At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, on the 27th day of May, 2020.

P R E S E N T:

HON. EDGAR G. WALKER,
Justice.

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JOSE CORNEJO and CARLOS CORNEJO on behalf of themselves and others similarly situated,

Plaintiffs,

- against - Index No. 500936/16

EDEN PALACE INC.; PALACE OF EDEN INC.; TASTY CATERING, LLC; EMMANUEL ROTH; JEFF ROSENBAUM; and any other related entities, including those doing business as EDEN PALACE,

Defendants.

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TASTY CATERING, LLC; EDEN PALACE INC.; PALACE OF EDEN INC.; EMMANUEL ROTH; JEFF ROSENBAUM; and any other related entities, including those doing business as EDEN PALACE,

Third-Party Plaintiffs,

- against -

RB WAITER SERVICES LLC and ROGER BAISDEN,

Third-Party Defendants.

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The following e-filed papers read herein:	NYSCEF Docket No.:
Notice of Motion/Cross Motion and Affidavits (Affirmations) and Exhibits Annexed	231-232, 253-256, 262, 264 264, 273-274, 277-288, 291, 291-292, 299-312
Opposing Affidavits (Affirmations)	343, 349-352, 369-380, 382, 415, 436

Reply Affidavits (Affirmations)_____ 425, 429, 441

Upon the foregoing papers, defendants/third party plaintiffs Eden Palace Inc., Palace of Eden Inc., Emmanuel Roth, and Tasty Catering, LLC, move for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint (motion sequence number 8). Plaintiffs Jose Cornejo and Carlos Cornejo move for an order: (1) certifying this action as a class action; (2) designating Leeds Brown Law, P.C., as class counsel; and (3) approving for publication the proposed Notice of Class Action Lawsuit and Publication Order annexed to the Klein Affirmation as Exhibits Y and Z, respectively (motion sequence number 9). Plaintiffs Jose Cornejo and Carlos Cornejo also move for an order: (1) pursuant to CPLR 3212, granting them summary judgment as to defendants' liability under Labor Law § 196-d; and (2) for an adverse inference and preclusion order as a result of defendants' discovery violations (motion sequence number 10).

Defendants' motion sequence number 8 is denied.

The portion of plaintiffs' motion sequence number 10 seeking summary judgment is denied and the portion of that motion seeking preclusion and/or an adverse inference is denied with leave to renew before the trial court.

Plaintiffs' motion sequence number 9 is granted to the extent that: (1) the action is certified as a class action pursuant to CPLR 902; (2) for purposes of CPLR 903, the class is comprised of all individuals who were employed by defendants as servers, attendants, bussers, bartenders, food runners, captains and in any related service position at defendants' catered events at the facility commonly known as Eden Palace from October 1, 2009 to

September 17, 2015. The putative class does not include maintenance workers, corporate officers, salespersons, cooks, food preparers, chefs, dishwashers, valet drivers, directors, clerical office workers, or any other person employed by defendants whose trade, classification or profession does not customarily receive gratuities; (3) Leeds Brown Law, P.C., is designated as class counsel.

BACKGROUND

In this putative class action, plaintiffs allege that defendants violated the requirements of Labor Law § 196-d and the Department of Labor's wage orders relating to tips governed by section 196-d (Department of Labor Regulations [12 NYCRR] §§ 146-2.18 and 146-2.19) by failing to distribute customer charges identified as gratuities in customer agreements relating to banquets and events held at defendants' banquet/catering hall operated under the name Eden Palace to the waiters and others who provided services at the banquets and events. Plaintiffs contend they were employed by defendants at these events as waiters and bartenders. Tasty Catering, LLC (Tasty), is the entity that runs the catering events at what is known as Eden Palace. Emmanuel Roth is the manager of Tasty, and Jeff Rosenbaum was a salesperson and customer contact person for Tasty from 2010 to 2017. Third-party defendant Roger Baisden worked as a maitre d' for events at Eden Palace, and defendants contend that they hired him, working through third-party defendant RB Waiter Services LLC (RB Waiter), to provide service staff events at Eden Palace.

Plaintiffs commenced this action on October 1, 2015.[1] Following joinder of issue,

[1] The court notes that this action was initially commenced in Supreme Court, Nassau County,

plaintiffs moved to certify this action as a class action and defendants cross-moved for summary judgment dismissing the complaint on the ground that the service staff at the events were not their employees, but rather, were hired by the third-party defendants. Defendants asserted that they did not employ plaintiffs and the other putative class members for purposes of the Labor Law and they thus may not be held liable for any violation of Labor Law § 196-d. In an order dated October 3, 2017, this court denied defendants' cross motion as premature under CPLR 3212 (f), as little discovery had taken place, but with leave to renew upon completion of depositions. The court also denied plaintiffs' motion for class certification with leave to renew upon completion of depositions because the court found it appropriate to defer determination of class certification until after depositions had been held and the court had made a determination as to whether defendants may be considered plaintiffs' employer under the Labor Law. Depositions have largely been completed, plaintiffs and defendants have renewed their respective motions, and plaintiffs have additionally moved for summary judgment in their favor with respect to defendants' liability under Labor Law § 196-d.

SUMMARY JUDGMENT MOTIONS

Determination of the parties' summary judgment motions turns on whether plaintiffs and the putative class of waiters and other servers who worked at Eden Palace were employees of defendant or were independent contractors or employees of RB Waiter.

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and that plaintiffs thereafter consented to the transfer of venue of this action to Supreme Court, Kings County.

These determinations may be dispositive of the action as a defendant may only be held liable for improperly retaining purported gratuities under Labor Law § 196-d if it is the plaintiffs' employer for purposes of Labor Law article 6 (*see Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]; *see also Matter of Ovadia v Office of Indus. Bd. of Appeals*, 19 NY3d 138, 142-143 [2012]; Labor Law §§ 2 [7], 190 [2], [3]).[2] An independent contractor is not considered an employee under the Labor Law (*see Hernandez v Chefs Diet Delivery, LLC*, 81 AD3d 596, 597 [2d Dept 2011]; *see also Bynog*, 1 NY3d at 199). "The critical inquiry in determining whether an employment relationship exists pertains to the degree of control exercised by the purported employer over the results produced or the means used to achieve the results" (*Bynog*, 1 NY3d at 198; *see also Matter of Vega [Postmates, Inc. – Commissioner of Labor]*, ___ NY3d ___, 2020 NY Slip Op 02094, *2-3 [2020]), with greater emphasis placed on the control over the means (*see Matter of Ted Is Back Corp. [Roberts]*, 64 NY2d 725, 726 [1984]). Factors the Court of Appeals has identified as relevant to assessing control "include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4)

[2] Labor Law § 196-d provides that, "No employer or his agent or an officer or agent of any corporation, or any other person shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee. This provision shall not apply to the checking of hats, coats or other apparel. Nothing in this subdivision shall be construed as affecting the allowances from the minimum wage for gratuities in the amount determined in accordance with the provisions of article nineteen of this chapter nor as affecting practices in connection with banquets and other special functions where a fixed percentage of the patron's bill is added for gratuities which are distributed to employees, nor to the sharing of tips by a waiter with a busboy or similar employee."

was on the employer's payroll and (5) was on a fixed schedule" (*Bynog*, 1 NY3d at 198). In considering these factors, the Court of Appeals has also looked to whether the workers are, in effect, in business for themselves, such as by creating their own following or customer base, or whether it is the entity that hires them that controls their connection with customers and their compensation (*compare Matter of Vega*, 2020 NY Slip Op 02094, *2-3; *with Matter of Yoga Vida NYC, Inc. [Commissioner of Labor]*, 28 NY3d 1013, 1015-1016 [2016]).

In determining employment for purposes of the Labor Law, New York courts and the Department of Labor have also looked to the "economic realities" test applied by federal courts in determining whether someone is an employer under the Fair Labor Standards Act of 1938 (FLSA) (29 USC § 201 *et seq.*) (*see Matter of Zurita v New York State Dept. of Labor*, 175 AD3d 1182, 1183 [1st Dept 2019]; *Altamirano v Omni Childhood Ctr. Inc.*, 51 Misc 3d 1273 [A], 2012 NY Slip Op 52517, *2-3 [Sup Ct, Kings County 2013]; *Napoli v 243 Glen Cove Ave. Grimaldi, Inc.*, 397 F Supp3d 249, 263-264 [EDNY 2019]; *cf. Matter of Ovadia*, 19 NY3d at 143-145). The economic realities test was developed to ensure that the remedial purposes of the FLSA protected workers intended to be covered by the act who might not be found covered under a strict application of common-law agency principles (*see Barfield v New York City Health & Hosps. Corp.*, 537 F3d 132, 142 [2d Cir 2008]; *see also Rutherford Food Corp. v McComb*, 331 US 722, 728-729 [1947]; *United States v Rosenwasser*, 323 US 360 [1945]). One formulation of the economic realities test focuses on:

"(1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business" (*Barfield*, 537 F3d at 142, quoting *Brock v Superior Care, Inc.*, 840 F2d 1054, 1058-1059 [2d Cir 1988]).

The Second Circuit has emphasized that, in applying the economic realities test, employment determinations are made under the totality of the circumstances, that different sets of factors may be relevant based on the factual challenges of a particular case, and that no single factor is determinative (*see Agerbrink v Model Service LLC*, 787 Fed Appx 22, 25 [2d Cir 2019]; *Zheng v Liberty Apparel Co. Inc.*, 355 F3d 61, 73-74 [2d Cir 2003]). [3]

Defendants' contention that they hired RB Waiter to staff events must be analyzed under the general rule that an entity that hires an independent contractor to perform work on its behalf is not found to be the employer of the employees of its independent contractor

[3] The Court of Appeals has not expressly adopted the federal economic realities test. The Court of Appeals criticized the Industrial Board of Appeals' (Board) application of a six factor federal economic realities test from *Zheng v Liberty Apparel Co. Inc.* (355 F3d 61, 72 [2d Cir 2003]) in upholding a Department of Labor finding that a general contractor was a joint employer of a subcontractor's employees in *Matter of Ovadia* (19 NY3d at 143-144). In doing so, however, the Court made clear that its criticism was directed primarily at the Board's application of the test, as the Court also emphasized that the court in *Zheng* (355 F3d at 73-74) had recognized that no single factor of the test was dispositive and that industry customs and practices must be considered in applying the test (*Matter of Ovadia*, 19 NY3d at 145 n6). In any event, in considering control over the worker, the Court of Appeals has looked to factors that are part of the economic realities test, such as whether the workers are, in effect, in business for themselves (*Matter of Vega*, 2020 NY Slip Op 02094, *2-3). In other contexts, the Court of Appeals has also recognized the importance of harmonizing New York rules under the Labor Law with the federal approach under the FLSA (*Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 180 [2019]) and other New York Courts have also recognized the relevance of FLSA precedent in determining wage issues under the Labor Law (*see O'Donnell v JEF Gulf Corp.*, 173 AD3d 1528, 1529 [3d Dept 2019]; *Schiferle v Capital Fence Co., Inc.*, 155 AD3d 122, 131 [4th Dept 2017]).

(*see Matter of Ovadia*, 19 NY3d at 143; *Bynog*, 1 NY3d at 200). An entity, however, may be deemed the employer, or joint or special employer of the employees' of its independent contractor, where it assumes the role of the employer of such workforce (*see Matter of Ovadia*, 19 NY3d at 145; *Bynog*, 1 NY3d at 200; *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]; *Zheng*, 355 F3d at 71-72). Similar to the factors considered with respect to determining whether a worker is an employee or an independent contractor, the focus in determining the existence of special or joint employment is on "who controls and directs the manner, details and ultimate result of the employee's work" (*Thompson*, 78 NY2d at 558-559). In some instances, where the employer's control is over the activities of the independent contractor, and not just those of its employees, the purported independent contractor is deemed a mere agent of the employer rather than an independent contractor (*see Matter of Exceed Contr. Corp. v Industrial Bd. of Appeals*, 126 AD3d 575, 575-576 [1st Dept 2015]; *Budgewood Laundry Service, Inc. v Dorset Hotel Corp.*, 249 AD2d 85, 85 [1st Dept 1998]). While courts emphasize that independent contractor arrangements may generally have legitimate economic justification, they also note that such arrangements should not be used solely as a means of avoiding applicable labor laws (*see Zheng*, 355 F3d at 72-74; *cf. Matter of Ovadia*, 19 NY3d at 145 n6).

This court notes defendants' arrangement with RB Waiter bears at least a facial resemblance to that at issue in the Court of Appeals decision in *Bynog v Cipriani Group* (1 NY3d 193), which addressed plaintiffs' claim that the Cipriani defendants violated Labor Law § 196-d by withholding service charges to which they were entitled. In *Bynog*, the

plaintiffs were temporary waiters who the Cipriani defendants obtained to work at banquet events through a staffing agency (*id.* at 197). The Court of Appeals granted the Cipriani defendants summary judgment dismissing the action because it found the facts before it demonstrated that the banquet waiters and other staff were independent contractors who were not employed by the Cipriani defendants since they worked at their own discretion, worked for other caterers without restriction, were under the exclusive direction and control of the staffing agency that interviewed, hired, and compensated plaintiffs and provided them with 1099's for tax purposes, and the Cipriani defendants did not provide uniforms or bottle openers (*id.* at 198-199). The Court also held that, even if the plaintiff banquet waiters and staff were deemed to be general employees of the staffing agency, the facts showed that the Cipriani defendants did not exert sufficient control over the staff for them to be deemed the special or joint employers of plaintiffs (*id.* at 200).

The fact specific nature of this employment determination, however, is shown by the Appellate Division, First Department's decision in *Maor v One Fifty Fifty Seven Corp.* (169 AD3d 497 [1st Dept 2019]). In *Maor*, the court found that issues of fact as to the degree of control the Russian Tea Room defendants exercised over service staff, supplied by a staffing agency for catering events held at the Russian Tea Room, required the denial of the Russian Tea Room defendants' motion for summary judgment dismissing the plaintiff service staff's Labor Law § 196-d action (*id.* at 497; *see also Connor v Pier Sixty, LLC*, 29 Misc 3d 1220 [A], 2010 NY Slip Op 51911, *2 [U] [Sup Ct, New York County 2010]). While the determinations involving control for purposes of employment,

special/joint employment and independent contractors may be made as a matter of law in the absence of conflicting evidence, these determinations are fact sensitive and often present questions for the trier of fact (*see Hernandez*, 81 AD3d at 598; *see also Thompson*, 78 NY2d at 557-558; *Edwards v Rosario*, 166 AD3d 453, 454 [1st Dept 2018]; *Bermudez v Ruiz*, 185 AD2d 212, 213-214 [1st Dept 1992]).

Applying these legal principles to the facts here, this court finds that there are factual issues with respect to defendants' control of RB Waiter and of plaintiffs such that both summary judgment motions must be denied. Initially, both Emmanuel Roth and Jeff Rosenbaum testified at their depositions that defendants exercised only limited control over RB Waiter, Roger Baisden and the event staff that worked at Eden Palace banquet events. Their testimony would support a finding, like that in *Bynog*, that the waiters were independent contractors, or even if they were employees of RB Waiter, they were not joint or special employees of defendants (*see Bynog*, 1 NY3d at 197-200). The deposition testimony of other witnesses and affidavits appended to the parties' motion and opposition papers, however, paint a different picture of defendants' operation of events at Eden Palace.

At his deposition, Roger Baisden testified that he began working as a maitre d' for the banquets held at Eden Palace in 2007 and did so until October 2015. In this role, he managed the wait staff who worked at these events. From the time he started at Eden Palace until some point in 2010, the wait staff was paid directly by defendants and Baisden was paid $200 for each event. At some point in 2010, Baisden states that Emmanuel Roth came to him and told him that he wanted to form a business in Baisden's name so he could

pay Baisden a lump sum instead of paying the waiters directly. Roth allegedly told Baisden that he would pay Baisden $200 per event plus $11 an hour for each waiter who worked an event. Out of the $11 for each waiter per hour, the waiters would receive $10 per hour, which was the amount the waiters were paid per hour before RB Waiter was formed. Baisden retained the $1 an hour for each waiter to cover the cost of Workers' Compensation insurance that Roth insisted he obtain. Roth also purportedly insisted that Baisden retain the ratio of 1 waiter for every 30 guests at events that he had always used. It was Roth who filed the paperwork to form the entity RB Waiter and once it was formed, Baisden continued using the same list of wait staff names used previously. The list had 20 to 25 event staff on it who worked mostly for Eden Palace. Baisden noted that waiters could decline to work when asked to work a particular event. While Baisden personally would occasionally assist other halls to find staff for events, he did so as an individual, and RB Waiter worked exclusively for Eden Palace from the time it was formed until defendants ended the relationship in October 2015.

At his deposition, Baisden also testified that Jeff Rosenbaum, Emmanuel Roth and his wife, who also managed events at Eden Palace, generally spoke to him when there were issues with the wait staff. All three of them, however, would occasionally talk directly to the staff about issues, and Mrs. Roth, in particular, would also talk to the staff directly when she saw that they were not dressed properly or were sitting down. Rosenbaum would also on occasion tell Baisden not to have a particular waiter at an event. While Rosenbaum had the authority to permanently bar a waiter from working at Eden Palace, he never exercised

that authority.

Carlos Cornejo and Jose Cornejo testified at their depositions that they worked at banquet events at Eden Palace from before October 2009 into 2015. During the four to five months of the busy season, they each worked four to five nights a week at Eden Palace. Each also worked at other catering halls, including Rose Castle. Each stated that, while they received direction from Baisden regarding their job responsibilities, they also received direct instruction from others at Eden Palace, including Roth, Mrs. Roth, their son, Yechezkiel Roth, and Jeff Rosenbaum.

Carlos Cornejo testified that, although a waiter could choose not to work a certain party, if the waiter did so, he or she would not be able to work events at the Eden Palace for the rest of the week. The same was true if a waiter declined a request to work late if an event went overtime. While Carlos Cornejo stated that he on occasion worked at other event places, he primarily worked at Eden Palace and Rose Castle, depending on which hall had a party and which one didn't. Carlos Cornejo added that if Mrs. Roth observed a worker was missing a part of his or her uniform, she would direct Baisden to send that worker home, and that if there was a conflict with instructions from Baisden and those from defendants, the staff would follow the instructions from defendants.

Baisden's testimony regarding how RB Waiter was established, Roth's control over the terms of RB Waiter's compensation and its operation and Baisden's and plaintiffs' respective testimony regarding the defendants' oversight of the wait staff at functions are sufficient to demonstrate issues of fact as to whether RB Waiter and Baisden merely

worked as agents of defendants (*see Matter of Exceed Cont. Corp.*, 126 AD3d at 575-576; *Budgewood Laundry Service, Inc.*, 249 AD2d at 85). These same facts present issues as to whether defendants' control over RB Waiter and the staff at the events rendered it a special or joint employer of the staff (*see Thompson*, 78 NY2d at 558-559; *Zheng*, 355 F3d at 72-76; *cf. Bynog*, 1 NY3d at 197-200). Relevant in assessing defendants' control of RB Waiter is Baisden's testimony that much of the staff worked at Eden Palace before RB Waiter was established, that RB Waiter provided staff exclusively for defendants at Eden Palace, and that defendants effectively set the staff's wages by setting the terms of how they would pay RB Waiter (*see Zheng*, 355 F3d at 72-76; *but see Bynog*, 1 NY3d at 197).[4]

The deposition testimony of Baisden and plaintiffs, as well as the affidavits of non-party waiters, also present factual issues as to whether wait staff were employees or independent contractors. If RB Waiter and Baisden are deemed agents of defendants, the wait staff would have been working under the exclusive control of defendants (*see Maor*, 169 AD3d at 497; *Connor*, 2010 NY Slip Op 51911, *2; *cf. Bynog*, 1 NY3d at 199). Even if RB Waiter and Baisden were not agents of defendants, the testimony of Baisden and plaintiffs present factual issues with respect to whether defendants exercised more than incidental control over their work (*see Davis v EAB-TAB Enters.*, 166 AD3d 1449, 1451

[4] While hiring an independent contractor wait staff service provider to provide staff for banquet event may be common practice at catering halls (*see Bynog*, 1 NY3d at 200), there is no suggestion that the relationship between a banquet hall and a wait staff provider is comparable to the relationship between general contractors and subcontractors in the construction industry such that it would be improper to utilize the factors identified in *Zheng* in assessing whether the banquet hall may be deemed a joint employer (*cf. Matter of Ovadia*, 19 NY3d at 144-145).

[3d Dept 2018]; *Hart v Rick's Cabaret Intern., Inc*, 967 F Supp2d 901, 916-919 [SDNY 2013]).

The record shows that plaintiffs and the non-party waiters worked a significant number of events at Eden Palace each year. While they could refuse to work certain events and weren't barred from working at other venues, Carlos Cornejo's testimony shows that some control over this discretion was retained by penalizing workers who declined to work an event by preventing them from working additional events that week. If such testimony is accepted, the weighing of *Bynog* factors examining whether the waiters "worked at their own discretion," were "free to engage in other employment" and were "on a fixed schedule" does not clearly favor finding the wait staff to be independent contractors (*see Matter of Greystoke Indus. LLC [Commissioner of Labor]*, 142 AD3d 746, 746-747 [3d Dept 2016]; *Keller v Miri Microsystems LLC*, 781 F3d 799, 808 [6th Cir 2015] [a worker does not lose protections of FLSA simply by working for more than one employer or having a flexible schedule where the lack of permanence is due to operational characteristics of an industry rather than the worker's own initiative]; *Doty v Elias*, 733 F2d 720, 723 [10th Cir 1984] [a relatively flexible work schedule alone does not make one an independent contractor where restaurant controlled work hours and established schedules]; *Luna v HDMP, LLC*, 2014 WL 12543796, *5 [EDNY 2014]; *Landaeta v New York & Presbyterian Hosp., Inc.*, 2014 WL 836991, *6 [SDNY 2014]; *Hart*, 967 F Supp2d at 925).[5] Finally, similar to the

[5] The record shows that the waiters did not receive any fringe benefits (*Bynog* factor number 3). The determination of *Bynog* factor number 4 relating who was responsible for paying the wait staff turns on whether or not RB Waiter and Baisden were merely defendants' agents.

delivery drivers in *Matter of Vega*, defendants had complete control over the waiters' connection to the guests at the events and their compensation such that plaintiffs may not be considered in business for themselves (*see Matter of Vega*, 2020 NY Slip Op 02094, *3; *see also Henderson v Inter-Chem Coal Co.,, Inc.*, 41 F3d 567, 570 [10th Cir 1994]; *Doty*, 733 F 2d at 723). As such, the status of waiters and service staff are more akin to that of the delivery drivers found to be employees in *Matter of Vega* than the Yoga instructors found to be independent contractors in *Matter of Yoga Vida NYC, Inc. (Commissioner of Labor)* (28 NY3d 1013 [2016]).[6]

These factual issues relating to whether defendants may be deemed the employers of the wait staff that worked the banquet events at Eden Palace therefore raises issues as to whether the requirements of Labor Law § 196-d are applicable to defendants. These issues therefore require the denial of both defendants' and plaintiffs' summary judgment motions.

DISCOVERY ISSUES

In their discovery demand, plaintiffs requested wage and hourly records relevant to their claims that defendants violated Labor Law § 196-d by failing to pass on a charge identified as a gratuity to the service staff. The testimony of defendants' witnesses shows that defendants have provided material that is in their possession, but also shows that defendants, as a matter of practice, routinely disposed of records that are relevant to the section 196-d claims here. Plaintiffs contend that defendants were required to establish,

[6] If plaintiffs' factual assertions are accepted, the factors identified with respect to the economic realities test lean toward identifying the wait staff as employees rather than independent contractors (*Barfield*, 537 F3d at 142).

maintain and preserve such records pursuant to Department of Labor Regulations (12 NYCRR) § 146-2.18 (c) (*see* Labor Law §§ 195 [3], 661). Like Labor Law § 196-d, however, the duty to maintain such records under 12 NYCRR § 146-2.18 (c) only applies to employers (*see Schultz v Jim Walter Corp.*, 314 F Supp 454, 455, 458 [MD Ala 1970] [company could not be held liable for record keeping violations under FLSA where workers were independent contractors not employees]). As there are factual issues as to whether defendants were employers of the wait staff at the events held at Eden Palace, the determination of whether defendants violated their recordkeeping obligations and whether plaintiffs are entitled to preclusion or an adverse inference charge based on a failure to maintain such records cannot be made until the time of trial (*compare Lilavois v JP Morgan Chase & Co.*, 151 AD3d 711, 712 [2d Dept 2017]; *Pennachio v Costco Wholesale Corp.*, 119 AD3d 662, 665 [2d Dept 2014] *with Rodman v Ardsley Radiology, P.C.*, 80 AD3d 598, 598-599 [2d Dept 2011]). The portion of plaintiffs' motion seeking preclusion of evidence or an adverse inference charge based on defendants' failure to preserve documents requested in discovery is thus denied with leave to renew before the trial judge.

CLASS CERTIFICATION

CPLR 902 states that a class action can only be maintained if each of the prerequisites promulgated by CPLR 901 (a) are met (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 421 [1st Dept 2010]; *Alix v Wal-Mart Stores, Inc.*, 57 AD3d 1044, 1045 [3d Dept 2008]). Those prerequisites are (1) that the class is so numerous that joinder of all members is impracticable (numerosity); (2) questions of law or fact common to the class

predominate over questions of law or fact affecting individual class members (commonality or predominance); (3) the claims or defenses of the class representatives are typical of those in the class (typicality); (4) the class representatives will fairly and adequately protect the interests of the class; and (5) a class action represents the superior method of adjudicating the controversy (superiority) (*Hurrell-Harring v State of New York*, 81 AD3d 69, 71-72 [3d Dept 2011]; CPLR 901 [a]). If the prerequisites set out in CPLR 901 (a) are met, the court, in deciding whether to grant class action certification should then consider the additional factors promulgated by CPLR 902 such as the interest of individual class members in maintaining separate actions and the feasibility thereof; the existence of pending litigation regarding the same controversy; the desirability of the proposed class forum; and the difficulties likely to be encountered in managing the class action (CPLR 902; *Ackerman v Price Waterhouse*, 252 AD2d 179, 191 [1st Dept 1998]).

Whether the facts presented on a motion for class certification satisfy the statutory criteria is within the sound discretion of the trial court (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52 [1999]; *CLC/CFI Liquidating Trust v Bloomingdale's, Inc.*, 50 AD3d 446, 447 [1st Dept 2008]). The proponent of class certification bears the burden of establishing the criteria promulgated by CPLR 901 (a) (*CLC/CFI Liquidating Trust*, 50 AD3d at 447; *Ackerman*, 252 AD2d at 191), and must do so by the tender of evidence in admissible form (*Pludeman*, 74 AD3d at 422; *Feder v Staten Is. Hosp.*, 304 AD2d 470, 471 [1st Dept 2003]). Although the class certification motion is no substitute for summary judgment or a trial, it is appropriate for the court to consider the merit of the claims in determining the motion

(*Pludeman*, 74 AD3d at 422; *Matros Automated Elec. Canst. Corp. v Libman*, 37 AD3d 313, 313 [1st Dept 2007]).

In considering these factors, this court finds that plaintiffs have met their burden of demonstrating the appropriateness of class certification under CPLR 901 (a) and 902 (*see Maor*, 169 AD3d at 498). Plaintiffs' allegations regarding the violation of Labor Law § 196-d and the failure to maintain adequate records "suggest[s] a policy or practice of unlawful action of the type" particularly appropriate for class treatment (*see Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 184 [2019]).

In opposing class certification, defendants essentially concede that this case is of the kind appropriate for class certification. Defendants, however, argue that certification should be rejected because defendants are not liable for unpaid gratuities under section 196-d because they are not the employers of plaintiffs or the proposed class members. As this court found, in denying the parties' summary judgment motions, that there are factual issues with respect to whether defendants may be considered plaintiffs' employer, the issue of employment is not a ground for denying class certification (*see Maor*, 169 AD3d at 497-498; *Pludeman v Northern Leasing Sys., Inc.*, 106 AD3d 612, 615 [1st Dept 2013]; *Maor v Hornblower N.Y., LLC*, 51 Misc 3d 1231 [A], 2016 NY Slip Op 50891, *10 [U] [Sup Ct, New York County 2016]).

Defendants also argue that plaintiffs are not proper class representatives because their claims are not typical of the claims of the proposed class. In making this argument, defendants assert that that there is no evidence that plaintiffs worked events at Eden Palace

during the six year limitations period for a Labor Law claim because (1) Carlos Cornejo testified at his deposition that he did not work events after 2007, and (2) Baisden testified that he did not know the plaintiffs and did not recognize their names in his records relating to payments to wait staff. Defendants' position, however, misrepresents Carlos Cornejo's testimony, in that he testified that he worked events at Eden Palace into 2015. With respect to Baisden, while he stated that he did not recognize the names of Carlos Cornejo and Jose Cornejo, he also stated that he might recognize them if he saw them in person. Baisden testified that he used first names in his payment records relating to the wait staff, and he recalled that there were more than one Carlos and one Jose. As the names Carlos and Jose appear on some of these sheets for events occurring from 2010, Baisden's testimony and records fail to demonstrate that plaintiffs did not work events at Eden Palace during the relevant period, let alone make such a demonstration as a matter of law.

Defendants finally assert that Leeds Brown Law, P.C., is not an appropriate class counsel because of potential ethical issues identified in a seven year old case and in a nine year old case. Leeds Brown Law, P.C., however, represents that no actual finding of impropriety was ultimately made against the firm. Moreover, these assertions are many years old, and, in the interim, Leeds Brown Law, P.C., has been appointed class counsel in numerous class actions involving wage and hour claims, including some also involving Labor Law § 196-d.[7] Accordingly, this court will appoint Leeds Brown Law, P.C., as class

[7] Defendants also assert that counsel for third-party defendants has engaged in conflicted representation by representing some of the putative class members. Defendants, however, have failed to articulate how this possibly conflicted representation by counsel for third-party

counsel.

DESCRIPTION OF THE CLASS

CPLR 903 requires that the order permitting a class action describe the class. In their proposed notice of class action, plaintiffs have described the proposed class as:

"All individuals who performed work as servers, attendants, bussers, bartenders, food runners, captains and in related service positions at Defendants' catered events from October 1, 2009 to the present, including those at the facility commonly known as the Eden Palace. The putative class does not include maintenance workers, corporate officers, salespersons, cooks, food preparers, chefs, dishwashers, directors, clerical workers, office workers or any other person employed whose trade, classification or profession does not customarily receive gratuities."

While the court finds that this description of the class that the plaintiffs have provided appears generally acceptable, the court finds it appropriate to limit the class to catered events from October 1, 2009 (six years before the commencement of this action) to September 17, 2015, when RB Waiter and Roger Baisden were terminated. Although it appears that some putative class members continued working at events at Eden Palace after that date, plaintiffs do not appear to have worked there after RB Waiter and Baisden were discharged. Additionally, defendants assert that they changed the wording of their customer contracts to remove the word "gratuities." Plaintiffs, in their motion for class certification, have not addressed whether plaintiffs would be appropriate class representatives for employees who continued working after that date or addressed the effect of these changes on defendants' status as employers or on whether Labor Law § 196-d was

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defendants bears on the appropriateness of appointing Leeds Brown Law, P.C., as class counsel.

violated after that date. As questions of law and fact thus differ after September 17, 2015, the class is narrowed to staff that worked at events at Eden Palace before that date (*see Maor*, 169 AD3d at 497; *Martin v Restaurant Assoc. Events Corp.*, 2013 WL 4351788 [U] [Sup Ct, Westchester County 2013]). Additionally, since there is testimony that valet parking service was generally provided at events held at Eden Palace, but plaintiffs' have provided no facts relating to such services in moving for class certification, the court has added valet drivers to the list of workers excluded from the class.

The court thus restates the description of the class to read as follows:

"The class is comprised of all individuals who were employed by defendants as servers, attendants, bussers, bartenders, food runners, captains and in any related service position at defendants' catered events at the facility commonly known as Eden Palace from October 1, 2009 to September 17, 2015. The putative class does not include maintenance workers, corporate officers, salespersons, cooks, food preparers, chefs, dishwashers, valet drivers, directors, clerical office workers, or any other person employed by defendants whose trade, classification or profession does not customarily receive gratuities."

NOTICE TO THE CLASS

Plaintiffs' proposed publication order contains a direction that defendants provide plaintiffs with a list of food service workers at Eden Palace events from October 1, 2009 to present, their last known addresses and other contact information. The deposition testimony of defendants' witnesses, however, demonstrates that defendants do not have such information in their possession. Similarly, Baisden, at his deposition, testified that he no longer had the list of workers he used when he worked at Eden Palace. Based on this testimony, the direction to defendants to provide names and addresses of service staff would appear to be a futile act. Without a list of names and address, it does not appear that

plaintiffs will be able to provide notice by mail or email to a significant portion of the workers who staffed the Eden Palace events. Similarly, it is unclear to the court whether the proposed publication order's provision requiring posting of the notice on class counsel's website, Facebook page, Twitter or other social media accounts would provide sufficient notice to many additional putative class members (*see Drizin v Sprint Corp.*, 7 Misc 3d 1018 [A], 2005 NY Slip Op 50661, *1-2 [U] [Sup Ct, New York County 2005] [due process requires the best notice under the circumstances to class members]; *Roes, 1-2 v SFBSC Mgt., LLC*, 944 F3d 1035, 1047-1048 [9th Cir 2019]; *DeJulius v New England Health Care Employees Pension Fund*, 429 F3d 935, 943-944 [10th Cir 2005] [due process requires notices of a class action be "the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort"]; *see* CPLR 904 [b], [c], and [d]).

The court thus directs the parties to appear for a virtual conference to be scheduled after consultation with all parties to address the question of what method or methods of notification would provide the best notice practicable under the circumstances in addition to including individual notice to all members who can be identified through reasonable effort.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.