

American Arbitration Association

EMPLOYMENT AND CLASS ACTION ARBITRATION TRIBUNAL

In the Matter of the Arbitration between:

Mark Johnson, and all others similarly situated      Case # 11 160 01513 05

and      Date: June 27, 2007

Morton's Restaurant Group, Inc. and      Class Determination Award  
Morton's of Chicago, Inc.      (Partial Final Award)

Arbitrator:      Roberta Golick, Esq.

Appearances:      For the Claimant  
Shannon Liss-Riordan, Esq.  
Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan, P.C.

For the Respondent  
Elise M. Bloom, Esq.  
Proskauer Rose LLP

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties, and having been duly sworn, and having received the proofs and allegations of the Parties, do hereby, AWARD, as follows:

Procedural Background

As previously decided (in my May 22, 2006 Clause Construction Award), the claim against Morton's Restaurant Group, Inc. filed by Mark Johnson on behalf of himself and a nationwide class of all others similarly situated can proceed as a class action.<sup>1</sup> A ruling on Claimants' request to add Kristin Aires as a lead claimant was expressly deferred to this class certification stage of the proceeding. Following the issuance of the clause

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<sup>1</sup> Respondents' contend, however, that the only putative class members similarly situated to Mark Johnson are servers who were employed in Morton's Boston restaurant.

construction award, the parties engaged in and completed pre-certification discovery, after which, on March 9, 2007, Claimants filed a formal motion for class certification. On April 13, 2007, Respondents filed a memorandum of law in opposition to the motion as well as a motion for summary disposition. Claimants filed a reply memorandum on May 4, 2007. Thereafter, Respondent requested leave to file a sur-reply brief to address two discrete issues – whether Kristin Aires can be substituted for or added to Mark Johnson as a lead claimant; and whether Morton’s arbitration policy revisions in January 2004 would exclude from the putative class servers hired after January 2004. I granted Respondents’ request, and allowed Claimants to file a sur-sur reply memorandum in response. Briefing was complete by May 29, 2007.

The matter of class certification is now ripe for decision.

### Claimants’ Motion

Claimants bring this motion for Class Certification, moving the Arbitrator:

1. to certify the following class pursuant to Rule 4 of the American Arbitration Association’s Supplementary Rules for Class Arbitrations:

All employees of Morton’s of Chicago restaurants in the United States for whom Respondents have claimed a “tip credit” and thereby paid less than the federal minimum wage of \$5.15 per hour since May 19, 2002<sup>2</sup>, in every state except New York, California, Florida,<sup>3</sup> Kentucky, Minnesota, and the District of Columbia.<sup>4</sup>

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<sup>2</sup> Respondents assert that the complaint in this matter was filed in U.S. District Court on or about May 20, 2005. The parties are directed to ascertain the exact date.

<sup>3</sup> Claimants explained that they do not seek to include Morton’s employees from New York, California and Florida in this class because other counsel in these states have filed the same claim on behalf of employees in those states.

<sup>4</sup> Claimants explained that they do not seek to include Morton’s employees from Kentucky, Minnesota and the District of Columbia *at this time*, relying on Morton’s alleged admissions regarding the nationwide commonality of the challenged practice. Claimants at this point will exclude from the class employees

2. to certify Claimant Mark Johnson as class representative<sup>5</sup> and his counsel, Shannon Liss-Riordan, Esq., of Pyle, Rome, Lichten, Ehrenberg and Liss-Riordan, P.C., as class counsel pursuant to AAA Supplementary Rule 5(b)<sup>6</sup>; and
3. to direct that notice issue to the class pursuant to AAA Supplementary Rule 6 (on an opt-out basis) and to require Respondents to pay the cost of providing notice to the class.

#### AAA Supplementary Rules for Class Arbitrations

Rule 4(a) of the applicable rules sets forth the prerequisites to a class arbitration. The rule directs the arbitrator to consider any law or agreement of the parties the arbitrator determines applies to the arbitration, as well as the following criteria:

- 1) whether the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;
- 2) whether there are questions of law or fact common to the class;
- 3) whether the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- 4) whether the representative parties will fairly and adequately protect the interests of the class;
- 5) whether counsel selected to represent the class will fairly and adequately protect the interests of the class; and
- 6) whether each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

In considering the above criteria, Rule 4(a) directs the arbitrator to determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. A representative is permitted to do so only if each of the conditions set forth above is met.

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from these states, but indicate that they may seek to add them back into the class later if warranted following further factual development of the case.

<sup>5</sup> At the clause construction stage, I deferred judgment until this class certification stage on Claimants' January 2006 request to add or substitute Kristin Aires as a lead claimant. Claimants renew their request and seek to have Ms. Aires certified as a class representative.

<sup>6</sup> As will be discussed, I find that Morton's employees in Massachusetts must (as a whole) elect either to be included in this nationwide class action or to press their statewide class action claim currently pending in arbitration, but not both.

Further, Rule 4(b) provides that the arbitrator must find that questions of law or fact common to the members of the class “predominate” over any questions affecting only individual members, *and* that “a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy.” The matters pertinent to the findings include:

- 1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;
- 2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;
- 3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and
- 4) the difficulties likely to be encountered in the management of a class arbitration.

#### Kristin Aires as Lead Claimant

Many of the issues relative to class certification are impacted by the inclusion or exclusion of Kristin Aires as a lead claimant. Accordingly, I will address that matter at the outset.

Respondents have advanced several reasons why Ms. Aires should not be added or substituted as lead claimant/class representative. Respondents argue that Aires is not “similarly situated” to Claimant Johnson or to the only workable collective group that Johnson could represent. Therefore, they argue, to add or substitute Aires would be futile.<sup>7</sup>

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<sup>7</sup> On the matter of “futility,” Respondents cite *Correa-Martinez v. Arrillaga*, 903 F.2<sup>nd</sup> 49 (1<sup>st</sup> Cir. 1990).

In support of its argument, Respondents assert that Aires was not subject to the same “tip-out” policy that Johnson and Morton’s Massachusetts<sup>8</sup> employees were subject to. Aires never worked in Massachusetts; she worked in different states under different policies. Respondents maintain that the tip-out policy under which Johnson worked was wholly unique to the Boston restaurant and was not a national policy. Thus, the claims Ms. Aires seeks to assert against Respondents do not arise out of the “same conduct, transaction or occurrence” as those that gave rise to Mr. Johnson’s claims.<sup>9</sup> Respondents seek a ruling that Aires’ claims are not typical of the entire class, and she cannot be a class representative for a nationwide class.

Further, Respondents argue, Ms. Aires cannot assert a wage claim in Massachusetts because the arbitration policy governing her rights requires employees to arbitrate in the state in which the arbitration policy was signed.<sup>10</sup> To the extent that Ms Aires can state a viable claim against Respondents, then, she must initiate a new arbitration in either Arizona or Oregon, the states where she worked.

Finally, Respondents contend that to carve out from the class Morton’s Boston employees and to proceed with Ms. Aires as the substituted class representative is improper at this juncture.

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<sup>8</sup> Morton’s Boston restaurant is its only restaurant in Massachusetts.

<sup>9</sup> Respondents cite *Carson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 97-5147, 1998 U.S. Dist. LEXIS 6903, at \*37 (W.D. Ark. Mar. 30, 1998).

<sup>10</sup> Similarly, they argue, Claimant Johnson must arbitrate his claims in Massachusetts, the state in which his arbitration agreement was executed.

Claimants respond that Ms. Aires is similarly situated to Mark Johnson and all other employees for whom Respondents have claimed a tip credit while requiring them to share their tips with managers. The distinction that Respondents attempt to draw between Aires and Johnson (i.e. that Johnson worked under a tipping policy that was “unique” to Boston) is unavailing because a) the tipping out of management at the Boston restaurant was mandatory, not voluntary; and b) even if it were voluntary, “voluntariness” is not a valid defense to this FLSA tip-credit claim. Boston is not unique, Claimants assert.

Claimants also challenge Respondents’ reading of the arbitration agreement as requiring Ms. Aires to arbitrate every aspect of her claims in Arizona and/or Oregon. The applicable provision, Claimants contend, governs solely the location of the hearing itself. It has no bearing on whether class certification is appropriate.

Finally, it is entirely proper, Claimants argue, to add or substitute Ms. Aires at this juncture. Substitution of a class representative is an appropriate remedy in situations where the adequacy of the existing representative is found to be problematic.<sup>11</sup> The request to add Aires was made early in the case, over a year ago, and judgment was specifically deferred to this stage. Expanding the class to include Ms. Aires as lead claimant promotes efficiency and protects people who would otherwise lose the opportunity to resolve their disputes.

I hereby grant Claimant’s request to add or substitute Ms. Aires as lead claimant.

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<sup>11</sup> Claimants cite, among other cases, *Little Caesar Enterprises, Inc. v. Smith*, 172 F.R.D. 236, 244 n.3 (E.D. Mich. 1997).

The arbitration policies under which Ms. Aires worked do not prohibit her participation as a class member in a national class action where the claim was filed outside of Phoenix/Portland. Respondents’ reliance upon Paragraph 1.1.7 of its Phoenix<sup>12</sup> restaurant’s mandatory arbitration policy is misplaced. The language in question is housed in a paragraph entitled “The Arbitration Hearing,” and is one of several that outline the mechanics of the arbitration process. The sentence reads, “The arbitration hearing shall take place in the State in which this agreement was executed, and shall continue on consecutive business days until completed, unless the parties and the arbitrator agree upon a different schedule.” Though in the ordinary course of events, an individual filing a claim on an individual basis would file his/her claim in the state where the claim arose, the language of Paragraph 1.1.7 cannot be read to limit the breadth of class actions to single-state class members. Rather, as Claimants concede, “compliance with this provision would at most require that the parties (and the Arbitrator) conduct the hearing itself in Arizona or Portland, something Claimants would be willing to do (despite the obvious inefficiency for all involved)...”<sup>13</sup>

The larger issue, of course, is whether Ms. Aires is similarly situated to Mr. Johnson. Respondents have argued at every turn that Johnson worked under a unique policy applicable only to Boston – that is, a policy by which the sharing of tips with managers was voluntary. The evidence presented, however, indicates that the “voluntariness” of the Boston tipping policy during the relevant period was “illusory.” Arbitrator Mark Irvings found as a factual matter that in Boston, management practices “included using

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<sup>12</sup> Presumably, the Portland policy contains the same language.

<sup>13</sup> By the same token, the arbitration policy under which Mr. Johnson worked does not prohibit the inclusion of class members across state lines.

various forms of leverage to get servers to tip out managers, thereby saving Morton's from having to pay the full guaranteed salaries, and increasing the earnings of the managers through bonuses."<sup>14</sup> Despite management's "supposed" position that tipping was voluntary, Irvings wrote, "managers in Boston continued to pursue servers who did not tip out as late as December, 2002."<sup>15</sup> Irvings wrote that "the corporation never took the steps necessary to insure that the servers were not being effectively coerced into tipping out their supervisors, who controlled all aspects of their work life." Irvings ruled that a server in Boston was fired for opposing the tip-out policy and for encouraging other servers to do the same. Though given lip service as a "voluntary" policy, then, Boston's tip-out policy was effectively mandatory.

The evidence also supports Claimants' contention that "voluntariness" is not a valid legal defense in the face of an FLSA violation. This point will be discussed in further detail in connection with the criteria set forth for consideration in Rule 4, but for purposes of assessing whether Ms. Aires is similarly situated to Mr. Johnson, it suffices to note that the alleged distinction (Johnson's working under a voluntary versus a mandatory tip-out policy) is a distinction without a legal difference.<sup>16</sup>

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<sup>14</sup> *David Bilbilian and Morton's of Chicago/Boston, Inc.*, AAA Case Number 11 160 00217 03, Irvings, Mark, Arb., Final Award September 28, 2006.

<sup>15</sup> Irvings' award does not address Morton's tip-out policy for any time period after December 2002, when Mr. Bilbilian was terminated. The evidence indicates, however, that the so-called "voluntary" system continued unchanged until either July 2003 or September 2004 (Morton's advances conflicting claims) after which the sharing of tips with managers was prohibited in Boston.

<sup>16</sup> Claimants cite, among other cases, *Tony & Susan Alamo Foundation*, 471 U.S. at 302, where a unanimous Court stated, "[T]he purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act..."

As for the propriety of the request to add or substitute Ms. Aires as lead claimant *at this juncture*, Respondents' position has no support beyond the general argument that to add Ms. Aires is futile. Certainly, the timing of Claimant's request was appropriate (January 2006), affording Respondents full opportunity to engage in pre-certification discovery. The parties were advised in the clause construction award that "the determination as to whether Aires is similarly situated to Johnson remains a matter of proof at the next stage of the proceedings," i.e. the class certification stage.

### The Issue of Standing

As a threshold matter, Respondents have argued that Claimant Mark Johnson lacks standing to sue on behalf of the proposed class.<sup>17</sup> Respondents contend that Johnson's case is either barred entirely by the applicable statute of limitations (which Respondents assert is two years, absent willfulness) or that Johnson has no standing to represent putative class members who were employed outside of the three-month window he was employed (May to August 2002<sup>18</sup>) if a three-year statute of limitations applies.

Moreover, Respondents continue, Johnson has no standing to represent the putative class because he suffered no injury. Inasmuch as he was never *required* to share his tips with managers, there was no unlawful tip-pooling scheme and Johnson was not harmed.

Finally, at all relevant times, the sum of the tip credit wage paid to Johnson and the tips Johnson received directly from customers was greater than the minimum wage.

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<sup>17</sup> Citing *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9<sup>th</sup> Cir. 2003), Respondents argue that "if the individual plaintiff lacks standing, the court need never reach the class action issue."

<sup>18</sup> Johnson's employment at Morton's ended in August 2002.

Claimants reply that Johnson was personally injured by Morton’s tip-sharing policy, and was injured in the same way, by the same policy, as were servers nationwide. Claimants state that Johnson’s claims are clearly timely under the FLSA’s three-year statute for willful violations, which must be assumed to apply at this stage, and in fact, does apply in that Morton’s conduct was demonstrably willful. Claimants suggest that Respondents “cloud this simple issue [of standing] by erroneously conflating Claimant’s standing with his suitability as a class representative.”

I find that the addition or substitution of Kristin Aires as a lead claimant resolves all questions of standing. Ms. Aires worked for Morton’s from 2001 until 2005 in Phoenix and Portland where tipping out of management was mandatory. Thus, Claimants have a valid, cognizable claim and they may seek relief on behalf of a class.

#### Rule 4(a) - Class Certification Prerequisites

For purposes of this section, I will assume that Kristin Aires will join Mark Johnson as a lead claimant. If Claimants drop the Massachusetts servers from this class action (to continue their claim commenced in the *Esposito*<sup>19</sup> case), Kristin Aires qualifies to act in the arbitration as a class representative.

#### Numerosity

Morton’s argues that since the tipping policy in Boston was unique, the only putative class members in this case are servers at the Boston restaurant working from May 20,

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<sup>19</sup> *Kasey Esposito et al. and Morton’s of Chicago/Boston, Inc.*, AAA Case Number 11-160-02864-03, Katz, Lawrence, Arb.

2002 to August 12, 2002. It asserts that, at best, there are only 10 servers, including Johnson, who were employed by the Boston restaurant who can state timely wage claims (assuming a three-year limitations period) and who have not previously been a part of a wage action against Morton's.<sup>20</sup>

Inasmuch as I am persuaded that Boston's tip-out policy was *involuntary* and therefore not unique, the numerosity criterion is easily satisfied, and it is not necessary to address the statute of limitations issues ostensibly implicated by Mark Johnson's individual circumstances, as they do not defeat class certification. Morton's has conceded that tipping out of managers has been mandatory in 50 or more of its restaurants nationwide. Even the most conservative estimate of the number of putative class members compels a finding that the geographically diverse class is sufficiently large that joinder of separate arbitrations on behalf of all members is impracticable.

#### Questions of Law or Fact Common to the Class

Respondents contend that the "myriad differences" in the factual and legal issues that must be determined in order to adjudicate the claims of the proposed class render class certification inappropriate.<sup>21</sup> In this regard, Respondents argue that the Boston restaurant

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<sup>20</sup> This argument presupposes that FLSA's "opt-in" provision governs this case, rather than AAA's "opt-out" mechanism.

<sup>21</sup> Respondents cite *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982) for the proposition that class certification is only appropriate "when the issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class."

had a unique practice, and even a finding of liability at the Boston restaurant would not necessarily require a finding of liability at another Morton's restaurant.<sup>22</sup>

As noted above, I disagree with Respondents' contention that tip-out policy in Boston differed in any essential way from the policy in the other states whose employees Claimants seek to represent in a class action. In addition, Claimants have adequately demonstrated that voluntariness is not a valid defense to their FLSA tip-credit claim. Numerous cases support the proposition that the FLSA allows for no deviation from its tip credit requirements, and even consensual arrangements are prohibited. Thus, the predominant issue in this case will center upon the legal question, common to all class members, whether Morton's policy of requiring servers to share their tips with managers violates the FLSA. Respondents' continuing assertion that the tip-out policy in Boston was voluntary may present a different factual predicate for those servers who worked in Boston, but the matter of mandatory/coerced sharing of tips as a violation of the FLSA is the operative and fundamental question of fact and law common to all class members.

#### Claims of the Representative Parties are Typical of the Claims of the Class

The claim of Mark Johnson and Kristin Aires is that they involuntarily shared their tips with Morton's managers and therefore Morton's was not entitled to take a tip credit against the minimum wage. Johnson's and Aires' asserted injuries arise from the same course of conduct as that imposed on the proposed class of nationwide servers – namely a mandatory tip-out policy requiring the sharing of tips with managers. Johnson's and

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<sup>22</sup> Respondents note that courts have routinely denied class certification where plaintiffs' claims were based on local policies at different sites, requiring individual inquiries at each location. *England v. New Century Fin. Corp.*, 370 F. Supp. 2d 504, 511 (M.D. La. 2005).

Aires' claims are based on the same legal theories, even if the fact patterns (the so-called voluntary practice in Boston) reveal certain distinctions. I do not agree with Respondents' argument that Johnson's claim is subject to a unique defense that threatens to become a major focus of the litigation, because the defense of "voluntariness" has been shown to be unavailable. As for the issue of "willfulness" as it pertains to the statute of limitations, that is a matter of concern for all putative class members because it impacts the scope of the possible remedy.

#### Representative Parties will Fairly and Adequately Protect the Interests of the Class

Respondents proffer two basic guidelines to determine the adequacy of representation by the lead plaintiff: 1) the absence of conflicting interests with unnamed class members; and 2) the assurance of vigorous prosecution.<sup>23</sup>

It is not necessary to address Respondents' repeated arguments relative to the inadequacy of Mark Johnson as a class representative (due to the alleged unique practice applicable to Boston and the statute of limitations issues connected to his claim). With the addition of Kristin Aires as lead claimant, there is both a clear absence of conflicting interests with unnamed class members and the assurance of vigorous prosecution.

#### Counsel Selected to Represent the Class will Fairly and Adequately Protect the Class Interests

This criterion is amply established. Claimants' counsel responds to Morton's assertions on this point as follows: "In raising these attacks on Claimants' counsel, Morton's

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<sup>23</sup> Respondents cite *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D., 310 (D. Mass. 2004).

interest is clearly not in protecting the rights of absent class members from not being ably enough represented in this case, but instead its motive is to defeat the possibility that their claims under the FLSA be vindicated at all.” Whatever its motives, Morton’s declaration that Ms. Liss-Riordan is incapable of vigorously prosecuting this case is without merit. Notably, in his ruling on a petition for attorneys’ fees in the *Bilbilian* case, Arbitrator Irvings wrote,

Liss-Riordan provided more than a sufficient basis to justify her request for a billing rate of \$350. She is widely recognized as one of the pre-eminent plaintiff lawyers in New England, and she is the unchallenged leader regarding wage and hour and retaliation claims in the hotel and restaurant industry.

#### Substantially Similar Arbitration Agreements

In their motion for class certification, Claimants asserted that Morton’s had drafted a uniform arbitration policy that it required its employees to sign. “Therefore,” Claimants maintained, “each class member will have signed a substantially similar agreement, and Rule 4(a)(6) is satisfied.” Respondents’ memorandum of law in opposition to the motion for class certification did not challenge Claimants’ representation. In their request to file a sur-reply brief, however, Respondents asserted that they “learned recently” that Morton’s arbitration policy was revised in January 2004 “to prohibit class or collective claims, as well as the consolidation of claims brought by separate employees.” Attached to Respondents’ sur-reply brief is an affidavit of Renee Dews Sykes, human resources manager for Morton’s of Chicago, Inc., stating that Morton’s Boston Restaurant and Morton’s Phoenix and Portland Restaurants instituted the changes to their arbitration policies in January 2004. Therefore, Respondents maintain, “Neither Claimant Johnson nor Ms. Aires can represent any putative class member hired after January 2004. In

addition, claims brought by individuals hired after January 2004 cannot be consolidated with this matter.”

The 2004 language in Morton’s arbitration policies reads as follows:

Paragraph B(7)

Class Claims/Collective Claims/Consolidation of Claims Brought by Separate Employees

This Policy does not permit the initiation of class claims or collective claims. Similarly, consolidation of claims brought by separate employees also is prohibited.

Claimants have advanced two persuasive bases upon which to disregard Respondents’ belated assertion that the class must exclude individuals hired after January 2004. First, Respondents have offered no explanation or justification for their failure to have known about and raised the matter earlier. The question of whether Morton’s arbitration policy allows for class claims has been at the forefront of this and other disputes between these very parties. That Morton’s modified its policy for employees hired after January 2004 is something that the parties in this case must be deemed to have known or should have known.<sup>24</sup>

Second, and in any event, the apparent modification for employees hired after January 2004 does not defeat Claimants’ right to include such employees in the class represented by Mr. Johnson and Ms. Aires. Morton’s revised policy forbids employees hired in

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<sup>24</sup> Courts have disregarded information that should have been provided earlier where there is no reliable justification for its earlier non-disclosure. Claimants cite *National Fire Protection Assn, Inc. v. International Code Council, Inc.*, 2006 WL 839501, at \*30 (D. Mass. Mar. 29, 2006); *Dickinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 431 F. Supp. 2d 247, 254-55 (D. Conn. 2006).

Boston, Phoenix and Portland<sup>25</sup> after January 2004 from “initiating” class claims. It does not forbid such employees from participating in class claims legitimately initiated by other persons who are not so restricted.<sup>26</sup>

For purposes of class certification, then, the arbitration clause in Johnson’s and/or Aires’ agreement is deemed substantially similar to those signed by other putative class members.

#### Rule 4(b) – Class Maintenance Requirements

Questions of law or fact common to the member of the class predominate over questions affecting only individual members.

Morton’s nationwide tip-out policy under which servers have been required to share their tips with managers is the common thread linking the members of the class. Whether this policy violates the FLSA is the predominant question of law. Variations in the impact of Morton’s tip-out policy on individuals do not detract from the predominant issue that pertains to all members of the class.

#### Class Arbitration is Superior to Other Available Methods of Adjudication

The evidence in this matter clearly supports a finding that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The fairest and most efficient way to protect the interest of members of the class is through this class arbitration. Class certification will protect the rights of the class members, most

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<sup>25</sup> Respondents’ evidence pertains only to these three restaurants. I assume, however, that the revision appears in all Morton’s arbitration agreements on and after January 2004.

<sup>26</sup> It is beyond the scope of this case to pass judgment on whether such restriction would be enforceable.

of whom would likely be precluded from pursuing their own claims. It is undoubtedly desirable to concentrate the determination of the common claim at issue here in a single arbitral forum. Though there are other proceedings in individual states that have been commenced, none of those (except Massachusetts) can result in remedies available to members of the class to be certified here.

With respect to the class members employed in the Boston Restaurant, there is the potential for duplicative or conflicting results given the commencement of a class arbitration brought under Massachusetts law. Claimants (through Counsel, who has brought both claims) are directed to choose one forum or the other.<sup>27</sup>

There are difficulties to be encountered in the management of any class action, perhaps more so in a class action of national scope. However, the benefits of consolidation far outweigh the difficulties.

#### Respondents' Motion for Summary Disposition

The motion is denied, for all the reasons discussed above.

#### Class Determination Award

All of the prerequisites for a class arbitration set forth in Rules 4(a), 4(b) of AAA's Supplementary Rules for Class Arbitrations have been satisfied, and this arbitration shall proceed as a class arbitration.

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<sup>27</sup> To the extent putative class members in Boston or other locations have resolved their wage claims against Morton's and signed general releases, they will be excluded from the nationwide class.

Pursuant to Rule 5(a) of AAA's Supplementary Rules for Class Arbitrations, I hereby certify the following class:

All employees of Morton's of Chicago restaurants in the United States for whom Respondents have claimed a "tip credit" and thereby paid less than the applicable federal minimum wage since May 19, 2002, with the following exceptions:

Employees in New York, California, and Florida are excluded from the class (see footnote 3).

Employees in Massachusetts are provisionally included in the class, as discussed above.

Employees in Kentucky, Minnesota and the District of Columbia are provisionally excluded from the class (see footnote 4).

I further certify Claimant Mark Johnson and Kristin Aires as class representatives, Johnson's participation as a class member being dependent upon Massachusetts employees remaining in the class.

I further certify Attorney Shannon Liss-Riordan of Pyle, Rome, Lichten, Ehrenberg & Liss-Riordan, P.C., as class counsel pursuant to AAA Supplementary Rule 5(b).

The class claim is that Morton's conduct, in failing to pay its waitstaff and other employees the full federal minimum wage, in failing to allow these employees to retain all of their tips and service charges to which they are entitled, and in failing to provide the legally required notice regarding its intention to take a "tip credit," violates the Fair Labor Standards Act, 29 U.S.C., Sections 201 et seq. Further, Morton's has improperly taken a "tip credit" against the minimum wage in violation of 29 U.S.C., Section 203(m).

Members of the class may be excluded from the class arbitration by requesting exclusion in a timely fashion.<sup>28</sup>


In accordance with Rule 5(c), all proceedings shall be stayed following the issuance of this Class Determination Award for a period of at least 30 days to permit either party to move a court of competent jurisdiction to confirm or vacate this Partial Final Award.

Upon expiration of the stay, Respondent is directed (at its expense) to issue a Notice of Class Determination pursuant to AAA Supplementary Rule 6 to all members who can be identified through reasonable effort.

Rule 5(b) anticipates that a copy of the proposed Notice of Class Determination be attached to the Class Determination Award. The parties have apparently not had an opportunity to address the contents and timing and mode of delivery of the Notice. The parties are directed to confer and come to agreement on these points. The stay provision shall not affect the resolution of issues pertaining to notice or other administrative issues in need of resolution. If necessary, the parties may brief issues relative to notice.

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<sup>28</sup> Respondents have argued for an “opt-in” mechanism pursuant to the FLSA’s procedures for class actions. There are several reasons why this matter should proceed on an “opt-out” basis, as Claimants have requested. Among the primary reasons is the fact that this matter is governed by the AAA Supplementary Rules for Class Arbitration, which provide for class arbitration on an opt-out basis, similar to the procedure under the Federal Rules of Civil Procedure, Rule 23. Other arbitrators confronting the same issue in other cases have noted that when employers have pressed their right to arbitrate in order to block claimants’ attempts to litigate in federal court (resulting in protracted delays, dramatically reducing the number of eligible class members), they necessarily agreed to arbitrate under the AAA’s Supplementary Rules which prescribe an opt-out procedure. *Cole v. Long John Silver’s Restaurants, Inc.*, AAA Case Number 11 160 00194 04, Hon. Richard A. Hodge (Ret.), Arb., September 19, 2005; *Bryant v. Joel Antunes, LLC, et al.*, AAA Case Number 11 160 01783 05, Pratt, George C., Arb., April 4, 2007. The U.S. District Court upheld Arbitrator Hodge’s “opt-out” determination, noting that the Court failed to find any authority for the proposition that the opt-in requirement of the FLSA governs arbitration proceedings. *Long John Silver’s Restaurants, Inc. v. Cole*, 409 F. Supp.2d 682 (D.S.C. 2006).

  
Roberta Golick, Esq.  
Arbitrator  
June 27, 2007

I, Roberta Golick, do hereby affirm upon my oath as Arbitrator that I am the individual designated in accordance with Morton's of Chicago/Boston, Inc.'s Mandatory Arbitration Policy and Procedure for Resolving Disputes Arising Out of its Employees' Employment or Termination of Employment, and I am the individual who executed this instrument, which is my Partial Final Award.

  
Roberta Golick, Esq.

Date: June 27, 2007