

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

CASSANDRA GREENE and ELIZABETH GOFF, individually and on behalf of all other persons similarly situated who were employed by C.B. HOLDING CORP. d/b/a CHARLIE BROWN'S STEAKHOUSE; CHARLIE BROWN'S ACQUISITION CORP.; CHARLIE BROWN'S OF COMMACK, LLC; CHARLIE BROWN'S OF HOLTSVILLE, LLC; and/or any other entities affiliated with or controlled by C.B. HOLDING CORP. d/b/a CHARLIE BROWN'S STEAKHOUSE; CHARLIE BROWN'S ACQUISITION CORP.; CHARLIE BROWN'S OF COMMACK, LLC; CHARLIE BROWN'S OF HOLTSVILLE, LLC,

Plaintiffs,

- against -

C.B. HOLDING CORP. d/b/a CHARLIE BROWN'S STEAKHOUSE; CHARLIE BROWN'S ACQUISITION CORP.; CHARLIE BROWN'S OF COMMACK, LLC; CHARLIE BROWN'S OF HOLTSVILLE, LLC; and/or any other entities affiliated with or controlled by C.B. HOLDING CORP. d/b/a CHARLIE BROWN'S STEAKHOUSE; CHARLIE BROWN'S ACQUISITION CORP.; CHARLIE BROWN'S OF COMMACK, LLC; CHARLIE BROWN'S OF HOLTSVILLE, LLC; and SAMUEL BORGESE,

Defendants.

**Docket No.: 10 cv 1094  
(JBW)(CLP)**

**AFFIRMATION IN  
SUPPORT OF  
PLAINTIFFS' MOTION  
TO AMEND THE  
COMPLAINT**

Kara Belofsky, an attorney duly admitted to practice law in the Eastern District of New York, hereby affirms under the penalties of perjury that:

1. I am associated with the law firm of Virginia and Ambinder, LLP, counsel to Plaintiffs in this action. I submit this affirmation in support of Plaintiffs' motion for an order pursuant to Federal Rule of Civil Procedure 15(a)(2) granting Plaintiffs leave to amend their complaint by: (1) adding Plaintiff Martin Tello ("Tello") as an additional named Plaintiff in this action; (2) adding new causes of action for unpaid minimum wages and unpaid overtime compensation pursuant to New Jersey Statutes Annotated 34:11-56a *et seq*, New Jersey Administrative Code 12:56-14.1 *et seq*, and 43 Pennsylvania Statutes §§ 333.101 *et seq*; and (3)

granting such other and further relief as the Court may deem just and proper. (A copy of the proposed Amended Complaint is annexed hereto as "Exhibit A.")

2. Plaintiffs initially brought this action alleging violations of the Fair Labor Standards Act (hereinafter referred to as "FLSA"), 29 U.S.C. §§ 206, 207 and 216(b), New York Labor Law Article 19 § 663, New York Labor Law Article 6 § 190 *et sec.*, and N.Y. CODES RULES AND REGULATIONS TITLE 12 §§142-2.2, and 142-2.4, to recover unpaid minimum wages and overtime compensation, and improperly withheld wages and tips owed to Plaintiffs and all similarly situated persons who are presently or were formerly employed by C.B. Holding Corp. d/b/a Charlie Brown's Steakhouse, Charlie Brown's Acquisition Corp., Charlie Brown's of Commack, LLC, Charlie Brown's of Holtsville, LLC, and Samuel Borgese, and/or any other entities affiliated with or controlled by C.B. Holding Corp. d/b/a Charlie Brown's Steakhouse, Charlie Brown's Acquisition Corp., Charlie Brown's of Commack, LLC, and Charlie Brown's of Holtsville, LLC, (collectively "Charlie Brown's Steakhouse") and Samuel Borgese, (collectively the "Defendants"). (A copy of the initial Summons and Complaint is annexed hereto as "Exhibit B.")

3. After filing the original Complaint, additional facts were discovered which have given rise to the instant motion to amend.

4. Specifically, one additional individual (Martin Tello) has expressed a desire to join the lawsuit as a representative Plaintiff. Additionally, Plaintiffs' initial Complaint failed to plead causes of action under New Jersey and Pennsylvania minimum wage and overtime statutes inadvertently.

5. Accordingly, Plaintiffs respectfully requests leave of the Court to amend their Complaint to reflect these additional operative facts.

6. Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a party's pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Leave to amend should be given "absent evidence of undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, or futility." Monahan v. New York City Dep't of Corr., 214 F.3d 275, 283 (2d Cir. 2000) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). Indeed, "[t]he rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith." Block v. First Blood Assoc., 988 F.2d 344, 350 (2d Cir. 1993).

7. In determining what constitutes prejudice, courts in this Circuit generally consider whether "the assertion of the new claim or defense would "(i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.'" Monahan, 214 F.3d at 284 (quoting Block, 988 F.2d at 350).

8. The burden is upon the opposing party to assert and demonstrate that it will be substantially prejudiced by a proposed amendment. See Panzella v. Skou, 471 F. Supp. 303 (S.D.N.Y. 1979); Manhattan Fuel Co., Inc. v. New England Petroleum Corp., 422 F. Supp. 797 (S.D.N.Y. 1976), adhered to, 439 F. Supp. 959 (S.D.N.Y. 1977), aff'd, 578 F.2d 1368 (2d Cir. 1978). Moreover, in an ordinary civil action, the Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). When there are "well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1940-41 (2009). A court may "dismiss a complaint only if it is clear

that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

9. In sum, amendments should be granted liberally. If the proposed amendment “alleges facts or circumstances which may be a proper subject of relief, the suitor, in the absence of sufficient reasons for denying him this opportunity, should have a chance to test his claim on the merits.” Middle Atlantic Utilities Co. v. S. M. W. Development Corp., 392 F.2d 380, 11 Fed.R.Serv.2d 241 (2d Cir. 1968) (quoting Foman, 371 U.S. at 182). As such, “narrow pleading rules should not be applied to foil an honest plaintiff’s efforts to gain redress.” *Id.* In examining the circumstances which might justify not granting plaintiff this opportunity to be heard on the merits, the trial courts should normally focus on the resultant prejudice to defendant. United States v. Hougham, 364 U.S. 310, 316 (1960); Ricciuti v. Voltarc Tubes, Inc., 277 F.2d 809, 814 (2d Cir. 1960).

10. As the proposed Amended Complaint contains no substantial substantive changes to the allegations set forth in the initial Complaint; reflects operative facts essentially identical to those set forth in the initial Complaint; and merely asserts the same legal theories, Defendants will not be prejudiced by the amendment, and the Amendments made to the Complaint are clearly legally sufficient to support the motion to amend under Fed. R. Civ. Pro. 15(a)(2).

**I. The Addition of the New Plaintiff is Proper**

11. Plaintiffs seek to add additional named Plaintiff Tello to those specifically enumerated in the Caption of the Complaint.

12. Mr. Tello worked for Charlie Brown’s Steakhouse at its Old Tappan, New Jersey location as a salad maker.

13. Plaintiffs and the proposed additional Plaintiff all performed work at Charlie

Brown's Steakhouses, and Mr. Tello wishes to act as a named class representative in this action.

14. Questions of law and fact surrounding the claims of the new proposed Plaintiff are similar to the current Plaintiffs' claims against the Defendants; namely, whether Defendants failed to pay the proper wages, including minimum wages and overtime compensation. As such, the amendment to include Mr. Tello as a new additional Plaintiff is proper.

## **II. Amending the Complaint to Add New Causes of Action is Proper**

15. Plaintiffs new causes of action, pursuant to New Jersey Statutes Annotated §§ 34:11-56a *et seq*, New Jersey Administrative Code 12:56-14.1 *et seq*, and 43 Pennsylvania Statutes §§ 333.101 *et seq* for unpaid minimum wages and overtime, are based upon the same facts set forth in the initial Complaint, and assert no new allegations. Indeed, these causes of action are to address the same wrongs set forth in the initial Complaint pursuant to New Jersey and Pennsylvania law, in addition to the previously pled claims under federal and New York state law.

16. These amendments are therefore proper and relate back to the date of the original Complaint. Accordingly, the absence of prejudice to the existing Defendants dictates that the Court should grant Plaintiffs' motion for leave to amend their Complaint. Therefore, respectfully, this Court should permit Plaintiffs to make the proposed amendments.

## **III. Established Law Dictates that the Amendments Should be Permitted**

17. The Supreme Court has set forth the circumstances under which courts should allow such amendments: in the absence of any apparent or declared reason---such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to prove deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of

the amendment, futility of amendment, etc.--- the leave sought should, as the rule requires, be "freely given." Foman, 371 U.S. at 182 (quoting Fed.R.Civ.P. 15(a)).

18. Defendants here can show no prejudice to their position. Defendants have not undergone any change in position, or relinquished any right, in reliance upon any omission in the pleading sought to be amended. Indeed, the substantive allegations in the amended Complaint for unpaid minimum and overtime wages are identical to those in the initial Complaint; the amendments are required solely for the purpose of including an additional plaintiff and causes of action pursuant to New Jersey and Pennsylvania law. Additionally, Defendants are faced with the same claims and can provide the same defenses for Mr. Tello as they can for the plaintiffs named in the initial Complaint.

19. Furthermore, Plaintiffs' counsel have responded to Defendants' interrogatory requests and document demands on behalf of Mr. Tello. Plaintiffs' counsel have also provided Defendants' counsel advance notice of this motion to amend, and an opportunity to supplement Defendants' discovery demands with any additional requests specific to Mr. Tello. Defendants will receive Mr. Tello's responses at the same time Defendants will receive timely responses from Plaintiffs Goff and Greene. Any additional discovery burdens placed on Defendants at such an early stage in litigation would be *de minimis*. See Platt v. The Incorporated Village of Southampton, 2009 WL 3076099, at \*10 (E.D.N.Y. Sept. 21, 2009) (citing US v. Continental Ill. Nat'l Bank & Trust of Chicago, 889 F.2d 1248, 1255 (2d Cir. 1989) ("the adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a motion to amend a pleading."))

20. Plaintiffs are moving to amend the Complaint only three months after the initial filing, and thus, there has been minimal delay. Courts have found no undue delay in many cases where even more time has passed. See e.g. Platt v. The Incorporated Village of Southampton, 2009 WL 3076099, at \*9 (E.D.N.Y. Sept. 21, 2009) (stating that a five month delay “is much less than other cases where courts have permitted amended.”) (citing e.g. State Teachers Retirement Bd. V. Fluor Corp., 654 F.2d 843, 845-46 (2d Cir. 1981) (granting leave to amend three years after the initial pleadings)).

21. Moreover, the claims have solid basis in law – numerous actions to recover unpaid minimum and overtime wages have been brought before this Court and have been approved of. See e.g. Laura v. Saybolt, LP, 2010 WL 1992008 (E.D.N.Y. May 17, 2010).

22. Consequently, the absence of prejudice to the Defendants dictates that the Court should grant Plaintiffs’ motion for leave to amend their Complaint.

WHEREFORE, it is respectfully requested that an order be issued: I submit this affirmation in support of Plaintiffs’ motion for an order pursuant to Fed. R. Civ. Pro. 15(a)(2) granting Plaintiffs leave to amend their complaint by: (1) adding Plaintiff Martin Tello as an additional named Plaintiffs in this action; (2) adding new causes of action for unpaid minimum and overtime wages under New Jersey and Pennsylvania law; and (3) granting such other and further relief as the Court may deem just and proper.

Dated: New York, New York  
June 18, 2010



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