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.**	**6:13-cv-2995 (JMC)**

MOTION TO NARROW THE SCOPE OF THE FLSA CLASS

Now come Plaintiffs and move the Court to narrow the scope of the FLSA class they seek to have conditionally certified by limiting the class to:

> All persons who have worked for Buffets, Inc. as Servers between July 18, 2012 and the date of final judgment in this matter as tipped employees earning a sub-minimum, tip credit wage rate at restaurants overseen by the Area Directors responsible for managing the restaurants where the current opt-in plaintiffs were employed:
>
> - Matthew Thomas Lampkin;
> - Kevin Gadberry;
> - Samuel Brian Papa;
> - Mark Creekmur;
> - Nicholas Anthony Kagay;
> - Steven J Hamilton Jr;
> - John R. Walker;
> - Rick Mishleau;
> - Steven Molen Sr;
> - Mark Brauner; and
> - Wallace Lester Jones

and their predecessors and successors.[1]

The scope of the FLSA class that Plaintiffs originally pleaded in their motion for conditional certification currently includes:

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

Plaintiffs' Reply ISO Conditional Certification, Dkt. No. 113, at p. 1. While there is nothing inherent in the original class definition that is problematic with the standard for conditional certification, Plaintiffs have identified an extrinsic area of concern that can be addressed by narrowing the scope of the FLSA class. Specifically, Plaintiffs' continued investigations and discussions have shown that Defendant's current financial situation is tenuous. They ask the Court to narrow the class definition due to Defendant's current financial condition because it is not in the best interest of the parties or the Court to litigate the claims of a nationwide class that could ultimately drive an employer into insolvency.

Narrowing the class definition would not only address the substantial risk posed by Defendant's current financial condition. It would also be more efficient and manageable because Plaintiffs will litigate the claims of fewer employees, and the litigation will focus on a narrower number of restaurant locations all supervised by the same Area Directors who supervised the restaurants where opt-in Plaintiffs were employed. In the analogous Rule 23 context, this Court has favored tailoring the class definition and narrowing the scope of the class to address manageability concerns. *Brooks v. GAF Materials Corp.,* No. 8:11-CV-00983-JMC, 2012 WL

[1] Defendant produced information identifying the Area Directors and the restaurant locations they oversaw. In order to redefine the class Plaintiffs cross-referenced a list of restaurant locations at which opt-in Plaintiffs worked with Defendant's information identifying the Area Director responsible for each location.

5195982, at *3 (D.S.C. Oct. 19, 2012) clarified on denial of reconsideration, No. 8:11-CV-00983-JMC, 2013 WL 461468 (D.S.C. Feb. 6, 2013)(attached as Exhibit A).

Moreover, employees who are excluded from the narrower FLSA class definition will not be unfairly impacted. The narrower definition of the FLSA class will not preclude any employee from bringing her own action to enforce her rights. Ultimately, if Plaintiffs in the narrower class were to prevail, all current employees will benefit because Defendant is likely to change its practices to comply with the wage and hour laws. If Plaintiffs are not successful, the employees that were not part of this litigation would not suffer any harm.

I. Defendant's current financial condition warrants limiting the scope of the FLSA class.

Plaintiffs seek to limit the scope of the FLSA class because Defendant's current financial condition creates a substantial risk that it may not be able to withstand a judgment on behalf of a nationwide class of Servers.

Plaintiffs have come to this conclusion because Defendant has been through two bankruptcies in the past seven years, one in 2008 and a second in 2012[2], and continued discovery and evaluation of settlement have made Plaintiffs aware of additional challenges to Buffets' financial condition. Recent filings in the Bankruptcy Court overseeing Buffets' second bankruptcy indicate that Buffets continues to face financial challenges, including negative net earnings. *See, Post-Confirmation Quarterly Summary Report for the Reporting Period Beginning September 25, 2014 and Ending December 17, 2014, In re: Buffets Restaurants Holdings, Inc. et al,* Case Nos. 12-10237 to 12-10252, Dkt. No. 1566 at p. 5 (attached as Exhibit B).

[2] Buffets filed for Chapter 11 bankruptcy twice in the past six years, emerging from its most recent reorganization on July 18, 2012. Defendant's Opposition to Conditional Certification, Dkt. 101 at p. 30.

Limiting the scope of the class avoids the risk that a judgment may drive Defendant into a third bankruptcy with the result that it would be unable to satisfy a judgment favorable to Plaintiffs in this matter.

II. Limiting the scope of the FLSA class also promotes efficiency and strengthens the argument for collective certification.

Limiting the scope of the class also brings greater efficiency to the litigation and strengthens the argument for collective action certification. The evidence is strong that Area Directors were responsible for overseeing the practices in individual restaurants and implementing corporate directives such as the Labor Calculator. Indeed, in the parties' joint 26(f) report, Defendant identifies "Area Level Managers" where "Named Plaintiffs" and "Consent to Sue" Servers worked as having knowledge of Defendant's operations including: the services Plaintiffs provided to guests, manager and employee training, and the policies, procedures, and practices related to work schedules, timekeeping, off-the-clock work, and tip credit. Joint Rule 26 Statement of Facts, Dkt. No. 61 at pp. 3-5.

Plaintiffs described the Area Directors' critical role in their briefing:

> Individual restaurants are also monitored through field management that reports to corporate. Area Directors oversee individual restaurants and report to Regional Vice Presidents who report directly to corporate. Area Directors are expected to visit each individual restaurant regularly and complete a written report evaluating the restaurant in more than 60 categories. 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.

Plaintiffs' Reply ISO Conditional Certification, Dkt. No. 113, at pp. 5-6. (internal citations omitted). Defendant corroborated the supervisory role Area Directors play for individual restaurants in its briefing:

> Buffets' GMs report directly to Area Directors ("ADs"), who oversee an "area" of restaurants limited to restaurant concepts unique to each Division. (Wykes Dep. pp. 35-36, 55). . . . ADs will, at times, address issues arising from restaurants in their area; however, whether or when an AD does any follow-up is up to each AD. (Wykes Dep. pp.

> 147, 150-151). While ADs are eligible to receive bonuses based upon the cumulative performance of their area, an AD's "performance" is not specifically tied to labor costs in individual restaurants. (Id. at pp. 54, 57). ADs report to Vice Presidents of Operations ("VPOs") who oversee a region comprised of restaurants unique to each Division, and report to senior leaders. (Id. at pp. 52-53, 55).

Defendant's Opposition to Conditional Certification, Dkt. 101 at 5-6.

Plaintiffs have also described the role Area Directors played in the implementation of corporate policies to reduce labor costs through a Labor Calculator:

> 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 . . . 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. 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. 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. 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.

Plaintiffs' Reply ISO Conditional Certification, Dkt. No. 113, at p. 9 (internal citations omitted). Defendant's 30(b)(6) deposition witness confirmed that Area Directors monitored labor costs for individual restaurants through the Labor Calculator:

> "[T]hat's where the [AD] comes into play, and would evaluate the restaurant. He might find that [the restaurant is] going to need to spend more labor than the calculator calls for, in order to operate the restaurant the way they need to operate it."

Id. at 12 (citing the Wykes Deposition at p. 124)

Because Area Directors directly supervise individual restaurants and are responsible for overseeing the implementation of corporate policies and practices, the same law and reasoning that supports conditional certification of the original class supports certification of this more

refined class. Moreover, litigating claims on behalf of the revised class is more manageable as it is limited to specific areas and a narrower number of employees.

Accordingly, Plaintiffs request that the Court narrow the scope of the FLSA class they seek to conditionally certify in order to avoid risk of non-payment of any resulting judgment and to create further efficiencies in the litigation.

Respectfully submitted,

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Local Rule 7.02 Certification:
Counsel certifies that, prior to filing this Motion, her co-counsel conferred with opposing counsel and attempted in good faith to resolve the matters contained in this Motion, to no avail.

March 18, 2015
Columbia, South Carolina