Case Nos. 09-20561 and 10-20614

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JENNIFER ROUSSELL, on her own behalf and on behalf of a class of similarly-situated persons, ***et al.***

Plaintiffs-Appellees,

vs.

BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
(Honorable Keith P. Ellison, District Judge)

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CERTIFICATE OF INTERESTED PERSONS

Case Nos. 09-20561 and 10-20614, Jennifer Roussell, et al. v. Brinker International Payroll Company

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1. have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Jennifer Roussell, Katie Abshire, Amy Acosta, Rick Adams, Allison Alfrey, Sherreta Anderson, Jessica Antley, Angela Baker, Deborah Bandala, Joette Beaulieu, Jeremiah Brenner, Theresa Bryant, Theresa Buonopane, Lisa Carbone, Daniel Carter, Kimberly Colbeck, Charles Joseph Corno, Devon Davasher, Ted Davis, Leslie Dellamano, Kirby Donohue, Wendy Dorr, Mandybeth Downing, Jason Ekeler, Elizabeth Ellis, Heidi Evans, Maureen Farinato, Karen Fitzgerald, Thomas Falnagin, Richard Fox, Sylvia Garner, Jennifer Hallmark, Heather Christian Hart, Juanita Held, Lisa Lavada Hill, Jason Jandera, Falon Jones, Jesse Kaddy, Shari Martino-Huffman, Danielle McDonald, Kerry McDonald, Janelle McKelvey, Alysha Miller, Nicole Moodie, Lindsey Parrish, Heather Plane, Christine Poulin, Aneta Skubicz, Christina Slomkowski, Lori Smith-Crowder, Kara Spahl, Lena Vial, Cory Walker, Shannon Williams, and Emily Zayas.

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REQUEST FOR ORAL ARGUMENT

The principal issue for this Court to resolve on appeal is whether the district court acted within its considerable discretion in structuring and managing the trial below. Oral argument of no more than 20 minutes for each side is appropriate.

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I. INTRODUCTION

Disappointed by an adverse jury verdict and court ruling, Brinker seeks a second bite at the apple through this appeal. The litany of complaints Brinker raises are without merit. The district court meticulously certified this Fair Labor Standards Act ("FLSA") collective action, of 55 waiters and waitresses (referred to collectively as "Plaintiffs"), structured the trial, reviewed the evidence, and awarded fees. The jury's verdict awarding $27,878.04 in back wages and liquidated damages was supported by substantial evidence. Ironically, many of Brinker's complaints on appeal follow from Brinker's own requests before and during trial, which the district court granted. Brinker got the trial it requested.

II. STATEMENT OF ISSUES

Whether the district court acted within its broad discretion, to which this Court gives great deference, in: (1) not decertifying the 55-person collective action; (2) structuring and managing the trial; (3) determining applicable legal standards; and (4) awarding attorneys' fees.

III. STATEMENT OF THE CASE

Jennifer Roussell filed this FLSA opt-in collective action against Defendant Brinker International Payroll Company, L.P. ("Brinker" or "Defendant") on November 11, 2005. Roussell brought this case individually and on behalf of other similarly-situated current and former food servers employed by Brinker at its Chili's Bar and Grill Restaurants ("Chili's") restaurant chain. Roussell alleged that Brinker required servers to share tips with non-tip pool eligible Quality Assurance employees (also known as "QAs") in violation of the FLSA's tip pool credit and minimum wage provisions.

Brinker agreed to conditional certification of the case as a collective action. The district court therefore issued an approved notice to the potential class members informing them of their right to participate in the case. In response to the

court-approved notice of collective action, approximately 3,500 current and former Chili's servers joined the action as opt-in plaintiffs. After extensive discovery, Brinker filed motions to decertify and for summary judgment. The court granted, in part, the motion to decertify the approximately 3,400 opt-in plaintiffs who had not been deposed during discovery. However, the court denied decertification as to the 55 opt-in plaintiffs who had been deposed because these 55 all presented deposition testimony showing them to be similarly-situated.

At the parties' request, the case was tried on a representative basis. Fourteen plaintiffs provided testimony on behalf of the 55 collective action opt-ins. Prior to trial, Brinker stipulated that all fourteen representative trial witnesses were coerced to share tips with QAs during their tenures with Chili's. The jury trial was therefore limited to Brinker's affirmative defense of whether QAs were eligible to participate with servers in mandatory tip pools. Following a two week trial, the jury reached a verdict for Plaintiffs – finding the 55 plaintiffs were similarly situated and that, based on their duties, QAs were not tip pool eligible.

At trial, Brinker attempted to renege on its earlier concession that the fourteen testifying plaintiffs had been coerced. At Brinker's request, the court agreed to address the issue of coercion – Brinker's second affirmative defense. Following trial, the court held that Brinker's concession of coercion as to the fourteen representative witnesses could be extrapolated to the remaining forty-one plaintiffs due to their similarly situated status.

Following substantial post-trial proceedings, including rulings on several post-trial motions filed by Brinker, the district court entered a final judgment of $271,878.04 ($135,939.02 in back wages plus[1] an equal amount as liquidated

[1] Brinker stipulated to the amount of damages. R12109-11. References to the Record on Appeal are designated by "R" followed by the page number(s) assigned

damages). After nearly six years of litigation, significant discovery and motion practice, a lengthy trial, and post-trial practice, the court also awarded Plaintiffs $1,747,110.81 in attorneys' fees and costs, which was approximately 40% less than the total fees incurred.

IV. FACTS AND PROCEDURAL HISTORY

A. The Parties and the Claims

Prevailing Plaintiffs are 55 food servers employed at Chili's. These food servers were paid a sub-minimum wage supplemented by a tip credit system (see below).

1. FLSA Restrictions on Tip Credits and Tip Pools

Under the protections of FLSA, tips given to restaurant workers are the property of the employees, not the employer. *Reich v. Priba Corp.*, 890 F. Supp. 856, 594 (N.D. Tex. 1995) (citing 29 C.F.R. § 531.52); Dep't Labor Wage & Hour Div., Op. Ltr., 1997 WL 959133 (Jan. 27, 1997). FLSA permits employers to pay certain employees a subminimum wage of $2.13 per hour. 29 U.S.C. § 203(m); *Pedigo v. Austin Rumba, Inc.*, 722 F. Supp. 2d 714, 721 (W.D. Tex. 2010). A "tip credit" is the permitted portion of the minimum wage (currently $7.25 per hour) that an employer is excused from paying because its employees receive tips. 29 U.S.C. §§ 203(m), 206(a)(1)(C). Without a tip credit, the payment of a sub-minimum wage to tipped employees constitutes a *per se* minimum wage violation

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by the Clerk of the District Court for docket entries 1 through 369. References to Supplemental Records on Appeal are designated by "SR-I" refer to followed by the page number(s) assigned by the Clerk of the District Court for docket entries 370 through 389, while "SR-II" followed by the page number(s) assigned by the Clerk of the District Court refers to docket entries 390 through 417. References to Plaintiffs'-Appellees' Record Excerpts are designated by "RE" followed by the page number(s) in the attached Appendix.

under FLSA. For an employer to take advantage of the tip credit, tipped employees, such as servers, can only be required to share tips with other "*employees who customarily and regularly receive tips*." *Bursell v. Tommy's Seafood Steakhouse*, No. H-06-0386, 2006 WL 3227334, at *1 (S.D. Tex. Nov. 3, 2006) (emphasis added) (citing 29 U.S.C. § 203(m)).

Employees who "customarily and regularly receive tips" are limited to those employees engaged in an "occupation" in which they customarily and regularly receive tips, such as food servers, bartenders, and hostesses. *Myers v. Copper Cellar Corp.*, 192 F.3d 546, 548-50 (6th Cir. 1999). An occupation qualifies as one that "customarily and regularly receives tips" if there exists significant interaction between the customer and the employee. *Id.* at 550-51.

The prerequisites to the "tip credit" exception are strictly construed against the employer. *Bursell*, 2006 WL 3227334, at *1 (citing *Chung v. New Silver Palace Rest., Inc.*, 246 F. Supp. 2d 220, 229 (S.D.N.Y. 2002)). As such, employers bear the burden of proof to show the tip pool is valid. *Myers*, 192 F.3d at 549 n.4.

2. Claims and Defenses

Plaintiffs alleged that Brinker failed to pay Chili's servers a minimum wage by forcing servers to share tips with non-tip eligible QAs. Brinker raised two affirmative defenses to Plaintiffs' claims: (1) QAs are in a service occupation in which they customarily and regularly received tips and, therefore, eligible to participate with servers in mandatory tip pools ("QA tip pool eligibility" defense); and (2) any tip sharing between Chili's servers and QAs was voluntary and thus not subject to the requirements of FLSA ("voluntariness" or "lack of coercion" defense). R61-62, R8438-40.

B. Pre-Trial and Trial Proceedings

1. Conditional Certification of the Class and Discovery

Chili's consented to conditional certification of the case as a collective action. R136. Thus, on August 28, 2006, the court authorized the distribution of an agreed notice to current and former Chili's servers nationwide. In response to class notice, approximately 3,500 plaintiffs opted into the lawsuit. R136, R7636.

The parties then conducted extensive class discovery. At Brinker's request, Plaintiffs identified 55 opt-in plaintiffs as trial witnesses, whom Brinker deposed. R715-18, R686-87. In total, the parties conducted 120 depositions in 26 states, including the depositions of the 55 opt-ins identified by Plaintiffs, Plaintiffs' managers and co-workers, and Brinker's corporate and expert witnesses.

2. Brinker's Motions to Decertify the Class and for Summary Judgment

After the close of discovery, Brinker moved to decertify the class. R914-45. Brinker also moved for summary judgment on its QA tip pool eligibility defense, arguing that QAs were eligible to participate in a mandatory tip pool as a matter of law. R2074-2102.

The district court denied Brinker's motion to decertify in part and granted it in part. Because there was a lack of evidence to establish that the tips pools were involuntary for all opt-ins, the court decertified the 3,500 member opt-in class. R7683-84. However, the court certified a collective action of the 55 deposed opt-in plaintiffs based on its evidentiary finding that they were similarly situated as to coercion and QA job duties.[2] R7656, R7678, R8380.

[2] Brinker produced the report and supplemental report of its expert, William Michael Lynn, Ph.D., who proffered opinions on the voluntariness of servers' tipping of QAs and the appropriateness, under FLSA, of QAs participating in mandatory tip pools. Plaintiffs moved to exclude his testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), on the ground that his

The district court denied Brinker's motion for summary judgment. The court found that Plaintiffs had submitted substantial evidence demonstrating QAs did not have more than minimal customer interaction or engage in customer service functions. R7657. Thus, the court determined that there was a genuine issue of material fact as to whether servers could be required to share their tips with QAs. *Id.*

In certifying the 55-person collective action and denying Brinker's motion for summary judgment, the court: (1) ruled that an employee's tip pool eligibility was dependent upon his or her performing customer service functions and having more than minimal customer interaction (R7655); (2) adopted the U.S. Department of Labor's ("DOL") definition of a voluntary tip pool as one that is free of any coercion whatever (R7669-72); and (3) held that "QA" was a separate job, and therefore, servers who worked in both positions were employed in "dual jobs" rather than being engaged in QA work "incidental" to their server's duties (R2095-96, R7661-63).

C. The Final Trial Plan and Brinker's Concession on the Issue of Coercion

1. Final Trial Plan

Having determined the 55 plaintiffs could proceed to trial collectively, the district court allowed trial to proceed with representative testimony on all issues. RE6:9-14. It directed Plaintiffs to identify for Brinker their fourteen testifying representative witnesses. *Id*. The court further granted Brinker wide "latitude" to present as many rebuttal witnesses as it deemed necessary. RE6:17-18, R8917.

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methodology was unsound and he was not qualified in the area of expertise in which he was offered, which the court granted. R7684-89.

2. Brinker Conceded to Coercion and Requested the Court to Eliminate the Issue from Trial.

Shortly before trial, Brinker conceded that the fourteen testifying plaintiffs met the court's coercion standard. R8406. Brinker repeatedly argued that no coercion-related testimony should be presented at trial and the principal remaining trial issue was QAs' eligibility for mandatory tip pools. RE7-11, R8407, R8706, R8710, R8742. The court later granted Brinker's motion in limine to exclude evidence related to coercion from the jury at trial, noting that "[t]he remaining issue in this case is Brinker's [§] 203(m) affirmative defense – whether the QAs were tip-pool eligible." R9077.

D. Plaintiffs Prevailed at Trial with Both Jury Verdict and Court Ruling in Their Favor.

1. Evidence Presented to the Jury on QA Tip Pool Eligibility

At trial, Plaintiffs presented voluminous documentary evidence, including many of Brinker's own internal records, such as the corporate QA job description, QA Workbook, and company-wide memoranda regarding the QA position, which established that the QAs' primary job functions were food preparation and presentation – not customer interaction. *See, e.g.*, RE12-16.

Plaintiffs' witnesses and Brinker's witnesses (on cross-examination) confirmed that QAs had minimal customer contact and did not perform customer service functions. *See, e.g.*, R10428, R10430, R10686, R10718 (testimony of Brinker's Vice President of Corporate Affairs Susan Sandidge); R10914-15 (Brinker witness); R10734-35 (Brinker witness); R9466, R9643-44, R9792-93, R10306 (testimony of several Plaintiffs).

Though not followed in practice, Brinker's written policy is that QAs are not eligible to participate in a mandatory tip pool. RE12, R17-21. Brinker's corporate trial witnesses also conceded that Brinker's own internal investigation of the QAs'

job duties and level of customer interaction confirmed that QAs did not engage in customer service functions. R10370-73; R10464-65, R10467, R10504-05; R10560-61; R10469, R10478 (testimony of Barbara Youngman, Brinker's former Regulatory Analyst for Corporate Affairs); RE22-24 (internal investigation focused on job descriptions and duties performed in the field). Finally, Plaintiffs called multiple witnesses who testified that QAs or similar employees at other casual dining restaurant chains, such as Applebee's and Bennigan's, did not participate in tip pools with servers. *See, e.g.*, R9464-65, R9468 (Applebee's); R9716-17, R9727 (Bennigan's); R9928-30 (Dave & Busters); R9804-05 (Ryan's Steakhouse); R9892-99, R9903 (Biaggi's Restaurant).

Moreover, on cross examination, Brinker's witnesses admitted: (1) that the documentary evidence presented by Plaintiffs and cited above was accurate and used companywide (*see, e.g.*, R4090-14, R11481-82, R11789-90); (2) that QAs worked in an employee only part of the restaurant (underscoring their lack of customer interaction) (*see, e.g.*, R11030-32, R11770, R11396); and (3) that the QAs' primary location in the restaurant was next to the cooks and not in the dining area with customers (R11791-92 (explaining that QAs would never leave the pass during a busy shift); R11714-15). Finally, Plaintiffs impeached many of Brinker's witnesses, including those who testified about non-testifying opt-in plaintiffs. *See, e.g.*, R11018-19, R11400-01, R11491, R11364-65.

2. Trial Evidence Presented to the District Court on Coercion

At trial, notwithstanding its earlier concession as to coercion, Brinker requested, and the district court granted, the opportunity to present to the court, outside the presence of the jury, evidence about the lack of coercion of tip-pooling at restaurants of non-testifying plaintiffs. RE26:4-20. Brinker introduced evidence in support of its theory that the tip pools were voluntary. R11563.

3. Jury Verdict, District Court Ruling, and Judgment in Favor of Plaintiffs

On March 23, 2009, the jury returned a verdict in favor of Plaintiffs on both issues – concluding the fourteen testifying plaintiffs were representative of the remaining forty-one non-testifying plaintiffs with respect to QA job duties and that Brinker failed to prove that it operated legal tip pools. R12104-05.

On April 9, 2009, the court held a hearing to discuss the resolution of the coercion issue. At the hearing, Plaintiffs proposed that Brinker's coercion concession as to the fourteen representative plaintiffs should be extrapolated to the remaining forty-one plaintiffs. In the alternative, Plaintiffs proposed that, if the court rejected the use of representative testimony, it could conduct its own factual findings as to whether the remaining forty-one plaintiffs were coerced into sharing their tips with QAs. R12654-55. Brinker rejected both proposals and insisted that the court either decertify the collective action or enter judgment in its favor. R12659-62. After the district court considered Brinker's additional coercion evidence and the deposition testimony on coercion from the forty-one non-testifying plaintiffs, it ruled, on April 29, 2009, that Brinker's concession as to coercion for the fourteen testifying plaintiffs would be extrapolated to the remaining forty-one plaintiffs. R12682.

On June 18, 2009, the court entered judgment for Plaintiffs in the amount of $271,878.04 ($135,939.02 in back wages and an equal amount in liquidated damages). R12697-98.

E. Post-Trial Motions and Award of Attorneys' Fees and Costs

The court denied Brinker's post-trial motions for judgment as a matter of law and a new trial. R12123-27, R12677, R12732. Plaintiffs subsequently moved for initial and supplemental awards of their attorneys' fees and costs. R12737; SR-

I 48. The court, after exhaustively reviewing the factual record, carefully considering the relevant factors, and reducing Plaintiffs' lodestar for lack of complete success, awarded Plaintiffs fees in the amount of $1,520,850.94 and costs in the amount of $226,259.87. SR-I 141-46, SR-II 504-05. On August 4, 2010, the district court entered its final Rule 54(b) judgment in favor of Plaintiffs. SR-II 504-05.

V. ARGUMENT

The district court appropriately certified this 55-person collective action, managed trial issues, applied the correct legal standards, entered judgment on the jury verdict, and awarded attorneys' fees. Many of the alleged "errors" on appeal paradoxically arise from Brinker's own requests that the court granted. Brinker's dissatisfaction with the outcome is not a reason to reverse.

A. This 55 Plaintiff Collective Action Was Appropriately Certified for Trial.

The key inquiry for maintaining a FLSA collective action is whether the plaintiffs are "similarly situated." 29 U.S.C. § 216(b). Brinker concedes that the court used the appropriate legal standards to determine whether plaintiffs were similarly situated, specifically: (1) the factual and employment settings of the individual plaintiffs; (2) whether defenses individual to each plaintiff are present; and (3) fairness and procedural considerations. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1215-16 (5th Cir. 1995); *Falcon v. Starbucks Corp.*, 580 F. Supp. 2d 528, 534 (S.D. Tex. 2008). Brinker's argument, therefore, is with the court's fact finding, which is reviewed for abuse of discretion. *Pederson v. La. State Univ.*, 213 F.3d 858, 866 (5th Cir. 2000); *Mooney*, 54 F.3d at 1213.

1. This Case Was Exceptionally Well-Suited for a Collective Action.

The court's certification of a 55-person collective action was supported by substantial evidence of the similarity of Plaintiffs and their claims. The court

certified this collective action for trial after extensive discovery, including the depositions of all 55 opt-in plaintiffs. The parties also conducted an additional 65 depositions of individuals who had worked with the 55 opt-in plaintiffs, Brinker's corporate witnesses, and Brinker's expert witness.

2. Plaintiffs Presented Common Proof of Coercion through the Deposition Testimony of 100% of Plaintiffs.

Brinker's primary argument is that certification of this collective action was inappropriate because there was no common proof of coercion.[3] Not so. Similarly situated determinations are generally based on representative testimony.[4] *See, e.g.*, *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1258-65, 1276-80 (11th Cir. 2008) (testimony of less than 1% of the 1,424 opt-in plaintiffs); *Dole v. Snell*, 875 F.2d 802, 803 (10th Cir. 1989) (testimony from only one of thirty-two employees); *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982) (testimony from only

[3] Contrary to Brinker's contentions, for purposes of this 55-person collective action, Plaintiffs never alleged nor needed to allege a "single, uniform, nationwide policy or practice of coerced tip-sharing." Brief of Defendant and Appellant ("Br.") at 24. Rather, the 55 opt-in plaintiffs contended that all of them were coerced by their managers to share their tips with QAs. The question of whether there was a nationwide policy, therefore, is irrelevant. In any case, "a unified policy, plan, or scheme . . . may not be required to satisfy the more liberal 'similarly situated' requirement of § 216(b)." *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001); *see also O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 584 (6th Cir. 2009) ("Showing a 'unified policy' of violations is not required . . ."); *Frank v. Capital Cities Commc'ns, Inc.*, No. 80-CIV-2188-CSH, 1983 WL 643, at *2 (S.D.N.Y. Oct. 11, 1983) (same).

[4] Brinker's quarrel with the oral, rather than written, nature of the evidence is misguided. Plaintiffs' consistent testimony created a strong inference that "the pattern of violations was not coincidental but resulted from the application of a central policy." *Hill v. Muscogee Cnty. Sch. Dist.*, No. 4:03-CV-60 (CDL) 2005 WL 3526669, at *3 (M.D. Ga. Dec. 20, 2005); *Falcon*, 580 F. Supp. 2d at 531-33, 536 (unwritten policy encouraging off-the-clock work based on deposition testimony); *see also Maynor v. Dow Chem. Co.*, 671 F. Supp. 2d 902, 931-32 (S.D. Tex. 2009) (common policy based on plaintiff testimony despite lack of general, official stated requirements).

6 of 44 restaurants); *Maynor*, 671 F. Supp. 2d at 912 (testimony of 12 of 129 opt-in plaintiffs); *Falcon*, 580 F. Supp. 2d at 531-33, 536 (collecting cases).

Here, Plaintiffs presented ample common proof of coercion, including testimony from each of the 55 plaintiffs.[5] *See, e.g.*, R7674 (the "testimony of the opt-ins deposed . . . does at least suggest such a pattern" of coercion among the 55 to share tips with QAs."); R7678. This deposition testimony more than adequately demonstrated that Brinker had a common, unwritten policy or practice *with respect to these 55 plaintiffs* whereby managers subjected them to *de facto* mandatory tip pools with QAs.[6] Because there was ample proof of coercion, the court correctly denied decertification based on "a volume of good old-fashioned direct evidence." *Morgan*, 551 F.3d at 1277. Brinker's disappointment with the court's finding of fact does not warrant reversal.

a. Collective Actions Comprising Employees in Different Locations Supervised by Different Managers Are Permissible.

Brinker incorrectly claims that "other courts have recognized [that] individual violations of company policy by different employees at different

[5] There is nothing inappropriate or even unusual about Plaintiffs' counsel selecting a subset of opt-ins for depositions. *See, e.g.*, *Morgan*, 551 F.3d at 1244 ("Plaintiffs [] select[ed] 250 opt-ins for [defendant] to depose"); *Falcon*, 580 F. Supp. 2d at 530 (plaintiffs chose 8 of 355 opt-ins for deposition). Moreover, Brinker expressly requested that Plaintiffs do so. *See* R686-87, R715-68.

[6] The recognition that other Chili's managers may not have required servers to participate in an illegal tip pool does not extend to the limited 55 deposed opt-in plaintiffs whom the court found had been coerced. Like in *Falcon*, although not "all managers nationwide [may have] act[ed] in lockstep," "the deposition testimony supports a finding that the opt-in plaintiffs [] before the court were, in fact, similarly situated." 580 F. Supp. 2d at 536. "An employer should not be allowed to escape class liability simply because some managers do not commit FLSA violations as long as the evidence shows that there is a factual or legal nexus that binds together the claims of the opt-in plaintiffs before the Court." *Id.*; *see also O'Brien*, 575 F.3d at 586 (recommending "*partial*" decertification because "Plaintiffs who do present evidence that they are similarly situated . . . should not be barred from the opportunity to be part of a FLSA collective action" given its "important remedial purpose." (emphasis added)).

locations, by their very nature, are not appropriate for collective treatment."[7] Br. at 24. *See, e.g.*, *Morgan*, 551 F.3d at 1263 (decertification denied despite defendant's "assertion that the duties of store managers varied significantly depending on the store's size, sales volume, region, and district"); *Maynor*, 671 F. Supp. 2d at 931-32 (129 employees certified despite differences in managers and departments); *Falcon*, 580 F. Supp. 2d at 531-32, 536 (denying decertification despite "official written policy of prohibiting off-the-clock work" and opt-in plaintiffs from different stores under the supervision of different individuals in 30 states); *Wilks v. Pep Boys*, No. 3:02-0837, 2006 WL 2821700, at *5 (M.D. Tenn. Sept. 26, 2006) (denying decertification of action involving 593 stores in 36 states and Puerto Rico despite written policy of prohibiting off-the-clock work).

[7] Collective treatment of employees in different locations has been denied, but such decisions were based on the insufficiency of evidence to establish a "similarly situated" finding. *See Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1302 (11th Cir. 2008) (some employees paid for all time worked and time recording method varied); *Simmons v. T-Mobile USA, Inc.*, No. H-06-1820, 2007 WL 210008, at *6-7 (S.D. Tex. Jan. 24, 2007) ("no admissible proof from or about any specific [employee] other than [plaintiff]"); *Aguirre v. SBC Commc'ns, Inc.*, No. Civ.A. H-05-3198, 2006 WL 964554, at *7 (S.D. Tex. Apr. 11, 2006) (job duties varied widely); *Johnson v. TGF Precision Haircutters, Inc.*, No. Civ.A. H-03-3641, 2005 WL 1994286, at *3, 5 (S.D. Tex. Aug. 17, 2005) (declarations with no deposition testimony, two different job positions, and different payment methods); *Lugo v. Farmer's Pride Inc.*, No. 07-0749, 2010 WL 3370809, at *11-18 (E.D. Pa. Aug. 25, 2010) (inconsistent deposition testimony, different compensation systems, different donning/doffing practices, and different compensation for donning/doffing time); *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 579 (E.D. La. 2008) (substantial variations in job duties and discretion); *Williams v. Veolia Transp. Servs., Inc.*, 379 F. App'x 548, 549 (9th Cir. 2010) (in Rule 23 case, no proof "of what route and type of service [defendant] operates and whether [defendant] in fact deprived each of its employees of rest periods"); *Babineau v. Fed. Express Corp.*, 576 F.3d 1183, 1188, 1192 (11th Cir. 2009) (Rule 23 declarations unsupported by deposition testimony); *Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 485, 487 (C.D. Cal. 2008) (in Rule 23 case, survey experts unable to testify that surveys were representative).

"[T]here is no indication that Congress intended section 216 to only allow small collective actions . . . to proceed." *Falcon*, 580 F. Supp. 2d at 540; *see also Donohue v. Francis Servs., Inc.*, No. Civ. A. 04-170, 2004 WL 1406080, at *1 (E.D. La. June 22, 2004) ("[a]dopting defendants' reasoning would lead to the absurd result that employers could escape FLSA liability by making sure to underpay vast numbers (rather than smaller numbers) of their employees."). In sum, Plaintiffs presented substantial evidence of similarity where 100% of the class members in the same job working at the same restaurant chain provided consistent deposition testimony.

b. Brinker's Citations to Rule 23 Opt-Out Class Certification Cases Are Inapposite.

The cases Brinker cites as "controlling" are inapposite because they are Rule 23 opt-out cases that are "fundamental[ly] [and] irreconcilab[ly]" different from opt-in FLSA § 216(b) collective actions.[8] *LaChapelle v. Owens-Ill., Inc.*, 513 F.2d 286, 288 (5th Cir. 1975); *see also Grayson v. K-Mart Corp.*, 79 F.3d 1086, 1096 n.12 (11th Cir. 1996) ("requirements for . . . a § 216(b) class action are independent of, and unrelated to, the requirements for class action under Rule 23 . . .").

[8] Brinker's Rule 23 cases are also inapposite because the legal theories upon which they are based require subjective, individualized determinations whereas the question of tip pool coercion is an *objective inquiry* as discussed more fully below. *See Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880 (5th Cir. 1973) (Rule 23 class action brought by customer against broker alleging common-law fraud and negligence and non-disclosure violations of the Securities Exchange Act); *Sandwich Chef of Tex. Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F. 3d 205, 211 (5th Cir. 2003) (RICO violations involving excessive insurance premiums wherein Rule 23 predominance inquiry hinged on individual proof of reliance); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009) (breach of contract and unjust enrichment wherein determining whether commission charge backs were "unjust" and whether commissions were "earned" defeated Rule 23 predominance and commonality).

The Rule 23 "predominance" standard is "more stringent" than the "similarly situated" § 216(b) standard. *O'Brien*, 575 F.3d at 584-85 (use of Rule 23-type analysis was an abuse of discretion); *Grayson*, 79 F.3d at 1096 (same). "While Congress could have imported the more stringent criteria for class certification under Fed. R. Civ. P. 23, it has not done so in the FLSA." *O'Brien*, 575 F.3d at 584, 585-86 ("[A]pplying the criterion of predominance undermines the remedial purpose of the collective action device."). Reliance on Rule 23 class action cases is therefore improper. *Id.* at 584-85; *Sheffield v. Orius Corp.*, 211 F.R.D. 411, 412 (D. Or. 2002) (collecting cases and noting "[t]he majority of courts have concluded that Rule 23 factors are inapplicable to § 216(b) actions.").

c. Allegations of Coerced Tip Pools Are Suitable for Collective Actions.

Tip pool cases, supported by substantial evidence of coercion, may be tried as collective actions. *O'Brien*, 575 F.3d at 585 ("representative testimony from a subset of plaintiffs could be used to facilitate the presentation of proof of FLSA violations, when such proof would ordinarily be individualized" (citing *Morgan*, 551 F.3d at 1263-65, 1279-80)). Brinker's reliance on *Howard v. Gap, Inc.*, No. C06-06773 WHA, 2009 WL 3571984 (N.D. Cal. Oct. 29, 2009), is unavailing. *Howard* is an inapposite Rule 23 case in which a class of 35,000 employees was denied certification due to the difficulty of showing that each of the 35,000 was required to purchase Gap clothing. Additionally, whereas in *Howard* plaintiff declarations regarding manager coercion differed, here, the consistent deposition testimony of all 55 plaintiffs amply demonstrated that they were subjected to coercion. R7674, R7678.

Heath v. Hard Rock Café International, Inc., No. 6:10-cv-344-Orl-28KRS, 2010 WL 3941832 (N.D. Fla. Aug. 31, 2010), does not compel a different result. In *Heath*, the court denied class certification because affidavits showed coercion in

only four of the locations nationwide. *Id*. at *4. Significantly, the court *did not* conclude that manager coercion claims by their very nature are unsuited to collective actions. To the extent that similar concerns to *Heath* arose in this case, the district court dealt and dispensed with them by decertifying the proposed class of 3,500 opt-in plaintiffs and permitting only the claims of the 55 opt-in plaintiffs whose deposition testimony showed a common pattern of coercion to proceed to trial. In sum, there is no "show stopper" here. Brinker's disappointment with the court's factual findings does not justify reversal.

3. QA Job Duties Were Sufficiently Similar for Class Certification.

Brinker misdirects this Court's attention to minor variations in QA job duties to claim that the 55 opt-in plaintiffs are not identically situated. However, the 55 plaintiffs need only to be similarly, not identically, situated. *Morgan*, 551 F.3d at 1260; *Grayson*, 79 F.3d at 1096; *Crain v. Helmerich & Payne Int'l Drilling Co.*, No. 92-0043, 1992 WL 91946, at *2 (E.D. La. Apr. 16, 1992). "Just because the inquiry is fact-intensive does not preclude a collective action where plaintiffs share common job traits." *Morgan*, 551 F.3d at 1263. After all, "[i]f one zooms in close enough on anything, differences will abound . . . . But Plaintiffs' claims need to be considered at a higher level of abstraction." *Frank v. Gold'n Plump Poultry, Inc.*, No. 04-CV-1018 (PJS/RLE), 2007 WL 2780504, at *4 (D. Minn. Sept. 24, 2007). Here, the alleged variations in QA job duties were distinctions without significance; they related to incidental peripheral duties rather than the core job responsibilities that all QAs shared. R7656-57, RE12-16.

a. <u>The District Court's Similarly Situated Finding Was Well Supported by the Record.</u>

Brinker falsely claims the court's decision to deny decertification was "driven" by the admission of internal memoranda. Br. at 29. Rather, the district court made its decision "[a]fter reviewing the [entire] record" before it, including

"witness testimony, internal memoranda . . . , and the relevant duties." R7668; *see also* R7656 (relying on the fact that "many of Defendant's witnesses and virtually all of the opt-in Plaintiffs appear to testify that QAs, at most, performed [customer service] functions only rarely").[9] The court, therefore, correctly reviewed the entirety of the record and determined that QA job duties were sufficiently similar to warrant trying this case as a collective action.

b. Defenses Based on Job Duties Do Not Foreclose Collective Actions.

Individual inquiries into job duties do not foreclose collective action status because the district court "has the discretion to determine whether the potential defenses would make the class unmanageable." *Moss v. Crawford & Co.*, 201 F.R.D. 398, 410 (W.D. Pa. 2000) (citing *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 52 (3d Cir. 1989)); *Reyes v. Tex. Ezpawn, L.P.*, No. V-03-128, 2007 WL 101808, at *5 (S.D. Tex. Jan. 8, 2007). Courts regularly certify collective actions where variations in job duties are in question. *See, e.g.*, *Morgan*, 551 F.3d at 1247 (defendant's "defenses were not so individually tailored to each Plaintiff that a collective action would be unmanageable" "[b]ecause substantial similarities existed in the Plaintiffs' job duties."); *Falcon*, 580 F. Supp. 2d at 540-41; *Moss*, 201 F.R.D. at 410-11.

Thus Brinker's cited cases do not "establish" that defenses predicated on job duties are inappropriate for collective adjudication. Rather, in those cases, the courts found that given the evidence of substantial variations in job duties, the

[9] In any case, courts routinely evaluate corporate documents in class certification proceedings. *Indergit v. Rite Aid Corp.*, Nos. 08 CIV. 9361 (PGG), 08 CIV. 11364 (PGG), 2010 WL 2465488, at *5 (S.D.N.Y. June 16, 2010) (internal company documents "indicate that store managers are officially assigned a similar set of duties by [defendant's] corporate headquarters"); *Nerland v. Caribou Coffee Co.*, 564 F. Supp. 2d 1010, 1022-23 (D. Minn. 2007) (same).

plaintiffs were not similarly situated.[10] *See Mooney*, 54 F.3d at 1215 (age discrimination plaintiffs not similarly situated given "widely disparate factual, employment, and discharge histories" and defendant's defenses of "reasonable factors other than age"); *Anderson v. Cagle's Inc.*, 488 F.3d 945, 952, 954 n.8 (11th Cir. 2007) (multiple employers, wide variety of work assignments and compensation methods, and differences in union membership); *Reyes*, 2007 WL 101808, at *2-4 (deposition testimony of misclassification plaintiffs showed significant variations in job duties). No such substantial variations exist here.

c. Both the District Court's and the Jury's Similarly Situated Findings Are Entitled to Substantial Deference.

Ultimately, Brinker's quarrel is with the district court's and the jury's findings of fact. The factual findings of a judge and jury are entitled to the utmost deference. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991) ("Rule 52(a) commands that a trial court's findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). Similarly, appellate courts must be "especially deferential" when reviewing a jury verdict and "reverse only if no

[10] Brinker's analogy to misclassification cases is inapposite. Br. at 28, n.19. Job descriptions may be disregarded in misclassification cases because employers are incentivized to draft them in a self-serving manner so as to support their classification decisions. Here, Plaintiffs offered these job descriptions as *de facto* corporate admissions against Brinker's interest, thereby eliminating any credibility concerns of these documents. In addition, Brinker's, mostly Rule 23, cases involve dramatic variations in job duties and Rule 23 predominance inquiries that are inapplicable to section 216(b) collective actions as discussed above. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009) (applying stringent Rule 23 predominance inquiry to job duty questions); *Odem v. Centex Homes*, No. 3:08-CV-1196-L, 2010 WL 424216, at *5 (N.D. Tex. Feb. 4, 2010) ("dramatic[]" differences in job duties weighed against certification of a nationwide class); *Marlo*, 251 F.R.D. at 484-87 (no Rule 23 predominance given inconsistent deposition testimony and experts' inability to testify that survey evidence was representative).

reasonable jury could have arrived at the verdict." *Miss. Chem. Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 365 (5th Cir. 2002) (citation omitted).

After more than four years of litigation, the court relied on a fully developed record, including the deposition testimony of all 55 plaintiffs, corporate witness testimony, and corporate records. R7668; RE12-21. All 55 plaintiffs shared the same job title and alleged the same FLSA violation. At each step of the process, the court applied the correct legal standards for FLSA collective actions. The jury, after a two-week trial, found the 55 plaintiffs to be similarly situated. R12104-05. Given the deference accorded these findings of fact, there was no error in the denial of Brinker's post-trial motion for decertification.

4. The Presentation of a Court-Approved Trial Plan Is Not a Mandatory Prerequisite to Maintaining a Collective Action.

Though Brinker claims otherwise, the approval of a trial plan at the time of collective action decertification decisions is not a mandatory prerequisite to the maintenance of a collective action; Brinker's citations to Rule 23 certification standards are inapposite to collective actions. In fact, Plaintiffs presented multiple trial plans for the trial of the original 3,500-person collective action. R7370, R7700, R8031. The court considered the issue of manageability and *decertified* the original 3,500-person collective action, finding that trial for the 55 deposed opt-ins to be appropriate and manageable. R8380. Given the plethora of collective actions involving hundreds, if not thousands, of opt-in plaintiffs cited above, it is implausible that a 55-person collective action trial would be unmanageable.

B. The District Court's Methodology and Rulings at Trial Were Fair and Consistent with Applicable Law.

"A district court has broad discretion in managing its docket and structuring the conduct of trial." *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 282 (5th Cir. 2008) (citing *Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849 (5th Cir. 1996)).

This deferential standard "recognizes the fact that the trial judge is in a much better position than an appellate court to formulate an appropriate methodology for a trial." *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1018 (5th Cir. 1997). Even where a court abuses its discretion, "the district court's error is presumed harmless until shown to be prejudicial." *McClain*, 519 F.3d at 282.

Ultimately, "[a] party is entitled [only] to a day in court and a fair trial. To require the district court to give every party who loses another day and thus to grant the loser a replay would be unfair to the party who was prepared and who prevailed." *Trs. of Sabine Area Carpenters' Health & Welfare Fund v. Don Lightfoot Home Builder, Inc.*, 704 F.2d 822, 828 (5th Cir. 1983).

1. The Use of Representative Testimony Was Fair and Requested by Brinker.

The district court's broad discretion extends "under Fed. R. Evid. 403 to prevent the needless presentation of cumulative evidence." *Donovan*, 672 F.2d at 225 (internal quotation marks omitted). The court created its trial plan after Plaintiffs offered to present all 55 plaintiffs at trial (RE3:14-5:3), and Brinker opposed this plan requesting instead that the case be tried on a representative basis (RE2:4-3:2, 5:10-13, 5:21-24).[11] Therefore, like *Donovan*, the court found that testimony would be "substantially the same" and "counsel for [Brinker] agreed with this both at trial and in the stipulation." 672 F.2d at 225. "The evidence was

[11] At the February 10, 2009 pre-trial hearing, Brinker argued:

> [I]f we started off with all 55 and did, essentially, 55 mini-trials before one jury, . . . the risk of confusion is so high that . . . the jury would not distinguish between the different stories told, couldn't keep that straight. The rebuttal witnesses that would come in dealing with a store/restaurant in a particular location might be three weeks after that person testified, and that would be just a gargantuan task for a jury.

RE5:13-21.

thus admittedly cumulative, and it was within the province of the district court to exclude it." *Id.*

Brinker cannot have it both ways. Not only was the trial plan timely created in response to Brinker's request, the limitations on trial testimony were exceptionally favorable to Brinker. The court imposed *no* limits on the number of opt-in plaintiffs and other witnesses Brinker could present to the jury. RE6:17-18, R8917. By contrast, the court limited the number of witnesses *Plaintiffs* could present to fourteen. RE29:10-15, 31:21-32:7 (court denying Plaintiffs' request to present rebuttal opt-in plaintiff witnesses beyond the fourteen who initially testified); R8917.

Moreover, Brinker received a fair trial. At trial, Plaintiffs presented fourteen class representative witnesses; Brinker presented the testimony of fourteen witnesses who testified regarding the circumstances of thirteen plaintiffs, including eleven non-testifying plaintiffs. In total, testimony concerning QA tip pool eligibility facts for 25 out of the 55 plaintiffs (or over 45%) was put before the jury. Further, the parties presented an abundance of other trial evidence about QA tip pool eligibility, including: (1) the company-wide QA job description; (2) testimony of two corporate trial witnesses, including Brinker's Vice President of Corporate Affairs; (3) corporate QA training manuals; (4) nine witnesses testifying about QA-type positions at similar restaurant chains; and (5) fourteen witnesses, including store managers, who worked at the same restaurants as Plaintiffs. *See* Section IV.D.1., pp. 7-8, *supra*. In short, "[t]he jury's verdict is well-supported not simply by representative testimony, but rather by a volume of good old-fashioned direct evidence." *Morgan*, 551 F.3d at 1277.

Thus, in light of the wide latitude given to Brinker to present witness testimony and the abundance of other evidence presented during the two-week

trial, the court did not abuse its broad discretion in structuring the trial. Brinker received the day in court it requested.

a. The District Court's Trial Methodology Based on Representative Evidence Was Consistent with Applicable Law.

Although Brinker argues that the fourteen testifying plaintiffs were "handpicked," Plaintiffs' selection of fourteen of the 55 class members to testify does not disqualify the use of representative testimony. Appellate courts have reviewed and affirmed similar trial plans. *See, e.g.*, *Morgan*, 551 F.3d at 1276-77 (plaintiffs selected seven of the 1,424 plaintiffs to testify); *Donovan*, 672 F.2d at 224-25 (despite defendant's claim that stores chosen by plaintiff were "unrepresentative," the trial method "in the absence of agreement among the parties – seems fair and equitable.").

In fact, courts have allowed the use of representative testimony of far fewer opt-ins in cases involving FLSA violations.[12] "[T]here is no bright line formulation . . . when the sample is below a percentage threshold." *Reich*, 121 F.3d at 66-67. "It is axiomatic that the weight to be accorded evidence is a function not of quantity but of *quality*, and that, depending on the nature of the facts to be proved, a very small sample of representational evidence can suffice."[13] *Id*. (emphasis added).

[12] *See, e.g.*, *Morgan*, 551 F.3d at 1276 (less than 1% of the total number of plaintiffs testified); *Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 67 (2d Cir. 1997) (citing *Reich v. S. Md. Hosp., Inc.*, 43 F.3d 949, 941 (4th Cir. 1995)); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 701-02 (3d Cir. 1994)); *Falcon*, 580 F. Supp. 2d at 540 (collecting cases); *Chavez v. IBP, Inc.*, No. CV-01-5093-RHW, 2005 WL 6304840, at *4 (E.D. Wash. May 16, 2005) (4-6% of opt-ins testified); *Donovan*, 672 F.2d at 224-25 (testimony from only six of 44 restaurants).

[13] Brinker's reliance on "bellwether" cases is misplaced. Br. at 33-36. Unlike the cases cited by Brinker, the current case is not a mass tort bellwether action in which one defining injurious act led to property damage and personal injuries for which inferential statistics determines liability.

Moreover, it is difficult to determine how the outcome would have differed if the court had structured the trial differently. Given the exceptionally small size of the class, the testimony of the fourteen plaintiffs already represented 25 percent of the 55-person class. Taking into account Brinker's rebuttal witnesses who testified about *non-testifying plaintiffs*, the jury heard testimony regarding nearly 45 percent of the class. Even on appeal, Brinker does not (and cannot) argue that the fourteen representative witnesses were *qualitatively* different from the remaining 41 plaintiffs.

Brinker's argument is further flawed because Plaintiffs did not shoulder the burden of proof on the validity of the tip pool.[14] Brinker did. *Myers*, 192 F.3d at 549 n.4; *Reich*, 890 F. Supp. at 595-96; *Smith v. Noso, Inc.*, No. 6:06-CV-1123-Orl-28KRS, 2007 WL 2254531, at *4 (M.D. Fla. Aug. 3, 2007). Brinker "cannot rely on an insufficient number of witnesses being called by the Plaintiffs to meet [Brinker's] burden of proof on" the validity of its tip pool. *Morgan*, 551 F.3d at 1278; *Walters v. Am. Coach Lines of Miami, Inc.*, No. 07-22000-CIV, 2009 WL 1708811, at *4 (S.D. Fla. June 17, 2009) ("[I]t remains Defendant's burden to call as many Plaintiffs as necessary to establish its affirmative defense."). This argument is a transparent attempt at a second bite of the proverbial apple.

[14] Prior to trial, the court had already determined that each of the 55 class members had presented deposition testimony that they involuntarily shared tips with QAs. R7674-77, R7674. Additionally, the court had determined that it would try the issue of coercion on a representative basis. Therefore, it was Brinker's burden at trial to present sufficient evidence to rebut the representativeness of the fourteen testifying class members. *See* R12680 ("barring new offers of proof demonstrating that opt-in Plaintiffs were not similarly situated as to the coercion issue, the concession as to the 14 would be extrapolated to the 41 because of the Court's previous rulings on the representative nature of the case."). Indeed, Brinker acknowledged that at trial it would "need to show that [the 14 testifying plaintiffs are] not truly representative of the other 41." R8735.

b. Any Error Committed Was Brinker's, Not the Court's.

Plaintiffs offered and Brinker *opposed*, the testimony of all 55 plaintiffs at trial. Further, Brinker could have presented testimony from more witnesses, including other opt-in plaintiffs, but *it chose not to*. Again, Brinker cannot have it both ways.

Under the doctrine of invited error, an appellant "cannot [] complain of error in the trial that it directly provoked and induced." *First Nat'l Bank, Henrietta v. Small Bus. Admin.*, 429 F.2d 280, 284 (5th Cir. 1970). This doctrine "is based on reliance interests similar to those that support the doctrines of equitable and promissory estoppel." *Harvis v. Roadway Express, Inc.*, 923 F.2d 59, 61 (6th Cir. 1991). "Any other ruling would permit a party to deliberately manufacture errors on which to get a reversal, should the jury find against him." *First Nat'l*, 429 F.2d at 284. Invited error will only be reviewed for manifest injustice. *United States v. Solis*, 299 F.3d 420, 452 (5th Cir. 2002).

Here, Brinker "cannot validly complain about the number of testifying plaintiffs when it successfully objected to Plaintiffs' attempt to present the testimony of" all 55 plaintiffs. *Morgan*, 551 F.3d at 1278. Moreover, Brinker "itself had the opportunity to present a great deal more testimony from Plaintiff[s] . . ., or its own . . . managers, [but] it chose not to." *Id.* Brinker should not be entitled to benefit on appeal from its own calculated choices to try the case on a representative basis and to present fewer witnesses than the court allowed.

2. Particularly Since Brinker Requested It Do So, the Court Acted within Its Substantial Discretion in Limiting Evidence of Coercion.

In excluding evidence of coercion from the jury, the district court acted within its broad discretion to determine the admissibility of evidence. *United States v. Silva*, 748 F.2d 262, 264 (5th Cir. 1984). Brinker's appeal on the

exclusion of evidence of coercion is inconsistent with the positions it took before and during trial.[15] Brinker conceded coercion as to the fourteen testifying plaintiffs,[16] and later specifically asked the court to hear its offers of proof as to voluntariness outside the presence of the jury. RE26:27-22 (requesting to present to the court, outside the presence of the jury, testimony and offers of proof about tip-pooling coercion at restaurants in which several non-testifying class members worked); R11403-04 (confirming that coercion issue was only for the court and not the jury).[17] Despite Brinker's reversal of its earlier concession on coercion, the court accepted Brinker's offers of proof about voluntary tip pools.

Brinker further ensured that the district court, and not the jury, would decide the issue of coercion by not requesting a jury charge on the issue. RE27:7-24 (Brinker's submitted jury instruction on the use of representative evidence went to QA "eligibility, not to coercion."); R9173 (submitting coercion jury charge only if the court determined that jury needed to address the issue); R12020 ("[c]oercion has nothing to do with" Brinker's jury charge); R9173 (Brinker's proposed jury charge on coercion was to create a record for its objection to the DOL

[15] Contrary to Brinker's contentions, the issue of coercion was excluded from the jury, *not* the trial in its entirety.

[16] Brinker reiterated its concession regarding coercion through its counsel at the Final Pretrial Hearing, stating, "We want to make it clear that with respect to coercion, . . . *we're not going to present testimony or evidence about that* . . . ." R8742 (emphasis added).

[17] This request for the court to hear evidence of voluntariness was made after Brinker initially insisted that the issue be eliminated from trial. *See, e.g.*, RE7-11 (Motion in Limine to preclude presentation of evidence related to issue of coercion); RE10 ("Evidence of coercion, willfulness, good faith, and reasonable belief would have no probative value, and should therefore be excluded."); R8743 (stating it would not present any evidence or testimony about the coercion issue); R8406 ("QA eligibility defense would be the principal issue remaining for trial"). The court granted this later request. R9077.

voluntariness standard, not because it wanted the court to give the instruction to the jury).

Brinker cannot have it both ways. "Having stipulated as to the facts in the district court [Brinker] cannot repudiate that stipulation on appeal." *United States v. Sinor*, 238 F.2d 271, 277 (5th Cir. 1956) (applying invited error doctrine because the court "cannot, on appeal, give credence to factual recitals which might have been but were not presented to the trial court"); *see also United States v. Wurtsbaugh*, 140 F.2d 534, 537-38 (5th Cir. 1944) (where appellant "invited the direction of the verdict and the entry of the judgment, [] thus reliev[ing] appellees of the necessity to offer [the] evidence" in question, appellant "put the judge in error for doing what it invited him to do."); *Cranston Print Works Co. v. Pub. Serv. Co. of N.C.*, 291 F.2d 638, 649 (4th Cir. 1961) ("[a] party who procures or is responsible for the exclusion of adverse evidence is estopped to assign as error the fact that the record is devoid of such evidence.").

Brinker had the unfettered ability to present offers of proof regarding coercion to the court following its multiple requests that evidence of coercion be excluded from the jury at trial. The court therefore did not abuse its discretion in excluding such evidence from the jury.

3. The District Court Appropriately Extrapolated Brinker's Concession as to Coercion for the 14 Plaintiffs to the Remaining 41.

a. The District Court's Factual Finding Is Entitled to Deference.

The district court's finding that all 55 plaintiffs were coerced was supported by substantial evidence, including deposition testimony showing all 55 plaintiffs experienced a similar pattern of coercion. R7678, R12679-83. Contrary to Brinker's characterization, the court made this decision based on both the facts and the law.

Brinker takes the court's finding out of context. Although Brinker characterizes the court's decision as a finding "as a matter of law," the full opinion includes reference to and analysis of prior evidence of coercion placed before the court.[18] The court found:

> "With heed to these considerations and to the parties' respective positions prior to and during trial, the Court holds, as a matter of law, that Defendant's concession as to coercion for the 14 Plaintiffs will be extrapolated to cover the remaining 41. *The trial evidence submitted by Defendant is insufficiently persuasive* to require the Court to revisit its earlier finding as to the testimony of the deposed opt-ins regarding their similarly situated status with respect to coercion, or its ruling that the trial may proceed collectively. Accordingly, *incorporating the reasoning of its early Orders*, the Court will deny Defendant's Motion for Decertification.

R12682 (emphasis added). The court's finding thus was a finding of fact entitled to heightened deference. *Salve Regina Coll.*, 499 U.S. at 233.

Brinker further argues the court had "no evidentiary basis to support a class-wide coercion finding." Br. at 41. Not so. As stated above, the court had ample proof of class-wide coercion, including, but not limited to: the deposition testimony of all 55 opt-in plaintiffs (R7674-77), the deposition testimony of corporate witnesses and witnesses who worked with opt-in plaintiffs (R10739, 11564-80), and Brinker's concession that all 14 representative plaintiffs[19] were coerced (R8406, R8742).

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[18] The verbiage "as a matter of law" is not controlling as to the nature of the court's analysis because the substance of the opinion was one of fact finding and credibility determination. *United States v. Green*, 532 F.3d 538, 554 (6th Cir. 2008) (declining to "elevate form over substance" in reviewing lower court order); *Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd.*, 760 F.2d 1045, 1051 (9th Cir. 1985) (same).

[19] Much of the witness testimony offered by Brinker was impeached by Plaintiffs and Brinker's own coercion concession. *See* R11564-80. For example, two of Brinker's manager witnesses testified that there was no coercion to share tips at restaurants where two of the testifying class representatives worked, *despite*

b. The District Court's Error, If Any, Was Invited Error.

Any alleged "error" in the court's statement that it found coercion "as a matter of law" is also controlled by the doctrine of invited error. Brinker represented to the court "that the only way for the Court to issue a final judgment pursuant to the jury's verdict [wa]s for the Court to conclude, *as a matter of law*, that the 41 non-testifying opt-in Plaintiffs experienced coercion." R12679 (emphasis added). In response to Brinker's request for a finding as a matter of law, "the Court [held], *as a matter of law*, that Defendant's concession as to coercion for the 14 Plaintiffs will be extrapolated to cover the remaining 41." R12682 (emphasis added). Thus, the term "as a matter of law" was included in response to Brinker's specific request for a finding "as a matter of law." Brinker cannot have its cake and eat it too.

Moreover, "the only reason that the Court concluded coercion was not a triable issue [before the jury] was that (1) Defendant had conceded coercion as to the 14 Plaintiffs, (2) Plaintiffs had been allowed to present representative testimony at a prior hearing, and, (3) barring new offers of proof demonstrating that opt-in Plaintiffs were not similarly situated as to the coercion issue, the concession as to the 14 would be extrapolated to the 41 because of the Court's previous ruling on the representative nature of the case." R12680.

(continued …)
Brinker's pre-trial concession that the fourteen testifying class representatives were coerced. Furthermore, Brinker is simply misstating the record that opt-in Plaintiff Ted Davis was not coerced into sharing tips with QAs. Davis testified at his deposition that sharing tips with QAs was a "suggested thing" and implied by management, which squarely met the DOL voluntariness standard adopted by the court (R4881), as specifically found by the court in its order partially denying decertification (R7677).

Thus, both the court and Plaintiffs understood that Brinker had conceded the issue of coercion for purposes of trial and only the issue of QA tip pool eligibility remained to be tried. R12672 (Court: "I really did think at that point [by granting the coercion motion in limine] we had narrowed the issue to tip pool eligibility. I really did. And if I'm mistaken, that should have been corrected then, I think."); R12672 (Plaintiffs: "And the way that we saw [the coercion concession] initially was that because there was a stipulation as to the 14 and because the Court said this is a representative trial, that we were done."). Brinker, by conceding coercion and removing the issue from the jury, thereby induced the court to rule on coercion as to the 55 plaintiffs.

There is no manifest injustice here. *Solis*, 299 F.3d at 452 (no manifest injustice where defendant elected to have the cause of death or injuries issue decided as a sentencing matter by the court only later trying to "renege on this bargain"). Brinker "cannot be heard to complain in an appellate court of an error which [it] invited in the lower court." *Wurtsbaugh*, 140 F.2d at 538 n.6 ("Such errors, if any, are to be imputed to the party making the request rather than to the court.") (internal citation omitted). Brinker got the trial it asked for.

4. The District Court Properly Admitted Internal Company Memoranda and QA Job Descriptions.

Brinker claims the district court erred in admitting internal company memoranda and a draft QA job description at trial.[20] Br. at 29. "The trial court maintains broad discretion over the admissibility of evidence, including its relevance, probative value, and prejudicial effect," and such rulings "will not be reversed on appeal absent an abuse of discretion." *United States v. Parziale*, 947

[20] Brinker neither identified the "internal company memoranda" to which it objects nor provided this Court with a copy of the allegedly questionable document to review.

F.2d 123, 129 (5th Cir. 1991) (internal citation omitted). The exclusion of testimony under Fed. R. Evid. 403 for "unfair prejudice" is an "extraordinary remedy." *United States v. Caldwell*, 820 F.2d 1395, 1404 (5th Cir. 1987). "Merely because the [evidence] is adverse to the opposing party does not mean it is *unfairly* prejudicial. . . . The jury was entitled to weigh this evidence . . ." *Davidson Oil Country Supply, Inc. v. Klockner, Inc.*, 908 F.2d 1238, 1245 (5th Cir. 1990) (emphasis in original).

Internal company memoranda from Brinker's wage and hour compliance team finding that QAs did not qualify for a tip credit were directly relevant to the issues in this case. They related to what the QA job duties were, the extent of customer service interactions, and the extent to which QA job duties were consistent. Brinker's own findings on the issues in the case were, therefore, admissible.[21] Their relevance was not outweighed by unfair prejudice because courts commonly evaluate internal corporate documents when considering representativeness and liability. *See, e.g.*, *Indergit*, 2010 WL 2465488, at *5.

In any case, even if in error, their admission was so limited as to be harmless. The court *granted* most of Brinker's motions in limine to exclude such internal documents; only those internal company memoranda that presented "*fact-based testimony* concerning . . . evidence of the duties QAs perform and the amount and quality of QAs customer interaction" were admitted. R9084 (emphasis added).

For similar reasons, QA job descriptions were correctly admitted or at the very least, harmless error. At trial, Plaintiffs sought to admit company documents

[21] In denying Brinker's motion for summary judgment, the court, after reviewing several internal company memoranda, found that the documents provided "factual evidence that Defendant itself did not think QAs had significant customer interaction." R7656.

regarding QA job duties, and *Brinker did not oppose* the admission of several of these trial exhibits. R9373 (no objection to trial exhibit); R9378 (no objection except request for additional instruction to RE13). Other trial exhibits were further redacted to exclude legal discussions. R9380-81 (redacting RE23-24); R10445-46 (redacting second page of RE22). The nature of the relevant documentary evidence permitted at trial was limited; the court did not abuse its discretion in admitting such evidence.

5. The Jury Instruction Regarding "QA-Type Positions" at Other Restaurants Was Correct.

The district court correctly answered the jury's request for clarification of the meaning of "occupation." The court explained that the "position of QA is not necessarily unique to [Brinker]." R12102. It further instructed that "QA-type positions" at other restaurants, such as Bennigan's or Applebee's, could be used to determine whether the QA position is one that "customarily and regularly" receives tips. *Id*.

Prior to the jury's question, the court had already ruled that whether QAs could lawfully participate in a tip pool involved, as other courts have found, an occupational analysis. R7658-59; *see also Myers*, 192 F.3d at 548-50; *Chan v. Triple 8 Palace, Inc.*, No. 03 Civ. 6048 (GEL), 2006 WL 851749, at *14 n.22, *15 (S.D.N.Y. Mar. 30, 2006); *Davis v. B&S, Inc.*, 38 F. Supp. 2d 707, 717 (N.D. Ind. 1998). Moreover, courts routinely consider industry custom when determining whether a particular position "customarily" received tips. *See, e.g., Kilgore v. Outback Steakhouse of Fla., Inc.*, 160 F.3d 294, 301-02 (6th Cir. 1998); *Wajcman v. Inv. Corp. of Palm Beach*, No. 07-80912-CIV, 2009 WL 465071, at *4 (S.D. Fla. Feb. 23, 2009); *see also* Dep't Labor Wage & Hour Div., Op. Ltr., 1997 WL 998047 (Nov. 4, 1997) (referring to industry custom in evaluating whether dishwashers customarily and regularly receive tips). The court's instructions

carefully balanced the occupational analysis and allowed the jury to weigh for themselves the credibility of witnesses (whom Brinker fully cross-examined) who testified about QA-type positions at similar restaurants.

"[I]f the jury charge as a whole correctly instructs the jury, even if it is technically imperfect, no reversible error has been committed." *Morgan*, 551 F.3d at 1283 ("Our practice is not to nitpick the instructions for minor defects.") (citation omitted); *United States v. Duvall*, 846 F.2d 966, 977 (5th Cir. 1988) ("The trial court judge retains his discretion to tailor his jury instructions when he must supplement them during the jury's deliberations."). The court's response to the jury's question was correct, and cannot form the basis for a new trial.[22]

C. The District Court Applied the Correct Legal Standards to Adjudicate the Claims and Defenses.

1. The District Court's Definition of "Voluntary" Was Correct.

The court correctly adopted the DOL's objective standard for "voluntary" as "free of any coercion whatever and outside any formalized arrangement or as a condition of employment." *Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521, 525 (5th Cir. 1999) (opinion letters "entitled to be 'weighed carefully' and to 'great deference' if they state a reasonable conclusion") (citation omitted).

The only references to voluntariness are contained in the Senate Report and the DOL Field Operations Handbook, both of which emphasize the importance of maintaining the rights of tipped employees to retain their tips.[23] *See* RE34 (S. Rep.

[22] Brinker's additional speculation as to the effect of the court's instruction based on the amount of time between the instruction and the jury verdict is a red herring. "If the evidence is sufficient to support the verdict, the length of time the jury deliberates is immaterial." *Guar. Serv. Corp. v. Am. Employers' Ins. Co.*, 893 F.2d 725, 729 (5th Cir. 1990).

[23] Neither FLSA nor the relevant regulations define *or use* the words "voluntary," "mandatory," or "required" as they relate to tip pools.

93-690, at 43 (Feb. 22, 1974) (an employer "will lose the benefit of [the tip credit] exception if tipped employees are required to share their tips with employees who do not customarily and regularly receive tips")); RE36-37 (Dep't Labor Wage & Hour Div. Field Operations Handbook § 30d04(c)).

Consistent with FLSA's remedial statutory purpose, the DOL interprets "voluntary" as meaning that tip pools must be objectively "free from any coercion whatever and outside of any formalized arrangement or as a condition of employment." *Id*.; Dep't Labor Wage & Hour Div., Op. Ltr., WH-380, 1976 WL 41732 (Mar. 26, 1976) (same); *see also* Dep't Labor Wage & Hour Div., Op. Ltr., 1997 WL 998047 (Nov. 4, 1997).

Other courts examining this issue have adopted similar objective standards for voluntariness with a focus on manager action, rather than subjective employee responses to coercion.[24] *See, e.g.*, *Zhao v. Benihana, Inc.*, No. 01 Civ. 1297 (KMW), 2001 WL 845000, at *2 (S.D.N.Y. May 7, 2001) (mandatory tip pool where manager encouraged tip sharing even though the tip pool was established by employees); *Bonham v. Copper Cellar Corp.*, 476 F. Supp. 98, 101-02 (E.D. Tenn. 1979) (same).

Furthermore, this voluntariness standard is consistent with the plain meaning of the word. Voluntary is defined as "unconstrained by interference; not impelled

[24] Brinker's reliance upon *Howard*, 2009 WL 3571984, at *4, is misplaced. As explained earlier, *Howard* is readily distinguishable as a Rule 23 class action for state labor law claims of requiring illegal payments and kickbacks to the employer. Further, *Howard* required a subjective inquiry into whether the employer "required" employees to purchase certain items, whereas here, the standard is broader and involves an objective inquiry of whether tip sharing was "voluntary." 2009 WL 3571984, at *4-5. That New York courts may choose to use a subjective standard for its state law claims for illegal payments and kickbacks to employers has no bearing on the propriety of FLSA utilizing an objective standard when examining voluntary tip sharing.

by outside influence." Black's Law Dictionary (9th ed. 2009); Merriam-Webster Dictionary (2011) (same). Given the legislative history, the DOL's guidance, the uniform case law, and the plain meaning of "voluntary," the district court correctly applied the standard for determining whether a tip pool was voluntary.[25] The propriety of this adopted standard is underscored by Brinker's own policies that define voluntary tip pools the same way. *See* RE12, 17-20. Brinker received a fair trial on this issue.

a. Brinker's Proposed Coercion Definition Is Unfounded.

To support its proposed standard for coercion, Brinker cites inapposite Title VII retaliation and other non-tip pool cases for one reason – no court or administrative agency has ever adopted Brinker's proposal that "coercion" requires a finding that the employee "reasonably found that a Manager's action dissuaded him, by force or threat, from believing that tipping out a QA was voluntary." Br. at 46. Such an onerous standard for voluntariness would run counter to the remedial purpose of FLSA and the presumption that FLSA exemptions should be narrowly construed in the employee's favor. *See Myers*, 192 F.3d at 549 n.4; *Bracamontes v. Weyerhaeuser Co.*, 840 F.2d 271, 276 (5th Cir. 1988).

[25] Brinker criticizes the court's voluntary standard by asserting that it allows Plaintiffs to establish involuntary tip sharing without causation. However, at no point has the court held that Plaintiffs did not need to establish that they experienced coercion which led them to share tips with QAs. Without such a showing, Plaintiffs' complaint would be dismissed. Furthermore, all 55 plaintiffs demonstrated causation through their deposition testimony stating that they involuntarily shared tips with QAs due to the actions of management. Brinker's citations on causation are inapplicable because they have nothing to do with voluntary tip pooling under FLSA. *See McNair v. Synapse Group, Inc.*, No. 06-5072(JLL), 2009 WL 1873582, at *9 (D.N.J. June 29, 2009) (Rule 23 New Jersey Consumer Fraud Act claim, which had an express element of causation); *Raynor v. Merrill Pharm., Inc.*, 104 F.3d 1371, 1376 (D.C. Cir. 1997) (products liability action involving causal link between drug and birth defects).

2. The District Court Correctly Required "Customer Interaction" for Tip Pool Eligibility.

The district court correctly held that tip pool eligibility under FLSA was dependent on the performance of customer service functions. R7655. The court's holding is supported by virtually every court that has evaluated the issue of tip pool eligibility. *See, e.g.*, *Myers*, 192 F.3d at 550; *Kilgore*, 160 F.3d at 301; *Pedigo*, 722 F. Supp. 2d at 730-32; *Ash v. Sambodromo, LLC*, 676 F. Supp. 2d 1360, 1369-71 (S.D. Fla. 2009); *Wajcman v. Inv. Corp. of Palm Beach*, No. 07-80912-CIV, 2008 WL 783741, at *4 (S.D. Fla. Mar. 20, 2008); *Morgan v. SpeakEasy, LLC*, 625 F. Supp. 2d 632, 653 (N.D. Ill. 2007); *Elkins v. Showcase, Inc.*, 704 P.2d 989 (Kan. 1985); *Driver v. AppleIllinois*, LLC, 265 F.R.D. 293, 311 (N.D. Ill. 2010); *Hai Ming Lu v. Jing Fong Rest., Inc.*, 503 F. Supp. 2d 706, 711 (S.D.N.Y. 2007).

Brinker cites to the lone exception to this mountain of authority, *Lentz v. Spanky's Restaurant II, Inc.*, 491 F. Supp. 2d 663 (N.D. Tex. 2007), which is inapposite. *Lentz* noted in dicta that customer interaction was not specifically required in 29 U.S.C. § 203(m) and observed that busboys had no direct interaction with customers.[26] While Section 203(m) does not expressly define "employees who customarily and regularly receive tips" as requiring customer interaction, such an interpretation is consistent with the language and employee protective purpose of the statute. Moreover, *Lentz*'s comparison to busboys is flawed as busboys do interact with customers at Chili's.[27] RE38 (offer assistance to customers); R10358; R10326 (noting that bussers interact with customers on occasion).

[26] Brinker's citation to *Louis v. McCormick & Schmick Restaurant Corp.*, 460 F. Supp. 2d 1153 (C.D. Cal. 2006), misses the mark because it was a non-FLSA case applying California state law.

[27] Brinker also argues against the consideration of customer interaction by mentioning in a footnote that service bartenders do not interact with customers, but are considered tip pool eligible. Br. at 48, n.33. This comparison, like *Lentz*'s

3. The District Court Properly Excluded Brinker's "Incidental Work/Dual Jobs" Defense at Trial.

Brinker also argues that the court improperly precluded it from presenting its "incidental work/dual jobs" defense at trial. Br. at 49-50. The court did not commit reversible error by precluding this defense because its ruling on the issue was correct as a matter of law.[28] Prior to trial, Brinker brought a summary judgment motion on its "incidental work/dual jobs" defense – arguing that when servers worked separate shifts as QAs, their QA duties were incidental to their job duties as servers. R2095-96.

The court rejected this defense. It found that these servers worked entirely separate shifts as QAs, performed only QA duties, were paid as QAs and not servers, and were subject to a separate QA job description from the server position. Therefore, relying on *Myers*, 192 F.3d at 549-50, the court found that as a matter of law, they were employed in "dual jobs" with a "clear dividing line between the servers' duties as a server and the server's duties as a QA." R7661-62. Because of this ruling, Brinker was not permitted to present this defense at trial.[29]

(continued …)
comparison with busboys, is unavailing because service bartenders were a codified exception at the time of FLSA's application to the restaurant industry and do serve customers. RE36-37 (Dep't Labor Wage & Hour Div. Field Operations Handbook 30d04(a)).

[28] This "incidental work/dual jobs" defense conflicts with Brinker's own internal assessment that whereas servers are tip pool eligible, QAs are not. *See* RE12, 17-21.

[29] Brinker misrepresents the court's refusal to allow it to raise this defense at trial as a *sua sponte* partial summary judgment ruling. Br. at 50. Brinker itself brought the motion for summary judgment on this defense and forced the court to rule. Confronted with a motion for summary judgment, the court was well within its discretion to render a summary judgment ruling for the non-moving party in the absence of a formal cross-motion. *See Benchmark Elec., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 730 (5th Cir. 2003).

The court's refusal to allow Brinker to present this defense at trial was amply supported by the record. There is no disputed material fact that servers who worked separate shifts as QAs: (1) performed QA duties; (2) clocked in as QAs; (3) were paid QA wages; and (4) had a separate and distinct QA job description. R7661.

In addition, the court properly relied upon *Myers* to deny Brinker's "incidental work/dual jobs" defense as a matter of law. *Myers* held that servers who spent entire shifts working as salad preparers were employed in dual jobs, even though the servers prepared the very same salads when no salad preparers were on duty. 192 F.3d at 549-50; *see also Solis v. Aguilar*, No. 3:09-CV-0646, 2009 WL 3049288, at *10 (M.D. Tenn. Sept. 14, 2009); *Pedigo*, 722 F. Supp. 2d at 733-34; 29 C.F.R. § 531.56(e) (employee who works one shift as maintenance man and another as a server holds dual jobs). These authorities demonstrate that the incidental work defense does not apply where certain servers work shifts in separate QA job positions that involve distinct duties because these servers are employed in dual jobs.

Here, the court properly found a "clear dividing line" between server and QA duties; shifts for QAs required the completion of different core job duties compared to server core job duties.[30] *Compare* RE39 with RE13. Having denied Brinker's defense as a matter a law, the court properly excluded it from trial.

Furthermore, contrary to Brinker's claims, the court did not preclude Brinker from presenting evidence comparing the duties of servers and QAs. The court

[30] Brinker misconstrues the court's "clear dividing line" conclusion as asserting that server and QA duties did not overlap. Br. at 50. The court acknowledged that servers intermittently performed QA duties when no QA was on duty. R7661. The "dividing line" arises not from the lack of similarity between duties for the positions, but rather from differences in each job's essential functions.

specifically permitted Brinker to present to the jury "[g]eneral comparisons between the overall duties of a server and the overall duties of a QA, and evidence that a servers' and QAs' customer service functions overlapped." R8920. Preclusion of the incidental work/dual jobs defense is not a basis for a new trial.

D. The District Court Appropriately Entered Judgment Against Brinker and Denied Brinker's Trial and Post-Trial Motions.

1. The District Court Correctly Denied Brinker's Post-Trial Motions on the Issue of QA Tip Eligibility.

The court properly denied Brinker's various post-judgment motions on the issue of QA tip pool eligibility because the jury's verdict in favor of Plaintiffs on that issue was sufficiently supported by the trial record. It therefore should not be disturbed. Brinker cites testimony allegedly supporting its position that QAs who worked with non-testifying opt-ins performed extensive customer service duties. Br. at 43. Brinker then claims that because the non-testifying opt-ins did not testify at trial, this evidence was uncontested.[31]

Ultimately Brinker's quarrel with the rulings on its various post-judgment motions is with the jury's fact finding, credibility determinations, and verdict. Those determinations are "the purest of jury issues," *Dotson v. Clark Equip. Co.*, 783 F.2d 586, 588 (5th Cir. 1986) (internal citation omitted), and "[i]n reaching [its] determination, the jury is entitled to weigh the credibility of witnesses and to disbelieve self-serving testimony." *Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 207 (5th Cir. 1986). A court should not disturb a jury verdict if "the jury's resolution is

[31] Brinker curiously states that its due process rights were violated (Br. at 45) even though it was allowed to present unlimited witness testimony as to QA duties and Plaintiffs were restricted to the presentation of fourteen plaintiffs. Failure to persuade the jury after a two-week trial despite Brinker's evidentiary advantages does not make the jury's verdict "unfair, erroneous," or a violation of "Brinker's due process rights." Br. at 45.

supported by more than a scintilla of evidence." *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1092 (5th Cir. 1988).

The jury verdict on tip pool eligibility was supported by a litany of facts and evidence presented at trial. The evidence that QAs had minimal customer interaction included internal company documents, job descriptions, and memoranda, consistent testimony from all fourteen testifying plaintiffs, and testimony that QAs at other casual dining restaurant chains did not participate in mandatory tip pools with servers. *See supra*, Section IV.D.1, pp. 7-8.

Moreover, on cross examination, Brinker's witnesses admitted: (1) that the documentary evidence presented by Plaintiffs and cited above was accurate and used companywide; (2) that QAs worked in an employee only part of the restaurant (underscoring their lack of customer interaction); and (3) that the QAs' primary location in the restaurant was next to the cooks and not in the dining area with customers. Finally, Plaintiffs impeached many of Brinker's witnesses, including those who testified about non-testifying opt-in Plaintiffs. *See id.* Given the totality of the trial record and evidence supporting the jury verdict, the court did not err in denying Brinker's post-trial motions. Brinker received a fair trial.

E. The District Court's Attorneys' Fees Awards Should Be Affirmed.

1. The District Court Understood and Applied the Correct Legal Standards.

A district court has broad discretion in determining the amount of an attorneys' fee award. *Hopwood v. State of Tex.*, 236 F.3d 256, 277 (5th Cir. 2000). Appellate courts have "only a limited opportunity to appreciate the complexity of trying any given case and the level of professional skill needed to prosecute it." *Id.* In contrast, the district court "has, among other things, observed first-hand the presentation of testimony and argument at trial, sifted through countless depositions

and interrogatories, and assessed the value of numerous dispositive filings"; it is, therefore, in a superior position to determine a reasonable fee award. *Id.*

On appeal, a district court's award of attorneys' fees is reviewed for abuse of discretion and its factual findings for clear error. *Singer v. City of Waco, Tex.*, 324 F.3d 813, 829 (5th Cir. 2003). The initial determination of reasonable hours and rates is assessed for clear error and the application of the *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-20 (5th Cir. 1974), factors for fee awards is assessed for abuse of discretion. *Migis v. Pearle Vision*, 135 F.3d 1041, 1047 (5th Cir. 1998).

The district court recognized that it was required first to conduct a lodestar analysis and then determine whether the lodestar amount should be adjusted based upon factors this Court first articulated in *Johnson*. SR-I 48-50.[32] The court thoroughly evaluated the *Johnson* degree of success factor. SR-I 49 (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)).

2. The District Court Carefully Considered Each of Brinker's Arguments Regarding the Reasonableness of Plaintiffs' Lodestar Hours.

The court, in conducting its lodestar analysis, carefully considered Brinker's arguments and reduced Plaintiffs' lodestar hours accordingly. SR-I 55.[33] With respect to hours billed in reviewing discovery, including discovery pertaining to

[32] The district court's August 14, 2010 order awarded Plaintiffs their supplemental fees, costs and expenses incurred since Plaintiffs filed their original fee application. Brinker raises no specific issues or objections to the district court's supplemental fee award in its opening brief. Accordingly, any such issues or objections must be deemed to have been waived by Brinker. *See Tharling v. City of Port Lavaca*, 329 F.3d 422, 430 (5th Cir. 2003) (party waived issue by failing to raise it in opening brief).

[33] The parties stipulated to hourly rates for Plaintiffs' counsel in this case. The district court found those rates to be reasonable. SR-I 50-51. Accordingly, the hourly rates awarded to Plaintiffs' counsel are not part of Brinker's appeal.

non-deposed opt-ins, the court deleted 209.2 hours because "Plaintiffs had not met their burden of showing that all of these hours were, in fact, spent on tasks that directly benefited the 55 Plaintiffs."[34] *Id.*

With respect to other categories of work challenged by Brinker, the court found that Plaintiffs had met their burden of demonstrating that the time spent was reasonably necessary to the case and Brinker had not conclusively rebutted this showing. SR-I 52-53, SR-I 55-58.

The court considered and found that Brinker's argument that Plaintiffs should be awarded nothing for time spent briefing the class certification issue was "unpersua[sive]." SR-I 58-60. However, contrary to Brinker's contention, the district court did not disregard the degree of success Plaintiffs obtained on the class certification issue. Rather, the court expressly acknowledged "that the overall outcome achieved by Plaintiffs' counsel was not that which was originally sought." SR-I 60; *see also* SR-I 61.

The court found, however, that attempting "to disentangle those hours spent on decertification that benefited the certified class of 55 Plaintiffs from those that did not would require far too much speculation and conjecture on the part of the Court." SR-I 60. It, therefore, found that the "appropriate stage at which to consider a fee reduction in light of the limited nature of Plaintiffs' success is in

[34] In *Hensley*, the Supreme Court recognized that "[t]here is no precise rule or formula for making" a determination of "a fee award based on the claimed hours." 461 U.S. at 436. "The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id.* at 436-37. Here, the district court – in reducing Plaintiffs' lodestar by more than 200 hours and imposing an additional 20% across the board reduction on the remaining hours – did both. Importantly, *Hensley* also recognized that it is the function of the district courts to "mak[e] this equitable judgment," and not to allow fee disputes to commence a second round of litigation. *Id.* at 437.

making *Johnson* factor adjustments and not through reducing the hours reasonably expended to defeat decertification." SR-I 61.

3. The District Court Expressly Considered and Discounted Plaintiffs' Lodestar Fee Based on Plaintiffs' Limited Success.

In determining whether to adjust the lodestar based on the *Johnson* degree of success factor, the district court carefully assessed the parties' arguments and evidence on three points: (1) the unsuccessful certification of the entire class of 3,555 opt-in plaintiffs (SR-I 61-64); (2) the judgment sought vs. the judgment obtained (SR-I 64-65); and (3) the amount of the attorney fees vs. the judgment obtained (SR-I 65-66).

In addressing the first point, the district court reviewed the conflicting case law cited by the parties on the question of lodestar adjustments to account for wholly or partially unsuccessful class certification (SR-I 61-62), and made the following record based findings: (1) Plaintiffs were not wholly unsuccessful; the case began as a single plaintiff case and was ultimately tried on behalf of a certified class of 55 opt-in plaintiffs (SR-I 63); (2) the favorable judgment benefited all members of the original class because Brinker provided notice to all of its managers not to include QAs in tip pools, *id.*; (3) the precedential value of the judgment will continue to benefit the decertified class members, *id.*; and (4) Plaintiffs already reduced their lodestar to account for the fact that they were not entirely successful in pursuing the case as a class action on behalf of all original opt-ins (SR-I 63-64).[35]

[35] The record shows that Plaintiffs' counsel reduced their lodestar by almost 2100 hours or 22% in presenting their initial fee award request. R13920. This reduction combined with the court's additional reductions resulted in a cumulative 40% reduction of Plaintiffs' counsel's actual lodestar.

In light of all of these factors, the district court reduced Plaintiffs' fees by an additional 20% "to account for the fact that Plaintiffs were not successful in certifying the national class," finding that "this reduction, combined with the hourly reductions already implemented through Plaintiffs' billing judgment and by the Court, *accurately reflects the degree of success obtained by Plaintiffs.*" SR-I 64 (emphasis added).

The court found that the other factors relevant to the degree of success – the judgment sought vs. the judgment obtained and the attorneys' fees vs. the judgment obtained – were subsumed in the overall degree of success factor. The court, therefore, concluded that, based on the facts of this case, there was no need to *further* reduce Plaintiffs' fee beyond the 20% across the board reduction and other reductions implemented by the court and Plaintiffs' counsel.[36] SR-I 64-66. *See Lucio-Cantu*, 239 F. App'x at 868 ("district court . . . properly considered the Plaintiffs' limited recovery when it reduced the lodestar amount by ten percent"); *compare Saizan v. Delta Concrete Prods. Co., Inc.*, 448 F.3d 795, 799-803 (5th Cir. 2006) (plaintiffs' fees reduced from $114,000 to $14,000 where "[t]he settlement agreement does not contain an admission of liability," plaintiffs failed to convince the court on overtime claims, willfulness, and liquidated damages, and plaintiffs' counsel failed to exercise billing judgment).[37]

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[36] Brinker grossly misrepresents the ratio of the award to the amount of damages awarded to Plaintiffs. The fee is *not* a 1,300 percent multiple of – or 13 times – the damages, but rather approximately 5.5 times the damages – a ratio well within fee awards approved by this Court. *See, e.g.*, *Cox v. Brookshire Grocery Co.*, 919 F.2d 354 (5th Cir. 1990) (award of $9,250 in attorneys' fees when FLSA plaintiff recovered $1,181); *Lucio-Cantu v. Vela*, 239 F. App'x 866 (5th Cir. 2007) ($51,750 in attorneys' fees when FLSA plaintiffs recovered $3,349.29, $52.50, and $1,296.00).

[37] The district court's supplemental fee award for attorneys' fees incurred after the entry of judgment in Plaintiffs' favor represented a 73.4% reduction of Plaintiffs' counsel's actual post-judgment lodestar. SR-II 504.

Here, the jury found Brinker liable for FLSA violations, the prevailing 55 plaintiffs were awarded both lost wages and liquidated damages and Plaintiffs' counsel exercised billing judgment to reduce their fees substantially. Thus, it is simply not the case – as Brinker argues – that the court failed to take into account Plaintiffs' less than complete success in this case in determining the fee awarded. The district court applied the correct legal standard, made factual findings well supported by the record, and reduced Plaintiffs' initial fee request by a total of 40% of Plaintiffs' actual lodestar. Brinker's invitation for this Court to second-guess the trial judge who has lived with this case for five years should be rejected.[38]

VI. CONCLUSION

For the foregoing reasons, the jury verdict and district court's factual findings and rulings should be affirmed. Brinker received its fair day in court.

Dated: February 14, 2011

Respectfully submitted,

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[38] If this Court affirms the judgment on liability, reversal of the corollary fee award would run counter to the FLSA's "comprehensive remedial scheme." *Lamon v. City of Shawnee, Kan.*, 972 F.2d 1145, 1149-50 (10th Cir. 1992).

***** Application for admission to the Fifth Circuit pending.

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CERTIFICATION OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE AND FIFTH CIRCUIT LOCAL APPELLATE RULES

Pursuant to Rule 32 of the Federal Rules of Appellate Procedure and Fifth Circuit Local Appellate Rule 32.3, I certify that **RESPONSE BRIEF OF PLAINTIFFS-APPELLEES** is proportionately spaced, has a typeface of 14 points or more and contains 13,984 words. Pursuant to Fifth Circuit Local Appellate Rules, I also certify that (1) all privacy redactions have been made (5th Cir. R. 25.2.13); (2) the text of electronic document is identical to the text in the paper copies (5th Cir. R.25.2.1.); (3) that the electronic brief has been checked for viruses using the most recent version of Symantec Endpoint Protection, and that no virus was detected (5th Cir. R.25.2.1).

Dated: February 14, 2011

/s/ James Kan
James Kan

CERTIFICATE OF SERVICE

The undersigned counsel certifies that an electronic copy of the foregoing document was electronically filed and served on counsel for Plaintiffs-Appellees and Defendant-Appellant on February 14, 2011, via the Court's case management/electronic case filing (ECF) systems.

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