UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ERIC MICHAEL ROSEMAN, ALEXANDER LEE,   :
and WILLIAM VAN VLEET, individually and :
on behalf of others similarly situated, :   14cv2657 (DLC)
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                  Plaintiffs,   :   ORDER
                                 :

           -v-   :

BLOOMBERG L.P.,   :

                  Defendant.   :

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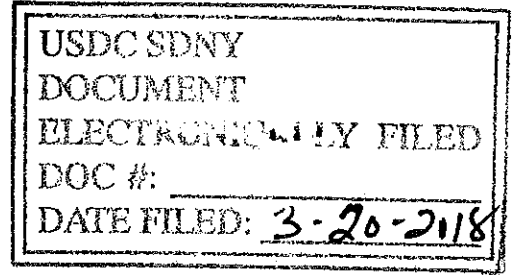
DENISE COTE, District Judge:

     This Order addresses two motions in limine brought by the
parties on the eve of trial: plaintiffs' motion for "relation
back," and defendant's motion for reconsideration. For the
following reasons, both motions are denied.

     Through a motion of March 5, the plaintiffs seek a ruling
that their third amended complaint ("TAC"), filed on March 23,
2016, relates back to the filing of this lawsuit on April 14,
2014. In the TAC, the plaintiffs asserted for the first time a
California class action, and named a plaintiff who could
represent such a class, William Van Vleet. The standard for
this motion is supplied by Fed. R. Civ. P. 15. Generally, it
requires a showing of fair notice. United States v. The Baylor
University Medical Center, 469 F.3d 263, 270 (2d Cir. 2006).
("[T]he touchstone for relation back pursuant to Rule 15(c)(2)

is notice, i.e., whether the original pleading gave a party
adequate notice of the conduct, transaction, or occurrence that
forms the basis of the claim or defense. . . ." (citation
omitted)).

The plaintiffs have not shown fair notice. The amendment
to the original complaint had a substantial impact on the
configuration of this lawsuit. Instead of proceeding with only
a Fair Labor Standards Act ("FLSA") opt-in collective action for
California employees serving as Analytics Representatives, the
TAC sought to add an opt-out class action. Until a named
plaintiff willing to represent a California class agreed to join
the lawsuit, no California class action could have proceeded.
The California statutory claim also has significant differences
when compared to the FLSA (and New York's Labor Law). Among
other things, the California claim has a four-year statute of
limitations and calculates overtime not just weekly, but also
daily. The existence of a California class could be expected to
affect discovery, settlement discussions, and the nature of the
trial.

In a motion of March 8, the defendant seeks reconsideration
of a ruling of February 22, 2018 that the defendant would bear
the burden of proving that the fluctuating workweek method
("FWW") would be used to calculate damages. Whether or not this
application is timely, it does not present a reason to revisit

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the February 22 ruling.

As explained at the conference held on February 22, should the jury find that the Analytics Representatives are non-exempt employees, then Bloomberg will have an opportunity to prove that the FWW method for calculating damages should be used. The decision in Siegel v. Bloomberg, 13cv1351 (DLC), 2015 WL 223781 (S.D.N.Y. Jan. 16 2015), provides guidance on what must be shown to establish that the FWW method applies. Bloomberg will be required to prove a clear mutual understanding between the employer and employees that that FWW method would be used. Siegel, at *7.
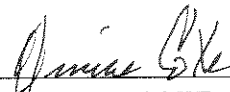
The FWW method of calculating damages is generally favorable to the employer and it is the employer who has the incentive to seek agreement with the employee that it will use this method of calculating wages. At trial only the defendant has the incentive to elicit evidence of that understanding. Whether or not Bloomberg uses the FWW method to compensate all of its non-exempt employees based in New York does not affect the decision as to whom should bear the burden of proof. Bloomberg will have the burden of showing at trial that it had a clear mutual understanding with the New York-based Analytics Representatives that the FWW method would be used to calculate their compensation.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the plaintiffs' March 5 motion for "relation back" is denied.

IT IS FURTHER ORDERED that the defendant's March 8 motion for reconsideration is denied.

Dated: New York, New York
          March 20, 2018

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DENISE COTE
United States District Judge