IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

TORIN SELLERS, RENEE BELL, and KEITH RUSSELL, *individually and on behalf of all others similarly situated*,	*	
Plaintiffs,	*	
v.	*	1:17-CV-03614-ELR
SAGE SOFTWARE, INC., *et al.*,	*	
Defendants.	*	

ORDER

Presently before the Court is Plaintiffs' Motion for Conditional Certification as a Collective Action and Supervised Notice to Class [Doc. 25], and Plaintiffs' Motion for Equitable Tolling of Statute of Limitations [Doc. 77]. The Court's rulings are set forth below.

I. Background

Defendants Sage Software, Inc. d/b/a Sage North America ("SSI") and Paya, Inc. f/k/a Sage Payment Solutions, Inc. ("SPS")[1] sell software and cloud-based applications to businesses for administering payroll, payment solutions, and other

[1] On May 21, 2018, Defendants filed a Notice of Name Change for Defendant SPS indicating that Defendant SPS changed its name to Paya, Inc. [Doc. 76].

business management needs. See Am. Compl. at ¶¶ 43-44 [Doc. 12]. Plaintiffs Torin Sellers, Renee Bell, and Keith Russell are former inside sales representatives for Defendants working in Defendants' Lawrenceville, Georgia and Atlanta, Georgia office locations. Id. at ¶¶ 15, 27, 32. Plaintiffs filed this collective action pursuant to the Fair Labor Standards Act ("FLSA"), 28 U.S.C. § 201, *et seq.*, alleging Defendants willfully failed to pay inside sales representatives overtime wages and willfully failed to properly track and record the inside sales representatives' work hours. Id.

Plaintiffs now seek conditional certification of the collective action pursuant to 29 U.S.C. § 216(b). Specifically, Plaintiffs move the Court (1) to certify a conditional class of all persons currently or formerly employed by Defendants as an inside sales representative under the title of Account Manager, Account Executive, or any other job title performing essentially the same job duties as inside sales representatives (collectively, "Inside Sales Representative"), who worked at either the Lawrenceville or Atlanta offices; (2) to require Defendants to submit a list of putative class members to Plaintiffs; and (3) to authorize notice to potential opt-in Plaintiffs of their right to join the collective action.[2]

[2] Since the Court rules on the pending motion to conditionally certify the class within this order, the Court denies as moot Plaintiffs' Request for Status Conference on Pending Motion for Conditional Certification. [Doc. 75].

II. Legal Standard

"The FLSA authorizes collective actions against employers accused of violating the FLSA." Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1258 (11th Cir. 2008) (citing 29 U.S.C. § 216(b)). In order to maintain a collective action, Section 216(b) requires the plaintiffs to demonstrate that they are "similarly situated." 29 U.S.C. § 216(b); Morgan, 551 F.3d at 1258. "To determine whether a collective action is warranted pursuant to § 216(b), a district court may follow a two-stage process." Lawson v. Bell S. Telecomms., Inc., No. 1:09-CV-3528-JEC, 2011 WL 3608462, at *3 (N.D. Ga. Aug. 16, 2011).

In the first stage of the conditional certification, the Court considers "whether other similarly situated employees should be notified." Morgan, 551 F.3d at 1260. At this stage, the "plaintiff has the burden of showing a 'reasonable basis' for his claim that there are other similarly situated employees." Id. This standard has been described as "not particularly stringent," "fairly lenient," flexib[le]," "not heavy," and "less stringent than that for joinder under Rule 20(a) or for separate trials under 42(b)." Id. at 1261 (internal citations and quotations omitted). "Plaintiffs may satisfy their burden through 'detailed allegations supported by affidavits which successfully engage defendants' affidavits to the contrary.'" Lawson, 2011 WL 3608462, at *3 (quoting Grayson v. K Mart Corp., 79 F.3d 1086, 1097 (11th Cir. 1996)).

The Eleventh Circuit has declined "to draw bright lines in defining similarly," but has "explained that as more legally significant differences appear amongst the opt-ins, the less likely it is that the group of employees is similarly situated." Morgan, 551 F.3d at 1261. "To warrant conditional certification in the first stage, a court 'should satisfy itself that there are other employees . . . who desire to 'opt-in' and who are 'similarly' situated with respect to their job requirements and with regard to their pay provisions.'" Lawson, 2011 WL 3608462, at *4 (quoting Morgan, 551 F.3d at 1259). Stated differently, "courts determine whether employees are similarly situated—not whether their positions are identical." Morgan, 551 F.3d at 1260.

"The second stage imposes a greater burden on the plaintiff to prove similarity. When discovery is over or nearly complete, the employer may file a motion for decertification." Lawson, 2011 WL 3608462, at *4 (internal citation omitted). "At this point, the district court has a much thicker record than it had at the notice stage, and can therefore make a more informed factual determination of similarity." Morgan, 551 F.3d at 1261 (citation omitted). During this second stage, the Court "reassesses its initial certification decision based on a more comprehensive factual record." Lawson, 2011 WL 3608462, at *4.

III. Discussion

A. Motion to Conditionally Certify the Class

"Plaintiffs are entitled to conditional certification of a collective action if they can show there are other employees: (1) who wish to opt-in and (2) who are similarly situated in their job requirements and pay provisions." Lawson, 2011 WL 3608462, at *4.

The first requirement is easily met where, as here, at least twelve Inside Sales Representatives filed written consents to opt in to this action at the time Plaintiffs filed this motion. See id. (finding the first requirement met where thirty-eight of the defendant's field managers filed written consents to opt in to the suit); see also Stevenson v. Great Am. Dream, Inc., No. 1:12-CV-3359-TWT, 2013 WL 4217128, at *2 (N.D. Ga. Aug. 14, 2013) (finding that the plaintiffs had a reasonable basis for their claim that other entertainers would want to opt in to the lawsuit where one consent was filed during the briefing of the motion for conditional certification). Accordingly, the key issue before the Court is whether the putative class members share similar job requirements.

The Court finds that Plaintiffs have satisfied their minimal, initial burden to show that there are other Inside Sales Representatives with similar job requirements. Plaintiffs, through the various declarations filed by Inside Sales Representatives, provide as follows:

- Inside Sales Representatives' duties consist of selling the companies' software and cloud applications through telephone calls with customers or potential customers. [Docs. 25-2–25-16].
- Generally, all Inside Sales Representatives worked Monday through Friday, working nine hour shifts with a one hour break or eight and a half hour shifts with a thirty minute break. [Id.]
- Inside Sales Representatives' compensation plans comprised of a base pay plus monthly commissions. [Id.]
- Inside Sales Representatives were assigned sales quotas. [Id.]
- If the sales quotas were not met, the Inside Sales Representatives were at risk of termination. [Id.]
- Defendants encouraged Inside Sales Representatives to work as many hours as needed to meet sales quotas, but Defendants discouraged Inside Sales Representatives to claim overtime hours. [Id.]

This demonstrates that the putative class members share similar job requirements.

Defendants make several legal arguments against conditional certification. First, Defendants argue that Plaintiffs are exempt employees pursuant to 29 U.S.C. § 207(i). The section 207(i) exemption applies to commissioned employees of retail or service establishments. See Amponsah v. DirecTV, LLC, 278 F. Supp. 3d 1352, 1366 (N.D. Ga. 2017). However, the appropriate time to address "whether any particular individual is exempt is after the completion of discovery and during the second stage of the certification determination." Jewell v. Aaron's, Inc., No. 1:12-cv-0563-AT, 2012 WL 2477039, at *5 (N.D. Ga. June 28, 2012) (quoting Riddle v. SunTrust Bank, No. 1:08-CV-1411-RWS, 2009 WL 3148768, at *2

(N.D. Ga. Sept. 29, 2009)). Nevertheless, Plaintiffs aver that the offer letters and pay stubs they received during their employment indicate they were classified as non-exempt employees. To the extent Defendants classified some of their Inside Sales Representatives as exempt employees, Plaintiffs consent to the class being limited to non-exempt Inside Sales Representatives. [Doc. 46 at 13]. Accordingly, while the Court does not delve into the exemption inquiry at this notice stage, the class is limited to non-exempt Inside Sales Representatives.

Second, Defendants argue that Plaintiffs were not subject to a common policy, plan, or scheme resulting in a violation of the FLSA. Specifically, Defendants argue that their timekeeping policies were not unlawful and required all non-exempt employees to report all additional time worked.[3] However, Defendants' argument that their timekeeping policy on its face does not violate the FLSA is not sufficient to avoid conditional certification. See Jewell, 2012 WL 2477039, at *7 (citing Burkhart-Deal v. Citifinancial, Inc., No. 07-1747, 2010 WL 457127, at *3 (W.D. Pa. Feb. 4, 2010) (stating "[t]he fact that Defendant has a written policy requiring overtime pay . . . does not defeat conditional certification.")). At the conditional certification stage

[3] Plaintiffs do not allege that Defendants do not have an overtime pay policy, but rather, allege that Defendants were encouraging the Inside Sales Representatives to work overtime hours to meet sales quotas, that Defendants were aware the Inside Sales Representatives were working overtime hours and not submitting the overtime hours for compensation, and that Defendants were discouraging the Insides Sales Representatives to submit the overtime hours that they worked for compensation.

> [t]he focus of th[e] inquiry . . . is not on whether there has been an actual violation of the law but rather on whether the proposed plaintiffs are 'similarly situated' under 29 U.S.C. § 216(b) with respect to their allegations that the law has been violated. . . . [A] court adjudicating a motion to authorize a collective action need not evaluate the merits of plaintiffs' claims in order to determine whether a similarly situated group exists.

Kreher v. City of Atlanta, No. 1:04-cv-2651-WSD, 2006 WL 739572, at *4 (N.D. Ga. Mar. 20, 2006) (quoting Young v. Cooper Cameron Corp., 229 F.R.D. 50, 54-55 (S.D.N.Y. 2005)).

Furthermore, establishing an employee handbook with lawful timekeeping policies does not immunize Defendants from an FLSA violation. See Jewell, 2012 WL 2477039, at *7 (citing Beauperthuy v. 24 Hour Fitness USA, Inc., No. 06-0715 SC, 2008 WL 793838, at *4 (N.D. Cal. Mar. 24, 2008) ("An employer's responsibility under the FLSA extends beyond merely promulgating rules to actually enforcing them. . . . That Defendants published a handbook cannot immunize them against an FLSA violation where there is substantial evidence that they did not follow their own guidelines.")).

Defendants' two remaining arguments against conditional certification are that (1) the declarations Plaintiffs submitted differ slightly in their alleged reasoning for not receiving overtime compensation and (2) certification will require individualized inquiries. These differences, however, do not alter the Court's conclusion regarding whether Plaintiffs are similarly situated to the other

Inside Sales Representatives. Indeed, "[i]f one zooms in close enough on anything, differences will abound[.]" Frank v. Golden Plump Poultry, Inc., No. 04-CV-1018(PJS/RLE), 2007 WL 2780504, at *4 (D. Minn. Sept. 24, 2007). Defendants do not dispute that Inside Sales Representatives sold Defendants' software and cloud services through telephone calls with customers or potential customers, worked similar Monday through Friday schedules, were paid a base rate plus monthly commission, and were assigned sales quotas. In fact, Defendants' response brief repeatedly groups all Inside Sale Representatives together while arguing that the section 702(i) exemption applies. See generally, Doc. 45 at 11–13.

The Court expresses no opinion as to the veracity of the statements in the declarations submitted by Plaintiffs; however, at this stage, the Court merely finds that Plaintiffs are similarly situated to other Inside Sales Representatives. See Lawson, 2011 WL 3608462, at *7 ("Differences in individual factual and employment settings are generally a consideration for the second stage when discovery is complete and the Court has more information to evaluate."); Scott v. Heartland Home Fin., Inc., No. 1:05-CV-2812-TWT, 2006 WL 1209813, at *3 (N.D. Ga. May 3, 2006) ("[V]ariations in specific duties, job locations, working hours, or the availability of various defenses are examples of factual issues that are not considered at this stage."; "[T]he Court declines to resolve factual issues or make credibility determinations at [the notice] stage."); Kreher, 2006 WL 739572,

at *4 n.8 (finding conditional certification appropriate where the plaintiffs alleged that "many employees were subject to common policies which violated the FLSA" and that "[t]he Court will consider whether the individualized nature of their claims requires decertification of the class at the appropriate time during the second stage of the analysis.").

Accordingly, the Court finds that Plaintiffs have "submitted sufficient evidence at the notice stage to establish, based on the fairly lenient standard, that [Inside Sales Representatives] employed by [Defendants] are 'similarly situated' for purposes of conditionally certifying the collective action." Scott, 2006 WL 1209813, at *4. "Should [Defendants] move for decertification following discovery, the Court will revisit the certification issue and make a final determination as to whether the similarly-situated requirement has been met. Nevertheless, at this stage, the Court will permit the Plaintiffs to send notice of opt-in rights to potential members of the class." Id.

B. Plaintiffs' Proposed Notice

The Court has the discretion to assist in the notification of prospective plaintiffs pursuant to 29 U.S.C. § 216(b). Beavers v. Am. Cast Iron Pipe Co., 975 F.2d 792, 802 (11th Cir. 1992) (citing Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165 (1989)). "The benefits of a collective action 'depend on employees receiving accurate and timely notice . . . so that they can make informed decisions

about whether to participate.'" Morgan, 551 F.3d at 1259 (quoting Hoffman-La Roche, Inc., 493 U.S. at 170). After a review of the case and the parties' arguments, the Court finds that judicial notice is appropriate.

Plaintiffs submitted a proposed Court-ordered notice and requested the Court (1) apply a three year statute of limitations period for the notice; (2) require notice be posted at Defendants' Lawrenceville and Atlanta offices; (3) require notice be posted on a website; (4) require notice be disseminated via U.S. Mail, email,[4] and text messages; (5) authorize a 90-day notice period; (6) authorize a reminder notice to potential opt-in plaintiffs who have not submitted their consent forms 45 days after the initial notice period; and (7) authorize electronic signatures on the consent forms. Defendants raise a number of objections to Plaintiffs' requests and Plaintiffs' proposed notice.

First, Defendants argue that the statute of limitations should be two years and not three years.[5] Indeed, 29 U.S.C. § 255(a) states that the statute of limitations for FLSA claims is generally two years, but it is extended to three years for claims "arising out of a willful violation." Here, at this early stage, Plaintiffs' allegations that Defendants had a practice of willfully failing to pay Inside Sales Representatives for all hours worked is sufficient to extend the statute of

[4] Plaintiffs seek dissemination of the notice to the business email addresses of currently employed class members and to the personal email addresses of formerly employed class members. [Doc. 25 at 35].

[5] The Court addresses Plaintiffs' Motion for Equitable Tolling [Doc. 77], *infra*.

limitations. Sizemore v. Grayhawk Homes, Inc., No. 4:17-CV-161 (LJA), 2018 WL 1997539, at *3 (M.D. Ga. Apr. 27, 2018) ("Because Plaintiffs have alleged a willful FLSA violation, the statute of limitations is presumptively three years rather than two years. 29 U.S.C. § 255(a). Defendants are not precluded from challenging the three-year limitations period at an appropriate time in the proceedings."). Accordingly, at this notice stage, the three year statute of limitations applies.

In Plaintiffs' proposed notice, the temporal scope of the class begins on September 18, 2014, which was three years prior to the date Plaintiffs filed this action; however, Defendants argue that the "notice period must be calculated from the date of any Court certification order" and not from the commencement of this action. [Doc. 45 at 41 (emphasis omitted)]. After careful review, the Court agrees with Defendants. Accordingly, the temporal scope of the class shall begin three years preceding the notice mailing date. See Olmstead v. RDJE, Inc., No. 3:16-CV-198-TWT, 2017 WL 3769331, at *5 (N.D. Ga. Aug. 31, 2017) (listing the temporal scope of the class from "3 years prior to the mailing date" to "the mailing date"); Reece v. United Home Care of N. America, Inc., No. 1:12-CV-2070-RWS, 2013 WL 895088, at *6 (N.D. Ga. Mar. 8, 2013) (listing the temporal scope of the class from "3 years prior to the Notice mailing date" to "the Notice mailing date.").

Second, Defendants argue that disseminating the notice via U.S. Mail is sufficient, and thus, emails and text messages are unnecessary. More specifically, Defendants object to Plaintiffs' request to disseminate the notice to the business email addresses of currently employed class members. The Court agrees that Plaintiffs have failed to show why dissemination to currently employed class members via their business email addresses is necessary rather than through their personal email addresses. However, the Court agrees with Plaintiffs that utilizing email to disseminate the notices rather than disseminating solely through the U.S. Mail is appropriate. See Burrell v. Toppers Int'l, Inc., No. 3:15-cv-125(CDL), 2016 WL 4111375, at * 2 (M.D. Ga. Mar. 11, 2016) (using "first-class mail and email" to disseminate notice); Alexander v. CYDCOR, Inc., No. 1:11-CV-01578-SCJ, 2012 WL 1142449, at *9 (N.D. Ga. Apr. 6, 2012) (using "first class mail, email (if available) and/or overnight delivery" to disseminate notice).

Additionally, the Court agrees with Defendants that sending notice via text message is unnecessary and potentially costly for the recipients. See Miller v. JAH, LLC, No. 5:16-cv-01543-AKK, 2018 WL 305819, at *3 (N.D. Ala. Jan. 5, 2018) ("the court has serious reservations about sanctioning text messages as a way to reach the potential class[,] . . . some individuals have limited phone plans, and unwarranted text messages may cause these individuals to incur monetary charges."). In sum, the Court denies Plaintiffs' requests to disseminate the notice

via text messages and via potential class members' business email addresses, but the Court grants Plaintiffs' requests to disseminate the notice via U.S. Mail and via potential class members' personal email addresses.

Third, Defendants object to the reference to or use of a website controlled by a third party claims administrator hired by Plaintiffs' counsel. Defendants contend that a notice posted online "is easily shared to improper recipients with commentary that could distort any court approved message." [Doc. 45 at 37]. The Court disagrees and will allow Plaintiffs' counsel to use a website to inform similarly situated persons of their right to join this litigation. However, the notice on the website *must* mirror any notice ultimately approved by the Court. Alexander, 2012 WL 1142449, at *9 (allowing website so long as the notice on the website does not "deviate from the approved Notice."). Plaintiffs also request that class members be allowed to electronically sign their consent forms via the website. [Doc. 25 at 39]. Defendants do not object to the electronic signatures. Accordingly, the Court will allow electronically signed consent forms. See Destin v. World Fin. Grp., No. 1:13-cv-1092-CAP, Order at 4, Doc. 211 (N.D. Ga. Apr. 9, 2015) (approving notice that allowed the potential opt-in plaintiffs to join online by going to a website and electronically signing the consent form).

Fourth, Defendants object to posting notices at Defendants' Lawrenceville and Atlanta offices and to sending reminder notices as redundant and unnecessary.

The Court agrees. Plaintiffs have not provided sufficient justification for posting notices at Defendants' offices nor for sending reminder notices. See Trentman v. RWL Commc'ns, Inc., No. 2:15-cv-89-FtM-38CM, 2015 WL 2062816, at *5 (M.D. Fla. May 4, 2015) ("Sending a putative class member notice of this action is informative; sending them a 'reminder' is redundant.") (quoting Palma v. MetroPCS Wireless, Inc., No. 8:13-cv-698, 2014 WL 235478, at *3 (M.D. Fla. Jan. 22, 2014)); see also Stelmachers v. Maxim Healthcare Servs., Inc., No.1:13-CV-1062-RLV, 2013 WL 12251411, at *4 (N.D. Ga. Aug. 5, 2013) (posting the notice in the defendant's offices and workplaces was "unnecessary, burdensome, and ineffective.")

Fifth, Defendants object to Plaintiffs' proposed notice period of 90 days and argues that the notice period should be 60 days. Specifically, Defendants argue that a 60-day notice period is more similar to notice periods in this district than a 90-day notice period. [Doc. 45 at 39]. The Court agrees, and Plaintiffs have not sufficiently shown why an extended notice period is necessary in this case. Accordingly, the notice period shall not exceed sixty (60) days.

Sixth, Defendants object to Plaintiffs' request for potential class members' telephone numbers and the last four digits of their social security numbers. After careful review, the Court overrules Defendants' objection as to the telephone numbers and sustains Defendants' objection as to the social security numbers. See

Olmstead, 2017 WL 3769331, at *5 ("This Court . . . has approved the use of telephone numbers before[.]"); see also Randle v. Allconnect, Inc., No. 1:14-cv-245-WSD, 2014 WL 1765184, at *4 n.6 (N.D. Ga. May 6, 2014) ("The production of the employees' social security numbers is not required at this time.").[6] Accordingly, Defendants shall provide Plaintiffs, within twenty-one (21) days from the date of entry of this order, a list of all persons currently or previously employed by Defendants as non-exempt Inside Sales Representatives including: names, mailing addresses, telephone numbers, and personal email addresses, from the date of entry of this order.[7]

The remainder of Defendants' objections relate to the language of Plaintiffs' proposed notice and proposed consent form. As to these remaining objections, the Court directs the parties to meet and confer and jointly file on the docket, within fourteen (14) days from the date of entry of this order, a proposed notice and consent form.[8] Should the parties remain unable to agree, Plaintiffs are to file a proposed notice and consent form within twenty-one (21) days from the date of

[6] The Court also overrules Defendants' objection to providing the potential class information to the third-party claims administrator instead of directly to Plaintiffs' counsel.

[7] While the temporal scope of the notice is within three years prior to the dissemination date of the notice, in order to capture all members of the potential class and without knowing the exact notice date, Defendants shall provide Plaintiffs a list of potential class members that were employed by Defendants within three years prior to the date of entry of this order. See Olmstead, 2017 WL 3769331, at *5.

[8] As Defendant Sage Group plc was voluntarily dismissed from this action on December 28, 2017 [Doc. 33], the Court directs the parties to remove any reference to Sage Group plc from the notice.

entry of this order, and Defendants will have five (5) days to object. Any objections will be limited to three (3) pages. Any response by Plaintiffs to Defendants' objections shall be due within three (3) days and will also be limited to three (3) pages.

C. Motion for Equitable Tolling

Plaintiffs request that the Court toll the putative class members' statute of limitations "while or during the time the Motion [for Conditional Certification] has been pending until ruled upon and all issues of the notice are finalized and notice is to be commenced." [Doc. 77 at 2]. In FLSA collective actions, "the statute of limitations is not automatically tolled as to the claims of putative opt-in plaintiffs upon the filing" of the complaint. Bennett v. Adv. Cable Contractors, Inc., No. 1:12-cv-115-RWS, 2012 WL 1600443, at *2 (N.D. Ga. May 7, 2012). Pursuant to the plain language of the statute, an FLSA collective action is considered to be commenced

> (a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
>
> (b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced.

29 U.S.C. § 256. Accordingly, "opt-in plaintiffs are deemed to commence their civil action only when they file their written consent to opt into the class action." Grayson, 79 F.3d at 1106.

Plaintiffs appear to request this Court toll the statute of limitations for putative plaintiffs who have not yet opted into this suit *and* for the opt-in plaintiffs who have already filed consents to join. For those putative plaintiffs who have not yet opted into the suit, Plaintiffs do not represent them, and therefore, Plaintiffs have no authority to seek equitable tolling on their behalf. Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1249 (11th Cir. 2003) (a plaintiff in a FLSA action has no right to represent other plaintiffs and the action does not become a "collective action" until other plaintiffs affirmatively opt into the class by giving written and filed consent); Jesiek v. Fire Pros, Inc., No. 1:09-CV-123, 2011 WL 2457311, at *2 (W.D. Mich. June 16, 2011) (plaintiffs had no authority to request a tolling of the statute of limitations on behalf of absent parties). Until these putative plaintiffs opt into this suit, the Court has no jurisdiction over them, and any opinion regarding equitable tolling as to them would be an advisory opinion. See, e.g., Cameron-Grant, 347 F.3d at 1249 ("Until such consent [to join an FLSA suit] is given, no person will be bound by or may benefit from judgment.") (quotation omitted); Atkinson v. TeleTech Holdings, Inc., No. 3:14-CV-253, 2015 WL 853234, at *8 (S.D. Ohio Feb. 26, 2015) ("because the potential

opt-in plaintiffs do not become parties to the lawsuit until they file their consent forms with the court, the court lacks jurisdiction to grant them equitable relief"); Tidd v. Adecco USA, Inc., No. CIV.A. 07-11214-GAO, 2010 WL 996769, at *3 (D. Mass. Mar. 16, 2010) ("Because these persons have not yet opted-in to the case, the plaintiffs are, in effect, asking for an advisory opinion, which the Court cannot issue."); Ingersoll v. Royal & Sunalliance USA, No. CV05-1774L, 2006 WL 859265, at *3 (W.D. Wash. Feb. 10, 2006) ("Because these individuals have not yet chosen to 'opt in' to the 29 U.S.C. § 216(b) collective action, plaintiffs ask the Court to make an advisory decision."); see also Roberts v. TJX Companies, Inc., No. 13-CV-13142-ADB, 2017 WL 1217114, at *7 (D. Mass. Mar. 31, 2017) (collecting cases wherein "courts have held that equitable tolling for putative collective action members is premature at the conditional certification stage because the individuals have not yet opted in and are thus not yet parties to the case" and refusing to "toll the limitations period for thousands of putative collective action members, particularly where it is possible that no putative plaintiffs whose claims are time-barred ultimately elect to opt-in"). Therefore, the Court will not equitably toll any time with regard to putative plaintiffs.

As for the opt-in plaintiffs who have already filed consents to join, "equitable tolling is an 'extraordinary remedy' that should be applied 'sparingly.'" Abram v. Fulton Cty. Gov't, 598 F. App'x 672, 675 (11th Cir. 2015). "Equitable

tolling requires the party invoking it to show both extraordinary circumstances and diligence in pursuing her rights." Wilson v. Standard Ins. Co., 613 F. App'x 841, 844 (11th Cir. 2015). "Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." Arce v. Garcia, 434 F.3d 1254, 1261 (11th Cir. 2006) (quoting Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999)).

Plaintiffs are correct that several courts have allowed equitable tolling due to the particular circumstances of a case, including delays caused by pending motions. Compare Gutescu v. Carey Int'l, Inc., No. 01-4026CIV-MARTINEZ, 2004 WL 5333763, at *4 (S.D. Fla. Feb. 25, 2004) (allowing equitable tolling because the "Motion to Certify Class remained pending for an unusual amount of time"), with Vaughn v. Oak St. Mortg., LLC, No. 505CV311OC10GRJ, 2006 WL 890071, at *2 (M.D. Fla. Apr. 3, 2006) ("ordinary delays in the judicial system are routine and not considered extraordinary") and Longcrier v. HL-A Co., 595 F. Supp. 2d 1218, 1244 (S.D. Ala. 2008) (to allow equitable tolling when motions are pending would be to allow such tolling "in every § 216(b) case as a matter of course during the pendency of a conditional class certification request, thereby transforming this extraordinary remedy into a routine, automatic one").

Nevertheless, Plaintiffs, as the movants, have not shown how the opt-in plaintiffs diligently pursued their rights. The affidavits of the opt-in plaintiffs do

not speak to their diligence in pursuing their rights. In addition, the opt-in plaintiffs have not pointed to extraordinary circumstances that were beyond the opt-in plaintiffs' control and unavoidable, even with diligence, which prevented the opt-in plaintiffs from filing consents to join in this case so as not to risk running up against the statute of limitations. See Wilson, 613 F. App'x at 845 ("there is no equitable tolling when the plaintiffs had notice sufficient to prompt them to investigate and . . . had they done so diligently, they would have discovered the basis for their claims"). There is no explanation from opt-in plaintiffs as to why they did not file consents to join sooner. See Bobbitt v. Broadband Interactive, Inc., No. 8:11-CV-2855-T-24, 2012 WL 2872846, at *3 (M.D. Fla. July 12, 2012) (denying equitable tolling because the putative plaintiffs could have chosen to file suit at any time and nothing precluded them from doing so). The fact that the opt-in plaintiffs filed consents to join at different times in this case further proves that these potential plaintiffs were free to file sooner.

While, "[e]quitable tolling may be warranted where the defendant misled the plaintiff into allowing the statutory limitations period to lapse or where the plaintiff had no reasonable way of discovering the wrong perpetrated against her," see Abram, 598 F. App'x at 675, Plaintiffs do not contend that Defendants misled Plaintiffs. Strangely, Plaintiffs contend that Defendants "have played loosey-goosey with their obligations under the FLSA, giving all sorts of excuses and

reasons for not paying their inside sales rep[resentative]s at issue in this case . . . ." [Doc. 77 at 9]. However, Plaintiffs' allegations against Defendants and Defendants' defense(s) are irrelevant for equitable tolling. The opt-in plaintiffs had two options for filing a timely claim: "(1) opt into this collective action if they were aware of it, or (2) file an individual FLSA claim." Czopek v. TBC Retail Grp., Inc., No. 8:14-CV-675-T-36TBM, 2015 WL 12915566, at *2 (M.D. Fla. Aug. 7, 2015) (quoting Lytle v. Lowe's Home Centers, Inc., No. 8:12-CV-1848-T-33TBM, 2014 WL 103463, at *7 (M.D. Fla. Jan. 10, 2014)). There is no evidence that they were prevented from doing either at any time. Therefore, for all of these reasons, the Court will not equitably toll any time for the current opt-in plaintiffs and putative plaintiffs who are not yet before this Court.[9]

D. Summary

The Court finds that Plaintiffs have met their burden of showing "there are other employees: (1) who wish to opt-in and (2) who are similarly situated in their job requirements and pay provisions." Lawson, 2011 WL 3608462, at *4. Accordingly, the Court grants Plaintiffs' motion for conditional certification. The class shall be defined as follows:

> All current and former non-exempt Inside Sales Representatives under the title of Account Manager, Account Executive, or any other job title performing inside sales representation, employed by Sage

[9] Even if the Court had jurisdiction over putative plaintiffs at this time, there is no evidence that they have diligently pursued their rights to justify equitable tolling.

> Software, Inc. or Paya, Inc. f/k/a Sage Payment Solutions, Inc. from *[3 years prior to the Notice dissemination date]* through *[the Notice dissemination date]*.

Additionally, the Court, at this notice stage, will apply a three year statute of limitations; will allow a sixty (60) day notice period; will allow dissemination of the notice via U.S. Mail, website, and potential class members' personal email addresses; and will allow electronic signatures on the consent forms. The Court will not allow posting of the notice at Defendants' Lawrenceville and Atlanta office locations; will not allow a reminder notice; will not allow dissemination of the notice via text message or via potential class members' business email addresses; and will not require Defendants to provide Plaintiffs with potential class members' last four digits of their social security numbers.

IV. Conclusion

The Court **GRANTS** Plaintiffs' Motion for Conditional Certification as a Collective Action and Supervised Notice to Class [Doc. 25] and **DIRECTS** Defendants to provide Plaintiffs, within twenty-one (21) days from the date of entry of this order, a list of names and other information of potential class members, as stated herein.

The Court further **DIRECTS** the parties to meet and confer regarding the proposed notice, proposed consent form, and objections thereto. The parties shall file a joint proposed notice and consent form within fourteen (14) days from the

date of entry of this order. If the parties are unable to agree, Plaintiffs shall file a proposed notice and consent form within twenty-one (21) days from the date of entry of this order, in compliance with the above rulings, and Defendants shall have five (5) days to file any objections, limited to three (3) pages. Any response by Plaintiffs to Defendants' objections shall be due within three (3) days and will also be limited to three (3) pages. The Court **DIRECTS** the Clerk to submit this matter to the undersigned at the conclusion of this period.

Furthermore, the Court **DENIES AS MOOT** Plaintiffs' Request for Status Conference on Pending Motion for Conditional Certification [Doc. 75], and **DENIES** Plaintiffs' Motion for Equitable Tolling of Statute of Limitations [Doc. 77].

SO ORDERED, this 25th day of May, 2018.

Eleanor L. Ross
United States District Judge
Northern District of Georgia