IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

LYNN WALTER, *et al*., individually and on behalf of all others similarly situated, Plaintiffs, vs. **BUFFETS, INC., d/b/a HOMETOWN BUFFETS, RYAN'S, OLD COUNTRY BUFFET, FIRE MOUNTAIN, COUNTRY BUFFET**, Defendant.	Civil Action No. 6:13-cv-2995-JMC

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS INITIAL RESPONSE TO, AND REQUEST FOR STAY OF, PLAINTIFFS' MOTION TO CONDITIONALLY CERTIFY A FLSA COLLECTIVE ACTION AND TO SEND NOTICE OF THE OPPORTUNITY TO JOIN THE COLLECTIVE ACTION

I. INTRODUCTION

Plaintiffs Cheryl Lynn Walter, Robin Kathlene Abston, and Cindy Lynn Brown (collectively, the "Plaintiffs") have moved this Court for conditional certification of a nationwide class of Servers employed by Defendant Buffets, Inc. ("Buffets" or the "Company") since July 11, 2010.[1] Because the evidence provided in support of Plaintiffs' motion raises serious questions as to whether Plaintiffs are similarly situated to the putative class members, and to themselves, and because Plaintiffs will not be prejudiced by a stay of their motion, Buffets requests that the Court stay Plaintiffs' motion to allow Buffets 90-days to conduct discovery so it can properly oppose Plaintiffs' allegations. Buffets' also requests that the Court permit Buffets

[1] Defendant Buffets, Inc.'s name, as stated in the Amended Complaint, is incorrect. On October 30, 2013, Defendant Buffets, Inc., changed its operating name to Buffets, Inc. d/b/a OvationBrands. OvationBrands will continue to operate its restaurant concepts, HomeTown Buffet, Ryan's, Old Country Buffet, Fire Mountain and Country Buffet. For ease of reference, Defendant will be referred to herein as "Buffets" or Defendant."

to file a response to Plaintiffs' Motion for Conditional Certification 21 days following the close of this limited discovery period.

II. STATEMENT OF THE CASE AND RELEVANT FACTS

Plaintiffs originally filed this case in the District of Minnesota on October 17, 2013, on behalf of themselves and current or former Servers at Defendant Buffets, Inc., and alleged that Buffets failed to pay them the minimum wage and overtime wages in violation of the Fair Labor Standards Act ("FLSA"). (Doc. #1). The case was transferred to this Court on November 4, 2013. (Doc. #21). On March 6, 2014, the parties entered into a Tolling Agreement to toll the claims of Plaintiffs and the putative FLSA class. This Tolling Agreement is still in place.

On May 6, 2014, Buffets served Interrogatories and Requests for Production of Documents in this matter on Plaintiffs Walter, Abston and Brown, and upon those individuals who filed Consent to Sue notices with this Court. The responses to Buffets' discovery requests are due June 5, 2014. On May 8, 2014, Plaintiffs filed their Motion to Conditionally Certify A FLSA Collective Action and to Send Notice of the Opportunity to Join the Collective Action (the "Motion for Conditional Certification"). (Doc. # 60).[2] In their Motion, Plaintiffs insist, without any real evidence, that they are similarly situated to "all persons who have worked for Buffets, Inc., as Servers" since July 11, 2010, and "who worked as tipped employees earning a sub-minimum, tip credit wage rate." Based upon their untested and glossed over inaccurate assertions, Plaintiffs demand that this Court conditionally certify a nationwide class of Servers.

Plaintiffs, however, are mistaken. A careful review of the "evidence" provided demonstrates the parties' need to conduct discovery to determine whether the named Plaintiffs are, in fact, similarly situated to the putative class members. Such need is amplified by Plaintiffs' request that this Court permit them to send notice to more than 24,000 current and

[2] References to Plaintiffs' Motion for Conditional Certification are abbreviated herein as "Plfs. Mot. p. __."

former Buffets' Servers in the putative class, and to disrupt their lives, without undergoing any substantive investigation into Plaintiffs' claims that they are actually similarly situated to the rest of the putative class members. As a result, Buffets respectfully requests that this Court stay the briefing on Plaintiffs' Motion for Conditional Certification and allow it a limited 90-day period to continue conducting discovery in this matter, so that it can properly oppose Plaintiffs' Motion for Conditional Certification. Buffets further requests that the Court extend the time for its response to Plaintiffs' Motion for Conditional Certification to 21 days following the close of this limited discovery period.

III. LAW AND ARGUMENT

A. Plaintiffs Will Not Be Prejudiced By A Limited Discovery Period Because The Parties Have Entered Into A Tolling Agreement

In support of their argument that the Court should conditionally certify Plaintiffs' putative class of Servers, Plaintiffs argue that "[b]ecause *the filing of an FLSA collective action does not toll limitations* for the alleged collective action members, unlike the filing of a Rule 23 class action," courts have conditionally certified putative classes *before any significant discovery*. (Plfs. Mot. p. 9) (emphasis added).

As an initial matter, Plaintiffs argument obscures the fact that the parties have engaged in no discovery in this matter, let alone "significant discovery." As noted above, though Buffets has served discovery requests, the discovery responses are not due until June 5, 2014. Further, Plaintiffs' argument omits any reference to the fact that the parties have entered into a Tolling Agreement. In fact, on March 6, 2014, more than two months before Plaintiffs filed their Motion for Conditional Certification, the parties:

> stipulated and agreed that the statutes of limitation for the Fair Labor Standards Act claims and the Ohio wage and hour claims of Plaintiff[s] and all other similarly situated Servers falling under the collective definition set forth in the First Amended Complaint

> (Docket Entry No. 47) are tolled as of March 5, 2014, and will remain tolled unless revoked in accordance with the provisions of th[e] Tolling Agreement.

(*Id.*).

Although the Tolling Agreement provides that either party can revoke its terms with a 5-day notice, Buffets affirmatively states that ***it will not exercise its right to revoke*** the Tolling Agreement while the Motion for Conditional Certification remains pending before this Court. Accordingly, Plaintiffs, and any putative class members, will not be prejudiced by a limited discovery period prior to conditional certification because, absent Plaintiffs' own revocation, the Tolling Agreement protects their limitations period.

Moreover, Buffets does not request an extensive delay to conduct discovery in this matter. Again, Buffets already served discovery requests on May 6, 2014, before Plaintiffs filed their Motion for Conditional Certification. As a result, Buffets seeks a limited period of time to obtain responses to its discovery requests and to depose the three named Plaintiffs, the five opt-in Plaintiffs who affirmatively signed and filed Declarations in support of Plaintiffs' Motion for Conditional Certification, and a few additional opt-in Plaintiffs to be identified after they respond to Buffets' discovery requests. A 90-day discovery period would allow Buffets to investigate Plaintiffs' allegations that they are similarly situated to the putative class members. Following the completion of the 90-day discovery period, Buffets requests 21 days to appropriately respond to Plaintiffs' Motion for Conditional Certification.

B. Buffets Should Have The Opportunity To Conduct Limited Discovery To Test The Evidence Proffered In Support Of Plaintiffs' Motion

Buffets should be allowed to complete limited pre-certification discovery, including depositions of the three named Plaintiffs, the five opt-in Plaintiffs who voluntarily chose to actively participate in this litigation as witnesses when they filed Declarations in support of

Plaintiffs' Motion for Conditional Certification, and a few additional opt-in Plaintiffs identified based upon their discovery responses, to test the evidence Plaintiffs proffered in support of their assertion that all proposed class members are "similarly situated." *See, e.g., Simons v. Pryor's, Inc.*, 3:11-CV-0792-CMC, 2011 WL 3158724 (D.S.C. July 26, 2011) (denying plaintiffs' motion for conditional certification without prejudice to allow discovery). *See also, Brickly v. Dolgencorp, Inc.*, 272 F.R.D. 344, 346-347 (W.D.N.Y. 2011) (denying conditional certification after discovery demonstrated that plaintiffs were not similarly situated); *Bernard v. Household International, Inc.*, 231 F. Supp. 2d 433, 435 (E.D. Va. 2002) ("Mere allegations will not suffice; some factual evidence is necessary."). The Fourth Circuit has not definitively defined "similarly situated" in the FLSA collective action context; however, numerous district courts within the circuit have. *De Luna–Guerrero v. The N.C. Grower's Ass'n*, 338 F. Supp. 2d 649, 654 (E.D.N.C.2004).

> "Similarly situated" in this context means similarly situated with respect to the legal and, to a lesser extent, the factual issues to be determined. In FLSA actions, persons who are similarly situated to the plaintiffs must raise a similar legal issue as to coverage, exemption, or nonpayment or minimum wages or overtime arising from at least a manageably similar factual setting with respect to their job requirements or pay provisions, but their situations need not be identical. Differences as to time actually worked, wages actually due and hours involved are, of course, not significant to this determination.

Pelczynski v. Orange Lake Country Club, Inc., 284 F.R.D. 364, 368 (D.S.C. 2012) *citing De Luna–Guerrero*, 338 F.Supp.2d at 654. Determining whether proposed class members are "similarly situated" is the first step when analyzing motions to certify a collective action under the FLSA. *Brickly*, 272 F.R.D. at 346. If the class members are similarly situated, the court "conditionally certifies the class and orders putative notice to class members, who are then afforded the opportunity to opt in." *Id.* (internal quotations omitted).

Pre-certification discovery and deposition testimony regarding whether the named Plaintiffs are similarly situated to the putative class they seek to represent is absolutely appropriate, and courts regularly allow such discovery before conditionally certifying a collective action. *See Bouaphakeo v. Tyson Foods, Inc.*, 564 F. Supp. 2d 870, 877-78 (N.D. Iowa 2008) (allowing limited discovery at the pre-certification stage of a class action under Iowa law and a collective action under FLSA section 216(b)); *Jimenez v. Lakeside Pic-N-Pac, L.L.C.*, No. 1:06-CV-456, 2007 U.S. Dist. LEXIS 91989, at *7 (W.D. Mich. Dec. 14, 2007) (allowing six months of pre-certification discovery in a case raising class action claims under the Migrant and Seasonal Agricultural Worker Protection Act and collective action claims under FLSA section 216(b)); *Olivo v. GMAC Mortg. Corp.*, 374 F. Supp. 2d 545, 546 (E.D. Mich. 2004) (allowing discovery as to whether the action should proceed as a "collective action" pursuant to section 216(b)); s*ee also, e.g., Kress v. Price Waterhouse Coopers*, No. CIV C-08-0965, 2011 U.S. Dist. LEXIS 87845, at *10 (E.D. Cal. Aug. 9, 2011) (holding in the Rule 23 context that "[d]iscovery is necessary in some cases to determine the propriety of a class action. If discovery is needed to determine the existence of a class or set of subclasses, it would be an abuse of discretion to deny it.") (citation omitted).

Federal Rule of Civil Procedure 26(b)(1) governs the scope of discovery and provides in relevant part:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1). This includes "any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Thus, in the "pre-certification" stage of discovery, relevant discovery includes inquiry into the issues surrounding collective action certification under Section 216(b) of the Fair Labor Standards Act. *Helmert v. Butterball, LLC*, No. 4:08CV00342, 2008 U.S. Dist. LEXIS 115356, at *5 (E.D. Ark. Dec. 15, 2008).

Because of the obvious relevance of evidence regarding whether Plaintiffs are similarly situated to a putative class, "experienced counsel often *agree* to conduct fairly limited formal discovery during the period before conditional certification." *Green v. Harbor Freight Tools USA, Inc.*, No. 09-2380- JAR, 2010 U.S. Dist. LEXIS 16094, at *4-5 (D. Kan. Feb. 23, 2010) (emphasis in original). Where there is no such agreement, like here, it is appropriate for courts to order such limited discovery "so [the defendant] may at least test the veracity of plaintiffs' … allegation that they are similarly situated victims of a common decision, policy, or plan." *Id.*

The above rationale applies to the instant matter. Prior to issuing notice and disrupting the lives of over 24,000 current and former Buffets' Servers, Buffets should be able to test the veracity of Plaintiffs' allegations that they are similarly situated to one another and to the entire putative class they seek to represent. (Declaration of Michelle Filar Collins ("Collins Decl."),

at ¶ 4, attached hereto as Exhibit 1) (noting that the putative class contains approximately 24,386 Servers). As is discussed further below, the allegations in Plaintiffs' Motion for Conditional Certification raise significant questions as to whether they are actually similarly situated to the putative class members. As a result, Buffets requests that the Court stay Plaintiffs' Motion for Conditional Certification to permit it the opportunity to conduct limited discovery on Plaintiffs' claims.

1. Twenty-Four Percent of Buffets' Servers Do Not Receive A Tip Credit

As an initial matter, throughout their Motion for Conditional Certification, Plaintiffs repeatedly allege that Defendant treats all of its Servers as tipped employees. (*See, generally*, Motion for Conditional Certification). By way of example, Plaintiffs' claim:

> Buffets, Inc. treats its [S]ervers as 'tipped employees' pursuant to 29 U.S.C. §203(m) ….
>
> * * *
>
> Buffets, Inc. employs Servers at each of its locations and pays them a sub-minimum 'tip credit' wage.
>
> * * *
>
> Buffets, Inc. Servers were not paid the full minimum wage for the time spent working on … non-tip-producing duties ….
>
> * * *
>
> Servers—all of whom were paid less than the standard minimum wage—were assigned these non-tip-producing duties ….

(*See, e.g.*, Plfs. Mot. p. 1, 4, 6-7).

Notwithstanding Plaintiffs' allegations, Buffets does not pay all of its Servers at "sub-minimum 'tip credit' wages." Buffets has locations in 36 states, including in California, Minnesota, Oregon, and Washington (the "Non-Tip Credit States"). (Collins Decl., at ¶ 3). These Non-Tip Credit States all require that employers pay employees the full minimum wage

prior to tips.[3] In fact, approximately 24 percent of Buffets' Servers employed since July 1, 2010, work or have worked in the Non-Tip Credit States. (Collins Decl., at ¶¶ 4-5). Furthermore, over 60 percent of the individuals employed as Servers at a Hometown Buffets restaurant – the only restaurant at which the named Plaintiffs ever worked – were employed in these Non-Tip Credit States. (Collins Decl., at ¶ 5).

As such, Plaintiffs' claim that all of Buffets' Servers receive a "sub-minimum 'tip credit' wage" and are, therefore, similarly situated to Plaintiffs is, necessarily, incorrect. Buffets' requests a limited discovery period to further test Plaintiffs' claim that they are similarly situated to the putative class.

2. Buffets' Policies Demonstrate That The Named Plaintiffs Are Not Similarly Situated To The Putative Class Members

Throughout their Motion for Conditional Certification, the named Plaintiffs repeatedly allege that Buffets has enacted corporate-wide policies and practices which apply to all of their Servers nationwide and, as a result, they are similarly situated to the putative class. (*See, e.g.,* Plfs. Mot. pp. 5-8). However, Buffets does not have these so-called corporate-wide policies. Thus, for this additional reason Buffets' questions whether Plaintiffs are truly similarly situated to the putative class, as asserted in the Motion for Conditional Certification.

a. Buffets Has No "Matrix" Policy Which Controls Labor Costs

Central to Plaintiffs' allegations that they have been forced to perform non-tip-producing duties and off-the-clock work is Buffets' so-called "Matrix" corporate-wide staffing policy. This phantom "Matrix" policy is the lynchpin to Plaintiff's effort to conditionally certify a class because, without a corporate-wide policy, the alleged non-tip producing work and off-the-clock issues would be individualized at the restaurant-level and, thus, inappropriate for a nationwide

[3] *See* Cal. Lab. Code §§ 351, 1182.12; California Minimum Wage Order; Minn. Stat. § 177.24; Or. Rev. Stat. §§ 653.025, 653.035; and Wash. Rev. Code § 49.46.020; Wash. Admin. Code § 296-126-022.

collective action. Thus, this "Matrix" policy is critical to Plaintiffs' Motion. As Plaintiffs allege:

> [t]his policy limited the labor costs that a restaurant could incur based upon a formula applied to the restaurant's sales. All [Buffets'] general managers were required to adhere to the Matrix policy. Among other things, the practical effect of the Matrix policy was to require general managers to reduce the hours of non-tipped staff who performed non-tip-producing jobs, such as washing dishes, cleaning, and setting up, stocking, maintaining, and cleaning the buffet line…. In that way, [Buffets] cut its labor costs throughout the system.

(Plfs. Mot. p. 7-8).

However, simply put, Buffets has no "Matrix" policy. (Collins Decl., at ¶ 6). Buffets has no corporate staffing policy which controls Servers' hours, or which forces Servers to perform non-tip-producing duties or off-the-clock work. (Id.). Turned on its head, if Plaintiffs are simply saying that Buffets staffs its restaurants to meet its customer and business demands – that it tracks its revenue, in the form of sales to customers, and tracks it expenses, here payroll expenses – then no "for profit" business could ever hope to defend a motion for conditional certification. Plaintiffs simply have not identified a specific corporate-wide policy that supports a nationwide collective action. As a result, there are serious questions as to whether Plaintiffs can be similarly situated to the putative class when no corporate policy has "the practical effect" of cutting labor costs by requiring that Servers perform non-tip-producing duties and/or off-the-clock work exists.

Given the foregoing, Buffets requests that the Court permit it to conduct discovery to investigate Plaintiffs' belief that such a corporate-wide "Matrix" policy exists, and to determine whether Plaintiffs are similarly situated to the putative class members.

b. Buffets' Corporate Operations Do Not Support Plaintiffs' Allegations Of Non-Tip Producing Or Off-The-Clock Work

Additionally, while each of Buffets' locations utilizes a computerized time clock, the time keeping systems for Buffets' various restaurants are critically different. For instance,

Ryan's and Fire Mountain restaurants use the "RA Time" timekeeping system which requires Servers to use different job codes to record time spent performing opening and closing Server duties ("Open/Close Server") as compared to "Server" duties. Up through September 18, 2012, Servers at Ryan's and Fire Mountain restaurants were paid at least minimum wage for all time worked as an "Open/Close Server." (Collins Decl., at ¶ 7).

As of the pay period beginning September 19, 2012, Buffets changed its practice such that Servers at Ryan's and Fire Mountain restaurants must still record "Open/Close Server" time separately, but they are now paid the tip-credit hourly rate for such time, rather than minimum wage. (Collins Decl., at ¶ 8). However, the different job codes remain important because Buffets' audit program monitors the Servers' working time. (Collins Decl., at ¶ 9). If the time worked by Servers as an "Open/Close Server" equates to 18% or more of their working time on that shift, the individual is automatically paid at least minimum wage for the time worked as an Open/Close Server rather than the Server's usual tip-credit hourly rate. (Id.).[4]

Notably, many of the alleged non-tip producing duties about which Plaintiffs complain, such as "washing furniture and walls, emptying trash . . . washing . . . blinds and light fixtures" (Plfs. Mot. p. 5) are part of the Server "Opening Duties Checklist" and the kinds of work duties for which Ryan's Servers were paid minimum wage, and for which they are now compensated at least minimum wage if they spend more than 18% of their working time as an "Open/Close Server." As to this crucial point, ***none*** of the Declarations submitted in support of Plaintiffs' Motion for Conditional Certification by opt-in Plaintiffs who worked at Ryan's (Katherine Howell (Doc. 60-5), Rebecca Johnson (Doc. 60-6), Eleanor Morehead (Doc. 60-7), Gayla Spon (Doc. 60-8), and Shirley Ward (Doc. 60-10)) recognize that prior to September 19, 2012, they

[4] Currently there are approximately 128 Ryan's and Fire Mountain restaurants. Thus, about 38 percent of Buffets' restaurant operations use the RA Time time-keeping system and the "Open/Close Server" job code. (Collins Decl., at ¶¶ 3, 12).

were paid at least minimum wage for their time worked as an Open/Close Server, nor that they are currently paid at least minimum wage if they spend more than 18% of their shift as an Open/Close Server. All of these opt-in Plaintiffs incorrectly testified that they were only ever paid the tip-credit hourly rate as a Server. (Howell Decl. ¶19; Johnson Decl. ¶14; Morehead Decl. ¶17; Spon Decl. ¶17; and Ward Decl. ¶18).[5] Surely Buffets is entitled to explore the basis for these untrue statements.[6]

This "automatic correction" system for Ryan's and Fire Mountain is different than the TMX time-keeping systems in place at Buffets' other restaurants, including HomeTown Buffet where the named Plaintiffs work. (Collins Decl., at ¶ 11). The TMX time-keeping system has one "Server" job code, and time worked as an opening or closing server is not subject to an audit. (Id.). Accordingly, Plaintiffs cannot be similarly situated to Servers at Ryan's and Fire Mountain who were paid minimum wage for time worked as an Open/Close Server up until September 18, 2012, and are now compensated at minimum wage if they spend more than 18% of their shift as an Open/Close Server. As a result, and despite Plaintiffs' attempts to prove otherwise, Buffets should be provided a limited discovery period to investigate the basis for Plaintiffs' belief that they and the putative class of all Buffets' Servers are similarly situated, and the accuracy of the statements made in the opt-in Plaintiffs' Declarations filed in support of the Motion for Conditional Certification.

---

[5] The Declarations of Named Plaintiffs Robin Abston, Cheryl Brown and Cheryl Walter and of opt-in Plaintiffs Katherine Howell, Rebecca Johnson, Eleanor Morehead, Gayla Spon and Shirley Ward were filed with this Court as Exhibits 2 through 9 to Plaintiffs' Motion for Conditional Certification.

[6] In fact, opt-in Plaintiff Gayla Spon, who filed a Declaration in support of Plaintiffs' Motion for Conditional Certification, had her pay adjusted fifteen times as a result of the audit program (Collins Decl., at ¶10). Ms. Spon's Declaration is absolutely silent about the audit program or the adjusted pay she received as a result thereof. (*See* Gayla Spon Decl., *generally* (Doc. 60-8)).

c. Buffets Does Not Require That Its Servers Perform Off-The Clock Work Or The Duties Alleged By Plaintiffs

Again, Plaintiffs' theory of their case appears to revolve around their belief that Buffets' alleged Matrix policy and other unnamed policies either require, or have the practical effect of requiring, Servers to perform non-tip-producing duties and to force Servers to work off-the-clock in order to keep labor costs down nationwide.

Despite Plaintiffs' sweeping allegations, Plaintiffs have not provided any evidence, beyond self-serving Declarations, that Buffets actually has the policies they allege. As a result, Plaintiffs have not demonstrated that all Buffets' Servers are similarly situated. Rather, at best, Plaintiffs have provided evidence that Servers in certain locations have been allowed to work in violation of Buffets' policies.

As an initial matter, the crux of the Matrix policy as alleged by Plaintiffs is that, about three years ago, restaurant-level labor budgets were slashed which pushed non-tip producing work, typically done by employees paid at least minimum wage, down to Servers because they earn lower wages. (Plfs. Mot. pp. 7-8, 13). However, Plaintiffs' allegations about the so-called Matrix policy make no sense when one considers that during this timeframe Ryan's and Fire Mountain paid Servers at least minimum wage for all time worked as an "Open/Close Server" (during which much of this so-called non-tip producing work is performed), and now pays Servers at least minimum wage if they work more than 18% of their shift as an "Open/Close Server." In addition, Servers in the Non-Tip Credit States are paid at least minimum wage for all of their working time. Thus, there is no incentive under Plaintiffs' Matrix policy theory to push work down to Servers working at Ryan's, Fire Mountain or at any of Buffets' restaurants in California, Minnesota, Oregon and Washington.

Furthermore, with respect to Plaintiffs' off-the-clock work claims, Plaintiffs allege that

"it is frequently impossible for Servers to perform all of the non-tip-producing jobs assigned to them during their regular shifts. As a result, Servers … regularly perform these tasks before and after their regular shifts without any compensation at all." (Plfs. Mot. pp. 5-6). Contrary to Plaintiffs' allegations, off-the-clock work is direct a violation of Buffets' policies. For instance, the Ryan's and Fire Mountain's Crew Team Member Handbook, makes clear:

> The Company is committed to paying team members in accordance with federal, state and local laws. When you receive your paycheck, you may be asked to sign a form acknowledging that the hours you received payment for are correct. **It is your responsibility to immediately notify a Manager if your paycheck does not accurately reflect hours worked**.
>
> * * *
>
> Recording Time Worked: As an hourly team member, you are responsible to accurately record all hours worked for the Company. **You are responsible for entering your hours on the computerized time clock system. You are responsible to notify the Company if you believe that your pay or any records related to your pay are inaccurate. No adverse action will be taken against any employee who makes a good faith report of inaccurate pay or records. However, disciplinary action, including discharge will be taken where it is determined that records have been falsified**.
>
> * * *
>
> **Even though the clock may allow you to punch in earlier, you should not begin working until your scheduled shift time. The time clock system will not record any hours before your scheduled shift. If you are asked by a Manager to work earlier or later than your shift, your Manager will make the correction. It is your responsibility to ensure you are not performing work "off of the clock."**

(Collins Decl., at ¶ 13, Ex. A, pp. 27, 30 (emphasis added)). Similar policies are part of the Country Buffet, Hometown Buffet, and Old Country Buffet Restaurant Employee Handbook. (Collins Decl., at ¶ 14, Ex. B, pp. 32-33 (emphasis added)). Accordingly, Buffets' actual policies ***prohibit*** off-the-clock work, making any violation thereof an event specific to each individual and not pursuant to some Company-wide scheme or policy.

Plaintiffs here admit that Buffets' policies assign the same specific serving duties to its Servers: (1) greeting customers; (2) telling customers about buffet options and specials; (3) checking on customers throughout their meals to address their needs; (4) keeping tables clear during customers' meals; and (5) thanking customers when they are finished and cleaning and setting table for next customer.[7] On the other hand, Plaintiffs allege that, contrary to Buffets uniform Server duties, they have been forced to perform numerous non-tip-producing tasks, including the following (which were ***not*** consistently described across the Declarations): cleaning restrooms, washing dishes and silverware, restocking the buffet with hot food items, and working as a Cashier. (Abston Decl. ¶23(f)-(g); Brown Decl. ¶23(g); Howell Decl. ¶25(g); Johnson Decl. ¶20(r)-(s); Morehead Decl. ¶22(i)-(j) and (n); Spon Decl. ¶22(g)-(i); Walter Decl. ¶24(g)-(i); and Ward Decl. ¶23(f)-(g)). However, Buffets does not require its Servers to perform these alleged non-tip producing tasks. In fact ***none*** of Buffets' Server job descriptions or checklists describes these duties. (Collins Decl., at ¶ 15; Exs. C-D).

Indeed, Plaintiffs' Motion reveals the truth about their tip-credit claim, i.e., that each Servers' particular job duties and the amount of time each Server spends on those job duties is a highly individualized inquiry, ill-suited to a collective determination. Plaintiffs themselves acknowledged the difficulty in collectively maintaining their tip-credit claim in their Memorandum in Opposition to Buffets' Motion to Dismiss when they explained that the on-point case law "***merely demonstrates that claims for non-tip producing work depend on the specific facts of each case*** . . . [.]" *See* Plaintiffs' Mem. Opp. Def. Motion to Dismiss, Doc. 35, p. 4 (emphasis added).

Buffets' submits that all of this evidence raises serious doubts as to whether Plaintiffs can

[7] Abston Decl. ¶20; Brown Decl. ¶21; Howell Decl. ¶22; Johnson Decl. ¶17; Morehead Decl. ¶20; Spon Decl. ¶20; Walter Decl. ¶21; and Ward Decl. ¶21.

be similarly situated to the putative class. Thus, Buffets requests that the Court stay Plaintiffs' Motion for Conditional Certification to allow Buffets to test Plaintiffs' claim that they are similarly situated to the putative class.

3. The Named Plaintiffs Are Not Similarly Situated To Each Other

Not only have the named Plaintiffs not provided evidence that they are similarly situated to the putative class they seek to represent, the named Plaintiffs have not demonstrated that they are similarly to each other.

In her Declaration, named Plaintiff Cindy L. Brown ("Plaintiff Brown") alleges that she spent 30% of her total work time performing non-tip producing activities. (Brown Decl., ¶26). Similarly, Plaintiff Kathlene Abston alleges she worked 50% or more of her work time performing non-tip producing duties (Abston Decl., ¶26), while Plaintiff Cheryl Walter alleges that she spent 30% of her work time performing non-tip producing activities. (Walter Decl., ¶28).

However, a review of Plaintiff Brown's payroll records since July 2010 demonstrates that she did spend 30% of her work time performing non-tip producing duties, and was paid more than minimum wage for this work. (Collins Decl., at ¶ 16). That is, from approximately July 2010 through July 2011, Plaintiff Brown also worked as a Line Server and a Shift Supervisor and spent nearly one-third of her work time in one of these positions for which she was paid more than minimum wage. During Plaintiff Brown's last year of employment, from July 2011 through July 2012, she spent more than one-third of her work time as a Shift Supervisor and was paid approximately $3.00 per hour more than Ohio's minimum wage for this work. (Id.). On the other hand, Plaintiffs Abston and Walter did not work as a Shift Supervisor. (Collins Decl., at ¶¶ 17-18). As a result, there are questions as to whether Plaintiff Brown actually spent 30% of her work time performing non-tip-producing activities as a Server, or as a Line Server or a Shift

Supervisor, and whether she is similarly situated to the other named Plaintiffs.

Furthermore, and pursuant to the Declarations Plaintiffs submitted in support of their Motion for Conditional Certification, Shift Supervisors, like Plaintiff Brown, were responsible for assigning the alleged non-tip producing work to Servers. (Abston Decl. ¶25; Brown Decl. ¶24; Howell Decl. ¶27; Johnson Decl. ¶22; Morehead Decl. ¶25; Spon Decl. ¶24; Walter Decl. ¶26; Ward Decl. ¶25). In fact, even Plaintiff Brown admits that "non-tip producing work is assigned by a manager or supervisor" (Brown Decl. ¶24) but conveniently omits from her Declaration that she worked as a Shift Supervisor during the last year of her employment with Buffets. For this additional reason Buffets is entitled to conduct discovery to explore the similarities, if any, between Plaintiff Brown as a Shift Supervisor and the Servers to whom she claims she is similarly situated.

Such lack of commonality could be fatal to the named Plaintiffs' collective action claims. *See Williams v. Accredited Home Lenders, Inc.*, No. 1:05- CV-1681-TWT, 2006 U.S. Dist. LEXIS 50653, at *10-11 (N.D. Ga. July 25, 2006) (noting that, to obtain conditional certification, a plaintiff "must make some rudimentary showing of commonality between the basis for his claims and that of the potential claims of the proposed class, beyond the mere facts of job duties and pay provisions"). Given that Plaintiffs may not be similarly situated to each other, they may not be similarly situated to the putative class they seek to represent. Buffets should be allowed to conduct limited discovery to determine whether the named Plaintiffs are similarly situated to each other, and to the putative class they seek to represent.

4. Discovery About Buffets' Bankruptcy Is Necessary For Temporal Scope Issues As Plaintiffs Recognized In The Parties' Rule 26(f) Report

Plaintiffs here seek to conditionally certify a nationwide class of Servers employed by Buffets at any point since July 11, 2010. (Plfs. Mot., p. 1). However, Buffets filed for Chapter

11 bankruptcy twice in the past six years, emerging from its most recent reorganization on July 19, 2012. *See In re Buffets, Inc.*, Case No. 12-10237 (D. Del. Bankr. Jan. 18, 2012); *In re Buffets, Inc.*, Case No. 08-10141 (D. Del. Bankr. Jan. 22, 2008). (Collins Decl., at ¶ 19). Most recently, on January 18, 2012 (the "Petition Date"), each of the Debtors[8] filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").[9] The Debtors' chapter 11 cases (the "Chapter 11 Cases") were intended to effectuate a balance sheet restructuring through a chapter 11 plan of reorganization. To that end, on June 27, 2012, the Bankruptcy Court entered an order (Doc. 743) (the "Confirmation Order") confirming the *Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* (Doc.733) (the "Plan")[10]. The Effective Date of the Plan occurred on July 18, 2012. (Doc. 806).

Pursuant to Article VIII.E of the Plan,[11] as of the Effective Date, the Confirmation Order

---

[8] The "Debtors" in the Chapter 11 Cases (as defined herein) are Buffets Restaurants Holdings, Inc., Buffets Holdings, Inc., Buffets, Inc., HomeTown Buffet, Inc., OCB Purchasing Co., OCB Restaurant Company, LLC, Buffets Franchise Holdings, LLC, Buffets Leasing Company, LLC, Ryan's Restaurant Group, Inc., Ryan's Restaurant Leasing Company, LLC, HomeTown Leasing Company, LLC, OCB Leasing Company, LLC, Fire Mountain Restaurants, LLC, and Fire Mountain Leasing Company, LLC.

[9] The Debtors' cases were jointly administered under the caption *In re Buffets Restaurant Holdings, Inc.*, et al., Case No. 12-10237 (MFW) (Bankr. D. Del.).

[10] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Plan.

[11] The full text of Article VIII.E provides:

> The rights afforded herein and the treatment of all Claims and Equity Interests herein shall be in exchange for and in complete satisfaction, discharge, and release of all Claims of any nature whatsoever, including any interest accrued on such Claims from and after the Petition Date, against the Debtors, the Debtors in Possession, the Reorganized Debtors or any of their respective assets or properties, arising prior to the Effective Date. Except as otherwise expressly specified in the Plan, the Confirmation Order shall act as of the Effective Date as a discharge of all debts of, Claims against, and Liens on the Debtors, their respective assets and properties, arising at any time before the Effective Date, regardless of whether a proof of Claim with respect thereto was filed, whether the Claim is Allowed, or whether the holder thereof votes to accept the Plan or is entitled to receive a distribution hereunder. Except as otherwise expressly specified in the Plan, after the Effective Date, any holder of such discharged Claim shall be precluded from asserting against the Debtors, the Reorganized Debtors, or any of their respective assets or properties, any other or

discharged all Claims against the Debtors whether or not the holder of the Claim filed a proof of Claim, and "any holder of such discharged Claim shall be precluded from asserting against the Debtors, the Reorganized Debtors, or any of their respective assets or properties, any other or further Claim based on any document, instrument, act, omission, transaction, or other activity of any kind or nature that occurred before the entry of the Confirmation Order."

Pursuant to Section VIII.F of the Plan,[12] all entities that held, hold, or may hold a Claim that is discharged pursuant to Article VIII.E of the Plan are permanently enjoined from commencing or continuing an action or other proceeding on account of any Claim arising prior to the Effective Date. Accordingly, and as a matter of federal bankruptcy law, Plaintiffs and the putative class are precluded from asserting any claims or collecting any damages against Buffets that arose prior to the Effective Date of the Plan (*i.e.*, July 18, 2012).

It is well-established that confirmation of a Chapter 11 plan "discharges the debtor from any debt that arose before the date of such confirmation, . . . whether or not—(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of [the Bankruptcy Code]; (ii) such claim is allowed under section 502 of [the Bankruptcy Code]; or (iii) the holder of such

---

further Claim based on any document, instrument, act, omission, transaction, or other activity of any kind or nature that occurred before the entry of the Confirmation Order.

[12] The full text of Article VIII.F provides:

Except as otherwise expressly provided in the Plan, the Confirmation Order, or a separate order of the Court, all entities who have held, hold, or may hold Claims against the Debtors that arose before or were held as of the Effective Date, are permanently enjoined, on and after the Effective Date, from (a) commencing or continuing in any manner any action or other proceeding of any kind against the Debtors, the Reorganized Debtors or the Litigation Trustee, with respect to any such Claim, (b) the enforcement, attachment, collection, or recovery by any manner or means of any judgment, award, decree, or order against the Debtors, the Reorganized Debtors or the Litigation Trustee on account of any such Claim, (c) creating, perfecting, or enforcing any encumbrance of any kind against the Debtors, the Reorganized Debtors or the Litigation Trustee or against the property or interests in property of the Debtors or the Litigation Trustee on account of any such Claim, and (d) asserting any right of setoff, or subrogation of any kind against any obligation due from the Debtors, the Reorganized Debtors or the Litigation Trustee or against the property or interests in property of the Debtors on account of any such Claim.

claim has accepted the plan." 11 U.S.C. § 1141(d).[13] The term "debt" means "liability on a claim." 11 U.S.C. § 101(12). Section 101(5) of the Bankruptcy Code defines a "claim" as any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5).[14]

Numerous courts have held that claims by employees against employer-debtors for damages arising from pre-confirmation conduct are subject to the discharge under the Bankruptcy Code. *See O'Loghlin v. County of Orange*, 229 F.3d 871 (9th Cir. 2000); (wrongful termination action under ADA for pre-confirmation conduct is subject to discharge); *McSherry v. TWA*, 81 F.3d 739, 740-741(8th Cir. 1996) (same); *In re US Airways, Inc.*, 365 B.R. 624 (wrongful termination action under ADA for pre-confirmation conduct is subject to discharge); *Morrow v. Green Tree Servicing, L.L.C.*, 360 F. Supp. 2d 1246, 1248-49 (M.D. Ala. 2005) (FLSA claims subject to discharge). In *Morrow*, the court held that claims alleging that an employer failed to compensate employees at an overtime rate for work in excess of 40 hours per week could not be maintained with respect to work performed prior to the effective date of the employer's chapter 11 plan or reorganization. *Morrow*, 360 F. Supp. at 1248-49.

Finally, the discharge under the Bankruptcy Code "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the Debtor." 11 U.S.C. § 524(a); *see also Joubert v. ABN Mortg. Group, Inc. (In re Joubert)*, 411 F.3d 452, 456 (3d Cir. 2005); *Stratton v. Mariner Health Care, Inc. (In re Mariner Post-Acute Network, Inc.)*, 303 B.R. 42, 45

[13] The exceptions to the discharge granted to a corporation under section 1141(d) of the Bankruptcy Code are extremely limited and include only certain claims of governmental units and claims arising under subchapter III of Chapter 37 of title 11 of the United States Code. *See* 11 U.S.C. 1141(d)(6).

[14] Article I, Section A of the Plan uses substantially the same definition.

(Bankr. D. Del. 2003). Further, actions taken in violation of the discharge injunction are void *ab initio*. *In re Mariner Post-Acute Network, Inc.*, 303 B.R. at 47 ("Actions which violate the discharge injunction, similar to actions which violate the automatic stay, are void ab initio.") (citing *In re Motley*, 268 B.R. 237, 242 (Bankr. C.D. Cal. 2001)).

Here, the damages alleged in the Complaint, if any in fact occurred, constitute a "claim" as defined in the Plan and section 101(5) of the Bankruptcy Code. The discharge under Section 1141(d) of the Bankruptcy Code and Article VIII.E of the Plan serves to discharge such claims to the extent they relate to activities conducted prior to the Effective Date (*i.e.*, July 18, 2012). Further, the injunctive provisions of Section 524(a) of the Bankruptcy Code and Article VIII.F of the Plan enjoin any action by Plaintiffs or the putative class seeking to enforce claims that arose prior to the Effective Date of the Plan.

Practically applied here, Plaintiffs' request that nationwide notice be sent out to individuals employed since July 11, 2010, necessarily covers approximately 12,491 individuals only employed prior to July 18, 2012, who are enjoined from bringing such claims against Buffets and, thus, are not proper participants in this collective action. (Collins Decl., at ¶ 4). In sum, Plaintiffs ask this Court to notify Servers about their ability to participate in this lawsuit when, in fact, they may have no such ability. None of this is a surprise to Plaintiffs as they already indicated their need to conduct discovery on Buffets' bankruptcy filings in the Parties Joint Rule 26(f) Report. (Doc. 61, p. 10). Indeed, it would be illogical to send notice to over 12,000 individuals about their ability to participate in this action when, in fact, they cannot participate. Determining the relevant temporal scope for any collective class is imperative and another basis for allowing a brief 90-day discovery period before deciding the issues pending in Plaintiffs' Motion for Conditional Certification.

5. Inaccuracies Within Plaintiffs' Declarations Demonstrate The Need For Discovery

Additionally, inaccuracies in each named Plaintiffs' Declaration call into question the remaining allegations made in support of Plaintiffs' Motion for Conditional Certification. For instance, each of the three named Plaintiffs incorrectly state their current and/or final wage rate in their Declarations. Plaintiff Brown claims that she was paid $3.70/hour. (Brown Decl., ¶¶ 18, 28). However, at the end of her employment with Buffets, Plaintiff Brown earned $3.85/hour for the time she worked as a Server. (Collins Decl., ¶ 20). Plaintiff Abston and Plaintiff Walter have also misstated their current Server wage rates with Defendant. (Id.; *cf.* Abston Decl., ¶¶ 17, 29; Walter Decl., ¶¶18, 30). These additional inaccuracies further call into question the rest of the Declarations submitted in support of the Motion for Conditional Certification, and demonstrate Buffets' need for discovery to determine whether Plaintiffs' assertions are correct, and whether they are truly similarly situated to the putative class members.

C. Plaintiffs Are Not Similarly Situated To The Putative Class Because Their Off-The-Clock Claims Are Personal In Nature And Require An Individualized Assessment

As noted above, Plaintiffs allege that Buffets' corporate policies have had the effect of forcing them, and all other Servers, to work off-the-clock and that Buffets has failed to pay them their regular wage, and overtime wages, for this off-the-clock work. Plaintiffs, however, have provided no evidence to support their theory that any of Buffets' corporate policies actually have the effect of forcing its Servers to perform off-the-clock work. Moreover, Plaintiffs ignore the fact that their and the putative class's off-the-clock claims are personal in nature and individualized assessments of the credibility of each named Plaintiff, each putative class member, and their hours worked would need to be made to evaluate these claims. At the very least, this demonstrates that the parties need to engage in discovery to determine whether Plaintiffs are similarly situated to the putative class with respect to their off-the-clock claims.

The District of South Carolina has previously refused to certify off-the-clock claims because an individualized assessment is necessary to litigate these claims. *See, e.g., Pelczynski*, 284 F.R.D. 364. In *Pelczynski*, the plaintiffs were timeshare salesmen, who sought to conditionally certify a collective action, and included affidavits from the plaintiffs and other employees to support their off-the-clock work allegations. *Id*. at 365. The *Pelczynski* Court, however, found that certification was "inappropriate" because of:

> the manageability problems of the collective action proposed by Plaintiffs. …. Particularly, the Court is convinced that it must eventually conduct an individualized assessment of each of Plaintiffs' claims. As noted above, **the heart of this case is a dispute of the amount of overtime hours worked, and again, assuming the Plaintiffs' allegations are true, there is likely no record of the hours to make the appropriate findings with any ease. Testimony from the parties would be required in order to determine the overtime hours worked for each individual plaintiff, and the likelihood of dispute would require individualized credibility assessments by the fact-finder**.

Id. at 369 (emphasis added).

Similarly in *MacGregor v. Farmers Ins. Exchange*, the District of South Carolina Court considered, in detail, the individualized assessment necessary in unpaid overtime cases where, like in the instant matter, the corporate policies strictly forbid working off-the-c 2:10-CV-03088, 2011 WL 2981466 (D.S.C. July 22, 2011). The *MacGregor* Court denied conditional certification and noted:

> [w]hen '[a]lleged FLSA violations stem[ ] from the enforcement decisions of individual supervisors,' without a company-wide policy or plan directing those enforcement decisions, collective treatment is not appropriate.
>
> * * *
>
> The necessity for independent inquiries into each alleged violation makes collective action likely to hinder rather than promote judicial economy.

Id. (internal citations omitted). Similarly, Plaintiffs' claims stem from alleged enforcement decisions of individual supervisors, not a Buffets-wide policy and, as such, certification is inappropriate.

In fact, the only District of South Carolina decisions certifying classes whose claims included off-the-clock work came in cases where actual evidence existed that the employer maintained an unlawful corporate policy. *See, e.g., Faile v. Lancaster County*, 2012 U.S. Dist. LEXIS 189610, *4 (D.S.C. Mar. 8, 2012) (employer acknowledged the existence of an unlawful policy which forced employees to work 15 unpaid minutes each shift); *Curtis v. Time Warner Entm't-Advance/Newhouse P'ship*, 3:12-CV-2370-JFA, 2013 WL 1874848 (D.S.C. May 3, 2013) (plaintiffs presented evidence that management changed a policy which directed employees to perform previously uncompensated work on-the-clock).

Again, in the instant matter, Plaintiffs have provided no such evidence of a corporate-

wide policy of off-the-clock work. Moreover, Plaintiffs seek to have the putative class certified without even attempting to take discovery to make such a showing. Plaintiffs have not demonstrated the existence of a Buffets corporate policy which requires off-the-clock work. Thus, Plaintiffs' off-the-clock work claims are not appropriate for certification because discovery will be necessary to conduct an individualized assessment of such claims.

IV. CONCLUSION

As discussed herein, in the interest of promoting efficiency and justice, and based on the aforementioned case law cited in support, the Court should stay Plaintiffs' Motion To Conditionally Certify A FLSA Collective Action And To Send Notice of the Opportunity To Join the Collective Action and permit Buffets 90 days to conduct limited pre-certification discovery concerning the veracity of Plaintiffs' allegations that they are similarly situated to each other and the putative class, and 21 days following the close of this discovery period to respond to Plaintiff's Motion for Conditional Certification. Accordingly, Buffets respectfully requests that the Court issue an order temporarily staying briefing on Plaintiff's Motion for Conditional Certification and allowing Buffets sufficient time to receive responses to its discovery requests and depose the named Plaintiffs, the opt-in Plaintiffs who filed Declarations in support of Plaintiffs' Motion for Conditional Certification and an appropriate number of additional opt-in Plaintiffs to be identified based upon the substance of their discovery responses.

Dated: May 27, 2014

Respectfully submitted,

LITTLER MENDELSON, P.C.

/s/ D. Michael Henthorne

D. Michael Henthorne (Fed. ID #6386)
Kiosha Hammond Dickey (Fed. ID #10248)
Capitol Center Tower
1201 Main Street, Suite 1930
Columbia, SC 29201
Telephone: 803.231.2500
Facsimile: 803.799.9837
E-mail: mhenthorne@littler.com
kdickey@littler.com

Jacob Modla (NC No. #17534)*
4150 Bank of America Corporate Center
100 North Tryon Street
Charlotte, NC 28202
Telephone: 704.972.7047
Facsimile: 704.973.9535
E-mail: jmodla@littler.com

Tracy Stott Pyles (OH No. #0074241)*
21 East State Street, 16th Floor
Columbus, OH 43215
Telephone: 614.463.4201
Facsimile: 614.221.3301
E-mail: tpyles@littler.com
**Admitted Pro Hac Vice*

Attorneys for Defendant

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing *Defendant's Memorandum In Support Of Its Initial Response to, and Request for Stay of, Plaintiffs' Motion To Conditionally Certify A FLSA Collective Action And To Send Notice Of The Opportunity To Join The Collective Action* has been filed via the electronic filing system on May 27, 2014. Notice of filing will be performed by the Court's electronic filing system, and parties may access the document through the electronic filing system.

/s/ D. Michael Henthorne
D. Michael Henthorne (Fed. ID #6386)