IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MICHAEL ROXBERRY, *et al.*,	:	
	:	1:16-cv-02009-JEJ
Plaintiffs,	:	
v.	:	
SNYDERS-LANCE, INC., *et al.*,	:	
Defendants.	:	

PLAINTIFFS' MOTION FOR CONDITIONAL CERTIFICATION

Plaintiffs Michael Roxberry, Michelle Roxberry, Randy Perdue, Britt Manning, Tom Grutsch, Thomas Lee Smawley, Bob Johnson, Renae Riddle and Makenzie Snyder ("Plaintiffs") respectfully move, pursuant to 29 U.S.C. § 216(b), for conditional certification of the following Fair Labor Standards Act ("FLSA") collective:

> Every individual who, during any time within the past three years, has performed work pursuant to a Distributor Agreement entered into between (i) such individual or any business entity owned by such individual and (ii) Snyder's-Lance, Inc., S-L Routes, LLC, or S-L Distribution Company, Inc.

The Third Circuit applies a "modest factual showing" standard to FLSA conditional certification motions. See Symczyk v. Genesis Healthcare Corp., 656 F.3d 189, 192 (3d Cir. 2011). Under this standard, a worker merely is required to "produce some evidence, 'beyond pure speculation,' of a factual nexus between the

manner in which the employer's alleged policy affected her and the manner in which it affected other employees." Id. As this Court has observed:

> The burden . . . is light because the risk of error is insignificant: should further discovery reveal that the named positions, or corresponding claims, are not substantially similar the defendants will challenge the certification and the court will have the opportunity to deny final certification.

Craig v. Rite Aid Corp., 2009 U.S. Dist. LEXIS 114785, *9 (M.D. Pa. Dec. 9, 2009) (Jones, J.).

As will be demonstrated in Plaintiffs' brief and accompanying exhibits, conditional certification of the above collective is warranted under the "modest factual showing" standard.

WHEREFORE, Plaintiffs respectfully request that the Court grant this motion and sign and enter the accompanying proposed order.

Date: December 22, 2016

Respectfully,

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Plaintiffs,	:	1:16-cv-02009-JEJ
v.	:	
SNYDERS-LANCE, INC., *et al.*,	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of _____, 2017, upon consideration of Plaintiffs' December 22, 2016 Motion for Conditional Certification, the accompanying brief and exhibits, Defendants' opposition papers, Plaintiffs' reply papers, and all other papers and proceedings herein, it is hereby **ORDERED** that the Motion is **GRANTED** as follows:

1. This action is conditionally certified, pursuant to Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), on behalf of the following collective: **Every individual who, during any time within the past three years, has performed work pursuant to a Distributor Agreement entered into between (i) such individual or any business entity owned by such individual and (ii) Snyder's-Lance, Inc., S-L Routes, LLC, or S-L Distribution Company,**

Inc. [1] Such individuals are referred to herein as "Putative Collective Members."

2. Within five (5) business days of the entry of this Order, the parties must jointly submit to the Court proposed language for a notification form to be approved by the Court informing all Putative Collective Members of their right to join this action as party plaintiffs. In drafting the proposed notification language, the parties should "be scrupulous to respect judicial neutrality" and "take care to avoid even the appearance of judicial endorsement of the merits of the action." Hoffman-LaRoche Inc. v. Sperling, 493 U.S. 165, 174 (1989); and

3. Within five (5) business days after the entry of this Order, Defendants must produce to Plaintiffs' counsel an Excel spreadsheet listing the name, last known address, and last known phone number of all Putative Collective Members.

SO ORDERED:

_____

Honorable John E. Jones III

[1] The Court recognizes that an earlier limitations period applies to the FLSA claims of the current originating and opt-in Plaintiffs.

CERTIFICATE OF NON-CONCURRENCE

I hereby certify, pursuant to Local Civil Rule 7.1, that I have been informed that defendant does not concur in the relief sought in this motion.

Date: December 22, 2016

/s/ Pete Winebrake
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PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR CONDITIONAL CERTIFICATION

Plaintiffs seek "conditional certification" of the following FLSA collective: "Every individual who, during any time within the past three years, has performed work pursuant to a Distributor Agreement entered into between (i) such individual or any business entity owned by such individual and (ii) Snyder's-Lance, Inc., S-L Routes, LLC, or S-L Distribution Company, Inc."[1]

The FLSA's conditional certification standard is not difficult for workers to satisfy. *See infra* at Sections II.A-B. Under the applicable "modest factual showing" standard, an FLSA plaintiff merely is required to "produce some evidence, 'beyond pure speculation,' of a factual nexus between the manner in which the employer's alleged policy affected her and the manner in which it affected other employees." *Symczyk v. Genesis Healthcare Corporation*, 656 F.3d 189, 192 (3d Cir. 2011). As discussed herein, Plaintiffs satisfy this standard.

[1] Defendants Snyder's-Lance, Inc., S-L Routes, LLC, or S-L Distribution Company, Inc. will be referred to collectively as "S-L."

I. BACKGROUND.

A. Independent contractor "misclassification" cases raise important societal issues.

This lawsuit addresses the increasingly common phenomenon of blue collar workers – here snack food delivery drivers – being labeled "independent contractors" rather than employees. *See generally* David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can be Done to Improve It* (Harvard Press 2014). The Seventh Circuit Court of Appeals has explained that lawsuits like this one are

> of great importance not just to this case but to the structure of the American workplace. The number of independent contractors in this country is growing. There are several economic incentives for employers to use independent contractors and there is a potential for abuse in misclassifying employees as independent contractors. Employees misclassified as independent contractors are denied access to certain benefits and protections. Misclassification results in significant costs to government: "[B]etween 1996 and 2004, $34.7 billion of Federal tax revenues went uncollected due to the misclassification of workers and the tax loopholes that allow it." And misclassification "puts employers who properly classify their workers at a disadvantage in the marketplace[.]"

Craig v. FedEx Ground Package System, Inc., 686 F.3d 423, 430-431 (7th Cir. 2012) (internal citations omitted).

B. S-L uses Independent Business Operators ("IBOs") to deliver its snack foods to its retail store customers.

S-L's business consists of "the manufacturing, distribution, and sale of snack

foods." Snyder's-Lance, Inc. SEC Form 10-K for FYE Jan. 2, 2016 ("Form 10-K") (Ex. A) at p. 2. S-L "distribute[s] snack food products throughout the United States using [its] DSD network," *id.* at p. 3, which stands for "direct-store-delivery distribution network," *id.* at p. 2. This "DSD network is made up of approximately 3,100 [delivery] routes that are primarily owned and operated by "IBOs," *id.* at p. 2, which stands for "independent business owners," *id.* at p. 2.

S-L has set up a business model whereby it uses IBOs to deliver S-L snack foods to S-L's retail store customers. In particular, S-L "relies on approximately 2,800 IBOs for the sale and distribution" of its snack food products. *See* Form 10-K (Ex. A) at p. 8. S-L purports to sell its snack foods to the IBOs, who, in turn, sell the products to retail stores and outlets. *See id.* at p. 4. However, S-L repeatedly refers to these retail stores and outlets as customers of ***S-L***, not the IBOs. *See, e.g., id.* ("Sales to ***our*** largest retail customer, Wal-Mart Stores, Inc. ("Wal-Mart"), either through IBOs or our direct distribution network, were approximately 13% of net revenue in 2015"); *id.* at p. 6 ("***Our*** top ten retail customers accounted for approximately 50% of our net revenue . . . .").

IBO's must buy their delivery routes from S-L. *See id.* Since many workers seeking blue-collar delivery work have little disposable income, "[c]ertain financing arrangements, through third-party lending institutions, are made available to IBOs." *Id.* In 2015, S-L reaped "$1.9 million in net gains" from the

purchase and sale of IBO delivery routes. *Id.* at p. 22.

C. IBOs often work over 40 hours per week.

IBOs frequently work over 40 hours per week. *See* Second Amended Complaint ("SAC") (Doc. 56) at ¶¶ 54-56; Declaration of Tom Grutsch ("Grutsch Dcl.") (Ex. D) at ¶¶ 18-19; Declaration of Britt Manning ("Manning Dcl.") (Ex. E) at ¶¶ 18-19; Declaration of Randy Perdue ("Perdue Dcl.") (Ex. F) at ¶¶ 18-19; Declaration of Renae Riddle ("Riddle Dcl.") (Ex. G) at ¶¶ 18-19; Declaration of Makenzie Snyder ("Snyder Dcl.") (Ex. H) at ¶¶ 18-19; Declaration of Thomas Smawley ("Smawley Dcl.") (Ex. I) at ¶¶ 17-18.

D. S-L does not pay IBOs any overtime premium compensation for hours worked over 40 hours per week.

When IBOs work over 40 hours in a week, they do not receive any overtime premium compensation for such work hours. *See* SAC (Doc. 56) at ¶ 56; Grutsch Dcl. (Ex. D) at ¶¶ 18-19; Manning Dcl. (Ex. E) at ¶¶ 18-19; Perdue Dcl. (Ex. F) at ¶¶ 18-19; Riddle Dcl. (Ex. G) at ¶¶ 18-19; Snyder Dcl. (Ex. H) at ¶¶ 18-19; Smawley Dcl. (Ex. I) at ¶¶ 17-18. S-L admits that it does not pay overtime premium compensation to IBOs. *See* Revised Joint Case Management Plan ("RJCMP") (Doc. 66) at p. 3.

E. S-L maintains an across-the-board policy of classifying all IBOs as non-employee independent contractors.

S-L uniformly treats all IBOs as non-employee independent contractors. *See*

RJCMP (Doc. 66) at p. 4; *accord Tavares v. S-L Distribution Co., Inc.*, 2016 U.S. Dist. LEXIS 57689, *10 (M.D. Pa. May 2, 2016) (Jones, J.). This enables S-L to avoid the FLSA's overtime pay mandate. *See Martin v. Selker Brothers, Inc.*, 949 F.2d 1286 (3d Cir. 1991) (true independent contractors not covered by FLSA).[2]

F. S-L requires all IBOs to sign the same Distributor Agreements.

S-L requires all IBOs to sign Distributor Agreements. *See* Form 10-K (Ex. A) at p. 4 (referring to "IBO's distributor agreement with us"). As this Court previously observed, these S-L Distributor Agreements "largely constrain[]" the drivers' work and are "substantially similar to one another." *Tavares*, 2016 U.S. Dist. LEXIS 57689, at *22. S-L will terminate the Distributor Agreement if the IBO breaches the Agreement or defaults on the loan. Form 10-K (Ex. A) at p. 4.

S-L previously filed with the Court a collection of executed Distributor Agreements. *See* Docs. 61-3 - 61-12. As indicated, the Agreements are standardized and detailed. Some of the notable provisions include, *inter alia*, the following:

- IPOs must purport to be "independent contractors. *See*, *e.g.*, Doc. 61-10

[2] Of course, whether a worker is an employee or independent contractor is governed by the "economic realities of the relationship," *Id.* at 1293; *accord Donovan v. DialAmerica Marketing, Inc.*, 757 F.2d 1376, 1382-83 (3d Cir. 1985). The "inquiry is not governed by the 'label' put on the relationship by the parties or the contract controlling th[e] relationship." *Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013); *see also Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("an employer's self-serving label of workers as independent contractors is not controlling").

(Agreement signed by Robert Johnson) at Article 2.[3]

- S-L issues "Suggested Operating Guidelines" that include "suggested guidelines" and "charges for various services." *See id.* at Article 1.F.
- S-L may "in its sole discretion, vary the Suggested Operating Guidelines." *Id.* at Article 25.E.
- IPOs are limited to delivering "Authorized Products" and "Other Products." *See id.* at Article 3.A-B. Such products (whether "Authorized" or "Other") must appear on a Price List published by S-L. *See id.* at Article 1.B, C, E.
- IPOs are effectively prohibited from delivering products outside of their assigned "Territory." *See id.* at Article 1.G, 3.A-B.
- S-L issues a "Price List" for all products. *See id.* at Article 1.E, 10.A.
- IPO's must submit product orders "in accordance with S-L's then applicable procedures." *Id.* at Article 4.C.
- S-L dictates the location where the IPO must pick-up the products. *See id.* at Article 4.E.
- IPOs must transmit purchases and "any other transactions" to S-L using a "specific file format" dictated by S-L. *See id.* at Article 5.L.
- When a retail store alters its "channel of distribution," S-L can terminate the IPO's right to deliver to the store. *See id.* at Article 7.A-B.
- IPOs must reimburse SL for certain costs, such as, for example, "leasing costs," through pay deductions made by S-L. *See id.* at Article 10.A.
- S-L has broad discretion to terminate or alter the scope and composition of an IPOs' assigned route. *See id.* at Article 13, 15.B. Indeed, S-L can terminate the Agreement "for other just cause as may arise from time to time including, but not limited to, for business or economic reasons of S-L." *Id.* at Article 15.B.3.

G. S-L gives all IBOs the same Suggested Operating Guidelines.

As noted above, the Distributor Agreements reference a set of Suggested Operating Guidelines ("Guidelines"). *See, e.g.*, Doc. 61-10 at Article 1.F. Under

[3] *See* footnote 2 *supra*.

the Agreement, "S-L may, in its sole discretion , vary the [Guidelines] . . . ." *Id.* at Article 25.E. "Such variations may lead to different costs and ***obligations*** among distributors." *Id.* (emphasis supplied).

Sample Guidelines are attached as Exhibit B. As indicated, the IBO must acknowledge that he "has read [the Guideliness] thoroughly and understands them" and that the [Guidelines] may be amended, from time to time, by S-L." *See* Ex. B at p. 5. The Guidelines include standardized rules addressing the terms and conditions of the IBO position. *See id.* at pp. 1-4.

H. IBO's are disciplined and terminated for failing to follow S-L's standard rules and expectations.

Discovery is not developed in this case. However, in *Tavares*, discovery revealed that IBOs are frequently disciplined and terminated for failure to comply with S-L's common rules and expectations. *See* Collection of Letters (Ex. C).

I. Sworn declarations confirm similarities among IBOs.

Plaintiffs' lawyers have gathered sworn declaration from 6 IBOs. *See* Grutsch Dcl. (Ex. D); Manning Dcl. (Ex. E); Perdue Dcl. (Ex. F); Riddle Dcl. (Ex. G); Snyder Dcl. (Ex. H); Smawley Dcl. (Ex. I). As summarized below, these declarations confirm that IBOs have similar work experiences. In particular, all of the declarants:

- were classified by S-L as independent contractors. *See* Exs. D-I at ¶ 2.
- worked over 40 hours per week without receiving any extra overtime

premium compensation. *See* Exs. D-H at ¶ 18; Ex. I at ¶ 17.

- signed the Distributor Agreement. *See* Exs. D-I at ¶ 3.
- had similar job duties that included, delivering S-L products to S-L customers, placing orders using S-L's handheld device, removing expired products, loading and unloading the truck, and stocking shelves. *See id.* at ¶ 4.
- were closely supervised by S-L management and received weekly directives regarding the servicing of the delivery route. *See* Exs. D-H at ¶ 15; Ex. I at ¶ 14.
- were subject to reprimands – referred to as "breaches" – issued by S-L management for failing to comply with S-L directives and expectations. *See* Exs. D-H at ¶ 15. Ex. I at ¶ 14.
- were required to utilize an internal tracking device that enabled S-L to monitor their whereabouts. *See* Exs. D-H at ¶ 17; Ex. I at ¶ 16.
- contend that the IBO job does not require any skills other than driving, delivering product, stocking shelves, and ordering product. *See* Exs. D-I at ¶ 5.
- assert that they could learn everything they needed to know about the job through training provided by S-L. *See id.*
- were required to cover all costs associated with the product deliveries. *See* Exs. D-I at ¶¶ 6, 9.
- were only permitted to deliver specifically authorized products to specifically authorized stores in a specifically defined territory. *See* Exs. D-I at ¶ 7.
- lacked authority to negotiate or determine product prices. *See id.* at ¶ 8.
- had little or no involvement in product billing. *See id.* at ¶ 10.
- were required to follow detailed "plan-o-grams" in merchandising S-L's products in retail stores. *See id.* at ¶ 12.
- Had little or no role in decisions concerning, *inter alia*, basic merchandising matters such as, for example, the timing of product promotions, product advertising, the terms of product promotions, allocated shelf space, authorization for new items, product selection, authorization for price changes, and product placement/display. *See id.* at ¶ 13.

II. ARGUMENT.

A. FLSA "Conditional Certification" Generally.

"Under the 'collective action' mechanism, an employee alleging an FLSA violation may bring an action on 'behalf of himself . . . and other employees similarly situated,' subject to the requirement that '[n]o 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 in the court in which such action is brought." *Symczyk*, 656 F.3d at 192 (quoting 29 U.S.C. § 216(b)).

Collective actions provide employees with "the advantage of lower individual costs to vindicate rights by the pooling of resources." *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989); *accord Gallagher v. Lackawanna County*, 2008 U.S. Dist. LEXIS 43722, *20-21 (M.D. Pa. May 30, 2008) (Vanaskie, J.). These advantages, however, "depend[] on employees receiving accurate and timely notice . . . so that they can make informed decisions about whether to participate." *Hoffman-LaRoche*, 493 U.S. at 170. So judges have a "managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Id.* at 170-71.

Conditional certification merely facilitates the notice process. As the Third Circuit has explained, conditional certification has nothing to do with "class certification" in the traditional sense: "the certification we refer to here is only the

district court's exercise of [its] discretionary power, upheld in *Hoffman-LaRoche*, to facilitate notice to potential class members, and is neither necessary nor sufficient for the existence of a representative action under FLSA." *Symczyk*, 656 F.3d at 194 (internal quotations omitted). In other words, "'***conditional certification' is not really a certification***." *Zavala v. Wal Mart Stores, Inc.*, 691 F.3d 527, 536 (3d Cir. 2012) (emphasis supplied). As Judge Beetlestone observed, it is merely "the metaphorical gate through which the case must pass before notices can be sent out and class discovery can be taken." *Diabate v. MV Transportation, Inc.*, 2015 U.S. Dist. LEXIS 93762, *17-18 (E.D. Pa. July 20, 2015).

Whether the lawsuit *ultimately* will proceed as a collective action is determined later in the litigation, "[a]fter discovery, and with the benefit of a much thicker record than it had at the notice stage." *Symczyk*, 656 F.3d at 193 (internal quotation omitted). Your Honor has observed:

> The burden in this preliminary certification [stage] is light because the risk of error is insignificant: should further discovery reveal that the named positions, or corresponding claims, are not substantially similar the defendants will challenge the certification and the court will have the opportunity to deny final certification.

Craig v. Rite Aid Corp., 2009 U.S. Dist. LEXIS 114785, *9 (M.D. Pa. Dec. 9, 2009) (Jones, J.).[4] So conditional certification just does not require any detailed

[4] Other Pennsylvania judges agree. *See, e.g.*, *Waltz v. Aveda Transportation and Energy Services, Inc.*, 2016 U.S. Dist. LEXIS 17874, *5 (M.D. Pa. Dec. 27, 2016) (Brann, J.)

factual analysis. *See, e.g., Chung v. Wyndham Vacation Resorts, Inc.*, 2014 U.S. Dist. LEXIS 126156 (M.D. Pa. Sept. 9, 2014).

Nor should courts "delve into the merits of the case or determine issues of credibility." *Outlaw v. Secure Health, L.P.*, 2012 U.S. Dist. LEXIS 108218, *8 (M.D. Pa. Aug. 2, 2012) (Munley, J.).[5] Many FLSA defendants are confident in their merits arguments. But they cannot defeat conditional certification based on "generalized position that 'we will win.'" *Stallard v. Fifth Third Bank*, 2013 U.S. Dist. LEXIS 186531, *9 (W.D. Pa. Dec. 12, 2013).

B. The Lenient Conditional Certification Standard.

In *Symczyk*, the Third Circuit clarified that conditional certification motions are dictated by a "modest factual showing" standard:

> Under the "modest factual showing" standard, a plaintiff must

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("high rate of success at the conditional certification stage results because the district court bears an 'insignificant' risk of error by granting the motion"); *Garcia v. Nunn*, 2016 U.S. Dist. LEXIS 39188, *7-8 (E.D. Pa. Mar. 25, 2016) (Stengel, J.) ("courts should err in favor of providing notice to employees."); *Mueller v. CBS, Inc.*, 201 F.R.D. 425, 429 (W.D. Pa. 2001) ("to require conclusive findings of 'similar situations' before providing notice . . . to absent class members 'would condemn any large class claim . . . to a chicken and egg limbo in which the class could only notify all its members to gather after it had gathered together all its members"). Cognizant of these observations, FLSA defendants appearing before this Court often stipulate to conditional certification. *See, e.g., Sexton v. JDK Management Company, L.P.*, 1:16-cv-01594-JEJ, at Doc. 27; *Cover v. Feesers, Inc.*, 1:10-cv-00282-JEJ, at Doc. 27.

[5] *See also Vargas v. General Nutrition Centers, Inc.*, 2012 U.S. Dist. LEXIS 154073, *12 (W.D. Pa. Oct. 26, 2012) ("[t]he thrust of the Court's inquiry at this juncture . . . 'is not on whether there has been an actual violation of the law'"); *Resch v. Krapf's Coaches*, 2012 U.S. Dist. LEXIS 89993, *6 (E.D. Pa. June 28, 2012) (merits "need not be evaluated"); *Bishop v. AT&T Corp.*, 256 F.R.D. 503, 507 (W.D. Pa. 2009) (merits "are not addressed").

> produce some evidence, "***beyond pure speculation***," of a factual nexus between the manner in which the employer's alleged policy affected her and the manner in which it affected other employees. We believe the "modest factual showing" standard – which works in harmony with the opt-in requirement to cabin the potentially massive size of collective actions – best comports with congressional intent and with the Supreme Court's directive that a court "ascertain[] the contours of [a collective] action at the outset."

Symczyk, 656 F.3d at 192-93 (emphasis supplied; internal citations omitted).

C. Because Plaintiffs Satisfy the "Modest Factual Showing" Standard, Conditional Certification Should Be Granted.

Applying the "modest factual showing" standard, the Court should conditionally certify an FLSA collective consisting of: "Every individual who, during any time within the past three years, has performed work pursuant to a Distributor Agreement entered into between (i) such individual or any business entity owned by such individual and (ii) Snyder's-Lance, Inc., S-L Routes, LLC, or S-L Distribution Company, Inc." As discussed below, even in the absence of discovery, the record sufficiently demonstrates that the IBOs are bound together by common facts and legal issues:

First, it is undisputed that S-L has implemented an across-the-board policy of classifying all IBOs as non-employee independent contractors not entitled to overtime premium pay. *See* Section II.C. This policy, standing alone, can justify conditional certification. *See Resch*, 2012 U.S. Dist. LEXIS 89993, at *7 (conditional certification warranted because "in formulating and implementing this

uniform exemption policy, [defendant] treats all [covered employees] alike and does not consider any individual characteristics"). As Judge Brody observed in another independent contractor misclassification case: "Numerous federal courts . . . have granted conditional certification and authorized dissemination of judicial notice based on a simple showing that other employees may also have been subjected to the employer's practice of 'misclassifying' employees." *Verma v. 3001 Castor, Inc.*, 2014 U.S. Dist. LEXIS 88459, *38-39 (E.D. Pa. June 30, 2014). Likewise, in *Spellman v. American Eagle Express, Inc.*, 2011 U.S. Dist. LEXIS 53521 (E.D. Pa. May 18, 2011), Judge Sanchez conditionally certified an FLSA collective of delivery drivers classified as independent contractors based primarily on the common classification. *See id.* at *2-5, n. 1. Judge Sanchez turned away the defendant's arguments that drivers' job experiences were too "individualized" to warrant conditional certification, observing that "it is disingenuous for an employer to argue a court must inquire into the individual work duties of each proposed plaintiff when the employer has itself uniformly classified the plaintiffs as exempt from FLSA protections." *Id.* at *4-5 n. 1 (citing *Misra v. Decision One Mortgage Co.*, 673 F. Supp. 2d 987, 996 (C.D. Cal. 2008)).[6]

[6] *Spellman* is just one of several cases in which district judges within the Third Circuit have conditionally certified the FLSA claims of allegedly misclassified independent contractors. *See, e.g.*, *Harrison v. DelGuerico's Wrecking & Salvage, Inc.*, 305 F.R.D. 85 (E.D. Pa. 2015); *Ornelas v. HooperHomes, Inc.*, 2014 U.S. Dist. LEXIS 172903 (D.N.J. Aug. 1, 2014); *Adami v. Cardo Windows, Inc.*, 299 F.R.D. 68 (D.N.J. 2014); *Tae*

Second, all IBOs are required to enter into standard Distributor Agreements, are given standardized Guidelines, and are subject to discipline or termination for failing to comply with S-L's across-the-board work rules and expectations. *See* Section I.F-H *supra*. Such standardized directives, standing alone, provide enough similarity among IBOs to justify conditional certification. In fact, when this Court certified a settlement class of 224 Massachusetts IBOs under Rule 23's more demanding class certification criteria, it relied on the common Distributor Agreements in support of its finding that Rule 23(b)(3)'s "predominance" requirement was satisfied: "Further, the facts of each case are largely constrained by the Distributor Agreements, which we have already described as substantially similar to one another." *Tavares*, 2016 U.S. Dist. LEXIS 57689, at *22; *see also Williams v. Jani-King of Philadelphia Inc.*, 837 F.3d 314 (3d Cir. 2016) (relying on franchise agreement in affirming Rule 23 certification of janitors who alleged they had been misclassified as non-employee franchisees).

Third, Plaintiffs have submitted 6 separate declarations confirming that IBOs share many common characteristics with respect to their job duties and their work relationship with S-L. *See supra* at Section I.I (summarizing declaration testimony). Such declarations justify conditional certification. *See, e.g.*, *Neal v.*

In Kim v. Dongbu Tour & Travel, Inc., 2013 U.S. Dist. LEXIS 148549 (D.N.J. Oct. 16, 2013); *Scott v. Bimbo Bakeries, Inc.*, 2012 U.S. Dist. LEXIS 26106 (E.D. Pa. Feb. 29, 2012).

Air Drilling Associates, Inc., 2015 U.S. Dist. LEXIS 5554, *7 (M.D. Pa. Jan. 16, 2015) (4 declarations); *Chung*, 2014 U.S. Dist. LEXIS 126156, at *4-5 (8 declarations); *Bell v Citizens Financial Group, Inc.*, 2010 U S Dist LEXIS 91172, *3 (W.D. Pa. Sept. 2, 2010) (8 declarations); *Morrow v. County of Montgomery*, 2014 U.S. Dist. LEXIS 13093, *12 (E.D. Pa. Jan. 31, 2014) (8 declarations); *Williams v. Owens & Minor, Inc.*, 2009 U.S. Dist. LEXIS 102304, *4 (E.D. Pa. Oct. 9, 2009) (2 declarations); *Gallagher*, 2008 U.S. Dist. LEXIS 43722, at *25 (8 declarations).

In sum, conditional certification is warranted because Plaintiffs have "produc[ed] some evidence, 'beyond pure speculation,' of a factual nexus between the manner in which the employer's alleged policy affected her and the manner in which it affected other employees." *Symczyk*, 656 F.3d at 192.

III. CONCLUSION

For the above reasons, Plaintiffs request that the Court grant this Motion.

Date: January 5, 2017

Respectfully,

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