IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STEVEN BELT, ET.AL., **Plaintiff,** **v.** **P.F. CHANG'S CHINA BISTRO, INC.,** **Defendant.**	**Civil Action No.: 2:18-CV-03831-AB**

MOTION OF THE RESTAURANT LAW CENTER FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Restaurant Law Center ("Law Center") respectfully moves the Court for leave to file the attached amicus curiae brief in support of Defendant's Motion for Summary Judgment, dated January 15, 2019, Dkt. No. 37. Defendant consents to the filing of this amicus curiae brief.

The Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor intensive industry is comprised of over one million restaurants and other foodservice outlets employing 15 million people – approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second-largest private-sector employers.

The Law Center provides courts with the industry's perspective on legal issues significantly impacting it. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases such as these, through *amicus* briefs on behalf of its industry.

Companies throughout the foodservice industry rely on Department of Labor guidance when designing and implementing payment structures for their employees – namely, deciding

whether and how much of a tip credit to assess against various employees' wages. Being able to rely on guidance that (1) is consistent with the meaning of the Fair Labor Standards Act, and (2) creates a practical, workable standard for employers in the industry. Thus, the Law Center and its affiliates have vital stakes in these proceedings.

For all of the foregoing reasons, the undersigned respectfully moves to submit the attached brief in connection with Defendant's pending motion for summary judgment.

Respectfully submitted this 28th day of May, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, I caused the foregoing Motion of the Restaurant Law Center for Leave to File Amicus Curiae Brief in Support of Defendant's Motion for Summary Judgment has been transmitted via electronic mail, to the following counsel of record for Defendants:

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AMICUS CURIAE BRIEF OF THE RESTAURANT LAW CENTER IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Restaurant Law Center ("Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing 15 million people – approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second-largest private-sector employers.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Employing a legal "interpretive triple bank shot,"[1] Plaintiffs ask this Court to ignore recent enactments of the Department of Labor (DOL) by claiming they are deficient or not entitled to deference for a variety of (sometimes conflicting) reasons. Not surprisingly, their argument misses the mark.

Plaintiffs' position is unavailing for many reasons, but this brief focuses only on two points: (1) DOL Opinion Letter FLSA2018-27 ("Opinion Letter") should be applied retroactively and (2)

[1] *Epic Systems Corp. v. Lewis*, 584 U.S. ___, ____, 138 S. Ct. 1612, 1626 (2018).

the Opinion Letter and the February 15, 2019, revisions to the Dual Jobs Section of the Field Operations Handbook ("New FOH") more effectively interpret the FLSA and its regulations and establish that there is no basis for continuing to give any weight to the now-withdrawn 80/20 "rule" guidance.

Particularly in light of the New FOH guidance that the Opinion Letter should be applied to new and existing investigations into conduct that predates November 2018, the Opinion Letter can and should be applied retroactively. Congress empowered the DOL with the ability to implement rules and guidance that are retroactively and retrospectively applied. Moreover, the only argument against retrospective application – unfair surprise to one or more parties – is not an issue in this case. Thus, where the DOL has expressly stated its intent that this new guidance be applied retrospectively, and no litigant will be harmed by unfair surprise, the Opinion Letter should be interpreted and applied retrospectively.

The DOL's new Opinion Letter and the New FOH must be followed because they are consistent with the regulations, were well-reasoned and properly adopted, and, most importantly, expose and correct unworkable, practical difficulties in applying the old 80/20 rule, which had led to inconsistent application by Courts and years of legal challenges. Conversely, the Opinion Letter and the New FOH create a workable standard that should be recognized and enforced by this Court.

Plaintiffs' shot at avoiding summary judgment remarkably relies on the so-called 80/20 "rule" while concomitantly advancing arguments undermining the rule, then banks off the Dual Jobs regulation, 29 C.F.R. § 531.56(e), which does not even impliedly endorse the 80/20 rule, and finally banks off case law that either fails to address the new law or ignores clear statutory language and the old FOH's admonition that it does not constitute "interpretive guidance." But the Opinion Letter and the New FOH supersede prior opinion letters and the old FOH. These old documents

are no longer "good law" – if they ever were.

Because the Opinion Letter and the New FOH supersede prior opinion letters and the old FOH's 80/20 rule, and because they create a new reasonable, workable standard, they are controlling. They also can be applied retroactively. For these reasons, and for the reasons articulated below, Plaintiffs cannot state a claim. Summary judgment in favor of Defendant is therefore warranted.

ARGUMENT

I. The Opinion Letter Operates and Should Be Applied Retrospectively.

A. The DOL Has Instructed that the Opinion Letter Be Applied Retrospectively

The DOL is authorized by Congress to implement guidance on a retroactive basis. Here, it chose to do so, as demonstrated by the clear mandate at the end of its February 15, 2019 Field Assistance Bulletin ("FAB"): "As a matter of enforcement policy, WHD staff should also follow the revised guidance in FOH 30d00(f) in ***any open or new investigation*** concerning work performed ***prior*** to the issuance of WHD Opinion Letter FLSA2018-27 on November 8, 2018." (emphasis added.) The directive is clear – current cases should be analyzed pursuant to the guidance set forth in the new Opinion Letter and accompanying FAB, even when requiring retrospective application. Further, and as discussed below, such retrospectivity is permissible here, because the regulation is being clarified, not changed, and no parties are harmed by unfair surprise as a result.

B. Retroactive Application Is Permissible Where Law Is Clarified, Not Changed.

No problem with retroactive application of an agency interpretation exists so long as the interpretation is a clarification of existing law, as opposed to the issuance of a new or changed law. *See Heimmermann v. First Union Mortg. Corp.*, 305 F.3d 1257, 1260 (11th Cir. 2002). Indeed, "[c]larification, effective ab initio, is a well-recognized principle." *Liquilux Gas Corp. v. Martin*

Gas Sales, 979 F.2d 887, 890 (1st Cir. 1992). A rule simply clarifying an unsettled or confusing area of the law does not change the law, but restates what the law according to the agency is and has always been: It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand. *See Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 135 (1936). In effect, the court applies the law as set forth in the amendment to the present proceeding because the amendment accurately restates the prior law. *Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) *citing Liquilux*, 979 F.2d at 890.

Several factors are relevant when determining whether a change represents a clarification or change to prior law. One significant factor is whether a conflict or ambiguity existed with respect to the interpretation of the relevant provision when the change was implemented. *See Cortes*, 177 F.3d at 1284-85. Here, it is clear that ambiguity and conflict both existed with regard to the 80/20 rule, as demonstrated by the inconstancy of the court orders interpreting the rule, as well as their discussion of the underlying ambiguity of the dual job regulation. This factor weighs in favor of a finding that the new Opinion Letter intended to clarify the regulation, not create new law. *See id.* (reasoning that "[i]f such an ambiguity existed, courts view this as an indication that a subsequent amendment is intended to clarify, rather than change, the existing law.") *citing Liquilux*, 979 F.2d at 890. Additionally, courts may rely upon a declaration by the enacting body that its intent is to clarify the prior enactment. *See id.* Here, both the new Opinion Letter and FAB both expressly state their intent is to clarify the confusion regarding the dual job regulation. Accordingly, these statements further support the conclusion that the new Opinion Letter is a clarification of – not a modification to – the dual job regulation, and its retrospective application is thus warranted.

C. No Litigant Will Suffer Unfair Surprise If Law Is Applied Retroactively.

When considering whether an agency may act retrospectively, the court should balance the

agency's interest in such action against the parties' interest in being able to avoid unfair surprise and rely on the terms of the pre-existing rule. Factors to consider in this balancing analysis include "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518 (9th Cir. 2012) *citing Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1328 (9th Cir. 1982).

Here, no factors suggest that Plaintiffs will suffer they type of unfair surprise contemplated by this balancing test. Plaintiffs will not experience sufficient liability, forfeiture, or otherwise suffer in anyway other than having their claims decided pursuant to different guidance regarding the same underlying regulation. *See, e.g., Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-157 (2012) (reasoning that *Auer* deference was not appropriate where the agency did not provide "fair warning of the conduct a regulation prohibits or requires," and citing *NLRB v. Bell Aer5ospace Co.*, 416 U.S. 267, 295 (1974) for the proposition that an agency should not change an interpretation during a proceeding where it would impose new liability, fines, or damages.) Thus, no chance of unfair surprise exists sufficient to preclude retrospective application of the new Opinion Letter, as expressly directed by the FAB.

II. The New Opinion Letter Is Controlling and Enforceable Because It Corrects Inherent Deficiencies In The 80/20 Rule And Creates A Reasonable, Workable Standard For Determining When the Tip Credit Applies.

DOL Opinion Letters have long been recognized by courts throughout the country as entitled to deference when they provide reasonable guidance regarding statutes that are unclear or

ambiguous.[2] Moreover, because agencies are entitled to change their position with regard to varying matters, the latest guidance published by an agency should control, again, so long as the guidance sets forth a reasonable interpretation of the law. Finally, given that the prior 80/20 rule has now been withdrawn by the DOL, there is no basis to continue to rely on such outdated guidance, and the Court should rely instead on the new Opinion Letter. This in mind, the new Opinion Letter is thus controlling and enforceable in this matter.

A. The Dual Job Regulation is Ambiguous and is Clarified by the New FOH.

The ambiguity of the FLSA dual job regulation is beyond dispute. *See, e.g., Marsh v. Alexander's LLC,* 905 F.3d 610 (9th Cir. 2018) (finding ambiguity based on undefined terms and legislative history); *see also Fast v. Applebee's Int'l, Inc.* 638 F.3d 872 (8th Cir. 2011) (same). Courts considering and declining to apply the 80/20 rule also have undergone this analysis because of an initial finding of ambiguity in the underlying regulation. *See, e.g., Pellon v. Business Representation International, Inc.*, 528 F. Supp. 2d 1306 (S.D. Fla. 2007) *aff'd* 291 Fed. Appx 310 (11th Cir. 2008); *Chavez v. T&B Mgmt., LLC*, 2017 U.S. Dist. LEXIS 79992 (M.D.N.C. May 24, 2017).

1. The New Opinion Letter and the New FOH Address and Clarify the Regulation.

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

[2] The Supreme Court heard argument in *Kisor v. Wilkie*, No. 18-15, on March 29, 2019, and is expected to issue its decision by the end of June 2019, which will answer the question of whether the Court will overturn its prior decisions in *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945) regarding the appropriate level of deference that should be afforded to agency opinions. This Court may wish to defer ruling on Defendant's pending motion for summary judgment until after the Supreme Court issues its decision in *Kisor*, as the ruling could invalidate or otherwise supersede nearly all of the case law relied upon by Plaintiffs in their briefing.

Here, the DOL has changed its position from the rigid application of the 80/20 rule to a more fluid and holistic consideration of tipped employees' job duties. As stated in the Opinion Letter:

> The current FOH sections addressing the tip credit have resulted in some confusion and inconsistent application and, as a result, may require clarification. It is our intent that FOH § 30d00(e) be construed in a manner that ensures not only consistent application of the Act and a level of clarity that will allow employers to determine up front whether their actions are in compliance with the Act, but also the paramount goal that all affected workers receive the full protections of the Act.

Moreover, as stated in the field assistance bulletin issued by the DOL in February 2019, the "prior interpretation created confusion for the public" regarding whether certain job duties must be excluded from the tip credit, and so the DOL issued the new Opinion Letter to "clarify" this point of confusion. These explanations establish that the DOL's change in position was well reasoned and is not plainly erroneous. As demonstrated by the cases discussed herein, prior to the DOL's issuance of this new Opinion Letter, courts inconsistently applied the 80/20 rule. *See, e.g., Marsh,* 905 F.3d 610; *Pellon,* 528 F. Supp. 2d 1306. Finally, the DOL's decision to abandon the 80/20 rule came after it was sued under the APA by two restaurant associations challenging the rule, providing another valid justification for its change of position. *See Restaurant Law Center v. U.S. Dept. of Labor,* Case No. 18-cv-567 (W.D. Tex. July 6, 2018).

2. The New Opinion Letter is Consistent with the FLSA and the 80/20 Rule is Demonstrably Unworkable.

The new Opinion Letter is consistent with the FLSA. Indeed, both the Opinion Letter and the New FOH constitute proper agency action because they recognize the practical impracticalities of enforcing the 80/20 rule. It is no surprise that Plaintiffs have no answer to the myriad problems arising under the 80/20 rule. They instead try to claim the Opinion Letter and the new FOH are not well justified or explained. (*E.g.*, ECF 41, p.6). Their argument attempts to divert this Court's attention from the inherent difficulties in enforcing the 80/20 rule upon which they rely.

Even the old FOH recognized that the 80/20 inquiry must be made not just on an individual basis, but on a work-week basis for each individual employee. FOH 30d00(c)(1) (12/9/88) ("[t]he tip provision applies on an individual employee basis"). That same section acknowledged that the tip credit may be claimed for some employees but not others. *Id.* Notably, the old FOH stressed that the determination "will depend on the total fact situation and will be determined on the basis of [the] employee's activities over the entire [work week]." *Id.*, 30d00(c)(2). Thus, the very authority on which Plaintiffs rely dictates an individualized, week-by-week determination.

The rabbit hole that is trying to ascertain whether a server works more than 20% of their individual time in non-tipped duties necessarily includes a minute-by-minute, day-by-day inquiry. The minutes would then have to be totaled for the week to ensure that, by the end of the week, the 80/20 rule has not been violated. Each restaurant, every day, would have to engage in Orwellian monitoring of the workforce. The temporal limit that Plaintiffs insist upon in this case would open the door to "nearly every person employed in a tipped occupation" to "claim a cause of action against their employer if the employer did not keep perpetual surveillance or require them to maintain precise time logs accounting for every minute of their shifts." *Pellon*, 528 F. Supp. 2d at 1314. But that would be only half the battle in trying to comply with the rule.

The minute analysis and calculation doesn't even answer what task or duty is being reviewed every minute. Which ones are "directed toward producing tips"? What about two tasks done simultaneously? How about opening a bottle of wine? How about cleaning up a drink a customer has spilled? Small talk with customers? Expediting orders? Re-wiping a table previously cleaned by a busser? Talking to kitchen staff about an order? Learning the day's specials? Getting a soft drink from a machine? Getting a clean fork at a customer's request? Determining what food allergies a patron may have? Dealing with poorly supervised children or

an intoxicated consumer? Calling a cab for a customer who might or might not be intoxicated? In each of these situations, how much time did they take? These are but a few of the imponderables the Plaintiffs do not even try to address. These questions and countless others demonstrate why both the Eleventh Circuit and DOL found the 80/20 rule to be unworkable. Nor could they, and that is why the 80/20 rule is unworkable.

Given the array of tasks that go into the tip a service employee receives, it would be impossible to divide an employee's time into related and direct customer-service duties. That is what the Opinion Letter and the New FOH recognize by stating that so long as those related duties occur contemporaneously with direct customer service, there is no time limit on them because they are all performed in the interest of generating tips. Thus, the Opinion Letter and the New FOH correct deficiencies in the administration of the FLSA and create a workable standard. They are therefore enforceable by this Court.

B. The New Opinion Letter is the DOL's Latest Application of the FLSA and Thus Controls.

As discussed above, the new Opinion Letter is well-reasoned. The fact that it represents a departure from prior guidance does not undermine its legitimacy. *See, e.g., Perez v. Mortgage Bankers Association,* 35 S.Ct. 1199 (2015) (deferring to most recent DOL interpretation regarding mortgage-loan officers' coverage under FLSA despite departure from prior interpretations and lack of notice and comment period prior to implementation). Accordingly, the new Opinion Letter is controlling.

C. There is No Basis to Continue to Rely on the Now-Withdrawn 80/20 Rule.

i. The DOL Expressly Disclaims that the FOH Is Official Agency Guidance.

The 80/20 rule is not part of any regulation. Nor has the DOL ever formally endorsed it. It had what can only be described as a murky history, at best. No such rule exists in the statute.

No such rule has ever appeared in a regulation. There is no record of any such rule existing for the first 50 years of the FLSA's existence.

Instead, the rule first appeared in 1988 when it found its way into an internal handbook, the FOH, the DOL gave to its investigators as a guide to use when conducting wage and hour audits. Again, however, it never appeared in the Federal Register and was never embodied in a regulation. The *very first page* of the FOH's preface made crystal clear that it was not to be used "as a device for establishing interpretive guidance." FOH, Forward, p.1 (4/4/88). *That admonition has never changed*. While much of the FOH was generally available for inspection and copying (FOH, Forward, p. 5), there is no record that the DOL publicly announced the new rule at that time. These factors illustrate why the rule is entitled to no deference by this Court, and subsequent developments, as further discussed below, buttress this point.

ii. Prior to Being Withdrawn, the 80/20 Rule Was Not Consistently Enforced.

In *Pellon v. Business Representation Int'l, Inc*., 528 F. Supp. 3d 1206 (S.D. Fla. 2007), *aff'd*, 291 Fed. Appx. 310 (11th Cir. 2008), the Eleventh Circuit Court of Appeals rejected the viability of any such rule. In early 2009, the DOL formally abandoned it. U.S. Department of Labor, Wage & Hour Div., Opinion Letter FLSA2009-23 (Jan. 16, 2009), 2009 DOLWH LEXIS 27, ECF 37-15. But FLSA2009-23 was later withdrawn "for further consideration." *Id.* Since then, courts split over the viability and impact of the rule. Ten years later, the DOL again abandoned the 80/20 rule in the Opinion Letter and the New FOH was revised shortly thereafter to make it clear that no such rule applies in determining whether an employer can apply the tip-credit wage. *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Nov. 8, 2018); ECF No. 40-4, Field Assistance Bulletin No. 2019-2 (Feb. 15, 2019).

Significantly, the Opinion Letter states that many of the duties that some courts had

interpreted as being non-tipped duties, were in fact, tip-producing duties. Consequently, the Opinion Letter explains that there is no limit on the amount of time an employee spends on those duties as long as they are performed contemporaneously with direct customer interaction. Among those tip-producing duties are many of the duties Plaintiffs in this case allege to be non-tip producing and therefore not entitled to a tip credit. (*See* Compl. ¶ 45). But as the Opinion Letter articulates, of course, conduct like preparing checks, setting tables, and filling napkin containers is directly related to tip-producing activity because it is "core" or "supplemental" to the tip-producing activity of waiting tables. This should not be surprising as it is not hard to imagine what might happen to a tip if the coffee is cold, the silverware is presented without a napkin, or the ketchup bottle is empty. Those types of tasks—indeed many of the tasks Plaintiffs identify—are part and parcel of earning tips. That is why the Opinion Letter clarifies that, with respect to those tasks, as long as they are performed contemporaneously with customer interaction, there is no time limit on them. *Id.*

Collectively, the 80/20 rule's checkered past and practical flaws – as found by courts and noted in the Opinion Letter – make the rule unenforceable. The rule therefore has no impact on this case, and Plaintiffs cannot rely on it. Because their claims are based solely on the hoped-for applicability of the now-rejected 80/20 rule, their claims fail. [3]

Similarly, the New FOH clarifies how to apply the dual jobs regulations in the restaurant industry. Both of these new pronouncements from the DOL must be followed by this Court.

[3] Importantly, Plaintiffs are not arguing that they performed nontipped work throughout their shifts, and therefore P.F. Chang's improperly took a tip-credit. (*See* Compl. ¶31). They are just arguing a tip-credit violation based on the 80/20 rule, which has no binding legal, practical, or logical support.

CONCLUSION

P.F. Chang's Motion for Summary Judgment should be granted.

Respectfully submitted this 28th day of May, 2019.

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