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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

OSABEMI-YE ADEDAPOIDLE-
TYEHIMBA,

Plaintiff,

v.

CRUNCH, LLC, et al.,

Defendants.

Case No. [13-cv-00225-WHO](#)

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS SECOND
AMENDED COMPLAINT WITH
LEAVE TO AMEND; DENYING
DEFENDANTS' MOTION TO STRIKE;
AND DENYING PLAINTIFF'S MOTION
FOR EQUITABLE TOLLING**

Re: Dkt. Nos. 43, 45

INTRODUCTION

Plaintiff Osabemi-Ye Adedapoidle-Tyehimba alleges that he worked as a non-exempt personal trainer in a fitness club operated by Defendants Crunch, LLC, New Evolution Ventures, LLC (“NEV”), and New Evolution Fitness Company, LLC (“NEFC”) (collectively, “Defendants”). His Second Amended Complaint (“SAC”) alleges that Defendants violated the Fair Labor Standards Act (“FLSA”) and various state laws by requiring employees to work “off the clock,” failing to reimburse for necessary business expenses, and failing to provide meal and rest breaks. Mr. Adedapoidle-Tyehimba seeks to represent a nationwide collective action pursuant to the FLSA.

Defendants NEV and NEFC move to dismiss the FLSA claim for failure to state a claim, on the grounds that Mr. Adedapoidle-Tyehimba does not adequately plead that NEV and NEFC are his employers, joint employers, or alter-egos of his “direct employer,” Defendant Crunch, LLC. In addition, all three Defendants move to strike Mr. Adedapoidle-Tyehimba’s proposed FLSA class definition on the theory that the definition, which includes all of Defendants’ non-exempt hourly employees, is overbroad as it includes persons unrelated to the allegations in the

1 SAC. Also before the Court is Mr. Adedapoidle-Tyehimba’s motion for equitable tolling of the
2 FLSA claims of potential members of his proposed FLSA collective action.

3 As described below, the Court grants the motion to dismiss the FLSA claim against NEV
4 and NEFC, with leave to amend, and denies Defendants’ motion to strike. The Court denies Mr.
5 Adedapoidle-Tyehimba’s motion for equitable tolling.

6 **BACKGROUND**

7 Mr. Adedapoidle-Tyehimba filed a First Amended Complaint (“FAC”) on February 7,
8 2013. Dkt. No. 12. The FAC alleged the following causes of action:

- 9 1) failure to pay minimum wages and overtime wages as required by the FLSA, 29
10 U.S.C. §§ 206, 207;
- 11 2) failure to pay wages and overtime wages as required by California Labor Code
12 Sections 226, 226.6, 1174, 1194, 1197, and 1199;
- 13 3) failure to provide meal periods as required by California Labor Code Sections 226,
14 512, 516;
- 15 4) failure to provide rest periods as required by California Labor Code Sections 226.7;
- 16 5) failure to reimburse for necessary work-related expenses as required by California
17 Labor Code Section 2802(c);
- 18 6) failure to provide and maintain accurate wage statements in violation of California
19 Labor Code Sections 226, 226.3, 1174 and 1174.5;
- 20 7) failure to pay all wages due on termination in violation of California Labor Code
21 Sections 201 and 202; and
- 22 8) violations of California Business and Professions Code Sections 17200, *et seq.*

23 On May 3, 2013, the Court stayed the state law causes of action (causes of action 2-8)
24 pending developments in a class action lawsuit filed against Defendant Crunch, LLC on April 4,
25 2012 in San Francisco Superior Court, *Rothberg v. Crunch LLC*, Case No. CGC-12-519740,
26 alleging the same California wage and hour claims stated in this action. Dkt. No. 39 at 4-7.¹

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¹ Accordingly, only the FLSA claim is at issue in the Motion to Dismiss.

1 The Court also granted Defendants’ motion to dismiss the FAC for failure to state a claim
 2 on the grounds that the complaint failed to allege which of the three Defendants was Mr.
 3 Adedapoidle-Tyehimba’s employer, and instead lumped all three entities together as “Crunch.” *Id.*
 4 at 7-8. The Court explained that

5 The FAC does not contain any facts in support of the allegations that
 6 defendants are “joint employers,” “agents” or “alter egos.” While
 7 plaintiff need not plead detailed allegations regarding the
 8 relationship between the defendants, presumably plaintiff has some
 9 factual basis for seeking to hold each of the defendants liable.

10 *Id.* at 7. The Court granted Mr. Adedapoidle-Tyehimba leave to amend “to clarify and amplify the
 11 allegations regarding the three defendants.” *Id.*

12 On May 10, 2013, Mr. Adedapoidle-Tyehimba filed the SAC. Dkt. No. 40. The SAC re-
 13 alleges the eight causes of action alleged in the FAC, and adds new allegations regarding the
 14 relationships between the parties. *Id.* ¶ 24. Also on May 10, 2013, at a Case Management
 15 Conference, the parties agreed to stay discovery on the FLSA claim pending finalization of the
 16 settlement pending in *Rothberg*, the related state court proceeding. Dkt. No. 41.

DISCUSSION

17 **I. Motion to dismiss FLSA claim against Defendants New Evolution Ventures, LLC and**
 18 **New Evolution Fitness, LLC for failure to state a claim**

19 NEV and NEFC move to dismiss the FLSA claim for failure to state a claim, arguing that
 20 Mr. Adedapoidle-Tyehimba concedes that they are not his direct employers, and has not
 21 adequately pleaded a basis for finding them liable as his joint employers or as alter-egos of his
 22 direct employer, Crunch, LLC.

a. Legal Standard

23 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
 24 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
 25 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its
 26 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). A claim is facially plausible when
 27 the plaintiff pleads facts that “allow the court to draw the reasonable inference that the defendant
 28 is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation

1 omitted). This standard is not akin to a probability requirement; there must be “more than a sheer
2 possibility that a defendant has acted unlawfully.” *Id.* While courts do not require “heightened
3 fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above
4 the speculative level.” *Twombly*, 550 U.S. at 555, 570.

5 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the
6 court accepts the plaintiff’s allegations as true and draws all reasonable inferences in favor of the
7 plaintiff. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court
8 is not required to accept as true “allegations that are merely conclusory, unwarranted deductions of
9 fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
10 2008).

11 **b. Allegations regarding joint employment and alter ego**

12 In ruling on Defendants’ motion to dismiss the FAC in May 2013, the Court noted that Mr.
13 Adedapoidle-Tyehimba’s “imprecise and conclusory” allegations did “not contain any facts in
14 support of the allegations that defendants are ‘joint employers,’ ‘agents’ or ‘alter egos.’” Dkt. No.
15 39, at 7. Mr. Adedapoidle-Tyehimba’s repeats those “imprecise and conclusory” allegations in the
16 SAC, supplemented with one new paragraph. However, Mr. Adedapoidle-Tyehimba’s
17 supplemental allegations do not cure the pleading deficiencies as to NEV and NEFC.

18 The SAC alleges that Crunch, LLC was Mr. Adedapoidle-Tyehimba’s “direct employer.”
19 Dkt. No 40 at 8. But the SAC asserts, as did the FAC, that NEV and NEFC are “joint-employers
20 of Plaintiff and Class Members” and that “Plaintiff and Class Members have, directly or
21 indirectly, performed services to each of defendant, and to the mutual benefit of all defendants.”
22 SAC ¶ 25; FAC ¶ 24. The SAC also re-alleges that “each defendant knew or should have known
23 about, and authorized, ratified, adopted, approved, controlled and abetted the conduct of all other
24 defendants.” SAC ¶ 25; FAC ¶ 24.

25 Mr. Adedapoidle-Tyehimba’s alter ego allegations consist of one paragraph, also alleged in
26 the FAC, that there exists

27 a unity of interest and ownership between each defendant and
28 Defendant Crunch LLC such that any separateness and individuality
between them have ceased, and they are the alter-egos of Defendant

Crunch LLC. Adherence to the fiction of the separate existence of said defendants and Defendant Crunch LLC would permit abuse of any corporate privilege, sanction fraud and promote injustice.

SAC ¶ 26; FAC ¶ 25. As noted, these joint employer and alter ego allegations are *identical* to those previously stated in the FAC. See FAC ¶¶ 24-25.

Presumably in response to the Court’s admonition that the FAC lacked facts supporting the joint employer and alter ego allegations, the SAC adds the following allegations:

- that Crunch fitness clubs are “co-owned” by NEV;
- that NEV “focuses on the acquisition, development, management and operation of fitness;”
- that NEV “and/or”² NEFC, “through their co-ownership with Defendant Crunch LLC, manage and oversee the operations of Defendant Crunch LLC;” and,
- that all Defendants “share a common management team, including officers, and/or directors and senior management level employees.”

SAC ¶ 24.

c. Discussion regarding joint employment and alter allegations

Mr. Adedapoidle-Tyehimba contends that the new allegations in paragraph 24 of the SAC, “and all reasonable inferences stemming from those allegations construed in Plaintiff’s favor,” adequately allege that Defendants NEV and NEFC may be liable as joint employers. Dkt. No. 47 at 4. He further argues that the SAC “demonstrates that Defendants manage and control the operations of Crunch, LLC, use the same employees, and share officers and directors” such that he has adequately pleaded NEV’s and NEFC’s liability as alter egos. *Id.* at 5. For the reasons stated below, the Court disagrees.

A defendant must be an “employer” of the plaintiff in order to be liable under the FLSA. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1468 (9th Cir. 1983)

² Mr. Adedapoidle-Tyehimba alleges that “Plaintiff is informed and believes and, based thereon, alleges that Defendants New Evolution Ventures LLC *and/or* New Evolution Fitness Company LLC through their co-ownership with Defendant Crunch LLC manage and oversee the operations of Defendant Crunch LLC, Plaintiff’s direct employer.” SAC ¶ 24 (emphasis added). Such an admittedly speculative allegation does nothing to further a claim against either NEV or NEFC.

1 *disapproved of, on other grounds, by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528
2 (1985). “Two or more employers may jointly employ an employee and be individually liable
3 under the FLSA.” *Maddock v. KB Homes, Inc.*, 631 F.Supp.2d 1226, 1232 (C.D. Cal. 2007).
4 Whether an entity is a “joint employer” under the FLSA is a question of law. *Torres-Lopez v.*
5 *May*, 111 F.3d 633, 638 (9th Cir. 1997).

6 The Supreme Court has explained that the “economic reality” of an employment situation
7 should determine whether an employee-employer relationship exists under the FLSA. *Goldberg v.*
8 *Whitaker House Coop.*, 366 U.S. 28, 33 (1961). The FLSA itself does not specifically address the
9 concept of joint-employers. However, regulations promulgated by the Department of Labor
10 provide guidance for when joint employment may exist. *See Baldwin v. Trailer Inns, Inc.*, 266
11 F.3d 1104, 1112 n.4 (9th Cir. 2001) (“We give deference to the DOL’s regulations interpreting the
12 FLSA”). Those regulations provide that

13 Where the employee performs work which simultaneously benefits
14 two or more employers, or works for two or more employers at
15 different times during the workweek, a joint employment
relationship generally will be considered to exist in situations such
as:

16 (1) Where there is an arrangement between the employers to
17 share the employee’s services, as, for example, to
interchange employees; or

18 (2) Where one employer is acting directly or indirectly in the
19 interest of the other employer (or employers) in relation to
the employee; or

20 (3) Where the employers are not completely disassociated
21 with respect to the employment of a particular employee and
22 may be deemed to share control of the employee, directly or
indirectly, by reason of the fact that one employer controls,
23 is controlled by, or is under common control with the other
employer.

24 29 C.F.R. § 791.2(b). Accordingly, “Subsection 791.2(b)(3) tells us that joint employment will
25 generally be considered to exist when 1) the employers are not “completely disassociated” with
26 respect to the employment of the individuals and 2) where one employer is controlled by another
27 or the employers are under common control.” *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 918
28 (9th Cir. 2003).

1 In turn, the Ninth Circuit, mindful of the Department of Labor regulations, has identified a
2 four factor “economic reality” test to aid in the determination of the employee-employer
3 relationship. *Bonnette*, 704 F.2d at 1470. Those factors are: “whether the alleged employer (1)
4 had the power to hire and fire the employees, (2) supervised and controlled employee work
5 schedules or conditions of employment, (3) determined the rate and method of payment, and (4)
6 maintained employment records.” *Id.*; see also *Moreau v. Air France*, 356 F.3d 942, 946-47 (9th
7 Cir. 2004) (reaffirming applicability of *Bonnette* factors). While these factors are helpful and
8 relevant to the joint employer analysis, the “ultimate determination must be based upon the
9 circumstances of the whole activity.” *Bonnette*, 704 F.2d at 1470 (citation and internal
10 punctuation omitted).

11 In *Maddock*, 631 F.Supp.2d at 1234, the court applied the *Bonnette* factors and held that
12 the defendant, KB Home, a nationwide seller of homes in community developments, was not a
13 joint employer with its California subsidiary, KB Home Greater Los Angeles, Inc., the plaintiff’s
14 direct employer, and thus not liable under the FLSA. It was not sufficient that KB Home
15 maintained a database of information about KB Home Greater Los Angeles, Inc.’s employees and
16 provided payroll services to KB Home Greater Los Angeles, Inc. *Id.* The court found it more
17 significant to the joint employer analysis that the plaintiff failed to show that KB Home controlled
18 the plaintiff’s employment conditions or exercised any control over the nature of the plaintiff’s
19 work. *Id.* at 1236.

20 In contrast, in *Espenscheid v. DirectSat USA, LLC*, 09-CV-625-BBC, 2011 WL 10069108
21 (W.D. Wis., Apr. 11, 2011), the defendant was a joint employer for purposes of FLSA liability
22 where, among other responsibilities, the defendant provided all of the direct employer’s human
23 resources services, prepared employee handbooks and policy booklets governing day-to-day
24 aspects of employment, implemented employee discipline, recruiting, hiring and termination
25 decisions, coordinated and provided curriculum for the weekly and biweekly meetings, and
26 provided training to employees.

27 Here, Mr. Adedapoidle-Tyehimba has failed to allege facts sufficient to hold NEV and
28 NEFC liable as his joint employers. As the Court previously noted, the allegations in paragraph

1 25 of the SAC (identical to the allegations in paragraph 24 of the FAC) are imprecise and
2 conclusory. The supplemental allegations in paragraph 25 of the SAC do not cure these
3 deficiencies. Regarding NEV, the allegation that it focuses on “fitness clubs” says nothing about
4 its relationship with Crunch, LLC or with Mr. Adedapoidle-Tyehimba. That leaves the allegation
5 that NEV “co-owns” the fitness club where Mr. Adedapoidle-Tyehimba worked, that it perhaps
6 managed and oversaw Crunch, LLC’s operations, and that it shares “a common management team,
7 including officers, and/or directors and senior management level employees” with the other
8 Defendants. *See* SAC ¶ 24 (“Defendants New Evolution Ventures LLC *and/or* New Evolution
9 Fitness Company LLC through their co-ownership with Defendant Crunch LLC manage and
10 oversee the operations of Defendant Crunch LLC, Plaintiff’s direct employer.”) (emphasis added).
11 The allegations as to NEFC are even thinner, limited to the allegation that it perhaps co-owned,
12 managed and oversaw Crunch, LLC’s operations, and that it shares a common management team
13 with the other Defendants. *Id.*

14 The allegations as to NEV and NEFC lack sufficient facts to hold them liable under the
15 FLSA. Even assuming that NEV and NEFC co-owned Crunch, LLC and played some role in the
16 management or oversight of Crunch, LLC’s operations, Mr. Adedapoidle-Tyehimba must still
17 plead *facts* addressing the economic reality of his relationship to NEV or NEFC, for example
18 indicating that they in any way controlled his employment conditions or the nature of his work.
19 He does not. A mere allegation that a defendant co-owns the business where the plaintiff works
20 does not, without more, establish the economic reality of an employer-employee relationship for
21 purpose of the FLSA. Bare allegations that a defendant managed or oversaw a direct employer’s
22 operations are likewise insufficient.

23 Mr. Adedapoidle-Tyehimba’s alter ego allegations fare no better. The conclusory
24 assertion, without any factual support, that any separation between the Defendants has “ceased”
25 such that they should not be treated as separate entities, is insufficient to plead alter ego liability.
26 *See High v. Choice Mfg. Co.*, 11-cv-5478 EMC, 2012 WL 3025922, *4 (N.D. Cal. July 24, 2012)
27 (“[t]he only real allegation on alter ego is that Mr. Masi is the sole shareholder and president of
28 Choice but that fact by itself is not enough to give rise to a prima facie case of alter ego”); *Leek v.*

1 *Cooper*, 194 Cal. App. 4th 399, 415 (2011) (“An allegation that a person owns all of the corporate
2 stock and makes all of the management decisions is insufficient to cause the court to disregard the
3 corporate entity.”). Rather, to state an alter ego claim, Mr. Adedapoidle-Tyehimba must plead
4 facts evidencing “(1) such a unity of interest and ownership between the corporation and its
5 equitable owner that no separation actually exists, and (2) an inequitable result if the acts in
6 question are treated as those of the corporation alone.” *Leek*, 194 Cal. App. 4th at 417. Mr.
7 Adedapoidle-Tyehimba has not pleaded any facts showing such a unity of interest and ownership
8 between Crunch, LLC and either NEV or NEFC such that no separation exists. Moreover, Mr.
9 Adedapoidle-Tyehimba has not pleaded any facts showing an inequitable result if the alleged acts
10 are treated as those of Crunch, LLC alone.

11 For these reasons, the SAC fails to state a FLSA claim against NEV and NEFC under Rule
12 12(b)(6).

13 **II. Defendants’ motion to strike FLSA class definition**

14 Defendants move to strike Mr. Adedapoidle-Tyehimba’s FLSA class definition, arguing
15 that the asserted definition includes employees “in positions that have nothing to do with the
16 allegations of fact made in Plaintiff’s SAC.” Dkt. No. 43 at 7. For the reasons described below,
17 the Court denies the motion to strike.

18 **a. Legal standard**

19 Federal Rule of Civil Procedure 12(f) provides that a court “may strike from a pleading an
20 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
21 Civ. P. 12(f). The function of a motion to strike under Rule 12(f) is to avoid the expenditure of
22 time and money that must arise from litigating spurious issues by dispensing of those issues before
23 trial. *See Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds*,
24 510 U.S. 517 (1994). “As with motions to dismiss, when ruling on a motion to strike, the Court
25 takes the plaintiff’s allegations as true and must liberally construe the complaint in the light most
26 favorable to the plaintiff.” *Stearns v. Select Comfort Retail Corp.*, 763 F.Supp.2d 1128, 1140
27 (N.D. Cal. 2010) (citation omitted). Motions to strike “are generally disfavored because they are
28 often used as delaying tactics and because of the limited importance of pleadings in federal

1 practice.” *Rosales v. Citibank*, 133 F.Supp.2d 1177, 1180 (N.D. Cal. 2001). In most cases, a
2 motion to strike should not be granted unless “the matter to be stricken clearly could have no
3 possible bearing on the subject of the litigation.” *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352
4 F.Supp.2d 1048, 1057 (N.D. Cal. 2004).

5 **b. Allegations regarding Mr. Adedapoidle-Tyehimba’s proposed FLSA class**

6 Mr. Adedapoidle-Tyehimba alleges that he was employed by Crunch, LLC as a “personal
7 trainer to perform personal fitness training and to sell personal training packages” and was paid on
8 an hourly basis, supplemented with performance-based commission. SAC ¶ 5. He alleges that he
9 was required, without compensation, to attend certification and continuing education programs
10 “off-premise” and to study for certification and continuing education exams. *Id.* ¶ 7. Mr.
11 Adedapoidle-Tyehimba further alleges that he was required to work “off the clock” designing
12 training programs specific to individual gym members, but was paid only for the time spent on
13 actual training sessions. *Id.* Finally, Mr. Adedapoidle-Tyehimba alleges that he was required to
14 attend company meetings but was not paid for the travel time to and from those meetings. *Id.*
15 Mr. Adedapoidle-Tyehimba seeks to represent a class of FLSA plaintiffs defined as:

16 Plaintiff and all current and former non-exempt hourly employees
17 who worked for Defendants in the United States at any time from
18 three years preceding the filing of the complaint and continuing
19 through entry of judgment.

20 SAC ¶ 3.

21 Defendants contend that Mr. Adedapoidle-Tyehimba’s claims “pertain exclusively to
22 personal trainers . . . paid on [sic] for time in training sessions only and not time outside training
23 sessions,” but his proposed FLSA class includes employees “in positions that have nothing to do
24 with the allegations of fact made in Plaintiff’s SAC.” Dkt. No. 43 at 7. Defendants thus assert
25 that Mr. Adedapoidle-Tyehimba’s FLSA class definition should be stricken and, “[i]f Plaintiff so
26 desires, he should re-pled [sic] a Class to fit (1) persons employed by his employer (Crunch LLC),
27 and (2) persons in the position exclusively described by the balance of his pleading (trainers,
28 alleged to have been compensated only for training sessions, and forced to work off the clock at all
other times), not any and all ‘hourly employees.’” *Id.*

In response, Mr. Adedapoidle-Tyehimba argues that Defendants’ motion to strike is

1 procedurally improper as there is nothing “redundant, immaterial, impertinent, or scandalous”—
2 the indispensable ingredients of a motion to strike—about his proposed class definition. In any
3 event, asserts Mr. Adedapoidle-Tyehimba, “the question of whether the scope of Plaintiff’s class
4 is overly broad or relevant to Plaintiffs’ allegations should be resolved only through the FLSA
5 conditional certification process.” Dkt. No. 47 at 6. As Mr. Adedapoidle-Tyehimba sees it, “it is
6 not appropriate at this time to force Plaintiff to specify all the formal job titles and other
7 particulars of each of the putative collective members;” rather, he “should at least be afforded the
8 opportunity to conduct discovery to determine the various formal job titles before narrowing their
9 class definition.” *Id.* at 8-9.

10 In support for their positions, both sides point to job titles other than “personal trainer,”
11 which would be captured by the proposed FLSA definition and which are or are not allegedly
12 similarly situated to Mr. Adedapoidle-Tyehimba: Defendants point out that the proposed FLSA
13 definition would include secretaries, which are not similarly situated to Mr. Adedapoidle-
14 Tyehimba, while Mr. Adedapoidle-Tyehimba points out that “Fitness and Pilates instructors,”
15 which he suggests are similarly situated to him, would be excluded from his class if it were limited
16 to personal trainers.

17 **c. Discussion regarding Mr. Adedapoidle-Tyehimba’s proposed FLSA class**

18 The FLSA allows an employee to maintain an action on behalf of “other employees
19 similarly situated.” 29 U.S.C. § 216(b). The FLSA itself does not define the term “similarly
20 situated,” and neither has the Ninth Circuit. *Lewis v. Wells Fargo & Co.*, 669 F.Supp.2d 1124,
21 1127 (N.D. Cal. 2009); *Ramirez v. Ghilotti Bros. Inc.*, 12-cv-04590 CRB, 2013 WL 1786636
22 (N.D. Cal. Apr. 25, 2013).

23 Generally, courts in this Circuit take a two-step approach to determine whether employees
24 are similarly situated for purposes of the FLSA. The court first makes an initial “notice stage”
25 determination to assess whether a collective action should be certified for the purpose of sending
26 notice of the action to potential class members. At this stage, the court looks for “substantial
27 allegations, supported by declarations or discovery, that the putative class members were together
28 the victims of a single decision, policy, or plan.” *Lewis*, 669 F.Supp.2d at 1127 (citation and

1 internal punctuation omitted). At the second stage, after the conclusion of discovery and usually
2 in response to a motion for decertification by the defendant, the court applies a stricter “similarly
3 situated” standard, reviewing various factors, including “the disparate factual and employment
4 settings of the individual plaintiffs; the various defenses available to the defendant which appear to
5 be individual to each plaintiff; [and] fairness and procedural considerations.” *Id.* (citation and
6 internal punctuation omitted). “The requisite showing of similarity of claims under the FLSA is
7 considerably less stringent than the requisite showing under Rule 23 of the Federal Rules of Civil
8 Procedure.” *Id.* Nevertheless, the plaintiff must still show that some “identifiable factual or legal
9 nexus binds together the various claims of the class members in a way that hearing the claims
10 together promotes judicial efficiency and comports with the broad remedial policies underlying the
11 FLSA.” *Id.*

12 As the above demonstrates, whether members of a proposed FLSA collective action are
13 similarly situated to a plaintiff is typically addressed in connection with a motion to certify or
14 decertify a collective action. Moreover, the Court is not convinced that a Rule 12(f) motion to
15 strike is an appropriate vehicle for addressing alleged deficiencies in a class definition, at least not
16 in this matter. Defendants’ concern is that the proposed definition is overbroad; not that it is
17 “redundant, immaterial, impertinent, or scandalous.” Fed. R. Civ. P. 12(f). Defendants cite six
18 cases for the proposition that “many cases hold that an FLSA [sic] class definition is subject to a
19 motion to strike.” Dkt. No. 50 at 7. However, in none of the six cases cited did a court actually
20 grant a motion to strike a class definition. Accordingly, the Court denies Defendants’ motion to
21 strike the FLSA class definition.³

22 **III. Mr. Adedapoidle-Tyehimba’s motion for equitable tolling**

23 Mr. Adedapoidle-Tyehimba moves for equitable tolling of the FLSA claims of potential
24 members of a proposed FLSA class. He asserts that equitable tolling is warranted because
25

26 ³ The facts alleged in the SAC, if true, may not support conditional certification of the class as
27 currently defined by Mr. Adedapoidle-Tyehimba, and the Court acknowledges Defendants’
28 concern about the potential for unduly burdensome discovery arising from the breadth of the class
definition. Those concerns about discovery are a distinct issue from whether the class definition
should be struck and may be raised separately in the discovery process.

1 Defendants’ conduct, including filing motions to dismiss and to stay and refusing to provide him
2 with potential class members’ contact information, has delayed this action to the detriment of
3 potential members of his proposed FLSA collective action members, whose claims may be
4 extinguished before they can join the action. Mr. Adedapidle-Tyehimba also asserts that
5 equitable tolling is warranted, irrespective of Defendants’ conduct, because the stay on discovery
6 currently in place is delaying his ability to move for conditional certification of his class. The
7 Court denies the motion for equitable tolling because this case, at least at this juncture, does not
8 present an extraordinary circumstance in which equitable tolling would be warranted.

9 **a. Legal standard**

10 Under some circumstances, a court may equitably toll otherwise applicable statutes of
11 limitations. “Equitable tolling applies when the plaintiff is prevented from asserting a claim by
12 wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the
13 plaintiff’s control made it impossible to file a claim on time.” *Stoll v. Runyon*, 165 F.3d 1238,
14 1242 (9th Cir. 1999).

15 **b. Discussion**

16 The statute of limitations for filing a claim under the FLSA is two years; three years if the
17 violation is “willful.” 29 U.S.C. § 255(a). For purposes of calculating the timeliness of a claim,
18 claims for individual claimants who are not named plaintiffs are considered commenced when the
19 claimant files a written consent to become a party plaintiff. 29 U.S.C. § 256(b).

20 A collective action under the FLSA thus differs from a Rule 23 class action, under which
21 the statute of limitations is tolled when the complaint is filed. Accordingly, when Congress
22 enacted Section 256 of the FLSA, it was aware that “time would lapse between the filing of the
23 collective action complaint by the named plaintiff and the filing of written consents by the opt-in
24 plaintiffs, yet it chose not to provide for tolling of the limitations period.” *Woodard v. FedEx*
25 *Freight E., Inc.*, 250 F.R.D. 178, 194 (M.D. Pa. 2008). Consistent with Congressional design
26 then, good faith motion practice by a defendant does not amount to wrongful conduct warranting
27 equitable tolling of FLSA claims. *See, e.g., MacGregor v. Farmers Ins. Exch.*, 10-cv-03088, 2011
28 WL 2731227 (D.S.C. July 13, 2011) (“Congress could have avoided the foreseeable delay of good

1 faith motions and judicial decision-making by patterning the statute of limitations for the FLSA
2 after that of Rule 23 for class actions; however, they did not do so.”). Here, Defendants have filed
3 two motions to dismiss, both of which also sought other relief, including staying the claims and
4 discovery. Defendants’ motions raised valid legal arguments and do not constitute wrongful
5 conduct warranting equitable tolling. *See id.* (filing motion to dismiss complaint and motion to
6 dismiss amended complaint did not warrant equitable tolling of FLSA claim).

7 Defendants’ refusal to provide potential plaintiffs’ contact information to Mr.
8 Adedapoidle-Tyehimba also does not warrant equitable tolling, as a defendant in a FLSA suit is
9 not required to provide contact information for potential plaintiffs until after the court certifies a
10 collective action.⁴ *Gilbert v. Citigroup, Inc.*, 08-cv-0385 SC, 2009 WL 424320 (N.D. Cal. Feb.
11 18, 2009) (“Defendants’ refusal to provide contact information prior to certification does not count
12 as wrongful conduct”); *Prentice v. Fund for Pub. Interest Research, Inc.*, 06-cv-7776 SC, 2007
13 WL 2729187 (N.D. Cal. Sept. 18, 2007) (“If refusal to disclose contact information is sufficient
14 basis to grant equitable tolling, either the FLSA statute of limitations is meaningless or the Courts
15 are reading a disclosure requirement into the FLSA where the statute does not contain such a
16 requirement. Neither outcome is appropriate.”).

17 In addition, it appears that Mr. Adedapoidle-Tyehimba agreed, or at least acquiesced, to
18 stay discovery on the FLSA claim pending resolution of the *Rothberg* action. The resolution of
19 the *Rothberg* case may well have a significant impact on this litigation, so the stay was certainly
20 appropriate. Mr. Adedapoidle-Tyehimba’s acquiescence to the stay also makes equitable tolling
21 inappropriate at this time.⁵

22 _____
23 ⁴ The Court also notes that at least six individuals have filed consents to be plaintiffs in this action,
24 suggesting that Defendants’ conduct has not in fact prevented Mr. Adedapoidle-Tyehimba from
25 identifying other potential plaintiffs and notifying them of this action. *See* Dkt. Nos. 26, 33, 42,
26 46, 54.

27 ⁵ The Court is concerned about the amount of time elapsing while the *Rothberg* action is pending
28 and how that may affect potential class members. A second hearing in state court on the *Rothberg*
settlement is set for August 20, 2013. At the hearing on August 7, 2013, this Court (i) directed
that once the decision is made whether to approve the *Rothberg* settlement, counsel should meet
and confer about the impact of the determination in *Rothberg* on this case, including with respect
to discovery issues and the motion for conditional certification of the class, and (ii) scheduled a
Case Management Conference for September 17, 2013. The Court may reconsider equitable
tolling at a later date if circumstances beyond plaintiff’s control interfere with his ability to seek

1 **CONCLUSION**

2 For the reasons stated above, the Court GRANTS NEV's and NEFC's motion to dismiss,
3 with leave to amend. The Court DENIES Defendants' motion to strike and the Court DENIES
4 Mr. Adedapoidle-Tyehimba's motion for equitable tolling.

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6 **IT IS SO ORDERED.**

7 Dated: August 9, 2013



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9 WILLIAM H. ORRICK
United States District Judge

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United States District Court
Northern District of California

certification.