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2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

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5 : CV-10-1094
6 :
7 PLAINTIFFS, :
8 :
9 V. : U.S. Courthouse
10 C.B. HOLDING CORP., ET AL : Brooklyn, New York
11 :
12 DEFENDANTS. :
13 : August 11, 2010
14 : 10:00 o'clock a.m.
15 - - - - - X

16 TRANSCRIPT OF CIVIL CAUSE FOR MOTION
17 BEFORE THE HONORABLE JACK B. WEINSTEIN
18 UNITED STATES DISTRICT JUDGE

19 APPEARANCES:

20 For the Plaintiff: LADONNA LUSHER, ESQ.
21 SENA GRANT, ESQ.

22 For the Defendant: JONATHAN KOZAK, ESQ.

23 Court Reporter: Sheldon Silverman
24 (718) 613-2537

25 Proceedings recorded by mechanical stenography, transcript
produced by CAT.

1 MS. LUSHER: We're here on a case that involves
2 restaurant employees. We had made a motion, two motions
3 actually, one for collective action certification under the
4 Fair Labor Standards Act, motion to amend the complaint to
5 additional plaintiff, some additional causes of action.

6 Both motions have been fully briefed. We are here
7 to respectfully request the court grant our motion to amend,
8 also for collective action certification and notification to
9 the class, potential class

10 THE COURT: I read the briefs. They're very good.
11 If you want to supplement them by oral argument, I'll be happy
12 to hear you.

13 MS. LUSHER: We feel the plaintiffs have put on
14 sufficient evidence they're similarly situated. We've
15 submitted substantial evidence they're exists a common scheme
16 throughout all the restaurant locations. We've submitted the
17 affidavits of both named plaintiffs and also six opt-in
18 plaintiffs over the evidence submitted, it's clear these
19 restaurants are in a small geographic area comprised of three
20 bordering states; that the testimony shows this was a common
21 scheme that was happening in all the restaurants.

22 As your Honor knows, we've brought causes of action
23 that's for unpaid wages, also for overtime wages. There's
24 three schemes that the plaintiffs are alleging and they
25 consist of the plaintiffs were not paid for all their overtime

1 hours at time and a half, the regularly hourly rate, not paid
2 hours for meetings they attended that were mandatory, they
3 also -- there was illegal tip sharing scheme occurring where
4 they were forced to give some of their tip money to non-tip
5 employees, also managers where they created a slush fund for
6 the restaurants.

7 They've each submitted evidence at all the locations
8 they worked, allegations of other restaurant locations. I
9 know the defendants' position is that the notice should be
10 limited to just the restaurants the plaintiffs worked at, for
11 their positions. We feel the case law and the evidence
12 submitted establishes the notice should be distributed to all
13 the employees.

14 THE COURT: How many restaurants are involved that
15 are not represented by these named plaintiffs?

16 MS. LUSHER: Total of 49 restaurants under the
17 Charlie Brown's umbrella. There are also seven restaurants
18 that are under the Office Bar and Grill. Then the defendant
19 corporation also owns another restaurant called Bugaboo. We
20 don't have any allegations for them. They've come into the
21 case later.

22 The individuals here have submitted evidence, worked
23 at six locations altogether.

24 THE COURT: How many restaurants altogether are you
25 seeking to cover?

1 MS. LUSHER: We would seek to cover all the Charlie
2 Brown restaurants, 49 restaurants.

3 THE COURT: How many employees are you seeking to
4 cover in the class?

5 MS. LUSHER: Average of 45 employees that work
6 there on average on a regular basis. The defendants in their
7 base include the potential class to include 9200 employees.
8 If you do the math it probably comes out to that. If you go
9 back to a six-year period under New York state law.

10 THE COURT: You're going back six years for
11 compensation?

12 MS. LUSHER: Under New York state's law.

13 THE COURT: Would be over nine thousand?

14 MS. LUSHER: That's probably a good estimate.

15 Again -- your Honor has read the papers. I don't
16 want to reargue what you read. If you have any further
17 questions I would be happy to answer anything.

18 THE COURT: Thank you.

19 MR. KOZAK: The legal standard for the conditional
20 certification the plaintiffs have moved for is concededly not
21 a high standard. However, there has to be some factual
22 showing of a policy or practice that violates the Fair Labor
23 Standards Act at the company's locations. Here, the
24 contentions are that individual general managers participated
25 or took from a tip sharing pool which would be unlawful under

1 the FLSA.

2 The second main claim is that individual managers
3 failed to compensate employees for time spent at mandatory
4 meetings. The third claim is that individual managers did not
5 pay employees for all the overtime they worked or they altered
6 hours or time records.

7 Each of those claims would be inconsistent with the
8 company's policies and practices. The evidence submitted in
9 this case is for opting class members who worked at the two
10 locations on Long Island as well as the affidavit of a former
11 manager who worked at those two locations as well, includes
12 various hearsay contentions regarding things that she claims
13 were said by a vice-president to persons who are unidentified
14 at a time and a place that is unnamed.

15 The plaintiffs fail to provide a single affidavit
16 naming a specific individual or a specific location or a
17 specific allegation of these same unlawful practices regarding
18 any other individual at any location other than the Commack,
19 Holtsville restaurant or Old Tappan restaurant.

20 It is the defendants' position plaintiffs have
21 failed to provide a modest factual showing that these alleged
22 violations occurred across the board at 49 restaurants and
23 potentially covering 9200 individual employees.

24 This is not the same as a misclassification case
25 under the Fair Labor Standards Act. Plaintiffs are not

1 alleging the defendants classified a position incorrectly
2 across the board and that that position worked at all 49
3 restaurants.

4 Plaintiffs also are not claiming the defendant's had
5 a time keeping practice or policy that applies at all 49
6 restaurants that was inadequate or somehow failed to
7 accurately record all the hours that someone worked.

8 Also, plaintiffs are not alleging pre-shift
9 activities that every single person in one particular position
10 has to do undeniably across the board. Those are cases where
11 a company-wide nationwide class is appropriate. This is not
12 that case.

13 THE COURT: I'm going to grant the motions to amend
14 on certification preliminarily. There will have to be
15 extensive discovery, I believe, in order to establish of
16 company-wide policy, if that policy can be proven, I suppose
17 not only by statement and explicit indication of national
18 policy but also by what the practice is in other restaurants.

19 I'll issue an opinion.

20 I want the parties to get together on the form of
21 notice. If you have problems, I'm going to refer the matter
22 to the magistrate judge to try to work them out. Notice is
23 going to be very important here.

24 I want it on a publicly available web site. I want
25 the web site to contain a link to the public docketed

1 maintained in the court's electronic filing system. I want
2 the Clerk of the Court to ensure that the public document and
3 all filed documents are freely available to potential class
4 members without charge. I want the form of notice to contain
5 the internet address where the form of notice shall be posted
6 by plaintiffs' counsel, the internet address for accessing the
7 public docket for this case, any necessary instructions for
8 accessing the public docket. In fact, access to the document
9 is free and without charge.

10 In selecting jurors recently, I found much to my
11 amazement that some 95 percent of the people chosen at random
12 from this Eastern District have computers. There's no reason
13 why we shouldn't use the internet to save everybody a lot of
14 time and to permit people to get an assessment what the
15 charges are and to communicate.

16 I'll issue a memorandum and order forthwith.

17 Anything else you think the court should say?

18 (No response.)

19 THE COURT: Are there any questions? I think you
20 ought to get together, try to make this as painless as
21 possible. I don't know whether there was any liability or how
22 widespread it was, but I don't want any unnecessary
23 rediscovery or costs in the case. Let's move it ahead.

24 The magistrate judge is respectfully requested to
25 expedite and I'll issue an order for publication of some kind;

1 is that right?

2 MS. LUSHER: Yes. We could work on the notice and
3 the publication order.

4 THE COURT: Try to get together so we can move
5 ahead. Thank you very much. The briefs from both sides were
6 extremely helpful. Thank you.

7 Plaintiff will order a copy of these minutes, see
8 that the magistrate judge gets a copy and see that it's
9 available on the internet system that I've just directed as
10 well as anything that happens in court or in the magistrate
11 judge's hearings. I want this case open to all of these
12 people so that they know what's going on.

13 Thank you.

14 (Whereupon this matter was concluded as of this
15 date.)

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