

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHAEL HUTSON and)
KENNETH WILLIAMS, on behalf)
of themselves and all those persons)
similarly situated who consent to) CIVIL ACTION
representation,) FILE NO. 1:10-CV 0814-JOF
)
Plaintiffs,)
)
vs.)
)
W.W. GRAINGER, INC.)
)
Defendant.)

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR
CONDITIONAL CERTIFICATION AND ISSUANCE OF NOTICE**

Plaintiffs Michael Hutson and Kenneth Williams have brought this lawsuit on behalf of themselves and all other Account Relationship Managers (“ARMs”) employed by W.W. Grainger, Inc. between March 22, 2007 and the present. Plaintiffs claim that Grainger misclassified them as exempt from the Fair Labor Standards Act (“FLSA”) and failed to pay them, and all other ARMs, overtime compensation in willful violation of the Act, 29 U.S.C. § 201, *et seq.* Plaintiffs respectfully request the Court conditionally certify this case as a collective action, order the Defendant to produce the names and contact information of all current

and former ARMs it has employed between March 22, 2007 and the present, and issue notice to each of these potential opt-in plaintiffs using the notice form Plaintiffs have filed with their motion pursuant to 29 U.S.C. § 216(b).

I. INTRODUCTION

A. Factual Background

Grainger is an international supplier of industrial products. The ARMs are Grainger's inside sales people. Their job is to make phone calls to existing Grainger customers, to which Grainger assigns them, in order to sell Grainger's products. The ARMs routinely work more than forty hours per week but are paid no overtime compensation.¹

Grainger's current and former ARMs are an ideal class for conditional certification. First, all of the ARMs have the same job duties and are compensated according to the same compensation plan, regardless of the customers to which they are assigned or the location at which they work. Second, the ARMs have no managerial responsibility, and plainly are not exempt from the FLSA, as discussed

¹ Inside sales people are, as a matter of black letter law, non-exempt and must be paid overtime under the FLSA. 29 U.S.C. § 213(a)(1) (*outside* sales people, only, are exempted from the FLSA); 29 C.F.R. § 541.500 – 541.203 (the outside sales exemption applies only to employees whose primary duty is to make sales *by going outside of the office to visit with customers*). Until last year, the department for which the ARMs worked was actually called the Inside Sales Department – Grainger just recently changed the name (though not the ARMs' jobs). (Hutson Decl., ¶14, 17; Williams Decl., ¶15-16).

further below. Third, Grainger exercises tight, centralized control over virtually every facet of the ARMs' daily activities, including requiring the ARMs to work overtime hours without overtime compensation. This centralized control weighs in favor of conditional certification because it renders the regular job activities of all ARMs substantially identical. It also further undermines Grainger's claimed administrative exemption to the FLSA, since it ensures the ARMs exercise no meaningful discretion or independent judgment

Finally, there is abundant evidence that current and former ARMs will opt-in to a collective action should the Court conditionally certify a class and issue notice. Even before certification or notice, nearly twenty ARMs have already filed their consents to opt in to this action, including ARMs who worked or currently work at Grainger's offices in Alpharetta, Georgia; Denver, Colorado; and Chicago, Illinois. Plaintiffs are aware of other currently employed ARMs who would like to join the action but are declining to do so for fear Grainger may retaliate.

For these reasons, Plaintiffs respectfully move the Court to conditionally certify this case as a collective action, order the Defendant to produce the name and contact information of the class members, and issue notice to all potential opt-in members pursuant to 29 U.S.C. § 216(b). Plaintiffs seek conditional

certification of the following class: *all current and former ARMs employed by Grainger between March 22, 2007 and the present.*

B. The Plaintiffs and Other ARMs Are Entitled to Overtime Pay

All employees are subject to the FLSA's overtime pay requirements, which mandate that when they work more than forty hours per week they shall be compensated at one and a half times their regular rate of pay, unless the employer can prove the employees are exempt from the statute. 29 U.S.C. § 207(a)(1). Grainger contends that ARMs are exempt because they are "administrative" employees. (Doc. # 11 – Ninth Affirmative Defense).

Given the remedial nature of the FLSA, all exemptions are "narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). It is the employer's burden to establish that it is entitled to an exemption from the general overtime payment provision. *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 291 (1959); *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1070 (1st Cir.1995). Even at this early stage, it is apparent that Grainger cannot meet its burden.

To be an “administrative” employee: (1) the employee must earn at least \$455 a week, (2) his “primary duty” must be “the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers,” and (3) his “primary duty” must “include [] the exercise of discretion and independent judgment with respect to matters of significance,” 29 C.F.R. § 541.200(a).² *In re Novartis Wage and Hour Litigation*, 2009 WL 961131, *13 (2d Cir., July 6, 2010)(finding that pharmaceutical company’s sales representatives were administrative employees).

As shown in depth below, ARMs have no managerial responsibility, and Grainger ensures they exercise no discretion or independent judgment on significant matters by requiring them to adhere to prescribed questions, techniques, examples, and talking points when performing their primary duty of speaking on the phone with customers to sell products. (Reed Decl., ¶ 13-17; 31-35). Grainger also regulates *to the minute* the amount of time per day that ARMs devote to their tasks and micromanages their activities. (Hutson Decl., Ex. A).

Grainger will likely try to glorify the ARMs as using independent judgment and initiative, such as to develop customer relationships, by relying on a position description that exalts form over substance. This does not satisfy Grainger’s

² Plaintiffs do not dispute that they earned at least \$455 per week.

burden. “The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.” 29 C.F.R. § 541.202(e). The Second Circuit recently found that this regulation precludes application of the administrative exemption to a class of pharmaceutical sales representatives, because

[w]hat [the employer] characterizes as the Reps' exercise of discretion and independent judgment -- ability to answer questions about the product, ability to develop a rapport with a physician who has a certain social style, ability to remember past conversations with a given physician, ability to recognize when a message has been persuasive -- are skills gained and/or honed in their [employer] training sessions.

In re Novartis, 2009 WL 961131, *14. This is precisely the case with the ARMs.

II. THE UNDERLYING FACTS

Grainger is an international supplier of business and industrial supplies. It employs approximately 18,000 people and did \$6.4 billion in sales in 2009. (<http://www.experiencedone.com/who/overview.php>, as of July 25, 2010). During the three-year statute of limitations applicable to willful FLSA violations, Grainger has, and continues to, employ ARMs at its facilities in Alpharetta, Georgia; Chicago, Illinois; Colorado; and elsewhere throughout the United States. Grainger

employs several hundred ARMs at any given time, including between one hundred fifty and two hundred in Alpharetta. (Hutson Decl., ¶ 7-8).

A. All ARMs Have the Same Responsibilities and Compensation Plan

All of the ARMs have the same job duties and responsibilities, and the same or nearly identical compensation plans, consisting of a base salary and commissions. (Reed Decl., ¶ 20-22; Hutson Decl., ¶ 9-11, 56; Williams Decl., ¶9-10, 56-57; Bradley Decl., ¶6-7). Critically, opt-in Plaintiff Mary Bradley, who was an ARM at Grainger's Northbrook, Illinois office, describes her job duties virtually identically to the descriptions by the named Plaintiffs. (Bradley Decl., *passim*).

The ARMs' primary job duty is inside sales: they use phone calls to sell Grainger's products to existing Grainger customers to which the company assigns them. (Reed Decl., ¶9,11; Williams Decl., ¶9-10; Bradley Decl., ¶7). They also perform clerical work associated with this, such as routine correspondence and entering data into Grainger's computer system in preparation for, and in follow-up to, their customer phone calls. (Williams Decl., ¶25, 49-54). Although different ARMs may be assigned to different customers, or may work in different locations, their job duties are the same regardless of these factors. (Reed Decl., ¶24-26; *see*, Bradley Decl., *passim*). Grainger used the same performance evaluation form for all of the ARMs throughout the company. (Reed Decl., ¶21).

B. The ARMs Have no Managerial Responsibility

Ralph Reed, a former District Manager at the Alpharetta facility who directly supervised the ARM team that included Plaintiff Hutson, has provided a Declaration that unequivocally supports Plaintiffs' contention that they and the other ARMs lacked managerial responsibility. (Reed Decl., ¶ 3-8). Mr. Reed supervised a team of a dozen ARMs and reported directly to the Regional Director, making him familiar both with the ARMs' job responsibilities and with upper management's expectations regarding the ARMs. (Reed Decl., ¶ 4-6).

As Mr. Reed states:

13. ARMs did not supervise any employees.
14. ARMs did not participate in the management of Grainger's business.
15. They did not participate in company decisions regarding marketing or sales strategy.
16. They did not participate in company decisions regarding what products Grainger would make available to customers.
17. They did not hire or fire employees.

(Reed Decl., ¶ 13-17).

Plaintiffs Hutson and Williams, who worked on different teams and reported to different supervisors at the Alpharetta office, and opt-in Bradley, from Illinois, separately confirm that ARMs had no managerial role:

62. ARMs do not supervise any other employees.
63. We do not participate in formulating the prices for any of the products in the inventory.

64. ARMs have no knowledge as to what Grainger's cost is for any of its products, what the cost of sales is for any product, or how much any of Grainger's products need to be marked up in order for Grainger to operate profitably.

65. We do not participate in formulating the talking points or promotional programs Grainger requires us to mention to customers.

66. We do not participate in formulating the "Ideal Selling Week" or any of Grainger's other requirements about how much time we should devote to our required tasks.

(Hutson Decl., ¶ 61-65). *See also*, Williams Decl., ¶ 49-53; Bradley Decl., ¶57-61)

Similarly, ARMs had no responsibility for seeking new business. They were assigned to a list of existing customers, and they were not permitted to call customers outside of their lists. They did not travel outside of the office to see customers or for other business. (Reed Decl., ¶9-12; Bradley Decl., ¶8-10).

C. Grainger Closely Controls ARMs' Daily Activities, Eliminating Meaningful Discretion or Independent Judgment and Rendering all of the ARMs' Job Duties Virtually Identical

1. Grainger Centrally Controls Prices

Grainger sets all of its prices at its central office in Chicago, Illinois and publishes them in a catalogue, which each ARM keeps at his desk. Grainger also sets a minimum sales price for each product, a price below the catalogue price.

ARMs can only accept a purchase order if the customer's asking price is between the catalogue price and the minimum allowable price. Whenever the customer's price is below the minimum, the ARMs must submit a request for approval of the

sale to Grainger's Chicago headquarters. Only if the company approves the sale can the ARM then call the customer back to conclude the sale. (Reed Decl., ¶¶36-40; Hutson Decl., ¶¶48-55; Williams Decl., ¶¶45-51; Bradley Decl., ¶¶44-51).³ In fact, Grainger has terminated at least one ARM in Alpharetta for promising a customer a price below the minimum permissible sales price. (Hutson Decl., ¶ 54).

2. Grainger Controls the ARMs' Daily Activities, Requiring them to Work More than Forty Hours Per Week Without Overtime

The ARMs have so little discretion in their daily activities that, earlier this year, Grainger codified the ARMs' day to day job expectations in a document called the "Ideal Selling Week," which is a part of Grainger's "Playbook" – a manual the ARMs are required to follow. (Hutson Decl, Ex. A; Bradley Decl., Ex A). This document prescribes *to the minute* the amount of time every ARM should spend on daily tasks. The "Ideal Selling Week" document provided to Plaintiff Hutson in Alpharetta is *identical* to the one given to opt-in Bradley in Illinois. (Id.)

According to Grainger's "Playbook," each ARM should spend a total of 426 minutes (7.1 hours) each day on "customer facing sales efforts" – meaning phone calls with customers and activities directly related to those calls, such as reviewing customers' ordering history prior to calls and entering notes about conversations in

³ The process of submitting these approval requests is rote data entry. (Williams Decl., 52-53).

Grainger's computer system. (Hutson Decl., ¶23, Ex. A). Grainger provides a *minute by minute* prescription of the ARMs' "customer facing sales efforts" as follows:

- 140 minutes per day on customer calls, which must include thirty-five outgoing calls made by the ARM. Of these, fifteen must be "DM touches," meaning, dealing with the customer's purchasing manager;⁴
- 122 minutes per day on "pre-call planning," which consists of reviewing the customer's ordering history and possibly doing some Internet research about the customer;
- 144 minutes on "post-call follow-up," which consists of entering notes into Grainger's computer system about the ARM's conversations and other clerical work;
- 20 minutes on "marketing," which consists of emails to customers? (Hutson Decl., ¶24-27, Ex. A; Bradley Decl., ¶17-22, Ex. A).

Grainger's "Playbook" further specifies that ARMs spend an equally scripted two hours each day on "non-customer facing activity," as follows:

- 20 minutes on "branch calls" (internal phone calls);

⁴ Of course, Grainger actually demands more than this, requiring ARMs to spend 220 minutes per day on customer calls pursuant to the ARMs' performance evaluation forms. (Hutson Decl., ¶24)

- 60 minutes on “credit, quotes, sourcing, and tech support,” which consists mostly of submitting requests to the central office for permission to sell products to customers whose asking price is below Grainger’s minimum allowable price;
- 15 minutes on internal meetings;
- 45 minutes on internal emails.

(Hutson Decl., ¶28-32, Ex. A; Bradley Decl., ¶23-27, Ex. A).

Even before Grainger memorialized these expectations in the “Playbook” earlier this year, it always required its ARMs to spend a specified number of hours on the phone, make a certain number of outgoing calls, and enter a certain number of notations into the computer system. The “Playbook” is merely a memorialization of the highly scripted way in which Grainger had previously controlled the ARMs’ daily activities. (Reed Decl., ¶27-29; Hutson Decl., 37-38; Williams Decl., 22-25; Bradley Decl., ¶15-16, 31-32).

Significantly, Grainger’s “Ideal Selling Week” expressly requires the ARMs to work a minimum of 9.1 hours per day, and 45.5 hours per week, without even addressing the fact that many of the ARMs do additional work outside of the office, or in their cars while commuting. Thus, an ARM who performs the bare

minimum of “Ideal” work accrues 5.5 hours of unpaid overtime every week.

(Hutson Decl., Ex. A; Bradley Decl., Ex A).

3. Grainger Centrally Controls the Techniques, Talking Points, and Phrases ARMs Must Use When Speaking With Customers

Grainger trains the ARMs on tightly controlled techniques for dealing with customers. ARMs are expected to adhere to Grainger’s prescribed talking points, and even specific verbiage, during their customer phone calls. (Reed Decl., ¶31-33). In fact, Grainger’s District Managers monitor the ARMs’ customer calls to ensure they adhere to Grainger’s standardized techniques for customer calls.

Mr. Reed states:

31. Beyond the centrally determined requirements for the number of hours ARMs had to spend on the phone and the number of calls the ARMs had to make each day, Grainger also had a centralized and tightly controlled system of techniques and procedures which all ARMs were required to follow whenever they were dealing with customers.

32. Grainger referred to some of these prescribed techniques as the “Grainger Value Advantage.”

33. Grainger's training, which was the same for all ARMs throughout the company, required ARMs to adhere to specific, prescribed talking points whenever dealing with customers. The training even included specific verbiage the ARMs were to use when dealing with our customers.

34. As District Manager, one of my responsibilities was to monitor the phone calls made by the ARMs under my supervision to ensure adherence to Grainger's centrally established techniques and procedures for speaking with customers. This was also the responsibility of the other district managers in the company.

35. In fact, we District Managers were expected to counsel ARMs when they deviated from the prescribed talking points or verbiage.

(Reed Decl., ¶ 31-35).

Plaintiff Williams, who worked for a different team and district manager, confirmed that he was subject to similar control and monitoring, including being counseled for deviating from the official Grainger script:

37. The company even tightly controlled the techniques and procedures we used during our customer calls.

38. Our District Managers or other management officials listened in on our calls.

39. One of the purposes of this monitoring was to ensure that, when dealing with the customers, we followed Grainger's training for conducting customer calls, and that we mentioned certain prescribed talking points which the company developed and disseminated or trained us on.

40. Grainger trained the ARMs on specific techniques for speaking with customers. These were known generally as the "Go To Market Strategy." This "Strategy" included being sure to mention to customers particular promotional programs Grainger was running at a given time.

41. Even the examples and hypotheticals we used when dealing with customers were prescribed and trained by Grainger. For example, the "Pain Chain" was a talking point we used in describing to a customer why they may lose money in the long run by purchasing from a competing company, even though Grainger's prices may be higher than competitors' prices.

42. When District Managers monitored a call and heard that an ARM failed to employ the required techniques or talking points, or failed to ask the required questions, the District Managers counseled or disciplined the ARM.

43. My District Manager, Mr. Rolader, often sat right next to me listening to my calls. He frequently counseled me when I failed to ask the customer specific questions Grainger had trained the ARMs to

ask, or if I failed to mention the prescribed talking points, like Grainger's "Simplify and Save" program.

44. Grainger officials also periodically called the customers and inquired whether the ARM mentioned the required talking points and programs.

(Williams Decl., ¶¶37-44). Opt-in Bradley, working in Illinois, was trained and controlled in the same way. (Bradley Decl, ¶¶36-43).

D. Other ARMs are Likely to Opt In to the Action if the Class is Certified and Notice is Issued

There is substantial interest among current and former ARMs in opting in to this action. Since Plaintiffs Hutson and Williams filed suit on March 22, 2010, nearly twenty current and former ARMs have consented to join and have filed their opt-in notices with the Court. These "opt-ins" include over fifteen ARMs from Grainger's Alpharetta, Georgia facility, where Plaintiff Hutson is presently employed and where Plaintiff Williams was employed until his termination.⁵ The opt-ins also include an ARM who was employed at Grainger's Denver, Colorado facility, Ron McMillion; and from Grainger's Chicago, Illinois facility, Ms Bradley. That these persons have opted in prior to certification and notice shows that many more will likely join the action if they receive the official notice letter.

Conditional certification and Court-supervised notice are also critical to address potential opt-ins' concerns that Grainger may retaliate against them if they

⁵ Plaintiff Hutson's termination is not at issue in this case.

join the case. Plaintiff Hutson has personally spoken with at least ten ARMs currently employed in Alpharetta who have stated they would like to join the action, but have declined to do so out of fear for the jobs. (Hutson Dec., ¶67). Given the present condition of the job market, such fear can be a powerful deterrent to participation. To that end, the proposed notice letter Plaintiffs have submitted with their Motion contains a statement regarding the FLSA's anti-retaliation provision. Such notice, coming from the Court, would provide other ARMs the security they need to make an informed decision whether to opt in.

III. ARGUMENT

Plaintiffs seek conditional certification of the class of *all current and former ARMs employed by Grainger between March 22, 2007 and the present.*

A. Plaintiffs Easily Meet the Lenient Standard for Conditional Certification

The FLSA provides Plaintiffs the right to bring actions on behalf of themselves and on behalf of other, similarly situated employees. 29 U.S.C. § 216(b); *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 167 (1989) (applying Section 216(b)'s collective action mechanism in the context of an Age Discrimination in Employment Act case.). In such a collective action, the court has discretion to “facilitat[e] notice to potential plaintiffs” and require the defendant to produce these persons' names and contact information so that timely

and accurate notice can be sent to the class. *Hoffman-La Roche, Inc.*, 493 U.S. at 169-79. This mechanism helps ensure “the efficient resolution in one proceeding of common issues of law and fact arising from the same alleged [unlawful] activity.” *Hoffman-La Roche, Inc.*, 493 U.S. at 170.

Courts in the Eleventh Circuit follow a two-stage, or “ad hoc,” certification procedure in FLSA cases. At stage one, the district court conditionally certifies a class so long as the plaintiffs can “show[] a reasonable basis for [their] claim[s] that there are other similarly situated employees.” *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 (11th Cir. 2008) (affirming district court’s denial of employer’s motion to decertify nationwide class of over 1,400 store managers seeking overtime compensation). “This first step is . . . referred to as conditional certification since the decision may be reexamined once the case is ready for trial.” *Id.* at 1261. Plaintiffs seek conditional certification by their present Motion.

Early certification and notice to potential plaintiffs are central to the FLSA’s broad remedial purpose, because class members must affirmatively opt-in, and the statute of limitations continues to run on the unnamed class members’ claims until they join the action. *See* 29 U.S.C. §§ 216(b), 256; *Hoffman-La Roche, Inc.*, 493 U.S. at 170 (explaining that the benefits of a collective action “depend on employees receiving accurate and *timely* notice concerning the pendency of the

collective action, so that they can make informed decisions about whether to participate”) (emphasis added); *Dybach v. State of Florida Dept. of Corrections*, 942 F.2d 1562, 1567 (11th Cir. 1991) (certification and notice serve the FLSA’s broad, remedial purpose).

Plaintiffs’ burden to show the existence of “similarly situated” employees is light. *Id.* at 1260. While the Eleventh Circuit has declined to set out a precise definition, it has described the standard as “fairly lenient,” “flexible,” and “less stringent than that for joinder under Rule 20(a)”⁶ *Hipp v. Liberty National Life Ins. Co.*, 252 F.3d 1208, 1218-1219 (11th Cir. 2001) (affirming conditional certification, under ADEA, of class of current and former managerial employees who held a variety of different job titles at different levels of management). “[P]laintiffs need show only that their positions are similar, not identical, to the positions held by the putative class members.” *Id.* at 1217. Plaintiffs also need not show the existence of any unified plan or policy giving rise to the claimed FLSA

⁶ Rule 20(a), which is *more* stringent than Section 216(b), provides that “Persons may join in one action as plaintiffs if: (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action.” Fed. R. Civ. P. 20(a). In *Grayson, supra*, the Eleventh Circuit expressly distinguished the “similarly situated” standard of 29 U.S.C. § 216(b) as being more flexible, lenient, and permissive than the standard for joining plaintiffs to an action under Rule 20(a). *Grayson*, 79 F.3d at 1097.

violation, though here Plaintiffs easily make such a showing via Grainger's highly centralized control over ARMs' day to day activities. Grayson, 79 F.3d at 1095.

The leniency of the "similarly situated" standard appropriately reflects the fact that Plaintiffs must seek conditional certification without the benefit of discovery.

At the notice stage, the district court makes a decision-usually based only on the pleadings and any affidavits which have been submitted-whether notice of the action should be given to potential class members. Because the court has minimal evidence, this determination is made using a fairly lenient standard, and typically results in "conditional certification" of a representative class.

Hipp, 252 F.3d at 1218 (quoting *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir.1995)). The standard is also less stringent than that used during the ultimate determination that the class is proper on a defense motion for decertification prior to trial since, at that point, the parties have had full discovery. *Jackson v. New York Telephone Co.*, 163 F.R.D. 429, 431 (S.D.N.Y. 1995).

In order to conditionally certify the class and issue notice to the potential opt-in plaintiffs, the district court need only

satisfy itself that there are other employees of the department-employer who desire to opt-in and who are similarly situated with respect to their job requirements and with regard to their pay provisions. If the district court concludes that there are such other employees, we leave it to the district court to establish the specific procedures to be followed with respect to such possible opting-in.

Dybach, 942 F.2d at 1567-68.

Under this standard the court should authorize notice to the conditional class. Then, after discovery, the court may revisit the propriety of including additional plaintiffs, normally after the defendant files a motion for decertification of the conditional class. *See Anderson v. Cagles, Inc.*, 488 F.3d 945, 953 (11th Cir. 2007), citing *Mooney*, 54 F.3d at 1214.

Plaintiffs easily satisfy the standard for conditional certification. First, Plaintiffs and all potential opt-in members do not merely have “similar” jobs, they all have the *same* job: ARM. The job expectations, duties, and compensation scheme applicable to that position, as well as the close supervision and monitoring of workplace activities, are established centrally by Grainger and are the same for all of the ARMs, regardless of the customers they serve or their geographic location. These facts have been true throughout the three year period for which Plaintiffs seek certification, notwithstanding Grainger’s tweaks to the job description, such as the number of minutes per day ARMs must spend talking with customers, or the specific talking points ARMs must use on calls. *Supra*, § II.A.

Second, the ARMs routinely work over forty hours per week without receiving overtime compensation. In fact, Grainger *requires* them to via its

“Playbook,” to work a minimum of 9.1 hours per day. (Reed Decl., ¶18; Hutston Decl., Ex. A).

Third, there is already abundant evidence of interest among current and former ARMs in opting in to this action. *See Barron v. Henry County School System*, 242 F. Supp. 2d 1096, 1101-1102 (M.D. Ala. 2003) (filing of opt-in consent forms weighs in favor of conditionally certifying the class because it shows that there is interest among potential opt-ins in joining the collective action).

B. Plaintiffs’ Proposed Notice is Appropriate

Notice at this time to the potential Class Members is appropriate and essential. In FLSA collective actions, the statute of limitations continues to run on the unnamed Class Members’ claims until they join the action by filing consents with the court. *See* 29 U.S.C. §§ 216(b), 256.

In *Hoffman La-Roche*, the Supreme Court authorized district courts to facilitate notice to putative class members. *Hoffman La-Roche*, 493 U.S. at 171-72. Since this decision, courts have uniformly authorized the type of notice Plaintiffs propose issuing in this case. The Supreme Court has also authorized district courts to order a defendant to produce names and addresses of putative class members in a collective action to facilitate notice. *Hoffman La Roche*, 493 U.S. at 170.

Plaintiffs request that the Court order Defendant to produce the names and current or last known contact information for all current or former ARMs it has employed between March 22, 2007 and the present. Plaintiffs further request that notice be sent to each of these potential opt-ins using the form Plaintiffs have submitted with their Motion.

“[C]ourts have endorsed the sending of notice early in the proceeding, as a means of facilitating the FLSA's broad remedial purpose and promoting efficient case management.” *Hoffmann v. Sbarro, Inc.*, 982 F.Supp. 249, 262 (S.D.N.Y. 1997). *Accord, Dybach*, 942 F.2d at 1567. For this reason, there is no need or requirement of preliminary discovery before the Class is conditionally certified and notice is issued. *See, Hoffman*, 983 F. Supp. at 262-63 (conditional certification and notice before discovery facilitate efficient case management, and courts’ decisions not to certify and issue notice occur only where there is a “total dearth of factual support for the plaintiffs' allegations of widespread wrongdoing”).

1. The Form of the Proposed Combined Notice and Consent Provide Timely and Accurate Notice.

Plaintiffs have provided the Court with a proposed combined Notice and Consent form for approval pursuant to the FLSA. (Ex. A). Potential plaintiffs must receive “accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.”

Hoffman La-Roche, 493 U.S. at 170. Such notice should provide a reasonable cutoff date for the filing of consents. Id. at 172.

The content of the Notice provided to the Class Members here meets these requirements. It provides information about the pendency of the action, the nature of the claims, and the steps the Class must take to “opt in.” The ninety day deadline for members to opt-in is reasonable and will not delay adjudication of the case on the merits. The neutral language of the Notice does not create any appearance of judicial endorsement. By reading the Notice, Class Members will be able to make an independent, informed decision about whether to participate in the lawsuit, without fear of retaliation.

2. Delivery of the Notice by United States Mail to the Last Known Address is the Best Notice Practicable.

All of the potential Class Members are current or former employees of Defendant. Defendant therefore can individually identify them. Plaintiffs request that the Court approve delivery of the Notice by mailing, via First Class United States Mail, postage prepaid, a copy of the Notice and Consent to each Class Member at his last known address.

3. Defendant Should Produce Data Reasonably Sufficient to Enable Plaintiffs to Locate Potential Opt Ins

Defendant possesses the names of the current and former employees who are members of the proposed Class and other objective information needed to achieve proper notice to all potential Class Members. Plaintiffs request that the Court order Defendant to provide them with the following data, in electronic form if practicable, for each potential Class Member:

- a) first, middle and last name;
- b) last known home address;
- c) last known home telephone number;
- d) last known cell telephone number;
- e) last known email address;
- f) date of birth;
- g) social security number;
- h) dates of hire and termination (if applicable); and
- i) location at which the class member works or last worked.

This information will assist in locating potential collective action participants if they cannot be located at their last known home address. The Court has authority to order Defendant to produce this data. *See Hoffman La-Roche*, 493 U.S. at 170 (affirming district court's order that the defendant produce names and contact information of class members in order to facilitate notice).⁷

⁷ Plaintiffs stipulate that they are willing to enter into an appropriate confidentiality agreement or consent order regarding confidentiality in order to alleviate any concern Defendant may have about disclosing this information.

4. Plaintiffs will Follow-Up on the Notices.

Plaintiffs will pay the cost of the mailing and related services. Plaintiffs propose that the time limit for consents will be 90 days after the mailing is complete. If no response is received in the first 45 days, Plaintiffs will mail reminder Notices and Consent Forms to ensure that participants have the Notice and respond on a timely basis. If Notices must be re-mailed because any addresses continue to be out of date, the time period for responding will start with the date of the re-mailed notice.

IV. CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court certify this case as a collective action on behalf of the class of all current and former ARMs employed by Grainger between March 22, 2007 and the present. Plaintiffs further request that the Court order Defendant to produce contact information concerning potential opt-in Plaintiffs so that Plaintiffs can make reasonable efforts to locate them. Finally, Plaintiffs request the Court issue notice to each class member using the Notice form Plaintiffs have submitted with their Motion.

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2010, I electronically filed the foregoing **Brief In Support of Plaintiffs' Motion for Conditional Certification and Issuance of Notice** with the Clerk of the Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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