IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATRICK W. HEAPS, et al.,	:	
Plaintiffs,	:	CASE NO. 2:10 CV 729
v.	:	JUDGE FROST
SAFELITE SOLUTIONS, LLC, et al.,	:	MAGISTRATE JUDGE KING
Defendants.	:	

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CONDITIONAL CLASS CERTIFICATION, EXPEDITED DISCOVERY, AND COURT-SUPERVISED NOTICE TO POTENTIAL OPT-IN PLAINTIFFS

I. OVERVIEW

Before the Court is sharply conflicting testimony about Safelite's employment practices. The Plaintiffs have alleged in their detailed Complaint, whose factual allegations they had sworn in initial declarations were true, and additional corroborative declarations from Plaintiffs and other Customer Services Representatives (CSRs), which are attached hereto and summarized in the Supplemental Facts below, that Safelite has required its CSRs to start their daily shifts by booting up its computer system and omitting the time it took for booting up from its calculation of the hours they had worked that week. Similarly, Safelite had them participate in interactive online training necessary for the successful performance of their job duties during breaks and lunch periods and omitted that time from their weekly hours, and had them log out before shutting down their computers, thereby omitting that time as well. Even though Safelite could readily have recorded this booting up and training time, it failed to maintain records of all the hours they worked.

Safelite has submitted an affidavit from a Vice President, Brian O'Mara, indicating that CSRs were ***always*** directed to include their booting up, training, and shutting down time in their work hours. In that affidavit, Safelite actually describes its ***current*** employment practices. The

declarations submitted as Exhibits to this Reply Memorandum demonstrate that those ***current*** practices ***started shortly after this lawsuit was filed***. CSRs had been specifically and clearly told in training and thereafter to boot up first and record hours worked after booting up and to stop recording hours worked and then shut down their computers. There was no global misunderstanding. These CSRs were not an exception to the general rule observed and known to be followed by other CSRs.

Were the pending motion one for summary judgment, this Court would no doubt conclude that a genuine issue of material fact exists about when Safelite started its current practices, what it communicated to its CSRs, and what its Coaches and Assistant Managers observed CSRs do in the workplace. This motion is, however, one for conditional class certification of Plaintiffs' claims, expedited discovery of the names and contact information of relevant current and former CSRs, and authorization to send to those potential opt-in plaintiffs a notice about this lawsuit and the Fair Labor Standards Act (FLSA) process.

Courts use ***two stages*** in an alleged FLSA collective action by similarly situated employees, and Safelite's denial of the truth of the Plaintiffs' allegations and their declarations must be relegated in this case to the second stage. Were FLSA plaintiffs to make bald, general allegations and submit cursory declarations or affidavits, an employer could rebut them at the first stage and conditional certification would properly be denied.

At bar, though, Plaintiffs have submitted far more than the "modest showing" established as the standard for granting conditional certification. *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006). Indeed, the details in the sworn-to Complaint and the additional declarations demonstrate a solid evidentiary basis for the determinative proposition: Safelight acted toward all of its CSRs in the same way under a common employment practice that eliminated time worked each day from the time recorded and paid. Under the FLSA, a collective action by similarly situated CSRs should, therefore, be permitted to proceed, and notices and discovery necessary to pursuit of that action ordered.

II. SUPPLEMENTAL FACTS

Safelite trained its CSRs to trigger their daily time records by logging on their telephones ***after*** they had booted up their computers and to mark the end of their work day by logging off ***before*** they shut down their computers. Logging begins and ends the work day. *See Pursley Declaration*, ¶3; *Kritzer Declaration*, ¶3. Until Safelite changed these practices shortly after this lawsuit was commenced, CSRs adhered to their training, prepared to handle the daily onslaught of service calls by booting up, reviewing any new information from Safelite, and having the programs ready to serve customers.

"During my training, the trainer made it very clear that we were to be organized and 'ready to go" to take calls and service customers before we logged on to the phone. Also during the training we were told to log off the phone at the end of our work shift and then shut down the programs[.]" *McIntosh Declaration*, ¶4. Ms. McIntosh had worked other hourly jobs and was "bothered by the idea that we would be required to spend a few minutes conducting work activities before we began to get paid." *Id.* at ¶5. So, she asked the trainer, who she identified as Ben Ross, "if we were in fact required to boot up our computers on our own time before we logged into the phone." *Id.* His answer was unqualified: "He said yes." *Id.*

Eight other CSRs participated in that training. *Id.* at ¶6. Ms. McIntosh and the other CSRs were assigned at times to both Safelite's two Columbus area call centers. *Id.* at ¶¶ 3;6.

Juxtaposing that training and her experience with Safelite's ***current*** practices, Ms. McIntosh explained that, on August 21, 2010, after this lawsuit had been commenced, Safelite Vice President Brian O'Mara told CSRs that a lawsuit had been filed and they should "follow the 'New Hire' procedure that had us first log into the phone and then boot-up the computer." *McIntosh Declaration*, ¶7. But that was decidedly neither how she was trained nor what she observed other CSRs do. *Id.* She confirmed this point with five other CSRs during a break. *Id.* at ¶8.

Ms. McIntosh then wrote to Safelite a memorandum, the contents of which she describes in her declaration. *Id.* at ¶9. She related how she had been trained and had logged in during her

tenure. She asked which procedure to follow and whether the end-of-the-day practice should be to shut down and then log out, the reverse of what she had been trained and had done. She added that the new approach would increase her time and raised the concern that her performance would be criticized for taking too much time. *Id.*

Ms. McIntosh submitted that memorandum on a Saturday and was asked the next Monday morning to report to the office of Center Manager Tisha Bevins. *McIntosh Declaration*, ¶10. Manager Bevins told her that many CSRs had been following the "New Hire" procedure to which Vice President O'Mara referred, and Ms. McIntosh responded that from what she observed and had learned from other CSRs they were all following the practice they had been trained to do. *Id.* at ¶11. Center Manager Bevins also answered Ms. McIntosh's question about logging off by saying that the same procedure would be followed: shut down and then log out. *Id.*

Another CSR, Sharon Ruppert, was trained by a different trainer nearly two years before Ms. McIntosh. *Sharon Ruppert Declaration*, ¶2. She shared, however, exactly the same training: "Nancy told me and the several other CSR trainees present that we should boot up the computer systems and do anything else we needed to do to get ready to immediately service customers, before we logged into the phones." *Id.* at ¶3.

CSR Sharon Ruppert recounted the conversion after the lawsuit was filed, explaining that "[b]ased on my observations, conversations with Coaches, before late August of this year (2010) no CSR used 'AUX' or 'ACW' holds on the phones while preparing to work, booting up, and reading the information which comes on our screens before we can access Safelite University." *Sharon Ruppert Declaration*, ¶4 ("AUX" stands for "Auxiliary," "ACW" for "After Call Work," which were designations the CSRs had to use when they were not receiving calls and service customers). *Accord Id.* at ¶¶ 6-8 (Coaches regularly observe CSRs' logging in and out and neither Coaches nor a supervisor ever corrected Ms. Ruppert's performance until after the lawsuit was filed.) Safelite restricts the amount of AUX and ACW time a CSR should have and

lowers performance ranking (which may adversely affect compensation) for CSRs who go over that amount. *Id.* at ¶5.

A month or so before Ms. Ruppert was trained, CSR Richard Ruppert received his training. *Richard Ruppert Declaration*, ¶4. He recalled emphasis that "CSR's were to be ready to take calls and provide service to the customers as soon as their shift began." *Id.* The only way to do that was to boot up before their shift began. *Id.* During his tenure of two-and-a-half years, he always booted up first and then logged on. *Id.* at ¶5. At the end of the day, he always logged off first and then shut down his computer. *Id.* His observations of and conversations with other CSRs confirmed this uniform approach. *Id.*

Before a CSR could access the programs necessary to service customers, the CSR had to read "the memos, directives, and informational items that come up on screen when we booted up." *Richard Ruppert Declaration*, ¶8. Coaches and other supervisors regularly observed CSRs when they booted up before logging in or shut down after logging out and never indicated a different procedure. *Id.* at ¶¶ 5; 7. The notion that AUX or ACW could be used after logging in while booting up or before logging out while shutting down was directly contradicted by Safelite's insistence (through lowering performance ratings and threatening discipline) to curtail ACW time and its policy against use of AUX time. *Id.* at ¶6.

Another CSR, Richard G. Kritzer, testified that in his five years of employment by Safelite, he and other CSRs always booted up before logging in and shut down after logging out and were regularly observed by Coaches and other supervisors following that procedure. *Kritzer Declaration*, ¶2. The procedure described by Vice President O'Mara in his affidavit "has ONLY been true since August of 2010, after the lawsuit was file." *Id.* at ¶4.

Indeed, the only way to implement the new procedure is to spend time on AUX or ACW, and that time had been severely restricted and "would count against a CSR's performance and be negatively reflected in their performance evaluation." *Id.* at ¶6. After the conversion to its current practice, Safelite increased from 2% to 3% the ceiling on ACW time. *Id.* at ¶12; *Sharon Ruppert Declaration*, ¶5.

Safelite had changed the procedure once before. Until January 1, 2007, CSRs punched in and out approximately five minutes before logging on and five minutes after logging off. *Kritzer Declaration*, ¶8. CSRs were then paid for the time it took to boot up at the beginning of their shift and shut down at the end of their shift. *Id.* That change was announced in December 2006 by a memorandum sent to CSRs entitled "Paying from the Phones," which explained that logging in and out on the telephones would record time instead of punching in and out. *Id.* at ¶9. Nearly simultaneously with logging in, though, customer calls would start and, unless booted up, a CSR would commit the "serious offence" of failing to serve a customer. *Id.*

CSR Kritzer had a meeting with Center Manager Tisha Bevins in much the way CSR McIntosh did. He asked his Coach, Bethany Berry, about the new procedure, she replied that she had not seen the O'Mara memorandum, and later that day escorted him to Manager Bevins' office. *Kritzer Declaration*, ¶11. Manager Bevins told him that "some people" had not understood that they should log in, take ACW status, and then boot up. *Id.*

What Manager Bevins told CSR Kritzer directly contradicted his understanding of Safelite's restrictions on ACW and AUX. He attached to his declaration a "Stat Goals" sheet of the sort regularly used over the years that emphasized the ACW and AUX ceilings. *Kritzer Declaration*, ¶12. Safelight imposes "pressure" on CSRs to keep the ACW and AUX time to a minimum. *Id.* at ¶13.

The Associate Handbook CSR Kritzer received in 2008 (and attached an excerpt from to his Declaration) states Safelite's expectation that CSRs be ready to serve customers at the beginning of their shifts. *Kritzer Declaration*, ¶14. Because service calls come in virtually simultaneously with logging in and yet can only be handled when the CSR has already booted up, that expectation was consistent with Safelite's pre-conversion practice alleged in this lawsuit. *Id. Accord Id.* at ¶15 (2008 "Tardiness Policy," also attached to the Declaration, measures tardiness "as not being at the workstation, logged on, and prepared to take calls at the start of the scheduled shift").

Another CSR, Joshua Pursley, was trained in later April 2008 by a fourth trainer, Mr. Rodriguez, along with at least 12 other trainees who were to be spread between the two Columbus call centers. *Pursley Declaration*, ¶2. As with the other CSRs, training was specific and clear:

> During my training, Mr. Rodriguez told the CSR's that we should boot up our computer systems and be ready to take calls before logging in on the phones (which began our paid workday). He also made it clear that at the end of the workday, we should log off the phones (ending our paid workday) before we shut down the computer systems.

Id. at ¶3. Contrary to Vice President O'Mara's affidavit, CSR Pursley, the CSRs he has observed, and those with whom he has conversed adhered before this lawsuit was filed to the procedure in the way he was trained. *Id.* at ¶5. Until Safelite's post-lawsuit conversion, both direct supervisors, known as Coaches, and their supervisors, known as Assistant Managers, had never indicated that the procedure had changed or he was not adhering to the applicable procedure. *Id.* at ¶¶ 5-6.

The first he heard of the procedure described in Vice President O'Mara's testimony was ***after*** the lawsuit and through a memorandum. *Pursley Declaration*, ¶5. AUX had always been limited to one minute a day, far too short to use for booting up and/or shutting down, and ACW time had been strictly limited. *Id.* at ¶10. Indeed, Safelite regularly posted or distributed communications discouraging CSRs from using ACW. *Id.*

One particular document, "Key Performance Indicators Fact Sheet #69," stated that Safelite used key performance indicators to track computer and telephone CSR performance with CSRs being "monitored on a daily" basis. *Pursley Declaration*, ¶¶ 10-11 (attached as Exhibit). For reasons CSR Pursley does not know, Fact Sheet #69 was eliminated from the documents accessible on his computer after this lawsuit was filed. *Id.* at ¶ 11 ("Right after our lawsuit was filed, fact sheet #69 was deleted off the system by Safelite.").

Because "calls normally come fast and furious at work," and some administrative processing is required after a call, CSRs are hard pressed to keep ACW below the ceiling imposed by Safelite. *Pursley Declaration,* ¶12. Had ACW been proper to use for booting up

and shutting down when the ceiling was 2% before Safelite's post-lawsuit conversion, lowered evaluations and potential discipline would have been nearly unavoidable. *Id.* Particularly suspicious in light of the established pre-conversion 2% ACW ceiling – *see* "Key Performance Indicators Fact Sheet #69" -- was that a July 2010 internal newsletter published to CSRs online had read 2% and, after the lawsuit, was changed to read 3% as if 3% had always been the ACW ceiling. *Id.* at ¶13.

Although written memoranda, computer communications, or printouts describing the change from the punch in and out procedure and the post-lawsuit conversion were published by Safelite, as well as employee handbooks, directives, and constant updates, none of the CSRs produced a written memo or printout indicating that the pre-lawsuit procedure was anything other than the one in which they were trained, actually performed, observed other CSRs performing, and knew from conversations with those other CSRs was in place. Only after the lawsuit was filed did the procedure change to the one announced in a written memorandum by Vice President O'Mara.

III. ANALYSIS

A. At the First Stage of FLSA Conditional Certification, Safelite's Denial of its Common Employment Practice Is Insufficient to Block Granting Plaintiffs' Motion.

FLSA collective actions were established by Congress and have been administered by Courts in a way that facilitates employees vindicating their statutory rights to minimum wages and overtime. Because the collective actions are opt-in and a two/three year statute of limitations applies, the ***first stage*** gets the ball rolling as soon as possible through notice to the putative plaintiffs. Then, after an opportunity for discovery, the ***second stage*** considers decertifying and allowing those current or former employees who have opted in to proceed with individual actions. *Laichev v. JBM, Inc.*, 269 F.R.D. 633, 637 (S.D.Ohio 2008); *Harrison v. McDonald's Corp.*, 411 F.Supp.2d 862, 864 (S.D.Ohio 2005).

Safelite attempts to short circuit this process. By suggesting that Plaintiffs and the CSRs who support their claims are idiosyncratic employees who misunderstood its actual employment

practice, Safelite argues that the conditional certification motion should be denied. Far from a handful of employees who perversely acted against their own interests by ***omitting time they worked*** from the records Safelite used to calculate pay, Plaintiffs and the other CSRs were trained in the procedure they uniformly followed and Safelite imposed on all CSRs until it post-lawsuit conversion.

The controlling standards at this ***first stage*** block Safelite's tactic. Those standards establish that the Plaintiff's evidentiary burden for conditional certification is not onerous and involves only a colorable basis for their claim that putative collective action members were the victims of a single decision, policy, or plan. Credibility determinations or findings of fact are impermissible at this first stage.

Instead, a factual determination of whether the FLSA plaintiffs who have opted in are similarly situated is made at the ***second stage***, typically on a motion to decertify. Then, disparities in the employment settings (Columbus vs. Arizona) or duties (sales vs. customer service) of the individual plaintiffs, defenses unique to a plaintiff, and fairness and procedural interests are considered. *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 584 (6th Cir. 2009).

At the ***first stage***, "a district court is not obliged to conduct an evidentiary hearing." *Merrill v. Southern Methodist Univ.*, 806 F.2d 600, 608 (5th Cir. 1986). Pleadings and affidavits or declarations need only show that single employment practice affected the putative collective action members. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995). Being similarly situated -- the FLSA term -- suffices. *Harrison*, 411 F.Supp.2d at 864-65.

Courts use phrases such as "modest showing," *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546 (6th Cir. 2006), to signal both the letter and spirit of an evidentiary standard. *See, e.g.*,

Plaintiffs understand that some courts use an extremely liberal standard – class-wide allegations in a Complaint suffice – while others use a more demanding standard -- a factual showing must be made. *Pritchard*, 210 F.R.D. at 595. Even the latter standard is, however, used in the context of a "modest showing." Thus, conditional certification will be granted when plaintiffs "demonstrate a factual nexus that supports a finding that potential plaintiffs were subjected to a common discriminatory scheme." *Jackson v. New York Telephone Co.*, 163 F.R.D. 429, 431 (S.D.N.Y. 1995). Identifying potential opt-in plaintiffs, submitting affidavits or declarations, or presenting evidence of a widespread employment practice violative of the FLSA will suffice. *Pritchard*, 210 F.R.D. at 596; *H&R Block, Ltd. v. Housden*, 186 F.R.D. 399, 400 (E.D.Tex. 1999).

At bar, Plaintiffs have satisfied either standard. Their "modest showing" consists of proof that CSRs, who number in the thousands, were governed by a centralized and uniform employment practice which deprived them of the time they had to be at work booting up or shutting down their computers and training while on breaks. CSRs were trained by various Safelite trainers in that employment practice, Safelite knew or should have known about the practice, Safelite documented changes from a more generous practice and a post-lawsuit conversion to a lawful practice, and Safelite's ceiling on hold time (ACW or AUX) precluded the pre-lawsuit practice from being what Safelite now suggests.

Plaintiffs' declarations establish a *prima facie* case of an employer which, in willful disregard of its FLSA duty, required employees to be in the workplace, performing duties integral to their primary duties (booting up was essential to servicing customers), and refused to pay them for that time. Far more than a modest showing has been made.

Importantly, even if Vice President O'Mara's affidavit accurately reflected the official Safelite way CSRs were to log in and out, the actual practice in the workplace controls. *Burry v. National Trailer Convoy, Inc.*, 338 F.2d 422, 426 (6th Cir. 1964), appreciated that the FLSA's "suffers or permits" phrasing trumps an employer's purported policy limiting the hours an employee can work. The CSRs who have submitted supplemental declarations testify that their

Coaches and the Assistant Managers knew or should have known that time spent booting up and shutting down was off the books, and Safelite's knowledge is established by what its trainers trained CSRs to do.

Safelite does not tell the entire story of *Shabazz v. Asurion Ins. Serv.*, No. 3:07-0653, 2008 U.S. Dist. LEXIS 29696 (M.D. Tenn. April 10, 2008). *Shabazz* was settled after conditional certification had been granted. Two employees who did not opt-in then brought their own FLSA lawsuit. *Benson v. Asurion Corp.*, 2010 WL 4922704 (M.D.Tenn. 2010).

On declarations nearly identical to those before the Court today, conditional certification for ***both*** Nashville area call centers was granted: "These declarations show that, despite differences in job descriptions, each hourly call center employee used the same phone-based timekeeping system and performed similar tasks related to logging on and off of their computers. The declarations, which span all five hourly job titles and both Nashville call center facilities, support a finding that Asurion's supervisors effectively required at least some hourly employees to perform uncompensated pre- and post-shift tasks." *Id.* at *4.

As at bar, the employer contradicted the declarations. The Court refused to deny conditional certification: "Although the evidence submitted by the defendants tends to contradict the plaintiffs' evidence and to reveal potential weaknesses in their case, it does not preclude conditional certification." *Id.* at *5. Its rationale applies with full force at bar: "[T]he plaintiffs' evidence suggests, at a minimum, that some hourly employees have performed uncompensated pre- and post-shift tasks." *Id.*

There, too, the employer invoked litigation costs. The Court explained that the employer's "true quarrel is with the lenient standard for certification, see *Comer*, 454 F.3d at 547, which this court is not free to revisit." *Id.* at *5 n. 8.

The declarations and detailed factual allegations in the Complaint at bar, which have been sworn to, far exceed relatively meager affidavits that have justified conditional certification in the precedent. *See, e.g., Pritchard*. Safelite's effort to inject the merits into the ***first stage*** must be rebuffed. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 178 (1974) ("In determining the

propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits[.]"). *Accord Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85 (S.D.N.Y. 2001) (merits irrelevant to class certification). *See also Realite v. Ark Restaurants Corp.*, 7 F.Supp.2d 303, 307 (S.D.N.Y. 1998) ("Even 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 more efficient resolution of the underlying issues in this case.") (internal citations omitted).

Under the fairly lenient standard that controls the ***first stage***, *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1218 (11th Cir.2001), Plaintiffs' submission warrants conditional certification. "[I]t 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." *O'Brien*, 575 F.3d at 585. That situation the Sixth Circuit described is precisely the one Plaintiffs have submitted to this Court.

B. At the First Stage of Conditional Certification, the Willfulness or Reckless Disregard of Safelite Ought Not to Be Determined.

Safelite's initial fallback position is that notice be confined to a two-year period. Yet the evolution of Safelite's employment practice from paying CSRs for booting up and shutting down time when they punched in and out to a telephone log on and off system was palpably willful or in reckless disregard of its FLSA duty to pay employees for the time they spent in the workplace on duties essential to customer service.

At this first stage of conditional certification, Safelite has not earned summary judgment on willfulness or reckless disregard. Safelite can hardly suggest in light of this evolution that it made a "completely good-faith but incorrect assumption" that it was following the FLSA. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-35 (1988). On the record before the Court, a reasonable inference is that the only assumption Safelite made was that it could avoid paying CSRs for time before or after they were actually servicing customers or on the ceilinged ACW or AUX. And, at this juncture in the litigation, particularly in light of the machinations reflected in

Vice President O'Mara's affidavit and seeming spoliation, the willfulness of that assumption in terms of violating the FLSA cannot be ruled out.

Safelite may ultimately prevail on the willfulness and cut the three year statutory time period to two years. If so, most opt-in plaintiffs will have any back pay owed to them reduced and some opt-in plaintiffs may even lose their claim due to untimeliness. In the overall context of the lawsuit, though, the prejudice to Safelite will be slight. To discourage current and former employees from opting-in now could, however, block them from ever invoking the FLSA. Safelite's willfulness or reckless disregard should not be determined until the second stage of conditional certification or even later in the proceeding on summary judgment motion or at trial.

C. A Timely, Informative, and Accurate Notice Need Not Be So Comprehensive or Written in Such a Problematic Way that It Deters Similarly Situated Current or Former Employees from Exercising their Statutory Rights.

In *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 172 (1989), the Supreme Court tasked District Courts to ensure that a collective action notice is "timely, accurate, and informative." Safelite's second fallback position is that the proposed notice must be heavily edited by the Court, confined to one Columbus call center (as it claims discovery should), and otherwise written in so prolix a manner that few will read it.

observed doing, and known by the declarants (as well as Safelite Coaches and Assistant Managers) to have done.

It is true that Plaintiffs are "making a federal case" out of this, but Congress enacted the FLSA to do that. A Notice may be "timely, accurate, and informative" without detailing Safelite's defenses – ***15*** were alleged in its Answer – or explaining that a share of costs might be awarded, discovery awaits recipients, or a different law firm could be retained. Information of this sort can be left to communications between putative opt-ins and undersigned counsel. *See Delaney v. Geisha NYC, LLC*, 261 F.R.D. 55, 59 (S.D.N.Y. 2009) ("[T]he statement that 'Japonais denies that they violated the Fair Labor Standards Act' is sufficient. * * * Defendants cite no other Court that has required a notice to warn opt-in plaintiffs of potential discovery obligations and liability for Defendants' costs or required plaintiffs to sign the consent form on penalty of perjury.").

As one Court explained, the purpose of telling recipients about exposure to an award of costs is questionable: "The courts have rejected Cargill's argument, noting it is not clear whether prevailing defendants can be awarded defense costs from plaintiffs seeking recovery under the FLSA, and ***such a notice may discourage plaintiffs from joining the litigation***." *Martinez v. Cargill Meat Solutions*, 265 F.R.D. 490, 500 (D.Neb. 2009) (emphasis noted).

The purpose of the notice is to inform, not discourage. "Courts consider the overarching policies of the collective suit provisions and whether the proposed notice provides 'accurate and timely notice concerning the pendency of the collective action, so that [an individual receiving the notice] can make an informed decision about whether to participate.'" *Delaney*, 261 F.R.D. at 59 (quoting *Fasanelli v. Heartland Brewery, Inc.*, 516 F.Supp.2d 317, 322 (S.D.N.Y. 2007)) (alteration in original). *Delaney* was also satisfied that a notice which stated opt-in plaintiffs could select their own counsel sufficed to inform recipients of their right to alternate counsel and rejected other insertions sought at bar by Safelite. 261 F.R.D. at 60. *Accord Martinez*, 265 F.R.D. at 500 ("The notice need not state any individual plaintiffs may join this lawsuit but have their own lawyer.") (notice of right to file separate lawsuit sufficed).

Safelite's training extended to both Columbus call centers, and the CSRs who have submitted declarations tended to be assigned fungibly to one or another center throughout their employment. Safelight's employment practice was not confined to one call center, and notice and discovery should not be so confined.

The essence of a CSR position, whether in Columbus, Arizona, or elsewhere, is the same: use a computer terminal and a telephone to service customers whose windshields are insured for repair. Safelite's dedication to uniformity is inspiring, and its handbooks, directives, memoranda, and policies could not conceivably have varied based on geographic location. "Key Performance Indicators Fact Sheet #69," attached as an Exhibit to the *Pursley Declaration*, illustrates the genius of Safelite: create a script and computer program at Safelite University that enables a CSR to handle efficiently and effectively any call from any customer from any subscribing insurance company. At its core, Safelite insists on its ACW and AUX ceilings and exact compliance with its template because conforming enables CSRs to deal with those "fast and furious" customers calls. Geographical location, whether within the Columbus environs or anywhere in the United States or the world, makes no difference whatsoever to a CSR at Safelite.

Finally, on the telephone numbers, Safelite insists on yet another hurdle to efficacious communication by limiting Plaintiffs to addresses and citing the inapposite Ohio ethical rule against telephone solicitation. *Cf. Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101-02 (1981) ("order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties [and] such a weighing -- identifying the potential abuses being addressed -- should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances").

Telephone numbers are routinely disclosed in federal FLSA actions during first stage discovery in order to effectuate notice. *See, e.g., Bifulco v. Mortgage Zone, Inc.*, 262 F.R.D. 209, 217 (E.D.N.Y. 2009) ("Plaintiffs also seek relief 'requir[ing][d]efendants to produce a computer-readable data file containing the names, addresses and telephone numbers of [ ]

potential opt-in members so that notice may be issued [.]' (Plaintiffs' Memorandum of Law, at 14.) ***Courts often grant this kind of request*** in connection with a conditional certification of an FLSA collective action, and this Court concludes that such a request is appropriate in this case.") (emphasis noted). *Accord Tolentino v. C & J Spec-Rent Services Inc.*, 716 F.Supp.2d 642, 655 (S.D.Tex. 2010) ("[T]he Court also orders that Defendant produce to Plaintiffs in a usable electronic format no later than 14 days from entry of this Order, the names, addresses, phone numbers, and e-mail addresses of all persons employed by Defendant in 'operator' positions in the coil tubing division at Defendant's Robstown and Marshall, Texas facilities between three years prior to May 26, 2010 and October 31, 2008."); *Delaney*, 261 F.R.D. at 60 ("Defendants shall produce a computer-readable list of all non-managerial, tipped employees employed by Japonais within the last three years with name, last known mailing address, alternate address (if any), all known telephone numbers, and dates of employment.").

While there are exceptions to that general approach, *see, e.g.*, *Martinez*, 265 F.R.D. at 500-01, the nature of the CSR position – nearly entry level, lowly paid, uniformly trained and closely monitored – renders likely relocation by former employees. Moreover, providing telephone numbers to undersigned counsel differs in kind and degree from publishing them to the public. Any contact will regard opting in a collective action favored by Congress, not soliciting sales or services unrelated to this lawsuit.

V. CONCLUSION

Plaintiffs have surpassed the modest showing required for conditional certification of an FLSA action. While the merits may well be hotly contested, the ***first stage*** is neither the time nor the place for that contest. Plaintiffs' motion should be granted and putative opt-in plaintiffs given an opportunity to vindicate their FLSA rights.

Respectfully submitted,

By /s/John S. Marshall
John S. Marshall (0015160)
(*jmarshall@marshallandmorrow.com*)
Edward R. Forman (0076651)
(*eforman@marshallandmorrow.com*)
MARSHALL AND MORROW LLC
111 West Rich Street, Suite 430
Columbus, Ohio 43215-5296
Telephone: (614) 463-9790
Fax: (614) 463-9780

Robert E. DeRose (0055214)
(*bderose@bnhmlaw.com*)
Robert K. Handelman (0019589)
(*rhandelman@bnhmlaw.com*)
Katherine A. Stone (0085600)
(*kstone@bnhmlaw.com*)
BARKAN, NEFF, HANDLEMAN, MEIZLISH, LLP
360 South Grant Avenue
Post Office Box 1989
Columbus, Ohio 43216-1989
Telephone: (614) 221-4221
Fax: (614) 221-5808

Attorneys for Plaintiff

OF COUNSEL:

Louis A. Jacobs (002101)
(*LAJOhio@aol.com*)
66871 Rayo del Sol
Desert Hot Springs, California, 92240-1871
(614) 203-1255
Fax (760) 288-2146

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply Memorandum in Support of Plaintiffs' Motion for Conditional Class Certification, Expedited Discovery, and Court-Supervised Notice to Potential Opt-In Plaintiffs was filed with the Court on this 3rd day of January, 2011, using the Court's CM/ECF filing system, which will send notification of such filing to all counsel of record. Parties may access this filing through the Court's filing system.

By /s/John S. Marshall
John S. Marshall (0015160)
(*jmarshall@marshallandmorrow.com*)
Edward R. Forman (0076651)
(*eforman@marshallandmorrow.com*)
MARSHALL AND MORROW LLC
111 West Rich Street, Suite 430
Columbus, Ohio 43215-5296
Telephone: (614) 463-9790
Fax: (614) 463-9780