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United States District Court,
S.D. New York.

Jamel FLOOD, Ira Heaston, Isaac Heaston, Tashauna Reid, and Amy Courtemanche, on behalf of themselves and all others similarly situated, Plaintiffs,
v.
CARLSON RESTAURANTS INC., Carlson Restaurants Worldwide Inc., and T.G.I. Friday's Inc., Defendants.

No. 14 Civ. 2740(AT). | Signed Jan. 20, 2015.

MEMORANDUM AND ORDER

ANALISA TORRES, District Judge.

***1** Plaintiffs, on behalf of themselves and all others similarly situated, allege that Defendants, Carlson Restaurants Inc., Carlson Restaurants Worldwide Inc., and T.G.I. Friday's Inc., violated the Fair Labor Standards Act ("**FLSA**"), 29 U.S.C. § 201 *et seq.,* and the New York Labor Law.[1] Plaintiffs move for conditional collective action certification, court-authorized notice, and expedited discovery. Plaintiffs' motion is GRANTED in accordance with the conditions set forth below.

BACKGROUND

Carlson Restaurants Inc. and Carlson Restaurants Worldwide Inc. are among the world's largest private companies, employing more than 175,000 people. Am. Compl. ¶¶ 5, 7, ECF No. 73. T.G.I. Friday's Inc. is a wholly owned subsidiary of the Carlson entities. *Id.* ¶ 99. Together, Defendants operate 920 T.G.I. Friday's restaurants in 60 countries and territories. *Id.* ¶¶ 7, 96. Plaintiffs are former and current tipped employees at T.G.I. Friday's. *See* Compl. ¶¶ 47–67, ECF No. 2; Am. Compl. ¶¶ 48–73.

On April 17, 2014, Plaintiffs commenced this action "on behalf of themselves and all similarly situated current and former tipped workers"-including servers, bussers, runners, bartenders, barbacks, and hosts-employed at T.G.I. Friday's restaurants nationwide. Compl. ¶¶ 1, 106; *see also* Am. Compl. ¶¶ 1, 112. Plaintiffs allege that Defendants violated the **FLSA** because Defendants paid tipped employees less than the full statutory minimum hourly wage by availing themselves of the federal "tip credit." Am. Compl. ¶¶ 267–68. Plaintiffs argue that Defendants were not permitted to take the "tip credit" because Defendants: (1) failed to properly notify tipped workers of the **FLSA's** "tip credit" provisions; (2) required tipped workers to spend a substantial amount of time performing non-tip producing "side work"; and (3) distributed tips to tip-ineligible employees. *Id.* ¶¶ 268–69. Plaintiffs also claim that Defendants violated the **FLSA** by encouraging tipped workers to regularly work "off-the-clock" and by denying them overtime compensation. *Id.* ¶¶ 27, 276.

In support of collective action certification, Plaintiffs allege that, at all relevant times, they and other tipped employees "are and have been similarly situated" and "have had substantially similar job requirements and pay provisions." Am. Compl. ¶ 113. Plaintiffs claim that they and their counterparts have been subjected to the same company-wide policies, practices, and programs depriving them of the proper minimum wage and overtime pay. *Id.* ¶¶ 113–14.

DISCUSSION

I. *FLSA Conditional Certification*

A. Standard

The **FLSA** was enacted to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). To that end, under Section 216(b), employees may maintain actions to recover unpaid wages collectively where the employees are "similarly situated" and give consent in writing "to become ... a party [to the action] and such consent is filed [with the Court]." 29 U.S.C. § 216(b). Putative class members must "opt-in" to participate in an **FLSA** collective action.

***2** Courts in this Circuit use a two-step method to assess whether to certify a collective action. *Myers v. Hertz Corp.,* 624 F.3d 537, 554–55 (2d Cir.2010). First, plaintiffs must "make a modest factual showing that they

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and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law." *Id.* at 555 (internal quotation marks and citation omitted). "The threshold issue in deciding whether to authorize class notice in an **FLSA** action is whether plaintiffs have demonstrated that potential class members are 'similarly situated.' " *Hoffmann v. Sbarro, Inc.,* 982 F.Supp. 249, 261 (S.D.N.Y.1997). "Plaintiffs may satisfy this requirement by relying on their own pleadings, affidavits, declarations, or the affidavits and declarations of other potential class members." *Hallissey v. Am. Online, Inc.,* 99 Civ. 3785, 2008 WL 465112, at *1 (S.D.N.Y. Feb. 19, 2008). The Court should not examine "whether there has been an actual violation of law," but rather "whether the proposed plaintiffs are 'similarly situated' under 29 U.S.C. § 216(b) with respect to their allegations that the law has been violated." *Young v. Cooper Cameron Corp.,* 229 F.R.D. 50, 54 (S.D.N.Y.2005). "Conditional class certification is appropriate ... where all putative class members are employees of the same restaurant enterprise and allege the same types of **FLSA** violations." *Fasanelli v. Heartland Brewery, Inc.,* 516 F.Supp.2d 317, 322 (S.D.N.Y.2007).

"[C]ourts generally grant conditional certification" because the determination that plaintiffs are similarly situated is "merely a preliminary one." *Jackson v. Bloomberg, L.P.,* 298 F.R.D. 152, 158–59 (S.D.N.Y.2014). Indeed, the standard for conditional certification "is very low and considerably less stringent than the requirements for class certification under Rule 23." *Id.* at 158 (internal quotation marks and citation omitted). Once a plaintiff meets the standard, the court may authorize the plaintiff to send out notices to potential "similarly situated" opt-in plaintiffs. *See Myers,* 624 F.3d at 554.

At the second stage, which occurs after plaintiffs have opted-in and there has been discovery, the district court will "conduct a more stringent 'second tier' analysis upon a full record to decide whether the additional plaintiffs are similarly situated to the original plaintiffs." *Indergit v. Rite Aid Corp.,* No. 08 Civ. 9361, 2010 WL 2465488, at *4 (S.D.N.Y. June 16, 2010). If the court determines that the plaintiffs are not similarly situated, the collective action will be de-certified and the opt-in plaintiffs' claims will be dismissed without prejudice. *See Myers,* 624 F.3d at 555.

B. Application

Here, Plaintiffs have met the minimal factual burden to support conditional certification.[2] For starters, Plaintiffs submit six declarations from themselves and other tipped workers containing substantially similar allegations of Defendants' unlawful policies across eight different T.G.I. Friday's restaurants in four states. *See* Schaffer Decl. Ex. H, ECF No. 44–8 (Bronx, New York; Scarsdale, New York); Schaffer Decl. Ex. I., ECF No. 44–9 (Westbury, New York); Schaffer Decl. Ex. J, ECF No. 44–10 (Fredericksburg, Virginia; Westbury, New York); Schaffer Decl. Ex. K, ECF No. 44–11 (Brooklyn, New York);[3] Schaffer Decl. Ex. L, ECF No. 44–12 (Valley Stream, New York; Alpharetta, Georgia); Schaffer Decl. Ex. M, ECF No. 44–13 (Mansfield, Massachusetts). Each declarant alleges that Defendants paid him or her less than the full minimum wage, yet failed to properly notify him or her of the **FLSA** "regulations regarding the tip credit and minimum wages."[4] Moreover, Defendants allegedly subjected the tipped workers to "mandatory tip pooling arrangement[s]," in which the tipped employees were required to share tips with workers who had limited or no interaction with customers, such as expediters and silverware rollers. According to the declarants, T.G.I. Friday's also required that tipped workers "spend a substantial amount of time performing non-tip producing 'side work.' " Although T.G.I. Friday's has a timekeeping system that tracks multiple job codes, the declarants were not asked by "T.G.I. Friday's to punch in under a separate job code or keep track of the time ... spent performing 'side work.' "[5]

***3** The declarants also aver that "T.G.I. Friday's maintains a policy where tipped employees are encouraged to work off-the-clock." The restaurant managers enforce the policy, and employees are not compensated for "off-the-clock" work. In addition, the declarants claim that Defendants failed to pay tipped workers overtime compensation "for all of the hours ... worked over 40 in a workweek." Furthermore, the declarations discuss Defendants' policy in which employees are permitted to travel and work at different T.G.I. Friday's restaurants nationwide. The declarants who worked at two locations allege that they were subjected to identical illicit company-wide policies at both restaurants. Finally, the declarants attest that they spoke with other tipped workers who encountered similar practices.

Plaintiffs also present evidence of Defendants' centralized control over individual T.G.I. Friday's locations. Defendants run a "Support Center" to develop and enforce company-wide policies and practices. *See* Schaffer Decl. Ex. A at 7, ECF No. 44–1 (The T.G.I. Friday's Team Member Handbook states: "You'll pretty much always hear us referred to us as Carlson Restaurants or the 'Support Center.' We hold it down for the T.G.I.

FRIDAY'S brands We're located in Carrollton, Texas ... and take care of all the behind-the-scenes stuff like purchasing, payroll, legal, HR, marketing, and IT for the restaurants."). Plaintiffs also describe Defendants' implementation of uniform nationwide training programs. *See* Schaffer Decl. Ex. D at 2 (stating that Carlson Restaurants' Learning and Development Manager is responsible for "manag[ing] a team of instructional designers responsible for creating training materials for more than 30,000 employees in the US"); Schaffer Decl. Ex. F at 2 (According to Paul Rumsey, T.G.I. Friday's Inc.'s Vice President of Global Learning and Development, "It's critical to our reputation and growth that our guests know that they will have the same great experience at every Friday[']s restaurant. We view training as a way to ensure that uniformity and brand preservation."). For example, Defendants operate "Stripes U," an "online university" that teaches the "Friday[']s ways," and T.G.I. Friday's managers attend workshops conducted at the "Support Center." Schaffer Decl. Ex. E at 2–3, ECF No. 44–5.

Moreover, tipped workers are given the same handbooks with information related to compensation, time-keeping policies, and career development. *See* Schaffer Decl. Ex. A. Lastly, Defendants maintain centralized human resources and time-keeping systems for tipped workers and "non-exempt (hourly) team members." *See* Schaffer Decl. Ex. A at 18 (referencing "MICROS" and "www.myHR.carlson.com"); Schaffer Dec. Ex. G ¶ 5 (explaining that "TGIF utilizes Micros Point of Service Workstation Systems ... to record ... employee hours, guest checks[,] and summary financial information").

***4** Despite this evidence, Defendants contend that Plaintiffs have made no "factual showing" that Plaintiffs are similar to each other, let alone to the other 42,000 tipped workers employed by T.G.I. Friday's nationwide. The Court disagrees. Courts in this district have authorized nationwide certification on comparable or thinner records. *See, e.g., Locurto v. AT & T Mobility Servs. LLC,* No. 13 Civ. 4303 (S.D.N.Y. Aug. 18, 2014) (granting nationwide certification for regional account executives based on plaintiff's own affidavits, a job description for the position, and a notification from defendant); *Guttentag v. Ruby Tuesday, Inc.,* No. 12 Civ. 3041, 2013 WL 2602521, at *2 (S.D.N.Y. June 11, 2013) (granting nationwide certification based on plaintiffs' declarations and depositions covering eight store locations in four states, as well as other evidence of defendants' nationwide overtime policy, centralized staffing, and labor budget management system); *Raimundi v. Astellas U.S. LLC,* No. 10 Civ. 5240, 2011 WL 5117030, at *1 (S.D.N.Y. Oct. 27, 2011) (granting conditional certification of a nationwide class on the ground that "sales representatives nationwide held the same general job description and were exempt from overtime pay"); *Lynch v. United Servs. Auto. Ass'n,* 491 F.Supp.2d 357, 369 (S.D.N.Y.2007) (granting conditional class certification based on "the allegations in [plaintiff's] complaint, the deposition testimony of four opt-in plaintiffs and USAA's 30(b)(6) representative, and three opt-in plaintiff declarations"); *cf. Grant v. Warner Music Grp. Corp.,* No. 13 Civ. 4449, 2014 WL 1918602, at *l–2 (S.D.N.Y. May 13, 2014) (granting motion for nationwide court-authorized notice based on declarations from the named plaintiff and three opt-in plaintiffs and excerpts from defendants' website). Indeed, "when courts deny conditional certification of a nationwide class, they do so because the plaintiffs have made *no* factual showing of a nationwide policy that is relevant to their allegations." *Guttentag,* 2013 WL 2602521, at *2 (emphasis added) (collecting cases).

Here, Plaintiffs' declarations and depositions-which cover eight T.G.I. Friday's locations in four states-contain common allegations of **FLSA** violations, including Defendants' denial of full minimum wage and overtime compensation for tipped workers. This evidence, coupled with the evidence of Defendants' centralized control over T.G.I. Friday's restaurants nationwide, suffices to meet the minimal burden for conditional certification.

To further challenge Plaintiffs' motion, Defendants claim that they have policies in place that prohibit the alleged **FLSA** violations at T.G.I. Friday's restaurants. This is not a ground for denying certification. Indeed, "the existence of a formal policy [in compliance with the **FLSA**] should not immunize the defendant where," as here, "the plaintiffs have presented evidence that this policy was commonly violated in practice." *Winfield v. Citibank, N.A.,* 843 F.Supp.2d 397, 408 (S.D.N.Y.2012); *accord Levy v. Verizon Info. Servs. Inc.,* No. 06 Civ. 1583, 2007 WL 1747104, at *2 (E.D.N.Y. June 11, 2007) (granting conditional certification despite argument that defendant's written policy requiring overtime pay meant that "[a]ny deviations from this provision ... are at best isolated incidents, and do not implicate the company's overtime policy"). At this stage, Plaintiffs "need only show evidence of a *'de facto'* policy which, in practice, resulted in a pattern of **FLSA** violations." *Chhab v. Darden Rests., Inc.,* No. 11 Civ. 8345, 2013 WL 5308004, at *10 (S.D.N.Y. Sept. 20, 2013). Plaintiffs have satisfied this burden.

***5** Defendants' remaining arguments attack the merits of the case, raise factual disputes, or question the credibility of Plaintiffs' declarations. These are not issues that can be

addressed at this juncture.[6] *See Morris v. Lettire Constr., Corp.,* 896 F.Supp.2d 265, 269 (S.D.N.Y.2012) (observing that to grant conditional certification, courts neither "weigh the merits of the plaintiff's underlying claims" nor "resolve factual disputes or evaluate credibility" (internal quotation marks omitted)); *Lynch,* 491 F.Supp.2d at 368 ("At this procedural stage, the court does not resolve factual disputes, decide substantive issues going to the ultimate merits, or make credibility determinations."). However, Defendants remain free to renew these arguments by bringing a motion to decertify the class following the close of discovery.

Accordingly, because Plaintiffs have made the requisite factual showing, the motion for conditional collective action certification is GRANTED.

II. ***Notice and Expedited Discovery***
To enable "similarly situated" potential plaintiffs to opt in, the district court has discretion to authorize notice. *In re Penthouse Exec. Club Comp. Litig.,* No. 10 Civ. 1145, 2010 WL 4340255, at *4 (S.D.N.Y. Oct. 27, 2010); *see also Braunstein v. E. Photographic Labs., Inc.,* 600 F.2d 335, 336 (2d Cir.1978) ("Although one might read [§ 216(b)], by deliberate omission, as not providing for notice, we hold that it makes more sense, in light of the 'opt-in' provision of § 16(b) of the Act, 29 U.S.C. § 216(b), to read the statute as permitting, rather than prohibiting, notice in an appropriate case."). Likewise, the court has discretion in fashioning the form and content of the notice. *See Lee v. ABC Carpet & Home,* 236 F.R.D. 193, 202 (S.D.N.Y.2006) ("[T]he Supreme Court has noted that the 'details' of notice should be left to the broad discretion of the trial court." (citing *Hoffmann–La Roche Inc. v. Sperling,* 493 U.S. 165, 170 (1989))).

Moreover, the "district court has the power to direct a defendant to produce the names and contact information of potential plaintiffs." *In re Penthouse Exec,* 2010 WL 4340255, at *5; *see also Ack v. Manhattan Beer Distribs., Inc.,* No. 11 Civ. 5582, 2012 WL 1710985, at *6 (E.D.N.Y. May 15, 2012) ("Courts routinely order discovery of names, addresses, and telephone numbers in **FLSA** actions.") (collecting cases). As a practical matter, courts often order the production of this information at the notice stage.

Pursuant to Defendants' request,[7] the Court directs the parties to first meet and confer on both the form and dissemination of notice, as well as the terms of the production of the names and contact information of potential opt-in plaintiffs. *See Costello v. Kohl's Illinois, Inc.,* No. 13 Civ. 1359, 2014 WL 4377931, at *8 (S.D.N.Y. Sept. 4, 2014) (directing similar meet-and-confer period). The parties shall submit a joint proposal-including a proposed notice, procedures for its dissemination, and terms for the production of potential opt-in plaintiff information-for Court approval by **February 2, 2015.**

III. ***Equitable Tolling***
***6** Plaintiffs request that the **FLSA** statute of limitations be tolled until they are able to send notice to potential opt-in plaintiffs. Normally, in an **FLSA** collective action, the statute of limitations for each plaintiff runs when he or she files written consent with the court electing to join the lawsuit. *See* 29 U.S.C. § 256(b). But courts have "discretion to equitably toll the limitations period in appropriate cases in order to avoid inequitable circumstances." *McGlone v. Contract Callers, Inc.,* 867 F.Supp.2d 438, 445 (S.D.N.Y.2012) (internal quotation marks and citation omitted).

Here, in light of Plaintiffs' diligence in pursuing the **FLSA** claims on behalf of putative opt-ins, as well as to avoid any prejudice to potential plaintiffs, equitable tolling is warranted. *See Yahraes v. Rest. Assocs. Events Corp.,* No. 10 Civ. 0935, 2011 WL 844963, at *1–2 (E.D.N.Y. Mar. 8, 2011). Therefore, the statute of limitations will be tolled as of the date that Plaintiffs send notice to potential opt-in plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to conditionally certify an **FLSA** collective action is GRANTED. It is further ORDERED that:

1. Plaintiffs and Defendants shall meet and confer on the form and dissemination of notice, as well as the terms of the production of potential opt-in plaintiff information. The parties shall submit a joint proposal for Court approval by **February 2, 2015.**

2. The **FLSA** statute of limitations will be tolled as of the date that Plaintiffs send notice to potential opt-in plaintiffs.

3. Defendants' pre-motion conference request dated December 24, 2014, and Plaintiffs' pre-motion conference request dated January 7, 2015, are DENIED. The parties shall file their proposed motions by **February 9, 2015.** The parties shall file

their respective opposition papers by **February 23, 2015.** The parties shall reply by **March 2, 2015.**

The Clerk of Court is directed to terminate the motions at ECF Nos. 21, 23, 43, 91, and 104.

SO ORDERED.

Footnotes

1 On December 9, 2014, while briefing for Plaintiffs' motion for conditional certification was underway, Plaintiffs filed an amended complaint with leave of the Court. The amended complaint removes one original plaintiff (Josephine Diaz) and adds two additional plaintiffs (Tashauna Reid and Amy Courtemanche) and Massachusetts Wage Law claims. In all other respects, Plaintiffs' amended complaint is substantially similar to the original one. Since the filing of the amended complaint, additional plaintiffs have joined the action.

2 As an initial matter, the Court declines to apply the "somewhat heightened intermediate factual showing" standard that Defendants insist is applicable. At this early stage of discovery, "the Court finds no basis for deviating from accepted authority to require plaintiffs to make more than the minimal showing that they are similarly situated to the potential class members." *Karic v. Major Auto. Cos., Inc.,* 799 F.Supp.2d 219, 226 (E.D.N.Y.2011).

3 Defendants argue that Josephine Diaz's testimony, *see* Schaffer Decl. Ex. K, is irrelevant to the motion because her dates of employment are outside of the statute of limitations. Nonetheless, the Court concludes that Diaz's "affidavit is still relevant at this stage of the inquiry because it makes similar allegations and supports Plaintiff[s'] claim of a common policy at [T.G.I. Friday's] to violate the **FLSA**." *Kim Man Fan v. Ping's on Mott, Inc.,* No. 13 Civ. 4939, 2014 WL 1512034, at *2 (S.D.N.Y. Apr. 14, 2014); *accord Rosario v. Valentine Ave. Disc. Store, Co.,* 828 F.Supp.2d 508, 516 (E.D.N.Y.2011) ("Affidavits of workers whose employment falls outside the statutory period 'are probative of employer's wage and hour practices and they may corroborate the claims of more recent violations.' "). In any event, even without Diaz's testimony, Plaintiffs have still met the minimal evidentiary burden necessary for conditional certification.

4 In support of their argument that Defendants have failed to comply with the **FLSA** tip notification requirements, Plaintiffs submit the T.G.I. Friday's tip notice given to "tipped team member[s]." *See* Swartz Decl. Ex. X, ECF No. 80–8.

5 Plaintiffs also submit deposition testimony from these six declarants, *see* Swartz Decl. Exs. Q, R, S, T, U, V, ECF Nos. 80–1–80–6, as well as the deposition testimony of Samaya Cotto, a "tipped worker" employed at T.G.I. Friday's in Valley Stream, New York, *see* Swartz Decl. Ex. W, ECF No. 80–7.

6 Along the same vein, Defendants urge the Court to consider a number of declarations and other evidence rebutting Plaintiffs' evidence. Doing so, however, "would require a court to weigh evidence and determine credibility, which is not appropriate until the second stage after discovery." *Stevens v. HMSHost Corp.,* No. 10 Civ. 3571, 2012 WL 4801784, at *3 (E.D.N.Y. Oct. 10, 2012) (internal quotation marks omitted); *see also Winfield,* 843 F.Supp.2d at 407 n. 6 ("[C]ourts in this Circuit regularly conclude that [competing] declarations do not undermine the plaintiffs' showing in the first stage of the conditional certification process."); *In re Penthouse Exec. Club Comp. Litig.,* No. 10 Civ. 1145, 2010 WL 4340255, at *4 (S.D.N.Y. Oct. 27, 2010) (holding that defendants' submission of competing affidavits "amounts to a premature request to make credibility determinations and factual findings, something that is inappropriate at the notice stage"). In addition, Plaintiffs have not yet had an opportunity to depose Defendants' affiants. *See Winfield,* 843 F.Supp.2d at 407 n. 6. Moreover, "statements gathered by an employer from its current employees are of limited evidentiary value in the **FLSA** context because of the potential for coercion." *Amador v. Morgan Stanley & Co.,* No. 11 Civ. 4326, 2013 WL 494020, at *8 (S.D.N.Y. Feb. 7, 2013). Defendants' evidence, therefore, does not undermine Plaintiffs' showing.

7 Plaintiffs consent to this request, but ask that the Court impose a one-week deadline for the meet-and-confer period.

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