UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIC MICHAEL ROSEMAN, ALEXANDER LEE, and WILLIAM VAN VLEET, individually and on behalf of others similarly situated,

Plaintiffs,

v.

BLOOMBERG, L.P.,

Defendant.

No. 14-cv-2657

OPINION & ORDER

Plaintiffs Eric Michael Roseman, Alexander Lee, and William Van Vleet bring this action, on behalf of themselves and others similarly situated, against Defendant Bloomberg, L.P. under the Fair Labor Standards Act ("FLSA"), New York Labor Law, and the California Labor Code. Bloomberg now moves to dismiss opt-in plaintiffs Edward DaCosta, Catherine Fox, and Joseph Marfil[1] under Federal Rules of Civil Procedure 37(b) and 41(b).

The Court denies Defendants' motion to dismiss at this time. For the reasons explained below, however, the Court orders DaCosta, Fox, and Marfil to respond to Bloomberg's document production requests and file affidavits

[1] Bloomberg inadvertently named former opt-in plaintiff Alexander Whitney in its first motion to dismiss dated August 2, 2016, ECF No. 152, not realizing that Alexander Whitney had withdrawn from this case on April 11, 2016, ECF No. 107. Bloomberg had intended to name Joseph Marfil as the third Non-Responsive Plaintiff and, as such, filed a separate motion to dismiss against Mr. Marfil on August 23, 2016. ECF No. 169.

with the Court indicating whether they intend to remain in this litigation no later than May 19, 2017.

BACKGROUND

Plaintiffs filed this action on April 14, 2014. ECF No. 1. Plaintiffs allege, among other things, that Bloomberg misclassified its representatives in its Analytics Department ("Analytics Representatives") as exempt from the overtime requirements contained within the FLSA, New York Labor Law, and the California Labor Code. Compl. ¶¶ 73–97.[2] As such, plaintiffs allege that they are entitled to unpaid overtime wages, liquidated damages, as well as their costs and reasonable attorneys' fees. *See id.* at 15.

On April 17, 2015, the Court granted plaintiffs' request to conditionally certify this action as a collective action under 29 U.S.C. § 216(b). ECF No. 37. The Court also authorized plaintiffs to send notices to other Analytics Representatives to alert them of their right to join this litigation. *Id.* at 8. As a result of this opt-in process, a total of 48 (including the 3 named plaintiffs) individuals consented to join this litigation against Bloomberg.

At the initial pretrial conference held on September 17, 2015, Magistrate Judge Kevin N. Fox permitted Bloomberg to conduct discovery on all of the opt-in plaintiffs. Sept. 17, 2015 Tr. ("I'm not going to prevent the defendant from examining plaintiffs who may opt in[.]"). Bloomberg served each of the opt-in plaintiffs with discovery requests on October 5, 2015. Def.'s Br. at 2. Although

[2] All references to the complaint are to the Third Amended Complaint, which was filed on March 23, 2016. ECF No. 103.

the opt-in plaintiffs at first objected to these requests, they later agreed, without waiving their objections, to respond to Bloomberg's requests by February 22, 2016. *Id.*; Lampe Decl. Ex. D ("Subject to and without waiving the objections Plaintiffs have asserted I can confirm that Opt-In Plaintiffs will conduct a diligent search for responsive documents . . . and will produce any responsive documents that are neither privileged nor protected.").

The named plaintiffs and 28 opt-in plaintiffs eventually produced responses to Bloomberg's discovery requests. Def.'s Br. at 2; Pls.' Opp. at 4. Edward DaCosta, Catherine Fox, and Joseph Marfil (collectively, the "Non-Responsive Plaintiffs"), however, continued to refuse to respond to Bloomberg's requests.[3] Def.'s Br. at 2–3; *see also* Pls.' Opp. at 4. In fact, plaintiffs' counsel concedes that the Non-Responsive Plaintiffs have ceased all communication with their counsel. *See* Pls.' Opp. at 6. As a result, Bloomberg moved to compel the Non-Responsive Plaintiffs to respond to its discovery requests by a date certain. ECF No. 104.

Magistrate Judge Fox held a telephone conference on May 5, 2016 to rule on Bloomberg's motion to compel. At the May 5, 2016 conference, Magistrate Judge Fox stated:

> So if it can be determined that the five opt ins who had not responded intend to continue to participate in the litigation then they'll have to respond to discovery demands that have been made by the defendant. If they're not going to participate in the action any longer, if that can be ascertained, then that should be communicated to the defendant and to the Court.

[3] The remaining 14 opt-in plaintiffs have withdrawn from this litigation.

May 5, 2016 Tr. at 28–29. Magistrate Judge Fox declined, however, to set a firm deadline for the opt-ins' responses and declined to establish clear sanctions if they continued to fail to respond. *See id.* at 30. The Non-Responsive Plaintiffs have still not responded to Bloomberg's discovery requests.

DISCUSSION

Bloomberg now moves to dismiss the Non-Responsive Plaintiffs for failure to prosecute and/or failure to comply with a court order pursuant to Federal Rules of Civil Procedure 37(b) and 41(b). The Court, however, declines to reach the question of whether the Non-Responsive Plaintiffs should be dismissed under Rule 37(b) because the grounds for their dismissal extend beyond mere failure to comply with a discovery order. Specifically, Bloomberg argues that the Non-Responsive Plaintiffs should be dismissed because they have ceased to cooperate with their counsel *in addition* to their failure to comply with a discovery order. Although dismissal for "noncompliance" with a discovery order "depends exclusively upon Rule 37," *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958), courts in this Circuit have utilized Rule 41(b) where opt-in plaintiffs ceased to communicate with their counsel in addition to their noncompliance with a discovery order, *see Savage v. Unite Here*, No. 05 Civ. 10812(LTS)(DCF), 2007 WL 1584206 (S.D.N.Y. May 31, 2007).

Federal Rule of Civil Procedure 41(b) provides that "[i]f the plaintiff fails to prosecute or to comply with [the Rules of Civil Procedure] or a court order, a

defendant may move to dismiss the action or any claim against it." Although dismissal for failure to prosecute under Rule 41(b) is "discretionary," the Second Circuit has described dismissal as a "harsh remedy to be utilized only in extreme situations." *Minnette v. Time Warner*, 997 F.2d 1023, 1027 (2d Cir. 1993) (internal quotations and citations omitted). Courts therefore must consider the following five factors before dismissing a claim for failure to prosecute:

> (1) the duration of the plaintiff's failure to comply with the court order, (2) whether plaintiff was on notice that failure to comply would result in dismissal, (3) whether the defendants are likely to be prejudiced by further delay in the proceedings, (4) a balancing of the court's interest in managing its docket with the plaintiff's interest in receiving a fair chance to be heard, and (5) whether the judge has adequately considered a sanction less drastic than dismissal.

Baptiste v. Sommers, 768 F.3d 212, 216 (2d Cir. 2014) (quoting *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir. 1996)). "No single factor is generally dispositive." *Id.* (citing *Nita v. Conn. Dep't of Envtl. Prot.*, 16 F.3d 482, 485 (2d Cir. 1994)).

As an initial matter, the parties dispute whether Magistrate Judge Fox's statements at the May 5, 2016 conference constituted an order requiring the Non-Responsive Plaintiffs to respond to Bloomberg's discovery demands. Specifically, the parties dispute the meaning of the following statement: "So if it can be determined that the [Non-Responsive Plaintiffs] intend to continue to participate in the litigation then they'll have to respond to discovery demands that have been made by the defendant." Tr. 28–29. Although Magistrate Judge Fox did not expressly use the word "order," the plain meaning of his statement cannot reasonably be disputed. Generally, when a judge instructs the parties

in a case that they "have" to do something, the parties are obligated to do that thing. The Court therefore concludes that the Non-Responsive Plaintiffs were ordered to respond to Bloomberg's discovery demands.

In light of that finding, the Court turns to the first *Baptiste* factor—i.e., "the duration of the plaintiff's failure to comply with the court order[.]" *Baptiste*, 768 F.3d at 216. This factor requires two lines of inquiry: (1) whether the failure to comply was caused by plaintiffs' own neglect and (2) whether that failure was of "significant duration." *Jackson v. City of New York*, 22 F.3d 71, 75 (2d Cir. 1994). Here, plaintiffs' counsel argues that the Non-Responsive Plaintiffs' failure to comply *could have* been caused by any "one of a myriad of life circumstances" and the "difficulties that attend modern life." Pl. Opp. at 7. Plaintiffs' counsel then lists some possible life circumstances—e.g., family instability, the stresses of single parenting, health problems, disabilities, military service, homelessness—that would excuse a failure to comply with a court order. *Id.*

Indeed, perhaps one or some combination of those circumstances, if they were proven to exist, could militate against dismissal under Rule 41(b). But plaintiffs' counsel notably does not say—because he cannot say—whether the Non-Responsive Plaintiffs are in fact plagued by any of those circumstances. As more than ten months have passed since the Court issued its order and because plaintiffs' counsel have not offered any actual reason for the Non-Responsive Plaintiffs' failure to comply with a court order, the Court finds that the first factor of the Rule 41(b) dismissal analysis weighs in favor of dismissal.

The second *Baptiste* factor, however, does not weigh in favor of dismissal because Magistrate Judge Fox's May 5, 2016 order did not provide clear "notice that failure to comply would result in dismissal." *Baptiste*, 768 F.3d at 216. Although Magistrate Judge Fox speculated on the possibility of sanctions, he expressly declined to make a ruling on the appropriateness of sanctions. *See* Tr. at 30 ("Well, I can't speak to whether [the Non-Responsive Plaintiffs will be] dismissed because that would be for the assigned district judge to do . . . [but] I imagine that after today whatever new efforts are made will include admonition that the time for completing discovery is coming to an end and if you haven't participated in discovery Rule 37 talks about the consequences that might befall someone."). Because Magistrate Judge Fox's order did not clearly set forth dismissal as a consequence for failing to comply with his discovery order, the Court finds that the second factor in the Rule 41(b) dismissal analysis weighs against dismissal at this juncture.

Under the third *Baptiste* factor, the Court finds that Bloomberg has been prejudiced by the Non-Responsive Plaintiffs' failure to comply with the Court's order to respond to discovery requests. "Prejudice to defendants resulting from unreasonable delay may be presumed, but in cases where delay is more moderate or excusable, the need to show actual prejudice is proportionally greater." *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 43 (2d Cir. 1982) (internal citations omitted). Although the line between a reasonable and unreasonable delay is not always clear, there is sufficient reason to believe that the Non-Responsive Plaintiffs' delay in this case was unreasonable.

Bloomberg served the Non-Responsive Plaintiffs with discovery requests in October 2015. Def. Br. at 2. Although plaintiffs' counsel timely objected to these discovery requests, Magistrate Judge Fox overruled those objections on May 5, 2016 by ordering them to respond to Bloomberg's requests. Thus, approximately seventeen months have passed since Bloomberg served discovery requests on the Non-Responsive Plaintiffs and approximately ten months have passed since Magistrate Judge Fox ordered the Non-Responsive Plaintiffs to respond to those requests. Courts in this Circuit have dismissed plaintiffs for failure to prosecute for delays shorter than ten months. *See Love v. Amerigroup Corp.*, No. 09-CV-4233(ILG)(RER), 2010 WL 2695636, at *4 (E.D.N.Y. June 2, 2010) (holding that a delay of five months was sufficient to dismiss plaintiffs under Rule 41(b)); *see also LeSane v. Hall's Sec. Analyst, Inc.*, 239 F.3d 206, 211 (2d Cir. 2001) (vacating district court's dismissal of plaintiff's claims but recognizing that some district courts have dismissed claims under Rule 41(b) where plaintiffs' delays lasted for "many months, in spite of repeated warnings"). The Court therefore presumes prejudice to Bloomberg here.

Even if, however, the Court did not presume such prejudice, Bloomberg has been actually prejudiced by the Non-Responsive Plaintiffs' failure to comply with Magistrate Judge Fox's order. The fact that Bloomberg obtained "discovery from 90% of the opt-ins" did not—as plaintiffs suggest—foreclose the possibility of prejudice. *See* Pls. Opp. at 13. Indeed, Bloomberg argues in a separate motion that the conditionally-certified FLSA class of opt-in plaintiffs should be

decertified because there is "significant variation in the day-to-day duties of the 33 [Opt-In] Plaintiffs." ECF No. 199 at 14. As support for this proposition, Bloomberg cites to discovery responses from some of the responsive opt-in plaintiffs to highlight the variations in their self-described job duties. *Id.* at 15. The Non-Responsive Plaintiffs' failure to respond to Bloomberg's discovery requests necessarily deprived Bloomberg of an opportunity to uncover further variations, which, in turn, could have strengthened Bloomberg's argument to decertify the opt-in class. That deprivation—regardless of whether the Non-Responsive Plaintiffs' discovery responses would in fact have revealed further probative material—constitutes actual prejudice to Bloomberg.[4]

Plaintiffs counter that Bloomberg's motion to dismiss should nevertheless be denied because Bloomberg "fails to explain why the discovery it sought . . . is relevant or necessary."[5] Pls. Opp. at 11. Relying principally on *Saleem v. Corp. Transp. Grp., Ltd.*, 12 CIV. 8450(JMF), 2013 WL 6331874 (S.D.N.Y. Dec. 5, 2013), plaintiffs argue that "[t]his failure is . . . fatal to Bloomberg's attempt to dismiss[.]" Pls.' Opp. at 11. The court in *Saleem*, however, merely stated that dismissal of unresponsive FLSA opt-in plaintiffs

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[4] The fact that Bloomberg was prejudiced by this loss of opportunity, however, is not a reflection of the underlying merits of Bloomberg's Motion to Decertify. The Court expresses no opinion on the merits of Bloomberg's arguments in its Motion to Decertify at this time.

[5] To the extent that plaintiffs mean to argue that Bloomberg did not meet the standard to prevail on a motion to compel under Federal Rule of Civil Procedure 37(a)(3)(B), the Court dismisses this argument as untimely. Bloomberg moved to compel the discovery responses at issue here on April 5, 2016. ECF No. 104. Plaintiffs opposed that motion to compel on April 8, 2016. ECF No. 105. Magistrate Judge Fox granted—albeit without setting a deadline for compliance—Bloomberg's motion to compel on May 5, 2016. The time to object to that order expired on May 19, 2016, making plaintiffs' argument that Bloomberg failed to establish the relevance or necessity of its discovery requests untimely. *See* Fed. R. Civ. P. 72(a).

was improper where (1) there had not been any order requiring them to verify their continued desire to participate in the lawsuit or (2) any specific court orders directing them to respond to defendant's discovery demands. *See Saleem*, 2013 WL 6331874, at *3–4.

In this case, the Court has ordered the Non-Responsive Plaintiffs to respond to Bloomberg's discovery demands. Moreover, the Court asked for verification of whether the Non-Responsive Plaintiffs intend to continue in this lawsuit. *See* May 5, 2016 Tr. at 28–29 ("So if it can be determined that the [Non-Responsive Plaintiffs] intend to continue to participate in the litigation then they'll have to respond to discovery demands that have been made by the defendant. If they're not going to participate in the action any longer, if that can be ascertained, then that should be communicated to the defendant and to the Court."). Plaintiffs' reliance on *Saleem* is therefore inapposite.

Fourth, the Court finds that its interest in managing its docket outweighs the Non-Responsive Plaintiffs' interest in receiving a fair chance to be heard. While dismissal of the Non-Responsive Plaintiffs for failure to prosecute under Rule 41(b) would not resolve this case outright, their dismissal would eliminate the potential of any future disputes arising from continued refusals to participate in this litigation or to comply with judicial orders. This benefit outweighs what appears to be the Non-Responsive Plaintiffs' lack of interest in having their claims heard by this Court.

Finally, the Court finds that a sanction other than dismissal would not be adequate to address the Non-Responsive Plaintiffs' failure to participate in

this litigation or maintain communication with their counsel. *Savage v. Unite Here*, No. 05 Civ. 10812(LTS)(DCF), 2007 WL 1584206, at *1 (S.D.N.Y. May 31, 2007) ("Finally, it does not appear that lesser sanctions would be adequate in this case, as [plaintiffs'] history of ignoring Court orders and deadlines and refusing to even communicate with their own counsel make it unlikely that another warning would be fruitful."). Plaintiffs' counsel have presumably spent the better part of a year attempting to contact the Non-Responsive Plaintiffs. It appears those attempts have been futile as counsel have not offered any indication that the Non-Responsive Plaintiffs will resume communication with counsel (or otherwise participate in this litigation).

In sum, four out of the five Rule 41(b) factors weigh in favor of dismissing the Non-Responsive Plaintiffs for failure to prosecute and to comply with a court order. In light of the Second Circuit's admonition against dismissals under Rule 41(b), the Court declines to dismiss the Non-Responsive Plaintiffs at this particular juncture because of the second *Baptiste* factor—i.e., the lack of clear notice to the Non-Responsive Plaintiffs that dismissal would result if they continued to fail to comply with the Court's May 5, 2016 order. The Court therefore exercises its discretion to offer the Non-Responsive Plaintiffs one last opportunity to take part in this litigation. Edward DaCosta, Catherine Fox, and Joseph Marfil shall respond to Bloomberg's document requests and shall file affidavits with the Court signaling their intent to remain in this litigation no later than May 19, 2017. Failure to comply with this order shall result in their dismissal.

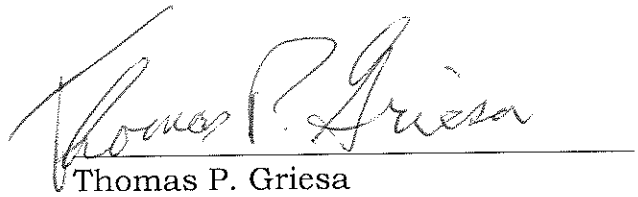
CONCLUSION

For the reasons discussed above, the Court denies Bloomberg's motions to dismiss at this time. However, plaintiffs Edward DaCosta, Catherine Fox, and Joseph Marfil shall respond to Bloomberg's document requests and shall file affidavits with the Court signaling their intent to remain in this litigation no later than May 19, 2017. Failure to comply with this order shall result in dismissal under Federal Rule of Civil Procedure 41(b).

This Opinion and Order resolves Docket Numbers 152 and 169.

SO ORDERED.

Dated: April 4, 2017
New York, New York



Thomas P. Griesa
United States District Judge