IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| KURTIS JEWELL, on behalf of himself and all others similarly situated, | : | |
| Plaintiff, | : | CIVIL ACTION NO. 1:12-CV-0563-AT |
| v. | : | |
| AARON'S, INC. | : | |
| Defendant. | : | |

**ORDER**

This matter is before the Court on Plaintiff's Motion for Conditional Certification, Expedited Opt-In Discovery, and Court-Supervised Notice to Potential Opt-In Plaintiffs [Doc. 18]. For the reasons set forth below, Plaintiff's motion is **GRANTED**.

## I. BACKGROUND

Plaintiff filed this action on behalf of himself and all others similarly situated as a result of Defendant's alleged practices and policies of failing to pay Plaintiff and other similarly-situated employees for meal periods during which they performed work, in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. (*See* Compl. ¶ 1.) Aaron's is a lease-to-own retailer. The company focuses on leases and retail sales of furniture, electronics, appliances, and computers, and operates over 1,000 company-owned sales and lease

ownership stores. (Compl. ¶ 13.) Plaintiff Kurtis Jewell was employed in various positions including account manager, manager trainee, and sales manager in Defendant's sales and lease ownership store in Mansfield, Richland County, Ohio, between approximately January 20, 2010 and May 13, 2011. (Compl. ¶ 14.) Plaintiff and other similarly-situated account managers, manager trainees, sales managers, customer service representatives, and/or product technicians were classified by Defendant as non-exempt employees and paid on an hourly basis. (Compl. ¶¶ 16, 17.)

Plaintiff alleges that he and these other similarly situated employees were not provided bona fide meal periods during which they were completely relieved from duty as a result of Defendant automatically deducting 30 minutes from their pay each day for a meal period. (Compl. ¶¶ 18, 19.) Plaintiff further alleges that he and these other similarly situated employees frequently did not receive meal a period, and/or were required to perform work during their meal period and were therefore denied significant amounts of overtime compensation. (Compl. ¶¶ 20, 21.)

The class which Plaintiff seeks to represent and for whom Plaintiff seeks the right to send "opt-in" notices for purposes of the collective action is composed of at least 4,000 persons and defined as follows:

> All former and current hourly, non-exempt account managers, manager trainees, sales managers, customer service representatives, and product technicians of Aaron's at any time between October 27, 2008 and the present.

(Compl. ¶¶ 25, 26.)

In support of the motion for conditional certification of a collective action, Plaintiff submitted declarations from approximately 20 opt-in Plaintiffs who are either current or former Aaron's employees who claim to be similarly situated in being denied bona fide meal periods during which they were not completely relieved from work duty. These employees worked in twenty-three cities and eleven states covering the Northeast, the Midwest, the Southeast, and the Southwest.

On April 5, 2012, the parties submitted a Joint Proposed Notice for Distribution to Potential Class Members [Doc. 56-1]. On May 14, 2012, the parties agreed to use Kurtzman Carson Consultants as the Notice Administrator [Doc. 74].

The Court held a hearing in this matter on April 18, 2012, and ordered Plaintiff to submit supplemental declarations from potential opt-in Plaintiffs to support his request for certification of a potentially large nationwide collective action. Plaintiff submitted supplemental declarations from nine Aaron's employees on May 7, 2012 [Doc. 72]. Defendant submitted supplemental declarations from numerous Aaron's employees in opposition on May 14, 2012 [Doc. 73].

## II. ANALYSIS

### A. Legal Framework Governing Collective Action Certification Under the FLSA

Section 216(b) of the FLSA authorizes employees to bring a collective action against employers accused of violating the FLSA as follows:

> An action ... may be maintained against any employer ... by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed with the court in which such action is brought.

29 U.S.C. § 216(b).[1] The court, in its discretion, may authorize the sending of notice to potential class members in a collective action. *Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. 165, 169-170 (1989); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001); *Haynes v. Singer Co.*, 696 F.2d 884, 886-87 (11th Cir. 1983). A collective action is particularly appropriate when it permits the "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged ... activity." *Hoffmann–La Roche*, 493 U.S. at 170. "The benefits of a collective action 'depend on employees receiving accurate and timely notice . . . so that they can make informed decisions about whether to participate.'" *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1259-60 (11th Cir. 2008).

[1] Participants in a putative collective action must affirmatively opt into the suit. 29 U.S.C. § 216(b). Thus, the decision to certify a collective action, on its own, does not create a class of plaintiffs; rather the "existence of a collective action under § 216(b) . . . depend[s] on the active participation of other plaintiffs." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1259-60 (11th Cir. 2008).

The Eleventh Circuit applies a two-stage process to FLSA class certification. *See Hipp*, 252 F.3d at 1218; *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260-61 (11th Cir. 2008). The first stage in determining whether a collective action should be certified is the notice stage (also referred to as the conditional certification stage) at which time the court determines whether other similarly situated employees should be notified. *Morgan*, 551 F.3d at 1261. The second stage of the certification process is "typically precipitated by a motion for 'decertification' by the defendant usually filed after discovery is largely complete and the matter is ready for trial." *Hipp*, 252 F.3d at 1218; *Anderson v. Cagles, Inc.*, 488 F.3d 945, 953 (11th Cir. 2007). At the conclusion of discovery when a matter is ready for trial, the district court uses the factual information gathered during discovery to determine whether the plaintiffs are actually similarly situated, and if they are not the court decertifies the class.[2] *Id.*

In the first stage of the certification process, the district court makes a decision based on limited information, such as detailed pleadings and affidavits, whether notice of the action should be given to potential class members.[3] *Hipp*, 252 F.3d at 1218; *Anderson*, 488 F.3d at 952-53. A plaintiff has the burden of showing a "reasonable basis" for his claim that there are other similarly situated employees. *Morgan*, 551 F.3d at 1260; *Grayson v. K-Mart Corp.*, 79 F.3d 1086,

[2] During the second stage, the standard "is less lenient, and the plaintiff bears a heavier burden." *Morgan*, 551 F.3d at 1261. The district court "has a much thicker record than it had at the notice stage, and can therefore make a more informed factual determination of similarity." *Id.*

[33] At the second stage, in order to overcome the defendant's evidence opposing certification, plaintiffs must rely on more than just allegations and affidavits. *Morgan*, 551 F.3d at 1261.

1096 (11th Cir. 1996). The burden on the plaintiff, however, is not a heavy one. At the first stage of class certification, because the court has minimal evidence the "determination is made using a fairly lenient standard, and typically results in 'conditional certification' of a representative class."[4] *Hipp*, 252 F.3d at 1218; *Morgan*, 551 F.3d at 1260 (describing the standard for determining similarity, at this initial stage, as "not particularly stringent," "fairly lenient," "flexib[le]," "not heavy," and "less stringent than that for joinder under Rule 20(a) or for separate trials under 42(b)."). The first step is a conditional certification because the decision may be reexamined once discovery is complete and the case is ready for trial. *See Morgan*, 551 F.3d at 1261.

Before granting conditional certification, the court should determine: (1) whether employees sought to be included in the putative class are similarly situated with respect to their job requirements and pay provisions; and (2) whether there are other employees who wish to opt-in to the action. *Dybach v. State of Fla. Dept. of Corrections*, 942 F.2d 1562, 1567-68 (11th Cir. 1991). Here,

[4] Several courts in this district have recently granted conditional certification under the FLSA applying the fairly lenient standard. *Riddle*, 2009 WL 3148768 (N.D. Ga. 2009) (Story); *McCray v. Cellco Partnership*, 2011 WL 2893061 (N.D. Ga. 2011) (Jones) (rejecting defendant's reliance on non-binding district court decisions and arguments in opposition to certification in recognition that the court's analysis is more stringent, and the plaintiff's burden is heavier at the second decertification stage); *Scott*, No. 1:05-cv-2812-TWT, 2006 WL 1209813, at *2 (N.D. Ga. May 3, 2006) (Thrash, J.) (declining to resolve factual issues or make credibility determinations at this stage); *Kreher v. City of Atlanta, Ga.*, No. 1:04-cv-2651-WSD, 2006 WL 739572, at *4 (N.D. Ga. Mar. 20, 2006) (Duffey, J.) ("a court adjudicating a motion to authorize a collective action need not evaluate the merits of plaintiffs' claims in order to determine whether a similarly situated group exists."); *Clincy v. Galardi South Enterp., Inc.*, No. 1:09-cv-2082-RWS, 2010 WL 966639 (N.D. Ga. Mar. 12, 2010) (Story J.); *Cash v. Gwinnett Sprinkler Co.*, No. 1:08-cv-2858-JOF, 2008 WL 5225874 (N.D. Ga. Dec. 12, 2008) (Forrester, J.) (noting the allegation of a common practice by the defendant as the basis for granting certification). However, Defendant relies on several cases from the district courts in Florida that appear to undertake a more factually intensive and stringent analysis resulting in the denial of conditional certification.

Plaintiff offers declarations from more than twenty employees who wish to opt-in to a potential collective action, thus the Court need only determine whether the named Plaintiff is similarly situated to these the potential class-members. *See Riddle v. Suntrust Bank,* No. 1:08-CV-1411-RWS 2009 WL 3148768 (N.D. Ga. 2009) (Story, J.) (finding that because actual notice has not been sent to putative class members who may be spread over a wide geographic area, the existence of only three opt-in plaintiffs sufficiently demonstrated an interest by other employees to opt-in to the suit); *Longcrier v. HL-A Co., Inc.*, 595 F.Supp.2d 1218, 1232 n. 20 (S.D. Ala. 2009).

The focus of the court's inquiry at this stage is not on whether there has been an actual violation of law, but on whether the proposed plaintiffs are similarly situated with respect to their allegations that the law has been violated. *Kreher v. City of Atlanta, Ga.*, No. 1:04-cv-2651-WSD, 2006 WL 739572, at *4 (N.D. Ga. Mar. 20, 2006) (stating that plaintiffs are not required to submit evidence of a highly particularized nature and finding that "[a]lthough lacking in some detail, Plaintiffs' declarations establish the existence of other employees employed in similar positions and subjected to similar policies.") Applying the fairly lenient standard of the notice/conditional certification stage, plaintiffs are not required to show that they hold identical positions. *Hipp*, 252 F.3d at 1217; *Grayson*, 79 F.3d at 1096. Rather for purposes of conditional certification, plaintiffs may show either (1) that their job positions and duties are similar to those positions held by the putative class members, *see Hipp*, 252 F.3d at 1217;

*Grayson*, 79 F.3d at 1096, or (2) that plaintiffs and the putative class members were all subject to the same unified policy, plan, or scheme that forms the basis of the alleged FLSA violation, *see, e.g., Morgan*, 551 F.3d at 1262-63 (upholding district court's denial of employer's motion to decertify and finding that "there is nothing unfair about litigating a single corporate decision in a single collective action"); *Lindberg v. UHS of Lakeside, LLC*, 761 F.Supp.2d 752 (W.D. Tenn. 2011) ("It is clear that plaintiffs are similarly situated when they suffer from a single, FLSA violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs . . . Plaintiffs may also meet the similarly situated requirement if they demonstrate, at a minimum, that 'their claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct."); *Ohsann v. L.V. Stabler Hosp.*, 2008 WL 2468559 (M.D. Ala. 2008); *Scott v. Heartland Home Finance, Inc.*, No. 1:05-cv-2812-TWT, 2006 WL 1209813, at *2 (N.D. Ga. May 3, 2006) (Thrash, J) (holding that the notice stage requires only "substantial allegations that the putative class members were together the victims of a single decision, policy, or plan."); *Harper v. Lovett's Buffet, Inc.*, 185 F.R.D. 358, 364-65 (M.D. Ala. 1999).

### B. Defendant's Objections to Plaintiff's Opt-in Declarations and Supplemental Declarations

In support of the motion for conditional certification of a collective action, Plaintiff submitted more than twenty declarations from current or former

Aaron's employees containing the following identical allegations: (1) during their employment at Aaron's, the employee was not provided with meal periods during which the employee was completely relieved from duty; (2) Aaron's automatically deducted 30 minutes from the employee's pay each day for a meal period despite the fact that the employee frequently did not receive a meal period or was required to perform work during the meal periods; and (3) the employee observed that Aaron's did this to other similarly situated hourly, non-exempt account managers, manager trainees, sales managers, customer service representatives, and product technicians. (*See* Doc. 55-3.)

Defendant opposed Plaintiff's request for conditional certification, asserting that Plaintiff had not established that the putative class-members are similarly situated on the following grounds: (1) the declarations submitted by Plaintiff in support of his request to certify this case as a nationwide class of thousands were vague and conclusory and represent only "a tiny fraction of the putative class," (2) the declarations failed to establish that Plaintiff and the putative class members had similar job duties or pay, (3) the declarations failed to establish that Plaintiff and the putative class members were subject to a common scheme or policy violation, and (4) individualized inquiries into the underlying claims would be required at the liability stage. Defendant offered numerous declarations from Aaron's managers and supervisors countering Plaintiff's generic allegations that it employs a policy of requiring its employees to

work through their meal breaks and applies automatic meal deductions in violation of the FLSA.

Despite the findings by other district courts in this Circuit that generalized declarations may be sufficient at the first stage of the certification process for certain collective actions[5], this Court was concerned about certifying a nationwide class involving all hourly employees of Aaron's based on the bare-boned record originally presented by the Plaintiff in this case. Accordingly, at the conclusion of the hearing on Plaintiff's motion, the Court deferred ruling and ordered Plaintiff to provide supplemental declarations addressing the following questions: (1) any staffing model issues relating to the reasons why employees are forced to work through lunch; (2) to whom the employee reports to in management at the store or on the corporate level; (3) specific facts as to whether and why employees felt compelled to work overtime – including whether or not they were (a) discouraged or (b) actively prevented by management from correcting their time records as to being credited for working through lunch; (4) whether non-payment for work during lunch was a frequent occurrence or instead, an isolated occurrence during the course of any one year; (5) any specific facts and evidence the employee is

[5] *See McCray v. Cellco Partnership*, 2011 WL 2893061 (N.D. Ga. 2011) (Jones) (holding that plaintiff's declarations at first stage of certification process are not subject to the standards of proof for summary judgment or trial and allowing a relaxed evidentiary standard at the conditional certification stage in light of the applicable fairly lenient standard); *Kreher v. City of Atlanta, Ga.*, No. 1:04-cv-2651-WSD, 2006 WL 739572, at *4 (N.D. Ga. Mar. 20, 2006); *Longcrier v. HL-A Co., Inc.*, 595 F.Supp.2d at 1234 n. 22 (S.D. Ala. 2009) (accepting generalized declarations consisting largely of "boilerplate form documents, with minimal tailoring to the specific circumstances of the individual" in granting conditional certification where plaintiff's burden is minimal and plaintiff is required to make a modest factual showing).

aware of that suggests that the Defendant's alleged FLSA violations are a systemic practice either within the store s/he works at or on a broader level within the company; and (6) for those individuals who had been employed in more than one job title, whether there was any difference in the way their overtime/lunch period payments were handled when they held different positions, and in what way. (April 18, 2012, Hearing Tr. at 52-57, Doc. 70.)

Out of the original twenty-three 23 declarations submitted by Plaintiff in support of the motion for conditional certification, Plaintiff presents supplemental declarations from nine putative class members. Plaintiff's supplemental declarations cover each of the hourly job positions purportedly subject to the alleged FLSA violations which include account managers, manager trainees, sales managers, customer service representatives, and product technicians. Geographically, the supplemental declarations encompass thirteen (13) out of the twenty-three (23) cities and six (6) out of the twelve (12) states addressed in the original declarations. The supplemental declarations offer specific individualized accounts that: (1) the stores in which these employees worked were under-staffed; (2) the general managers at each of these stores were under pressure to keep employee hours down and productivity up; (3) the non-managerial hourly employees were pressured to complete the work despite staffing constraints; (4) as a result of the pressure placed on them by the managerial staff, employees employees felt compelled to eat on the job to keep on schedule; (5) many of these employees were expressly required by their managers

to eat on the job; (6) many of these employees worked more hours that they were scheduled or paid for; and (7) paid meal periods would have constituted overtime hours for which the employees were not compensated. (*See* Doc. 72.) These allegations, if true, would demonstrate that Aaron's engages in a systemic practice of pressuring its managers and all hourly employees to operate productively (keeping costs down) with minimal staffing thereby resulting in employees being forced to miss or work through their meal periods without compensation.

Despite the additional details Plaintiff has now furnished to establish the "substantial similarity" of the putative class, Defendant again objects to the supplemental declarations, asserting that they are insufficient to warrant certification of a nationwide class of more than 20,000 employees because they: (1) discuss the individual experiences of the employees of allegedly working off the clock; (2) offer only hearsay[6] or conclusory assertions that other associates

[6] The Court notes that the majority of the allegations in Plaintiff's supplemental declarations contained sufficient factual information based on the declarants' personal knowledge standing on their own, independent of any hearsay. Even so, on a motion for conditional certification courts in this Circuit apply a relaxed evidentiary standard. *See McCray v. Cellco Partnership*, 2011 WL 2893061, *3 (N.D. Ga. 2011) (Jones) (overruling the defendant's objections that the plaintiffs' declarations were not based on personal knowledge and amounted to hearsay); *Longcrier v. Hil-A Co., Inc.*, 595 F.Supp.2d 1218, 1223, 1224 n. 8 (2008). In consideration of the present posture of this case and the fairly lenient standard applied at the conditional certification stage, the Court finds that it may properly consider hearsay, if necessary, in deciding whether to issue class notice.[6] This approach is consistent with the purpose of conditional certification which is only a preliminary determination of whether there is a sufficient showing to warrant notice being sent to the purported collective class to allow members to opt-in to the lawsuit. *See McCray v. Cellco Partnership*, 2011 WL 2893061, at *3; *Winfield v. Citibank*, 2012 WL 423346, *4, --- F.Supp.2d --- (2012). Defendant will have the opportunity to challenge the sufficiency of Plaintiff's evidence during the second stage of the Court's inquiry on a motion for decertification.

worked through or had interrupted meal breaks; (3) fail to offer any facts suggesting a systemic practice of violating Defendant's written policies rather than isolated incidents of FLSA violations committed by individual, rogue managers; and (4) fail to identify the managers who allegedly perpetuated the illegal policy of requiring their employees to work through lunch.

Most of Defendant's objections go to the merits of the underlying claims and are more appropriately considered during the second stage of the certification process. At the notice/conditional certification stage, the Court does not determine the legality of Defendant's practice or evaluate the merits of the plaintiff's claim, but only determines whether the plaintiff has shown that he is similarly situated to the putative class members with respect to the nature of the alleged violations. *Riddle*, 2009 WL 3148768, at *2-3 (finding that "variations in specific duties, job locations, working hours, or the availability of various defenses are examples of factual issues that are not considered at this stage."); *Scott v. Heartland Home Fin., Inc.*, No. 1:05-cv-2812-TWT, 2006 WL 1209813, at *3 (N.D. Ga. May 3, 2006)); see *also Grayson*, 79 F.3d at 1009 n. 17 (plaintiffs allegations were sufficient to warrant conditional class certification despite defendant's substantial allegations to the contrary supported by affidavits and depositions); *Hipp*, 252 F.3d at 1219 (finding that the fact that the plaintiffs all worked in different geographical locations was not conclusive of whether they are similarly situated during first stage of analysis). "The appropriate time to address issues of individual differences between putative class members and whether any

particular individual is exempt is after the completion of discovery and during the second stage of the certification determination." *Riddle*, 2009 WL 3148768, at *2 (citing *Scott*, 2006 WL 1209813, at *3 (citing *Kreher v. City of Atlanta*, No. 1:04-CV-2651-WSD, 2006 WL 739572, at *4 n. 8 & 9 (N.D. Ga. Mar.20, 2006) (issues of individualized nature of employees' claims, although potentially meritorious, should be considered during second stage of analysis); *Clarke v. Convergys Customer Mgmt. Group, Inc.*, 370 F.Supp.2d 601, 607 (S.D. Tex. 2005) (individualized factual issues should be considered during second-stage analysis, not initial "notice" stage); *Reab v. Electronic Arts, Inc.*, 214 F.R.D. 623, 627 (D. Colo. 2002) (factors such as "disparate factual and employment settings of the individual plaintiffs" and "various defenses available to defendant which appear to be individual to each plaintiff" are considered during the second, and stricter, stage of the similarly-situated analysis); *Moss*, 201 F.R.D. at 409-10 (same))).

Plaintiff has satisfied his minimal burden of showing he is similarly situated to the other opt-in and potential opt-in plaintiffs. Plaintiff and the declarants each attest that they were hourly employees and were compelled to work through meal periods without pay. (*See generally*, Doc. 72-1.) Plaintiff and eight of the declarants who submitted supplemental declarations also attest that they are aware of other Aaron's employees who are similarly required to work through meal periods without being compensated for those hours. (Jewell Supp. Decl. ¶ 11; Poston Supp. Decl. ¶ 11; Garcia Supp. Decl. ¶ 11; Babin Supp. Decl. ¶ 11; Davis Supp. Decl. ¶ 11; Atwell Supp. Decl. ¶ 11. Braggs Supp. Decl. ¶ 11; Burton

Supp. Decl. ¶ 11; Culton Supp. Decl. ¶ 11.) Plaintiff and the other declarants further attest that they were required to work through their meal periods without pay as a result of Aaron's policy of leanly staffing its stores while requiring the employees to meet certain sales requirements that could not reasonably be accomplished in a forty-hour work week. (Jewell Supp. Decl. ¶ 7, 9; Poston Supp. Decl. ¶ 7, 9; Garcia Supp. Decl. ¶ 7, 9; Babin Supp. Decl. ¶ 7, 9; Davis Supp. Decl. ¶ 7, 9; Atwell Supp. Decl. ¶ 7, 9. Braggs Supp. Decl. ¶ 7, 9; Bryant Supp. Decl. ¶ 7, 9; Burton Supp. Decl. ¶ 7, 9; Culton Supp. Decl. ¶ 7, 9.) Several courts have found plaintiffs to be similarly situated when they made common allegations that the defendant's conflicting policies, similar to those alleged here, effectively required them to work uncompensated overtime. *Winfield v. Citibank*, 2012 WL 423346, at *4 (finding that personal bankers were similarly situated in light of their common allegations that the defendant encouraged them to work unpaid overtime by requiring them to meet strict sales quotas that could not reasonably be accomplished in a forty-hour work week); *Burkhart-Deal v. Citifinancial, Inc.*, 2010 WL 457127, *2 (W.D. Pa. 2010) ("In this case, all affidavits submitted by Plaintiff contain a sufficiently similar allegation of injury, based on an unwritten 'policy' involving sales targets, job responsibilities, and managerial personnel, that discouraged them from recording or requesting overtime. They ... all allege that they worked for Defendant ..., were *de facto* required to work more than forty hours per week, and were not always compensated for that overtime."); *Falcon v. Starbucks Corp.*, 580 F.Supp. 2d

528, 536-37 (S.D. Tex. 2008) (concluding, on motion for decertification, that plaintiffs were similarly situated where they presented evidence that the defendant's policy of requiring them "to perform job duties that could not easily be completed within 40 hours while, at the same time, strongly discouraging overtime" resulted in off-the-clock work and time shaving); *Levy v. Verizon Info. Servs., Inc.*, 2007 WL 1747104, *2, *4 (E.D. N.Y. 2007) (finding telephone sales representatives similarly situated where they alleged that they were encouraged to work overtime to meet strict sales quotas but that overtime had to be and rarely was pre-approved, resulting in a failure to pay overtime hours worked).

Defendant's contention that conditional certification should be denied because Defendant has a written policy that all non-exempt hourly associates working more than six hours a day are required to take a minimum thirty minute lunch break holds no water at this stage of the case. Nor does the corollary of this argument that violations of such a written policy must have necessarily resulted from isolated decisions by individual managers acting contrary to the express orders of their employer. Indeed, the existence of a formal policy of requiring employees to take a lunch break should not immunize the defendant where the plaintiffs have presented evidence that this policy was commonly violated in practice. *See, e.g., Winfield v. Citibank*, 2012 WL 423346, at *8 (holding that the plaintiffs were subject to an unlawful policy or practice for purposes of conditional certification where the testimony demonstrated that managers at several branches nationwide committed FLSA violations and that these managers

tied their actions in some instances to an overarching policy by the defendant of minimizing the accrual of overtime); *Burkhart–Deal*, 2010 WL 457127, at *3 (concluding that "[t]he fact that Defendant has a written policy requiring overtime pay ... does not defeat conditional certification" and noting that such arguments "skirt the merits" and are inappropriate for resolution on motion for conditional certification); *Beauperthuy v. 24 Hour Fitness USA, Inc.*, No. 06–0715 SC, 2008 WL 793838, at *4 (N.D.Cal. Mar. 24, 2008) ("An employer's responsibility under the FLSA extends beyond merely promulgating rules to actually enforcing them.... That Defendants published a handbook cannot immunize them against an FLSA violation where there is substantial evidence that they did not follow their own guidelines."); *Levy*, 2007 WL 1747104, at *2 (granting conditional certification despite argument that defendant's written policy requiring payment of overtime meant that "any deviations from this provision ... are at best isolated incidents and do not implicate the company's overtime policy"); *Vennet v. Am. Intercontinental Univ. Online*, No. 05 Civ. 4889, 2005 WL 6215171, at *7–*8 (N.D.Ill. Dec. 22, 2005) (rejecting argument that defendant's written policy requiring payment for all overtime necessarily meant that "any contrary instruction from individual supervisors would have to be proven on an individualized basis and be based on anecdotal evidence").

"Conditional certification is appropriate even though the plaintiffs allege that the FLSA violations were caused by a widespread *de facto* policy carried out by individual managers." *See Falcon*, 580 F.Supp.2d at 539 (rejecting the notion

that "an informal policy requiring off-the-clock work cannot be litigated collectively where a large number of plaintiffs were employed at many different locations and the decision to allow or require off-the-clock work was carried out by individual managers"). Plaintiffs need not show that "all managers nationwide [acted] in lockstep" in order to make a modest factual showing at this preliminary stage that they were subject to a common policy or practice. *Falcon v. Starbucks Corp.*, 580 F. Supp. 2d 528, 536 (S.D. Tex. 2008). However, if further discovery reveals that only certain managers were acting aberrantly, Defendant may renew its argument in a motion for decertification following the close of discovery.

Finally, Defendant contends that even if Plaintiff's claim that Aaron's effectively required its employees to work without pay through their meal periods is true, Plaintiff's supplemental declarations concern at most only 0.05% of the putative class and only 1.1% of Defendant's stores, and thus do not warrant certifying a nationwide class. However, "generally speaking, the size of an FLSA collective action does not, on its own, compel the conclusion that a decision to collectively litigate a case is inherently unfair." *Morgan v. Family Dollar*, 551 F.3d at 1265. Determining whether a plaintiff's claims could be tried fairly as a collective action "requires looking to the purposes of Section 216(b) actions under FLSA: (1) reducing the burden on plaintiffs through the pooling of resources, and (2) efficiently resolving common issues of law and fact that arise from the same illegal conduct." *Morgan*, 551 F.3d at 1264 (*citing Hoffman-La Roche*, 493 U.S. 165). Moreover, the FLSA is a remedial statute that should be liberally

construed "to apply to the furthest reaches consistent with congressional direction." *Id.* (*quoting Prickett v. DeKalb Cnty.*, 349 F.3d 1294, 1296 (11th Cir. 2003)). As the district court in *Falcon* aptly stated:

> It simply cannot be that an employer may establish policies that create strong incentives for managers to encourage or allow employees to work off-the-clock, and avoid a FLSA collective action because a large number of employees at a number of different stores are affected. To a certain extent, any large class of employees working for a nationwide employer alleging FLSA overtime violations will encounter these difficulties, and there is no indication that Congress intended section 216 to only allow small collective actions involving unpaid overtime to proceed.

580 F. Supp. 2d at 539–40.

Under the Eleventh Circuit's fairly lenient standard, Plaintiffs have made a sufficient showing that Defendant's policies resulted in widespread alleged FLSA violations. Plaintiff has provided declarations from employees staffed at different Aaron's stores across the nation. Plaintiff's original declarations spanned more than twenty stores in twenty-three cities across eleven states. The more detailed supplemental declarations cover twelve stores and cities across six states. All but one of these nine declarants indicated they had knowledge that FLSA violations were likely occurring at other stores. Thus, in light of the court's mandate to broadly construe the FLSA's application and the purposes of Section 216(b), the Court finds there is an adequate basis for finding that Plaintiff and the opt-in plaintiffs' experiences are sufficiently common to that of other Aaron's employees nationwide to support conditional certification. *See Morgan v. Family Dollar*, 551 F.3d at 1264-65 (upholding certification of nationwide collective action and

rejecting the defendant's argument that the district court allowed the jury to decide 1,424 claims based on the testimony of only seven named plaintiffs); *see also Winfield v. Citibank*, 2012 WL 423346, at *7 (granting conditional certification of nationwide collective action based on testimony of five plaintiffs, one opt-in plaintiff, and four declarants who collectively worked in six of the thirteen states where the defendant operated).

In summary, this Court finds that Plaintiff has satisfied his burden of making a modest factual showing that he and other similarly situated employees were subject to an unlawful common policy or practice by Defendant in being required to work through meal breaks without receiving overtime compensation. Nonetheless, Plaintiff should be mindful that Defendant's arguments made here against conditional certification of a nationwide class in this matter will be given greater weight and consideration by this Court after the completion of discovery during the second stage of the certification process. The Court cautions that Plaintiff and the putative class members will be held to a more stringent standard during this second stage and will be required to concretely demonstrate the existence of a pervasive company-wide pattern or scheme rather than incidental individualized and independent decisions of certain store managers to justify final class certification under Section 216(b).

## III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff's Motion for Conditional Certification, Expedited Opt-In Discovery, and Court-Supervised

Notice to Potential Opt-In Plaintiffs [Doc. 18]. The Court further **APPROVES** the parties' Joint Proposed Notice for Distribution to Potential Class Members and **AUTHORIZES** distribution of the form of the notice[7] submitted to the Court at Doc. 56-1 to the potential class.

**IT IS SO ORDERED** this 28th day of June, 2012.

**AMY TOTENBERG**
**UNITED STATES DISTRICT JUDGE**

[7] The Court notes that due to the lapse in time since it was filed with the Court on April 5, 2012, the form notice requires revisions with respect to certain dates referenced therein.