IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RYEA BRUSKE, TAMSYN BRUSKE,
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

OPINION AND ORDER

19-cv-851-wmc

CAPITOL WATERTOWN SPRECHERS, LLC;
CAPITOL CUISINE, LLC; CAPITOL COLUMBUS,
LLC; KEVIN LEDERER; & SUE GETGEN,

Defendants.

Plaintiffs Ryea Bruske and Tamsyn Bruske, on behalf of themselves and a putative class, bring this action alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203 *et seq.*, and Wisconsin wage and hour laws. Now before the court is plaintiffs' motion for leave to amend their complaint (dkt. #33), which the court will grant in part and deny in part. More specifically, for the reasons discussed below, plaintiffs will not be permitted to add Abe Richgels as a defendant, but their motion will be granted in all other respects.[1]

BACKGROUND

Named plaintiffs, Ryea and Tamsyn Bruske ("the Bruskes"), previously worked as tipped employees at the Sprecher Pub & Restaurant in Watertown, Wisconsin. In their initial complaint, plaintiffs named only Capital Watertown Sprechers, LLC, as a defendant.

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[1] The court acknowledges that other motions are also pending before the court. However, in light of this order granting in part plaintiffs' proposed amendments to their complaint, the court will withhold ruling on those motions until the newly added defendants have an opportunity to respond.

(*See* Compl. (dkt. #1).) Plaintiffs then amended this complaint as a matter of course (and without need for a court order) to add certain defendants. (*See* First Am. Compl. (dkt. #18).) In particular, plaintiffs added as defendants Capitol Cuisine, LLC and Capitol Columbus, LLC, on the basis that they formed a "single employer" with Capital Watertown Sprechers, LLC. (*Id.* ¶ 1.) Plaintiffs also added Kevin Lederer, the "principal owner of Capitol Watertown Sprechers, LLC; Capitol Cuisine, LLC; and Capitol Columbus, LLC" and Sue Getgen, the "Operations Manager of Sprecher Restaurant Group." (*Id.* ¶¶ 10, 11.) Plaintiffs now seek leave from the court to file a second amended complaint, asking in part to further alter the parties involved in this lawsuit as follows: (1) replace Capitol Cuisine, LLC with Capitol Geneva, LLC, Capitol Delton, LLC, Capitol Glendale LLC, and Capitol Hospitality, LLC; (2) remove Capitol Columbus, LLC as a defendant; and(3) add Abe Richgels as a defendant to their FLSA claim. In addition, in order to conform their allegations to the evidence received during discovery, plaintiffs seek to amend their legal theory and amend their allegations to make clear the deductions from their wages were made for *additional* uniforms and aprons, rather than their first one of each received.

To support the addition of these new LLC defendants, plaintiffs allege that all of the newly named LLC defendants:

- "held themselves out to the public as a chain of restaurants under the same brand name of Sprecher Pub & Restaurants";
- "were operated as a unit in that they would often honor each other's promotions and coupons";
- "transferred funds between the restaurants as well as from other Capitol LLCs owned by the same owners without any agreed upon terms of repayment, shared services of common administrative employees such as Defendant Getgen and third party service providers without any payment of consideration

between the entities";

- used "either the identical or similar point of sales system, time keeping system, and employee handbook was utilized at each restaurant"; and
- maintained "the records of time worked and earnings of all employees were together, and could be accessed through a single password."

(Proposed Sec. Am. Compl. (dkt. #33-1) ¶ 31.) Plaintiffs further allege that "common decision making caused the delegation of job responsibilities for time record keeping and payroll to the same accountant and payroll company, who were then jointly responsible for the employment policies that are at issue in this lawsuit." (*Id.* ¶ 32.)

As to Richgels, plaintiffs allege that he served as an accountant to each of the defendant LLCs. Specifically, they allege Richgels was assigned "to select the payroll company for performing payroll functions for each Sprecher's Pub held by the Defendants LLCs along with Fast Lanes, for determining how each of the restaurants would comply with wage and hour laws with respect to how they compensated their tipped employees, how records concerning the Plaintiffs' hours worked and compensation would be maintained, as well as what notices of the tip credit to provide to said tipped employees." (*Id.* ¶ 14.)

OPINION

The Federal Rules of Civil Procedure provide that leave to amend a complaint should be "freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). Nevertheless, a court may "deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile." *Right Field Rooftops, LLC v. Chicago Cubs Baseball*

Club, LLC, 870 F.3d 682, 693 (7th Cir. 2017) (quoting *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008)).

As a preliminary matter, the court will permit plaintiffs to amend (1) their allegations to clarify deductions from their wages were made for *additional*, as opposed to their first uniforms and aprons in order to conform their allegations to the evidence received during discovery; and (2) their legal theory. Defendants do not object to these amendments (Defs.' Opp'n (dkt. #35) 2-3), and the court sees no grounds to prevent plaintiffs from making these requested changes. Defendants do, however, object to plaintiffs' proposed addition of the LLC defendants, arguing that doing so would be futile *and* was unduly delayed. Defendants also object to plaintiffs' proposed addition of Abe Richgels on the same grounds, as well as bad faith.

I. Addition of the LLC Defendants

The parties dispute what standard applies to plaintiffs' proposed addition of the new LLC defendants. Rather than the single employer or alter ego doctrines cited by plaintiffs, defendants argue that the joint employer doctrine is applicable to FLSA claims. Under this test, defendants further argue that plaintiffs have failed to allege facts that would support a finding of liability against the newly proposed corporate defendants. (Defs.' Opp'n (dkt. #35) 3.) Plaintiffs counter that the single employer and alter ego doctrines may be applied to the FLSA, and they have alleged sufficient facts to support findings of liability under both doctrines. (Pls.' Reply (dkt. #43) 3.)

To understand the various doctrines at play, some background on the FLSA may be helpful. Generally speaking, the Act applies to those engaged in an "employment

relationship." Les A. Schneider & J. Larry Stine, 1 Wage and Hour Law § 3:1 (2020). The Act itself defines (1) an "employer" as those "acting directly or indirectly in the interest of an employer in relation to an employee," and (2) an "employee" as "any individual employed by an employer," 29 U.S.C. § 203(e), (d). However, because these definitions are "circular," courts have found them "of little use," and instead examine the "economic reality" to determine the existence of an employment relationship. *Hollins v. Regency Corp.*, 867 F.3d 830, 835 (7th Cir. 2017).

The Department of Labor ("DOL") has long recognized the "joint employer" doctrine through its implementing regulations, which holds that an employee may have two or more employers who are individually responsible for compliance with the FLSA and may be held jointly and severally liable for violations of the Act. *See* 85 Fed. Reg. 2820 (Jan. 16, 2020) (discussing the history of the joint employer doctrine). More helpfully, the Seventh Circuit has recognized the existence of a joint employer relationship under the FLSA "when each alleged employer exercises control over the working conditions of the employees." *Pope v. Espeseth, Inc.*, 228 F. Supp. 3d 884, 889 (W.D. Wis. 2017) (citing *Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr.*, 536 F.3d 640, 644 (7th Cir. 2008)); *Amos v. Classic Dining Grp., LLC*, 2020 WL 5077067, at *2 (S.D. Ind. Aug. 27, 2020) ("[T]he touchstone for joint employment is ultimately control, evaluated based on economic reality.").[2]

[2] The Seventh Circuit's interpretation is also in line with the latest rule regarding FLSA joint employment announced by the DOL in January of 2020. Recently, however, Judge Gregory Woods for the Southern District of New York vacated this new rule on the grounds that it focused on a purported employer's "control" of the employee, rather than the "economic dependence" of an employee on a purported employer. *See New York v. Scalia*, No. 1:20-CV-1689-GHW, 2020 WL

In contrast, the "single employer" doctrine invoked by plaintiffs is used to "determine whether two nominally separate business entities are a single employer." *Trustees of Pension, Welfare & Vacation Fringe Ben. Funds of IBEW Local 701 v. Favia Elec. Co.*, 995 F.2d 785, 788 (7th Cir. 1993). This inquiry involves consideration of four elements: "(1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership." *Id.* This doctrine has been applied to actions brought under, *inter alia*: the Labor-Management Relations Act, 29 U.S.C. § 141, *et seq.*, *Lippert Tile Co. v. Int'l Union of Bricklayers & Allied Craftsmen, Dist. Council of Wisconsin & Its Local 5,* 724 F.3d 939, 944 (7th Cir. 2013); the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*, *Moriarty v. Svec*, 164 F.3d 323, 332 (7th Cir. 1998); and Title VII, *Hines v. JBR Trucking LLC*, 2020 WL 1429907, at *5 (C.D. Ill. Mar. 24, 2020). As plaintiffs acknowledge, however, neither the Seventh Circuit nor any district court within the circuit has had occasion to consider whether this doctrine should extend to actions brought under the FLSA.

District courts in other circuits are divided on the applicability of the single employer doctrine to FLSA cases, although the weight of authority favors its application. *Compare Yap v. Mooncake Foods, Inc.*, 146 F. Supp. 3d 552, 557-58 (S.D.N.Y. 2015) (applying single employer theory in FLSA case); *Coley v. Vannguard Urban Improvement Ass'n, Inc.*, 2016 WL 4179942, at *5 (E.D.N.Y. Aug. 5, 2016); *Martin v. Lincor Eatery, Inc.*, 423

5370871, at *34 (S.D.N.Y. Sept. 8, 2020), appeal filed. According to Judge Woods, the DOL's new interpretation conflicted with the FLSA's broad definitions and departed from the DOL's previous (non-binding) opinion letters. *Id.* at *16-29. Regardless of Judge Woods' opinion, however, this court is bound to apply the "control test" adopted by the Seventh Circuit even before the DOL's new rule.

F. Supp. 3d 432, 440 (E.D. Mich. 2019) (same); *Takacs v. Hahn Automotive Corp.*, 1999 WL 33117265, at *4-*5 (S.D. Ohio Jan. 4, 1999) (same); *Szymula v. Ash Grove Cement Co.*, 941 F. Supp. 1032, 1036 (D. Kan. 1996) (same); *Masso v. City of Manchester*, 2012 WL 1067158, at *2 (D.N.H. Mar. 28, 2012); *with Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 940 n. 16 (S.D.N.Y. 2013) (rejecting use of single employer theory in FLSA case); *Fuentes v. Compadres, Inc.*, 2018 WL 1444209, at *5 n.7 (D. Colo. Mar. 23, 2018) (same).

This court, too, is persuaded that the single employer doctrine may apply to FLSA cases. Seven years after the Act was passed, the Supreme Court noted that "[a] broader or more comprehensive coverage" than the FLSA's definition of employment "would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945). More recently, the Court again noted the "striking breadth" of the FLSA's definition of "employment." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). The Seventh Circuit has also applied the single employer doctrine to ERISA, which shares a nearly identical definition of "employer" with the FLSA. *Compare* 29 U.S.C. § 1002(5) (ERISA) *with* 29 U.S.C. § 203(d) (FLSA).

Finally, plaintiffs argue that the LLC defendants may be added under an "alter ego" theory. Under Wisconsin law, the

> "alter ego" doctrine requires proof of the following elements:
> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and

> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Consumer's Co-op. of Walworth Cty. v. Olsen, 142 Wis. 2d 465, 484, 419 N.W.2d 211 (1988).

Although the Seventh Circuit has not yet weighed in, other district courts in this circuit have concluded that the alter ego doctrine may be applied to FLSA actions. *See Nicks v. Koch Meat Co.*, 260 F. Supp. 3d 942, 960 (N.D. Ill. 2017) ("[a]lter ego liability may be applied to FLSA claims" under Illinois law); *Deschepper v. Midwest Wine & Spirits, Inc.*, 84 F. Supp. 3d 767, 782 (N.D. Ill. 2015) (applying Illinois alter ego doctrine in FLSA and Illinois wage and hour case); *Pfefferkorn v. Primesource Health Grp., LLC*, No. 17-CV-1223, 2018 WL 828001, at *8 (N.D. Ill. Feb. 12, 2018) (same). While these cases all involved the application of the Illinois alter ego doctrine, the court sees no reason why Wisconsin alter ego doctrine would not also apply.

Having concluded that the single employer and alter ego doctrines are applicable to FLSA actions, the court finds that plaintiffs have alleged sufficient facts to support the inclusion of the new LLC defendants under these two theories, such that their addition is not futile. Specifically, plaintiffs' proposed, amended complaint alleges facts to support the interrelationship of operations, common management, centralized control of labor relations, and common ownership of the LLCs. Further, the complaint alleges that this common control was used to violate federal and state wage and hour laws, causing plaintiffs' injury.

Setting futility aside, defendants also argue that plaintiffs unduly delayed seeking leave to amend their complaint. Plaintiffs represent that they: (1) did not find out until May 15, 2020 -- during the depositions of Capitol Watertown Sprechers and Kevin Lederer

-- the actual entities operating the four restaurants; and (2) moved to amend their complaint only five days later, on May 20, 2020. Plaintiffs additionally point out that the new LLC defendants share the same registered agent as the existing corporate defendants, and so they "should have known since the filing of the original complaint . . . that the Plaintiffs were attempting to sue the entities that controlled each and every Sprecher's Restaurant and Pub." (Pls.' Br. (dkt. #33) ¶ 10.)

Particularly given the constructive notice the new LLC defendants received through their registered agent, as well as the nature of the relationship between the new and existing LLC defendants, the court also finds that denial of plaintiffs' motion to amend is not warranted on grounds of undue delay. *See McCoy v. Iberdrola Renewables, Inc.*, 760 F.3d 674, 687 (7th Cir. 2014) ("The underlying concern is the prejudice to the defendant rather than simple passage of time."). Accordingly, the court will also hold that the proposed addition of the new LLC defendants should relate back to the original complaint under Federal Rule of Civil Procedure 15(c)(1)(C).

II. Addition of Abe Richgels

Defendants' futility argument against the addition of Abe Richgels as a defendant is more persuasive, plaintiffs do not plead adequate facts to find that he is plaintiffs' employer under the FLSA. As previously explained, the Act defines employer as "anyone acting directly or indirectly in the interest of an employer in relation to an employee." 28 U.S.C. § 203(d). Whether an individual or entity is an "employer" under the FLSA is generally guided by four factors: "(1) whether the individual has the power to hire and fire; (2) whether he supervises and controls employee work schedules or conditions; (3)

whether he determines the rate and method of payment; and (4) whether he maintains employment records." *Ochoa v. Los Nopales Rest.*, No. 13-CV-204-SLC, 2014 WL 1278644, at *3 (W.D. Wis. Mar. 28, 2014) (citing *George v. Badger State Industries*, 827 F. Supp. 584, 587 (W.D. Wis. 1993)). Illustrative of the breadth of the FLSA's reach, the Seventh Circuit has explained that an FLSA employer may even be a "supervisor who uses his authority over the employees whom he supervises to violate their rights under the FLSA is liable for the violation." *Luder v. Endicott*, 253 F.3d 1020, 1022 (7th Cir. 2001); *see also Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987) ("The word 'employer' is defined broadly enough in the Fair Labor Standards Act (of which the Equal Pay Act is an amendment) to permit naming another employee rather than the employer as defendant, provided the defendant had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation."). Moreover, the District Court for the Northern District of Illinois has held that "[t]he FLSA will apply to a defendant if he or she possesses control over the aspect of employment alleged to have been violated even if the defendant does not exercise control over the day-to-day affairs of the employer." *Natal v. Medistar, Inc.*, 221 F. Supp. 3d 999, 1003 (N.D. Ill. 2016).

Here, plaintiffs allege that Richgels was responsible for selecting the payroll company for the LLC defendants, determining how each of the LLC defendants would comply with wage and hour laws in compensating their tipped employees, and determining what notices of the tip credit to provide tipped employees at each location. (Proposed Sec. Am. Compl. (dkt. #33-1) ¶ 14.) In response, defendants argue that none of these allegations are sufficient to find that Richgels had supervisory authority over plaintiffs, and

thus cannot adequately state an FLSA claim against him. Because the liberal pleading standard is in plaintiffs' favor and the FLSA definition is broad, this is a closer question than might appear on first impression. Still, the facts that plaintiffs allege to support their allegation that Richgels is plaintiffs' "employer" are sparse. In particular, despite their allegations suggest he may exercise control over certain payroll decisions, all of the other factors relevant to employer status are completely absent, including the ability to hire and fire, supervision of work schedules or conditions, and maintenance of employment records.

Independent of defendants' argument that the addition of Richgels would be substantively futile, plaintiffs' undue delay and the resulting prejudice caution against amendment. Defendants argue persuasively that "[s]imply by virtue of selecting the payroll companies to process the Defendant LLCs' payrolls, Richgels had no reason to believe that he would be impleaded in this lawsuit as an individual defendant." (Defs.' Opp'n (dkt. #35) 10.) They further note that the deposition of named plaintiffs Ryea and Tamsyn Bruske occurred before the present motion came under advisement with this court, thus depriving Richgels of the opportunity to participate in those depositions through counsel of his own choosing.[3] Regardless, the court agrees that plaintiffs' belated naming of Richgels would result in substantial prejudice to him, and thus, it will deny plaintiffs' request to add him as a new defendant at this stage of the lawsuit.

[3] Defendants did not make this argument as to the new LLC defendants, presumably because (1) those entities had ample notice of their possible entanglement and (2) if added, they would be represented by the same counsel currently representing the existing LLC defendants.

ORDER

IT IS ORDERED that:

1) Plaintiffs' motion to amend their complaint (dkt. #33) is GRANTED IN PART and DENIED IN PART. Plaintiffs will not be permitted to add Abe Richgels as a defendant, but their motion is granted in all other respects.

2) Defendants may stand on their current answer or file an amended answer on or filed an amended answer to this operative complaint on or before June 4, 2021.

3) On or before June 8, 2021, the new defendants are required to inform the court whether they intend to stand on the pleadings and responses submitted by the existing defendants to the now operative complaint and currently pending motions, or whether they intend to respond separately. If the latter, the new defendants shall have until June 15, 2021, to answer, move or otherwise respond to the operative complaint and to respond separately to any currently pending motion.

4) By June 25, 2021, all parties shall have met and conferred, as well as bring any other concerns to the attention of the court, including issues related to scheduling or discovery, understanding that the court's strong preference will be to keep the current schedule absent good cause shown.

Entered this 26th day of May, 2021.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge