

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ANNE MARSH, DEBRA OTTO,	:	
STEVEN KIEFFER, RUSSELL	:	
GASKELL,	:	
Plaintiffs,	:	
	:	
	:	3:04CV220(WWE)
v.	:	
	:	
TAUCK INC.,	:	
Defendant.	:	

RULING ON DEFENDANT'S MOTION TO DISMISS

This case¹ concerns alleged federal and California state labor law violations by defendant Tauck, Inc., a tour company. The four named plaintiffs, Anne Marsh, Debra Otto, Steven Kieffer, and Russell Gaskell, allege failure to pay minimum wage and overtime in violation of the Fair Labor Standards Act ("FLSA")(count one); failure to pay minimum wage and overtime, and to make timely final wage payments in violation of the California Labor Code and California Industrial Commission Wage Orders (count two); failure to fully reimburse employees for the expense of purchasing laptop computers in violation of the Labor Code and California Industrial Commission Wage Orders (count three); violation of California's Unfair

¹ This case, which was originally filed in the Northern District of California, was transferred upon defendant's motion to this district based on, inter alia, the fact that defendant has its principal place of business in Connecticut, and that many of the non-party witnesses reside in Connecticut.

Competition Law/Unfair Business Practices Act, Section 17200, ("UCL")(count four); and claims under the California Labor Code, Section 2689-99, California Private Attorney General Statute for Labor Code violations (count five). Plaintiffs will seek class certification on counts one, two, and three. The fourth claim under the UCL is a non-class, representative claim.

Defendant has moved pursuant to FRCP 12(b)(6) for dismissal of 1) plaintiff's UCL representative action alleged in count four, and 2) all claims raised by plaintiff Gaskell. For the following reasons, the motion to dismiss will be denied.

DISCUSSION

Motion to Dismiss for Failure to State a Claim

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) should be granted 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 & Spaulding, 467 U.S. 69, 73 (1984). The function of a motion to dismiss "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980). In considering a motion to dismiss, a court must presume all factual allegations of the complaint to be true

and must draw any reasonable inferences in favor of the non-moving party. Cruz v. Beto, 405 U.S. 319, 322 (1972).

UCL Representative Claim for Restitution

Defendant's motion to dismiss attacks the named plaintiffs' ability to bring this UCL claim in a representative capacity against Tauck. Defendant asserts that allowing the fourth count to proceed in a representative capacity will present potential state and federal constitutional due process violations to non-party individuals and the defendant. Specifically, defendant complains that the non-party individuals will not get notice of the proceedings and the opportunity to opt-out, and that the defendant will not have the benefit of res judicata protection against duplicative law suits filed by non-party individuals. Additionally, defendant argues that the due process concerns are heightened where the determination of liability and damages are complex, and awarding judgments for or against non-parties creates control and management problems for the court. Plaintiffs counter that this representative UCL action may be maintained without implicating due process concerns and complexities of proof or case management.

California's unfair competition statute, Section 17200 et seq., permits a suit to be brought by any person acting for the interests of himself or herself or the general public. A

representative action brought by an individual may eliminate the potentially significant expense of pretrial certification and notice, and thus may prove to be a preferable procedure to a class action. See Bronco Wine Co. v. Frank A. Logoluso Farms, 214 Cal. App. 3d 699 (1989). However, a UCL claim is one in equity, and "the court may decline to entertain the action as a representative suit if the defendant can demonstrate a potential for harm or show that the action is not one brought by a competent plaintiff for the benefit of injured parties." Kraus v. Trinity Management Services, Inc., 23 Cal.4th 116, 138 (2000).

In Bronco Wine Company, a grape grower brought a UCL representative action based on breach of contract on behalf of himself and twenty seven non-party growers against a winery operator. The California Court of Appeal held that a representative UCL action was improper in light of the due process concerns and reversed the restitution awarded to the non-party growers. The court explained that due process under California and federal law is violated where a judgment enters either for or against a non-party to a proceeding, and the non-parties have not had notice of the proceedings or an opportunity to opt out.

Bronco Wine has been criticized as "a poor, if not wholly inaccurate, statement of California law." In re First

Alliance Mortg. Co., 269 B.R. 428, 440 (C.D.Cal. 2001).

Further, at least two district courts have declined to dismiss UCL representative actions for overtime wages brought by tour directors against tour operators. See Stokes v. Saga International Holidays, LTD, 218 F.R.D. 6 (D. Mass. 2003)(citing unpublished 2003 Northern District of California opinion, Scherrer v. Group Voyagers).

In Kraus, the California Supreme Court, holding that a representative UCL action could be brought without due process concerns, instructed that a trial court could implement certain procedures to avoid due process violations: 1) order the defendant to identify and notify the non-parties of their right to restitution; 2) establish a reasonable time for restitution to be claimed and retain jurisdiction to adjudicate any disputes over entitlement to the restitution award; and 3) if appropriate, condition payment upon execution of releases to avoid duplicative litigation against defendant.

Here, plaintiffs suggest that the procedures described in Kraus will provide adequate due process safeguards for the non-parties and defendant. Defendant responds that the release will not eliminate the danger of subsequent claims against defendant for statutory penalties and punitive damages, remedies which are not provided for by the UCL.

However, in Kraus, the California Supreme Court indicated that the release could encompass the "full settlement of claims against the defendant, thereby avoiding any potential for repetitive suits." Accordingly, this Court has capacity to fashion a release that will eliminate the danger of subsequent duplicative lawsuits by non-parties against defendant.

Further, the administrative burden of handling the claims in this case, as described by the defendant, does not warrant dismissal of the action. The cited travails in determining liability and damages include individualized analysis of which tour directors are exempt from California and/or federal minimum wage and overtime requirements, and how much each non-party is entitled to as restitution. This Court has some familiarity in administering multiple claims requiring individualized analysis. In a recent interpleader action, this Court administered the determination of approximately 200 pro se plaintiffs' claims for backpay and vacation payments. Petronella v. ACAS, 02cv1047 (WWE). Upon review of the papers, the Court finds that the individualized determinations and management required for the instant case do not appear to be insurmountably complex.

At this procedural posture, the Court will not exercise its discretion to dismiss the case based upon the asserted due process concerns.

UCL Representative Claim for Injunctive Relief

Defendant argues that injunctive relief requiring defendant to treat each tour director as non-exempt is improper on a UCL representative claim. Defendant asserts that some tour directors are exempt from the federal and state statutory laws for minimum wage and overtime. The Court will not dismiss the request for injunctive relief on the representative UCL claim. Consideration of the requested injunctive relief is more appropriate after discovery.

Plaintiff Gaskell As Proper Plaintiff

Defendant argues that plaintiff Gaskell works abroad and therefore he cannot maintain an action pursuant to the FLSA or the California wage and hour laws. Plaintiffs counter that Mr. Gaskell is not a named plaintiff on the FLSA count, and that he is covered under the California wage and hour laws. Plaintiffs also assert that dismissal of Gaskell on this motion prior to discovery would be improper since discovery will afford an opportunity for them to gather proof of Mr. Gaskell's work in California.

Upon review of the papers, the Court declines to treat this motion to dismiss as a motion for summary judgment. Accordingly, the Court will allow Mr. Gaskell's claim to proceed through discovery.

Statute of Limitations on FLSA Class Action Claims

Plaintiffs represent that the statute of limitations is running as to the FLSA claims of potential class members' FLSA claims until such members file an opt-in form. Plaintiffs further assert that defendant's answer is material to whether the case merits class certification. Thus, plaintiffs request the Court to afford the defendant ten days to answer the complaint. In light of the delay owing to this action's transfer from California and the filing of the motion to dismiss, the Court will order the defendant to answer the complaint within ten days of this ruling's filing date.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss [doc. #252] is DENIED. Defendant must answer the complaint by October 18, 2004.

JUDGE

WARREN W. EGINTON
SENIOR UNITED STATES DISTRICT

Dated at Bridgeport, Connecticut this 7th day of October, 2004.