IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

EVER BEDOYA, DIEGO GONZALES, and MANUEL DeCASTRO, on behalf of themselves and all others similarly situated,	:	2:14-cv-02811-ES-JAD
Plaintiffs,	:	Motion Day: August 4, 2014
v.	:	
AMERICAN EAGLE EXPRESS, INC. d/b/a AEXGroup.,	:	
Defendant.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM AND TO DISMISS DEFENDANT'S THIRD PARTY COMPLAINT

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IN THE UNITED STATES DISTRICT COURT
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EVER BEDOYA, DIEGO GONZALES, and MANUEL DeCASTRO, on behalf of themselves and all others similarly situated, Plaintiffs, v. AMERICAN EAGLE EXPRESS, INC. d/b/a AEXGroup., Defendant.	:	2:14-cv-02811-ES-JAD

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM AND TO DISMISS DEFENDANT'S THIRD PARTY COMPLAINT

In this action under the New Jersey Wage Payment Law ("NJWPL") and the New Jersey Wage and Hour Law ("NJWHL"), Plaintiffs Ever Bedoya, Diego Gonzales, and Manuel DeCastro (collectively "Plaintiffs")[1] performed work as delivery drivers for Defendant American Eagle Express, Inc. d/b/a AEXGroup ("AEX"). *See* Complaint (Doc. 1) at ¶¶ 9-17. Plaintiffs bring claims on their own behalf, and those similarly situated, alleging that they were misclassified as independent contractors, and that they were actually employees under New Jersey law. Relying on this misclassification, AEX failed to comply with statutory overtime obligations applicable to employees under the NJWHL, and made certain pay deductions that are

[1] In its Third Party Complaint, AEX named three entities as defendants that were associated with Plaintiffs: KV Service, LLC, A&D Delivery Express, LLC, and M&J Express, LLC. These entities join in the instant motion to the extent that Plaintiffs seek dismissal of the Third Party Complaint.

impermissible for employees under the NJWPL. *See id.* at ¶¶ 26-37. Simply put, the outcome of Plaintiffs' claims will turn on whether AEX properly classified them as independent contractors (rather than employees) under New Jersey law.[2]

On June 17, 2014, AEX filed its Answer in this matter and asserted a counterclaim, *see* Doc. No. 8, and a third party complaint against Plaintiffs and their limited liability companies, *see* Doc. No. 6. In doing so, AEX takes the position that the Plaintiffs, by merely asserting their rights under the New Jersey wage statutes and claiming that they were misclassified as independent contractors, have triggered a duty to indemnify AEX for any costs and fees incurred in defending this action, subject to the terms of the parties' "Transportation Brokerage Agreement" ("TBA"). Plaintiffs move to dismiss the counterclaim and third party complaint under Fed.R.Civ.P 12(b)(6) because the claims are unsupported by the language of the TBA, and because the claims are barred by New Jersey's wage statutes.

I. PERTINENT BACKGROUND

In this class action, Plaintiffs Ever Bedoya, Diego Gonzales, and Manuel DeCastro worked as delivery drivers for AEX in the state of New Jersey. Plaintiffs allege that they have been improperly characterized as independent contractors even though, as a matter of law and fact, they are employees under New Jersey law. As a result, Plaintiffs and the class they seek to

[2] The Wage Payment Law defines "employee" as "any person suffered or permitted to work by an employer, except that independent contractors and subcontractors shall not be considered employees." N.J. Stat.§ 34:11-4.1(b). The Court of Appeals for the Third Circuit has certified a question to the New Jersey Supreme Court to clarify which "test" is used to determine employee status under the wage laws. *See Hargrove v. Sleepy's, et al.* Supreme Court Docket No. 072-742. A hearing was held on the certified question in the *Sleepy's* case on March 17, 2014 before the Supreme Court of New Jersey.

represent have been subject to improper deductions from their pay and have been denied overtime pay, and have otherwise been unjustly forced to bear the costs of AEX's business. *See* Complaint (Doc. 1) at Counts I-III.

AEX has asserted a counterclaim and a third party complaint against the named Plaintiffs and their limited liability companies. All of these claims are based on an indemnity clause in the TBA entered into between Plaintiffs and AEX. In pertinent part, the indemnity provision states as follows:

> [Plaintiff] agrees to defend, indemnify, and hold harmless [AEX] from any direct, indirect and consequential loss, damage, fine, expense, including reasonable attorneys' fees, action, claim for injury to persons, including death, and damage to property which [AEX] may incur arising out of or in connection with the operation of the Equipment, [Plaintiff's] obligations under this Agreement, or any breach by [Plaintiff] or its drivers or workers of the terms of this Agreement.

AEX's Counterclaim (Doc. 8) at ¶ 10.

AEX alleges that "the claims asserted by Plaintiffs in the Class Action Complaint, and the expenses AEX has incurred and will incur to defend against them," fall within the terms of the indemnity clause, and therefore AEX should be permitted to recover from Plaintiffs their attorney's fees and other costs in defending this action. *See* AEX's Counterclaim, (Doc. 8) at ¶¶ 12-13. The claims asserted in the third party complaint against Plaintiff's LLC's are nearly identical to that which is alleged in the Counterclaim. *See* AEX's Third Party Complaint (Doc. 6) at ¶¶ 10-13. Thus, according to AEX, the Plaintiffs, both individually and through their LLC's, are contractually bound to pay for AEX's defense in this action in which they challenge their classification as independent contractors. This result is completely unsupported by the indemnity clause in the TBA and, perhaps more importantly, AEX's attempt to impose a

contractual penalty upon Plaintiffs who assert their statutory rights to wages violates New Jersey law.

II. STANDARD OF REVIEW

A motion to dismiss under Fed.R.Civ.P. 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court concludes that plaintiff failed to set forth fair notice of what the claim is and the grounds upon which it rests that make such a claim plausible on its face. *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). A complaint will only survive if it contains sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 663 (2009). Although a court must accept as true all factual allegations in a complaint, that tenet is "inapplicable to legal conclusions," and "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Id.* at 678. In the instant case, neither the counterclaim nor the third party complaint state a plausible claim for relief, and both are subject to dismissal under Rule 12(b)(6).

III. ARGUMENT

A. The Counterclaim and Third Party Complaint Should be Dismissed Because the Indemnification Clause in the TBA Does Not Provide a Basis for AEX to Recover Costs and Attorneys' Fees in Defending this Complaint.

It is axiomatic that the interpretation of an unambiguous contract presents a question of law that may be resolved on a motion to dismiss. *See Hanig v. Orton,* 119 N.J.L. 248, 251, 195 A. 812, 814 (Sup. Ct. 1938); *Sheris v. Nissan N. Am. Inc.*, CIV. 07-2516 (WHW), 2008 WL 2354908, at *4 (D.N.J. June 3, 2008) ("Under New Jersey law, interpretation and construction of a contract is a matter of law for the court."); *Deshpande v. Taro Pharm. U.S.A., Inc.*, CIV. 10-

865, 2010 WL 1957869, at *2 (D.N.J. May 13, 2010) ("The interpretation of an unambiguous contract can be resolved on a motion to dismiss, and the question of whether a contract is ambiguous is a question of law.") (applying New York law).

The relevant principles of contract interpretation are straightforward. The court first makes the determination whether a contractual term is clear or ambiguous. *See Nester v. O'Donnell*, 301 N.J. Super. 198, 210, 693 A.2d 1214, 1220 (App. Div.1997) (quotations omitted). "An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations[.] To determine the meaning of the terms of an agreement by the objective manifestations of the parties' intent, the terms of the contract must be given their plain and ordinary meaning." *Armco Inc. v. Glenfed Financial Corp.*, 746 F.Supp. 1249, 1252 (D.N.J.1990) (internal quotation omitted). The court should examine the document as a whole, and "should not torture the language of the policy to create ambiguity." *Stiefel v. Bayly, Martin & Fay of Connecticut, Inc.*, 242 N.J. Super. 643, 651, 577 A.2d 1303, 1308 (App.Div. 1990). Finally, "under New Jersey law, indemnification contracts must be strictly construed against the party seeking the indemnification." *Ryan v. United States*, 233 F. Supp. 2d 668, 689 (D.N.J. 2002).

Here, the relevant portion of the indemnity clause provides that Plaintiffs will "defend, indemnify, and hold harmless [AEX] from any direct, indirect and consequential loss… including reasonable attorneys' fees… which [AEX] may incur… arising out of or in connection with the operation of the Equipment, [Plaintiff's] obligations under this Agreement, or any breach by [Plaintiff] or its drivers or workers of the terms of this Agreement." AEX's Counterclaim (Doc. 8) at ¶ 10. As a preliminary matter, a clause of this nature cannot be read to require indemnification of attorney's fees resulting from litigation between the two contracting

parties. "When a contract requires one party to indemnify the other party for legal fees, courts presume that the provision only applies to the cost of litigation with third parties and not to the cost of litigation between the parties themselves, absent clear evidence to the contrary." *Fernandez v. Kinray, Inc.*, No. 13-cv-4938, slip op. at 5 (E.D.N.Y. Feb. 5, 2014) (attached hereto as Exhibit A) (citing *Bank of N.Y. Trust Co., N.A. v. Franklin Advisers, Inc.*, 726 F.3d 269, 283 (2d Cir. 2013)). "Promises by one party to indemnify the other for attorneys' fees run against the grain of the accepted policy that parties are responsible for their own attorneys' fees." *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 199 (2d Cir. 2003). Therefore, even where the language of the indemnification provision is silent about the types of claims that it covers, courts "are wary of the inference that indemnification clauses apply to litigation between the parties in the absence of express wording." *Bank of N.Y. Trust Co.*, 726 F.3d at 283. The parties must make it "unmistakably clear" that they intended that the indemnification clause would apply to disputes between the parties themselves. *Oscar Gruss*, 337 F.3d at 199 (citation omitted). In the instant matter, there is no clear indication that the indemnity clause was intended to apply to litigation between the contracting parties, and this basic fact alone requires dismissal of the counterclaim and the third party complaint.

Inclusion of a "duty to defend" provides further evidence of the parties' intention that the indemnification clause should apply only to third-party claims. As set forth above, the relevant portion of the TBA states that Plaintiffs will "defend, indemnify, and hold harmless" AEX under a shared set of circumstances. Were this provision intended to apply to litigation between the two parties, the duty to defend would be rendered entirely meaningless because one party cannot "defend" another in an action between them. For this reason, one court has observed that contractual language by which one party agreed to defend, indemnify and hold harmless the

opposing party from certain losses "tends to suggest a prerequisite of a third-party claim." *Kusiak v. Doherty*, 942 N.E.2d 1017, 2011 WL 816754 at *2 n.6 (Mass. App. Ct. Mar. 10, 2011) (unpublished decision pursuant to Massachusetts Appeals Court Rule 1:28) (observing that one party cannot "defend" the other in *inter se* litigation). The obligation to "defend" would be absurd and ineffectual if the language were construed in this manner. Such an interpretation would run afoul of the basic tenet of contract law that "[a]n interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect." *Anfield v. Love*, 5 N.J. Super. 347, 351, 69 A.2d 27, 29 (App.Div. 1949) (citation omitted).

Even if the indemnification clause were somehow read to apply to litigation between the contracting parties, Plaintiffs alleged duty to defend, indemnify, and hold AEX harmless is only triggered in three distinct circumstances: (1) if the loss or attorney's fees arise "out of or in connection with the operation of the Equipment;" (2) if the loss arises out of Plaintiff's "obligations under th[e] Agreement;" or (3) if the loss arises from "any breach by [Plaintiff] or its drivers or workers of the terms of this Agreement." AEX's Counterclaim (Doc. 8) at ¶ 10. There is no allegation in the counterclaim or the third party complaint that AEX has incurred damages or attorney's fees arising out of a breach of the TBA, or out of the operation of equipment (as that term is defined in the TBA). Thus, AEX's pleadings apparently rely on an allegation that any loss arises out of the Plaintiffs' "obligations" under the TBA.

In the relevant pleadings, AEX has merely asserted that any loss and attorney's fees it seeks to recover have arisen solely because of the claims asserted by Plaintiffs in this lawsuit. AEX's Counterclaim (Doc. 8) at ¶ 12. AEX has not pled that Plaintiffs' lawsuit bears any relation to its "obligations" under the TBA. Even assuming that Plaintiffs and their entities have

undertaken various obligations in the TBA, these obligations are limited to Plaintiffs' agreement to comply with applicable laws and regulations, and their obligations to provide certain service standards. *See, e.g.*, Ex. A to AEX's Answer (Doc. 8) at ¶¶ 4, 13. Rather than having any relationship to Plaintiffs' "obligations," this lawsuit concerns only the actions and obligations of the AEX and its alleged failure to comply with state wage laws. In the *Fernandez* case, in which a defendant asserted similar indemnification counterclaims against FLSA plaintiffs, the court observed that "[t]he only costs that defendants assert, and for which they seek indemnification, are the 'filing of the instant underlying lawsuit… and the resulting legal fees….' This [FLSA] lawsuit arises from defendants' alleged actions, not from any possible breach of the agreement by plaintiffs." *See Fernandez v. Kinray, Inc.*, slip op. at 11 (Exhibit A).

Plaintiffs anticipate that AEX will rely on the decision in *Spellman v. Am. Eagle Express, Inc.*, 680 F. Supp. 2d 188 (D.D.C. 2010), in which AEX, as defendant in an action under the federal Fair Labor Standards Act ("FLSA"), asserted similar counterclaims based on the same indemnity provision at issue in this case. *See id.* at 190-192. In that case, the court held that the defendant's counterclaims survived a motion to dismiss, based on the convoluted reasoning that plaintiffs had an "obligation" under the terms of the TBA to work for certain rates, and by alleging that they were owed more than those rates, Plaintiffs' lawsuit arose out of their "obligations" under the TBA, triggering the indemnity provision. *Id*. at 191. Such a theory has not been pled in the instant matter, and it is therefore unnecessary for the Court to entertain any comparison to *Spellman* based on AEX's thin assertion that the "claims asserted by Plaintiffs in the Class Action Complaint, and the expenses AEX has incurred and will incur to defend against them, fall within the terms of Paragraph 10" of the TBA. AEX's Counterclaim (Doc. 8) at ¶ 12. Even if the court were to engage in a comparison to *Spellman*, Plaintiffs note that at least three

federal courts (including one from this District) have declined to follow *Spellman*, with one court observing that the *Spellman* court engaged "in mental gymnastics" when interpreting the parties' indemnity agreement. *Casias v. Distribution Mgmt. Corp., Inc.*, No. 1:11-CV-00874, 2012 WL 4511376, at *7 (D.N.M. Sept. 28, 2012); *see also Yaw Adu Poku v. BeavEx, Inc.*, CIV.A. 13-3327 SRC, 2013 WL 5937414 (D.N.J. Nov. 1, 2013) (Chesler, J.) (declining to follow *Spellman* and dismissing defendant's indemnity counterclaim); *Fernandez v. Kinray, Inc.*, slip op. at 10 (Exhibit A).

Furthermore, the *Spellman* case did not arise under New Jersey law, and thus did not implicate rules of contractual interpretation relevant in this jurisdiction. "[U]nder New Jersey law, indemnification contracts must be strictly construed against the party seeking the indemnification." *Ryan*, 233 F. Supp. 2d at 689. As discussed above, there is also persuasive authority suggesting that contracts of indemnification for attorney's fees do not apply in litigation between the contracting parties absent a clear manifestation of this intent, and that inclusion of the duty to "defend" in the same clause demonstrates that the parties did not intend for the provision to apply in *inter se* litigation. *See Bank of N.Y. Trust Co., N.A. v. Franklin Advisers, Inc.*, 726 F.3d at 283; *Kusiak v. Doherty*, 2011 WL 816754 at *2.

Finally, and most importantly, the supposed "obligation" that the plaintiffs undertook in the *Spellman* case, which the court described as an obligation to work only for the rates set forth in the TBA, would be invalid under New Jersey law. As discussed in more detail below, under New Jersey law, any contractual "obligation" of the named Plaintiffs to work for a specific amount, and to somehow forgo their rights to overtime and full payment of wages, constitutes an unenforceable contract under the NJWPL and NJWHL. N.J. Stat. § 34:11-4.7 (every agreement made in violation of [the Wage Payment Law] shall be deemed to be null and void…); N.J. Stat.

§ 34:11-56a25 (any agreement between such employee and the employer to work for less than such minimum fair wage shall be no defense to the action"). Thus, the ill-defined "obligation" that the *Spellman* court found in the TBA is void and unenforceable under the laws of New Jersey, and the *Spellman* decision has no bearing on outcome of this case.

In sum, AEX has failed to plead any facts stating a plausible claim for relief on their indemnification counterclaim asserted against the three named Plaintiffs, and their identical third party claims against the entities affiliated with the Plaintiffs. Based on the straightforward rules of contract interpretation, AEX's indemnification claim is not supported by the plain language of the TBA, and must be dismissed.

B. AEX's Counterclaim and Third Party Complaint Are Prohibited by New Jersey's Wage and Hour Law and New Jersey's Wage Payment Law.

The purpose of New Jersey's Wage and Hour Law is "[t]o safeguard [workers'] health, efficiency, and general well-being and to protect them as well as their employers from the effects of serious and unfair competition resulting from wage levels detrimental to their health, efficiency and well-being." N.J. Stat. § 34:11-56a; *see also Keeley v. Loomis Fargo & Co.*, 183 F.3d 257, 259 (3d Cir. 1999) (the purpose of the Wage and Hour Law is to "protect employees from unfair wages and excessive hours"). Among other protections, the law establishes a minimum wage and requires that overtime be paid at a rate of one-and-one half the regular rate for hours worked in excess of forty in a given week. See N.J. Stat. § 34:11-56a4. Aggrieved employees are granted a private right of action to seek damages arising from a violation of the law, and a prevailing plaintiff is entitled to an award of attorney's fees in such an action. N.J. Stat. § 34:11-56a25; *see also Karanjawala v. Associated Humane Societies, Inc.*, No. A-3560-

08T2, 2010 WL 4025911 (App. Div. Aug. 20, 2010) (affirming judgment awarding unpaid overtime to plaintiff as well as award of attorney's fees under N.J. Stat. § 34:11-56a4).

The purpose of New Jersey's Wage Payment Law is "primarily to protect employees." *Vengurlekar v. Silverline Technologies, Ltd.*, 220 F.R.D. 222, 231 (S.D.N.Y. 2003) (citing *Mulford v. Computer Leasing, Inc.*, 334 N.J. Super. 385, 759 A.2d 887 (1999); *Winslow v. Corporate Express, Inc.*, 364 N.J. Super. 128, 834 A.2d 1037, 1043 (2003)). The Wage Payment Law governs the timing of wage payments, requiring that "every employer shall pay the full amount of wages due to his employees at least twice during each calendar month." N.J. Stat.§ 34:11-4.2. The law forbids deductions and withholdings from wages, except under a very limited set of circumstances (not applicable here). *See* N.J. Stat. § 34:11-4.4. The NJWPL also contains a strict prohibition on any agreements between an employer and employee to circumvent or waive the protections of the statute, and grants an aggrieved employee a private right of action to assert his or her rights under the law. *See* N.J. Stat. § 34:11-4.7.[3]

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[3] This section provides, in full:

> It shall be unlawful for any employer to enter into or make any agreement with any employee for the payment of wages of any such employee otherwise than as provided in this act, except to pay wages at shorter intervals than as herein provided, or to pay wages in advance. Every agreement made in violation of this section shall be deemed to be null and void, and the penalties in this act provided may be enforced notwithstanding such agreement; and each and every employee with whom any agreement in violation of this section shall be made by any such employer, or the agent or agents thereof, shall have a right of civil action against any such employer for the full amount of his wages in any court of competent jurisdiction in this State.

N.J. Stat. § 34:11-4.7.

Overall, the wage laws are "social legislation designed to correct abuses in employment." *New Jersey State Hotel-Motel Ass'n v. Male*, 105 N.J. Super. 174, 177, 251 A.2d 466, 467 (App.Div. 1969). Due to their remedial and humanitarian purpose, the New Jersey wage laws are applied broadly and may even extend their "protection to a greater number of employees [than the FLSA] …." *Marx v. Friendly Ice Cream Corp.*, 380 N.J. Super. 302, 309-10, 882 A.2d 374, 378 (App. Div. 2005) (citing the FLSA, 29 U.S.C. § 218(a)).

Though there is not yet any New Jersey case law regarding the exact question raised by this motion to dismiss, numerous courts have dismissed similar indemnity counterclaims in cases arising under the FLSA, the federal analogue to New Jersey's wage laws. Similar to the New Jersey statutes discussed above, the FLSA is a remedial statute. *See Reich v. Gateway Press, Inc.*, 13 F.3d 685, 694 (3d Cir. 1994). As the Supreme Court has explained, the FLSA is intended "to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602-603 (1944). Based on this legislative purpose, courts have uniformly held that an employer in an FLSA action cannot seek indemnification from the plaintiff-employees. *See, e.g., Quintana v. Explorer Enterprises, Inc.*, No. 09-22420-CIV, 2010 WL 2220310 at *2 (S.D. Fla. June 3, 2010) (dismissing indemnification counterclaim and observing that "the circuits that have addressed the issue consistently found that indemnification claims against employees or owners are contrary to public policy and the legislative intent of the

FLSA.").[4] Courts have reached the same conclusion in interpreting state wage and hour laws similar to New Jersey's. *See Gustafson v. Bell Atlantic Corp.,* 171 F.Supp.2d 311, 328 n. 8 (S.D.N.Y. 2001); *Villareal v. El Chile, Inc.*, 601 F.Supp.2d 1011, 1017 (N.D. Ill. 2009) ("As with the FLSA, the [Illinois Minimum Wage Law's] statutory goals would be undermined by diminishing the employer's compliance incentives if an employer were permitted to seek indemnity or contribution from its employees for statutory violations.") (ordering dismissal of indemnity counterclaims under Rule 12(b)(6)).

Like the FLSA, the New Jersey wage laws are remedial in nature; they specifically provide for a private right of action and prohibit agreements that would permit an employer to circumvent the laws protections. The legislative protections enshrined in these statutes would disintegrate if an employer who were sued under the New Jersey Wage Payment Law or the New Jersey Wage and Hour Law were permitted to seek indemnification for attorney's fees and other

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[4] Additional case law includes the following: *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 143 (2d Cir. 1999) (affirming dismissal of third-party indemnification claim against employee in FLSA action); *Lyle v. Food Lion, Inc.*, 954 F.2d 984, 987 (4th Cir. 1992) (affirming dismissal of third party claim for indemnification) ("In effect, [defendant] sought to indemnify itself against [plaintiff] for its own violation of the FLSA, which the district court found, and we agree, is something the FLSA simply will not allow."); *Local 1035, Int'l Bhd. of Teamsters v. Pepsi Allied Bottlers, Inc.*, 99 F. Supp. 2d 219, 221 (D. Conn. 2000) (holding that indemnification clause in union contract was void in regard to plaintiffs' FLSA action, and dismissing indemnification counterclaim under Rule 12(b)(6)); *Varnell, Struck & Associates, Inc. v. Lowe's Companies, Inc.*, No. 5:06-CV-068, 2008 WL 1820830 at *10 (W.D.N.C. Apr. 21, 2008) ("It would indeed be unconscionable for an employer to escape liability for unlawful labor practices by having the employee agree to indemnify the employer for FLSA violations" and "to hold otherwise would be to gut the remedial nature of the FLSA."); *Emanuel v. Rolling in the Dough, Inc.*, No. 10 C 2270, 2010 WL 4627661 at *4 (N.D. Ill. Nov. 2, 2010) ("Every case to consider the issue of indemnification in the FLSA context has reinforced that to allow employers to seek indemnification from their employees for FLSA violations would frustrate the very purpose of the statute.").

losses arising from the litigation - requiring plaintiffs to indemnify defendants for the costs of litigating a wage claim would deter plaintiffs from bringing suit in the first place, frustrating the entire purpose of the statutes. *See Fernandez v. Kinray Inc.*, slip op. at 15 (Exhibit A). Plaintiffs therefore ask that this Court join the number of decisions condemning indemnity counterclaims against employees who seek unpaid wages, and dismiss AEX's counterclaim and third party complaint under Rule 12(b)(6).

C. AEX's Counterclaim and Third Party Complaint Constitute Illegal Retaliation under the New Jersey Wage Laws.

AEX's counterclaim and third party complaint are also subject to dismissal because they constitute illegal retaliation in violation of the New Jersey wage laws. The NJWHL protects workers from retaliation, prohibiting an employer from discharging or in "any other manner" discriminating against an employee "because such employee has caused to be instituted or is about to cause to be instituted any proceeding under or related to this act, or because such employee has testified or is about to testify in any such proceeding." N.J. Stat. § 34:11–56a24; *Chen v. Domino's Pizza, Inc.*, No. CIV.A. 09-107, 2009 WL 3379946, at *3 (D.N.J. Oct. 16, 2009). In fact, the NJWHL makes retaliation against a complaining employee a criminal offense. *See Chen v. Domino's Pizza, Inc.*, 2009 WL 3379946, at *3 (citing N.J. Stat. § 34:11–56a24).

Under the similar "anti-retaliation" provision of the federal FLSA, courts have routinely held that an employer's baseless counterclaim against the employee constitutes actionable

retaliation in violation of the Act.[5] *See, e.g, Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008) (finding employer's lawsuit alleging fraud was filed with a retaliatory motive and without a reasonable basis in fact or law, and was an actionable adverse employment action under FLSA); *Yaw Adu Poku v. BeavEx, Inc.*, 2013 WL 5937414, at *4 (granting plaintiffs leave to amend and add FLSA retaliation based upon defendant's filing of an indemnification counterclaim). These courts have explained that "groundless counterclaims … against employees who assert statutory rights are actionable retaliation [ ] because of their *in terrorem* effect." *Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 473 (S.D.N.Y. 2008) (citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 740 (1983)).

As set forth above, the counterclaim and third party complaint in this action are unsupported by the indemnity clause in the TBA, and are otherwise barred by the NJWHL and NJPWL. In addition, AEX's pleadings demonstrate that the sole basis for AEX's counterclaim and third party complaint is Plaintiffs' decision to exercise their rights under New Jersey's wage laws. *See* AEX's Counterclaim (Doc. 8) at ¶¶ 12-13; AEX's Third Party Complaint (Doc. 6) at ¶¶ 10-13. By asserting claims of this nature, AEX no doubt intends to "place its employees on notice that anyone who engages in such conduct [i.e., asserts his or her rights to wages] is subjecting himself to the possibility of a burdensome lawsuit." *Bill Johnson's Restaurants*, 461 U.S. at 740. This is precisely the type of retaliation that constitutes a crime under the NJWHL, and this Court should dismiss AEX's counterclaim and third party complaint in order to

[5] The FLSA utilizes similar language to the NJWHL, stating that it is unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under [the FLSA]." 29 U.S.C.A. § 215(a)(3).

demonstrate to all employees, including putative class members, that AEX cannot discriminate against them for their participation in this type of litigation.

IV. CONCLUSION.

For the above reasons, Plaintiffs request that the Court dismiss AEX's Counterclaim and Third Party Complaint.

Dated: July 8, 2014

Respectfully,

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