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

Annette POLLOCK, Victor Viera, Jr., and Misael Fernandez, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

[LEGENDS HOSPITALITY, LLC](#), and New York Yankees Partnership, Defendants.

No. 12 Civ. 8334(KBF). | July 25, 2013.

Opinion

MEMORANDUM DECISION & ORDER

[KATHERINE B. FORREST](#), District Judge.

*1 On November 15, 2012, plaintiffs brought this action under the Fair Labor Standards Act (“FLSA”) and New York Labor Laws for the alleged failure of defendants Legends Hospitality, LLC, (“Legends”) and New York Yankees Partnership (the “Yankees”) to pay them the wages and tips to which they are entitled.

On January 31, 2013, plaintiffs moved to certify a collective action under [29 U.S.C. § 216\(b\)](#). (ECF No. 20.) In support of that motion, plaintiffs—Annette Pollock, Victor Viera, Jr., and Misael Fernandez—each submitted declarations, along with paystubs from plaintiffs and two other individuals that plaintiffs claim show unpaid minimum wages and overtime. (ECF No. 22.)

On February 1, 2013, the Yankees answered the complaint (ECF No. 31), and Legends filed a motion to dismiss the complaint under [Fed.R.Civ.P. 12\(b\)\(6\)](#) (ECF No. 23). On March 1, 2013, Legends filed a motion to stay the briefing on plaintiffs’ motion for conditional certification pending resolution of its motion to dismiss. (ECF No. 35.) On March 26, 2013, the Court effectively granted Legends’ motion to stay by extending the time for defendants to respond to plaintiffs’ motion for conditional certification until thirty days after the Court decides the motion to dismiss. (ECF No. 41.)

This action was reassigned to the undersigned on June 6, 2013. On June 27, 2013, this Court denied Legends’ motion to dismiss and motion to stay the briefing schedule for plaintiffs’ motion for conditional certification. (ECF No. 52.) The Court ordered Legends to submit opposition papers, if any, to plaintiffs’ motion for conditional certification, along with a list of names and addresses of all individuals who would be entitled to receive notice if conditional certification were granted, by July 12, 2013. (*Id.*)

On July 3, 2013, plaintiffs submitted a revised proposed form of collection action notice. (ECF No. 53.)

On July 12, 2013, Legends responded to plaintiffs’ motion for conditional certification, stating that it does not oppose both the issuance of a collective action notice and plaintiffs’ revised proposed form of notice. (ECF No. 55.) Legends otherwise reserved its rights and defenses to oppose this case proceeding as a collective action under the FLSA or as a class action pursuant to [Fed.R.Civ.P. 23](#) at a later date. (*Id.*) Legends represented that it had served plaintiffs’ counsel with the list of employee names and addresses on July 12, 2013, but requests, with plaintiffs’ counsel’s consent, that the Court modify its June 27, 2013 order to permit the parties to treat the list of names and addresses as confidential and not file them on the public docket. (*Id.*) To date, the Yankees have not opposed plaintiffs’ motion for conditional certification.

For the reasons that follow, plaintiffs’ unopposed motion is GRANTED, subject to the modifications to its proposed form of notice imposed by the Court.

DISCUSSION

Section 216(b) of the FLSA authorizes employees to maintain collective actions where they are “similarly situated” with respect to the alleged violations of the FLSA. 29 U.S.C. § 216(b); *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir.2010). Similarly situated employees must “opt in” to an action by filing a “consent in writing to become ... a party.” 29 U.S.C. § 216(b).

*2 Certification of a “collective action” is a two-step process in the Second Circuit. See *Mvers*, 624 F.3d at 554–55. At the first step (conditional certification), the Court simply authorizes notice to be sent to potential similarly situated plaintiffs. *Id.* at 555. Plaintiffs bear the light burden of making a “modest factual showing” that the named initial plaintiff(s) and the potential opt-in plaintiffs “together were victims of a common policy or plan that violated the law.” *Id.* (quoting *Hoffman v. Sbarro, Inc.*, 982 F.Supp. 249, 261 (S.D.N.Y.1997)). The burden may be satisfied through the pleadings and affidavits alone. *Iglesias–Mendoza v. La Bell Farm, Inc.*, 239 F.R.D. 363, 367 (S.D. N.Y.2007).

At the second step, defendants have the opportunity to move for decertification if, after additional discovery, the record shows that the opt-in plaintiffs are not, in fact, similarly situated to the named plaintiff(s). See *Myers*, 624 F.3d at 555.

Here, plaintiffs have satisfied the light burden they bear at the first stage of certification. They allege, among other things, that defendants (1) failed to pay the applicable minimum wage, (2) failed to pay overtime premiums, (3) failed to properly record the time worked by employees, and (4) failed to pay employees tips and gratuities owed to them. (See Compl. ¶¶ 52, 54, 72–88, 89–108, ECF No. 1.)

Plaintiffs also submitted three declarations in support of this motion. (See ECF No. 22.) In their declarations, plaintiffs declare that they have “usually been paid less than the full minimum wage rate for the hours [they] have worked,” which is “an hourly rate of \$7.00,” and that “a majority of Banquet Servers at Yankee Stadium are paid \$7.00 per hour.” (See Decl. of Annette Pollock ¶ 3, ECF No. 22–1; Decl. of Victor Viera, Jr. ¶ 3, ECF No. 22–2; Decl. of Misael Fernandez ¶ 3, ECF No. 22–3.) Plaintiffs declare that they and other Banquet Servers have worked over forty hours per week during their employment and have not been paid time and one-half the full minimum wage rate for those hours worked in excess of forty hours. (See Decl. of Annette Pollock ¶ 4, ECF No. 22–1; Decl. of Victor Viera, Jr. ¶ 4, ECF No. 22–2; Decl. of Misael Fernandez ¶ 4, ECF No. 22–3.) Plaintiffs also declare that they and other Banquet Servers have not been permitted to keep all of the tips they have earned, and that they “know that there are many other Banquet Servers at Yankee Stadium who were treated similar to me, and who were subject to the same compensation policies and practices.” (See Decl. of Annette Pollock ¶¶ 5–7, ECF No. 22–1; Decl. of Victor Viera, Jr. ¶¶ 5–7, ECF No. 22–2; Decl. of Misael Fernandez ¶¶ 5–7, ECF No. 22–3.) Because the pleadings and declarations, taken together, suggest a common policy of failing to pay required minimum wages, overtime premiums, and tips, that showing suffices for conditional certification.

*3 Accordingly, the Court hereby conditionally certifies a collective action of all current and former employees of defendants who allege not to have been paid overtime premiums to which they were legally entitled under the FLSA. Should facts develop suggesting that any opt-in plaintiffs are not similarly situated, defendants may move for decertification at that time.

CONCLUSION

For the reasons set forth above, it is hereby

ORDERED that:

1. Plaintiffs’ motion for conditional certification of a collective action is GRANTED;
2. Plaintiffs, their representatives, or any third-party notice administrator shall, within ten days of the entry of this order, cause a copy of the Notice of Pendency and Consent to Join forms to the individuals listed as recipients of the notice as described on the attached form;
3. The Court approves the form of Notice of Pendency and Consent to Join and finds that the mailing of such forms substantially in the manner set forth above will constitute the best notice practicable under the circumstances;
4. The parties may keep the list of names and addresses of all individuals employed by Legends from February 1, 2010 to the present, which they have previously exchanged, confidential and need not file those names and addresses on the public docket in this matter;
5. The Notice of Pendency and Consent to Join shall be published in English and Spanish; and

6. Plaintiffs' counsel shall file a certification from the Spanish interpreter retained to translate those documents.

The Clerk of Court is directed to terminate the motion at ECF No. 20.

SO ORDERED.

ANNETTE POLLOCK, VICTOR VIERA, JR., and MISAEEL FERNANDEZ, on behalf of themselves and all others similarly situated, Plaintiffs,

-against-

LEGENDS HOSPITALITY, LLC and NEW YORK YANKEES PARTNERSHIP, Defendants.

Civil Action No.: 12 Civ. 8334(KBF)

Putative Collective Action under [29 U.S.C. § 216\(b\)](#)

TO: All current and former BANQUET SERVERS who have performed work at YANKEE STADIUM between February 1, 2010 and the present.

The purpose of this Notice is to advise you that a lawsuit has been filed against Legends Hospitality, LLC and New York Yankees Partnership (collectively referred to as the "Defendants"), and to advise you of your legal rights with respect to this action.

ANNETTE POLLOCK, VICTOR VIERA, JR. and MISAEEL FERNANDEZ (collectively referred to as the "Plaintiffs"), current Banquet Servers who work at Yankee Stadium, have brought this action on behalf of all other current and former Banquet Servers to recover unpaid minimum wages and overtime compensation (for hours worked in excess of 40 per week), and other improperly withheld wages and tips, for which they claim to have been incorrectly paid.

This lawsuit seeks payment of minimum wages, overtime compensation, and improperly withheld tips and service charges, pursuant to the Fair Labor Standards Act ([29 U.S.C. §§ 201 et seq.](#)) and New York State Labor Law, allegedly owed to current and former Banquet Servers who have worked at Yankee Stadium. Corporate officers, shareholders, directors, administrative employees, and other customarily exempt employees are not part of the defined class.

***4** You may be owed payment if you worked at the new Yankee Stadium as a Banquet Server and were not paid at least the minimum wage for all hours worked. You may be owed payment even if you are an employee that received tips and/or service charges. You may be owed payment if the Defendants took any portion of your tips and/or service charges. Lastly, you may be owed payment if you worked for more than 40 hours per week at Yankee Stadium and were not paid overtime at time and one-half the full minimum wage rate.

The Defendants vigorously deny any wrongdoing and/or liability to the Plaintiffs or any other past or present Banquet Server who may allege that he or she was underpaid. The Defendants strongly deny that any Banquet Server was underpaid for his or her work at any time, and that the Plaintiffs should be able to pursue their claims together as a "collective action."

This Notice is meant to advise you of your right to participate in this lawsuit as a claimant and plaintiff under the Fair Labor Standards Act if you believe that you were underpaid by the Defendants.

No determination has been made that you are owed any minimum wages, overtime wages, tips and/or service charges, and the Court is not endorsing the merits of this lawsuit or advising you to participate in this lawsuit. You are under no obligation to respond to this notice.

Federal law prohibits the Defendants from retaliating against you in any manner if you wish to join this lawsuit.

FAIR LABOR STANDARDS ACT CLAIMS

If you worked at Yankee Stadium at any time on or after February 1, 2010, you may be entitled to certain protection under the federal Fair Labor Standards Act for all hours that you received less than the minimum wage. You may be entitled to these protections even if you are an employee that received tips and/or service charges. You may also be entitled to certain protections under the Fair Labor Standards Act for all work performed in excess of 40 hours each week when you may not have been paid one and one-half times the full minimum wage rate.

If you wish to participate in this portion of the lawsuit, you must have the enclosed written "Consent to Join Lawsuit" form filed with the Clerk of the Court. If you do not sign and mail the "Consent to Join Lawsuit" form to the address listed below, you will not be permitted to seek recovery of unpaid wages under the Fair Labor Standards Act in this case.

If you choose to participate in this lawsuit, you may be asked to (1) appear for depositions, (2) respond to written discovery, (3) testify at trial, and (4) under certain circumstances, pay costs if you do not prevail.

FILING THE CONSENT FORM

If you wish to participate in the portion of this lawsuit that seeks payment of allegedly improperly withheld minimum wages, overtime wages, and tips and/or service charges under the Fair Labor Standards Act, you must sign and return the enclosed Consent to Join Lawsuit form as directed below. Your Consent to Join Lawsuit form will be filed with the Clerk of the Court on your behalf. If you fail to mail a signed Consent to Join Lawsuit form to the Clerk of the Court, you will not be eligible to participate in the FLSA portion of this lawsuit. Consent to Join Lawsuit forms filed after [30 days from date of Notice] will be rejected unless good cause is shown for the delay.

***5 IF YOU WISH TO FILE A CLAIM FOR UNPAID MINIMUM WAGES, UNPAID OVERTIME PAY AND/OR IMPROPERLY WITHHELD TIPS AND/OR SERVICE CHARGES UNDER THE FEDERAL FAIR LABOR STANDARDS ACT IN THIS LAWSUIT, YOU MUST MAIL THE ENCLOSED CONSENT TO JOIN LAWSUIT FORM POSTMARKED BY [30 DAYS FROM DATE OF NOTICE] TO EITHER:**

Brian S. Schaffer, Esq.

Fitapelli & Schaffer, LLP

475 Park Avenue South, 12th Floor

New York, New York 10016

Or:

Clerk of Court

United States District Court, S.D.N.Y.

500 Pearl Street

New York, New York 10007

Brian S. Schaffer, Esq., of Fitapelli & Schaffer, LLP, 475 Park Avenue South, 12th Floor, New York, New York 10016, Tel: (212) 300-0375, Fax: (212) 481-1333, represents the Plaintiffs in this case. You will not be required to pay any fee for services provided by Plaintiffs' counsel, Fitapelli & Schaffer, LLP. If you are represented by Plaintiffs' attorneys, their costs

and fees will be paid out of any recovery against the Defendants.

You have a right to consult with an attorney about this matter. If you wish to be represented by other counsel, you may retain another attorney, but you will be responsible for paying that attorney. Further information about this Notice, the deadline for joining the lawsuit, the form provided or answers to other questions concerning the lawsuit may be obtained by contacting the Plaintiffs' attorney, Brian S. Schaffer, Esq., telephone number (212) 300-0375, facsimile number (212) 481-1333. Any communications with Fitapelli & Schaffer, LLP are *privileged and confidential* and will not be disclosed to anyone without your permission.

You have a right to participate in this action regardless of your immigration status or the manner in which you were paid.

CONSENT TO JOIN LAWSUIT

1. I consent to be a party plaintiff in the lawsuit *ANNETTE POLLOCK, et al.v. LEGENDS HOSPITALITY, LLC and NEW YORK YANKEES PARTNERSHIP*, U.S. District Court, Southern District of New York, Civil Action No. 12 CIV. 8334 (KBF), in order to seek redress for violations of the Fair Labor Standards Act, pursuant to [29 U.S.C. § 216\(b\)](#).

2. By signing and returning this consent form, I hereby designate Plaintiffs Annette Pollock, Victor Viera, Jr. and Misael Fernandez, and their counsel Fitapelli & Schaffer, LLP ("the Firm") to represent me and make decisions on my behalf concerning the litigation and any settlement. I understand that reasonable costs expended on my behalf will be deducted from any settlement or judgment amount on a pro rata basis among all other plaintiffs. I understand that the Firm will petition the Court for attorney's fees from any settlement or judgment in the amount of the greater of: (1) the "lodestar" amount, calculated by multiplying reasonable hourly rates by the number of hours expended on the lawsuit, or (2) 1/3 of the gross settlement or judgment amount. I agree to be bound by any adjudication of this action by a court, whether it is favorable or unfavorable.

*6 _____

Name (printed)

Signature Date

Address

Best Telephone Number(s)

E-Mail Address

Mail, E-mail or Fax to:

Fitapelli & Schaffer, LLP	or	Clerk of Court
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