issues in FLSA collective actions. In concluding that remaining disputes over which potential opt-in plaintiffs are subject to arbitration are better addressed at the second stage of the certification process, the Court pointed to other courts in this circuit in accord. (Doc. 82 at 21 citing *Monplaisir v. Integrated Tech Grp., LLC*, 2019 WL 3577162, at *3 (N.D. Cal. Aug. 6, 2019) ("[T]o avoid putting the cart before the horse, this inquiry [of arbitration] is best left for step two"); *Mejia v. Bimbo Bakeries USA Inc.*, 2018 WL 11352489, at *4 n.7 (D. Ariz. May 7, 2018); *Campanelli*, 2018 WL 6727825, at *8–9; *Delara v. Diamond Resorts Int'l Mktg., Inc.*, 2020 WL 2085957, at *5–6 (D. Nev. Apr. 30, 2020)). Although Cracker Barrel invokes a number of out-of-circuit authorities[10] and persuasive, in-circuit authorities[11] to argue a contrary approach, Cracker Barrel has not pointed to any

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[10] For example, Cracker Barrel relies on *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1050 (7th Cir. 2020) and *In re JPMorgan Chase & Co.*, 916 F.3d 494, 502 (5th Cir. 2019). (Doc. 83 at 9–10).

[11] For example, Cracker Barrel relies on *Droesch v. Wells Fargo Bank, N.A.*, 2021 WL 2805604 (N.D. Cal. July 6, 2021) and *Sandbergen v. Ace Am. Ins. Co.*, 2019 WL 13203944 (N.D. Cal. June 17, 2019). (Doc. 83 at 8–9).

binding authority that precludes the Court from addressing arbitrability issues at the second stage of certification. Nor is the Court aware of any. Therefore, the Court did not commit clear error. That Cracker Barrel merely disagrees with the Court's decision to follow suit with other courts in this circuit is an insufficient basis for reconsideration. *See Leong*, 689 F. Supp. at 1573.

Moreover, Plaintiffs' list of remaining factual issues illustrates why the enforceability of Cracker Barrel's Arbitration Agreement must be determined on a case-by-case basis. Plaintiffs identify the following disputes among the parties: (1) whether an employee signed the Agreement when they were a minor depends on the state in which the Agreement was signed; (2) there may be adult employees who signed the Agreement as minors who still need to be given the opportunity to void the Agreement; and (3) employees who signed the Agreement, ended their employment with Cracker Barrel, and then were later rehired by Cracker Barrel may not be subject to arbitration. (Doc. 90 at 9–10). Indeed, the Court had to perform fact-intensive analysis to determine that Plaintiff Dylan Basch is not subject to arbitration because he had voided the Agreement within a reasonable time[12] after turning the majority age. (Doc. 82 at 6–10). The Court cannot possibly define which opt-in plaintiffs are certainly subject to arbitration at this juncture. Separate analyses will need to be per-

[12] Based on Plaintiff Dylan Basch's circumstances, the Court found that eighteen months was a reasonable time for him to disaffirm Cracker Barrel's Arbitration Agreement. (Doc. 82 at 8–9).

formed on each putative collective member based on the facts of their employment with Cracker Barrel.

Cracker Barrel is reminded that we are still at the first preliminary certification stage of the Ninth Circuit's two-step approach to FLSA collective actions, which is called "preliminary" for a reason. *Campbell*, 903 F.3d at 1100. It is not the court's role to resolve factual disputes, decide substantive issues relating to the merits of the claims, or make credibility determinations at this first stage of certification—yet, that is exactly what Cracker Barrel asks this Court to do. *See Lee v. Asurion Ins. Servs. Inc.*, 2016 WL 9525665, at *2 (D. Ariz. Dec. 2, 2016) (citing *Colson v. Avnet, Inc.*, 687 F. Supp. 2d 914, 926 (D. Ariz. 2010)); *see also Thornsburry v. Pet Club LLC*, 2016 WL 11602764, at *2 (D. Ariz. Nov. 22, 2016). Although the Court has identified nuanced circumstances in which a Cracker Barrel employee *may* not be subject to arbitration, a final determination requires further fact inquiries that are better resolved at the second stage of certification. *See Davis v. Westgate Planet Hollywood Las Vegas, LLC*, 2009 WL 102735, at *10 (D. Nev. Jan. 12, 2009) (stating that "disparities in the factual employment situations of any plaintiffs who choose to opt in should be considered during the court's second tier analysis"). Furthermore, the putative collective does not run afoul of the FAA because the Notice Forms adequately alert potential opt-in plaintiffs that they can only join the action if they are not subject to arbitration. (*See* Doc. 76-13 at 1, 2).[13] And, "[a]t this stage, all putative col-

[13] For example, the Notice is addressed to "All Cracker Barrel servers, *not subject to arbitration*, who were paid on a "tip

(*Footnote continued*)

lective members remain potential plaintiffs." *Monplaisir*, 2019 WL 3577162, at *3 (emphasis added).

4. *Conclusion*.

In sum, Cracker Barrel's Motion for Reconsideration is granted to the extent it relates to the time frame of the putative collective, but denied to the extent it relates to the scope of the putative collective. Plaintiffs' request for equitable tolling is granted in part, and the Court will toll the statute of limitations on the putative collective's FLSA claims from September 6, 2022—the date Plaintiffs' meritorious certification motion became ripe for review—until the date on which notice is sent to the putative collective. Cracker Barrel's Motion to Strike Plaintiffs' Request for Equitable Tolling will therefore be denied. To reflect these findings, the putative collective for notice purposes shall be modified to the following definition: all current and former Cracker Barrel servers who worked for Cracker Barrel from *September 6, 2019*, *to the present* in states where Cracker Barrel pays its employees under the 29 U.S.C. § 203(m) tip credit scheme. Final determinations as whether certain opt-in plaintiffs are subject to arbitration will be reserved for the second stage of certification.

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credit" basis or less than minimum wage by Cracker Barrel at any time in the last three (3) years, or worked off-the-clock." (Doc. 76-13 at 1) (emphasis added). The Notice further states in the lawsuit description that "only servers *who are not subject to arbitration* may join this lawsuit." (*Id.* at 2) (emphasis added).

B. Cracker Barrel's Motion to Certify Interlocutory Appeal (Doc. 84).

Cracker Barrel next requests the Court to certify the Collective Certification Order for interlocutory appeal to the Ninth Circuit under 28 U.S.C. § 1292(b). (Doc. 84 at 8–15). Cracker Barrel argues the Collective Certification Order gives rise to the following four questions that are appropriate for appeal:

> 1. Whether a District Court may allow sending a notice under Section 216(b) of the FLSA to individuals whom the Court has determined to be bound by an enforceable arbitration agreement.
>
> 2. Whether a District Court may allow sending a notice under Section 216(b) of the FLSA to individuals whose claims would be time-barred by the FLSA's most-inclusive three year statute of limitations period.
>
> 3. Whether *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255, 265 (2017), prevents a District Court from sending notice under Section 216(b) of the FLSA to individuals over whom the Court lacks specific personal jurisdiction.
>
> 4. Whether a District Court, in determining whether putative plaintiffs are "similarly situated" to named plaintiffs under Section 216(b) of the FLSA, must follow the two-step certification process detailed in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 352 (D.N.J. 1987), or instead should "rigorously enforce the similarly situated requirement" through a period of

> preliminary discovery as held in *Swales v. KLLM Transport Services, L.L.C.*, 985 F.3d 430, 443 (5th Cir. 2021).

(*Id.* at 7). Plaintiffs did not file a response in opposition to Cracker Barrel's Motion. Under Rule 7.2 of the Local Rules of Civil Procedure, if a party "does not serve and file the required answering memoranda, ... such non-compliance may be deemed a consent to the denial or granting of the motion and the Court may dispose of the motion summarily." L.R. Civ. 7.2(i); *see also Brydges v. Lewis*, 18 F.3d 651, 652 (9th Cir. 1994). However, because requests for interlocutory appeals are to be granted "only in exceptional circumstances," the Court will nonetheless proceed to evaluate the merits of Cracker Barrel's Motion. *City of Glendale v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2013 WL 12250532, at *2 (D. Ariz. June 5, 2013) (citing *U.S. v. Woodbury*, 263 F. 2d 784, 799 n.11 (9th Cir. 1959)).

1. *Legal Standards.*

Generally, "parties may appeal only from orders which end the litigation on the merits and leave nothing for the court to do but execute the judgment." *Couch v. Telescope Inc.*, 611 F.3d 629, 632 (9th Cir. 2010) (internal citations omitted). A "narrow exception" to the final judgment rule allows a non-final order to be certified for interlocutory appeal provided that three statutory requirements are met: the non-final order "(1) involves a controlling question of law" as to which "(2) there is substantial ground for difference of opinion" and where "(3) an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Cracker Barrel, as "[t]he party

seeking certification[,] has the burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Villarreal v. Caremark LLC*, 85 F. Supp. 3d 1063, 1067 (D. Ariz. 2015) (internal citations omitted).

The first statutory requirement is that an order must involve a controlling question of law. "While Congress did not specifically define what it meant by 'controlling,' the legislative history of [28 U.S.C. §] 1292(b) indicates that this section was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981). "Examples of controlling questions of law include fundamental issues such as the determination of who are necessary and proper parties, whether a court to which a case has been transferred has jurisdiction, or whether state or federal law should be applied." *Villarreal*, 85 F. Supp. 3d at 1068 (internal citations omitted).

As to the second statutory requirement to determine if a "substantial ground for difference of opinion" exists under 28 U.S.C. § 1292(b),[14] courts must examine to what extent the controlling law is unclear. Courts traditionally will find this requirement is satisfied where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." *Couch*, 611

[14] Unless where otherwise noted, all Section references are to Title 28 of the United States Code.

F.3d at 633. However, "just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." *Id.*

Last, the third statutory requirement "that the appeal must be likely to materially speed the termination of the litigation [] is closely linked to the question of whether an issue of law is 'controlling,' because the district court should consider the effect of a reversal on the management of the case." *L.H. Meeker v. Belridge Water Storage District*, 2007 WL 781889, at *6 (E.D. Cal. March 13, 2007) (citing *In re Cement*, 673 F.2d at 1026). Where "a substantial amount of litigation remains in th[e] case regardless of the correctness of the Court's ruling ... arguments that interlocutory appeal would advance the resolution of th[e] litigation are unpersuasive." *Lillehagen v. Alorica, Inc.*, 2014 WL 2009031, at *7 (C.D. Cal. May 15, 2014).

28 U.S.C. § 1292(b) "is to be applied sparingly" and is not intended "merely to provide review of difficult rulings in hard cases." *City of Glendale*, 2013 WL 12250532, at *2 (citing *Woodbury*, 263 F. 2d at 799 n.11). "Even when all three statutory requirements are satisfied, district court judges have 'unfettered discretion' to deny certification." *Id.* (internal citations omitted). Therefore, "a district court's denial of a motion to certify a decision for immediate appeal under section 1292(b) is not reviewable by the appellate court." *Environmental Protection Information Center v. Pacific Lumber Co.*, 2004 WL 838160, at *2, n.6 (N.D. Cal. April 19, 2004) (citing *Executive Soft-*

ware v. U.S. Dist. Court, 24 F.3d 1545, 1550 (9th Cir. 1994)). By the same token, "[e]ven where the district court makes such a certification, the court of appeals nevertheless has discretion to reject the interlocutory appeal, and does so quite frequently." *Villarreal*, 85 F. Supp. 3d at 1068.

2. *Question Regarding Arbitration*.

Cracker Barrel's first proposed question for interlocutory appeal is: "Whether a District Court may allow sending a notice under Section 216(b) of the FLSA to individuals whom the Court has determined to be bound by an enforceable arbitration agreement." (Doc. 84 at 7). The Court agrees with Cracker Barrel that the statutory requirement is met because this question would "dramatically affect the number of persons who will be invited to file consents to join as plaintiffs." (Doc. 84 at 9). Thus, this issue goes to the fundamental determination of who the necessary and proper parties are in this matter. *See Villarreal*, 85 F. Supp. 3d at 1068. The Court further agrees the second statutory requirement is met because the Ninth Circuit has not yet opined on the issue, and there are cases displaying that "other courts both within and outside the Ninth Circuit are hostile to such an approach." (Doc. 84 at 11); (*see also* Doc. 82 at 20–21); *see also supra* Section II.A(3).

Lastly, the Court finds the third statutory requirement is met because resolution of the issue would materially affect the manner and speed in which litigation is terminated against those individuals who are subject to arbitration. Although courts across the nation have found that FLSA conditional class certification orders are not generally proper for interlocutory appeal due to their preliminary nature,

see Villarreal, 85 F. Supp. 3d at 1069–70 (collecting cases), the Court finds the split decisions among circuit courts and inner-circuit district courts on how to approach arbitration issues in FLSA collective actions present the type of exceptional circumstances that warrant interlocutory appeal. *See Couch*, 611 F.3d at 633.

Therefore, the Court will certify Cracker Barrel's proposed question regarding arbitration in FLSA collective actions for interlocutory appeal under 28 U.S.C. § 1292(b).

3. *Question Regarding FLSA Statute of Limitations.*

Cracker Barrel's second proposed question for interlocutory appeal is: "Whether a District Court may allow sending a notice under Section 216(b) of the FLSA to individuals whose claims would be time-barred by the FLSA's most-inclusive three year statute of limitations period." (Doc. 84 at 7). Because the Court will grant Cracker Barrel's request to modify the time frame of the putative collective so that it reflects the opt-in standard under Section 256 of the FLSA, this issue is moot. *See supra* Section II.A(2).

4. *Question Regarding Specific Personal Jurisdiction.*

Cracker Barrel's third proposed question for interlocutory appeal is: "Whether *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255, 265 (2017), prevents a District Court from sending notice under Section 216(b) of the FLSA to individuals over whom the Court lacks specific personal jurisdiction." (Doc. 84 at 7). The Court agrees with Cracker Barrel that this question meets

all three statutory requirements. This is a controlling question of law that would materially speed the termination of litigation because it concerns a jurisdictional issue that would fundamentally "change the nature of this action from a nationwide action to one focused only on claims with connection to the State of Arizona." (*Id.* at 9). An outcome narrowing this matter as such would indeed avoid protracted and expensive litigation. *See Villarreal*, 85 F. Supp. 3d at 1068. Furthermore, there is clearly a substantial ground for difference of opinion as the circuit courts are split on the issue. And, because the Ninth Circuit has yet to weigh in on this issue, inner-circuit courts have consequently applied varying approaches. (Doc. 84 at 12). The Court has certainly noted these issues in its Certification Order. (Doc. 82 at 21–23).

Therefore, the Court will certify Cracker Barrel's proposed question on specific personal jurisdiction in FLSA collective actions for interlocutory appeal under 28 U.S.C. § 1292(b).

5. *Question Regarding Certification Process for FLSA Collective Actions*.

Cracker Barrel's fourth and last proposed question for interlocutory appeal is: "Whether a District Court, in determining whether putative plaintiffs are 'similarly situated' to named plaintiffs under Section 216(b) of the FLSA, must follow the two-step certification process detailed in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 352 (D.N.J. 1987), or instead should 'rigorously enforce the similarly situated requirement' through a period of preliminary discovery as held in *Swales v. KLLM Transport Services, L.L.C.*, 985 F.3d 430, 443 (5th Cir. 2021)." (Doc. 84 at 7). The Court agrees with Cracker Barrel that the first statutory

requirement is met because this question would replace the certification framework as followed in the Ninth Circuit. (*Id.* at 10). However, the Court disagrees that the second statutory requirement is met. Cracker Barrel argues a substantial ground for difference of opinion exists because "[t]he Ninth Circuit has used the two-step *Lusardi* approach but has never decided whether the approach follows the FLSA, or whether *Swales* reflects the proper approach." (*Id.* at 12). But, as stated in the Collective Certification Order, the Ninth Circuit has explicitly established the two-step approach to FLSA collective action certification in *Campbell*, 903 F.3d at 1108–09, which addresses "preliminary certification" at step one and "decertification" at step two. (Doc. 82 at 11–13). *Swales* has no binding effect on the Ninth Circuit. Therefore, Cracker Barrel's fourth proposed question is not proper for interlocutory appeal. *See Couch*, 611 F.3d at 633 (holding that "just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal").

6. *Conclusion.*

In sum, Cracker Barrel's Motion to Certify Interlocutory Appeal is denied as to proposed questions two and four, but granted as to questions one and three. The Court will permit Cracker Barrel to seek appeal of the Collective Certification Order under 28 U.S.C. § 1292(b) regarding arbitration and specific personal jurisdiction in FLSA collective actions.

C. Cracker Barrel's Motion to Stay Proceedings Pending Appeal (Doc. 96) and Motion to Strike Plaintiffs' Notice of Supplemental Authority (Doc. 101).

The final issue is whether the Court should stay all proceedings in this matter pending Cracker Barrel's various appeals of the Collective Certification Order. Cracker Barrel argues that, under the United States Supreme Court's June 23, 2023, decision in *Coinbase, Inc. v. Bielski*, 599 U.S. 736, (2023),[15] an automatic stay is required because Cracker Barrel appealed the Collective Certification Order under Section 16 of the FAA.[16] (Doc. 96 at 5–7). Alternatively, Cracker Barrel argues the Court should exercise its discretion to issue a stay under either test set forth in *Nken v. Holder*, 556 U.S. 418, 433–34 (2009)[17] and *Landis v. N. Am. Co.*, 299 U.S. 248, 254

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[15] At the time Cracker Barrel filed its Motion to Stay Proceedings Pending Appeal, *Coinbase* was not yet issued. On June 25, 2023, Plaintiffs filed a Notice of New Authority (Doc. 99) alerting the Court that *Coinbase* had published. Cracker Barrel moved to strike Plaintiffs' Notice on the basis that it contained improper, additional legal arguments. (Doc. 101). The Court agrees, and will strike Plaintiffs' Notice from the record. In any event, Plaintiffs' Notice of New Authority is not necessary for the Court to consider the implications of *Coinbase* on this matter.

[16] Section 16 of the FAA provides that "[a]n appeal may be taken from an order denying an application under section 206 of this title to compel arbitration." 9 U.S.C. § 16(a)(1)(C). The Collective Certification Order denied Cracker Barrel's "Motion to Compel Arbitration and Dismiss Second Amended Complaint with Prejudice." (Doc. 96 at 5–7), and Cracker Barrel indeed filed its Notice of Appeal (Doc. 91).

[17] Under the *Nken* test, a court should consider the following four-factors when deciding whether to stay proceedings:

(*Footnote continued*)

(1936).[18] (*Id.* at 7–14). In opposition, Plaintiffs argue that *Coinbase* has no bearing on this matter because it applies to non-frivolous appeals, whereas Cracker Barrel's appeal is frivolous. (Doc. 97 at 4–7). Plaintiffs further contend *Coinbase* is distinguishable because the decision concerns a Federal Rule of Civil Procedure 23 class action while this matter concerns an FLSA collective action. (*Id.* at 7–9). Last, Plaintiffs argue both the *Nken* and *Landis* tests favor litigation to proceed. (*Id.* at 9–17).

The Court need not weave through the parties' tangled, technical arguments to conclude a stay of proceedings in this matter is warranted. In holding that district courts are required to stay its proceedings when a party appeals the denial of its motion to compel arbitration, *Coinbase* emphasized the longstanding principle that "[a]n appeal, including an interlocutory appeal, 'divests the district court of its control over those aspects of the case involved in the

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"(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770 (1987)).

[18] Under the *Landis* test, a court should consider the following three-factors when deciding whether to stay proceedings: "[1] the possible damage which may result from the granting of a stay, [2] the hardship or inequity which a party may suffer in being required to go forward, and [3] the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and question of law which could be expected to result from a stay." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

appeal.'" 599 U.S. at 740 (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). Accordingly, a stay is required pending Cracker Barrel's appeal of the Collective Certification Order under Section 16 of the FAA because (a) Cracker Barrel's appeal is non-frivolous, *see supra* Section II.B; and (b) whether this litigation may move forward in this Court is precisely what the Ninth Circuit must decide. *See Coinbase*, 599 U.S. at 741. Likewise, at this juncture, the Court's control over dissemination of notice to the putative collective is divested because fundamental questions regarding arbitration and personal jurisdiction in FLSA collective actions stand to be resolved on interlocutory appeal. *See supra* Section II.B.

Turning to the parties' individual interests, it is evident that Cracker Barrel would face irreparable harm absent a stay. Cracker Barrel represents that of the 159,934 individuals in the putative collective, 106,184 are potentially subject to arbitration. (Doc. 96 at 10). So, Cracker Barrel would incur significant discovery expenses should the certification process proceed. Indeed, the size of the putative collective makes it likely that *both* parties would suffer irreparable harm in spending substantial time and resources on litigation that might otherwise be narrowed on appeal. *See Salhotra v. Simpson Strong-Tie Co., Inc.*, 2022 WL 1091799, at *2 (N.D. Cal. Apr. 12, 2022) (collecting cases). By comparison, the issuance of a stay would not pose injury to Plaintiffs—or the putative collective as potential opt-in plaintiffs—because the applicable statute of limitations will be equitably tolled from September 6, 2022, until the date on which notice is sent to the putative collective. *See supra* Section II.A(2)(b). This tolling period

would necessarily include any duration the proceedings are stayed pending appeal.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254. In light of *Coinbase* and the *Nken* and the *Landis* tests, the Court finds it appropriate to stay all proceedings in this matter pending Cracker Barrel's appeals to the Ninth Circuit.

Accordingly,

IT IS ORDERED that Cracker Barrel's "Motion for Clarification, or, in the Alternative, Reconsideration" (Doc. 83) is **granted in part and denied in part** as stated herein. Lines 8–12 on page 28 of the March 31, 2023, Order (Doc. 82 at 28) is **stricken** and **amended** as follows:

> **IT IS FURTHER ORDERED** the collective class of potential plaintiffs is conditionally certified under 29 U.S.C. § 216(b) and shall consist of all current and former Cracker Barrel servers who (a) worked for Cracker Barrel from September 6, 2019, to the present in states where Cracker Barrel pays its employees under the 29 U.S.C. § 203(m) tip credit scheme.

The remainder of the March 31, 2023, Order (Doc. 82) is otherwise **affirmed**.

IT IS FURTHER ORDERED that Plaintiffs' request for equitable tolling (Doc. 90 at 5–8) is construed as a motion and is **granted**. The three-year statute of limitations on the putative collective's

FLSA claims shall be tolled from September 6, 2022—the date Plaintiffs' meritorious certification motion became ripe for review—until the date on which notice is sent to disseminated to the putative collective. Cracker Barrel's "Motion to Strike Plaintiffs' Request for Equitable Tolling" (Doc. 93) is therefore **denied**.

IT IS FURTHER ORDERED that Cracker Barrel's "Motion to Certify Interlocutory Appeal" (Doc. 84) is **granted in part and denied in part** as stated herein. Cracker Barrel may seek appeal under 28 U.S.C. § 1292(b) of the March 31, 2023, Order (Doc. 82) regarding arbitration and specific personal jurisdiction in FLSA collective actions.

IT IS FURTHER ORDERED that Cracker Barrel's Motion to Strike Plaintiffs' Notice of Supplemental Authority (Doc. 101) is **GRANTED**. The Notice of Supplemental Authority at Doc. 99 shall be stricken and disregarded.

IT IS FINALLY ORDERED that Cracker Barrel's Motion to Stay Proceedings Pending Appeal (Doc. 96) is **granted**. As set forth herein, the proceedings in this matter are **stayed** until the Ninth Circuit resolves Cracker Barrel's appeals of the March 31, 2023, Order (Doc. 82).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 23-15650, 24-1979

ANDREW HARRINGTON; KATIE LIAMMAYTRY;
JASON LENCHERT; AND DYLAN BASCH,

Plaintiffs-Appellees,

V.

CRACKER BARREL OLD COUNTRY STORE, INC.,

Defendant-Appellant.

Filed August 8, 2025

Before: HAWKINS, CLIFTON, and BADE, Circuit Judges.

ORDER

The panel has voted to deny the petitions for panel rehearing [Dkt. Entry Nos. 59 and 60 in 23-15650 and Dkt. Entry Nos. 51 and 52 in 24-1979].

Judge Bade has voted to deny both petitions for rehearing en banc, and Judges Hawkins and Clifton so recommend. The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petitions for panel rehearing and petitions for rehearing en banc are denied.

APPENDIX E — 29 U.S.C. § 216(b)

Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) or 218d of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) or 218d of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences 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. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attor-

ney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) or 218d of this title.

APPENDIX F — FEDERAL RULE OF CIVIL PROCEDURE 4

Summons

(a) Contents; Amendments.

(1) *Contents.* A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) *Amendments.* The court may permit a summons to be amended.

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served.

(c) Service.

(1) *In General.* A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) *By Whom.* Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) *By a Marshal or Someone Specially Appointed.* At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiving Service.

(1) *Requesting a Waiver.* An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized

by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside any judicial district of the United States—to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) *Failure to Waive.* If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) *Time to Answer After a Waiver.* A defendant who, before being served with process, timely re-

turns a waiver need not serve an answer to the complaint until 60 days after the request was sent—or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) *Results of Filing a Waiver.* When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) *Jurisdiction and Venue Not Waived.* Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) *United States.* To serve the United States, a party must:

(A)

(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) *Agency; Corporation; Officer or Employee Sued in an Official Capacity.* To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) *Officer or Employee Sued Individually.* To serve a United States officer or employee sued in

an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) *Extending Time.* The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(j) Serving a Foreign, State, or Local Government.

(1) *Foreign State.* A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. §1608.

(2) *State or Local Government.* A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(k) Territorial Limits of Effective Service.

(1) *In General.* Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) *Federal Claim Outside State-Court Jurisdiction.* For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(*l*) Proving Service.

(1) *Affidavit Required.* Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) *Service Outside the United States.* Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) *Validity of Service; Amending Proof.* Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

(n) Asserting Jurisdiction over Property or Assets.

(1) *Federal Law.* The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) *State Law.* On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is ac-

quired by seizing the assets under the circumstances and in the manner provided by state law in that district.

APPENDIX G — FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H — FOURTEENTH AMENDMENT

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously

taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.