

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TAMARA BARRUS,
*on behalf of herself and all other employees similarly
situated,*

Plaintiffs,

v.

DICK'S SPORTING GOODS, INC., AND
GALYAN'S TRADING COMPANY, INC.,

Defendants.

Civil Action
No.05-CV-6253CJS

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
EXPEDITED NOTICE TO AFFECTED EMPLOYEES

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PRELIMINARY STATEMENT

Plaintiffs seek Court authorization to send notice of this Fair Labor Standards Act (“FLSA”) action to affected employees.¹ In particular, plaintiffs seek to send notice to the following classes of employees affected by Dick’s Sporting Goods, Inc.’s (“Dick’s”) and Galyan’s Trading Company, Inc.’s (“Galyan’s”; and collectively with Dick’s, “Defendants”) illegal policies:

CLASS I: Current and former hourly employees of Defendants whose pay was subject to an automatic deduction for a lunch break even when such employees worked through their lunch.

Subclass IA: Current and former hourly employees of Dick’s:

1. during the weeks in which they were not notified of the automatic lunch break deduction and whose pay was subject to that deduction;
2. whose pay was subject to an automatic lunch break deduction even if such employees were aware of the deduction because Dick’s policies did not accurately record the actual hours worked.

Subclass IB: Current and former hourly employees of Galyan’s:

1. during the weeks in which they were not notified of the automatic lunch break deduction and whose pay was subject to that deduction;
2. whose pay was subject to an automatic lunch break deduction even if such employees were aware of the deduction because Defendants’ policies did not accurately record the actual hours worked;

CLASS II: Current and former hourly employees of Defendants who were interrupted during their lunch breaks and not compensated for working during their lunch.

¹ Through this motion, plaintiffs only seek certification pursuant to the FLSA. Plaintiffs will seek class certification pursuant to Rule 23 in accordance with the Local Rules or this Court’s Order through a subsequent motion.

Subclass IIA: Current and former hourly employees of Dick's who were interrupted during their lunch breaks, and thus did not take one half-hour of uninterrupted lunch, and were not compensated for working during their lunch;

Subclass IIB: Former hourly employees of Galyan's who were interrupted during their lunch breaks, and thus did not take one half-hour of uninterrupted lunch, and were not compensated for working during their lunch;

CLASS III: Current and former hourly employees of Dick's who were suffered or permitted to work more than 40 hours in one week and then permitted to take time off in another week or receive "retro pay" in the following week at straight time rates, thus depriving employees of overtime compensation in the week it was earned.

Specifically, plaintiffs seek an Order:

1. requiring the issuance of an expedited notice as set forth in Exhibit A to the affirmation of Patrick J. Solomon to all current and former hourly employees of the Defendants who fall within Classes I, II, and III as described above;
2. requiring defendants to provide to plaintiffs' counsel a list both electronically (in an Excel spreadsheet with each item of the employee's name and address designated as a separate field) and by hard copy, of all individuals who meet the above class description, including their current or last known address, phone number and e-mail address within 15 days of the issuance of the order;
3. requiring defendants to post notices and opt-in forms in a conspicuous place (such as break rooms or other such locations) at defendant's location for a period of 90 days where employees can see such notices;
4. requiring defendants to e-mail such notices to employees;
5. requiring defendants to publicize such notice three times in defendants' employee newsletter or other employee communications; and
6. granting such other relief as this Court deems just and proper.

FACTS

Tamara Barrus (referred to herein as "Named Plaintiff") filed this action against Dick's Sporting Goods, Inc. and Galyan's Trading Company (the "Defendants") as a

collective action under the FLSA, 29 U.S.C. §216(b) and as a class action for violations of the New York State Labor Law (“Labor Law”) for failure to pay wages and overtime.

The complaint seeks to recover on behalf of those hourly employees denied overtime by the Defendants’ policies.

All of Defendants’ hourly employees are subjected to the following three policies which deprive them of statutorily required overtime payments:

Automatic Deduction Policy (Class I)

First, Defendants maintain a policy which automatically deducts time from employees when employees do not clock out for a lunch break (the “Automatic Deduction Policy”). Thus, employees who work through their lunch and do not clock out, automatically lose either one-half hour or one hour of compensable time because of the Automatic Deduction Policy and are included in Class I as described above.

Michael D’Agostino, a store manager for Dick’s, testified that managers would review employee hours and make a deduction for lunch periods when employees did not clock for lunch. (Affirmation of Michael D’Agostino, sworn to October 6, 2005 (“D’Agostino Aff.”), ¶¶ 10 – 11) Mr. D’Agostino was following his training and company policy when making such deductions. (D’Agostino Aff. ¶ 11)

Employees have also testified to being subjected to the Automatic Deduction Policy. For example, plaintiff Tamara Barrus testified that she learned of the Automatic Deduction Policy while she was a salaried manager, and later as an hourly employee, she experienced the deductions. (Affirmation of Tamara Barrus, sworn to October 7, 2005 (“Barrus Aff.”), ¶ 10) Carolyn Caulkins similarly testified to becoming aware of the Automatic Deduction Policy once she became a manager. (Affirmation of Carolyn Caulkins, sworn to October 6, 2005

("Caulkins Aff."), ¶ 9) Ivy Lewis testified that she learned of the Automatic Deduction Policy after working for Defendants for some time. (Affirmation of Ivy J. Lewis, sworn to October 10, 2005 ("Lewis Aff."), ¶ 14) Plaintiff Jeffrey Little also testified that he became aware of the Automatic Deduction Policy after he had already been working for Defendants for a period of time. (Affirmation of Jeffrey Little sworn to on October 10, 2005 ("Little Aff."), ¶ 11) Although employees eventually learned that they were subject to the Automatic Deduction Policy, measures taken to ensure that they were credited for the time that they worked did not result in an accurate recordation of the actual hours worked. (Barrus Aff. ¶ 33; Lewis Aff. ¶¶ 17, 18; Little Aff. ¶¶ 14, 15.) Being subjected to the Automatic Deduction Policy was a common experience for Defendants' employees. (D'Agostino ¶ 13; Barrus Aff. ¶10; Caulkins Aff. ¶ 8; Lewis Aff. ¶ 10; Little Aff. ¶ 10) Jamie Foehner, a former general manager for Defendants also testified that he was aware of the Automatic Deduction Policy in place. (Affirmation of Jamie Foehner, sworn to on October 11, 2005 ("Foehner Aff.") ¶ 7)

Defendants, its employees, and management knew that the employees continued to work through some or all of their lunches. They saw the work being done and employees' lunches being interrupted. (D'Agostino Aff. ¶ 18; Barrus Aff. ¶ 24; Caulkins Aff. ¶ 15; Lewis Aff. ¶ 27; Little Aff. ¶ 26; Foehner Aff. ¶ 17)

Interrupted Lunch Policy (Class II)

Second, employees who are interrupted during their lunch breaks, and thus do not take one half-hour of uninterrupted lunch, are not compensated for working during their lunch (the "Interrupted Lunch Policy"). Such employees are included in Class II as described above.

Employees who had clocked out for lunch would often be interrupted during their lunch breaks on a daily basis to do work tasks. (D'Agostino Aff. ¶¶ 15, 19; Barrus Aff. ¶¶ 18, 22; Caulkins Aff. ¶¶ 11, 14, 16; Lewis Aff. ¶¶ 20-22; Little Aff. ¶¶ 21, 27; Foehner Aff. ¶¶ 14, 18) Managers would interrupt employees in the break room and ask employees to return to work to assist customers, to load cars, to drill bowling balls, to string tennis racquets, to complete federal paperwork on gun sales, to take care of display or merchandising issue or perform other work tasks. (D'Agostino Aff. ¶ 17; Barrus Aff. ¶ 21; Caulkins Aff. ¶ 13; Lewis Aff. ¶ 23; Little Aff. ¶ 23; Foehner Aff. ¶ 16) Ms. Barrus witnessed this policy in effect at Defendants' stores in St. Louis, MO; Boston, MA; Garden City, NY; Woodbridge, NJ; Buffalo, NY; and Lakewood, CO. (Barrus Aff. ¶ 23). Mr. Little was either subject to or observed this policy in effect at Defendants' stores in Richfield MN, Woodbury, MN, Dublin, OH Columbus, OH. (Little Aff. ¶¶ 24, 25).

Some employees were required to carry two-way radios or phones during their lunch breaks so that they could be interrupted during lunch to return to work. (D'Agostino Aff. ¶ 16; Barrus Aff. ¶ 20; Caulkins ¶ 13, Lewis Aff. ¶ 22; Foehner Aff. ¶ 15) Management was fully aware the employees were interrupted during their lunches. (D'Agostino Aff. ¶ 18; Barrus Aff. ¶ 24; Caulkins ¶ 15; Lewis Aff. ¶ 27; Little Aff. ¶ 26; Foehner Aff. ¶ 17)

Defendants' policy was not to pay employees when their lunches were interrupted. (Barrus Aff. ¶ 19; Caulkins ¶ 12; Little Aff. ¶ 22; Foehner Aff. ¶ 14)

Comp Time Policy (Class III)

Third, when employees work over 40 hours in one week, they may be permitted to take time off the following week or receive "retro pay" the following week at straight time rates (the "Comp Time Policy"). (D'Agostino Aff. ¶ 24; Caulkins Aff. ¶ 22) Thus, employees

were not paid overtime compensation in the week it was earned. Such employees are included in Class III as described above.

Defendants' Failure to Prevent the Violations from Occurring

Defendants were always concerned with cutting payroll or watching out for the increasing payroll numbers that they didn't seem concerned about employees missing breaks and not getting paid for that time. (D'Agostino Aff. ¶ 26; Caulkins Aff. ¶ 23; Barrus Aff. ¶ 34; Lewis Aff. ¶ 34; Little Aff. ¶ 34; Foehner Aff. ¶ 25) Furthermore, every week management would repeatedly stress that the stores needed to pay close attention to payroll in order to keep the overhead numbers low. (D'Agostino Aff. ¶ 27; Caulkins Aff. ¶ 24) Additionally, since Defendants' stores were repeatedly understaffed, employees often had to compensate for the loss of manpower by working through their breaks. (D'Agostino Aff. ¶ 29; Caulkins Aff. ¶ 26; Barrus Aff. ¶ 36; Lewis Aff. ¶ 36; Little Aff. ¶ 36; Foehner Aff. ¶ 27) Defendants were more concerned about the bottom-line numbers than their employees. (D'Agostino Aff. ¶ 28; Caulkins Aff. ¶ 26; Barrus Aff. ¶ 35; Lewis Aff. ¶ 35; Little Aff. ¶ 35; Foehner Aff. ¶ 26)

ARGUMENT

I. DEFENDANTS' ILLEGAL POLICY AND PRACTICES CONCERNING WAGE AND HOUR PAYMENTS VIOLATE THE FLSA.

Under the FLSA, an employer is required to compensate its employees at the rate of one-and-a-half times their normal hourly rate for every hour the employee works over 40 in a week. 29 U.S.C. § 207(a)(1).

As described above, the three policies maintained by Defendants—the Automatic Deduction Policy, the Interrupted Lunch Policy and the Comp Time Policy—deprive employees of overtime compensation. Defendants knew that such work was being performed

and Defendants' corporate policy and practice was not to pay employees for such work. (D'Agostino ¶ 18; Barrus Aff. ¶¶ 19, 24; Caulkins ¶¶ 12, 15; Lewis Aff. ¶ 27, 23; Little Aff. ¶¶ 22, 26; Foehner Aff. ¶¶ 14, 17)

II. DEFENDANTS' POLICY AND PRACTICES CONCERNING WAGE AND HOUR PAYMENTS UNDER THE FLSA WERE WILLFUL.

The wage and hour violations described above are willful violations of the FLSA. A "willful" violation extends the FLSA's statute of limitations to three years. The Second Circuit requires that the employer carry the burden to prove it did not act willfully. An employer's action is willful if the employer "failed to take any steps to determine the legality of its practices." A finding of "willfulness is the norm, [not] the exception...." *Brock v. Wilamowsky*, 833 F.2d 11, 19-20 (2d Cir. 1987) citing *Walton v. United Consumer Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986). Defendants certainly failed to take steps to determine the legality of its practices, including, maintaining a policy which would automatically deduct time from employees when the employees were working.

III. THE COURT'S ROLE IN NOTIFYING EMPLOYEES OF THEIR RIGHT TO OPT-IN TO THIS FLSA LAWSUIT.

A. Expedited Notice Is Required Under the FLSA.

When the FLSA was enacted in the 1930s, Rule 23 did not exist. Congress, however, thought it was important to create a mechanism by which employees who alleged violations under the FLSA could have their claims adjudicated in one lawsuit. Therefore, the FLSA created a precursor of Rule 23 with its "collective action" provision. 29 U.S.C. § 255(a). Under the FLSA, the employee must affirmatively "opt-in" to the lawsuit, but once he or she does so, his or her case is part of the class-wide allegations in the lawsuit.

It is important that employees be notified of their rights to participate in a FLSA collective action. First, the Second Circuit has long held that the interests of both the parties and the courts are best served if plaintiffs' FLSA claims are heard in one lawsuit. *Braunstein v. Eastern Photographic Labs.*, 600 F.2d 335, 336 (2d Cir. 1979) ("We believe that Judge Daly took the proper course in authorizing notice to other potential plaintiffs in this action under the FLSA....[T]his holding comports with the broad remedial purpose of the Act, which should be given a liberal construction, as well as with the interest of the courts in avoiding the multiplicity of suits.").

The Supreme Court adopted the views of the Second Circuit and encouraged the use of notice as being in the best interests of the parties involved. *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. at 170 ("[a] collective action allows ... plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources" and serves the equally important judicial interest of "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged . . . activity."). This Court wrote,

A collective action allows...plaintiffs to take advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.... Notice plays an important role in facilitating a collective action and furthers [the statute's] remedial purposes.

Rehwaldt v. Elec. Data Systems Corp., 1996 WL 947568, *3 (W.D.N.Y.) citing *Jackson v. N.Y. Tel. Co.*, 163 F.R.D. 429 (S.D.N.Y. 1995).

Second, expedited notice is required because of the FLSA's statute of limitations. The statute of limitations covers the last three (or two) years of an employee's paychecks. Therefore, an injured employee loses forever his right to recover on illegal paychecks more than three years old. As then-District, now Circuit, Judge Sotomayor explained, expedited

notice is essential because an injured employee's claims "die daily" if they do not opt-in to the lawsuit. *Hoffman v. Sbarro, Inc.*, 982 F. Supp. 249, 260 (S.D.N.Y. 1997). Certainly defendant has every incentive to delay the matter. Although Defendants agreed to toll the statute of limitations during the extension of time to file its answer, it has now decided not to continue a toll.

B. Notice Is Required Once Plaintiffs Present "Modest" Allegations of Other Similarly Situated Employees.

If there are potentially "similarly situated" employees, class-wide notice is appropriate. *Hoffmann-LaRoche, Inc.*, 493 U.S. at 168-69. Perhaps because of the importance of expedited notice, the requirements to demonstrate the existence of possibly "similarly situated" employees are minimal. *Gjurovich v. Emmanuel's Marketplace, Inc.*, 282 F. Supp. 2d 91, 95-96 (S.D.N.Y. 2003); *Brychnalski v. Unesco, Inc.*, 35 F. Supp.2d 351, 353 (S.D.N.Y. 1999); *Realite v. Ark Restaurants Corp.*, 7 F. Supp.2d 303, 307-308 (S.D.N.Y. 1998); *Hoffman*, 982 F. Supp. at 249; *Rehwaldt*, 1996 WL 947568, at *5 (W.D.N.Y.); *Jackson*, 163 F.R.D. at 429; *Schwed v. Gen. Elec. Co.*, 159 F.R.D. 373, 375 (N.D.N.Y. 1995); *Palmer v. Reader's Digest Association, Inc.*, 1986 WL 324 (S.D.N.Y.); *Frank v. Capital Cities Communications, Inc.*, 88 F.R.D. 674, 676 (S.D.N.Y. 1981). Courts, including this Court, hold that notice in FLSA collective actions is appropriate under standards far more lenient than those under Rule 23. See *Scholtisek v. Eldre Corp.*, No. 03-CV-6656, Feb. 3, 2005, p. 5 (W.D.N.Y.) (Larimer, J.) ("the FLSA simply requires that all employees be 'similarly situated.' The other factors required in class actions—numerosity, typicality, etc.—do not apply to collective actions."); *Ayers v. SGS Control Svcs., Inc.*, No. 03 Civ. 9078, 2004 WL 2978296, at *4 (S.D.N.Y. Dec. 21, 2004); *Hoffman*, 982 F. Supp. at 263 ("[T]he prevailing view among federal courts, including courts in this Circuit, is that [FLSA] collective actions are *not* subject to Rule 23's strict requirement,

particularly at the notice stage.”) (Sotomayor, J.); *Schwed v. Gen. Elec.*, 1997 WL 204394 at, *3 (N.D.N.Y.) (Pooler, J.); *Rehwaldt*, 1996 WL 947568, at *3 (citing with approval *Jackson*, 163 F.R.D. at 431 and *Krueger v. N.Y. Tel. Co.*, 1993 WL 276058, *2 (S.D.N.Y.)).

This Court has held that notice should be sent if the plaintiffs merely allege that there are other employees who were also not paid overtime. *Rehwaldt*, 1996 WL 947568, at *4 (notice to be sent “based on little more than the plaintiff’s allegations”) citing with approval *Frank v. Capital Cities Communications, Inc.*, 88 F.R.D. 674 (S.D.N.Y. 1981). Other courts in this Circuit have reached the same conclusion. Courts have noted that plaintiffs must, at most, make “substantial allegations;” or “describe the potential class within reasonable limits;” or allege that other plaintiffs are “purportedly subject” to a common scheme to deprive them of overtime; or assert “at least a colorable claim;” or make a “modest factual showing;” or present “some factual basis;” or “indicate” there is a class-wide basis for relief. *Jackson*, 163 F.R.D. at 431; *Schwed*, 159 F.R.D. at 375-76; *Hoffman*, 982 F. Supp. at 261 (Sotomayor, J.); *Realite*, 7 F. Supp.2d at 307 (Sotomayor, J.). As this Court has held, the allegations need neither be “strong or conclusive” for notice to be sent. *Rehwaldt*, 1996 WL 947568, at *4 (“plaintiffs are only required to demonstrate a factual nexus that supports a finding that potential plaintiffs were subject to a common discriminatory scheme”) (citing *Jackson*, 163 F.R.D. at 431-32; *Hoffman*, 982 F. Supp. at 261 (“The burden on plaintiffs is not a stringent one.”) (Sotomayor, J.)).

Courts identify two reasons for this low standard. First, under well-established Second Circuit and Supreme Court precedence, the FLSA is to be read broadly and liberally to effectuate its remedial purpose. *Hoffman*, 982 F. Supp. at 261 (Sotomayor, J.); *Rehwaldt*, 1996 WL 947568, at *4 (W.D.N.Y.); *Braunstein*, 600 F.2d at 336.

Second, and perhaps more importantly, class-wide notice is wise, even if the claims have no merit, or even if the plaintiffs will be placed into subclasses. This Court cited with approval the following holding in *Jackson v. New York Telephone Company*:

The inquiry at the inception of the lawsuit is less stringent than the ultimate determination that the class is properly constituted.... [E]ven if plaintiffs' claims turn out to be meritless or, in fact, all the plaintiffs turn out not to be similarly situated, notification at this stage, rather than after further discovery, may enable a more efficient resolution of the underlying issues in this case.... These benefits, however, depend on employees receiving accurate and timely notice.

Rehwaldt, 1996 WL 947568, at *3 (emphasis in original). Discovery can also be conducted more efficiently if the notice is sent early, regardless of the potential merits of the claim or ultimate merits of the claim. As cited by this Court,

Defendants' argument [against pre-discovery notice] is that the "plaintiffs' claims may be shown in the crucible of discovery to be weak, if not meritless," in which case no notice should be sent. The answer is that the experiences of other employees may well be probative of the existence *vel non* of a discriminatory policy, thereby affecting the merits of plaintiffs' own claims; and the notice machinery contemplated by the [statute], by reaching out to potential plaintiffs, may further the statute's remedial purpose.

Rehwaldt, 1996 WL 947568, at *5 (citing *Frank*, 88 F.R.D. at 676; *Realite*, 7 F. Supp.2d at 308 ("I am not holding at this time that all members of the proposed class who will be sent notices are, in fact, similarly situated.... I may later decertify the class, or divide the class into subgroups.... However, at this early juncture ... principles of efficiency and judicial economy militate in favor of maintaining this action as a collective one, and waiting to see what the facts bear out.") (Sotomayor, J.)).

Thus, in making the determination to send out notice, the court does not examine the underlying merits of the action. *Rehwaldt*, 1996 WL 947568, at *5 (citing *Frank*, 88 F.R.D. at 676; *Realite*, 7 F. Supp.2d at 308; *Jackson*, 163 F.R.D. at 431.). Nor does the fact that the

notified employees may or may not ultimately be found to be similarly situated, make any difference at the notification stage. *Id.*

Nor do the employment situations or claims of the notified employees need to be the same. Courts send out notice to employees allegedly affected by the same policy regardless of their job titles, location within the company, or reporting relationships: “Class treatment under the [statute] is not defeated simply because, as here, the plaintiffs performed a variety of jobs in a number of departments at different locations.” *Heagney v. European Am. Bank*, 122 F.R.D. 125, 127 (E.D.N.Y. 1988). A “finding of similarly situated does not require the plaintiffs to perform the same job in the same location as long as there is a discriminatory policy common to all.” *Abrams v. Gen. Elec. Co.*, 1996 WL 663889, at *2 (N.D.N.Y.); *Jackson*, 163 F.R.D. at 432. Even if all the named plaintiffs were employed by the same department, as long as the plaintiffs allege the same policy effected other employees elsewhere, notice to employees in the corporation’s other units and operations is warranted. *Schwed*, 159 F.R.D. at 377; *Hoffman*, 982 F. Supp. at 264 (notice appropriate to all current and former managers and co-managers, or persons holding equivalent positions, however titled, who worked overtime and were not paid, rejecting defendant’s attempts at a narrower range) (Sotomayor, J.). The plaintiff must simply allege a factual nexus between the employees and the alleged policy. *Realite*, 7 F. Supp.2d at 308 (notice appropriate because affidavits “indicate” same policy was in effect at other locations) (Sotomayor, J.).

As part of the notification process, the defendant is required to immediately (often within 15 days or shorter) turn over the names and last known addresses of the potential opt-ins. *Hoffmann-LaRoche, Inc.*, 493 U.S. at 170 (“District Court was correct to permit discovery of the names and addresses ...”); *Brzychnalski v. UNESCO*, 35 F. Supp.2d 351, 353 (S.D.N.Y.

1999); *Realite*, 7 F. Supp.2d at 309-10; *Jackson*, 163 F.R.D. at 432-33; *Rehwaldt*, 1996 WL 947568, at *8; *Schwed*, 159 F.R.D. at 378. Because the information is likely stored on a computer database, to facilitate notice, plaintiffs request the production in both electronic (in a readily readable format) and hard copy format.

C. Because Plaintiffs Presented More Than The Minimal Showing Required, Notice Should Be Sent To Other Employees.

To determine if plaintiff meets the liberal standard for notification, two issues must be addressed: the proper scope of the class of similarly situated employees and whether the plaintiff has presented evidence that she is similarly situated to that group of plaintiffs.

In this case, the proper scope for notification is current or former employees of Defendants who fall within Classes I, II and III as described above. Additionally, plaintiff has presented far more than enough evidence to meet the liberal standard for notification to these similarly situated former and current employees.

Not only are the putative plaintiffs similarly situated, the named plaintiff has produced more than sufficient evidence to warrant notification under the liberal FLSA standards by showing that similarly situated employees were subject to a common policy, practice and/or system that deducted time from employees for lunch breaks even when employees worked through lunch. (D'Agostino ¶ 13; Barrus Aff. ¶ 10; Caulkins Aff. ¶ 8; Lewis Aff. ¶ 10; Little Aff. ¶ 10; Foehner Aff. ¶¶ 12-13) Employees also universally testified that Defendants' policy was not to compensate employees when their lunch breaks were interrupted. (D'Agostino Aff. ¶¶ 15, 19; Barrus Aff. ¶¶ 18, 22; Caulkins Aff. ¶¶ 11, 14; Lewis Aff. ¶ 20; Little Aff. ¶ 21; Foehner Aff. ¶ 13) Additionally, managers and employees have testified that the policies equally applied to all hourly employees. (D'Agostino ¶¶ 11, 12, 15 – 19; Barrus Aff. ¶¶ 13, 22 – 25; Caulkins ¶¶ 14 – 16; Lewis Aff. ¶¶ 12, 13, 21, 27; Little Aff.

¶¶ 16, 17, 18, 21, 25; Foehner Aff. ¶¶ 9, 15-19) Plaintiff has also provided sufficient evidence that the policies were observed at multiple locations of Defendant, including Henrietta, NY; Greece, NY; Victor, NY; St. Louis, MO; Boston, MA; Garden City, NY; Woodbridge, NJ; Buffalo, NY; Lakewood, CO; Richfield, MN; Woodbury, MN; Dublin, OH and Columbus, OH. D'Agostino Aff. ¶¶ 4, 8-13, 15; Barrus Aff. ¶¶ 3, 12-14, 23; Caulkins Aff. ¶¶ 3, 8, 16; Lewis Aff. ¶ 3, 10, 21 ; Little Aff. ¶¶ 3, 4, 10, 18-19, 21, 25; Foehner Aff. ¶¶ 3, 19) Therefore, there is little dispute that there is common issue among all the putative plaintiffs in this lawsuit: that similarly situated employees were subject to common policies which deducted time for lunch breaks and did not pay employees for interrupted lunches.

In addition, Dick's employees were subjected to the Comp Time Policy which caused employees not to receive overtime compensation for hours worked over 40 in one week and to instead receive "retro pay" at straight time rates or time off in another week. (D'Agostino ¶ 24; Caulkins ¶ 22)

Therefore, it is appropriate to send notice to all potentially affected employees.

D. The Proposed Notice is Fair and Adequate.

As discussed above, a collective action depends "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." *Hoffmann-LaRoche, Inc.*, 493 U.S. at 170. 172. The court-authorized notice prevents "misleading communications," such as is often unilaterally disseminated by defendants. *Id.* at 172. Plaintiffs' proposed notice meets these criteria. (Solomon Aff., Ex. A) It provides notice of the pending action and of the opportunity to opt-in. The plaintiffs' legal claims are accurately described. Potential opt-ins are advised that Defendants are defending against the claims and that they are not required

to participate. The notice provides clear instructions on how to opt-in; describes the legal effect of joining the suit; describes the legal effect of not joining the suit; and accurately states the prohibition against retaliation or discrimination for participation in an FLSA action. *See also* 29 U.S.C. § 215(a)(3) (anti-retaliation provision).

Plaintiffs propose that the notice and consent forms be mailed by first-class mail to all Defendants' employees as defined in the notice of motion in the last three years prior to the filing of the complaint. Because the statute of limitations is daily destroying the injured employees' ability to collect damages, plaintiffs also request that defendant post the notice prominently on bulletin boards and provide e-mail addresses of current and former employees and help facilitate the notice being sent electronically to such employees. Courts have long required that notice be posted at company facilities, in addition to being mailed to employees' homes. *See, e.g., Frank*, 88 F.R.D. at 679; *Kane v. Gage Merchandising Servs, Inc.*, 138 F. Supp.2d 212, 216 (requiring the provision of employee's e-mail address).

It is true that plaintiffs' counsel can take steps in addition to the court-approved notice to inform plaintiffs of their rights. For instance, counsel may send additional written notices to affected employees, provided the written communication is accurate and not misleading. *See* Disciplinary Rule 2-103; *Shapero v. Kentucky Bar Assoc.*, 486 U.S. 466 (1988). To ascertain the facts and gather evidence, plaintiffs' counsel may initiate telephone contact with potential witnesses, provided those individuals are not represented by counsel. *See* N.Y. State Bar Ass'n Comm. Prof. Eth. No. 499, 1978 WL 14162. These measures are important, and plaintiffs' counsel will utilize them as needed. However, as courts have repeatedly held, the best way to insure that employees' rights do not continue to "die daily" is for this Court

to approve the notice proposed by plaintiffs; order its expedited dissemination; and forbid any future retaliation.

CONCLUSION

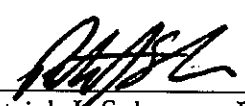
For the forgoing reasons, plaintiffs respectfully request that this Court issue an Order:

1. requiring the issuance of an expedited notice as set forth in Exhibit A to the affirmation of Patrick J. Solomon to all current and former hourly employees of the Defendants who fall within Classes I, II and III as described above;
2. requiring the provision to plaintiffs' counsel of a list both electronically (in an Excel spreadsheet with each item of the employee's name and address designated as a separate field) and by hard copy, of all individuals who meet the above class descriptions, including their current or last known address, phone number and e-mail address within 15 days of the issuance of the order; and
3. requiring defendants to post notices and opt-in forms in a conspicuous place (such as break rooms or other such locations) at defendants' location for a period of 90 days where employees can see such notices;
4. requiring defendants to e-mail such notices to employees;
5. requiring defendants to publicize such notice three times in defendants' employee newsletter or other employee communications; and
6. for such other relief as this Court deems just and proper.

Dated: October 13, 2005

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By: _____


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