UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EMMANUEL AGROPONG, et al.,

Plaintiffs,

14-cv-7990 (RWS)

- against -

OPINION

MICHAEL MEMON, et al.

Defendants.

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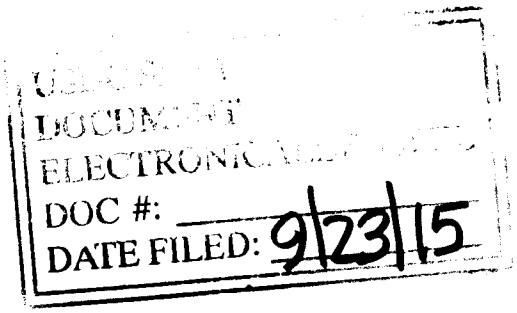

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Sweet, D.J.,

Plaintiffs Emmanuel Agropong, Marcos Basabe, Adrian Batana, Carlos Laguna, Yolana Nieve, Christine Nunez, Andy Osei, Abel Pantoja, Elietzer Pierre-Louis, Josue Pierre-Louis, David Richardson, Daniel Rodriguez, Roberto Rodriguez, Hector Rosado, and Surita Suedass (collectively, the "Plaintiffs") have moved the court to conditionally certify their lawsuit against defendants Michael Memon, Gulan Doria, Bergen Discount Inc., Bergen Discount Plus, Inc., 518 Willis Realty, Inc., Willis Discount Inc., Ali M. Abadi, Ziad Nassradin, ZNF 99 Cent Discount Corp., Dollar-Rite Inc., Todo Barato Discount Inc., Community Dollar Plus, Inc., 167 Trading Discount Inc., 167 Primo Trading, Inc., B&S Discount Inc., 99 Cent Discount and Party Store Inc., 99 Cent Discount, Inc., Clear Choice, Inc., 50 individual John and Jane Doe defendants, and 20 John Doe corporation defendants (collectively, the "Defendants") as a collective action under the Fair Labor Standards Act. Plaintiffs have separately moved to amend their Complaint, seeking to redesignate this action as "In re Doria/Memon Discount Stores Wage and Hour Litigation," to add 13 new defendants while removing certain others who were erroneously sued, and to add eight additional named plaintiffs while removing one who wishes to withdraw. For the reasons set forth

below, both motions are granted.

Prior Proceedings

The Plaintiffs, employees of a Bronx-based chain of discount stores owned or operated by the Defendants, brought this action on October 3, 2014, alleging that the Defendants paid Plaintiffs less than minimum wage, failed to pay overtime, and did not provide proper statements documenting hours worked and payment received, in violation of the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL"). (See generally Complaint, Dkt. No. 1.) Defendants Answered the Complaint on December 6, 2014. (Dkt. No. 10.)

On May 12, 2015, the Plaintiffs filed an Order to Show Cause, seeking to enjoin the Defendants from retaliating against any employee for their participation in the lawsuit, and from speaking to any employees regarding any communications with Plaintiffs' counsel. (Dkt. No. 16) The Court signed a Temporary Restraining Order on the same day (id.), and the TRO was converted into a preliminary injunction, with minor alterations, by the Honorable Richard J. Sullivan, sitting as Part One Judge, on June 2, 2015. (Dkt. No. 61.) The Plaintiffs allege that they continued to suffer retaliation even after the entry of the TRO and preliminary injunction, and have filed two

motions for contempt (Dkt. Nos. 27 & 100), which are scheduled to be heard on September 30, 2015. (Dkt. No. 113.)

Plaintiffs filed their motion for conditional certification on June 25, 2015 (Dkt. Nos. 77-89), and Defendants responded by letter dated July 9, 2015, offering no opposition to the motion but seeking minor changes to the Plaintiffs' Proposed Order. (Dkt. No. 95.) The motion was heard on submission on July 16, 2015. (See Dkt. No. 90.) The Plaintiffs' motion to amend their Complaint was filed on August 5, 2015 (Dkt. Nos. 114-116), and Defendants opposed the motion with a letter-brief filed on September 14. (Dkt. No. 140.) The motion was heard on submission on September 21, 2015. (See Dkt. No. 137.)

Conditional Certification as a Collective Action is Granted

In order to merit conditional certification as a collective action under the FLSA, plaintiffs need only "make a modest factual showing that they and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law." Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010) (quotation omitted). That modest factual showing "cannot be satisfied simply by unsupported assertions, but it should remain a low standard of proof because the purpose of this first stage is merely to determine whether similarly situated

plaintiffs do in fact exist." Id. The Court is not concerned with weighing the merits of the underlying claims, but rather with determining whether there are others similarly suited who could opt into the lawsuit and become plaintiffs. See Lloyd v. J.P. Morgan Chase & Co., No. 11 Civ. 9305, 2013 WL 4828588, at *3 (S.D.N.Y. Sept. 9, 2013).

Here, the Plaintiffs have more than adequately made the modest factual showing required. Along with their notice of motion and its supporting memorandum of law, they submitted ten declarations and affidavits from employees at the defendants' stores, several of whom are not yet plaintiffs in this case. (See Dkt. Nos. 80-89.) A number of the affidavits make reference to other employees in the Defendants' stores who allegedly were subject to the Defendants' illegal wage-and-hour practices or suffered retaliation in connection with this lawsuit. (See, e.g., Affidavit of Roberto Rodriguez, Dkt. No. 85 ¶¶ 7-11; Affidavit of David Richardson, Dkt. No. 88 ¶¶ 15-18, 21-22.) These affidavits and declarations are sufficient to sustain the low burden of proof required at the conditional certification stage. See Weng Long Liu v. Rong Shing, Inc., No. 12 Civ. 7136, 2014 WL 1244676, at *2 (S.D.N.Y. Mar. 26, 2014) ("Plaintiffs may satisfy their minimal burden by relying on their own pleadings and affidavits, or the affidavits of other potential class members.").

Therefore, this lawsuit is conditionally certified as a collective action under the FLSA on behalf of a class consisting of all current and former non-exempt employees who have worked for the Defendants since October 4, 2008, authorizes Plaintiffs' Counsel to issue the proposed Notice of Pendency, as modified by this Opinion,[1] and requires Defendants to post copies of the Notice and the Consent to Become a Party Plaintiff form in a conspicuous location at each of their stores. The parties are directed to meet and confer regarding whether these documents should also be translated into any language other than English. The Defendants are ordered to provide Plaintiffs' counsel with all known names, titles, periods of employment, mailing addresses, alternate addresses, telephone numbers, and email addresses of potential class members, to the extent that the information is within their possession, custody, or control, within 45 days of the filing of this Opinion.

Leave to Amend the Complaint is Granted

[1] Pursuant to the Court's discretionary authority to shape the Notice of Pendency, see Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989); Ramos v. Platt, No. 13 Civ. 8957, 2014 WL 3639194, at *5 (S.D.N.Y. July 23, 2014), Plaintiffs' Counsel are directed to remove from the Notice all language indicating that opt-in plaintiffs must consent to being represented by their law firm. Any plaintiffs that join the action are entitled to representation by an attorney of their choosing, and counsel cannot use the certification process to bind opt-in plaintiffs in this manner. See Ramos, 2014 WL 3639194 at *5.

In their motion to amend, the Plaintiffs ask to make three major changes to their Complaint: first, altering the caption to redesignate this case "In re Doria/Memon Discount Stores Wage and Hour Litigation;" second, adding additional named plaintiffs and additional defendants connected to the ownership and operation of the discount stores; and third, adding a claim that Defendants failed to provide Wage Theft Prevention Act Notices, as required by the NYLL, as well as claims for overtime under the NYLL and retaliation under both the NYLL and FLSA.[2] (See generally Pl.'s Br., Dkt. No. 116; Proposed Amended Complaint, Dkt. No. 115 Ex. A.)

Federal Rule of Civil Procedure 15(a)(2) provides that once 21 days have passed after the filing of a responsive pleading, a party may amend its pleading only with the consent of the opposing party or with leave of the court, although "[t]he court should freely give leave when justice so requires." The decision to grant or deny leave to amend is "within the sound discretion of the district court," Franconero v. UMG Recordings, Inc., 542 F. App'x 14, 17 (2d Cir. 2013), and should generally be denied "only for such reasons as undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party." Richardson

[2] A FLSA overtime claim was present in the original Complaint. (See Dkt. No. 1 at 22-24.)

Greenshields Sec., Inc. v. Lau, 825 F.2d 647, 653 n.6 (2d Cir. 1987).

Taking each of the Plaintiffs' proposed changes in turn, the new caption is a welcome alteration and befits the case's status as a conditional collective action. Since the Defendants do not specifically oppose the new proposed caption in their letter-brief, it is approved without further discussion.

Secondly, the Plaintiffs seek to add a number of parties to the case: eight corporate defendants they allege to be part of Defendants' discount store chain; Sofiya Doria, the administrator of the estate of Mohamed Doria, who allegedly ran the stores along with Defendants Gulan Doria and Mike Memon; four individual defendants who are alleged to hold managerial roles at the discount stores and to have enacted the unfair wage-and-hour practices; and eight additional named plaintiffs who have filed forms seeking to join the action.[3] Defendants argue that joinder of the additional parties would cause "undue delay and prejudice" and that several of the individuals the Plaintiffs seek to sue are not properly part of the action because they are not managers or lack authority to hire, fire, or set wages. In deciding whether to permit the addition of new parties pursuant to Fed. R. Civ. P. 21, the Court applies the

[3] Plaintiffs also seek to remove one named plaintiff and several defendants, to which Defendants do not object.

same "standard of liberality" that governs the addition of new claims under Rule 15(a), with leave freely given when justice so requires. Otegbade v. N.Y. City Admin. for Children's Servs., No. 12 Civ. 6298, 2015 WL 851631, at *2 (S.D.N.Y. Feb. 27, 2015).

Here, Defendants have not articulated what "undue delay and prejudice" would result from the additional corporate defendants being joined, other than their being required to defend this lawsuit and participate in discovery, which is still ongoing. The addition of the corporate defendants is of importance to the case because they are necessary to achieve "a merit-based resolution of the entire controversy." Lavian v. Hagnazari, 884 F. Supp. 670, 674 (E.D.N.Y. 1995). Since Plaintiffs allege that unfair labor practices were present throughout the Defendants' chain of discount stores, including only part of the chain in this litigation would likely result in multiple parallel lawsuits, wasting judicial resources and potentially resulting in inconsistent verdicts. Given the early stage of the litigation, including the additional corporate defendants should result in no significant prejudice. See Saint-Jean v. Emigrant Mortg. Co., 50 F. Supp. 3d 300, 326 (E.D.N.Y. 2014) (granting amendment where new corporate defendants were connected to corporate defendants already in the case and the new parties "only slightly increased the scope of discovery which remained

incomplete."). The Defendants' objection to their joinder is therefore rejected.

As to the objection that four newly-named individual defendants, Usman Doria, Sikander Doria, Salim Doria, and Musajee Vawda, did not have managerial responsibilities and therefore are not liable for the Plaintiffs' claims, their joinder is improper if it is futile, i.e., if a claim against them could not withstand a motion to dismiss. See Dougherty v. Bd. of Zoning Appeals, 282 F.3d 83, 88 (2d Cir. 2002).[4] Here, the Proposed Amended Complaint alleges that all four individual defendants had managerial responsibilities at the Defendants' discount stores, regulate the employment of the workers there, and acted on behalf of the discount stores in relation to the employees. (See Dkt. No. 115 Ex. A. ¶¶ 1, 39-46, 81, 115, 152, 157, 227, 231, 243.) The Defendants' opposition papers, on the other hand, state that the four are salespeople and stock-boys, without any authority over wages or hours. (D.'s Opp. Br., Dkt. No. 140, at 6.) This factual dispute would not be sufficient to defeat claims against the four new defendants at the motion to dismiss stage, since the Court would be required to accept all facts alleged in the Complaint as true. See Thomas v. N.Y. City Dep't of Educ., No. 14 Civ. 8019, 2015 WL 5143986, at *2

[4] Defendants' counsel acknowledges in his letter-brief (Dkt. No. 140 at 5-6) that he does not represent the Estate of Mohamed Doria and therefore cannot object to joinder on behalf of its executor.

(S.D.N.Y. Sept. 1, 2015). Addition of the new defendants is therefore proper.

Defendants also object to the addition of eight new plaintiffs, arguing that one of them, Joseph Kofei, is not their employee, and that eight others should not be included because their claims are based only on retaliation.[5] (See D.'s Br., Dkt. No. 140 at 6-7.) In the Proposed Amended Complaint, the Plaintiffs allege that Kofei has been employed by the Defendants for nearly eleven years, working 66 hours per week, and had his pay and hours reduced after joining the lawsuit. (Proposed Amended Complaint ¶ 118.) The facts may ultimately prove otherwise, but because these allegations would be accepted as true on a motion to dismiss, Mr. Kofei's joinder is proper. See Dougherty, 282 F.3d at 88; Thomas, 2015 WL 5143986 at *2. As to the eight proposed plaintiffs alleging retaliation, since the Court also grants the Plaintiffs' request to include retaliation claims in the Amended Complaint, as discussed further below, their allegations are also properly part of this case.

Lastly, Defendants oppose the addition of new claims, arguing that too much time has passed since the original Complaint, that the new claims are meritless, and that the new claims are duplicative of other proceedings. None of their

[5] Mr. Kofei's name has been spelled differently from document to document in this litigation. The Plaintiffs are directed to verify its spelling before filing their Amended Complaint.

objections holds water. Although the original Complaint was filed nearly a year ago, "Rule 15(a) does not prescribe any time limit within which a party may apply to the court for leave to amend," 6 Charles Alan Wright et al., Federal Practice and Procedure § 1488 (3d ed. 2015), and courts in this district have granted leave to amend after periods far longer than the one at issue here. E.g., Hinds County, Miss. V. Wachovia Bank N.A., 291 F.R.D. 73, 74 (S.D.N.Y. 2013) (granting leave to amend more than five years into litigation). At this early stage, with discovery only just underway and no dispositive motion having been filed, the addition of new claims will result in little prejudice to the Defendants.

As to their merits challenge to the new claims, Defendants correctly point out that an amendment to a pleading should be rejected as futile if it could not withstand a motion to dismiss, citing Lucente v. IBM Corp., 310 F.3d 243, 358 (2d Cir. 2002), but they do not point to any actual deficiencies in the new claims. The only substantive attack aimed at any of the new claims is an objection that Plaintiffs' allegations regarding the alleged hacking of two cell phones by the Defendants are contradicted by Defendants' affidavits and not supported by "actual proof." (See D.'s Br., Dkt. No. 140, at 7-8.) This factual attack on the allegations would fail at the motion to dismiss stage, where the Court accepts the facts set forth in

the complaint as true and draws all reasonable inferences in the plaintiff's favor. See Thomas, 2015 WL 5143986 at *2.

The Defendants also argue that the retaliation claims which the Plaintiffs seek to add to the Complaint are duplicative of their contempt motions, and of a recent related action filed in this Court, Diallo v. Memon, No. 15 Civ. 6947. (D.'s Br., Dkt. No. 140, at 8.) Although the facts of the retaliation claims in the Proposed Amended Complaint overlap with those asserted in the contempt motions, the legal justifications are different, since the new claims are for violations of the NYLL and FLSA, while the contempt motions are for violations of the Temporary Restraining Order and Preliminary Injunction imposed during the pendency of this case. (Compare MOL in Support of Pl.'s Second Motion for Contempt, Dkt. No. 101 at 1 (objecting to "numerous violations of the Court's Preliminary Injunction") with Proposed Amended Complaint, Dkt. No. 115 Ex. A at 62-63 (alleging retaliation under the FLSA and NYLL).) And since these allegations of retaliation have been part of the fabric of this case for months, the proper response to a newly-filed litigation covering the same claims and parties would be to dismiss the new case under the prior pending action doctrine, rather than to scrub the retaliation issues from this one. See Smith v. United Fed'n of Teachers, 162 F.3d 1148, 1998 WL 639756, at *2 (2d Cir. Mar. 26, 1998) ("Faced with repetitive complaints in the same

district, the district court should invoke the prior pending action doctrine to give priority to the first suit.").[6]

Conclusion

The Plaintiffs' motion for conditional certification is granted, and the parties are directed to provide notice to potential class members. The Plaintiffs' motion to amend their Complaint is also granted in its entirety.

[6] The Court makes no finding regarding whether the claims or parties in this action and the Diallo case overlap.

It is so ordered.

New York, NY
September 29 2015

ROBERT W. SWEET
U.S.D.J.