APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A: Order by the United States Court of Appeals for the Seventh Circuit Staying Mandate (Sep. 2, 2025) 1a

APPENDIX B: Opinion by the United States Court of Appeals for the Seventh Circuit Vacating and Remanding (Aug. 5, 2025) 3a

APPENDIX C: Order by the United States District Court for the Southern District of Indiana Staying Notice (Sep. 16, 2024) 30a

APPENDIX D: Order by the United States Court of Appeals for the Seventh Circuit Granting Panel Rehearing And Permission To Appeal (Aug. 29, 2024) 32a

APPENDIX E: Order by the United States Court of Appeals for the Seventh Circuit Denying Permission To Appeal (July 8, 2024) 34a

APPENDIX F: Order by the United States District Court for the Southern District of Indiana Certifying an Immediate Appeal (May 10, 2024) 36a

APPENDIX G: Order by the United States District Court for the Southern District of Indiana Granting Motion for Conditional Certification (Mar. 25, 2024) 54a

APPENDIX H: Constitutional and Statutory Provisions Involved..... 80a

---

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn St.
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

September 2, 2025

Before

THOMAS L. KIRSCH II, *Circuit Judge*

No. 24-2574	MONICA RICHARDS, Plaintiff - Appellee v. ELI LILLY & COMPANY and LILLY USA, LLC, Defendants - Appellants
Originating Case Information:	
District Court No: 1:23-cv-00242-TWP-MKK Southern District of Indiana, Indianapolis Division District Judge Tanya Walton Pratt	

Upon consideration of the **MOTION TO STAY MANDATE PENDING PETITION FOR WRIT OF CERTIORARI**, filed on August 22, 2025, by counsel for the appellants,

IT IS ORDERED that the motion to stay the mandate is **GRANTED**. The stay will expire automatically if the time to file a petition for writ of certiorari expires without a petition being filed, or if a petition is filed and denied. If a petition is filed and granted, the stay will remain in place pending the Supreme Court's decision.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

No. 24-2574

MONICA RICHARDS, individually and on behalf of all other similarly situated individuals,

Plaintiff-Appellee

v.

ELI LILLY & COMPANY and LILLY USA, LLC,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:23-cv-00242-TWP-MKK — **Tanya Walton Pratt**, *Judge*.

ARGUED JANUARY 28, 2025 — DECIDED AUGUST 5, 2025

Before HAMILTON, KIRSCH, and LEE, *Circuit Judges*.

KIRSCH, *Circuit Judge*. The Fair Labor Standards Act authorizes similarly situated employees to collectively sue employers for violations of the Act. 29

U.S.C. § 216(b). District courts take an active and early role in the management of these mass actions—commonly known as collective actions— including by issuing notice to potential plaintiffs so that they may opt to join the collective. At issue in this interlocutory appeal is the showing necessary to procure this court-issued notice.

Absent meaningful guidance from the FLSA or higher courts, district courts have been left to fashion their own standards. Today, we clarify this area of the law and provide district courts in our circuit with a uniform, workable framework for assessing the propriety of notice to a proposed collective. As we explain in greater detail below, district courts must consider both parties' evidence with respect to similarity and may issue notice to potential plaintiffs when the named plaintiffs have raised at least a material factual dispute as to the similarity of potential plaintiffs.

I

A

To ensure broad and robust enforcement, the Fair Labor Standards Act of 1938 (FLSA) permits employees to bring so-called collective actions to sue employers for violations of the FLSA on behalf of themselves and other similarly situated employees. 29 U.S.C. § 216(b). The Age Discrimination in Employment Act of 1967 (ADEA) incorporates this enforcement provision, permitting employees to band together in collective actions when suing an employer for age discrimination. *Id.* § 626(b); *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 167–68 (1989). The statutory text authorizing collective actions is

sparse, however, and explains neither what it means to be similarly situated nor by what standard or at what stage in the proceedings courts must assess the similarity of the collective:

> An action … may be maintained against any employer … by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b).

Collective actions are a unique enforcement mechanism. Though, at first blush, they resemble a Federal Rule of Civil Procedure 23 class action, the two actions are "fundamentally different" in practice. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013). In a class action for damages under Rule 23(b)(3), a named plaintiff represents the rights of absent non-party plaintiffs who will be bound by the disposition of the case unless they opt out of the class. See 7B Wright & Miller's Federal Practice and Procedure § 1807 (3d ed. 2005). As we stated in *Vanegas v. Signet Builders, Inc.*, 113 F.4th 718 (7th Cir. 2024), collective actions are, by contrast, "a consolidation of individual cases, brought by individual plaintiffs." *Id.* at 726 (quotation omitted). Plaintiffs must affirmatively opt in to join a collective action. And unlike in a class action, each plaintiff who joins the collective enjoys full party status. See Wright & Miller, supra, § 1807.

"The twin goals of collective actions are enforcement and efficiency." *Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049 (7th Cir. 2020). Litigating collectively furthers these goals by lowering the "individual costs to vindicate rights" and enabling common legal issues to be resolved in one fell swoop. *Hoffmann-La Roche*, 493 U.S. at 170. But due to their opt-in nature, the benefits of collective actions can only be effectively realized if other similarly situated employees are made aware of the pending action. Acknowledging this fact, the Supreme Court has held that federal district courts may issue notice of a pending collective action to "potential plaintiffs" so that they may make "informed decisions about whether to participate." *Id.* at 169–70, 172–73. The Court declined, however, to define who qualifies as a potential plaintiff or what showing plaintiffs must make to secure notice, confirming "the existence of the trial court's discretion" to facilitate notice but "not the details of its exercise." *Id.* at 169–70.

With minimal guidance from Congress or the Court, district courts have largely been left to devise their own standards for facilitating notice to similarly situated employees. Over the last few decades, most district courts—including those in our circuit—have followed the *Lusardi* approach, which originated in a New Jersey district court. See *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 361 (D.N.J. 1987). Though it has many variations, *Lusardi* generally divides the management of a collective action into two steps.

At the first step, a plaintiff seeking notice to a proposed collective must make a "modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common

policy or plan that violated the law." *Strait v. Belcan Eng'g Grp.*, 911 F. Supp. 2d 709, 718 (N.D. Ill. 2012) (quotation omitted). A plaintiff's evidentiary burden at this stage is minimal, and many courts refuse to "make merits determinations, weigh evidence, determine credibility, or specifically consider opposing evidence presented by a defendant." *Iannotti v. Wood Grp. Mustang*, 603 F. Supp. 3d 649, 653 (S.D. Ill. 2022) (quotation omitted). Once a plaintiff makes this "modest" showing, the court issues notice to prospective plaintiffs, who may then opt in to the collective action by filing written consent with the court. Occasionally, if significant discovery has already taken place, courts will impose a higher level of scrutiny—referred to as a "modest-plus" or "intermediate" standard—before issuing notice. See, e.g., *Hawkins v. Alorica, Inc.*, 287 F.R.D. 431, 439 (S.D. Ind. 2012); *O'Neil v. Bloomin' Brands Inc.*, 707 F. Supp. 3d 768, 776 (N.D. Ill. 2023).

Step two occurs once opt-in and discovery are complete, at which point the defendant typically moves to challenge whether the collective is similarly situated. *Iannotti*, 603 F. Supp. 3d at 654. Now, with the benefit of more specific information about the collective's membership, the court engages in a more rigorous review to determine whether the plaintiffs are, in fact, similarly situated. If not, the individual plaintiffs' claims may be severed. See *Alvarez v. City of Chicago*, 605 F.3d 445, 450 (7th Cir. 2010) ("When a collective action is decertified, it reverts to one or more individual actions on behalf of the named plaintiffs.").

Lusardi's two steps are commonly but misleadingly referred to as conditional certification (step one) and decertification (step two). These stages are not to be

confused with class certification under Rule 23, however. See *Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003, 1009 (6th Cir. 2023) (rejecting the use of this terminology in the collective action context). Conditional certification does not produce a legal class or join any parties to the action. Rather, "[t]he sole consequence of conditional certification is the sending of court-approved written notice to employees." *Genesis*, 569 U.S. at 75. Thus, at step two, there is technically no collective to "decertify."

In recent years, *Lusardi*'s lenient notice standard has become the object of increasing scrutiny. Because most collective actions settle rather than proceed to trial, the issuance of notice, though it has no legal effect, carries significant practical implications for parties. For plaintiffs, broad and early notice helps to increase the size of the collective. This lowers costs, improves plaintiffs' bargaining position, and makes it easier to recruit suitable counsel. See *Hoffmann-La Roche*, 493 U.S. at 170. Expeditious notice is particularly important in FLSA cases. Under the FLSA, the statute of limitations is not automatically tolled to the date of the first filing for plaintiffs who have yet to opt in. 29 U.S.C. § 256(b). This means that delays in notice risk limiting or even running out the clock on putative plaintiffs' claims. [1] Notice also matters greatly to defendants, who worry that overly permissive notice standards will allow plaintiffs to

[1] This issue is not present in ADEA collective actions, at least in this circuit, because we have interpreted the ADEA to permit opt-in plaintiffs to piggyback on the timely filed claim of the named plaintiff, so long as the named plaintiff alleges class-wide discrimination. See *Anderson v. Montgomery Ward & Co.*, 852 F.2d 1008, 1016–17 (7th Cir. 1988).

artificially expand the size of a collective, "increas[ing] pressure to settle, no matter the action's merits." *Bigger*, 947 F.3d at 1049. Notice to employees who are ineligible to join a collective may also risk stirring up further litigation against an employer, especially if court-issued notice is perceived as an invitation for "those employees to bring suits of their own." *Clark*, 68 F.4th at 1010.

Consensus as to the proper standard for notice remains elusive. Several circuits have approved the use of some version of *Lusardi*'s two-step approach. See *Harrington v. Cracker Barrel Old Country Store, Inc.*, 142 F.4th 678, 681–83 (9th Cir. 2025) (citing *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1108–10 (9th Cir. 2018)) (holding that a district court did not abuse discretion by following the two-step process); *Thiessen v. Gen. Elec. Cap. Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (finding "no error" with a district court's choice to use the two-step approach); *Myers v. Hertz Corp.*, 624 F.3d 537, 554–55 (2d Cir. 2010) (describing the two-step approach as "sensible" but not required); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001) (same).

Recently, two circuits have expressly rejected *Lusardi*'s modest notice standard in favor of a heightened burden of proof. The Fifth Circuit now holds that notice may only issue if, at the outset of the case, plaintiffs can demonstrate that notice recipients are "actually similar to the named plaintiffs," ostensibly by a preponderance of the evidence. *Swales v. KLLM Transp. Servs., L.L.C.*, 985 F.3d 430, 434 (5th Cir. 2021). Taking a slightly different tack, the Sixth Circuit has concluded that notice may issue only where plaintiffs can show a "strong likelihood" that

employees are similarly situated. *Clark*, 68 F.4th at 1011. Until now, our circuit has yet to directly address the issue.[2]

B

In 2022, Monica Richards applied for a promotion to become District Sales Manager for one of Eli Lilly's Boston-based sales teams. A six-year veteran of the company in her early fifties, Richards had already been occupying the role on an interim basis for nearly six months. When the promotion was given instead to a much younger employee with less sales experience, Richards sued Eli Lilly & Company and Lilly USA, LLC, (collectively "Eli Lilly") in federal court, alleging age discrimination in violation of the ADEA, 29 U.S.C. § 621 et seq., and the Massachusetts Anti-Discrimination Law, Mass. Gen. Laws ch. 151B, § 4(1B) (2024).

On her ADEA claim, Richards moved to conditionally certify a collective action, asserting that the unfavorable treatment she experienced was part of a broader pattern of age discrimination against Eli Lilly's older employees. To alert other potential plaintiffs to her suit, Richards requested that the court send notice of the action to all "Eli Lilly employees who were 40 or older when they were denied promotions for which they were qualified, since February 12, 2022."

---

[2] In *Bigger*, we passingly observed that while some courts in our circuit follow the *Lusardi* approach, we have never required it. 947 F.3d at 1049 n.5. Richards relies on language in *In re New Albertsons, Inc.*, No. 21-2577, 2021 WL 4028428 (7th Cir. Sept. 1, 2021), to suggest that we have rejected critiques of *Lusardi*, but such non-precedential orders do not "constitute the law of the circuit." 7th Cir. R. 32.1(b).

The members of this proposed collective were similarly situated, Richards alleged, because they had all been plausibly harmed by a companywide initiative to support and retain "Early Career Professionals" (i.e., workers with less than two years of postgraduate experience) at the expense of older, more experienced employees.

Though the parties debated the appropriate standard for notice, the district court ultimately followed *Lusardi* and refused to consider Eli Lilly's evidence opposing the similarity of the proposed collective. Concluding that Richards had made the requisite modest factual showing, the district court conditionally certified the collective and agreed to issue notice. Recognizing, however, that we have not yet articulated a standard to govern the issuance of notice, the district court certified the question for interlocutory review under 28 U.S.C. § 1292(b). The proper facilitation of a collective action is largely committed to a district court's case management discretion, see *Hoffmann-La Roche*, 493 U.S. at 170–73, and conditional certification is not a final appealable decision under 28 U.S.C. § 1291. Accordingly, we rarely review a district court's decision to issue notice. In light of the Fifth and Sixth Circuit's recent decisions rejecting *Lusardi*'s "modest showing" standard, we agreed to take this interlocutory appeal. This should not signal, however, that we intend to accept frequent interlocutory appeals from notice decisions or micromanage the notice process.

II

We review a district court's decision to issue notice of a collective action for abuse of discretion but review the legal conclusions underlying that decision de novo. *Bigger*, 947 F.3d at 1048.

The time has come for us to offer clearer guidance on the proper facilitation of notice. As more courts have begun to question *Lusardi*, the standard for issuing notice in our circuit has begun to vary by court. See, e.g., *McColley v. Casey's Gen. Stores, Inc.*, 559 F. Supp. 3d 771, 776 (N.D. Ind. 2021) (observing that *Lusardi* "remains the dance of this circuit—a[t] least for the time being"); *Laverenz v. Pioneer Metal Finishing, LLC*, 746 F. Supp. 3d 602, 613–16 (E.D. Wis. 2024) (rejecting *Lusardi* and applying a preponderance of the evidence standard); *Fillipo v. Anthem Cos.*, No. 22-cv-00926, 2022 WL 18024818, at *2 (S.D. Ind. Dec. 30, 2022) (applying "the law of Rule 23 class certification" to evaluate whether conditional certification is appropriate). Such inconsistency leaves parties in the dark with respect to a critical aspect of the collective action process. And if left unchecked, this disuniformity may eventually jeopardize broader principles of equal treatment, creating the appearance of a system that permits unpredictability and arbitrariness. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989).

Richards resists, arguing that we cannot impose any uniform standard for notice because the management of collective actions is committed solely to the discretion of district courts. No doubt, district courts generally enjoy "wide discretion to manage collective

actions." *Alvarez*, 605 F.3d at 449. And appellate courts cannot create prophylactic rules that "circumvent or supplement legal standards" set out by Congress or the Supreme Court. *United States v. Tsarnaev*, 595 U.S. 302, 314–16 (2022). But, here, there is no legal standard to displace. In *Hoffmann-La Roche*, the Court confronted only the "narrow question" of whether district courts may play "any role" at all in facilitating notice of a collective action. 493 U.S. at 169. Richards relies heavily on a single line from *Hoffmann-La Roche*: "We confirm the existence of the trial court's discretion, not the details of its exercise." *Id.* at 170. But this remark is hardly an express delegation of sole and open-ended authority to district courts. Indeed, even as it left the "details" of how notice is facilitated for another day, the Court emphasized that the district court's discretion with respect to notice is not "unbridled." *Id.* at 170, 174.

Imposing guardrails on the exercise of a district court's discretion is the normal business of appellate courts. When we review discretionary district court decisions, we typically do so deferentially but against defined legal standards. In the class action context, for example, we have concluded that the prerequisites for class certification must be proven by a preponderance of the evidence, see *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012), even though Rule 23 confers "broad discretion" on district courts to determine whether certification is appropriate, *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008) (quotation omitted). More to the point, we have already outlined some contours of a district court's discretion to issue notice to a collective. See *Bigger*, 947 F.3d at 1050

(describing steps district courts must follow to investigate and resolve arbitrability disputes prior to issuing notice); *Woods v. N.Y. Life Ins.*, 686 F.2d 578, 580 (7th Cir. 1982) (holding that the district court's power to regulate notice does not include the power to forbid sending notice altogether). The issues presented in this case—who qualifies as a potential plaintiff under the FLSA, what evidence may be considered to make this showing, and the requisite burden of proof—are exactly the sorts of legal questions that ordinarily fall within our purview. Cf. *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 779 (7th Cir. 2016) (a district court's decision to dismiss a case for misconduct is discretionary but "distinct from the standard of proof by which the underlying facts must be proven").

III

Having established the need for a uniform notice standard, we turn now to the task of defining that standard. Because the text of the FLSA is silent with respect to notice, our analysis begins with *Hoffmann-La Roche*, from which we extract three core principles to guide the proper facilitation of notice. The first is the importance of ensuring that notice is timely and accurate—otherwise, the Court cautioned, the benefits of collective actions cannot be effectively realized. *Hoffmann-La Roche*, 493 U.S. at 170–71. Second is the principle of judicial neutrality: a district court's involvement in the notice process must remain "distinguishable in form and function from the solicitation of claims," and courts must facilitate notice in such a way as to "avoid even the appearance of judicial endorsement of the merits of the action." *Id.* at 174. Third, district courts must use their discretion

to "govern[] the conduct of counsel and the parties" to prevent abuses and ensure that the joinder of additional parties "is accomplished in an efficient and proper way." *Id.* at 171–73 (quotations omitted).

Below, we consider the various notice standards proposed by Richards and Eli Lilly. But because we find each inconsistent with the Court's instructions, in the end, we chart a different path that more closely adheres to the principles contained in *Hoffmann-La Roche*.

A

Richards argues that district courts should be permitted to continue applying *Lusardi*'s modest notice standard. We recognize that the majority of district courts have opted to apply *Lusardi*.[3] It is difficult to know, however, whether *Lusardi*'s ubiquity reflects genuine consensus that it is "an effective tool," *Hipp*, 252 F.3d at 1219, or is merely the product of inertia or "anchoring bias," *Clark*, 68 F.4th at 1008 (quotation omitted). Indeed, even as courts routinely employ the "modest" or "modest-plus" standards from *Lusardi*, those standards have been repeatedly criticized as unclear and difficult to apply. See, e.g., *McColley*, 559 F. Supp. 3d at 775 ("The court has researched deeply the origins of the 'modest' and

[3] We don't, however, attribute significance to the fact that the Court in *Hoffmann-La Roche* affirmed a lower court decision that followed *Lusardi*. See *Sperling v. Hoffmann-La Roche, Inc.*, 118 F.R.D. 392, 399 (D.N.J. 1988). *Hoffmann-La Roche* dealt only with the narrow question of whether court-issued notice was permissible at all; the Court never discussed the two-stage certification process nor considered whether *Lusardi* was a permissible exercise of the district court's discretion.

'modest plus' standards but thus far has not found or been presented with a case that defines them."); *Swales*, 985 F.3d at 440 (describing *Lusardi* as an "amorphous and ad-hoc test [that] provides little help in guiding district courts in their notice-sending authority"). When the district court in this case certified Eli Lilly's interlocutory appeal, for instance, it noted that existing case law does not resolve "what scrutiny should apply … at conditional certification" nor "how the court should precisely define that scrutiny." *Richards v. Eli Lilly & Co.*, No. 1:23-cv-00242-TWP-MKK, 2024 WL 2126103, at *5 (S.D. Ind. May 10, 2024) (alteration in original) (quotations omitted).

Undoubtedly, *Lusardi*'s permissive notice standard has practical advantages. It enables courts to expeditiously send notice without weighing competing evidence, engaging in protracted discovery, or delving into difficult merits issues. But these rigid limits on what arguments and evidence courts may consider favor timely notice at the expense of both judicial discretion and neutrality. With their discretion curtailed at stage one, courts applying *Lusardi* must typically wait to sever a collective until after full opt-in and discovery are complete—even if the dissimilarity of the collective could have been readily established earlier. In such a case, issuing notice is deeply inefficient, inviting "futile attempts at joinder" that undermine judicial economy and unnecessarily increase litigation costs. *Bigger*, 947 F.3d at 1050.

A lenient and virtually unrebuttable notice showing also threatens judicial neutrality. Sending notice to plaintiffs who are ineligible to join the collective can generate significant discovery costs, incentivizing

defendants to settle early rather than attempt to "decertify" at step two. Such notice may also be seen as "solicitation of those employees to bring suits of their own," *Clark*, 68 F.4th at 1010, transforming what should be a neutral case management tool into a vehicle for strongarming settlements and soliciting claims. See *Swales*, 985 F.3d at 442. Because its overly permissive notice standard places "a judicial thumb on the plaintiff's side of the case," *Bigger*, 947 F.3d at 1050, we join the Fifth and Sixth Circuits in concluding that the modest level of scrutiny commonly employed under *Lusardi* inevitably conflicts with a district court's obligation to "maintain neutrality and to shield against abuse of the collective-action device," *id.* We do not, however, mean to cast doubt on the general proposition that a two-step approach to notice can be an appropriate exercise of a district court's discretion nor categorically disapprove every decision that permitted notice with a citation to *Lusardi*.

For its part, Eli Lilly argues we should adopt the Fifth Circuit's preponderance of the evidence approach, *Swales*, 985 F.3d at 434, or, at the very least, the Sixth Circuit's strong likelihood of similarity standard, *Clark*, 68 F.4th at 1011. We decline to do either.

Requiring plaintiffs to prove their similarity by a preponderance of the evidence to secure notice is unworkable and inconsistent with *Hoffmann-La Roche*. While some factual disputes about the similarity of a proposed collective may be definitively resolved prior to notice, others cannot be because the evidence necessary to establish similarity resides with yet-to-be-noticed plaintiffs. See *Clark*, 68 F.4th at 1010 ("[A]n employer's records might show that an employee worked less than 40 hours per week during

a certain period; the employee might be ready to testify that she worked more."). In such cases, this heightened requirement for notice functions as an insurmountable barrier for even meritorious collective actions. This result is incompatible with the Court's express instruction that the "broad remedial goal of the [FLSA] should be enforced to the full extent of its terms." *Hoffmann-La Roche*, 493 U.S. at 173.

Recognizing the impracticality of a preponderance of the evidence standard, the Sixth Circuit has endorsed a less demanding standard for notice: strong likelihood of similarity. *Clark*, 68 F.4th at 1011. But when relevant evidence of similarity is in the hands of individuals who are not yet parties to the action, we doubt that plaintiffs will be able to show a strong likelihood of similarity before notice any more than they would be able to show it by a preponderance of the evidence. Moreover, both heightened standards may foster delay and inefficiency, requiring courts to facilitate pre-notice discovery even when it's readily apparent that such discovery is unlikely to help resolve the factual dispute at hand.

Though the notice frameworks outlined in *Lusardi*, *Swales*, and *Clark* strike different compromises between timely notice and judicial neutrality, they share a common weakness: each imposes an inflexible notice standard that all but eliminates judicial discretion. In doing so, they not only disregard a core principle of *Hoffmann-La Roche* but also leave district courts ill-equipped to efficiently resolve the varied factual disputes that can arise when defining the scope of a collective action. In our view, *Hoffmann-La Roche* requires something different.

B

The plain text of the FLSA states that plaintiffs must be similarly situated if they are to proceed collectively. 29 U.S.C. § 216(b).[4] Accordingly, once opt-in is complete, it's sensible that plaintiffs bear the burden of moving to certify their collective action, at which point the court will assess whether plaintiffs are, in fact, similarly situated and may proceed collectively. And in the absence of statutory language dictating otherwise, we presume that plaintiffs must establish their similarity at the certification stage by a preponderance of the evidence. See *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45, 52 (2025) ("Faced with silence, courts usually apply the default preponderance standard."). Indeed, we have applied this default standard to other procedural and case management decisions. See *Bell v. PNC Bank, Nat'l Ass'n*, 800 F.3d 360, 373 (7th Cir. 2015) (noting that while we review class certification orders for abuse of discretion, the party seeking class certification "bears the burden of demonstrating that certification is proper by a preponderance of the evidence").

---

[4] Though we have described the opt-in process in general terms as a "system of permissive joinder," *Vanegas*, 113 F.4th at 725 (quotations omitted), we agree with our sister circuits that the similarly situated requirement distinguishes a collective action from an ordinary multiparty suit achieved through Rule 20. See *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 96 (1st Cir. 2022) ("The FLSA's 'similarly situated' limitation for collective actions displaces Rule 20 and limits the range of individuals who may be added as opt-in plaintiffs by requiring that they be 'similarly situated.'"); *Scott v. Chipotle Mex. Grill, Inc.*, 954 F.3d 502, 520 (2d Cir. 2020); *Campbell*, 903 F.3d at 1112.

Whether a plaintiff can reasonably be expected to make this showing before notice, however, is a different question altogether and turns largely on the nature of plaintiffs' allegations. For example, if the common thread connecting plaintiffs' claims is an employer's informal policy of requiring work off the clock, it may be impossible to prove which employees were subject to that policy until opt-in plaintiffs are identified. See, e.g., *Smith v. Fam. Video Movie Club, Inc.*, No. 11 C 1773, 2012 WL 580775, at *4 (N.D. Ill. Feb. 22, 2012) (explaining that an official corporate policy on working hours might be rebutted by testimony from opt-in plaintiffs that they were ordered not to adhere to the policy). But, in other cases, it may be readily proven prior to notice that a challenged policy was limited in scope—for example, to only a particular type of worker or geographic location. See, e.g., *Jonites v. Exelon Corp.*, 522 F.3d 721, 725–26 (7th Cir. 2008) (describing a collective action as "hopelessly heterogeneous" where it included employees who did not work the day shift and thus had no conceivable claim based on the employer's daytime lunch policy).

With this in mind, we conclude that to secure notice, a plaintiff must first make a threshold showing that there is a material factual dispute as to whether the proposed collective is similarly situated. By this, we mean that a plaintiff must produce some evidence suggesting that they and the members of the proposed collective are victims of a common unlawful employment practice or policy. A plaintiff's evidence of similarity need not be definitive, but defendants must be permitted to submit rebuttal evidence and, in assessing whether a material dispute exists, courts must consider the extent to which plaintiffs engage

with opposing evidence. We acknowledge that, at this stage, the relevant evidence will likely come in the form of affidavits and counter-affidavits, including those that a plaintiff may wish to submit after seeing a defendant's rebuttal evidence. That's fine; courts routinely assess whether competing affidavits create a material factual dispute.

This threshold showing imposes a meaningful yet appropriate evidentiary burden on the plaintiff, reflecting both the preliminary stage of the proceedings and the practical significance of notice to both parties. A lower standard would permit notice based on little more than allegations, conflicting with the Court's warning against encouraging "the solicitation of claims." *Hoffmann-La Roche*, 493 U.S. at 174. By contrast, a substantially higher standard risks leaving some plaintiffs in limbo, unable to make the required showing without access to evidence held by individuals who are not yet parties to the case.

We stress, however, that a plaintiff is not automatically entitled to notice upon establishing the existence of a material dispute as to similarity. Once the district court is satisfied that there is at least a material dispute, the decision to issue notice will depend on its assessment of the factual dispute before it. And here, as *Hoffmann-La Roche* instructs, we rely on the sound discretion of the district court to facilitate notice in an efficient way that strikes an appropriate balance between timely notice and judicial neutrality.

If the district court is persuaded that the evidence necessary to resolve a similarity dispute is likely in the hands of yet-to-be-noticed plaintiffs, it may proceed with a two-step approach—that is, it may issue notice

to the proposed collective while postponing the final determination as to whether plaintiffs are similarly situated until plaintiffs move for certification after opt-in and discovery are complete. Alternatively, if the court is confident that a similarity dispute can be resolved by a preponderance of the evidence before notice, it may authorize limited and expedited discovery to make this determination and tailor (or deny) notice accordingly. This flexibility promotes efficient case management, enabling a district court to tailor its approach depending on the issues and complexities of the case before it.

This need not be an all-or-nothing determination. A district court might decide that a subset of issues relating to the similarly situated analysis are capable of definitive resolution and narrow the scope of notice accordingly, even as it recognizes that other disputes cannot be resolved until later in the proceedings. And if a plaintiff fails to produce evidence that establishes a material factual dispute, a district court might deny the motion for notice without prejudice, subject to possible reconsideration if the plaintiff comes forward with further evidence. The watchword here is flexibility, with respect for the principles outlined in *Hoffmann-La Roche* and the remedial goals of the FLSA and ADEA.

This framework is consistent with *Bigger*, in which we held that courts may not issue notice to an employee if a defendant can show that a valid arbitration agreement bars the employee from participating in the action. 947 F.3d at 1050. As *Bigger* recognizes, whether some members of a proposed collective are bound by arbitration agreements is the type of factual dispute that can be

readily resolved prior to notice and opt-in. Our decision today builds on this logic and empowers courts to recognize other similarity disputes that can likewise be resolved swiftly and conclusively before notice.

When district courts do decide to authorize pre-notice discovery, we trust that they will carefully supervise this process to prevent abuses and unnecessary delay.[5] And while such discovery should be conducted expeditiously, we are mindful that even minimal pre-notice discovery risks running out the clock on putative plaintiffs' FLSA claims. To that end, district courts should decide as soon as practicable whether notice is appropriate and are empowered to use their equitable tolling authority to ensure that plaintiffs are not unfairly disadvantaged by any delays in discovery. See *Clark*, 68 F.4th at 1014 (Bush, J., concurring) ("Equitable considerations support the use of tolling for FLSA collective actions."). Indeed, the equitable tolling of FLSA claims is already a familiar practice in our circuit, see, e.g., *Iannotti*, 603 F. Supp. 3d at 657; *Koch v. Jerry W. Bailey Trucking, Inc.*, 482 F. Supp. 3d 784, 799 (N.D. Ind. 2020), and that is a fair and appropriate measure, especially while disputes about notice are being resolved.

---

[5] And, of course, even after notice and opt-in are complete, a district court retains broad discretion with respect to the scope of discovery. Because a collective action might comprise tens, hundreds, or even thousands of opt-in plaintiffs, a district court's discretion includes carefully delimiting any additional discovery mindful of its obligation under Federal Rule of Civil Procedure 1 to "secure the just, speedy, and inexpensive determination" of the action and the "twin goals of collective actions … enforcement and efficiency." *Bigger*, 947 F.3d at 1049.

Finally, we caution that this pre-notice discovery should remain narrowly tailored to the similarly situated inquiry—in other words, to the question of whether common issues of fact or law make it more efficient to resolve plaintiffs' claims together. This inquiry should not devolve into an early adjudication of the merits. That said, courts need not refuse to consider merits issues altogether. Some factual disputes about similarity inevitably overlap with merits issues. A defendant might, for example, present evidence that the proposed collective includes employees who are exempt from FLSA protections. If true, this fact would certainly affect the merits of those plaintiffs' claims. But it is also directly relevant to assessing whether the collective is similarity situated—that is, "whether the merits of other-employee claims would be similar to the merits of the original plaintiffs' claims" such that "collective litigation would yield 'efficient resolution in one proceeding.'" *Clark*, 68 F.4th at 1012 (quoting *Hoffmann-La Roche*, 493 U.S. at 170). Accordingly, a district court need not ignore evidence of dissimilarity at the pre-notice stage simply because it touches on a merits issue. Rather, it is for the district court to decide whether and to what extent a particular merits question affects the similarly situated analysis.

* * *

Our decision today realigns the issuance of notice in our circuit with the core principles of *Hoffmann-La Roche*. It recognizes the need for workable standards to guide district courts in the process of issuing such notice and empowers them to use their discretion to strike the proper balance between timely notice and judicial neutrality. Because the district court below

did not have the opportunity to evaluate the propriety of notice under the framework we adopt today, we vacate and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED

HAMILTON, *Circuit Judge*, concurring in part and concurring in the judgment. I am pleased to join almost all of Judge Kirsch's opinion for the court. His opinion provides important and appropriate guidance for issuing notice to people who may be situated similarly to lead plaintiffs and who may have similar claims under the FLSA or ADEA. His opinion also preserves important flexibility and discretion for district judges in managing these cases.

My only point of disagreement is with the paragraph on page 16 addressing what happens after notice is issued in FLSA or ADEA cases to people who may be similarly situated to the lead plaintiff. The draft opines without citing relevant authority (a) that the plaintiff bears the burden of moving to "certify" a collective action and (b) that similarity must be proven by a preponderance of the evidence. We would do better not to opine on either point in this case, where this passage amounts to *obiter dictum*.

Neither question is actually presented in this narrow interlocutory appeal. We agreed to review only the standard for issuing notice in the first place. And the majority's answers to these two extra questions may not be correct. They seem to me a little too close to the Rule 23 process and standard for certifying a true class action.

As I see it, proceeding in a collective action may be better understood as closer to presenting Rule 20 or 21

questions of permissive joinder or misjoinder or Rule 42 questions of consolidation of cases for trial. The Supreme Court has twice described § 216(b) as a "joinder process." See *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 70 n.1 (2013); *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 – 71 (1989) (district court has "managerial responsibility to oversee the joinder of additional parties"). This court and other circuits have used the same characterization. E.g., *Vanegas v. Signet Builders, Inc.*, 113 F.4th 718, 725 (7th Cir. 2024) ("Congress chose to 'create a system of permissive joinder rather than creating so-called class actions.'" (internal quotation marks omitted)), quoting *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 379 (3d Cir. 2022); *Alvarez v. City of Chicago*, 605 F.3d 445, 450 (7th Cir. 2010) (whether FLSA plaintiffs are "permitted to pursue their claims in one action or several is committed to the sound discretion of the district court, but misjoinder of parties is never a ground for dismissing an action"), citing Fed. R. Civ. P. 21; see also *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 96 (1st Cir. 2022) ("The FLSA's 'similarly situated' limitation for collective actions displaces Rule 20 and limits the range of individuals who may be added as opt-in plaintiffs by requiring that they be 'similarly situated.'"); *Scott v. Chipotle Mexican Grill, Inc.*, 954 F.3d 502, 520 (2d Cir. 2020) ("[T]he FLSA not only imposes a lower bar than Rule 23, it imposes a bar lower in some sense even than Rules 20 and 42, which set forth the relatively loose requirements for permissive joinder and consolidation at trial."), quoting *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1112 (9th Cir. 2018); *Campbell*, 903 F.3d at 1104–05

("The natural parallel [with opt-in plaintiffs] is to plaintiffs initially named or later added under the ordinary rules of party joinder.").

If a district court decides to exercise its authority under *Hoffman-La Roche* to send notice to potential plaintiffs, those plaintiffs may opt into the case by filing notices with the court. Merely filing those notices makes them parties to the case. See 29 U.S.C. § 216(b) (employee becomes "party plaintiff" when he files written consent "in the court in which [the] action is brought"). That becomes the status quo, and it would ordinarily require a motion (by the defendant) to change that status, though the court could also act on its own initiative. The remedy, as the panel notes, should be severance—allowing the actions to continue, albeit individually or perhaps in smaller sub-groups.

Further, being similarly situated is not an element in a plaintiff's case that must be proven by a preponderance of the evidence. It is only an issue of joinder or consolidation, which are matters of case management. That's consistent with our and other courts' decisions holding that FLSA and ADEA collective actions are not "representative" actions. E.g., *Vanegas*, 113 F.4th at 723 (collective actions are just amalgamations of parties, requiring personal jurisdiction over each plaintiff); *Canaday v. Anthem Cos.*, 9 F.4th 392, 402 (6th Cir. 2021) ("A Rule 23 class action is representative, while a collective action under the FLSA is not."); *Campbell*, 903 F.3d at 1105 ("A collective action, on the other hand, is not a comparable form of representative action. Just the opposite: Congress added the FLSA's opt-in requirement with the express purpose of 'bann[ing]' such actions under the FLSA. … A collective action is

more accurately described as a kind of mass action, in which aggrieved workers act as a collective of individual plaintiffs with individual cases—capitalizing on efficiencies of scale, but without necessarily permitting a specific, named representative to control the litigation, except as the workers may separately so agree."). It's also consistent with the Supreme Court's emphasis in *Hoffmann-La Roche* that the collective action mechanism is designed to benefit the judicial system through "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." 493 U.S. at 170.

We review Rule 20 decisions granting or denying permissive joinder with a deferential standard, abuse of discretion. E.g., *UWM Student Ass'n v. Lovell*, 888 F.3d 854, 863–64 (7th Cir. 2018). To my knowledge this court has never said one side or the other bears a burden of going forward or persuading on those questions. We have left those matters to the discretion of the district court to choose a process and to answer the case-management question. Those decisions will most often be based on factors that have more to do with efficiency, fairness, and expense than with disputed issues of material fact. See 7 Wright, Miller & Kane, Federal Practice & Procedure § 1653 at 435 (2019) ("language in a number of decisions suggests that the courts are inclined to find that claims arise out of the same transaction or occurrence when the likelihood of overlapping proof and duplication in testimony indicates that separate trials would result in delay, inconvenience, and added expense to the parties and to the court"); *Eclipse Mfg. Co. v. M and M Rental Center, Inc.*, 521 F. Supp. 2d 739, 744 (N.D. Ill.

2007); see also 9A Wright, Miller & Kane § 2383, 26 ("consolidation of separate actions presenting a common issue of law or fact is permitted under Federal Rule 42 as a matter of convenience and economy in judicial administration"). That should be the case for § 216(b) actions too. Whether the claims proceed to trial on a collective basis should depend on a case-specific determination of whether plaintiffs are sufficiently similarly such that their claims could be more efficiently resolved together.

Accordingly, with respect for my colleagues' different views, I would leave open the burden of moving forward and the burden of persuasion and save those issues for an FLSA or ADEA appeal where the answers would make a difference.

APPENDIX C

SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MONICA RICHARDS, individually and on behalf of all other similarly situated individuals, Plaintiff, v. ELI LILLY AND COMPANY and LILLY USA, LLC, Defendants.	)	Case No. 1:23-cv-00242-TWP-MKK

ORDER GRANTING DEFENDANTS' UNOPPOSED MOTION TO STAY NOTICE

Having considered Defendants' Unopposed Motion to Stay Notice (ECF No. 148), and for good cause shown, the Court hereby GRANTS Defendants' Motion. The Court STAYS notice to opt-in plaintiffs and Defendants' related production of contact information and HOLDS IN ABEYANCE Defendants' Motion for Clarification of this Court's Order on Plaintiff's Motion for Conditional Certification of Collective Action (ECF No. 131) and Defendants' Objections to Plaintiff's Proposed Notice and Opt-In Consent Forms (ECF No. 93) until Defendants' interlocutory appeal of this Court's Order on Plaintiff's

Motion for Conditional Certification of Collective Action (ECF No. 82) has been fully exhausted.

SO ORDERED:

Date: 9/16/2024

Hon. Tanya Walton Pratt, Chief Judge United States District Court
Southern District of Indiana

Service will be made electronically on all ECF-registered counsel of record via email generated by the court's ECF system.

APPENDIX D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 29, 2024

Before

DAVID F. HAMILTON, *Circuit Judge*
THOMAS L. KIRSCH II, *Circuit Judge*
JOHN Z. LEE, *Circuit Judge*

No. 24-8017

IN RE: ELI LILLY & COMPANY and LILLY USA, LLC,
Petitioners.

Petition for Permission to Appeal from the Southern District of Indiana, Indianapolis Division.

No: 1:23-cv-00242-TWP-MKK

Tanya Walton Pratt,
Chief Judge.

O R D E R

Petitioners filed a petition for rehearing and rehearing en banc on August 15, 2024. No judge in

regular active service has requested a vote on the petition for rehearing en banc.*

Accordingly, the petition for rehearing en banc is **DENIED**. The petition for panel rehearing is **GRANTED** to the extent that the panel has reconsidered its decision to deny the petition for permission to appeal and the order issued on July 8, 2024, is **VACATED**.

The petition for permission to appeal is **GRANTED**. The petitioners shall pay the required docket fees to the clerk of the district court within fourteen days from the entry of this order pursuant to Federal Rule of Appellate Procedure 5(d)(1). Once the district court notifies this court that the fees have been paid, the appeal will be entered on this court's general docket.

---

* Circuit Judge Doris L. Pryor and Circuit Judge Nancy L. Maldonado did not participate in consideration of this Petition for Rehearing.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn St.
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

July 8, 2024

Before

DAVID F. HAMILTON, *Circuit Judge*
THOMAS L. KIRSCH II, *Circuit Judge*
JOHN Z. LEE, *Circuit Judge*

No. 24-8017	IN RE: ELI LILLY & COMPANY and LILLY USA, LLC, Petitioners
Originating Case Information:	
District Court No: 1:23-cv-00242-TWP-MKK Southern District of Indiana, Indianapolis Division District Judge Tanya Walton Pratt	

The following are before the court:

1. **PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. §1292(b)**, filed on May 20, 2024, by counsel for the petitioners.

2. **PLAINTIFF-RESPONDENT'S OPPOSITION TO DEFENDANTS-PETITIONERS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. §1292(b)**, filed on May 31, 2024, by counsel for the respondent.

IT IS ORDERED that the petition is **DENIED**. We recognize that the process for certifying a collective action under the Fair Labor Standards Act is a recurring issue for district courts, but we believe that it is better to review that process on a more complete record. Accordingly, we would be more receptive to an interlocutory appeal from an order resolving certification at the second step of the two-step process.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MONICA RICHARDS individually and on behalf of all other similarly situated individuals, Plaintiff, v. ELI LILLY & COMPANY, LILLY USA, LLC, Defendants.	Case No. 1:23-cv-00242-TWP-MKK

ENTRY ON DEFENDANTS' MOTION TO CERTIFY AN IMMEDIATE APPEAL UNDER 28 U.S.C. § 1292(b) AND EMERGENCY MOTION FOR A STAY

This matter is before the Court on Defendants Eli Lilly & Company and Lilly USA, LLC's (collectively "Eli Lilly" or "Defendants") Motion to Certify an Immediate Appeal under 28 U.S.C. § 1292(b) and Emergency Motion for a Stay (*Filing No. 88*). In this lawsuit, Plaintiff Monica Richards ("Richards") alleges Eli Lilly knowingly and willfully denied promotions to qualified employees who were older than forty, including herself and all other similarly situated

employees, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and the Massachusetts Anti-Discrimination Law, G.L. c. 151B § 4(1B) (*Filing No. 1*). After the Court granted conditional collective certification under 29 U.S.C. § 216(b) (*Filing No. 82*), Eli Lilly filed the present motion, asking the Court to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). For the following reasons, Eli Lilly's motion is **granted**.

I. BACKGROUND

Richards, a fifty-three-old woman who has worked for Eli Lilly since August 1, 2016, alleges that,

> [s]ince at least 2017, Eli Lilly has been engaged in a companywide effort to shift its personnel focus to Millennials at the detriment of older employees, openly espousing an aggressive strategy of hiring and retaining Millennial employees. As a part of its effort to retain Millennial workers, Eli Lilly has created resource groups for younger employees who it calls "Early Career Professionals" and has systematically favored younger employees by giving them promotions to the exclusion of older employees who are equally or better qualified.

(*Filing No. 1*, ¶ 10). In her motion for conditional certification, Richards sought collective action status under the ADEA for the following class: "All Eli Lilly employees who were 40 or older when they were denied promotions for which they were qualified, since February 12, 2022." (*Filing No. 41*). Eli Lilly opposed Richards' motion, arguing that she neither

demonstrated she was 'similarly situated' to other members of the proposed collective, nor identified a common policy or plan that impacted such employees (*see Filing No. 45 at 12*–19).

On March 25, 2024, the Court conditionally certified Richards' proposal for collective action as requested (*Filing No. 82 at 2*). The Court authorized notice to all former and current Lilly employees who were "forty (40) years of age or older and were denied a promotion for which [they] were qualified on or after February 12, 2022. . . ." *Id.* at 15. In doing so, the Court utilized the two-stage certification process that most federal courts apply in FLSA collective actions, pursuant to *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), in contravention of Eli Lilly's urging to instead apply a one-step process that the Fifth Circuit more recently outlined in *Swales v. KLLM Transport Services*, 985 F.3d 430 (5th Cir. 2021), or that crafted by the Sixth Circuit in *Clark v. A&L Homecare & Training Ctr., LLC*, 68 F.4th 1003 (6th Cir. 2023) (requiring a "strong-likelihood" of similarly situated members before issuing notice).

The Court explained that "many courts in this Circuit have traditionally applied an *ad hoc* two-step certification process" in which the first step is requires "a modest factual showing" and is merely preliminary (*Filing No. 82 at 3*, 4 (quoting *Duan v. MX Pan Inc.*, No. 1: 22-cv-02333, 2023 WL 5955911, at *1 (S.D. Ind. Aug. 21, 2023))).

At the more stringent second step following discovery, the court reevaluates the conditional certification after employees have opted in to "determine[] whether there is sufficient similarity

between the named and opt-in plaintiffs." *Id.* at 4 (quoting *Duan*, 2023 WL 5955911, at *1). A defendant can thus move to decertify or restrict the class because various putative class members are not 'similarly situated'. *See Hawkins v. Alorica, Inc.*, 287 F.R.D. 431, 439 (S.D. Ind. 2012). In ruling on such a motion, courts typically consider the following factors: "(1) whether plaintiffs share similar or disparate factual and employment settings; (2) whether the various affirmative defenses available to the defendant would have to be individually applied to each plaintiff; and (3) fairness and procedural concerns." *Id.* (quoting *Threatt v. CRF First Choice, Inc.*, No. 1:05cv117, 2006 WL 2054372, at *5 (N.D. Ind. 2006)).

This two-step process stands in opposition to the *Swales* Court's view that "a district court must rigorously scrutinize the realm of 'similarly situated' workers, and must do so from the outset of the case, not after a lenient, step-one 'conditional certification.'" 985 F.3d at 434. "Only then can the district court determine whether the requested opt-in notice will go to those who are actually similar to the named plaintiffs." *Id.*

Seventeen days after the conditional certification order, Eli Lilly asked the Court to certify an interlocutory appeal, which would allow it to petition the Seventh Circuit for review of the following question:

> Whether notice in a collective action can issue based on a modest factual showing of similarity, rather than upon a showing by a preponderance of the evidence that requires

> the Court to find that commonality across the collective is more likely than not.

(*Filing No. 88 at 11*). Eli Lilly further requested, on an emergency basis, that the Court stay the then-approaching deadline for providing contact information of Richards' proposed collective and the issuance of notice to those individuals. *Id*. Recognizing that the deadline for providing contact information was fast approaching, the Court granted the emergency motion and stayed the deadline to give the parties time to fully brief the Motion to Certify and the Court an opportunity to issue its ruling on Defendants request for interlocutory appeal. The motion is now fully briefed and ripe for ruling.

II. DISCUSSION

Federal appellate jurisdiction is generally limited to review of only the "final decisions of the district courts." 28 U.S.C. § 1291. Waiting for a final judgment "preserves the proper balance between trial and appellate courts, minimizes the harassment and delay that would result from repeated interlocutory appeals, and promotes the efficient administration of justice." *Microsoft Corp. v. Baker*, 582 U.S. 23, 36-37 (2017) (citing *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

However, 28 U.S.C. § 1292(b) allows for an interlocutory appeal when an order "involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of litigation." *Richardson Elecs, Ltd. v. Panache Broad. of Pa., Inc*., 202 F.3d 957, 958 (7th Cir. 2000). Thus, "[t]here are

four statutory criteria for the grant of a section 1292(b) petition to guide the district court: there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* the litigation.[1] *Ahrenholz v. Bd. of Trustees of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000) (emphasis in original). "Unless *all* these criteria are satisfied, the district court may not and should not certify its order to [the appellate court] for an immediate appeal under section 1292(b)." *Id.* at 676 (emphasis in original).

Here, all four criteria are met.

A. Question of Law?

For purposes of § 1292(b), the term "question of law" generally refers to a

> 'pure' question of law rather than merely to an issue that might be free from a factual contest. The idea was that if a case turned on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record,

[1] " Courts have also upheld a nonstatutory requirement that "the petition must be filed in the district court within a reasonable time after the order sought to be appealed." Ahrenholz v. Bd. of Trustees of Univ. of Ill., 219 F.3d 674, 675 (7th Cir. 2000) (emphasis in original). The Court does not take issue with the time taken by Eli Lilly in submitting its motion. Though not immediate, the filing of the petition occurred less than three weeks from the March 25, 2024 conditional certification order. Given the breadth of the collective that was conditionally certified and the data collection at hand — which the Court assumes is underway — the Court finds the period reasonable under the circumstances.

> the court should be enabled to do so without having to wait till the end of the case.

Ahrenholz, 219 F.3d at 676–77.

The Court disagrees with Richards' concern, to the extent one exists, that a district court's choice, in the face of the "wide discretion" afforded it, cannot serve as a basis for interlocutory appeal or present a "pure question of law" (*Filing No. 92 at 12* (quoting *Iannotti v. Wood Grp. Mustang*, 603 F. Supp. 3d 649, 653 (S.D. Ill. 2022), 14). Richards is correct that district courts are entrusted with such discretion in managing collective action (*see In re New Albertsons, Inc.*, No. 21-2577, 2021 WL 4028428, at *1 (7th Cir. Sept. 1, 2021)). And, as Richards argues, challenges to the adequacy of a plaintiff's evidentiary showing or questions that seek review of the application of facts to the standards are widely rejected in this Circuit on the grounds that they are not pure questions of law (*see Filing No. 92 at 14*–15 (quoting among others *Piazza v. New Albertsons, Inc.*, No. 20-cv-03187, 2021 WL 3645526, at *3 (N.D. Ill. Aug. 16, 2021)).

The Court is assured here, however, that Eli Lilly speaks instead about the 'similarly situated' standard itself, bypassing altogether the issue of how the Court manages the collective action *in arriving to* the 'similarly situated' standard, including, for those courts who follow the so-called two-step *Lusardi* approach, *see* 118 F.R.D. 351 (D.N.J. 1987), the facilitation and issuance of 'conditional certification' notice. The question Eli Lilly seeks to present for resolution by the Seventh Circuit is focused on "a plaintiff's *burden of proof* for establishing that the

proposed collective is similarly situated before notice may issue" (*Filing No. 94 at 8*) (emphasis in original).

As such, the determination of whether *Lusardi* or *Swales* (or even *Clark*) should control whether a court certifies a collective presents a purely legal question that would not require wading into the record for the answer. Eli Lilly simply seeks clarity on the proper legal standard for collective certification, not whether the Court appropriately applied the facts to a particular standard. The Seventh Circuit should be given the opportunity to clarify the standard, should it so choose. After all, both *Swales* and *Clark* were decisions from interlocutory appeals.

B. Controlling?

A question of law is "controlling" for purposes of § 1292(b) if its "resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *In re Ocwen Fed. Bank FSB Mortg. Servicing Litig.*, 04 CV 2714, MDL No. 1604, 2006 WL 1371458 at *2 (N.D. Ill. May 16, 2006) (citing *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996)). Furthermore, "the resolution of an issue need not necessarily terminate an action in order to be 'controlling'." *Knauf Insulation, LLC v. Johns Manville Corp.*, No. 1:15-cv-00111, 2020 WL 4261814, at *5 (S.D. Ind. July 24, 2020) (quoting *Klinghoffer v. S.NC. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990)). "'Controlling' is to be interpreted and applied with flexibility, such that a question is 'controlling' if it is 'serious to the conduct of the litigation, either practically or legally.'" *In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 212 F. Supp. 2d 903, 911 (S.D. Ind. 2002) (quoting

Johnson v. Burken, 930 F.2d 1202, 1206 (7th Cir. 1991)).

Even if the interlocutory question has the possibility of not terminating the litigation as a legal matter, application of a standard more rigorous than the one previously applied by this Court would certainly affect as a practical matter the scope of the notice and the size of the collective. *See, e.g., Swales v. KLLM Transp. Servs., LLC*, 410 F. Supp. 3d 786, 794 (S.D. Miss. 2019) ("[A]pplying a different test for conditional certification — or for the ultimate decision whether to certify — could materially impact the trial of this matter; the case will either be a collective action or involve individual claims."), *vacated and remanded sub nom. Swales*, 985 F.3d 430. This would in turn increase settlement leverage, *see Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049 (7th Cir. 2020) (citing *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 171 (1989)), that could then "exert 'formidable settlement pressure'" on a defendant. *Thomas v. Maximus, Inc.*, No. 3:21cv498, 2022 WL 1482008, at *4 (E.D. Va. May 10, 2022) (quoting *Holder v. A&L Home Care and Training Ctr., LLC*, 552 F. Supp. 3d 731, 747 (S.D. Ohio 2021), *vacated and remanded sub nom. Clark*, 68 F.4th 1003). The offramp of later decertification is certainly possible. But it would occur after inviting the conditional class to grow. Thus, at this stage, resolution of the interlocutory question on appeal is "likely to affect the further course of the litigation," *Sokaogon*, 86 F.3d at 659, notwithstanding the certification's conditionality.

C. Contestable Question of law?

The "contestable" criterion turns on whether "substantial grounds for a difference of opinion" on the issue exist. *Ormond v. Anthem, Inc.*, No. 1:05-cv-1908, 2011 WL 3881042, at *3 (S.D. Ind. Sept. 2, 2011) (quoting *Sandifer v. US. Steel Corp.*, 2010 WL 61971, at *4 (N.D. Ind. Jan.5, 2010)). The mere presence of a disputed issue that is a question of first impression for the Seventh Circuit, by itself, is insufficient to demonstrate a substantial ground for difference of opinion. *See Manitowoc Cranes LLC v. Sany Am. Inc.*, No. 13-C-677, 15-C-647, 2018 WL 582334, at *2 (E.D. Wis. Jan. 29, 2018). Rather, it is the duty of the district court to analyze "'the strength of the arguments in opposition to the challenged ruling,' which process includes 'examining whether other courts have adopted conflicting positions regarding the issue of law proposed for certification.'" *Whipkey v. Eli Lilly and Co.*, No. 1:20-cv-00450, 2021 WL 11963021, at *2 (S.D. Ind. Mar. 16, 2021) (quoting *United States v. Select Med. Corp.*, No. 3:12-cv-00051, 2017 WL 468276, at *3 (S.D. Ind. Feb. 3, 2017)).

The question of the correct standard to apply when issuing notice to a proposed FLSA collective has generated sufficient controversy to justify certification. Indeed, the Fifth and Sixth Circuits took up the issue of collective certification on interlocutory appeals, and the pair of opinions demonstrates the substantial and ripe ground for difference of opinion percolating in those circuits alone. *Compare Swales*, 985 F.3d at 442–43 (prescribing district courts consider all available evidence in the "rigorous[] enforce[ment]" of the 'similarly situated' mandate), *with Clark*, 68 F.4th at 1010–11 (6th Cir. 2023) (declining to require a

"conclusive finding of 'similar situations'" and remanding for the district court to redetermine certification under a "strong-likelihood standard") (quoting *Sperling v. Hoffmann-La Roche*, 118 F.R.D. 392, 406 (D.N.J. 1988)).

Equally important, the Seventh Circuit has yet to address this specific question, and there are decisions within this circuit that lend support to both parties' positions about the proper level of scrutiny to be applied before issuing notice. *Compare Fillipo v. Anthem Companies, Inc.*, 2022 WL 18024818, at *2 (S.D. Ind. Dec. 30, 2022) (citing in part *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 772 (7th Cir. 2013)) ("To determine whether the proposed collective is 'similarly situated,' the Court may apply the law of Rule 23 class certification."), with *Piazza v. New Albertsons, LP*, No. 20-cv-03187, 2021 WL 365771 (N.D. Ill. Feb. 3, 2021) (quoting *Bergman v. Kindred Healthcare, Inc.*, 949 F. Supp. 2d 852, 855–56 (N.D. Ill. 2013) ("Conditional certification is not the time to 'weigh evidence, determine credibility, or specifically consider opposing evidence presented by a Defendant'. . . ."). At least one court in this Circuit has "inkled the use of a preponderance standard" and

> bemoaned the 'modest' and 'modest plus' concepts — as they are unmoored from the statute, unhinged from any recognized or defined standard for assessing evidence, foreign from what federal courts seem to be really doing, and ostensibly divorced from the goals of enforcement and efficiency that must be promoted ever mindful of the parallel risks to neutrality and case

> leverage in FLSA conditional certification cases.

Fitzgerald v. Forest River Mfg. LLC, 2022 WL 558336, at *4 (N.D. Ind. Feb. 23, 2022).

In short, "[j]ust because the 'FLSA certification two-step remains the dance of this circuit' does not answer the question what scrutiny should apply. . . at conditional certification [] and how the court should precisely define that scrutiny," *id*., nor does it nullify the difference of opinion starting to appear in this and other circuits in recognition that the FLSA's text does not require a certain standard of similarity in collective certification. *See Smith v. United States*, 163 Fed. Cl. 155, 165 (Fed. Cl. 2022) ("Other than the 'similarly situated' requirement, the FLSA does not define a mechanism or any other conditions for certification — nor does it define 'similarly situated.'"); *see, e.g.*, *Mathews v. USA Today Sports Media Grp., LLC*, 2023 WL 3676795, at *3 (E.D. Va. Apr. 14, 2023) (rejecting the *Lusardi* framework in favor of the *Swales* approach and holding that the FLSA's text permits limited discovery "targeted only at the factual and legal considerations needed to make the 'similarly situated' determination," which courts "must determine, at the outset").

Weighing Eli Lilly's arguments in opposition to this Court's grant of conditional certification, and in light of the well-reasoned decisions in *Swales* and *Clark* and the burgeoning adoption in several circuits of positions conflicting with the "modest" showing customarily utilized in the *ad hoc* approach, the Court finds that a substantial ground for difference of opinion exists.

D. Materially Advance Termination of Litigation?

Once it is determined that the appeal presents a controlling question of law on which there is a substantial ground for a difference of opinion, "all that section 1292(b) requires as a precondition to an interlocutory appeal. . . is that an immediate appeal *may* materially advance the ultimate termination of the litigation." *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2012) (emphasis in original). "[N]either the statutory language nor the case law requires that if the interlocutory appeal should be decided in favor of the appellant the litigation will end then and there, with no further proceedings in the district court." *Id*. (citations omitted). "What is required, however, is that an immediate appeal will expedite rather than protract the resolution of the case." *Consumer Fin. Prot. Bureau v. TransUnion*, 674 F. Supp. 3d 467, 471 (N.D. Ill. 2023) (quoting *US. Commodity Futures Trading Comm'n v. Kraft Foods Grp.*, 195 F. Supp. 3d 996, 1008 (N.D. Ill. 2016)).

Richards argues that interlocutory appeal would only incur delay in the matter. She maintains that such an appeal would "serve to prolong the inevitable" (*Filing No. 92 at 18*) since, by her reasoning, the issuance of notice would still be warranted even were Eli Lilly's sought-after standard adopted. *See id*. at 18–19. Eli Lilly clarifies it seeks only a limited stay of the issuance of notice (*see Filing No. 94 at 12*). It further argues that continuing discovery while the appeal is resolved strikes an appropriate balance between allowing Richards' claims to proceed and potential clarification of an issue which may avoid

protracted and expensive litigation. Eli Lilly asserts that discovery is more complex in this case, and that discovery will take longer than ten months[2] — a span of time which Richards points to and which constitutes, as of September 2023, the median time for a civil appeal in this Circuit to reach a last opinion or final order (*see Filing No. 92 at 18*; Table B-4A, U.S. Courts of Appeals – Median Time Intervals, During the 12-Month Period Ending September 30, 2022, *available at* https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2023.pdf).

As a practical matter, an immediate appeal will — or, at the very least, *may* — materially advance the ultimate resolution of this litigation by resolving uncertainty about the proper scope of the collective as it proceeds, first to the opt-in period, then to the conclusion of discovery, and finally to summary judgment.

On one end of the spectrum, a mere affirmance of the Court's order would simply postpone notice and the discovery that follows, which would proceed without a stay in place. At the other end of possibilities, however, awaits the following prospect. Were the reviewing court to hold that the issuance of notice requires a showing by a preponderance of the

---

[2] The Court recognizes that the parties initially agreed to a period of less than ten months for liability and non-expert discovery (*see Filing No. 31*). Since then, however, the parties have sought and the Court has granted several discovery deadline extensions (*see Filing No. 57*; *Filing No. 59*; *Filing No. 71*; *Filing No. 84*), and the Court has had to referee an extensive discovery dispute arising out of Richards' individual claims (*see Filing No. 95*).

evidence that similarity across the proposed collective is more likely than not, then the preclusive effect of such a determination, once made, would potentially result in a smaller, but nevertheless final collective being certified at an earlier stage than would be the case otherwise.

Inevitably, such a determination would "materially impact the trial of this matter". *Swales*, 410 F. Supp. 3d at 794. The Court makes the preceding observations about the potential effect or impact, however, without opining on the putative collective as presently conceived, or as to the appropriateness of its scope or size as conditionally granted. The Court is merely pointing out the obvious: clarifying the proper scope of the collective, sooner rather than later, would ultimately serve to expedite, not protract, the eventual resolution in this case.

The Court agrees with the balanced approach presented in granting a limited stay only as it pertains to the issuance of notice but allowing unrelated discovery to continue pending the resolution of the appeal. Permitting all other discovery to continue in the meantime facilitates the efficient, accurate resolution of this matter, furthers the best interests of the Court and parties, and ensures that the case progresses down the path to the five-day jury trial set to begin in February 2025. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

III. CONCLUSION

The Court stands by its decision that Richards has met her step one burden to certify her ADEA claims as a conditional collective action under the FLSA. (*Filing No. 82*). Nonetheless, Eli Lilly has demonstrated that the Court's March 25, 2024 conditional certification order involves a controlling question of law to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of litigation. Thus, the Motion to Certify an Immediate Appeal under 28 U.S.C. § 1292(b) and Emergency Motion for a Stay (*Filing No. 88*) is **GRANTED**.

The Court now **CERTIFIES** the following question for interlocutory appeal:

> Whether notice in a collective action can issue based on a modest factual showing of similarity, rather than upon a showing by a preponderance of the evidence that requires the Court to find that commonality across the collective is more likely than not.

Id. at 11. The Court **ORDERS** the statute of limitations for members of the conditionally certified collective defined in its March 25, 2024 order, *Filing No. 82*, to be tolled pending notification of a decision from the Seventh Circuit Court of Appeals.

Additionally, the Court **STAYS** the issuance of notice to members of the putative collective and the deadline imposed on Eli Lilly to provide members' contact information, which it had previously stayed on an interim basis in contemplation of issuing this ruling (*see Filing No. 89*). Today's limited stay is meant to preserve the status quo only as it relates to

the issuance of notice, and the parties are advised that all other discovery is to proceed as it normally would.

The parties are to confer and submit to the Magistrate Judge a joint proposed scheduling order in line with the requirements set forth in the conclusion of the Court's April 23, 2024 Order on Richards' Motion to Compel Discovery (*Filing No. 95*) **within ten (10) days** of the date of Order.

SO ORDERED.

Date: 5/10/2024

Hon. Tanya Walton Pratt, Chief
Judge United States District Court
Southern District of Indiana

DISTRIBUTION:

Jane Farrell
Lichten & Liss-Riordan PC
jfarrell@llrlaw.com

Thomas Fowler
Lichten & Liss-Riordan, P.C.
tfowler@llrlaw.com

Katherine Funderburg
Jenner & Block LLP
kfunderburg@jenner.com

Harold Lichten
Lichten & Liss-Riordan
hlichten@llrlaw.com

Jeffrey A. Macey
Macey Swanson LLP
jmacey@maceylaw.com

Matthew Patton
Law Office of Nicholas F. Ortiz P.C.
mdp@mass-legal.com

Joseph Torres
Jenner & Block LLP
jtorres@jenner.com

Jacob Wentzel
Jenner & Block LLP
jwentzel@jenner.com

Joanna Wright
JENNER & BLOCK LLP
1155 Avenue of the Americas
New York, NY 10036

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MONICA RICHARDS, individually and on behalf of all other similarly situated individuals, Plaintiff, v. ELI LILLY AND COMPANY and LILLY USA, LLC, Defendants.	)	Case No. 1:23-cv-00242-TWP-MKK

ORDER ON PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION OF COLLECTIVE ACTION AND DEFENDANTS' MOTION TO STRIKE

This matter is before the Court on Plaintiff Monica Richards' ("Richards") Motion for Conditional Certification and Issuance of Notice and Opt-In Form (Filing No. 41). Richards initiated this action individually and on behalf of others similarly situated, against Defendants Eli Lilly & Company and Lilly

USA, LLC ("Lilly USA") (collectively "Eli Lilly" or "Defendants"), alleging violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*., and the Massachusetts Anti-Discrimination Law, G.L. c. 151B § 4(1B) (Filing No. 1). Richards seeks to bring the ADEA claim as a collective action under 29 U.S.C. §§ 216(b), 626(b). Also before the Court is Defendants' Motion to Strike Opt-In and Consent Form (Filing No. 58). For the reasons set forth below, both motions are **granted**.

I. BACKGROUND

The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Aggrieved employees may enforce the ADEA through certain provisions of the Fair Labor Standards Act of 1938 ("FLSA"), and the ADEA specifically incorporates § 16(b) of the FLSA, 29 U.S.C. § 216(b). *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 67–68 (2000).

Richards is a fifty-three (53) years old woman who has worked for Eli Lilly since August 1, 2016. (Filing No. 1, ¶ 3). She alleges that,

> Since at least 2017, Eli Lilly has been engaged in a companywide effort to shift its personnel focus to Millennials at the detriment of older employees, openly espousing an aggressive strategy of hiring and retaining Millennial employees. As a part of its effort to retain Millennial workers, Eli Lilly has created resource groups for younger employees who it calls "Early Career Professionals" and has

> systematically favored younger employees by giving them promotions to the exclusion of older employees who are equally or better qualified.

Id. ¶ 10. Richards contends that Eli Lilly both knowingly and willfully denied promotions systematically to qualified employees who were older than forty, including herself and all other similarly situated employees, and she alleges Eli Lilly's discriminatory preferences for younger, Millennial employees has been well documented. Id. at *Id.* ¶ 11.

Richards seeks conditional certification of a collective action, which would permit court-authorized notices to be sent to potential opt-in plaintiffs. Her proposal for her collective action consists of: "All Eli Lilly employees[1] who were 40 or older when they were denied promotions for which they were qualified, since February 12, 2022." (Filing No. 41 at 1.)

Opposing certification, Defendants argue Richards does not demonstrate she is "similarly situated" to other members of the proposed collective because she does not point to another specific employee who qualifies for the proposed collective, nor identify a common policy or plan that impacted such employees (Filing No. 45 at 12). Defendants further argue the more lenient "modest showing" standard on which Richards relies is not required by statute or Seventh Circuit case law and that she fails to carry her burden under the more demanding "preponderance of the

---

[1] Defendants and the Court understand the sought class to include Lilly USA employees, not just those of Eli Lilly (*see, e.g.*, Filing No. 45 at 7).

evidence" standard that Defendants seek to apply. *Id.* at 12, 19–33.

II. DISCUSSION

Richards alleges Eli Lilly engaged in rampant age discrimination by systematically denying promotions to her and qualified employees who are older than 40, while disproportionately promoting younger employees, in violation of the ADEA. She asks the Court to conditionally certify a collective action. Richards points out, that "[u]nder the ADEA (like the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. ("FLSA")), employees who wish to participate in a collective action challenging age discrimination may do so by affirmatively "opting in" to join the lawsuit." (Filing No. 42 at 3.)

The Seventh Circuit has not identified a specific standard for certifying a collective action under the FLSA. *Iannotti v. Wood Grp. Mustang*, 603 F. Supp. 3d 649, 653 (S.D. Ill. 2022). Richards' motion is styled as a motion for "conditional" collective certification because many courts in this Circuit have traditionally applied an *ad hoc* two-step certification process "in which the first step is merely preliminary." *Fillipo v. Anthem Companies, Inc.*, No. 1:22-cv-926, 2022 WL 18024818, at *1 (S.D. Ind. Dec. 30, 2022) (citing *In re New Albertsons, Inc.*, No. 21-2577, 2021 WL 4028428, at *1 (7th Cir. Sept. 1, 2021) (describing two-step collective certification)); *see, e.g.*, *Hawkins v. Alorica, Inc.*, 287 F.R.D. 431, 438 (S.D. Ind. 2012); *Owens v. GLH Cap. Enter., Inc.*, No. 3:16-cv-1109, 2017 WL 2985600, at *1 (S.D. Ill. July 13, 2017) (citing *Jirak v. Abbott Labs., Inc.*, 566 F. Supp. 2d 845, 847 (N.D. Ill. 2008) (collecting cases)).

Defendants correctly observe (*see* Filing No. 45 at 24–25) that the two-step process is not statutorily mandated, *see* 29 U.S.C. § 216(b), nor required by the Seventh Circuit. *See Bigger v. Facebook, Inc.*, 947 F.3d 1043, 1049 n.5 (7th Cir. 2020). District courts throughout this Circuit, entrusted with "wide discretion" in managing collective actions, *New Albertsons*, 2021 WL 4028428 at *2 (quoting *Alvarez v. City of Chicago*, 605 F.3d 445, 449 (7th Cir. 2010)), have nevertheless commonly employed the two-step process. *See id.* at *1; *Duan*, 2023 WL 5955911, at *1.

At the first step — the only step relevant here — the plaintiff need only make a "modest factual showing sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law." *Duan v. MX Pan Inc.*, 2023 WL 5955911, at *1 (S.D. Ind. Aug. 21, 2023) (quoting *New Albertsons*, 2021 WL 4028428 at *1). If the plaintiff meets this standard, the court may conditionally certify the suit as a collective action and allow the plaintiff to send notice of the case to similarly situated employees who may then opt-in as plaintiffs. *Id.*

Importantly, at step one, the court is not required "to make any findings of fact with respect to contradictory evidence presented by the parties nor does th[e] court need to make any credibility determinations with respect to the evidence presented." *Berndt v. Cleary Bldg. Corp.*, No. 11-cv-791, 2013 WL 3287599, at *7 (W.D. Wis. Jan. 25, 2013) (quoting *Severtson v. Phillips Beverage Co.*, 141 F.RD. 276, 278–79 (D. Minn. 1992)). "Therefore, where the parties' evidentiary submissions directly conflict, they will be resolved — for purposes of this order only — in

plaintiffs' favor." *Id.* (citing *Larsen v. Clearchoice Mobility, Inc.*, No. 11 C 1701, 2011 WL 3047484, at *1 (N.D. Ill. Jul. 25, 2011)). In exercising discretion, district courts must "respect judicial neutrality and avoid even the appearance of endorsing the action's merits." *Bigger*, 947 F.3d at 1046.

At the more stringent second step following discovery, the court reevaluates the conditional certification and "determine[s] whether there is sufficient similarity between the named and opt-in plaintiffs." *Duan*, 2023 WL 5955911, at *1. "If there is sufficient similarity, . . . the matter [may] proceed to trial on a collective basis; if there is not, the court may revoke conditional certification or divide the class into subclasses." *Id.*

Defendants contest the "modest factual showing" standard at this stage and urge the Court to instead apply the "preponderance of the evidence" standard "given the dangers posed by collective actions in exerting undue pressure on defendants to settle." (Filing No. 45 at 26.) Defendants point to the decision in *Bigger* and argue "trial courts must 'shield against abuse of the collective action device' by assessing certification under familiar evidentiary standards." *Id.* at 28 (quoting 947 F.3d at 1050).

Bigger addressed, as a matter of first impression, a defendant's opposition to the issuance of notice to individuals who allegedly entered mutual arbitration agreements that waived the right to join any collective action. *See* 947 F.3d at 1047, 1049. The Seventh Circuit held that an overseeing court may authorize notice to such individuals "unless (1) no plaintiff contests the existence or validity of the alleged

arbitration agreements, or (2) after the court allows discovery on the alleged agreements' existence and validity, the defendant establishes by a *preponderance of the evidence* the existence of a valid arbitration agreement for each employee it seeks to exclude from receiving notice." *Id.* at 1047 (emphasis added).

This Court is not persuaded that the *Bigger* decision imposes a "preponderance of the evidence" standard on *any party besides* an "employer seeking to exclude employees from receiving notice" and to demonstrate "the existence of a valid arbitration agreement." *Id.* at 1050. No other decision from this court cites *Bigger* for such a proposition, even in cases involving arbitration agreements and invoking its analytic framework. *See, e.g.*, *Rodgers-Rouzier v. Am. Queen Steamboat Operating Co.*, LLC, 2022 WL 823697, at *2–*3 (S.D. Ind. Mar. 18, 2022).

The Court declines Defendants' invitation to apply the Fifth Circuit's framework in *Swales v. KLLM Transp. Servs., LLC*, 985 F.3d 430 (5th Cir. 2021), or the Sixth Circuit's more recently established version in *Clark v. A&L Homecare & Training Center, LLC*, 68 F.4th 1003 (6th Cir. 2023) (*see* Filing No. 45 at 28–29). When presented with the issue, other courts throughout the Seventh Circuit have refused to adopt *Swales* and/or *Clark* and have continued to adhere to the two-step approach. *See, e.g., New Albertsons*, 2021 WL 4028428 at *2 (declining to hold that district court's decision to apply two-stage collective certification framework instead of *Swales*, "was patently erroneous or outside the bounds of judicial discretion"); *O'Neil v. Bloomin' Brands Inc.*, 2023 WL 8802826, at *3 n.2 (N.D. Ill. Dec. 19, 2023) (disagreeing with Defendants' claim that *Swales* and

Clark show the "tide is shifting away from a two-stage approach to certification"); *Brant v. Schneider Nat'l Inc.*, 2023 WL 4042016, at *2 (E.D. Wis. May 4, 2023) (declining invitation to depart from the two-step process), *reconsideration denied*, 2024 WL 218416 (E.D. Wis. Jan. 19, 2024); *McColley v. Casey's Gen. Stores, Inc.*, 559 F. Supp. 3d 771, 776, 2021 WL 1207564 (N.D. Ind. 2021) ("The FLSA certification two-step remains the dance of this circuit — as least for the time being — and the court adheres to it."). In the absence of a Seventh Circuit case overruling this long-applied approach, the Court finds no reason to depart from it and now turns to the issue of whether the potential plaintiffs are "similarly situated" for purposes of conditionally certifying the collective action.

A. Richards' Evidentiary Support

To support her allegations that Defendants systematically denied promotions to qualified employees who were older than forty and disproportionately promoted younger employees over older workers, Richards submits an affidavit (Filing No. 42-4), as well as those of one former employee Christina Sosa ("Sosa") (Filing No. 42-6), and one current Eli Lilly employee, Herold Oluoch ("Oluoch") Filing No. 42-5), asserting they had similar experiences (*see* Filing No. 42 at 10). She also provides an affidavit of an Eli Lilly executive business manager James Sweeney("Sweeney) (Filing No. 42-3) and cites to a pair of prior lawsuits brought before this court (*see* Filing No. 42 at 4–6). In the first suit, which has been resolved by consent decree, the Equal Employment Opportunity Commission ("EEOC") alleged that Lilly USA failed to hire applicants aged forty and over for

Sales Representative positions from April 2017 through December 2021 (*see EEOC v. Lilly USA, LLC*, No. 1:22-cv-01882 (S.D. Ind. Oct. 10, 2023)). In the second suit, which has been since dismissed with prejudice, Eli Lilly employees brought a class and collective action alleging that Eli Lilly engaged in systematic age discrimination with respect to the hiring practices of Sales Representatives in the Diabetes and Primary Care Business Units (*see Grimes et al. v. Eli Lilly and Co.*, No. 1:21-cv-2367 (S.D. Ind. Oct. 13, 2023)).

1. Similarly Situated Individuals

Defendants first point out that Richards fails to identify a single specific employee who is similarly situated to herself (Filing No. 45 at 10). They assert that the former Lilly employee, Sosa, left before the start of the collective period and the current employee, and Oluoch "does not claim that he ever actually *sought and was denied a promotion*." *Id.* at 11 (emphasis in original).

Sosa's affidavit describes a "shift" in treatment in 2020 and her subsequent constructive discharge, which occurred in November 2021 (*see* Filing No. 42-6, ¶¶ 6–10). Upon review, the Court finds that, although the potential collective action class cannot include Sosa, her affidavit supports Richards' underlying argument about Eli Lilly's alleged common policy or plan involving age discrimination. The actions therein — of a younger Eli Lilly employee with lower sales numbers receiving promotion support unoffered to the older employee affiant — are consistent with the complaint and helpfully illustrate circumstances similar to those experienced by Richards.

Defendants' arguments about the current employee, Oluoch, and his unsuccessful promotions are likewise unpersuasive and inappropriate at this step. His affidavit describes five internal promotion slots opened annually to department employees (Filing No. 42-5, ¶ 3). In 2017, Oluoch started noticing "much younger employees . . . being promoted over [him] and at much higher rates." *Id.* ¶ 4. He clearly asserts Eli Lilly "passed [him] over for a promotion in favor of an [Early Career Professional ("ECP")] at least eight times" and that he reported the alleged age discrimination to Human Resources in 2022. *Id.*, ¶¶ 6, 7. The Court finds this to be sufficiently supportive of Richards' theory that Defendants attempted in the relevant time periods to retain Millennial workers "by promoting them over" older counterparts (Filing No. 1, ¶ 1), who were "passed over for promotion." *Id.*, ¶ 23.

Although Defendants make their own substantial allegations (supported by exhibits and declarations), including that Oluoch "did not apply to any open job postings" from February 12, 2022, onward (Filing No. 45-8, ¶ 8), at this initial notice stage of the proceedings, the Court does "not make merits determinations, weigh evidence, determine credibility, or specifically consider opposing evidence presented by a defendant." *Prater v. All. Coal, LLC*, 2022 WL 22285581, at *2 (S.D. Ind. Mar. 22, 2022) (quoting *Nicks v. Koch Meat Co.*, 265 F. Supp. 3d 841, 849 (N.D. Ill. 2017) (St. Eve, J.)). Reliance on defendant declarations is largely misplaced when the court analyzes certification under step one. *See Briggs v. PNC Fin. Servs. Grp.*, 2016 WL 1043429, at *6 (N.D. Ill Mar. 16, 2016) (defendant's declarations "are futile in the Court's step one analysis"); *Salmans v. Byron*

Udell & Assocs., 2013 WL 707992, at *4 (N. D Ill. Feb. 26, 2013) ("[W]hether … discrepancies [between potential class members] will become important down the road does not affect the current question of conditional certification.") (citation omitted). Challenging the factual merits of the collective action in such a manner is properly addressed at the second certification step, when Defendants' opportunity to decertify the collective action will occur.

Defendants nevertheless maintains Richards' evidence regarding similarly situated individuals is conclusory and speculative. While ultimately the evidence may show this to be true, it is sufficient at this step that Richards merely shows "some factual nexus" that connects her to "other potential plaintiffs" as "victims of an unlawful practice." *Berndt v. Cleary Bldg. Corp.*, No. 11-cv-791, 2013 WL 3287599, at *6 (W.D. Wis. Jan. 25, 2013). The Court finds Richards has succeeded in doing so.

Throughout her motion and reply, Richards draws heavily upon the expertise of Eli Lilly executive business manager, Sweeney, who, for the preceding twenty-two years, has assisted in the hiring, recruitment, and development of sales team members and attended numerous executive level recruitment and hiring meetings (*e.g.*, Filing No. 42 at 6–8; Filing No. 49 at 17–18; *see also* Filing No. 42-3, ¶ 1). Sweeney's detailed affidavit provides the necessary "factual nexus" connecting Richards to other potential plaintiffs.

Being "very familiar with Eli Lilly's recruitment *and promotion practices*," Sweeney described a company departure from strict promotion

requirements in favor of an "early identified talent" pilot program, which allowed managers "to bypass the competency model and promote new employees with minimal or no experience" (Filing No. 42-3, ¶¶ 1–3) (emphasis added). This departure started in or around 2012 and "gained momentum" over the next few years. *Id.*, ¶ 3.

He explained biannual human resource planning meetings and that he witnessed how senior Eli Lilly employees with hiring and promotional authority would "discredit and undermine" the work of older employees being considered for promotions. *Id.*, ¶ 10. Older employees he supervised "often were singled out for criticism," even when he could attest to their excellent performance, but younger and newer sales representatives "who [we]re not ready for promotions" were often promoted. *Id.*

Sweeney's affidavit provides the specific example of a salesperson in their fifties whom he personally supervised. Although the salesperson's identity is left undisclosed, the affidavit details what happened when Sweeney recommended him for a stock grant, which is often considered a "precursor[] to promotion[]." *Id.* One Sales Director (who subsequently became an Associate Vice President) shot down the recommendation, called the salesperson lazy, and represented "he had not performed to his maximum potential" "without having any firsthand knowledge about his performance or work." *Id.* The director never observed him work nor cited any specific metrics in this evaluation.

From this context, Sweeney indicates he is aware of at least twenty employees over the age of forty "who

are qualified for more senior sales representative roles, have expressed interest in being promoted, and have not been promoted." *Id.* at 6. Given the totality of Richards' other proffered evidence, including the sweeping picture painted by Sweeney's statements, it would be at least reasonable to infer that these twenty individuals, personally known to him, suffered the same or similar plight ("similarly situated") as Richards, Sosa, Oluoch, or the salesperson Sweeney supervised. That is to say, some plan, policy or instruction linked Millennial employees to promotions that these twenty or so older, more qualified individuals had "expressed interest" in and, as an ultimate result, they were "not . . . promoted." *Id.* at 6. Adjudging the accompanying theories and specifics of *how* that happened (or did not happen) is more proper at the second decertification step. As noted earlier, the Court need not determine at this step whether, in practice, the common plan, policy, or instruction played out over "perfunctory interview[s]" (Filing No. 42-4 at 4), like in Richards' case, or unsubstantiated negative exchanges dissecting older employees' performance, like in the salesperson's case. This occurs at the more stringent second step. *See Duan*, 2023 WL 5955911, at *1.

2. <u>Common Policy or Plan Impacting Such Individuals</u>

Defendants next argue that Richards identifies no evidence regarding a common or single plan of discriminatory promotions (Filing No. 45 at 16). They maintain that Eli Lilly's organizational structure and discretionary policies used in evaluating employees for promotion, and Richards' supporting affidavits do not establish a common thread linking the broad collective.

Defendants argue that Richards attempts "to identify such a common plan by discussing the ECP initiative" and does not provide any specific facts to the contrary. *Id.* In discussing "the ECP initiative", Defendants provide evidence in the form of a declaration by an Eli Lilly senior vice president, Matthew "Kip" Chase. *See id.* (discussing Filing No. 45-1). The exhibits attached to the declaration include an internal website page describing job paths and job levels (Filing No.45-2), an excerpt of an April 2017 "People Strategy" presentation used during the 2017 town hall meeting referenced in the collective action complaint (Filing No. 45-5), and a corresponding "Pre-Read" distributed in advance of the meeting to human resources personnel (Filing No. 45-6). In essence, Defendants argue that the 2017 ECP initiative mentioned in the complaint could not have served as the common plan, since it "was focused on hiring and advancement for entry-level positions, not manager-level positions" like Richards' (Filing No. 45 at 16; *see also* Filing No. 45-1, ¶¶ 22, 24), and had its last hiring goal set in fiscal year 2020 (Filing No. 45 at 16–17; *see also* Filing No. 45-1, ¶ 25).

Ignoring for a moment the fact that the Court does not make merits determinations, weigh evidence, or specifically consider opposing evidence at this stage, *Prater*, 2022 WL 22285581, at *2, the Court finds that this evidence, introduced by Defendants, seems to imply that the April 2017 presentation, and associated ECP *hiring* initiative which ensued, constitutes — full stop — the entirety of the alleged "companywide age bias" that Richards seeks to put forth in this proposed collective. But Richards does not pursue such a limited collective action.

Rather, in the Complaint itself, as well as in the motion and reply, Richards makes substantial allegations, supported by detailed affidavits, that putative class members were together victims of a policy or plan that "extended *beyond* the discriminatory hiring practices detailed in the *EEOC* and *Grimes* lawsuits." (Filing No. 1 at 4) (emphasis added). For example, Sweeney describes learning that a certain Sales Director (the same one involved in the previous salesperson incident) "was following a directive from senior Elil Lilly leadership, including [the] CEO . . . and Senior Vice President of Human Resources and Diversity . . . , to hire *and promote* Early Career Professionals." (Filing No. 42-3 at 4) (emphasis added). He continues: "[P]romoting Early Career Professionals even became part of our performance planning objectives." *Id.* Sweeney straightforwardly assesses that, despite "claim[ing] to have a standardized hiring and promotion process," "the company ignores this process when it comes to both hiring and promoting Early Career Professionals, who are advanced quickly through the promotion process" "at the expense of more qualified and older employees." *Id.* at 6.

Richards recounts her own experience and understanding of such policy or plan working for Eli Lilly in Boston, Massachusetts. Among other things, she describes how an individual "in her late 20s" was promoted to the district sales manager position instead of her and was "hired as an S1 or S2 and … promoted to an S6 in just six years" (Filing No. 42-4 at 4, 5). These "rapid promotions deviate sharply from Eli Lilly's professed Human Resource Planning Process and 'competency model' of promotion, which

provides that it takes around three years at each 'S' level before being promoted to the next 'S' level . . . ." *Id.* at 5. Finally, as discussed previously, Richards' allegations are supported by affidavits of other individuals — one working in Indianapolis, Indiana and one that worked previously in Florida — that detail individual circumstances similar to those experienced by Richards. These showings together are sufficient to demonstrate the existence of a "factual nexus" connecting "victims of an unlawful practice." *Berndt*, 2013 WL 3287599, at *6.

The Court is not dissuaded by Defendants' insistence that Richards', Oluoch's, and Sosa's circumstances are individualized occurrences. This would be to miss the forest for the trees. Instead of undermining Richards' claim, the differences to which Defendants point (geographic area, supervisors, and promotion evaluators) are details whose widespread variety might support the allegations of an overarching — *i.e.*, "companywide" (Filing No. 1 at 3) — plan, threading together instances of age bias in promotion.

Defendants' arguments concerning the complexity of Eli Lilly's organizational structure and the variance in discretionary policies used in evaluating employees for promotion are likewise unavailing at this step. Richards alleges a common policy or plan of willfully promoting younger, less qualified employees over older, more qualified employees. It is therefore the disadvantaged employees' age, qualifications with regard to the relevant promotion, and status of being passed over in favor of a younger and less qualified counterpart — and not *per se* their job functions, or core business unit to which they belong, or the hiring

criteria applied to the sought-after position — that bind the proposed collective of employees. While Defendants may disagree as to the relevance of the alleged variation in Eli Lilly hierarchy, the Court may not engage in making merit determinations or weighing evidence at this stage, and therefore does not find the potential differences between collective members to be disqualifying for purposes of authorizing notice. *See Prater*, 2022 WL 22285581, at *2–3. Should further discovery reveal that some or all potential plaintiffs are not in fact similarly situated or subject to a single common plan of discriminatory promotions, then decertification may be appropriate.

All told, Richards has made a "modest factual showing" that she and potential plaintiffs "together were victims of a common policy or plan that violated the law." *In re New Albertsons, Inc.*, 2021 WL 4028428, at *1. Therefore, the Court conditionally certifies this action.

B. Proposed Notice

After conditionally certifying a collective action, the court may, at its discretion, authorize notice to similarly situated employees. *Horta v. Indy Transp., Inc.*, No. 1:20-cv-02659, 2021 WL 1667078, at *3 (S.D. Ind. Apr. 28, 2021). In doing so, the court maintains a "managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Jirak*, 566 F. Supp. 2d at 850 (quoting *Hoffmann-LaRoche Inc. v. Sperling*, 493 U.S. 165, 170–71 (1989)).

Richards seeks leave to send the Notice and Opt-In Consent Forms by text, e-mail, and U.S. Mail (*see* Filing No. 42 at 22). She also seeks a ninety-day opt-

in period with a mail and email reminder sent within forty-five days of the first notice. *See id.* at 22–23. To accomplish this notice plan, Richards asks the Court to require Defendants to produce, within ten days from the date of the order, a collective list for "all former and current Eli Lilly employees[] who have worked for any period of time since February 12, 2022, to the present" (*see* Filing No. 41) to Richards' counsel.

Casting the net as wide as requested ("all former and current" employees) fails to preserve Eli Lilly's privacy interests by requiring Defendants to relinquish the information of employees who are ineligible to become opt-in plaintiffs. To match the certified collective more properly, the Court limits the requested information that Eli Lilly is mandated to turn over to Richards to "all former and current Eli Lilly employees who have worked for any period of time since February 12, 2022, to the present *and were forty years of age or older when they were denied promotion*."

Defendants further seek modifications to the notice and consent forms and have submitted redline versions of each. Specifically, Defendants argue the forms should: (1) define the collective and use congruent criteria to describe opt-in plaintiffs; (2) explain Eli Lilly can seek decertification, which may result in the dismissal, and that opt-in plaintiffs are thus only potentially members of any ultimate collective; (3) reference Richards' claims and Eli Lilly's defenses in a more prominent paragraph disclaiming that the case is at an early stage; (4) advise potential opt-ins that they may be required not only to provide evidence, but respond to discovery and testify at trial; (5) inform potential opt-ins that they may share in

liability for Eli Lilly's costs if Eli Lilly prevails; and (6) inform potential opt-ins that they may contact Richards' counsel or an attorney of their choice (Filing No. 45 at 32–33).

The Court agrees with some, but not all, of Defendants' proposed modifications. First, Richards does not object specifically to Defendants' request that the forms define the collective and use congruent criteria to describe opt-in plaintiffs. Without modification, the notice form in particular would appear to apply to *any* employees over the age of forty considered for a promotion, regardless of whether they were denied, or unqualified for, those same promotions. Since the certified collective consists by its own terms of those employees over forty who were *denied* promotions *for which they were qualified*, Defendants' modifications to the forms are **granted** to the extent that they incorporate the missing necessary elements. Considering these changes, the sentence in the notice now reads in relevant part: "According to the company's records, you were forty (40) years of age or older and were denied a promotion for which you were qualified on or after February 12, 2022, and are therefore eligible to . . . ."

C. Defendants Motion to Strike Opt-In and Consent Form

Even with Defendants' proposed modification, the language in the consent form does not match the collective's breadth. After briefing the motion for conditional certification, Richards filed a "notice of consent to opt-in" to the claims in the case (*see* Filing No. 56; Filing No. 56-1), which is the subject of Defendants' Motion to Strike. In relevant part, the

consent, signed by affiant Sweeney, removes the statements that the undersigned "applied for a promotion at Eli Lilly" and Eli Lilly denied the application, both of which were found in the previous consent form (*see* Filing No. 42-2). In lieu of these indications, Sweeney's consent form instead states he was "passed over for a promotion by Eli Lilly in favor of a younger employee in approximately" October 2022 (Filing No. 56-1). The added language, which parallels that found in Oluoch's affidavit, squarely fits within a theory of the case promoted by Richards (*see* Filing No. 1, ¶¶ 1, 23). For such reasons, and taking into account the collective which the Court has certified above, the Court finds that the altered language in Sweeney's consent fulfills 29 U.S.C. § 216(b)'s requirement that any party plaintiff shall "give[] consent in writing to become [] a party."

Considering such observations, as well as the proposed modifications which assist in determining the relevant timeline, the consent form to be sent to opt-in plaintiffs is changed to now read in relevant part:

> On or about _____ (month/date), I applied or was considered for a promotion at Eli Lilly. Eli Lilly denied my application or passed me over for a promotion in favor of a younger employee on _____ (month/date). At the time I applied for the promotion, I was a _____ (title, role, division). At the time my application was denied or I was passed over for promotion, I was _____ years old. The promotion(s) I had applied to/did not receive was to the position(s) of _____ (title(s), role(s), division(s)). I believe I was qualified for the role

and was passed over for a less qualified, younger applicant.

In light of these and other changes, the Court **grants** Defendants' Motion to Strike (Filing No. 58), Sweeney's consent form (Filing No. 56-1), but Richards is **granted leave** to file an amended consent form for Sweeney that is consistent with this Entry.

Next, when it comes to Defendants' proposed modification concerning Eli Lilly's possible decertification and effect on opt-in plaintiffs, the Court finds the addition of such an explanation unnecessary. At present, a prominent paragraph indicates that the case "is at an early stage" and there has not been a decision on the merits or settlement (Filing No. 42-1 at 2). Later on, it is further explained that opt-in plaintiffs "will be bound by any ruling or settlement in this case." *Id.* Together, these disclaimers satisfactorily place potential plaintiffs on notice that they will be bound by rulings to come at later stages. The Court finds that spelling out the possibilities or effects therein as stated in the second paragraph of Exhibit 6 is appropriate. (*See* Filing No. 45-11 at 2).

The Court finds Defendants' request that the proposed notice include language regarding the potential consequences of joining the case and the prospect of participation in discovery and at trial to be a fair suggestion. *See Knox v. Jones Grp.*, 208 F. Supp.3d 954, 966 (S.D. Ind. 2016) ("Plaintiffs' notice . . . is approved with the addition of a phrase that 'a class member may be subject to obligations such as responding to discovery, giving a deposition, and testifying at trial' in the 'What happens if I join the lawsuit?' section."), o*n reconsideration in part*, 2016

WL 6083526 (S.D. Ind. Oct. 18, 2016); *see also Carrel v. MedPro Grp., Inc.*, 2017 WL 1488359, at *11 (N.D. Ind. Apr. 26, 2017) ("However, the class members may be subject to discovery, including depositions, to determine their individualized damages. Accordingly, revisions to include reference in the Notice to this impeding discovery are warranted.").

Richards should also acknowledge the consequences of an unfavorable result. *See Hayes v. Thor Motor Coach, Inc.*, 502 F. Supp. 3d 1342, 1353, 2020 WL 5217388 (N.D. Ind. 2020). Although § 216(b) is silent regarding the court's authority when the defendant is the prevailing party, at least one circuit court has held that the statute does not prevent prevailing defendants from seeking an award of costs under Federal Rule of Civil Procedure 54(d). *See Lochridge v. Lindsey Mgmt. Co.*, 824 F.3d 780, 782–83 (8th Cir. 2016); *see also E.E.O.C. v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 883 (7th Cir. 1994) ("Congress must be presumed to know, upon incorporating the FLSA into the ADEA, that in the absence of a specific provision, prevailing defendants would not be able to recover fees absent a showing of bad faith. By explicitly changing this rule with respect to plaintiffs but remaining silent with respect to defendants, the most sensible reading is that the FLSA and the ADEA adopt the common law rule with respect to prevailing defendants."). It only seems prudent to advise future plaintiffs of their responsibilities and potential consequences if they join, so long as the language does not unfairly dissuade possible plaintiffs from joining. The Court finds that Defendants' proposed language does not run this risk. The forms shall be modified accordingly.

Lastly, Defendants request that the opt-out period should be reduced from Richards' proposed ninety days to sixty days. A period of seventy-five days is a reasonable compromise. The notice shall be modified accordingly. Defendants further argue the Court should not authorize reminder notices, which they contend are unnecessary and "could be interpreted as encouragement by the Court to join the lawsuit" (Filing No. 45 at 33 (quoting *Smallwood v. Ill. Bell Tel. Co.*, 710 F. Supp. 2d 746, 753–54 (N.D. Ill. 2010)). However, such concerns are uncompelling, given that the second notice will be disseminated by Richards' counsel, not the Court. That aside, since the individual is not part of the collective in an FLSA action unless he or she opts-in, this court has previously recognized a second notice or reminder is appropriate. *See, e.g., Slack v. Xcess, Inc.*, 2020 WL 12738895, at *3 (S.D. Ind. July 9, 2020); *Knox*, 208 F. Supp. 3d at 964–65. The Court therefore authorizes Richards to send a second notice, identical to the first, forty-five days after the issuance of the first notice to all individuals who have not yet opted-in to this matter.

The Court has considered Defendants' remaining objections, as well as the other suggested redlined changes, and overrules them. They are largely stylistic suggestions concerning the language included in the notice or are otherwise unnecessary. The Court will not engage in a wholesale rewrite of Richards' proposed notice form, as collective action plaintiffs should be allowed to use the language of their choice in drafting the communication to other prospective collective members. *See King v. ITT Continental Baking Co.*, 1986 WL 2628, at *3 (N.D. Ill. Feb. 18, 1986) (Rovner, J.).

III. CONCLUSION

Richards has met her step one burden to certify her ADEA claims as a conditional collective action under the FLSA. Her Motion for Conditional Certification and Issuance of Notice and Opt-In Form (Filing No. 41) is **GRANTED**. Eli Lilly's Motion to Strike (Filing No. 58) is **GRANTED**, and Filing No. 56-1 **is stricken**. Richards is granted leave file a new a consent form for Sweeney that is consistent with this Order.

The notice and opt-in consent forms are limited in accordance with this Order. Because Richards must revise these forms before they can be sent, the Court **ORDERS** her to **file within fourteen (14) days of the date of this Order supplemental notice and opt-in consent forms**, as well as a **proposed order** granting leave to send them. Absent any unforeseen issues or unconsidered additions, the Court intends to grant the proposed order and allow notice to proceed. Thus, new objections by Defendants, if any, are not to exceed three pages and are due **seven (7) days after Richards' submission**.

Additionally, the Court **ORDERS** Defendants **to share the requested contact information with Richards' counsel within twenty-one (21) days of the date of this Order** for all former and current Eli Lilly employees who have worked for any period since February 12, 2022, to the present and were forty years of age or older when they were denied promotion.

SO ORDERED.

Date: 3/25/2024 s/ Tanya Walton Pratt

Hon. Tanya Walton Pratt, Chief Judge United States District Court
Southern District of Indiana

DISTRIBUTION:

Harold Lichten
LICHTEN & LISS-RIORDAN
hlichten@llrlaw.com

Jane Farrell
LICHTEN & LISS-RIORDAN PC
jfarrell@llrlaw.com

Jeffrey A. Macey
MACEY SWANSON LLP
jmacey@maceylaw.com

Matthew Patton
LAW OFFICE OF NICHOLAS F. ORTIZ P.C.
mdp@mass-legal.com

Thomas Fowler
LICHTEN & LISS-RIORDAN, P.C.
tfowler@llrlaw.com

Jacob Wentzel
JENNER & BLOCK LLP
jwentzel@jenner.com

Joanna Wright
JENNER & BLOCK LLP
1155 Avenue of the Americas
New York, NY 10036

Joseph Torres
JENNER & BLOCK LLP
jtorres@jenner.com

Katherine Funderburg
JENNER & BLOCK LLP
kfunderburg@jenner.com

APPENDIX H

U.S. Const. Art. III

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

* * *

29 U.S.C. § 626

§ 626. Recordkeeping, investigation, and enforcement

* * *

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to

effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

* * *

29 U.S.C. § 216

§ 216. Penalties

* * *

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) or 218d of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) or 218d of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 203(m)(2)(B) of this title shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become

such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) or 218d of this title.

* * *