UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

LYNN WALTER, 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)**

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

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

David A. Young (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
dyoung@davidyounglaw.com

M. Malissa Burnette, Esq.
Callison Tighe & Robinson, LLC
1812 Lincoln Street
P.O. Box 1390
Columbia, SC 2902
Phone: 803-404-6900
Fax: 803-404-6901
mmburnette@callisontighe.com

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Regulations

Plaintiffs Walter, Brown, and Abston, have moved this Court, pursuant to 29 U.S.C. §216(b), for an order certifying this action as an Fair Labor Standards Act (FLSA) collective action and to authorize Plaintiffs to issue notice to similarly situated employees of Defendant Buffets, Inc.[1] 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 11, 2010 and the date of final judgment in this matter who worked as tipped employees earning a sub-minimum, tip credit wage rate.

STATEMENT OF THE CASE

I. Plaintiffs' Claim

The Named Plaintiffs are individuals who were employed as servers at Buffet, Inc.'s Columbus, Ohio location. Sixty (60) additional Servers from fourteen (14) different states have opted into the action. Buffets, Inc. operates approximately 340 buffet style restaurants in 35 different states under various names including HomeTown Buffet, Old Country Buffet, Ryan's Grill Buffet, Fire Mountain, and Country Buffet.[2] Buffets, Inc. treats its servers as "tipped employees" pursuant to 29 U.S.C. §203(m) which allows an employer to pay workers, in occupations that regularly receive more than $30 a month in tips, less than the minimum wage as long as the tips are sufficient to bring the workers

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[1] This motion refers to Defendant as Buffets, Inc. Buffets, Inc. claims that it changed its operating name to Buffets, Inc. d/b/a Ovation Brands on October 30, 2013.

[2] Ex. 1, *Ovation Brands Newsroom*, available at http://news.ovationbrands.com/about (last visited February 28, 2014) ("*Ovation Brands Newsroom*").

earnings up to the minimum wage level.[3] The Department of Labor (DOL) has interpreted this provision of the FLSA as allowing an employer to pay this sub-minimum "tip credit" wage even for time that a worker spends on non-tip-producing work related to his or her tipped occupation, as long as that work is only done on an incidental basis. 29 C.F.R. §531.56(e). [4] However, if the time spent on non-tip producing duties is substantial (i.e. more than 20%), the full minimum wage must be paid for the hours spent on those duties. DOL Field Operations Handbook §30d00(e); *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 880 (8th Cir. 2011) (finding that the DOL's 20% rule a reasonable interpretation of the regulation). In addition, the full minimum wage must be paid for any hours in which a tipped employee is assigned to perform duties unrelated to his or her tipped occupation. 29 C.F.R. §531.56(e).

Plaintiffs allege that Buffets, Inc. violated these provisions of the FLSA by regularly assigning servers throughout its operations to perform non-tip-producing job work, including washing dishes and cleaning and restocking food and beverage areas, on more than an incidental basis without paying them the full minimum wage for the time

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[3] Ex. 1, *Ovation Brands Newsroom*; Ex. 2, Declaration of Robin Kathlene Abston in Support of Plaintiffs' Motion for Conditional Certification ("Abston Decl.") ¶ 17; Ex. 3, Declaration of Cindy Lynn Brown in Support of Plaintiffs' Motion for Conditional Certification ("Brown Decl.") ¶ 18; Ex. 4, Declaration of Katherine Howell in Support of Plaintiffs' Motion for Conditional Certification ("Howell Decl.") ¶ 19; Ex. 5, Declaration of Rebecca Johnson in Support of Plaintiffs' Motion for Conditional Certification ("Johnson Decl.") ¶ 14; Ex. 6, Declaration of Eleanor Morehead in Support of Plaintiffs' Motion for Conditional Certification ("Morehead Decl.") ¶ 17; Ex. 7, Declaration of Gayla Spon in Support of Plaintiffs' Motion for Conditional Certification ("Spon Decl.") ¶ 17; Ex. 8, Declaration of Cheryl Lynn Walter in Support of Plaintiffs' Motion for Conditional Certification ("Walter Decl.") ¶ 17; Ex. 9, Declaration of Shirley Ward in Support of Plaintiffs' Motion for Conditional Certification ("Ward Decl.") ¶ 18.

[4] The FLSA allows an employer to pay as little as $2.13/hour to tipped employees. However, States can require a higher cash wage for tipped employees. For example, Ohio requires a minimum cash wage of $3.93 per hour, Missouri requires $3.67 per hour, and Illinois requires $4.95 per hour.

spent on those duties and also regularly assigned servers to job duties unrelated to the occupation of server, such as cleaning restrooms, sweeping and mopping floors, washing furniture and walls, and emptying trash, without paying minimum wage for that time.

II. Course of Proceedings

Plaintiffs' original complaint was filed on October 17, 2013 in the District of Minnesota—where Plaintiffs understood Buffets, Inc. corporate offices to be located. Buffets, Inc. moved to transfer venue to the Greenville Division of the District of South Carolina claiming that, while some of their corporate offices were in Minnesota, the bulk of their corporate operations were located in South Carolina. Plaintiffs did not oppose the motion to transfer and the case was ordered transferred on October 31, 2013. Buffets, Inc. filed a motion to dismiss Plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6) on November 13, 2013. Dkt. No. 22. Plaintiffs amended their complaint in response to the motion. Dkt. No. 47. Buffets, Inc. answered the amended complaint on April 7, 2014. Dkt. No. 55. On April 8, 2014, this Court entered a Conference and Scheduling Order. Dkt. No. 56. On April 28, 2014, the parties held their 26(f) conference as directed by the Court's Order. Dkt. No. 56 at ¶1. No discovery has yet been conducted by either side. In addition to the three Named Plaintiffs, sixty (60) other Servers from fourteen (14) different states have opted into the action.

III. Facts Relevant to the Motion

Buffets, Inc. operates Buffets, Inc. operates approximately 340 buffet style restaurants in 35 different states including South Carolina and Ohio.[5] Its restaurants operate under various names including HomeTown Buffet, Old Country Buffet, Ryan's,

[5] Ex. 1, *Ovation Brands Newsroom*.

Fire Mountain, and Country Buffet.[6] All Buffets, Inc. restaurants, regardless of name, offer self-service buffets featuring entrees, sides and desserts for an all-inclusive price. Buffets, Inc. employs Servers at each of its locations and pays them a sub-minimum "tip credit" wage.[7]

At each of Buffets, Inc.'s restaurants Servers' job duties include greeting customers, telling them about featured foods and Buffets, Inc. promotions, checking on them throughout their meals and addressing their needs, keeping tables clear, thanking customers when they are done and cleaning and resetting the table for the next customer.[8]

Plaintiff Walter has been employed as a server by Buffets, Inc. in its Columbus Ohio restaurant on Chantry Drive for approximately 15 years. She is paid for all of her work time as a "tipped employee" at a rate of $3.92 per hour. [9]

Plaintiff Brown was employed as a server by Buffets, Inc. in its Columbus Ohio restaurant on Chantry Drive from approximately December 1997 until August 2012. She was employed as a server and compensated for all of her time as a "tipped employee" at a rate of $3.70 per hour. [10]

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[6] Ex. 1, *Ovation Brands Newsroom*, see also Ex. 10, *Restaurant Menus*, available at http://ryans.com/menus/menu-samples (last visited February 2, 2014); http://oldcountrybuffet.com/menus/menu-samples (last visited February 2, 2014); http://hometownbuffet.com/menus/menu-samples (last visited February 2, 2014); http://www.firemountainbuffet.com/menus/menu-samples (last visited February 2, 2014); ("*Restaurant Menus")* (showing various menus).

[7] Ex. 2, Abston Decl. ¶ 29; Ex. 3, Brown Decl. ¶ 28; Ex. 4, Howell Decl. ¶ 34; Ex. 5, Johnson Decl. ¶ 26; Ex. 6, Morehead Decl. ¶ 23; Ex. 7, Spon Decl. ¶ 37; Ex. 8, Walter Decl. ¶ 30; Ex. 9, Ward Decl. ¶ 29.

[8] Ex. 2, Abston Decl. ¶ 20; Ex. 3, Brown Decl. ¶ 21; Ex. 4, Howell Decl. ¶ 22; Ex. 5, Johnson Decl. ¶ 17; Ex. 6, Morehead Decl. ¶ 20; Ex. 7, Spon Decl. ¶ 20; Ex. 8, Walter Decl. ¶ 21; Ex. 9, Ward Decl. ¶ 21.

[9] Ex. 8, Walter Decl. ¶ 3, 18.

[10] Ex. 3, Brown Decl. ¶ 3, 18.

Plaintiff Abston has been employed as a server by Buffets, Inc. in its Columbus, Ohio restaurant on Chantry Drive since approximately June 2003. Throughout that time she has worked as a server and been paid for all of her work time as a "tipped employee" at a rate of $3.92 per hour.[11]

In addition to their regular tip-producing activities waiting on customers, Buffets Inc. expects its Servers to perform many non-tip-producing duties including cleaning restrooms, sweeping and mopping floors, washing furniture and walls, emptying trash, washing dishes, cleaning and restocking food and beverage areas, and washing windows, blinds, and light fixtures.[12]

Buffets, Inc. Servers were not paid the full minimum wage for the time spent working on these non-tip-producing duties even though the duties occupy far more than 20% of each Server's work time.[13] Moreover, it is frequently impossible for Servers to perform all of the non-tip-producing jobs assigned to them during their regular shifts. As

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[11] Ex. 2, Abston Decl. ¶3, 17.

[12] See, Ex. 2, Abston Decl. ¶ 23; Ex. 3, Brown Decl. ¶ 22; Ex. 8, Walter Decl. ¶ 24 (describing non-tip-producing activities assigned to servers at the Columbus, Ohio, HomeTown Buffets restaurant); Ex. 4, Howell Decl. ¶ 25 (describing non-tip-producing activities assigned to servers at the Pensacola, Florida, Ryan's restaurant); Ex. 5, Johnson Decl. ¶ 20 (describing non-tip-producing activities assigned to servers at the Michigan City, Indiana, Ryan's restaurant); Ex. 6, Morehead Decl. ¶ 22 (describing non-tip producing jobs assigned to servers at the Boaz, Alabama, Ryan's restaurant); Ex. 7, Spon Decl. ¶ 22 (describing non-tip-producing jobs assigned to servers at the Joplin, Missouri, Ryan's restaurant); Ex. 9, Ward Decl. ¶ 23 (describing non-tip-producing jobs assigned to servers at the Marion, Illinois, Ryan's restaurant).

[13] Ex. 2, Abston Decl. ¶ 27; Ex. 3, Brown Decl. ¶ 26; Ex. 4, Howell Decl. ¶ 29; Ex. 5, Johnson Decl. ¶ 24; Ex. 6, Morehead Decl. ¶ 27; Ex. 7, Spon Decl. ¶ 26; Ex. 8, Walter Decl. ¶ 28; Ex. 9, Ward Decl. ¶ 27.

a result, Servers throughout Buffets, Inc.'s system regularly perform these tasks before and after their regular shifts without any compensation at all.[14]

Buffets, Inc. exercises a high degree of corporate control over each of the restaurants in its system. For example, Buffets, Inc. uses a common set of server duties that apply in its restaurants across the country.[15] The policies and procedures for Servers are used throughout the country at Buffets Inc. restaurant locations. Buffets, Inc. mandated the use of corporate menus, promotional materials, recipes, job descriptions, job duties, and dress codes throughout its restaurants. [16] Servers were all trained on corporate policies and received corporate materials that described corporate policies.[17] Server job duties and expectations were the same across the Company.[18] Servers

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[14] Ex. 2, Abston Decl. ¶ 36; Ex. 3, Brown Decl. ¶ 35; Ex. 4, Howell Decl. ¶ 41; Ex. 5, Johnson Decl. ¶ 33; Ex. 6, Morehead Decl. ¶ 35; Ex. 7, Spon Decl. ¶ 44; Ex. 8, Walter Decl. ¶ 37; Ex. 9, Ward Decl. ¶ 36.

[15] Ex. 15 Server Opening Duties Checklist; Ex. 16, Line Server Opening Beverage Bar Duties; Ex. 18, Declaration of Lisa Patterson in Support of Plaintiffs' Motion for Conditional Certification ("Patterson Decl.") ¶¶3-5 (testifying that the server duties listed in Ex.s 15 and 16 are corporate policies that apply in Buffets, Inc. restaurants across the country).

[16] Ex. 2, Abston Decl. ¶ 6; Ex. 3, Brown Decl. ¶ 6; Ex. 4, Howell Decl. ¶ 7; Ex. 5, Johnson Decl. ¶ 5; Ex. 6, Morehead Decl. ¶ 6; Ex. 7, Spon Decl. ¶ 6; Ex. 8, Walter Decl. ¶ 6; Ex. 9, Ward Decl. ¶ 6; Ex. 10, *Restaurant Menus* (showing Buffets, Inc. using the same form menu for each of its restaurants); Ex. 11, Job Descriptions, Ovation Brands' Website, available at: https://ovationbrandsjobs.clickandhire.net/index.cfm?action=hourly.descriptions&jobNo=233 (last visited December 4, 2013) ("*Job Descriptions*") (showing the same application process for all Buffets, Inc. restaurants); Ex. 12, *Hours and Locations* (showing the same internet marketing for each of Buffets, Inc. restaurants).

[17] Ex. 2, Abston Decl. ¶ 19; Ex. 3, Brown Decl. ¶ 20; Ex. 4, Howell Decl. ¶ 21; Ex. 5, Johnson Decl. ¶ 16; Ex. 6, Morehead Decl. ¶ 19; Ex. 7, Spon Decl. ¶ 19; Ex. 8, Walter Decl. ¶ 20; Ex. 9, Ward Decl. ¶ 20.

[18] Ex. 2, Abston Decl. ¶¶ 20, 23; Ex. 3, Brown Decl. ¶¶ 21, 22; Ex. 4, Howell Decl. ¶¶ 22, 25; Ex. 5, Johnson Decl. ¶ 17, 20; Ex. 6, Morehead Decl. ¶¶ 20, 22; Ex. 7, Spon Decl. ¶¶ 20, 22; Ex. 8, Walter Decl. ¶ 21, 24; Ex. 9, Ward Decl. ¶¶ 21, 23.

throughout the country were paid a sub-minimum "tip credit" wage.[19] All the locations employed the same job titles.[20] Each store used the same computerized time recording system.[21] And employees' scheduled and actual work hours were monitored at the corporate level.[22]

Plaintiffs attest that Buffets, Inc.'s practice of requiring Servers to do extensive non-tip-producing work while still taking the tip credit is a company-wide practice resulting from a corporate policy. In addition, approximately three years ago, Buffets, Inc., instituted a corporate-wide staffing policy called "Matrix."[23] This policy limited the labor costs that a restaurant could incur based on a formula applied to the restaurant's sales.[24] All Buffets Inc., general managers were required to adhere to the Matrix policy.[25] 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. Because the non-tip-producing work previously performed by non-tipped

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19 Ex. 2, Abston Decl. ¶ 17; Ex. 3, Brown Decl. ¶ 18; Ex. 4, Howell Decl. ¶ 19; Ex. 5, Johnson Decl. ¶ 14; Ex. 6, Morehead Decl. ¶ 17; Ex. 7, Spon Decl. ¶ 17; Ex. 8, Walter Decl. ¶ 18; Ex. 9, Ward Decl. ¶ 18.

20 Ex. 2, Abston Decl. ¶¶ 8-16; Ex. 3, Brown Decl. ¶¶ 8-17; Ex. 4, Howell Decl. ¶¶ 9-18; Ex. 5, Johnson Decl. ¶¶ 7-13; Ex. 6, Morehead Decl. ¶¶ 8-16; Ex. 7, Spon Decl. ¶¶ 8-16; Ex. 8, Walter Decl. ¶¶ 8-17; Ex. 9, Ward Decl. ¶¶ 8-17.

21 Ex. 2, Abston Decl. ¶¶ 31,32; Ex. 3, Brown Decl. ¶¶ 30, 31; Ex. 4, Howell Decl. ¶¶ 36, 37; Ex. 5, Johnson Decl. ¶¶ 28, 29; Ex. 6, Morehead Decl. ¶¶ 30, 31; Ex. 7, Spon Decl. ¶¶ 39, 40; Ex. 8, Walter Decl. ¶¶ 32, 33; Ex. 9, Ward Decl. ¶¶ 31, 32.

22 Ex. 4, Howell Decl. ¶¶ 31, 32; Ex. 5, Johnson Decl. ¶ 25; Ex. 7, Spon Decl. ¶¶ 28-32.

23 Ex. 4, Howell Decl. ¶¶ 30-32; Ex. 7, Spon Decl. ¶¶ 27-33.

24 *Id.*

25 *Id.*

workers still had to be performed, Servers—all of whom were paid less than the standard minimum wage—were assigned these non-tip-producing duties in addition to non-tip-producing work already assigned to them.[26] The additional work combined with the Matrix's strict limits on labor costs resulted in Servers performing the work before and after their shifts when the time was unrecorded.[27] In that way, Buffets, Inc. cut its labor costs throughout its system.

At no time, either before or after the institution of the Matrix system, did Buffets, Inc. monitor the amount of time that Servers spent on non-tip-producing work.[28]

ARGUMENT

I. Legal Standard for Certifying an FLSA Collective Action

Under the FLSA, employees may maintain a collective action on behalf of themselves and "other employees similarly situated." 29 U.S.C. § 216(b). To implement this provision, Courts may authorize the issuance of notice to similarly situated employees informing them of the action and of their right to opt-in as plaintiffs. *Hoffman–La Roche Inc. v. Sperling,* 493 U.S. 165, 170 (1989). District courts generally take a two-step approach to certification of FLSA collective actions. *Visco v. Aiken Cnty., S.C.*, CIV.A. 1:11-01428, 2013 WL 5410134 (D.S.C. Sept. 26, 2013); *Curtis v. Time*

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[26] Ex. 2, Abston Decl. ¶¶ 28, 29; Ex. 3, Brown Decl. ¶¶ 27, 28; Ex. 4, Howell Decl. ¶¶ 33, 34; Ex. 5, Johnson Decl. ¶¶ 25, 26; Ex. 6, Morehead Decl. ¶ 28; Ex. 7, Spon Decl. ¶¶ 27, 34-35; Ex. 8, Walter Decl. ¶¶ 29, 30; Ex. 9, Ward Decl. ¶¶ 28, 29.

[27] 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.

[28] Ex. 2, Abston Decl. ¶ 26; Ex. 3, Brown Decl. ¶ 25; Ex. 4, Howell Decl. ¶ 28; Ex. 5, Johnson Decl. ¶ 23; Ex. 6, Morehead Decl. ¶ 26; Ex. 7, Spon Decl. ¶ 25; Ex. 8, Walter Decl. ¶ 27; Ex. 9, Ward Decl. ¶ 26.

Warner Entm't-Advance/Newhouse P'ship, 3:12-CV-2370-JFA, 2013 WL 1874848 at *2 (D. S.C May 3, 2013); *MacGregor v. Farmers Ins. Exchg.,*2:10-CV-03088, 2012 WL 2974679 at *1 (D.S.C. July 20, 2012); *Simons v. Pryor's Inc.*, 3:11-CV-0792-CMC, 2011 WL 3158724 at *1 (D.S.C. July 26, 2011). In general, at the first step, or notice stage, the court considers whether other similarly situated employees should be notified of the opportunity to join the action. *Visco*, 2013 WL 5410134, *5; *Curtis,* 2013 WL 1874848 at *2 *quoting Morgan v. Family Dollar Stores, Inc.,* 551 F.3d 1233, 1260 (11th Cir. 2008). The second step, which typically occurs after substantial discovery has taken place, "is triggered by an employer's motion for decertification." *Curtis,* 2013 WL 1874848 at *2. "At the second stage of collective action certification, the court makes a factual finding on the 'similarly situated' issue, based on the record produced through discovery." *Visco,* 2013 WL 5410134, *5

Because 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 concluded that the objectives to be served through a collective action justify the conditional certification of a class of putative plaintiffs early in a proceeding, typically before any significant discovery, upon an initial showing that the members of the class are similarly situated." *Curtis,* 2013 WL 1874848 at *3 *quoting Houston v. URS Corp.,* 591 F.Supp.2d 827, 831 (E.D. Va. 2008); *MacGregor,* 2012 WL 2974679 at *2 (noting that the notice stage generally occurs before plaintiffs have an opportunity to conduct discovery). As a result of the need to rule before discovery can be conducted, courts apply a "fairly lenient" standard to the initial notice determination. *Curtis,* 2013 WL 1874848 at *2; *Visco,* 2013 WL 5410134, at *5 (explaining that plaintiffs' burden at the

conditional certification and notice stage is light); *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261 (11th Cir. 2008); *Cormer v. Walmart Stores,* 454 F.3d 544, 547 (6th Cir. 2006). Plaintiffs' burden is simply to make a "modest factual showing" that they and potential opt-in plaintiffs "together were victims of a common policy or plan that violated the law." *Curtis,* 2013 WL 1874848 at *2 *quoting Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010); *Visco,* 2013 WL 5410134, at *5; *Simons,* 2011 WL 6012484 at *1 (D.S.C. Nov. 30, 2011); *Benbow v. Gold Kist, Inc.*, 3:06-CV-02751-MBS, 2007 WL 7595027 at *2 (D.S.C. Apr. 16, 2007) citing *Iglesias-Mendoza v. LaBell Farm, Inc.*, 239 F.R.D. 363, 368 (S.D.N.Y. 2007) (a modest showing that plaintiffs "were subjected to certain wage hour practices at defendants' workplace and to the best of their knowledge, and on the basis of their observations, their experience was shared by members of the proposed class"). While the burden of showing that the potential class members are similarly situated is not onerous, it is also not invisible. *Visco,* 2013 WL 5410134, at *5; *MacGregor,* 2012 WL 2974679 at *2. Mere allegations will not suffice; some factual evidence is necessary. *Id.; Curtis,* 2013 WL 1874848 at *2.

II. Plaintiffs Have Met Their Modest Factual Burden of Showing that Buffets Inc. Servers Are Similarly Situated

Plaintiffs assert that they and all of Buffets, Inc.'s other servers throughout the country have together been the victims of Buffets, Inc.'s central policy and uniform practice of assigning non-tip-producing work to servers, including work jobs unrelated to serving, on more than an incidental basis and without paying minimum wage for the time spent on that work. Plaintiffs have met their burden of coming forward with "modest" factual support for these allegations in the form of affidavits from eight servers working in six different locations in six different states and documentary evidence.

The work of Servers in all the Buffets, Inc. locations was highly controlled by Buffets, Inc.'s corporate policies and practices. The Server affidavits show that Buffets, Inc.'s different locations are all staffed and operated in a similar manner. For example, the various locations employ the same job titles and the titles have the same job duties throughout the country, they operated on similar schedules, they all use the same menus, recipes and promotional manuals, and they all use the same corporate employment policies.[29] The server affidavits also demonstrate that servers in all locations are paid in the same manner—i.e. at a sub-minimum "tip credit" wage for all of their work time and are not paid the full minimum wage regardless of the tasks assigned to them.[30] In addition to the extensive testimony, Plaintiffs have presented documentary evidence of Buffets, Inc.'s extensive corporate control of individual restaurants. For example, Buffets, Inc.. uses a common set of server duties across the country,[31] it operates all restaurants across 35 states, the menus are the same across the restaurants, job descriptions are the same, and all restaurants use the same marketing format and operate during similar hours.[32]

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[29] Ex. 2, Abston Decl. ¶¶ 5-16, 19; Ex. 3, Brown Decl. ¶¶ 5-17, 20; Ex. 4, Howell Decl. ¶¶ 6-18, 21; Ex. 5, Johnson Decl. ¶¶ 4-13, 16; Ex. 6, Morehead Decl. ¶¶ 5-16, 19; Ex. 7, Spon Decl. ¶¶ 5-16, 19; Ex. 8, Walter Decl. ¶¶ 5-17, 20; Ex. 9, Ward Decl. ¶¶ 5-17, 20.

[30] Ex. 2, Abston Decl. ¶ 17; Ex. 3, Brown Decl. ¶ 18; Ex. 4, Howell Decl. ¶ 19; Ex. 5, Johnson Decl. ¶ 14; Ex. 6, Morehead Decl. ¶ 17; Ex. 7, Spon Decl. ¶ 17; Ex. 8, Walter Decl. ¶ 18; Ex. 9, Ward Decl. ¶ 18.

[31] Ex. 15 Server Opening Duties Checklist; Ex. 16, Line Server Opening Beverage Bar Duties; Ex. 18 Patterson Decl. ¶¶ 3-5.

[32] Ex. 1, *Ovation Brands Newsroom* (showing restaurants Buffets, Inc. operates); Ex. 10, *Restaurant Menus* (showing common menus used across Buffets, Inc. restaurants); Ex. 11, *Job Descriptions* (showing the same job application across Buffets, Inc. restaurants); Ex. 12, *Hours and Locations*, available at: http://locations.buffet.com/SC/SPARTANBURG/2107/index.html?utm_source=Buffets&utm_medium=Store%2BLocator&utm_campaign=Buffets%2BStore%2BLocator (last visited March 7); http://locations.buffet.com/PA/BEAVER-FALLS/2457/index.html?utm_source=Buffets&utm_medium=Store%2BLocator&utm_c

The testifying Servers confirm that Servers throughout the Buffets, Inc. system are routinely assigned to perform non-tip-producing work that takes up far more than 20% of their work time.[33] Many of these jobs, such as cleaning floors, bathrooms, walls and windows, are wholly unrelated to the occupation of server.[34] Moreover, because of Buffets, Inc.'s strict limits on labor costs, Servers are required to perform their work before and after their shifts when the work is unrecorded.[35]

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ampaign=Buffets%2BStore%2BLocator (last visited March 7); http://locations.buffet.com/MO/WEST-PLAINS/2375/index.html?utm_source=Buffets&utm_medium=Store%2BLocator&utm_campaign=Buffets%2BStore%2BLocator (last visited March 24, 2014); http://locations.buffet.com/KY/RICHMOND/2390/index.html?utm_source=Buffets&utm_medium=Store%2BLocator&utm_campaign=Buffets%2BStore%2BLocator (last visited March 7, 2014); http://locations.buffet.com/IL/MARION/2281/index.html?utm_source=Buffets&utm_medium=Store%2BLocator&utm_campaign=Buffets%2BStore%2BLocator (last visited March 24, 2014); http://locations.buffet.com/IN/MICHIGAN-CITY/2439/index.html?utm_source=Buffets&utm_medium=Store%2BLocator&utm_campaign=Buffets%2BStore%2BLocator (last visited March 24, 2014); http://locations.buffet.com/TN/HIXSON/2122/index.html?utm_source=Buffets&utm_medium=Store%2BLocator&utm_campaign=Buffets%2BStore%2BLocator (last visited March 6, 2014); http://locations.buffet.com/OH/COLUMBUS/0778/index.html?utm_source=Buffets&utm_medium=Store%2BLocator&utm_campaign=Buffets%2BStore%2BLocator (last visited March 7, 2014); http://locations.buffet.com/FL/PENSACOLA/2180/index.html?utm_source=Buffets&utm_medium=Store%2BLocator&utm_campaign=Buffets%2BStore%2BLocator (last visited February 4, 2014), ("*Hours and Locations*").

[33] Ex. 2, Abston Decl. ¶ 27; Ex. 3, Brown Decl. ¶ 26; Ex. 4, Howell Decl. ¶ 29; Ex. 5, Johnson Decl. ¶ 24; Ex. 6, Morehead Decl. ¶ 27; Ex. 7, Spon Decl. ¶ 26; Ex. 8, Walter Decl. ¶ 28; Ex. 9, Ward Decl. ¶ 27.

[34] Ex. 2, Abston Decl. ¶ 23; Ex. 3, Brown Decl. ¶ 22; Ex. 4, Howell Decl. ¶ 25; Ex. 5, Johnson Decl. ¶ 20; Ex. 6, Morehead Decl. ¶ 22; Ex. 7, Spon Decl. ¶ 22; Ex. 8, Walter Decl. ¶ 24; Ex. 9, Ward Decl. ¶ 23.

[35] 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.

The requirement that Servers perform extensive non-tip-producing work is the result of Buffets, Inc.'s corporate-wide staffing policy, called "Matrix." This policy limited the labor costs that a restaurant could incur based on a formula applied to the restaurant's sales. All Buffets, Inc., general managers were required to adhere to the Matrix policy. As a result of the Matrix policy general managers were required to reduce labor costs by laying off staff, including staff who did non-tipped jobs such as washing dishes, cleaning, and setting up, stocking, maintaining, and cleaning the buffet line for an hourly rate equal to or greater than the minimum wage. Because these non-tip-producing jobs still had to be performed, they were assigned to other workers, most often Servers who are paid less than the minimum wage. In that way, Buffets, Inc. not only reduced its labor force, but was able to have these non-tip-producing tasks performed at a lower rate of pay than had previously been the case when minimum wage workers did them. As a consequence, however, the amount of non-tip-producing work performed by Servers increased significantly and was unrecorded in part.[36]

This evidence is more than sufficient to satisfy Plaintiffs' modest burden of coming forward with evidence to support their allegations that Servers throughout Buffets, Inc. restaurants were together victims of Buffets, Inc.'s uniform policy or practice of assigning excessive non-tip-producing work to Servers without paying minimum wage for that work time. Indeed, other courts have certified claims challenging excessive non-tip-producing work as FLSA collective actions based on similar evidence. For example, in *Fast v. Applebee's International, Inc.,* 243 F.R.D. 360 (W.D. Mo. 2007), the court certified an FLSA action on behalf of all tipped employees working in

[36] Ex. 4, Howell Decl. ¶¶ 30-32; Ex. 7, Spon Decl. ¶¶ 27-35. Howell ¶¶ 30-33, Morehead ¶ 28, Spon ¶¶ 27-35.

restaurants operated by Applebee's. As in this case, the plaintiffs alleged that Applebee's assigned excessive non-tip-producing work to tipped employees without paying the required minimum wage for that work time. The plaintiffs produced the affidavits of two tipped employees from two different stores who claimed to have worked in excess of 20% of their time on non-tipped work. The plaintiffs also submitted testimony about that corporate policies that encouraged restaurant managers to use low-wage tipped employees to perform jobs that were non-tip-producing as a way to save money. *Id.* at *363. Similarly, in *Ervin v. OS Restaurant Services Inc.*, 2009 WL 1904544 (N.D. Ill. July 1, 2009), *reversed on other grounds*, 632 F.3d 971 (7th Cir. 2011), the court certified an FLSA collective action on behalf of tipped employees of Outback Steakhouse who claimed that they should have been paid the full minimum wage for time spent on non-tip-producing duties based on the deposition testimony of two tipped employees and affidavits from another five. *Id.* at *3. (On appeal, the Seventh Circuit vacated the court's refusal to certify similar state law claims as a Rule 23 class and remanded for reconsideration of the class). *See also Clark v Honey Jam Café, LLC*, 2013 WL 1789519 (N.D. Ill. March 21, 2013) (certifying FLSA collective action and state minimum wage law Rule 23 action on behalf of tipped employees alleging they performed duties outside their tipped occupations without payment of minimum wage).

III. Buffets, Inc. Should Provide Addresses, and Telephone Numbers of Class Members to Assist with Issuance of Notice

Plaintiffs request that they be authorized to distribute the notice attached as Exhibit 13 by first-class mail—in order to make that possible, they request that Buffets, Inc. be ordered to produce all class members' addresses. Mailing is a common way to disseminate class notice in an FLSA collective action. *See, Curtis v. Time Warner*

Entm't-Advance/Newhouse P'ship, 12 Civ. 2370-JFA, 2013 WL 1874848, *8 (D.S.C. May 3, 2013) (authorizing mailing of court approved notice); *Simons v. Pryor's, Inc.*, 11 Civ. 0792-CMC, 2011 WL 6012484, *6 (D.S.C. Nov. 30, 2011) (directing defendants to "prepare a list with last known addresses" to facilitate mailing of notice to current and former employees' in FLSA collective action); *see also, Carter v. MV Transp., Inc.*, 8:09-CV-00527-RWT, 2012 WL 7861459, *1 (D. Md. Feb. 13, 2012) (mailing of notification of settlement in an FLSA collective action was appropriate method to distribute notice under the circumstances). To ensure that the mailed notice is as effective as possible the Court should also order Buffets, Inc. to produce the last four digits of the social security number and birth date of any class member whose notice is returned as undeliverable. The partial social security number and birth date will enable Plaintiffs to use address finder databases to identify a current address. This additional information to facilitate notice is routinely ordered to be produced in FLSA collective actions. *See, Rehberg v. Flowers Foods, Inc.*, 3:12CV596, 2013 WL 1190290, *2 (W.D.N.C. Mar. 22, 2013) (granting motion for conditional certification and directing defendants to provide plaintiffs with "names, last known addresses, dates of employment, job title, respective warehouse, phone numbers, last four digits of their Social Security numbers, and email addresses in an agreeable format for mailing"); *Hargrove v. Ryla Teleservices, Inc.*, 2:11CV344, 2012 WL 463442, *1 (E.D. Va. Feb. 13, 2012) (granting motion for conditional certification and ordering defendant "to provide Plaintiffs a list, in Excel format, of all persons employed by Defendant . . . which list shall include each employee's name, last known address, telephone number, employment dates, employment location, last four digits of their social security number, and date of birth."); *see also, Lynch v. United Services Auto.*

Ass'n, 491 F.Supp.2d 357, 371-72 (S.D.N.Y. 2007) (granting motion for conditional certification and ordering defendant to provide to plaintiffs the contact information of similarly-situated employees including date of birth and last four digits of their social security number).

Plaintiffs also request that the Court order Buffets, Inc. to post Notice of this lawsuit and consents to sue in a conspicuous location in the offices where it employs Servers. Posting of the notice contributes to dissemination among similarly-situated employees and serves what the Supreme Court recognizes as section 216(b)'s "legitimate goal of avoiding a multiplicity of duplicative suits and setting cutoff dates to expedite disposition of the action." *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 172, 110 S.Ct. 482, 487 (1989). It is an efficient, non-burdensome method of notice that courts regularly employ. *See Denney*, 2012 WL 3854466 at *4 (finding that "fair and proper notice to current and former servers will be accomplished by regular mail, electronic mail, and postings in defendants' break rooms."); *O'Donnell v. Southwestern Bell Yellow Pages, Inc.*, 11 Civ. 1107, 2012 WL 1802336, at* 4 (E.D.Mo. May 17, 2012) (ordering defendant to "conspicuously post" notice in the break room); *Ack v. Manhattan Beer Distributors, Inc.*, 11 Civ. 5582, 2012 WL 1710985, at *6 (E.D.N.Y. May 15, 2012) (ordering mailing and posting); *Jacob v. Duane Reade, Inc.*, 11 Civ. 0160, 2012 WL 260230 at * 9-10 (S.D.N.Y. Jan. 27, 2012) (approving posting at locations where all putative class members worked); *Gambino v. Harvard Protection Services LLC*, 10 Civ. 0983, 2011 WL 102691, at *2 (S.D.N.Y. Jan. 11, 2011) (ordering notice to be posted at defendant's chief place of business); *Sherrill v. Sutherland Global Servs. Inc.*, 487 F.Supp.2d 344, 351 (W.D.N.Y. 2007) (allowing notice to be posted at defendant's places

of business for 90 days and mailed to all class members); *Castillo v. P & R Enterprises, Inc.*, 517 F.Supp.2d 440, 449 (D.D.C. 2007) (ordering notice posted in "(1) Defendant's offices, or (2) office spaces designated for Defendant's use in third-party buildings"); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 492-493 (E.D.Cal. 2006) (finding that posting of notice in the workplace and mailing is appropriate and not punitive); *Veliz v. Cintas Corp.*, 03 Civ. 1180, 2004 WL 2623909, at * 2 (N.D.Cal. Nov. 12, 2004) (citing Court order to post notice in all workplaces where similarly situated persons are employed); *Garza v. Chicago Transit Authority*, 00 Civ. 0438, 2001 WL 503036, at *4 (N.D.Ill. May 8, 2001) (ordering defendant to post notice in all its terminals); *Johnson v. American Airlines, Inc.*, 531 F.Supp. 957, 961 (D.C.Tex. 1982) (finding that sending notice by mail, "posting on company bulletin boards at flight bases and publishing the notice without comment in American's The Flight Deck, are both reasonable and in accordance with prior authority").

In addition to the initial notice, Plaintiffs request that they be authorized to send a reminder post card and make an automated reminder telephone call to class members who have not responded by midway through the notice process. Reminder postcards are a common way to ensure that class members receive effective notice and to make sure that class members who are interested in joining the action do so within the opt in period. Courts routinely approve the sending of a follow-up postcard to class members who have not responded after the mailing of the initial notice. *See, Hargrove v. Ryla Teleservices, Inc.*, 2:11CV344, 2012 WL 463442, *1 (E.D. Va. Feb. 13, 2012) (ordering a reminder letter sent for class members who had not responded within thirty days of the notice); *see also, Helton v. Factor 5, Inc.*, C 10–04927 SBA, 2012 WL 2428219, *7 (N.D. Cal. June

26, 2012) (authorizing a reminder postcard to potential plaintiffs thirty (30) days prior to the deadline for opting into the action); *Graham v. Overland Solutions, Inc.*, 10 Civ. 672 BEN (BLM), 2011 WL 1769737, *4 (S.D. Cal. May 9, 2011) (authorizing a reminder postcard to individuals who did not return their the opt-in forms); *Harris v. Vector Mktg. Corp.*, 716 F. Supp. 2d 835, 847 (N.D. Cal. 2010) (authorizing a postcard reminder "since the FLSA requires an opt-in procedure, the sending of a postcard is appropriate."); *Hart v. U.S. Bank NA*, CV 12-2471-PHX-JAT, 2013 WL 5965637, at *6 (D. Ariz. Nov. 8, 2013) (authorizing a reminder postcard to potential opt-ins between mailing the initial notice and the close of the opt-in period); *Sanchez v. Sephora USA, Inc.*, No. 11–CV–3396, 2012 WL 2945753, at *6 (N.D. Cal. July 18, 2012) ("courts have recognized that a second notice or reminder is appropriate in an FLSA action since the individual is not part of the class unless he or she opts-in"); *Chhab v. Darden Restaurants, Inc.*, 11 CIV. 8345 NRB, 2013 WL 5308004 at *16 (S.D.N.Y. Sept. 20, 2013) (approving reminder letter); *Morris v. Lettire Const., Corp.*, 896 F. Supp. 2d 265, 275 (S.D.N.Y. 2012) ("Given that notice under the FLSA is intended to inform as many potential plaintiffs as possible of the collective action and their right to opt-in, we find that a reminder notice is appropriate.")

Telephone distribution is also considered an effective method of notice. For example, Judge Anderson approved the method in *Curtis v. Time Warner Entertainment*, 2013 WL 1874848 at 8 (D.S.C. May 3, 2013) (finding distribution "by mail and/or telephone . . . consistent with [the court's] managerial responsibilities to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way."); *see also Tice v. AOC Senior Home Health Corp.*, 826 F.Supp.2d 990, 996

(E.D.Tex. Sept. 30, 2011) (ordering production of telephone numbers of potential FLSA class members); *Williams v. XE Services LLC,*2:09-CV-59-D, 2011 WL 52353 at *4 (E.D. N.C. January 4, 2011) (same); *Recinos-Recinos v. Express Forestry, Inc.*, 233 F.R.D. 472, 482 (E.D. La. 2006) (same); *Blake v. Colonial Savings,* 04 Civ.A. 0944, 2004 WL 1925535 at * 2 (S.D. Tex. Aug. 16, 2004) (same); *Patton v. Thomson Corp.*, 364 F.Supp.2d 263, 268 (E.D.N.Y. 2005) (same). Using telephone notice in addition to mail increases the likelihood that class members will receive notice even if their mailing address has changed. Plaintiffs request that the Court order Buffets, Inc. to produce the telephone numbers for class members to facilitate telephone notice.

IV. Plaintiffs' Proposed Notice Should Be Approved

A copy of the notice the Plaintiffs propose to send to the Class Members is attached as Exhibit 13. This form of notice informs Class Members in neutral language of the nature of this action, of their right to participate in it by filing a consent to sue with the Court and the consequences of their joining or not joining the action.

A copy of the reminder postcard is attached as Exhibit 14. Accordingly, Plaintiffs request that the Court approve the form of Notice attached as Exhibit 13 to be mailed as the initial notice to class members and approve the form of the postcard reminder attached as Exhibit 14 to be sent as a reminder to class members who have not responded by midway through the notice process and the language in Exhibit 14 to be used for automated reminder telephone calls to those class members who have not responded. Plaintiff's counsel will bear the cost of distributing notices.

CONCLUSION

For all of the foregoing reasons, this Court should conditionally certify this action

as a representative action on behalf of all Servers employed by Buffets, Inc. employed by Buffets, Inc. during the past three years, authorize Plaintiffs' counsel to issue the notice attached as Exhibit 13 by mail and require Buffets, Inc. to post the Notice at its workplaces where Servers work. The Court should also order the sending of a reminder postcard in the form attached as Exhibit 14 and an automated reminder telephone call using the language from Exhibit 14 to those class members who have not responded by midway through the notice period. To facilitate the Notice and reminders, the Court should order Buffets, Inc. to provide Plaintiffs with the last known addresses and telephone numbers of all potential Class Members, so that Plaintiffs' counsel may issue the notice, and to provide the dates of birth and last four digits of the social security numbers for any class members whose notice is returned.

Date: May 8, 2014

Respectfully submitted,

/s/Michael J.D. Sweeney

GETMAN & SWEENEY, PLLC
9 Paradise Lane
New Paltz, NY 12561
Tel: (845) 255-9370
Email: msweeney@getmansweeney.com

Edward Tuddenham
228 West 137th Street
New York, NY 10030
Telephone: (212) 234-4443
Fax: (845) 255-8649
Email: etudden@prismnet.com

Attorneys for Plaintiffs