STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY
COMMERCIAL DIVISION

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ROBERT TAGUE and ANASTACIA A. VILLARREAL, on behalf of themselves and others similarly situated,

Plaintiffs,

**DECISION & ORDER**

-against-

BULLOCK BOYS, LLC, 400 HIE LLC, JAMES J. MORRELL and MARSHALL HOTELS & RESORTS INC.,

Defendants.

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Index No.: 906182-18

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

In this putative class-action lawsuit premised on alleged violations of New York Labor Law § 196-d, plaintiffs Robert Tague and Anastacia Villarreal move for (1) class certification (*see* NYSCEF Doc No. 77), and (2) summary judgment (*see* NYSCEF Doc No. 79).

Defendants Bullock Boys, LLC ("Bullock Boys"), 400 HIE LLC ("HIE") and James J. Morrell (collectively, "the Morrell Defendants") oppose the motions and cross-move for dismissal of the Labor Law § 196-d claim as against them (*see* NYSCEF Doc No. 142).

Defendant Marshall Hotels & Resorts Inc. ("Marshall") opposes plaintiff's motion and cross-moves for summary judgment against HIE on its cross claim for contractual indemnification (*see* NYSCEF Doc No. 131). HIE opposes Marshall's cross motion.

**BACKGROUND**

Plaintiffs Robert Tague and Anastacia Villarreal commenced this putative class action on October 3, 2018, "seeking to recover misappropriated tips on behalf of Plaintiffs and their similarly situated co-workers . . . as hourly food service workers during events catered at the Holiday Inn Express in Latham ('the Holiday Inn')" (NYSCEF Doc No. 26, ¶ 1).[1]

Following entry of numerous scheduling orders and extensive fact discovery (*see e.g.* NYSCEF Doc Nos. 11, 33, 38, 39), the amendment of pleadings (*see* NYSCEF Doc Nos. 26 ["Complaint"], 27 ["Morrell Answer"], 30 ["Marshall Answer"]), discovery motion practice (*see* NYSCEF Doc No. 70), countless remote conferences throughout the COVID-19 pandemic, and efforts by the parties to resolve the case through mediation in early 2022 (*see* NYSCEF Doc Nos. 74-75), the instant motion practice ensued.

[1] Tiffany Cannistraci originally was named as a plaintiff, but she was dismissed from the case pursuant to stipulation (*see* NYSCEF Doc No. 43).

## I. SUMMARY JUDGMENT (LABOR LAW § 196-d)

Plaintiffs move for summary judgment on their Labor Law § 196-d claim (*see* NYSCEF Doc No. 79; *see also* Complaint, ¶¶ 31-35). The Morrell Defendants oppose the motion and cross-move for dismissal (*see* NYSCEF Doc No. 142). Marshall separately opposes the motion.

"To prevail on a motion for summary judgment, the moving party must establish prima facie entitlement to judgment as a matter of law by adducing sufficient competent evidence to show that there are no issues of material fact" (*Staunton v Brooks*, 129 AD3d 1371, 1372 [3d Dept 2015] [citations omitted]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). If the movant fails to satisfy this initial burden, the motion must be denied, "regardless of the sufficiency of the opposing papers" (*Alvarez*, 68 NY2d at 324). But if the movant establishes a prima facie case, the burden shifts to the nonmoving party to demonstrate that material issues of fact or legal defenses to the claims exist (*see id.*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

### A. Violations of Labor Law § 196-d

Initially, the Court will consider whether the proof adduced by plaintiffs establishes violations of Labor Law § 196-d throughout the proposed class period of January 1, 2014 to December 31, 2018.

#### 1. Legal Framework

Labor Law § 196-d provides, in relevant part: "No employer or [its] agent or an officer or agent of any corporation . . . shall demand or accept, directly or indirectly, any part of the gratuities, received by an employee, or retain any part of a gratuity or of any charge purported to be a gratuity for an employee."

Under Department of Labor ("DOL") regulations, "[a] charge purported to be a gratuity must be distributed in full as gratuities to the service employees or food service workers who provided the service" (12 NYCRR 146-2.18 [a]). "There shall be a rebuttable presumption that any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for 'service' or 'food service,' is a charge purported to be a gratuity" (*id.*, [b]).

"A charge for the administration of a banquet, special function, or package deal shall be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip" (12 NYCRR 146-2.19 [a]). "The employer has the burden of demonstrating, by clear and convincing evidence, that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity" (*id.*, [b]).

"Adequate notification shall include a statement in the contract or agreement with the customer, and on any menu and bill listing prices, that the administrative charge is for administration of the banquet, special function, or package deal, is not purported to be a gratuity, and will not be distributed as gratuities to the employees who provided service to the guests. The statements shall use ordinary language readily understood and shall appear in a font size similar to surrounding text, but no smaller than a 12-point font" (*id.*, [c]).

2. Plaintiffs' Proof

Customers of Holiday Inn banquet events were provided banquet event orders ("BEOs") showing a 20% fee described as a "service charge" or "administrative fee" (*see* NYSCEF Doc Nos. 83-86; *see also* NYSCEF Doc No. 81 ["SOMF"], ¶ 1; NYSCEF Doc No. 144 ["Morrell RSOMF"], ¶ 1; NYSCEF Doc No. 121 ["Marshall RSOMF"], ¶ 1). The BEOs do not disclose

that such fees and charges would not be remitted to banquet waitstaff (*see* NYSCEF Doc Nos. 83-86; *see also* SOMF, ¶ 1; Morrell RSOMF, ¶ 1; Marshall RSOMF, ¶ 1).

Banquet customers also were provided contracts that described the 20% fee as a gratuity and did not disclose that the gratuity would not be remitted to waitstaff (*see* SOMF, ¶ 2; Morrell RSOMF, ¶ 2; Marshall RSOMF, ¶ 2; *see also* NYSCEF Doc No. 87 ["Catering Contract"]).

Defendants collected substantial service charges and administrative fees from January 1, 2014 through December 31, 2018 in connection with banquet events at the Holiday Inn (*see* SOMF, ¶¶ 23, 31, 45; Morrell RSOMF, ¶¶ 23, 31, 45; Marshall RSOMF, ¶¶ 23, 31, 45). No portion of these funds were paid to banquet waitstaff (*see* NYSCEF Doc No. 92, ¶¶ 10-11).

Morrell acknowledged in his deposition that the administrative fee was charged to banquet customers in lieu of a gratuity, and he was aware of only two instances in which customers left additional gratuities (*see* NYSCEF Doc No. 89 ["Morrell EBT"], p. 40; SOMF, ¶¶ 3-4; Morrell RSOMF, ¶ 3; Marshall RSOMF, ¶¶ 3-4; *see also* NYSCEF Doc No. 149 ["VanDenburgh EBT"], pp. 55-56).

The foregoing evidence demonstrates, *prima facie*, that a charge or fee purporting to be a gratuity was imposed upon Holiday Inn banquet customers during the proposed class period, and no portion of such charge or fee was remitted to waitstaff. The burden therefore shifts to defendants to show that Labor Law § 196-d was not violated by such conduct.

3. Defendants' Opposition

The only opposition to this branch of plaintiffs' motion comes from Marshall, which observes that most of the BEOs refer to an "administrative fee," rather than a gratuity or service charge, and also show a separate charge of "$0.00" for "Staff" (NYSCEF Doc Nos. 84-86). Marshall further observes that at least a few banquet patrons left additional gratuities,

"presumably because they understood from the BEOs, invoices, or from conversations with staff that no charges for banquet events were intended as gratuities" (Marshall RSOMF, ¶ 68, citing Morrell EBT, p. 40 ["only one or two times was it brought to my attention that . . . a tip was left for the wait staff"]). From this, Marshall argues that "a reasonable customer would almost certainly understand that no charges imposed on BEOs were intended to be a gratuity" (NYSCEF Doc No. 120, p. 7).

The Court does not find Marshall's argument to be convincing, as it ignores the fact that customers' expectations would be formed, at least in part, by the Catering Contract, which refers to the 20% fee as a "gratuity" (*see* SOMF, ¶ 2; Morrell RSOMF, ¶ 2; Marshall RSOMF, ¶ 2). Moreover, administrative fees are presumed to be gratuities under DOL regulations, unless it is demonstrated, through clear and convincing evidence, that customers were "notified that the charge is not a gratuity or tip" (12 NYCRR 146-2.19 [a], [b]). Neither the BEOs nor the catering contracts affirmatively and adequately notified customers that the service charges or administrative fees were not gratuities for waitstaff (*see Picard v Bigsbee Enters., Inc.*, 55 Misc 3d 1221[A], 2017 NY Slip Op 50698[U], *7 [Sup Ct, Albany County 2017]).

4. Conclusion

Plaintiffs have established as a matter of law that Holiday Inn banquet customers were charged gratuities within the meaning of Labor Law § 196-d that were not remitted to waitstaff.

**B. Plaintiffs' Employer(s) at Pertinent Times**

An individual or entity is not liable under Labor Law § 196-d merely by serving as an owner, shareholder, officer or agent of a corporation (*see Andux v Woodbury Auto Park, Inc.*, 30 AD3d 362, 362 [2d Dept 2006]; *Stoganovic v Dinolfo*, 92 AD2d 729, 729 [4th Dept 1983], *affd* 61 NY2d 812 [1984]). However, the Labor Law does impose liability on "employers" (Labor

Law § 190 [3]), and an owner, shareholder, officer or agent of a corporation who qualifies as an "employer" may be held liable on that basis (*see Bonito v Avalon Partners, Inc.*, 106 AD3d 625, 625-626 [1st Dept 2013] [officer]; *Wing Wong v King Sun Yee*, 262 AD2d 254, 255 [1st Dept 1999] [shareholder]).

The term "employer" is broadly defined in article 6 of the Labor Law to include "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service" (Labor Law § 190 [3]). In determining whether an individual or entity is subject to liability as an "employer," courts look to whether they exercise control of the day-to-day operations of the business and its employees, including determination of the rate and method by which employees are compensated (*see Bonito*, 106 AD3d at 626; *accord Lomeli v Falkirk Mgt. Corp.*, 179 AD3d 660, 663 [2d Dept 2020]). The test ultimately is one that looks to the "economic realities of the case" (*Bonito*, 106 AD3d at 626; *see Tezoco v GE & LO Corp.*, 199 AD3d 541, 543 [1st Dept 2021]; *Matter of Yick Wing Chan v New York Indus. Bd. of Appeals*, 120 AD3d 1120, 1121 [1st Dept 2014]; *see also Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999]).

1. January 1, 2014 through December 31, 2014

Plaintiffs allege that HIE and Morrell were employers of the putative class for the period from January 1, 2014 through December 31, 2014 (*see* NYSCEF Doc No. 80, pp. 19-20).

*a. Plaintiffs' Proof*

HIE operates the Holiday Inn hotel (*see* VanDenburgh EBT, p. 10), and Morrell is the sole owner of HIE and Bullock Boys (*see* Morrell EBT, pp. 11, 17).

On February 2, 2010, HIE entered into a Management Agreement with Bullock Hospitality, Inc. ("Hospitality") (*see* NYSCEF Doc No. 99 ["Hospitality Management

Agreement"]).[2] That agreement remained in effect until late 2014, when HIE discovered that Hospitality's managing member, Tod Hanlon, was embezzling funds (*see* NYSCEF Doc No. 92, ¶ 1; VanDenburgh EBT, pp. 57-58).

HIE had engaged Hospitality "to manage, market and operate the Hotel on [its] behalf" (Hospitality Management Agreement, Second Whereas Clause). Hospitality was "solely responsible for operating the Hotel[]," including the restaurant and banquet facility, "with full power, authority, discretion and control in all matters relating to [the facility's] management, operating and maintenance," including "employment policies," "approv[al of] all payroll and operating expenditures," and "labor policies (including hiring, firing and direction of all employees)" (*id.*, ¶ 3 [b]).

In arguing that HIE was an employer of the putative class in 2014, plaintiffs emphasize that Hospitality was required by its management agreement to "make reports to [HIE] concerning all affairs connected with the Hotel . . . whenever reasonably requested by [HIE]" (*id.*, ¶ 3 [g]). Further, Hospitality agreed to "comply with any specific instructions" of HIE, so long as the instructions are not inconsistent with the Hospitality Management Agreement or the Hotel's annual budget (*id.*). Additionally, Hospitality was required to submit an annual operating budget to HIE and HIE had "the right to object" to such budget (*id.*, ¶ 5). Finally, plaintiffs emphasize that the "Hospitality Management Agreement makes clear that HIE owns all employment records of the hotel" (SOMF, ¶ 20; Morrell RSOMF, ¶ 20; Marshall RSOMF, ¶ 20).

As to Morrell, plaintiffs assert that he directed the activities of HIE and Bullock Boys, personally and though his representative, John VanDenburgh (*see* SOMF, ¶ 9). Plaintiffs support this assertion through citation to VanDenburgh's testimony that Morrell, as the

[2] Bullock Hospitality is not connected with Bullock Boys.

managing member of HIE, was responsible for "monitoring the relationship with [Hospitality]" (Vandenburgh EBT, p. 111) and that he served as Morrell's "agent" (*id.*, p. 117).

While emphasizing HIE and Morrell's ability to exercise control over the Holiday Inn, Hospitality and hotel staff, plaintiffs submit little, if any, evidence demonstrating any actual involvement by HIE or Morrell in 2014 in relation to the banquet facility or its staff.

Thus, plaintiffs are left to rely upon a single email from *2012* in which Morrell stated that he and Hospitality's principal were "fine" with hiring a certain individual to prepare food for catered events at a rate of $15 per hour (NYSCEF Doc No. 97; *see* NYSCEF Doc No. 98, pp. 156-157).

Plaintiffs also cite Morrell's proprietary attitude towards the Holiday Inn, directing the Court's attention to testimony in which Morrell generally acknowledged that he would direct staff to correct minor issues that he personally observed, such as a lack of paper towels in the bathroom or insufficient soap in the dispenser (*see* Morrell EBT, p. 118).

Plaintiffs further emphasize that "[t]he funds earned from banquet functions increased Mr. Morrell's profits or partially offset his losses from running the Holiday Inn" (SOMF, ¶ 8; Morrell RSOMF, ¶ 8; Marshall RSOMF, ¶ 8).

The Court concludes that the proof adduced by plaintiffs is insufficient to discharge their initial burden of establishing that HIE and Morrell were employers of the putative class during 2014. The Hospitality Management Agreement may have allowed HIE and its principal, Morrell, to exercise control over the working conditions of waitstaff and made HIE the owner of employment records (*see* NYSCEF Doc No. 80, p. 19; *see also* SOMF, ¶¶ 15-21), but there simply is no evidence that HIE or Morrell actually exercised control over the day-to-day operations of the banquet facility or its employees during 2014.

Apart from an isolated email sent several years earlier in which Morrell merely concurred in the management company's hiring of a cook, plaintiffs submit no evidence that HIE or Morrell hired or fired employees, determined their rate or method of pay, set work schedules or otherwise exercised control over the terms and conditions of employment during this period (*cf. Tezoco*, 199 AD3d at 543 ["controlled the restaurants' daily operations"]; *Lomeli*, 179 AD3d at 663 ["control of the corporation's day-to-day operations"]). And, of course, an owner of a hotel and banquet facility does not become the "employer" of waitstaff merely by adopting a propriety attitude towards the facility and pointing out the lack of soap or towels in a washroom.

As the Morrell Defendants properly observe, business owners commonly contract with professional managers who possess specialized knowledge to exercise day-to-day control over their businesses (*see* NYSCEF Doc No. 143, p. 2), and these management agreements invariably impose reporting requirements on the manager, and usually leave the owner with some residual authority. But where the owner leaves the day-to-day management and operations of the business, including control over the workforce, in the hands of the outside manager, it would be inconsistent with the "economic realities" of the situation to deem the owner an "employer" (*see Picard*, 2017 NY Slip Op 50698[U], *8 ["the mere fact that (the owner) had the ability to exercise authority over the day-to-day operations of the defendant corporations of which he was the principal owner . . . does not establish that the 'economic realities' of (his) role were such that he should be deemed to be plaintiffs' employer"]).

This conclusion is not altered by the fact that the Hospitality Management Agreement made employment records the property of HIE and required Hospitality to deliver such records to HIE upon termination of the management agreement (*see* ¶ 7 [a]). Given that management companies come and go (*e.g.* Hospitality, Marshall) while employees often remain (*e.g.*

Anastacia Villarreal), it was entirely logical for Hospitality to possess the employment records during its service as manager and return them to HIE once the management contract ended. Under the circumstances, HIE's ownership of the employment records is not a sufficient basis to demonstrate that HIE was an employer of the waitstaff during Hospitality's tenure.

The Court therefore concludes that plaintiffs have not met their initial burden of demonstrating an entitlement to summary judgment against HIE or Morrell for the period from January 1, 2014 through December 31, 2014. Accordingly, this branch of plaintiffs' motion must be denied without regard to the sufficiency of the Morrell Defendants' opposition papers.

*b. The Morrell Defendants' Cross Motion*

Plaintiffs have not adduced legally sufficient evidence from which to conclude that HIE or Morrell was an employer of the putative class during 2014. And the proof adduced by the Morrell Defendants in opposition to plaintiffs' motion and in support of their cross-motion shows that the banquet facility was "100 percent in [Hospitality's] care, custody, and control" throughout 2014 (NYSCEF Doc No. 148, p. 23; *see* NYSCEF Doc No. 145, ¶¶ 13-14).

In opposition to this *prima facie* showing that Hospitality exercised control over the day-to-day operations of the banquet facility and banquet staff in 2014 (*see* Morrell RSOMF, ¶¶ 59-60), plaintiffs are left with Morrell's 2012 email (*see* NYSCEF Doc No. 169, ¶¶ 59-60), which plainly is insufficient to demonstrate that HIE or Morrell was an employer of the putative class in 2014 or even give rise to a triable issue of fact.

Accordingly, the branch of the Morrell Defendants' cross motion seeking dismissal of claims against them for 2014 is granted.

2. January 1, 2015 through June 30, 2017

Plaintiffs allege that Marshall, Bullock Boys and Morrell were employers of plaintiffs and the putative class from January 1, 2015 through June 30, 2017 (*see* NYSCEF Doc No. 80, pp. 19-20).

*a. Marshall*

On December 17, 2014, Bullock Boys and HIE contracted with Marshall to manage the Holiday Inn's restaurant and banquet space (*see* NYSCEF Doc No. 100 ["Marshall Management Agreement"]).[3]

As the "exclusive manager and operator of the Restaurant and Banquet Space," Marshall was given "uninterrupted control in the operations of the . . . Space," including the authority to "determine all rates and charges to customers" (*id.*, ¶ 3 [a], [b]).

"All employees of the Restaurant and Banquet Space will be employees of [Marshall] or a Professional Employment Organization" (*id.*, ¶ 4 [g]), and Marshall was "solely responsible for complying with all statutes, ordinances, rules, regulations, orders and determinations affecting or issued in connection with the operation of the Restaurant and Banquet Space by any governmental authority having jurisdiction over [such] Space" (*id.*, ¶ 4 [n]).

As with the Hospitality Management Agreement, Marshall was obliged to make reports to Bullock Boys and HIE concerning the restaurant and banquet space as reasonably requested

[3] The record includes two different versions of the Marshall Management Agreement. The first, submitted by plaintiffs, refers to an agreement made between Bullock Boys and Marshall, but is signed by HIE, as "Owner," through its manager, Morrell (*see* NYSCEF Doc No. 100, pp. 1, 19). The second version, submitted by the Morrell Defendants (*see* NYSCEF Doc No. 147), also purports to be an agreement between Bullock Boys and Marshall, but that agreement identifies Bullock Boys as "Owner" and is signed by Morrell in his capacity as a manager of Bullock Boys (*see id.*, pp. 1, 19). Apart from the identity of the "Owner" on the signature pages, the two documents otherwise appear to be identical. Accordingly, references to the Marshall Management Agreement shall refer to the text common to both documents.

and to "comply with any specific instructions of [Bullock Boys or HIE] that may be expressed in formal directions communicated to [Marshall], if such instructions are not inconsistent with [the management agreement] and [the annual budget]" (*id.*, ¶ 4 [o]).

Bullock Boys and HIE were entitled to terminate the Marshall Management Agreement for an uncured material breach, including a breach of Marshall's obligation to operate the banquet facility in compliance with applicable laws, rules and regulations (*see id.*, ¶¶ 4 [n]; 15 [a]). Further, Bullock Boys and HIE owned all books and records pertaining to the restaurant and banquet facility, including the employment records of banquet waitstaff (*see id.*, ¶ 8 [a]).

Marshall operated the banquet facility from January 7, 2015 through June 30, 2017 (*see* NYSCEF Doc No. 92, ¶ 1; SOMF, ¶ 30; Morrell RSOMF, ¶ 30; Marshall RSOMF, ¶ 30). During this period, Marshall collected the following aggregate amounts of service charges and administrative fees: $104,878.87 in 2015; $107,174.72 in 2016; and $54,226.99 through June 30, 2017 (*see* SOMF, ¶ 31; Morrell RSOMF, ¶ 31; Marshall RSOMF, ¶ 31). The Marshall Management Agreement was terminated as of June 30, 2017 (*see* SOMF, ¶ 38; Morrell RSOMF, ¶ 38; Marshall RSOMF, ¶ 38).

The foregoing proof suffices to demonstrate, *prima facie*, that Marshall was the employer of plaintiffs and the putative class from January 7, 2015 through June 30, 2017. Accordingly, the burden shifts to Marshall to raise a legal defense or triable issue of fact.

Marshall first observes that the management agreement contemplated the possibility that restaurant and banquet personnel would be employed by "a Professional Employment Organization" (*i.e.* a staffing agency), rather than employed by Marshall directly (¶ 4 [g]). However, plaintiffs have submitted exemplar payroll records showing that Marshall directly employed banquet waitstaff (*see* NYSCEF Doc No. 93*; see also* NYSCEF Doc No. 151

[Marshall payroll records submitted by Morrell Defendants]; NYSCEF Doc No. 163 [additional Marshall payroll records submitted by plaintiffs]), and any evidence concerning Marshall's use of a staffing agency would lie within Marshall's possession. Under the circumstances, Marshall's conclusory and unsupported speculation regarding the potential involvement of a staffing agency is insufficient to give rise to a triable issue of fact concerning Marshall's status as an employer or defeat plaintiffs' *prima facie* case (*see Zuckerman*, 49 NY2d at 562).

Marshall further contends that plaintiffs ignore the Marshall Management Agreement's broad reservation of powers to Bullock Boys and HIE, including the requirement that Marshall comply with their specific directions.

Relatedly, Marshall contends that "Morrell micro-managed every aspect of the Hotel's operations, to the point that Marshall did not exercise any meaningful control over the Holiday Inn or its employees" (Marshall RSOMF, ¶ 69). To this end, Marshall cites Morrell's role in interviewing a candidate for the Holiday Inn's general manager position in 2016 and Morrell's disagreement with extending a job offer to that candidate (*see* Morrell EBT, pp. 164-166; NYSCEF Doc No. 129).

Marshall also cites (*see* Marshall RSOMF, ¶¶ 69-72): Morrell's acknowledgement that he had the authority to waive the administrative fee (*see* Morrell EBT, p. 65); his frequent visits to the Holiday Inn, during which he would ask staff to correct minor maintenance issues that he observed (*see id.*, pp. 117-120); and Morrell's 2012 email (*see id.*, pp. 156-157).

Marshall further contends that it had no control over the language used in the BEOs because the forms were generated using computer software located at the Holiday Inn to which Marshall employees lacked access (*see* NYSCEF Doc No. 128 ["Harvill EBT"], pp. 102-103, 110-111). Additionally, Marshall claims that it advised HIE to change its practice regarding the

disclosure of charges on the BEOs (*see id.*, pp. 25-27, 113-115), but was directed to maintain existing pay practices by HIE (*see id.*, pp. 131-132, 147; *see also* Morrell EBT, pp. 48-50).

The Court does not find Marshall's arguments to be convincing. The record shows that, in accordance with its obligations under the management agreement, Marshall operated the Holiday Inn's restaurant and banquet facility and served as the employer of all restaurant and banquet staff (*see* Harvill EBT, pp. 145-147 [detailing corporate reporting structure used by Marshall to exercise control over the working conditions of plaintiffs and the putative class]).

Further, Marshall acknowledges that it could have sought to revisit the Morrell Defendants' alleged decision to continue the disclosure and compensation practices that occurred under Hospitality, but Marshall refrained from doing to preserve a good business relationship with Morrell (*see id.*, p. 56 ["I mean, you want to get along, right. So yes, we had the authority, and if we wanted to, you know, beat the owner over the head with it, we could have come to a loggerhead with it, and whatever the outcome that would have been, would have been. I mean, the owner's got – the owner could claim they have authorities within the contract as well, and it becomes a case for the court, you know."]).

And isolated proof of Morrell's involvement in the hiring of a new general manager for the hotel – a critically important position – does not show that Morrell or his companies usurped Marshall's management and control over the banquet facility to such a degree that Marshall cannot be said to be the employer of plaintiffs and the putative class.

Marshall's proof demonstrates, at most, that the Morrell Defendants were joint employers of plaintiffs and the putative class, but that is not a basis upon which Marshall can avoid liability under the Labor Law for its own activities as an "employer" of plaintiffs and the putative class.

Based on the foregoing, plaintiffs have established as a matter of law that Marshall was an employer of plaintiffs and the putative class from January 7, 2015 through June 30, 2017.

*b. The Morrell Defendants*

For essentially the reasons stated in Part I (B) (1) (a), *supra*, the Court concludes that plaintiffs have not made a *prima facie* showing that Bullock Boys or Morrell were employers of plaintiffs and the putative class from January 1, 2015 through June 30, 2017 based on (i) their residual authority under the Marshall Management Agreement, (ii) Morrell's 2012 email concurring in Hospitality's hiring of a banquet cook, (iii) Morrell speaking up if he noticed insufficient soap or toilet paper in the hotel bathrooms, (iv) ownership of employee records, and (v) Morrell's participation in the hiring of a new general manager for the Holiday Inn in 2016. In sum, plaintiffs' proof falls short of demonstrating that Bullock Boys or Morrell exercised meaningful control over the day-to-day operations of the banquet facility or the terms and conditions of employment of waitstaff.

Contrary to plaintiffs' contention, this is not a case of employers attempting to contract away their liability under the Labor Law. Rather, Bullock Boys and HIE contracted with a professional hospitality management company to serve as the "exclusive manager and operator of the Restaurant and Banquet Space" and exercise "uninterrupted control in the operations of the . . . Space," including the power to "determine all rates and charges to customers" (Marshall Management Agreement, ¶ 3 [a], [b]) and the duty to ensure legal compliance (*see id.*, ¶ 4 [n]).

Based on the foregoing, the Court concludes that plaintiffs have not met their initial burden of adducing legally sufficient evidence that Bullock Boys or Morrell was an employer of plaintiffs and the putative class from January 1, 2015 through June 30, 2017. Accordingly, this branch of plaintiffs' motion is denied.

However, the Court further concludes that the Morrell Defendants' cross motion for dismissal as to this period must also be denied. Even assuming that Bullock Boys and Morrell met their initial burden, the proof adduced by plaintiffs in opposition to the cross motion and the proof submitted by Marshall in opposition to plaintiffs' motion suffice to raise triable issues of fact as to whether Bullock Boys and Morrell were employers of plaintiffs and the putative class from January 1, 2015 through June 30, 2017.

In their opposition to the cross motion, plaintiffs submit evidence showing that Morrell personally made employment decisions concerning plaintiff Tague, including his rejection of Tague's request for a promotion and his direction to Tague to perform certain non-banquet work (*see* Morrell EBT, p. 56; NYSCEF Doc No. 115 ["Tague EBT"], p. 28).

Moreover, the evidence submitted by Marshall in opposition to plaintiffs' motion, while insufficient to absolve it of liability as an employer under the Labor Law, does show, among other things, that: Morrell played a role in Marshall's decisions regarding the collection, disclosure and distribution of the service charge/administrative fee (*see* Harvill EBT, pp. 38, 59-60, 63, 124); the Morrell Defendants, not Marshall, controlled the process of generating the challenged BEO forms (*see id.*, pp. 102-103, 110-111); and the Holiday Inn's general managers "were complete puppets of Morrell" (*id.*, p. 93).

The Court therefore concludes plaintiffs' claims against Bullock Boys and Morrell for the period from January 1, 2015 through June 30, 2017 must be determined at trial.

3. July 1, 2017 through December 31, 2018 (HIE/Bullock Boys/Morrell)

Following termination of the Marshall Management Agreement, Bullock Boys served as the employer of plaintiffs and the proposed class through December 31, 2018 (*see* SOMF, ¶ 39;

Morrell RSOMF, ¶ 39; Marshall RSOMF, ¶ 39; *see also* Morrell Answer, ¶¶ 8, 10, 12 [admitting that Bullock Boys was plaintiffs' employer]).

During this period, the Holiday Inn's general manager, John D'Adamo, an HIE employee, was involved in deciding whether to collect a service charge from banquet customers and whether such charge would be remitted to waitstaff (*see* SOMF, ¶ 40; Morrell RSOMF, ¶ 40; Marshall RSOMF, ¶ 40). Additionally, the general manager's duties included oversight of the restaurant and banquet facilities, and he had the power to hire and fire waitstaff and participate in decisions concerning their compensation (*see* SOMF, ¶¶ 41-43; Morrell RSOMF, ¶¶ 41-43; Marshall RSOMF, ¶¶ 41-43). Frank Rivera then replaced D'Adamo as of August 27, 2018 and served in a similar role through the end of 2018 (*see* SOMF, ¶ 44; Morrell RSOMF, ¶ 44; Marshall RSOMF, ¶ 44).

The Court concludes that the foregoing evidence establishes, *prima facie*, that HIE and Bullock Boys were the employer of plaintiffs and the putative class from July 1, 2017 through December 31, 2018. Contrary to the Morrell Defendants' contention, HIE's employment of a general manager to run the restaurant and banquet facilities is not a "relinquish[ment of] all authority to professional management personnel," akin to the third-party management agreements with Hospitality and Marshall (NYSCEF Doc No. 143, pp. 25-26).

Finally, for essentially the reasons stated in Part I (B) (2), *supra*, the Court finds that neither side has demonstrated its entitlement to summary judgment on the issue of whether Morrell was an employer of plaintiffs and the putative class during this period. Although the evidence for this period concerning Morrell is limited, it seems wholly implausible that Morrell would have become *less involved* with the affairs of the hotel and banquet facility after terminating Marshall and bringing control over management in-house.

**C. Damages**

Plaintiffs submit proof that the following service charges and administrative fees were collected from January 1, 2015 through December 31, 2018 in connection with banquet events at the Holiday Inn: $104,879 (2015); $107,175 (2016); $97,877 (2017); and $100,149 (2018) (SOMF, ¶¶ 31, 45; Morrell RSOMF, ¶¶ 31, 45; Marshall RSOMF, ¶¶ 31, 45). Marshall collected $266,281 in fees during its period of involvement (*see* SOMF, ¶ 31; Morrell RSOMF, ¶ 31; Marshall RSOMF, ¶ 31), and the Morrell Defendants collected an additional $143,799 from July 1, 2017 through December 31, 2018 (*see* SOMF, ¶ 45; Morrell RSOMF, ¶ 45; Marshall RSOMF, ¶ 45).

Defendants do not dispute the foregoing sums. However, the Morrell Defendants argue that plaintiffs waived their right to receive tips, and, to the extent that the Court concludes otherwise, defendants are entitled to an offset based upon the minimum wage for tipped employees. Marshall similarly contends that plaintiffs' claimed entitlement to all banquet service charges is excessive without an offset for the substantial hourly wage paid to waitstaff.

1. Waiver

The Morrell Defendants argue that plaintiffs are not entitled to any gratuities collected by defendants because they signed documents acknowledging that they would be paid an hourly rate and would not be tipped employees (*see* NYSCEF Doc Nos. 153-154).

Employees may contract away their rights under Labor Law § 196-d through clear and unmistakable language (*see Tamburino v Madison Sq. Garden, LP*, 115 AD3d 217, 220 [1st Dept 2014]), but the Morrell Defendants submit only standard pay notices for the hospitality industry, merely indicating the employee's hourly rate without reduction for tip credit.

As such, the documents relied on by the Morrell Defendants do not manifest the kind of clear expression of intent necessary to support a waiver of rights under article 6 of the Labor Law (*see id.* at 220-221; *see also Matter of Altour Serv., Inc. v Industrial Bd. of Appeals*, 127 AD3d 609, 609 [1st Dept 2015]).

2. Offset

Defendants argue that they are entitled to an offset against damages. The Morrell Defendants seek to offset the withheld gratuities by the tipped minimum wage (*see* NYSCEF Doc No. 143, pp. 29-30), and Marshall more generally requests an offset for the substantial hourly wage paid to plaintiffs, which presumably would have been set at a much lower rate had anyone contemplated the waitstaff's receipt of the service charges and administrative fees.

When presented with a similar issue five years ago in *Picard*, this Court ruled:

> [T]he Court shares defendants' concern that the measure of damages requested by plaintiffs exceeds their actual damages. It seems inconceivable that defendants would have paid their banquet servers as much as $14 per hour if the servers also were to receive a mandatory 20% gratuity. In this connection, plaintiffs have not cited any legal authority affirmatively demonstrating the unavailability of an offset of the type requested by defendants under the facts and circumstances presented here (2017 NY Slip Op 50698[U], *9).

As plaintiffs observe, however, defendants herein have not preserved the affirmative defense of offset or setoff in their answers (*see* Morrell Answer; Marshall Answer). Nor do defendants' answers sufficiently plead the facts underlying such a defense.

Under the circumstances, the Court concludes that defendants have waived their right to the defense of setoff or offset (*see Killian v Captain Spicer's Gallery, LLC*, 140 AD3d 1764, 1765 [4th Dept 2016], *lv dismissed* 29 NY3d 981 [2017]; *Ellenville Natl. Bank v Freund*, 200 AD2d 827, 828 [3d Dept 1994]).

**D. Conclusion**

Plaintiffs have established as a matter of law that Holiday Inn banquet customers were charged gratuities that were not remitted to waitstaff, in violation of Labor Law § 196-d, from January 1, 2014 through December 31, 2018.

From January 7, 2015 through June 30, 2017, Marshall was an employer of plaintiffs and the putative class and is liable for $266,281 in aggregate gratuities collected but not distributed to waitstaff. Further, there are triable questions of fact as to whether Bullock Boys and Morrell were employers of plaintiffs and the putative class from January 1, 2015 through June 30, 2017.

From July 1, 2017 through December 31, 2018, HIE and Bullock Boys were employers of plaintiffs and the putative class and are liable for $143,799 in gratuities collected but not distributed to waitstaff. Further, there are triable questions of fact as to whether Morrell was an employer of plaintiffs and the putative class for this period.

Finally, plaintiffs' allegations concerning 2014 must be dismissed, as the Morrell Defendants have demonstrated that they cannot be held liable as employers for this period, and plaintiffs have not sued Hospitality.

Accordingly, plaintiffs' motion for summary judgment and the Morrell Defendants' cross motion are granted to the extent indicated above and otherwise denied.

**II. CLASS CERTIFICATION**

Plaintiffs move for an order granting their motion to certify a class, appoint them as class representatives, and appoint their attorneys as co-lead counsel for the class (*see* NYSCEF Doc No. 77). The Morrell Defendants and Marshall separately oppose the motion.

The CPLR lists five prerequisites to class certification (*see* CPLR 901 [a] [1-5]). The ultimate determination is discretionary, and the burden of proof lies with the plaintiff to show

that each of the statutory prerequisites has been met (*see Beller v William Penn Life Ins. Co. of N.Y.*, 37 AD3d 747, 748 [2d Dept 2007]).

**A. Numerosity**

The first prerequisite to certification is that the class be "so numerous that joinder of all members . . . is impracticable" (CPLR 901 [a] [1]).

Plaintiffs argue that the proposed class consists of more than 100 individuals who were banquet servers at the Holiday Inn from 2014 through 2018 (*see* NYSCEF Doc No. 78 ["Class MOL"], p. 8). They rely on payroll records produced by Marshall that are said to show over 70 banquet waitstaff employed during the term of the Marshall Management Agreement (*see* NYSCEF Doc No. 93), as well as payroll records produced by the Morrell Defendants' payroll vendor showing at least 30 additional banquet waitstaff employed from July 1, 2017 through December 31, 2018 (*see* NYSCEF Doc Nos. 94-95).

The Morrell Defendants complain that the payroll records submitted by plaintiffs fail to substantiate the claimed number of class members. According to the Morrell Defendants, plaintiffs' exhibits show only a "combined total of 28 individuals" (NYSCEF Doc No. 108 ["Class Morrell Opp"], p. 13), and do not identify the employees' positions or job descriptions, thus potentially including employees other than banquet waitstaff (*see id.*, pp. 13-14).

Plaintiffs respond that the payroll records produced in support of their motions were only a sample of the payroll records produced by or for defendants during discovery, and, for the sake of completeness, they filed a full set of payroll records in reply. The additional Marshall payroll records submitted by plaintiffs show that at least 70 banquet servers were employed under payroll code 27094 from January 7, 2015 through June 30, 2017 (*see* NYSCEF Doc No. 163; *see also* Harvill EBT, p. 72 [testifying that code 27094 "refers to banquet service"]), and the

employment records for the post-Marshall period show 39 employees with job code 27094 (*see* NYSCEF Doc No. 162).

Given plaintiffs' proof of at least 70 class members for the period from January 1, 2015 through June 30, 2017 and 39 class members for the period from July 1, 2017 through December 31, 2018, the Court is satisfied that plaintiffs have sufficiently demonstrated numerosity for the proposed class (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399 [2014]; *Agolli v Zoria Hous., LLC*, 188 AD3d 514, 514 [1st Dept 2020]).

For ease of administration and trial, the Court finds that there shall be two sub-classes: one encompassing Marshall's period of management from January 1, 2015 through June 30, 2017 ("Marshall Sub-Class"), and another for the post-Marshall period from July 1, 2017 through December 31, 2018 ("Post-Marshall Sub-Class") (*see* CPLR 906). The Court finds that each of these sub-classes independently satisfies the numerosity requirement to the extent that such a showing may be required.

**B. Commonality/Predominance**

The second prerequisite to class certification is that "there are questions of law or fact common to the class which predominate over any questions affecting only individual members" (CPLR 901 [a] [2]). Plaintiffs must satisfy two distinct, but related, elements: commonality of issues and the predominance of the common issues over issues requiring individualized consideration (*see e.g. Freeman v Great Lakes Energy Partners, L.L.C.*, 12 AD3d 1170, 1171 [4th Dept 2004]).

The Court's summary judgment ruling obviates the need to litigate whether Labor Law § 196-d was violated and leaves for trial the over-arching common issues of whether (1) Bullock

Boys and Morrell Defendants were employers of the Marshall Sub-Class, and (2) whether Morrell was an employer of the Post-Marshall Sub-Class.

The fact that banquet servers may have performed non-tipped work before or after banquet events does not defeat commonality, as determining the class's right to unpaid gratuities for banquet service does not call for individualized consideration of any non-service work. As plaintiffs observe, the unambiguous language of Labor Law § 196-d precludes defendants from retaining any portion of gratuities, and the regulations relied upon by the Morrell Defendants merely concern an employer's ability to take a tip credit (*see* NYSCEF Doc No. 159, pp. 7-9).

Finally, it is well settled that individualized issues of damages do not defeat class certification where, as here, the total amount of gratuities collected by defendants are known, none of the collected gratuities were remitted to waitstaff, and there are detailed payroll records showing the hours worked by waitstaff (*see Picard v Bigsbee Enters., Inc.*, 44 Misc 3d 1214[A], 2014 NY Slip Op 51113[U], *3-4 [Sup Ct, Albany County 2014]).

Accordingly, commonality and predominance have been established,

**C. Typicality**

The third prerequisite to class certification is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (CPLR 901 [a] [3]).

Here, the named plaintiffs worked at the Holiday Inn as banquet servers during the class period of January 1, 2015 through December 31, 2018 and were subject to the same violations of Labor Law § 196-d as other putative class members employed during this period. Villarreal worked at the Holiday Inn as a banquet server from August/September 2016 to October 2017, thus spanning both sub-classes, and Tague was employed from January 2018 to August 2018,

thereby falling into the Post-Marshall Sub-Class (*see* NYSCEF Doc No. 102, pp. 8, 15; NYCEF Doc No. 103, pp. 8, 24).

Insofar as defendants complain that plaintiffs' claims are not typical of a claim of banquet servers in 2014 – the period in which Hospitality managed the banquet facility – their concerns are academic in light of the Court's dismissal of the 2014 allegations.

Accordingly, plaintiffs have shown that their claims are typical of the class.

**D. Adequacy of Representation**

The fourth prerequisite to class certification is that "the representative parties will fairly and adequately protect the interest of the class" (CPLR 901 [a] [4]). To meet this requirement, plaintiffs must show that class counsel is qualified and capable of seeing this litigation through to its conclusion, no conflict of interest exists that would pit the nominative plaintiffs against other members of the class, and plaintiffs are sufficiently familiar with the lawsuit (*see Ferrari v National Football League*, 153 AD3d 1589, 1592 [4th Dept 2017]; *see also In re Drexel Burnham Lambert Group, Inc.*, 960 F2d 285, 291 [2d Cir 1992]).

Plaintiffs submit that they have no known conflict with any other class member, and will continue to devote their time and efforts to representing the interest of the putative class (*see* NYSCEF Doc No. 102, pp. 43-44; NYCEF Doc No. 103, pp. 47-49). Further, plaintiffs' attorneys affirm that they have extensive experience in prosecuting wage and hour class actions against restaurants in New York State and have obtained substantial recoveries (*see* NYSCEF Doc Nos. 106-107). Thus, counsel argue that they have the requisite experience, vigor and financial resources to adequately represent the class through the ultimate conclusion of this litigation.

In opposing the motion, the Morrell Defendants argue that plaintiffs' assertions are inadequately supported. They also take issue with plaintiffs' knowledge of the underlying facts, citing testimony that HIE and Morrell were their employers, their lack of familiarity with Marshall, and their confusion about service charges and administrative fees (*see* Class Morrell Opp, pp. 23-24).

Marshall similarly argues that neither plaintiff has any demonstrated familiarity with this litigation or their obligations as class representatives (*see* NYSCEF Doc No. 121, ¶¶ 74-83). Marshall also claims that plaintiffs have not established that they have the financial resources to prosecute this action (*see* NYSCEF Doc No. 130, p. 10).

Of the factors raised by the parties, the Court is fully satisfied that plaintiffs have no known conflicts with other class members, and that plaintiffs and their counsel have the financial ability, willingness and capacity to continue to vigorously litigate this case on behalf of the putative class, as they have done for the last four years.

And while defendants raise some legitimate concerns about plaintiffs' grasp of some of the intricacies of the case,[4] plaintiffs generally are familiar with the underlying facts and allegations, and some of their confusion has not been shown to be unjustified (*see* Part I [B], *supra* [questions of fact as to identity of plaintiffs' employer(s) at pertinent times]).

The Court finds that the representative parties will fairly and adequately protect the interest of the class.

[4] Insofar as Marshall complains about Villarreal's refusal to produce documentation concerning her pursuit of an administrative remedy before DOL (*see* NYSCEF Doc No. 130, pp. 11-12) following her deposition almost two years ago (*see* NYSCEF Doc No. 103), Marshall's remedy was to bring a motion to compel or preclude after following the prescribed process for resolving discovery disputes (*see* Commercial Division Rule 14), which it failed to do.

**E. Superiority**

The final prerequisite to class certification is that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (CPLR 901 [a] [5]). Plaintiffs argue that adjudicating this case on a class-wide basis will avoid the possibility of inconsistent outcomes and eliminate impediments to litigating their relatively modest claims. In opposition, defendants argue that the administrative process before DOL is superior.

While defendants' arguments regarding the availability of an administrative remedy are not without some force, the Court finds that plaintiffs have made an adequate showing of superiority under the particular facts and circumstances presented here. Unlike *Alix v Wal-Mart Stores, Inc.* (57 AD3d 1044 [3d Dept 2008], *affg* 16 Misc 3d 844 [Sup Ct, Albany County 2007]), adjudication of class members' claims here would not call for intensive, individualized inquiries. Indeed, the key issue for trial is establishing who employed the class at pertinent times, and the claims of sub-class members stand or fall together on this critical point.

**F. CPLR 902 Factors**

Having determined that the prerequisites of CPLR 901 have been satisfied, the Court must also consider the factors set forth in CPLR 902, which are: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the impracticability or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and (5) the difficulties likely to be encountered in the management of a class action.

The Court is satisfied that the foregoing factors weigh in favor of class certification. Members of the class have only a limited interest in controlling the prosecution of their cases, since each member has sustained damages that are modest in amount. Further, while it would not be impractical for individuals to pursue their own administrative proceedings against defendants, it would be inefficient. And defendants have not identified any other litigation that has been commenced by members of the proposed class. Finally, concentration of this litigation in Albany County is appropriate given that the Holiday Inn is located in Albany County, many of the class members reside in or around Albany County, and the relevant events occurred in Albany County.

**G. Conclusion**

Plaintiffs' motion for class certification is granted, plaintiffs are appointed class representatives, and plaintiffs' attorneys are appointed as co-lead counsel for the class.

## III. INDEMNIFICATION

Marshall cross moves against HIE for summary judgment on Marshall's cross claim for contractual indemnification (*see* NYSCEF Doc No. 131).

Section 11 (a) of the Marshall Management Agreement ("MMA") requires HIE (*see* n 3, *supra*) to indemnify and hold Marshall harmless for all liability, loss, damage, cost or expense (including attorney's fees) "to the extent arising from or relating to the organization, management, operation or maintenance of the Restaurant and Banquet Space except those liabilities arising from or caused by the willful misconduct, negligence, fraud, or embezzlement of or by [Marshall]" (MMA, § 11 [a]). Conversely, Marshall agreed to indemnify and hold HIE and Bullock Boys harmless for all liability, loss, damage, cost or expense (including attorney's

fees) "which may be occasioned by or caused by the willful misconduct, negligence, fraud, or embezzlement of or by [Marshall]" (*id.*, [b]).

The Morrell Defendants allege three cross claims against Marshall sounding in contractual indemnification (*see* Morrell Answer, ¶¶ 55-73), and Marshall alleges one such cross claim against HIE (*see* Marshall Answer, ¶¶ 74-79).

**A. Marshall's Motion**

In arguing that HIE is obliged to indemnify it against plaintiffs' claims, including the costs and attorney's fees incurred in defending against this action, Marshall observes that HIE's indemnity claims also are brought under the MMA, thus obviating any dispute that the agreement is controlling.

Under Section 11 (a) of the MMA, HIE is obliged to indemnify Marshall for all liabilities "arising from or relating to the organization, management, operation or maintenance of the Restaurant and Banquet Space," and Marshall contends that plaintiffs' wage claims clearly arise from and relate to the management and operation of the banquet facility.

Regarding the MMA's exception for "liabilities arising from or caused by [Marshall's] willful misconduct, negligence, fraud, or embezzlement," Marshall observes that HIE's claims for indemnity do not refer to any such conduct and, instead, focus solely on Marshall's alleged breaches of its contractual obligation to ensure legal compliance (*see* Morrell Answer, ¶¶ 55-59). "Thus, it appears that even 400 HIE does not believe Marshall engaged in willful misconduct, fraud, embezzlement, or negligence" (NYSCEF Doc No. 132, p. 8).

Marshall further asserts that, "because willful misconduct, fraud, and embezzlement would require 400 HIE to demonstrate some affirmative act of misfeasance, Marshall anticipates 400 HIE's theory to avoid indemnification will be to accuse Marshall of negligence with regard

to banquet server compensation" (*id.*). In this regard, Marshall argues that it was not negligent because: (1) it had no control over the language used in the BEOs (*see* Harvill EBT, pp. 102-103, 110-111); (2) Marshall advised HIE that it should change its practice regarding disclosure of the service charges (*see id.*, pp. 25-27, 113-115); and (3) the MMA reserved ultimate decision-making authority to HIE, and HIE informed Marshall that it intended to maintain its pay practices for banquet servers (*see id.*, pp. 131-132, 147; Morrell EBT, pp. 48-50).

Finally, Marshall contends that, under the MMA, HIE was responsible for all costs stemming from operation of the banquet facility, which necessarily included employee compensation, and Marshall received only a modest 2% share of revenues as a management fee. Moreover, it was HIE that received the service and administrative fees collected during the effectiveness of the MMA. Thus, Marshall argues that the equities support indemnification.

**B. HIE's Opposition**

HIE responds that Marshall had complete control over banquet operations under the MMA, and it was Marshall that assumed responsibility for ensuring compliance with applicable laws and regulations. Thus, HIE submits that any violation of Labor Law § 196-d that occurred during Marshall's period of management constitutes negligence at a minimum and may rise to the level of willful misconduct (*see Holmes v Air Line Pilots Assn., Intl.*, 745 F Supp 2d 176, 200 [ED NY 2010]).

**C. Analysis**

The liabilities, costs and expenses for which Marshall seeks indemnification plainly "aris[e] from or relat[e] to the organization, management, operation or maintenance of the Restaurant and Banquet Space" (MMA, § 11 [a]). As such, Marshall is entitled to

indemnification, unless such liabilities, costs or expenses "aris[e] from or [were] caused by [Marshall's] willful misconduct, negligence, fraud, or embezzlement" (*id.*).

However, given the stark factual disputes concerning the role played by the Morrell Defendants in the management and operation of the banquet facility during the effectiveness of the MMA,[5] Marshall has failed to demonstrate its entitlement to summary judgment on its indemnity claim.

**CONCLUSION**

For all of the foregoing reasons, it is

**ORDERED** that plaintiffs' motion for summary judgment is granted to the extent indicated in Part I, *supra*, and is otherwise denied; and it is further

**ORDERED** that the Morrell Defendant's cross motion for summary judgment is granted to the extent set forth in Part I (B) (1) (b), *supra*, and is otherwise denied; and it is further

**ORDERED** that plaintiffs' motion to certify a class, appoint them as the class representatives, and appoint their attorneys as co-lead counsel for the class is granted; and it is further

**ORDERED** that Marshall's cross motion for summary judgment is denied; and finally it is

[5] As Marshall observes, HIE did not respond to its Statement of Undisputed Facts in support of the cross motion for indemnity, which is combined with Marshall's response to plaintiffs' Statement of Undisputed Facts (*see* NYSCEF Doc Nos. 81, 133; *see also* NYSCEF Doc No. 131, n 1). However, given the detailed factual record developed on plaintiffs' motion for summary judgment on their Labor Law claim and the Morrell Defendants' cross motion for dismissal of the claim (*see* Part I [B] [2], *supra*), the Court will excuse any non-compliance with Rule 19-a of the Commercial Division on the indemnity motion.

**ORDERED** that remote status conference is hereby scheduled for **November 9, 2022 at 9:30 a.m.** Prior to such conference, counsel shall personally confer with their clients and each other regarding: (1) the parties' willingness to participate in mediation/ADR prior to trial; and (2) mutually agreeable dates for a jury trial during the second quarter of 2023.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for plaintiffs shall promptly serve notice of entry on all parties entitled thereto.

Dated: Albany, New York
October 5, 2022

RICHARD PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Doc Nos. 77-155, 159-172.

10/05/2022