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

LYNN WALTERS, LYNN BROWN, KATHLENE ABSTON, individually and on behalf all others similarly situated,

Plaintiffs,

v.

BUFFETS, INC. d/b/a HOME TOWN BUFFETS, RYAN'S, OLD COUNTRY BUFFET, FIRE MOUNTAIN, COUNTRY BUFFET,

Defendant.

6:13-CV-02995 (JMC)

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REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO CONDITIONALLY CERTIFY A FLSA COLLECTIVE ACTION AND TO SEND NOTICE OF THE OPPORTUNITY TO JOIN THE COLLECTIVE ACTION

Plaintiffs Walter, Brown, and Abston file this reply brief in support of their motion to certify this action as a Fair Labor Standards Act (FLSA) collective action and to authorize Plaintiffs to issue notice to similarly situated employees of Defendants informing them of their right to "opt-into" this action. The similarly situated workers to whom Plaintiffs seek to issue notice are defined as:

> All persons who have worked for Buffets, Inc. as Servers between July 18, 2012[1] and the date of final judgment in this matter who worked as tipped employees earning a sub-minimum, tip credit wage rate. [2]

ARGUMENT

I. DEFENDANTS MIS-STATE THE LEGAL STANDARD FOR CERTIFYING AN FLSA COLLECTIVE ACTION

As explained in Plaintiffs' initial brief, a motion for certification of an FLSA collective action is reviewed under "a fairly lenient standard" that requires only a "modest factual showing" that Plaintiffs and potential opt-in plaintiffs "together were victims of a common policy or plan that violated the law." *Curtis v. Time Warner Entertainment*, 3:12cv2370, 2013 WL 1874848 at *2 (D.S.C. May 3, 2013); *Simons v. Pryor's Inc.*, 2011 WL 6012484 at *1 (D.S.C. Nov. 30, 2011). Defendants argue that Plaintiffs should be held to a higher standard because some discovery has been conducted. As they do throughout their brief, Defendants support their

[1] Plaintiffs initially proposed that the class period begin in July 2010. However, as a result of the bankruptcy issues raised in Defendants' brief, Doc 101 at 30, Plaintiffs have voluntarily decided to limit the class to post-bankruptcy claims.

[2] Defendants argue that 24% of its servers (i.e. those who work in California, Minnesota, Oregon, and Washington) are paid the full minimum wage for all of their work and that this variation means the class is not similarly situated. However, Plaintiffs' proposed class definition specifically excludes workers paid the full minimum wage as Servers. Plaintiffs only seek to notify servers "who worked as tipped employees receiving a sub-minimum tip credit wage."

argument with cases from outside the 4th Circuit. However, the majority of courts in this district decline to alter the lenient first stage standard despite the fact the parties have engaged in some discovery. *See Curtis*, 2013 WL 1874848 at *3-4 (applying lenient standard and rejecting use of intermediate standard despite the fact parties engaged in some discovery); *Simons*, 2011 WL 6012484 at *1 (D.S.C. Nov. 30, 2011) (after denying certification without prejudice and giving parties opportunity for discovery, court granted renewed motion for collective action using the liberal first stage standard). The majority of the courts elsewhere in the Fourth Circuit have taken a similar position. *See, e.g., Long v. CPI, Sec. Systems, Inc.*, 292 F.R.D. 296, 299-301 (W.D.N.C. 2013) (refusing to apply intermediate standard to first stage determination even though depositions of plaintiffs, opt-ins and defendants' major witnesses had been taken); *Essame v. SSC Laurel Operating Co. LLC*, 847 F.Supp.2d 821, 826–27 (D.Md.2012) (declining to apply an intermediate standard of review after the parties engaged in some limited initial discovery); *Butler v DirectSAT USA, LLC*, 876 F.Supp.2d 560, 566–67 (D.Md. 2012) (rejecting the defendants' proposal to apply an intermediate standard where the parties had completed some discovery); *Romero v. Mountaire Farms, Inc*., 796 F. Supp. 2d 700, 705 (E.D.N.C. 2011) (adhering to the two-stage analysis); *Choimbol v. Fairfield Resorts, Inc.*, 475 F.Supp.2d 557, 562–63 (E.D. Va. 2006) (same).

As the Court in *Long* stated, there are "sound substantive reasons" for declining to apply an intermediate standard upon the completion of some discovery:

> First, courts have reasoned that "'when the parties have engaged in only limited discovery, it is premature to conclude that the evidence is representative of what the plaintiffs would present given further discovery.' " *Id.* (quoting *Helmert v. Butterball, LLC*, No. 4:08CV00342 JLH, 2009 WL 5066759, at *6–7 (E.D.Ark. Dec. 15, 2009)). "A second justification is that 'the notice stage analysis places the burden of proof on the plaintiff, but the opt-in stage analysis, which typically follows a motion to decertify, places the burden of proof on the defendant; merging the two stages of analysis

> would inevitably skew the burden of proof.' " *Id.* (quoting *Helmert*, 2009 WL 5066759, at *6). "These concerns have full applicability to the case at bar and caution against ratcheting up the standard of review because of the limited discovery that the Parties have conducted." *Id.*

292 F.R.D. at 300.

Plaintiffs have clearly met the lenient standard for conditional certification of an FLSA collective action. Indeed, Plaintiffs' evidence is sufficiently extensive and specific to satisfy the higher, intermediate standard urged by Defendants.

II. PLAINTIFFS HAVE MET THEIR BURDEN OF SHOWING THAT BUFFETS INC. SERVERS ARE SIMILARLY SITUATED

A. Plaintiffs' Claim

The FLSA allows an employer to pay less than the minimum wage to employees who regularly receive tips as long as the tips they receive are sufficient to bring their wages up to the minimum wage level. 29 U.S.C. § 203(m). There are two caveats to that rule: First, tipped employees who spend a substantial amount of their work time (more than 20%) engaged in non-tip producing duties, even if *related* to their tipped occupation must be paid the full minimum wage for those activities. DOL Field Operations Handbook §30d00(e); *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 880 (8th Cir. 2011). Second, the full minimum wage must be paid for any hours in which a tipped employee is assigned to perform jobs *unrelated* to his or her tipped occupation. 29 C.F.R. §531.56(e). Plaintiffs allege that, as a matter of corporate policy, Defendants violate both of these provisions with respect to their servers paid the tip credit wage.

B. Plaintiffs' Evidence

Plaintiffs' opening brief cited substantial evidence to support their allegations of company-wide policies resulting in violations of the tip credit wage. Plaintiffs provided evidence of the high degree of corporate control Buffets exercises over all of its restaurants and the server jobs at issue, including the use of the same job titles, job duties, and corporate

employment policies for Servers at all of its restaurants.[3] Plaintiffs testified in their declarations that one aspect of this corporate control was a corporate policy that limited the number of labor hours individual restaurants could use and pushed labor from workers paid at least the full minimum wage to Servers who are paid substantially below the full minimum wage.[4] Plaintiffs provided evidence that the result of the labor policy is that Servers are required to spend more than 20% of their time on non-tipped work, some of which is unrelated to the Server position, and that some of the non-tipped work is performed off-the-clock.[5]

The limited discovery taken by the parties over the past few months provides additional support for Plaintiffs' allegations of unlawful corporate policies. First, Buffets' deposition testimony and its documents confirm that Buffets exercises a high degree of control over its individual restaurants. Buffets' develops the job titles and job duties for each restaurant at the corporate level, including the Server job duties.[6] It sets out the job duties that each Server is supposed to perform during the opening, closing, and regular shifts[7] It communicates to

[3] See Dkt. 60-1, Plaintiffs' Memorandum in Support of Plaintiffs' Motion to Conditionally Certify a FLSA Collective Action and to Send Notice of the Opportunity to Join the Collective Action ("*Plaintiffs' Moving Brief*"), at pp. 6-7, footnotes 15-22. *See also* Ex. 37, Declaration of Jodi Davis at ¶¶19-21, 23-28, 31-33, 38 (Because opt-in Plaintiff Gayla Spon was not available for deposition Plaintiffs offered the additional declaration of Jodi Davis in support of their motion. Defendants took the deposition of Jodi Davis on October 17, 2014).

[4] *Plaintiffs' Moving Brief* at pg. 7, footnotes 23-25. *See also* Ex. 37 Davis Decl. ¶ 28. In their opening brief, Plaintiffs alleged that this policy was enacted through the "Matrix" and their understanding that the Matrix limited the labor hours available based on the individual restaurant's revenue. The discovery has borne out Plaintiffs' allegations with two small differences. First, the "Matrix" is actually called the "Labor Calculator". Second, it limits labor based on guest counts rather than revenue (although the two concepts are inextricably linked).

[5] *Plaintiffs' Moving Brief* at pp. 7-8, footnotes 26-27. *See also* Ex. 37 Davis Decl. ¶ 27.

[6] Ex. 17, 30(b)(6) deposition of Ovations Brands, Inc., Robert Wykes as Designee ("Wykes Depo.") at 256:4-257:4 (job descriptions developed at corporate level)..

[7] *Id.* 258:11-23 (Buffets provides a definition of the type of work servers should be doing to managers at the restaurant level).

individual restaurants and employees reinforcing the corporate policies.[8] Corporate provides the training program for employees, including Servers, on what job duties to perform and how to perform them.[9] Corporate goes as far as to script what Servers say to their customers.[10]

Buffets' corporate department also monitors individual restaurants through a highly-structured reporting process. Every day each restaurant generates a call-in report that includes extraordinary detail about the day's business.[11] At the end of each week, every restaurant provides corporate with a food inventory from which corporate determines the restaurant's weekly food cost.[12] Corporate regularly analyzes the information and reports on each individual restaurant's compliance with company standards.[13] Corporate even reports which specific employees are working overtime hours.[14] Guest complaints and comments for individual restaurants are all collected and reviewed at the corporate level.[15]

Individual restaurants are also monitored through field management that reports to corporate. Area Directors oversee individual restaurants and report to Regional Vice Presidents

[8] *Id.* 14-15 (corporate sends memos all Ryan's restaurants regarding Server duties); 89:25-90:1-9 corporate communication—as attachments to paychecks)
[9] *Id.* 252:17-255-8 (training materials developed and generated at corporate level and apply to all restaurants. Exs. 26 and 28 [Wykes Exs. 15 and 16].
[10] Ex. 27 BSN DEF 00302-303(RV-1 Introducing-Yourself-to-the-Guest).
[11] Wykes Depo. 114:9 to 114:18 (the daily call-in reports show "total paid guests, variance to last year as a number, variance to last year as a percent, variance to previous week as a number and variance to previous week as a percent; how many employees paid for a meal; how many free guests we did; how many total guests; how many guests were forecast, and what the variance was to that; total sales' variance to last year, to-go sales; cash over/short; average wage and variance to previous year; average check and variance to previous year.")
[12] *Id*. 106:24-107:9 (every Wednesday restaurants provide data for corporate food cost analysis.)
[13] *Id*. 205:11-206:1 (describing corporate labor cost analysis of individual restaurants); 232:2-233:23 (describing weekly "outlier" reports for VPOs, senior VPs of Ops, the COO, Wykes—food, labor, guest count, and sales for all restaurants;
[14] *Id*. 193:3-24 (Daily Payroll Tracking Report shows employees who are approaching overtime).
[15] *Id*. 94:22-95:13 (describing process for guest complaints and compliments).

who report directly to corporate.[16] Area Directors are expected to visit each individual restaurant regularly and complete a written report evaluating the restaurant in more than 60 categories.[17] At least twice a year, Area Directors are required to inspect individual restaurants and complete reports grading them in 396 categories. The data from the inspections is gathered by corporate for evaluation.[18]

Of particular significance in this case, Buffets confirmed that individual restaurant's labor performance is closely monitored at the corporate level.[19] Through its Labor Calculator, discussed below, corporate dictates not only how many labor hours each restaurant may use each day, but how they must allocate them among workers.[20] Corporate then electronically monitors each restaurant's compliance with the labor requirements on a daily basis.[21] Labor cost information is pulled by corporate every day[22] and some information is reported from the individual restaurants every 15 minutes. [23] Corporate has every restaurant's sales, labor hours and their allocation among workers, guest counts, labor costs, and information from time clocks

[16] *Id*. 54:21-55:9
[17] *Id*. 92:15-94:1.
[18] *Id*.
[19] *Id.* 235:24-238:8 (corporate tracks the performance of restaurants and issues a "Weekly Outlier Report" showing the restaurants that field management should focus on.)"
[20] *Id*.121:21-122:23 (Labor Calculator calculates separate levels of hours for Servers and for all other labor).
[21] *Id.* 150:5-151:11 (corporate monitors compliance with the Labor Calculator through electronic reporting.); *Id*. 205:11-206:1 (describing corporate labor cost analysis of individual restaurants).
[22] *Id.* 108:17-21 (guest count is pulled from individual restaurants by corporate every night).
[23] *Id.* 110:1-23 (guest count, time of transaction, sales amounts—pushed to corporate every 15 minutes from the POS system).

at the end of each day. [24] It uses the information to determine whether or not an individual restaurant is complying with the guidelines that are embedded in the Labor Calculator.[25]

Second, discovery confirms Plaintiffs' allegation that approximately three years ago Buffets implemented a policy that significantly reduced labor and shifted non-tipped work onto Servers. In April of 2011, Buffets' CEO issued a company-wide mandate that all restaurants reduce their hourly labor by 50 to 75 hours each week.[26] The reduction was a financial decision and not based on an analysis of operational needs, and there was no corresponding reduction in work.[27] The result was that restaurants across the country had insufficient labor to complete the work necessary to run the restaurants successfully.[28] As a result of the mandate to cut hours, Buffets implemented a company-wide "Labor Calculator" that calculates the number of labor hours individual restaurants are allowed to use based on the number of guests the restaurant serves.[29]

[24] *Id.* 114:9 to 114:18 (describing elements of the daily call-in reports);; 125:23-126 (allocation of server hours and other hours for individual restaurants known by corporate at the end of every day).
[25] *Id*. 205:5-10.
[26] *Id*. 165:11-166:25 in April of 2011, the then-current CEO, Mike Andrews, issued a verbal directive to reduce hours and tighten up labor to hit company financial targets—there was a special conference call between the CEO, the COO, Wykes (who was VP of Ops Services), division VPs, and RVPs—take current targets and reduce them by 50-75 [hours]; 170:21-171:8 [in April of 2011] the message was passed down to all restaurants "cut labor by 50-75 hours" regardless of restaurant size.
[27] Wykes 167:1-16 (there was no reduction in work and no analysis performed to determine whether [the cuts] were feasible.)
[28] 215:20-216:4 (effect of April 2011 labor cuts was restaurants got dirty and service went downhill).
[29] *Id.* 163:14-23 (the Labor Calculator roll-out began in fall of 2013 and completed in February of 2012.)

The Labor Calculator limits the total number of labor hours that a restaurant can use each week.[30] It works in the following way: Managers enter forecasts of how many guests they will have for breakfast, for lunch, and for dinner on each day of the work week.[31] The Labor Calculator uses the forecasts to calculate the allowable labor for each day[32] and managers are required to schedule within the Calculator's results.[33] At the end of each day, managers enter the actual guests the restaurant served that day into the Labor Calculator, which recalculates the allowable labor based on the actual guests. The Labor Calculator keeps a weekly tally of the allowed hours based on actual guest count so that if labor hours allotted based on the manager's forecast are over what the Labor Calculator allows for any given day based on actual guest count, managers have to adjust labor later in the week to ensure that they meet the weekly labor constraints.[34]

Not only does the Labor Calculator limit the labor hours available, but it is also designed to shift non-tipped work onto Servers who are paid substantially below the full minimum wage. The Labor Calculator does this by calculating the total hours allowable ("Total Hours") and breaking those hours into two groups: Servers, who are paid the sub-minimum tip credit wage

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[30] *Id*. 121:2-12 (Buffets does not want restaurants to use more hours than the Labor Calculator provides).

[31] Ex. 36 [Labor Calculator]; Wykes Deposition at 139:24-140:10 manager enters forecasted guest count, calculator returns allowable hours used by manager to create schedule; 140:15-141:1 allowable hours will change with actual guest count; 190:17-24 (managers can call employees at any time, based on the calculator, and instruct them not to come to work, or send employees home, or ask them to come in late.) 190:1-16 Ex.6 "Core 40 Skills" (managers are to adjust labor throughout the day based on current guest count);

[32] *Id*. 155:21-156:3 (the Labor Calculator converts forecast guest count into allowed hours).

[33] *Id*. (characterizing Labor Calculator results as "allowed hours"); 121:2-15 (Buffets expects managers to schedule hours within the allowed range of hours); Ex. 32, BSN DEF 01876 (manager training program discussion "Why should you never post a schedule that is not within the labor guidelines"). .

[34] Wykes Depo. 188:5-190:24 (restaurant managers are trained to constantly monitor their compliance with the labor calculator and make adjustments as needed.); Ex. 36 (Labor Calculator designed to adjust allowable hours as actual guest counts are determined).

("Server Hours"), and all other job titles who are paid the minimum wage or more ("Other Hours").[35] The Server Hours set by the Labor Calculator operate as a minimum—i.e. the restaurant must use all of the allocated Server Hours during the week.[36] But because the total allowable hours are fixed, treating the allotted Server hours as a *minimum* necessarily means that the allocated number of Other Hours operates as a *maximum* that restaurants may not exceed.[37] Restaurants are not allowed to use fewer Server Hours than the Calculator allocates, but they can use more Server Hours as long as they make an equivalent reduction in the Other Hours so that the combined Server and Other Hours do not exceed the Total Hours. Restaurants can substitute as many Server Hours as it likes for Other Hours so long as it does not go over Total Hours. [38] A restaurant with more non-server work than covered by the Other Hours allowed cannot increase Other Hours, it can only shift the work over to the Servers. Moreover, by shifting work from Others to Servers, the restaurants pay less than half the hourly wage for the work. Managers (and the Area Directors who supervise them) are motivated to shift work to Servers because they are compensated based on the profitability of the restaurant and the lower labor cost translates to more compensation.[39]

The discovery also supports Plaintiffs' claim that the Labor Calculator's restrictions resulted in off-the-clock work. The Labor Calculator restricts labor to levels below what is needed to run a restaurant successfully in at least two ways. First, it requires restaurants that go

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[35] Wykes Depo. 121:21-23 (Labor Calculator distinguishes between hours for servers and hours for all other positions); 122:19-24 (Labor Calculator calculates allowable hours for all positions); see Ex. 36 (Labor Calculator).
[36] Wykes Depo. 122:3-18 (the Labor Calculator sets an absolute minimum for server hours).
[37] *Id.* 126:11-20 (explaining that Other Hours cannot be increases over the Labor Calculator allocation because doing so would decrease Server Hours below the minimum).
[38] *Id.* 121:21-126:20
[39] *Id.* 54:5-13 (Area Directors and General Managers receive bonuses based on the profitability of the restaurants they supervise); 176:14-23 a hundred percent of GMs bonuses are based on the performance of their restaurants.

over their allotted hours at any time during the week to offset those excess hours by operating during the remainder of the week with less labor than the Labor Calculator would otherwise allow.[40] The more a restaurant goes over its labor limit (i.e. the more the discrepancy between projected customers and actual customers) the greater the labor deficit the restaurant must make up later in the week. [41] As a result, managers are forced to have Servers work off-the-clock to catch up. Second, by pushing non-tipped work onto Servers, the Labor Calculator ensures inefficiencies. Having Servers do non-tipped work, such as cleaning the restaurant during their shifts, is far less efficient that having a dedicated person do the work, such as cleaning when the restaurant is empty. The result is that the Labor Calculator underestimates the time needed to perform the work. Because restaurants are given insufficient labor to perform the work needed, managers are forced to require off-the-clock work.[42]

Buffets insistence that its labor policy has not resulted in a diminution of total hours is not only disputed,[43] but it misses the point. Plaintiffs' claim is that the policy pushes non-tipped work from employees who are paid the minimum wage onto Servers who are not. Regardless of the level of total labor hours, Servers' complaint is that the policy results in a redistribution of non-tipped work onto Servers. On the other hand, Buffets claim based on its "Labor vs. Guide Opportunity Cost Analysis" that its reporting shows regular deviations in Servers' hours from the

[40] Ex. 36 [Labor Calculator]; Wykes Depo. 188:5-190:24 (restaurant managers are trained to constantly monitor their compliance with the labor calculator and make adjustments as needed.);.
[41] Wykes Depo. 127:11-25 (Labor Calculator was developed to identify "what we needed to run a restaurant"); see also, *id*. 156:24 to 157:9 (explaining the development of the Labor Calculator formulae").
[42] Ex. 2, Abston Decl. ¶¶ 30, 36; Ex. 3, Brown Decl. ¶¶ 29, 35; Ex. 4, Howell Decl. ¶¶ 35, 41; Ex. 5, Johnson Decl. ¶¶ 27, 33; Ex. 6, Morehead Decl. ¶¶ 29, 35; Ex. 7, Spon Decl. ¶¶ 36, 38, 43; Ex. 8, Walter Decl. ¶¶ 31, 37; Ex. 9, Ward Decl. ¶¶ 30, 36. *See also* Ex. 37 Davis Decl. ¶¶ 35-38.
[43] Wykes Depo. 218:6-23 (after the 2011 cut, the average wage came down close to where it was prior to April 2011).

Labor Calculator's allocations only helps to confirm Plaintiffs' point. Buffets Labor Calculator encourages deviations in Server hours from the Labor Calculator's allocations because only Server hours can be increased whenever additional non-tip producing work needs to be done and because increasing Server hours, as opposed to Other Hours, saves money.[44] Accordingly, the more relevant part of Buffets' Labor vs. Guide Opportunity Cost Analysis is the "Server Opportunity Dollars" column that represents where opportunity for labor cost savings were lost by not following the Labor Calculator.[45] That column shows that most restaurants comply with the policy, and where they do not, the deviation is minimal.[46]

Third, Buffets' corporate documents and testimony also establish that Servers are required to do a wide variety of non-tipped work, some of which is not related to the Server job at all. Plaintiffs have now obtained documents outlining the "opening," "shift," and "closing" duties assigned to all Buffets' servers across the country.[47] On their face these documents assign a number of tasks unrelated to the servers tipped occupation for which full minimum wage should have been paid regardless of the time spent on them, including janitorial work such as mopping floors and cleaning carpets, baseboards, soffits, hanging lamps, blinds, fire extinguisher cabinets, picture frames, dining room partitions and walls.[48] *See Driver v. AppleIllinois, LLC*, 890 F.Supp.2d 1008, 1031-1032 (N.D.Ill. 2012) (concluding that general cleaning, including wiping down walls, cleaning chandeliers, and mopping floors, is unrelated to servers' tipped

[44] 126:25-127:5 Q. when an individual restaurant shifts labor hours, total labor hours, from other to server labor, what does that do to the average wage that they pay by hour? A. In general, we drop it. (Cite the spreadsheet quip re server hours).
[45] *Id*. 209:20-213:15 Opportunity Costs explained.
[46] Ex. 36 [Wykes Ex. 5] Labor Opportunity Spreadsheet, Server Opportunity Dollars column.
[47] Ex. 28 BSN DEF 00309-311, Ex. 26 319-321 (Server duty lists); Wykes Depo. 252:17-255:8 (explaining that the duty lists are developed at the corporate level and supposed to be used by all restaurants).
[48] *Id*.

occupation); *Dole v. Bishop,* 740 F.Supp 1221, 1228 (S.D. Miss. 1990) (jobs like cleaning bathrooms and general areas of the restaurant in the afternoons and before the restaurant opened were not incidental to the waitresses' tipped duties and should have been paid at the full minimum wage). Defendants may argue that this janitorial work is sufficiently related to the servers' tip producing job to justify Buffets' decision to pay for it at the tip-credit wage (as long as it occupies less than 20% of servers duties).[49] However, whether the duties assigned by these corporate documents are, or are not, related to the servers' tipped occupation is a merits question to be decided by the finder of fact after full discovery. For purposes of the present motion, what is important is that all the members of Plaintiffs' class are similarly situated with respect to the corporate policies assigning these job duties so that the determination of whether those jobs should have been paid at the full minimum wage can be efficiently made for all members of Plaintiffs' proposed class.

Finally, Buffets' exhaustive examination of the Plaintiffs and declarants in this case demonstrated that their testimony was consistent with the statements in their affidavits that Servers are required to do a wide variety of non-tipped work that takes more than 20% of their time and that the additional work combined with strict adherence to scheduled hours results in regular off-the-clock work. Buffets conducted full-day depositions of eight Servers who worked in restaurants in Alabama, Indiana, Illinois, Missouri, Ohio, and Pennsylvania. All the deponents testified that Buffets routinely assigned a substantial amount of non-tip producing work that takes up more than 20% of their work time to complete for which they were not paid

[49] Buffets also admits that beyond recording opening and closing shifts in some restaurants, it does not attempt to monitor the amount of time Servers spend in non-tip related work. See Wykes Depo. 16:16-17-8 (Buffets records only "open/close" times in some instances); *id*. 268:18-269:3 (other than open and close shifts, Buffets does not track non-tip producing or non-tip related work).

the full minimum wage—exactly what would be expected from the Defendants' corporate Labor Calculator policies.[50] For example, they testified that they were required to regularly wash dishes, clean and restock food and beverage areas, clean restrooms, sweep and mop floors, wash furniture and walls, and empty trash.[51] They all testified that this non-tip producing work took more than 20% of their time to complete and they were not paid the full minimum wage when performing these tasks.[52] Moreover, all the deponents testified that because they could not complete all the work assigned to them within their scheduled hours, they were required to work off-the-clock.[53] The testimony strongly supports Plaintiffs' allegations that Buffets' Labor Calculator resulted in Servers across the company performing excessive non-tip producing work for less than the minimum wage and in Servers working off-the-clock.

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[50] Ex. 18, Deposition of Robin Abston (Abston Dep.) 32:8-12, 33:4-16, 69:4-11, 80:4-7, 95:15-17; Ex. 19, Deposition of Cindy Brown (Brown Dep.) 47:2-10, 48:16-17, 78:12-17; Ex. 21 Deposition of Katherine Howell (Howell Dep.) 19:24-20:1, 28:17-29:23,34:4-7, 35:4-12, 82:18-93:18, 91:21-93:6, 150:24-151:4; Ex. 22, Deposition of Rebecca Johnson (Johnson Dep.) 29:16-20; 111:16-22, 112:1-9,121:12-20, 145:13-146:3, 147:23-148:19; Ex. 23 Deposition of Eleanor Morehead (Morehead Dep.) 31:19-23, 93:16-23, 118-119, 120:19-22; Ex. 24 Deposition of Cheryl Walter (Walter Dep.) 70:15-71:13, 75:13-23, 141:2-16, 145:21-146:1, 222:10-223:17; Ex. 25, Deposition of Shirley Ward (Ward Dep.) 11:16:19, 39:3-40:9, 42:18-43:9, 121:21-122:3; Ex. 20 Deposition of Jodi Davis (Davis Dep.) 12:3-6, 39:4-16, 63:21-64:20; 66:6-22; 74:14-75:9; 81:1-8; 83:16-20; 87:24-25; 90:21-91:6; 91:21-92-1; 93:10-15; 93:23-94:3; 94:4-21; 97:8-10; 97:23-98:1; 100:7-12; 102:2-10; 109:21-110:23, 115:11-22; 116:18; 117:22-118:7.

[51] Abston Dep. 32:8-12, 33:4-16, 69:4-11, 95:15-17; Brown Dep. 47:2-10, 78:12-17; Howell Dep. 28:17-29:23,34:4-7, 35:4-12, 82:18-93:18, 91:21-93:6, 150:24-151:4; Johnson Dep. 111:16-22, 112:1-9,121:12-20, 145:13-146:3, 147:23-148:19; Morehead Dep. 93:16-23, 118-119, 120:19-22; Walter Dep. 70:15-71:13; Ward Dep. 39:3-40:9, 42:18-43:9, 121:21-122:3; Davis Dep. 39:4-16, 63:21-64:20; 66:6-22; 74:14-75:9; 81:1-8; 83:16-20; 87:24-25; 90:21-91:6; 91:21-92-1; 93:10-15; 93:23-94:3; 94:4-21; 97:8-10; 97:23-98:1; 100:7-12; 102:2-10; 109:21-110:23, 115:11-22; 116:18; 117:22-118:7.

[52] *Plaintiffs' Moving Brief* at pp. 7-8, footnotes 26-27. *See also* Ex. 37 Davis Decl. ¶ 27, Walter Dep. 70:15-71:13, 75:13-23, 141:2-16, 145:21-146:1, 222:10-223:17; Johnson Dep. 121:12-20.

[53] Abston Dep. 215-5-16, 221:21-222:22; Brown Dep. 161:5-12, 162:3-12, 165:3-17; Howell Dep. 74:13-77:5; Johnson Dep. 138:8-140:22; Morehead Dep. 167:22-169:16; Walter Dep. 91: 1-7, 94:7-18, 100:10-12, 120:11-15; Ward Dep. 99:17-100:2; Davis Dep. 81:6-8, 82:1-9, 89:20-23, 103:3:140, 103:3-10, 121:24-122:20.

This evidence is more than sufficient to satisfy Plaintiffs' burden at the conditional certification stage. Indeed, the evidence here is quite similar to the evidence found to support conditional certification in two very similar cases: *Fast v. Applebee's Int'l., Inc.*, 243 F.R.D. 360 (W.D. Mo. 2007), and *Chhab v. Darden Restaurants, Inc.*, 11Civ8345, 2013 WL 5308004 (S.D.N.Y. Sept. 30, 2013). In *Fast*, the court conditionally certified a nationwide FLSA collective action on behalf of all Applebee's International's tipped employees based on a corporate "Core Manual" that assigned janitorial tasks (such as dusting and cleaning artifacts, pictures, blinds, and Tiffany lights), corporate documents encouraging use of tipped employees to perform non-tip producing jobs and affidavits testifying to the fact that tipped employees spent more than 20% of their time in such activities. In *Darden* the court conditionally certified a similar claim brought on behalf of servers in 1900 restaurants based on evidence of detailed corporate control over the restaurants, a *de facto* corporate policy of assigning certain opening, closing, and continuous side work duties and affidavits and depositions testifying that those policies resulted in non-tipped side work exceeding 20% of servers work time. 2014 WL 5308004 at *10-12. *See also Ervin v. OS Restaurant Services, Inc.*, No. 08C1091, 2009 WL 1904544 at *3-4 (N.D. Ill. July 1, 2009) *rev'd on other grounds*, 632 F.3d 971 (7th Cir.2011) (granting conditional certification based on plaintiffs' affidavits and depositions to a FLSA class of tipped employees who were forced to perform non-tipped tasks); *Clark v. Honey Jam Café LLC*, 2013 WL 1789519 (N.D. Ill. March 21, 2013) (certifying FLSA collective action and Rule 23(b)(3) class action on behalf of tipped employees who performed duties outside their tipped occupations); *Bellaspica v. PJPA, LLC*, 3 F.Supp.3d 257 (E.D. Pa. 2014) (certifying collective action of tipped workers who performed excessive non-tipped work at tip credit wage); *Driver v. AppleIllinois, LLC*, 265 F.R.D. 293 (N.D. Ill. 2010) (certifying Illinois Minimum Wage Law

claims as a Rule 23(b)(3) class on behalf of tipped employees at 34 Applebee's restaurants. The initial certification was limited to claims for time spent on duties unrelated to the plaintiffs' tipped occupations, *id.* at 313, but in a subsequent order, 802 F.Supp.2d 1008, 1034-1035, the class definition was amended to include claims for time spent in all non-tip producing work, whether related and unrelated to the workers' tip producing occupation.)

III. DEFENDANTS' AFFIDAVITS DO NOT DEFEAT CONDITIONAL CERTIFICATION

In opposition to conditional certification Defendants have submitted affidavits from approximately 50 servers attesting that the side work they performed did not exceed 20% of their work time and that they did not work off the clock to accomplish the side work duties assigned to them. Courts routinely refuse to consider such affidavits at the conditional certification stage because at that stage "the court's role is not to resolve factual disputes or make credibility determinations." *Curtis*, 2013 WL 1874848 at * 6. Rather it "is sufficient for Plaintiffs to have shown a reasonable basis for their claim that other similarly situated plaintiffs exist." *Id.* *See also Darden*, 2013 WL 5308004 at *12 (holding that defendants' affidavits claiming that servers worked less than 20% of their time on side duties "do not undermine" the appropriateness of conditional certification and noting that "[t]he accuracy of the parties' competing views will be tested through discovery and may be raised before the Court on a motion to decertify the class after the close of discovery."); *Ruggles v. Wellpoint, Inc.*, 591 F.Supp.2d 150, 160-61 (N.D.N.Y.2008) ("Notwithstanding [Defendant's] opposition to Plaintiffs' [a]ffidavits with sixty-six (66) of its own in an attempt to show that the employees were not similarly situated and challenge Plaintiffs' ability to show any common policy or plan, such opposition would not defeat Plaintiffs, at this first step, if they have met their initial burden." Defendant's affidavits "are premature and best reserved for the second stage of the class analysis").

Defendants' affidavits are particularly inappropriate in the circumstances of this case where Defendants were granted the opportunity to depose Plaintiffs' affiants but gave Plaintiffs no notice of their affiants until they filed their opposition to conditional certification and, hence, Plaintiffs' have had no opportunity to depose them.

IV. THE FACT THAT DAMAGES MAY REQUIRE INDIVIDUAL CONSIDERATION DOES NOT PRECLUDE CONDITIONAL CERTIFICATION OF A COLLECTIVE ACTION.

A. Individual Damage Issues Do Not Affect Conditional Certification

Defendants argue that the specific jobs that each Server performed and the amount of time they spend on any specific task are highly-individualized inquiries that will make this collective action unmanageable. Doc 101 at 25. This argument is without merit for a number of reasons. First, given the standardization of all of Defendants' restaurants from menus to staffing/customer it is highly likely that the amount of time spent on non-tip producing tasks can be determined relatively easily through representative testimony. "Courts have frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees." *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1116 (4th Cir. 1985). See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1957) (affirming classwide damages based on representative testimony of seven workers). See also *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 310 (4th Cir. 2006) ("Courts have, of course, frequently granted back wages under the FLSA to non-testifying employees based upon the representative testimony of a small percentage of the employees."); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1276-77 (11th Cir. 2008) (affirming damages award for a class of 1,424 based on testimony of seven representatives); *Hipp v. Liberty Nat. Life Ins. Co.*, 252 F.3d 1208, 1227 (11th Cir.2001) (discussing pattern and practice evidence used to prove discrimination in the ADEA context); *Donovan v. Burger King*, 672 F.2d 221, 224-25 (1st

Cir.1982) (allowing representative testimony to prevent cumulative evidence because of the "basic similarities between the individual restaurants").

Second, and more importantly, even if the amount of time that any given server spent on non-tip producing work requires individual testimony, individualized damages do not preclude conditional certification. *See Simons v. Pryor's Inc.*, 3:11cv0792, 2011 WL 3158724, at *7 (D.S.C. July 26, 2011) ("the court is not persuaded that it should deny conditional certification of a collective action due to the possible need for individualized proof of some aspects of liability and damages"); *Gregory v. Belfor USA Group, Inc.*, 2:12cv11, 2012 WL 3062696, at *2 (E.D.Va. 2012) (fact that individualized inquiry may be necessary in awarding damages does not preclude conditional certification); *Gieseke v. First Horizon Home Loan Corp.*, 408 F.Supp.2d 1164, 1168 (D. Kan. 2006) ("[I]ndividual differences in damages are not to be considered when ruling on conditional certification and will not defeat certification . . .unless the issue creates a conflict which goes to the heart of the lawsuit."). All of the FLSA tip-credit cases cited above presented exactly the same individual damage questions as this case and were conditionally certified. *See Fast*, 243 F.R.D. 360 (rejecting defendants' manageability arguments and conditionally certifying 20% claim obviously despite need for individual testimony to establish damages); *Honey Jam Café LLC*, 2013 WL 1789519 at *2 (rejecting defendants' argument that extensive individual proof of the time each worker spent on each non-tipped task prevents certification); *Driver*, 265 F.R.D. 293, 313 (N.D. Ill. 2010) (noting that individual determinations as to whether class members were affected by assignment of side jobs unrelated to tipped occupation "is more in the nature of a damages calculation" and does not affect Rule 23 certification of class); *Darden*, 2013 WL 5308004, at *14 (certifying off-the-clock claims for servers at 1900 restaurants based on affidavits showing corporate control over time-keeping

policies and procedures and despite declarations offered by defendant from servers who claimed not to have worked off-the-clock)

B. Off-the-Clock Hours Are Damages Issues and Are Appropriate for Conditional Certification

Defendant argues strenuously that Plaintiffs' off-the-clock claims are too individualized to be part of the collective action. There are two responses to this. First, contrary to Defendants' arguments, the off-the-clock time at issue here is not an independent claim, separate from Plaintiffs' claim that Defendants' had a policy of assigning unrelated and excessive non-tip duties to servers. Rather, the off-the-clock hours are simply one part of the damages that flowed from that unlawful policy because servers could not complete all of the non-tip duties assigned to them within the time allotted by Defendants' corporate Labor Calculator. As noted above, the potential need for individualized damage testimony should not preclude conditional certification, and the fact that damage testimony regarding the number of hours spent on non-tip work may include references to off-the-clock hours as well as clocked hours does not change the fact that it is damages testimony unrelated to the conditional certification decision.

Even if the off-the-clock hours were viewed as a separate claim, it would still be appropriate for conditional certification, despite Buffets' explicit corporate policy against such work. For example, in a case remarkably similar to this one, *LaFleur v. Dollar Tree Stores, Inc.*, the district court denied a motion to decertify a nationwide collective action brought by "hourly associates" who alleged that they were required to work off-the-clock as a result of Dollar Tree's "national practices pertaining to labor budgeting, timekeeping and monitoring." *LaFleur v. Dollar Tree Stores, Inc.*, No. 2:12-CV-00363, 2014 WL 934379, at *4 (E.D. Va. Mar. 7, 2014) (mot. to certify appeal denied, No. 2:12-CV-00363, 2014 WL 2121721 (E.D. Va. May 20, 2014); recons. denied, No. 2:12-CV-00363, 2014 WL 2121563 (E.D. Va. May 20, 2014)).The court

found that the evidence of Dollar Tree's strict implementation of its labor budget policies was sufficient to establish the appropriateness of conditional certification for the off-the-clock claims. *See also Curtis,* 2013 WL 1874848 (D.S.C. May 3, 2013) (certifying nationwide class of telesales representatives who alleged that they were forced to reconcile their sales reports off the clock based on evidence of an informal policy requiring such work); *In re Bank of Am. Wage & Hour Emp't Litig.,* 286 F.R.D. 572, 586 (D. Kan. 2012) (granting conditional certification where plaintiffs "satisfied their minimal burden of providing substantial allegations that [defendant] maintained an unofficial policy requiring off the clock [work] through the use of labor budgets, aggressive management of overtime, and scheduling processes that result in understaffing of branch locations."); *Vargas v. General Nutrition Centers, Inc.,* 2012 WL 3544733, at *7–8 (W.D.Pa. Aug. 16, 2012) (evidence that employer budgeted certain number of labor hours for each store; managers were expected to perform work without incurring overtime; and managers engaged in time-shaving was sufficient "hold the case over until the next stage of the certification analysis" despite employer's contention that fact-intensive, individualized determinations made the case unsuitable for collective treatment, which would be reviewed at a later stage). The off-the-clock claims in this case, to the extent they are viewed as independent claims rather than damages, are quite similar to those in *LaFleur*, *Bank of America,* and *Vargas* and should be conditionally certified for the same reasons.

V. V. DEFENDANTS' OTHER ARGUMENTS ARE WITHOUT MERIT

A. Non-Tip Credit States Are Not Part of the Class

Defendants argue that the class is not similarly situated because servers in four states are paid the full minimum wage. Doc 101 at 17. However, Plaintiffs' class definition—which is limited to servers paid a "tip credit" wage—specifically excludes those individuals.

B. Differences in Time Keeping Systems Are Irrelevant

Defendants argue that the class is not similarly situated because the time-keeping system used in their Ryan's and Fire Mountain restaurants is different from the system used in their other restaurants because it codes servers' opening and closing times separately from their shift time while the other restaurants do not. As a result of this difference Ryan's and Fire Mountain paid minimum wage for opening and closing time prior to September 2012 and, since that time, has paid minimum wage if opening and closing duties equate to 18% or more of the total for the shift. Because they do not record opening and closing time separately Defendants' other restaurants have not made these payments. While the payment of minimum wage to certain servers for opening and closing may affect the amount of damages incurred by those servers, it does not make them dissimilar to the rest of the class. Ryan's and Fire Mountain servers are still performing the same work, under the same labor budgeting policies, as all other servers and they present the same claims—i.e. they are entitled to minimum wage for any work they performed during their shift or otherwise that was *unrelated* non-tip producing work, even if it was less than 18% of their time. Similarly they are entitled to minimum wage if all of their non-tip producing work (including work done during their shifts) amounts to more than 20%. The fact that Fire Mountain and Ryan's paid minimum wage to some servers for their opening and closing activities may be important evidence of Defendants' knowledge that such activities should be paid at minimum wage but it does not make the Fire Mountain and Ryan's class members dissimilar. *Benbow v. Gold Kist, Inc.*, 3:06cv2751, 2007 WL 7595027 at *2 (D.S.C. Apr. 16, 2007) (plaintiffs and class members need only be similar, not identical).

C. Cases Cited By Defendants Are Distinguishable

Defendants rely on two tip credit cases to argue against conditional certification but both are easily distinguishable. *Mathis v. Darden Restaurants,* 12-61742-Civ, 2014 WL 4428171 (S.D. Fla. 2014), granted a motion to decertify a tip credit claim on behalf of an extremely large class of 20,000 opt-in plaintiffs (out of a putative class of over 218,000 individuals—more than 10 times the putative class at issue here). *Id.* at *1. After full discovery, the court determined that the evidence was insufficient to satisfy the more demanding second stage standard for a collective action. Nevertheless, the court specifically noted that "conditional certification was certainly warranted under the 'fairly lenient standard' at the outset of the action." *Id* at *5. Thus, if anything, the case supports Plaintiffs' current motion. The other case, *Ide v. Neighborhood Restaurant Partners,* 1:13cv509, 2014 WL 3644322 (N.D. Ga. July 8, 2014), is also an analysis conducted using the second stage decertification standard and is not relevant to the conditional certification question presented by this case. Moreover, despite having conducted full discovery, the plaintiff in that case presented far less evidence than Plaintiffs here have adduced with only limited discovery. Indeed, the plaintiff in *Ide* could not cite evidence of a company-wide policy.

D. Plaintiff Brown

Brown is similarly situated to the other Named Plaintiffs and the class because she worked as a Server and was required to spend more than 20% of her time performing non-tip producing work, and was required to punch in and out but continue working off-the-clock.[54] Buffets' claim that conditional certification must fail because Plaintiff Brown has a conflict with the class because she worked as a shift supervisor and manager separately from her Server shifts

[54] Buffets' assertion that Brown was paid more than the minimum wage for her non-tipped work as a Server is baseless. Brown worked as a Server and testified that she spent at least 30% of her time working as a Server performing non-tip producing work. Declaration at 21-26. The fact that she was paid above the minimum wage for work in other capacities is irrelevant to her work as a Server.

is neither relevant nor true. Brown's adequacy as a Named Plaintiff is not at issue at the conditional certification stage. *Butler v. DirectSAT USA, LLC*, 876 F. Supp. 2d 560, 573 fn 14 (D. Md. 2012). See also, *North. v. Bd. of Trustees of IL State Univ.*, 676 F. Supp. 2d 690, 696 (C.D. Ill. 2009) (adequacy of named plaintiff "is more prudently considered at step two, when the Court will have the benefit of further briefing and information about the actual members of the collective action."). Even if Brown's adequacy were at issue at this stage, there is no evidence that Brown personally violated the FLSA. To the extent she assigned any non-tip producing work, she was simply following corporate policy with respect to Servers' duties. And even if the Court were to find Brown an inadequate Named Plaintiff, conditional certification is appropriate because Buffets has not challenged the adequacy of the two other Named Plaintiffs and they are sufficient for conditional certification. *Butler*, 876 F. Supp. 2d at 573 fn 14.

E. Bankruptcy

In light of the unique issues presented by Defendants bankruptcy, Plaintiffs have voluntarily narrowed their class definition to include only individuals who worked after July 18, 2012, the date that Defendants' received their discharge. In doing so, Plaintiffs do not concede in any way the merits of Defendants' argument that the bankruptcy discharged FLSA or state law wage-and-hour claims.

VI. Conclusion

For all of the foregoing reasons, Plaintiffs' motion for conditional certification of an FLSA collective action should be granted.

Respectfully submitted,

s/M. Malissa Burnette
M. Malissa Burnette (Fed. ID #1616)
CALLISON TIGHE & ROBINSON, L.L.C.
1812 Lincoln Street
P.O. Box 1390
Columbia, SC 29202-1390
Telephone: 803.404.6900
Facsimile: 803.404.6901
Email: mmburnette@callisontighe.com

Michael J.D. Sweeney (admitted *pro hac vice)*
Artemio Guerra (admitted *pro hac vice*)
Getman & Sweeney, PLLC
9 Paradies Lane
New Paltz, NY 12561
Phone: 845-255-9370
Fax: 845-255-8649
Email: msweeney@getmansweeney.com
Email: aguerra@getmansweeney.com

David A. Young (admitted *pro hac vice)*
The Law Firm Of David A. Young, LLC
The Hoyt Block Building
700 West St. Clair Avenue, Suite 316
Cleveland, OH 44113
Phone: 216-621-5100
Fax: 216-621-7810
Email: dyoung@davidyounglaw.com

November 17, 2014

Columbia, South Carolina