

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No.: 1:14-cv-00990-RBJ

RHONDA NESBITT, individually and on behalf of all others similarly situated,

Plaintiff,

v.

FCNH, INC., VIRGINIA MASSAGE THERAPY, INC., MID-ATLANTIC  
MASSAGE THERAPY, INC., STEINER EDUCATION GROUP, INC., STEINER  
LEISURE LTD., SEG CORT LLC, doing business as the “Steiner Education Group,”

Defendants.

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**PLAINTIFF’S MOTION FOR CONDITIONAL CERTIFICATION OF  
COLLECTIVE ACTION**

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Plaintiff Rhonda Nesbitt through her counsel, David H. Miller and Rachel Graves of the Sawaya & Miller Law Firm, hereby moves for conditional collective action certification and the issuance of a court supervised notice to potential opt-in Plaintiffs. Plaintiff seeks conditional certification under 29 U.S.C. § 216(b) of the Fair Labor Standards Act (“FLSA”) with respect to all current and former students of the Defendants who plaintiffs allege were *de facto* hourly employees who performed massage services for Defendants FCNH, Inc., Virginia Massage Therapy, Inc., Mid-Atlantic Massage Therapy, Inc., Steiner Education Group, Inc., Steiner Leisure Ltd., SEG CORT LLC, doing business as the “Steiner Education Group” (collectively “Steiner” or “Defendants”).

**I. COMPLIANCE WITH LOCAL RULE 7.1(a)**

Pursuant to D.C. COLO. L. Civ. R. 7.1(a), Plaintiff's counsel contacted Defendants' counsel regarding the relief requested in this Motion and Brief on December 16, 2014. Defendants object to conditional certification of the collective class. *See Renfro v. Spartan Computer Services, Inc.*, 243 F.R.D. 431, 435 n.1 (D. Kan. 2007) (The court, *citing* 29 U.S.C. 255(a), applied a three-year statute of limitations where willfulness was alleged in the complaint).

**II. PLAINTIFF REQUESTS THAT THE COURT CONDITIONALLY CERTIFY THIS COLLECTIVE ACTION AND AUTHORIZE NOTICE TO POTENTIAL OPT-IN PLAINTIFFS**

**A. Conditional Collective Action Certification**

Plaintiff respectfully requests that this Court conditionally certify the Plaintiffs' collective action pursuant to 29 U.S.C. §216(b) for the following employees:

All current and former uncompensated students who were and / or are the alleged employees of Steiner who allegedly worked for the Defendants in the United States within the three years prior to April 7, 2014, and were allegedly misclassified as students or interns instead of employees of Defendants when they were performing paid massage services for the Defendants, and who were not paid at an hourly rate at least equal to the federal minimum wage.

Plaintiff further requests that the class include all such student/employee massage therapists hired and/or utilized by Steiner while this action is pending. Plaintiffs believe the putative class includes approximately 10,000 employees.

**1. Requirements for Conditional Certification.**

To maintain a collective action under the FLSA, Plaintiff must show that she is “similarly situated.” *See* 29 U.S.C. §216(b) (An action to recover unpaid minimum wages and overtime “may be maintained against any employer ... by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”) The Tenth Circuit has adopted a two-step approach in determining whether Plaintiffs are “similarly situated” under § 216(b).

At the first step, which typically occurs before discovery has been conducted, Plaintiff is required to set forth “substantial allegations that the putative class members were together the victims of a single decision, policy or plan.” *See Daugherty v. Encana Oil & Gas, Inc.*, 838 F. Supp. 2d 1127, 1132 (D. Colo. 2011) (*citing Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1102 (10th Cir. 2001)). This step is referred to as the notice stage because it frequently results in the court giving notice of the action to the putative class members. At the second step, which occurs after discovery is complete and by way of a motion to decertify by defendant, the court applies a stricter standard and looks at various factors to determine whether the putative class members are similarly situated. *Thiessen*, 267 F.3d at 1102-03.

This case is at step one of the certification analysis because no discovery has been conducted. The Court has set January 20, 2015, at 8:30 a.m., for the Scheduling Conference of the parties. The parties have not yet met or conferred under the terms of Fed.R.Civ.Proc. 26(f). Their Rule 26(f) conference is currently scheduled to occur on December 23, 2014. Accordingly, pursuant to Rule 26(d), no discovery has yet issued.

**2. The Plaintiff Class Meets the Requirements for Conditional Certification.**

Plaintiff has met the requirement of providing “substantial allegations” in the Complaint and Affidavit provided by the named Plaintiff. Plaintiff has put forth “credible, admissible evidence that they are appropriate class representatives or that there are other similarly situated parties ... [and] satisfied the minimal burden necessary to the conditional certification of a collective action under § 216(b).” *Lysyj v. Milner Distribution Alliance, Inc.*, No. 13-CV-01930-RM-MJW, 2014 WL 273214, at \*3 (D. Colo. Jan. 24, 2014)(citations omitted). At this early stage, “Plaintiffs need only show their positions are similar, not identical, to the positions held by the rest of the collective class members.” *Garcia v. Tyson Foods, Inc.*, 890 F. Supp. 2d 1273, 1279 (D. Kan. 2012). In *Guy v. Casal Institute of Nevada, LLC*, the court approved a conditional collective certification in a case in which a cosmetology student alleged that she was not paid for providing salon services for paying customers that defendants required her and other students to perform. *See Guy v. Casal Institute of Nevada, LLC*, No. 2:13-CV-02263-APG, 2014 WL 1899006, at \*4 (D. Nev. May 12, 2014).<sup>1</sup> The Court, under facts remarkably similar to those in this case, found that the named plaintiff’s declaration set forth sufficient facts “based on her personal knowledge as a student at Aveda” to

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<sup>1</sup> “The Court finds that Plaintiff Guy’s declaration sets forth sufficient facts, based on her personal knowledge as a student at Aveda between March 27, 2011 and February 1, 2012, to show that Defendants required cosmetology students to perform work in Aveda’s cosmetology salon located on the school campus, and that Aveda charged customers for the student’s services. Defendants have not disputed these factual allegations or Plaintiff’s assertion that Defendants conducted the cosmetology salon as a for-profit enterprise. The Court therefore finds that Plaintiff has provided a sufficient factual basis for the conditional certification of an FLSA, opt-in class consisting of all Aveda Institute Las Vegas students who performed salon services on paying clients . . . and were not paid minimum wages or overtime.” *Guy v. Casal Institute of Nevada, LLC*, No. 2:13-CV-02263-APG, 2014 WL 1899006, at \*4 (D. Nev. May 12, 2014).

approve certification. *See id.* *See also, Hughes v. Burie*, No. 3:12-CV-332-RS-CJK, 2014 WL 1572543 at \*3 (N.D. Fla., April 18, 2014) (denying defendants’ motion to decertify FLSA certification because “Plaintiffs have put forward information indicating they were all subject to operational control including being hired and/or fired, being required to obtain a license prior to employment by the defendants, and subjected to collective policies that existed for several years and under which they were not paid the appropriate wages.”)

The standard for conditional certification at the notice stage is a “lenient standard which typically results in conditional certification of a representative class.” *See Daugherty*, 838 F.Supp.2d at 1132 (*citing Renfro*, 243 F.R.D. at 432). Given the lenient standard, a court does not resolve factual disputes, make credibility determinations, or determine the merits of the case at this initial stage. *See Greenstein v. Meredith Corp.*, 948 F. Supp. 2d 1266, 1267 (D. Kan. 2013); *Porter v. West Side Restaurant, LLC*, No. 12-1112-JAR-KGG, 2014 WL 1642152, at \*11 (D. Kan. 2014); *Wlotkowski v. Michigan Bell Tel. Co.*, 267 F.R.D. 213, 217 (E.D. Mich. 2010) (*citing Brasfield v. Source Broadband Servs., LLC*, 257 F.R.D. 641, 642 (W.D. Tenn. 2009)).

Plaintiff has made a sufficient showing that she is similarly situated to the proposed class members. The Complaint alleges that the named Plaintiff and the putative class members were employees. (Compl. ¶ 17). The Complaint alleges that Defendants implemented and enforced policies by which they profited off of massages given by the named Plaintiff and the putative class members (Compl. ¶ 25) but failed to

pay any wages whatsoever despite the FLSA's requirement that such workers be paid at least the minimum hourly wage provided for in 29 U.S.C. § 206. (Compl. ¶ 20).

The named Plaintiff's affidavit attached as Exhibit 1 attests to the allegations in the Complaint. Rhonda Nesbitt stated in her attached affidavit that while she was a student at the Denver School of Massage Therapy, she was required by the school to perform massages on paying customers but received no pay. (Exhibit 1, Nesbit Aff. ¶¶ 2, 3, 5, 6, and 7). She further stated that she received no instruction, training, or meaningful monitoring before, during, or after the massages on paying customers. (Nesbit Aff. ¶ 4). Defendants' own published advertisements support the claim that Defendants charged the public for student massages. (*See* Exhibit 2, Defendants' web advertisement offering the public 50 minute weekend massages for \$25 performed by Defendants' "student therapists." Exhibit 2.

**B. Notice of Collective Action**

**1. Request for List of Potential Opt-In Plaintiffs with Identifying Information**

Plaintiff further requests that the Court order Defendants to provide Plaintiff the following list, in electronic and importable format, within fourteen (14) days of its order approving the proposed notice:

All current and former students/employees who perform or performed massage services on behalf of Steiner within the states of Arizona, Colorado, Connecticut, Florida, Illinois, Maryland, Massachusetts, Nevada, New Jersey, Pennsylvania, Utah, or Washington at any time on or after April 7, 2011, including their names, last known addresses, email addresses, telephone numbers, dates of employment/matriculation, dates of birth, social security numbers, or if a foreign national, the student's/employee's

passport number and home country address and telephone number.

The purpose of the FLSA's notice provisions is to inform employees who have potentially been impacted by the employer's alleged unlawful pay policies that a lawsuit has been filed and that they have the right to participate in the lawsuit. *See Hoffman-LaRoche, Inc., v. Sperling*, 493 U.S. 165, 172, 110 S.Ct. 482 (1989) ("Court authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action.") Plaintiff seeks additional identifying information because of the high risk that notice sent by first-class mail will not reach potential opt-in plaintiffs who are no longer working or matriculating for or at Steiner.

Potential opt-in plaintiffs are students and therefore a transient population, creating a high risk that they will not receive a notice that is mailed to the addresses they provided while in school. The U.S. Supreme Court and this Court have recognized that students are a transient population. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, n. 15, 94 S.Ct. 1076 (1974) ("[S]pecial problems (are) involved in determining the bona fide residence of college students' ... since those students are characteristically transient.") (citing *Vlandis v. Kline*, 412 U.S. 441, 451, 93 S.Ct. 2230 (1973)); *Carrington v. Rash*, 380 U.S. 89, 95, 85 S.Ct. 775 (1965) ("Students at colleges and universities ... may be as transient as military personnel."); *Ayyad v. Gonzales*, Nos. 05-CV-02342-WYD-MJW, 05-CV-02653, 2008 WL 2955964, at \*3 (D. Colo. July 31, 2008) (holding that law students could be treated differently than paralegals because of their transient character).

Courts have held that reaching certain populations entails unique challenges that require more flexible means of notice. *See, e.g., Jones v. JGC Dallas, LLC*, No. 3:11-CV-2743-O, 2012 WL 6928101, at\*5 (N.D. Texas, Nov. 29, 2012) (granting plaintiffs' motion to provide plaintiffs' counsel with the names, last known addresses, phone numbers (home and mobile), email addresses (work and personal), dates of birth, and dates of employment for all putative class members); *Guy*, 2014 WL at \*7 (allowing notice and consent forms to be emailed to opt-in class members because "email is an efficient, reasonable, and low cost supplemental form of notice, particularly where the defendants may lack current physical mailing address information for its former employees.") (internal citations omitted); *Calder v. GGC-Baltimore, LLC*, No. BPG-12-2350, 2013 WL 3441178, at \*3 (D. Md., July 8, 2013) (allowing identifying information for the potential plaintiffs to include full name, last known residential address, and last known email address because email communication is "now the norm" and potential plaintiffs were technicians who would be especially likely to communicate by email) (internal citations omitted).

Because of the unique population represented here, it is necessary for Plaintiff to receive any and all contact information for each potential opt-in plaintiff, including phone number, email address, date of birth, and social security number. Plaintiff also seeks permission to distribute notice via email. Providing the additional information that Plaintiff is seeking will facilitate the timely identification of the class, which is in both parties' interest.



Plaintiff further requests that Defendants be ordered to update this list monthly with employees who are hired while this lawsuit is pending. Upon receipt of the updated list, Plaintiff will send the notice to the potential opt-ins.

**2. Request to Mail the Notice and Consent Form**

Plaintiff requests that the Court authorize mailing the notices attached as Exhibit 1 and the consent form attached as Exhibit 2 to potential class members as soon as possible. The proposed notice informs employees of their right to opt-in to the litigation, explains in sufficient detail what the lawsuit is about, tells them what their options are, and informs them that the Court has not yet decided the merits of this dispute. The attached notice closely tracks the notice approved by the court in *Darrow v. WKRP Management LLC*, Civil Action No. 09-CV-01613-CMW-BNB, CM/ECF Doc. #164 at p. 11 (D. Colo. Feb 28, 2012) (unpublished) and is based upon the form approved by the Federal Judicial Center.

**3. Request to Initially Contact Potential Opt-In Collective Class Members via Email and Text Message to Obtain Mailing Addresses**

Plaintiff requests that she be allowed to contact potential Opt-In Collective Class Members using email addresses and/or phone numbers to obtain mailing addresses for potential opt-in collective class members.

**4. Request to Post the Notice At Steiner Facilities**

Given the transient nature of potential opt-in class members, many of the employees in the putative class are unlikely to receive information through the U.S. Post Office or through other communications. Plaintiff requests that the Court order Defendants to post the notice in its

break rooms and/or other areas where employees can view it at Steiner facilities until the opt-in period closes for all potential plaintiffs. Under similar circumstances, other courts have approved this method of notice. *Baricuatro v. Industrial Personnel and Management Svcs, Inc.*, No. 11-2777, 2012 WL 5986467, at \*1 (E.D. La., Nov. 29, 2012) (finding that posting a bulletin notice in the defendants' housing facilities was appropriate because potential opt-in plaintiffs housed in defendants' facilities might not have access to radio, newspaper, internet, or even mail or email); *Arriaga-Zacarias v. Lewis Taylor Farms, Inc.*, No. 7:08-CV-32(HL), 2008 WL 5115005, at \*8 (M.D. Ga. Dec. 4, 2008) (ordering notice posted at barracks housing farm workers and distributed by mail); *Garcia v. Salamanca Group, Ltd.*, No. 07 C 4665, 2008 WL 818532, at \*5 (N.D. Ill. Mar. 24, 2008) (ordering notice posted at workplace and distributed by mail); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 492-93 (E.D. Cal. 2006) (ordering defendant to post notice at its facilities because of the risk that potential plaintiffs would not receive the notice by mail).

**4. Request for One Hundred and Twenty-Three Day (123) Opt-In Period**

Plaintiff further requests that the Court order a one hundred and twenty-three (123) day period from the date that the notice is mailed for potential class members to opt-in to the case. This length of time is proper and necessary in order to inform opt-in plaintiffs of this action and allow them sufficient time to exercise their rights. *See, e.g., Gonzalez v. Ridgewood Landscaping, Inc.*, No. H-0902992, 2010 WL 1903602, at \*9 (S.D. Tex. May 10, 2010) (approving a four-month opt-in period).

### **5. Request to Send Reminder Notice**

Plaintiff requests that the Court authorize her to mail a reminder notice to potential class members who have not already returned their consent to join forty-five (45) days before the opt-in period ends. Such a reminder furthers the purpose of the FLSA's notice provision to inform as many potential class members as possible of the pending lawsuit and their right to participate. *See Morris v. Lettire Const. Corp.*, 896 F. Supp. 2d 265, 274 (S.D.N.Y. 2012) (granting plaintiffs' request to send a reminder notice to potential plaintiffs).

### **III. REQUEST FOR APPROVAL OF CLASS REPRESENTATIVE AND APPOINTMENT OF CLASS COUNSEL**

Plaintiff requests that the Court approve the named Plaintiff Rhonda Nesbitt as representative of the conditional class. The named Plaintiff is a former employee of Steiner who performed massage services and is familiar with and has been subjected to the pay policies at issue in this lawsuit. (*See, e.g.*, Compl. (Doc. 1, *passim*; Ex. 1, attached hereto at ¶¶ 2-7). The named Plaintiff will fairly and adequately protect the interests of the class and should be approved as class representative. In *Brown v. Money Tree Mortgage, Inc.*, the Court granted conditional certification and found that plaintiffs' Complaint alleged that the named plaintiffs and putative class members were similarly situated because they were employed in similar positions and were similarly denied overtime. *See Brown v. Money Tree Mortg., Inc.*, 222 F.R.D. 676, 681(D. Kan. 2004). The court also stated that "[t]he FLSA allows an action under § [2]16(b) to be brought 'by any one or more employees.' It does not contain any language from which it can be implied that an action must be brought by the employee who suffered the

greatest damages from an employer's unlawful practice." *See* 29 U.S.C. § 216(b); *Brown*, 222 F.R.D. at 682.

Plaintiff further requests that the Court appoint the law offices of Sawaya & Miller to serve as counsel for the conditional class. Plaintiff's counsel has extensive experience handling employment and class action litigation. Plaintiff's counsel has thoroughly investigated its client's claims to date and is committed to continuing zealous representation of the named Plaintiff and the class members throughout the pendency of this suit. *See Romero v. Producers Dairy Food, Inc.*, 235 F.R.D. 477, 493-94 (although analyzed under Rule 23, the same criteria may be applied, albeit less stringently, under §216(b)). As the records of this Court show, undersigned counsel is counsel of record in several cases pending and previously pending before this Court and has been approved by this Court as counsel for conditionally certified FLSA collective action plaintiffs as well as finally certified and court-approved FLSA collective action plaintiffs. *See, e.g., Lozoya v. AllPhase Landscapte Construction, Inc.*, No. 12-cv-1048-JLK, Doc. 82 (January 21, 2014) (Order on Motion to Decertify, denying Defendants' motion at 14, with undersigned counsel remaining as counsel for the certified collective action plaintiffs).

#### **IV. CONCLUSION**

Based upon the foregoing, Plaintiff respectfully requests that the Court:

- (1) Conditionally certify the Plaintiff's FLSA claims to proceed as a collective action pursuant to 29 U.S.C. §216(b).

- (2) Order Defendants to provide a list of all hourly employees who performed massage services on behalf of Steiner at any time on or after April 7, 2011, and include each employee's name, last known address, email address, telephone numbers, dates of employment, date of birth, and social security number.
- (3) Order Defendants to provide this information to Plaintiff within fourteen (14) days of the Court's Order approving the notice.
- (4) Order Defendants to supplement the list on a monthly basis with employees hired while this lawsuit is pending.
- (5) Authorize Plaintiff to mail the notices attached as Exhibit 1 and consent form attached as Exhibit 2 to all employees provided by Defendants.
- (6) Order Defendants to post the notice in its break rooms and/or other areas where employees can view it until the opt-in period closes for every potential opt-in employee.
- (7) Order Defendants to include a copy of the notice and consent form with the employees' next pay following the Court's Order approving the notice.
- (8) Order a one hundred and twenty-three (123) day period to begin on the date that the notice is mailed for each putative class member to opt in to the case.
- (9) Authorize Plaintiff to mail a reminder notice to potential class members forty-five (45) days before the opt-in period ends.
- (10) Designate named Plaintiff Rhonda Nesbitt to serve as representative of the conditional class.
- (11) Approve Plaintiff's counsel to serve as counsel for the conditional class.

(12) Grant such other relief the Court deems just and proper.

Dated this 16th day of December, 2014.

Respectfully submitted,

/s/ David H. Miller

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CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of December, 2014, I filed with the Court the foregoing Motion through the Court's ECF system which will provide service to all counsel of record appearing in this case.

/s/ David H. Miller