

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

AMBER MCKINLEY, individually and on)
behalf of all others similarly situated,)

Plaintiff,)

v.)

GENGHIS GRILL; GENGHIS GRILL)
FRANCHISE CONCEPTS, LP; CHALAK)
MITRAS GROUP OF COMPANIES; AL)
BHAKTA; CHET BHAKTA; RON)
PARIKH; NIK BHAKTA; MANISH)
PATEL; DR. SANJAY PATEL; PUSHPAK)
PATEL; and DOE DEFENDANTS 1-10,)

Defendants.)

Case No. 2:17-cv-2408-JPM-tmp

**ORDER GRANTING IN PART, DENYING IN PART, MOTION FOR
CONDITIONAL CERTIFICATION**

Before the Court is Plaintiff Amber McKinley’s Motion for Conditional Certification, filed on July 7, 2017. (ECF No. 26.) Pursuant to the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216, et seq., Plaintiff moves the Court to conditionally certify two nationwide classes of Defendants’ current and former hourly paid, non-exempt employees—including the employees of Defendants Genghis Grill and Chalak Mitras Group of Companies—and to order certain proposed notices to be mailed to those two nationwide classes. (Id.) For the reasons stated below, Plaintiff’s Motion for Conditional Certification is GRANTED IN PART and DENIED IN PART. Specifically, the Court conditionally certifies two classes of workers who, within three years prior to the entry of this Order, were employed by Chalak Restaurants

of Germantown, LLC and were (1) employed in a tipped position, including as a server, host(ess), or bartender; or (2) employed in a non-tipped position as a non-exempt, hourly-paid employee.

By no later than **October 13, 2017**, the parties shall meet and confer regarding the language of the proposed notices and the procedure for sending the notices to the conditionally-certified class members, and if agreement is possible, the parties shall submit a Joint Proposed Notice and Plan for Distribution by the same date. If agreement is not possible, the parties shall notify the Court of their failure to agree. Conditional certification as to the employees of Chalak Restaurants of Germantown, LLC is effective as of the entry of this Order, and the FLSA's statute of limitations will be tolled from the entry of this Order until the entry of an order approving specific notice language and distribution procedures.

I. BACKGROUND

On July 7, 2017, Plaintiff moved this Court for conditional certification of two nationwide classes of Defendants' current and former hourly paid, non-exempt employees:

1. **The FLSA Tip-Credit Collective Class:** All current and former workers employed by Defendants who were paid at a sub-minimum wage rate or had to contribute to a tip pool within three years preceding the date of conditional certification of this action through final judgment in this matter, and who elect to opt into this action;
2. **The FLSA Minimum Wage Collective Class:** All current and former non-exempt hourly paid employees who were required to work "off-the-clock" and therefore were not properly paid minimum wage for all hours worked in a workweek within three years preceding the date of conditional certification of this action through final judgment in this matter, and who elect to opt into this action.

On July 10, 2017, Chalak Restaurants of Germantown, LLC filed an Answer to Plaintiff's Complaint on behalf of Defendant Genghis Grill, stating that:

“Genghis Grill” is a brand and does not exist as a legal entity. Plaintiff was employed by Chalak Restaurants of Germantown, LLC. Thus, Chalak Restaurants of Germantown, LLC is the correct entity to respond to Plaintiff’s allegations, not “Genghis Grill.”

(ECF No. 32.) Similarly, on July 24, 2017, Chalak Restaurants of Germantown, LLC filed an Answer to Plaintiff’s Complaint on behalf of Defendant Chalak Mitras Group of Companies, stating that:

“Chalak Mitras Group of Companies” does not exist as a legal entity. Plaintiff was employed by Chalak Restaurants of Germantown, LLC. Thus, Chalak Restaurants of Germantown, LLC is the correct entity to respond to Plaintiff’s allegations.

(ECF No. 41.)

On August 29, 2017, Defendants filed a Response in Opposition to Plaintiff’s Motion for Conditional Certification. (ECF No. 60.) Defendants argue that Plaintiff makes bare conclusory allegations and has not provided sufficient factual allegations to demonstrate that she and other employees were subjected to a common FLSA-violating decision, policy, or plan. (Id. at PageID 492-97.) Defendants further argue that even if the Court grants Plaintiff’s Motion for Conditional Certification, the Court should limit notice to the location at which Plaintiff worked. (Id. at PageID 498-502.) Finally, Defendants object to Plaintiff’s proposed notices and request that the Court order the parties to confer and submit agreed class definitions, proposed notices, and proposed notice procedures. (Id. at 502.)

The same day, on August 29, 2017, Defendants filed a Motion to Dismiss Defendants Genghis Grill and Chalak Mitras Group of Companies from this action for lack of personal jurisdiction, arguing that the two defendants do not exist as legal entities and lack the capacity to sue and be sued. (ECF No. 61.) On October 2, 2017, the Court entered a Second Order Setting Dates permitting the parties to take discovery on the issue of personal jurisdiction—

including the accounting, ownership, and decision-making structure of Chalak Restaurants of Germantown, LLC—and setting a schedule for determining the appropriate defendants in this action by early 2018. (ECF No. 70.)

II. LEGAL STANDARD

The Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 216, et seq., permits employees to recover unpaid minimum wages or overtime compensation through collective actions. Specifically, the FLSA provides that:

Any employer who violates [the minimum wage or maximum hours provisions] of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover [for such liability] may be maintained . . . by any one or more employees for an in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. § 216(b).

“To proceed collectively, named plaintiffs must therefore demonstrate that they are ‘similarly situated’ to the opt-in plaintiffs—the employees they seek to notify and represent.” Lindberg v. UHS of Lakeside, LLC, 761 F. Supp. 2d 752, 757 (W.D. Tenn. 2011). “[P]laintiffs are similarly situated when they suffer from a single, FLSA-violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs.” See O’Brien v. Ed Donnelly Enters., 575 F.3d 567, 585 (6th Cir. 2009) abrogated on other grounds by Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016). Plaintiffs are also similarly situated when “their claims [are] unified by common theories of defendants’ statutory violations, even if the proofs of these theories are inevitably individualized and distinct.” Id. The scope of conditional certification may be limited to the

employees of certain defendants if the plaintiff has not provided sufficient evidence of company-wide employment policies. See Thompson v. Direct Gen. Consumer Prod., Inc., No. 3:12-1093, 2014 WL 884494, at *6 (M.D. Tenn. Mar. 5, 2014) (“This structure of responsibility suggests that Plaintiffs are similarly situated to putative class members who work or worked for the Defendant entities that employ or employed the named Plaintiffs and individuals who submitted affidavits in support of the motion.”); see also Tyler v. Taco Bell Corp., No. 2:15-2084-JPM-cgc, 2016 WL 2344229, at *4 (W.D. Tenn. May 3, 2016) (granting plaintiff’s motion as to the conditional certification of a class of employees at two Taco Bell stores and denying plaintiff’s motion as to nationwide certification).

Courts generally employ a two-stage inquiry to determine whether plaintiffs are similarly situated. See Wright, Miller, and Kane, Federal Practice and Procedure § 1807 (3d ed. 2005); see also O’Brien, 575 F.3d at 583. “The first stage occurs early in the discovery process, when the Court determines whether to ‘conditionally’ certify the proposed class.” Lindberg, 761 F. Supp. 2d at 757 (citing Comer v. Wal-Mart Stores, Inc., 454 F.3d 544, 546-47 (6th Cir. 2006)); see also Shabazz v. Asurion Ins. Serv., No. 3:07-0653, 2008 WL 1730318, at *2-3 (M.D. Tenn. Apr. 10, 2008) (“The first step . . . consists of a preliminary inquiry into whether the plaintiff’s proposed class consists of similarly situated employees who were collectively ‘the victims of a single decision, policy, or plan.’” (quoting Lugo v. Farmer’s Pride, Inc., No. 07-cv-00749, 2008 WL 638237, at *3 (E.D. Pa. Mar. 7, 2008))). The purpose of conditional certification is to provide notice to potential plaintiffs and to present them with an opportunity to opt in. Lindberg, 761 F. Supp. 2d at 757-58. “Because the determination at this stage is made using a fairly lenient standard, the Sixth Circuit has recognized that it ‘typically results in conditional certification of a representative class.’” Id.

“At the notice stage, district courts within the Sixth Circuit typically do not consider the merits of the plaintiff’s claims, resolve factual disputes, make credibility determinations, or decide substantive issues.” Swigart v. Fifth Third Bank, 276 F.R.D. 210, 214 (S.D. Ohio 2011).

The second stage occurs after “all of the opt-in forms have been received and discovery has concluded.” Comer, 454 F.3d at 546. At that point, a second determination, using a more rigorous standard, is made as to whether the named plaintiffs and opt-in plaintiffs are similarly situated. Id. at 547.

III. ANALYSIS

Plaintiff has met her first-stage burden of showing that she and other employees of Defendants’ Memphis, Tennessee location are “similarly situated” under the FLSA. Plaintiff alleges that she worked as a server and hostess at Defendants’ Genghis Grill restaurant in Memphis, Tennessee, where she was an hourly-paid, non-exempt, tipped employee. (Decl. of Pl. Amber McKinley, ECF No. 27-1 at PageID 220.) Plaintiff alleges that she was required to contribute a portion of her tips to a tip pool that may have included non-tipped staff, required to perform non-tipped labor unrelated to her tipped position, and required to work “off-the-clock,” including before the restaurant was open or after it was closed, when there was no chance of receiving tips. (See id. at PageID 220-21.) Plaintiff further alleges that she talked to other employees about their hours, work, and pay, and that she believes all tipped workers at her workplace were paid according to the same uniform policy. (Id. at PageID 221-22.)

With respect to Defendants’ Memphis location, Plaintiff has alleged an FLSA-violating policy the proof of which “proves a violation as to all the plaintiffs” at the Memphis

location. See O'Brien, 575 F.3d at 585. The Court is satisfied that first-stage conditional certification is appropriate with respect to the employees of Chalak Restaurants of Germantown, LLC, which filed Answers on behalf of Defendants Genghis Grill and Chalak Mitras Group of Companies and represents that it was Plaintiff's employer. (See ECF Nos. 32, 41.) Specifically, the Court conditionally certifies the two following classes of Defendants' employees:

1. **The FLSA Tip-Credit Collective Class:** All current and former workers employed by Chalak Restaurants of Germantown, LLC who were employed in a tipped position—including as a server, host(ess), or bartender—within three years preceding the date of conditional certification of this action through final judgment in this matter, and who elect to opt into this action;
2. **The FLSA Minimum Wage Collective Class:** All current and former non-exempt hourly paid employees (i.e., “non-tipped” employees) employed by Chalak Restaurants of Germantown, LLC who worked within three years preceding the date of conditional certification of this action through final judgment in this matter, and who elect to opt into this action.

At this time, however, the Court will not conditionally certify Plaintiff's requested nationwide classes. The Court recognizes that Plaintiff has alleged that it is her understanding that all Genghis Grill locations were controlled by “upper management” and used the same policies. (Decl. of Pl. Amber McKinley, ECF No. 27-1 at PageID 222.) The Court also recognizes that Plaintiff has submitted declarations by former employees of Genghis Grill locations across multiple states in which they make similar allegations to Plaintiff's allegations. (See Decls. of Judy Nye, Courtnie Arnold, Jamelynn Halley, Kristin Boyle; ECF No. 27-2.) One of those employees, Kristin Boyle, alleges that she “worked in a supervisory position at multiple Genghis Grill locations” and personally witnessed the same or similar employment policies implemented “at multiple Genghis Grill locations in multiple states.” (Id. at PageID 236-37.)

But to achieve nationwide conditional certification, Plaintiff must do more than provide evidence that a handful of restaurants—out of a total of many more—underpaid their workers. At minimum, Plaintiff must provide evidence of a company structure that makes a nationwide employment policy plausible, if not likely. See Thompson v. Direct Gen. Consumer Prod., Inc., No. 3:12-1093, 2014 WL 884494, at *6 (M.D. Tenn. Mar. 5, 2014).

Additionally, and crucially, Plaintiff cannot proceed collectively against defendants who are not properly before the Court. No matter how lenient the standard for conditional certification, the Court cannot require entities over whom it lacks personal jurisdiction to turn lists of their employees over to Plaintiff—or to do anything else, for that matter. To the extent that Plaintiff seeks conditional certification before a determination on personal jurisdiction, Plaintiff puts the cart before the horse. Following the parties' discovery on the issue of personal jurisdiction, it may become clear that Defendants—possibly along with other defendants yet to be joined—implemented a nationwide employment policy in the Western District of Tennessee as well as elsewhere. At that time, Plaintiff may renew her Motion for Conditional Certification.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Conditional Certification is GRANTED IN PART and DENIED IN PART. The Court conditionally certifies two classes of workers who, within three years prior to the entry of this Order, were employed by Chalak Restaurants of Germantown, LLC and were (1) employed in a tipped position, including as a

server, host(ess), or bartender; or (2) employed in a non-tipped position as a non-exempt, hourly-paid employee.¹

By no later than **October 13, 2017**, the parties shall meet and confer regarding the language of the proposed notices and the procedure for sending the notices to the conditionally-certified class members, and if agreement is possible, the parties shall submit a Joint Proposed Notice and Plan for Distribution by the same date. If agreement is not possible, the parties shall notify the Court of their failure to agree. Conditional certification as to the employees of Chalak Restaurants of Germantown, LLC is effective as of the entry of this Order, and the FLSA's statute of limitations will be tolled from the entry of this Order until the entry of an order approving specific notice language and distribution procedures.

IT IS SO ORDERED, this 4th day of October, 2017.

/s/ Jon P. McCalla

JON P. McCALLA
UNITED STATES DISTRICT COURT JUDGE

¹ In light of the Court's limited conditional class certification, the parties may propose revised class definitions within the time period allowed for submission of the joint proposed notice.