UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL ALBERT, ***on behalf of himself and others similarly situated*****,**

Plaintiff,

v.

HONDA DEVELOPMENT & MANUFACTURING OF AMERICA, LLC,

Defendant.

Case No. 2:22-cv-694
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

TREVOR TRIPOLI, ***on behalf of himself and others similarly situated*****,**

Plaintiff,

v.

HONDA DEVELOPMENT & MANUFACTURING OF AMERICA, LLC,

Defendant.

Case No. 2:22-cv-3828
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

BRANDON WHATLEY, ***on behalf of himself and others similarly situated*****,**

Plaintiff,

v.

HONDA DEVELOPMENT & MANUFACTURING OF AMERICA, LLC,

Defendant.

Case No. 2:22-cv-4372
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

MELISSA SCARBROUGH, ***on behalf of herself and others similarly situated*****,**

Plaintiff,

v.

Case No. 2:22-cv-4277
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

**HONDA DEVELOPMENT &
MANUFACTURING OF AMERICA, LLC,**

Defendant.

OPINION AND ORDER

This matter is before this Court on a Motion to Facilitate Court-Authorized Notice to Other Similarly Situated Potential Plaintiffs. (Notice Mot., ECF No. 75.) Named Plaintiffs Michael Albert, Trevor Tripoli, Brandon Whatley, and Melissa Scarbrough (collectively, "Named Plaintiffs") seek court-facilitated notice to potential opt-in plaintiffs. In their Motion, Named Plaintiffs defined the potential opt-in plaintiffs as:

> All current and former non-exempt (including but not limited to commission-based, hourly and salaried) employees of Defendant in the United States since the onset of the Kronos ransomware attack, from on or about December 1, 2021 to the present, whose weekly work hours were usually or would usually have been tracked by the Kronos timekeeping system, and who were not paid overtime compensation in the amount of one and one-half times the employee's regular rate of pay for all hours worked over forty (40) in any workweek during the Kronos outage period.

(Notice Mot., PageID 1064.)[1] In their reply, Named Plaintiffs revised their definition as follows:

> All current and former non-exempt (including but not limited to commission-based, hourly and salaried) employees of Defendant in the United States during the Kronos Outage Period, from December 1, 2021 to February 28, 2022, whose weekly work hours were usually or would usually have been tracked by the Kronos timekeeping system, and who, during any one workweek during the Kronos Outage Period, were not paid overtime compensation in the amount of one and one-half times the employee's regular rate of pay for all hours worked over forty (40) in any as a result of any late and/or non-overtime payment.

(Reply, ECF No. 79, PageID 1280.) For the reasons below, the Notice Motion is **GRANTED IN PART** and **DENIED IN PART**.

[1] Named Plaintiffs proposed this definition to cover employees whose overtime payments were not paid when due as well as those whose overtime payments were not paid at all. (*See* Proposed Notice, ECF No. 75-1, PageID 1086.)

I. BACKGROUND

A. *Albert* Action

Named Plaintiff Michael Albert brought this action against Defendant Honda Development & Manufacturing of America, LLC ("Honda") in February 2022. (Compl., ECF No. 1.) In his Amended Complaint filed in April 2022, Albert raises claims under the Fair Labor Standards Act ("FLSA"), alleging that Honda failed to pay overtime to him and other similarly situated employees. (Am. Compl., ECF No. 13, ¶¶ 61–67.) Albert also raises claims for Ohio wage and hour violations under Ohio Revised Code §§ 4111.03, 4113.15, and 2307.60. (*Id.* ¶¶ 68–73.)

Honda "is a firm consisting of . . . automobile manufacturing facilities in the U.S. related to frame, engine, transmission, and related engineering and purchasing operations[.]" (*Id.* ¶ 14.) Albert also maintains that Honda is an "employer" of Albert and other potential collective members under the FLSA, 29 U.S.C. § 203(d). (*Id.* ¶ 15.)

Albert has been employed by Honda as an hourly equipment service technician since October 2020. (Albert Decl., ECF No. 75-16, ¶ 2.) Honda classifies and pays Albert, as well as those he seeks to include in this collective action, as a nonexempt employee. (*Id.* ¶ 4.)

B. Ransomware Attack on Honda's Kronos System

To facilitate the payment of compensation to Honda's employees, Honda uses a timekeeping system called Kronos, which is maintained by Ultimate Kronos Group. (Am. Compl. ¶ 2; Notice Mot. PageID 1061–62, 1066.)

Albert's FLSA claim arises from a ransomware attack on the Kronos timekeeping system that rendered the system, as used by Honda, inoperable from about December 11, 2021 to mid-February 2022. (*Id.*; Opp., ECF No. 78, PageID 1151; Alloway Decl., ECF No. 32-1, ¶¶ 3, 21.) At the time of this service outage, Honda did not have an alternative system in place to

accurately track its employees' hours worked, including overtime compensation. (Notice Mot. PageID 1066.) Without access to Kronos, Honda could not determine the time worked by each employee in the weeks before and during the Kronos outage. (Notice Mot. PageID 1066–67.)

On December 16, 2021, just a few days after Honda lost access to Kronos, Honda needed to issue paychecks to its employees. (Alloway Decl. ¶ 7.) Unable to determine whether any nonexempt employees were entitled to overtime compensation, Honda chose to pay these employees for 40 hours at their regular rate of pay. (*Id.* ¶¶ 8–11.) These paychecks did not account for any overtime that may have been due. (*Id.*) Before the second week of the Kronos outage, Honda implemented a new compensation method, labeled the "40 plus 3 Pay Method." (*Id.* ¶¶ 14–15.) Under the 40 plus 3 Pay Method, Honda paid all nonexempt employees for 40 hours at their regular rate and for three hours at their overtime rate. For the second week of the outage, Honda paid 40 hours plus six overtime hours and retroactively applied three of the overtime hours to the previous pay period when these nonexempt employees did not receive overtime compensation. (*Id.*)

Honda used the 40 plus 3 Pay Method until on or around December 30, 2021. (*Id.* ¶ 20.) Then, Honda transitioned to a new timekeeping system using PeopleSoft, which functioned as a less-sophisticated Kronos. (*Id.* ¶¶ 17–21.) The PeopleSoft system required nonexempt employees to manually complete their timesheets, which department managers and other supervisors reviewed, adjusted, or approved, and then entered into the PeopleSoft system. (*Id.*) Honda used the PeopleSoft system until on or about February 9, 2022, which covered weeks five through ten of the Kronos outage. (*Id.*)

After the tenth week of the outage, Honda decided it could safely return to the Kronos timekeeping system in a limited capacity. (*Id.* ¶ 21.) Honda also issued a memo to its nonexempt

employees stating that Honda had started a reconciliation process that would rectify any discrepancies between the amount paid under the 40 plus 3 Pay Method and the amount that should have been paid while Kronos was either offline or functioning at a limited capacity. (*Id.* ¶¶ 21–23.) Honda began issuing reconciliation payments on April 27, 2022. (*Id.* ¶ 28.) According to Plaintiff Albert, as well as multiple opt-in plaintiffs, these reconciliation payments did not adequately compensate them for their overtime, other wage damages, or both. (*See* Am. Compl.; Notice Mot.)

Because of the Kronos outage and Honda's subsequent remedial efforts, Plaintiff alleges that Honda knowingly and willfully violated the FLSA by failing to pay and/or failing to timely pay its nonexempt employees for all overtime hours worked. (*Id.*)

C. The *Tripoli*, *Whatley*, and *Scarbrough* Actions

The three other above-captioned actions—*Tripoli v. Honda Development & Manufacturing of Am., LLC*, 2:22-cv-03828, *Whatley v. Honda Development & Manufacturing of Am., LLC*; 2:22-cv-04372, and *Scarbrough v. Honda Development & Manufacturing of Am., LLC*, 2:22-cv-04277—were filed after the *Albert* action and allege similar violations of federal or state law because of Honda's Kronos outage. (ECF No. 58, PageID 723–25.)

The *Tripoli* action was filed in the Southern District of Indiana, but transferred to this Court on October 27, 2022, upon Honda's unopposed motion to transfer it to this Court. (*Id.*) The *Whatley* action was filed in the Northern District of Alabama, and similarly transferred to this Court on November 29, 2022. (*Id.*) The *Scarbrough* action was brought in this Court on December 2, 2022, and brings claims on behalf of current and former nonexempt Honda employees who worked in South Carolina during the Kronos outage. (*Id.*) Upon the parties' request, the Court consolidated the four actions in January 2023, as detailed below. (ECF Nos. 55, 58.)

The four Named Plaintiffs bring this Motion. (Notice Mot. PageID 1066.)

D. Other Relevant Procedural History

After Albert brought his Amended Complaint in April 2022, he began filing of consent forms. (*See, e.g.*, ECF Nos. 14, 22.) On May 4, 2022, Albert moved under § 216(b) of the FLSA to conditionally certify a collective (a pre-*Clark* motion, *see infra*), but Honda opposed and in the alternative, requested a stay. (ECF Nos. 27, 32.)

In August 2022, Honda moved for summary judgment in the *Albert* action. (ECF No. 37.) Albert filed a Federal Rule of Civil Procedure 56(d) motion to defer ruling on that motion, or alternatively, extend time to conduct discovery. (ECF No. 39.) The parties then jointly moved to extend time for Albert to respond to the motion for summary judgment (until February 16, 2023) to conduct discovery, which this Court granted. (ECF No. 44.)

In January 2023, the parties jointly filed a request to consolidate the *Albert*, *Tripoli*, *Whatley*, and *Scarbrough* matters pursuant to Federal Rule of Civil Procedure 42(a). (ECF No. 58, PageID 725.)

In a January 30, 2023 Opinion and Order, this Court granted the request to consolidate the *Albert*, *Tripoli*, *Whatley*, and *Scarbrough* cases. (*Id.* PageID 728–29.) This Court also stayed the case, finding persuasive Honda's argument that the Court should stay the consolidated proceeding because a controlling issue— the applicable legal standard for certification of collective actions under the FLSA—was before the Sixth Circuit in the cross-appeals captioned *Brooke Clark et al. v. A&L Home Care and Training Center LLC, et al.*, Nos. 22-3101 and 22-3102. (*Id.* PageID 729–733.)

On June 2, 2023, the parties filed a joint status report, alerting the Court that the Sixth Circuit had published its opinion in *Clark*. (ECF No. 62.) Later that month, this Court put on an

Order lifting the case stay and adopting the parties' joint proposed scheduling order. (ECF No. 65.)

At the same time, the parties moved to reactivate Honda's motion for summary judgment, which applies to only Albert's claims (ECF No. 67), and the reactivation motion was granted (ECF No. 68). But as the result of discovery disputes and motions for extensions of time, the August 2022 motion for summary judgment did not become ripe until late February 2024. (ECF No. 97; *see also* ECF Nos. 77, 85, 89.)

While those discovery disputes were ongoing, Named Plaintiffs filed the instant Notice Motion (ECF No. 75), which became ripe for review before the summary judgment motion became ripe. The Court finds it prudent to rule on the Notice Motion first. *See Bouaphakeo v. Tyson Foods Inc.*, 564 F. Supp. 2d 870, 900 (N.D. Iowa 2008) (noting that courts often hear summary judgment motions on individualized FLSA defenses after conditional certification); *see also Hendricks v. Total Quality Logistics, LLC*, No. 1:10-cv-649, 2023 U.S. Dist. LEXIS 170355, at *39 (S.D. Ohio Sep. 25, 2023) (Barrett, J.) (citations omitted) (explaining that conditional certification is preliminary and subject to revision and modification before the court addresses the merits); *Polen v. JSW Steel USA Ohio, Inc.*, 699 F. Supp. 3d 622, 627 (S.D. Ohio 2023) (Marbley, C.J.) (explaining that under the *Clark* standard, the notice determination is "provisional' and "take[s] place before the factual record is fully developed," at an earlier stage in the litigation than summary judgment). The Court will issue a separate opinion and order on the motion for summary judgment as that motion only relates to Albert. *See Miller v. SBK Delivery, LLC*, No. 2:21-CV-4744, 2024 WL 862195, at *5 (S.D. Ohio Feb. 29, 2024) (Watson, J.).

II. STANDARD OF REVIEW

At this stage of FLSA litigation, the Court inquires into whether potential opt-in plaintiffs are "similarly situated" to the named plaintiffs. The Sixth Circuit recently changed the court-facilitated notice standard for FLSA cases. *See Clark v. A&L Homecare and Training Ctr., LLC*, 68 F.4th 1003 (6th Cir. 2023); *see, e.g.*, *Hogan v. Cleveland Ave Rest., Inc*, No. 2:15-cv-2883, 2023 WL 5745439, at *3 (S.D. Ohio Sept. 6, 2023) (Marbley, C.J.); *Murphy v. Kettering Adventist Healthcare*, No. 3:23-cv-69, 2023 WL 6536893, at *3 (S.D. Ohio Oct. 5, 2023) (Rose, J.); *Wesel v. Certus Healthcare Mgmt., LLC*, No. 2:23-cv-1479, 2024 WL 794375, at *1 (S.D. Ohio Feb. 26, 2024) (Watson, J.). After *Clark*, "plaintiffs must show a 'strong likelihood' that those employees are similarly situated to the plaintiffs themselves"—a familiar standard, "analogous to a court's decision whether to grant a preliminary injunction." *Clark*, 68 F.4th at 1010–11. "Both decisions are provisional." *Id.* This "standard requires a showing greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance." *Id.* at 1011.

Courts have coined this a "notice determination" as opposed to a "conditional certification," *Hogan*, 2023 WL 5745439, at *4, as this preliminary similarly situated determination "has zero effect on the character of the underlying suit," but acts as a green light for the sending of court-approved written notice to employees. *Clark*, 68 F.4th at 1009. In this way, the focus is properly shifted away from whether a group of plaintiffs should, substantively, become parties to the FLSA suit, and back toward the court's facilitation of awareness to those who could choose to opt-in. *See id.* This focus is important because, "[of] course, a [similarly

situated employee] can join [a FLSA action] only if they are aware of the suit in the first place." *Polen v. JSW Steel USA Ohio, Inc.*, 699 F. Supp. 3d at 627.

But even with *Clark*'s clarification, a few key things have remained the same. First, the question is still whether the potential plaintiffs are similarly situated to the named plaintiffs. *See supra*; *see, e.g.*, *Gifford v. Northwood Healthcare Grp.*, No. 2:22-cv-4389, 2023 WL 5352509, at *3 (S.D. Ohio Aug. 21, 2023) (Morrison, J.). And although under a new name, the court applies more lenient scrutiny in its first take at answering this question than its second. *See Clark*, 68 F.4th at 1010–11 (differentiating between the thresholds for notice versus a conclusive determination of similarity); *see Creely v. HCR ManorCare, Inc.*, 920 F. Supp. 2d 846, 851 (N.D. Ohio 2013) (explaining the difference in scrutiny under the pre-*Clark* standard). This is so because the court-facilitated notice step occurs while "the body of evidence is necessarily incomplete." *Creely*, 920 F. Supp. 2d at 851 (internal quotation marks omitted) (citation omitted) (pre-*Clark*); *see Clark*, 68 F.4th at 1010, 1012; *Polen*, 699 F. Supp. 3d at 627. Indeed, *Clark* emphasized a district court's "practical" inability to make "conclusive[] . . . 'similarly situated' determinations as to employees who are in no way present in the case" given the factbound nature of the question. *Clark*, 68 F.4th at 1010. To the contrary, a court "renders a final decision on the underlying issue [of] . . . whether employees are similarly situated . . . only after the record for that issue is fully developed." *Id.* at 1010–11.

III. ANALYSIS

A. Similarly Situated Inquiry

The FLSA does not define "similarly situated," but this Court is not deprived of guidance. Potential plaintiffs can be similarly situated where their claims are "unified by common theories of defendants' statutory violations," such as "a single, FLSA-violating policy[.]" *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567, 585 (6th Cir. 2009) (noting,

however, that "a 'unified policy' of violations is not required" to be similarly situated), *abrogated on different grounds by Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016). This is so even though "proofs of these theories are inevitably individualized and distinct[,]" such that "proof of a violation as to one particular plaintiff does not prove that the defendant violated any other plaintiff's rights under the FLSA." *Id.* (internal quotation marks omitted). In this way, situations must be similar, not identical. *Hogan*, 2023 WL 5745439, at *4, *7.

Courts consider "a variety of factors"—none of which is dispositive—including: (1) "factual and employment settings of the individual[ ] plaintiffs"; (2) "the different defenses to which the plaintiffs may be subject on an individual basis"; (3) "the degree of fairness and procedural impact of certifying the action as a collective action," *O'Brien*, 575 F.3d at 584; and (4) "whether the named plaintiff submits affidavits from opt-in plaintiffs," *Gifford*, 2023 WL 5352509, at *3; *see also Hogan*, 2023 WL 5745439, at *4 (quoting *Clark*, 68 F.4th at 1010–11).

Named Plaintiffs argue that they have shown more than a strong likelihood that there are similarly situated employees because their colleagues performed the same tasks and were subject to the same timekeeping and compensation policies. (Notice Mot. PageID 1077–78 (citing *Clark*, 68 F.4th at 1010).) They argue Honda used the Kronos system nationwide, and took the same actions following the attack in all of their facilities. (*Id.* (citing Rule 30(b)(6) Dep., ECF No. 73-1, 31:22–25; 52:01–15).) The Kronos outage impacted all hourly nonexempt employees who used Kronos, and Honda's rectification efforts applied to all hourly nonexempt employees as well. (*Id.*) Named Plaintiffs submit 15 declarations from Named Plaintiffs and opt-ins, in which those individuals attest that they were not paid overtime, or were not timely paid overtime, because of the Kronos outage. (*Id.* PageID 1079; *see* ECF No. 75-7–75-21.)

Honda rebuts, first, that the Notice Motion should be denied as moot because Albert has no cause of action under the FLSA. (Opp. PageID 1156.) Next, Honda argues that Named Plaintiffs fail to demonstrate a strong likelihood that they and others allegedly similarly situated have been victims of a common policy or practice. (*Id.* PageID 1150.) Honda's arguments are addressed in the order in which they were made.

1. Mootness Argument

Honda urges that—for the reasons stated in its summary judgment motion (ECF No. 37)—Albert[2] cannot demonstrate that he and other potential plaintiffs were victims of a common policy or plan that violated the law if he himself did not suffer an FLSA violation, and so the Notice Motion is moot. (Opp. PageID 1156–57.) This argument is unpersuasive as Honda essentially urges the Court to reach the merits of whether it violated the law at the notice stage.

The Court has not ruled on the summary judgment motion yet. On a court-facilitated notice determination, a plaintiff need not prove that he or she will be meritorious on his or her claims. Such an approach would contravene *Clark*'s acknowledgment that notice motions generally come earlier in FLSA litigation before the Court has the chance to make "fact bound

[2] Honda asserts that "[a]lthough this case was consolidated with three other cases, that is of no consequence here, as this motion for notice is brought before the Court as it relates to the *Albert* action." (Opp. PageID 1158.) But the Notice Motion makes clear that Albert brings it "with all other [N]amed Plaintiffs in the other cases that have been consolidated with this action." (Mot. PageID 1066.) Named Plaintiffs are just that—plaintiffs (or parties) in this lawsuit. This contrasts with the opt-ins, who do not become plaintiffs until a court determines by a preponderance of the evidence that the named plaintiffs are similarly situated to the opt-in plaintiffs. *Murphy*, 2023 WL 6536893, at *3. The Court will therefore assume the parties' arguments apply to all Named Plaintiffs, not just Albert, where appropriate.

Honda moved for summary judgment only as to Albert, not the other Named Plaintiffs, Tripoli, Whatley, and Scarbrough. Even if the summary judgment motion had been granted before the Court's examination of this Notice Motion, the claims of the other Named Plaintiffs would remain and so the Notice Motion would not be moot.

determinations." *See Clark*, 68 F.4th at 1010. Rather, a plaintiff must establish a strong likelihood that other employees are similarly situated; "a showing greater than one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance." *See Clark*, 68 F.4th at 1010–11. "The very point of the 'similarly situated' inquiry is to determine whether the merits of other-employee claims would be similar to the merits of the original plaintiffs' claims—so that collective litigation would yield 'efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.'" *Jenkins v. EVO Servs. Grp., LLC,* No. 2:23-CV-01874, 2023 WL 8185965, at *2 (S.D. Ohio Nov. 27, 2023) (Marbley, C.J.) (quoting *Clark*, 68 F.4th at 1010, quoting *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989)).

Honda's reliance on *O'Neal v. Kilbourne Med. Labs., Inc.* and *Beery v. Quest Diagnostics, Inc.* does not persuade otherwise. No. CIV.A. 05-50, 2007 WL 956428 (E.D. Ky. Mar. 28, 2007); No. 12-CV-00231 KM MCA, 2013 WL 3441792 (D.N.J. July 8, 2013). In *O'Neal*, pre-*Clark*, the court declined to certify the collective where plaintiff could not rebut defendant's evidence that because of a settlement approved by the Department of Labor, that included a release and waiver of claims, all other potential plaintiffs were precluded from joining the lawsuit. 2007 WL 956428, at *7. Thus, in *O'Neal*, there were no similarly situated employees who could opt in. *Id.* Here, there are already hundreds of opt-ins.

In *Beery*, the court had dismissed the claims of three named plaintiffs based on arbitration clauses in their employment agreements. 2013 WL 3441792, at *1. It found it no longer had jurisdiction over the case after the dismissal because the "mere filing of consent-to-join forms does not confer party-plaintiff status." *Id.* No claims against any of Named Plaintiffs have been dismissed, so *Beery*'s logic is inapplicable.

2. No Strong Likelihood Argument

The Court should deny the Notice Motion, Honda says next, because Named Plaintiffs have not met their burden of demonstrating a strong likelihood that other employees are similarly situated to them. (Opp. PageID 1158.)

Honda first challenges the references in Named Plaintiffs' declarations, submitted in support of their Notice Motion, to additional forms of compensation beyond what the FLSA requires (e.g., shift differentials, call back pay, attendance bonuses, paid time off, and so on). (Opp. PageID 1159–60.) Any argument by Named Plaintiffs that payment was not provided as it relates to those other forms of compensation is outside the scope of the litigation and does not establish a common unlawful policy or practice, Honda contends. (*Id.*) The Court agrees that such assertions in the declarations are not relevant to the FLSA claim, and therefore cannot be used to establish an unlawful policy or practice. This conclusion is not fatal to Named Plaintiffs' Notice Motion, however, for the reasons below.

Honda continues on and argues that the merits of the other employees' claims are not similar to the merits of Named Plaintiffs' claims. (Opp. PageID 1160–61.) First, Honda asserts that "[p]ayments to associates should be analyzed in three phases: weeks 1-2, weeks 3-4, and weeks 5-10" because of the different compensation methods it used during those time periods. (*Id.* PageID 1160.) Honda also tries to parse the testimony in the declarations and make arguments about who did and did not work overtime, in what weeks, and whether they were paid overtime amounts due during those weeks. (Opp. PageID 1161.)

But these arguments seem to go more to defenses and damages calculations, not similarly situatedness. Honda does not dispute that during the first week of the Kronos outage it paid its nonexempt employees for 40 hours of work, used the 40 plus 3 Pay Method for the second through fourth weeks (including paying six overtime for the second week so that three could be

retroactively applied to the first). Named Plaintiffs urge that the 40 plus 3 Pay Method was a FLSA-violating policy that applied across the board to all nonexempt employees.

Honda paid its nonexempt employees under the PeopleSoft system during weeks 5-10 of the Kronos outage. Honda urges the Court not to authorize notice for this period because of differences once it implemented this solution. (*Id.* PageID 1162.) "Individualized inquiries would abound" Honda says, because "[t]here was no set way the hours worked by associates were recorded in PeopleSoft that applied to the entire proposed collective." (*Id.*) Instead, "each associate was tasked with accurately self-reporting . . . It was then up to the individual [Time Verification Coordinators ("TVCs")] to review and adjust or approve those time entries as they saw fit." (*Id.* PageID 1163.) Honda questions the reporting by the individuals and the TVCs ability to determine the accuracy of such reporting. (*Id.*) Honda allowed TVCs to use their judgment, so they "developed unique processes to collect, review, and record their associate's time." (*Id.*) Honda supports these assertions by offered TVC declarations and examples provided in those declarations. (*Id.* PageID 1163–66.)

Named Plaintiffs point out that Honda opposes the Notice Motion "by pointing to its multiple and varied failures in responding to the Kronos Outage and saying that there is no commonality. This is offensive to the goals of the FLSA—an employer cannot use its own bad acts and failures as a shield against liability." (Reply, PageID 1273.) They draw an analogy to a defendant saying that it cannot be held liable for overtime violations because it did not maintain records or otherwise track employee time. (*Id.* PageID 1273 n. 1 (citing *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680, 687–88, (1946) ("The solution . . . is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep

proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."); *see also Acosta v. Off Duty Police Servs.*, 915 F.3d 1050, 1065 (6th Cir. 2019) ("Courts will not punish employees for their employer's failure to comply with the FLSA's recordkeeping requirements.")).)

The Court finds Named Plaintiffs' argument and analogy compelling. It is indeed unfortunate that Honda suffered a ransomware attack on its Kronos system—both for Honda and its employees. But the fact that Honda had to apply ad hoc and sometimes individualized stopgap measures does not mean that its employees should be punished as a result. Potential plaintiffs must only be "unified by common theories of defendants' statutory violations," and "proofs of these theories are inevitably individualized and distinct." *O'Brien*, 575 F.3d at 585. Here, that common theory is that Honda violated the FLSA during the Kronos outage by not paying, or not timely paying, overtime compensation due to non-exempt employees.

Honda submits eight declarations from TVCs in support of its position that individual inquiries abound during the weeks Honda was using the PeopleSoft system. (ECF No. 78-3–78-11.) Those TVCs explain that Honda allowed them to exercise their judgment about how to best collect, review, and record employee time records during that time. (*See, e.g.*, ECF Nos. 78-3 ¶ 9; 78-6 ¶ 9.) They also detail the processes and procedures they used to do is, and explained that because of human error, there could have been reporting mistakes. (*See, e.g.*, ECF No. 78-3 ¶¶ 10–12; 78-6 ¶ 10–11.) These are analogous to "happy camper" declarations:

> so called because they tend to be from the employer's handpicked employees—are routinely given little or no weight at the court facilitated notice stage. *Slaughter v. RMLS Hop Ohio, LLC*, No. 2:19-cv-3812, 2020 U.S. Dist. LEXIS 69772, at *21-22, 2020 WL 1929383, at *8 (S.D. Ohio Apr. 21, 2020) (collecting cases); *Abner v. Convergys Corp.*, No. 1:18-cv-42, 2019 U.S. Dist. LEXIS 62597, at *15, 2019 WL 1573201, at *5 (S.D. Ohio Apr. 11, 2019) ("However, district courts regularly

> reject 'happy camper' defenses at the [notice] stage"); *Myers v. Marietta Mem'l Hosp.*, 201 F. Supp. 3d 884, 891-92 (S.D. Ohio 2016) (citing *Amador v. Morgan Stanley & Co.*, No. 11-cv-4326, 2013 U.S. Dist. LEXIS 19102, at *4, 2013 WL 494020, at *1-2 (S.D.N.Y. Feb. 7, 2013) ("Moreover, form affidavits 'gathered by an employer from its current employees are of limited evidentiary value in the FLSA context because of potential for coercion' ")).

Murphy, 2023 WL 6536893, at *5. There is a greater potential for employer coercion here: the TVCs have no personal stake in the litigation and Honda likely has more control over statements from managers and supervisors. The Court gives these TVC declarations little weight at this notice stage.

Honda cannot avoid that there are thousands of their non-exempt employees who performed similar tasks to Named Plaintiffs and were subject to the same timekeeping and compensation policies as Named Plaintiffs before, during, and after the Kronos outage. The Kronos outage impacted them all, and Honda applied blanket rectification efforts across the board. That Honda's replacement systems impacted some employees differently—or that TVCs implemented the PeopleSoft system in different ways—does not change this.

Many employees testify that they were not paid overtime due or were not paid on time. For example, the declarants in the exhibits offered by Named Plaintiffs explain they: were vehicle quality inspectors, production workers or associates, or assembly associates (*see, e.g.*, ECF No. 75-7, ¶ 2; ECF No. 75-8, ¶ 2; ECF No. 75-9, ¶ 2; ECF No. 75-10, ¶ 2;ECF No. 75-11, ¶ 2; ECF No. 75-15, ¶ 2); were hourly employees (*see, e.g.*, ECF No. 75-7, ¶ 3; ECF No. 75-8, ¶ 4; ECF No. 75-9, ¶ 4); were not paid the correct overtime compensation during the ransomware attack (*see, e.g.*, ECF No. 75-7, ¶¶ 6, 8; ECF No. 75-8, ¶¶ 7–8; ECF No. 75-9, ¶¶ 7, 9); and have still not been paid all due overtime compensation (*see, e.g.*, ECF No. 75-7, ¶ 9; ECF No. 75-8, ¶ 9; ECF No. 75-9, ¶ 10).

Named Plaintiffs have shown a strong likelihood of similarly situatedness.

B. Content and Scope of the Proposed Notice

Having determined there is a strong likelihood other Honda employees are similarly situated to Named Plaintiffs, the Court turns next to the content and scope of the proposed notice.

Along with mail and email notice, Named Plaintiffs request to post notice at all Honda facilities in breakrooms and next to timeclocks, and to send text message notice. (Notice Mot. PageID 1081.) Named Plaintiffs ask to maintain an internet website for opt-ins to return their consents electronically, and that the Court authorize reminder notices to be sent half-way into the notice period to potential members who have yet to return consent forms. (*Id.* PageID 1082.) Honda maintains the proposed notice is inappropriate for various reasons and must be modified.

The Court examines each of Honda's reasons to provide the parties with guidance, but ultimately **ORDERS** the parties to meet and confer and submit an updated proposed notice within **21 days** of the date of this Opinion and Order.

1. Overbroad

Honda's opening position is that the proposed collective definition as drafted is overbroad as to the time frame because it includes anyone not paid overtime through the present day, even though the Kronos outage ended in February 2022. (Opp. PageID 1167.) Named Plaintiffs propose revised collective definition language in their Reply that narrows those eligible to receive notice to those who were not paid overtime from December 1, 2021 to February 28, 2022. (Reply, PageID 1280.)

When the parties meet and confer, they should discuss Named Plaintiffs' updated language and agree upon a new collective definition that includes the relevant time.

2. Duplicative Means of Notice

Next, Honda argues that notice by all the means Named Plaintiffs request is duplicative. (Opp. PageID 1167.) They urge that mail, email, text message, posting in Honda's breakrooms

and next to time clocks, and reminder notice collectively constitute notice that is "intrusive, redundant, and risks the appearance of Court-endorsed pressure to join." (*Id.*) One mailed and one email notice should suffice, says Honda. (*Id.* PageID 1168.)

Named Plaintiffs, seemingly misreading Honda's memorandum in opposition as requesting mailed notice only, protest such limited means. The Court finds both mail and email notice appropriate and construes Honda's memorandum as consenting to such. *See Hall v. U.S. Cargo & Courier Serv., LLC*, 299 F. Supp. 3d 888, 899 (S.D. Ohio 2018) (explaining the court would follow the trend and continue to allow mail and email notice because the use of two methods would "(i) increase the likelihood that all potential opt-in plaintiffs receive notice of the suit and (ii) likely obviate the need to resend notice if an employee's home address is inaccurate"); *Conklin v. 1-800 Flowers.com, Inc.*, No. 2:16-CV-675, 2017 WL 3437564, at *5 (S.D. Ohio Aug. 10, 2017) (Marbley, J.) ("It had been the common practice in this district to order notice to be sent by first-class mail to current employees and by first-class mail *and* electronic mail to former employees due to concerns that former employees may have moved after the conclusion of their employment.").

As for Named Plaintiffs' suggested posting of the notice, Honda does not specifically object to posting notice in the breakroom and next to the timeclocks. (*See* Opp. PageID 1167.) Instead, Honda argues generally it is duplicative with the other forms of proposed notice. (*Id.*) Named Plaintiffs suggest some courts have viewed this as a "common practice." (Reply, PageID 1281 (citing *Conklin*, 2017 WL 3437564, at *6 (posting "appears to be a common practice, and [Honda] does not object, and therefore the Court approves this form of notice."))). But Named Plaintiffs concede that posting is common practice only in breakrooms, not breakrooms *and* next

to employee timeclocks as first suggested. (*Id.*) The Court approves such breakroom posting as a common practice to which Honda does not specifically object.

3. Text Message Notice

Third, Honda asserts that text message notice is categorically improper, and courts in this jurisdiction have declined to authorize notice by text message when an alternative, less intrusive method is available. (Opp. PageID 1168.) Named Plaintiffs agree to withdraw their request for such notice (Reply, PageID 1282), and so this issue is moot.

4. Reminder Notices

Honda views Named Plaintiffs request to send reminder notices as unnecessary and as running the risk of suggesting judicial encouragement to join. (Opp. PageID 1168.) It also takes issues with the specific language in the reminder notice as overboard. (*Id.* PageID 1168–69.) Named Plaintiffs cite case law from out-of-circuit district courts in support of its proposed reminder notice, but concede that this Court has found reminder notice improper, reasoning:

> Courts "have rejected reminder notices, recognizing the narrow line that divides advising potential opt-in plaintiffs of the existence of the lawsuit—and encouraging participation." *Wolfram v. PHH Corp.,* Case No. 1:12–cv–599, 2012 WL 6676778, at *4-5, 2012 U.S. Dist. LEXIS 181073, at *13–14 (S.D. Ohio Dec. 21, 2012) (citation omitted). Furthermore, as Plaintiffs are already permitted to send notice to potential opt-in plaintiffs through certified mail and email, the potential for confusion is greater. Accordingly, Plaintiffs request to send a reminder notice to opt-in Plaintiffs who do not respond is not permitted.

Hall, 299 F. Supp. 3d at 900. The same logic applies here—no reminder notice will be permitted.

5. Cost Warning

Honda's fifth position is that Named Plaintiffs proposed notice does not inform potential opt-ins of the potential costs that may be assessed against them if Honda prevails, and such information is essential to make an informed decision about joining the action. (Opp. PageID 1169.) Named Plaintiffs retort that the caselaw Honda cites is "antiquated" and that "recent

decisions have found that such language may improperly dissuade potential opt-ins" from joining the action. (Reply, PageID 1283 (citing *Slaughter v. RMLS Hop Ohio, LLC*, No. 2:19-cv-3812, 2020 U.S. Dist. LEXIS 69772, at *28 (S.D. Ohio April 21, 2020).)

This Court has found such cost language should not be included, finding persuasive the argument that "district courts in the Sixth Circuit's recent decisions have found that such language may improperly dissuade putative class members from opting into a wage case." *Slaughter* 2020 U.S. Dist. LEXIS 69772, at *28 (collecting cases); *see McElwee v. Bryan Cowdery, Inc.,* No. 2:21-CV-1265, 2021 WL 5027410, at *7 (S.D. Ohio Oct. 29, 2021) (Morrison, J.) ("[W]hile it is not impossible for a prevailing defendant to win an award of attorney's fees, . . . the likelihood that potential opt-in plaintiffs will eventually find themselves liable to pay Defendant's attorney's fees is slight, and notifying potential opt-ins of that remote possibility may unfairly chill potential opt-in participation than otherwise.").

Named Plaintiffs need not include warning language in the notice as to potential costs associated with opting-in.

6. Unbalanced Notice

Finally, Honda contends the proposed notice is "unbalanced":

> It contains ten lines of text describing Plaintiff's claim, and an additional six bolded lines of text also describing the claim, but only a mere one and one-half lines of text about HDMA's position on the lawsuit, and there is no description whatsoever of HDMA's position on the lawsuit in the proposed reminder notice.

(Opp. PageID 1169.) Named Plaintiffs respond that the proposed notice simply summarizes the claims in the lawsuit, contains language standard in FLSA notices cases. (Reply, PageID 1285.) The language also makes clear that Honda denies the allegations and claims it did not violate any wage and hour laws, and that the Court takes no position on the merits of the lawsuit. (*Id.*)

The Court is confident that when counsel meet and confer, they can resolve any remaining concerns on Honda's part as to an unbalanced notice.

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS IN PART** and **DENIES IN PART** Named Plaintiffs' Motion to Facilitate Court-Authorized Notice to Other Similarly Situated Potential Plaintiffs. (ECF No. 75.) Named Plaintiffs have shown a strong likelihood of similarly situatedness, but the proposed notice must be revised. The parties are **ORDERED** to meet and confer and submit an updated proposed notice consistent with the findings above (*see supra* Section III.B) within **21 days** of the date of this Opinion and Order. This case remains open.

IT IS SO ORDERED.

9/30/2024
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE