UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JULIE A. SU, ACTING SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR Plaintiff,	)	
	)	No. 1:23-cv-948
v.	)	
	)	Honorable Paul L. Maloney
SPARTY TACOS, LLC, *et al.*, Defendants.	)	

OPINION AND ORDER RESOLVING MOTION FOR SUMMARY JUDGMENT

This matter comes before the court on Plaintiff's motion for summary judgment. (ECF No. 21). Defendants filed a response in opposition. (ECF No. 25). Plaintiff filed a reply brief. (ECF No. 26). The court will grant the motion but decline to issue injunctive relief.

I.

Plaintiff—Julie A. Su, the Acting Secretary of Labor—brought this Fair Labor Standards Act ("FLSA") action against Defendants Sparty Tacos, LLC, a Michigan corporation; TC Tacos, LLC, a Michigan corporation; GR Tacos, LLC, a Michigan corporation; and Jacob Hawley, an individual. Plaintiff alleges that Defendants violated sections 203(m)(2)(B), 206, 207, 211, 215(a)(2) and 215(a)(5) of the FLSA.

Defendant Hawley owns and controls three Mexican restaurants throughout west and mid-Michigan—Sparty Tacos, LLC; TC Tacos, LLC; and GR Tacos, LLC. Hawley operates each entity under the name "Barrio Tacos." Plaintiff alleged that Hawley's businesses

engaged in an unlawful tip pooling scheme. Hawley's scheme would take tips from servers and bartenders and redistribute those tips to kitchen staff.

Plaintiff brought a four-count complaint against Defendants. (ECF No. 1). Count I alleges that since "October 11, 2020, Defendants violated Section 203(m)(2)(B) of the FLSA by requiring tipped employees to participate in an invalid tip pool in which Defendants unlawfully kept tips for a purpose other than to distribute to employees who customarily and regularly receive tips within the meaning of Section 203(t) of the FLSA." (*Id.* at PageID.7). Count II alleges that since "October 11, 2020, Defendants violated the provisions of Sections 206 and 215(a)(2) by including kitchen staff employees in the tip pool when they are not customarily or regularly tipped employees, thereby invalidating the tip credit." (*Id.* at PageID.8). Count III states that "Defendants violated the provisions of Section 207 and 215(a)(2) of the FLSA by employing employees for workweeks longer than 40 hours without compensating them at rates not less than one and one-half times the regular rates at which those employees were employed for hours worked in excess of 40 hours in such workweeks." (*Id.* at PageID.9). Count IV alleges that Defendants "failed to keep true and accurate records of the wage paid to and hours worked by each of their non-exempt employees in violation of Section 211 of the FLSA and the regulations thereunder, specifically 29 C.F.R. § 516." (*Id.* at PageID.9). Plaintiff seeks injunctive relief and liquidated damages. (*Id.* at PageID.10).

In support of her motion for summary judgment, Plaintiff relies on Defendants' answers to a set of interrogatories and a declaration by Bridget Hillard, an investigator with the Department of Labor, Wage, and Hour Division ("WHD"). (ECF Nos. 22-2, 22-3). Plaintiff also relies on a declaration from Zaki Rahal, who was a WHD investigator out of

the Traverse City Field Office. (ECF No. 22-1 at PageID.99). Rahal was assigned to investigate Sparty Tacos, LLC, TC Tacos, LLC, GR Tacos, LLC, and Hawley. (*Id.* at PageID.100). The investigation lasted from October 11, 2020 through October 10, 2022. (*Id.*).

Defendants provided Rahal with payroll records and sales records, which were used to calculate back wages. (*Id.* at PageID.101). With the information provided by Defendants, Rahal prepared a "Narrative Report" summarizing his findings. (*Id.* at PageID.102). Rahal determined the following:

> (a) Barrio Tacos is an employer under Section 3(d) of the FLSA, and Jacob Hawley is an individual employer under Section 3(d) of the FLSA. Together, Defendants employed over 200 individuals across the three restaurant locations.
> (b) Defendants' employees included servers, bartenders, barbacks, hosts, and cooks (also called "taco rollers"). Servers, bartenders, barbacks, and hosts were "front-of-the-house" employees, while cooks were "back of-the-house employees." *Id.* Cooks had no interactions with customers.
> (c) Defendants' tipped employees included servers and bartenders. Defendants paid their tipped employees an hourly cash wage of $3.67 per hour in 2020 and 2021 and an hourly cash wage of $3.75 in 2022. The hourly cash wage Defendants paid to their tipped employees was less than federal minimum wage. Defendants took a tip credit for the remainder of their minimum wage obligation to servers and bartenders.
> (d) Defendants required servers and bartenders to participate in a tip pool established by Defendant Jacob Hawley.
> (e) Defendants explained their tip pool to employees verbally during their orientation session. Defendants did not provide written notice to their employees or require employees to provide a written acknowledgement of the tip pool to Defendants.
> (f) Defendants distributed the tips they took from the servers and bartenders to cooks, which is in violation of Section 3(m)(2)(B) of the FLSA.
> (g) Defendants paid all of their cooks and barbacks an hourly wage that was more than federal minimum wage. As a result, Defendants did not take a tip credit related to the wages they paid to cooks and barbacks.
> (h) Defendants paid cooks at their hourly rates for all hours worked, including hours over 40 per workweek. Defendants, however, did not include in cooks'

> regular rate the tips distributed from servers and bartenders, in violation of Section 7 of the FLSA.
> (i) Defendants also computed the overtime premium rate for some servers and bartenders who worked more than 40 hours per workweek based on their hourly cash wage rates and not on the applicable federal or state minimum wage rate.
> (j) Defendants violated Section 11 of the FLSA by failing to make and keep accurate pay records.

(*Id.* at PageID.103-04).

Rahal calculated the back wages owed to Defendants employees using Defendants' records. (*Id.* at PageID.104). Because Defendants pooled tips differently for servers and bartenders, Defendants did not have records showing the precise amounts of tips. (*Id.*). Rahal had to reconstruct the figures. (*Id.*). Rahal explained his process in detail for both servers and bartenders:

> For servers, Defendants required 2% of food sales to be shared with the kitchen. Defendants provided gross weekly records of sales made by servers. To determine the amount of tips taken from tipped employees and distributed to cooks, I calculated an enterprise-wide average of the percentage of total sales made by servers that were food sales.
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> . . .
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> The enterprise-wide average of the percentage of total food sales that I calculated was 54.43%. After I reached this percentage, I informed Defendants that this was the percentage I would use to calculate back wages owed. I multiplied this percentage by the servers' gross weekly sales to find their weekly food sales, then multiplied that figure by 2% to find back wages due in wrongly diverted tips.
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> For bartenders, Defendants also required 2% of food sales to be distributed to cooks. Individual sales records for bartenders do not exist, so I calculated back wages using weekly records of total sales made by all bartenders. I again estimated the calculated weekly food sales by taking the average enterprise wide percentage of food sales (54.43%) and multiplying that by the total sales by bartenders. Then, I took 2% of that figure and divided it by all hours worked in a week by bartenders to find an hourly proration due to each bartender. Finally, I multiplied this proration by the hours worked by each individual bartender in a week.

(*Id.* at PageID.104-05). Rahal concluded that the corporate Defendants owed $106,805.01 to 129 employees for section 3(m)(2)(B) violations. (*Id.* at PageID.105).

Rahal also calculated section 6 minimum wage violations:

> Defendants' tipped employees earned a cash wage of $3.67 per hour in 2020 and 2021 and a cash wage of $3.75 per hour in 2022. I calculated back wages owed under Section 6 by taking the difference between the $7.25 federal minimum wage and the amount of cash wages paid according to Defendants' payroll records multiplied by the hours worked up to 40 in a workweek based on Defendants' time and attendance records. My calculations show $252,703.97 in back wages owed to 206 employees across the three Corporate Defendants for Section 6 violations.

(*Id.* at PageID.105-06). Rahal concluded that Defendants owed $252,703.97 in back wages owed to 206 employees across the three Corporate Defendants under section 6. (*Id.* at PageID.106).

Rahal also calculated damages under section 7 for overtime violations. (*Id.*). Rahal "calculated back wages owed for Defendants' failure to pay overtime on employees' proper regular rate by subtracting half of the cash wage paid from half of the state minimum wage to find the back wages due for each overtime hour." (*Id.*). He then multiplied that amount by each hour worked over 40 per week and found that Defendants owed $2,909.40 to 57 employees across their three locations. (*Id.*). Additionally, 11 cooks were owed $421.65 for violations of section 7. (*Id.*). Finally, Defendants owed $48,822.66 to 80 employees for an invalid tip credit where employees worked over 40 hours. (*Id.* at PageID.107).

In total, Defendants owe $411,662.69 in unlawfully kept tips, unpaid minimum wage, and unpaid overtime compensation to 177 employees. (*Id.*). Plaintiff seeks to double that figure to $823,325.38 through liquidated damages.

Defendants' brief in response to Plaintiff's summary judgment motion succinctly explained the scheme:

> As supported by Defendants' sworn answers to interrogatories, the tip sharing that was in effect during the relevant investigation provided that servers would share 2% of total sales to barbacks, 3% of liquor sales to bartenders, 2% of food sales to cooks, referred to as "taco rollers"; the tip structure for bartenders was 2% of total sales to barbacks and 2% of food sales to taco rollers; the tip structure for hosts was 60% of carryout tips to host and 40% to taco rollers.

(ECF No. 25 at PageID.259). There is no dispute that Defendants' tip sharing scheme existed or that it violated the FLSA.

II.

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008). The burden is on the moving party to show that no genuine issue of material fact exists, but that burden may be discharged by pointing out an absence of evidence supporting the nonmoving party's case. *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). The facts, and the inferences drawn from them, must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

III.

Under the FLSA, an "enterprise" has "employees engaged in commerce or in the production of goods for commerce" and has "annual gross volume of sales . . . not less than

$500,000 . . . ." 29 U.S.C. § 203(s)(1)(A). Defendants Sparty Tacos, LLC, TC Tacos, LLC, GR Tacos, LLC are all "enterprises" within the meaning of the FLSA.

Likewise, an "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 29 U.S.C. § 203(d). The definition includes corporate officers. *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991) (citing *Donovan v. Grim Hotel Co.,* 747 F.2d 966, 972 (5th Cir. 1984)). Therefore, Defendant Hawley is an "employer" within the meaning of the FLSA.

There is no dispute that Defendants' tip sharing scheme existed or that it violated the FLSA. In a six-page brief, Defendants refute summary judgment on three grounds. First, they argue that Plaintiff's calculations are "based entirely on estimates, extrapolations, and projections made by former WHD investigator Rahal." (ECF No. 25 at PageID.262). Second, Defendants argue that they are entitled to have their good faith defense heard by a trier of fact regarding liquidated damages. Third, Defendants argue that injunctive relief is inappropriate because Defendants are no longer violating the FLSA.[1]

A.

Defendants argue that Rahal's calculations are confusing and that his calculations create a question of fact. But Defendants' aversions to Rahal's calculations do not genuinely challenge them. Defendants do not offer other calculations. They did not explain why any of Rahal's projections or estimations are inaccurate. Mathematical reconstructions of FLSA

[1] Defendant's response does not meaningfully respond to the government's motion for summary judgment. "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). Notably, Defendants did not attach an exhibit to their response. (ECF No. 25).

damages may be confusing to attorneys and judges alike, but that confusion alone is not a basis for finding a question of fact at summary judgment. Defendants failed to cite a case to bolster their claim. And to the contrary, "[i]n the absence of accurate employer records, both Supreme Court and Sixth Circuit precedent dictate that the burden then shifts to the employer to 'negative the reasonableness of the inference to be drawn from the employee's evidence' and, if it fails to do so, the resulting damages award need not be perfectly exact or precise." *Monroe v. FTS USA, LLC*, 860 F.3d 389, 404 (6th Cir. 2017) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946)). The court rejects Defendants' argument that Rahal's calculations create a genuine issue of material fact.

B.

Defendants next argue that the court cannot enter summary judgment because Defendants are entitled to have their good faith defense heard by the trier of fact. Liquidated damages are discretionary "if the employer shows to the satisfaction of the court that the act or omission giving rise to such [a violation] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]." 29 U.S.C. § 260. "This burden on the employer is substantial and requires 'proof that [the employer's] failure to obey the statute was *both* in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon [it] more than a compensatory verdict.'" *Sec'y of Lab. v. Timberline S., LLC*, 925 F.3d 838, 856 (6th Cir. 2019).

Defendants maintain that Hawley had an honest and good faith belief that the tip sharing structure did not violate the law because the tips were all shared with non-management employees. (ECF No. 22-2 at PageID.245). Defendants aver that because

ownership did not retain the tips and that the tip structure was designed to benefit employees, they had a good faith basis to believe that they were complying with the law.

Unfortunately for Defendants, the law imposes a higher standard. "Whether an employer had reasonable grounds to believe that its conduct did not violate the Act is decided under an objective standard." *Reich v. Lapatisserie, Inc.*, 19 F.3d 1434 (6th Cir. 1994). The use of an objective standard leads this court to believe that Defendant Hawley's subjective beliefs are not salient. *See Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 312 (7th Cir. 1986) (explaining that an objective standard is used because "corporations . . . do not have subjective mental states). In *Reich*, the Sixth Circuit reversed a district court when it relied on a belief that "the law ought not to bar [the defendant] from making whatever contracts were agreeable to him and his employees." 19 F.3d at 1434. Despite lamenting about the harshness of the liquidated damages provision, the circuit maintained that a "good heart but an empty head does not produce a defense." *Id.* (quoting *Walton*, 786 F.2d at 312). And Defendants benefitted whether they meant to or not. *See Boaz v. FedEx Customer Info. Servs., Inc.*, 725 F.3d 603, 605–06 (6th Cir. 2013) (explaining that ignoring the FLSA's requirements provides advantage over competitors). Defendants did not meet their "substantial" burden of showing "more than the absence of intent or knowledge." *Solis v. Min Fang Yang*, 345 F. App'x 35, 39 (6th Cir. 2009). Liquidated damages are properly awarded here.

C.

The FLSA authorizes district courts to issue injunctive relief "restrain[ing] violations" of sections 6 and 7 upon a showing of cause. 29 U.S.C. § 217. Whether to issue injunctive

relief is a decision within the court's discretion. *Martin v. Funtime, Inc.*, 963 F.2d 110, 113 (6th Cir. 1992).

Defendants argue that there is "zero evidence" of any continuing FLSA violations, so an injunction would be improper. (ECF No. 25 at PageID.263). In response, Plaintiff cites several provisions from the record. First, Plaintiff argues that an "injunction would ensure Defendants' future compliance not only at these locations but at future locations." (ECF No. 22 at PageID.95). Second, Plaintiff cites a Declaration from Investigator Bridget Hillard, which states that Defendant Hawley opened another "Barrio Tacos" location in Kalamazoo, MI. (ECF No. 22-3 at PageID.250). And third, Plaintiff cites Rahal's narrative report. (ECF No. 22 at PageID.158–60). Plaintiff has failed to establish that an injunction is necessary to stop an ongoing or future harm. The court will exercise its discretion and not issue an injunction. *See Perez v. Ohio Bell Tel. Co.*, 655 F. App'x 404, 410-12 (6th Cir. 2016) (explaining that "obey-the-law injunctions" are disfavored).

IV.

The court has reviewed the parties' submissions. Defendants have failed to "come forward with 'specific facts,' based on 'discovery and disclosure materials on file, and any affidavits,' showing that there is a genuine issue for trial." *Chappell v. City Of Cleveland*, 585 F.3d 901, 912 (6th Cir. 2009) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)). Summary judgment is properly entered against Defendants, but the court will decline to issue an injunction.

IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment (ECF No. 21) is **GRANTED** in part and **DENIED** in part. The court will decline to issue an injunction.

IT IS FURTHER ORDERED that Defendants are ordered to pay full back wages and liquidated damages totaling $823,325.38

Judgment to follow.

IT IS SO ORDERED.

Date: October 30, 2024

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge