

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 61

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REZWANUL CHOWDHURY, ALBERTO MORENO, ABDIAS PEREZ,  
YOBANI TARAX, GUILLERMO CHAVEZ, CARLOS LAZARO RAMOS,  
NELSON CRISANTOS, BARAQUEL CRUZ, ROSALIO RUIZ,  
JESSE SANCHEZ, IVAN GARCIA, and MARCOS FLORES on  
behalf of themselves and others similarly situated,

Plaintiffs,

-against-

Index No.  
153996-14

GK GRILL LLC d/b/a LE MARAIS RESTAURANT, and  
JOSE MEIRAIS RESTAURANT, and JOSE MEIRELLES,

Defendants.

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October 29, 2014  
80 Centre Street  
New York, New York

BEFORE: HON. ANIL C. SINGH  
Supreme Court Justice

APPEARANCES:

Attorney for Plaintiff  
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Attorney For Defendant  
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JACQUELINE GLASS  
Senior Court Reporter

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THE COURT: On the record. I have before me a motion by the defendants to dismiss this wage action brought by the plaintiff. The plaintiff opposes the motion and by separate motion moves to maintain this action in the form of a class action. The defendant opposes that motion.

So I'll hear first since the motion to dismiss could potentially be dispositive. I'll hear argument first on the motion to dismiss.

MR. FREEDBERG: Thank you, your Honor. Eli Freedberg from the law office of Eli Freedberg PC for the defendants. Thank you for hearing us today. Shall I limit this just to the motion to dismiss?

THE COURT: Yes.

MR. FREEDBERG: Just to the motion to dismiss, plaintiffs have alleged a number of claims against defendants. Defendants operate a kosher steakhouse in the Times Square area of Manhattan. It has been in operation for well over ten years. The genesis of plaintiff's claims in this case pretty much all concern the participation of a maitre d.

THE COURT: Pooling of tips.

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2 MR. FREEDBERG: That's correct. So --

3 THE COURT: Your argument on a motion to  
4 dismiss in part seems to be that the allegations  
5 are conclusory as to the function of the maitre d  
6 etcetera etcetera and that's the basis to dismiss.  
7 Is that appropriate at this juncture as opposed to  
8 after discovery and on a motion for summary  
9 judgment?

10 MR. FREEDBERG: Partially, your Honor.  
11 Plaintiff's complaint is rather vague. They do  
12 have more concrete allegations against one of the  
13 alleged, against one of the maitre d's Danny Viti.  
14 I'd like to put his claims, plaintiff's claim  
15 concerning him aside for a moment.

16 THE COURT: The claim is against the  
17 restaurant not just the maitre d. The maitre d is  
18 the alleged person who is sharing in this, but the  
19 claim is against the restaurant. So wouldn't we  
20 look at them together?

21 MR. FREEDBERG: Could you rephrase that,  
22 your Honor?

23 THE COURT: Wouldn't we look at the  
24 claim together? The claim essentially is there  
25 has been an unlawful sharing of tips.

26 MR. FREEDBERG: I would argue no, your

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2 Honor. That you would separate the claims because  
3 discovery is affected. If the plaintiffs have not  
4 stated the claim as to two of the people that they  
5 are complaining should not have received tips,  
6 then discovery and just the costs associated with  
7 discovery would be significant larger. It will be  
8 additional depositions, additional perhaps  
9 records.

10 THE COURT: With respect to the two why  
11 do you believe that sufficient allegations haven't  
12 been stated?

13 MR. FREEDBERG: There is no concrete  
14 allegation that any plaintiff was hired, fired,  
15 suspended, disciplined, interviewed, any of the  
16 criteria that courts in the state and Federal  
17 courts, courts in the circuit apply to determine  
18 whether an employee is eligible to participate in  
19 a tip pool. So with respect to -- we have  
20 requested from this court to please narrow the  
21 claims that are discoverable, certainly with  
22 respect to the individuals identified as Manning  
23 Jordon.

24 With respect to Mr. Viti, I concede their  
25 claims are probably detailed enough to state a  
26 claim and those claims to the extent they are

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2 dismissable that would be more appropriate for a  
3 summary judgment.

4 THE COURT: Okay.

5 MR. FREEDBERG: One of the other  
6 components to our motion to dismiss are the  
7 damages that plaintiffs are alleging. And again I  
8 think this is amenable to a motion to dismiss  
9 because the parties are going to engage in  
10 settlement discussions during the pendency of  
11 discovery.

12 Court's decision, this court's decision on  
13 that issue is incredibly germane and frankly it's  
14 a strictly legal issue. There is no discovery  
15 taken. No damages available for Section 196(d).

16 THE COURT: What do you rely on for your  
17 argument that damages aren't recoverable under --

18 MR. FREEDBERG: The explicit wording of  
19 the statute for one of the -- the explicit wording  
20 of the regulations that have been in effect.

21 THE COURT: What, the ream of Federal  
22 court cases cited by the plaintiff? Your response  
23 seems to be they are all wrongly decided.

24 MR. FREEDBERG: Not only that. There  
25 have been one or two Federal courts that have been  
26 wrongly decided. Even the cases cited by

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2 plaintiffs don't support the interpretation that a  
3 violation of 196(d) yields tip credit damages.

4 For example, in the Wicaksono case cited by  
5 plaintiffs, that's not a tip credit case. And the  
6 plaintiffs -- the court did not determine  
7 explicitly or implicitly that tip credit damages  
8 are available if an ineligible employee  
9 participates in the tip pool.

10 Similarly, in the Chung versus New Silver  
11 Palace case, I would in fact read that case to  
12 support defendant's position that the damages, tip  
13 credit damages are available for a Federal Fair  
14 Labor Standards Act violation which are not  
15 alleged here. And the appropriate remedy for  
16 196(d) violation which plaintiffs do allege here  
17 is disgorgement of the tips received by the  
18 employee who allegedly should not have  
19 participated in the tip pool. The same thing in  
20 the Paguay versus Buona Fortuna case. Again to be  
21 actually supportive of defendants and again that  
22 isn't to say there are one or two cases plaintiffs  
23 have cited. I believe the Federal court was  
24 simply wrong. In support of that --

25 THE COURT: What about the state cases?

26 MR. FREEDBERG: There are none.

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2 THE COURT: You refer to as I recall an  
3 opinion.

4 MR. FREEDBERG: Yes.

5 THE COURT: Is that opinion binding on  
6 me in any way?

7 MR. FREEDBERG: It's at the very least  
8 persuasive, your Honor. The Department of Labor  
9 as I'm sure you know is the administrative agency  
10 charged with enforcing the -- charged with  
11 enforcing.

12 THE COURT: It's a rather old opinion as  
13 well.

14 MR. FREEDBERG: It is, your Honor, and  
15 it isn't. It's all relative. But I would argue  
16 that there is nothing that superseded it. In  
17 fact, to the extent that plaintiffs argue that it  
18 has been superseded, it would be because there is  
19 a new wage order that governs employer,  
20 hospitality employers. And even that regulation I  
21 propose to the court further supports the  
22 defendant's arguments that tip credit damages are  
23 unavailable. I do have a regulation here.

24 THE COURT: Go on.

25 MR. FREEDBERG: But that regulation is  
26 incredibly specific about what the prerequisites

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2 are for an employer taking tip credit. And the  
3 prerequisites are number one that the employee  
4 simply earns enough in tips to take that employee  
5 over the minimum wage per hour which plaintiffs do  
6 not allege is an issue here. These are very  
7 highly tipped employees. Even if plaintiff is  
8 right, their hourly compensation is well above the  
9 minimum wage. It's not been alleged and it's not  
10 an issue here.

11 The second prerequisite in the new wage order  
12 is that the employer provides notice of the intent  
13 to apply tip credit. And again that's not a claim  
14 that plaintiffs are asserting. And in fact, I  
15 could tell and represent to your Honor that  
16 defendants do present a rate of pay notice form  
17 that goes to every employee. And has been doing  
18 that since the inception of the wage order in 2011  
19 and doesn't inform each employee each employee  
20 will be applying a tip allowance towards their  
21 wages. There is nothing within the plain text of  
22 the regulations that say that if an ineligible  
23 employee participates in a tip pool, you lost tip  
24 credit. And that would frankly be contrary to the  
25 plain language of the statute which says that  
26 nothing construed, and I'm paraphrasing, nothing



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2 construed herein shall affect an employer's  
3 ability to apply, take an allowance for the  
4 employee's tips.

5 THE COURT: Anything else, counsel?

6 MR. FREEDBERG: One other point.

7 Defendants have produced and moved to dismiss for  
8 documentary evidence. Defendants have been paying  
9 spread of hour compensation which is one of the  
10 plaintiff's claims for 2011. We believe the  
11 documentary evidence we submitted along with our  
12 papers have demonstrated that. And we believe  
13 that as a matter of law because plaintiffs'  
14 compensation was high in light of the tips that  
15 they have been receiving prior to the -- prior to  
16 the wage order changing in 2011 there was no  
17 obligation for an employer to actually pay spread  
18 of hours before that time. And that's a basis for  
19 our motion. Thank you.

20 THE COURT: Thank you. Counsel.

21 MR. GOLDMAN: Thank you. Jeff Goldman  
22 from the law office of Jeff Goldman.

23 Your Honor, has obviously read the papers  
24 very carefully and is very familiar with the law.  
25 The real question at this stage is we're at the  
26 motion to dismiss stage. The burden is a very

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2 high burden --

3 THE COURT: But still I agree with you.  
4 I have to assume that the statements made in the  
5 complaint are true, but at least with respect to  
6 two of the individual disposition of the defendant  
7 that they are not sufficient allegations to  
8 suggest that they are in that position where it  
9 would be improper for them to share tips. So why  
10 don't you respond specifically how your client  
11 shows that they have that kind of authority that  
12 would not allow them to share tips.

13 MR. GOLDMAN: Our complaint along with  
14 the affidavits that we submitted, twelve  
15 affidavits that we submitted is what we're  
16 submitting to you. We have outlined in the  
17 complaint how maitre d's took this money. We did  
18 not specifically name Danny Viti. I'm sorry. The  
19 two that he referenced. We're not required to  
20 name them. We named them as a class of people as  
21 maitre d's. My intuition tells me they may have  
22 fluctuated between captains. Not only did maitre  
23 d's participate in a tipout, but captains may have  
24 also participated in a tipout. These individuals  
25 that he's referring to may have been captains at  
26 different time periods. Plaintiffs at this stage,

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2 at this early stage have alleged clearly that the  
3 maitre d's who took anywhere from it looks like  
4 it's between 7 and 10 percent of the tipout off  
5 the top are not entitled to do that, based on the  
6 amount of supervisory responsibility that they  
7 have. And we've alleged facts sufficient to  
8 overcome that hurdle at this early juncture. It  
9 may turn out that the only one that is a  
10 legitimate maitre d may be Mr. Viti. But I can't  
11 foresee what may or may not be the scenario with  
12 regard to these other two gentlemen. I know  
13 because I've met all twelve of the people who have  
14 come and complained about this, that Mr. Viti  
15 obviously takes is a larger than life person in  
16 sort of the restaurant world and that's why all of  
17 them have remembered him by name. That does not  
18 preclude that -- they've also said clearly that  
19 the other maitre d's participated in the tip pool.  
20 Some of the maitre d didn't last that long. I've  
21 been doing restaurant cases since 2003 which  
22 brings me to my next point. I along with many  
23 many other judges yourself included I'm sure, have  
24 stared at 196(d) to try to understand and read the  
25 terms there. It's only taken the Court of Appeals  
26 multiple times and many judges along the way of

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2 trying to interpret what 196(d) means. I don't  
3 see that there is any clear meaning there that the  
4 defendants, that the plaintiff's may not recover  
5 the difference between their tips, between their  
6 tip credit and the minimum wage. The law is such  
7 in the State of New York and in the City of New  
8 York that favors the employee and to give the  
9 employee the benefit of every possible, of every  
10 possible law so I can't see how the court would  
11 preclude. I can't see how the legislature would  
12 have precluded plaintiffs from being able to  
13 recover the difference between the tip credit and  
14 what the minimum wage was. We, I should note in  
15 our complaint, we sued under Section 650 which is  
16 the minimum wage law. Likewise under the overtime  
17 law we sued under 650. The spread of hours claim,  
18 so under the spread of hours claim we've given you  
19 case law. We've been pursuing spread of hours  
20 claim for many years prior to 2011. And there is  
21 case law that supports the spread of hours. I  
22 think it was more clearly clarified in 2011, but  
23 you could look at the case law that we've  
24 provided. I'm sure you already have and you could  
25 see that the courts have awarded spread of hours  
26 damages. I remember in earlier cases that I

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2 handled we didn't pursue it because it was so  
3 unclear to us at that point, but other judges and  
4 opinions that we attached to our brief have  
5 awarded spread of hours.

6 THE COURT: Okay counsel. Just very  
7 briefly respond to that and then we'll go onto the  
8 class motion.

9 MR. FREEDBERG: I want to be very clear  
10 that defendant's position is, not to say that if  
11 plaintiffs were to somehow establish a violation  
12 of the law they would be out of luck and without  
13 damages. Plaintiffs are seeking -- plaintiffs are  
14 seeking two measures of the damages for the same  
15 statutory violation. They are seeking first  
16 disgorgement of the tips that the alleged maitre  
17 d's who are allegedly not allowed to participate  
18 in the tip tool received. And in addition to that  
19 a separate substantive measure of damages being  
20 the tip credit. To me that's manifested in two  
21 separate substantive violations for the same act.  
22 And I'm sure plaintiffs would be seeking the  
23 statutory liquidated damages and penalties and  
24 interests on top of both of those violations. So  
25 it's not, and I want to be crystal clear, it's not  
26 defendant's position that plaintiffs would not be

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2 entitled to any damages if they are able to  
3 establish any violation. There is a measure of  
4 damages. The proper measure of damages is the tip  
5 misappropriation that the maitre d allegedly  
6 received.

7 And finally, your Honor, 190.60 is not that.  
8 It's not at all ambiguous I would posit. The  
9 first sentence reads, "no employer or its agent or  
10 officer other agent of any corporation or any  
11 other person shall demand, accept, directly or  
12 indirectly any part of the gratuities received by  
13 an employee or retain any part of a gratuity or  
14 any charge purported to be a gratuity by an  
15 employee." To me that's simple. An employer  
16 can't take an employee's gratuity. Who the  
17 employer is, that's a legal question the courts  
18 have been wrestling with and that's what we're  
19 fighting over here, whether the maitre d  
20 constitute an employer. Then there is another  
21 sentence not relevant here so I'll skip that. And  
22 then nothing in this subdivision shall be  
23 construed as affecting the allowances from the  
24 minimum wage for gratuities in accordance with the  
25 provisions of Article 19 of this chapter. Nothing  
26 ambiguous about that counsel. That says in plain

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2 English to me that nothing in the statute shall  
3 prevent an employer from taking the tip credit  
4 allowance. Thank you.

5 THE COURT: Okay. The class action.

6 MR. GOLDMAN: So we are seeking to  
7 certify this as a class action. In certain sense  
8 job has been made easier. Defendants have pointed  
9 out to you this case has been certified as a  
10 collective action. For reasons unknown to me they  
11 decided not to settle the class action and only to  
12 settle a little small portion of the case which  
13 left a whole lot of people left out there hanging.  
14 So numerosity we alleged and we provide you with  
15 affidavits to that, certified over a hundred  
16 people would be members of this class. The  
17 turnover, we've explained the turnover in  
18 restaurant as we all know is very high. There is  
19 some argument about there is only 62 possible  
20 people, but in fact the number we compared tipout  
21 sheets from earlier periods to current periods and  
22 almost none of the names were the same or many of  
23 the names were not the same. So we feel that that  
24 is, you know, that we have meet the numerosity  
25 requirement.

26 Counsel brings forward a very novel argument

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2 saying well because the busboys get paid off the  
3 top that somehow that that doesn't -- that they  
4 don't meet the numerosity requirement. Again  
5 there is no case law that supports that argument.  
6 No case notation in his brief to that affect and  
7 having done these cases for twelve years the  
8 maitre d gets paid off the top. The manager gets  
9 paid off the top. And the busboy as in this case  
10 who often doesn't speak the language, gets paid  
11 off the bottom. And we've also shown you in our  
12 documentation that it's not 20 percent, but that  
13 it's 20.1 percent or 16.9 percent and it's all  
14 laid out in our document which you've seen.  
15 Commonality. The questions in this case are all  
16 common. Whether they were paid -- everybody was  
17 paid \$5 an hour or 4.65 an hour depending on the  
18 time period. Is that wrong or is that right?  
19 Cross the board with the question. The other  
20 question they were all time shaped. It's occurred  
21 to me finally after all these years and by sitting  
22 down one day and reading the manual and this is a  
23 particular manual related to the point of sale POS  
24 system, the manual states in no less than five  
25 different spots you must clock everyone out before  
26 you start doing the nightly calculation. And this



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2 has resulted in all of our busboys across all of  
3 our cases saying that when I went to go punch  
4 myself and punch my number, I was already punched  
5 out. Who punched you out? It was because of the  
6 maitre d on duty or manager on duty. It's because  
7 of the system when we get further along with this  
8 case we'll discover whatever system they used. I  
9 have a feeling it will be similar to the point of  
10 sale system which requires everyone be checked  
11 out. Maitre d's doesn't want to stay there until  
12 2 in the morning so he starts his paperwork at  
13 some hour 11 or 12 o'clock at night. Commonality.  
14 We talked about the overtime, very common. All of  
15 them was a POS policy or under information policy  
16 or practice the maitre d would check these people  
17 out. Prior I think before the first lawsuit all  
18 of the servers worked anywhere from fifty to sixty  
19 hours a week. None of them were paid over time.  
20 They were forced to work fifty to sixty hours a  
21 week not paid overtime. Provided you with  
22 affidavits as to the service those working during  
23 that period of time and the ones required to work  
24 overtime. Typically, that the claims of the class  
25 representatives are typical of the rest of the  
26 claims, and I think you could see that from the

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2 affidavits. These are all busboys and people who  
3 were paid tip credit wage. These are all people  
4 who were forced to participate in the mandatory  
5 tip pool. And these people's wages we feel they  
6 were taken unfairly. The third to fourth criteria  
7 is that the class representatives were fairly and  
8 accurately represent the class. We've picked two  
9 class representatives out of the twelve.  
10 Obviously it's happened in cases where other  
11 people have come forward in class representatives  
12 as well. I myself, am I an adequate  
13 representative for the class? I've been handling  
14 wage cases since 2002, received many successful  
15 settlements on behalf of my clients. And the  
16 class action is a fair and efficient way to  
17 adjudicate this matter. People who are making  
18 less than minimum wage can hardly afford a lawyer  
19 and if you decertify the class, or didn't allow  
20 the class to go forward, as a lawyer many people  
21 wouldn't be able to get legal representation and  
22 the ability to collect fees and to handle this as  
23 a class is what ultimately benefits the client.

24 THE COURT: Counsel. Very briefly.

25 MR. FREEDBERG: Thank you, your Honor.

26 THE COURT: Why shouldn't I certify a

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2 class action?

3 MR. FREEDBERG: Because plaintiffs have  
4 not satisfied the elements of commonality.

5 THE COURT: Why not? Aren't the claims  
6 essentially the same?

7 MR. FREEDBERG: They are not, your  
8 Honor. There is a wide gap between the potential  
9 claims of the bartender busboys. The bartenders  
10 and busboys on one hand and the runners and  
11 waiting on the other hand.

12 THE COURT: Clearly the job duty are  
13 different, but isn't the claim the same? It all  
14 arises out of how tips are allocated.

15 MR. FREEDBERG: The claims arise how  
16 tips are allocated, but plaintiffs misstate the  
17 way the tip pool is structured. The way the tip  
18 pool is structured there is no possibility that  
19 bartenders and busers were harmed.

20 THE COURT: And that goes to.

21 MR. FREEDBERG: Commonality. It  
22 absolutely does. Even if plaintiffs are able to  
23 establish their violation, they cannot establish  
24 that there was any harm onto the busboys and  
25 bartenders because they are getting tips, to use  
26 plaintiff's term off the top.

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2 THE COURT: I think plaintiff's term is  
3 off the bottom.

4 MR. FREEDBERG: They are incorrect.

5 THE COURT: So in other words, I have to  
6 make that finding now as to whether tips are from  
7 the top or from the bottom?

8 MR. FREEDBERG: Correct, your Honor.

9 THE COURT: You don't think that's more  
10 appropriate for summary judgment.

11 MR. FREEDBERG: Absolutely not. This is  
12 a procedural issue to determine whether the claims  
13 of the individual class members are cohesive and  
14 unified and they are not here. Those require a  
15 substantive finding here. This is not a motion to  
16 dismiss standard. There is an evidentiary  
17 standard plaintiffs have to meet and which I  
18 submit they fail to meet. The structure of the  
19 tip pool is such that each bartender that is on a  
20 particular tip give 5 percent of the tips off the  
21 top regardless of the maitre d's participation if  
22 there is a thousand dollars in tips.

23 THE COURT: You are saying they are off  
24 the top.

25 MR. FREEDBERG: So there is no harm. If  
26 part of the class is not harmed and part of the

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2 class is harmed, class certification must be  
3 denied at least with respect to the people that  
4 weren't harmed.

5 THE COURT: Commonality is where you put  
6 most of your eggs.

7 MR. FREEDBERG: Commonality and  
8 typically because definitions of those --

9 THE COURT: Respond very briefly to just  
10 to the commonality typically.

11 MR. GOLDMAN: Sure. If the maitre d  
12 didn't participate in the tip out --

13 THE COURT: His position the bartenders  
14 get off the top and if they get off the top how is  
15 there -- how are they harmed, the bartenders.

16 MR. GOLDMAN: If there is ten percent  
17 more to give to the bartenders and the busboys  
18 then you don't know how. He's asking you to  
19 speculate how the tip out would be divided. He's  
20 bringing up a novel theory that's never been tried  
21 before and he's asking you on a motion to dismiss  
22 without --

23 THE COURT: It's not a motion to  
24 dismiss.

25 MR. GOLDMAN: Preliminary stage to rule  
26 on this issue. There is no way to know how the

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2 tips would be divided if the maitre d wasn't part  
3 of that tip pool. The busboys they get 22 percent  
4 and again we talked in our brief and I said  
5 earlier that it's not a uniform policy. We  
6 attached some of the tipout sheets that showed one  
7 night the busboys got 16.9 percent. Another night  
8 they got 21 percent or 20.1 percent or some other  
9 percentage. So it's not off the top. The policy  
10 is erratic. Restaurant in general by their very  
11 nature are erratic and at this early juncture,  
12 this is an argument for summary judgment in six  
13 months from now. This is not an argument, a novel  
14 argument like this to be made at this stage of the  
15 litigation.

16 THE COURT: Okay. Thank you folks.

17 MR. FREEDBERG: Can I add one more  
18 point?

19 THE COURT: But your adversary on this  
20 motion gets the last word. One point.

21 MR. FREEDBERG: I want to address the  
22 off the clock claims.

23 THE COURT: Sure.

24 MR. FREEDBERG: We have cited today a  
25 number of decisions within courts of this state so  
26 off the clock claims paid overtime claims are not

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amenable to class action certification. Because really by their very nature they require individual mini trials. We would still be required, I believe, we would have the right to depose every single member of the class to go through every single time entry.

THE COURT: Counsel, you want to address that.

MR. GOLDMAN: Very briefly. He's talking about the Walmart case, two hundred thousand people. Your Honor addressed it in the Weinstein decision. Do I need to say anymore than that? There are 60 to 100 people in this class.

THE COURT: Thank you.

MR. GOLDMAN: Thank you, your Honor.

THE COURT: Have a good day folks.

Certified to be a true and accurate transcript of the original stenographic notes.

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JACQUELINE GLASS  
SENIOR COURT REPORTER