No. 21-328

In The Supreme Court of the United States

ROBYN MORGAN, on Behalf of Herself and All Similarly Situated Individuals,

Petitioner,

v.

SUNDANCE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

KARLA GILBRIDE
Counsel of Record
LEAH M. NICHOLLS
PUBLIC JUSTICE, P.C.
1620 L St. NW, Ste. 630
Washington, DC 20036
(202) 797-8600
kgilbride@publicjustice.net

Counsel for Petitioner

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MICHAEL D. LIEBERMAN
JOHN C. BRINKERHOFF JR.
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Respondent

[Additional Counsel On Inside Cover]

Petition For Certiorari Filed August 27, 2021
Certiorari Granted November 15, 2021

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

CHARLES R. ASH, IV
JASON J. THOMPSON
SOMMERS SCHWARTZ, P.C.
One Towne Sq., Ste. 1700
Southfield, MI 48067
(248) 355-0300

BETH M. RIVERS
PITT MCGEHEE PALMER
& RIVERS, PC
117 W. Fourth St., Ste. 200
Royal Oak, MI 48067
(248) 398-9800

PAIGE FIEDLER
FIEDLER LAW FIRM, P.L.C.
8831 Windsor Pkwy.
Johnston, IA 50131
(515) 254-1999

Counsel for Petitioner

JOEL W. RICE
SCOTT C. FANNING
FISHER & PHILLIPS LLP
10 S. Wacker Dr.
Ste. 3450
Chicago, IL 60606
(312) 346-8061

Counsel for Respondent

TABLE OF CONTENTS

U.S. District Court
Southern District of Iowa (Central)
CIVIL DOCKET FOR CASE #:
4:18-cv-00316-JAJ-HCA

Morgan v. Sundance, Inc.
Assigned to: Chief Judge John A. Jarvey
Referred to: Chief Magistrate Judge Helen C. Adams
Cause: 29:0216(b) FLSA: Minimum wage or overtime compensation

Date Filed: 09/25/2018
Jury Demand: Plaintiff
Nature of Suit: 710 Labor: Fair Standards
Jurisdiction: Federal Question

Date Filed	#	Docket Text
09/25/2018	1	COMPLAINT *and Jury Demand* against Sundance, Inc.,Filing fee paid in the amount of $400, receipt number 0863-3605766 filed by Robyn Morgan. Notice of Dismissal for lack of Service deadline set for 12/24/2018. Rule 16 Notice of Dismissal set for 12/24/2018.(Fiedler, Paige) Modified on 9/25/2018, added payment information (kjw). (Entered: 09/25/2018)
09/28/2018	2	SUMMONS Returned Executed by Robyn Morgan. Sundance, Inc. served on 9/27/2018, answer due 10/18/2018. (Fiedler, Paige) (Entered: 09/28/2018)
10/18/2018	3	Unresisted MOTION for Extension of Time to File Answer re 1

		Complaint, *or Otherwise Plead to Plaintiff's Complaint* by Sundance, Inc..Motions referred to Helen C. Adams. (Driscoll, Kevin) (Entered: 10/18/2018)
10/18/2018	4	TEXT ORDER: ORDER granting 3 defendant Sundance, Inc.'s unopposed motion for an extension of time to answer or otherwise plead to plaintiff's complaint. Defendant shall have until 11/8/2018 to move or plead in response to the complaint. Signed by Chief Magistrate Judge Helen C. Adams on 10/18/2018.(kln) (Entered: 10/18/2018)
10/29/2018	5	MOTION for Leave to Appear Pro Hac Vice Receipt Number: 0863-3635753 Fee paid in the amount of $100. by Sundance, Inc.. (Rice, Joel) (Entered: 10/29/2018)
10/29/2018	6	MOTION for Leave to Appear Pro Hac Vice Receipt Number: 0863-3635759 Fee paid in the amount of $100. by Sundance, Inc.. (Fanning, Scott) (Entered: 10/29/2018)
10/30/2018	7	TEXT ORDER granting 5 Motion for Leave to Appear Pro Hac Vice Joel W. Rice; granting 6 Motion for Leave to Appear Pro Hac Vice Scott C. Fanning. Signed by Chief Magistrate Judge Helen C. Adams on

		10/30/2018. (kjw) (Entered: 10/30/2018)
11/08/2018	8	Corporate Disclosure/Statement of Interest by Sundance, Inc.. (Rice, Joel) (Entered: 11/08/2018)
11/08/2018	9	MOTION to Dismiss *or, Alternatively Stay* by Sundance, Inc.. Responses due by 11/23/2018. (Attachments: # 1 Memorandum in Support, # 2 Exhibit A – Complaint, # 3 Exhibit B – Flanagan Amended Complaint, # 4 Exhibit C – Stipulated Order, # 5 Appendix Unpublished Case Law) (Rice, Joel) (Entered: 11/08/2018)
11/21/2018	10	RESPONSE to Motion re 9 MOTION to Dismiss *or, Alternatively Stay* filed by Robyn Morgan. Replies due by 11/28/2018. (Attachments: # 1 Exhibit)(Fiedler, Paige) (Entered: 11/21/2018)
11/28/2018	11	REPLY re 9 MOTION to Dismiss *or, Alternatively Stay* filed by Sundance, Inc.. (Attachments: # 1 Exhibit A – Declaration of Joel W. Rice, # 2 Exhibit B – Email of 08.03.18, # 3 Exhibit C – Plaintiff's Brief in Wood et al v. Sundance case, # 4 Appendix Unpublished Case Law)(Rice, Joel) (Entered: 11/28/2018)
11/30/2018	12	NOTICE of Appearance by Madison Elizabeth Fiedler-Carlson on behalf

		of Robyn Morgan (Fiedler-Carlson, Madison) (Entered: 11/30/2018)
12/05/2018	13	MOTION for Leave to Appear Pro Hac Vice Receipt Number: 0863-3668163 Fee paid in the amount of $100. by Robyn Morgan. (Thompson, Jason) (Entered: 12/05/2018)
12/05/2018	14	MOTION for Leave to Appear Pro Hac Vice Receipt Number: 0863-3668170 Fee paid in the amount of $100. by Robyn Morgan. (Ash, Charles) (Entered: 12/05/2018)
12/06/2018	15	TEXT ORDER granting 13 Motion for Leave to Appear Pro Hac Vice Jason J. Thompson; granting 14 Motion for Leave to Appear Pro Hac Vice Charles R. Ash, IV. Signed by Chief Magistrate Judge Helen C. Adams on 12/6/2018. (kjw) (Entered: 12/06/2018)
03/05/2019	16	ORDER denying 9 Motion to Dismiss or Stay. Signed by Chief Judge John A. Jarvey on 3/5/2019. (ggp) (Entered: 03/05/2019)
03/19/2019	17	ANSWER to Complaint *and Notice of Affirmative Defenses* by Sundance, Inc..(Rice, Joel) (Entered: 03/19/2019)
03/20/2019	18	TEXT ORDER SETTING SCHEDULING CONFERENCE. A Scheduling Conference shall be held on 4/12/2019 at 10:30 AM before Chief Magistrate Judge Helen C. Adams

		in Room 420 at the Des Moines Courthouse. Counsel outside of Des Moines may attend telephonically. If they choose to do so, counsel should call 1-877-336-1829 and enter access code 1176783 at the prompt to be joined with the call. The parties shall file a proposed scheduling order and discovery plan as provided under L.R. 16 by 4/8/2019. Signed by Chief Magistrate Judge Helen C. Adams on 3/20/2019. (imk) (Entered: 03/20/2019)
03/25/2019	19	TEXT ORDER CONTINUING SCHEDULING CONFERENCE. Due to an impending settlement conference, the scheduling conference set for 4/12/2019 at 10:30 AM is continued to 5/1/2019 at 10:00 AM. All previous conditions regarding appearance remain unchanged.The parties shall file a proposed scheduling order and discovery plan as provided under L.R. 16 by 4/26/2019. Signed by Chief Magistrate Judge Helen C. Adams on 3/25/2019. (imk) (Entered: 03/25/2019)
04/26/2019	20	TEXT ORDER CONTINUING SCHEDULING CONFERENCE. As discussed with counsel via email, the Scheduling Conference originally set for 5/1/2019 at 10:00 AM is continued to 5/8/2019 at 10:00 AM.

		The parties shall file a proposed scheduling order and discovery plan as provided under L.R. 16 by 5/3/2019. All previous conditions regarding personal or telephonic appearance remain unchanged. Signed by Chief Magistrate Judge Helen C. Adams on 4/26/2019. (imk) (Entered: 04/26/2019)
05/03/2019	21	MOTION to Compel *Individual Arbitration and Dismiss Plaintiff's Complaint* by Sundance, Inc..Motions referred to Helen C. Adams. Responses due by 5/17/2019. (Attachments: # 1 Memorandum in Support Memorandum in Support of Motion to Compel Arbitration and Dismiss, # 2 Exhibit A – Application, # 3 Exhibit B – Declaration of Kenneth Petty, # 4 Exhibit C – Complaint)(Rice, Joel) (Entered: 05/03/2019)
05/03/2019	22	TEXT ORDER CONTINUING SCHEDULING CONFERENCE. Due to the recently filed Motion at Docket No. 21, the Scheduling Conference originally set for 5/8/2019 is continued to 7/8/2019 at 10:00 AM. The parties shall file a proposed scheduling order and discovery plan as provided under L.R. 16 by 7/4/2019. All previous conditions regarding personal or telephonic appearance remain unchanged.

		Signed by Chief Magistrate Judge Helen C. Adams on 5/3/2019. (imk) (Entered: 05/03/2019)
05/17/2019	23	NOTICE of Consent(s) by Robyn Morgan (Attachments: # 1 Exhibit Consents)(Ash, Charles) (Entered: 05/17/2019)
05/17/2019	24	RESPONSE to Motion re 21 MOTION to Compel *Individual Arbitration and Dismiss Plaintiff's Complaint* filed by Robyn Morgan. Replies due by 5/24/2019. (Attachments: # 1 Exhibit A – Expert Retainer Agreement, # 2 Exhibit B – April 22, 2019 Email)(Ash, Charles) (Entered: 05/17/2019)
05/24/2019	25	MOTION to file overlength brief *for Defendant's Reply In Further Support of its Motion to Compel Arbitration* by Sundance, Inc..Motions referred to Helen C. Adams. Responses due by 6/7/2019. (Attachments: # 1 Brief in Support Defendant's Reply Brief In Further Support of Motion to Compel Arbitration)(Rice, Joel) (Entered: 05/24/2019)
05/28/2019	26	TEXT ORDER granting 25 Motion to file overlength brief. Defendant may file its overlength reply brief. Signed by Chief Magistrate Judge Helen C. Adams on 5/28/2019. (imk) (Entered: 05/28/2019)

05/28/2019	27	REPLY re 21 MOTION to Compel *Individual Arbitration and Dismiss Plaintiff's Complaint* filed by Sundance, Inc..(Rice, Joel) (Entered: 05/28/2019)
06/28/2019	28	ORDER denying 21 Motion to Compel Individual Arbitration And Dismiss Plaintiff's Complaint. Signed by Chief Judge John A. Jarvey on 6/28/2019. (mem) (Entered: 06/28/2019)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBYN MORGAN, on behalf of herself and all similarly situated individuals, Plaintiff, vs. SUNDANCE, INC., Defendant.	Case No. _____ **COMPLAINT and JURY DEMAND**

(Filed Sep. 25, 2018)

COMES NOW the Plaintiff and for her cause of action states the following:

INTRODUCTION

1. This is an overtime and wage theft case under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. Plaintiff is an adult residing and working within this judicial district and – during the relevant time – worked as an hourly employee for Defendant Sundance, Inc. ("Sundance"), a company that owns well over 150 Taco Bell franchises throughout the United States.

2. Plaintiff Robyn Morgan is a current resident of the City of Seligman, County of Barry, State of Missouri.

3. Robyn Morgan was employed by Sundance from approximately August 2015 to October 2015. She worked as a Crew Member throughout her employment with Sundance in the Osceola, Iowa restaurant.

4. Defendant Sundance, Inc. is a for-profit corporation incorporated in Brighton, Michigan and with locations throughout the State of Iowa.

5. The acts about which Plaintiff complains occurred in Clarke County, Iowa.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction over Plaintiff's FLSA claims pursuant to 28 U.S.C. § 1331 because Plaintiff's claims raise a federal question under 29 U.S.C. § 201, *et seq*.

7. Additionally, this Court has jurisdiction over Plaintiff's FLSA claims pursuant to 29 U.S.C. § 216(b), which provides that suit under the FLSA "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction."

8. Defendant's annual sales exceed $500,000, and Defendant employs more than two persons, so the FLSA applies in this case on an enterprise basis. Defendant's employees engage in interstate commerce; therefore, they are also covered by the FLSA on an individual basis.

9. At all relevant times, Defendant owned and operated a business enterprise engaged in interstate

commerce utilizing goods moved in interstate commerce as defined in 29 U.S.C. § 203(s).

10. Defendant's various franchise locations constitute an "enterprise" within the meaning of 29 U.S.C. § 203(r)(1), because they perform related activities, either through a unified operation or through common control for a common business purpose.

11. Defendant provides mutually supportive services to the substantial advantage of each entity and each are therefore operationally interdependent and may be treated as single "enterprise."

12. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because the actions and omissions giving rise to the claims in this Complaint substantially occurred in this District.

13. This Court has personal jurisdiction over Defendant because Defendant operates a restaurant in Osceola, Iowa and otherwise conducts business within the state of Iowa.

FACTUAL BACKGROUND

14. Plaintiff brings this action pursuant to 29 U.S.C. § 216(b) of the FLSA for her subjection to Sundance's improper wage and hour practices scheme at any time during the last three years.

15. At various points within the past three years, Plaintiff has experienced the following: a) Sundance's failure to pay her for all hours worked; and b)

Sundance's failure to pay overtime wages for all hours worked over 40, when legally required to do so.

16. Sundance knew or should have known the business model it developed and implemented was unlawful under applicable laws. Nonetheless, Sundance continued to willfully engage in the violations described herein.

17. Sundance's hourly employees, including but not limited to Crew Members, are not paid for all hours worked. In fact, Sundance engages in a practice in which it "shifts" hours that an employee works during one week over to the following week, so that an employee's time records do not demonstrate that the employee worked over 40 hours in a given work week. Sundance maintains a white board in its office on which it keeps track of its employees' "shifted hours" from week to week.

18. By shifting its employees' hours, Sundance a) does not pay its employees for all hours worked in a given work week; and b) does not pay overtime wages for hours worked over 40 in a given work week.

19. In addition, some employees simply were not paid at all for their "shifted over" hours.

20. With regard to hourly employees that regularly work over 40 hours each work week, Sundance does not engage in the "shifting" exercise; it simply does not pay such employees for all hours worked and caps their paychecks at 80 hours per two week pay period. Again, by doing so, Sundance a) does not pay its

employees for all hours worked in a given work week; and b) does not pay overtime wages for hours worked over 40 in a given work week.

21. In addition, hourly workers were regularly instructed to clock out and continue working off the clock, in order for each store to maintain its Sundance-imposed labor metrics.

22. Throughout the course of her employment, Plaintiff was directed by Sundance and its agents to perform work, was allowed to work, and did work one or more weeks in excess of forty (40) hours.

23. The provisions of the FLSA, 29 U.S.C. § 207, require Sundance to compensate nonexempt employees who work in excess of forty (40) hours in a workweek at a rate of one and one-half times their regular rate of pay.

24. Contrary to the above statutory enactment, Sundance adopted a policy and practice of failing to pay Plaintiff and all similarly situated individuals an overtime wage at a rate of one and one-half times their regular rate for hours worked in excess of forty (40) hours during a workweek. It further adopted a policy and practice of, by clocking out Plaintiff yet requiring her to continue to work, and failing to pay Plaintiff and all similarly situated individuals their regular hourly rate for hours worked under 40 in a workweek.

25. Sundance willfully violated the FLSA by knowingly failing to compensate Plaintiff for overtime wages for the hours she worked in excess of forty (40)

hours per week, and failing to compensate Plaintiff her regular hourly rate for all hours worked under 40.

NATIONWIDE COLLECTIVE ACTION

26. Plaintiff brings this case on behalf of herself and all other Crew Members and other hourly employees who have worked for Sundance at any time between three years before the commencement of this action and the date of final judgment in this matter.

27. Plaintiff brings this complaint under 29 U.S.C. § 216(b) of the FLSA. Plaintiff, her fellow Crew Members, and other hourly employees are similarly situated in that they are all subject to Sundance's common plan or practice failing to pay them for all hours worked and/or of failing to pay them proper overtime wages.

COUNT I
VIOLATION OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201, et seq.
FAILURE TO PAY OVERTIME WAGES AND FAILURE TO PAY MINIMUM WAGE

28. Plaintiff re-alleges and incorporates all previous paragraphs herein.

29. At all times relevant to this action, Sundance was an "employer" under the FLSA, 29 U.S.C. § 203(d), subject to the provisions of 29 U.S.C. § 201, *et seq*.

30. At all times relevant to this action, Plaintiff and those similarly situated were "employees" of Sundance within the meaning of the FLSA, 29 U.S.C. § 203(e)(1).

31. At all times relevant to this action, Sundance "suffered or permitted" Plaintiff and those similarly situated to work and thus "employed" them within the meaning of the FLSA, 29 U.S.C. § 203(g).

32. At all times relevant to this action, Sundance failed to pay Plaintiff and those similarly situated the federally mandated wages and overtime compensation for all services performed. Specifically, Sundance failed to pay Plaintiff and those similarly situated regular wages for all hours worked under 40 in a work week and failed to pay them overtime wages – or any wages at all – for all hours worked in excess of forty (40) hours per week.

33. The FLSA requires an employer to pay employees the federally mandated overtime premium rate of one and a half times their regular rate of pay for every hour worked in excess of forty (40) hours per workweek. 29 U.S.C. §207.

34. In addition, Sundance is subject to the minimum wage requirements of the FLSA.

35. Sundance violated the FLSA by failing to pay Plaintiff and those similarly situated the federally mandated overtime premium for all hours worked in excess of forty (40) hours per workweek.

36. Sundance also violated the FLSA by failing to pay Plaintiff and those similarly situated all minimum wages due to them.

37. Sundance's violations of the FLSA were knowing and willful.

38. By failing to compensate Plaintiff and those similarly situated at a rate not less than one and one-half times their regular rate of pay for work performed in excess of forty hours in a workweek, Sundance has violated the FLSA, 29 U.S.C. § 201, *et seq*., including 29 U.S.C. §§ 207(a)(1) and 215(a).

39. The FLSA, 29 U.S.C. 216(b), provides that as a remedy for a violation of the Act, Plaintiff and those similarly situated are entitled to damages equal to the mandated minimum wage and overtime premium pay within three years preceding their filing of this Complaint plus an additional equal amount in liquidated damages, costs, and reasonable attorneys' fees.

40. Plaintiff and those similarly situated seek damages in the amount of their respective unpaid wages, overtime wages, liquidated damages as provided by 29 U.S.C. §216(b), interest, attorneys' fees, and such other legal and equitable relief as the Court deems proper.

41. Plaintiff and all other similarly situated hourly employees, as described above, who opt into this litigation are entitled to compensation for all regular hours worked, overtime hours worked, liquidated damages, attorneys' fees and court costs.

WHEREFORE, Plaintiff seeks the following:

A. Certification of the described class under the FLSA;

B. An award of overtime wages under the FLSA;

C. An award of unpaid regular wages under the FLSA;

D. An award of liquidated damages under the FLSA;

E. A declaratory judgment that the practices complained of are unlawful under the FLSA;

F. Interest and costs;

G. Attorneys' fees under the FLSA; and

H. Such other relief as in law or equity may pertain.

JURY DEMAND

COMES NOW the Plaintiff, by and through her attorneys, FIEDLER LAW FIRM, P.L.C. and SOMMERS SCHWARTZ, P.C., and hereby demands a trial by jury on this matter.

/s/ Paige Fiedler
FIEDLER LAW FIRM, P.L.C.
Paige Fiedler AT0002496
paige@employmentlawiowa.com
8831 Windsor Parkway
Johnston, IA 50131
Telephone: (515) 254-1999
Fax: (515) 254-9923

Jason J. Thompson
(Pending Pro Hac Vice)
Charles R. Ash, IV
(Pending Pro Hac Vice)
SOMMERS SCHWARTZ, P.C.
Attorneys for Plaintiff
One Towne Square, Suite 1700
Southfield, MI 48067 PH:
(248) 355-0300
jthompson@sommerspc.com
crash@sommerspc.com

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBYN MORGAN, on behalf of herself and all similarly situated individuals, Plaintiff, vs. SUNDANCE, INC., Defendant.	Case No.: 4:18-cv-00316-JAJ-HCA

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS OR, ALTERNATIVELY, TO STAY

(Filed Nov. 8, 2018)

Plaintiff's putative collective action lawsuit against Defendant Sundance, Inc. ("Sundance" or "Defendant"), a Michigan corporation, should be dismissed or, alternatively, stayed under the first-filed rule and Fed. R. Civ. P. 12(b)(3). This is the second nationwide putative collective action case alleging that Defendant engaged in a common plan to violate the overtime provisions of the Fair Labor Standards Act ("FLSA") by failing to pay employees for all hours they worked and/or failing to pay employees the required overtime rate for all hours worked over forty in a week. The first was filed more than two years ago in the Eastern District of Michigan on October 7, 2016, *Wood v. Sundance, Inc.*, Case No. 2:16-cv-13598-GCS-RSW (the "Wood

Action"); Exhibit A, *Collective Action Complaint in the Wood Action*. The previously filed action involves overlapping parties and identical issues with this case. In fact, the Complaint in this action and Amended Collective Action Complaint in the Wood Action are near carbon copies of each other. Each centers on whether a purported nationwide class of current and former hourly crew members and other employees employed by Defendant at its Taco Bell branded restaurants were subjected to Defendant's alleged "common plan or practice failing to pay them for all hours worked and/or failing to pay them proper overtime wages." Compl. ¶¶ 26-27; Exhibit B, *Amended Collective Action Complaint in the Wood Action*, ¶ 34-35. Also, each case involves Sundance as the sole defendant. Dismissing this case (or alternatively staying it) would serve the interests of comity, judicial economy, and certainty in the law. Accordingly, under the first-filed rule and Fed. R. Civ. P. 12(b)(3), Defendant moves to dismiss or, alternatively, stay Plaintiff's Complaint.

BACKGROUND FACTS

I. The Complaint

On September 25, 2018, Plaintiff, Robyn Morgan ("Plaintiff" or "Morgan"), filed this putative nationwide collective action complaint under the FLSA, 29 U.S.C. §§ 201-219. [Dkt. No. 1] ("Compl."). Plaintiff brings this action "on behalf of herself and all other Crew Members and other hourly employees who have worked for Sundance at any time between three years before the

commencement of this action and the date of final judgment in this matter." Compl. ¶ 26 [Doc. 1]. Plaintiff alleges that Defendant had a "common plan" to violate the overtime provisions of the FLSA by failing to pay employees for all hours they worked and/or failing to pay employees the required overtime rate for all hours worked over forty in a week by allegedly: (1) requiring employees to perform off-the-clock work, (2) shifting employees' worked hours from week to week to avoid paying the overtime rate on such hours, and (3) capping employees' hours at 40 hours per week regardless of the number of hours actually worked. Compl. ¶¶ 17-25, 27.

Plaintiff seeks to include in her collective action "all other Crew Members and other hourly employees who have worked for Sundance at any time between three years before the commencement of this action and the date of final judgment in this matter." Compl. ¶ 26. Plaintiff seeks compensation for overtime hours worked, liquidated damages, and attorneys' fees for herself and on behalf of all similarly situated employees. *Id.* ¶ 40.

II. The Wood Action

Nearly two years before Plaintiff filed this action, the first putative nationwide collective action was filed against Sundance for the same alleged practices. On October 7, 2016, Plaintiffs Jolene Flanagan, Travis Pietrykowski, Michelle Wilkins, and Denise Wood filed the first putative nationwide collective action under

the FLSA in the Eastern District of Michigan naming Sundance, Inc. as the Defendant. *See* Exhibit A.[1] As in this case, the named Plaintiffs in the Wood Action brought their action on behalf of themselves and "all other Crew Members, Team Leaders, Shift Managers, and other hourly employees who have worked for Sundance at any time between three years before the commencement of [the] action and the date of final judgment in this matter." Exhibit B, ¶¶ 34-35.

The plaintiffs in the Wood Action also claim that Defendant had a "common plan" to violate the overtime provisions of the FLSA by failing to pay employees for all hours they worked and/or failing to pay employees the required overtime rate for all hours worked over forty in a week by allegedly: (1) requiring employees to perform off-the-clock work, (2) shifting employees' hours worked from week to week to avoid paying the overtime rate on such hours, and (3) capping employees' hours at 40 hours per week regardless of the number of hours actually worked. Exhibit B, ¶¶ 22-33, 35.

In the Wood Action, by stipulated order, a class has been conditionally certified as to current and former hourly crew members and shift leaders employed by Defendant at its Taco Bell branded restaurants in Michigan. *See* Exhibit C, *June 21, 2017, Stipulated*

[1] The Complaint in the Wood Action initially included claims for the alleged misclassification of overtime exempt employees in addition to claims for failure to pay overtime wages. On October 5, 2017, the plaintiffs in the Wood Action filed an Amended Collective Action Complaint withdrawing the misclassification claims and modifying the named plaintiffs. *See* Exhibit B.

Order. However, the Wood Plaintiffs reserved their right to expand the conditional class to a nationwide class depending on information obtained during discovery. Indeed, after entry of the June 21, 2017, Order, the Wood Plaintiffs filed their Amended Collective Action Complaint on October 5, 2017, reaffirming their intention to seek a nationwide class. *See* Exhibit B, ¶¶ 34, 35. Additionally, an opt-in notice and consent form were sent to the putative class members in the Wood Action, consisting of more than 8,600 individuals employed by Defendant in Michigan during the three-year class lookback period. At the closure of the opt-in period, 509 employees returned consent forms opting in to the conditionally certified class. Discovery has commenced as to those opt-in plaintiffs.

Argument

I. Plaintiff's Lawsuit Should Be Dismissed.

A. The First-Filed Rule Applies.

The Eighth Circuit has stated that, "[t]o conserve judicial resources and avoid conflicting rulings, the first-filed rule gives priority, for purposes of choosing among possible venues when parallel litigation has been instituted in separate courts, to the party who first establishes jurisdiction." *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993) (emphasis added). "In the absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169,

1174 (11th Cir. 1982) (*citing Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971)) (affirming dismissal of second-filed action).

Comity is the primary underpinning of the first-filed rule. *Id.* at 1173-74; *see also Covell v. Heyman*, 111 U.S. 176, 182 (1884). Courts have similarly stated that "[t]he primary purpose of the rule is to conserve judicial resources and avoid conflicting rulings." *Allstate Ins. Co. v. Clohessy*, 9 F. Supp. 2d 1314, 1316 (M.D. Fla. 1998) (*citing Nw. Airlines, Inc.*, 989 F.2d at 1006). "The concern [of the first-filed rule] manifestly is to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result." *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997) (ordering transfer of subsequent action under first-filed rule); *see also Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("[A]s between federal district courts . . . the general principle is to avoid duplicative litigation.").

"When two actions involving overlapping issues and parties are pending in two federal courts, there is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the first-filed rule." *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2002) (citations omitted). Stated another way, "The 'first-filed' rule . . . holds that when parties have instituted competing or parallel litigation in separate federal courts, the court initially having jurisdiction should hear the case." *Supreme Int'l Corp. v. Anheuser-Busch, Inc.*, 972 F. Supp. 604, 606 (S.D. Fla.

1997) (*citing Nw. Airlines*, 989 F.2d at 1006) (staying subsequent case under first-filed rule); *see also Tiber Laboratories, LLC v. Cypress Pharm., Inc.*, 2007 U.S. Dist. LEXIS 54684 (N.D. Ga. May 11, 2007).

The first-filed rule does not require identity of parties or issues. *Save Power*, 121 F.3d at 950. Rather, "[t]he crucial inquiry is one of 'substantial overlap.'" *Id.* (citing *Mann Mfg.*, 439 F.2d at 408). "'Regardless of whether or not the suits here are identical, if they overlap on the substantive issues, the cases would be required to be consolidated in . . . the jurisdiction first seized of the issues.'" *Id.* (quoting *Mann Mfg.*, 439 F.2d at 408 n.6).

Also, "the party objecting to jurisdiction in the first-filed forum carr[ies] the burden of proving 'compelling circumstances' to warrant an exception to the first-filed rule." *Manuel*, 430 F.3d at 1135. "Compelling circumstances" that could justify departure from the rule, such as when a party, on notice of a potential lawsuit, files a declaratory judgment action in its home forum, are absent here. *Supreme Int'l*, 972 F. Supp. at 606 (citations omitted). But even if "those conditions are present, 'the first-filed action is preferred.'" *Id.* (quoting *Serco Serv. Co. v. Kelley Co.*, 51 F.3d 1037, 1039 (Fed. Cir. 1995)).

The substantial overlap of issues between this case and the Wood Action requires the application of the first-filed rule. Plaintiffs in each case have brought nationwide collective action claims under the FLSA challenging the very same alleged "common plan or

practice" of Defendant to not "pay [all hourly workers] for all hours worked and/or failing to pay them proper overtime wages." The first-filed case should proceed.

B. Plaintiff's Lawsuit is Duplicative of *Wood*.

The first-filed rule turns on which court "initially seized of [the] controversy." *Merrill Lynch*, 675 F.2d at 1172. Suits form the same controversy for purposes of the first-filed rule if "substantial overlap" exists; that is, whether the suits "overlap on the substantive issues." M*ann Mfg.*, 439 F.2d at 408 & n.6. This standard is satisfied here.

The same collective action claim asserted in this case regarding the payment of overtime wages is asserted in the Wood Action. In fact, the substantive allegations in this case are exact copies of the allegations in the Wood Action. The following chart demonstrates the nearly identical allegations that are contained in both the Complaint in this action and the Amended Collective Action Complaint in the Wood Action:

Morgan Complaint [Dkt. No. 1]	**Wood Amended Complaint (Exhibit B)**

This is an overtime and wage theft case . . . Plaintiff is an adult residing and working within this judicial district and – during the relevant time – worked as an hourly employee for Defendant Sundance, Inc. ("Sundance"), a company that owns well over 150 Taco Bell franchises throughout the United States. (¶1)	This is an overtime and wage theft case. Plaintiffs are all adults residing and working within this judicial district and – during the relevant time – worked as hourly employees for defendant Sundance, Inc. ("Sundance"), a company that owns well over 150 Taco Bell franchises throughout the United States. (¶1)
At various points within the past three years, Plaintiff has experienced the following: a) Sundance's failure to pay her for all hours worked; and b) Sundance's failure to pay overtime wages for all hours worked over 40, when legally required to do so. (¶15)	At least one Plaintiff, at various points within the past three years has experienced the following: 1) Sundance's failure to pay the Plaintiff for all hours worked; and/or 2) Sundance's failure to pay overtime wages for all hours worked over 40, when legally required to do so. (¶20)
Sundance knew or should have known the business model it developed and implemented was unlawful under applicable laws. Nonetheless, Sundance continued to willfully engage in the violations described herein. (¶16)	Sundance knew or should have known the business model it developed and implemented was unlawful under applicable laws. Nonetheless, Sundance continued to willfully engage in the violations described herein. (¶21)

Sundance's hourly employees, including but not limited to Crew Members, are not paid for all hours worked. In fact, Sundance engages in a practice in which it "shifts" hours that an employee works during one week over to the following week, so that an employee's time records do not demonstrate that the employee worked over 40 hours in a given work week. Sundance maintains a white board in its office on which it keeps track of its employees' "shifted hours" from week to week. (¶17)	Sundance's hourly employees, including but not limited to Crew Members, Team Leaders and Shift Managers, are not paid for all hours worked. In fact, Sundance engages in a practice in which it "shifts" hours that an employee works during one week over to the following week, so that an employee's time records do not demonstrate that the employee worked over 40 hours in a given work week. Sundance maintains a white board in its office on which it keeps track of its employees' "shifted hours" from week to week. (¶22)
By shifting its employees' hours, Sundance a) does not pay its employees for all hours worked in a given work week; and b) does not pay overtime wages for hours worked over 40 in a given work week. (¶18)	By shifting its employees' houses, Sundance a) does not pay its employees for all hours worked in a given work week; and b) does not pay overtime wages for hours worked over 40 in a given work week. (¶23)

In addition, some employees simply were not paid at all for their "shifted over" hours. (¶19)	In addition, some employees simply were not paid at all for their "shifted over" hours. (¶24)
With regard to hourly employees that regularly work over 40 hours each work week, Sundance does not engage in the "shifting" exercise; it simply does not pay such employees for all hours worked and caps their paychecks at 80 hours per two week pay period. Again, by doing so, Sundance a) does not pay its employees for all hours worked in a given work week; and b) does not pay overtime wages for hours worked over 40 in a given work week. (¶20).	With regard to hourly employees that regularly work over 40 hours each work week, Sundance does not engage in the "shifting" exercise; it simply does not pay such employees for all hours worked, and caps their paychecks at 80 hours per two week pay period. Again, by doing so, Sundance a) does not pay its employees for all hours worked in a given work week; and b) does not pay overtime wages for hours worked over 40 in a given work week. (¶25)
In addition, hourly workers were regularly instructed to clock out and continue working off the clock, in order for each store to maintain its Sundance-imposed labor metrics. (¶20)	In addition, hourly workers were regularly instructed to clock out, and continue working after doing so, in order for each store to maintain its Sundance- imposed labor metrics. (¶26)

Throughout the course of her employment, Plaintiff was directed by Sundance and its agents to perform work, was allowed to work, and did work one or more weeks in excess of forty (40) hours. (¶22)	Throughout the course of their employment, Plaintiffs were directed by Sundance and its agents to perform work, were allowed to work, and did work every week in excess of forty (40) hours per week. (¶27)
Contrary to the above statutory enactment, Sundance adopted a policy and practice of failing to pay Plaintiff and all similarly situated individuals an overtime wage at a rate of one and one-half times their regular rate for hours worked in excess of forty (40) hours during a workweek. It further adopted a policy and practice of, by clocking out Plaintiff yet requiring her to continue to work, and failing to pay Plaintiff and all similarly situated individuals their regular hourly rate for hours worked under 40 in a workweek. (24¶)	Contrary to the above statutory enactment, Sundance adopted a policy and practice of failing to pay Plaintiffs and all similarly situated individuals an overtime wage at a rate of one and one-half times their regular rate for hours worked in excess of forty (40) hours during a workweek. It further adopted a policy and practice of, by clocking out Plaintiffs yet requiring them to continue to work, failing to pay Plaintiffs and all similarly situated individuals their regular hourly rate for hours worked under 40 in a workweek. (¶32)

Sundance willfully violated the FLSA by knowingly failing to compensate Plaintiff for overtime wages for the hours she worked in excess of forty (40) hours per week, and failing to compensate Plaintiff her regular hourly rate for all hours worked under 40. (25)	Sundance willfully violated the FLSA by knowingly failing to compensate Plaintiffs overtime wages for the hours they worked in excess of forty (40) hours per week, and failing to compensation Plaintiffs their regular hourly rate for all hours worked under 40 . . . U.S.C. § 201, et seq. (¶ 33)
Plaintiff brings this case on behalf of herself and all other Crew Members and other hourly employees who have worked for Sundance at any time between three years before the commencement of this action and the date of final judgment in this matter. (¶26)	Plaintiffs bring this case on behalf of themselves and all other Crew Members, Team Leaders, Shift Managers and other hourly employees who have worked for Sundance at any time between three years before the commencement of this action and the date of final judgment in this matter. (¶34)
Plaintiff brings this complaint under 29 U.S.C. § 216(b) of the FLSA. Plaintiff, her fellow Crew Members, and other hourly employees are similarly situated in that they are all subject to Sundance's common plan	Plaintiffs bring this complaint under 29 U.S.C. § 216(b) of the FLSA. Plaintiffs and the Crew Members, Team Leaders, Shift Managers and other hourly employees are similarly situated in that they are all subject to

or practice failing to pay them for all hours worked and/or of failing to pay them proper overtime wages. (¶27)	Sundance's common plan or practice failing to pay them for all hours worked and/or of failing to pay them proper overtime wages. (¶35)
At all times relevant to this action, Sundance "suffered or permitted" Plaintiff and those similarly situated to work and thus "employed" them within the meaning of the FLSA, 29 U.S.C. § 203(g). (¶31)	At all times relevant to this action, Sundance "suffered or permitted" Plaintiffs to work and thus "employed" them within the meaning of the FLSA, 29 U.S.C. § 203(g). (¶39)
At all times relevant to this action, Sundance failed to pay Plaintiff and those similarly situated the federally mandated wages and overtime compensation for all services performed. Specifically, Sundance failed to pay Plaintiff and those similarly situated regular wages for all hours worked under 40 in a work week and failed to pay them overtime wages – or any wages at all – for all hours worked in excess of forty (40) hours per week. (¶32)	At all times relevant to this action, Sundance failed to pay Plaintiffs the federally mandated wages and overtime compensation for all services performed. Specifically, Sundance failed to pay Plaintiffs regular wages for all hours worked under 40 in a work week, and failed to pay Plaintiffs overtime wages – or any wages at all – for all hours worked in excess of forty (40) hours per week. (¶40)

Sundance violated the FLSA by failing to pay Plaintiff and those similarly situated the federally mandated overtime premium for all hours worked in excess of forty (40) hours per workweek. (¶35)	Sundance violated the FLSA by failing to pay Plaintiffs the federally mandated overtime premium for all hours worked in excess of forty (40) hours per workweek. (¶42)
Sundance also violated the FLSA by failing to pay Plaintiff and those similarly situated all minimum wages due to them. (¶36)	Sundance also violated the FLSA by failing to pay Plaintiffs all minimum wages due to Plaintiffs. (¶44)
Sundance's violations of the FLSA were knowing and willful. (¶37)	Sundance's violations of the FLSA were knowing and willful. (¶45)
By failing to compensate Plaintiff and those similarly situated at a rate not less than one and one-half times their regular rate of pay for work performed in excess of forty hours in a workweek, Sundance has violated the FLSA, 29 U.S.C. § 201, et seq., including 29 U.S.C. §§ 207(a)(1) and 215(a). (¶38)	By failing to compensate Plaintiffs at a rate not less than one and one-half times their regular rate of pay for work performed in excess of forty hours in a workweek, Sundance has violated the FLSA, 29 U.S.C. § 201, et seq., including 29 U.S.C. §§ 207(a)(1) and 215(a). (¶46)

Plaintiff and those similarly situated seek damages in the amount of their respective unpaid wages, overtime wages, liquidated damages as provided by 29 U.S.C. §216(b), interest, attorneys' fees, and such other legal and equitable relief as the Court deems proper. (¶40)	Plaintiffs seek damages in the amount of their respective unpaid wages, overtime wages, liquidated damages as provided by 29 U.S.C. §216(b), interest, attorneys' fees, and such other legal and equitable relief as the Court deems proper. (¶48)
Plaintiff and all other similarly situated hourly employees, as described above, who opt into this litigation are entitled to compensation for all regular hours worked, overtime hours worked, liquidated damages, attorneys' fees and court costs. (¶41)	Plaintiffs and all other similarly situated hourly employees, as described above, who opt into this litigation are entitled to compensation for all regular hours worked, overtime hours worked, liquidated damages, attorneys' fees and court costs. (¶49)

This alleged "common plan" not to pay overtime wages is the factual and legal centerpiece to each case. Further, Plaintiffs in each case are seeking to represent a nationwide class of all Crew Members and other hourly employees of Defendant nationwide (Defendant operates stores in six states across the Midwest), and because those classes are nearly identical, they will necessarily involve the same analysis for potential certification under 29 U.S.C. § 216(b). Indeed, plaintiffs in

the Wood Action are purported collective action members in this action. *Compare* Compl. ¶ 26, Exhibit B, ¶¶ 12-17. Considering that each case is a putative nationwide collective action, these classes are destined to encompass many of the same individuals.

Moreover, each case involves the same alleged conduct of Sundance. For instance, the collective action allegations in both cases are based on a "common plan" by Sundance to intentionally fail to pay its employees for all overtime wages they worked. *Compare* Compl. ¶ 27, 37, Exhibit B, ¶¶ 35, 45. Specifically, each case presents identical questions, including whether Sundance engaged in such a "common plan" to (1) require employees to perform off-the-clock work, (2) shift employees' hours worked from week to week to avoid paying the overtime rate on such hours, and (3) cap employees' hours at 40 hours per week regardless of the number of hours actually worked; and whether Sundance's violations of the FLSA were knowing and willful. This overlap in claims, substantive issues, purported collective action members, and defendants will necessarily result in a substantial, if not complete, overlap of facts and issues.

This duplication is precisely what the first-filed rule seeks to avoid. *Save Power*, 121 F.3d at 950. Two actions with overlapping collective action "classes" and issues proceeding simultaneously in two different districts would invariably and unnecessarily waste judicial and party resources, result in piecemeal and potentially contradictory litigation, and be inefficient. A plethora of cases have recognized this dilemma and

yielded to the first-filed action. *See*, *e.g.*, *Save Power*, 121 F.3d at 950 (ordering transfer of second-filed action); *Fisher v. Rite Aid Corp.*, No. RDB-09-1909, 2010 WL 2332101 (D. MD Jun. 8, 2010) (dismissing state law wage and hour class claims that were duplicative of previously filed FLSA collective action claims pending in another federal district court.); *Walker v. Progressive Cas. Ins. Co.*, No. C03–656R, 2003 WL 21056704 at *3 (W.D. Wash. May 9, 2003) (same); *Merrill Lynch*, 675 F.2d at 1174 (affirming dismissal of second-filed action); *Tiber Laboratories*, 2007 U.S. Dist. LEXIS 54684 (transferring second-filed action); *Marietta Drapery & Wind Coverings v. North River*, 486 F. Supp. 2d 1366 (N.D. Ga. 2007) (same); *Supreme Int'l*, 972 F. Supp. at 606 (same).

Furthermore, the fact that a conditional nationwide class has not been certified in the Wood Action does not affect the calculus for this motion because identical parties and identical issues are not required under the first-filed rule and the plaintiffs in the Wood Action may move to certify a broader class at any time. All that is required is a substantial overlap in parties and issues, not identical parties and issues. *See New Beckley Mining Corp. v. International Union*, UMWA, 946 F.2d 1072, 1073 (4th Cir.1991) (noting that cases are parallel when "substantially the same parties litigate substantially the same issues in different forums"); *Fuller v. Abercrombie & Fitch Stores, Inc.*, 370 F. Supp. 2d 686, 690 (E.D. Tenn. 2005) (transferring second-filed FLSA collective action under the first-filed rule even though second-filed action contained

additional "off-the-clock" claim because claims in both actions "substantially overlap[ped]"). Moreover, even if the plaintiffs in the Wood Action do not move to certify a nationwide class, judicial determinations in the Wood Action related to the propriety of a Michigan collective action and whether Defendant engaged in a willful "common plan" not to pay overtime wages will substantially overlap with judicial determinations regarding the propriety of collective treatment in this case. This is especially true considering that the Plaintiff's proposed class includes Defendant's Michigan employees. As such, the parties in each action remain virtually identical.

C. The Pursuit of Collective Action Claims Further Compels Dismissal.

In addition to the substantial overlap of the Wood Action and this case, the unique notice requirements of the FLSA compel a dismissal. The FLSA provides an "opt-in" procedure for collective action claimants. 29 U.S.C. § 216(a). Unlike class actions under Rule 23 of the Federal Rules of Civil Procedure, which establishes that individual class members remain in the class unless they take affirmative steps to exclude themselves from the class, the FLSA requires that "in any action to recover the liabilities prescribed in the statute," every plaintiff must affirmatively "opt-in" to the group. *Id.*

This opt-in procedure surely renders *two* parallel actions perilous, inefficient, and inappropriate. If the

Wood Action and this case were both certified for collective action treatment on a nationwide basis, two notices would issue to the same employees to opt-in to the competing collective actions, and confusion would reign. Even if a nationwide class is never conditionally certified in the Wood Action, the requested conditional certification in this action will result in duplicate notices being sent to the same Michigan employees who have already been sent notices in the Wood Action. Any one of these scenarios would create substantial inefficiencies and great confusion for not only these individuals but also for the parties and the courts. In *Fuller*, for example, the court exercised its inherent authority to transfer an FLSA collective action under the first-filed rule, noting that "if both actions proceed, the same individuals could receive two opt-in notices for the same claim but in different courts." 370 F. Supp. 2d at 690.

Even worse, any one of these circumstances would create a risk of conflicting precedents and inconsistent results, should some individuals opt-in to one or both of the actions. Similarly, if Plaintiff in this action was allowed to proceed with a collective action after the court in the Wood Action refused to certify a collective action, this Court would effectively overrule that court's decision, in violation of the principle of comity as well as the principle of collateral estoppel. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different

cause of action involving a party to the first case." (citations omitted)); *Covell*, 111 U.S. at 182 ("The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity. . . ."); *Save Power*, 121 F.3d at 950 ("The concern [of the first-filed rule] manifestly is to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result."); *Allstate*, 9 F. Supp. 2d at 1316 ("The primary purpose of the rule is to conserve judicial resources and avoid conflicting rulings." (*citing Nw. Airlines*, 989 F.2d at 1006)).

D. This Lawsuit Should be Dismissed.

The most appropriate remedy under the first-filed rule is to dismiss the later action. *See*, *e.g.*, *Merrill Lynch*, 675 F.2d at 1174 (stating that comity compelled dismissal of later action). Defendant is not seeking to dismiss Plaintiff's individual substantive FLSA claims with prejudice; in fact, Plaintiff has several options with regard to them. For example, Plaintiff may refile her claim on an individual basis before this Court or attempt to opt-in to or otherwise join the Wood Action. 29 U.S.C. §§ 216(b), 256*; See Lott v. Advantage Sales & Mktg. LLC*, No. 2:10-CV-00980-JEO, 2011 WL 13229682, at *1 (N.D. Ala. Jan. 26, 2011) (dismissed complaint applying first-filed rule and held that "a dismissal of the individual claims without prejudice to

refile individual claims in this court or other courts of competent jurisdiction or to opt in to the pending Campbell litigation is appropriate.") *see also Partlow v. Jewish Orphans' Home, Inc.*, 645 F.2d 757, 759 (9th Cir. 1981) (stating that an FLSA class member who does not opt-in to collective action is not barred from bringing individual claim), *abrogated on other grounds*, 493 U.S. 165 (1989). Plaintiff has no substantive right to bring her own duplicative collective action claim in this Court. *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (stating that plaintiffs' "inability to proceed collectively" does not deprive them of any substantive right under the FLSA). The collective action procedure under the FLSA is simply that—a procedure designed to promote judicial efficiency. There is, however, no judicial efficiency gained by adjudicating a duplicative claim while risking the possibility of inconsistent results.

Because Plaintiff remains free to pursue her FLSA claim, and because parallel collective actions would be unworkable, this Court should dismiss Plaintiff's lawsuit. *See Merrill Lynch*, 675 F.2d 1169 (affirming dismissal of second-filed action); *James v. AT & T Corp.*, 334 F. Supp. 2d 410 (S.D.N.Y. 2004) (dismissing second putative class action where the putative classes were composed of the same members and organized to vindicate the same rights); *Fisher*, 2010 WL 2332101 (dismissing state law wage and hour class claims that were duplicative of previously filed duplicative FLSA collective action claims pending in another federal district court.); *Walker*, 2003 WL 21056704 (same). And to

the extent necessary to preserve Plaintiff's off-the-clock claim, this Court can stay this case or grant Plaintiff leave to re-file her individual claims on an individual basis. *See infra*, sec. II; *see also Lott*, 2011 WL 13229682 at *1; *Nat'l Inv. Fraud Cntr., Inc. v. Invention Submission Corp.*, 2000 U.S. Dist. LEXIS 2621, at *35 (D.S.D. Feb. 17, 2000) (dismissing some claims under the first-filed rule while retaining others).

II. Alternatively, This Court Should Transfer or Stay This Action.

While the most appropriate remedy for this duplicative litigation is to dismiss, the Court, under the first-filed rule, should at the very least stay the action pending final resolution of Wood. Rather than dismiss the subsequent proceedings, several courts have stayed a subsequently filed action under the first-filed rule. *See*, *e.g.*, *Homeowners Loan*, 2007 U.S. Dist. LEXIS 10261; *Supreme Int'l*, 972 F. Supp. at 606. Those courts have reasoned that a disposition of the action in the first forum is superior to a competing disposition in the subsequent forum, citing the overarching concerns of judicial economy and consistency in the law. *See*, *e.g.*, *Supreme Int'l*, 972 F. Supp. at 606. Just as in those cases, disposition of this action by the first-filed forum, the Eastern District of Michigan, would conserve judicial resources and ensure a clear, consistent result. The Wood Action has been pending since October 2016; the parties are actively involved in complex discovery, the entry of an order partially certifying the class, and notice to putative class members in

Michigan. The Wood Action includes the same classification claim involving the same nationwide class of hourly employees as this case. Given that the Eastern District of Michigan has already seized this controversy and the parties have engaged in significant litigation in that forum, an effective disposition of this classification dispute requires that the case be decided in the Eastern District of Michigan. *See Supreme Int'l*, 972 F. Supp. at 606 (" 'The first-filed action is preferred . . . unless considerations of judicial and litigant economy, and the just and effective disposition of disputes, require otherwise.' " (citation omitted)).

Here, concerns of economy require that the first-filed forum decide the case. Moreover, because disposition of the Wood Action may have preclusive effect on the question of whether the Defendant engaged in a "common plan" to not pay its hourly employees overtime pay, *see Allen*, 449 U.S. at 94, the equities weigh in favor of allowing the *Wood* court to decide the case. Thus, this Court should alternatively stay the instant case.

Conclusion

Defendant respectfully requests that the Court dismiss Plaintiff's claims. Alternatively, Defendant respectfully requests that the Court stay the case and grant all other appropriate relief.

Dated: November 8, 2018 Respectfully submitted:

/s/ Joel W. Rice
Joel W. Rice (pro hac vice)
Scott C. Fanning (pro hac vice)
Fisher & Phillips, LLP
10 S. Wacker Dr., Ste. 3450
Chicago, IL 60606
(312) 346-8061

Kevin J. Driscoll
Finley Law Firm, P.C.
699 Walnut Street, Suite 1700
Des Moines, IA 50309
Telephone: (515) 288-0145
E-Mail:
kdriscoll@finleylaw.com

Attorneys for Sundance, Inc.

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBYN MORGAN, on behalf of herself and all similarly situated individuals, Plaintiff, vs. SUNDANCE, INC., Defendant.	No. 4:18-cv-316 **ORDER**

(Filed Mar. 5, 2019)

This matter comes before the Court pursuant to Defendant's November 11, 2018, Motion to Dismiss or Stay. [Dkt. No. 9]. Plaintiff responded to the Motion on November 21, 2018. [Dkt. No. 10]. Defendant replied on November 28, 2018. [Dkt. No. 11]. For the reasons that follow, Defendant's Motion is **DENIED.**

I. BACKGROUND

This lawsuit

On September 25, 2018, Robyn Morgan filed this action against Sundance, Inc., a Michigan corporation that owns over a hundred Taco Bell restaurants throughout six Midwestern states. Morgan, a former Crew Member at the Osceola, Iowa, Taco Bell, alleges that her former employer violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201–219, and seeks to certify a putative collective action pursuant to

§ 216 of the FLSA. In specific, Morgan contends that "Sundance engages in a process in which it 'shifts' hours that an employee works during one week over to the following week," as well as, for some employees, simply capping the employees' paychecks at 80 hours per two week period. These practices, she alleges, violate the FLSA's minimum wage requirements and its guarantee of a minimum wage and enhanced pay for overtime work. Morgan seeks to include in her action "all other Crew Members and other hourly employees who have worked for Sundance at any time between the three years before the commencement of this action and the date of final judgment in this matter." [Dkt. No. 1, at 4].

In response, Sundance filed the Motion now before the Court. In its Motion to Dismiss or Alternatively Stay, Sundance argues that Morgan's lawsuit should be dismissed or stayed pursuant to the first to file rule, arguing that it is duplicative of a collective action that has been proceeding for over two years in the Eastern District of Michigan.

The *Wood* action

The Michigan action to which Sundance points, *Wood v. Sundance, Inc.*, was filed prior to this lawsuit. No. 2:16-cv-13598 (E.D. Mich. filed Oct. 7, 2016).[1] At the time that the Michigan action began, it alleged three violations of the FLSA: two based on the same "shifting" practice alleged here, and one based on

[1] For clarity and parallelism, this Order will cite to the docket in *Wood* in the following form: "[*Wood* Dkt. No. 1]."

misclassification of employees. [*Wood* Dkt. No. 1]. On October 5, 2017, the plaintiffs in the Michigan action amended their Complaint, with the two most significant changes being (1) the removal of the misclassification claim, and (2) a change in lead plaintiff, with Denise Wood's name now listed first. [*Wood* Dkt. Nos. 1, 49]. With the misclassification claims removed, the Amended Complaint in *Wood* now detailed the same allegations, almost to the very word, that were alleged in Morgan's Complaint almost a year later. [Dkt. No. 1; *Wood* Dkt. No. 49].

Before the Amended Complaint was filed, the parties in the *Wood* action reached a stipulated agreement for conditional class certification, and on June 20, 2017, the court entered an order granting conditional certification in part, pursuant to that agreement. [*Wood* Dkt. No. 23]. While the Complaint had alleged a nationwide class, the conditionally certified class was limited to employees of Sundance's Michigan restaurants:

> [T]he putative class for the instant action is defined as . . . All Team Members, Shift Leads or other hourly employees that were employed with Defendant as an hourly employee at any of its Taco Bell locations within the State of Michigan at any time in the past three years from the date of this Order.

[*Wood* Dkt. No. 23]. Additionally, the stipulated Order included provisions stating that the plaintiffs would not "seek class certification regarding [Sundance] employees that held salaried positions with" the company, and that the plaintiffs would withdraw any class-wide

claims as to those employees. [*Wood* Dkt. No. 23]. Following this promise, the plaintiffs removed the misclassification claims in their Amended Complaint. [*Wood* Dkt. No. 49].

Since then, sixteen months have passed. Discovery has proceeded in a stop-start manner, as the parties have disputed the appropriateness of the plaintiffs' electronic discovery requests. [*See Wood* Dkt. Nos. 70–79]. The end of the discovery process is not in sight—or at least, it is not imminent, as the parties and the court have agreed that the most recent scheduling order is no longer operative. [Dkt. Nos. 11-1, 11-2]. Instead of strictly following the scheduling order, the *Wood* parties are pursuing mediation, and there will be no new schedule ordered until the parties' settlement discussions conclude. [Dkt. Nos 11-1, 11-2].

The docket in *Wood* shows no activity since December 12, 2018. [*Wood* Dkt. No. 79]. It is against this backdrop—with the *Wood* class conditionally certified as Michigan-only, and with the *Wood* action mired in settlement negotiations—that the Court decides the issue here.

II. LEGAL STANDARD

FLSA collective actions

The Fair Labor Standards Act allows a plaintiff alleging a violation of the statute to sue individually or on behalf of a class of other employees. *See* 29 U.S.C.

§ 216(b). The employees that make up a class must be similarly situated, and they must "opt in" to the action:

> An action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Id. In the Eighth Circuit, certification of the class in an FLSA action tends to proceed in two steps. *See Nobles v. State Farm Mutual Automobile Ins. Co.*, 2011 WL 3794021, at *9 (W.D. Mo. Aug. 25 2011) (collecting cases and concluding that "the majority of district courts in the Eighth Circuit use the two-step analysis adopted in *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995)."). In the first step, the plaintiff moves for collective action certification for notice purposes, and the court conditionally certifies the class. *Id.* (citing *Mooney*, 54 F.3d at 1213–14). Later, typically after discovery has finished, the defendant may move to decertify the class, and the court applies a stricter standard in its analysis. *Nobles v. State Farm Mutual Automobile Ins. Co.*, 2013 WL 12153518, at *2 (W.D. Mo. July 8, 2013) (decertifying class after full discovery, pursuant to the court's "ongoing duty to ensure that the class continues to be certifiable").

Neither the text of the FLSA nor Eighth Circuit precedent requires that all plaintiffs with potential claims against a defendant consolidate their claims into a single nationwide action. But when multiple actions overlap, a court may decide that the interests of efficiency and justice require dismissing one of the actions.

The first to file rule

As a matter of comity, a federal district court may decline jurisdiction over an action when "a complaint involving the same parties and issues has already been filed in another district." *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119, 121 (8th Cir. 1985) (citing *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94–95 (9th Cir. 1982)). The "first to file" rule, which Sundance invokes here, dictates that when two courts have concurrent jurisdiction, the case should be decided by "the court initially seized of [the] controversy." *Id.* (quoting *Merrill Lynch, Pierce, Fenner & Smith v. Haydu*, 675 F.2d 1169, 1774 (11th Cir. 1982). The first to file rule is "not intended to be rigid, mechanical, or inflexible, but should be applied in a manner best serving the interests of justice." *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1005 (8th Cir. 1993) (citation omitted). Typically, the rule will only yield when "compelling circumstances" demand its non-application. *Id.* at 1004 (citing *United States Fire Insurance Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488–89 (8th Cir. 1990)). The decision to apply the rule is left to the district court's discretion. *Id.* (citing

Minnesota Mining & Mfg. Co. v. Rynne, 661 F.2d 722 (8th Cir. 1981) (per curiam)).

In the prototypical situation in which the first to file is applied, the two cases are essentially identical, with the defendant in one case being the plaintiff in the other and vice versa. *See Arnold v. DirecTV, Inc.*, 2011 WL 839636, at *4 (E.D. Mo. Mar. 7, 2011). But despite the greater complexity of analysis required, district courts frequently apply the rule to overlapping FLSA collective actions. *See Ortiz v. Panera Bread Co.*, 2011 WL 3353432, *2 (E.D. Va. Aug.2 2011) (collecting cases). The reason for this is clear: simultaneous, parallel FLSA wage-and-hour claims "threaten to present overlapping classes, multiple attempts at certification in two different courts, and complicated settlement negotiations." *Id.* Thus, when a defendant invokes the first to file rule regarding two FLSA claims, a court must decide whether the cases are duplicative. If they are, only compelling circumstances will prevent the dismissal of the later-filed action.

III. ANALYSIS

The key question, then, is whether this action is duplicative of the *Wood* action. The answer to this question turns on the similarity of both the parties and the issues. *See Missouri ex rel. Nixon v. Prudential Health Care Plan, Inc.*, 259 F.3d 949, 954 (8th Cir. 2001) ("Plaintiffs may not pursue multiple federal suits against the same party involving the same controversy at the same time."); *see also Walton v. Eaton*

Corp., 563 F.2d 66, 70 (3d Cir. 1977) (en banc) ("[A plaintiff has] no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant.") (citations omitted); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("[B]etween federal district courts, . . . the general principle is to avoid duplicative litigation.") (citations omitted). The parties and issues need not be perfectly identical, however—the "crucial inquiry is whether the parties and issues substantially overlap." *Fuller v. Abercrombie & Fitch Stores*, 370 F. Supp. 686, 688 (E.D. Tenn. 2005) (citing *Save Power Ltd. v. Syntek Finance Corp.*, 121 F.3d 947, 950–51 (5th Cir. 1997); *TPM Holdings, Inc. v. Intra-Gold Indus., Inc.*, 91 F.3d 1, 4, (1st Cir. 1996)).

Here, there does not appear to be any doubt that the issues are identical to those raised in the *Wood* action. The substantive allegations of Morgan's Complaint are virtually identical to those of Amended Complaint in *Wood*. [*Compare* Dkt. No. 1, *with Wood* Dkt. No. 49]. And Sundance is the defendant in both actions. [Dkt. No. 1; *Wood* Dkt. Nos. 1, 49].

What distinguishes the two actions, however, is their plaintiffs.[2] While the *Wood* plaintiffs originally

[2] While the lead plaintiffs in the two cases are not the same person, this alone does not prevent the plaintiff classes from substantially overlapping in a way that would implicate the first to file rule. *Fuller*, 370 F. Supp. at 689–90 (finding that when different plaintiffs bring claims based on their identical employment

sought to certify a nationwide collective class, [*Wood* Dkt. No. 1], they no longer do so, and the court has conditionally certified a class limited to Sundance employees *in Michigan*. [*Wood* Dkt. No. 23]. Morgan, represented by different counsel, aims to certify a nationwide class. If the cases had been brought at the same time, then, the Court is persuaded that they would have been identical. But by the time Morgan filed her Complaint, that identity had been lacking for almost a year. [*Compare* Dkt. No. 1, *with Wood* Dkt. No. 49].

At least one other district court has focused on the opt-in eligibility of the named plaintiffs in determining that two collective FLSA actions are identical. *Ortiz*, 2011 WL 3353432, at *2 ("Both Ortiz and the *Lewis* Plaintiffs seek to represent the exact same class . . . Jaime Ortiz is a member of the putative collective class alleged in *Lewis*. And the *Lewis* Plaintiffs are now members of the putative collective class alleged in Ortiz."). The parties have not identified, and the Court has been unable to find, a case such as this, in which the collective class in the first case is a proper subset of the class in the second. But the analysis is still informative: the *Wood* plaintiffs are members of the putative collective class alleged by Morgan. But Robyn Morgan is not, nor has she been at any point since before she filed her Complaint, a member of the class alleged in *Wood*.

---

positions with the same company, they are "effectively identical" for the purposes of the rule).

The crucial issue in this case is, as it is in *Wood*, whether Sundance had a policy of shifting hours for its hourly employees in violation of the FLSA. But to hold that the identity of the claims and the defendant outweighs the key difference between the plaintiff classes would essentially be to deprive non-Michigan employees of their statutory right to collective action under the FLSA. Usually, a dismissal under the first to file rule effectively tells members of the second action's class to join the first action or file individually. But here, all of Morgan's class plaintiffs except those in Michigan[3] are ineligible to join the *Wood* action. The Eighth Circuit Court of Appeals has instructed district courts to construe the FLSA liberally and apply it "to the furthest reaches consistent with congressional direction' in fulfillment of its humanitarian and remedial purposes.'" *Perez v. Contingent Care, LLC*, 820 F.3d 288, 292 (8th Cir. 2016) (quoting *Brennan v. Plaza Shoe Store, Inc.*, 522 F.2d 843, 846 (8th Cir. 1975)). To tell all plaintiffs outside of Sundance's home state of Michigan to sue individually would be to ignore that instruction.

---

[3] Morgan has indicated that if necessary, she would "carve out all Michigan employees from her proposed class definition." [Dkt. No. 10, at 4]. This would, after all, entirely remove the overlap between the Wood class and the class Morgan seeks to certify. But as Morgan points out, the proposed notice in Wood assured its recipients, "You are not required to join the Lawsuit. If you do not join, your rights are not affected." [Wood Dkt. No. 15-2]. This detail matters: one of the rights that was "not affected" is the right to receive notice of, and perhaps opt into, a later lawsuit such as this one.

Sundance argues, correctly, that the Stipulated Order that conditionally certified *Wood*'s Michigan-only class included no stipulation by the *Wood* plaintiffs promising to permanently abandon certification of a nationwide class. [Dkt. No. 11; *Wood* Dkt. No. 23]. Given that the Scheduling Order in that case is inoperative, it remains entirely possible that *Wood* could someday again become the nationwide collective action that it was when it was first filed. At present, though, it has not. That *Wood* may conceivably be changed to be duplicative of this case does not mean that it is duplicative of it now. *See Fru-Con Const. Corp. v. Controlled Air, Inc.*, 574 F.3d 527 (8th Cir. 2009) (remarking that substantial similarity analysis between two cases "focuses on matters as they currently exist, not as they could be modified."); *Baskin v. Bath Twp. Bd. of Zoning Appeals*, 15 F.3d 569, 571–72 (6th Cir. 1994) (emphasis in original) (quoting *Crawley v. Hamilton County Com'rs*, 744 F.2d 28, 32 (6th Cir. 1984)) (noting that while one case "could be modified so as to make it identical to the current federal claim, that is not the issue here. The issue is whether [that case], as it currently exists, is a parallel" proceeding), *limited on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 710–11 (1996). If this Court were to invoke the first to file rule, it would be because the two cases are duplicative. At present, they are not.

IV. CONCLUSION

The first to file rule allows a court to exercise its discretion to dismiss or stay the second of two

duplicative actions proceeding simultaneously. Because *Wood* is a Michigan-only collective action, while this case brings nationwide claims, the Court holds that they are not duplicative. Therefore, the Court will retain jurisdiction over this case, rather than require the non-Michigan plaintiffs to proceed individually. Accordingly, the Court **DENIES** Defendant's Motion to Dismiss or Stay.

Upon the foregoing,

IT IS ORDERED that Defendant's Motion to Dismiss or Stay is **DENIED**.

DATED this 5th day of March, 2019.

/s/ John A. Jarvey
JOHN A. JARVEY, Chief Judge
UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBYN MORGAN, on behalf of herself and all similarly situated individuals, Plaintiff, vs. SUNDANCE, INC., Defendant.	Case No.: 4:18-cv-00316-JAJ-HCA

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT

(Filed Mar. 19, 2019)

Defendant Sundance, Inc. ("Sundance" or "Defendant"), by and through the undersigned attorneys, hereby respectfully submits its Answer and Affirmative Defenses to Plaintiff Robyn Morgan's ("Plaintiff") Complaint as follows:

INTRODUCTION

1. This is an overtime and wage theft case under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. Plaintiff is an adult residing and working within this judicial district and – during the relevant time – worked as an hourly employee for Defendant Sundance, Inc. ("Sundance"), a company that owns well over 150 Taco Bell franchises throughout the United States.

ANSWER: Defendant admits that this case is a purported collective action brought under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. ("FLSA") and admits that the Complaint purports to bring claims for Defendant's failure to pay Plaintiff proper wages. Defendant further admits that it owns over 150 Taco Bell franchise restaurants in multiple states. Defendant denies that any acts or omissions giving rise to a cause of action have occurred, and denies that Plaintiff or any alleged similarly situated employees are entitled to recover any relief under the FLSA. Defendant further denies that this action is properly maintained on behalf of any alleged similarly situated employees.

2. Plaintiff Robyn Morgan is a current resident of the City of Seligman, County of Barry, State of Missouri.

ANSWER: Defendant lacks sufficient knowledge or information to form a belief as to the truth of the allegation contained in Paragraph 2 of Plaintiff's Complaint and, therefore, denies same.

3. Robyn Morgan was employed by Sundance from approximately August 2015 to October 2015. She worked as a Crew Member throughout her employment with Sundance in the Osceola, Iowa restaurant.

ANSWER: Defendant admits that Plaintiff was employed by Defendant from August 20, 2015 to November 12, 2015 and had been assigned to Defendant's store located in Osceola, Iowa. Defendant further admits that Plaintiff was employed as a Crew Member during her employment with Defendant. Defendant

denies all remaining allegations contained in Paragraph 3 of Plaintiff's Complaint.

4. Defendant Sundance, Inc. is a for-profit corporation incorporated in Brighton, Michigan and with locations throughout the State of Iowa.

ANSWER: Defendant admits the allegations contained in Paragraph 4 of Plaintiff's Complaint.

5. The acts about which Plaintiff complains occurred in Clarke County, Iowa.

ANSWER: Defendant admits that Plaintiff was employed by Defendant in Clarke County, Iowa. Defendant denies all remaining allegations contained in Paragraph 5 of Plaintiff's Complaint.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction over Plaintiff's FLSA claims pursuant to 28 U.S.C. § 1331 because Plaintiff's claims raise a federal question under 29 U.S.C. § 201, *et seq*.

ANSWER: Defendant admits that this Court has subject-matter jurisdiction.

7. Additionally, this Court has jurisdiction over Plaintiff's FLSA claims pursuant to 29 U.S.C. § 216(b), which provides that suit under the FLSA "may be maintained against any employer . . . in any Federal or State court of competent jurisdiction."

ANSWER: Defendant admits that this Court has subject-matter jurisdiction.

8. Defendant's annual sales exceed $500,000, and Defendant employs more than two persons, so the FLSA applies in this case on an enterprise basis. Defendant's employees engage in interstate commerce; therefore, they are also covered by the FLSA on an individual basis.

ANSWER: Paragraph 8 of Plaintiff's Complaint constitutes a legal conclusion to which Defendant is not required to respond. To the extent a response is required, Defendant admits that the FLSA applies to Defendant, but denies that any acts or omissions giving rise to a cause of action have occurred, and denies that Plaintiff or any other present or former employees are entitled to recover any relief.

9. At all relevant times, Defendant owned and operated a business enterprise engaged in interstate commerce utilizing goods moved in interstate commerce as defined in 29 U.S.C. § 203(s).

ANSWER: Defendant admits the allegations contained in Paragraph 9 of Plaintiff's Complaint.

10. Defendant's various franchise locations constitute an "enterprise" within the meaning of 29 U.S.C. § 203(r)(1), because they perform related activities, either through a unified operation or through common control for a common business purpose.

ANSWER: Paragraph 10 of Plaintiff's Complaint constitutes a legal conclusion to which Defendant is

not required to respond. To the extent a response is required, Defendant denies the allegations contained in Paragraph 10 of Plaintiff's Complaint.

11. Defendant provides mutually supportive services to the substantial advantage of each entity and each are therefore operationally interdependent and may be treated as single "enterprise."

ANSWER: Paragraph 11 of Plaintiff's Complaint constitutes a legal conclusion to which Defendant is not required to respond. To the extent a response is required, Defendant denies the allegations contained in Paragraph 11 of Plaintiff's Complaint.

12. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because the actions and omissions giving rise to the claims in this Complaint substantially occurred in this District.

ANSWER: Defendant denies the allegations contained in Paragraph 12 of Plaintiff's Complaint.

13. This Court has personal jurisdiction over Defendant because Defendant operates a restaurant in Osceola, Iowa and otherwise conducts business within the state of Iowa.

ANSWER: Defendant admits the allegations contained in Paragraph 13 of Plaintiff's Complaint.

FACTUAL BACKGROUND

14. Plaintiff brings this action pursuant to 29 U.S.C. § 216(b) of the FLSA for her subjection to

Sundance's improper wage and hour practices scheme at any time during the last three years.

ANSWER: Defendant denies the allegations contained in Paragraph 14 of Plaintiff's Complaint.

15. At various points within the past three years, Plaintiff has experienced the following: a) Sundance's failure to pay her for all hours worked; and b) Sundance's failure to pay overtime wages for all hours worked over 40, when legally required to do so.

ANSWER: Defendant denies the allegations contained in Paragraph 15 of Plaintiff's Complaint.

16. Sundance knew or should have known the business model it developed and implemented was unlawful under applicable laws. Nonetheless, Sundance continued to willfully engage in the violations described herein.

ANSWER: Defendant denies the allegations contained in Paragraph 16 of Plaintiff's Complaint.

17. Sundance's hourly employees, including but not limited to Crew Members, are not paid for all hours worked. In fact, Sundance engages in a practice in which it "shifts" hours that an employee works during one week over to the following week, so that an employee's time records do not demonstrate that the employee worked over 40 hours in a given work week. Sundance maintains a white board in its office on which it keeps track of its employees' "shifted hours" from week to week.

ANSWER: Defendant denies the allegations contained in Paragraph 17 of Plaintiff's Complaint.

18. By shifting its employees' hours, Sundance a) does not pay its employees for all hours worked in a given work week; and b) does not pay overtime wages for hours worked over 40 in a given work week.

ANSWER: Defendant denies the allegations contained in Paragraph 18 of Plaintiff's Complaint.

19. In addition, some employees simply were not paid at all for their "shifted over" hours.

ANSWER: Defendant denies the allegations contained in Paragraph 19 of Plaintiff's Complaint.

20. With regard to hourly employees that regularly work over 40 hours each work week, Sundance does not engage in the "shifting" exercise; it simply does not pay such employees for all hours worked and caps their paychecks at 80 hours per two week pay period. Again, by doing so, Sundance a) does not pay its employees for all hours worked in a given work week; and b) does not pay overtime wages for hours worked over 40 in a given work week.

ANSWER: Defendant denies the allegations contained in Paragraph 20 of Plaintiff's Complaint.

21. In addition, hourly workers were regularly instructed to clock out and continue working off the clock, in order for each store to maintain its Sundance-imposed labor metrics.

ANSWER: Defendant denies the allegations contained in Paragraph 21 of Plaintiff's Complaint.

22. Throughout the course of her employment, Plaintiff was directed by Sundance and its agents to perform work, was allowed to work, and did work one or more weeks in excess of forty (40) hours.

ANSWER: Defendant denies the allegations contained in Paragraph 22 of Plaintiff's Complaint.

23. The provisions of the FLSA, 29 U.S.C. § 207, require Sundance to compensate nonexempt employees who work in excess of forty (40) hours in a workweek at a rate of one and one-half times their regular rate of pay.

ANSWER: Paragraph 23 of Plaintiff's Complaint constitutes a legal conclusion to which Defendant is not required to respond. To the extent a response is required, Defendant states that the provisions of 29 U.S.C. § 207 speak for themselves.

24. Contrary to the above statutory enactment, Sundance adopted a policy and practice of failing to pay Plaintiff and all similarly situated individuals an overtime wage at a rate of one and one-half times their regular rate for hours worked in excess of forty (40) hours during a workweek. It further adopted a policy and practice of, by clocking out Plaintiff yet requiring her to continue to work, and failing to pay Plaintiff and all similarly situated individuals their regular hourly rate for hours worked under 40 in a workweek.

ANSWER: Defendant denies the allegations contained in Paragraph 24 of Plaintiff's Complaint.

25. Sundance willfully violated the FLSA by knowingly failing to compensate Plaintiff for overtime wages for the hours she worked in excess of forty (40) hours per week, and failing to compensate Plaintiff her regular hourly rate for all hours worked under 40.

ANSWER: Defendant denies the allegations contained in Paragraph 25 of Plaintiff's Complaint.

NATIONWIDE COLLECTIVE ACTION

26. Plaintiff brings this case on behalf of herself and all other Crew Members and other hourly employees who have worked for Sundance at any time between three years before the commencement of this action and the date of final judgment in this matter.

ANSWER: Defendant admits that Plaintiff purports to bring this case as a collective action with respect to Crew Members and other hourly employees who have worked for Sundance. Defendant denies that any acts or omissions giving rise to a cause of action have occurred, and denies that Plaintiff or any alleged similarly situated employees are entitled to recover any relief under the FLSA. Defendant further denies that this action is properly maintained on behalf of any alleged similarly situated employees.

27. Plaintiff brings this complaint under 29 U. S.C. § 216(b) of the FLSA. Plaintiff, her fellow Crew Members, and other hourly employees are similarly

situated in that they are all subject to Sundance's common plan or practice failing to pay them for all hours worked and/or of failing to pay them proper overtime wages.

ANSWER: Defendant denies the allegations contained in Paragraph 27 of Plaintiff's Complaint.

COUNT I
VIOLATION OF THE FAIR LABOR STANDARDS ACT, 29 U.S.C. § 201, et seq.
FAILURE TO PAY OVERTIME WAGES AND FAILURE TO PAY MINIMUM WAGE

28. Plaintiff re-alleges and incorporates all previous paragraphs herein.

ANSWER: Defendant hereby incorporates its answers to the preceding paragraphs as though fully set forth herein.

29. At all times relevant to this action, Sundance was an "employer" under the FLSA, 29 U.S.C. § 203(d), subject to the provisions of 29 U.S.C. § 201, *et seq*.

ANSWER: Defendant admits the allegations contained in Paragraph 29 of Plaintiff's Complaint.

30. At all times relevant to this action, Plaintiff and those similarly situated were "employees" of Sundance within the meaning of the FLSA, 29 U.S.C. § 203(e)(1).

ANSWER: Defendant admits the allegations contained in Paragraph 30 of Plaintiff's Complaint.

31. At all times relevant to this action, Sundance "suffered or permitted" Plaintiff and those similarly situated to work and thus "employed" them within the meaning of the FLSA, 29 U.S.C. § 203(g).

ANSWER: Defendant admits the allegations contained in Paragraph 31 of Plaintiff's Complaint.

32. At all times relevant to this action, Sundance failed to pay Plaintiff and those similarly situated the federally mandated wages and overtime compensation for all services performed. Specifically, Sundance failed to pay Plaintiff and those similarly situated regular wages for all hours worked under 40 in a work week and failed to pay them overtime wages – or any wages at all – for all hours worked in excess of forty (40) hours per week.

ANSWER: Defendant denies the allegations contained in Paragraph 32 of Plaintiff's Complaint.

33. The FLSA requires an employer to pay employees the federally mandated overtime premium rate of one and a half times their regular rate of pay for every hour worked in excess of forty (40) hours per workweek. 29 U.S.C. §207.

ANSWER: Paragraph 33 of Plaintiff's Complaint constitutes a legal conclusion to which Defendant is not required to respond. To the extent a response is required, Defendant states that the provisions of 29 U.S.C. § 207 speak for themselves.

34. In addition, Sundance is subject to the minimum wage requirements of the FLSA.

ANSWER: Defendant admits that it is subject to the FLSA's minimum wage requirements with respect to eligible non-exempt employees. Defendant denies all remaining allegations contained in Paragraph 34 of Plaintiff's Complaint.

35. Sundance violated the FLSA by failing to pay Plaintiff and those similarly situated the federally mandated overtime premium for all hours worked in excess of forty (40) hours per workweek.

ANSWER: Defendant denies the allegations contained in Paragraph 35 of Plaintiff's Complaint.

36. Sundance also violated the FLSA by failing to pay Plaintiff and those similarly situated all minimum wages due to them.

ANSWER: Defendant denies the allegations contained in Paragraph 36 of Plaintiff's Complaint.

37. Sundance's violations of the FLSA were knowing and willful.

ANSWER: Defendant denies the allegations contained in Paragraph 37 of Plaintiff's Complaint.

38. By failing to compensate Plaintiff and those similarly situated at a rate not less than one and one-half times their regular rate of pay for work performed in excess of forty hours in a workweek, Sundance has violated the FLSA, 29 U.S.C. § 201, *et seq*., including 29 U.S.C. §§ 207(a)(1) and 215(a).

ANSWER: Defendant denies the allegations contained in Paragraph 38 of Plaintiff's Complaint.

39. The FLSA, 29 U.S.C. 216(b), provides that as a remedy for a violation of the Act, Plaintiff and those similarly situated are entitled to damages equal to the mandated minimum wage and overtime premium pay within three years preceding their filing of this Complaint plus an additional equal amount in liquidated damages, costs, and reasonable attorneys' fees.

ANSWER: Paragraph 39 of Plaintiff's Complaint constitutes a legal conclusion to which Defendant is not required to respond. To the extent a response is required, Defendant states that the provisions of 29 U.S.C. § 216(b) speak for themselves.

40. Plaintiff and those similarly situated seek damages in the amount of their respective unpaid wages, overtime wages, liquidated damages as provided by 29 U.S.C. §216(b), interest, attorneys' fees, and such other legal and equitable relief as the Court deems proper.

ANSWER: Defendant admits that Plaintiff's Complaint purports to seek damages in the amount of Plaintiff's and other purported similarly situated employees' alleged unpaid overtime wages, liquidated damages as provided by 29 U.S.C. §216(b), interest, attorneys' fees, and such other legal and equitable relief as the Court deems proper. Defendant denies that any acts or omissions giving rise to a cause of action have occurred, and denies that Plaintiff or any alleged similarly situated employees are entitled to recover any relief under the FLSA.

41. Plaintiff and all other similarly situated hourly employees, as described above, who opt into this litigation are entitled to compensation for all regular hours worked, overtime hours worked, liquidated damages, attorneys' fees and court costs.

ANSWER: Defendant denies the allegations contained in Paragraph 41 of Plaintiff's Complaint.

42. WHEREFORE, Plaintiff seeks the following:

A. Certification of the described class under the FLSA;

ANSWER: Defendant denies that this action should be certified as a collective action.

B. An award of overtime wages under the FLSA;

ANSWER: Defendant denies that Plaintiff or any alleged similarly situated employees are entitled to recover any relief requested in sub-paragraph B of the Prayer for Relief.

C. An award of unpaid regular wages under the FLSA;

ANSWER: Defendant denies that Plaintiff or any alleged similarly situated employees are entitled to recover any relief requested in sub-paragraph C of the Prayer for Relief.

D. An award of liquidated damages under the FLSA;

ANSWER: Defendant denies that Plaintiff or any alleged similarly situated employees are entitled to recover any relief requested in sub-paragraph D of the Prayer for Relief.

E. A declaratory judgment that the practices complained of are unlawful under the FLSA;

ANSWER: Defendant denies that Plaintiff or any alleged similarly situated employees are entitled to recover any relief requested in sub-paragraph E of the Prayer for Relief.

F. Interest and costs;

ANSWER: Defendant denies that Plaintiff or any alleged similarly situated employees are entitled to recover any relief requested in sub-paragraph F of the Prayer for Relief.

G. Attorneys' fees under the FLSA; and

ANSWER: Defendant denies that Plaintiff or any alleged similarly situated employees are entitled to recover any relief requested in sub-paragraph G of the Prayer for Relief.

H. Such other relief as in law or equity may pertain.

ANSWER: Defendant denies that Plaintiff or any alleged similarly situated employees are entitled to recover any relief requested in sub-paragraph H of the Prayer for Relief.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

2. Plaintiff's claims, in whole or in part, are barred by the doctrines of laches, estoppel, or waiver.

3. Plaintiff's claims are barred, in whole or in part, by the limitations periods applicable under the FLSA.

4. Plaintiff's claims are barred, in whole or in part, to the extent that they exceed the one hundred and eighty day limitations period agreed to by Plaintiff at the commencement of her employment with Defendant.

5. Plaintiff's and any alleged similarly situated employees' claims are barred to the extent they exceed the two-year statute of limitations set forth in Section 6(a) of the Portal-to-Portal Act, 29 U.S.C. § 255(a), and Defendant's conduct at all times was not willful.

6. Plaintiff's and any alleged similarly situated employees' claims are barred to the extent they exceed the three-year statute of limitations set forth in Section 6(a) of the Portal-to-Portal Act, 29 U.S.C. § 255(a).

7. Plaintiff's and any alleged similarly situated employees' claims are barred in whole or in part by the provisions of Section 11 of the Portal-to-Portal Act, 29 U.S.C. § 260, because any acts or omissions

giving rise to this action were done in good faith and with reasonable grounds for believing that the acts or omissions were not a violation of the FLSA.

8. Plaintiff's claims for liquidated damages are barred because the Defendant at all times had a good faith, reasonable belief that its actions were in conformity with the law.

9. Plaintiff's claims are barred, in whole or in part, by statutory exclusions, exemptions, or credits under Section 7 of the FLSA.

10. Plaintiff's claims are barred in whole or in part because the work alleged to be unpaid is not compensable time under applicable law, including because it was preliminary, postliminary, or *de minimis*.

11. Defendant had no knowledge of, nor should it have had knowledge of, any alleged uncompensated overtime work or any violation of the FLSA by Plaintiff or any persons allegedly "similarly situated" to them, and Defendant did not authorize, require, request, suffer or permit such activity by Plaintiff or any persons allegedly "similarly situated" to them.

12. Plaintiff's and any alleged similarly situated employees' claims are barred in whole or in part by the doctrines of estoppel and unclean hands to the extent that Plaintiff's and any alleged similarly situated employees' own conduct resulted in them not being paid for all hours worked or otherwise compensated in accordance with the FLSA.

13. Plaintiff cannot satisfy the requirements to maintain a collective action under the FLSA.

14. Plaintiff's claims are barred, in whole or in part, because Defendant exercised reasonable care and diligence to comply with the provisions of the FLSA by promulgating and implementing policies to comply with federal wage and hour laws and investigated and took prompt and appropriate remedial action upon notice of any alleged nonpayment of wages. Further, Plaintiff unreasonably failed to take advantage of the opportunities provided by Defendant to report, prevent, correct, or avoid the alleged nonpayment of wages. For this reason, Defendant did not know any wages were due Plaintiff, should not have known, and did not acquiesce in any alleged non-payment of wages. To the extent any such conduct was brought to Defendant's attention, it took immediate and appropriate corrective action.

Defendant expressly reserves the right to seasonably amend this Answer and to assert additional affirmative defenses upon further investigation and discovery in this matter.

WHEREFORE, Defendant respectfully requests that the Court dismiss Plaintiff's Collective Action Complaint with prejudice, award Defendant its reasonable costs and attorneys' fees, and provide Defendant with such other relief as the Court deems just and equitable.

Dated: March 19, 2019

Respectfully submitted,

/s/ Joel W. Rice
Joel W. Rice (pro hac vice)
Scott C. Fanning (pro hac vice)
Fisher & Phillips, LLP
10 S. Wacker Dr., Ste. 3450
Chicago, IL 60606
(312) 346-8061

Kevin J. Driscoll
Finley Law Firm, P.C.
699 Walnut Street, Suite 1700
Des Moines, IA 50309
Telephone: (515) 288-0145
E-Mail: kdriscoll@finleylaw.com

Attorneys for Sundance, Inc.

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ROBYN MORGAN, on behalf of herself and all similarly situated individuals, Plaintiff, vs. SUNDANCE, INC., Defendant.	Case No.: 4:18-cv-00316-JAJ-HCA

DEFENDANT'S MOTION TO COMPEL INDIVIDUAL ARBITRATION AND DISMISS PLAINTIFF'S COMPLAINT

(Filed May 3, 2019)

Defendant Sundance, Inc. ("Defendant" or "Sundance"), by and through its attorneys, Joel W. Rice and Scott C. Fanning of FISHER & PHILLIPS LLP, respectfully moves this Court pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 3,4, for an order compelling individual arbitration for all claims in Plaintiff Robyn Morgan's ("Plaintiff") Complaint ("Complaint") and dismissing Plaintiff's Complaint; or, in the alternative, staying the underlying proceedings pending the outcome of the arbitration.

This Motion is made pursuant to the FAA, which requires parties to arbitrate claims in accordance with their arbitration agreements. This Motion is based on

the law, the supporting Memorandum filed with this motion, the exhibits, the declarations, and any Reply Memorandum that Defendant may file, and any oral argument the Court may allow at any hearing on this Motion.

Dated: May 3, 2019

Respectfully submitted:
/s/ Joel W. Rice
Joel W. Rice (pro hac vice)
Scott C. Fanning (pro hac vice)
Fisher & Phillips, LLP
10 S. Wacker Dr., Ste. 3450
Chicago, IL 60606
(312) 346-8061

Kevin J. Driscoll
Finley Law Firm, P.C.
699 Walnut Street, Suite 1700
Des Moines, IA 50309
Telephone: (515) 288-0145
E-Mail: kdriscoll@finleylaw.com
Attorneys for Sundance, Inc.

[Certificate Of Service Omitted In Printing]

EXHIBIT A

AGREEMENT (Please read, sign and date below)

Throughout this application, the term "Company" or "Taco Bell" refers to the entity reviewing your application and making any hiring decisions.

Nature of my Employment. If I am hired by Taco Bell, I agree that I will be an at-will employee, which means that either I or Taco Bell may end my employment at any time, with or without cause or notice. I agree that no written materials or verbal statements by Taco Bell will constitute an expressed or implied contract of continued employment and that this at-will relationship can only be modified in writing by Taco Bell's President. I agree that, if hired, I will obey Taco Bell's rules, including treating confidentially any information I learn during my employment.

My Participation in Taco Bell's Drug Free Environment. I am not a current user of illegal drugs, and I agree I will never work under the influence of drugs or alcohol.

Agreement to Arbitrate. Because of the delay and expense of the court systems, Taco Bell and I agree to use confidential binding arbitration, instead of going to court, for any claims that arise between me and Taco Bell, its related companies, and/or their current or former employees. Without limitation, such claims would include any concerning compensation, employment (including, but not limited to, any claims concerning sexual harassment or discrimination), or termination

of employment. Before arbitration, I agree: (i) first to present any such claims in full written detail to Taco Bell; (ii) next, to complete any Taco Bell internal review process; and (iii) finally, to complete any external administrative remedy (such as with the Equal Employment Opportunity Commission or National Labor Relations Board). In any arbitration, the then prevailing employment dispute resolution rules of the American Arbitration Association will apply, except that Taco Bell will pay the arbitrator's fees, and Taco Bell will pay that portion of the arbitration filing fee in excess of the similar court filing fee had I gone to court.

APPLICANT'S SIGNATURE: *ROBYN MORGAN*

DATE: 08/20/2015