UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELVYS REYES, ALBERT RAMON RIVERA, PERFECTO PEREZ, RAMON SERRA, LUIS MANUEL SUAREZ, and GENESIS CANEPA, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

-against-

[redacted] Jointly and Severally,

Defendants.

[redacted]

ORDER

VALERIE CAPRONI, United States District Judge:

Plaintiffs are former employees of Defendants' restaurants and allege a series of labor violations under federal and state law. Plaintiffs seek conditional certification of a Fair Labor Standards Act ("FLSA") collective, which Defendants oppose. For the reasons stated below, Plaintiffs' motion for collective certification is denied.

I. MOTION FOR CONDITIONAL CERTIFICATION OF A COLLECTIVE

Plaintiffs move for conditional certification of a collective action and to send notice and consent forms to the putative members of the collective supported by Declarations from five of the six Plaintiffs.[1] Plaintiffs allege, *inter alia*, that they worked as food preparers, dishwashers,

[1] *See* Memorandum of Law in Support of Plaintiffs' Motion for Conditional Collective Certification ("Collective Mem.") [Dkt. 31]; Declaration of Elvys Reyes ("Reyes Decl.") [Dkt. 32-2]; Declaration of Albert Ramon Rivera ("Rivera Decl.") [Dkt. 32-3]; Declaration of Ramon Serra ("Serra Decl.") [Dkt. 32-4]; Declaration of Luis Manuel Suarez ("Suarez Decl.") [Dkt. 32-5]; Declaration of Genesis Canepa ("Canepa Decl.") [Dkt. 32-6]; Proposed Collective Notice and Consent Forms ("Proposed Notice and Consent") [Dkts. 32-7; 32-8]; Proposed Reminder Letter [Dkt. 32-9]; Proposed Order [Dkt. 30-1].

counter employees, and delivery employees for Defendants' restaurants, and that they and other employees were not paid overtime compensation for time worked beyond 40 hours per week. *See* Collective Mem. at 3–7. They allege that they were paid bi-weekly, typically receiving a paycheck reflecting fewer than 40 hours of work, with compensation for excess hours paid in cash at their regular rate, rather than time-and-a-half. *See id*. at 5–6. *See also* Reply Memorandum of Law in Further Support of Plaintiffs' Motion for Conditional Collective Certification ("Reply") [Dkt. 37] at 5–10.

Defendants[2] oppose conditional certification of a collective, arguing, *inter alia*, that the Defendants who have appeared do not hold any interest in two of the three restaurants named by Plaintiffs, that Plaintiffs have failed to show joint ownership and operation across the three restaurants, that the proposed collective is overbroad in including all non-managerial employees, and that Plaintiffs fail to sufficiently describe conversations with other similarly-situated employees who might join the class. *See* Collective Opp. at 8–16. Defendants also raise challenges to Plaintiffs' Proposed Notice and Consent. *See id*. at 16–17.

The FLSA permits employees to maintain an action "for and in behalf of . . . themselves and other employees similarly situated." 29 U.S.C. § 216(b). In determining whether to certify a collective action, courts in the Second Circuit use a two-step process. *Myers v. Hertz Corp.*, 624 F.3d 537, 554–55 (2d Cir. 2010). At the "notice stage," plaintiffs must establish that other employees "may be 'similarly situated'" to them. *Id.* at 555 (citations omitted). To meet this burden, plaintiffs need only "make a modest factual showing that they and potential opt-in

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[2] Defendants [redacted] have not appeared in this matter, while the remaining Defendants have appeared and opposed certification collectively. The appearing Defendants assert that they are only responsible for the 37th Street location of [redacted] and not the 3rd Avenue location (allegedly owned by Defendant [redacted]) nor the Hawaiian restaurant (allegedly owned by John Doe Corp.). *See* Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Conditional Collective Certification ("Collective Opp.") [Dkt. 36] at 4–7.

plaintiffs together were victims of a common policy or plan that violated the law." *Id.* (citation and internal quotation marks omitted). While a plaintiff's burden is modest, "it is not non-existent," *Fraticelli v. MSG Holdings, L.P.*, No. 13-CV-6518 (JMF), 2014 WL 1807105, at *1 (S.D.N.Y. May 7, 2014) (citations omitted), and generally cannot be satisfied by "unsupported assertions." *Myers*, 624 F.3d at 555 (citation and internal quotation marks omitted). Nonetheless, courts employ a "low standard of proof because the purpose of this first stage is merely to determine *whether* 'similarly situated' plaintiffs do in fact exist . . . ." *Id.* (emphasis in original) (citation omitted). At this first stage, therefore, courts do not examine "whether there has been an actual violation of law . . . ." *Young v. Cooper Cameron Corp.*, 229 F.R.D. 50, 54 (S.D.N.Y. 2005) (citing *Krueger v. N.Y. Tel. Co.*, 1993 WL 276058, at *2 (S.D.N.Y. July 21, 1993) ("[T]he Court need not evaluate the merits of plaintiffs' claims in order to determine whether a 'similarly situated' group exists.")).

At the second stage, "when the Court has a more developed record, the named plaintiffs must prove that the plaintiffs who have opted in are *in fact* similarly situated to the named plaintiffs." *She Jian Guo v. Tommy's Sushi Inc.*, No. 14-CV-3964 (PAE), 2014 WL 5314822, at *2 (S.D.N.Y. Oct. 16, 2014) (quoting *Myers*, 624 F.3d at 555) (emphasis from *She Jian Guo*) (internal quotation marks omitted). "The action may be 'de-certified' if the record reveals that [the opt-in plaintiffs] are not [similarly situated], and the opt-in plaintiffs' claims may be dismissed without prejudice." *Myers*, 624 F.3d at 555 (citations omitted).

The Court finds that Plaintiffs have not met their burden. While the Plaintiffs' Declarations describe their hours of work, and how much and by what means each was paid, Plaintiffs have insufficiently demonstrated the basis for their knowledge of other employees' hours and compensation. For example, Plaintiff Reyes allegedly learned of Defendants'

"practice of failing to pay overtime premiums . . . through conversations with other Picnic Basket employees . . . and observations regarding the hours worked by other employees. . . . Specifically, [he] spoke with 'Gordo,' a salad maker and catering employee, and the named plaintiffs in this matter regarding the manner in which they were paid." Reyes Decl. ¶ 15. Reyes does not describe any particular observations he had as to other employees' hours, including Gordo's, such as observing when they arrived and left work, nor does he provide any detail as to when any conversation with Gordo occurred or what information Gordo relayed to Reyes. The other Plaintiffs' Declarations reference conversations with different employees but are substantively the same, lacking any detail as to the observations and conversations the Plaintiffs rely on for their belief that the compensation scheme about which they complain was a pervasive policy. *See* Rivera Decl. ¶ 15; Serra Decl. ¶ 16; Suarez Decl. ¶ 15; Canepa Decl. ¶ 15. Relatedly, in their Reply, Plaintiffs assert that their knowledge of Defendants' payment practices as to other employees is "based on numerous conversations and observations in the workplace. Plaintiffs' declarations are specific and set forth names of Defendants' other employees who had similar duties, were occasionally sent to work at other restaurant locations, and were subject to the same unlawful wage and hour policies." Reply at 7. But this overstates and misrepresents the level of detail that is actually in Plaintiffs' Declarations. In all, the facts asserted in Plaintiffs' materials are simply too vague and general to support their motion.

II. CONCLUSION

For the reasons stated above, Plaintiffs' motion to conditionally certify a collective is denied. Accordingly, the Court does not reach the other issues raised in the parties' briefs, such as Defendants' joint ownership and operation of the various restaurants, although these issues likely will be relevant at later stages of this litigation. The parties are ordered to confer and submit a proposed Case Management Plan and Scheduling Order no later than June 1, 2018, and to appear for a conference on June 8, 2018 at 10:00 A.M. The Civil Case Management Plan may be found on the Court's website: http://nysd.uscourts.gov/judges/Caproni. The Clerk of Court is instructed to terminate Docket Entry 30.

SO ORDERED.

Date: May 22, 2018
New York, New York

VALERIE CAPRONI
United States District Judge