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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KIMBERLY BEHZADI and JASON RINDENAU, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

INTERNATIONAL CREATIVE MANAGEMENT PARTNERS, LLC,

Defendant.

No: 14-cv-4382 (LGS)

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED COMPLAINT

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INTRODUCTION

The Court should deny Defendant International Creative Management Partners LLC's ("ICM's") motion to dismiss the Fair Labor Standards Act ("FLSA") claims of Plaintiff Jason Rindenau because the motion is premature and cannot be decided at the pleading stage before the parties have engaged in discovery. The Court has jurisdiction over Rindenau's California claims both under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332, which ICM does not dispute, and under 28 U.S.C. § 1367, because the California claims arise from the same facts and circumstances as the FLSA claims and raise no novel legal issues.

ARGUMENT

I. The Court Should Not Dismiss Rindenau's FLSA Claim.

A. The Statute of Limitations Is an Affirmative Defense that Courts Do Not Decide at the Pleading Stage.

Courts routinely deny motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure based on the affirmative defense that a claim is time-barred where, as here, the "[defendant] relies on materials outside the pleadings." *See* Ex. A (Hr'g Tr., No. 11 Civ. 6784, *Glatt v. Fox Searchlight Pictures Inc.* (S.D.N.Y. Oct. 9, 2012)) 13:3-5 (statute of limitations defense is premature before there has been discovery where defendant relies on materials outside of the pleading);[1] *Garcia v. Pancho Villa's of Huntington Vill., Inc.*, 268 F.R.D. 160, 166 (E.D.N.Y. 2010) ("the statute of limitations is an affirmative defense, the determination of which requires a consideration of the merit of both parties' claims and defenses"). "[D]ismissing claims on statute of limitations grounds at the complaint stage is 'appropriate only if a complaint clearly shows the claim is out of time.'" *SEC v. Gabelli*, 653 F.3d 49, 60 (2d Cir. 2011), *rev'd on other grounds*, 133 S.Ct. 1216 (2013) (quoting *Harris v. City of N.Y.*, 186 F.3d 243, 250 (2d

[1] All exhibits are attached to the Declaration of Rachel Bien.

Cir. 1999)).

Here, ICM relies on a declaration from its Vice President of Human Resources, Karen Abrams. ECF No. 33. The Court should not rely on the declaration because it is evidence outside the pleading with respect to which Plaintiffs have not had an opportunity to take discovery, and thus cannot support a motion under Rule 12(b)(6). *See DiFolco v. MSNBC Cable L.L.C.,* 622 F.3d 104, 111 (2d Cir. 2010) ("In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.").

B. Even If Rindenau's FLSA Claim Is Time-Barred, the Statute of Limitations May Be Equitably Tolled, a Ruling that Requires a Fully Developed Record.

Even if Rindenau's FLSA claim is untimely, he may be entitled to equitable tolling. *See* Ex. B (Hr'g Tr., No. 11 Civ. 3743, *Kassman v. KPMG LLC* (S.D.N.Y Aug. 1, 2013)) 16:23-17:3 (courts have discretion "'to extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances'") (quoting *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 479 (S.D.N.Y. 2008)). Courts do not determine whether equitable tolling applies at the pleading stage. *Kattu v. Metro Petroleum, Inc.*, No. 12 Civ. 54, 2013 WL 4015342, at *4-5 (W.D.N.Y. Aug. 6, 2013) (refusing to dismiss complaint on a 12(b)(6) motion where plaintiffs argued their claims should be equitably tolled); *Sampson v. MediSys Health Network, Inc.*, No. 10 Civ. 1342, 2012 WL 3027838, at *7 (E.D.N.Y. July 24, 2012) (declining to rule on equitable tolling at pleading stage and deferring decision until after discovery); *Leon v. Pelleh Poultry Corp.*, No. 10 Civ. 4719, 2011 WL 4888861, at *3 (S.D.N.Y. Oct. 13, 2011) (refusing to dismiss case at pleading stage because the plaintiffs' allegation that the defendant failed to advise them of their right to overtime was "a possible basis . . . for equitable tolling");

Garcia, 268 F.R.D. at 166 ("whether or not the statute of limitations should be equitably tolled . . . is an issue of fact better addressed on a motion for summary judgment or at the time of trial").

Although "[i]t is well established that '[c]omplaints need not anticipate, or attempt to plead around, potential affirmative defenses,'" *Kattu*, 2013 WL 4015342, at *4, here, the Complaint alleges facts that, if proven, may support equitable tolling. *See* ECF No. 23 (Am. Compl.) ¶ 69 (alleging that ICM's "deceptive conduct prevented Plaintiffs and the Intern Class from discovering or asserting their claims any earlier than they did"). This is a potential ground for equitable tolling. *See Whitehorn v. Wolfgang's Steakhouse, Inc*., 767 F. Supp. 2d 445, 449 (S.D.N.Y. 2011) (equitable tolling may be warranted where "the defendant concealed from the plaintiff the existence of a cause of action") .

II. The Court Has Original Jurisdiction over Rindenau's California Claims Under CAFA.

The Court has original jurisdiction over Rindenau's California claims under CAFA, which ICM does not dispute. CAFA provides federal courts with original jurisdiction in class action cases over state law claims involving minimal diversity and an aggregate amount in controversy of at least $5 million. *See* 28 U.S.C. § 1332(d); *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 56 (2d Cir. 2006). Plaintiffs have sufficiently alleged facts satisfying these requirements. *See* ECF No. 23 (Am. Compl.) ¶¶ 10, 14, 18, 22, 25-27, 29; *Scherer v. Equitable Life Assurance Soc'y of the U.S.*, 347 F.3d 394, 397 (2d Cir. 2003) (there is "a rebuttal presumption that the face of the complaint is a good faith representation of the actual amount in controversy") (citation omitted).

III. The Court Has Supplemental Jurisdiction over Rindenau's California Claims Under 28 U.S.C. § 1367.

The Court has supplemental jurisdiction over Rindenau's California claims because they

"are so related to" the FLSA claim "that they form part of the same case or controversy," and use the same legal standard as the FLSA claim. 28 U.S.C. § 1367(a), (c).

First, ICM fails to show any way in which the FLSA and California claims differ in terms of the "operative facts" on which they rely. The claims rest on the very same allegation – that ICM had a policy of failing to pay its interns based on its unlawful determination that they are not covered by minimum wage protections. *See* ECF No. 23 (Am. Compl.) ¶¶ 56, 58, 100, 104, 111, 127. The fact that Rindenau worked in California one year before Behzadi is irrelevant because the claim is the same regardless of where and when they worked. *See Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 245 (2d Cir. 2011) (state and FLSA actions derived from "a common nucleus of operative facts since they ar[o]se out of the same compensation policies and practices" of employer).

Courts routinely exercise supplemental jurisdiction over parallel state law claims in FLSA lawsuits. For example, in *Glatt v. Fox Searchlight Pictures Inc.*, the court exercised supplemental jurisdiction over California claims brought by an unpaid intern that were identical to the claims that Rindenau brings here. *See* Ex. A (Hr'g Tr., No. 11 Civ. 6784, *Glatt v. Fox Searchlight Pictures Inc.* (S.D.N.Y. Oct. 9, 2012)) 13:12-16. The court held that supplemental jurisdiction was proper because, like here, the California claims arose "from the same 'common nucleus of operative fact'" as the FLSA and NYLL claims brought by interns who worked in New York. *See id.* (quoting *Shahriar*, 659 F.3d at 245); *see also, e.g., Ruggles v. Wellpoint, Inc.*, 687 F. Supp. 2d 30, 36 (N.D.N.Y. 2009) (California claims "were not so distinct such that [they] . . . would raise a novel or complex issue for supplemental jurisdiction purposes") (citation omitted); *Lynch v. U.S. Auto. Ass'n*, 614 F. Supp. 2d 398, 401-02 (S.D.N.Y. 2007) (rejecting argument that inclusion of California claims would "thrust into [the] case complicated issues

regarding the interpretation of California's various statutes"); *Shahriar*, 659 F.3d at 243 ("Victims of wage and hour violations . . . often have parallel claims under both the FLSA and the New York Labor Law"); *see also Scott v. Chipotle Mexican Grill, Inc.,* No. 12 Civ. 08333, 2014 WL 2975346, at *7 (S.D.N.Y. July 2, 2014) (exercising supplemental jurisdiction over Colorado, North Carolina, Washington, and Illinois claims).[2]

"A federal court's exercise of pendent jurisdiction over plaintiff's state law claims, while not automatic, is a favored and normal course of action." *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 374 (S.D.N.Y. 2007) (quoting *Promisel v. First American Artificial Flowers,* 943 F.2d 251, 254 (2d Cir. 1991)) (internal quotation marks omitted). Exercising jurisdiction over a parallel state law claim avoids the inefficiency of multiple lawsuits in multiple courts over the same challenged policies.

Second, the California claims do not raise novel issues because, as ICM admits, California's Division of Labor Standards Enforcement ("DLSE") has adopted the U.S. Department of Labor's ("USDOL's") standard to evaluate unpaid internships. ICM Br. 4; *see* Ex. C (Cal. DLSE Op. Letter, Apr. 7, 2011) (adopting USDOL six-factor test). ICM has not pointed to any California court that has not adopted the DLSE's position.[3] *See id.* In *Glatt,* the court specifically held that "California's test governing the classification of interns is consistent

[2] The Rule 21 standard does not apply here because it applies to motions to add or drop a party where leave is required and Plaintiffs amended their complaint as of right pursuant to Rule 15(a)(1)(B). *See* Fed. R. Civ. P. 15(a)(1)(B) ("A party may amend its pleading once as a matter of course within: . . . (B) . . . 21 days after service of a motion under Rule 12(b) . . . ."). Even if it did apply, the standard is a liberal one that Plaintiffs easily meet. *See Scott*, 2014 WL 2975346, at *7 n.4 (noting that Rule 21 is guided by "the same standard of liberality afforded to motions to amend pleadings under Rule 15").

[3] The case that ICM cites, *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (Cal. 2012), did not involve the DLSE's intern test. Moreover, the court refused to defer to a DLSE opinion letter at issue simply because it did not support the proposition for which it was offered. *Id.* at 1032 ("We have no reason to disagree with the DLSE's view regarding the scenario it considered").

with the FLSA's," and thus that the California claims "d[id] not present 'novel or complex issues of state law.'" Ex. A (Hr'g Tr., No. 11 Civ. 6784, *Glatt v. Fox Searchlight Pictures Inc.* (S.D.N.Y. Oct. 9, 2012)) 13:18-21.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny ICM's Motion to Dismiss the First Amended Complaint.

Dated: New York, New York
September 19, 2014

Respectfully submitted,
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