No. 19-1944

In the
United States Court of Appeals
for the Seventh Circuit

SUSIE BIGGER, individually and on behalf of those similarly situated,

Plaintiff-Appellee,

v.

FACEBOOK, INC.,

Defendant-Appellant.

Appeal from the United States District,
for the Northern District of Illinois, Eastern Division, No. 1:17-cv-07753.
The Honorable **Harry D. Leinenweber**, Judge Presiding.

BRIEF AND SHORT APPENDIX OF APPELLANT

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: _____

Short Caption: Bigger, et al., v. Facebook, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Facebook, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cozen O'Connor

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Anneliese Wermuth Date: 4/19/2019

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Attorney's Signature: /s/ Jenny R. Goltz Date: 4/19/2019

Attorney's Printed Name: Jenny R. Goltz

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Attorney's Signature: /s/ Michael B. de Leeuw Date: 4/19/2019

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Attorney's Signature: /s/ Tamar S. Wise Date: 5/29/19

Attorney's Printed Name: Tamar S. Wise

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FACEBOOK'S JURISDICTIONAL STATEMENT

Jurisdiction of the District Court

The district court had subject matter jurisdiction over Plaintiff-Appellee's claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, pursuant to 28 U.S.C. § 1331, as those claims arise under the laws of the United States. The district court also had subject matter jurisdiction over Plaintiff's claims pursuant to 29 U.S.C. § 216(b), which provides that suit under the FLSA "may be maintained against any employer … in any Federal or State court of competent jurisdiction." Plaintiff alleged that the district court had supplemental jurisdiction over her Illinois state law claim under the Illinois Minimum Wage Law ("IMWL"), 820 ILCS 105/1, pursuant to 28 U.S.C. § 1367.

Jurisdiction of the Court of Appeals

This Court has jurisdiction to entertain this appeal pursuant to 28 U.S.C. § 1292(b). On March 22, 2019, the district court entered a memorandum and opinion granting Plaintiff's motion for conditional certification of an FLSA collective and denying Facebook's motion for summary judgment. (Dkt. #64.)[1] On March 28, 2019, Facebook moved the district court for an emergency stay and to certify the March 22, 2019 order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Dkt. #65.) The district court orally granted Facebook's motion to certify for interlocutory appeal at

[1] References herein to "Dkt." refer to the record as reflected in the district court electronic docket at 1:17-cv-7753. References herein to "A-__" refer to the short appendix annexed hereto.

an April 9, 2019 hearing (Dkt. #78), memorialized in its April 17, 2019 Order Certifying Appeal Under Section 1292(b). (Dkt. #81.) On April 19, 2019, Facebook filed with this Court its Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b). The Court granted Facebook's Petition on May 3, 2019.

This interlocutory appeal is timely because the Petition for Permission to Appeal was filed with this Court within 10 days of the district court's certification order.

As of this date, Plaintiff's claims under the FLSA and the IMWL against Facebook remain pending in the district court, as do final determinations regarding certification for an FLSA collective and Federal Rule of Civil Procedure 23 class action. This appeal concerns the district court's decision on Plaintiff's motion for conditional certification of the FLSA collective and, in particular, the scope, content, and recipients for notice of such collective under 29 U.S.C. § 216(b). This appeal also concerns the district court's decision on Facebook's motion for summary judgment on the FLSA claim.

No motion has been filed claiming to toll the time within which to appeal.

This is not a direct appeal from the decision of a magistrate judge.

PRELIMINARY STATEMENT

This case presents an issue of first impression for this Court: whether the FLSA empowers a district court to order notice of a pending collective action pursuant to 29 U.S.C. § 216(b) ("Section 216 Notice") to be sent to employees who have waived their rights to participate in the collective action by entering into arbitration agreements governed by the Federal Arbitration Act ("FAA").

Importantly, there is no "right" to receive Section 216 Notice. The Supreme Court made clear in *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989), that Section 216 Notice is part of a court's "case management" function and that Section 216 Notice may only go to "potential plaintiffs." The Court also made clear that Section 216 Notice may not be used as a mechanism for the "solicitation of claims."

The Supreme Court's recent decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), is the latest in a series of cases that emphasize the FAA's "liberal federal policy favoring arbitration agreements" and instruct district courts to "rigorously enforce" arbitration agreements. *See Epic Sys.*, 138 S. Ct. at 1621. The Court in *Epic Systems* held that collective action waivers in arbitration agreements are valid and enforceable—a holding that is consistent with the FAA's express statement that *all* agreements to arbitrate are presumptively "valid, irrevocable, and enforceable" absent a valid defense. Reading *Hoffmann-La Roche* and *Epic Systems* together leads to the inevitable conclusion that district courts lack discretion to authorize Section 216 Notice to issue to individuals who have contractually waived their right to participate in a collective action because they are not "potential plaintiffs" in the collective action.

The court below nonetheless authorized notice of this FLSA collective action to be sent to a group of current and former Client Solutions Managers ("CSM"s) at Facebook—even though the vast majority of this group—more than 78%—contractually agreed to resolve such disputes in arbitration and waived their rights to participate in collective actions by entering into Mutual Arbitration Agreements ("MAAs") that

include class and collective action waivers. Facebook submitted unrebutted evidence demonstrating that the agreements are enforceable—evidence that Plaintiff-Appellee Susie Bigger (a CSM who brought this action on behalf of the proposed collective of CSMs) never challenged or countered. Instead, Plaintiff asked the district court to send notice that purports to alert the ***entire*** group of CSMs (regardless of whether they entered into an MAA) that the case is pending and that invites them to join the collective action. But those CSMs who signed MAAs *cannot* participate in the collective action, and the district court acted outside its authority when it agreed to allow Plaintiff to issue Section 216 Notice to all CSMs regardless of their eligibility to participate.[2]

The district court's reasoning for authorizing this notice was flawed. The court held that it would be premature to exclude CSMs who had entered into MAAs from the Section 216 Notice because the court could not rule on the validity of arbitration agreements signed by employees who were not yet parties to the action. The district court also held that the determination of the MAAs' enforceability was a merits determination that was not suited for the conditional certification phase. But this holding directly contradicts the district court's prior acknowledgment on the record (with Plaintiff's counsel's agreement) that the conditional certification phase was, in fact, the appropriate juncture for addressing whether the putative collective should include individuals who signed MAAs. It also ignores the fact that Facebook submitted

[2] In light of this appeal, the district court stayed all proceedings, including Plaintiff's distribution of the Section 216 Notice. (Dkt. #75 (Minute Entry for Apr. 9, 2019 Hr'g); Dkt. #78 (Tr. of Proceedings held on April 9, 2019).)

unrebutted evidence of the MAAs' enforceability—evidence that Plaintiff never contested or challenged.[3]

The ruling below improperly treats arbitration agreements as *presumptively invalid* at the conditional certification phase—a determination that is radically inconsistent with the FAA's express statement to the contrary and the line of cases that have broadly interpreted the FAA in recent years. Finally, it is improper, as a matter of case management, for a district court to allow for Section 216 Notice to go to a group of individuals, the vast majority of whom are barred from participating in the collective action.

The only Circuit court to have addressed this issue held, contrary to the district court below, that *Hoffmann-La Roche*'s grant of authority to district courts to facilitate Section 216 Notice to "potential plaintiffs" ***does not*** extend to employees who signed arbitration agreements governed by the FAA. *See In re JPMorgan Chase & Co.*, 916 F.3d 494 (5th Cir. 2019). The Fifth Circuit was clear: while "[i]t is true that courts cannot compel individuals to arbitrate when they are yet to be identified and have not joined the suit," "to stay within the discretion authorized in *Hoffmann-La Roche*, district courts must respect the existence of arbitration agreements and must decline to notify [employees], who waived their right to proceed collectively, of the pending action." *Id.* at 503, n.19.

[3] And, taken to its logical conclusion, the district court's hesitation only underscores that CSM defenses in this case are necessarily individualized, demonstrating that CSMs who signed MAAs are not similarly situated to Plaintiff.

There is good reason to instruct district courts to exercise restraint in facilitating Section 216 Notice to employees who have signed arbitration agreements. The scope of a collective action matters. That is particularly true in this case, where the conditionally certified collective includes 428 members, *336 of whom have signed MAAs* explicitly precluding their participation in that collective as a matter of law. (Dkt. #74 Ex. 1 (April 8, 2019 Declaration of Nicolle Hickman), ¶ 6.) An artificially inflated collective would greatly expand the scope of the proceedings, discovery, and motion practice and would improperly amplify settlement pressure. *See*, *e.g.*, *Epic Sys.*, 138 S. Ct. at 1632 (noting that collective actions "can unfairly 'place pressure on the defendant to settle even unmeritorious claims'") (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445, n.3 (2010) (Ginsburg, J. dissenting)). It would also force Facebook to compel arbitration against any CSM with an MAA who attempted to join the collective action as a result of receiving the erroneous notification.

The district court's error in issuing notice to individuals who are not potential plaintiffs is compounded by its failure to properly apply the FLSA's Highly Compensated Employee ("HCE") exemption to Plaintiff. As part of its defense to Plaintiff's motion for conditional certification, Facebook moved for summary judgment on Plaintiff's FLSA claim in its entirety. Despite submitting undisputed evidence, primarily based on Plaintiff's own admissions, that the Plaintiff's duties met all of the necessary

criteria for exemption, the Court applied an erroneous analysis and denied that motion. Without Plaintiff's FLSA claims—and she has no such viable claim—there can be no collective at all.

The district court erred in authorizing Section 216 Notice to be sent to all 428 members of the putative collective and in denying Facebook's motion for summary judgment. This Court should reverse both holdings by the district court.

STATEMENT OF THE ISSUES

1. Did the district court err in authorizing Section 216 Notice to be distributed to all CSMs, even where the unrebutted record evidence demonstrated that the vast majority of the CSMs had entered into arbitration agreements and class/collective action waivers?
2. Did the district court err in concluding that there was a material issue of fact regarding whether Plaintiff's position as a CSM was properly classified as exempt under the FLSA's Highly Compensated Exemption?

STATEMENT OF THE CASE

Plaintiff, a former highly compensated Facebook CSM, filed this action on October 27, 2017, alleging that she was improperly classified as exempt from the overtime requirements in the FLSA.[4] (*See generally* Dkt. #1 (Complaint).) Plaintiff brought this suit on behalf of herself and other allegedly similarly-situated CSMs as a national

[4] Plaintiff also asserted violations of the Illinois Minimum Wage Law and seeks to represent an Illinois state-wide class of purportedly similarly situated CSMs under Federal Rule of Civil Procedure 23.

collective action under 29 U.S.C. § 216(b). (*Id.*) Plaintiff sought to have conditionally certified an FLSA national collective defined as follows:

> All individuals who were employed by Facebook as Client Solutions Managers at level IC-3 or IC-4 at any location in the United States during the period from three years prior to entry of the conditional certification order to the present.

(Dkt. #45 (Pl.'s Mot. For Conditional Certification as a Collective Action and Issuance of Notice Under 29 U.S.C. Section 216(b)), at p. 8.)[5]

A. The MAAs and Collective Action Waiver Provisions

Critically, at least 78% of the CSMs whom Plaintiff seeks to represent in a collective action have executed MAAs that require them to bring their claims in arbitration and *expressly* prohibit their involvement in collective actions against Facebook. (Dkt. #74 Ex. 1, at ¶ 6.) In approximately November 2013, Facebook began offering a Mutual Arbitration Agreement and Class Action Waiver "to all newly-hired CSMs during

[5] Facebook employs a compensation system, which it refers to as "Individual Contributor Levels" or "IC Levels." (Dkt. #51-1 (Nov. 13, 2018 Declaration of Nicolle Hickman), at ¶ 9.) While Facebook expects all CSMs will perform the same core duties, employees at higher pay grades (or IC levels) are expected to act with increasingly higher levels of independence, discretion, and autonomy. (Dkt. #51 (Def.'s Rule 56.1 Statement of Undisputed Material Facts) at ¶ 10.) For CSMs, IC levels 1-2 are non-exempt, overtime eligible positions which are reserved for new graduates or individuals without significant experience. (*Id.*) IC Levels 3 and above are exempt positions. (*Id.*) Plaintiff was employed at IC level 4 during her time at Facebook, but contends she was performing at an IC Level 5 (a level not included in the proposed collective). (*Id.* at ¶¶ 15, 80.) Notably, prior to her employment at Facebook, Plaintiff had nearly eight years of similar experience serving in overtime exempt account manager roles in the online advertising industry, first at careerbuilder.com and then at Microsoft. (*Id.* at ¶ 13.)

the onboarding process." (Dkt. #54-1 (December 4, 2018 Declaration of Nicolle Hickman ("December 2018 Hickman Declaration") at ¶ 5.) Thereafter, Facebook revised its Arbitration Agreement and renamed it the Mutual Arbitration Agreement. (*Id.* at ¶ 7.) By Facebook's calculation, at least 336 of the 428 CSMs employed at IC levels 3 or 4 between November 29, 2015 and April 2019 have executed MAAs. (Dkt. #74 Ex. 1, ¶ 6.) Each newly-hired CSM's agreement to the MAA was a "mandatory condition of their employment from November 2014 until January, 2017," at which point "Facebook gave newly-hired CSMs the choice to opt-out of the entire [MAA] by signing a form provided." (Dkt. #54-1 at ¶ 10.) Beginning in April 2017, Facebook gave newly-hired CSMs the choice to opt-out only of the class and collective action waiver provisions. (*Id.*)

Both the MAA and its predecessor agreement contain collective action waivers. (*Id.* at ¶¶ 5, 7.) In executing these agreements as part of their employment, the vast majority of CSMs agreed that they would arbitrate all claims for:

> non-payment, incorrect payment, or overpayment of wages … whether such claims be pursuant to … any federal, state, or municipal laws concerning wages, … failure to pay wages … and/or any other claims involving employee compensation issues.

(Dkt. #54 (Def.'s Opp'n To Pl.'s Mot. For Conditional Certification), at p. 8.) Moreover, those same MAAs mandate that all such claims be "brought in the party's individual capacity, and not as a plaintiff or class member in any purported class or collective proceeding"—either in court or in arbitration. (*Id.*)

B. The Parties and the Court Address the Interplay Between the Arbitration Employees and Section 216 Notice, but Plaintiff does not Challenge the Validity of the Arbitration Agreements

Following the Supreme Court's *Epic Systems* decision, Facebook sought Plaintiff's agreement to exclude CSMs with MAAs from her class and collective definitions. Plaintiff refused, and Facebook moved a) for leave to file a counterclaim seeking a declaration of the validity and enforceability of the MAAs; and b) to amend its Answer to include affirmative defenses relating to the enforceability and applicability of these MAAs. (Dkt. #27 (Def.'s Mot. for Leave to Amend Answer and File Original Countercl.); Dkt. #54-2 (Tr. of Proceedings, Aug. 30, 2018), at 3:7-11.) Facebook attached to its motion the two versions of the MAAs in effect during the relevant time period. (Dkt. #27-2 (Mutual Arbitration Agreement and Class Action Waiver); #27-3 (Mutual Arbitration Agreement).)[6] Both versions of the MAA require CSMs to bring wage claims in arbitration, and also contain clear and unequivocal class action and collection action waivers. (*Id.*)

Notably, at the August 30, 2018, hearing on Facebook's motion for leave, Plaintiff opposed the motion on the sole ground that Facebook lacked "standing" for its counterclaim, even though Plaintiff seeks to represent individuals with MAAs. (Dkt. #54-2, at 2:13-16.) Facebook specifically argued that the reason it sought declaratory judgment was "[s]o that notice does not go out to these individuals [who cannot participate in the action]." (*Id.* at 4:8-10; *see also id.* at 3:5-5:10 (explaining the harm attendant

[6] The only material difference between the two MAAs is the procedure permitting the CSMs to opt out of the class and collective action waivers, which was added to the later Mutual Arbitration Agreement.

to sending out notice to CSMs with arbitration agreements).) Both the district court and Plaintiff's counsel agreed that the appropriate time to address the enforceability of the mandatory arbitration provisions was at the conditional certification stage. (*Id.*, at 4:11-5:4.) The district court explained that the appropriate vehicle was for Facebook to object to Plaintiff's proposed definition of the collective. (*Id.*, at 4:11-5:4.) Plaintiff's counsel agreed, conceding that the "issue [of mandatory arbitration provisions] will play out in briefing on conditional certification ..." (*Id.* at 4:15-18.) The district court instructed Facebook: "just object to [Plaintiff's] class, and I'll rule on it."[7] (*Id.* at 4:21-22.)

Thereafter, the parties engaged in discovery, during which Facebook produced the templates for the relevant MAAs and informed Plaintiff and the district court that the vast majority of CSMs had entered into MAAs. But Plaintiff chose not to examine Facebook's witnesses on the topic of the MAAs despite the fact that Facebook produced a Human Resources witness competent to testify about them, and despite having ample time to do so. (Dkt. #74 Ex. 1, at ¶¶ 5, 7.) In fact, Plaintiff spent more than six hours deposing Nicolle Hickman, Human Resources Programs Lead for Global Marketing Solutions and Facebook's designated 30(b)(6) witness, but did not ask her a single question about the formation or the terms of the MAAs. (*Id*, ¶ 7.)

[7] The district court did, however, grant Facebook leave to assert affirmative defenses related to the MAAs. (Dkt. #31 (Minute Entry for Aug. 30, 2018 Hearing).)

C. Plaintiff's Motion for Conditional Certification

On November 8, 2018, Plaintiff moved for conditional certification of a collective under Section 216(b) of the FLSA. (Dkt. #45.) Despite her counsel's earlier acknowledgement that this was the appropriate stage to address the putative collective members' MAAs, Plaintiff did a complete about face. Plaintiff argued that the conditional certification phase is *not* the correct time to decide whether to exclude CSMs with signed enforceable MAAs from the collective. (*Id.*, at p. 8, n.3 (relying on a single opinion from the Eastern District of Pennsylvania).)

In opposition to Plaintiff's Motion to Certify, Facebook—in accordance with the district court's directive—challenged the certification of, and the issuance of Section 216 Notice to, a collective that included CSMs who signed MAAs. (Dkt. #54.) Facebook attached the December 2018 Hickman Declaration, in which she attested under penalty of perjury that the MAAs were introduced in 2013 as part of a condition of new employment. (Dkt. #54-1, at ¶¶ 5-10.) Facebook also attached templates of the two relevant MAA versions to the declaration, with terms that are valid under the FAA. (Dkt. #54-1, Exs. A and B.) With this unrebutted testimonial and documentary evidence, Facebook demonstrated in its opposition brief that the terms of the MAAs are valid and enforceable. (Dkt. #54, at pp. 8-10.)

In further opposition to Plaintiff's motion for conditional certification, on November 15, 2018, Facebook filed a motion for summary judgment arguing for dismissal of Plaintiff's FLSA claims under the HCE exemption. (Dkt. #48.)

Critically, at no point in its conditional certification briefing (or at any other time in subsequent proceedings) did Plaintiff argue—let alone demonstrate with evidentiary proof—that the MAAs were not valid and enforceable. Indeed, even in her reply papers, following receipt of the December 2018 Hickman Declaration, Plaintiff did not contest the MAAs' validity, including the class/collective action waiver term; nor did Plaintiff object to Facebook's evidence or otherwise challenge the formation of the MAAs.

D. The Intervening Fifth Circuit Decision

While Plaintiff's motion for certification was pending, on February 21, 2019, the Fifth Circuit Court of Appeals held that it was improper for a district court to authorize Section 216 Notice to putative class members who had signed arbitration agreements, admonishing that "alerting those who cannot ultimately participate in the collective 'merely stirs up litigation,'" which is proscribed by Supreme Court rulings. *See In re JPMorgan*, 916 F.3d at 502. In the wake of this ruling, Facebook submitted a Notice of Filing Supplemental Authority, attaching the Fifth Circuit opinion, in further support of its argument that the individuals with MAAs should not be included as part of the conditionally certified collective. (Dkt. #62 (Def.'s Notice of Filing Supplemental Authority).)

E. The District Court's March 22, 2019 Order

By Memorandum and Order dated March 22, 2019, the district court certified a collective action as proposed by Plaintiff:

> All individuals who were employed by Facebook as Client Solutions Managers at level IC-3 or IC-4 at any location in the United States during the period from three years prior

> to the entry of this Order, and as extended by stipulation of the parties, to the present.

(A-37.)

The Section 216 Notice approved by the court expressly—and inaccurately with respect to the vast majority of CSMs who have entered into MAAs—advises CSMs concerning their "right to participate" in the collective action. (*See* Dkt. #45-1 ([Proposed] Notice of Collective Action Lawsuit), at p. 2, Section IV.) Specifically, the notice reads as follows:

> **PLEASE READ THIS NOTICE CAREFULLY.**
>
> **THIS NOTICE COULD AFFECT YOUR LEGAL RIGHTS.**
>
> **I. INTRODUCTION**
>
> The purpose of this Notice is to inform you of the existence of a collective action in which you are potentially "similarly situated" to the Named Plaintiff, to advise you of how your rights may be affected by this suit, and to instruct you on the procedure for participating in this suit, should you decide that it is appropriate and should you choose to do so. You are not being sued.
>
> …
>
> **III. COMPOSITION OF THE COLLECTIVE CLASS**
>
> The Named Plaintiff seeks to sue on behalf of herself and also on behalf of other employees who are similarly situated. Specifically, the Named Plaintiff seeks to sue on behalf of any persons who were employed by Facebook as CSMs at level IC-3 or IC-4, at any time from [THREE YEARS PRECEDING COURT-APPROVAL OF NOTICE] to the present.

> **IV. YOUR RIGHT TO PARTICIPATE IN THIS SUIT**
>
> If you fit the definition above, you may join this suit (that is, you may "opt in") by returning your completed and signed "Opt-in Consent Form" … . If you file an "Opt-In Consent Form," your continued right to participate in this suit may depend upon a later decision by the Court that you and the Named Plaintiff are actually "similarly situated" in accordance with federal law.
>
> …

(*Id.* at pp. 1-2.)

Despite acknowledging that "[c]ourts must 'rigorously' enforce arbitration agreements according to their terms" and that under the FAA "an arbitration clause 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract'"; and despite the district court's earlier decision to address the enforceability of the MAAs at the conditional certification stage, the court nevertheless approved the improper notice and concluded that it "will determine whether to exclude CSMs who signed [MAAs] at the conclusion of discovery, when it can properly analyze the validity of" the agreements. (A-30, A-33.)

In its March 22, 2019 Order, the district court also denied Facebook's motion for summary judgment, finding the material facts relative to the Highly Compensated Exemption to be disputed. (A-15-23.)

F. Facebook Moves for Interlocutory Appeal

On March 28, 2019, Facebook filed an emergency motion for a stay and interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Dkt. #65 (Def.'s Emergency Mot. for Stay and Mot. To Certify § 1292(b) Interlocutory Appeal).) The district court granted

a temporary stay pending a determination of the motion for interlocutory appeal. (Dkt. #67 (Minute Entry for Mar. 29, 2019 Hr'g); Dkt. #83 (Tr. of Proceedings held on March 29, 2019).) In her opposition, Plaintiff did not challenge the validity of the MAAs, and at the April 9, 2019, hearing, the district court granted Facebook's motion for certification pursuant to 28 U.S.C. § 1292(b). (Dkt. #75 (Minute Entry for Apr. 9, 2019 Hr'g); Dkt. #78 (Tr. of Proceedings held on April 9, 2019).) The district court also entered a stay of the proceedings pending resolution of the interlocutory appeal. (*Id.*) By Order dated April 17, 2019, the district court certified the March 22, 2019 order for interlocutory appeal. (Dkt. #81 (Order Certifying Appeal Under Section 1292(b)).) On May 3, 2019, this Court granted Facebook's Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b).

SUMMARY OF THE ARGUMENT

The district court erred in authorizing Section 216 Notice to be sent to the entire proposed collective of CSMs, the vast majority of whom signed arbitration agreements prohibiting their participation in this action. That decision ignored the Supreme Court's limitation on district court authority with respect to Section 216 Notice: a district court may only facilitate notice to "potential plaintiffs" as part of its "case management" function to efficiently and effectively manage the joinder process. *See Hoffmann-La Roche*, 493 U.S. at 169, 174. The decision below also conflicts with the FAA and the Supreme Court's directive that courts should liberally construe arbitration agreements and "enforce particular arbitration agreements according to their terms"—including waivers of the right to proceed collectively. *See, e.g.*, *Epic Sys.*, 138 S. Ct. at 1621, 1631. The Fifth Circuit recently addressed this very issue and held

that, "to stay within the discretion authorized in *Hoffmann-La Roche*, district courts must respect the existence of arbitration agreements and must decline to notify [employees], who waived their right to proceed collectively, of the pending action." *In re JPMorgan*, 916 F.3d at 503, n.19.

Because Section 216 Notice is sent to the collective at the conclusion of the conditional certification phase, it is the appropriate juncture to determine whether CSMs with arbitration agreements are "potential plaintiffs" who should receive such notice. Given the broad policies of the FAA, the growing body of case law supporting the presumptive validity of and enforceability of arbitration agreements and collective waiver provisions—and in light of Facebook's submission of ***unrebutted*** evidence of the enforceability of these arbitration agreements—the district court should have held that the arbitration employees are not "potential plaintiffs" for the limited purpose of determining the scope of Section 216 Notice. The district court instead presumed these agreements' *invalidity*—with no support in the law or the record for doing so.

The district court was not constrained by concerns of standing or ripeness. Plaintiff had ample opportunity to develop evidence and/or assert arguments challenging the validity of the agreements, but never did so. Under these circumstances, and under the FAA and *Epic Systems,* the MAAs are presumptively valid. Thus, the CSMs who have entered into them are not potential plaintiffs under the *Hoffmann-LaRoche* standard, where the district court should only be ruling on the scope of the Section 216 Notice for purposes of case management. Allowing notice to go to each of the 336

arbitration employees misleadingly stating that they can opt in to the collective, only to prompt motions to compel arbitration of their claims, would undermine the efficiencies contemplated by the FLSA collective mechanism and the thoughtful case management function directed by *Hoffmann-La Roche*. Public policy also supports this upfront determination, as the size of the collective is important for purposes of settlement and leverage.

Finally, the district court erred when it misconstrued the undisputed facts and failed to apply indistinguishable Seventh Circuit precedent that should have disposed of Plaintiff's claims as a matter of law. If the court had properly granted Facebook's motion for summary judgment, which also served as the primary basis for its opposition to Plaintiff's motion for conditional certification, it would have not only disposed of Plaintiff's federal claims but, in doing so, it would have also precluded certification of any collective at all because Plaintiff is the sole individual who has consented to join the FLSA claims in this lawsuit.

ARGUMENT

I. Standard of Review

In this appeal, Facebook challenges the district court's resolution of the interplay between the FAA and the FLSA, as the Supreme Court has interpreted these statutes. Facebook appeals the legal conclusions reached by the district court in determining the scope and content of FLSA notice pursuant to Section 216(b) in light of two controlling U.S. Supreme Court decisions. Moreover, there are no disputed facts regarding the validity of the MAAs, as the district court did not make any factual findings, and Plaintiff has not challenged the enforceability of the MAAs. As such,

this Court reviews the district court's order under a *de novo* standard. *See, e.g.*, *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018) ("We review [] questions of law *de novo*"); *Grede v. FC Stone, LLC*, 867 F.3d 767, 774 (7th Cir. 2017) ("where "no facts are disputed, [] we review *de novo* the district court's decision on this question of law").[8]

II. The District Court Erred by Authorizing Section 216 Notice to CSMs Who Signed Arbitration Agreements With Collective Action Waivers, Thereby Exceeding its Limited Authority Under *Hoffmann-La Roche* and *Epic Systems*

A. Relevant Statutory and Legal Background

1. FLSA Collective Actions and the Role of District Courts at the Conditional Certification Phase

The FLSA permits an action against an employer "by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." 29 U.S.C § 216(b). These suits are referred to as "collective actions." After one employee files a collective action, similarly situated employees may join as party plaintiffs by giving consent in writing. *Id.* District courts have the discretion to authorize and facilitate notice of collective actions to potential plaintiffs. *Hoffmann-La Roche*, 493 U.S. at 169-72.

A collective action typically proceeds in two steps. *Gomez v. PNC Bank, N.A.*, 306 F.R.D. 156, 173 (N.D. Ill. 2014). First, the district court will decide if the collective action should be conditionally certified. *Id.* To establish that conditional certification

[8] Even under a more stringent standard of review, the district court's ruling was in error as facilitation of Section 216 Notice to CSMs who signed MAAs is outside the district court's authority as circumscribed in *Hoffmann-La Roche*.

is appropriate, a plaintiff must make a "modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." *Hudgins v. Total Quality Logistics, LLC*, 16 C 7331, 2016 WL 7426135, at *3 (N.D. Ill. Dec. 23, 2016) (quoting *Terry v. TMX Fin. LLC*, 13 C 6156, 2014 WL 2066713, at *2 (N.D. Ill. May 19, 2014)) (internal quotations omitted). If the plaintiff carries this burden, then the court will conditionally certify the collective action and authorize the plaintiff to give notice to putative members. *See Gomez*, 306 F.R.D. 156 at 173.[9]

The FLSA does not instruct district courts as to their role with respect to the Section 216 Notice procedure. Rather, that guidance is provided by the Supreme Court's decision in *Hoffmann-La Roche*. In that case, the Supreme Court considered the "narrow question whether [] district courts may play any role in prescribing the terms and conditions of communication from the named plaintiffs to the potential members of the class on whose behalf the collective action has been brought." 493 U.S. at 169. The Court concluded that district courts have measured authority to facilitate notice to "potential plaintiffs" under Section 216(b). *Id.* at 169-72. The Court made clear that district court authority in facilitating Section 216 Notice is not "unbridled"; rather, it is "procedural" and "managerial" and extends only to "manag[ing] the process of joining multiple parties in a manner that is orderly[] and sensible" and "accomplished in

[9] After the parties conduct discovery, the defendant may move for "decertification," and the district court determines, factually, whether the employees are similarly situated. *Gomez*, 306 F.R.D. at 174. The standard at the decertification stage is more stringent, akin to that of Rule 23. *Id.*

an efficient and proper way." *Id.* at 170-71, 174. This authority, the Court cautioned, "is distinguishable in form and function from the solicitation of claims."[10] *Id.* at 174. To illustrate the scope of the district court's managerial role in the notice process, the Court explained that case management authority extended to "monitoring [the] preparation and distribution of the notice, … [to] ensure that it is timely, ***accurate***, and informative." *Id.* at 172 (emphasis added); *see also id.* at 171 (district court's involvement in the notice procedure could "counter[]" "the potential for misuse of the [collective action] device, as by ***misleading communications***") (emphasis added).

Consistent with the Supreme Court's mandate in *Hoffmann-La Roche*, this Court has recognized that district court involvement at the conditional certification phase is necessary to effectuate its "case management" function. As this Court held in *Hollins v. Regency Corp.*, 867 F.3d 830 (7th Cir. 2017), "[t]he role of the district court in defining the scope of the potential FLSA collective action is more than ministerial. The named plaintiff is free to allege whatever she wants for her group, but the court must assess that proposed definition …. In exercising this power, district courts do not hesitate to pare down the group or to deny conditional certification altogether." *Id.* at 834.

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[10] A dissent by Justice Scalia in *Hoffmann-La Roche*, joined by then-Chief Justice Rehnquist, expressed deep concern with having district courts involved—at all—in the facilitation of Section 216 Notice. Justice Scalia was alarmed that courts would be "stirring up litigation" through getting involved in *potential* claims by *potential* plaintiffs. *Hoffmann-La Roche*, 493 U.S at 181 (Scalia, J., dissenting). This function, Justice Scalia remarked, was "once exclusively the occupation of disreputable lawyers, roundly condemned by this and all American courts." *Id.*

2. *Epic Systems* and the Supreme Court's Commitment to the FAA Policy Favoring Arbitration and Enforcing Arbitration Agreements as Written

In January 2018, the Supreme Court decided *Epic Systems* and held that arbitration provisions that include collective action waivers, such as those at issue here, are enforceable and presumptively valid with respect to FLSA claims. *See Epic Sys.*, 138 S. Ct. at 1632. *Epic Systems* is the latest Supreme Court precedent to emphasize the FAA's "liberal federal policy favoring arbitration agreements." *Id*. at 1621. The Court further made clear that district courts must "enforce particular arbitration agreements according to their terms," including agreements that waive the right to proceed collectively. *Id.* at 1631–32; *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The Court noted that it has repeatedly "heard and rejected efforts to conjure conflicts between the [Federal] Arbitration Act and other federal statutes" and "has rejected every such effort to date." *Epic Sys.*, 138 S. Ct. at 1627. Any attempt to interpret Section 216 in a way that supplants the FAA's liberal policy in favor of enforcing arbitration agreements should be rejected in light of the Court's admonitions in *Epic Systems.*

B. Consistent with *Hoffmann-La Roche*, the Scope of the Collective Action—and Therefore the Audience for Section 216 Notice—is a Determination That Must be Made at the Conditional Certification Phase

Under the guidelines set forth in *Hoffmann-La Roche*, the conditional certification stage is the appropriate time for the district court to define the collective and ensure

that employees who have no right to be part of the collective do not receive notice.[11] *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 75 (2013) ("The sole consequence of conditional certification is the sending of court-approved written notice to employees, who in turn become parties to a collective action only by filing written consent with the court."). The district court must ensure at the conditional certification phase that the Section 216 Notice is "accurate" and "informative"—and determining whether a notice is "accurate" and "informative" depends largely on ***to whom*** the notice is sent. Notice that tells employees that they have a "right" to proceed in a collective action is neither accurate nor informative where the recipient has entered into an arbitration agreement that waives the right to participate in the collective action. A district court authorizing such notice is acting outside the scope of authority contemplated by *Hoffmann-La Roche*.

The only Circuit to have weighed in on the issue of whether Section 216 Notice should be sent to employees with MAAs following the Supreme Court's *Epic Systems* decision held that, at the conditional certification phase, district courts should not authorize Section 216 Notice to be distributed to employees who signed arbitration agreements. In *In re JPMorgan*, a Chase employee filed an FLSA action on behalf of

[11] Plaintiff herself recognized in her briefing that the purpose of the Section 216 Notice is to inform potential plaintiffs of their right to sue: "Until notice issues, prospective class members remain unaware of this action or their right to pursue a claim …. In order to ensure their rights are protected, these workers must be provided prompt notice of the pendency of this case." (Dkt. #45, at p. 2.) And, as noted, earlier in the case both the district court and Plaintiff agreed that the issue of employees with arbitration agreements should—and would—be dealt with at the conditional certification phase. (Dkt. #54-2, at 4:15-18.)

herself and other call center employees alleging they did not receive proper overtime compensation. At the conditional certification phase, the plaintiffs asked the district court to send notice of the collective to all call center employees. But Chase demonstrated through uncontroverted evidence that 85% of the putative collective had signed binding arbitration agreements in which they waived their rights to join the collective. Plaintiffs did not contest the validity of these arbitration agreements, but the district court conditionally certified the collective and authorized Section 216 Notice to be distributed to all call center employees—even those who had contractually waived their right to join the collective. Chase appealed to the Fifth Circuit, which overturned the district court.

Relying heavily on *Hoffmann-La Roche*, the Fifth Circuit held that, at the conditional certification phase, district courts *do not* have discretion to issue Section 216 Notice to individuals with binding arbitration agreements that include class or collective action waivers. The court confirmed that district courts "do not have unbridled discretion" to issue notices to potential opt-ins:

> *Hoffmann-La Roche* confines district courts' notice-sending authority to notifying potential plaintiffs . . . and it nowhere suggests that employees have a right to receive notice of potential FLSA claims… [T]he purpose of giving discretion to facilitate notice is because of the need for "efficient resolution in one proceeding of common issues." *Id*. at 170, 172–73, 110 S. Ct. 482. Notifying Arbitration Employees reaches into disputes beyond the "one proceeding." And alerting those who cannot ultimately participate in the collective "merely stirs up litigation," which is what *Hoffmann-La Roche* flatly proscribes. *Id.* at 174, 110 S. Ct. 482.

In re JPMorgan, 916 F.3d at 501-502 (footnotes omitted).

The Fifth Circuit further held that, at the conditional certification stage, so long as the employer can demonstrate by a "preponderance of the evidence[] that the employee has entered into a valid arbitration agreement, it is error for a district court to order notice to be sent to that employee as part of any sort of certification." *Id.* at 503. The Fifth Circuit was clear: "to stay within the discretion authorized in *Hoffmann-La Roche*, district courts must respect the existence of arbitration agreements and must decline to notify [employees], who waived their right to proceed collectively, of the pending action." *Id.* at n.19; *see also Zannikos v. Oil Inspections (USA), Inc.*, 605 Fed. App'x 349, 351 (5th Cir. 2015) (noting that the district court had conditionally certified an FLSA collective "of marine superintendents who were employed by Oil Inspections during the prior three years ***and had not signed arbitration agreements***," which was not appealed) (emphasis added).

The Fifth Circuit's reasoning is consistent with case law from other contexts holding that "gateway matters," such as whether the parties agreed to arbitrate, should be addressed by the district court as early in the case as possible. *See, e.g.*, *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 n.2 (2013). For example, in *Herrington v. Waterstone Mortgage Corp.*, 907 F.3d 502 (7th Cir. 2018), this Court held that the determination of whether a class arbitration mechanism may be invoked is one such "threshold question of arbitrability" that must be addressed by a district court prior to the case being sent to an arbitrator. *Id.* at 510 ("[t]he size of the class—and therefore the amount at stake—does not take shape until the class is certified, and deciding

whether the parties agreed to class or collective arbitration is antecedent to certification"). In the same vein, the gateway issue presented here—*i.e.*, who are the potential plaintiffs to whom Section 216 Notice may be sent—is a threshold matter that district courts should address at the ***front end*** of a case as part of their "managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Hoffmann-La Roche*, 493 U.S. at 170-71.

C. The Court Below Erred by Failing to Address the Arbitration Employees at the Conditional Certification Stage

The district court's facilitation of Section 216 Notice to the entire putative collective of CSMs—rather than just the CSMs without arbitration agreements—exceeded the limited authority proscribed in *Hoffmann-La Roche* and the guidance of *Epic Systems*. The district court did acknowledge the "inherent conflict" between the FAA's "liberal federal policy favoring arbitration agreements" and the "'modest factual showing' that a plaintiff must make to obtain conditional certification under the FLSA." (A-29-30 (internal quotations omitted).) Nevertheless, the court *speculated* that other CSMs *could* come forward and challenge the enforceability of the MAAs, and thus held that enforceability of arbitration agreements should be adjudicated on the merits at the conclusion of discovery. (A-30-33.) This approach is inconsistent with *Hoffmann-La Roche* and *Epic Systems* and stretches the court's case management function far beyond the purpose of Section 216 as a joinder mechanism intended to streamline the proceedings.

1. Where, as Here, Evidence of Arbitration Agreements' Validity is Unrebutted, the District Court Should Have Treated the Agreements as Presumptively Valid for the Purpose of Section 216 Notice.

The district court erred in treating CSMs with MAAs as "potential plaintiffs" who should receive Section 216 Notice because the record contained ***unrebutted*** evidence that the arbitration agreements were valid and enforceable. Facebook presented the district court with evidence that the vast majority of the proposed collective received, accepted, and signed arbitration agreements. Specifically, Facebook submitted the following unchallenged evidence:

- templates of the two arbitration agreements signed by 78% of the proposed collective, showing the terms of the agreements including *mutuality* of the agreement to arbitrate (Dkt. # 27-2, 27-3);
- testimony that, in approximately November 2013, Facebook began offering a Mutual Arbitration Agreement and Class Action Waiver (which was later replaced with a Mutual Arbitration Agreement) "to all newly-hired CSMs during the onboarding process" and that these agreements contained collective action waivers (Dkt. #54-1 at ¶¶ 5, 7);
- testimony that "[e]ach newly-hired CSM's agreement to the [MAA] was a mandatory condition of their employment from November 2014 until January, 2017," at which point "Facebook gave newly-hired CSMs the choice to opt-out of the entire [MAA] by signing a form provided" (*Id.* at ¶ 10); and

- testimony that at least 336 of the 428 CSMs employed at IC levels 3 or 4 between November 29, 2015 and April 2019 have executed MAAs. (Dkt. #74 Ex. 1, ¶ 6).

District courts have found such evidence to be sufficient to establish presumptive validity of arbitration agreements for purposes of scope of Section 216 Notice. *See, e.g.*, *Lin v. Everyday Beauty Amore Inc.*, 18-cv-729 (BMC), 2018 WL 6492741, at *5 (E.D.N.Y. Dec. 10, 2018) (where FLSA defendant provided court with template arbitration agreement, and submitted "attestation that every retail sales employee has signed this provision as a condition of new or continued employment," that was sufficient evidence to find those employees not similarly situated to named plaintiffs and excise them from receipt of Section 216 Notice).

Here, Plaintiff never challenged the agreements nor objected to the evidence on any grounds. Plaintiff deposed Ms. Hickman, Facebook's designated Rule 30(b)(6) witness, but did not attack or question the arbitration agreements or any of their terms. (Dkt. #74 Ex. 1, ¶ 7.) Plaintiff even filed a reply responding to Facebook's opposition to conditional certification to which the December 2018 Hickman Declaration was attached without addressing—let alone challenging—any of the evidence of enforceability set forth in the declaration. In this circumstance, the district court should have held the arbitration agreements to be presumptively valid to justify withholding notice from the CSMs who had signed MAAs. *See, e.g.*, *In re JPMorgan*, 916 F.3d at 503, n. 17 ("We assume that in the ordinary case, as here, the party or parties seeking

the collective action would not raise a genuine dispute as to the existence of an arbitration agreement, thus obviating the need for a preponderance determination as to that employee.").

Instead, despite this clear and unchallenged record evidence, the district court found it premature to excise the arbitration employees from distribution of the Section 216 Notice, holding that enforceability of the agreements was a merits determination that was not suited for the conditional certification phase.[12] In so ruling, the district court treated the arbitration agreements as *presumptively invalid* at the conditional certification phase. There is simply no precedent for doing so.

The district court's *presumption* that the MAAs are invalid is contrary to the FAA—which expressly states that, in the absence of a raised defense, an arbitration provision "shall be valid, irrevocable, and enforceable." 9 U.S.C. sec. 2; *see also Hoffman v. Citibank (South Dakota), N.A.*, 546 F.3d 1078, 1082 (9th Cir. 2008) ("arbitration agreement[s] governed by the FAA [are] presumed to be valid and enforceable"); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 473 (5th Cir. 2002) (noting that "the Supreme Court has read the FAA to establish a presumption in favor of the enforceability of contractual arbitration agreements"); *Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321, 1324 (11th Cir. 2001) ("The FAA explicitly makes predispute arbitration agreements presumptively enforceable if they 'evidence a transaction involving commerce'"); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997)

[12] Moreover, these necessarily individualized defenses that the district court anticipated only serve to demonstrate that any CSMs who would seek to avoid their MAA are not similarly situated to Plaintiff.

(under the FAA, "there is a strong presumption in favor of the validity of arbitration agreements").

The district court's *presumption* of invalidity is also inconsistent with the body of case law culminating with *Epic Systems* directing that arbitration agreements be "rigorously enforced" and that arbitration agreements be "favor[ed]"—liberally. Given the broad policies of the FAA which the Supreme Court has repeatedly re-enforced, and the growing body of case law supporting the validity of and enforceability of arbitration agreements, and in light of the purpose of the conditional certification phase, where, like Facebook, a defendant introduces evidence of valid arbitration agreements, district courts should apply a rebuttable presumption that those arbitration agreements are enforceable and valid—for nothing more than the purpose of determining the scope of Section 216 Notice.

Moreover, the district court's *presumption* of invalidity undermines the purpose of and overstates the role of the district court at the conditional certification phase. At this juncture, the district court would not be making a definitive determination about whether the arbitration agreements are ultimately enforceable. Instead, the court's role is only in its case management capacity to decide to whom to send Section 216 Notice—and where there is unrebutted evidence of valid arbitration agreements in the collective, preventing these CSMs from receiving notice is important to ensure that the FLSA collective mechanism is not abused, that putative plaintiffs do not receive "misleading communications," and that the notice is "timely, accurate, and informative." *Hoffmann-La Roche* at 171-72.

Indeed, one can readily imagine conditions under which an FLSA plaintiff could rebut a presumption of validity at the conditional certification phase. Plaintiff has suggested that she would not have standing to contest any of this evidence.[13] But named plaintiffs in FLSA collective actions have made such arguments. *See, e.g., Camp v. Bimbo Bakeries USA, Inc.*, 1:18-cv-00378-SM, 2019 WL 1472586, at *3 (D.N.H. Apr. 3, 2019) ("Here, however, the plaintiffs [who were not themselves bound by arbitration agreements] contest both the existence and the enforceability of any arbitration agreements [binding putative collective members]."); *Lin*, 2018 WL 6492741, at *4 (FLSA named plaintiffs argued at the conditional certification phase that putative collective members' arbitration agreements were facially invalid because employees cannot waive their FLSA rights by contract, including collective action rights). A named plaintiff could also challenge an arbitration agreement on its face, *i.e.*, for lack of consideration or unconscionability—though here, the MAAs are mutual and were only offered to newly-hired CSMs, with the clear consideration being new employment. And in light of *Epic Systems*, a plaintiff may no longer challenge arbitration agreements solely on the ground that class action waivers are unenforceable.

[13] In any event, Plaintiff has waived her standing argument by conceding before the district court that the issue of whether Section 216 Notice would be sent to CSMs with arbitration agreements would be appropriately dealt with at the conditional certification phase—not when the arbitration employees opted in to the collective. (Dkt. #54-2, at 4:15-18.) Moreover, Plaintiff failed to raise this argument in her conditional certification briefing.

More likely is a situation where a defendant fails to present sufficient evidence of arbitration agreement validity in the first instance. Indeed, it was on this ground that the district court in *Bimbo Bakeries* refused to reconsider a ruling allowing Section 216 Notice to be distributed to a collective including employees who had allegedly signed arbitration agreements. Importantly, in *Bimbo*, the defendant failed to introduce *any* evidence—not even an affidavit—showing that members of the collective had signed arbitration agreements. *Bimbo Bakeries*, 2019 WL 147286, at *3. The defendant simply said in its briefing that there were such agreements among the putative collective. *Id.* But the *Bimbo* court acknowledged that where there is an "absence of any disagreement about the existence or enforceability of [] arbitration agreements, it is not surprising" for a court to prohibit sending Section 216 Notice to employees who signed such agreements. *Id.* at *3. The instant case is precisely that alternative scenario envisioned by the *Bimbo* court: Facebook has presented evidence of the validity of the agreements, and Plaintiff has not challenged that evidence. *See also In re JPMorgan*, 916 F.3d at 503 n.17 ("We assume that in the ordinary case, as here, the party or parties seeking the collective action would not raise a genuine dispute as to the existence of an arbitration agreement, thus obviating the need for a preponderance determination as to that employee.").

2. The District Court's Suggestion That it Cannot Adjudicate the Scope of Notice Issue Without the Individual, Signed Arbitration Agreements Before it is Wrong and Would Turn *Hoffmann-La Roche* on its Head.

The district court also erred in holding that it could not make a determination as to the scope of the Section 216 Notice without the arbitration agreements—and therefore the parties to those agreements—before the court. The only way for the CSMs with MAAs to be before the court at the conditional certification stage would be for Facebook to move to compel arbitration against each and every CSM with an MAA. But that would be both absurd and spectacularly inefficient. None of these CSMs have sued Facebook. And Facebook strongly believes there are no litigable issues with the CSMs regarding FLSA claims. Getting around the district court's concern and ensuring that the Section 216 Notice is properly circumscribed would thus require Facebook to commence an action against parties who have not sued Facebook, do not have a claim against Facebook, and against whom Facebook has no claims. Moreover, it would be impossible for Facebook to bring such a claim in the district court because it is subject to the MAAs, which require arbitration.

This would be the opposite of efficient case management; it is the creation of litigation—additional cases—that would not otherwise have ever come into being. This result would be even more troubling than the valid concern Justice Scalia expressed in his *Hoffmann-La Roche* dissent about the court "stirring up litigation" in authorizing notice to putative collective members. This would be the court requiring Facebook to stir up litigation ***against its will***.

In *In re JPMorgan*, the Fifth Circuit addressed this issue head on, holding that the district court should fashion a conditional collective that excludes those with arbitration agreements and collective action waivers—even without each and every arbitration agreement before it. As the court held, "Chase's failure to move to compel arbitration [does not] doom its petition." Rather, "to stay within the discretion authorized in *Hoffmann-La Roche*, district courts must respect the existence of arbitration agreements and must decline to notify arbitration employees, who waived their right to proceed collectively, of the pending action. … Under *Hoffmann-La Roche*, district courts do not have the discretion to order that arbitration employees receive notice of the action." *In re JPMorgan*, 916 F.3d at 503, n.19.

In the alternative, if Section 216 Notice is sent to the hundreds of CSMs with arbitration agreements and some or all of them attempt to join the collective action, then Facebook would—at that point—need to move to compel arbitration against all of them. In *In re JPMorgan*, the Fifth Circuit noted that sending notice to "arbitration employees" would go far beyond anything the Supreme Court envisioned in *Hoffmann-La Roche*, where the Court emphasized that the purpose of Section 216 Notice was the "efficient resolution in *one proceeding* of common issues." *Id.* at 502 (citing *Hoffmann-La Roche,* 493 U.S. at 170 (emphasis added)). Because of the specter of stirring up additional arbitrations, the *In re JPMorgan* court made clear that giving notice to "arbitration employees" improperly "reaches into disputes beyond the 'one proceeding.'" *Id*.

Either way, Facebook would be in the position of having to move to compel arbitrations that otherwise would never have existed. This result is the opposite of the good case management demanded by *Hoffmann-La Roche*.

3. Plaintiff's Ripeness Concerns are Misplaced

Plaintiff has argued that Facebook's challenge to the scope of Section 216 Notice is unripe because the CSMs with MAAs have not yet opted in to the collective. Plaintiff is wrong. There is only one issue Facebook is asking the district court to resolve: the proper scope of those who should receive Section 216(b) Notice. ***That*** issue is ripe, because that is what district courts are tasked with determining at the conditional certification phase. The district court only has authority to send notice to "potential plaintiffs," and CSMs with arbitration agreements that include collective action waivers (especially when the existence of these agreements is unchallenged) are not "potential plaintiffs." A district court's decision to exclude arbitration employees from receiving such notice would therefore not be an "advisory opinion."

Importantly, in deciding the scope of Section 216 Notice, the district court is not adjudicating the claims of the putative collective members, compelling any employees to arbitration, or making any final, definitive pronouncements regarding the validity or enforceability of any arbitration agreements.[14] Instead, the district court would be exercising its case management authority to simply exclude those employees from

[14] In opposing interlocutory review, Plaintiff made the strange and completely unsupported argument that Facebook may not even elect to enforce its arbitration agreements with CSMs. But that is beyond speculative and cannot rebut the evidence Facebook proffered showing the enforceability of the arbitration agreements.

receiving Section 216(b) notice because they are not "potential plaintiffs" and it would not be "accurate" or "informative" for these CSMs to receive notice.

4. It is Good Public Policy for the Notice Class not to Include CSMs With Arbitration Agreements

Public policy considerations strongly favor excluding CSMs who signed MAAs from the Section 216 Notice. As an initial matter, an artificially inflated collective would greatly expand the scope of the proceedings, discovery, and motion practice and would improperly amplify settlement pressure. *See*, *e.g.*, *Epic Sys.*, 138 S. Ct. at 1632 (noting that collective actions "can unfairly 'place pressure on the defendant to settle even unmeritorious claims'") (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445, n.3 (2010) (Ginsburg, J. dissenting)); *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995); Matthew W. Lampe, E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 Lab. Law. 311, 315 (2005) ("[E]arly-stage, court-facilitated notice … is a tremendous advantage for plaintiffs" and "may leverage significant settlements even in marginal cases."). By Facebook's calculation, the conditionally certified collective includes 428 members, *336 of whom have signed MAAs*. (Dkt. #74 Ex. 1, ¶ 6.) There is a world of difference between a collective with 428 potential opt-ins and one with 92.

Moreover, over-inclusion of the class to whom Section 216 Notice is sent undermines the purpose of the FLSA collective mechanism, which is to have an efficient, streamlined process for claims under the FLSA. Indeed, if Plaintiff is permitted to proceed with the proposed notice, ***78%*** of the conditionally certified collective will be

misinformed that they may join in a FLSA collective action in which they cannot actually participate. The next phase of this case would inevitably entail extensive motion practice, including potentially hundreds of motions to compel arbitration. That entire process would be lengthy, expensive, and invasive. And it would be the antithesis of the efficiencies an FLSA collective action are intended to create.

A district court in New York recently refused to send Section 216 Notice to a putative collective that included employees who had signed arbitration agreements (where the defendant submitted evidence of their presumptive enforceability). As that court explained, "It would waste everyone's time and resources to conditionally certify a group of individuals that the Court is virtually certain to decertify at step two. This is not to mention the risk of confusion to and subsequent disappointment of the employees who have signed the arbitration agreement. … Providing notice to them, therefore, would be futile." *Lin*, 2018 WL 6492741 at *4-5.

III. In any Event, There is no FLSA Issue Because the Sole Plaintiff in This Case is Exempt From the FLSA Under the HCE Exemption and has no Cause of Action Under the FLSA.

Setting aside the conditional certification errors, the district court further erred in its March 22, 2019 order by denying Facebook's motion for summary judgment, which served as the primary basis for Facebook's opposition to Plaintiff's motion for conditional certification in its entirety. In its motion for summary judgment, Facebook argued for dismissal of Plaintiff's FLSA claims under the Highly Compensated

Exemption.[15] In the same Order granting conditional certification, the district court denied summary judgment to Facebook, ignoring the undisputed evidence demonstrating that Plaintiff met each element of the HCE exemption. (A-11-A-23.) This Court can and should reverse. *See United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609 (7th Cir. 2000) ("[A]n appeal under [29 U.S.C.] 1292 brings up the whole certified order … rather than just the legal issue that led to certification.") (internal citations omitted).

As a threshold matter, there is no question that Plaintiff, whose annual compensation ranged from $130,000 to more than $183,000 each year during her employment with Facebook, met and far exceeded the $100,000 per year threshold for application of the HCE exemption. (Dkt. #51 at ¶ 18, Dkt. #57 (Pl.'s Local Rule 56.1(b)(3) Response to Def.'s Statement of Undisputed Facts), at ¶ 18.) Nor is there any dispute that Plaintiff's duties constituted "office work" and not "manual labor." (Dkt. #51 at ¶ 19, Dkt. #57 at ¶ 19.)

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[15] The FLSA provides a more streamlined test for "highly compensated employees" under which the ***"high level of compensation is a strong indicator of an employee's exempt status***, thus eliminating the need for a detailed analysis of the employee's job duties." 29 C.F.R. § 541.601(c) (emphasis added). To qualify for the HCE exemption, Facebook needed to prove only that Plaintiff (1) was paid more than $100,000 per year; and (2) that Plaintiff ***either*** customarily and regularly performed at least one administratively exempt duty; ***or*** that she customarily and regularly exercised discretion in her performance of her duties. *See Zelenika v. Commonwealth Edison Co.*, 09 C 2946, 2012 WL 3005375, at *12 (N.D. Ill. July 23, 2012). "The phrase 'customarily and regularly' means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed 'customarily and regularly' includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks." 29 C.F.R. § 541.701.

The facts are also clear with regard to Plaintiff's customary and regular exercise of discretion[16] in performance of those duties. By her own testimony, Plaintiff made ***recommendations*** to Facebook's clients about how to best allocate their advertising dollars on Facebook; she was responsible for ***troubleshooting*** client issues and ***devising*** solutions for their advertising problems; and she was the point person for Facebook's clients whereby she was expected to ***assess*** their needs and ***identify*** which internal partners within the Facebook organization could best resolve whatever issues arose. (Dkt. #50 at ¶¶ 31-37, 49-79.) Plaintiff also testified repeatedly that she, after considering the available options, either independently or in concert with others on her team, made recommendations to clients based on these problem-solving efforts. (*Id.* at ¶¶ 26, 28, 31, 43, 50-52, 61.)

These duties surely constitute discretion and judgment, by the common and legal meanings of those words and undoubtedly under Seventh Circuit precedent. A comparison with Seventh Circuit precedent such as *Verkuilen v. MediaBank, LLC* and

[16] "In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a). This "implies that the employee has authority to make an independent choice, free from immediate direction or supervision." 29 C.F.R. § 541.202(c). However, it "does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action." *Id.*; *see also Blanchar*, 736 F.3d at 758 (duties in promoting sales, advising sales staff, and fielding questions required the exercise of "a great deal of discretion and independent judgment" even though he lacked final-decisionmaking authority).

Schaefer-LaRose v. Eli Lily & Co., cases in which the plaintiffs' jobs were meaningfully indistinguishable from Plaintiff's job, underscores that inexorable conclusion.[17] *See* 29 C.F.R. § 541.202(a); *Verkuilen v. MediaBank, LLC*, 646 F.3d 979, 982 (7th Cir. 2011) (holding that an account manager at a software company who "[i]dentif[ied] customers' needs, translat[ed] them into specifications to be implemented by the developers, [and] assist[ed] the customers in implementing the solutions" qualified for the administrative exemption); *Schaefer-LaRose v. Eli-Lily & Co.*, 679 F.3d 560, 582 (7th Cir. 2012) (although pharmaceutical sales representatives were required to deliver their employer's messages with precision, core function of their duties required them to tailor their messages to respond to changing circumstances); *Verkuilen v. Mediabank, LLC*, 09 C 3527, 2010 WL 3003860, at *2 (N.D. Ill. Jul. 27, 2010) ("when confronted with a client's problem in using [the] software, Verkuilen determined the nature of the problem and how to handle it").

Moreover, each of the foregoing duties were of critical importance to Facebook and its economic success. The better Plaintiff analyzed campaign performance data, identified and troubleshot issues or offered solutions, extracted insights, and translated insights into actionable recommendations to help her clients realize more return on their investment, the more her clients were incentivized to invest even more of their

[17] Notably, despite her repeated claims that she did not have discretion, Plaintiff testified she believed she was performing at an IC5 level, a classification that imposes an even higher obligation upon incumbents to operate autonomously and exercise sound judgment than upon employees in Plaintiff's IC4 position (and which falls outside of the collective definition). (Dkt. #50 at ¶ 80.)

advertising dollars in Facebook. Thus, she not only exercised discretion, she did so with respect to "matters of significance." *See Verkuilen*, 2010 WL 3003860, at *3 (employee who was the primary customer contact for important company clients and helped to resolve problems those clients had using the company's software was found to have exercised discretion with respect to matters of significance.)

While the analysis should end there because Facebook was only required to show that Plaintiff ***either*** regularly exercised discretion **or** customarily and regularly performed ***just one*** administrative duty, the record shows that Facebook succeeded on both fronts. Her primary job duty[18] as a CSM was to promote the sale of Facebook's suite of advertising products through consultation[19] with its clients and partnership with internal experts. (Dkt. #50 at ¶¶ 25-79.) Plaintiff was the point person for Facebook's clients and the expert on Facebook's products and solutions, expected to leverage her industry and client knowledge to understand how those clients could use those products to grow their business. (*Id.* at ¶¶ 26-30, 33, 38-42, 50.) She advised

[18] "An 'employee's primary duty is that which is of principal importance to the employer, rather than collateral tasks which may take up more than fifty percent of his or her time.'" *Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 541 (7th Cir. 1999) *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965 (7th Cir. 2013) (quoting *Reich v. State of Wyo.*, 993 F.2d 739, 742 (10th Cir. 1993)).

[19] Plaintiff conceded that she gave clients advice and recommendations about their advertising spend on Facebook, but denies that makes her a "consultant." (Dkt. #50 at ¶¶ 26, 28, 31, 43, 50-52, 61.) Merriam Webster defines "consulting" as "providing professional or expert advice," which is precisely what Plaintiff did as a CSM. (*See, e.g.,* Dkt. #50 at ¶¶ 26, 28, 31, 43, 48, 50-52, 61 (each discussing Plaintiff's role in advising clients); Miriam-Webster Online Dictionary (https://www.merriam-webster.com/dictionary/consulting).)

and coordinated with Facebook clients regarding the various product offerings, all in an effort to help those clients maximize their advertising spend on Facebook, thus encouraging them to invest more advertising dollars in the platform (or prevent a loss of revenue). (*Id.*)[20] This is precisely the type of account management work that this Court has repeatedly deemed administratively exempt. *See, e.g., Schaefer-LaRose*, 679 F.3d at 574 (employees who support and promote sales satisfy the "directly related" prong); *Blanchar v. Standard Ins. Co.*, 736 F.3d 753, 757 (7th Cir. 2013) ("work aimed at promoting customer sales generally were directly related to the management and general business operations of the company"); *Verkuilen,* 646 F.3d at 981 (duties were directly related to general business operations both of employer and of employer's advertising agency clients where employee acted as intermediary between clients and company's software developers).

Plaintiff's duties are far too similar to the duties of the plaintiff in *Verkuilen v. Mediabank, LLC*, whom this Court observed was "a picture perfect example of a worker for whom the [FLSA's] overtime provision is ***not*** intended," to support the district court's conclusions. 646 F.3d at 981 (emphasis added). In *Verkuilen*, the plaintiff worked as an account manager for a software company that provided computer software to advertising agencies. *Id.* Exactly like Plaintiff-Appellee, Verkuilen was a

[20] *See, e.g.,* Dkt. #50 at ¶ 26 (advice and consulting serves to increase revenue), SOF 33 (meeting with clients serves to generate revenue), ¶¶ 38-42 (devising client solutions serves to generate revenue), ¶ 50 (campaign optimization and upselling promote revenue), and ¶ 70 (troubleshooting problems with existing campaigns prevents a loss of committed revenue).

bridge between the software developers and the customers, helping to determine the customers' needs, then relaying those needs to the developers and so assisting in the customization of the software, and finally helping customers use the customized software." *Id.* In holding that the exemption applied, this Court found "[t]he complexity and variance are where the account manager comes in. The manager of a customer's account has to learn about the customer's business and help [defendant's] software engineers determine how its software can be adapted to the customer's needs." *Id.* at 982.

The undisputed facts here mandate the same conclusion as *Verkuilen*. Plaintiff admittedly served as a point person and product expert for Facebook's clients at every stage of their campaigns in an ever-evolving social media/digital advertising environment. (Dkt #50 at ¶¶ 27-79.) She was a trusted advisor to Facebook's clients, tasked with learning her clients' business and gaining an intimate understanding of their advertising goals, working with the client to identify and understand their objectives, digest that information and decide which of Facebook's internal partners to engage in order to meet those objectives. (*Id.* at ¶¶ 25-47.) Plaintiff testified that she was the "glue" between these teams and the client; her job was to collaborate with those partners to develop and ultimately implement solutions, all the while educating the client about how the solution can help them meet their goals. (*Id.* at ¶¶ 25-58; 68-77.) As such, there is no genuine dispute that Plaintiff's job duties satisfy the "directly related" prong of the administrative employee exemption.

CONCLUSION

For the reasons set forth herein, Defendant-Appellant, Facebook, Inc., respectfully requests that the Court enter an order (1) prohibiting Section 216 Notice to be issued to CSMs who have signed MAAs; (2) granting Facebook's motion for summary judgment; and (3) granting any further relief that the Court finds just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32, because this document contains 11,637 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 12-point Century Schoolbook style font.

Dated: June 26, 2019

/s/Anneliese Wermuth
Anneliese Wermuth,
One of the Attorneys for Appellant

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

/s/Anneliese Wermuth
Anneliese Wermuth,

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2019, the Brief of Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Anneliese Wermuth
Anneliese Wermuth,

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SUSIE BIGGER, individually and on behalf of those similarly situated, **Plaintiff,** **v.** **FACEBOOK, INC.,** **Defendant.**	**Case No. 17 C 7753** **Judge Harry D. Leinenweber**

MEMORANDUM OPINION AND ORDER

This case concerns the Client Solutions Manager ("CSM") position at Facebook, Inc., and whether that role constitutes an "overtime-exempt" position under the Fair Labor Standards Act ("FLSA") and Illinois Minimum Wage Law ("IMWL"). For the reasons stated herein, Defendant's Motion for Summary Judgment (Dkt. No. 48) is denied. Plaintiff's Motion for Conditional Certification of an FLSA collective action (Dkt. No. 45) is granted in part and denied in part.

I. BACKGROUND

Defendant Facebook, Inc. ("Facebook") is a social media company. It generates revenue primarily from selling advertisements that are displayed on its various electronic platforms. (Def.'s Statement of Facts ("SOF") ¶ 5, Dkt. No. 57.)

Facebook offers its clients an array of customization and monitoring options so that each client can precisely target particular demographics in its advertisements. (*Id.*) Facebook employs an array of advertising, marketing, and engineering professionals to shepherd clients through the process of implementing a Facebook advertising campaign. (SOF ¶ 6.) Facebook's sales structure is organized around industries (known at Facebook as "verticals") and sales teams (known as "pods"). (SOF ¶ 7.)

Facebook utilizes a compensation system in which employees are hired at certain designations that indicate their role and compensation level. For example, a manager in human resources might be designated "M-2": "M" for manager and "2" for second level. (Hickman Dep. 40:8-17, Ex. A to Pl.'s Statement of Additional Facts ("SOAF"), Dkt. No. 58-1.) This case concerns the "Individual Contributor" ("IC") (*i.e.*, non-managerial) designation. (SOF ¶ 10.) An IC-1 is an Individual Contributor level 1, an IC-2 is an Individual Contributor level 2, and so on. (*Id.*)

This case concerns a particular position at Facebook — the Client Solutions Manager ("CSM") — whose origin lies in two prior roles that Facebook has since eliminated. Prior to 2014, a sales "pod" included, among other positions, an Account Manager and a Media Solutions Manager ("MeSo"). (SOF ¶ 7.) Account Managers had

a "sales role" in which they were responsible for "upselling" Facebook products. (Hickman Dep. 43:3-22.) "Upselling" is a sales technique in which a seller encourages the customer to purchase additional items or upgrades to make a more profitable sale. (*Id.*) Parties disagree over how exactly to characterize the MeSo role, and the extent to which MeSos were overtime exempt. Facebook contends that MeSos had a sales role as well as "more analytical" duties that included planning, implementing, and optimizing the performance of advertising campaigns. (*Id.* at 41:20-43:22.) In contrast, Plaintiff claims that MeSos performed operational duties, including data entry, troubleshooting bugs in ads, and following up with clients on unpaid invoices. (Bigger Dep. 141:16-149:21.) Plaintiff claims that Facebook classified all MeSos as overtime exempt (Bigger Dep. 131:16-132:3); Facebook contends that only MeSos at certain IC levels were exempt. (Hickman Dep. 36:21-24.)

Facebook hired Plaintiff Susie Bigger ("Bigger") in April 2013 to work in its Chicago office as an Account Manager in the Financial Services "vertical" (industry team). (SOF ¶ 14; Bigger Dep. 74:1-5.) Bigger received an IC-4 designation, which rendered her exempt from overtime compensation. (SOF ¶ 15.)

In late 2013, the Account Manager and MeSo positions were merged into a new role called Client Solutions Manager ("CSM").

(SOF ¶ 8.) Bigger was one of many who assumed that position. (SOF ¶ 16.) Some CSMs were classified as exempt and some as nonexempt. (SOF ¶ 10.) CSMs at IC-1 and IC-2 are non-exempt, overtime eligible positions, and CSMs at IC-3 and above are overtime exempt. (*Id.*) Facebook employees at higher IC levels are expected to act with increasingly higher levels of independence, discretion, and autonomy. (SOF ¶ 10.) However, the "core job responsibilities" of a CSM are "the same" across all IC levels. (Hickman Dep. 61:22-25.) Regardless of office location, all CSMs are employed full-time and have the same compensation structure, which is approximately 75% base salary plus 25% commission based on sales quotas. (Hickman Dep. 51:20-25, 87:19-25.)

Bigger retained her IC-4 designation when she became a CSM. (SOF ¶ 15.) Plaintiff claims she worked an average of 60 hours per week as a CSM. (Bigger Dep. 336:5-7.) Due to her IC-4 designation, Facebook classified her as exempt and did not pay her overtime. (*Id.*)

Plaintiff filed suit against Facebook on October 27, 2017, on behalf of herself and other similarly situated CSMs. Plaintiff claims that Facebook wrongly classified her, and all other IC-3 and IC-4 CSMs, as overtime exempt. She brings two counts: (1) a putative 29 U.S.C. § 216(b) collective action for violating the FLSA's overtime provisions, and (2) a putative Federal Rule of

Civil Procedure 23 class action for violating the IMWL's overtime provisions. Plaintiff defines her putative FLSA collective as follows:

> All individuals who were employed by Facebook as Client Solutions Managers at level IC-3 or IC-4 at any location in the United States during the period from three years prior to the entry of the conditional certification order, and as extended by stipulation of the parties, to the present.

Bigger now moves for conditional certification of her proposed FLSA collective. Facebook moves for summary judgment, contending that it cannot be held liable under the FLSA and IMWL as a matter of law. The Court will begin with its analysis of Facebook's summary judgment motion.

II. SUMMARY JUDGMENT

A. Incomplete Discovery

As a preliminary matter, Plaintiff contends that Facebook's summary judgment motion is premature. The parties originally planned to conduct discovery in two phases, with one phase to precede and another to follow Plaintiff's Motion for Conditional Certification, as is customary in FLSA collective actions. (Pl.'s Resp. to Def.'s Mot. for Summ. J. at 9, Dkt. No. 56; Decl. of Teresa Becvar, Ex. A to Pl.'s Resp. to Def.'s Mot. for Summ. J., Dkt. No. 56-1.) To that end, Plaintiff deposed two current Facebook employees—Nicolle Hickman and Ginger Melrose—in October 2018. Facebook deposed Bigger immediately thereafter. As far as the Court

can tell, those three are the only depositions that have taken place to date. More importantly, they are the only depositions that are presently on the record before the Court.

Plaintiff filed her Motion for Conditional Certification on November 8, 2018. On November 15, 2018, Facebook filed its Motion for Summary Judgment, apparently to Plaintiff's great consternation, as Facebook had not informed her that it was planning to file such a motion. (*See* Becvar Decl.) Of course, Facebook was under no obligation to keep Plaintiff abreast of its case strategy.

Plaintiff argues that Facebook's summary judgment motion is premature because discovery is not complete in this case. But procedurally, the motion is timely. The federal rules do not require that discovery always be complete (or even underway) before summary judgment can be granted. *Larsen v. Elk Grove Vill., Ill.*, 433 F. App'x 470, 472 (7th Cir. 2011). FED. R. CIV. P. 56(b) allows a party to file a motion for summary judgment "at any time" until 30 days after the close of discovery, unless the court orders otherwise. FED. R. CIV. P. 56(b). Because discovery has not closed, and the Court has not issued any restrictions on when parties may file for summary judgment, Facebook's Motion is properly before the Court.

In Plaintiff's response to Facebook's Motion for Summary Judgment, she invokes Rule 56(d), arguing that the Court must deny or continue Facebook's summary judgment motion in order for Plaintiff to conduct further discovery before responding. Under Rule 56(d), if a nonmovant shows by affidavit or declaration that, for specified reasons, she cannot present facts essential to justify her opposition, a court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order. FED. R. CIV. P. 56(d). Plaintiff attached a declaration by her counsel to her summary judgment response. (*See* Becvar Decl.) The declaration sets forth the various documents that Facebook has yet to produce, which Plaintiff's counsel believes will raise a genuine issue of material fact as to Facebook's exemption defenses. (Becvar Decl. ¶ 7.) Plaintiff's counsel also names individuals that Plaintiff has yet to depose who she believes could also raise a genuine issue of material fact. (Becvar Decl. ¶ 8.)

Facebook argues that Plaintiff's Rule 56(d) argument is unavailing because she has, to this day, not made any motion under that rule. The Seventh Circuit has made clear that Rule 56(d) requires a motion. *See Deere & Co. v. Ohio Gear*, 462 F.3d 701, 706 (7th Cir. 2006) ("When a party thinks it needs additional discovery

in order to oppose a motion for summary judgment … Rule 56(f) [now Rule 56(d)] provides a simple procedure for requesting relief: move for a continuance and submit an affidavit explaining why the additional discovery is necessary."); *Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996) ("When a party is unable to gather the materials required by Rule 56(e), the proper course is to move for a continuance under Rule 56(f) [now Rule 56(d)]."). A Rule 56(d) motion "must state the reasons why the party cannot adequately respond to the summary judgment motion without further discovery and must support those reasons by affidavit." *Ohio Gear*, 462 F.3d at 706. The preceding opinions refer to an earlier version of Rule 56, in which the current 56(d) provision was located in 56(f). Because no substantive change to this provision occurred when the rest of Rule 56 was rewritten, cases applying Rule 56(f) remain controlling authority. *See* 10B Fed. Prac. & Proc. Civ. § 2741 (4th ed.).

Plaintiff has not made any motion under Rule 56(d), which constitutes procedural error. *See Spierer v. Rossman*, No. 1:13-CV-00991, 2014 WL 4908023, at *7 (S.D. Ind. Sept. 30, 2014) (finding that plaintiffs committed procedural error by filing a Rule 56(d) affidavit contemporaneously with their response to summary judgment, rather than requesting 56(d) relief *instead* of responding to the summary judgment motion), *aff'd*, 798 F.3d 502

(7th Cir. 2015). Thus, Plaintiff's Rule 56(d) arguments and declaration are not properly before the Court and will be disregarded. The Court will judge Facebook's summary judgment motion on the record as it stands.

B. Legal Standard

Summary judgment is appropriate where there is "no genuine dispute as to any material fact." FED. R. CIV. P. 56(a). A dispute is "genuine" if the evidence would permit a reasonable jury to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the moving party satisfies its burden, the non-movant must present facts to show a genuine dispute exists to avoid summary judgment, which requires that she "do more than simply show that there is some metaphysical doubt as to the material facts." *Sarver v. Experian Info. Sols.*, 390 F.3d 969, 970 (7th Cir. 2004). When evaluating summary judgment motions, courts must view the facts and draw reasonable inferences in the light most favorable to the nonmovant. *Scott v. Harris*, 550 U.S. 372, 378 (2007). But the nonmovant "is only entitled to the benefit of inferences supported by admissible evidence, not those 'supported by only speculation or conjecture.'" *Grant v. Trustees of Ind. Univ.*, 870 F.3d 562, 568 (7th Cir. 2017).

C. FLSA

Under the FLSA, employers must pay their workers overtime wages for each hour worked in excess of 40 hours per week. 29 U.S.C. § 207. Overtime wages constitute payment of at least one and half times the regular rate of pay. *Id.* There are exceptions to the overtime wage requirement, and the burden is on the employer to establish that an employee is covered by an exemption. *Schaefer-LaRose v. Eli Lilly & Co.*, 679 F.3d 560, 571 (7th Cir. 2012). However, the Supreme Court recently rejected the oft-cited proposition that exemptions to the FLSA are construed narrowly against the employers seeking to assert them. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). It held that FLSA exemptions should be given a "fair," rather than narrow, interpretation. *Id.* Additionally, the evaluation of an FLSA claim requires a "thorough, fact-intensive analysis of the employee's employment duties and responsibilities." *Blanchar v. Standard Ins. Co.*, 736 F.3d 753, 756 (7th Cir. 2013) (citation omitted).

Facebook claims that two FLSA exceptions are applicable to Bigger's work as a CSM: (1) the "highly compensated employee" exception, and (2) the "bona fide administrative capacity" exception. The Court will discuss each in turn. And because both Plaintiff and Defendant's Local Rule 56.1 statements of undisputed material facts contain almost exclusively disputed

characterizations about the nature of Bigger's work, the Court will directly cite to the relevant depositions when necessary.

1. Highly Compensated Employee Exception

Facebook claims that Bigger was overtime-exempt under the "highly compensated employee" exception to the FLSA. Under this exception, a "high level of compensation is a strong indicator of an employee's exempt status." 29 C.F.R. § 541.601. An employee who receives a total annual compensation of at least $100,000 is exempt from overtime if she "customarily and regularly perform[ed] any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee." *Id.* Facebook claims that Bigger customarily and regularly performed the exempt duties of an "administrative" employee. Bigger was paid over $100,000 annually throughout her time at Facebook. (SOF ¶ 18.) Thus, Facebook need only demonstrate that Bigger regularly performed one of the two types of duties of an administrative employee: (1) performing work related to Facebook's management or general business operations; or (2) exercising discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200; *Silver v. Townstone Fin., Inc.*, No. 14-CV-1938, 2016 WL 4179095, at *4 (N.D. Ill. Aug. 8, 2016).

An employee satisfies the first category of exempt administrative duties — work related to the employer's management

or general business operations — when she regularly performs work "directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a). The distinction between assisting with running the business and working on a production line or selling a product is referred to as the "production versus staff" dichotomy. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 FR 22122-01 (Apr. 23, 2004); *Schaefer-LaRose v. Eli Lilly & Co.*, 679 F.3d 560, 574 n.22 (7th Cir. 2012). While the production versus staff dichotomy can be difficult to apply in modern service and information industries, *id.*, it is one analytical tool courts can use to determine whether work is directly related to management policies or general business operations. *Schaefer*, 679 F.3d at 574 n.22. Additionally, FLSA regulations provide an illustrative list of "functional areas" in which employees frequently qualify for the administrative exemption, which includes advertising and marketing. 29 C.F.R. § 541.201(b). Facebook contends that Bigger regularly performed several types of work related to Facebook's management or general business operations: (1) promoting sales, (2) marketing, and (3) consulting.

a. Administrative Duties: Promoting Sales

Facebook first argues that Bigger regularly "promoted sales," which the Seventh Circuit has indicated is an administrative duty. *See Schaefer*, 679 F.3d at 574, 577. In *Schaefer-LaRose v. Eli Lily & Co.*, 679 F.3d 560 (7th Cir. 2012), the Seventh Circuit concluded that pharmaceutical sales representatives fall within the administrative exemption to the overtime requirements of the FLSA. *Id.* at 562. The court found that pharmaceutical sales representatives' work is directly related to the general business operations of their company because they "neither produce the employers' products nor generate specific sales, but service the production and sales aspects of the business by communicating the employers' message to physicians." *Id.* at 576-77. *Schaefer* differs from this case in a key respect. Critical to the *Schaefer* court's holding was the fact that, due to strict federal law and medical ethics requirements, pharmaceutical sales representatives do not actually *sell* any pharmaceuticals to physicians, nor do the physicians upon whom they call actually *buy* any pharmaceuticals. *Id.* at 562-63, 575 n. 23 (noting that the sales reps "do not make individual sales" and the "circumstances of pharmaceutical work [are] somewhat unusual, as far as sales and marketing go").

Plaintiff argues that rather than "promoting sales," she made sales, which is not an administrative employee's task. She cites

Reiseck v. Universal Communications of Miami, Inc., 591 F.3d 101 (2d Cir. 2010), in which the Second Circuit considered the FLSA overtime lawsuit of a plaintiff who worked as an advertising salesperson for a free magazine. *Reiseck*, 591 F.3d at 103. That court concluded that an employee making sales to individual customers is a salesperson — not an administrative employee — for purposes of the FLSA. *Id.* at 107. In reconciling the differences between *Schaefer* and *Reiseck*, the Seventh Circuit emphasized that the *Reiseck* plaintiff was involved in "routine individual sales," unlike the *Schaefer* plaintiffs. *Schaefer*, 679 F.3d at 575 n.23.

Plaintiff contends that her work at Facebook was more comparable to the *Reiseck* plaintiff than the *Schaefer* plaintiffs. Facebook's business model is similar to the free magazine at issue in *Reiseck*. Facebook provides its social media platforms to users on a complimentary basis, and advertising sales constitute the majority of its revenue. *See Reiseck*, 591 F.3d at 103. The Seventh Circuit's analysis of *Reiseck* suggests that if Facebook's advertising constitutes its "product," and Bigger sold that "product," she would be a salesperson for FLSA purposes. *See Schaefer*, 679 F.3d at 575 n.23. Furthermore, Plaintiff underscores that "when an employee is engaged in the core function of a business, his or her task is not properly categorized as administrative." *Id.* at 574 (finding that plaintiffs' work

supports the pharmaceutical company's core function but is distinct from it). Therefore, if advertisements are the core function of Facebook's business (as they appear to be from the record), and Bigger sold those ads, she was engaged in the core function of Facebook's business. *Id.*

The material facts as to whether Bigger made sales or "promoted" sales are in dispute. Facebook admits that its business is the sale of advertising. (SOAF ¶ 1.) Nicolle Hickman ("Hickman"), Facebook's Federal Rule of Civil Procedure 30(b)(6) designated deponent, is an "HR programs lead" for Facebook's sales and marketing division. (Hickman Dep. 14:7-21.) Hickman testified that Facebook is an "advertising business" and "the product [it] sell[s] is advertising." (*Id.* at 18:1-9.) Hickman further testified that, prior to the reorganization of its sales team structure in 2013, Facebook used to have two separate sales divisions: "direct sales" and "mid market sales." (*Id.* at 42:19-25; 45:9-23.) Bigger worked in a client-facing sales division. (*Id.* at 17:23-18:13.) Hickman testified that CSMs have "sales quotas," and cannot determine the pricing for Facebook products. (*Id.* at 54:12-20; 55:7-8.)

Facebook's summary judgment briefing is replete with corporate jargon that attempts to obscure the issue of whether Bigger made sales. (*See* Def.'s Mot. for Summ. J. at 4, Dkt. No. 49

(stating that the purpose of Bigger's job was "promoting the sale of Facebook's panoply of digital marketing product offerings to advertisers").) But ultimately, Facebook admits that Bigger's responsibilities included making sales. (*See* SOAF § 3; Hickman Dep. at 88:11-20.) Hickman testified further that CSMs are "responsible for sales with existing clients… [CSMs and Client Partners are] actually both sales which is why they're on commission plans." (Hickman Dep. 88:6-10.) Ultimately, the *Schaefer* opinion was specific to "the particular jobs at issue here in this particular industry," *id.* at 575 n.23, and the undisputed facts are insufficient to show that Bigger's work at Facebook is similar enough to that of the pharmaceutical sales reps in *Schaefer*. Thus, a triable issue of fact remains regarding Defendant's "promoting sales" theory.

b. Administrative Duties: Marketing

Facebook also argues that Bigger regularly performed marketing and consulting work, which generally constitute exempt administrative duties. 29 C.F.R. § 541.201(b). Bigger disputes this characterization. (SOAF ¶ 2.) Bigger claims that, rather than performing marketing and consulting tasks, she performed more rote "operational tasks" like data entry (SOAF ¶ 7); billing clients (SOAF ¶ 6); coordinating client meetings, parties, and meals (SOAF

¶ 15); and ordering and delivering "swag" (Facebook branded merchandise) (*id.*).

First, the Court finds that a genuine issue of material fact exists as to whether Bigger did marketing work. Neither the FLSA regulations nor the parties define "marketing." Facebook only identifies one specific marketing duty that Bigger had: she "develop[ed] marketing plans" for Facebook's clients by engaging "cross functional partners" within Facebook and doing some of her own "internal digging and sleuthing to find material." (Def.'s Mot. for Summ. J. at 5 (citing SOF ¶¶ 38-39)). Bigger counters that she did not "develop marketing plans," but merely pulled advertising templates from Facebook's internal repositories to show to clients. (SOF ¶ 39.) Additionally, Hickman testified that the sales group Bigger worked in was distinct from Facebook's separate Business Marketing Group. (Hickman Dep. 18:14-19:15.) And in its Motion for Summary Judgment, Facebook characterized one of Bigger's duties as "liais[ing]" between clients and Facebook's "marketing sciences team." (Def.'s Mot. for Summ. J. at 9.) Thus, Facebook's own submissions suggest that Facebook's marketing work took place in a different department, of which Bigger was not a part. As such, a factual dispute exists about whether Bigger did marketing work. Facebook's argument fails.

c. Administrative Duties: Consulting

Facebook next argues that Bigger had a "multi-faceted advisory/consultative role" at Facebook. (Def.'s Mot. for Summ. J. at 13.) FLSA regulations provide that acting as an adviser or consultant to an employer's clients may constitute administrative duties. 9 C.F.R. § 541.201(c). Facebook adopts Miriam-Webster's definition of consultant—providing professional or expert advice — and asserts that Bigger was a consultant because "she gave clients advice and recommendations about their advertising spend on Facebook." (Def.'s Mot. for Summ. J. at 13.) Facebook also cites to *Verkuilen v. MediaBank, LLC*, 646 F.3d 979 (7th Cir. 2011), which concerned an account manager at a software company. In that case, the plaintiff did not make individual sales; she was responsible for working with the company's software engineers to determine how software could be adapted to customer's specific needs. *Verkuilen*, 646 F.3d at 982. The court found the plaintiff was a "specialist" and had a "consulting role," and was exempt from overtime under the administrative exception. *Id.* at 982-83. *Verkuilen* is instructive in considering whether an FLSA plaintiff does "consultant" work, but as explained below, the relevant facts for this determination are in dispute.

Facebook's "consultant" argument is largely duplicative of its "promoting sales" claim. (*See* Def.'s Mot. for Summ. J. at 13

(stating that Bigger's primary duty was to "promote the sale of Facebook's suite of advertising products through consultation with its clients.").) The facts that Facebook points to in support of its consultant argument all describe the same essential pattern: to the extent Bigger was "advising" or "consulting" clients, such activities were in furtherance of her role selling, or upselling, Facebook "products" (ads). (SOF ¶¶ 26, 28, 31, 43, 50-52, 61.) The facts do not suggest that Bigger was consulting on advertising campaigns—Facebook's clients had their own advertising agencies. (SOF § 41.) And the "expertise" Facebook claims Bigger had was knowing the scope of Facebook's advertising offerings and matching those products to the clients' needs. (SOF ¶ 27.). This argument is unavailing. If being familiar with the employer's clients' needs and the employer's product list makes one a consultant, every employee who made sales would be a consultant. As the Court has already explained, whether Bigger was making sales or merely promoting them is in dispute. Because Facebook argues that Bigger's "consulting" work was intertwined with promoting sales, its claim is premised on disputed material facts, and fails.

d. Administrative Duties: Exercising Discretion

Facebook next contends that Bigger regularly performed work in the second category of administrative duties: "exercis[ing] discretion and independent judgment with respect to matters of

significance." 29 C.F.R. § 541.200. Discretion and independent judgment implies that the employee "has authority to make an independent choice, free from immediate direction or supervision." 29 C.F.R. § 541.202(c); *Blanchar v. Standard Ins. Co.*, 736 F.3d 753, 757 (7th Cir. 2013). However, this prong does not require that the employee's decisions "have a finality that goes with unlimited authority and a complete absence of review." *Id.*; *Blanchar*, 736 F.3d at 758. Facebook argues that Bigger performed many tasks that satisfy this standard, which can be distilled to: (1) making recommendations to clients about how best to allocate their advertising dollars, (2) deciding what information to relay between clients and other internal Facebook employees, and (3) creating finished products that were presented to clients.

Bigger disputes Facebook's characterization of her work and argues that to the extent she made recommendations to clients, she merely presented materials that she pulled from Facebook's repositories of examples of advertising products. (*See* Bigger Dep. 123:9-20 ("I was not coming up with the solutions. I was not creating the solutions. It was all things that had been provided to us by vertical managers, product managers, industry experts, engineers, measurement teams."); 126:11-19 ("many of the tasks… were already written down, and we had manuals and we had scripts and we had templates to follow").) Further, Bigger emphasizes

that she did not have authority to make independent choices, as all strategic decisions were made "at the team level," and Bigger's supervisor required her to get his approval at all phases of a task. (SOAF §§ 25, 26.) Facebook admits that Bigger did not have the ability to change or create advertising products or solve complex business issues. (SOAF § 19.) However, at one point in her deposition, Bigger stated that she produced client-ready reports "to some degree." (Bigger Dep. 321:8-10.) Thus, it appears that Bigger's work involved some amount of discretion; however, it is unclear whether she exercised that discretion "customarily and regularly" (defined by FLSA regulations as work normally and recurrently performed every workweek, not isolated or one-time tasks, 29 C.F.R. § 541.701) and about matters of significance. Construing the record in the light most favorable to the Bigger, the facts are not sufficiently clear to find that Bigger had the requisite discretion as a matter of law. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

Defendant cites the Seventh Circuit's decision in *Blanchar v. Standard Insurance Company*, 736 F.3d 753 (7th Cir. 2013), to support its contention that Bigger had discretion on matters of significance. The court held in *Blanchar* that the "Director of Sales/Product Manager" for an insurance company was an administrative employee and thus exempt from the FLSA's overtime

provisions. *Blanchar*, 736 F.3d at 759. The *Blanchar* plaintiff did not make sales; rather, he "promoted sales" as did the *Schaefer* plaintiffs. *Id.* at 757. The court found the following duties constituted discretion: promoting sales; training and advising the sales staff; scripting talking points for consultants to use; working largely alone, and meeting with his supervisor only once a year; and using materials he made himself in presentations. *Id.* at 758. The case Defendant cites is factually inapposite.

In reaching its decision, the *Blanchar* court also considered the FLSA regulations, which list factors for courts to consider when determining whether an employee exercised discretion with respect to matters of significance. *Id.* at 757 (citing 29 C.F.R. § 541.202(b)). Factors include whether the employee provides consultation or expert advice to management; whether the employee has authority to formulate, interpret, or implement management policies or operating practices; and whether the employee has authority to waive or deviate from established policies and procedures without prior approval). Facebook does not contend that Bigger's work satisfies any of the § 541.202(b) factors. Additionally, the *Blanchar* court looked to the Department of Labor's 2004 final rule and found that courts can also consider factors set forth therein when assessing discretion. *Id.* at 758 (citing Defining and Delimiting the Exemptions for Executive,

Administrative, Professional, Outside Sales and Computer Employees, 69 FR 22122-01 (Apr. 23, 2004)). Those factors include the employee's personnel responsibilities; advertising or promotion work; freedom from direct supervision; authority to set budgets; duty to anticipate competitive products or services and distinguish them from competitor's products or services; and duty to troubleshoot or problem-solve on behalf of management. 69 FR 22122-01. Some of these factors may cut in Bigger's favor, and some against. Regardless, Facebook failed to measure Bigger's work against those factors. Thus, under *Blanchar*, there remains a genuine dispute of material facts as to Bigger's discretion.

Accordingly, Facebook fails to establish that Plaintiff is overtime exempt under the highly compensated employee test.

2. Bona Fide Administrative Capacity Exception

As an alternative to the highly paid employee test, Defendant seeks to establish that Bigger is exempt from the FLSA's overtime requirements because she was employed in a "bona fide . . . administrative . . . capacity." 29 U.S.C. § 213(a)(1). To prove that this exemption applies, Facebook must establish: (1) Bigger was compensated at least $455 per week on a salary basis; (2) her primary duty entailed office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; *and* (3) her primary duty included the

exercise of discretion and independent judgment with respect to matters of significance. 29 C.F.R. § 541.200. The Court need not perform this inquiry now. Defendant failed to establish that Bigger regularly performed *either* of those two duties as a matter of law. Thus, the Court denies Facebook's Motion for Summary Judgment on Bigger's FLSA claims.

B. IMWL

The Illinois Minimum Wage Law provides the same overtime wage protections to hourly workers as the FLSA. *See* 820 ILCS § 105/4a. As a result of their common purpose and similar language, the two statutes generally require the same analysis. *See Driver v. AppleIllinois, LLC*, 917 F. Supp. 2d 793, 798 (N.D. Ill. 2013) (citing *Condo v. Sysco Corp.*, 1 F.3d 599, 601 n.3, 605 (7th Cir. 1993)). However, the IMWL applies the administrative exemption "as defined by or covered by the [FLSA] and the rules adopted under that Act, *as both exist on March 30, 2003*." 820 ILCS § 105/4a (emphasis added). Thus, for Facebook to prevail on summary judgment of the IMWL claim, it must establish that Plaintiff is overtime exempt under the FLSA exemptions that existed as of March 30, 2003. *Zelenika v. Commonwealth Edison Co.*, No. 09 C 2946, 2012 WL 3005375, at *14 (N.D. Ill. July 23, 2012).

As the Seventh Circuit explained in *Kennedy v. Commonwealth Edison Company*, 410 F.3d 365 (7th Cir. 2005), the old FLSA

regulations had a "long test" and a "short test" to determine whether an employee fell within the administrative exception. *Kennedy*, 410 F.3d at 370. The short test, which applies to high salaried employees, would apply to Bigger. *See id.*; 29 C.F.R. § 541.214 (2003). The short test is similar to FLSA's current bonda fide administrative capacity test, but it is not identical. For example, the short test does not specify that an employee had to exercise discretion "with respect to matters of significance," as the current test does. 29 C.F.R. § 541.200. Regulations interpreting the short test explained that "the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence." *Zelenika*, 2012 WL 3005375, at *15; 29 C.F.R. § 541.207(d)(1) (2003). The old regulations further distinguished between the exercise of such discretion and "the use of skill in applying techniques, procedures, or specific standards." *Id.* Of potentially particular relevance to Bigger, the old regulations explained that "[a]n employee who merely applies his knowledge in following prescribed procedures or determining which procedure to follow . . . is not exercising discretion and independent judgment within the meaning of § 541.2." *See* 29 C.F.R. § 541.207(c)(1) (2003); *Zelenika*, 2012 WL 3005375, at *15.

Defendant did not address the relevant IMWL standards in its motion, but instead assumed that the short test is identical to the bona fide administrative capacity exception in the current regulations. Even if the Court assumes these two tests are coextensive, Facebook failed to establish as a matter of law that Plaintiff was a bona fide administrative employee under the FLSA. Therefore, Facebook's Motion for Summary Judgment on the IMWL claim fails.

III. FLSA CONDITIONAL CERTIFICATION

A. Legal Standard

The FLSA authorizes employees to bring a "collective action" against an employer for violations of the FLSA's overtime provisions, on behalf of themselves and other employees "similarly situated." 29 U.S.C. § 216(b). FLSA lawsuits do not proceed as traditional Rule 23 class actions. Instead, they proceed as "opt-in representative actions," or collective actions. *Schaefer v. Walker Bros. Enters.*, 829 F.3d 551, 553 (7th Cir. 2016); 29 U.S.C. § 216(b). A prospective member of the collective action may "opt-in" by filing a written consent form in the court where the action is brought; a person who does not opt-in is not part of the FLSA collective action and is not bound by the court's decision. *Garcia v. Salamanca Grp., Ltd.*, No. 07 C 4665, 2008 WL 818532, at *2 (N.D. Ill. Mar. 24, 2008). A district court has wide discretion to manage

collective actions. *Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010) (citation omitted).

The Seventh Circuit has not articulated a procedure for determining whether an FLSA lawsuit should proceed as a collective action. Nor has it set forth criteria for determining whether employees are "similarly situated." *Pfefferkorn v. PrimeSource Health Grp., LLC*, No. 17-CV-1223, 2019 WL 354968, at *2 (N.D. Ill. Jan. 29, 2019). Courts in this District, however, have used a two-step process. *Id.* The first step is "conditional certification," in which a plaintiff must make a "modest factual showing" that she and similarly situated employees were "victims of a common policy" that violated the FLSA. *Id.* At this step, Plaintiff needs only to clear a "low bar" to meet her burden. *Id.* (citation omitted); *Howard v. Securitas Security Services, USA Inc.*, No. 08 C 2746, 2009 WL 140126, at *5 (N.D. Ill. Jan. 20, 2009) ("[T]he court looks for no more than a 'minimal showing' of similarity."); *Rottman v. Old Second Bancorp, Inc.*, 735 F. Supp. 2d 988, 990 (N.D. Ill. 2010) (finding that the similarly situated standard is a liberal one, which "typically results in conditional certification" of a collective) (citation omitted).

After the parties complete discovery, the court conducts the second, more stringent step of the inquiry. *Id.* at 990. At that point the court knows which employees will be part of the class

and it must "reevaluate the conditional certification to determine whether there is sufficient similarity between the named and opt-in plaintiffs to allow the matter to proceed to trial on a collective basis." *Id.* (citation omitted). The second step imposes more demanding requirements on plaintiffs, *id.*, but is not yet relevant at this stage.

B. Discussion

Plaintiff seeks conditional certification of the following collective:

> All individuals who were employed by Facebook as Client Solutions Managers at level IC-3 or IC-4 at any location in the United States during the period from three years prior to the entry of the conditional certification order, and as extended by stipulation of the parties, to the present.

The parties have entered into two independent tolling agreements, which extend the limitations period for the claims of prospective collective members an additional 111 days. (*See* Tolling Agreements, Dkt. No. 22, 34.)

1. Scope of Collective

Facebook contends that the scope of Plaintiff's proposed collective must be narrowed to exclude all individuals who had arbitration clauses and class action waivers in their employment contracts. By Facebook's estimate, at least 252 of the CSMs who Plaintiff seeks to include in her collective — over half the potential collective — executed arbitration agreements and class

action waivers with Facebook. (Hickman Declaration, Ex. 1 to Def.'s Resp. to Pl.'s Mot. for Cond. Cert., Dkt. No. 54-1.) Therein, Facebook alleges, the CSMs agreed to arbitrate individually all claims for "non-payment, incorrect payment, or overpayment of wages . . . whether such claims be pursuant to . . . any federal, state, or municipal laws concerning wages . . . failure to pay wages . . . and/or any other claims involving employee compensation issues." (Arbitration Agreements, Ex. A, B to Ex. 1 to Def.'s Resp. to Pl.'s Mot. for Cond. Cert.) The Supreme Court has held that district courts have discretion to implement 29 U.S.C. § 216(b) collective actions by facilitating notice to "potential plaintiffs." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 169-71 (1989). Facebook argues that because many of the individuals in Bigger's putative collective are barred from litigating the claims at issue in her case, they are not "potential plaintiffs" and should not be sent notice.

There is inherent conflict between the "liberal federal policy favoring arbitration agreements," *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citation omitted), and the "modest factual showing" that a plaintiff must make to obtain conditional certification under the FLSA, *Pfefferkorn v. PrimeSource Health Grp., LLC*, No. 17-CV-1223, 2019 WL 354968, at *2 (N.D. Ill. Jan. 29, 2019) (describing the "similarly situated" burden as a

"low bar" at step one). Courts must "rigorously" enforce arbitration agreements according to their terms. *Epic Sys. Corp.*, 138 S. Ct. at 1621. And the Federal Arbitration Act ("FAA") provides that an arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Federal district courts are divided over whether notice of a collective action may be sent to employees with arbitration agreements, and only one appellate court has weighed in on the issue thus far. *See In re JPMorgan Chase & Co.*, 916 F.3d 494, 499 n.6 (5th Cir. 2019) (collecting cases and laying out the various approaches district courts have taken on this matter). The Fifth Circuit recently held that district courts cannot send notice to an employee with a valid arbitration agreement unless the record shows that nothing in the agreement would prohibit that employee from participating in the collective action. *Id.* at 501. Facebook urges the Court to follow the Fifth Circuit's decision. There are several countervailing considerations, however, that lead the Court to hold otherwise.

First, Facebook has not moved the Court to compel arbitration, and it cannot do so presently. This is because Bigger, the only plaintiff in this case, did not sign an arbitration agreement. Whether parties have agreed to submit a particular dispute to

arbitration is typically an issue for judicial determination. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). In *Zurich American Insurance Company v. Watts Industries*, 466 F.3d 577, 580 (7th Cir. 2006), the Seventh Circuit held that a party moving to compel arbitration must show that: (1) a written agreement to arbitrate exists; (2) the dispute at issue is within the scope of that agreement; and (3) the other party has refused to arbitrate. In its response to Bigger's motion for conditional certification, Facebook asserts that these elements have been met, and its arbitration agreements are enforceable.

The contracts Facebook urges the Court to enforce are between Facebook and third parties not before the Court. Federal courts cannot issue advisory opinions. *Golden v. Zwickler*, 394 U.S. 103, 108 (1969). Thus, Facebook's argument is premature at this stage. *See Weckesser v. Knight Enterprises S.E., LLC*, No. 2:16-CV-02053, 2018 WL 4087931, at *3 (D.S.C. Aug. 27, 2018) ("The potential opt-in plaintiffs allegedly subject to arbitration agreements have not yet joined this action, and the Court therefore has no ability to determine whether any potential arbitration agreement are enforceable against them.").

Second, the enforceability of arbitration contracts must be adjudicated on the merits, and the Court "does not make merits determinations" at the conditional certification stage. *Briggs v.*

PNC Fin. Servs. Grp., Inc., No. 15-CV-10447, 2016 WL 1043429, at *2 (N.D. Ill. Mar. 16, 2016) (citing *Bergman v. Kindred Healthcare, Inc.*, 949 F. Supp. 2d 852, 855–56 (N.D. Ill. 2013)). Courts have certified collective actions and sent notice to employees who signed arbitration agreements, based on the proposition that the agreements might be unenforceable. *See Romero v. La Revise Assocs., L.L.C.*, 968 F. Supp. 2d 639, 647 (S.D.N.Y. 2013) ("[D]efendants' proposal essentially amounts to an invitation for the Court to adjudicate the validity of the arbitration agreements. But . . . this sort of merits-based determination should not take place at the first stage of the conditional collective action approval process."); *Hanson v. Gamin Cargo Control, Inc.*, No. 4:13-CV-0027, 2013 WL 12107666, at *2 (S.D. Tex. Aug. 9, 2013) (authorizing notice because "plaintiffs do not know who is and who is not subject to [an arbitration] agreement, and have not conceded that valid and legal arbitration agreements cover the dispute at hand").

Furthermore, whether parties have an enforceable arbitration agreement, and whether that agreement covers the dispute at issue, is determined by state law principles of contract formation. *Zurich*, 466 F.3d at 580. The parties have not briefed which state law they believe applies to the arbitration agreements. And Facebook admits that there are two different arbitration agreements that could apply to the potential opt-in plaintiffs

(Exs. A, B to Ex. 1 to Def.'s Resp. to Pl.'s Mot. for Cond. Cert.), though the Court does not know whether opt-in plaintiffs will ultimately bring in neither, one, or both of the agreements. Thus, the Court has insufficient information before it to judge the validity of the arbitration agreements.

The Court will determine whether to exclude CSMs who signed arbitration agreements at the conclusion of discovery, when it can properly analyze the validity of any arbitration agreements to which the opt-in plaintiffs may be party. *See Ali v. Sugarland Petroleum*, 2009 WL 5173508, at *4 (S.D. Tex. Dec. 22, 2009). At that time, Facebook may move to decertify the case or divide the class into subclasses. *Nehmelman v. Penn Nat. Gaming, Inc.*, 822 F. Supp. 2d 745, 751 (N.D. Ill. 2011). Nothing in this Opinion should be construed as affecting Facebook's ability to seek dismissal, prior to the second stage of the two-part inquiry, of the claims of any plaintiffs with valid arbitration agreements who join the action.

Defendant next argues that Bigger's putative collective must be narrowed to exclude all CSMs who made less than $100,000 annually, as those CSMs are not sufficiently similarly situated to Bigger. Defendant's argument is premised on the fact that Bigger will be subject to the FLSA's highly compensated employee exemption, and the Court cannot use that test on CSMs who made

under $100,000. *See* 29 C.F.R. § 541.601(c). However, "the applicability of FLSA exemptions typically is not addressed during step one of the certification analysis." *Slaughter v. Caidan Mgmt. Co., LLC*, 317 F. Supp. 3d 981, 990 (N.D. Ill. 2018). And Plaintiffs can be similarly situated for purposes of the FLSA even when "there are distinctions in their job titles, functions, or pay." *Jirak v. Abbott Labs., Inc.*, 566 F. Supp. 2d 845, 849 (N.D. Ill. 2008). This argument fails.

Plaintiff has made a "modest factual showing" that she and similarly situated employees were victims of a common policy that violated the FLSA. *Pfefferkorn*, 2019 WL 354968, at *2. Accordingly, the Court proceeds to Plaintiff's Proposed Notice to the FLSA putative collective members. (*See* Proposed Notice, Ex. A to Pl.'s Mot. for Cond. Cert., Dkt. No. 45-1.)

2. Form of Notice

Facebook argues that several of Plaintiff's requests regarding notice to the proposed collective are inappropriate. First, Defendant contends that Plaintiff's Proposed Notice should inform potential opt-in plaintiffs if there are circumstances in which they may have to bear costs or pay fees to Plaintiff's counsel. However, Plaintiff's counsel has assured the Court that there are "no circumstances" in which opt-in plaintiffs would need to bear costs or pay fees to Plaintiff's counsel. (Pl.'s Reply to

Mot. for Cond. Cert., Dkt. No. 55.) The Court denies this requested revision.

Second, Defendant claims that sending the Proposed Notice via email, per Bigger's request, would be intrusive and unwarranted. However, this Court agrees with the many other courts that have concluded that because communication by email is "the norm," notice by email is appropriate. *See Grosscup v. KPW Mgmt., Inc.*, 261 F. Supp. 3d 867, 880 (N.D. Ill. 2017) (collecting cases); *Atkinson v. TeleTech Holdings, Inc.*, No. 3:14-cv-253, 2015 WL 853234, *5 (S.D. Ohio Feb. 26, 2015) (noting that notice via both U.S. mail and e-mail to all potential opt-in plaintiffs in an FLSA action "appears to be in line with the current nationwide trend"). Particularly in this case, where the opt-in plaintiffs all work or have worked for a digital media company, using email enhances the chance that they receive notice. Plaintiff is authorized to send the Proposed Notice via email.

Third, Plaintiff requests to send a reminder notice 20 days before the end of the opt-in period to any opt-in plaintiffs who have not returned their opt-in consent forms. Defendant believes this request should be denied, arguing that a reminder notice is both unnecessary and unfair to Facebook, as it may be interpreted as the Court encouraging putative collective members to join this action. The Court agrees. A reminder is unnecessary given the

adequacy of both U.S. mail and email notice and may be misinterpreted as judicial encouragement to join the lawsuit. *See Witteman v. Wisconsin Bell, Inc.*, No. 09-CV-440, 2010 WL 446033, at *3 (W.D. Wis. Feb. 2, 2010) ("The purpose of notice is simply to inform potential class members of their rights. Once they receive that information, it is their responsibility to act as they see fit."). The Court denies Plaintiff's request for a reminder notice.

Fourth, Defendant asks the Court to deny Plaintiff's request to post the Proposed Notice in all Facebook offices where members of the FLSA Collective are likely to view it. Defendant argues that mailed notice is adequate and posting notice in its place of business is too intrusive. Workplace postings can be overly intrusive, especially when a workplace posting is meant to supplement a mailed notice. *See Howard v. Securitas Sec. Servs., USA Inc.*, No. 08 C 2746, 2009 WL 140126, at *9 (N.D. Ill. Jan. 20, 2009); *Lane v. Atlas Roofing Corp.*, No. 4:11-CV-04066, 2012 WL 2862462, at *3 (C.D. Ill. July 11, 2012). To justify this sort of duplicative notification, there must be some showing that notice via both U.S. mail and email is insufficient to provide prospective members with accurate and timely notice of their potential right to join the lawsuit. *Id.* Plaintiff has made no such showing. The

Court therefore denies her request to post the Proposed Notice in Defendant's workplace.

Subject to the modifications noted above, Plaintiff's Proposed Notice meets the requirements of "timeliness, accuracy and information." *Hoffmann-La Roche*, 493 U.S. at 172. The Court approves it.

IV. CONCLUSION

For the reasons stated herein, Defendant's Motion for Summary Judgment (Dkt. No. 48) is denied. Plaintiff's Motion for Conditional Certification of an FLSA collective action (Dkt. No. 45) is granted in part and denied in part as follows:

1. The Court conditionally certifies a collective action by Plaintiffs and similarly situated members of the collective pursuant to 29 U.S.C. § 216(b), defined as:

> All individuals who were employed by Facebook as Client Solutions Managers at level IC-3 or IC-4 at any location in the United States during the period from three years prior to the entry of this Order, and as extended by stipulation of the parties, to the present.

2. The Court orders Facebook to produce to Plaintiff in a usable electronic format the names, last-known mailing address, email address, telephone number, dates of employment, social security numbers, and dates of birth of all FLSA Collective members to be notified. Facebook shall tender this information to Plaintiff on or before April 2, 2019.

3. The Court orders notice to the FLSA Collective in the form of her Proposed Notice. The opt-in period will be 60 days from the Notice mailing.

4. The Court authorizes Plaintiff to send the Proposed Notice, at her expense, by first-class U.S. Mail and email to all members of the FLSA Collective to inform them of their right to opt-in to this lawsuit.

5. The Court denies Plaintiff's request for a reminder notice 20 days before the conclusion of the opt-in period.

6. The Court denies Plaintiff's request to post the Proposed Notice in Facebook's offices.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Dated: 3/22/2019