SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

WILLIAM ORGERA, on behalf of himself and others similarly situated,

Plaintiffs,

- against -

Index No.: 606066/17
Motion Seq. No.: 01
Motion Date: 03/20/18

SNAPPER INN, INC., RICHARD H. REMMER, GEORGE H. REMMER, JR., KAREN REMMER MARK and any other related corporate entities,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits, Affidavit and Exhibit and Memorandum of Law	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move, pursuant to CPLR § 2004, for an order extending the time to file a motion for class certification until pre-class certification discovery is completed; and move, pursuant to CPLR §§ 3124 and 3126, for an order compelling the production of specific discovery materials and depositions, including records for plaintiff William Orgera ("Orgera") and similarly situated individuals, and the deposition of an individual with knowledge of defendants' payroll, catering and tipping policies. Defendants oppose the motion.

In support of the motion, counsel for plaintiffs submits, in pertinent part, that "[t]his is Plaintiffs' first request for relief regarding discovery. However, the parties have conferred on numerous occasions, including twice before Your Honor and have been unable to reach a full resolution on the two primary issues, discussed below: **Issue 1:** To the extent that Defendants assert they have no pay, time, tip, or employment records for Plaintiff Orgera, what documents and information should be made available for the event(s) he alleges to have worked? **Issue 2:** As this is (*sic*) proposed class action, what records and information should be exchanged that would allow Plaintiffs to move for class certification under CPLR §§ 901, 902 - i.e., what should be exchanged in pre-class certification discovery? Plaintiffs have proposed compromises as to both issues - namely limiting a sample from putative class members, requesting a limited sample of records regarding the events that Plaintiff Orgera may have worked, and agreeing to conduct a deposition from a corporate representative from Defendants' catering operations.... Defendants responses have been two-fold: (1) Plaintiff Orgera never worked for Defendants and we refuse to produce any records related to any events during his alleged tenure, and (2) Plaintiff Orgera never worked for Defendants and we refuse to produce any records related to other events in which the same policies and practices applied. As a result, Defendants have played gatekeeper as to the records that would allow Plaintiffs to challenge the asserted illegal tipping and tip distribution policies that applied to Plaintiff Orgera and similarly situated service workers, and violate Labor Law § 196-d. Defendants have entirely stymied discovery as they have refused to produce a single document, despite acknowledging that they employed dozens of service workers who worked in the similar service positions to Plaintiff Orgera and who were similarly subject to the same employment and tip policies. Defendants also cannot dispute the allegation that they charged a 20% service charge on most, if not all, catered events - sometimes labeled as an administrative charge, a service charge, or a gratuity - without distributing it to the waitstaff.

Therefore, this Court should (1) extend the date for Plaintiffs to move for class certification, and (2) compel Defendants to produce documents and witness(es) for depositions."

Counsel for plaintiffs further asserts that, "[p]laintiff Orgera alleges that he was employed as a service employee at Defendants' catering venue commonly known as 'The Snapper Inn.'... Plaintiff Orgera alleges that he and similarly situated individuals were subject to the same illegal employment practices - namely they did not receive all of their tips when they worked catered events for Defendants. The fundamental allegation of the class action complaint is asserted as a claim under Labor Law § 196-d and entails the following facts: Defendants assessed and collected a mandatory charge from customers for the administration of a catered event. That amount was typically an additional 20%, plus the per price of the event. That amount was not distributed to the waitstaff that worked the catered event. Therefore, under the regulations and the respective case law, the following things would be material and necessary to the claims and defenses: the retention or assessment of such charges, the understanding of the reasonable patrons, the policies and procedures in place for employees, and who is the 'employer' of the service workers that worked the events.... As Defendants cannot contest the factual allegations that they assessed a mandatory charge (in its various labeling forms) and failed to remit this charge to its workers, they insist on stalling discovery and refusing to produce any records that would fully support Plaintiffs' allegations. Plaintiffs and Defendants have agreed - with the Court's blessing - to limit discovery of the 'reasonable patron' and all events, until after the Court renders a decision on class certification. However, certification should be resolved early and is regularly granted in § 196-d cases because the factual predicates are perfectly situated for class resolution. [citations omitted]."

With respect to discovery as to plaintiff Orgera, counsel for plaintiffs asserts, in pertinent part, that, "[a]fter Plaintiffs served formal requests and waited over 145 days for responses,

Defendants produced zero documents.... Amongst a plethora of objections, Defendants asserted that (1) they had no records of Plaintiff Orgera working there, and (2) they were refusing to produce records during that time frame.... Shortly after that production, the parties attended a compliance conference with Your Honor, on February 13, 2017. As a result of the Court's suggestion, Plaintiffs proposed that Defendants produce the following to resolve Issue No. 1: I. All event files (contracts, invoices, menus, BEOs, bills, estimates, flyers, jackets/folders) from catered events held in January and February of 2012.... II. All staffing sheets from those events, including any layouts and event related documents.... Plaintiffs' proposed compromise on Issue No. 1 comports both with the 'material and necessary' standard under CPLR § 3101 and allows for the efficient resolution of this action because it helps assess the nature of the central allegations during Plaintiff Orgera's employment - namely was a mandatory charged (*sic*) assessed and paid by customers, how was that mandatory charge explained, was that charge retained, and was that the same policy that applied to all service staff. Defendants have not agreed to this proposal, despite the Court issuing a preliminary conference order during October 2017 - and the parties being nearly four months into discovery...." *See* Plaintiffs' Affirmation in Support Exhibits A-E.

With respect to discovery as to putative class members, counsel for plaintiffs asserts, in pertinent part, that, "[d]efendants concede that they hosted hundreds of catered events during the last seven years, and concede that they employed dozens (if not hundreds) of service workers just like Plaintiff Orgera during the last seven years. They also concede that dozens of the same staff members worked the same parties, under the same standard form contracts. However, Defendants refuse to produce any records supporting or opposing theses issues, especially those regarding these workers or these class allegations.... Defendants provide no argument for this refusal. Other Courts have addressed discovery in the context of wage and gratuity class cases. The question in those cases is not whether Plaintiffs are entitled to discovery of putative class members, the question is how much Plaintiffs are entitled to receive in discovery. [citations omitted].... On Feb.

12, 2018, Plaintiffs made a proposal of 'a sampling of 3 months worth of pay, time, and event records (contracts, menus, invoices, etc. from catering events) from each of the relevant years.'... Defendants refused to agree to such a compromise. Defendants should not be allowed to play gatekeeper of the records and information regarding both the named plaintiff and those he worked with and those he seeks to represent - especially when there are clear policies and practices that uniformly apply to all such workers. To allow such would be to violate the requirements of the Labor Law and the Hospitality Wage Order, and the well-established case law. Therefore, the Court should compel Defendants to produce the sampling of 3 months worth of records (May, September, and December) from each year dating back to 2011."

Counsel for plaintiffs also requests that the Court impose discovery sanctions based upon defendants' continued delay in discovery.

In opposition to the motion, counsel for defendants submits, in pertinent part, that, "William Orgera ('Plaintiff') alleges that he worked as a bartender for a total of only 1 or 2 shifts for Defendants in approximately February of 2012 and that during this extremely limited alleged employment, Defendants failed to distribute a service charge allegedly paid by its customers to food service workers. Plaintiff admittedly has no recollection of any service charge being charged at Snapper Inn and instead bases his entire unsubstantiated allegation on his general experience in the catering industry. It is therefore readily apparent that Plaintiff is utilizing this motion to compel discovery as a fishing expedition with the hopes of manufacturing some sort of claim. In reality, however, Plaintiff was never employed by Defendants. It is for this reason and this reason only that Defendants are not in possession of any documents concerning Plaintiff. Snapper Inn maintains schedules and sign-in numbers for employees, yet Plaintiff is not listed on any of them, evidencing that he was not employed. In addition, during the time at which Plaintiff allegedly worked for Defendants, Snapper Inn did not charge any administrative fee or service charge. In fact, Defendants already notified Plaintiff in Defendants' Response To Plaintiffs' First Request For The Production Of Documents that it is not in possession of any documents regarding any

service charge during the period of time in which Plaintiff alleges he was employed by Defendants. Moreover, had Plaintiff actually worked at Snapper Inn at the time, he would have known that they did not charge any service charge or administrative fee. Plaintiff's (*sic*) requests in this motion, seeking a sampling of documents from 22 months in which Plaintiff was admittedly not employed, are highly irrelevant, overbroad, and only go to further corroborate Defendants' suspicion that Plaintiff commenced this action solely to manufacture claims against Defendants. As such, Plaintiff's (*sic*) motion to compel discovery should be denied. In addition, Plaintiff has failed to show any reason as to why its (*sic*) deadline to file a motion for class certification, which expired prior to the filing of this motion, should be extended."

Counsel for defendants further asserts, in pertinent part, that, "[d]efendants have already responded to 29 separate document requests, including all such requests concerning Plaintiff.... As such, Plaintiff's allegation that Defendants somehow stymied discovery is just plain wrong.... Contrary to Plaintiff's baseless assertion, in no way did Defendants concede that they violated the record keeping requirements of the New York Labor Law. As Plaintiff was never employed by Snapper Inn, there were never any records concerning Plaintiff to be maintained. In fact, the schedules discussed below evidence that records of actual employees of Snapper Inn were maintained. In Issue 1 of the present motion, Plaintiff seeks to compel discovery of documents concerning events that Plaintiff alleges to have worked. While Plaintiff is unable to identify a single date that he worked for Defendants, he somehow manages to declare that he worked 1-2 shifts in approximately February of 2012.... As such, Plaintiff's purported 'compromise;' to wit, asking for all event files and staffing sheets from events held in January and February of 2012, is illogical as it seeks documents for a time period even longer than what Plaintiff purportedly worked for Defendants. Nonetheless, as Your Honor will recall, at the Status Conference held on February 27, 2018, Defendants indicated that they would respond to Plaintiff's proposed 'compromise' by March 2, 2018 in an attempt to avoid unnecessary motion practice. Instead of simply waiting 3 days for a response, in which Plaintiff would have obtained the responsive

documents attached..., Plaintiff elected to ... file the instant motion.... In response to Plaintiff's 'compromise,' Defendants hereby produce ... Snapper Inn's schedules for the period of January 4, 2012 through February 29, 2012.... While ten (10) different bartenders are listed on these schedules, notably, Plaintiff is not.... This fact further evidences that Plaintiff was not employed during this time.... While Snapper Inn is not in possession of customer contracts or brochures from the period of Plaintiff's alleged employment, which took place over 6 years ago, Snapper Inn's menu from this time period does exist, and evidences that no service charge or administrative fee existed.... Accordingly, Documents Bates Numbered DEF-000017 to DEF-000018 is (*sic*) a copy of Snapper Inn's catering menu from February of 2012.... While this menu identifies the cost of various party options, it does not identify any service charge or administrative fee, as no such service charge or administrative fee was charged.... In the absence of such a service charge or administrative fee, Plaintiff's claim that such a service charge or administrative fee constitutes a gratuity simply fails.... Not surprisingly, Plaintiff admittedly has no recollection of any service charge being charged at Snapper Inn and instead based his unsubstantiated allegation on his general experience in the catering industry.... In addition, to the extent gratuities were paid by customers during the period of time in which Plaintiff alleges he was employed by Defendants, Snapper Inn maintained a policy pursuant to which 100% of gratuities were distributed to employees at the end of each shift.... As Plaintiff has filed many identical actions against various other businesses in the hospitality industry, and thus is aware of the issues those employers confront regarding service charges and compensation, it is apparent that he hopes, without any basis, that problems that exist at other businesses in the hospitality industry must exist with Defendants. Simply because Plaintiff has now randomly targeted Defendants does not mean that Plaintiff should be permitted to pursue this overbroad fishing expedition.... As a result, Plaintiff is not entitled to any other discovery and the motion to compel discovery should be denied." *See* Defendants' Affirmation in Opposition Exhibits A-D.

Counsel for defendants also submits, in pertinent part, that, "[a]s Plaintiff's counsel readily admits in his Affirmation, the parties agreed to bifurcated discovery pursuant to which only discovery concerning Plaintiff and Plaintiff's ability to be a class representative would be conducted prior to the filing of a motion for class certification.... All other discovery related to the putative class is only to be conducted in the unlikely event that class certification is granted. In order to obtain class certification, Plaintiff must establish, in addition to other factors, that 'there are questions of law or fact common to the class which predominate over any questions affecting only individual members' and that as a representative, Plaintiff's claims are typical of the claims of the class. [citation omitted]. Significantly, the dispute as to whether Plaintiff was ever employed by Snapper Inn in the first place would clearly predominate over any questions affecting individual members; and thus render him an inappropriate class representative. In addition, Snapper Inn has utilized different party contracts and party brochures at different times throughout the Class Period.... Snapper Inn also offers different types of parties to its customers during different times of the year, including inside parties and outdoor pavilion parties.... Thus, Plaintiff's assertion that Defendants somehow conceded that staff members work the same parties under the same standard form contracts is blatantly false. In fact, during the time in which Plaintiff alleges he worked for Snapper Inn, only inside parties were offered.... Accordingly, Plaintiff's claims are not common or typical of the other putative class members. Plaintiff here, seeks pay, time, and event records from May, September, and December of each year since 2011. Plaintiff admittedly did not work during any of the 21 months of this sampling, and one of these months is outside of the putative class period. Accordingly, these 21 months of requested records are highly irrelevant and have absolutely no bearing on Plaintiff or Plaintiff's ability to be a class representative.... In addition, Plaintiff asks that the Court compel an ESI search, yet conveniently omits that Defendants already responded to Plaintiff's request for ESI. In Defendants' Responses To Plaintiff's First Request For The Production Of Documents, Defendants confirmed that they are not in possession of any ESI concerning Plaintiff.... Thus, to the extent any additional ESI is

sought by Defendants (*sic*), it would solely be used to obtain class-wide ESI. Thus because of the parties' undisputed agreement at the Preliminary Conference to bifurcate discovery, there is no other ESI to be produced at this time. Such bifurcation includes the ESI sought by Plaintiff regarding Defendants George Remmer, Jr. and Karen Remmer Mark as such ESI in no way applies to Plaintiff or Plaintiff's ability to be class representative. In fact, Defendants' Responses To Plaintiffs' First Request For Interrogatories, which were verified by Richard H. Remmer, already confirmed that such individuals did not hire, fire, supervise, control employee schedules, determine employee compensation, determine employee methods of payment, have access to employee records, or maintain employee records during the time period in which Plaintiff allegedly worked at Snapper Inn.... Thus, Plaintiff's request to compel ESI production should be denied. Plaintiff also requests that a deposition be compelled concerning an individual with knowledge of Defendants' payroll, catering, and tipping policies. Once again this Court should not have been burdened with such a request by Plaintiff, as the issue of depositions is not in dispute. The parties have already agreed that prior to the filing of a class certification motion, the depositions of Plaintiff and of a witness from Defendants would be conducted. Any other depositions, if necessary, however, should not be conducted until after Plaintiff's motion for class certification is decided by the Court. Because Plaintiff is not entitled to any class-wide discovery at this time, his motion to compel such discovery should be denied." *See* Defendants' Affirmation in Opposition Exhibit C.

Counsel for defendants further argues that plaintiff is not entitled to sanctions.

Counsel for defendants adds that, "CPLR § 902 requires that a plaintiff must file a motion for class certification within 60 days of the time to serve a responsive pleading expired. On August 1, 2017, the parties agreed to extend this deadline to a date to be set forth in the Preliminary Conference Order.... Subsequently, during the Preliminary Conference on October 25, 2017, the extended deadline of February 28, 2018 was agreed to and set forth in the Preliminary Conference Order for Plaintiff to file a motion for class certification.... Only after

this deadline expired did Plaintiff file the present motion for an extension of the deadline to file a motion for class certification... Because the Appellate Division has held that '[t]his filing deadline is mandatory,' Plaintiff's motion to extend the deadline to file a motion for class certification must be denied. [citation omitted]."

In further opposition to the motion, defendants submit the Affidavit of defendant Richard H. Remmer. *See* Defendants' Affidavit Opposition and Exhibit.

CPLR § 3101(a) provides for full disclosure of "all matter material and necessary" in the prosecution or defense of an action, with the test being one of "usefulness and reason." *See Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968). A trial court is given broad discretion to oversee the discovery process. *See Stone v. Zinoukhova*, 119 A.D.3d 928, 990 N.Y.S.2d 567 (2d Dept. 2014); *Edwards v. Prescott Cab Corp.*, 110 A.D.3d 671, 972 N.Y.S.2d 629 (2d Dept. 2013).

"'While class certification is an issue that should be determined promptly (*see* CPLR 902), a trial court has discretion to extend the deadline upon a good cause shown' [citations omitted], such as the plaintiff's need to conduct class certification discovery to determine whether the prerequisites of a class action set forth in CPLR 901(a) may be satisfied." *Chavarria v. Crest Hollow County Club at Woodbury, Inc.*, 109 A.D.3d 634, 970 N.Y.S.2d 884 (2d Dept. 2013) *quoting Rodriguez v. Metropolitan Cable Communications*, 79 A.D.3d 841, 913 N.Y.S.2d 292 (2d Dept. 2010).

In the instant matter, the Court finds that the issue that must first be addressed is whether or not plaintiff Orgera actually worked for defendants. Plaintiff Orgera claims that he worked as a bartender for defendants for one (1) or two (2) shifts in February of 2012. Defendant Richard H. Remmer asserts in his sworn affidavit that, "I understand that William Orgera ('Plaintiff') is alleging that he was employed by Snapper Inn as a bartender in approximately February 2012. This allegation is false. At the time of Plaintiff's alleged employment, Snapper Inn maintained employee sign-in numbers and schedules for employees, however, Snapper Inn has absolutely no

records of Plaintiff having such a sign-in number or of being on any schedule during the time of his alleged employment. For example, attached hereto are (*sic*) documents Bates Numbered DEF-00001 to DEF-000016 are Snapper Inn's schedules for the period of January 4, 2012 through February 29, 2012. While ten (10) different bartenders are listed on these schedules, Plaintiff is not. This fact evidences that Plaintiff was not employed during this time. In addition, neither I, nor any of the multiple other employees and managers of Snapper Inn who I have spoken to has any recollection whatsoever of Plaintiff." *See* Defendants' Affidavit in Opposition and Exhibit.

The Court further finds that, before any further document discovery is addressed, the deposition of plaintiff Orgera should take place. Additionally, the deposition of a representative of defendant Snapper Inn should also take place. Said depositions shall be limited to the issues involving plaintiff Orgera and plaintiff Orgera's ability to be a class representative. Following said depositions, the issue of further document discovery may be renewed to the Court, if necessary.

Furthermore, the Court finds that there is good cause to extend the deadline for filing the class certification motion, to wit, the need to conduct the aforementioned depositions.

Accordingly, the branch of plaintiffs' motion, pursuant to CPLR §§ 3124 and 3126, for an order compelling the production of specific discovery materials and depositions, including records for plaintiff Orgera and similarly situated individuals, and the deposition of an individual with knowledge of defendants' payroll, catering and tipping policies, is hereby **GRANTED to the extent that** the aforementioned depositions are ordered to take place.

The branch of plaintiffs' motion, pursuant to CPLR § 2004, for an order extending the time to file a motion for class certification until pre-class certification discovery is completed is hereby **GRANTED**. And it is further

ORDERED that plaintiffs shall have until **August 6, 2018** to file their motion for class certification.

Plaintiffs' request for discovery sanctions is hereby **DENIED**.

All parties shall appear for a Certification Conference in IAS Part 32, Nassau County Supreme Court,100 Supreme Court Drive, Mineola, New York, on June 19, 2018, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
June 11, 2018