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Jacqueline Bryant
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

ANGELICA GODINEZ-GARCIA, on behalf of herself and all others similarly situated,

Plaintiffs,

v.

LAXMI HOTELS, dba HAMPTON INN & SUITES, HILTON WORLDWIDE, and DOES 1 through 50, inclusive,

Defendants.

/

Case No. CV15-01295

Dept. No. 3

ORDER DENYING HILTON WORLDWIDE'S MOTION TO DISMISS AND ORDER GRANTING IN PART MOTION FOR CIRCULATION OF NOTICE PURSUANT TO 29 U.S.C. § 216(b)

Currently before the Court is Plaintiff ANGELICA GODINEZ-GARCIA's ("the Plaintiff") Motion for Circulation of Notice Pursuant to 29 U.S.C. § 216(b) ("Motion for Circulation"), and Defendant HILTON WORLDWIDE's ("Hilton") Motion to Dismiss. Defendant LAXMI HOTELS, dba HAMPTON INN AND SUITES ("Laxmi") filed an Opposition to the Motion for Circulation on November 24, 2015, and the Plaintiff filed a Reply on December 7, 2015. The Plaintiff also filed an Opposition to the Motion to Dismiss on January 12, 2016,[1] and Hilton filed a corresponding Reply on January 21, 2016. The Motion for Circulation and the Motion to Dismiss were both submitted for consideration on January 22, 2016.

[1] Titled, "PLAINTIFF'S NRCP RULE 56(F) OBJECTION TO DEFENDANT HILTON WORLDWIDE INC.'S MOTION TO DISMISS" ("the Opposition to the Motion to Dismiss")

I. *Hilton Worldwide's Motion to Dismiss*

As the parties are well aware, this action was initiated by a Complaint filed July 2, 2015. The Complaint contains four Causes of Action arising from the Plaintiff's alleged employment relationship with Defendants Laxmi and Hilton. The Causes of Action enumerated in the Complaint are: (1) Failure to Pay Overtime Wages in Violation of NRS 608.140 and 608.018, (2) Failure to Timely Pay All Wages Due and Owing in Violation of NRS 608.140 and 608.020-050, (3) Failure to Pay Overtime in Violation of 29 U.S.C. § 207, and (4) Breach of Contract.

Defendant Hilton moves the Court to dismiss the Complaint on the basis that the Plaintiff has failed to state a claim for which relief may be granted against Defendant Hilton. Defendant Hilton argues that all of the causes of action in the Complaint are based on the premise that the Plaintiff was employed by Hilton as well as employed by Laxmi, the Plaintiff was not employed by Hilton, and therefore the Plaintiff's claims against Hilton should be dismissed. In support of its argument, Hilton provides an analysis of certain factors enumerated in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). Hilton includes the Declaration of Scott Schrank with the Motion to Dismiss and relies on this declaration in the Motion to Dismiss.

In the Opposition to the Motion to Dismiss the Plaintiff asserts that, by virtue of the inclusion of the Declaration of Scott Schrank, the Motion to Dismiss is more appropriately viewed by the Court as a motion for summary judgment. Therefore, the Plaintiff argues, more discovery as to the material fact of Hilton's alleged joint employer status must occur before the Plaintiff will have a reasonable opportunity to oppose such a motion. The Plaintiff asserts that the Court has discretion to refuse to grant summary judgment at this point in litigation, and further asserts that Hilton has not properly applied the "Economic Reality" test provided in *Bonnette*.

In the Reply, Defendant Hilton argues that the Motion to Dismiss should be granted whether the Court views it as a motion to dismiss or a motion for summary judgment. Defendant Hilton alleges that the Plaintiff's Complaint does not allege sufficient facts to demonstrate the existence of joint employer status between Hilton, Laxmi, and the Plaintiff. Hilton also argues that the Plaintiff's NRCP 56(f) defense is insufficient to justify denying the Motion to Dismiss because the Plaintiff

has not explained how further discovery will uncover information or evidence in support of a genuine issue of material fact or attached a proper affidavit to the Opposition.

NRCP 12(b) provides for a motion to dismiss for failure to state a claim upon which relief may be granted. The rule further states, in relevant part,

> If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are *presented to and not excluded by the court*, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(Emphasis added).

Motions for summary judgment are governed by NRCP 56, subsection (f) of which states,

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Under NRCP 56, a party seeking to recover upon a claim may move for summary judgment upon all or any part of the claim. Such relief is appropriate when the pleadings, discovery and exhibits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. NRCP 56(c); *Nelson v. Calif. State Auto Ass'n Inter-Ins. Bureau*, 114 Nev. 345, 956 P.2d 803 (1998). The burden on the moving party may be met by showing that there is an absence of evidence to support any one or more of the prima facie elements of the non-moving party's case. *See NGA #2, LLC v. Rains*, 113. Nev. 1151, 1156 (1997) (citing *Celotex Corp. v Catrett*, 477 U.S. 317, 331, 106 S.Ct. 2548 (1986). Once the moving party has met its burden to show that no genuine issue of material fact exists, the non-moving party must produce specific facts supported by competent admissible evidence that demonstrates the presence of a genuine issue of material fact for trial. *See Elizabeth E. v. ADT Security Sys. W.*, 108 Nev. 889, 892 (1992). While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party must do more than simply show that there is some metaphysical doubt as to

the operative facts in order to avoid entry of summary judgment, and is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture. *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005).

Although the Court may disregard the Declaration of Scott Schrank and view the Motion to Dismiss as what it purports to be, the Court finds that the Motion to Dismiss is more appropriately viewed as a motion for summary judgment by virtue of repeated reference to the declaration- a matter outside the pleadings. The Court further finds that, because discovery in this case has only just begun, it would be inappropriate to grant summary judgment in favor of the Defendant at this point. The Plaintiff has alleged, based on information and belief arising during the course of her employment and the limited discovery conducted, that circumstances evidencing a joint employer relationship between Hilton, Laxmi, and the Plaintiff exist. There is certainly a dispute as to the existence of a joint employer relationship, and the existence of this relationship is material to the dispute between the parties as it bears directly on the Plaintiff's claims against Hilton.

The Plaintiff should be granted access to discovery to determine the accuracy of the information the Plaintiff relied upon in asserting a joint employer relationship against Hilton. The *Bonnette* case, noted *supra*, does provide certain factors for consideration upon a determination of a joint employer relationship, but also makes clear that the focus of the inquiry should be on the economic reality of the relationship rather than isolated factors. *Bonnette*, at 1469.

The Plaintiff has put forth many specific facts in the Complaint, and even more in the Opposition to the Motion to Dismiss which will be relevant to a determination regarding the existence of a joint employer relationship in this matter with respect to the named Plaintiff and the putative class members. Therefore, the Plaintiff should be granted the opportunity to conduct discovery to determine whether the asserted facts demonstrating a joint employer relationship do in fact exist with regard to this Plaintiff and the putative class in this case. To find otherwise and grant summary judgment at this point in litigation would be unjust.

However, and also based on the early stage of litigation, the Court finds that Hilton should not be barred from reasserting their positions that a joint employer relationship does not exist, and that the claims against Defendant Hilton should be dismissed, once discovery on the matter has

been conducted. During the course of discovery evidence may come to light that the joint employer relationship alleged by the Plaintiff does not exist under the fact intensive inquiry required by *Bonnette*. Therefore, the Court hereby DENIES the Motion to Dismiss, as a motion for summary judgment, without prejudice.

II. *Motion for Circulation of Notice Pursuant to 29 U.S.C. § 216(b).*

The Plaintiff moves the Court for an order directing that other persons similarly situated to the Plaintiff be given notice of the pendency of the action and an opportunity to file written consents with the Court to join the action as party plaintiffs, to toll the statute of limitations on their individual claims while the Motion for Circulation is considered, and other assorted relief. The Plaintiff has provided a proposed Notice and has additionally requested that the Notice and Consent to Join both be translated into Spanish prior to circulation.

In support of the Motion for Circulation, the Plaintiff asserts that the Defendants maintain a common plan, policy, and practice whereby the Defendants "suffered or permitted" members of the asserted class to work over forty hours in a workweek without paying the employees commensurate premium overtime pay. The Plaintiff asserts that the Defendants failed to compensate her, and all members of the putative class, the required one and a half times the regular rate of pay for hours worked in excess of forty hours in a workweek. The Plaintiff points to their own declaration and pay stubs, the declaration of an asserted putative class member, and a letter from counsel for the Defendants in support of their position that the Defendants maintain a common plan, policy, or practice of not paying overtime pay to employees at the appropriate rate.

The Plaintiff seeks to have conditionally certified a class consisting of "[a]ll current and former employees of Defendant who worked as non-exempt employees at any time during the relevant time period", and would have therefore been subject "...to the same policy and procedure of requiring employees to perform work without proper overtime premium compensation." The Plaintiff asserts that the Court should use a lenient standard in deciding the Motion for Circulation because the only question before the Court at this juncture is whether the Plaintiff and putative class members should be notified of the pending action so that they may decide whether or not to

participate in the action. The Plaintiff provides substantial authority interpreting the FLSA from the Federal District Court for the District of Nevada. Further, the Plaintiff asserts that because the statute of limitations continues to toll on putative class members' individual causes of action, a grant of conditional certification would allow the Plaintiff to gather collective-wide facts during the course of discovery and prevent individual claims from expiring due to mistaken reliance on certification of the class.

The Plaintiff has attached a proposed Notice of Pendency of FLSA Collective Action Lawsuit Against LAXMI HOTELS, dba HAMPTON INN & SUITES, HILTON WORLDWIDE, and DOES 1 through 50 ("the Notice") and proposed Consent to Join which, the Plaintiff asserts, have been approved by federal courts in previous cases. The Plaintiff has indicated amenability to any changes to either document. Finally, the Plaintiff asserts that the statute of limitations in this matter should be tolled during the pendency of the Motion for Circulation to avoid an evaporation of time in which putative class members may join the action, and asserts that "the time required for a court to rule on a motion ... for certification of a collective action in an FLSA case[ ] may be deemed an 'extraordinary circumstance' justifying application of the equitable tolling doctrine."[2]

In opposition, Laxmi asserts that it does not have a "decision, policy, or plan, of not paying overtime" and does, in fact, pay overtime to nonexempt employees when earned. Laxmi admits that it failed to pay a certain amount of overtime pay to the Plaintiff, and asserts that said failure was due to a solitary administrative error which was thereafter corrected. Laxmi asserts that the contents of the declarations attached in support of the Motion for Circulation concern events and circumstances at an unrelated business, and rely on inadmissible hearsay. Laxmi objects to the proposed Notice because the proposed Notice refers to "the Defendants" or "the Defendant" generally, rather than specifically tailoring any request to any particular defendant. Laxmi asserts that the proposed Notice is therefore overbroad, and further argues that Defendant Hilton has not been served and the Plaintiff has not shown that the alleged decision, policy, or plan extends to Hilton, or that any of Laxmi's employees are also Hilton employees. Finally, Laxmi asserts that the statute of limitations

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[2] *Small v. Univ. Med. Ctr. of S. Nevada*, 2013 WL 3043454, at 3 (D. Nev. June 14, 2013) citing *Yahraes v. Restaurant Assocs. Events Corp.*, 2011 WL 844963 at 2 (E.D.N.Y.2011).

should not be tolled in this matter because neither the Plaintiff, nor any putative class members were prevented from asserting their claims by Laxmi, and the Plaintiff does not assert that she was prevented from filing her claims on time by any extraordinary circumstances beyond the Plaintiff's control.

In the Reply, the Plaintiff reasserts that the only question before the Court at this time is whether the named plaintiff and the proposed opt-in plaintiffs are "similarly situated" such that the proposed class members should be given notice of the action. The Plaintiff also asserts that the bare denial of a decision, policy, or plan to not pay overtime by an agent of the Defendant should not overcome the Motion for Circulation. The Plaintiff again states that, if the Motion for Circulation is granted, and the Court conditionally certifies a class, the parties will thereafter conduct discovery related to the Defendants' plans and policies. Such discovery may later lead to the revocation of certification for certain members of the class, or the entire class. The Plaintiff asserts that the proposed Notice is proper because Defendant Hilton was served on September 16, 2015, service was refused, and Plaintiff intends to take a default against Defendant Hilton. Finally, the Plaintiff reasserts that the time required for the Court to rule on a motion to certify a class is an extraordinary circumstance justifying equitable tolling of the statute of limitations.

A. Conditional Class Certification

An employee may maintain a cause of action against an employer for unpaid overtime compensation under the FLSA. 29 U.S.C. § 216(b). "An action … may be maintained against any employer … in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216. "Under the FLSA, 'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees … who in turn become parties to a

collective action only by filing written consent with the court." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1530 (2013) (Citation omitted).

The FLSA allows actions to be brought on behalf of "similarly situated" employees. The FLSA does not define "similarly situated." *See* 29 U.S.C. § 216(b). The generally accepted approach for certification of a collective action under the FLSA in the Ninth Circuit is a two-step approach. *Lewis v. Nevada Prop. 1, LLC*, 2013 WL 237098, at *7 (D. Nev. Jan. 22, 2013); *see also Kress v. Price WaterhouseCoopers, LLP,* 263 F.R.D. 623, 627 (E.D .Cal.2009). First, the Court will make a preliminary determination whether to conditionally certify the class under 29 U.S.C. § 216(b) and send notice to potential class members so that they will have an opportunity to opt-in to the action. *Lewis*, at *7; *see also Kress* at 627. Second, after the close of discovery, the Defendant may move to decertify the class. *Lewis*, at *7; *see also Kress* at 627. At the first stage, the court primarily relies on the parties' pleadings and affidavits to decide whether the potential class should be given notice of the pendency of the action and applies a lenient standard based on the "minimal evidence" before the court. *See Lewis* at *7 (citing *Mooney v. Aramco Services, Co.*, 54 F.3d 1207, 1213–14 (5th Cir. 1995); *Kane v. Gage*, 138 F.Supp.2d 212, 214 (D.Mass. 2001). The Federal District Court for the District of Nevada has held that "[a] plaintiff need only make substantial allegations that the putative class members were subject to a single decision, policy, or plan that violated the law." *See id.* Affidavits in support of a motion for conditional certification must be based on the affiant's personal knowledge, which may be inferred based on what the affiant would have probably learned during the normal course of employment. *Id.* The court, however, does not resolve factual disputes, decide substantive issues on the merits or make credibility determinations at the first stage. *Lewis*, at *8.

Here, the Plaintiff asserts that she was not paid the required overtime pay by the Defendants and provides her paystubs as support for the assertion. In addition, the Plaintiff has provided her own declaration and the declaration of a prospective class member. Both affidavits assert that, upon information and belief, there was a common decision, policy, or plan to not pay non-exempt employees the one and a half times rate when greater than forty hours were worked in a work week. The Defendant asserts that the declarations proffered by the Plaintiff are based on hearsay and

contain irrelevant information about an unrelated hotel. The Federal District Court for the District of Nevada has followed other federal district courts in holding that "[b]ecause final disposition is not an issue at the conditional certification stage, requiring a plaintiff to present evidence in favor of a conditional certification that meets the hearsay standards of the Federal Rules of Evidence fails to take into account that the plaintiff has not yet been afforded an opportunity, through discovery, to test fully the factual basis of his case." *Lewis* at *8 (2013 Nevada). This Court will follow the federal court's holding.

The Plaintiff states that the owners of the allegedly unrelated hotel also own the Hampton Inn & Suites at which the Plaintiff was employed. The Court need not make a finding at this time as to whether the evidence supports the substantive issue of common ownership of the hotels, rather; the Court must determine whether the declarations contain sufficient information based on personal knowledge, inferred by what the affiant would have probably learned during the normal course of employment, to support a grant of conditional class certification. The Court finds that it is likely the Plaintiff would have learned of common-ownership of additional properties by Defendant Laxmi during the normal course of employment, and observed representatives of Defendant Hilton on the premises in a supervisory role approximately twice each year, among other factual allegations in the Complaint. Therefore, the Court finds that sufficient evidence has been provided by the Plaintiff to meet the applicable lenient standard required to support a grant of conditional class certification. Of course, the Defendant is free to move to decertify the class at the close of discovery and prior to trial at the second stage of the class certification process.

B. Form of the Proposed Notice

"There are no strict guidelines for the form and content of the notification, district courts 'must be scrupulous to respect judicial neutrality ... and must take care to avoid even the appearance of judicial endorsement of the merits of the action.'" *Small v. Univ. Med. Ctr. of S. Nevada*, 2013 WL 3043454, at *3 (D. Nev. June 14, 2013) (quoting *Hoffman–La Roche*, 493 U.S. 165, 174 (1989).

The Plaintiff has included a proposed Notice as Exhibit 1 to the Motion for Circulation. The Defendant has objected to the proposed Notice inasmuch as the document refers to "Defendants" collectively, and the resulting implication that Defendant Hilton remain a party to this suit. For the reasons outlined in Part I of this Order, *supra*, regarding the Motion to Dismiss, the Court finds that Defendant Hilton should not be dismissed as a party at this juncture, and that the collective references to "Defendant" or "Defendants" are not problematic.

The Court has reviewed the Notices of Pendency of FLSA Collective Action Lawsuit attached as Exhibits 6-9 to the Motion for Circulation and the proposed Notice and Consent to Join and finds that the Exhibits properly identify those who may participate in the lawsuit, state that participation is voluntary, and that the Court's decision is binding on opt-in Plaintiffs regardless of whether the decision is favorable or unfavorable to the plaintiffs. In addition, the Court finds that the proposed Notice and proposed Consent to Join, which are based on the proffered Exhibits are sufficiently neutral, and properly printed on the letterhead provided by Plaintiff's counsel,[3] to avoid any appearance of judicial endorsement of the merits of the action.

However, although not objected to by the Defendants, the Court notes that the proposed Notice contains references Federal Court. Any references to Federal Court must be corrected to accurately reflect that this case has been filed in Nevada State District Court.

The Plaintiff has further requested that the Notice and Consent to Join be translated into Spanish and mailed together with an English version. The Court further finds that the translation of the Notice and Consent to Join into Spanish for the purpose of mailing both versions of the Notice and Consent to Join to prospective opt-in plaintiffs is prudent and appropriate under the circumstances.

C. Statute of Limitations

The Plaintiff argues that the Court should toll the statute of limitations while the Motion for Circulation is pending. The Plaintiff acknowledges that, for opt-in plaintiffs in an action under 29

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[3] *See, Small v. Univ. Med. Ctr. of S. Nevada*, 2013 WL 3043454, at *3 (D. Nev. June 14, 2013).

U.S.C. § 216(b), the statute of limitations is not tolled until the date on which the opt-in plaintiff's written consent is filed with the court. 29 U.S.C. 256(a). The Plaintiff cites to case law from the Federal District Court for the District of Nevada which holds that, while a motion to certify a class is pending decision, equitable tolling may apply in FLSA cases if certain criteria apply. The Plaintiff cites to *Small v. University medical Center of So. Nevada*, 2013 WL 3043454 at *3 (D. Nev. June 14, 2013) in support of this assertion. The Court in *Small* held that part of a Court's determination in considering a request to toll, should include whether the defendant was aware of the potential scope of their liability when the complaint was filed, as well as fairness to the parties.

As noted, *supra*, Laxmi opposes the Plaintiff's request that the statute of limitations be tolled during the consideration of the instant Motion for Circulation, based on the Defendant's assertion that no criteria justifying equitable tolling has occurred. Laxmi asserts that equitable tolling is only appropriate when the plaintiff, or plaintiffs, have been prevented from asserting their claims by the wrongful conduct of the defendant, or in the extent that extraordinary circumstances beyond the plaintiff's control made it impossible to file the claims on time. *See Bonilla v. Las Vegas Cigar Co.*, 61 F.Supp.2d 1129, 1140 (D. Nev. 1999).

The Court finds that, although equitable tolling may be necessary in certain cases, tolling the statute of limitations for the period necessary for the Court to decide on the Motion to Circulate is not appropriate here. Although the time required for the Court to rule on a motion before it is outside the Plaintiff's control, the Court finds that nothing extraordinary about these circumstances has been alleged. There has not been a substantial delay in the Court's determination of the Motion to Circulate, nor has the Plaintiff alleged any undue delay caused by either of the Defendants in briefing the Motion to Circulate.

III. *Conclusion and Order*

Accordingly, and based on the foregoing,

IT IS ORDERED

1. HILTON WORLDWIDE'S MOTION TO DISMISS filed by Defendant HILTON WORLDWIDE on December 28, 2015, is hereby DENIED without prejudice.

2. The MOTION FOR CIRCULATION OF NOTICE PURSUANT TO 29 U.S.C. § 216(b) filed by Plaintiff ANGELICA GODINEZ-GARCIA is hereby GRANTED IN PART.

   a. The putative class described at the top of page 3 of Exhibit 1 to the Motion to Circulate:

      > "To participate in this lawsuit, you must have been employed by Laxmi Hotels, dba Hampton Inn & Suites, Hilton Worldwide at any time from July 7, 2012, to the present and you worked over 40 hours in a week but were not paid overtime premium compensation for the overtime hours worked."

      is hereby GRANTED conditional certification.

   b. The Proposed Notice provided as Exhibit 1 to the Motion to Circulate is hereby APPROVED, subject to the corrections described in this Order.

   c. The proposed Consent to Join provided as Exhibit 2 to the Motion to Circulate is hereby APPROVED, subject to the corrections described in this Order.

   d. Plaintiff is hereby GRANTED leave to circulate the Notice of the Pendency of the Action and the Consent to Join to putative members of the conditionally certified class as described in Part (a), *supra*.

   e. The Notice of the Pendency of the Action and the Consent to Join shall be translated into Spanish, shall be printed on the letterhead of Plaintiff's counsel's firm, and shall be distributed to prospective members of the conditionally certified class.

   f. Each distribution shall contain one English copy and one Spanish copy of both the Notice of the Pendency of the Action and the Consent to Join.

   g. The Plaintiff's request that the statute of limitations to be tolled during the pendency of a decision regarding the Motion to Circulate is hereby DENIED.

IT IS SO ORDERED

Dated this 21st day of March, 2016.

JEROME POLAHA
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 21 day of March, 2016, I deposited for mailing a copy of the foregoing to:

The following was served via efiling:

MARK THIERMAN, ESQ.

AUSTIN SWEET, ESQ.

MARK GUNDERSON, ESQ.

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