AMERICAN ARBITRATION ASSOCIATION

VANESSA BALDWIN RENEE KAHMANN CRYSTAL M. MEJIA On behalf of each of themselves and all others similarly situated CLAIMANTS, v. FOREVER 21, INC. AND FOREVER 21 RETAIL, INC. RESPONDENTS.	Case No. 53-160-000071-13 **ARBITRATOR DECISION ON CONDITIONAL CLASS CERTIFICATION**

I. Procedural Background

This case began with a December 3, 2012 Complaint filed by Claimant Vanessa Baldwin ("Baldwin") in the United States District Court for the Northern District of Ohio as Case No. 1:12-cv-02967. In the Complaint, Baldwin alleged that Respondents Forever 21, Inc. and Forever 21 Retail, Inc. violated the Fair Labor Standards Act ("FLSA") by "failing to pay Plaintiff and other similarly-situated employees for meal periods during which they performed work." Complaint at ¶1. On December 4, 2012, Claimants Renee Kahmann and Crystal Mejia ("Mejia")

executed and filed Consent Forms to join the action as party Plaintiffs pursuant to 29 U.S.C. §216(b).[1]

On January 23, 2013, the parties submitted a Stipulation to Stay Action Pending Arbitration in which they agreed that the dispute was covered by a August 15, 2008 Agreement to Arbitrate between Baldwin and Forever 21, Inc. providing that final and binding arbitration was the exclusive means of resolving any dispute or controversy arising out of or in any way related to any "Dispute." The action was stayed on January 24, 2013.

On February 19, 2013, Baldwin, Kahmann, and Mejia (collectively, "Claimants") filed a Demand for Arbitration and a Complaint "on behalf of each of themselves and all others similarly situated" encompassing their FLSA claims against Forever 21, Inc. and Forever 21 Retail, Inc. ("Forever 21" or "Respondents"). Claimants alleged that:

- Claimants and other similarly-situated managers were paid on an hourly basis.
- Claimants and other similarly-situated managers were not provided bona fide meal periods during which they were completely relieved from duty.
- Respondents automatically deducted 30 minutes from Claimants' and other similarly-situated managers pay each day for a meal period.

[1] 29 U.S.C. §216(b) authorizes collective actions for FLSA claims and provides that no employee can become a party plaintiff in any such collective action unless he files written consent with the court.

- However, Claimants and other similarly-situated managers were required to perform work during their meal periods.
- As a result of Respondents' failure to pay Claimants and other similarly-situated managers for meal periods during which they performed work, Claimants and other similarly-situated managers were denied significant amounts of overtime compensation.
- Respondents knowingly and willfully failed to pay Claimant and other similarly situated managers for meal periods during which they performed work.[2]

In response to Claimants' Complaint and Demand for Arbitration, Respondents argued that Claimants could not bring a collective action because the arbitration agreements signed by the Claimants did not authorize arbitration of class or collective actions. A hearing on the issue of construction of the parties' arbitration clause was held before the Arbitrator on July 30, 2013. On August 30, 2013, the Arbitrator found that the Arbitration Agreements signed by the Claimants permit the determination of their FLSA claims in a collective arbitration action.

On November 15, 2013, Claimants submitted their Motion for Conditional Certification and Notice to Potential Opt-In Claimants. Respondents' Opposition to Claimants' Motion for Conditional Certification was submitted on December 6,

[2] See Demand for Arbitration at ¶¶ 18 - 22.

2013. Claimants submitted a Reply Brief on December 16, 2013 and Respondents submitted their Sur-Reply on December 23, 2013.

A hearing was held before the Arbitrator on January 17, 2014 during which counsel for Plaintiff and Respondent presented oral arguments.

II. Issue for Review

The sole issue for the Arbitrator is whether the Claimants have sufficiently demonstrated that their positions are similar to the positions held by the putative class members.

III. Applicable Standard

Both Claimants and Respondents have cited to *Comer v. Wal-Mart Stores,*[3] which describes the approach used by courts to evaluate claims under 29 U.S.C. §216(b).

> The first question such courts have generally asked has been whether proposed co-plaintiffs are, in fact, "similarly situated" for the purposes of the statute's requirements. They have used a two-phase inquiry to address this question. The first takes place at the beginning of discovery. The second occurs after "all of the opt-in forms have been received and discovery has concluded."[4]

The *Comer* court makes clear that a final determination of whether the proposed Claimants are similarly situated is not made until the second phase of

[3] 454 F.3d 544 (6th Cir. 2006).
[4] Id. at 546.

inquiry. In the first phase – the "Notice" phase, the only issue is whether the Claimants should be allowed to send notice of the action to other potential Claimants. At the notice phase, the Claimants need only show that their position is "similar, not identical, to the positions held by the putative class members."[5] The *Comer* court wrote that only a "modest factual showing" is required and that the determination is to be made using a "fairly lenient standard."[6]

IV. Arguments of the Parties

A. Claimants' Arguments

Claimants (Baldwin, Kahmann and Mejia), argued that sufficient information exists to establish that the potential opt-in claimants here are similarly situated such that the proposed FLSA class should be conditionally certified and prompt notice of the arbitration should be given. First, Claimants alleged in their Demand for Arbitration that they and the potential opt-in claimants are similarly situated. Second, Claimants have submitted declarations establishing that they are similarly situated to Claimant Baldwin and the potential opt–in claimants. Third, nine[7] additional Forever 21 employees have submitted

[5] Id. at 547.
[6] Id.
[7] Respondents have objected to the declarations of several prospective Claimants who they contend did not work in Respondents' stores during the relevant time period. Both parties have agreed that the statute of limitations would be tolled until March 4, 2013. See Claimants' Brief at 12, Respondents' Brief at 3. Accordingly, the Arbitrator has considered only the Declarations of those who averred that they worked at Forever 21 between

declarations which establish that they are similarly situated because they were employed by Respondents at various stores throughout the United States; that they had 30 minutes for meal breaks automatically deducted; they were not provided with meal periods during which they were relieved from duty; and Respondents failed to fully compensate them for all the time that they worked, including all the overtime hours. (*See* Hearing Exh. 3 – Declarations.) Claimants argue that these declarations along with Claimant Baldwin's declaration are more than sufficient evidence to warrant conditional certification. In *Ziemski v. P and G Hospitality Group, LLC*, N.D.Ohio No. 1:10-CV-2920, 2011 WL 1366668, *2 (April 12, 2011), the District Court held that "the affidavits of named Plaintiff and two opt-in Plaintiffs fulfill the modest factual showing that the opt-in plaintiffs were similarly employed and subject to a common payment policy." *See*, also *Douglas v. GE Energy Reuter Stokes*, N.D.Ohio No. 1:07-cv-77, 2007 WL 1341779 (April 30, 2007) where the court held that two affidavits of persons asserting that they were not paid overtime for hours worked over 40 hours per week are sufficient to warrant conditional treatment of the case as a collective action.

Claimants also argue that early facilitation of the notice process is essential because the filing of the instant action does not toll the running of the statute of

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March 4, 2010 and the present.

limitations for putative class members. Claimants request an order directing Respondents to provide them with the name, last known address, and last known telephone number of "all former and current non-exempt managers who worked in a Forever 21 retail store at any time between March 4, 2010 and the present, and who signed an arbitration clause with Forever 21." In addition, Claimants propose that the parties submit proposed notification and consent forms to the Arbitrator for consideration.

B. Respondents' Arguments

Respondents have argued that conditional certification should be denied because Claimants have not provided evidence sufficient to show that they are similarly situated to the opt-in employees**.** First, Respondents argue that Claimants have offered no evidence of either a common policy/practice that violated the law or that their claims and those of the putative class members are "unified by common theories of defendant statutory violations." According to Respondents, Claimants submitted nine "identical, scant and conclusory" declarations (only four of which are from putative class members -- *See* Chun Decl. ¶9-12) of current and former store managers for a potential class of an estimated 8,000 current and former managers which Respondents argue is insufficient support for conditional certification. See *Rutledge v. Claypool Electric,*

Inc., S.D.Ohio No. 2:12-cv-0159, 2012 WL 6593936,*13 (February 5, 2013) (denying conditional certification after finding that Plaintiff's affidavits established –at best- that 5% of the putative class members may have been "affected by an impermissible overtime issue" does little to suggest a wide spread discriminatory policy") **.**

Second, Respondents argue that even if Claimants' assertion that Forever 21 "automatically deducted" for meal periods was true, it would not be unlawful under the FLSA. According to Respondents, the closest Claimants come to asserting a "common policy or plan" that they presume violated the law is their erroneous assertion that meal period time was "automatically deducted." Even if this allegation was correct, "standing alone, an employer policy providing automatic deductions for meal breaks does not violate the FLSA." *White v. Baptist Mem'l Health Care Corp*., W.D.Tenn. No. 08-2478, 2011 WL 1883959, *8 (May 17, 2011). Where such "auto–deduct" systems are in place, "it is the failure of an employer to compensate employees who work through those unpaid meal breaks … that potentially runs afoul of the ACT." *Colozzi v. St. Joseph's Hosp. Health Ctr.,* 595 F.Supp.2d 200, 206-207 (N.D.N.Y. 2009).

Third, Respondents argue that Forever21's declarations from 104 putative class members describing their experiences at 233 separate stores affirmatively

show that Claimants cannot make even a "rudimentary showing of commonality" (Respondents' Opposition Brief at p. 16). In circumstances such as this, courts routinely deny requests for conditional certification. Respondents rely on *Rutledge*, where the court denied the plaintiff's conditional certification motion where the plaintiff submitted an affidavit establishing that he was not paid all overtime wages owed and defendants offered declarations from ten putative class members stating that they had not performed any off-the-clock work. "Accordingly, plaintiffs have not made even a modest factual showing that (the named plaintiff) is similarly situated to other crew leaders." *Rutledge* at *11.

Finally, Respondents argue that district courts routinely deny certification of off–the-clock cases where the evidence establishes that the alleged violations are the result of individual decisions, as opposed to a centralized or standardized unlawful policy. *Saleen v. Waste Mgmt., Inc*., 649 F. Supp.2d 937, 943 (D.Minn 2009). According to Respondents, if this case were certified, the alleged claims could only be resolved by conducting thousands of fact-intensive mini trials, reconstructing each class member's work and pay history. This prospect is antithetical to the purposes of the collective action mechanism and further supports the denial of conditional certification. See e.g. *Blaney v. Charlotte-Mecklenburg Hosp. Auth*., W.D.N.C. No. 3:10-CV-592-FDW-DSC, 2011 WL 4351631

(Sept. 16, 2011), at *10 ("Where the record before the court demonstrates that there is no common policy or scheme and instead individualized questions of fact predominate, the action is not an appropriate one for certification. Furthermore, the Court need not certify the action and facilitate notice where, based on the same record available to it presently, it would inevitably decertify the action in a month's time.")

Citing *Blaney,* Respondents also argue in their Surreply Brief that Claimants' motion should be denied as Claimants "abandoned" their automatic deduction theory for commonality, and now seek to replace it with an argument that they were not paid for missed meal periods. Respondents' Surreply at 7-8. They also argue that the Arbitrator should consider Respondents' evidence relating to whether the Claimants are similarly situated to the putative class members *before* deciding on Claimants' request for conditional certification even if that evidence is also appropriate for the second phase of the similarly situated analysis.

IV. Analysis

Upon review of the briefs, exhibits, oral arguments, declarations, and case law submitted, the Arbitrator finds that Claimants have met their burden of making a modest factual showing that their positions are similar to those held by

the prospective class members such that conditional certification is appropriate. The Demand for Arbitration contains allegations of an FLSA violation. Claimants allege in Count One that Respondents' practices and policies of not paying Claimants and other similarly situated managers for meal periods during which they performed work violated the FLSA, 29 CFR 785.19 and failing to pay overtime compensation at a rate of one and one-half times their regular rate of pay for the hours they worked over 40 in a work week violated FLSA, 29 U.S.C. 207. See Demand for Arbitration at ¶29-30.

Furthermore, Claimants alleged in their declarations that were employed as hourly, non-exempt managers in Respondents' retail stores; that they were not provided with meal periods during which they were completely relieved from duty; that Respondents automatically deducted 30 minutes from their pay each day for a meal period despite the fact that they frequently either did not receive a meal period or were required to perform work during their meal periods; that they were not paid for all the time that they actually worked, including overtime; and they believe that they are similarly situated to the class of opt-in plaintiffs because they observed that the class and themselves frequently worked during meal periods without pay. See Exhibit 2 to Claimants' Brief - Declarations of Consent of Vanessa Baldwin, Renee Kahmann, and Crystal Mejia.

Claimants also submitted the declarations of 9 additional Forever 21 employees (Acosta, Campbell, Hakemack, Huelsebusch, Johnson, Kessel-Servidio, King-Lopez, Meier and Shaw) to support these allegations. Upon review of the briefs, exhibits, oral arguments, declarations,[8] and case law submitted, the Arbitrator finds that the Demand, Claimants' declarations and the additional declarations of the Forever 21 employees, taken together, are sufficient to meet the Claimants' burden of showing that they are similarly situated to the proposed class. *See Jackson v. Papa John's USA*, N.D.Ohio No. 1:08 CV 2791, 2009 WL 385580 (N.D. Ohio Feb. 13, 2009), *Ziemski*, and *Douglas*.

Although Respondents argue above that Claimants have not produced evidence of a common plan or policy that violates the FLSA, such a showing is not required under the lenient standard for conditional certification. The Sixth Circuit has held that "a common plan or policy that violates the FLSA need not be shown even at the final stage of certification." *McNelley vs. Aldi*, N.D.Ohio No. 1:09-cv-1868, 2009 WL 7630236, *10 (Nov. 17, 2009) citing *O'Brien v. Ed Donnelly Enterprises*, 575 F.3d. 567, 584 (6th Cir. 2009). Claimants need only show that they are similarly situated to the class, which they have done.

[8] See fn. 7.

Respondents also argue that the declarations of current and former store managers submitted by Claimants are insufficient to make a modest factual showing when the class potentially numbers in excess of 7,000 people. See *Rutledge v. Claypool Electric, Inc*., S.D.Ohio No. 2:12-cv-0159, 2013 U.S. Dist. LEXIS 178647,*39 (December 17, 2012). However, the Arbitrator finds *Rutledge* is distinguishable from the instant arbitration in that the plaintiff in *Rutledge* submitted only one affidavit, which was his own, wherein he averred that he knew three or four other employees who worked overtime but he was not sure if they held the same position as Plaintiff. The court found that the allegations in the affidavit relating to unnamed employees would amount to nothing more than speculation, which is not a permissible basis for conditional certification. Here, Claimants submitted their own declarations and nine other declarations regarding their similarly situated status. Furthermore, the FLSA statute does not require a minimum number of plaintiffs or class certification for the collective action to proceed. See *Douglas vs. GE, supra.* Moreover, courts in this Circuit have granted conditional certification on fewer declarations. See *Jackson v. Papa John's USA*, N.D.Ohio No. 1:08 CV 2791, 2009 WL 385580 (N.D. Ohio Feb. 13, 2009) (court granted conditional certification based on Plaintiff's declaration, declarations of two putative opt in plaintiffs, a description of job duties and training program

documents for a class estimated at around 1,000 persons); *Murton Measurecomp, LLC*, N.D.Ohio No. 1:07CV3127, 2008 U.S. Dist. LEXIS 108060 (June 9, 2008) (court granted conditional certification based on plaintiff's declaration, declaration of opt-in plaintiff which attached a letter acknowledging some employees may have worked overtime, and a deposition transcript of an employee for a class of "several hundred individuals.)" Defendant has not cited to any authority requiring a minimum number of declarations, nor would a requirement be appropriate given that the parties have not yet engaged in discovery to identity the class members." *McNelley vs. Aldi*, N.D.Ohio No. 1:09-cv-1868, 2009 U.S. Dist. LEXIS 130788 (Nov. 17, 2009).

Respondents also argue that the declarations are insufficient because they are conclusory, identical and in some instances false. This is similar to the argument made by Defendants in *McNelley*. The court in that case held that "At this stage in the case, the court does not make credibility determinations, and each declaration states under penalty of perjury that the statements are true and based on personal knowledge." The declarations need not meet the same evidentiary standards required for summary judgment. *Monroe*, 257 F.R.D. at 639. Furthermore, the court noted that "although the declarations are short and substantially the same, potential opt-in plaintiffs are not required to make lengthy

detailed declaration in their own words or without the assistance of counsel." *Id.* at 4. Applying *McNelley* to this action, the declarations submitted by Claimants are sufficient. The declarants are competent to aver, based on personal knowledge and what positions they held, that Forever 21 automatically deducted 30 minutes from their pay checks for meal periods that they actually worked and that they observed the class frequently worked during meal periods without pay.

The fact that Respondents submit 104 declarations of employees similarly situated that had opposite experiences does not convince the Arbitrator at this initial stage of the process that the collective action fails. In *Thorn v. Bob Evans Farms Inc.*, S.D.Ohio No. 2:12-cv-768, 2013 U.S. Dist. LEXIS 172279, *14 (2012), when addressing a similar argument by a Respondent who produced such "happy camper" declarations, the court wrote:

> First, to obtain conditional certification, a lead plaintiff is not required to show unified violative policies. O'Brien, 575 F.3d at 584. Second, there is no requirement in the FLSA that collective actions be maintained by a certain threshold number of employees. Rather, the only requirement is that opt-in plaintiffs be similarly situated with the lead plaintiff. Third, the Court notes that 64 is also a relatively small sample of the over 2,500 assistant managers employed by Bob Evans since August 2010.

In the Declarations submitted by Respondents, 104 managers and former managers described their experiences at 233 separate stores and attested that at

no time did they believe or suspect by reviewing their time sheets and payroll records, that meal period time was "automatically" deducted from any shifts that they worked. In addition, 86% attested they never performed any work duties during unpaid meal periods. The other 14% attested that a few occasions they worked during a meal period and they knew they were expected to submit a work meal plan log, but chose not to. Citing *Rutledge,* Respondents argue that in circumstances such as these, courts routinely deny requests for conditional certification.

Respondents also rely on *Goldstein v. Children's Hospital of Philadelphia,* E.D.Pa. No. 10-cv-01190-DS, 2012 WL 5250385 (October 24, 2012) and *Saleen v. Waste Mgmt.,* 649 F.Supp.2d 937 (D.Minn. 2009) which are cases from other jurisdictions where courts have declined conditional certification when employers produced evidence that it had policies and procedures to reverse the deduction for meal periods taken. However, all of these cases are distinguishable.

In *Goldstein*, Plaintiff's only evidence to support a "similarly situated" argument was her own declaration in which she asserted that she "believed that Defendants' other employees were subjected to the same *** work policies and practices, and affected the same way by them." *Goldstein* at *3. The court denied Plaintiff's motion to certify and held that "we are unable to conclude that

the quantum of evidence rises to the level of a 'modest factual showing' such as to permit conditional certification." *Id.* "Moreover, Plaintiff's 'belief' that other employees were similarly situated to her has not been corroborated by even a single 'opt-in' from any of the 90 security guards employed by CHOP during the relevant period nor from any of the 5,000 to 6,000 estimated non-exempt employees working for CHOP during the relevant time period." *Id.*

In this case, Claimants have presented the declarations of potential class members – each of whom has averred that they are current or former managers at Forever 21, that they have performed work during meal periods for which they have not been paid, and that they have personally observed the same thing happening to other managers. Unlike in *Goldstein,* Claimants have presented evidence corroborating their belief that others are similarly situated to them.

In *Saleen*, a Minnesota case, Plaintiffs alleged they were subject to a time keeping system that automatically deducted a 30 minute meal break. Plaintiffs claimed that, although the employer had a written policy that allowed employees to reverse the automatic deduction in situations where the employees worked through the meal period, there existed an unwritten policy to discourage and refuse to honor the reversal requests. The *Saleen* court described the Plaintiffs' evidence as "circumstantial" and found that Plaintiffs' 112 declarations were

insufficient as they consisted of less than 1% of the 20,000 to 30,000 potential class members.

In Ohio, circumstantial evidence is given the same weight as direct evidence. Furthermore, Respondents have failed to establish the existence of a mathematical threshold in Ohio for what constitutes enough declarations to warrant conditional certification.

Finally, Respondents argue that this case should not be treated as a collective action because doing so would require the Arbitrator to make individual findings inappropriate to adjudication of a collective action. Respondents argue that if case were certified, the alleged claims could only be resolved by conducting thousands of fact intensive mini trials, reconstructing each class member's work and pay history. Respondents submit that this prospect is antithetical to the purpose of the collective action mechanism and further supports the denial of conditional certification. As an example, they cite to *Blaney v. Charlotte-Mecklenburg Hosp. Auth*., W.D.N.C. No. 3:10-CV-592-FDW-DSC, 2011 WL 4351631, *11 (Sept. 16, 2011), a North Carolina case in which the Court held that "[w]here the record before the court demonstrates that there is no common policy or scheme and instead individualized questions of fact predominate, the action is not an appropriate one for certification."

In *Blaney*, the court applied an "intermediate" standard of review rather than the *Comer* two-stage analysis and has characterized as an anomaly even in North Carolina. In *Long v. CPI Security Systems, Inc*., 292 F.R.D. 296, 299 (W.D.N.C. 2013), a more recent case from the same district, the court distinguished *Blaney*, stating that "although one judge in this District applied an intermediate standard, the majority of courts in the Fourth Circuit adhere to the two-stage analysis contemplated by [29 U.S.C. §] 216(B)." *Long* makes clear that *Blaney* does not even reflect the majority view in the Fourth Circuit.

The "intermediate standard" was described as one which requires a more stringent showing in cases where some, but not all, discovery has been completed, to determine whether Plaintiffs have demonstrated that they and the potential opt-ins are similarly situated. The *Long* court found several reasons for rejecting the application of an "intermediate standard" upon the completion of just some discovery:

- When the parties have engaged in only limited discovery, it is premature to conclude that the evidence is representative of what the plaintiffs would present given further discovery.
- The notice stage analysis places the burden of proof on the plaintiff, but the opt-in stage analysis, which typically follows a motion to decertify, places the burden of proof on the defendant; merging the two stages of analysis would inevitably skew the burden of proof.

- The court hesitates to speculate how much discovery will be performed in this FLSA collective action, but it appears likely that the discovery thus far completed is just a fraction of the total anticipated discovery.

Long at 300.

Under the two-stage *Comer* review, Respondents' arguments about the lack of a common policy or scheme and the alleged predominance of individualized questions of fact are only appropriate at the second stage of adjudication. *See Murton v. Measurecomp, LLC*, N.D.Ohio 1:07CV3127, 2008 U.S. Dist. LEXIS 108060, *12 (June 9, 2008) ("Generally, courts have left assessment of disparate factual and employment settings of individual class members to the second stage of the analysis"); *Musarra v. Digital Dish*, S.D.Ohio No. C2-05-545, 2008 WL 818692, *5 (March 24, 2008). *See, also Douglas* at *6 where the court found "Douglas correctly responds that making such individual findings is appropriate to the second stage of adjudication, upon motion by GE Energy to 'decertify' the class." Again, Respondents cite case law from other jurisdictions where courts have declined to conditionally certify a collective action based on individual decisions made on a decentralized basis (*Saleen*, *Jiminez*, *Basco* and *Clark*).[9] However the Sixth Circuit has held that the factual and employment

[9] See Respondents' Opposition Brief at 20.

settings of individual plaintiffs are generally considered in a final certification at the *second* stage of the FLSA's two tiered similarly-situated analysis. *O'Brien,* 575 F.3d. at 584. Moreover, as consideration of individual cases is impractical prior to an opt-in period, such consideration is not appropriate to the first stage of adjudication. *Hipp*, 252 F.3d at 1219.

VI. Conclusion

Upon consideration of the briefs and submissions of the parties, the oral arguments of the parties, and the applicable law, the Arbitrator hereby grants Claimants' Motion for Conditional Certification. By this decision, the Arbitrator finds only that the Claimants have met their burden for conditional certification and makes no findings as to the ultimate merits of their claims against Respondents.

Counsel are hereby ordered to confer and submit in Microsoft Word format a joint proposed Notice and Consent to Join form to the Arbitrator within 10 days from the date of this decision. In the event that the parties are unable to agree on any portion of the proposed notice, each party shall identify the disputed portions of the proposed Joint Notice and submit their proposed language for each such portion.

Furthermore, counsel shall confer to determine what, if any, discovery is to be conducted and shall submit a proposed timetable for any such discovery within 10 days of the date of this order.

Upon receipt of the above submissions, the Arbitrator shall schedule a telephone status conference with the parties to finalize a timetable for discovery and determine any remaining issues relating to the language of the Notice.

Peggy Foley Jones
Arbitrator Peggy Foley Jones

2-19-14
Date