UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JODY JORDENS and
STACI WILBER,
on behalf of themselves and all
others similarly situated,
Plaintiffs,

v. **Case No. 21-C-1173**

MOBILELINK, LLC, et al.,
Defendants.

DECISION AND ORDER

Plaintiffs Jody Jordens and Staci Wilber commenced this action under the Fair Labor Standards Act ("FLSA"). They propose to represent a nationwide collective of salaried employees who work for defendants. Defendants are limited liability companies that do business under the name "Mobilelink" and operate a chain of retail stores selling cellular telephones. Plaintiffs primarily contend that defendants made improper deductions from the salaries of management employees, and that therefore the employees were not properly classified as exempt from the overtime provisions of the FLSA. Before me now is plaintiffs' motion to conditionally certify the collective, which would have the effect of allowing plaintiffs to send court-approved notice to the proposed members of the collective and invite them to join the suit.

I. BACKGROUND

Plaintiffs Jordens and Wilber received paychecks from an entity known as MFK Mobilelink Wisconsin, LLC, which operates as an authorized retailer for Cricket Wireless in Wisconsin. This entity is one of about fifty Mobilelink entities, each of which operates a

chain of Cricket Wireless stores in its own state. The entities collectively operate 514 retail stores across the United States. Another entity, MFK, LLC, acts as the corporate headquarters for all Mobilelink entities. It employs the executive and corporate-level staff and issues policies for the retail stores to follow. Both MFK Mobilelink Wisconsin, LLC, and MFK, LLC, are named as defendants in this case.[1] For purposes of the motion for conditional certification, defendants concede that these two entities may together be regarded as the named plaintiffs' joint employer. (Br. in Opp. at 24 n.5, ECF No. 23.) I will generally refer to all Mobilelink entities collectively as "Mobilelink" except when it is necessary to draw distinctions among the various limited liability companies.

Mobilelink stores are categorized using a system of five "tiers." Tier levels are based on the quantity of sales made by the store each month. Tier 1 stores are the busiest and sell as many as 600 phones per month. Tier 2 stores sell between 150 and 300 phones per month, Tier 3 stores sell between 120 and 150 phones per month, and Tier 4 stores sell about 100 phones per month. Tier 5 stores encompass all stores that sell fewer than 100 phones per month.

Plaintiffs allege that Mobilelink misclassifies certain of its management positions as exempt from the overtime requirements of the FLSA. The positions at issue have the titles "Territory Sales Manager," "Senior Retail Store Manager," "Retail Store Manager III," and "Retail Store Manager II." There is a related position, "Retail Store Manager I,"

[1] A third entity, Mobilelink, LLC, was named as a defendant but has since been dismissed by stipulation of the parties.

that is not classified as exempt but which is relevant to the issues raised by the present motion.

The Territory Manager is the highest ranking of the positions at issue. The person in this position oversees the operations of multiple stores within an assigned territory. The employees who hold the various other manager positions directly manage one or more retail stores and report to the Territory Manager for the territory in which their stores are located. Senior Retail Store Managers always manage more than one store, and those stores are generally the smaller Tier 5 stores that cannot support their own, full-time managers. (Decl. of Angela Dunlop ¶ 19.) The other retail store managers each manage only one store. Retail Store Manager I is the title for the managers of Tier 3 and Tier 4 stores, Retail Store Manager II is the title for the managers of Tier 2 stores, and Retail Store Manager III is the title for managers of Tier 1 stores. According to Mobilelink, most of its stores are either Tier 3 or Tier 4. (*Id.* ¶ 21.)

Mobilelink has always designated Territory Managers as salary-paid, exempt positions. However, over the last several years, Mobilelink has changed the exemption status for certain Retail Store Managers. According to plaintiff Jordens, prior to March 2020, Mobilelink classified all levels of Retail Store Manager as hourly-paid, nonexempt employees. (Decl. of Jody Jordens ¶ 17.) She believes that, in March of that year, Mobilelink reclassified the positions of Retail Store Manager II, Retail Store Manager III, and Senior Store Manager as salary-paid, exempt positions. (*Id.*)

Mobilelink concedes that, back in 2014, all employees holding the title of Retail Store Manager were classified as hourly employees because they spent a significant amount of their time selling (which is a nonexempt duty) rather than managing. (Dunlop

Decl. ¶ 13.) However, Mobilelink denies that there was an abrupt change in classification in March 2020. Instead, it contends that, over the years, as stores grew in size, Mobilelink created new management positions and classified them as exempt because the employees in those positions spent most of their time managing stores rather than making sales. Mobilelink states that it created the position of Senior Retail Store Manager in 2016 and immediately designated that position as exempt. (*Id.* ¶ 14.) In later years, Mobilelink repurposed some existing job titles to reflect the different compensation plans for store managers. (*Id.* ¶ 23.) Under the current classification system, the positions of Retail Store Manger II and Retail Store Manager III are classified as exempt because the employees in those positions manage the largest stores and therefore spend less time selling and more time managing. (*Id.* ¶ 24.) According to Mobilelink, prior to the classification change, the title Retail Store Manager II was used for employees who, under the current system, hold the title of Retail Store Manager I. (*Id.* at ¶¶ 25–30.) Thus, there was a time when employees holding the position of Retail Manager II performed primarily nonexempt duties and were paid an hourly wage.

Plaintiff Jordens began working for Mobilelink on September 29, 2017, as a retail store manager for a store in Rhinelander, Wisconsin. The management position for Jordens' store was an hourly-paid, nonexempt position equivalent to the position of Retail Store Manager I under the current classification system. However, at the time when Jordens held it, the formal title for that position was Retail Store Manager II. On November 16, 2018, Jordens was promoted to Territory Manager for a territory that included four stores in Northern Wisconsin and four stores in the Upper Peninsula of Michigan. Jordens held that position until her separation from Mobilelink on September 30, 2021. Up to

September 2020, all stores in Jordens' territory were managed by hourly-paid, nonexempt employees. (Dunlop Decl. ¶ 37.) However, beginning in September 2020, one of the stores within Jordens' territory began being managed by co-plaintiff Staci Wilber as a salaried employee. (*Id.* ¶¶ 36 & 38.)

Plaintiff Wilber began working for Mobilelink as an hourly-paid store manager for a retail store in Northern Wisconsin. (Dunlop Decl. ¶ 34.) In September 2020, Wilber became a salaried, exempt store manager for a store within co-plaintiff Jordens' territory. (*Id.* ¶¶ 34–36.) Mobilelink terminated Wilber's employment in February 2021. (*Id.* ¶ 34.)

Plaintiffs have two theories as to why the positions at issue in this case are misclassified as exempt from the FLSA's overtime provisions. The first theory, which applies to all the positions at issue, is that Mobilelink maintains a nationwide policy of making improper deductions from managers' pay whenever they work less than 40 hours in one work week. If this theory is correct, then all employees in those positions will lose the exemption for the time period in which deductions were made, and they should receive overtime premium pay for all hours over 40 worked in one week during that period. *See* 29 C.F.R. § 541.603(b). Plaintiff's second theory, which applies only to the Retail Store Manager positions, is that the employees in those positions perform primarily nonexempt duties, such as making sales, and therefore cannot be classified as exempt in the first place. Plaintiffs seek to have the following collective conditionally certified:

> All current and former salary-paid employees of [MFK, LLC] employed in the positions of Retail Store Manager II, Retail Store Manager III, Senior Retail Store Managers, and Territory Sales Manager between October 11, 2018 and October 11, 2021.

(Br. in Supp. at 1–2, ECF No. 19.)

Mobilelink opposes conditional certification, arguing, among other things, that plaintiffs have failed to produce sufficient evidence that illegal policies exist. Mobilelink denies making improper deductions from any employee's pay and contends that the primary duty of all employees holding exempt positions is management rather than sales. Mobilelink also contends that the court would lack personal jurisdiction over the claims of employees who did not work for Mobilelink in Wisconsin, and that therefore it would be a waste of resources to send notice to those employees.

II. DISCUSSION

A. Standards for Conditional Certification

The FLSA permits collective actions "against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Collective actions are similar to class actions under Federal Rule of Civil Procedure 23. *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 771–72 (7th Cir. 2013). However, a significant difference between the two devices is that, in an FLSA collective action, a member of the collective must "opt in" to the suit by providing written consent to join the suit before he or she will be bound by or benefit from the result. *Id.* In contrast, in a certified Rule 23 class action, a class member will be bound by the result unless the class is certified under Rule 23(b)(3) and the class member opts out of the suit.

The twin goals of collective actions are enforcement and efficiency. *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049 (7th Cir. 2020). Collective actions further enforcement by enabling employees to pool resources when seeking redress for violations. *Id.* Collective actions further efficiency in the resolution of disputes by resolving

in a single action common issues arising from the same alleged illegal activity. *Id.* The FLSA invokes these goals by explicitly permitting collective actions in which "similarly situated" employees may join a lawsuit against their employer. 29 U.S.C. § 216(b).

There are no codified procedures that govern the process of soliciting consents from potential members of an FLSA collective. *See Campbell v. City of Los Angeles*, 903 F.3d 1090, 1100 (9th Cir. 2018) (noting that "much of collective action practice is a product of interstitial judicial lawmaking or ad hoc district court discretion"). Further, the Seventh Circuit has, to this point, provided no "guidance or instruction . . . on the proper procedure for certification of FLSA collective actions." *In re New Albertsons, Inc.*, No. 21-2577, 2021 WL 4028428, at *2 (7th Cir. Sept. 1, 2021); *see also Koch v. Jerry W. Bailey Trucking, Inc.*, 51 F.4th 748, 751 n.1 (7th Cir. 2022) (declining to address the "intricacies" of collective action certification). However, the Supreme Court has held that "district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) . . . by facilitating notice to potential plaintiffs." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 169 (1989).[2] Moreover, the Seventh Circuit has held that "[a] district court has wide discretion to manage collective actions." *Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010).

In light of this authority, a general practice has developed in which plaintiffs wishing to assemble a collective of similarly situated employees file a motion for "conditional certification." This motion is the first step in a two-step process that is not compelled by

[2] *Hoffman-La Roche* involved the Age Discrimination in Employment Act, which incorporates the collective-action provisions of the FLSA. 493 U.S. at 169 (citing 29 U.S.C. § 626(b)).

§ 216(b) but is "the near-universal practice to evaluate the propriety of the collective mechanism." *Campbell*, 903 F.3d at 1100.[3] In moving for conditional certification, plaintiffs must show "that they have at least facially satisfied the 'similarly situated' requirement." *Id.* If the motion for conditional certification is granted, the only thing that happens is "the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013) (citations omitted).[4] Later, in step two, the defendant will often file a motion for "decertification" of the collective action. In this motion, defendant attempts to show that "plaintiffs' status as 'similarly situated' was not borne out by the fully developed record." *Campbell*, 903 F.3d at 1100.[5]

The Seventh Circuit has not expressly endorsed or rejected this two-step approach to certification of an FLSA collective. *See Bigger*, 947 F.3d at 1049 n.5. However, the parties to the present case apply the two-step approach in their briefs, and thus I regard them as conceding that such approach should be applied here.

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[3] Recently, the Fifth Circuit rejected the two-step procedure and set out a different test that district courts in that circuit must use. *See Swales v. KLLM Transport Services, L.L.C.*, 985 F.3d 430 (5th Cir. 2021).

[4] Even if conditional certification is denied, a plaintiff may send notice to potential members of the collective, since a district court does not have "the power to forbid the sending of notice altogether." *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 580 (7th Cir. 1982).

[5] Notably, the terms "certification" and "decertification" do not appear in the FLSA and should not be confused with certification of a class action under Rule 23. *Campbell*, 903 F.3d at 1101. In the FLSA context, the terms "certification" and "decertification" are essentially shorthand for certain procedural consequences: If the court conditionally certifies the collective, the plaintiff may send out court-approved notice. If the court later decertifies the collective, those who filed opt-in forms in response to the notice are dismissed from the action.

The goal of the two-step process is to determine whether the members of the collective meet the FLSA's requirement that they be "similarly situated." *See* 29 U.S.C. § 216(b). The parties agree that, at the conditional certification stage, plaintiffs need only make "a modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." (Br. in Supp. at 11, ECF No. 19; Br. in Opp. at 10, ECF No. 23.) "The focus of this inquiry, however, is not on whether there has been an *actual* violation of law but rather on whether the proposed plaintiffs are 'similarly situated' under 29 U.S.C. § 216(b) with respect to their allegations that the law has been violated." *Young v. Cooper Cameron Corp.*, 229 F.R.D. 50, 54 (S.D.N.Y. 2005) (emphasis added).

B. Modest Factual Showing

I now examine whether plaintiffs have made a modest factual showing that the members of the proposed collective are similarly situated. To answer this question, I must examine the nature of plaintiffs' legal theories to determine whether they are susceptible to resolution on a collective basis. Thus, I begin by providing some general background on the legal principles that are relevant to plaintiffs' claims.

1. Law Governing Overtime Exemptions

The FLSA generally forbids an employer from employing an employee for a workweek longer than 40 hours unless the employee receives compensation at a rate of not less than one-and-one-half times the employee's regular rate for all hours worked over 40 per week. 29 U.S.C. § 207(a)(1). However, the FLSA contains exemptions from this rule. Relevant to this case is the exemption for "any employee employed in a bona fide executive . . . capacity." *Id.* § 213(a)(1). Regulations promulgated by the Department

of Labor ("DOL") generally define "employee employed in a bona fide executive capacity" using a four-part test. 29 C.F.R. § 541.100(a). Two of these parts that are relevant here require that the employee be "[c]ompensated on a salary basis" and that the employee's "primary duty" consist of managing the enterprise or some customarily recognized department or division thereof. *Id.* § 541.100(a)(1)–(2).

The DOL regulations define what it means for an employee to be compensated on a "salary basis." 29 C.F.R. § 541.602. The general rule is that the employee must regularly receive each pay period "a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." *Id.* § 541.602(a). This general rule against deductions from pay is subject to exceptions, one of which provides that "[d]eductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability." *Id.* § 541.602(b)(1). The regulations also provide that "[a]n employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis." 29 C.F.R. § 541.603(a). Under the regulations, "[a]n actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis." *Id.* Further, "[i]f the facts demonstrate that the employer has an actual practice of making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions." *Id.* § 541.603(b). However, "[i]mproper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees

subject to such improper deductions, if the employer reimburses the employees for such improper deductions." *Id.* § 541.603(c).

The DOL regulations also define the kinds of duties that qualify as "management." 29 C.F.R. § 541.102. This definition is lengthy and need not be reproduced in full. It is sufficient to note that the regulation states that management activities include things such as "interviewing, selecting, and training of employees" and "directing the work of employees." *Id.* Notably, an employee may be classified as exempt even if his or her duties are not exclusively management, so long as the employee's "primary duty" is management. *Id.* § 541.100(a)(2). Further, the regulations provide that "[c]oncurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met." *Id.* § 541.106(a). The following example is included in the text of the regulation:

> For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.

Id. § 541.106(b).

2. Plaintiffs' Legal Theories and Whether They Are Amenable to Collective Adjudication

In the present case, plaintiffs present two legal theories as to why members of the collective are entitled to overtime compensation. I will describe these theories as the "salary basis" theory and the "primary duties" theory.

a. Salary-basis theory

Plaintiffs' salary-basis theory is that Mobilelink had a company-wide policy of making improper deductions from the salaries of managers whenever they worked less than 40 hours per week. If plaintiffs prove that an actual practice of making these deductions existed, then Mobilelink would lose the exemption for all management employees nationwide during the period in which the actual deductions were made. *See* 29 C.F.R. § 541.603(b). This, in turn, would mean that all such employees would be entitled to overtime compensation for all weeks in which they worked more than 40 hours. On its face, this theory would make all employees in the salaried management positions similarly situated, in that proof of an actual nationwide practice of making improper deductions would entitle all employees in those positions to overtime compensation.

The question at this stage of the case is whether the plaintiffs have made a modest factual showing that such a nationwide practice exists. I conclude that they have. It is undisputed that defendant MFK, LLC, acts as the corporate headquarters for all Mobilelink entities in all fifty states, and that it performs functions such as human resources and payroll for all stores. (Decl. of Angela Dunlap ¶ 4; Br. in Opp. at 5 (stating that "MFK, LLC processes payroll for the Mobilelink entities").) Thus, it is reasonable to believe that nationwide human-resources and payroll policies and practices exist. Indeed, there is a single employee handbook that contains written human-resources and payroll policies for all Mobilelink entities. (Decl. of Tia Stafford ¶ 5 & Ex. A, ECF No. 29-1.)

One of Mobilelink's nationwide policies is to track the exact number of hours worked by each of its salaried managers. Mobilelink requires each salaried manager to use the same timekeeping system used by hourly employees to clock in and out of work

each day. (Stafford Decl. ¶ 9; Jordens Decl. ¶¶ 22–23.) Defendants admit that, if this timekeeping system showed that a salaried manager worked less than 80 hours in any pay period, then that manager would not automatically be paid his or her full salary. (Stafford Decl. ¶ 14.) Instead, if a salaried manager worked less than 80 hours, his or her name would appear on a report that is distributed to a Human Resources Manager. (*Id.* ¶ 12.) There are four Human Resources Managers, each of whom reports to Mobilelink's Vice President of Human Resources and is responsible for an assigned territory consisting of a geographic portion of the country. (*Id.* ¶¶ 3–4; Dunlap Dep. at 24:3–24:6, ECF No. 26-1.) Once the employee's name appeared on the report, the Human Resources Manager could authorize deductions from the employee's pay. (Stafford Decl. ¶ 32.)

The parties dispute the circumstances under which a Human Resources Manager would authorize a deduction from a salaried employee's pay. According to Mobilelink, a Human Resources Manager would authorize a deduction only if the manager determined that the salaried employee was absent from work for a full day for personal reasons and did not claim paid time off ("PTO") for the absence. (Stafford Decl. ¶ 16.) That would be consistent with Mobilelink's written policy as stated in its employee handbook. (*Id.* Ex. A at § 4.1.) However, plaintiff Jordens claims that her pay, and the pay of the salaried manager she supervised, were subject to deduction whenever they failed to work 40 hours during a week. (Jordens Decl. ¶¶ 26–28.) Jordens corroborates her version of the policy by pointing to emails from Human Resources Managers and Mobilelink's payroll department that threaten deductions for working less than 40 hours. (*Id.* ¶ 26 & Ex. 1;

ECF No. 21-4 at 1 of 3.) Jordens also demonstrates that her own pay was docked during a pay period in which she worked less than 40 hours each week. (*Id.* ¶ 28.)

With respect to the emails, Jordens states that, as a Territory Manger, she received an email each pay period from either the Human Resources Manager for her territory or a payroll employee that contained an excerpt from a spreadsheet that identified salaried store managers who had worked less than 40 hours in a week. (Jordens Decl. ¶ 26.) Jordens attaches two of these emails to her declaration and states that they are examples of the kind of emails she would receive each pay period. (*Id.* & Ex. 1.) Each email states in relevant part as follows: "Please see below employees who worked less than 40 hours from [date range]. Please see details and let us know if we need to prorate their pay?" (*Id.* Ex. 1 at pp. 2 & 6.) Also in the record is an email from a Human Resources Manager with the subject "Salary Verification" that states as follows:

> Hello,
>
> If I have emailed you it's because you have fallen short on your hours and deductions will take place.
>
> Please reach out to me concerning any missed punches, PTO etc. that might have made you have deductions. If you are aware of them fine.
>
> If not, please contact me via email/text/call to get it corrected (Not the day of or when you receive your pay check).
>
> I would like to catch it now.. I want everyone's paycheck correct …..
>
> Thanks

(ECF No. 21-4 at 1 of 3.)

With respect to her own pay, Jordens references one instance in which her salary was reduced because she failed to work forty hours in a workweek. (Jordens Decl. ¶ 28.) Defendants have provided additional evidence about this instance. Their evidence shows

that, on August 27, 2020, Jordens received a paycheck for less than the amount of her full salary, which was $2,250 at the time. The paycheck was for the period covering August 1–15, 2020, when Jordens took sixteen hours of PTO. Fefendants contend that an administrative error resulted in Jordens not receiving credit for the PTO, and that therefore Jordens was treated as having taken two full days of leave for personal reasons, which is a permissible basis for docking a salaried employee's pay. *See* 29 C.F.R. § 541.602(b)(1). When Jordens complained that her pay was short, Mobilelink recognized that it had failed to pay her for PTO and issued a separate check for that time. However, even after accounting for the two full days of absences for personal reasons, Jordens' paycheck for the period was still short by $310.78. Mobilelink does not explain why this deduction occurred, but it submits evidence that, after Jordens complained, it added an additional $310.78 to her next paycheck under the label "Retro Pay." (Dunlap Decl. Ex. 4, ECF No. 27-4.)

The above evidence concerning the emails and deductions from Jordens' pay provides a modest factual basis to believe that Mobilelink had a nationwide policy of making improper deductions from the pay of salaried employees. The emails show that employees at Mobilelink's corporate headquarters routinely inquired about docking the pay of salaried employees who "worked less than 40 hours" in a week. (*E.g.*, ECF No. 20-1 at 2 of 6.) Although Mobilelink claims that the purpose of these emails was to identify instances in which employees were absent for full days for personal reasons, the emails themselves do not support this claim. If Mobilelink were concerned only with full-day absences, then inquiries should have been made only with respect to employees who worked less than 32 hours in a week. (*See* Dunlap Dep. at 97:8–97:13, 101:16–101:19

(former VP of Human Resources testifies that corporate office should not question employee hours or dock pay unless recorded hours are less than 32 hours in a week).) But the emails routinely focused on employees who worked less than 40 hours per week, and responses from the recipients indicate that they were concerned with shortfalls as small as two hours. (*See* ECF No. 20-1 at 2 of 6 (referencing an employee who worked 38 hours as needing to get to 40 by the end of the day).) This suggests that even a partial day's absence could result in a reduction in pay, which is not permitted. *See* 29 C.F.R. § 541.602(b)(1). Further, Jordens' pay was docked by $310 more than it should have been if Mobilelink deducted only for full-day absences for personal reasons. Although Mobilelink eventually paid Jordens for this time, it did so only after she complained, and Mobilelink has not explained why it made this deduction in the first place.

Moreover, because the emails came from employees in Mobilelink's headquarters, it is reasonable to believe that they reflect a nationwide practice. That is, it is reasonable to believe that emails like the ones Jordens received were sent to salaried managers in other states. Notably, Jordens received emails threatening deductions in pay from multiple central-office employees, which suggests that this was not an isolated practice followed by a single employee who may have misunderstood Mobilelink's official policy. And the Human Resources Manager for Jordens' region, Tia Stafford, separately admits to threatening employees with deductions from their pay if they do not expeditiously explain to her why their hours are short. (Stafford Decl. ¶ 26.) Further, there are only four central-office employees who have the power to authorize deductions nationwide, namely, the four Human Resources Managers. (Stafford Decl. ¶ 32 ("only HR Managers may decide to make deductions from salary based on the quantity of time worked")).

These four employees "sometimes confer with each other about how a salaried manager should be paid." (*Id.* ¶ 17.) For this reason, it is reasonable to think, at this stage of the case, that if improper deductions are being made, they are being made on a uniform basis to all salaried employees who work less than 40 hours per week. To be sure, the Human Resources Managers claim that they each follow their "own process for confirming pay before the close of payroll" (*id.*), but this testimony does not defeat plaintiffs' modest factual showing.

Accordingly, I conclude that plaintiffs have carried their burden to make a modest factual showing that the members of the collective are similarly situated with respect to the salary-basis theory.

b. Primary duties theory

Plaintiffs' primary duties theory is that the salaried Retail Store Managers (*i.e.*, those holding the positions of Retail Store Manager II, Retail Store Manager III, and Senior Retail Store Manager) perform primarily nonexempt work, such as retail sales, and that therefore Mobilelink cannot satisfy the primary duties test of the executive exemption with respect to these employees. *See* 29 C.F.R. §§ 541.100(a)(2), 541.102.

Mobilelink's classification system for its retail store managers is uniform nationwide, and each position has the same written job description no matter where the store that the employee manages is located. Thus, for example, an employee who holds the position of Retail Store Manager II in Wisconsin should be performing the same duties as a person who holds the position of Retail Store Manager II in California. At least in theory, then, the question of whether each position is properly classified as exempt should receive the same answer nationwide: the court can simply look at the written job

descriptions and decide whether they reveal that the primary duties meet the regulatory definition of "management." However, to the extent that plaintiffs contend that the written job descriptions are not dispositive, then it is not so clear that the members of the collective are similarly situated. That is so because different managers at different stores could be performing different amounts or kinds of nonexempt work. Even if a salaried manager in Wisconsin performed primarily nonexempt retail sales duties, it would not follow that all salaried managers in all parts of the country similarly performed primarily nonexempt work. To determine which employees were performing primarily nonexempt work, the court would potentially have to make a separate inquiry for each employee that looked at the nature and quantity of the work performed by that employee. In that circumstance, the members of the collective likely could not be regarded as similarly situated.

In the present case, plaintiffs do not make clear whether they intend to rest on the written job descriptions, or whether they intend to argue that the duties actually performed by the various salaried managers were not primarily management. In their opening brief, plaintiffs mention the written job descriptions, but they do not claim that the job descriptions themselves show that the salaried managers performed primarily nonexempt duties. (Br. in Supp. at 21.) Instead, plaintiffs rely on Jordens' individual experience as both an hourly-paid Retail Store Manager II and as a Territory Manager who supervised a salaried retail store manager. (*Id.* at 21–22.) Jordens claims that, while she held the position of Retail Store Manager II, she performed primarily nonexempt work and that, as a Territory Manager for eight stores, she observed salaried managers performing nonexempt work. (Jordens Decl. ¶¶ 15–16.) But then in their reply brief, plaintiffs identify

certain duties listed in the written job descriptions and claim that those duties do not meet the definition of "management." (Reply Br. at 15–16.)

At this point, I do not need to resolve whether a collective may be conditionally certified based on the plaintiffs' primary duties theory alone. That is so because the employees who would make up that collective are already part of the conditionally-certified collective based on plaintiffs' salary-basis theory. Thus, those employees will receive court-approved notice of this action regardless of whether they are similarly situated with respect to the primary duties theory. However, I note that I am unlikely to allow the primary duties theory to be litigated as a collective if plaintiffs intend to go beyond the written job descriptions and submit evidence of the individual work experiences of the members of the collective. I will revisit this matter, if necessary, at the decertification stage.

C. Personal Jurisdiction and its Effect on Conditional Certification

Having concluded that plaintiffs have made a modest factual showing that the members of the collective are similarly situated with respect to the salary-basis theory, I must address a separate matter raised by defendants. They contend that this court cannot exercise personal jurisdiction over MFK, LLC, with respect to the FLSA claims of employees from states other than Wisconsin, and that it would therefore be pointless to provide notice of the action to those employees. Plaintiffs make two arguments in response: (1) defendants have waived personal jurisdiction by failing to raise it in their answer, and (2) the court has personal jurisdiction over MFK, LLC, with respect to the claims of the collective's out-of-state members. Because plaintiffs' second argument

provides an adequate basis for providing notice to nonresident opt-ins, I will not address their first.

Defendants do not dispute that this court has personal jurisdiction over MFK, LLC, with respect to the FLSA claims made by Wisconsin employees. (Br. in Opp. at 24.) Instead, they contend that the out-of-state employees could not satisfy the requirements of personal jurisdiction if they brought their own, independent actions under the FLSA against MFK, LLC, in Wisconsin, and that therefore the court may not exercise personal jurisdiction over MFK, LLC, in a way that would involve the adjudication of the out-of-state employees' claims. This argument is based on recent FLSA appellate cases that involve the intersection of several procedural concepts: specific personal jurisdiction, service of process, and joinder devices that permit multiple parties to obtain relief as part of a single litigation. *See Fischer v. Federal Express Corp.*, 42 F.4th 366 (3d Cir. 2022), *petition for cert. filed* No. 22-396 (Oct. 27, 2022); *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84 (1st Cir. 2022); *Canaday v. Anthem Companies, Inc.*, 9 F.4th 392 (6th Cir. 2021). These cases reflect a circuit split on the question of whether opt-in members of an FLSA collective must independently show that a federal court's exercise of personal jurisdiction over the defendant with respect to their claims would be consistent with the Due Process Clause *of the Fourteenth Amendment* even though the court already has personal jurisdiction over the defendant based on the claims of the named plaintiffs and the exercise of personal jurisdiction over the out-of-state claims would comport with the Due Process Clause *of the Fifth Amendment*. *Compare Fischer*, 42 F.4th at 370 (out-of-state opt-ins must independently satisfy Fourteenth Amendment); *Vallone v. CJS Solutions Group, LLC*, 9 F.4th 861, 865–66 (8th Cir. 2021) (same); *Canaday*, 9 F.4th at 395–404

(same), *with Waters*, 23 F.4th at 91–99 (out-of-state opt-ins need not satisfy Fourteenth Amendment). The Seventh Circuit has not yet weighed in on this issue. For the reasons stated below, I conclude that the First Circuit's approach is more persuasive and that such approach is in accord with existing Seventh Circuit caselaw.

To understand the legal question presented, I must first provide some background about personal jurisdiction. "Personal jurisdiction" refers to the court's power over the parties. *KM Enters., Inc. v. Global Traffic Techs., Inc.*, 725 F.3d 718, 723 (7th Cir. 2013). For any court to have personal jurisdiction, there must be a basis for serving a summons on the defendant, and the exercise of jurisdiction must comport with due process. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102–03 (1987). In state court, the limits of due process are set by the Due Process Clause of the Fourteenth Amendment. *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, __ U.S. __, 137 S. Ct. 1773, 1779 (2017). In federal court, the limits are set by the Due Process Clause of the Fifth Amendment. *Id.* at 1783–84.

Personal jurisdiction can be general or specific. *Id.* at 1779–80. A court with general jurisdiction may hear any claim against that defendant, even if all the incidents underlying the claim occurred in a different state. *Id.* at 1780. In contrast, before a court may exercise specific jurisdiction, "'the *suit*' must 'aris[e] out of or relat[e] to the defendant's contacts with the *forum*.'" *Id.* (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)). In state court, this requires an affiliation between the defendant's contacts with the state and the underlying controversy. *Id.* In federal court, the controversy must arise out of the defendant's contacts with the United States as a whole. *Central States,*

Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp., 230 F.3d 934, 946 n.10 (7th Cir. 2000).

Because any employment-related claims by MFK, LLC's employees in the United States would necessarily arise out of the company's contacts with the United States, the Due Process Clause of the Fifth Amendment poses no obstacle to the exercise of personal jurisdiction over the company with respect to those claims. However, even in federal court, the Fourteenth Amendment sometimes sneaks back into the analysis. The reason why stems from fact that, for a court to have personal jurisdiction over a defendant, there must be a statutory basis for service of a summons on the defendant. *Omni Capital*, 484 U.S. at 104. In most cases in federal court, the basis for service of a summons is supplied by Federal Rule of Civil Procedure 4(k)(1). As is relevant here, that rule provides that, unless a federal statute authorizes nationwide service, "[s]erving 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." Because the jurisdiction of a state court is limited by the Due Process Clause of the Fourteenth Amendment, service under Rule 4(k)(1)(A) is not effective unless a state court's exercise of personal jurisdiction would be consistent with that clause. Thus, it is Rule 4(k)(1)(A)'s requirement to look to a state's authority to exercise jurisdiction over the defendant that brings the Fourteenth Amendment back into the picture when a suit is filed in federal court.

The FLSA does not provide for nationwide service. For this reason, the named plaintiffs in this case could not have established personal jurisdiction over MFK, LLC, if a Wisconsin court's exercise of personal jurisdiction over the company would have violated

the Due Process Clause of the Fourteenth Amendment. But, as noted, defendants concede that the Fourteenth Amendment would not prevent a Wisconsin court from exercising personal jurisdiction over MFK, LLC, with respect to the named plaintiffs' claims, which arise out of MFK, LLC's contacts with Wisconsin. Thus, when plaintiffs filed MFK, LLC's waiver of service in this case (ECF No. 6), they established this court's personal jurisdiction over that party. *See Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444–45 (1946) ("[T]he service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.").

However, defendants contend that, although effective service has been achieved and exercising personal jurisdiction over MFK, LLC, with respect to the claims of the collective's out-of-state members would comport with the Fifth Amendment, the Fourteenth Amendment still limits the court's authority to exercise personal jurisdiction over MFK, LLC. The defendants' argument is based on the Sixth Circuit's decision in *Canaday*, the Third Circuit's decision in *Fischer*, and the Eighth Circuit's decision in *Vallone*. These courts hold that, although opt-in plaintiffs in an FLSA suit are not required to serve process on the defendant at all, a federal court's authority to exercise personal jurisdiction over the defendant with respect to the opt-in plaintiffs' claims is still limited by Rule 4(k)(1)(A) and therefore also the Due Process Clause of the Fourteenth Amendment. *Fischer*, 42 F.3d at 382; *Vallone*, 9 F.4th at 865–66; *Canaday*, 9 F.4th at 398–401. Plaintiffs disagree, relying principally on the First Circuit's decision in *Waters*. In *Waters*, the court held that, once the named plaintiff in an FLSA suit complies with Rule 4(k)(1) and establishes the court's personal jurisdiction over the defendant, Rule 4(k)(1)

drops out of the picture, leaving the Fifth Amendment's Due Process Clause as the only limitation on the court's power to exercise personal jurisdiction over the defendant. 23 F.4th at 93–94.

The approach of the Third, Sixth, and Eighth Circuits is based on the principle that "[b]efore a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital*, 484 U.S. at 104. This principle is undoubtedly correct, but, as the First Circuit recognized, it does not follow that "Rule 4 constrains a federal court's power to act once a summons has been properly served, and personal jurisdiction has been established." *Waters*, 23 F.3d at 94. Indeed, Rule 4 states that proper service establishes the court's authority to exercise personal jurisdiction "over a *defendant*," not over a *claim*. Rule 4(k)(1) (emphasis added). Thus, once the summons has been served in a manner that properly invokes the court's power to exercise personal jurisdiction over the defendant, then the court has personal jurisdiction over that defendant for the duration of the litigation, subject only to any limits imposed by the Due Process Clause of the *Fifth* Amendment. *Waters*, 23 F.4th at 96.

The courts holding to the contrary require parties that join the case after effective service of the original summons has been achieved to independently satisfy Rule 4(k)(1). Notably, however, those courts do not point to a single case in which a federal court has ever viewed Rule 4(k)(1) as a limit on the court's power to entertain new claims against a party that has already been served and therefore is already subject to the court's jurisdiction. The First Circuit specifically noted the absence of any such authority. In *Waters*, the court stated that it was not aware of any case "in which a court held that

Rule 4 applies to plaintiffs joined under Rule 20." 23 F.4th at 96. Further, the First Circuit noted that the Sixth Circuit's citation to a case from the Seventh Circuit, *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010), for the principle that Rule 4(k) applies to "amended complaints," *Canaday*, 9 F.4th at 400, is mysterious, in that *Tamburo* "concerned only the original plaintiff's state-law claims" and therefore the Seventh Circuit "had no occasion to consider its jurisdiction over federal claims or parties added after a summons was properly served." *Waters*, 23 F.4th at 98. Finally, the First Circuit noted that an article on which the Sixth Circuit relied similarly fails to cite any authority supporting its assertion that later-added parties must independently satisfy Rule 4. *Id.* at 98 n.12 (discussing A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction Over Absent Class Member Claims Explained*, 39 Rev. Litig. 31, 43–44 (2019)).

The courts that view Rule 4 as binding on newly added plaintiffs believe that, if it were not, the rule's "territorial restraints would come to naught" because its "limitations on judicial power would be one amended complaint—with potentially new claims and new plaintiffs—away from obsolescence." *Canaday*, 9 F.4th at 400. But, as the First Circuit pointed out, Rule 4(k)'s territorial limits are not rendered obsolete under its approach because those limits still govern service of the original summons. *Waters*, 9 F.4th at 98–99. Relatedly, the Sixth Circuit and other circuits attempt to find textual support for their interpretation by claiming that, unless Rule 4(k) applied to later-added parties, the part of Rule 4 dealing with nationwide service (Rule 4(k)(1)(C)) would be pointless. *Canaday*, 9 F.4th at 399. But, as the First Circuit observed, its approach does not permit nationwide service in every federal case because Rule 4(k)'s territorial limits still apply to service of the original summons. *Waters*, 23 F.4th at 99 n.14. Moreover, any later-added parties

must still satisfy the Due Process Clause of the Fifth Amendment, as well as the limits imposed by the rules governing joinder of parties, such as Federal Rule of Civil Procedure 20.

The First Circuit's approach is in harmony with a recent Seventh Circuit case relating to personal jurisdiction and the claims of absent members of a certified class action. *See Mussat v. IQVIA, Inc.*, 953 F.3d 441 (7th Cir. 2020). In *Mussat*, the Seventh Circuit held that absent class members do not have to independently satisfy the requirements of personal jurisdiction when those requirements have been satisfied by the named plaintiffs. *Id.* at 447. In the course of reaching its holding, the Seventh Circuit expressed skepticism of the defendant's argument that Rule 4(k) "establish[es] an independent limitation on a federal court's exercise of personal jurisdiction." *Id.* The court noted that the defendant's position was "in tension with Federal Rule of Civil Procedure 82, which stipulates that the rules 'do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.'" *Id*. at 448. The court also stated that defendant's argument based on Rule 4(k) "mix[ed] up the concepts of service and jurisdiction." *Id.* These comments by the Seventh Circuit suggest that the court would not view Rule 4(k) as limiting a federal court's power to exercise personal jurisdiction over a party who has already been properly served. For this reason, in conjunction with the reasons expressed in *Waters*, I conclude that Rule 4(k) does not limit a federal court's ability to exercise personal jurisdiction over the claims of later-added plaintiffs that are asserted against a defendant who was served in accordance with Rule 4(k) by the original plaintiff.

Even if, however, Rule 4(k) might apply to the claims of persons who join the case as formal plaintiffs after the original plaintiff has already served the defendant, in the present case we are dealing with a unique form of joinder. Under 29 U.S.C. § 216(b), an opt-in plaintiff joins an FLSA suit simply by filing a written consent. This is to be contrasted with how a non-FLSA plaintiff ordinarily joins an existing suit: that person must coordinate with the original plaintiff and file an amended complaint under Federal Rule of Civil Procedure 15 that lists both the original plaintiff and the new plaintiff as parties. *See* Fed. R. Civ. P. 15 & 20(a)(1).[6] The FLSA thus creates a joinder process that is much less formal than the process created by the Federal Rules. This process results in the opt-in plaintiff becoming a "party" to the collective action. *See Genesis Healthcare*, 569 U.S. at 75. However, "[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Mussat*, 953 F.3d at 447 (quoting *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002)). It is therefore possible that a person who becomes a party to a case via Rules 15 and 20 must independently satisfy Rule 4(k), while a person who merely opts into a collective action via § 216(b) does not have to satisfy Rule 4(k). Because Congress designed a process for opt-in plaintiffs that essentially allows them to piggyback on the complaint filed by the named plaintiffs, Congress likely also contemplated that the opt-ins could piggyback on the service of summons already completed by the named plaintiffs. Congress thus would not have intended for Rule 4(k) to limit a federal court's power to exercise personal jurisdiction over an FLSA defendant who has already been brought

[6] Another option is intervention under Federal Rule of Civil Procedure 24, but that too is a more formal process than the FLSA's written-consent requirement.

under the court's authority through the named plaintiff's service of a valid summons. Indeed, as the First Circuit pointed out, Congress created the collective-action mechanism to enable employees of nationwide employers to join together and enforce the FLSA in a single action, and interpreting § 216(b) as being limited by Rule 4(k) instead of the Fifth Amendment's Due Process Clause would frustrate Congress's intent.[7] *Waters*, 23 F.4th at 97. Thus, I conclude that, even if persons who become parties under the procedures specified in the Federal Rules must independently satisfy Rule 4(k), persons who join a federal collective action by filing written consents do not.[8]

Finally, even if I am mistaken about the above points and it turns out that opt-in members of a collective must independently show that they could have served the defendant with a summons that satisfies the territorial requirements of Rule 4(k), it may be that, in the present case, the opt-ins could make the requisite showing. To show that MFK, LLC, is subject to a court of general jurisdiction in Wisconsin, the plaintiffs must show both that the Wisconsin long-arm statute is satisfied and that exercising personal

[7] It is true that FLSA actions may be filed in state court, and that Congress could not expand the jurisdiction of state courts by creating the opt-in procedure, since the jurisdiction of a state court is limited by the Fourteenth Amendment. However, from the fact that Congress gave FLSA plaintiffs the option of filing their claims in state court, it does not follow that Congress would have intended to limit the personal jurisdiction of a federal court over FLSA defendants when plaintiffs choose to file in federal court.

[8] I note that some courts have held that an FLSA collective does not have the same independent legal status as a certified class action, and that therefore opt-in plaintiffs are not analogous to absent members of a certified Rule 23 class and must independently establish personal jurisdiction. *See Fischer*, 42 F.4th at 373–80; *Canaday*, 9 F.4th at 402–03. However, even if collective actions are not analogous to class actions, it is still the case that Congress, by creating the less-formal opt-in procedure, envisioned that they would function differently than ordinary civil actions under the Federal Rules. Thus, there is reason to believe that opt-in plaintiffs are not required to satisfy Rule 4(k) even if later-joining parties in ordinary civil actions are.

jurisdiction would be consistent with the Due Process Clause of the Fourteenth Amendment. *See Felland v. Clifton*, 682 F.3d 665, 678 (7th Cir. 2012). The Wisconsin long-arm statute is regarded as conferring jurisdiction to the fullest extent permitted by due process, *id.*, so the ultimate question is whether the claims of the opt-in plaintiffs have "minimum contacts" with Wisconsin. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).[9]

In *Bristol-Myers Squibb*, the Supreme Court held that the mere fact that other plaintiffs were injured by the defendant's conduct in a state does not allow the state to assert specific jurisdiction over the nonresidents' claims. 137 S. Ct. at 1781. "What is needed," the Court said, "is a connection between the forum and the specific claims at issue." *Id.* In the present case, however, there is a connection between Wisconsin and the claims of the nonresident opt-ins, namely, MFK, LLC's alleged nationwide policy of making deductions to the pay of salaried employees. Because we are at the conditional certification stage of the case and plaintiffs have made a modest factual showing that a nationwide policy exists, I must assume that MFK, LLC, has an actual nationwide practice of making deductions to the pay of salaried management employees. And under the FLSA, an actual practice of making improper deductions may cause *all* employees in the same job classification to lose their exempt status. *See* 29 C.F.R. § 541.603(b). Thus, deductions made from the pay of a Territory Manager in Wisconsin could affect whether a Territory Manager in, say, California, has lost his or her exempt status and is entitled to

[9] The parties concede that MFK, LLC, is not subject to general jurisdiction in Wisconsin; thus, the only basis for personal jurisdiction is specific jurisdiction, which involves application of the minimum-contacts test.

overtime compensation. In other words, some of the conduct giving rise to the out-of-state employees' claims occurred in Wisconsin. This is unlike the nonresident personal-injury claims at issue in *Bristol-Myers Squibb*, in which the defendant's contacts with the state were irrelevant to the nonresidents' claims. MFK, LLC's making deductions from the pay of its salaried Wisconsin workers pursuant to a nationwide policy might therefore furnish "an adequate link between [Wisconsin] and the nonresidents' claims." *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

At the very least, then, it is not a foregone conclusion that the claims of nonresident opt-ins will have to be dismissed for lack of personal jurisdiction. Accordingly, I conclude that it is appropriate to provide notice of this action to MFK, LLC's nonresident employees.

D. Form and Manner of Notice

Before concluding, I must address certain matters relating to plaintiffs' proposed notice to the potential members of the collective and the proposed consent-to-join form. Defendants raise various issues with the mechanics of providing notice and with the form of plaintiffs' proposed documents. Some of these issues concern simple mistakes and other matters that are likely to be resolved if the parties meet and confer. Therefore, I will require the parties to meet and confer. However, there are some disputes that are ripe for resolution now.

First, I do not understand defendants to be disputing that they must provide plaintiffs with the names and addresses of those employees and former employees who meet the collective definition so that notice can be sent to those employees by U.S. Mail. Accordingly, I expect that such notice will be mailed. I also expect defendants to provide information to plaintiffs as needed to locate those members of the collective whose mailed

notices are returned to sender. Plaintiffs also ask that I order defendants to post notice of this action in its break rooms and other locations where legal notices are posted to employees. However, I will not require this step because I have no reason to think that mailed notice will be insufficient to reach the potential members of the collective.

Second, I agree with defendants that the form of the notice should not contain the caption of this case. Although I have discretion to authorize notice to potential collective members, "the court must respect judicial neutrality and avoid even the appearance of endorsing the action's merits." *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1046–47 (7th Cir. 2020). The Seventh Circuit has specifically disapproved of notice given "on court letterhead over the signature of a court official." *Woods v. New York Life Ins. Co.*, 686 F.2d 578, 580 (7th Cir. 1982). Here, sending out notice on the caption of this case tends to suggest that the court has endorsed the merits of the suit. A nonlawyer might even misconstrue a document that appears underneath the case caption as a court order. In any event, there is no reason to include the caption on the notice. The notice can begin by addressing the proposed members of the collective by description (e.g., with the "To:" line in the plaintiff's proposed notice, ECF No. 18-1) and then provide the name of the case and the case number in the "Re:" line.

Third, I agree with defendants that the line "This is not a solicitation from a lawyer" should be removed. This line is potentially misleading, in that the proposed notice may fairly be described as a proposal from plaintiffs' lawyers to represent the interests of the opt-ins.

Fourth, the description of the action must more accurately describe the issue that resulted in conditional certification: the alleged improper deductions from the salaries of

managers. Plaintiffs' proposed notice describes the legal theory of this case as follows: "Plaintiffs allege that Plaintiffs and the potentially similarly-situated group were misclassified as salary exempt by Mobilelink and, therefore, were not properly and lawfully compensated at an overtime rate of pay for all work performed in excess of forty (40) hours in a workweek, in violation of the Fair Labor Standards Act." (ECF No. 18-1 at 1–2.) This description makes no mention of improper deductions. Defendants, however, have proposed a more accurate description of the case that I will adopt with some modifications:

> Plaintiffs allege that Mobilelink violated the Fair Labor Standards Act by making improper deductions from the salary of Plaintiffs and the potentially similarly-situated group that caused those employees to lose their exempt status for the period in which such deductions were made, such that they should have been paid overtime compensation for hours worked in excess of forty per week during the period in which the improper deductions were made.

Although plaintiffs also seek to pursue a theory based on the primary duties test, as discussed above, plaintiffs have not adequately developed this theory, and therefore the theory should not be included in the notice.

Fifth, the defendants contend that they should be referred to in the notice by their legal names (MFK, LLC and MFK Mobilelink Wisconsin, LLC) rather than by the name "Mobilelink." However, the defendants use the "Mobilelink" name in their communications with employees, as evidenced by their employee handbook, which states that "Mobilelink" is the "company" in charge of the "workplace." (ECF No. 29-1, § 1.4.) Thus, defendants' legal names are likely to be meaningless to potential class members, and the notice should continue to refer to the defendants as "Mobilelink."

Sixth, in their proposed consent forms, plaintiffs include a provision that states "[i]f this case does not proceed collectively, I also consent to join any subsequent action to assert these claims against Mobilelink." (ECF No. 18-1 at 4.) The defendants object to this language, and plaintiffs have not explained why they have included it. Moreover, I am unaware of any authority providing that a person may give advance consent to join an FLSA case that has not yet been filed or even proposed. Thus, I will require plaintiffs to delete this provision.

Finally, the proposed notice advises potential members of the collective that they may have received a similar notice regarding a separate FLSA action against Mobilelink, and that the decision to opt into one case does not affect the other. Defendants contend that this language is unfairly prejudicial because it suggests that, if multiple cases are pending against Mobilelink, then it must have done something wrong. However, if there are multiple cases pending, then a recipient of the current notice might wonder if it is unnecessary to respond because he or she already responded to the former notice. Defendants contend that because the other FLSA suit concerns hourly employees and this one concerns salaried employees, there is no potential for confusion. However, as evidenced by plaintiffs Jordens and Wilber, an employee might have held both hourly and salaried positions at Mobilelink and thus be eligible to join both collectives. Thus, the notice should continue to advise potential members that the two suits are unrelated and that separate consents are required.

Aside from the issues discussed above, I take no position on defendants' other objections. The parties should meet and confer regarding any remaining issues, as well as on a proposed schedule governing the notice process, further discovery, and pretrial

motion practice. The parties shall file a report summarizing the results of their conference in accordance with the schedule set out below. I will address any remaining issues and set deadlines for further proceedings at a status conference.

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that plaintiffs' motion for conditional certification is **GRANTED** to the extent set forth above.

IT IS FURTHER ORDERED that a telephonic status conference will be held on **February 9, 2023 at 9:30am** for the purposes of resolving any remaining disputes as to the form and manner of giving notice to potential members of the collective and setting a schedule for further discovery and pretrial motions. The parties shall meet and confer prior to this conference, and they shall file a report summarizing the results of the conference no less than **7 days** prior to the conference with the court.

Dated at Milwaukee, Wisconsin, this 7th day of December, 2022.

/s/Lynn Adelman
LYNN ADELMAN
United States District Judge