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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANCIS COSTA, AMANDA
HOFFMAN, and OLIVIA MCILRAVY-
ACKERT, individually and on behalf of
others similarly situated,

Plaintiffs,

v.

APPLE, INC.,

Defendant.

Case No. [23-cv-01353-WHO](#)

**ORDER GRANTING PLAINTIFFS'
MOTION FOR DISTRIBUTION OF
JUDICIAL NOTICE**

Re: Dkt. No. 78

INTRODUCTION

Plaintiffs Francis Costa, Amanda Hoffman, and Olivia McIlravy-Ackert are or were hourly paid, overtime eligible employees of defendant Apple, Inc., who contend that Apple should have included the value of vested restricted stock units (“RSUs”) as compensation in its calculation of their overtime rate of pay. They move here for distribution of judicial notice, or conditional certification, pursuant to the Fair Labor Standards Act, 29 U.S.C. § 216(b) (“FLSA”). The standard for ordering notice to others similarly situated at this stage is lenient, and the plaintiffs have met it. Modified as described in this Order, the plaintiffs’ motion to distribute notice is GRANTED.¹

BACKGROUND

I. Factual Background

Apple is a California corporation that “designs, manufactures and markets smartphones,

¹ Oral argument on this motion is unnecessary; the hearing set for November 22, 2023, is VACATED.

1 personal computers, tablets, wearables and accessories, and sells a variety of related services.”
2 Apple Inc. Form 10-K at p.1 (2022). Plaintiffs Costa, Hoffman, and McIlravy-Ackert worked
3 (and in the latter’s case, still work) for Apple as hourly, non-exempt, eligible for overtime pay
4 employees. Third Amended Complaint (“TAC”) [Dkt. No. 86] ¶¶s 9, 11, 13, and 25.

5 The plaintiffs allege that in addition to their hourly pay, Apple paid them compensation in
6 the form of RSUs, which they understand to have a three-year vesting period. TAC ¶¶s 27, 32, 37,
7 39, 42, 44; Mot. 3:17-23. They allege that Apple did not include the value of what they refer to as
8 their “vested RSU compensation” when calculating the regular rate for overtime hours that the
9 plaintiffs work. *See generally* TAC; Motion for Distribution of Judicial Notice (“Mot.”) [Dkt. No.
10 78] 3:17-23. The plaintiffs argue that this is a violation of FLSA and California and New York
11 state laws.

12 **II. Procedural History**

13 On March 23, 2023, Francis Costa filed this lawsuit on behalf of himself and the putative
14 Fair Labor Standard Act (“FLSA”) Collective. Dkt. No. 1. After motion practice over the
15 pleadings, Apple answered the TAC, denying liability and asserting affirmative defenses. Dkt.
16 No. 92.

17 On September 28, 2023, the plaintiffs filed the instant motion for Distribution of Judicial
18 Notice. *See generally* Mot. They sought an order directing issuance of Court-authorized notice
19 and that Apple produce an Excel or similarly formatted list within 10 to 20 days of the order of all
20 employees that Apple classifies as “non-exempt, overtime eligible” whom Apple paid
21 “compensation in the form of RSUs,” who worked for Apple “at any time within three years prior
22 to this action’s filing date through the date of the order.” *Id.* The plaintiffs proposed that the list
23 should include “each person’s name, unique-employee identifier,” and “address, cell-phone
24 number, and personal-email address.” *Id.* The plaintiffs seek permission to send notice of this
25 action by mail, email, and text message. *Id.* They also want to send a reminder postcard and
26 email. *Id.* During the briefing of this motion, plaintiffs have agreed to various modifications that
27 will be discussed later in this Order.

28 On October 26, 2023, Apple filed a Motion to Compel Arbitration as to the four opt-in

1 plaintiffs who signed arbitration agreements. Motion to Compel Arbitration (“Mot. to Compel”)
2 [Dkt. No. 83]. That hearing is set for January 10, 2024.

3 **LEGAL STANDARD**

4 Workers may litigate jointly if they “(1) claim a violation of the FLSA, (2) are “similarly
5 situated,” and (3) affirmatively opt in to the joint litigation, in writing.” *Campbell v. City of Los*
6 *Angeles*, 903 F.3d 1090, 1100 (9th Cir. 2018); 29 U.S.C. § 216(b). The Ninth Circuit has adopted
7 the “two-step approach” for “determining whether the [FLSA] collective mechanism is
8 appropriate.” *Campbell*, 903 F.3d 1090, 1108–10. The first step is that plaintiffs will “move for
9 preliminary certification,” which “refers to the dissemination of notice to putative collective
10 members, conditioned on a preliminary determination that the collective ... satisfies the ‘similarly
11 situated’ requirement of section 216(b).” *Id.* at 1109.

12 The Ninth Circuit defines “similarly situated” as “alike with regard to some material aspect
13 of their litigation,” meaning alike “in ways that matter to the disposition of their FLSA claims.” *Id.*
14 at 1114. “[W]hat matters is not just any similarity between party plaintiffs, but a legal or factual
15 similarity material to the resolution of the party plaintiffs’ claims, in the sense of having the
16 potential to advance these claims, collectively, to some resolution.” *Id.* at 1115.

17 “Determining whether a suit properly may be maintained as a FLSA collective action is
18 within the discretion of the court.” *Litvinova v. City & Cnty. of San Francisco*, 2019 WL 1975438-
19 RS, at *2 (N.D. Cal. Jan. 3, 2019). The plaintiff bears the burden of providing “substantial
20 allegations” that the collective class members “were together the victims of a single decision,
21 policy, or plan.” *Id.*

22 While the standard for conditional certification is lenient, it does “require[] at least *some*
23 evidence to support the ‘substantial allegations’ in the complaint.” *Id.* at *4 (emphasis added). If
24 the plaintiff’s burden is met, the court will grant conditional certification and consider the form of
25 notice proposed by the plaintiff. *Id.* at *5. “‘The sole consequence’ of a successful motion for
26 preliminary certification is ‘the sending of court-approved written notice’ to workers who may
27 wish to join the litigation as individuals.” *Campbell*, 903 F.3d at 1101.

1 **DISCUSSION**

2 **A. The Plaintiffs Have Shown That They Are Similarly Situated**

3 When moving for conditional certification under FLSA and seeking authorization to
4 contact similarly situated employees using a judicially approved form of notice, the plaintiff bears
5 the burden to show that she and the putative collective action members are “similarly situated.”
6 *See Campbell*, 903 F.3d 1090, 1100–01; *Rivera v. Saul Chevrolet, Inc.*, No. 16-CV-05966-LHK,
7 2017 WL 3267540, at *2 (N.D. Cal. Jul. 31, 2017). Here, the plaintiffs meet this standard.

8 Apple’s first argument against judicial notice is that the plaintiffs have failed to meet “even
9 the ‘lenient’ standard for conditional certification in the Ninth Circuit” because the evidence they
10 have produced is insufficient. *Oppo*. 6:16-18. It contends that the 12 declarations that the
11 plaintiffs submitted are entitled to “no evidentiary weight” because they are “virtually identical”
12 and “repeat verbatim vague contentions.” *Id.* 8:15-16. This argument is unpersuasive.

13 Courts in this district have declined to consider arguments that declarations submitted in
14 support of conditional certification are “boilerplate” because at the conditional certification stage,
15 the question is “simply whether plaintiffs have made an adequate threshold showing,” not whether
16 the evidence they produce regarding commonality is believable. *See Gonzales v. Charter*
17 *Commc'ns, LLC*, 2020 WL 8028108, at *4 (C.D. Cal. Dec. 4, 2020). To require more would be
18 contrary to the lenient level of consideration required by the Ninth Circuit in *Campbell*. *Id.*

19 The declarations that the plaintiffs have submitted alongside their motion are sufficient to
20 support conditional certification. They show that the declarants all worked as hourly paid, non-
21 exempt, overtime eligible employees during the three-year FLSA statutory period. They also
22 show that they received RSUs that vested during that period, and that they were subject to Apple’s
23 policy and practice of not including the value of the vested RSU in its overtime pay calculations
24 for such employees. *See generally* Dkt. No. 78-1 (combined declarations).

25 Apple’s opposition relies heavily on out-of-circuit authority and decisions within this
26 circuit that are both pre-*Campbell* and inapposite for resolution of the dispute on this motion. *See*
27 *Oppo*. 7:1-17; 8:5-14. The in-circuit cases are not instructive because they differ significantly on
28 the facts. *See Litvinova v. City and County of San Francisco*, 2019 WL 1975438, at *5 (N.D. Cal.

1 Jan. 3, 2019) (holding that the plaintiff had not met the lenient standard of showing “similarly
2 situated” where she only produced “averments in her complaint and her own declaration, the latter
3 of which does not even address whether other members of the collective action worked
4 overtime”); *Rivera v. Saul Chevrolet, Inc.* 2017 WL 3267540-LHK, at *5 (N.D. Cal. Jul. 31, 2017)
5 (holding the same, because plaintiff did not identify a “single decision, policy, or plan” that
6 affected all of the putative class members, which was fatal to conditional certification).

7 Here, the plaintiffs have produced declarations from numerous Apple employees, all of
8 which allege that they were victims of a “single decision, policy, or plan.” *See generally* Dkt. No.
9 78-1 (combined declarations). The veracity of these allegations will drive this litigation. The
10 plaintiffs have met the lenient standard for conditional certification.

11 **B. The Proposed FLSA Collective, With Modifications, Is Appropriate**

12 In their motion, the plaintiffs proposed a collective that is defined as: “all employees
13 Defendant classified as non-exempt, overtime eligible, who Defendant paid compensation in the
14 form of RSUs, who worked for Defendant at any time within three years prior to this action’s
15 filing date through the date of the Order.” Mot. at 1. Apple argues that the plaintiffs cannot show
16 that the entire nationwide collective they seek to certify “shares a similar issue of law or fact
17 material to the disposition of their FLSA claims.” *Campbell*, 903 F.3d at 1117. It contends that
18 the plaintiffs’ proposed collective definition is overbroad for three reasons: (i) it is an improper
19 “fail-safe” collective in defining RSUs as “compensation,” when Apple argues that RSUs are not;
20 (ii) the proposed collective seeks to send notice to employees that Apple argues would not have a
21 claim even under the plaintiffs’ theory; and (iii) the plaintiffs are not similarly situated to
22 employees with arbitration agreements.

23 With the modifications to which the plaintiffs now agree, the proposed collective will not
24 constitute a “fail-safe” collective, nor will it impermissibly include individuals who would not
25 have a claim. I address these two concerns before turning to Apple’s third issue with the proposed
26 collective—that it includes individuals who may be subject to binding arbitration agreements.

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1 **1. The Proposed Collective (After Modification) Is Neither a Fail-Safe**
2 **Collective Nor Is It Overbroad.**

3 A fail-safe collective is “a way of labeling the obvious problems that exist when the class
4 itself is defined in a way that precludes membership unless the liability of the defendant is
5 established.” *Kamar v. RadioShack Corp.*, 375 Fed. Appx. 735, 736 (9th Cir. 2010). In a class
6 defined in this way, when a possible class member realizes that she cannot prevail against the
7 defendant, she drops out of the class. *Id.* The Ninth Circuit has held that this is unfair to the
8 defendant and unmanageable from a procedural standpoint, specifically with regard to issuing
9 notice. *Id.*; Fed. R. Civ. P. 23(c)(2). But the court has also held that district courts are free to
10 narrow a class so long as it does not actually distinguish between those who may and may not
11 ultimately turn out to be entitled to relief if the case resolves in the plaintiffs’ favor. *See Kamar*,
12 375 Fed. Appx. 734, 736.

13 Apple takes issue with the proposed language that presumes that RSUs are
14 compensation—something that Apple denies. *Oppo*. 11:8-10; *see also* Defendant’s Answer [Dkt.
15 No. 76] ¶ 1. It contends that defining the collective to include employees to whom Apple paid
16 compensation in the form of RSUs “improperly presupposes that the value of vested RSUs is in
17 fact ‘compensation’ that must be included in the regular rate.” *Oppo*. 11:19-12:2. Apple alleges
18 that this language in the notice prematurely infuses the merits of the class action into the definition
19 of the collective, creating an improper fail-safe class.

20 The plaintiffs stated in reply that they are willing to change the definition of the collective
21 to avoid that problem. *Repl.* 6, n. 4 (“If using the term “RSU compensation” to define the group is
22 problematic, plaintiffs are agreeable to using a different term such as “employees who received
23 RSUs during their employment” or other language the Court deems appropriate). This is an
24 appropriate response to Apple’s concern and will mitigate against any risk that the collective
25 constitutes a “fail-safe” collective. The parties shall make the change to the notice language.

26 Apple also argues that the collective, as proposed, could include individuals who did not
27 work overtime, or employees who did work overtime but did not do so between the grant of an
28 RSU and the vesting date. *Oppo*. 13:13-15. It argues that such employees would not be similarly
 situated to the plaintiffs. *Id.* In response to that concern, the plaintiffs offer to change the

1 definition of the proposed collective to “narrow[] the group” to those who “recorded more than
2 forty hours in a workweek,” so as to avoid this potentially overbroad definition. Repl. 6, n. 3.
3 This is an appropriate modification. The plaintiffs shall also specify that the collective only
4 includes those employees who recorded more than 40 hours in a workweek between the grant of
5 an RSU and the time that particular RSU vested.

6 With the modifications discussed above, the plaintiffs’ proposed collective will not be
7 “fail-safe” or over-inclusive.

8 **2. It Is Appropriate to Certify the Collective Now, Even Though Some**
9 **Employees in the Collective May Be Subject to Binding Arbitration.**

10 Apple also argues that the proposed collective is inappropriate because it includes
11 employees who may be subject to valid arbitration agreements. It argues that this precludes
12 conditional certification of a FLSA collective and that questions of arbitrability should be resolved
13 before notice is distributed. *Oppo*. 14:2-8. Functionally, this means that Apple is asking that I
14 rule on its pending Motion to Compel Arbitration prior to ruling on this motion. This is not
15 legally necessary, nor would it be in the best interests of the collective.

16 So far, Apple has shown that four out of the 22 - 25 opt-in plaintiffs signed arbitration
17 agreements; these four opt-in class members are the subject of Apple’s pending motion to compel
18 arbitration.² Dkt. No. 83. It posits that thousands more employees have signed the same because
19 Apple has presented arbitration agreements to each new hire in the United States since 2016 and
20 “all but a small handful” have agreed to arbitrate claims. *Id.* 13:23-26.

21 Apple concedes that the Ninth Circuit has not addressed whether arbitration agreements
22 should be considered at the notice stage in FLSA actions. *Id.* 14:2-6. It asks me to follow out-of-
23 circuit decisions holding that it is improper to send notice to potential opt-in plaintiffs when the
24 defendants assert that “such recipients signed arbitration agreements that make them ineligible to

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26 ² In its Motion to Compel Arbitration, Apple states that “23 individuals including the Named
27 Plaintiffs have opted-in to the collective . . . the Opt-In Plaintiffs are four of these 22 individuals.”
28 Mot. to Compel Arb. 4:14-16. The plaintiffs state that Apple has shown that four of the 25 opt-in
plaintiffs signed arbitration agreements. While the parties differ slightly on how many individuals
have opted-in to date, this difference does not affect my analysis. Somewhere between 22 and 25
individuals have opted-in to the collective so far.

1 join a proposed collective.” See *Bigger v. Facebook, Inc.*, 947 F.3d 1043 (7th Cir. 2020) (holding
2 that the district court had abused its discretion in authorizing notice to individuals whom the court
3 understood to have entered mutual arbitration agreements that waived their right to join such an
4 action, and that courts must allow defendants to show that individuals entered such agreements
5 before authorizing notice); *In re JP Morgan Chase & Co.*, 916 F.3d 494, 501 (5th Cir. 2019)
6 (“district courts may not send notice to an employee with a valid arbitration agreement” unless it is
7 shown that “nothing in the agreement would prohibit that employee from participating in the
8 collective action”).

9 But courts in this circuit have consistently determined that the mere possibility of
10 mandatory arbitration should not prevent the conditional certification of a collective action.
11 *Pittmon v. CACI International, Inc.*, 2021 WL4642022, at *4 (C.D. Cal. Aug. 27, 2021) (citing
12 *Rosario v. 11343 Penrose Inc.*, 2020 WL881240, at *5 (C.D. Cal. 2020) (finding that “courts have
13 overwhelmingly determined that the possibility of mandatory arbitration should not prevent the
14 conditional certification of a collective action.”)); *Hererra v. EOS IT Management Solutions, Inc.*,
15 2020 WL 7342709, at *9 (N.D. Cal. Dec. 14, 2020) (holding that although some employees may
16 not ultimately be able to participate in the case because they were subject to arbitration
17 agreements, it was not appropriate to exclude potential opt-in members from the conditionally
18 certified class action at the notice stage because the focus of inquiry at that stage is whether there
19 is a common policy or plan that connects the claims of the putative class members, not on the
20 defendants’ ultimate defenses); *Conde v. Open Door Marketing, LLC*, 223 F. Supp. 3d 949, 969
21 (N.D. Cal. 2017) (arbitration agreements do not preclude conditional certification, “especially
22 given the lenient standard at step one” of conditional certification). I am inclined to follow my
23 peers on this issue.

24 Some courts within this circuit have determined that notice should not be sent when the
25 court has already ruled on the enforceability of the at-issue arbitration agreement and where the
26 defendant has produced evidence that a significant portion of their employees were subject to valid
27 arbitration agreements. See *Droesch v. Wells Fargo Bank, N.A.*, 2021 WL2805604-JSC, at *2
28 (N.D. Cal. Jul. 6, 2021). Neither of these circumstances is true here.

1 In *Droesch*, defendant Wells Fargo, moved to compel arbitration for certain opt-in
2 plaintiffs' claims, and the plaintiffs simultaneously sought conditional certification under FLSA §
3 216(b). *Id.* at *1. The court granted both motions, which in effect granted the plaintiffs leave to
4 send notice to the 27,000 Wells Fargo employees who appeared to have signed binding arbitration
5 agreements. Wells Fargo moved for reconsideration of the portion of the court's conditional
6 certification order that required notice of the FLSA action to those 27,000 individuals who signed
7 the same arbitration agreement that the court had determined was binding. Upon reconsideration,
8 the Hon. Jacqueline S. Corley decided that since she had already determined that the at-issue
9 arbitration agreement was enforceable as to the opt-in plaintiffs, and nothing suggested that the
10 agreements signed by the 27,000 other employees were different, she would follow the Fifth and
11 Seventh Circuit's decisions that concluded that it is inappropriate to send notice to employees with
12 valid arbitration agreements. *Id.* at *2. Apple asks that I follow her "pragmatic" approach to
13 notice distribution. While Judge Corley's decision made sense in the context of *Droesch*, this is a
14 different case.

15 Unlike in *Droesch*, where Wells Fargo had shown that 27,000 out of 34,000 current and
16 former employees had signed the same arbitration agreement that the court had determined was
17 binding, here Apple has shown no such thing. It has not demonstrated or approximated how many
18 of its employees opted-out of arbitration after being presented with the arbitration agreements
19 when they were hired. *See generally* Oppo.; Mot. to Compel Arbitration. Its contention that since
20 June 2016, it has presented arbitration agreements to "every employee it has hired in the United
21 States" and that "all but a small handful have agreed to arbitrate claims," Oppo. 13:23-14:2, is
22 conclusory and provides no insight into how many Apple employees might be free to litigate
23 FLSA claims regardless of whether I find the arbitration agreement to be enforceable. It is not
24 apparent to me that allowing the plaintiffs to send notice to all relevant Apple employees, *see*
25 *supra* B(1), would result in an inappropriate distribution of notice to non-similarly situated
26 individuals.

27 Also unlike the situation in *Droesch*, where Judge Corley had already determined that the
28 arbitration agreement at issue was enforceable, I have not ruled on whether Apple's arbitration

1 agreement is enforceable. The plaintiffs argue that the arbitration agreement is unenforceable
2 because it is both substantively and procedurally unconscionable. *See* Opposition to Def. Motion
3 to Compel Arbitration [Dkt. No. 89] 6-8. There appear to be at least two versions of the
4 agreement (one in 2016 and the other in 2019) and it is unclear whether the same analysis will be
5 appropriate for each version. *See* Mot. to Compel 2:16-3:9. The hearing is set for January 10,
6 2023, and it will likely take me a little while thereafter to render an opinion.

7 Apple protests that because the four opt-in plaintiffs do not claim that there are individual
8 issues that would need to be addressed by the court pertaining to the enforceability of each
9 individual arbitration agreement, I should delay ruling on distribution of notice until I rule on its
10 motion to compel arbitration. *Oppo*. 16:16-25. It seems to propose that since the four opt-in
11 plaintiffs take issue with universal aspects of Apple’s arbitration agreements, the resolution of
12 these issues will determine whether all other Apple employees who did not opt-out of arbitration
13 are bound by the terms of the agreement. At the moment, I cannot say whether it is accurate. It
14 cites *Bogle v. Wonolo Inc.*, for the theory that “[w]hether named and opt-in plaintiffs must
15 arbitrate their claims should be decided well before the nationwide notification issue is reached.”
16 2022 WL 1124973, at *4 (C.D. Cal. Apr. 8, 2022). But this case differs from *Bogle*, too. There,
17 the plaintiff did not contest that there was a valid arbitration agreement or that the agreement
18 covered his dispute. He instead alleged that he did not understand that he agreed to arbitrate
19 arbitrability and his substantive claims, and the court found his argument unpersuasive. *Id.* at *3.
20 Here, plaintiffs are contesting the validity and enforceability of the arbitration agreements that
21 they signed. The nature of their argument—which challenges the arbitration agreement on both
22 substantive and procedural unconscionability grounds—is such that if they prevail, thousands of
23 other Apple employees will be free to opt-in to the putative class and litigate FLSA claims.

24 I see no reason to delay notice to potential opt-in class members while the statute of
25 limitations clock is ticking until I decide Apple’s motion to compel arbitration. The parties shall
26 meet and confer about including language in the notice that informs potential opt-in plaintiffs that
27 their claims may be subject to binding arbitration agreements, pending my decision on Apple’s
28 motion to compel arbitration.

1 **C. The Plaintiffs’ Proposed Notice Strategy is Appropriate**

2 **1. Method of Notifying Putative Members**

3 The plaintiffs seek permission to send notice of this action by mail, email, and text
4 message.³ *Id.* They also wish to send a reminder postcard and email. *Id.* As a general rule,
5 putative collective members are entitled to receive “accurate and timely notice concerning the
6 pendency of the collective action, so that they can make informed decisions about whether to
7 participate.” *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

8 Apple first takes issue with the inclusion of a text message notice. Plaintiffs have offered a
9 variety of cases indicating that distribution of notice by mail, email, and text is “routinely
10 permitted by courts in this circuit.” Repl. 9:1-13. Apple raises concerns about this method; it
11 argues that text messages are unnecessary here for the same reasons they were unnecessary in
12 *Bakhtiar v. Info. Res., Inc.*, 2018 WL 3585057-JST, at *4 (N.D. Cal. Jul. 26, 2018) (where the
13 court determined that notification via text message was unnecessary where the court was ordering
14 notice by first class mail and email because notification was going out via two other forms of
15 notice, and the potential collective action members were not at risk of missing those forms of
16 notice). Apple also argues that since the text message could be “harassing in nature,” and because
17 the plaintiffs have proposed other forms of notice, I should reject their proposal to send a text
18 message. Oppo. 17:18-18:5.

19 Given that the proposed contents of the message do not include any personal or financial
20 information about the potential collective action members, and given the ubiquity of text
21 messaging (particularly in the lives of current and former Apple employees), plaintiffs may
22 distribute notice via mail, email, and text message. They may also send a reminder postcard and
23 reminder text 60 days after the notice is mailed to potential collective action members. *See*
24 *Bakhtiar*, 2018 WL 3585057, at *5 (holding that a second notice or reminder can be appropriate in

25 _____
26 ³ The plaintiffs also wish to include a QR code in their mail notification and reminder postcard to
27 potential collective action members, which would allow individuals to fill out the Consent Form
28 electronically. The parties discuss the permissibility of such an inclusion in their papers. *See*
Oppo. 17:8-14; Repl. 9:1-13; Mot. Exs. 7, 10. The plaintiffs may include a QR code in the notice
and reminder so long as it only links to an electronic version of the Consent Form and nothing
else.

1 a FLSA action because individuals are not yet part of a class until they opt-in). Both the initial
2 and reminder messages should incorporate the modifications discussed below.

3 **2. Substance of the Notice**

4 If a court facilitates notice of a collective action, it “must be scrupulous to respect judicial
5 neutrality,” trying to “avoid even the appearance of judicial endorsement of the merits.” *Hoffman-*
6 *La Roche*, 493 U.S. 165, 174. To this end, Apple takes issue with the proposed notice language
7 that it is “important” that potential plaintiffs be notified of the collective. Oppo. 18:14-16; *id.* Ex.
8 A, p. 2. Plaintiffs have agreed to, and shall, strike this language from the notice. Repl. 9, n. 8.
9 Plaintiffs have also agreed to, and shall, include language that Apple denies the allegations,
10 assuaging Apple’s next most legitimate concern. *Id.*; *see* Oppo. 18:20-26; *see also* Oppo. Ex. A p.
11 2.⁴ These two modifications will ensure that the notice does not appear to endorse either party’s
12 position in this suit.

13 Apple also opposes the plaintiffs’ proposal regarding production of collective member
14 information as impracticable and unduly burdensome. Oppo. 19:21-24. It specifically takes issue
15 with the plaintiffs’ request for “all known telephone numbers and email addresses, not limited to
16 ‘last known’” and that Apple produce this information within 10 days of my Order on the Motion.
17 *Id.*

18 Plaintiffs have modified these requests, as well, in response to Apple’s concerns. First,
19 they concede that last-known addresses and telephone numbers are sufficient. Repl. 9, n. 8; *see*
20 *supra* n. 2. As such, Apple is only obligated to produce last-known addresses and telephone

21
22 ⁴ Apple proposed other modifications to the notice that are unnecessary. As an example, it
23 opposes the proposed notice insofar as it “fails to explain to employees what their rights, options,
24 and obligations are.” *Id.* 19:1-2. Specifically, Apple argues that the notice should explain that the
25 individual may be required to appear for deposition, that they may have to testify in court, or share
26 liability for payment of costs if Apple prevails. *Id.* 19:2-8. It contends that the absence of such
27 information prevents potential opt-ins from “mak[ing] informed decisions about whether to
28 participate.” *Id.* (quoting *Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 540 (N.D. Cal.
2007)). However, Apple points to no Ninth Circuit or Supreme Court law requiring these
disclosures be included in the notice, and the plaintiffs cite several district court cases from within
this circuit holding that such inclusions are unnecessary and may chill participation. *See, e.g.*
Prentice v. Fund for Pub. Int. Rsch, Inc., 2007 WL 2729187-SC, at *5 (N.D. Cal. Sept. 18, 2007);
Williams v. U.S. Bank Nat’l Ass’n, 290 F.R.D. 600, 613 (E.D. Cal. 2013). The proposed language
is suitable, pending modifications discussed throughout this Order.

1 numbers. They do ask that if mail is returned, Apple provides the administrator with the last-four
2 digits of the non-contacted individual’s social security number, so that the contact information
3 may be updated, and notice may be sent to the proper address. *Id.* I am not going to grant this
4 request at this time, largely because I am approving the plaintiff’s text message notice proposal. If
5 mail is non-deliverable, the redundancy built in through the text message notification will serve as
6 sufficient back-up to ensure potential collective action members are notified.


7 Second, the plaintiffs have agreed to a “five to ten day[.]” extension for Apple to produce
8 the requested contact information. Repl. 9, n. 8. I will allow Apple 20 days from the date of this
9 Order to produce the requested contact information.

10 **CONCLUSION**

11 For the foregoing reasons, the plaintiff’s Motion for Distribution of Judicial Notice is
12 GRANTED, pending the modifications discussed in this order. The modified collective class shall
13 be: All current and former employees of Apple Inc. classified as non-exempt/overtime eligible
14 who received restricted stock units (“RSUs”) at any time from March 23, 2020, to the present, and
15 recorded more than forty hours of a work in a workweek after receiving an RSU but before the
16 RSU vested.⁵

17 **IT IS SO ORDERED.**

18 Dated: November 21, 2023

19
20 
21 William H. Orrick
22 United States District Judge
23
24
25

26 _____
27 ⁵ Plaintiffs shall provide Apple with the modified notice on or before November 30, 2023. If there
28 is any further disagreement concerning the notice language, it shall be presented in a joint dispute
letter of no more than five pages on or before December 4, 2023. Also, the parties may modify the
definition of the collective by stipulation if desired.