

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

MIAMI-CIVIL DIVISION

CASE NO.: 09-61989-CV-Zloch-Rosenbaum

JOHN CALLAWAY, on his own behalf  
and others similarly situated,

Plaintiff,

vs.

PAPA JOHN'S USA, INC.,

Defendant.

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**PLAINTIFF'S RESPONSE MEMORANDUM IN OPPOSITION TO  
DEFENDANT'S MOTION TO COMPEL**

Pursuant to the Federal and Local Rules of Civil Procedure, Plaintiff files this Response Memorandum in Opposition ("Response") to Defendant's Motion to Compel (Doc. 49) ("Motion") and states as follows:

Simply put, Defendant's Motion should be denied for three reasons. First, the discoverability of Plaintiffs' tax returns has no bearing, whatsoever, on what Defendant paid Plaintiffs (as Defendant maintains that information); further, Plaintiffs are not required to "mitigate damages" to successfully claim minimum wages under the Fair Labor Standards Act ("FLSA"), and any other income earned by Plaintiffs from other sources while employed by Defendant is irrelevant to the claims before this Court. Second, Defendant's demand for Plaintiffs' retainer agreement with their counsel is premature and irrelevant at this stage of the proceedings. To the extent a fee award is permitted to Plaintiffs in this litigation, Plaintiffs will provide their retainer agreement to Defendant at that time. Finally, two Plaintiffs were dismissed from this case with

opposing counsel's consent, thereby rendering any necessity for them to respond to outstanding discovery as moot. Further, any "partially answered" discovery as Defendant contends has been answered in full, thereby rendering Defendant's argument in this regard equally unavailing. Thus, for all the aforementioned reasons, this Court should deny the Defendant's Motion to Compel in its entirety.

**MEMORANDUM OF LAW**

**A. Plaintiffs' Tax Returns Are Irrelevant to The Issue of Whether Defendant Failed to Pay Minimum Wage.**

Defendant contends that it is entitled to discover Plaintiffs' tax returns because they are relevant to the issue of "damages" and whether the Plaintiffs were paid proper minimum wage. *See* Defendant's Motion at p. 8. It is well settled, however, that "FLSA claimants seeking unpaid overtime and minimum wages are under no duty to mitigate damages." *See Morrison v. Exec. Aircraft Refinishing, Inc.*, 434 F. Supp.2d 1314, 1319 (S.D. Fla. 2005). Further, "there is a public policy of confidentiality of tax returns to require discovery, [and] a party must establish relevancy and the court must find a compelling need for the returns because the information is not otherwise obtainable." *See Biliske v. American Live Stock Inc.*, 73 F.R.D. 124 (W.D. Okla. 1977); *Chen v. Republic Restaurant Corp.*, 2008 WL 793686 page 2,3 (S.D. NY 2008) (Tax returns not discoverable because not relevant to plaintiffs' claims).

The only issue in this case is whether Defendant failed to properly pay Plaintiff proper wages under the FLSA. *See* Complaint generally. More specifically, the parties dispute whether Defendant improperly paid the Plaintiffs the reduced minimum wage of \$4.25 for tipped employees, while Plaintiffs regularly performed work that was not tip producing and not incidental to Plaintiffs' delivery duties. *See Ash v. Sambodromo*, 2009

WL 3856367 at \* 4 (S.D. Fla. 2009). Whether Plaintiffs received other income, (albeit tip or a secondary source) that is on their tax returns, does not affect the ultimate determination of whether Defendant's failure to properly pay them less than the required minimum wage when Plaintiffs performed non-delivery duties.<sup>1</sup> Defendant maintains, and has produced the records it has regarding the amounts and type of compensation paid to Plaintiffs during their employment. That is the relevant data. To the extent Defendant seeks Plaintiffs' confidential tax returns in addition, the information contained therein is irrelevant to Plaintiffs' claims or Defendant's defenses and should not be provided. *See Flores v. Albertsons, Inc.*, 2002 WL 1163623 (C.D. Cal 2002) (Magistrate refusal to compel production of plaintiffs' tax returns was not erroneous, where plaintiffs met the burden of proving there was no compelling need for the tax returns, because the information contained could be obtained from other sources). Accordingly, Defendant's Motion should be denied for these reasons.

**B. Defendant's Demand for Plaintiffs' Retainer Agreement in Premature and Irrelevant at this Stage of the Proceedings.**

As a threshold matter, Plaintiffs have no objection to providing their retainer agreement to Defendant once this case reaches a prevailing plaintiff fee award stage. At that time, Plaintiffs will readily provide copies of their retainer agreement to Defendant. At this stage of the proceedings, however, the retainer agreement at issue has no relation, whatsoever, to the merits of the case before this Court. Simply put, Defendant has not,

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<sup>1</sup> Plaintiffs concede that the tax returns would be relevant if the sum of their total tips and the reduced minimum wage did not meet the required minimum wage of \$7.25 for each hour worked, because the Defendant would need to verify the total tips claimed by the Plaintiffs. While deposing Plaintiffs, Defendant muddied the waters by questioning Plaintiffs regarding the total tips earned and went so far as to get Plaintiffs to admit that their tax returns would be the only way to show the actual tips earned. But as stated above, the amount of tips received by Plaintiffs is completely irrelevant to whether Defendant could continue to pay them at a reduced minimum wage when Plaintiffs performed non-delivery duties. That is the sole issue before this Court.

and cannot, articulate an appropriate reason to compel the retainer agreement at issues at this time in the proceedings. For this reason alone, Defendant's Motion on this issue is premature. If Plaintiffs prevail on the merits of this claim, they will readily provide the agreement at issue. *See Stahler v. Jamesway Corp.*, 85 F.R.D. 85, 86 (E.D. Pa. 1979) (fee agreement not discoverable); *Combe v. Cinemark USA, Inc.*, 2009 WL 2578853 (D. Utah 2009) at p.2 (retainer agreement not discoverable because attorney fees not yet an issue in the case).

**C. Defendant's Remaining Arguments Are Moot.**

On June 24, 2010, Plaintiffs filed a Notice of Dismissal with regard to Luis Silva and Jonathan Zavala as their claims were no longer going to be pursued. *See* D.E. 50 and 51. As a result, any request by Defendant to compel answers to discovery from Luis Silva and Jonathan Zavala, is unnecessary as they are no longer parties to this case. Further, Defendant, upon receipt of Plaintiffs' initial discovery responses, conferred with Plaintiffs' counsel to supplement their responses. Plaintiffs' counsel agreed to same. Notwithstanding this agreement, Defendant, in violation of the Local Rules regarding good faith conferral, unnecessarily filed the Motion at issue, without giving Plaintiff adequate time to supplement same. *See* email from Plaintiffs' counsel to Defendant and Defendant's response to same, attached hereto as Exhibit "A." Regardless, Plaintiffs have since supplemented their discovery responses as requested. As a result, Defendant's Motion in this regard likewise is moot. Thus, Defendant's Motion should be denied as a result.

**CONCLUSION**

For the reasons set forth above, the Plaintiffs respectfully request that the Court deny Defendant's Motion to Compel Plaintiffs' Complete Discovery Responses as they are not relevant and not likely to lead to admissible evidence.

Dated this 1st day of July, 2010.

<p>MORGAN &amp; MORGAN Attorneys for Plaintiffs 6824 Griffin Road Davie, Florida 33314 Tel: 954-318-0268 Fax: 954-333-3515 E-mail: Nlevi@forthepeople.com</p> <p><b><u>/s NANETTE LEVI</u></b> Nanette Levi, Esquire FL Bar No.: 646679</p>	<p>Loren Law Group Attorneys for Plaintiffs 320 South State Road 7 Suite 300 Tel: 954-525-4878 Fax: 954-585-4886 E-mail: Jloren@lorenlaw.com</p> <p><b><u>/s JAMES LOREN</u></b> James M. Loren, Esquire FL Bar No.: 0055409</p>
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on July 1, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send a notice to all counsel of record.

**NANETTE LEVI, ESQ.**  
NANETTE LEVI, ESQ.