



1 On November 7, 2011, Plaintiffs filed a Supplement (#30), informing the Court that four  
2 additional individuals had consented to join the litigation: Helen Alderman, Cheryl Bieber, Calvet  
3 Howell and Patrice Wielandt. On November 18, 2011, parties stipulated to conduct phased  
4 discovery. *See* Order #31. The Court approved the parties' phased discovery plan and ordered a  
5 six month discovery period. *See* Order (#32).

6 On January 20, 2012, Defendant filed a Motion for Protective Order (#35), requesting the  
7 Court limit the scope of the deposition testimony to the Las Vegas distribution center. On January  
8 30, 2012, the Court granted in part Defendant's request and ordered that the 30(b)(6) deposition  
9 testimony be limited to the Las Vegas distribution center, but further ordered that Plaintiffs are not  
10 precluded from inquiring whether certain matters are established or governed by a nationwide  
11 policy, procedure or practice. *See* Minute of Proceedings (#44).

12 Between the filing of the initial motion and Defendant's Response, the parties conducted a  
13 significant amount of discovery over a period of four months. Defendant deposed all seven named  
14 and opt-in Plaintiffs; Plaintiffs conducted four Rule 30(b)(6) depositions of Defendant's corporate  
15 representatives; both parties have served and responded to several written discovery requests;  
16 nearly 5,000 pages of documents have been produced; and Defendant has collected sworn  
17 declarations from 20 Shift Supervisors at the Las Vegas distribution centers. On March 29, 2012,  
18 Defendants filed their Response (#50). Upon the parties' request, the Court stayed all discovery in  
19 this matter pending decision on this motion. *See* Order (#55). Plaintiff's Reply (#58) was filed on  
20 April 27, 2012.

## 21 **I. TJX's Structure**

22 Defendant TJX is a discount retailer of apparel and home fashion that operates T.J. Maxx  
23 and Marshalls stores across the United States. TJX operates nine distribution centers across the  
24 country that support the delivery of goods to the retail stores. The Las Vegas distribution center is  
25 the only center that serves both TJ Maxx and Marshalls stores ("MarMaxx"). The organization of  
26 the distribution centers, from the top down, includes general manager ("GM"), assistant general  
27 managers ("AGMs"), Area Operations Managers ("AOMs"), Shift Supervisors, and associates.  
28 Associates are employees who are assigned to a particular time-based shift within a specific

1 department. The associates are supervised by Shift Supervisors, who manage a particular  
2 department for a particular shift. The AOMs oversee several different departments within one  
3 distribution center and supervise the work of the Shift Supervisors. AOMs report to one of several  
4 AGMs, who in turn report to the distribution center's GM.

## 5 **II. Shift Supervisors**

6 TJX employs approximately 70 Shift Supervisors in the Las Vegas distribution center. *See*  
7 MacDonald Depo. 12:23-24. The Shift Supervisor's job summary contained in the D/C Supervisor  
8 Exempt Job Description states

9 Total responsibility for operating an efficient, productive and safe  
10 department, while meeting or exceeding daily production  
11 requirements within the Distribution Center. Ensures that quality and  
12 services are at a high level. Maintains a productive, positive, and  
13 motivated work force by spending a minimum of 90% of the total  
14 shift "on the floor" reviewing orders and directing associates.

15 *See* Plaintiff's Reply (#58, 59), Master Exhibit 8.

16 The job summary is further explained by a list of duties and responsibilities that each Shift  
17 Supervisor should perform. These duties and responsibilities include managing the day-to-day  
18 activity within the department, including planning, flow, and resource allocation by ensuring  
19 appropriate staffing levels, monitoring each associate's progress, work methods, behavior and pace  
20 and providing feedback. *Id.* Further, Shift Supervisors are responsible for developing and  
21 motivating associates, building effective relationships with business partners, effectively  
22 communicating with associates and management and ensuring constant improvement by reviewing  
23 practices, methods and processes among others. *Id.* Defendant's Vice President and General  
24 Counsel Jennifer Brady indicated this job description is used at all TJX distribution centers and has  
25 not changed since at least October 31, 2006. *See* Plaintiff's Reply (#59), Exhibit 2, Brady Depo.  
26 35: 2-18.

27 The named and opt-in Plaintiffs' deposition testimony further support that the D/C  
28 Supervisor Exempt Job Description accurately describes the duties and responsibilities of a Shift  
Supervisor. During their deposition, named-Plaintiffs Luksza and Foser and opt-in Plaintiffs  
Bieber, Weilandt, Alderman and Howell stated that the duties and responsibilities contained in the

1 Defendant’s job description accurately describe the duties they preform as Shift Supervisors. *See*  
2 Luksza Depo. at 122:13-16; Foser Depo. at 218:6-219:3; Bieber Depo. 91:16 - 92:20; Weilandt  
3 Depo. at 178:23-179:1; Alderman Depo. at 79:11-80:4; and. Howell Depo. at 125:23-126:7.<sup>1</sup>

4 Further, opt-in Plaintiff Beauford agreed that, in his capacity as a Shift Supervisor, he spends the  
5 majority of his time every day “directing the work of associates, providing coaching and counseling  
6 to the extent they require it, and generally directing the flow of work through your department.”

7 Beauford Depo. at 116:9-16. Plaintiffs understanding of the job description appears consistent with  
8 the duties and responsibilities contained in the D/C Supervisor Job Description in Master Exhibit 8.

9 **III. Plaintiffs’ Allegations**

10 Plaintiffs allege that Defendant mis-classified them, and potentially hundreds of other Shift  
11 Supervisors employed at nine different TJX and MarMaxx distribution centers across the country,  
12 as exempt from the overtime requirement of the FLSA. Plaintiffs allege that Shift Supervisors are  
13 classified as exempt even though they do not perform the type of work that warrants an exempt  
14 classification. Plaintiffs further allege that the Engineered Standards are a company-wide  
15 “common policy” that binds the class of Plaintiffs together and requires Shift Supervisors to  
16 conform to more oversight and regulation from immediate supervisors than in the past and to work  
17 additional uncompensated hours.

18 The named and opt-in Plaintiffs submitted declarations alleging that they were classified as  
19 exempt employees and worked in excess of 40 hours per week without compensation. *See*  
20 *generally* Plaintiffs’ Motion (#8), Exhibits 1-3 and Supplement (#30), Exhibits 11-13.<sup>2</sup> Plaintiffs  
21 allege that the Engineered Standards require all Shift Supervisors to follow a strict regimen, which  
22 removes any independent decision making or personal judgment. *Id.* Plaintiffs also allege that  
23 after implementation of the Engineered Standards, Shift Supervisors lack any real authority to  
24 discipline associates. *Id.* The declarations also state that the Engineered Standards are common to  
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26 <sup>1</sup> The Court further notes that Master Exhibit 8 provides a percentage of time that the job requires for each  
27 duty and responsibility identified. The named and opt-in Plaintiffs did not agree or were not asked if the percentages  
28 identified on Master Exhibit 8 were accurate. *See* Reply (#58, 59), Master Exhibit 8.

<sup>2</sup> It does not appear that opt-in Plaintiff Calvet Howell submitted a declaration.

1 all Shift Supervisors across the country, and therefore there are other similarly situated, current and  
2 former Shift Supervisors at the nine distribution centers. *Id.* Plaintiffs therefore argue that the  
3 Engineered Standards do not permit Shift Supervisors to act in any manner that would justify a  
4 classification of exempt from overtime under the FLSA.

5 Plaintiffs deposed four different corporate representatives, Jennifer Brady, Barry Honeycutt,  
6 Avery McDonald and Christopher Walker, on nine different topic areas. Plaintiffs point to Jennifer  
7 Brady’s deposition testimony to support their assertion that all Shift Supervisors are similarly  
8 situated. Brady stated “supervisors responsibilities are the same at MarMaxx facilities as compared  
9 to other TJX facilities,” and “employment positions are Las Vegas-based facility” are “typically”  
10 the “same.” Brady Depo. at 35:1-20 and 15:1-4. Plaintiffs further sought testimony and  
11 information on the Engineered Standards and how they apply to various employees. Plaintiffs  
12 submitted TJX documents that indicate that the Engineered Standards have been implemented in  
13 some form at every TJX distribution center. *See* Master Exhibit 135. Mr. Honeycutt was  
14 designated as the corporate representative to discuss the Engineered Standards. Mr. Honeycutt  
15 testified that Engineered Standards “provides [a] non-biased means of evaluat[ing] [an] associate,  
16 department, shift and building, etc.” Honeycutt Depo., at 78:9-79:7. Plaintiffs further point to TJX  
17 documents that indicate that the Engineered Standards have increased supervisor’s hours and added  
18 several additional layers to the decision-making process. *See* Master Ex. 123.

19 Plaintiffs argue that the deposition testimony of TJX’s corporate representatives and the  
20 documents obtained through discovery supports the allegations Plaintiffs made in their  
21 declarations. Plaintiffs conclude that certification under the lenient first phase standard “is  
22 inevitable based on the facts before this Court” because Plaintiffs have made the required modest  
23 factual showing that Plaintiffs were victims of a common policy or plan that violated the law. *See*  
24 Plaintiffs’ Reply (#58) at 23.

#### 25 **IV. Defendant’s Allegations**

26 Defendant argues that certification is improper. Initially, Defendant argues that because  
27 extensive discovery has taken place, the Court should proceed to the second step analysis described  
28 hereafter, and apply a heightened standard for determining whether certification of the class is

1 proper. Defendant maintains, however, that under either standard, certification should be denied.

2 Defendant argues that Plaintiffs have failed to show that they are similarly situated.  
3 Defendant claims that the Engineered Standards are not a common policy that bind the class  
4 members together, but rather the Engineered Standards are uniquely applied to each department at  
5 the distribution centers and are therefore not “common” to any of the Plaintiffs. Defendant  
6 maintains that Plaintiffs have not met their burden because the only reliable evidence before the  
7 Court demonstrates that the Engineered Standards are tailored to each department based on various  
8 discrete characteristics. Defendant claims that the unique application of the Engineered Standards  
9 would require the Court to make highly individualized inquiries into the duties that were actually  
10 performed by each of the Plaintiffs.

11 Even assuming the Court finds that the Engineered Standards apply uniformly to all  
12 Plaintiffs, Defendant argues that the evidence before the Court does not support that the application  
13 of the Engineered Standards are either per se unlawful or unlawful as applied. Defendant contends  
14 that the declarations submitted by Plaintiffs are not based on personal knowledge and are  
15 contradicted by their deposition testimony. Plaintiffs’ declarations generally allege that Plaintiffs  
16 were told exactly what to do by the AOMs, lacked decision-making power, lacked authority to  
17 discipline associates and lacked discretion to deviate from the tasks assigned to them. *See*  
18 *generally* Plaintiff’s Declarations at Plaintiffs’ Motion (#8), Exhibits 1-3 and Supplement (#30),  
19 Exhibits 11-13. Defendant points out that Plaintiffs each agreed at their depositions that the D/C  
20 Supervisor Job Description accurately reflects their duties and responsibilities as Shift Supervisors.  
21 *See* Defendant’s Opposition (#51), Plaintiffs’ Depo. at Exhibits 7-13. Defendants further claim that  
22 Plaintiffs testified that they perform a wide range of exempt/managerial duties including planning,  
23 assigning and directing associates, making decisions on staffing levels within their departments,  
24 training, coaching and evaluating associates, exercising discretion to assign “coach trainers” to  
25 associates, initiating and escalating disciplinary action against associates and making  
26 recommendations for discipline or termination among other tasks. *Id.*

27 Named-Plaintiff Luksza admitted during her deposition that she does not perform the same  
28 tasks as associates, that she is responsible for coordinating associate assignments in work areas,

1 checking the work of associates in her areas, monitoring associate progress, providing feedback to  
2 associates, developing associates, nominating associates for associate of the month and  
3 disciplining associates. Luksza Depo. 118 and 151-152. She further stated that she exercised her  
4 discretion to assign a coach trainer to certain associates. *Id.* at 102. Defendant argues these  
5 statements are in direct contradiction to her declaration stating that “all front Line Shift Supervisors  
6 [are] told exactly what tasks to do, when to do those tasks, and how to perform these tasks.”  
7 Lukzsa Decl. ¶ 9.

8 Further opt-in Plaintiff Beauford indicated in his declaration that he “never had any  
9 disciplinary authority.” Beauford Decl. ¶ 8. Defendants argue that Mr. Beauford’s deposition  
10 testimony is in direct contradiction to that statement. Mr. Beauford indicated in his deposition that  
11 he does take disciplinary action against associates including issuing verbal and written warnings  
12 and deciding whether to further escalate disciplinary action when prior disciplinary actions are  
13 unsuccessful. Beauford Depo. 129-130.

14 Defendant points to opt-in Plaintiffs Bieber and Alderman’s deposition testimony to further  
15 illustrate that Plaintiffs’ declarations contain false statements. Plaintiff Bieber admitted at her  
16 deposition that the following statements in her declaration were false: that she and other Shift  
17 Supervisors lacked any decision-making power and that “all Shift Supervisors were told exactly  
18 what tasks to do, when to do those tasks, and how to perform those tasks.” Bieber Depo. 218:5-8  
19 and 219:2-14. Contrary to her declaration, Ms. Bieber further indicated that she had no personal  
20 knowledge of the impact of the Engineered Standards on other Shift Supervisors in Las Vegas or  
21 around the country. Bieber Depo. 222.

22 Defendant further highlights Plaintiff Alderman’s deposition testimony where she stated  
23 that she had authority to discipline associates, which is contrary to her declaration statement  
24 indicating that “I never had any disciplinary authority.” Alderman Depo. 206:2-5. Plaintiff  
25 Alderman additionally stated that her declaration statement indicating that she never had any ability  
26 to deviate from the tasks assigned by the AOMs was incorrect and that, in fact, she had flexibility  
27 to perform her job. Alderman Depo. 206:6-13. Defendant points to several other perceived  
28 inconsistencies between Plaintiffs’ declarations and deposition testimony in arguing that

1 certification is improper.

2 To further rebut Plaintiffs’ original declarations, Defendant submitted declarations from 20  
3 Shift Supervisors who state that they perform a variety of exempt duties as Shift Supervisors  
4 (collectively known as “Defendant’s declarations”). Alternatively, Defendant argues that if the  
5 Court were inclined to grant certification, that certification should be limited to the Las Vegas  
6 distribution center because Plaintiffs have failed to allege any sufficient evidence that Shift  
7 Supervisors outside the Las Vegas area are similarly situated.

8 **DISCUSSION**

9 **A. FLSA**

10 Congress’ principal purpose in enacting the FLSA was to protect all covered workers from  
11 substandard wages and oppressive working hours. *Barrentine v. Arkansas–Best Freight Sys., Inc.*,  
12 450 U.S. 728, 739 (1981). The FLSA was created to provide a uniform national policy of  
13 guaranteeing compensation for all work or employment covered by the Act. *Id.* at 741. The FLSA  
14 grants individual employees broad access to the courts and permits an action to recover minimum  
15 wages, overtime compensation, liquidated damages, or injunctive relief. *Id.* at 740. Under the  
16 FLSA, an employee may initiate a class action on behalf of himself or herself and other similarly  
17 situated people. 29 U.S.C. § 216(b). Court-supervised notice of pendency of § 216(b) actions  
18 “serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to  
19 expedite disposition of the action.” *Hoffman–La Roche, Inc. v. Sperling*, 493 U.S. 165, 172 (1989).  
20 The clear weight of authority holds that the requirements for class action certification under  
21 Fed.R.Civ.P. 23(a) do not apply to claims arising under the FLSA. *Wang v. Chinese Daily News,*  
22 *Inc.*, 623 F.3d 743, 761 (9th Cir.2010) (citing *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th  
23 Cir.1977), overruled on other grounds by *Hoffman–La Roche, Inc. v. Sperling*, 493 U.S. at 167, n.  
24 1).

25 Under § 216(b) actions, although a plaintiff may bring an action on behalf of himself and  
26 others similarly situated, “no employee shall be a party to any such action unless he gives his  
27 consent in writing to become such a party and such consent is filed with the court in which such  
28 action is brought.” 29 U.S.C. § 216(b). This is commonly referred to as the “opt-in” provision.



1 District courts have the discretion to implement § 216(b) by facilitating notice to potential  
2 plaintiffs. *Id.* at 169. Although certification under the FLSA is not required, “certification in a §  
3 216(b) collective action is an effective case management tool, allowing the court to control the  
4 notice procedure, the definition of the class, the cut-off date for opting-in, and the orderly joinder of  
5 the parties.” *Edwards v. City of Long Beach*, 467 F.Supp.2d 986, 989 (C.D.Cal. 2006).

6 Although the FLSA does not define the term “collective action,” the Ninth Circuit has held  
7 that a collective action is “an action brought by an employee or employees for and on behalf of  
8 himself or themselves and other employees similarly situated.” *Gray v. Swanney–McDonald, Inc.*,  
9 436 F.2d 652, 655 (9th Cir. 1971) (quoting H.R.Rep. No. 326, 80th Cong., 1st Sess. at 14 )  
10 (internal quotations omitted). If the court finds the named plaintiffs have established that they are  
11 “similarly situated,” the court may, in its discretion, authorize the named § 216(b) plaintiffs to send  
12 notice to all of the potential plaintiffs and may set a deadline for those plaintiffs to “opt-in” to the  
13 suit. *Edwards*, 467 F.Supp.2d at 989.

#### 14 **B. The Similarly Situated Requirement**

15 The court must preliminarily determine whether the potential plaintiffs are “similarly  
16 situated” to create an opt-in class under § 216(b). *See Grayson v. K–Mart Corp.*, 79 F.3d 1086,  
17 1097 (11th Cir. 1996). A named plaintiff seeking to create a § 216(b) opt-in class must sue on  
18 behalf of himself or herself and other “similarly situated” employees. Named plaintiffs seeking to  
19 create a § 216(b) opt-in class need only show that their positions are similar, but not identical to,  
20 the positions held by putative class members. *Id.* (quoting *Sperling v. Hoffman–La Roche, Inc.*,  
21 118 F .R.D. 392, 407 (D.N.J.1988)). The similarly situated requirement of § 216(b) “is more  
22 elastic and less stringent” than the joinder and severance requirements found in Rule 20 and Rule  
23 42 respectively of the Federal Rules of Civil Procedure. *Id.* at 1095.

24 The FLSA does not define the term “similarly situated,” and the Ninth Circuit has not yet  
25 formulated a test for courts to determine whether putative class members are “similarly situated.”  
26 A number of courts, including this one, have adopted a two-step approach for determining whether  
27 potential plaintiffs are “similarly situated” for purposes of conditional class certification under §  
28 216(b). *See Fetrow-Fix v. Harrah's Entertainment, Inc.*, 2011 WL 6938594 (D. Nev. 2011) and

1 *Hinojos v. Home Depot*, 2006 WL 3712944 (D. Nev. 2006). The two-step approach involves  
2 notification to potential class members of the representative action followed by a final “similarly  
3 situated” determination after discovery is completed. At the first, or “notice stage,” the court relies  
4 “primarily on the pleadings and any affidavits submitted by the parties” [to decide] “whether the  
5 potential class should be given notice of the action.” *Leuthold v. Destination America, Inc.*, 224  
6 F.R.D. 462, 466 (N.D. Cal. 2004). A fairly lenient standard usually applies at the initial stage of a  
7 collective action case because the court has “minimal evidence” to make its determination.  
8 *Mooney v. Aramco Services, Co.*, 54 F.3d 1207, 1213–14 (5th Cir. 1995), overruled on other  
9 grounds by *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90–91 (2003); *Kane v. Gage*, 138 F.Supp.2d  
10 212, 214 (D. Mass. 2001). At the initial notice stage, a plaintiff need only make substantial  
11 allegations that the putative class members were subject to a single decision, policy or plan that  
12 violated the law. *Mooney, Id.* at 1214 n. 8. The majority of courts have adopted this two-step  
13 approach. *Leuthold*, 224 F.R.D. at 466.

14 If the court conditionally certifies a class under § 216(b) and authorizes notice to putative  
15 class members, the parties conduct discovery, and once discovery is completed, the party opposing  
16 class certification may move to decertify the class. *Id.* at 467. In determining whether to certify or  
17 decertify the conditionally certified class, the court makes “a factual determination regarding the  
18 propriety and scope of the class.” *Id.* Factors the court considers in making its factual  
19 determination include “(1) the disparate factual and employment settings of the individual  
20 plaintiffs; (2) the various defenses available to the defendants with respect to the individual  
21 plaintiffs; and (3) fairness and procedural considerations.” *Id.* This determination is made after  
22 discovery is completed, so that the court has a complete factual record on which to base its decision  
23 whether the plaintiffs are similarly situated. If the plaintiffs are not similarly situated, “then the  
24 court may decertify the class and dismiss the opt-in plaintiffs without prejudice.” *Id.*

### 25 **I. Applicable Standard**

26 Both parties agree that the two-step approach should be used by this Court in determining  
27 whether to grant Plaintiffs conditional certification. The parties however dispute what step and  
28 what standard the Court should apply at this time. Plaintiffs argue the Court should base its

1 analysis under the lenient standard of the first step, or the “notice stage,” because although some  
2 discovery has taken place, there is still considerable discovery that needs to take place before the  
3 Court can properly apply the second step analysis. Defendant however argues the Court should  
4 skip the first step and base its analysis under the standards of the second step, or “final stage,”  
5 because considerable discovery has occurred and an ample factual record has been established.

6 When conditional certification is sought early in the action before discovery has taken  
7 place, the determination is made using a fairly lenient standard based “only on the pleadings and  
8 any affidavits which have been submitted.” *Mooney*, 54 F.3d at 1213-14. However, where the  
9 parties have had an opportunity to conduct pre-certification discovery, courts tend to hold plaintiffs  
10 to a higher standard of proof. *See, e.g., Olivo v. GMAC Mortg. Corp.*, 374 F.Supp.2d 545, 548  
11 (E.D. Mich. 2004) (requiring “modest” factual support for class allegations where discovery had  
12 been allowed on the issue of collective action certification); *Thiessen v. Gen. Elec. Capital Corp.*,  
13 996 F.Supp. 1071, 1081 (D. Kan. 1998) (adopting an “intermediate” approach in analyzing the  
14 “similarly situated” issue where the parties had engaged in three months of discovery); *Ray v. Motel*  
15 *6 Operating, L.P.*, 1996 WL 938231 at 4 (D. Minn. 1996) (declining to apply lenient standard at the  
16 notice stage because the facts before the Court are extensive); *see also Hinojos v. Home Depot*,  
17 2006 WL 3712944 (D. Nev. 2006) (applying second step analysis, noting that it was clear that the  
18 named plaintiffs were not similarly situated, and that the action would not be manageable).

19 In *Bouaphakeo v. Tyson Foods, Inc.*, 564 F.Supp.2d 870, 893 (N.D. Iowa 2008), the court  
20 further examined the two-step process and noted that

21 the level of proof required at each stage in the FLSA collective action  
22 certification process is largely dependent upon the amount of  
23 information before the court. At the first step, when less information  
24 is before the court, plaintiffs simply need to come forward with a  
25 “factual basis,” *Dietrich*, 230 F.R.D. at 577, a “colorable basis,”  
26 Smith, 404 F.Supp.2d at 1149, or “substantial allegations,” that the  
27 existing plaintiffs and putative plaintiffs “were together the victims  
28 of a single decision, policy or plan,” *Davis*, 408 F.Supp.2d at 815. At  
the second step, the court has much more information and is in a  
position to “make a factual determination on the similarly situated  
question,” *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 (5th  
Cir.1995), and therefore “plaintiffs must clear a higher hurdle to  
continue,” *Frank*, 2007 WL 2780504, at \*3.

...

1           Although the court in *Tyson* found it proper to proceed with the first step analysis, the court  
2 stated that “it cannot overlook the almost six months of substantial class discovery that the parties  
3 have conducted and the valuable information before the court that is relevant to the certification of  
4 Plaintiffs’ collective action under the FLSA.” *Id.* at 895. The *Tyson* court therefore adopted what  
5 courts have labeled an “intermediate approach.” Essentially, where the parties have conducted  
6 discovery, courts will consider all the evidence before it and apply a heightened standard in making  
7 a determination of conditional certification. *See Villanueva-Bazaldua v. TruGreen Ltd. Partners*,  
8 479 F.Supp.2d 411, 415 (D.Del. 2007) (“District courts in other circuits have adopted an  
9 intermediate approach to the ‘similarly situated’ inquiry when the parties voluntarily engage in  
10 discovery prior to a decision on conditional certification.”); *Jimenez v. Lakeside Pin-nPac, LLC*,  
11 2007 WL 4454295, at \*3 (W.D. Mich, 2007) (stating, because the parties had engaged in six  
12 months of pre-certification discovery, that “the Court will review Plaintiffs’ allegations and  
13 affidavits in conjunction with the evidence gleaned through discovery”).

14           Here, the parties have had four months to engage in pre-certification discovery. *See*  
15 *Scheduling Order* (#32). Over those four months, all seven named and opt-in Plaintiffs have been  
16 deposed; four Rule 30(b)(6) depositions of Defendant’s corporate representatives have been  
17 conducted; several discovery requests have been served and responded to, resulting in the  
18 production of nearly 5,000 pages of documents; and sworn declarations from 20 other Shift  
19 Supervisors at the Las Vegas distribution centers have been collected. Accordingly, in determining  
20 whether Plaintiffs have met their burden of showing that they are “similarly situated” to the  
21 putative class members, the Court will review Plaintiffs’ allegations and affidavits in conjunction  
22 with the evidence obtained through discovery and apply a heightened standard. Although it is not  
23 the role of the Court at this stage of the proceedings to decide the case on the merits, *White v. MPW*  
24 *Indus. Servs., Inc.*, 236 F.R.D. 363, 368 (E.D. Tenn. 2006), the Court has “a responsibility to assure  
25 that there is some factual basis for plaintiffs’ claims of class-wide discrimination before judicial  
26 approval of the sending of notice is granted.” *Severtson v. Phillips Beverage Co.*, 137 F.R.D. 264,  
27 267 (D.Minn. 1991).

28     ...

1 Application of the intermediate standard is consistent with this district's prior decisions in  
2 *Fetrow-Fix v. Harrah* and *Hinijos v. Home Depot*. In *Fetrow-Fix*, plaintiffs sought class  
3 certification based on allegations that the defendants failed to pay non-exempt hourly employees  
4 straight time and overtime compensation for mandatory attendance at pre-shift meetings. 2011 WL  
5 6938594, \*1. The parties conducted extensive discovery prior to bringing the issue of conditional  
6 certification before the court. *Id.* In response to plaintiffs' arguments that the Court should not  
7 evaluate factual disputes, credibility or merits of the claims at the first stage, the court noted,

8 Given the extent of the discovery that has been conducted by the  
9 Plaintiffs, the court will not consider the evidence in the record  
10 supporting the Plaintiffs' claims they are similarly situated to the  
11 putative class, while ignoring the discovery suggesting they are not.  
12 Having reviewed the voluminous moving and responsive papers and  
13 attached deposition transcripts, declarations and other exhibits, the  
14 court is simply not persuaded that the Plaintiffs have established that  
15 putative class members were subjected to a common decision, policy  
16 or plan that violated the FLSA. For these reasons the court concludes  
17 that it would not serve the interests of judicial economy to attempt to  
18 resolve the potential claims of a putative class consisting of 85,000  
19 employees in 35 separate properties nationwide in this action. The  
20 court will therefore deny the motion to conditionally certify a  
21 collective action.

22 *Id.* at \*8.

23 In *Hinojos v. Home Depot*, plaintiffs alleged unpaid overtime under the FLSA. 2006 WL  
24 3712944. After extensive discovery took place, the Court stated that "there is a sufficient  
25 evidentiary record to determine whether this action can be managed on a collective basis." *Id.* at  
26 \*2. The Court applied a heightened standard and found that it was clear that the plaintiffs were not  
27 similarly situated and the proposed class would not be manageable. *Id.*

28 In applying the heightened standard here, the Court concludes that the evidence provided by  
29 Plaintiffs is insufficient to warrant conditional certification of the putative class. Plaintiffs through  
30 their declarations and Complaint allege that the Engineered Standards deprive them of exercising  
31 managerial discretion such that their classification as exempt employees under the FLSA is  
32 improper. Even assuming that the Engineered Standards are "common" to all Shift Supervisors in  
33 each department, Plaintiffs by their own testimony have failed to make an adequate showing that  
34 the Engineered Standards are a common policy that deprives this potential class of Shift  
35 Supervisors of their discretionary authority.

1 The evidence before the Court does not demonstrate that the Engineered Standards strip  
2 Plaintiffs of their managerial responsibilities such that it binds the putative class together. In  
3 particular, the Court is concerned about the contradictions between Plaintiffs' declarations and their  
4 deposition testimony. Each of Plaintiffs' deposition testimony appears to contradict the relevant  
5 portions of their declarations and the allegations in the Complaint (#1). Further, Plaintiffs  
6 Alderman and Bieber admitted during their depositions that several portions of their declaration  
7 were incorrect, and Plaintiff Alderman agreed to the extent that her deposition differs from her  
8 declaration, her deposition testimony was correct. Alderman Depo. 215:8-16.

9 Each named and opt-in Plaintiff further indicated during their deposition that their primary  
10 duties as Shift Supervisors include among other things directing and evaluating their associates and  
11 managing the flow of goods in their department. During the depositions, the named and opt-in  
12 Plaintiffs further admitted that the D/C Supervisor Job Description generally reflected their duties  
13 and responsibilities as Shift Supervisors. *See* Master Exhibit 8 and Beauford Depo. at 116:9-16;  
14 Luksza Depo. at 122:13-16; Foser Depo. at 218:6-219:3; Bieber Depo. 91:16 - 92:20; Weilandt  
15 Depo. at 178:23-179:1; Alderman Depo. at 79:11-80:4; and. Howell Depo. at 125:23-126:7. The  
16 types of duties and responsibilities set forth in this Job Description along with the types of tasks  
17 Plaintiffs testified they perform, appear to be consistent with the regulation governing exemption  
18 from the overtime requirement of the FLSA. *See generally* 29 C.F.R. § 541.100(a)(2).<sup>3</sup>

19 To further support that Engineered Standards are not a common policy that strip Plaintiffs  
20 of their managerial/exempt duties, Defendant has offered sworn declarations from 20 other Shift  
21 Supervisors from the Las Vegas distribution centers indicating that they exercise personal judgment  
22 and regularly perform managerial duties. *See* Defendant's Response, Exhibits 14-33. Plaintiffs  
23 classify Defendant's declarations as "happy camper" declarations and argue that Plaintiffs have not  
24 had an opportunity to depose those individuals. Because the declarations of Shift Supervisors  
25 submitted by Defendant are consistent with and support the named and opt-in Plaintiffs' deposition

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26  
27 <sup>3</sup> In order to fall under the executive, administrative, or combination exemptions to FLSA's overtime  
28 protections, an employee's primary duty must be managerial or administrative, or a combination of the two. *See*  
*generally* 29 C.F.R. § 541.

1 testimony, the Court finds they are probative on the issue of the actual duties of Shift Supervisors.


2 It appears Plaintiffs would have the Court ignore the apparent contradiction between  
3 Plaintiffs' depositions and declarations. Plaintiffs did not address the alleged contradictions in its  
4 Reply, but to state in a footnote that at the "first stage analysis, however the court does not 'weigh  
5 the evidence.'" Reply (#58) at 3. Although under the traditional first stage analysis Plaintiffs are  
6 correct, this Court will not consider the evidence in the record supporting the Plaintiffs' claims they  
7 are victims of a common policy or plan that violates the FLSA, while ignoring the discovery  
8 suggesting they are not. *See Fetrow-Fix*, 2011 WL 6938594 at \*8. The Court finds that Plaintiffs  
9 have failed to show that the Engineered Standards are a common policy that deprives Shift  
10 Supervisors of exercising their discretion and binds the Plaintiffs and the proposed putative class  
11 members together. Therefore, certification of Plaintiffs' proposed class is not warranted.

12 **CONCLUSION**

13 Having reviewed the voluminous moving and responding papers and attached deposition  
14 transcripts, declarations and other exhibits, the Court is simply not persuaded that Plaintiffs have  
15 established that the putative class members were subjected to a common decision, policy or plan  
16 that violated the FLSA. The Court therefore concludes that it would not serve the interests of  
17 judicial economy to conditionally certify this collective action. Accordingly,

18 **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Conditional Certification (#8) is  
19 **denied.**

20 DATED this 8th day of August, 2012.

21  
22   
23 GEORGE FOLEY, JR.  
24 United States Magistrate Judge  
25  
26  
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28