HAYES PAWLENKO LLP
Matthew B. Hayes (SBN 220639)
Kye D. Pawlenko (SBN 221475)
595 East Colorado Boulevard, Suite 303
Pasadena, California 91101
Tel: 626.808.4357
Fax: 626.921.4932

Attorneys for Plaintiffs
VERNA MAXWELL CLARKE and LAURA WITTMANN

CONSTANGY, BROOKS, SMITH & PROPHETE, LLP
Kenneth D. Sulzer (SBN 120253)
Sarah Kroll-Rosenbaum (SBN 272358)
2029 Century Park East, Suite 1100
Los Angeles, California 90067
Tel: 310.909.7775
Fax: 424.276.7410

Attorneys for Defendant
AMN SERVICES, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

VERNA MAXWELL CLARKE and LAURA WITTMANN, individuals on behalf of themselves and others similarly situated, Plaintiffs, v. AMN SERVICES, LLC, Defendant.	Case No.: 2:16-cv-04132-DSF-KS **JOINT STATEMENT RE; CONTENT OF NOTICES TO CLASS AND COLLECTIVE**

On October 12, 2017, the Court granted Rule 23 class action certification and conditional FLSA collective action certification to Plaintiffs Verna Maxwell Clarke and Laura Wittmann ("Plaintiffs"). Since then, counsel for Plaintiffs and Defendant AMN Services, LLC ("Defendant") have met and conferred in an effort to reach agreement on the content of the notices to be sent to putative members of the class and collective. Unfortunately, despite their best efforts, the parties were unable to agree on the content of the notices. Accordingly, the parties hereby lodge their respective versions of the notices for the Court's consideration and provide the Court with a brief statement of their respective positions.

Lodged as Exhibit 1 hereto is Plaintiffs' proposed joint notice of class and FLSA collective action certification for individuals who worked in California within the certified class period (hereafter "Joint California Class/FLSA Notice"). Lodged as Exhibit 2 hereto is Plaintiffs' proposed notice of FLSA collective action certification for individuals who worked only outside of California during the certified period ("FLSA Only Notice"). Lodged as Exhibit 3 hereto is Defendant's proposed Rule 23 class action notice redlined against Plaintiffs' proposed Joint California Class/FLSA Notice. Lodged as Exhibit 4 hereto is Defendant's proposed FLSA collective action notice redlined against Plaintiffs' proposed FLSA Only Notice.

I. PLAINTIFFS' POSITION

Rule 23(c)(2) governs the content of notice to putative class members. It provides that "[t]he notice must clearly and concisely state in plain, easily understood language" the following seven categories of information:

> "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests

> exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)."

Fed. R. Civ. P. 23(c)(2)(B).

"In addition to the Rule 23(c) requirements, class notice must be neutral and avoid endorsing the merits of the claim." *Adoma v. Univ. of Phoenix, Inc.*, 2010 U.S. Dist. LEXIS 114503, at *5-6 (E.D. Cal. Oct. 14, 2010).

With respect to the notice of FLSA conditional certification, "[n]either the [FLSA], nor other courts, have specifically outlined what form court-authorized notice should take nor what provisions the notice should contain." *Sharma v. Burberry Ltd.*, 52 F. Supp. 3d 443, 453 (E.D.N.Y. 2014). Courts in this Circuit have held that, at a minimum, "[t]he FLSA requires the Court to provide potential class members 'accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate.'" *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 492 (E.D. Cal. 2006) *quoting Hoffman-La-Roche, Inc. v. Sperling*, 593 U.S. 165, 170 (1989).

Plaintiffs' proposed notices clearly and concisely state in plain, easily understood language information about the seven categories required by Rule 23(c). In addition, Plaintiffs' proposed notices are neutral and avoid endorsing the merits of their claims.

Defendant's proposed notices, by contrast, are neither concise nor neutral and, run afoul of notice requirements in at least two major respects.

F*irst*, Defendant's proposed notices transparently attempt to discourage class member participation by repeatedly endorsing the merits of tax arguments already rejected by this Court and threatening putative class members that "[by] becoming a member" of the "collective" or "classes," "you may become liable to the IRS for taxes not paid on the per diem allowances you received from AMN."

In granting certification, this Court found that whether the IRS "takes action would not appear to depend on anything the parties or this Court will do going forward because nothing in this case will change the underlying substance of AMN's per diem structure" and that "[t]he way the per diem payments are structured either does or does not meet the business connection requirement." Dkt. 60 at p. 6. And in a direct rebuke to Defendant's proclamations in its proposed notices, this Court held "[t]hat the same underlying facts may lead to a certain conclusion about overtime treatment does not mean that arguments in favor of that overtime treatment *cause* tax consequences in any meaningful way." *Id.* (emphasis in original).

Courts within and outside this Circuit have rejected employer attempts to discourage participation by adding to the notice similar threats of negative consequences that are unfounded or "uncertain" to occur. *See, e.g., Chasatin v. Cam*, 2014 U.S. Dist. LEXIS 102465, at *29-30 (D. Or. 28, 2014) (rejecting defendant's argument that notice should "disclose the possibility that the Court may require Plaintiffs to pay Defendants' costs if Defendants prevail" because an employer's ability to recover costs in an FLSA action is "uncertain" and "this type of notice may provide . . . a disincentive to participate in the lawsuit."); *see also Coyle v. Flowers Foods Inc.*, 2016 U.S. Dist. LEXIS 116422, at *20 (D. Ariz. Aug. 29, 2016) (same); *Johnson v. Pink Spot Vapors, Inc.*, 2015 U.S. Dist. LEXIS 39463, at *16-17 (D. Nev. March 27, 2015) (same); *Dilonez v. Fox Linen Serv.*, 35 F. Supp. 3d 247, 255-56 (E.D.N.Y. 2014) (rejecting employer request to add language to notice advising that participation in lawsuit may involve "inquiries into immigration status," because, although "a possible consequence, it is far from certain, and therefore should not, on balance be included in the Notice"); *Whitehorn v. Wolfgang's Steakhouse, Inc.*, 767 F.Supp.2d 445, 451 (S.D.N.Y. Feb. 8, 2011) (rejecting employer's request to notify class of various uncertain negative

consequences of joining lawsuit because "it may have an in terrorem effect that is disproportionate to the actual likelihood" such consequences "will occur").

Second, Defendant's proposed notices are misleading and inaccurate because they falsely convey that putative class members can immunize themselves from potential tax exposure on the per diems by refusing to participate in this lawsuit. As this Court noted in granting certification, "[t]he way the per diem payments are structured" already "either does or does not meet the business connection requirement" and "the class may owe taxes regardless of the outcome of this case." Dkt. 60 at pp. 5-6. By advising putative class members that they "may owe the IRS taxes if you do not opt out of this lawsuit," Defendant's proposed notices falsely suggest that such tax exposure could be avoided by opting out when, in truth, the act of opting-in or opting-out of this lawsuit has no bearing whatsoever on the tax treatment of the per diems. Dkt. 60 at p. 6.

Accordingly, Defendant's proposed notices should be rejected because they repeatedly endorse the merits of rejected arguments, transparently attempt to discourage participation in this lawsuit, and mislead putative class members about the effect of joining this lawsuit. Finally, unlike Defendants, Plaintiffs have combined the Rule 23 class and FLSA collective notices for individual working in California to prevent the risk that putative class members may become confused, or accidentally disregard one of the notices as duplicative, if they simultaneously receive two separate notices concerning the same lawsuit.

II. DEFENDANT'S POSITION

In this case, the class and collective members are entitled to the "best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). To provide the "best notice" practicable, the notice must include "information that a reasonable person would consider to be material in making an informed, intelligent

decision of whether to opt-out or remain a member of the class." *Tierno v. Rite Aid Corp.*, 2007 WL 4166028, at *1–2 (N.D. Cal. Nov. 19, 2007), citing *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir.1977); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998) (holding that class members are entitled to due process, which includes the right to "intelligently and individually choose whether to continue in a suit as class members"). There should be no question that the potential economic consequences of Plaintiffs' lawsuit constitute material information that the class and collective must consider in making an informed decision as to whether to participate in this lawsuit. But Plaintiffs' proposed notices fail to include any reference to the fact that the potential benefit class and collective members may derive from participating in this lawsuit may be erased by additional tax liability. *See* Dkt. #40, 53. In contrast, AMN's proposed revisions to the class and collective notices include an explanation of the potential economic consequences of this lawsuit, so that class and collective members can evaluate whether they wish to be involved.

During the May 15, 2017 hearing on Plaintiffs' motions for class and conditional certification, the Court acknowledged that class and collective members have a right be apprised of the negative economic consequences that could ensue as a result of Plaintiffs' lawsuit. According to the Court, "I understand [the tax implications of the lawsuit] being addressed as an adequacy issue, but I also see it as a notice to the class issue. *I don't see how I can possibly authorize a notice to the class at this point without warning them that there's a potential tax issue*." Declaration of Kenneth Sulzer ("Sulzer Decl.") ¶ 1, Exh. A (May 15, 2017 Hearing Transcript ("Hr. Tr.")), 6:13-18 (emph. added). The Court also told Plaintiffs' counsel that "you're going to have to find some way to explain" to the putative class and collective members that a "substantial number" could be economically "worse off" so that they "can decide whether they want to opt in, not

opt in, whether they want to remove themselves from the class, et cetera." *Id.* at 12:13-25; 13:16-19. In an attempt to allay the Court's concerns that a "substantial number" of class members may owe retroactive taxes as a result of this lawsuit, Plaintiffs' counsel told the Court that "we [] don't have an objection to the concept of having something in a notice that raises this [tax] issue." *Id.* at 12:5-7.

Although the Court, in granting Plaintiffs' motions for class and conditional certification, ultimately held that the conflict of interest identified by AMN was "speculative," due process still requires that class and collective members be apprised of the potential economic consequences raised under Plaintiffs' theory of liability. To illustrate, in *Gutierrez v. Kovacevich "5" Farms*, 2004 WL 3745224, at *8 (E.D. Cal. Dec. 2, 2004), the court recognized that "concerns about a potential conflict merit some preventative action" in distributing notices to class members. Specifically, in *Gutierrez*, the defendant employer, K5 farms, argued that in the event the plaintiffs and their union advocates prevailed, they would "likely desire a remedy that imposes the maximum amount of financial pain" that would put K5's "ability to provide competitive wages and benefits at risk." *Id.* at *7. This, according to K5 farms, was consistent with the union's "practice of using litigation to send the message that the consequence for businesses that oppose the [the union] is ruin, and the consequence for employees who do not embrace the [union] as their representative is unemployment," which created an intractable conflict of interest between Plaintiffs and class members who voted against union representation. *Id.* at *7. In an effort to protect the putative class members' due process rights, the court ordered that the "class notice should clearly indicate" the conflict of interest identified by K5 farms. *Id.* at *8.

Here, the result should be no different. There is a real probability that class and collective members will suffer an economic detriment—owe retroactive taxes on past per diem amounts received—if Plaintiffs' theory of liability is adopted by

the Court. Even if this was merely a "potential" concern, this potential concern should nonetheless be addressed in the notices to be distributed to the class and collective.

Each of AMN's revisions to Plaintiffs' proposed notices appropriately address the real probability that a conflict of interest is present in this case. First, AMN revised the section titled "What is the Lawsuit About?" to better inform the class and collective[1] that if Plaintiffs' theory of liability is adopted by the Court, their per diem amounts could then be treated as taxable income by the Internal Revenue Service ("IRS"). Second, AMN drafted a section titled "Will I Owe Taxes if I Become a Member of the [California-Wide Class] or [Nationwide FLSA Collective] Action?" which explains exactly *why* the IRS may treat their per diems as taxable income if Plaintiffs' theory is adopted by the Court, as well as *why* the class and collective may owe retroactive taxes as a result of this lawsuit. Third, AMN drafted a section titled "How Do I know Whether it is More Beneficial for Me to Receive a Higher Overtime Rate or be Taxed on the Per Diem Amounts I Received From AMN?" This section includes a table of fifteen hypothetical examples of nurses working an average 13-week assignment for AMN, where each example was developed using varying rates of regular pay, number of overtime hours worked, and amounts of per diem stipends. This table is intended to assist the class and collective in understanding the tax implications raised by Plaintiffs' lawsuits by comparing the amount a hypothetical nurse would earn if per diems are

[1] AMN additionally challenges the time period in Plaintiffs' proposed notice to potential opt-in collective members. Plaintiffs contend the collective time period should run from December 15, 2013. But collective actions under the FLSA are opt-in only actions, the statute of limitations continues to run against putative class members until each individual class member's opt-in consent form is filed with the Court. 29 U.S.C. § 256(b).

included in the regular rate for overtime purposes with the loss or gain in take-home pay if per diems become taxable income. And because California's overtime and double-time differ from the applicable federal standards, two different tables are used for the FLSA collective and California class notices. Lastly, for the sake of clarity and simplicity, AMN revised Plaintiffs' proposed California notice, which combined the California class notice *with* the FLSA collective notice, to reflect a California-only notice (omitting any references to the FLSA collective action). California class members can then receive the California-only notice *and* the FLSA collective notice in separate documents.

Indeed, these revisions are calculated to provide information that the class and collective would consider material in this case, as the tax treatment of per diem amounts could directly impact members' *livelihoods.* This information is necessary for the class and collective to make an informed decision as to whether they should participate in this lawsuit. Accordingly, AMN's revisions to Plaintiffs' proposed notices should be adopted by the Court to adequately protect the class and collectives' economic and due process interests.

IT IS RESPECTFULLY SUBMITTED BY,

DATED: November 7, 2017 HAYES PAWLENKO LLP

By: /s/ Matthew B. Hayes
Matthew B. Hayes
Attorneys for Plaintiffs

DATED: November 7, 2017 CONSTANGY, BROOKS, SMITH & PROPHETE, LLP

By: /s/ Sarah Kroll-Rosenbaum
Kenneth D. Sulzer
Sarah Kroll-Rosenbaum
Attorneys for Defendant