UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DANIEL OMIATEK, on behalf of himself and all others similarly situated,

Plaintiff, **09-CV-0352S(Sr)**

v.

BIG LOTS INC.,

Defendant.

REPORT, RECOMMENDATION AND ORDER

This case was referred to the undersigned by the Hon. William M. Skretny, pursuant to 28 U.S.C. § 636(b)(1), for all pretrial matters and to hear and report upon dispositive motions. Dkt. #12.

Plaintiff brought this action on behalf of himself and all others similarly situated seeking to recover unpaid overtime compensation for violations of the federal Fair Labor Standards Act ("FLSA"), specifically, 29 U.S.C. § 207(a), and New York State Labor Law and regulations, specifically, 12 N.Y.C.R.R. § 142-2.2. Currently before the Court is plaintiff's motion for conditional certification of his FLSA claim as a collective action pursuant to 29 U.S.C. § 216(b), and for certification of his state Labor Law claims as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Dkt. #28. For the following reasons, it is recommended that plaintiff's motion be denied in all respects.

BACKGROUND

Defendant, Big Lots, Inc., operates a chain of retail stores offering various categories of "closeout" merchandise at more than 1,300 stores nationwide, including 45

stores in New York State. Dk. #1, ¶¶ 7, 13. Plaintiff was employed by defendant from July 2003 through October 2007. *Id.* at ¶ 6. He last worked for defendant as an Assistant Store Manager ("ASM") at the Big Lots store in Niagara Falls, New York. He alleges in his complaint that Big Lots employs a significant number of persons "nominally classified" as ASMs even though their job duties "in fact involve almost exclusively the unpacking and stocking of merchandise and arrangement of goods for display in defendant's stores." *Id.* at ¶¶ 14, 16. Plaintiff claims that he and other ASMs employed by defendant regularly worked in excess of 40 hours per week without receiving overtime compensation, in violation of the FLSA and New York Labor Law. *Id.* at ¶¶ 3, 15, 21.

More specifically, in his first cause of action plaintiff claims that defendant's practice of failing to pay "non-exempt"[1] employees for overtime violates Section 207(a) of the FLSA, which generally requires an employer to pay an employee one and one-half the employee's regular rate of pay if the employee works more than forty hours in a workweek. *See* 29 U.S.C. § 207(a)(1); Dkt. #1, ¶ 36. Plaintiff seeks to prosecute this claim as a "collective action" in accordance with FLSA § 216(b), which allows a cause of action for an alleged violation of Section 207(a) to be brought "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b); *see* Dkt. #1, ¶¶ 35-39. In the complaint, plaintiff defines the "FLSA Class of similarly situated plaintiffs" as:

> All similarly situated employees, current and former, of defendant in the United States . . . for the three-year period preceding the filing of this action.

[1] Under Section 213(a)(1) of the FLSA, "any employee employed in a bona fide executive, administrative, or professional capacity . . ." is exempt from the minimum wage and maximum hour requirements of Section 207(a). 29 U.S.C. § 213(a)(1).

Dkt. #1, ¶ 34.

In his second cause of action, plaintiff claims that defendant's failure to pay overtime to employees classified as ASMs also violates New York State Labor Law–specifically, Section 142-2.2 of the New York State Department of Labor regulations, which provides that "[a]n employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of" Sections 207 and 213 of the FLSA. 12 N.Y.C.R.R. § 142-2.2; Dkt. #1, ¶¶ 41-45. Plaintiff's third cause of action is for disgorgement of unjust enrichment resulting from the failure to pay overtime wages to plaintiff and the "Rule 23 Class," defined in the complaint as:

> All assistant store managers, regardless of precise title, employed by defendant in the State of New York during the six years preceding the filing of this Class Action Complaint.

Dkt. #1, ¶¶ 17, 47.

In lieu of answering the complaint, defendant moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) on the ground that the allegations in plaintiff's collective and class action claims are virtually identical to the claims asserted in a case brought in the United States District Court for the Eastern District of Louisiana in which District Judge Sarah S. Vance determined, after a seven-day bench trial, that the question of whether Big Lots' ASMs are properly classified for overtime purposes was not suitable for adjudication as a nationwide collective action because of the "significant diversity among plaintiffs in terms of their job experiences." *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 588 (E.D. La. 2008) (Vance, D.J). *See* Dkt. #6, pp. 6, 9-11. In a Report and Recommendation entered on January 4, 2010, this Court determined that it would be inappropriate to rely

upon the *Johnson* court's factual findings to resolve the issues raised by the pleadings in this action, and that the question whether plaintiff will be able to support the plausible allegations in the complaint with sufficient evidence to demonstrate that ASMs statewide are similarly situated to plaintiff is "most appropriately resolved in the context of a motion to conditionally certify a collective action rather than a motion to dismiss." Dkt. #18, p. 6. Accordingly, it was recommended that the District Judge deny defendant's motion.

Shortly thereafter, on January 21, 2010, this Court entered as an order a stipulation signed by counsel setting forth the parties' agreed upon "proposed schedule for filing of an amended complaint and briefing on class certification that would eliminate the need for any objections" to the report and recommendation. Dkt. #20. Pursuant to this stipulation and order, plaintiff agreed to file an amended complaint on or before March 1, 2010, "asserting claims on behalf of putative classes pursuant to Fed. R. Civ. P. 23 and 29 U.S.C. § 216(b) composed only of employees of defendant who worked within the State of New York . . . ," and further agreed to file his motion for class certification on or before April 30, 2010, with a schedule for response and reply. *Id.*

On February 4, 2010, no objections having been filed, the District Judge accepted this Court's recommendation and denied defendant's motion for judgment on the pleadings. *See* Dkt. #21.

On March 1, 2010, instead of an amended complaint, plaintiff filed the present motion seeking an order certifying his FLSA claim as a collective action, and his New York Labor Law claims as a class action pursuant to Rule 23. Dkt. #28. In his supporting brief, plaintiff redefines the putative Rule 23 class as follows:

> All persons employed by Big Lots as assistant store managers (regardless of precise title) in the State of New York whom Big Lots classified as exempt from the overtime requirements of the [New York Labor Law] at any time between April 15, 2003 and the date of final judgment in this matter.

Dkt. #29, p. 8.

Plaintiff submits his own declaration (Dkt. #32), along with the declarations of former area Big Lots Store Managers Barbara Crane (Dkt. #31) and Steve Casselman (Dkt. #33), in support of his contention that during the proposed class period Big Lots' ASMs regularly worked more than forty hours per week, and often worked as many as sixty or sixty-five hours per week, without being compensated for overtime. Instead, they were paid based on their annual salary, which was not keyed to the number of hours worked. According to plaintiff (and declarants Crane and Casselman), it is Big Lots' company policy that no overtime compensation is to be paid to hourly workers. Those workers are sent home once they have worked forty hours in a week, leaving ASMs to perform such non-managerial duties as unloading trucks, stocking shelves, unpacking boxes, arranging merchandise, cleaning the stores, fetching shopping carts, and working as cashiers. *See* Dkt. #29, pp. 3-4. Plaintiff contends that these duties are performed by ASMs at Big Lots stores statewide, often taking up the greater portion of the working day. In addition, ASMs are subject to supervision by Store Managers and other higher level managers, and have little or no actual managerial or decision-making responsibility with regard to employment, merchandising, or other business operations. According to plaintiff, these factual allegations are sufficient to support his claim that ASMs were intentionally misclassified by defendant as exempt from the federal and state overtime compensation requirements for the purpose of preliminary certification of this case as a collective action under FLSA

§§ 207 and 213, and/or a class action under Fed. R. Civ. P. 23 and the New York Labor Law and implementing regulations.

Following the filing of plaintiff's motion for class certification, defendant took the depositions of plaintiff and declarants Barbara Crane and Steve Casselman. Defendant then responded to the class certification motion in accordance with the agreed upon schedule, submitting the declarations of several Big Lots employees currently working as ASMs at stores in various locations throughout New York State. Based upon the matters set forth in these declarations, and in the deposition testimony, defendant contends that plaintiff has failed to make either the "modest" showing that he is "similarly situated" to all other New York ASMs required for conditional certification of plaintiff's FLSA claim as a collective action, or the more stringent showing required to certify plaintiff's state Labor Law and unjust enrichment claims as a class action pursuant to Rule 23.

DISCUSSION AND ANALYSIS

As recently recognized by the Second Circuit, "most FLSA plaintiffs . . . contend that *both* the FLSA *and* a provision of state law *independently* guarantee them overtime pay." *Myers v. Hertz Corp.*, 624 F.3d 537, 545 (2d Cir. 2010) (emphasis in original). Thus, notwithstanding the similarity of the relief available for violations of the overtime compensation provisions of the FLSA and the New York Labor Law regulations, *see id.* at 646 (claim for overtime pay under New York Labor Law "is entirely coextensive with, and derivative of" FLSA claim), the courts have generally deemed it appropriate to consider a plaintiff's request for certification of the FLSA claim as a collective action pursuant to 29 U.S.C. § 216(b) separately from a request for certification of the state law claim as a class

action under Fed. R. Civ. P. 23. *See, e.g., Lee v. ABC Carpet & Home*, 236 F.R.D. 193 (S.D.N.Y. 2006); *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381 (W.D.N.Y. 2005).

The Court turns first to plaintiff's request for certification of his FLSA claim.

Certification of a Collective Action Under the Fair Labor Standards Act

The FLSA was enacted in 1938 to "eliminate low wages and long hours, . . . to guarantee compensation for all work or employment engaged in by employees covered by the Act, . . . and to eradicate 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.' " *Hens v. ClientLogic Operating Corp.*, 2006 WL 2795620, at *3 (W.D.N.Y. Sept. 26, 2006) (quoting 29 U.S.C. § 202(a)) (citations and modifications omitted); *see also In re Novartis Wage and Hour Litigation*, 611 F.3d 141, 150 (2d Cir. 2010), *petition for cert. filed*, 79 U.S.L.W 3246 (Oct. 4, 2010) (No. 10-460). To enforce its provisions, Section 216(b) of the FLSA provides employees with a private right of action to recover "the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and . . . an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). The action "may be maintained against any employer . . . 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." *Id.* The statute also requires that an employee wishing to become a party plaintiff must "consent in writing to become such a party" and must file the written consent with the court in which the action is brought. *Id.*

> This section, which was enacted prior to Rule 23, thus provides something akin to a class action. A so-called "collective action" under the FLSA differs from a Rule 23 action in some respects, however. First, it provides for an "opt in" class, whereas a judgment in a class action binds all class members unless they previously opted out. Second, the FLSA simply requires that the employees be "similarly situated." The other factors required in class actions-numerosity, typicality, etc.–do not apply to collective actions.

Scholtisek, 229 F.R.D. at 386 (citations and footnote omitted).

To determine whether a lawsuit should proceed as a collective action, courts generally employ a two-step process. In the first step, the court reviews the facts set forth in the pleadings, affidavits, and/or declarations to determine whether the proposed "opt-in"class members are "similarly situated." *Scholtisek*, 229 F.R.D. at 387. If the court finds that the plaintiff's showing meets this minimal burden, the court will ordinarily "conditionally certify" the collective action. *Id.* (citing *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995)). Putative class members are given notice and the opportunity to "opt in," and the action proceeds as a representative action throughout discovery. *Id.*; *see also Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169-70 (1989) (district courts have discretion, in appropriate cases, to facilitate notice to putative class members so that they may opt in as a party plaintiff).

The second step occurs after discovery, at which point the court is called upon–typically by a motion for decertification–to examine the record and make a further factual finding regarding the similarly situated requirement. *Id.*; *see also Mooney*, 54 F.3d at 1214. "[I]f the claimants are similarly situated, the collective action proceeds to trial, and if they are not, the class is decertified, the claims of the opt-in plaintiffs are dismissed without prejudice, and the class representative may proceed on his or her own claims."

Lee v. ABC Carpet & Home, 236 F.R.D. 193, 197 (S.D.N.Y. 2006); *see also Myers v. Hertz Corp.*, 624 F.3d 537, 554-55 (2d Cir. 2010) (finding the two-step method to be a "sensible" way for district courts to determine whether to exercise discretion to facilitate opt-in notice).

As noted by the Second Circuit in *Myers*:

> [W]hile courts speak of "certifying" a FLSA collective action, it is important to stress that the "certification" we refer to here is only the district court's exercise of the discretionary power, upheld in *Hoffmann-La Roche*, to facilitate the sending of notice to potential class members. Section 216(b) does not by its terms require any such device, and nothing in the text of the statute prevents plaintiffs from opting in to the action by filing consents with the district court, even when the notice described in *Hoffmann-La Roche* has not been sent, so long as such plaintiffs are "similarly situated" to the named individual plaintiff who brought the action. Thus "certification" is neither necessary nor sufficient for the existence of a representative action under FLSA, but may be a useful "case management" tool for district courts to employ in "appropriate cases."

Myers, 624 F.3d at 555 n. 10 (citations and quotations omitted).

At the initial stage of the "certification" process, the plaintiff is required to make only a "modest factual showing sufficient to demonstrate that [he] and potential plaintiffs together were victims of a common policy or plan that violated the law." *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997). The plaintiff's burden in this regard is minimal, "because the determination that the parties are similarly situated is merely a preliminary one." *Lee*, 236 F.R.D. at 197; *see also Jackson v. New York Telephone Co.*, 163 F.R.D. 429, 431 (S.D.N.Y.1995) (at the preliminary notice stage, "plaintiffs are only required to demonstrate a factual nexus that supports a finding that potential plaintiffs were subjected to a common discriminatory scheme"). While some courts have deemed it appropriate to find plaintiffs and potential plaintiffs similarly situated based simply on a plaintiff's "substantial allegations" of a common scheme, *see Damassia v. Duane Reade,*

Inc., 2006 WL 2853971, at *3 (S.D.N.Y. Oct. 5, 2006) (citing cases), most have required the plaintiff to come forward with "actual evidence of a factual nexus between his situation and those that he claims are similarly situated rather than mere conclusory allegations." *Prizmic v. Armour, Inc.*, 2006 WL 1662614, at *2 (E.D.N.Y. June 12, 2006) (citing cases); *see also Smith v. Sovereign Bancorp, Inc.*, 2003 WL 22701017, at *2 (E.D.Pa. Nov. 13, 2003) (conditional certification based solely on allegations in complaint "is, at best, an inefficient and overbroad application of the opt-in system, and at worst it places a substantial and expensive burden on a defendant to provide names and addresses of thousands of employees who would clearly be established as outside the class if the plaintiff were to conduct even minimal class-related discovery.").

In *Myers*, the Second Circuit expressly adopted the "modest showing" approach:

> In a FLSA exemption case, plaintiffs accomplish this by making some showing that there are other employees who are similarly situated with respect to their job requirements and with regard to their pay provisions, on which the criteria for many FLSA exemptions are based, who are classified as exempt pursuant to a common policy or scheme. The "modest factual showing" cannot be satisfied simply by unsupported assertions, but it should remain a low standard of proof because the purpose of this first stage is merely to determine *whether* "similarly situated" plaintiffs do in fact exist.

Myers, 624 F.3d at 555 (emphasis in original; citations, quotation marks and internal alterations omitted).

In this case, plaintiff has not specifically identified any other ASMs as similarly situated potential plaintiffs, nor has he submitted declarations or affidavits from any potential class members to substantiate his claim that Big Lots ASMs were intentionally misclassified as exempt from the federal and state overtime compensation requirements. Rather, plaintiff relies on the declarations of two former Big Lots Store Managers who

stated that, in their experience, ASMs had little or no actual management responsibilities but instead spent most of their time on work ordinarily performed by hourly employees. Considering that defendant does not deny the existence of a single corporate policy to classify ASMs as exempt from the FLSA's overtime requirements, and given the lenient standard for discretionary collective action "opt-in"notice, it becomes apparent that plaintiff has met his preliminary burden to make a modest showing that there may be similarly situated Big Lots ASMs in New York State who could potentially opt in as claimants in this case.

However, this does not end the "similarly situated" inquiry. As the Court anticipated in its prior report and recommendation, Big Lots once again relies on the findings and holding of Judge Vance in the *Johnson v. Big Lots* case to argue that conditional certification of plaintiff's FLSA claim as a collective action would be futile because of the significant variation among Big Lots ASMs in terms of the duties that they perform and the hours they spend at work. In *Johnson*, two Big Lots ASMs brought an action under the FLSA asserting that they regularly worked in excess of forty hours per week and were denied overtime compensation as a result of being misclassified as "exempt" employees. Similar to plaintiff's allegations in this case, the plaintiffs in *Johnson* alleged that although their formal job descriptions included managerial responsibilities, their actual managerial duties were "*de minimis*" and, in reality, they spent the vast majority of their time performing "nonexempt" tasks such as unloading delivery trucks, organizing storerooms, stocking merchandise, operating cash registers, and cleaning their respective stores. *Johnson*, 561 F. Supp. 2d at 569. Utilizing the two-step approach outlined above, Judge Vance conditionally certified the case as a nationwide collective action, and approximately 1,200

potential claimants responded to the notice of opportunity to join the litigation as opt-in plaintiffs. The class was subsequently reduced to 936 current and former Big Lots ASMs nationwide, and the case proceeded through discovery. Along the way, Judge Vance denied Big Lots's motion to decertify the conditional class, as well as two attempts to renew the motion following the "intense discovery period" leading up to the non-jury trial. *Id.* at 571.

The *Johnson* trial encompassed 43 hours of testimony and presentations by counsel over the course of seven days, following which Big Lots moved once again for decertification. In recognition of its "ongoing obligation to monitor the propriety of certification in light of factual developments," the court revisited the "vexing question of whether the opt-in-plaintiffs are sufficiently similar such that adjudication of their claims based on representative proof may be done in a manner that respects the rights of both parties." *Id.* at 571. Judge Vance found that the evidence presented at trial, including the testimony of several opt-in plaintiffs and "non-opt-in ASMs," as well as the diverse results of a survey designed and conducted by the plaintiffs' own experts, revealed substantial variations among the opt-in plaintiffs' job experiences. Reaching the conclusion that the case could not be adjudicated as a collective action, Judge Vance stated:

> At a high level of generality opt-in plaintiffs' job duties may be similar in that they are subject to a uniform job description, are required to run individual stores according to corporate policies, and are supervised by store managers. But in terms of individual job duties, the evidence shows that the opt-in plaintiffs have different responsibilities from one another and that individuals themselves will have different duties from day-to-day and within a single day. Such diversity in individual employment situations inhibits Big Lots from proving its statutory exemption defense as to all 936 opt-in plaintiffs on the basis of representative proof. And because the plaintiffs are dissimilar, the Court cannot confidently adjudicate plaintiffs' claims or Big Lots' defense on the merits.

Id. at 578-79.

Central to Judge Vance's decertification decision was her concern about the fairness of rendering a binding class-wide ruling in light of the significant differences in the ASMs' employment experiences, as borne out by the evidence presented at trial. According to Judge Vance:

> After considering the full record, the Court reaches the inescapable conclusion that the all or nothing posture of this case makes ruling on the merits fundamentally unfair to both sides. Were the Court to rule in plaintiffs' favor, it would have to do so on the basis of proof that is not representative of the whole class, and the verdict would result in liability on the defendant in a magnitude that is not likely to be warranted in reality. The testimony of opt-in plaintiffs and their survey responses show that, in contrast to the evidence presented in the earlier stages of this litigation, there is significant diversity among plaintiffs in terms of their job experiences. . . .
>
> On the other hand, were the Court to find that on the whole Big Lots proved its defense, then all of plaintiffs' claims would be extinguished.

Id. at 588.

At least one court has relied directly on the holding and rationale of the *Johnson* decertification decision to preclude conditional collective action certification of a claim brought by Big Lots ASMs to recover unpaid overtime wages under the FLSA. In *Gromek v. Big Lots Stores, Inc.*, No. 10 C 4070 (N.D.Ill., E.D. December 17, 2010) (Zagel, D.J.) (copy of Memorandum Opinion and Order attached to Dkt. #45), the plaintiff asserted claims identical to those asserted by the plaintiffs in *Johnson*–and by Mr. Omiatek in this case–namely, that Big Lots classified its ASMs as exempt from the FLSA's overtime provisions, yet required them to regularly work in excess of forty hours per week performing non-managerial functions without overtime compensation. Joined by thirty-four opt-in plaintiffs representing fifteen different states, the plaintiff in *Gromek* moved to certify a

class of "all current and former ASMs who were employed by Big Lots Stores, Inc., anywhere in the United States (excluding California and New York) at any time during the past three years." *Gromek*, Memorandum Opinion and Order, at 2. Judge Zagel denied the motion, finding that although the plaintiff had sufficiently shown that putative class members were uniformly classified as exempt but were required to perform non-exempt work, he had failed to show how his case "would differ substantively in facts or theory from the *Johnson* case." *Id.* at 8. As stated by Judge Zagel:

> Given the extensive discovery undergone in *Johnson,* I am currently unwilling to conditionally certify Plaintiff's class. Uniform classification of all ASMs as exempt employees is insufficient to satisfy the similarly situated requirement because there is significant diversity of job experience which precludes the use of representative testimony to establish the exempt status of all Big Lots ASMs. As the *Johnson* court recognized, the "significant diversity among plaintiffs in terms of their job experiences" made it impossible to rule on the merits in an "all or nothing" fashion.

Id. at 8-9 (quoting *Johnson*, 561 F. Supp. 2d at 588).

Plaintiff has not addressed the implications of the overarching principle central to the holding in the *Johnson* decertification decision, and relied upon in the *Gromek* case, regarding the fundamental unfairness of rendering a binding class-wide ruling in the absence of representative proof. Rather, plaintiff simply argues that *Johnson* involved a putative nationwide class (as did *Gromek*), whereas the proposed class in this case is limited to Big Lots ASMs in New York State.[2] However, considering the identity of the

[2] Plaintiff also points out that the *Johnson* litigation ultimately resulted in verdicts for two of the individual plaintiffs, who prevailed on the merits of their FLSA claims after a two-day bench trial. *See Johnson v. Big Lots Stores, Inc.*, 604 F. Supp. 2d 903 (E.D.La. April 2, 2009). However, it is generally recognized that a court's decision whether to certify or decertify a class is a procedural ruling, collateral to the merits of the underlying claims, *see Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 336 (1980), and there is nothing in the *Johnson* court's findings of fact and conclusions of law on the merits to diminish the well-reasoned analysis of its decertification decision.

issues presented in these cases, the relative size of the proposed class provides little incentive for this Court to disregard the in-depth fact finding and well-reasoned legal analysis of the *Johnson* court's decertification decision. Rather, a thorough review of the several reported and unreported decisions and orders in the *Johnson* litigation[3] reaffirms that Judge Vance's determination was made as the result of exhaustive discovery and full trial on the merits of the issue whether ASMs working at Big Lots stores nationwide could be considered sufficiently "similarly situated" with respect to their job duties to allow for collective adjudication of their claims for overtime compensation on the basis of representative proof. There is noting in plaintiff's submissions to present a compelling reason why this Court should require the parties in this case to engage in a similar exercise merely to revisit the issue as it pertains to a smaller, statewide class.

Indeed, a brief review of the declarations and excerpts from deposition transcripts submitted by the parties strongly suggest that plaintiff's personal experience working as an ASM at Big Lots' Niagara Falls store differs in several significant respects from the experiences of other New York ASMs. For example, plaintiff stated in his declaration that he had no managerial responsibility with regard to employment decisions such as hiring, firing, or evaluating employees' performance to determine promotions or pay increases. *See* Dkt. #32, ¶ 8.[4] However, declarations submitted on behalf of defendant by several other individuals who worked as ASMs at Big Lots stores across New York State clearly indicate that ASMs were regularly given managerial authority to hire employees, make

[3]No less than thirteen decisions, orders and slip opinions in the *Johnson* litigation are available on Westlaw.

[4]Plaintiff testified at his deposition that he did, in fact, directly interview and hire at least one part-time associate. *See* Dkt. #38, Ex. 2, pp. 93-95.

hiring recommendations to their Store Managers, conduct employee evaluations, and other responsibilities related to employment matters. *See, e.g.*, Dkt. #38, Ex. 6 (Alice Walters, Binghamton store); Ex. 7 (Julie Hall, Buffalo store); Ex. 9 (Kenneth Johnson, Jamestown store); Ex. 10 (Sara Daniels, Mattydale store); Ex. 11 (Stephen Gale, Syracuse and Mattydale stores); Ex. 12 (Thomas Cipriano, Albany and Troy stores); Ex. 13 (Tracey Stone, Olean store); Ex. 14 (William Twining, Ithaca and Cortland stores). Additionally, Barbara Crane (who, as noted above, submitted a declaration in support of plaintiff's motion) testified at her deposition that in her experience as a Store Manager at the Big Lots Buffalo store ASMs were authorized to hire and fire hourly employees, and were involved in other employment matters such as conducting employee evaluations. Dkt. #38, Ex. 4, pp. 16-19.

Likewise, with regard to plaintiff's assertion that he spent the "vast majority" of his time as an ASM at the Niagara Falls store performing non-managerial duties such as unloading trucks, stocking shelves, and cashiering, the declarations submitted on behalf of defendant demonstrate that ASMs at other New York stores had significantly different job experiences. For example, ASM Sara Daniels states that she regularly performs some of these duties at the Mattydale store, but estimates that this only takes up about 20% of her time, if that much. Dkt. #38, Ex. 10, ¶ 12. Similarly, ASM William Twining spends about 20% of his time at the Cortland store performing "a certain amount of physical work that is regularly done by the hourly associates . . . ," such as unloading trucks and stocking shelves. Dkt. #38, Ex. 14, ¶ 10; *see also id.*, Ex. 12, ¶ 10 (ASM Cipriano, Troy, 30%); Ex. 6, ¶ 12 (ASM Walters, Binghamton, 30%-40%). Notably, each of the ASM declarants state that while they often perform "non-managerial" or "non-exempt" work at their respective

stores, they do so at their discretion, and continue to supervise and direct the work of their associates, train employees, oversee store operations, and perform their other management functions concurrently.

Based on this review of the record, and following the example of *Gromek* in reliance on the convincing findings and rationale of *Johnson*, the Court finds insufficient actual evidence of a factual nexus between plaintiff's job experiences and those of the putative opt-in plaintiffs that he claims are similarly situated to warrant conditional certification of plaintiff's FLSA claim as a collective action. The submissions on file reveal significant diversity among plaintiffs in terms of their job experiences, apparent at the outset, precluding the use of representative proof to establish the exempt status of all Big Lots ASMs working at stores in New York State. As in *Johnson*, this leads to "the inescapable conclusion that the all or nothing posture of this case makes ruling on the merits fundamentally unfair to both sides." *Johnson,* 561 F. Supp. 2d at 588.

Accordingly, it is respectfully recommended that the district court deny plaintiff's motion for conditional certification of his FLSA claim as a collective action under 29 U.S.C. § 216(b).

Class Certification Under Fed. R. Civ. P. 23

Plaintiff also moves pursuant to Rule 23 to certify as a class action his second and third causes of action for unpaid overtime compensation and disgorgement of unjust enrichment based on New York Labor Law.[5] In order to qualify for class certification,

[5]As the Second Circuit recently recognized in *Myers*, while New York Labor Law and administrative regulations "appear[ ] to protect a substantive right to overtime . . . ," 624 F.3d at 545 n. 1 (citing *Ballard v. Cmty. Home Care Referral Serv., Inc.*, 264 A.D.2d 747, 695 N.Y.S.2d 130, 131 (2d Dep't

plaintiff must first demonstrate that the action meets each of the following four requirements of Rule 23(a):

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). If this showing is made, then plaintiff must show that at least one of the three conditions set forth in Rule 23(b) have been met. Conversely, if the court determines that any one of the prerequisites of Rule 23(a) has not been satisfied, then it need not consider the remaining requirements of the rule. *See, e.g., In re Starbucks Employee Gratuity Litigation*, 264 F.R.D. 67, 75 n. 9 (S.D.N.Y. 2009) (In light of court's conclusion that plaintiffs failed to satisfy requirements of Rule 23(a), court need not consider whether plaintiffs have satisfied requirements of Rule 23(b)); *Manuel v. Gembala*, 2010 WL 3860407, at *4, *6 (E.D.N.C. Sept. 30, 2010) (failure to establish any one requirement of Rule 23(a) is fatal to motion for class certification, and court need not determine whether remaining requirements of Rule 23(a) are satisfied). In this case, plaintiff seeks to certify the state law claims under Rule 23(b)(3), which allows maintenance of a class action if the court finds that (1) questions of law or fact common to the class members predominate over any questions affecting only individual members, and (2) a

---

1999)), assertion of such a claim "is merely and nothing more than an alternative method of seeking redress for an underlying FLSA violation." *Id.* at 546.

class action would be superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *see Scholtisek*, 229 F.R.D at 381.

Defendant does not challenge plaintiff's contention that the putative statewide class of Big Lots ASMs (*i.e.*, at least two ASMs at each of Big Lots' 45 stores in New York State) would be large enough to satisfy the numerosity requirement of Rule 23(a)(1). Defendant does, however, challenge plaintiff's showing with respect to the "commonality," "typicality," and "adequate representation" requirements of Rule 23(a), as well as the "predominance" and "superiority" requirements of Rule 23(b)(3).

Commonality and Typicality

The Second Circuit has stated that the "commonality" requirement of Rule 23(a)(2) and the "typicality" requirement of Rule 23(a)(3) "tend to merge into one another, so that similar considerations animate [the] analysis" under those subsections. *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997).

> The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact. Typicality, by contrast, requires that the claims of the class representatives be typical of those of the class, and "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."

Id. (quoting *In re Drexel Burnham Lambert*, 960 F.2d 285, 291 (2d Cir. 1992), *cert. dismissed*, 506 U.S. 1088 (1993); other citations omitted).

Plaintiff contends that his claim regarding the legality of Big Lots' corporate policy to classify ASMs as exempt from the FLSA's overtime requirements presents questions of fact and law common to the class, and arises from the same course of events and is

subject to the same legal arguments as would be the same claim made on behalf of all ASMs working at Big Lots' New York stores. Big Lots contends that, to the extent plaintiff or any other ASM in New York State has a claim for overtime, it arises not from the corporate policy of uniform classification, but from the facts and circumstances necessary to determine whether or not each ASM's individual experience in the position fulfills the requirements for exempt status.

Once again, the *Myers* case provides helpful guidance. In *Myers*, a station manager for the Hertz car rental company brought an action alleging that the company's uniform policy of classifying station managers as exempt from the FLSA's overtime requirements resulted in violation of both the FLSA and the New York Labor Law. In separate orders, the district court first denied plaintiff's request for certification of a nationwide FLSA collective action upon application of the "similarly situated" test, finding that the court would be required "to make fact-intensive inquiry into each potential plaintiff's employment status" in order to determine whether each station manager was correctly classified as exempt pursuant to the corporate policy. *Myers v. Hertz Corp.*, 2007 WL 2126264, at *1 (E.D.N.Y. July 24, 2007) (quoting unreported determination). The plaintiff then sought to certify her state law claims as a statewide class action pursuant to Rule 23, but the court denied this motion as well, rejecting the plaintiff's contention that her claim for unpaid overtime was common to, and typical of, the claims of all putative class members:

> To this extent, all of the class claims are identical and not in dispute-defendant does not deny that no overtime was paid. The real issue . . . , however, is whether any of the putative class members were ever entitled to overtime wages under the FLSA.
>
> * * *

> Plaintiffs' allegation is that, whatever Hertz says Station Managers do or should do, what they actually do on a daily basis puts them outside the exemption. This means that proof of liability will not turn on what Hertz did or did not do vis-à-vis the entire class, but rather what each member of the class does on a daily basis. This is precisely what [the court] found when [it] determined that the putative opt-in class members were not similarly situated.

Id. at *4-5.

Similarly, it is not disputed in this case that defendant uniformly classified its ASMs as exempt from the FLSA's overtime requirements, or that plaintiff's claim regarding the legality of this practice under New York Labor Law and regulations is common to claims that could be made on behalf of all putative class members. However, as in *Myers*, liability for unpaid overtime will be determined not by reference to any conduct by the employer with respect to the class as a whole, but by individualized factual analysis of each putative class member's daily experiences on the job. As indicated by the discussion above regarding collective action certification, and as the declarations and deposition testimony submitted on record by the parties amply demonstrate, those work experiences are neither common nor typical on a statewide basis.

Accordingly, the Court finds that plaintiff has failed to show that his state law claims share common facts with, or arise from the same course of events as, the claims of each putative class member. Rather, the record before the Court strongly suggests that resolution of the "real issue" whether plaintiff or any Big Lots ASMs in New York State were ever entitled to overtime wages under the FLSA and/or state law would necessarily entail an analysis of each ASM's individual job experiences to determine his or her qualification for exempt status. As in *Myers*, this "necessity for individualized proof . . . is as detrimental to plaintiff['s] state-wide class claim as it was to [his] FLSA collective action claim . . . ."

Myers, 2007 WL 2126264, at *4 (citing *Diaz v. Electronic Boutique of America, Inc.*, 2005 WL 2654270, *6 (W.D.N.Y. Oct. 17, 2005) (denying class certification and opt-in notification on the basis that proof of exemption would require individualized factual inquiry)), *aff'd*, 624 F.3d 537.

Having found that plaintiff has failed to satisfy the commonality and typicality prerequisites of Rule 23(a)(2) and (3), the Court need not consider whether the remaining requirements of Rule 23 have been met.

CONCLUSION

For the foregoing reasons, it is recommended that plaintiff's motion (Dkt. #28), for conditional certification of his FLSA claim as a collective action pursuant to 29 U.S.C. § 216(b), and for certification of his state Labor Law claims as a class action pursuant to Fed. R. Civ. P. 23, be denied in its entirety.

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby

ORDERED, that this Report, Recommendation and Order be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report, Recommendation and Order must be filed with the Clerk of this Court within fourteen (14) days after receipt of a copy of this Report, Recommendation and Order in accordance with the above statute, Fed. R. Civ. P. 72(b) and Local Rule 72.3(a)(3).

The district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not presented to the

magistrate judge in the first instance. *See, e.g., Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Electric Co.*, 840 F.2d 985 (1st Cir. 1988).

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order. *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed.2d 435 (1985); *Wesolek v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." Failure to comply with the provisions of Rule 72.3(a)(3), or with the similar provisions of Rule 72.3(a)(2) (concerning objections to a Magistrate Judge's Report, Recommendation and Order), may result in the District Judge's refusal to consider the objection.

The Clerk is hereby directed to send a copy of this Report, Recommendation and Order to the attorneys for the parties.

SO ORDERED.

DATED: Buffalo, New York
January 20, 2011

S/ H. Kenneth Schroeder, Jr.
H. KENNETH SCHROEDER, JR.
United States Magistrate Judge