IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:14-cv-02612-CBS

LEAH TURNER, ARACELI GUTIERREZ, MARKEITTA FORD, JOLESSA WADE, DANYA GRANADO, BRETT CHARLES, and RUBY TSAO

Individually and on behalf of others
similarly situated

Plaintiff

v.

CHIPOTLE MEXICAN GRILL, INC.

Defendant

DEFENDANT'S MOTION TO DISMISS OR ALTERNATIVELY TRANSFER FORUM PURSUANT TO FED. R. CIV. P. 12(b)

Table of Contents

Table of Authorities

Cases

Statutes

Defendant Chipotle Mexican Grill, Inc. ("Chipotle"), by and through its counsel, submits its Motion to Dismiss or Alternatively Transfer Forum Pursuant to Fed. R. Civ. P. 12(b)[1] as follows:

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This lawsuit is one of several duplicative lawsuits filed by the same pool of plaintiffs, represented by the same counsel, bringing allegations based on the same evidence. This Motion addresses the critically important question of whether Plaintiffs' counsel may bring these concurrent duplicative lawsuits in multiple jurisdictions. Defendant respectfully requests that this Court dismiss Plaintiffs' Leah Turner ("Turner"), Araceli Gutierrez ("Gutierrez"), Markeitta Ford ("Ford"), Jolessa Wade ("Wade"), Danya Granada ("Granada"), Brett Charles ("Charles") and Ruby Tsao's ("Tsao," together, "Plaintiffs") lawsuit in its entirety under the doctrines of first to file and claim splitting. These independent doctrines and overarching principles of comity apply here to safeguard against the precise type of duplicative litigation and jurisdictional gamesmanship before the Court. The parties and issues in Plaintiffs' lawsuit are nearly identical to those asserted in lawsuits previously filed in this Court and the U.S. District Court for the District of Minnesota.[2] In fact, Plaintiffs filed their lawsuit because they are unhappy with the ruling their counsel and Turner received in the Minnesota lawsuit.

[1] Defendant has not conferred with counsel for Plaintiff regarding the relief requested because D.C.COLO.LCivR 7.1(b) does not require conferral for this type of Motion.

[2] Plaintiffs were required to identify these actions upon the filing of this case but failed to do so. D.C.COLO.LCivR 3.2 states "[a] party to a case must file a notice identifying all cases pending in this or any other federal, state, or foreign jurisdiction that are related to the case." "Related cases are cases that have at least one party in common and that have common questions of law and fact. D.C.COLO.LCivR 3.2(b). Turner opted into the *Harris* action on October 23, 2013, and was a party to the *Harris* action as a result. *Harris* Rec. Doc. 32. Defendant is still a party to the *Harris* and *Woodards* actions. This action, *Harris*, and *Woodards*, have substantially similar, if not identical, questions of law and fact. *See* **Appendix B.** Defendant filed a Notice of Related cases on February 9, 2015. In Response, on February 11, 2015, Plaintiffs filed their Notice of Case Association (Doc. 31). Plaintiffs include *Harris* and *Woodards*, but also several dissimilar cases, with only Chipotle as a common defendant.

On March 27, 2013, Plaintiff Turner filed a collective FLSA claim in this Court, Case No. 13-cv-00794, which was later amended to include only Plaintiff Turner's individual FLSA claim ("*Turner I*"). A few months later, on June 28, 2013, counsel for Plaintiffs filed another collective FLSA claim in this Court on behalf of Demarcus Hobbs and Dana Evenson, Case No. 13-cv-01719 ("*Hobbs"*). Four days later, on July 2, 2013, counsel for Plaintiffs filed yet another collective FLSA claim in the U.S. District Court for the District of Minnesota on behalf of Marcus Harris and Julius Caldwell, Case No. 13-cv-01719 ("*Harris*"). All four plaintiffs in *Hobbs* and *Harris* worked together in a single store in Crystal, Minnesota. On October 11, 2013, the *Hobbs* action was consolidated into the *Harris* action. On October 18, 2013, Turner filed a Consent to Join Collective Action and Become Party Plaintiff in *Harris*. As a result, *Turner I* was dismissed on January 6, 2014.

On September 9, 2014, Turner and Plaintiffs' counsel received an unfavorable ruling in *Harris* on the identical issue they now seek to litigate here: conditional certification of a nationwide collective. In *Harris,* Plaintiffs' counsel moved and failed to conditionally certify an identical nationwide collective to that sought in the complaint in this action. After more than a year of litigation and discovery, U.S. Federal District Court Judge for the District of Minnesota, the Honorable Susan Nelson, in a detailed, well-reasoned, thirty-three (33) page order, denied Plaintiffs' attempt to conditionally certify a nationwide collective, instead limiting Plaintiffs' conditional collective to employees who worked at Chipotle's Crystal, Minnesota restaurant ("Crystal Collective"). As a party, Turner was bound to that Order. The Court's decision to certify a limited collective for even the single store was based on allegations regarding the conduct of a single renegade supervisor of that store, Flinte Smith, who was accused, by Plaintiffs' and their counsel, of violating Chipotle's strict, written policies by allowing off-the-clock work. (*Harris*,

Rec. Doc. 101). Based on this unfavorable ruling, Plaintiffs' counsel immediately filed this action ("*Turner II*") and another action in the U.S. District Court of Minnesota, *DeShandre Woodards v. Chipotle Mexican Grill, Inc.*, Case No. 0:15-cv-04181, ("*Woodards*"). The *Woodards* action seeks to litigate the issues resolved in *Harris* and reasserted here.

For the purposes of ruling on this Motion, Defendant requests this Court take judicial notice of the *Turner I, Hobbs, Harris,* and the *Woodards* actions and the transcript of the most recent hearing in *Woodards*. (**Exhibit A**) Defendant does not introduce any facts outside of these lawsuits through this Motion. *See generally Pace v. Swerdlow*, 519 F.3d 1067, 1072 (10th Cir. 2008) (noting that judicial notice is acceptable under these circumstances).

According to the *Woodards* Class Action Complaint, a near mirror image of the *Harris* complaint, Plaintiffs again seek to certify a nationwide collective of hourly employees for the purposes of Rule 23 and FLSA claims. (*See Woodards* Rec. Doc. 1, ¶¶ 3-6.) Had Plaintiffs' counsel been successful in their attempt to certify a nationwide collective in *Harris*, they would not have filed the *Woodards* action or this action.

The instant action represents Plaintiffs' counsel's repeated attempt to re-litigate the identical issue of nationwide conditional collective certification rejected by Judge Nelson in *Harris*, and is a brazen attempt to skirt an unfavorable ruling in another district. Even before Defendant filed a responsive pleading in this action, Plaintiffs again moved for conditional certification of a nationwide collective, filing their Motion for Conditional Collective Action and for Judicial Notice to Class[3] ("Motion for Conditional Certification") on February 2, 2015 (Doc. 28). A centerpiece of Plaintiffs' Motion for Conditional Certification is a declaration of the very same individual, Flinte Smith, whom Plaintiffs and their counsel accused of dishonesty,

[3] Defendant maintains that Plaintiffs' Motion for Conditional Certification is not ripe. Defendant will respond to Plaintiffs' Motion separately.

falsification of time records, bigotry, and intentional violations of the FLSA in *Harris*. (Doc 28, Ex. 8; *See Harris*, Rec. Doc. 63-65).

The overlap between *Harris, Woodards,* and this action is not limited to attempting to conditionally certify the same nationwide collective. In their Motion for Conditional Certification, Plaintiffs' counsel rely on declarations from parties to the *Harris* and *Woodards* actions, the same labor complaints from Minnesota used as evidence in *Harris*, declarations and evidence submitted by Chipotle in opposition that were persuasive in defeating conditional certification of a nationwide collective, and the same complaints from the internet that Judge Nelson found insufficient to warrant conditional certification of a nationwide collective. (*See* **Appendices A** and **B**).

Because *Harris* and this case consider the same issues, the same allegations, the same parties, and the same collective, and because Plaintiffs' counsel filed *Harris* first, the first-to-file rule precludes Plaintiffs from re-litigating their claims in this Court and this lawsuit must be dismissed. Permitting Plaintiffs to litigate issues identical to those already ruled upon by the U.S. District Court for the District of Minnesota creates a risk of inconsistent rulings on the same issues and undermines principles of comity between federal courts. For the same reasons that the first-to-file and collateral estoppel principles apply, Plaintiffs' claims must also be dismissed pursuant to the doctrine of claim splitting. Duplicative claims in multiple courts waste scarce judicial resources, disrupt the efficient, comprehensive resolution of cases and must be dismissed.

Further, Plaintiff Turner failed to bring her lawsuit within the statute of limitations period as prescribed by 29 U.S.C. § 225(a) and thus, her claims are time-barred and should be dismissed with prejudice. Moreover, the doctrine of collateral estoppel bars Turner's claims. Because Turner was a party in *Harris*, the issues advanced are the same, the parties are the same, and there was an

adjudication on the merits of the issues, the doctrine of collateral estoppel precludes Turner from bringing a second collective action here.

This Motion requests the Court dismiss Plaintiffs' lawsuit. Alternatively, this Court should transfer this suit to the United States District Court for the District of Minnesota to the Honorable Judge Susan Nelson who is hearing the *Harris* and *Woodards* matters where this action will be subject to the law of the case in *Harris.*

II. FACTUAL BACKGROUND

A. About Chipotle Mexican Grill, Inc.

Chipotle operates fresh Mexican food restaurants serving a focused menu of burritos, tacos, burrito bowls, and salads. Chipotle demonstrates that food served fast does not have to be a traditional "fast food" experience. It does so by using high-quality raw ingredients, classic cooking methods, and by hiring friendly employees to take care of each customer. (*Harris,* Rec. Doc. 50, Gottlieb Decl. ¶ 4.) Chipotle's approach is committed to integrity which extends to the food it serves and the people it employs. It seeks the highest quality ingredients it can find—ingredients that are grown or raised with respect for the environment, animals and people who grow or raise the food. (*Harris,* Rec. Doc. 50, ¶ 5.) Chipotle similarly seeks top performing employees, whom it empowers and develops into future leaders of the company. (*Id.* at ¶ 6.) Consistent with its principles, Chipotle expects all of its employees to treat other employees honestly and fairly, with respect and integrity. (*Id.)* In keeping with its culture of treating employees fairly, Chipotle maintains a unique policy of paying all its employees for all off-duty meal periods and breaks. Significantly, the FLSA does not require employers to pay for off duty meal periods.

1. Chipotle's Operational Framework

Chipotle operates over 1,500 restaurants nationwide. In the United States, the restaurants are divided into seven regions: Central, Mid Atlantic, Northeast, Pacific, Rocky Mountain,

Southeast, and Southwest. A Regional Director or Executive Team Director typically has overall responsibility for the operations of all restaurants in his or her region. (*Harris,* Rec. Doc. 50, ¶ 9.) All regions are required to comply with Chipotle's written policies regarding accurate timekeeping and pay for time worked. The foundation for those policies is full compliance with all wage and hour laws. The regions differ in substantive ways, including budgeting, personnel and management decisions. While personnel decisions and management duties are carried out in different ways throughout the regions—based on the management styles of hundreds of different persons at different levels of authority—all are required to comply with the law and Chipotle's written policies of recording all time worked, prohibiting off-the-clock work, and properly compensating all hourly-paid employees for all hours worked. (*Id*. at ¶ 10-11.) New employees, existing employees, and supervisors, are repeatedly reminded of these strict rules in Crew Handbooks, training, and other written materials.

2. Chipotle's Hourly Employees and Timekeeping Policies

In its United States restaurants, Chipotle currently employs more than 40,000 individuals to whom it pays an hourly wage. (*Id.* at ¶ 17) Approximately 1,600 of those employees work in Minnesota, where *Harris* and *Woodards* are pending. *(Id.)* In any given year, because of employee turnover, Chipotle employs approximately 90,000 individuals in hourly-paid positions in its domestic restaurants. *Id.* Of its restaurant employees, Chipotle's Service Managers, Kitchen Managers, and Crew Members are paid an hourly wage. Chipotle also pays all hourly employees appropriate overtime pay for any overtime work in accordance with the requirements of state and federal laws. (*Id.* at ¶ 18). Chipotle maintains a timekeeping policy that applies to all hourly employees. The timekeeping policy is a part of Chipotle's Crew Handbook, which it distributes to all crew members and makes available in its restaurants. (*Id*. at ¶ 24). Salaried managers are

expected to conform with and enforce Chipotle's timekeeping policies as part of their job. Specifically, that policy states:

> **Timekeeping/Time Punch Policy**
>
> All hourly employees are paid for all time worked. This is the law and Chipotle's policy. All hourly employees must record time worked, meal times, and rest periods using the POS terminal.
>
> - **Time Worked**: "Time worked" is all of the time hourly employees worked, including:
>   - Prepping food, serving customers and cleaning the restaurant.
>   - Reading and studying Chipotle training materials.
>   - Writing in Development Journals before, during or after scheduled shifts.
>   - Work done before scheduled shifts start and after scheduled shifts end.
>   - Time spent at patch meetings or other meetings arranged by an authorized Chipotle manager.
>
> ***
>
> - **Punch In Required**: Hourly employees must always work on the clock, not 'off the clock'. All hourly employees must punch in when they are working. Clocking in or out for anyone other than yourself is prohibited.
>
> - **Breaks**: Hourly employees are provided with breaks (meal and rest periods) per state law. Your manager will review the break policy with you. All hourly employees (both crew and hourly managers) must punch in and out at the start and end of their breaks. Even though you need to clock in and out for these break periods, you do get paid for them.

(*Harris*, Rec. Doc. 50-1 at 22.)(original formatting retained)

Chipotle pays every employee for all breaks, including off-duty meal and rest breaks. (*Harris*, Rec. Doc. 50, ¶ 31.) Chipotle also provides every employee with a free meal during their off-duty meal breaks.

Chipotle's timekeeping policy is unambiguous. It requires hourly employees to record all time worked and meal times. It states, in part: "All hourly employees are paid for all time worked. This is the law and Chipotle's policy." In addition to the policy found in the Crew Handbook, the

Restaurant Management Handbook timekeeping policy makes it clear there is absolutely no exception to the rule requiring all work to be reported. In fact, Chipotle will take disciplinary action for violations. The handbook states:

> **Pay All Hourly Employees For All Time Worked**
>
> All hourly employees are paid for all time worked. This is the law and Chipotle's policy. The 'labor matrix' and 'overtime' are not reasons to not pay all hourly employees for all time worked. Chipotle will take all steps to prevent and remedy unlawful violations of this requirement and will take disciplinary action, up to and including termination, for your failure to pay all hourly employees for all time worked.

(*Harris*, Rec. Doc. 50-3, at 19). The timekeeping policy explicitly prohibits off the clock work. . Chipotle does not have any unwritten timekeeping policy that contradicts its written policy. (*Harris*, Rec. Doc. 50, ¶ 30.) Additionally, even though Chipotle is not required by the law to do so, it pays hourly employees during their meal periods even though they are not working

Chipotle reiterates its written policies requiring that all work be timed and recorded in various ways. For example, Chipotle reviews its timekeeping policy with employees and supervisors during orientation and training and the policy is disseminated in written materials. Chipotle also provides employees an opportunity to verify that all time is accurately recorded at the end of each shift. They are provided a written receipt that identifies when they began and ended each shift and their total hours for each day. This exceeds the time-keeping obligations imposed by the FLSA. (*Id.* at ¶ 34).

B. Active Lawsuits Substantially Similar to This Action

1. The Harris Action

On July 2, 2013, Marcus Harris ("Harris") and Julius Caldwell ("Caldwell"), represented by the Williams Law Firm, Bacchus & Schanker, LLC, and the Law Offices of Adam S. Levy, LLC, Plaintiffs' same counsel in the instant case, filed their Class Action Complaint. (*Harris*, Rec.

Doc. 1). On October 22, 2013, Harris and Caldwell filed their Consolidated Amended Class Action Complaint ("*Harris* Complaint," *Harris* Rec. Doc. 31), which added two additional plaintiffs, Demarkus Hobbs and Dana Evenson.[4] (*Harris*, Rec. Doc. 31). Specifically, the *Harris* Complaint alleges:

> 3. For at least three years prior to the filing of this action and continuing through the date of this action, Chipotle has devised and implemented general policies and practices to deprive its hourly-paid restaurant employees of the compensation to which they are entitled. Chipotle routinely requires its hourly-paid restaurant employees to work "off the clock," without pay, by various means, including, but not limited to, utilizing timekeeping devices that automatically punch employees off the clock, even if they are still working.
>
> 4. Plaintiffs, on behalf of themselves and all others similarly situated former and current hourly-paid Chipotle restaurant employees during the applicable time period, seek unpaid overtime, unpaid regular wages, liquidated damages, and/or pre-judgment interest, post-judgment interest and attorney fees and costs.
>
> 5. Plaintiffs shall request that the Court authorize concurrent notice to all former and current hourly-paid restaurant employees who were employed by Chipotle during the applicable time period, informing them of the pendency of this action and of their right to opt in to this lawsuit pursuant to the FLSA.

Harris, Rec. Doc. 31, ¶¶3-5.

On October 23, 2013, the day after Plaintiffs' counsel filed the *Harris* Complaint, Turner, a named Plaintiff here, filed her consent to join *Harris*. (*Harris*, Rec. Dec. 32). That same day, the *Harris* Plaintiffs moved for conditional collective certification of a nationwide collective. (*Harris*, Rec. Doc. 33). Specifically, the *Harris* Plaintiffs sought to certify the following FLSA collective:

[4] Hobbs and Evenson, represented by Plaintiffs' current counsel, originally filed a class action complaint in the U.S. District Court for the District of Colorado on June 20, 2013. Case No. 13-cv-01719. However, both Hobbs and Evenson worked in the same restaurant in Crystal, Minnesota as Harris and Caldwell, the named plaintiffs in the *Harris* action. Hobbs and Evenson agreed to consolidate their action into the *Harris* action. It is unclear why Bacchus & Schanker, LLC filed two identical cases in two separate U.S. District Courts less than two weeks apart. However, just as they have done in this action, it appears that they were seeking to split their claims and file duplicative actions so they could pursue multiple attempts at conditional certification of the same putative collective.

> All current and former hourly-paid restaurant employees of Chipotle Mexican Grill, Inc. who, on or after October 23, 2010, were automatically punched off the clock and continued to work, or who otherwise worked "off the clock," resulting in non-payment of regular wages or overtime wages.

Harris, Rec. Doc. 35 at ¶ 1.

In support of their motion for conditional certification, the *Harris* Plaintiffs submitted Turner's consent to join along with two other opt-in notices. (*Harris*, Rec. Doc. 33). The parties in *Harris* engaged in discovery and then participated in extensive briefing on the issue of conditional nationwide collective certification. Defendant filed its Opposition to Plaintiffs' Motion for Conditional Collective Certification on December 6, 2012. (*Harris*, Rec. Doc. 49). Plaintiffs filed their Reply on December 30, 2013, for which Turner submitted a declaration in support. (*Harris*, Rec. Doc. 62, 65).[5] Plaintiffs' counsel received permission to depose putative members of the collective who had submitted declarations in support of Defendant's opposition to Plaintiffs' Motion, but declined to present the resulting testimony to the Court and objected to Defendant's attempts to do so. Magistrate Judge Rau then heard oral arguments on certification on January 24, 2014, (*Harris*, Rec. Doc. 78), and issued his Report & Recommendation on April 10, 2014 (*Harris*, Rec. Doc. 87). Defendant filed its Objections to the April 10, 2014, Report on May 12, 2014. (*Harris*, Rec. Doc. 93). Plaintiffs filed a Response to Defendant's Objections on May 27, 2014, (*Harris*, Rec. Doc. 95). On June 18, 2014, Defendant filed a letter to Judge Nelson providing supplemental authority in support of its position that conditional certification of a nationwide collective should be denied. (*Harris*, Rec. Doc. 96). On June 24, 2014, Plaintiffs submitted a response to Defendant's letter (*Harris*, Rec. Doc. 99). Simply put, the parties thoroughly litigated the issue of nationwide conditional collective certification in *Harris*.

[5] Shortly thereafter, on January 6, 2014, Turner voluntarily dismissed *Turner I*.

After extensive briefing and nearly a year after Plaintiffs filed their motion, on September 9, 2014, Judge Nelson issued a detailed 33-page Order denying a conditional nationwide collective action. (*Harris*, Rec. Doc. 101). The Court found that "Plaintiffs' evidence presents a colorable claim that they were victims of a common, unlawful policy *only* at the Crystal, Minnesota restaurant." *Id.* at p. 19 (emphasis added). In denying the nationwide collective, the Court analyzed "whether Plaintiffs have come forward with evidence establishing a colorable basis that the putative class members are victims or a single decision, policy, or plan" and determined "that a nationwide class of Defendant's employees is inappropriate." *Id.* at 21-22. In further support, the Court found "that Plaintiffs' evidence is insufficient to establish a colorable basis for a nationwide collective action even under the lenient certification standard." *Id.* at 24. Plaintiffs filed a Motion to Certify Interlocutory Appeal, which was denied by Judge Nelson on November 14, 2014. (*Harris* Rec. Doc. 128). After the Order denying the motion to certify interlocutory appeal, Turner was excluded from the collective and chose to file this action seeking an identical nationwide collective. Defendant and Plaintiffs' counsel are currently litigating *Harris* in Minnesota. In fact, Plaintiffs' counsel recently represented to Magistrate Judge Rau that they might renew their motion to conditionally certify a nationwide collective, an identical conditional collective that is sought in this action. (**Exhibit A** at 17:3-18)

2. The Woodards Action

DeShandre Woodards ("Woodards") is a former employee of Defendant who worked as a non-exempt hourly employee between October 2011 and August 2012, in Defendant's Golden Valley, Minnesota restaurant. (*See Woodards*, Rec. Doc. 1, ¶ 35). On May 5, 2014, Woodards joined *Harris* as an opt-in plaintiff. (*Harris*, Rec. Doc. 91). Because he did not work at the Crystal, Minnesota restaurant, when Judge Nelson denied the *Harris* nationwide collective on September

9, 2014, Woodards was excluded from the narrow collective that was conditionally certified and was a party, bound by the Order in *Harris*.

On October 8, 2014, less than a month after Judge Nelson's ruling, Woodards, through Plaintiffs' counsel and the *Harris* Plaintiffs' counsel, filed an identical collective action complaint in the United States District Court for the District of Minnesota ("*Woodards* Complaint"), alleging that Woodards and others similarly situated were not properly compensated for all hours worked as non-exempt hourly employees. (*Woodards*, Rec. Doc. 1). The *Woodards* Complaint is a mirror image of the *Harris* Complaint and regurgitates verbatim the entirety of the *Harris* Complaint, save for specific facts related to Woodards' period of employment. (*Compare Woodards*, Rec. Doc. 1; *with Harris*, Rec. Doc. 1, 31). Specifically, the *Woodards* Complaint alleges:

> 3. For at least three years prior to the filing of this action and continuing through the date of this action, Chipotle has devised and implemented general policies and practices to deprive its hourly-paid restaurant employees of the compensation to which they are entitled. Chipotle routinely requires its hourly-paid restaurant employees to work "off the clock," without pay, by various means, including, but not limited to, utilizing timekeeping devices that automatically punch employees off the clock, even if they are still working.
>
> 4. Plaintiffs, on behalf of themselves and all others similarly situated former and current hourly-paid Chipotle restaurant employees during the applicable time period, seek unpaid overtime, unpaid regular wages, liquidated damages, and/or pre-judgment interest, post-judgment interest and attorney fees and costs.
>
> 5. Plaintiffs shall request that the Court authorize concurrent notice to all former and current hourly-paid restaurant employees who were employed by Chipotle during the applicable time period, informing them of the pendency of this action and of their right to opt in to this lawsuit pursuant to the FLSA.

Woodards, Rec. Doc. 1, ¶¶3-5 (verbatim from *Harris*)

Because of the similarities between *Woodards* and *Harris*, *Woodards* was assigned to Judge Nelson and Magistrate Judge Rau, the same judge and magistrate pair hearing *Harris*, on October 16, 2014, (*Harris*, Rec. Doc. 103). Plaintiffs' counsel has not filed a Motion for

Conditional Certification in *Woodards* as of the date this pleading was drafted, but has communicated to Magistrate Judge Rau that the motion will be filed soon **(Exhibit A** at 25:18-26:3). Defendant and Plaintiffs' counsel are currently litigating *Woodards* in Minnesota.

C. The Instant Action

Plaintiff Turner, the party who initially filed this suit, is an employee of Defendant who worked as a non-exempt hourly employee between March 29, 2010, and May 23, 2011, and as a salaried manager after May 23, 2011. (Doc. 1, ¶ 7; Doc. 25 ¶¶ 11-16.)[6] Since leaving Chipotle, Turner has been a serial litigant against Chipotle. She has sued Chipotle twice (*Turner I* and *Turner II)*, opted into an FLSA collective action in Minnesota (*Harris*), filed a workers' compensation claim against Chipotle in Colorado, W.C. No. 4-849-593-03, and joined an FLSA collective action against Chipotle in New York.[7] The *Turner I* complaint (*Turner I*, Rec. Doc. 1), the *Harris* complaint (*Harris*, Rec. Doc. 31), and the instant complaint (Doc. 25) all allege Turner was not properly compensated for all hours worked as a non-exempt hourly employee. Interestingly, Turner amended her complaint in *Turner I* to explicitly clarify that she was suing Chipotle in an individual capacity so that she could join the *Harris* action as an opt-in plaintiff. (*Turner I*, Rec. Doc. 15, 15-1).Turner, through the same counsel representing all the plaintiffs in *Harris* and *Woodards*, now brings this duplicative action, originally filed September 22, 2013, less than two weeks after Judge Nelson's Order denying a nationwide collective in *Harris*. Turner's collective action in Colorado originally named only her and asserted an FLSA Claim (*See* Doc 1). In response to Turner's original complaint, on October 27, 2014, Chipotle filed a Motion to Dismiss based on

[6] Defendant contends that Plaintiffs' counsel has irreconcilable conflicts of interest that include conflicts between Turner and the remainder of Plaintiffs' proposed collective pursuant to *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 856 (1999) and must withdraw from representation. Defendant will address this argument in a separate pleading.

[7] *Scott v. Chipotle Mexican Grill, Inc.*, Case No. 12-cv-08333, filed on November 15, 2012 in the U.S. District Court for the Southern District of New York (Turner filed a consent to opt-in on February 20, 2013)

the FLSA's statutory time bar, principles of collateral estoppel, claim splitting and the first-to-file rule. (Doc. 6). To avoid dismissal, likely in recognition of this suit's duplicative nature and the weakness of the unsupportable allegations plead, Plaintiffs' counsel amended Turner's original complaint on January 21, 2015, to include fourteen new causes of action, six new plaintiffs, and to assert claims on behalf of four purported separate statewide classes pursuant to F.R.C.P. 23 (*See* Doc. 25, *see also* Doc 22-1). Magistrate Shaffer, to whom this case was previously assigned, ruled from the bench during oral argument that Plaintiffs had leave to amend and that Chipotle's pending Motion to Dismiss (Doc. 6) was thus moot. (**Exhibit B**; *H*arris, Rec. Doc. 19).[8]

Plaintiffs' counsel hardly makes an effort to conceal the similarities between these suits as they apparently believe they have the ability to file as many collective actions as they wish across the country until a federal court gives them the relief they seek. (*See generally* **Exhibit A**). Notably, Plaintiffs' counsel have now filed five nearly identical complaints in two federal district courts: (1) *Turner I*, filed in this Court March 27, 2013 ; (2) *Hobbs and Evenson v. Chipotle Mexican Grill, Inc.*, Case No. 13-cv-01719, filed in the this Court on June 28, 2013; (3) *Harris* filed in U.S. District Court for the District of Minnesota on July 2, 2013; (4) *Woodards v. Chipotle Mexican Grill, Inc.*, Case No. 14-cv-04181, filed in the U.S. District Court for the District of Minnesota on October 29, 2014; and (5) this lawsuit *See* **Appx. A** for a charting of these actions and their similarities.

Even as amended, the Amended Complaint is obviously a cut and paste version of the complaints filed in *Harris* and *Woodards.* (*compare generally* Doc. 25 *with Harris,* Rec. Doc. 31;

[8] Because Magistrate Shaffer mooted the original Motion to Dismiss from the bench on account of Plaintiff's amendment, the substantive arguments originally asserted in Defendant's Motion to Dismiss are reasserted in this consolidated Motion, sometimes verbatim. (*See* **Exhibit B**; *Harris,* Rec. Doc. 19**)**

Woodards, Rec. Doc. 1). Specifically all three complaints allege nearly identical versions of the following allegations:

> 2. Upon information and belief, for at least six years prior to the filing of this action and continuing through the date of this action, Chipotle has devised and implemented general policies and practices to deprive its hourly-paid restaurant employees of the compensation to which they are entitled. Chipotle routinely requires its hourly-paid restaurant employees to work "off the clock," without pay, by various means, including, but not limited to, utilizing centralized, company-wide labor or payroll budgets that Chipotle knows incentivizes managers to understaff restaurants in order to meet those budgets, thereby resulting in the requirement that hourly employees work off-the-clock, and by utilizing timekeeping devices that automatically punch employees off the clock, even if they are still working.

Doc. 25, ¶2; *Compare with Harris* Rec. Doc. 31 ¶ 3; *Woodards* Rec. Doc. 1, ¶ 3 (noting nearly verbatim allegations in all three complaints); *see also* Doc. 22-1, ¶ 2 (Plaintiffs' redline version of their First Amended Complaint slightly differentiating the allegations from *Harris* and *Woodards*).

> 3. Class Representative Plaintiffs, on behalf of themselves and all other similarly situated former and current hourly-paid Chipotle restaurant employees during the applicable time period, seek unpaid overtime, unpaid regular wages, liquidated damages and/or pre-judgment interest, post-judgment interest and attorneys fees and costs.

Doc. 25, ¶3; *Compare with Harris* Rec. Doc. 31 ¶ 4; Woodards Rec. Doc. 1, ¶ 4 (containing verbatim language in all three complaints).

> 4. Class Representative Plaintiffs shall request that the Court authorize concurrent notice to all former and current hourly-paid restaurant employees who were employed by Chipotle during the applicable time period, informing them of the pendency of this action and of their right to opt-in to this lawsuit pursuant to the FLSA, 29 U.S.C. § 216(b). Class Representative Plaintiffs shall further request that the Court grant class certification under Federal Rule 23(b)(2) and (b)(3) for the state classes alleged herein pursuant to causes of action brought under the state laws of Arizona, California, Colorado and New Jersey.

Doc. 25, ¶4; *Compare with Harris* Rec. Doc. 31 ¶ 5-6; Woodards Rec. Doc. 1, ¶ 5-6; *see also* Doc. 22-1, ¶ 4 (identifying the only differences between the language of the three complaints).

On February 2, 2015, Plaintiffs' counsel again moved for conditional certification of nationwide collective, filing their Motion for Conditional Certification (Doc. 28). In their proposed Notice, Plaintiffs' seek to conditionally certify the collective as the following collective:

> All current and former hourly-paid crew members of Chipotle Mexican Grill, Inc. who, on or after February 2, 2012, were automatically punched off the clock and continued to work, or who otherwise worked "off the clock," resulting in nonpayment of minimum/regular wages or overtime wages." [sic]

Doc 28-2, p 8. This is the identical collective sought in *Harris* and denied by Judge Nelson.[9] More strikingly, Plaintiffs' counsel submitted the same, if not identical evidence from the same parties discussed above, and submitted in *Harris*, in support of their Motion.

III. STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(6) authorizes a court to dismiss a complaint that fails to state a claim upon which relief can be granted. A court should grant a 12(b)(6) motion when a complaint does not include enough facts to state a claim to relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Fed. R. Civ. P. 12(b)(3); provides that a party may assert improper venue as a defense by motion. Rule 12 is the appropriate procedural tool for moving to dismiss pursuant to the first-to-file rule. *See e.g. Animal Health Int'l, Inc. v. Livingston Enterprises, Inc.*, 2012 WL 1439243, at *2 (D. Colo. Apr. 26, 2012). District courts have "an ample degree of discretion" when considering and applying the first to file rule. *Id.* (citing *Kerotest Mfg. Co. v. C–O–Two Fire Equip. Co.*, 342 U.S. 180, 183–84 (1952)).

"As a general rule, a federal suit may be dismissed for reasons of wide judicial administration . . . whenever it is duplicative of a parallel action already pending in another federal

[9] Plaintiffs' counsel's attempts to "carve-out" the Crystal Collective from this action strain credulity and lead to an absurd result. For example, if Plaintiffs' counsel received an unfavorable ruling in one federal district court and then was permitted to file a fresh identical federal lawsuit carving out the unfavorable portions of the previous lawsuit, there would be no finality or recourse for FLSA or collective defendants like Chipotle. The inherent conflicts of interest would intensify as well. *See Ortiz v. Fibreboard Corp*. 527 U.S. 815 (1999).

court." *Serlin v. Arthur Anderson & Co.*, 3 F.3d 221, 223 (7th Cir. 1993) (internal citations omitted). Outright dismissal, rather than a stay, is most likely to be appropriate when the same party is involved in all of the suits. *Central States, Se. & Sw. Pension Fund v. Paramount Liquor Co.*, 203 F.3d 442, 445 (7th Cir. 2000). Preventing a party from pursuing duplicative FLSA claims advances wise judicial administration. *Copello v. Boehringer Ingleheim Pharmaceuticals Inc.*, 812 F.Supp.2d 886, 890 (N.D. Ill. 2011) (*citing in support Romine v. Compuserve Corp.*, 160 F.3d 337, 340 (6th Cir. 1998) (disapproving duplicative class actions); *Golf v. Menke*, 672 F.2d 702, 704-05 (8th Cir. 1982 (same); *Becker v. Schenley Indus., Inc.*, 557 F.2d 346, 348 (2d Cir. 1977) (same).

Similarly, the doctrine of collateral estoppel may be properly raised by either a motion to dismiss for failure to state a claim upon which relief can be granted or a motion for summary judgment. *See Fox v. Maulding*, 112 F.3d 453 (10th Cir. 1997). A party asserting collateral estoppel through a motion to dismiss may request the Court to take judicial notice of additional documents filed of record. *In re Pettingill Enterprises, Inc.*, 2012 WL 5387700 (quoting *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000)); *Haddad v. Dudek*, 784 F. Supp.2d 1308 (M.D. Fla. 2011); *United States v. Jones*, 29 F.3d 1549 (11th Cir. 1994) (a court may take notice of another court's order for the limited purpose of recognizing the judicial act that the order represents or the subject matter of that litigation).

IV. ARGUMENT

A. <u>This Lawsuit Must Be Dismissed Under to the First to File Rule</u>

This action must be dismissed because it is duplicative of *Harris* and presents substantially similar, if not identical, issues, evidence, and parties. Moreover, Plaintiff's' counsel filed *Harris* long before this action and have been litigating the same issues advanced here for nearly two years. Re-litigating this action in Colorado runs the risk of inconsistent rulings with the United States

District Court for the District of Minnesota and will tax judicial resources in two federal courts over identical allegations.

"[T]wo federal courts should not be adjudicating the same issues." *New York Marine and Gen. Ins. Co. v. Lafarge N. Am.,* 599 F.3d 102, 113 n. 4 (2d Cir. 2010). The first-to-file doctrine "permits a district court to decline jurisdiction where a complaint raising the same issues against the same parties has previously been filed in another district court." *Buzas Baseball, Inc. v. Bd. of Regents of the Univ. of Ga.,* 189 F.3d 477, at *2 (10th Cir.1999) (table opinion); *see Hospah Coal Co. v. Chaco Energy Co.,* 673 F.2d 1161, 1163 (10th Cir.1982). This doctrine serves to prevent inconsistent rulings and to preserve judicial resources. *See Keymer v. Mgmt. Recruiters Int'l., Inc.,* 169 F.3d 501, 503 n. 2 (8th Cir.1999); *Cessna Aircraft Co. v. Brown,* 348 F.2d 689, 692 (10th Cir.1965). The rationale for the rule is that "[t]he simultaneous prosecution in two different courts of cases relating to the same parties and issues 'leads to the wastefulness of time, energy and money.' *Cessna Aircraft Co. v. Brown,* 348 F.2d 689, 692 (10th Cir.1965) (quoting *Cont'l Grain Co. v. Barge FBL–585,* 364 U.S. 19, 26 (1960)).

The first to file rule should apply in the absence of compelling circumstances. *See Keymark Enterprises, LLC v. Eagle Metal Products,* 2008 WL 4787590, *3 (D.Colo. Oct. 30, 2008) (quoting *U .S. Fire Ins. Co. v. Goodyear Tire & Ribber Co.,* 920 F.2d 487, 488–89 (8th Cir.1990)). In determining whether the first-to-file rule applies, a court examines three threshold factors: 1) the similarity of the issues; 2) the similarity of the parties; and 3) the chronology of the two actions. *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 679 F.Supp.2d 1287, 1296 (D.Kan.2010). Neither the issues nor the parties must be identical for the first-to-file rule to apply; however, they must be substantially similar. *Aurora Bank, FSB v. Universal Am. Mortgage Co.*,

2012 WL 5878197, at *3 (D. Colo. Nov. 19, 2012) (internal citations omitted); *Commodity Futures Trading Comm'n. v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1485 (10th Cir.1983)).

1. The Issues In This Action And Harris Are Substantially Similar

Harris and this action attempt to litigate the same issues. Both actions bring FLSA and Rule 23 claims for the non-payment of wages due to alleged off-the-clock work and attempt to assert claims on behalf of a purported nationwide collective class based on the same evidence.[10] Of the three factors applicable to applying the first-to-file rule, the most important is similarity of the issues. *Advanta Corp. v. Visa U.S.A., Inc.*, 1997 WL 88906, at *2–3 (E .D.Pa. Feb. 19, 1997). The issues need only be substantially similar. *See Ed Tobergate Associates, Inc. v. Zide Sport Shop of Ohio, Inc.*, 83 F.Supp.2d 1197, 1198 (D.Kan.1999) (citing *Commodity*, 713 F.2d at 1485).

a. The Critical Issue in Both Suits is Whether Chipotle Failed to Compensate Its Hourly Employees for All Hours Worked

The common issue in *Harris* and this action is Plaintiffs' collective allegations that Chipotle did not compensate them for all hours worked. In *Harris*, *Woodards*, and this action, Plaintiffs' counsel consistently argues "Chipotle has devised and implemented general policies and practices to deprive its hourly-paid restaurant employees of the compensation to which they are entitled." (*Compare* Doc. 25, ¶2; *with Harris*, Rec. Doc. 31 ¶ 3; *Woodards* Rec. Doc. 1, ¶ 3 (noting nearly verbatim allegations in all three complaints); *see also* Doc. 22-1, ¶ 2 (Plaintiffs' redline version of their First Amended Complaint slightly differentiating the allegations from *Harris* and *Woodards*)). Plaintiffs' counsel asserted identical FLSA claims in all three actions. (Doc. 1; Doc. 25; *see Harris*, Rec. Doc. 35, *Woodards* Rec. Doc. 1).

Defendant moved to dismiss Turner's original complaint on October 27, 2014 (Doc 6). While that Motion was pending before this Court, Plaintiffs' counsel amended the Complaint on

[10] *Woodards* also seeks to litigate identical issues but was filed after the instant action.

January 21, 2015, to identify new named Plaintiffs and assert new causes of action. (*See* Doc 25, including new named Plaintiffs and asserting new causes of actions including claims pursuant to Fed. R. Civ. P. 23.)

Despite their procedural shenanigans, Plaintiffs' substantive amendments to their lawsuit do not operate to distinguish the issues from *Harris*. The fact that a copycat lawsuit contains varied allegations, additional legal claims, or different legal claims does not preclude the court from dismissing the case pursuant to the first-to-file rule. *Walker v. Progressive Casualty Ins. Co*., 2003 Dist. LEXIS, *7-8 (W.D. Wash. May 9, 2003); *Inherent.com v. Martindale Hubbell*, 420. F.Supp. 2d 1093, 1099 (N.D. Cal. 2006); *see also Tate-Small v. Saks, Inc.* 2012 WL 1957709 (2012)(finding that even concurrently pleaded Rule 23 allegations in different states did not save duplicative litigation from the first to file rule).

One particularly relevant case speaking to this issue is *Fuller v. Abercrombie & Fitch Stores, Inc.,* 370 F.Supp.2d 686, 689 (E.D.Tenn. 2005) ("*Abercrombie*"). In *Abercrombie*, two Tennessee employees sued Abercrombie & Fitch Stores, Inc. under the FLSA and sought to certify a putative collective action pursuant to 29 U.S.C. § 216(b) for themselves and others similarly situated, contending that they were not paid overtime and were forced to work off the clock. Abercrombie moved to transfer the action pursuant to the first-to-file rule to Ohio, where separate FLSA plaintiffs were also seeking to certify a collective against Abercrombie for unpaid overtime under 29 U.S.C. § 216(b). Unlike the Ohio plaintiffs, the Tennessee plaintiffs alleged additional claims to those asserted by the Ohio plaintiffs, namely that Abercrombie violated the FLSA by requiring the Tennessee plaintiffs and others similarly situated to work off the clock without compensation.

Thus, the Tennessee plaintiffs argued that transfer was inappropriate because their asserted claims were dissimilar. They also argued that the potential collective classes would be different between jurisdictions because of the opt-in feature of §216(b). *Id.* at 689-90. Rejecting the Tennessee plaintiffs' arguments, the Court determined that, despite the differences in the claims plead, the issues between the suits were still similar. *Id* at 690. The Court reasoned that both actions alleged the same claim: that Abercrombie violated the FLSA by working the plaintiffs of both proposed classes more than 40 hours a week, and that "despite this additional claim [for off the clock work] the issues in the two actions still substantially overlap[ped]." *Id.* Thus, the Court reasoned that the crux of the Tennessee plaintiffs' claims was whether Abercrombie's compensation policies violated the FLSA.

On February 5, 2015, the United States District Court for the Southern District of New York decided a nearly identical issue in *Atavia Thomas* v. *Apple-Metro, Inc., et al.* 14:CV-4120 (S.D.N.Y 2015). There, the Honorable Judge Valerie Caproni, applied the first to file rule to dismiss duplicative FLSA lawsuits just as Defendant seeks to do here. In *Atavia*, a former hourly employee of Applebee's, Atavia, filed suit under the FLSA, New York law, and 29 U.S.C. §§ 215, asserting putative collective action claims under the FLSA and various wage and hour and retaliation claims. Applebee's moved to dismiss under the first to file rule, citing two substantially similar suits pending in other New York districts, and alternatively moved to transfer Atavia's suit to the district where the other suits were pending. *Id.* at 1. In one of the two similar suits, Applebee's employees alleged off the clock work and that Applebee's shaved employees' time. In the other, a separate class of employees alleged Applebee's required servers to declare more tips than they earned. *Id.* at 2-3.

While the claims in all three suits were slightly different, Atavia alleged the same violations asserted in the two similar actions as well as several unique claims, including retaliation, a violation of the "20% Rule." *Id.* at 3. Atavia's claim did not include claims for minimum wage violations, unpaid overtime, conversion, or other violations of specific New York Labor laws like the other two suits alleged. In her opposition to the Applebee's Motion to Dismiss, Atavia asserted that the first to file rule did not apply because her case was not identical to the other two actions.

The Court disagreed. In dismissing Atavia's suit, the Court found that there "was simply no reason for this Court to decide nearly identical questions of law and fact as those being adjudicated in [the other actions]. (*Id.* at 8.) The Court further found that dismissal, rather than transfer was appropriate based on the fact that only a single other plaintiff had opted into Atavia's case. Even with the additional, difference claims between Atavia's case and the other two cases, the Court found the cases substantially similar. *Id.* at 6, The Court noted that Plaintiff was free to pursue her own claims against and opt out of any Rule 23 class pursued. (*Id.* at 7.)

The issues in this action are identical to *Abercrombie* and *Atavia.* The issues between the three lawsuits are so strikingly similar that the fact that Plaintiffs' counsel asserts numerous state law and Rule 23 claims in addition to those asserted in *Harris* is irrelevant. Like the Tennessee plaintiffs, and Atavia, Plaintiffs amended their complaint to include a litany of additional allegations in an attempt to distinguish their claims from those identical claims asserted in another jurisdiction where they received an unfavorable ruling. Plaintiffs' counsel's attempts at differentiation are futile because Plaintiffs' claims still stem from the same nexus of claims: the fact that all Plaintiffs were at one point, hourly workers for Chipotle, who allege they were not compensated for all work performed. Not only are the issues between this matter and *Harris* so substantially similar that they merit dismissal under the first-to-file rule, Plaintiffs' counsel's

claims in all three concurrent lawsuits are based on the same evidence provided by the same people.

b. Plaintiffs Support Their Claims in Both Cases with Declarations from the Same People

Plaintiffs' repeated attempts to certify the same nationwide class in different jurisdictions based on declarations from the same set of individuals highlights both the incestuous nature of these actions, and the substantial similarity of the issues presented. Plaintiffs' counsel have now attempted to obtain conditional nationwide certification of their claims for unpaid wages at least twice, with a third attempt looming on the horizon. (Doc. 28; *Harris*, Rec. Doc. 35; **Ex. A** at 25:18-25). In support of each attempt, Plaintiffs paper the court with the same testimony from the same declarants.

For example, Plaintiffs cite Woodards' declaration, in support of their Motion for Certification, alleging he was also "subjected to Chipotle's uniform policy [of clocking employees out automatically at 12:30 AM and] being made to work off the clock without pay." (Doc 28 at 9-10; Doc. 28-7). Plaintiffs also tender slightly updated versions of the declarations of Harris and Caldwell submitted in *Harris*, which dealt exclusively with the restaurant in Crystal, Minnesota in support of their Motion for Certification. (*Id.* at 8-9; Doc. 28-5, 28-6; *compare with Harris* Rec. Doc. 37, 38).[11] Similarly, Turner signed a declaration in support of the *Harris* case where she levelled the same allegations against Chipotle that she asserts here. (*Compare Harris* Rec. Doc. 65; *with* Doc. 25).

[11] Harris and Caldwell only worked at the Crystal, Minnesota restaurant and are part of the Crystal Collective that Plaintiffs purport to explicitly disclaim from their Motion for Conditional Certification. Their declarations have no relevance here. (Doc 28 at 8-9; *See* n.9.) They simply serve to show the substantial overlap in the allegations and issues here and in *Harris*.

Finally, and perhaps most interestingly, is the declaration of Flinte Smith, the former apprentice manager of the Crystal, Minnesota store (Doc. 28-1, ¶ 2). Smith was the primary target of Plaintiffs' counsel's allegations in *Harris* where Harris, Caldwell, and an opt-in plaintiff, Ryan Cox, alleged Smith forced off-the-clock work (*Harris*, Rec. Doc. 63-65). Smith consistently denied wrongdoing throughout the investigation in *Harris*, but now contradicts himself asserting that he forced employees to work off the clock. (Doc. 28-1). This is a clear example of recycling evidence and blatant issue overlap. Plaintiffs attempt to use the statements of a rogue manager of a single store in Minnesota to bolster their argument that a nationwide collective is probative of only the identical issues that were litigated in *Harris*. This is particularly suspect where Turner and her their counsel accused him of dishonesty and falsifying time records in *Harris*.

In fact, the only new declaratory evidence Plaintiffs present in support of their Motion for Certification are the declarations of three new named plaintiffs. A cursory review of these declarations reveals they are simply cut and paste duplicates from previously issued declarations. (*Compare generally* Doc. 28-2 through 28-4 *with Harris* Rec. Doc. 37, 38; 63, 64). Notably, each declaration discusses identical issues alleged in *Harris*. The common thread between the duplicative declarations is the allegation that Chipotle did not properly compensate its hourly employees for all work. Plaintiffs' reliance on recycled declarations from the same parties involved in *Harris* to support the allegations here is clear evidence that the issues between the cases are substantially similar.

c. Plaintiffs Support Their Claims in Both Cases with the Same Documentary Evidence

In support of the Motion for Conditional Certification, Plaintiffs submit identical evidence as that submitted in the *Harris* Motion for Conditional Certification. Examples include 20 pages of miscellaneous, unverified, unauthenticated complaints from the Minnesota Department of

Labor (*Compare* Doc 28-10, Ex. C *with Harris*, Rec. Doc. 36, Affidavit of Ken Williams, Ex. C), identical anonymous complaints pulled from the internet (*Compare* Doc. 28-10, Ex. G with *Harris*, Rec. Doc. 67-4), an identical description of the Chipotle's Aloha system (*Compare* Doc. 28-10, Ex. O with *Harris*, Rec. Doc. 67-8), and various identical pleadings from unrelated lawsuits[12] (*Compare* Doc. 28-10, Ex. D-F, I, J, *with Harris*, Rec. Doc. 67-1 through 67-3; 67-6, 67-8). Plaintiff's flagrant submission of duplicative "evidence" for the same purpose in two separate proceedings lends clear, convincing support to the conclusion that the issues between the suits are substantially similar.

The issues are substantially similar to *Harris* because: 1) both actions directly address FLSA violations for failure to compensate hourly employees for all hours worked; 2) Plaintiffs support this action with nearly identical declarations from plaintiffs of other active litigation over identical issues; and 3) Plaintiffs support their position with identical evidence submitted in another federal court for an identical purpose. Therefore, the Court should apply the first-to-file rule to this case and dismiss the instant action.

2. The Parties to Both Actions Are Substantially Similar

This action and the *Harris* action are identical disputes between the same parties: Chipotle, and a proposed nationwide collective of all hourly-paid employees who allege that Chipotle did not compensate them for all time worked. The parties in both cases are substantially similar for the purposes of the first-to-file rule. The law is consistent and clear that "[t]he parties only need be substantially similar for the rule to apply." *XTO Energy, Inc.*, 679 F.Supp.2d at 1296; *Bankers Ins. Co. v. DLJ Mortgage Capital, Inc.*, 2012 U.S. Dist. LEXIS 19361, *3 (M.D. Fla. Jan. 26, 2012). It is uncontested that Chipotle is the named defendant in both actions and there can be no

[12] Pleadings and complaints are not evidence. *United States v. Aguirre*, 245 F. App'x 801, 802 (10th Cir. 2007)

dispute that the defendant in each matter is substantially similar. (*Compare* Doc. 1; Doc. 25, ¶ 29; *Harris* Rec. Doc. 31, ¶ 22.)

Lead-plaintiff Turner was an opt-in plaintiff in *Harris* and is a named plaintiff in this action. The purported FLSA collectives sought here and sought in *Harris* are identical. This is not surprising as the same attorneys represented the parties here and in *Harris*. To determine whether the parties are substantially similar in a collective action, courts compare the collectives, and not the class representatives. *Ross v. U.S. Bank Nat. Ass'n*, 542 F.Supp.2d 1014, 1020 (N.D.Cal.2008) (citing Cal. Jur.3d Actions § 284); *see also Abercrombie,* 370 F.Supp.2d at 689 (finding that parties substantially overlapped where "both actions seek certification of the same collective class, defining the class as all current or former Abercrombie employees who worked as managers-in-training or assistant managers and were not properly compensated for overtime work" even though the named plaintiffs were different individuals). Evaluating two dueling FLSA collective action claims filed in different federal circuits, the *Abercrombie* Court reasoned:

> Though the named plaintiffs are different individuals, all are former Abercrombie employees who worked as managers-in-training and assistant managers. And importantly, the claims in both actions are based on the plaintiffs' employment positions with Abercrombie. Consequently, the named plaintiffs are effectively identical. Further, both actions seek certification of the same collective class, defining the class as all current or former Abercrombie employees who worked as managers-in-training or assistant managers and were not properly compensated for overtime work. And Abercrombie is undoubtedly the defendant in both actions. The Court notes that [Plaintiff's] contentions—that the named plaintiffs are different individuals and that, due to the opt-in feature of the collective action under 29 U.S.C. § 216(b), the collective classes in each action will be different—are correct. Nonetheless, the Court finds that neither warrants the conclusion that the parties are not substantially similar. Importantly, for the actions to be duplicative, the parties need not be identical; they need only substantially overlap. Here, the named plaintiffs and the collective classes substantially overlap. As previously noted, the named plaintiffs are all former Abercrombie employees who worked as managers-in-training and assistant managers, and their claims are based on this common characteristic. Consequently, the plaintiffs in the two actions are substantially similar. Further, both actions seek to certify the same collective classes. That the collective classes in each action will ultimately contain different individuals if both

> actions proceed is of little significance. For if both actions proceed, the same individuals could receive two opt-in notices for the same claim but in different courts. That such a confusing result could occur evidences that the collective classes are substantially similar.

Id. at 689-90 (internal citations omitted).

This case is analogous to *Abercrombie* and the Court should follow that court's logic in its opinion.[13] The *Harris* Plaintiffs sought to conditionally certify:

> All current and former **hourly-paid restaurant employees** of Chipotle Mexican Grill, Inc. who, on or after **October 23, 2010**, were automatically punched off the clock and continued to work, or who otherwise worked "off the clock," resulting in non-payment of regular wages or overtime wages.

Harris, Rec. Doc. 35 at ¶ 1 (emphasis added).

Here, Plaintiffs' identify the class they seek to conditionally certify as:

> All current and former **hourly-paid crew members** of Chipotle Mexican Grill, Inc. who, on or after **February 2, 2012,** were automatically punched off the clock and continued to work, or who otherwise worked "off the clock," resulting in nonpayment of minimum/regular wages or overtime wages." [sic].

Doc 28-2, p 8 (emphasis added).[14] These proposed collectives are identical save for the dates and the distinction between crew members and hourly restaurant employees. Like the plaintiffs in *Abercrombie* and *Atavia*, the claims asserted by Plaintiffs and the *Harris* Plaintiffs all stem from their hourly employment at Chipotle and their FLSA claims.

Because the Motion for Conditional Certification in *Harris* sought to include all "current and former" hourly-paid restaurant employees, the proposed *Harris* collective is nearly identical and overlaps significantly with Plaintiffs' proposed collective with respect to those hourly-paid employees who worked at Chipotle after February 2, 2012. All crew members identified in the

[13] The fact that the named Plaintiffs in each action are different is irrelevant. As the *Abercrombie* Court correctly recognized, whether the collective classes ultimately contain different individuals if both actions proceed is of little significance. *Id.* at 689-90.

[14] *See* n.10.

proposed collective in this action, are hourly-paid restaurant employees. However, not all hourly-paid restaurant employees sought in *Harris* were crew members because hourly-paid restaurant employees also encompass Kitchen Managers and Service Managers. Thus, the *Harris* proposed collective is broader than the proposed collective in this action, and encompassed employees that the proposed collective in this action does not encompass, namely hourly-paid Kitchen Managers and Service Managers.

Had the Motion for Conditional Certification in *Harris* been successful, potential opt-in plaintiffs in this action would have received opt-in notices in *Harris*. It is undisputed that the proposed collective in *Harris* would have completely subsumed the proposed collective in this action, which the *Abercrombie* Court found to be an unacceptable result. *Id.* at 690. Thus, the parties here are substantially similar because the proposed collective in the first-filed suit completely subsumes the proposed collective here.

Chipotle anticipates Plaintiffs will argue that the parties are dissimilar because they intentionally "carved out" the Crystal Collective in their Motion for Conditional Certification. However, Plaintiff's attempt to "carve out" the Crystal Collective from its Motion for Conditional Certification is not maintainable and has no support in the law. Simply because Plaintiffs' counsel received an unfavorable ruling in *Harris* does not permit them to continue to bring actions for nationwide collective certification throughout the nation until they find a court sympathetic to their cause. This "carve-out" leads to an absurd result and encourages duplicative litigation throughout the country.

For example, if Plaintiffs' counsel received an unfavorable ruling in one federal district court and then filed an identical federal lawsuit carving out the members subject to the unfavorable determination of the previous lawsuit, there would never be any finality or recourse for FLSA or

collective defendants like Chipotle. Moreover, this technique completely undermines the role of the federal courts in determining whether a group of potential plaintiffs and their counsel have advanced sufficient evidence to support any type of collective action. What Plaintiffs and their counsel are attempting to do in this action clearly goes against principles of federal comity. Such conduct encourages costly, duplicative litigation and jurisdictional gamesmanship and cannot be permitted.

3. The Harris Action is More Advanced than This Case

The *Harris* action, filed on July 2, 2013, and amended on October 22, 2013, is not only the first-filed suit, but is substantially more advanced than the current action. The "chronology" factor favors the first-filed suit, especially where it is in a more advanced stage of litigation than the second suit. *See e.g. Bankers Ins. Co. v. DLJ Mortgage Capital, Inc.*, 2012 U.S. Dist. LEXIS 19361, *3 (M.D. Fla. Jan. 26, 2012).

The parties in *Harris* participated in extensive briefing on the issue of a nationwide collective certification beginning as early as October 23, 2013, when the *Harris* Plaintiffs moved for conditional certification of a nationwide class, and on September 9, 2014, over a year after *Harris* was first filed, Judge Nelson denied the nationwide collective in a 33-page Order (*Harris*, Rec. Doc. 101). Conversely, here, Chipotle has not even filed an answer. There can be no dispute that *Harris* is substantially more advanced, satisfying the "chronology" factor and weighing in favor of applying the first-to-file rule.

B. Plaintiffs' Claims Must Be Dismissed Pursuant to the Doctrine of Claim-Splitting

Pursuant to the similar doctrine of claim-splitting, Plaintiffs' claims must be dismissed because they involve the same nationwide collective and are identical to the facts and issues in *Harris*. "The rule against claim-splitting requires a plaintiff to assert all of its causes of action

arising from a common set of facts in one lawsuit. By spreading claims around in multiple lawsuits in other courts or before other judges, parties waste 'scarce judicial resources' and undermine 'the efficient and comprehensive disposition of cases.'" *Katz v. Geradi*, 655 F.3d 1212, 1217 (10th Cir. 2011) (*citing Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp.*, 296 F.3d 982, 985 (10th Cir.2002)). "It is well settled that a plaintiff 'may not file duplicative complaints in order to expand their legal rights.'" *Greene v. H & R. Block Eastern Enterprises, Inc.*, 727 F.Supp.2d 1363, 1367 (S.D. Fla. 2010) (*citing Curtis v. Citibank*, 226 F.3d 133, 140 (2d Cir. 2000)). The Supreme Court holds that federal district courts must avoid duplicative litigation when plaintiffs possess multiple, similar claims that are pending. *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976); *see also Trippe Mfg. Co. v. Am. Power Conversion Corp.*, 46 F.3d 624, 629 (7th Cir. 1995) ("Federal district courts have the inherent power to administer their dockets so as to conserve scarce judicial resources …. A district court has an ample degree of discretion in deferring to another federal proceeding involving the same parties and issues to avoid duplicative litigation.") (internal quotation marks and citation omitted). A district court has the authority as part of its inherent power over its docket administration to stay or dismiss a suit that is duplicative of another case then pending in federal court. *Curtis*, 226 F.3d at 138; *Copello*, 812 F.Supp.2d at 889.

To determine whether duplicative claim-splitting has occurred, courts analyze whether the later-filed suit involves the same parties or their privies, and arises out of the same transaction or series of transactions as the first suit. *Greene*, 727 F.Supp.2d at 1367. It is not necessary to have a final judgment in the first suit for the purpose of dismissing an action pursuant to the principle of claim splitting. *Katz* 655 F.3d at 1218. A dismissal is appropriate on claim-splitting grounds if the two duplicative cases are both ongoing. *Id.*

In applying this principle, the South District of Florida dismissed a collective action because the plaintiffs' concurrent and pending individual claims arose from the same nucleus of operative facts. *Khan v. H & R Block Eastern Enterprises, Inc.*, 2011 WL 3269440 (S. D. Fla. July 29, 2011). In *Khan*, the plaintiffs' individual claims had been previously pled in a separate action under the FLSA. *Id.* at *7. In the second action, the plaintiffs asserted collective claims pursuant to the Fair Minimum Wage Act. *Id.* In determining whether the collective claims were permissible, the Court considered whether the cases involved the same parties, and whether the separate cases arose from the same transaction(s). *Id.* The Court held that the plaintiffs and defendants were identical. *Id.* The Court also held that the claims arose from the same nucleus of operative facts even though "the plaintiffs' individual claims allege the defendants failed to provide overtime compensation and their current action alleges failure to pay minimum wage, these actions both relate to the same, continuous failure to receive payment." *Id.* The Court found that the fifty-one plaintiffs who filed duplicative claims violated the rule against claim-splitting and granted defendants' motion to dismiss. *Id.*

Here, both *Harris* and this action are concurrently being litigated. Plaintiffs' collective claims in the current action are identical to those in the ongoing *Harris* action. Moreover, the parties and evidence are substantially similar, if not identical. If Plaintiffs' claims proceed as a collective action, there will now be three duplicative cases ongoing in the federal court system. This is precisely what the prohibition against claim-splitting seeks to prevent. Because final judgment has not been entered in *Harris*, claim-splitting is an appropriate method for dismissal. In the interests of judicial comity and clearly established law, Plaintiffs' collective action claim must be dismissed.

C. Turner's Claims Are Time-Barred and Precluded By the Doctrine of Collateral Estoppel[15]

1. Turner's Claims Are Barred by the FLSA's Statute of Limitations

Turner's claims are time-barred because she brought her action more than three years after she last worked as an hourly-paid employee. Turner limits her claim to her period of employment as an hourly-paid employee. (Doc. 25, ¶¶ 11-16). A cause of action "may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued. *See* 29 U.S.C. § 225(a). Defendant maintains that a two-year statute of limitations applies to Plaintiffs' Complaint. Regardless, the longest statute of limitations period available under the FLSA is three years.

It is undisputed that Turner "was classified as a non-exempt hourly employee between March 29, 2010 to May 23, 2011." (Doc. 25, ¶¶11-15). Turner sued Chipotle on September 22, 2014, more than three years after filing her Complaint. To have a cognizable FLSA claim, Turner must have worked for Chipotle as a non-exempt hourly employee within the three-year period before filing this lawsuit. Turner concedes that she was not an hourly employee in the three years and four months from the date she filed her lawsuit.

Moreover, no statutory tolling applies to Turner's claims. In prior briefing, Plaintiffs cited the inapt case of *Green v. Harbor Freight Tools USA, Inc.* 888 F. Supp. 2d 1088, 1105-1106 (D. Kan. 2012) for the proposition that the statute of limitations with respect to FLSA plaintiffs is tolled once they opt into an action. (Doc 8, at 5-6). Turner's argument that the statute of limitations

[15] Defendant renews its Motion to Dismiss filed in response to the original Complaint. For purposes of ease of briefing, it is set forth largely in full in the following section.

was tolled for the duration of her time as an opt-in plaintiff in *Harris* is without merit and Turner can provide no authority for her position. *Id.* Indeed, for a serial litigant like Turner, this leads to an absurd result whereby Turner's continued suits against Chipotle would result in essentially indefinite tolling of the statute of limitations. This is an impractical application of statutory tolling that is prejudicial to Chipotle. The statute of limitations ran until Turner filed her Complaint. As such, Turner's claim is time barred and must be dismissed.

2. Turner is Collaterally Estopped from Asserting a Collective Action

Turner is estopped from bringing a collective action claim because she has already attempted and failed to obtain conditional certification in *Harris.* Collateral estoppel, or issue preclusion, is designed to prevent needless relitigation and bring about some finality to litigation. *United States v. Botefuhr,* 309 F.3d 1263, 1282 (10th Cir. 2002). Collateral estoppel bars a party from relitigating an issue once it has suffered an adverse determination on the issue, even if the issue arises when the party is pursuing or defending against a different claim. *Park Lake Res. Ltd. Liab. Co. v. USDA*, 378 F.3d 1132, 1136 (10th Cir. 2004). Collateral estoppel will bar a claim if four elements are met: (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 978 (10th Cir.1995). Here, each of these elements is satisfied with respect to Turner and thus her claims are barred.

a. The Issues Decided in Harris are Identical to the Issues Here

Turner is estopped from bringing a collective action complaint that proposes a nationwide collective because the *Harris* Court has already denied a nearly identical nationwide collective. In a case analogous to the one before this Court, a California District Court held that plaintiffs were

collaterally estopped from seeking collective certification because a previously decided issue denying collective certification was substantially identical to the present issue of collective certification. *Frosini v. Bridgestone Firestone N. Am. Tire, LLC*, 2007 WL 2781656 *9 (C.D. Cal., Aug. 24, 2007). In the first action, *Littell I*, conditional certification was denied after the District Court permitted discovery because the plaintiffs failed to show that common issues of fact or law predominated over individual issues of proof as to each proposed class. *Id.* at *4, 8. In *Littell II*, the plaintiffs attempted to differentiate conditional certification in the second action by arguing that there were new allegations of defects. *Id.* at *10. The District Court rejected this argument and held that "certification issues presented in the instant case are identical to the issues regarding predominancy decided by the *Littell I* court and that those issues were necessary to that court's order denying class certification." *Id.* As such, plaintiffs were precluded from seeking collective certification in *Littell II* because collective certification had already been sought on a substantially similar issue and was denied. *Id. See also; In re Dalkon Shield Punitive Damages Litigation*, 613 F.Supp. 1112, 1115-16 (E.D. Va. 1985) (denying a nationwide punitive damages class action in second action when the issues were virtually the same as those in the first action where the nationwide punitive damages class action had already been denied); *Ferris v. Cuevas*, 118 F.3d 122, 130 (2d. Cir. 1997) (plaintiffs who fail to obtain a class action certification, but nevertheless assert the authority to represent other similarly situated persons, and who are demonstrated to be in privity with those other persons, are not immune from application of *res judicata*); *Lev v. Criterion Ins. Co.*, 650 F. Supp. 813, 823 (S.D. Ga. 1987) ("where litigation is between the same parties, state courts will give collateral estoppel effect to federal court denials of class certification and federal courts will do the same with respect to denials of certification rendered by state courts").

As discussed above, Turner seeks nationwide conditional class certification, nearly identical to what she and Plaintiffs' counsel sought in *Harris*. (*See supra* §§ II(B)(1); II(C); IV(A)(2); *compare* Doc. 28-2 *with Harris* Rec. Doc. 35, ¶ 1, noting the *Harris* collective subsumes the proposed class here). As such, it is clear that Turner's FLSA claims are identical to those asserted in *Harris*.

To prevail on her collective action claims, Turner will have to show that she is similarly situated to the putative class members. 29 U.S.C. § 216(b). The *Harris* Court, however, already determined that they are not similarly situated. Specifically, the court in *Harris* recognized "that Plaintiffs' evidence is insufficient to establish a colorable basis for a nationwide collective action even under the lenient certification standard." (*Harris*, Rec. Doc. 101, at 24). Because another Court has already made the factual and legal determination that Turner and putative class members are not similarly situated, Turner is precluded from pursuing collective claims in this action. *See, e.g., Dias v. Elique*, 276 Fed.Appx. 596, 598-99 (9th Cir. 2008) (taking judicial notice of prior proceedings, the Court found that plaintiff's allegations were directly controverted by existing factual findings and plaintiffs were not entitled to relief).

b. The Harris Order Constitutes Adjudication on the Merits

The issue of conditional nationwide collective action certification has been fully adjudicated on the merits. On November 14, 2014, the *Harris* Court denied Plaintiffs' Motion to Amend the September 9, 2014 Order on Collective Action Certification to Certify for Interlocutory Appeal. (*Harris*, Rec. Doc. 128). The *Harris* Court's November 14, 2014 Order has resulted in a final adjudication on the merits on the issue of a conditional nationwide collective. Although *res judicata* depends on a final judgment, collateral estoppel, or issue preclusion, does not. "The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion, 'final judgment' includes any prior adjudication of an issue in another action that

is determined to be sufficiently firm to be accorded preclusive effect." Re. 2dof Judgments § 13 (1980). An order denying class certification is considered adjudication on the merits. *Frosini*, 2007 WL 2781656 at *10.

In *Park Lake Resources v. U.S. Dept. of Agr.*, the Tenth Circuit held that even though the decision in the prior action did not result in an adjudication on the merits for the entire action, it had issue-preclusive consequences with respect to the issue decided. 378 F.3d 1132, 1136 (10th Cir. 2004). Therefore, plaintiffs could not present an argument that conflicted with the court's prior decision on that issue. *Id.* at 1137. Similarly, even though the November 14, 2014 Order did not result in a final adjudication on the merits for the entire *Harris* action, it did result in a final adjudication on the merits regarding the issue of conditional certification of a nationwide collective. As such, Turner is precluded from presenting an identical issue of conditional certification of a nationwide collective that could conflict with the *Harris* Court's decision on that issue.

If a class is decertified, opt-in class members are dismissed without prejudice and the case proceeds only in the putative class representatives' individual capacities. *Jennings v. Cellco Partnership*, 2012 WL 568146 *3 (D. Minn., July 2, 2012) (*citing Keef v. M.A. Mortenson Co.*, 2008 WL 3166302 *2 (D. Minn. Aug. 4, 2008)). Thus, the *Harris* opt-in Plaintiffs, like Turner, are free to pursue their individual claims against Chipotle, but are precluded from asserting duplicative collective actions. Turner's remedy, if any, lies in an individual action against Chipotle.

c. Turner Was a Party in Harris When The Court Issued Its Order Regarding Conditional Certification, or at the Very Minimum, in Privity with the Harris Plaintiffs

Even though Turner is not a named plaintiff in the *Harris* action, she was a party to that case when the Court issued its order on conditional certification because she opted in to the lawsuit. (*Harris*, Rec. Doc. 32). Turner was also represented by the same legal counsel in *Harris* as she is

in this action. For plaintiffs not named in the original complaint, a collective action under the FLSA commences "on the subsequent date on which [the plaintiffs'] written consent is filed in the court." 29 U.S.C.A. § 256(b); *Lee v. Vance Exec. Prot., Inc.,* 7 F. App'x 160, 166-67 (4th Cir.2001). Thus, when a party files a written consent to opt-in, he or she becomes a party to the litigation. *Jennings v. Cellco Partnership*, 2012 WL 2568146 *3 (July 2, 2012, D. Minn) (*citing Smith v. Heartland Auto. Servs., Inc.*, 404 F.Supp.2d 1144, 1149 (D. Minn. 2005)); *Adams v. School Bd. of Hanover County*, 2008 WL 5070454 *17 (November 26, 2008, E.D. Va). A plaintiff who expressly joins a collective action is bound by its results. *McElmurry v. U.S. Bank Nat. Ass'n*, 495 F.3d 1136, 1139 (9th Cir. 2007); 29 U.S.C. § 256; *Roussel v. Brinker Int'l, Inc.*, 441 Fed.Appx. 222, 225 (5th Cir. 2011); *Partlow v. Jewish Orphans' Home of S. Cal., Inc.*, 645 F.2d 757, 758–59 (9th Cir.1981), *abrogated on other grounds by Hoffmann–La Roche Inc. v. Sperling*, 493 U.S. 165 (1989). Turner joined the *Harris* action on October 23, 2013 and became a party to the *Harris* action at that time and is bound by the determinations on the issues there.

d. Turner Had a Full and Fair Opportunity to Litigate the Issue of Nationwide Conditional Certification in Harris

Turner participated in discovery during the *Harris* action and she therefore had a full and fair opportunity to litigate the issue she asserts here. Demonstrating Turner's participation in the litigation is the fact that Turner specifically filed a declaration in support of the motion for conditional collective action certification. (*Harris*, Rec. Doc. 65). In her declaration, Turner made allegations beneficial to the proposed opt-in class and therefore shared the same interests and motives as she and the other *Harris* Plaintiffs. Again, this is further evidenced by the fact that Turner is represented by the same attorneys here who represented her as a *Harris* opt-in Plaintiff.

After Turner and the *Harris* Plaintiffs moved for conditional collective action certification, the *Harris* action progressed for nearly a year before Judge Nelson issued her Order denying

nationwide conditional certification. (*See* discussion in §II(B)(1), *supra; see generally Harris*, Rec. Doc. 33, 49, 62, 78, 87, 93, 95, 96, 99, 101 (representing the posture and resolution of the litigated issue of nationwide conditional certification)). In addition, significant discovery was propounded specific to the conditional collective certification and Plaintiffs deposed putative members of the collective class who submitted declarations supporting Defendant's opposition. Therefore, it cannot be reasonably disputed that Turner had a full and fair opportunity to litigate the collective action certification in *Harris*.

The facts here support the conclusion that Plaintiffs' counsel directly exploited the discovery conducted in *Harris* to file their Motion for Conditional Certification in this case. In fact, they were even able to file that motion before Defendant filed a responsive pleading by exploiting the "evidence" and discovery obtained in *Harris.* As **Appendix B** demonstrates, Plaintiffs' support their Motion for Certification almost entirely on materials discovered by Turner and Plaintiffs' counsel in *Harris*. Such sharp practices designed to ambush defendants provide yet another reason to recognize the overlapping parties and issues and reject Plaintiffs' duplicative claims.

Chipotle has demonstrated that Turner's collective action here must be collaterally estopped. Plaintiffs' relief requested is identical to that sought in *Harris*. The *Harris* Court issued a 33-page Order denying nationwide conditional certification. Turner was a party in the *Harris* action, and had full and fair opportunity to litigate the conditional certification of the nationwide collective action. As such, Turner's collective action claim should be dismissed as a matter of law pursuant to the doctrine of collateral estoppel.

V. CONCLUSION

Plaintiffs' lawsuit should be dismissed under the first-to-file rule and the principle against claim splitting. The issues presented in *Harris* and in this action are substantially similar, the

parties are substantially similar, and *Harris* is more procedurally advanced. The doctrine of collateral estoppel also applies to Plaintiff Turner's claims. Moreover, Turner's claims are time-barred. Thus, dismissal of this action is appropriate.

In the alternative, Defendant requests that this Court transfer this action to the United States District Court for the District of Minnesota where *Harris* and *Woodards* are currently pending, to further federal comity, conserve judicial resources, and avoid needlessly duplicative and costly litigation.

Respectfully submitted this 11th day of February, 2015.

Respectfully submitted,

MESSNER REEVES LLP

s/ John K. Shunk

JOHN K. SHUNK, #16204
ALLISON J. DODD, #43835
ADAM M. ROYVAL, #43836
1430 Wynkoop Street, Suite 300
Denver, Colorado 80202
Telephone: (303) 623-1800
E-mail: jshunk@messner.com
E-mail: adodd@messner.com
E-mail: aroyval@messner.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2015, I electronically filed and served the foregoing **DEFENDANT'S MOTION TO DISMISS OR ALTERNATIVELY TRANSFER FORUM PURSUANT TO FED. R. CIV. P. 12(b)** via the CM/ECF system which will send notification of such filing to all counsel of record listed on CM/ECF system:

Karen O'Connor
Bachus & Schanker, LLC
1899 Wynkoop Street, Suite 700
Denver CO 80202

Kent M. Williams
WILLIAMS LAW FIRM
1632 Homestead Trail
Long Lake, MN 55356
Telephone: (612)-940-4452
Facsimile: (763) 473-0314
williamslawmn@aol.com

Adam S. Levy
LAW OFFICE OF ADAM S. LEVY, LLC
P.O. Box 88
Oreland, PA 19075
Telephone: (267) 994-6952
Facsimile: (215) 233-2992
adamslevy@comcast.net

Attorneys for Plaintiffs

s/ Jeanine A. Montoya
Legal Assistant