UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SALVADOR SANTIAGO, individually and on behalf of all other similarly situated persons,

Plaintiff,

-v-

THE TEQUILA GASTROPUB LLC et al.,

Defendants.

16-CV-7499 (JMF)

MEMORANDUM OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

Plaintiff Salvador Santiago brings this action pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and the New York State Labor Law ("NYLL"), N.Y. Lab. Law § 650 *et seq*., against the Tequila Gastropub LLC, doing business as the Daisy; Four Green Fields LLC, doing business as Agave; Five Green Fields LLC, doing business as Mojave (collectively, the "Corporate Defendants"), as well as James O'Hanlon, Susan O'Hanlon and James McCartin (collectively, with the Corporate Defendants, "Defendants"), to recover unpaid minimum wage and overtime pay. Plaintiff now moves for conditional certification of a FLSA collective action. (Docket No. 33). Upon review of the parties' submissions, Plaintiff's motion for conditional certification is GRANTED in part and DENIED in part.

Plaintiff, who worked as a "runner" at the Daisy from approximately October 2015 to July 2016, moves to certify a class of "all non-exempt employees" employed by the Corporate Defendants during the six years prior to the filing of the Complaint. (Docket No. 35 ("Santiago Decl.") ¶ 1). With respect to employees at the Daisy, Plaintiff carries his "low" burden at this

stage of making a "modest factual showing" that he and "potential opt-in plaintiffs together were victims of a common policy or plan that violated the law." *Myers v. Hertz Corp.*, 624 F.3d 537, 555 (2d Cir. 2010) (internal quotation marks omitted); *see also, e.g.*, *Amador v. Morgan Stanley & Co. LLC*, No. 11-CV-4326 (RJS), 2013 WL 494020, at *2 (S.D.N.Y. Feb. 7, 2013) (noting that a plaintiff may rely "'on [his] own pleadings, affidavits, [and] declarations'" to support a motion for collective action certification (quoting *Hallissey v. Am. Online, Inc.*, No. 99-CV3785 (KTD), 2008 WL 465112, at *1 (S.D.N.Y. Feb. 19, 2008)). (*See* Docket Nos. 1, 35). Many, if not most, of Defendants' arguments to the contrary go to the merits (*see, e.g.*, Docket No. 37, at 6 (arguing that Plaintiff was, in fact, paid more than the minimum wage and asserting that most of Plaintiff's allegations are "simply false")), and thus do not present a basis to deny certification. *See, e.g.*, *Lynch v. United Servs. Auto. Ass'n*, 491 F. Supp. 2d 357, 367-68 (S.D.N.Y. 2007).

By contrast, Plaintiff falls short of satisfying his burden, low as it may be, to certify a collective action that includes employees of Agave and Mojave. Plaintiff never worked at Mojave, and says only that "[d]uring his employment" at the Daisy, he was "also required to work" at Agave — without providing any information concerning the timing, duration, terms, or conditions of such work. (Santiago Decl. ¶ 1). He does state that "[t]o the best of [his] knowledge" Defendants "control and operate" the three restaurants and that "[e]mployees at Defendants' Restaurants were interchangeable and shifted as needed." (*Id.* ¶ 2). He also states that "[b]ased on [his] personal observations and conversations with other employees, all other non-managerial employees . . . were subject to the same wage and hour policies," and includes a list of eleven such alleged employees. (*Id.* ¶ 3). But the employees on the list — who are identified only by first name — all worked at the Daisy; only one is identified as having *also*

worked at Mojave and only one is identified as having *also* worked at Agave, and there is no information concerning the timing, duration, terms, or conditions of that work either. (*Id.*).

Put simply, Plaintiff's allegations are too general and conclusory to support a finding that the employees of Agave and Mojave are similarly situated to the employees at the Daisy. A plaintiff's burden at the preliminary certification stage may be low, but it is a burden nonetheless, and where, as here, a plaintiff did not work in a particular location, more is needed than conclusory assertions of a uniform policy or practice. *See, e.g.*, *Guaman v. 5 "M" Corp.*, No. 13-CV-03820 (LGS), 2013 WL 5745905, at *3 (S.D.N.Y. Oct. 22, 2013) (granting the plaintiff's motion for conditional certification for the one physical location he worked at, but refusing to include the three other locations that the plaintiff did not work at); *see also, e.g.*, *Ji v. Jling Inc.*, No. 15-CV-4194 (JMA) (SIL), 2016 WL 2939154, at *4-5 (E.D.N.Y. May 19, 2016) (denying the plaintiff's motion for conditional certification of all non-managerial employees of the defendants' three restaurant locations based on the unsupported assertions and conclusory allegations contained in the plaintiff's declaration); *Sanchez v. JMP Ventures, LLC*, No. 13-CV-7264 (KBF), 2014 WL 465542, at *2 (S.D.N.Y. Jan. 27, 2014) (holding that the plaintiff's affidavit was too "unsupported" and "generalized" to support certification of a collective including "all tipped employees, at three restaurants"); *Trinidad v. Pret A Manger (USA) Ltd.*, 962 F. Supp. 2d 545, 557-58 (S.D.N.Y. 2013) (rejecting conditional certification for twenty-seven of the defendants' thirty-three New York City stores based on the plaintiffs' inability to "demonstrate[] across all locations a uniform policy of failure to pay overtime compensation").

Accordingly, Plaintiff's motion for conditional certification is GRANTED with respect to employees at the Daisy and DENIED with respect to employees at Agave and Mojave. With

respect to the parties' subsidiary disputes and Plaintiff's proposed notice and opt-in form, the Court further rules as follows:

- As Plaintiff has made a showing that Defendants' policies extended to other non-exempt employees at the Daisy, including waiters, bartenders, dishwashers, and line cooks (Santiago Decl. ¶¶ 3-13), Defendants' objection to the scope of the collective of employees at the Daisy is overruled.

- Given that the statute of limitations for claims under the FLSA is, at most, three years, there is no basis or need to send notice to those who worked at the Daisy more than three years prior to Plaintiff's filing of his Complaint. *See, e.g.*, *Hamadou v. Hess Corp.*, 915 F. Supp. 2d 651, 668 (S.D.N.Y. 2013) ("Notice would normally be provided to those employed within three years of the date of the notice. However, because equitable tolling issues often arise for prospective plaintiffs, courts frequently permit notice to be keyed to the three-year period prior to the filing of the complaint, with the understanding that challenges to the timeliness of individual plaintiffs' actions will be entertained at a later date." (internal quotation marks and citations omitted)).

- Plaintiff's categorical request for equitable tolling of the statute of limitation is denied — without prejudice to an application from any opt-in plaintiff based on an individualized showing that tolling is warranted. *See, e.g.*, *Whitehorn v. Wolfgang's Steakhouse, Inc.*, 767 F. Supp. 2d 445, 451 (S.D.N.Y. 2011) (holding that, where "equitable tolling may extend the statute of limitations for certain prospective plaintiffs . . . . it is appropriate for notice to be sent to the larger class of prospective members, with the understanding that challenges to the timeliness of individual plaintiffs' actions will be entertained at a later date").

- **Within two week of this Memorandum Opinion and Order**, Defendants shall produce not only the names and last-known addresses of potential collective members, but also last-known telephone numbers and e-mail addresses. Defendants shall not, in the first instance, produce any Social Security numbers. If a notice is returned as undeliverable, Defendants shall provide the Social Security number of that individual to Plaintiff's counsel. Any Social Security numbers so produced will be maintained by Plaintiff's counsel alone and used for the sole purpose of performing a skip-trace to identify a new mailing address for notices returned as undeliverable. All copies of Social Security numbers, including any electronic file or other document containing the numbers, will be destroyed once the skip-trace analysis is completed. Within fourteen days following the close of the opt-in period, Plaintiff's counsel will certify in writing to the Court that the terms of this Order have been adhered to and that the destruction of the data is complete. These procedures are sufficient to safeguard the privacy information of potential plaintiffs. *See, e.g.*, *Shajan v. Barolo, Ltd.*, No. 10-CV-1385 (CM), 2010 WL 2218095, at *1 (S.D.N.Y. June 2, 2010).

- To avoid disputes over timeliness, potential opt-in plaintiffs shall be required to send their consent forms directly to the Clerk of Court rather than to Plaintiff's counsel.

- The consent form shall be modified to make clear that potential plaintiffs may retain other counsel (or represent themselves).

- Finally, the Notice should be modified to advise recipients that their immigration status does not affect their entitlement to recover back wages or to participate in the lawsuit and that they have a right to participate in the action even if they are undocumented immigrants.

The parties shall meet and confer and, **no later than April 19, 2017**, submit revised versions of a proposed order, notice, and consent form in accordance with this Memorandum Opinion and Order. (Counsel should refer to the notices and consent forms in *Tamay et al. v. Mr. Kabob Restaurant, Inc.*, 15-CV-5935 (JMF) (Docket No. 26), *Sanz et al. v. Johny Utah 51 LLC et al.*, 14-CV-4380 (JMF) (Docket No. 61), and *Saleem v. Corporate Transportation Group, Ltd.*, 12-CV-8450 (JMF) (Docket No. 67), for examples of notices and opt-in forms that the Court has previously approved.)

The Clerk of Court is directed to terminate Docket No. 33.

SO ORDERED.

Date: April 5, 2017
New York, New York

JESSE M. FURMAN
United States District Judge