NO. 15-492

In the Supreme Court of the United States

LINDA ASH and ABBIE JEWSOME,

Petitioners,

–v–

ANDERSON MERCHANDISERS, LLC; WEST AM, LLC; and ANCONNECT, LLC;

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should review the Court of Appeals' opinion affirming that the District Court acted within its discretion to deny Petitioners' post-judgment motion to vacate the judgment and permit post-judgment amendment of the Complaint when there is no disagreement among the Circuits that Rule 15 considerations continue to apply post-judgment but should not be construed so as to render Rules 59 and 60 meaningless.

2. Whether this Court should review the Court of Appeals' opinion affirming that the District Court acted within its discretion by denying Petitioners' post-judgment motion to vacate the judgment and to permit post-judgment amendment of the Complaint where Petitioners: (a) admittedly did not plead pertinent facts in their possession; (b) were presented with a motion to dismiss highlighting the absence of those very facts and the resulting deficiencies in the Complaint; (c) had ample opportunity to submit an amended complaint as matter of right before the motion to dismiss was granted; (d) were informed in the reply brief in support of the motion that they had not properly requested leave to amend; (e) could have sought leave to amend after the motion to dismiss was granted but before the District Court entered judgment; (f) but chose instead to stand on their pleadings and offered no excuse for their delay in both asserting facts admittedly known to them at the time the case was filed and not seeking amendment until after judgment was entered.

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Respondents Anderson Merchandisers, LLC and ANCONNECT, LLC each have two members, Anderson Media Corp and First Media Capital Corporation. Respondent West AM, LLC's members are individuals, not other business entities. There is no parent or publicly traded company owning more than a 10% ownership interest in any Respondent.

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FEDERAL RULES INVOLVED

- **Federal Rule of Civil Procedure 15(a)**

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

- **Federal Rule of Civil Procedure 59(e)**

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

- **Federal Rule of Civil Procedure 60(b)**

(b) Grounds for Relief from a Final Judgment, Order or Proceeding. On motion and just terms, the court may relieve a part or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party);

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

INTRODUCTION

Respondents Anderson Merchandisers, LLC, ANCONNECT, LLC, and West AM, LLC respectfully request that this Court deny the petition for a writ of certiorari filed by Petitioners Linda Ash and Abbie

Jewsome, seeking review of the decision of the United States Court of Appeals for the Eighth Circuit entered in this case on August 21, 2015. Here, the Eighth Circuit applied the considerations of undue delay and respect for finality of judgments that all other Circuit Courts of Appeal have applied in addressing similar post-judgment motions. The Court of Appeals' decision was based upon an appropriate application of well-settled legal principles regarding the circumstances under which a district court acts within its discretion to deny a post-judgment motion to amend under Rules 15, 59 and 60 of the Federal Rules of Civil Procedure.

Petitioners assert that the standard applied in the Court of Appeals' opinion ignored Rule 15(a)(2) and the precedent established in *Foman v. Davis*, 371 U.S. 178 (1962). In their attempt to satisfy the requirements of Supreme Court Rule 10, Petitioners argue that there is a "deep" conflict among and within the circuits concerning the standard that governs a district court's discretion to deny a motion to amend filed after dismissal and entry of judgment.[1] But in fact, there is no such conflict, and no circuit holds that the considerations for reopening a case established by Rules 59 and 60 are to be disregarded simply because the movant seeks to amend a complaint post-judgment. To hold otherwise would render the legitimate interest in the finality of judgments embodied by Rules 59 and 60 meaningless. Instead, the circuit courts uniformly account for the different policies behind Rule 15 and

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[1] *See* Petitioners Ash and Jewsome's Petition for Writ of Certiorari (hereinafter "Pet.") at 1–2, 9–10.

Rules 59 and 60, as well as the presence of factors such as undue delay, bad faith, dilatory motive, and futility, when reviewing a decision to deny post-judgment leave to amend.

But, even assuming, *arguendo*, that the circuit courts are divided over the permissible range of discretion afforded to a district court considering a post-judgment motion for leave to amend, the undisputed facts establish that this case is not the proper vehicle to resolve such conflicts. In the face of Respondents' motion to dismiss, Petitioners chose not to amend their Complaint at any time during the forty-seven days the motion was pending in the District Court, despite possessing the very facts proffered in their proposed amended complaint at the time they filed their original Complaint. Petitioners likewise never sought leave to amend their Complaint during the seven day period between when the District Court granted the motion to dismiss and when judgment for Respondents was entered. Instead, it was not until nine days after the District Court dismissed the Complaint and two days after judgment was entered when Petitioners finally filed a motion to set aside the judgment under Rules 59 and 60 and proffered a proposed amended complaint. And, when doing so, Petitioners offered no explanation for failing to amend their Complaint prior to the entry of judgment, nor did they explain in any way why they did not include facts previously known to them in their original Complaint. Thus, under any standard articulated by the circuit courts, and consistent with *Foman*, the District Court acted within its sound discretion when it denied Petitioners' post-judgment leave to amend. Accordingly, this case

does not provide the proper means through which to resolve any asserted conflicts among the circuits on these issues.

STATEMENT OF THE CASE

On April 21, 2014, Petitioners commenced this FLSA collective action against Respondents in the U.S. District Court for the Western District of Missouri, seeking relief for alleged violations of the overtime provisions of the FLSA, on behalf of themselves and others similarly situated. (Res.App.1a). Petitioners' Complaint alleged, among other things, that Respondents "shared interrelated operations, centralized control of labor relations, common management and common ownership and/or financial control" and therefore "were part of an integrated enterprise and, as such, were Plaintiffs' employer," but it did not include any facts to support those conclusory allegations or to make plausible that an employment relationship actually existed between Petitioners and any of the Respondents. (Res.App.1a).

On May 23, 2014, Respondents moved to dismiss the Complaint pursuant to Rule 12(b)(6), arguing that the Complaint failed to comply with the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure, as interpreted by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). (Res.App.14a, 17a). Specifically, Respondents argued that the Complaint failed to plead: (1) facts establishing a plausible

employment relationship between Petitioners and any Respondent (and therefore failed to adequately plead standing); (2) a plausible FLSA overtime violation; and (3) a proper collective action. (Res.App. 14a, 17a).

After Respondents filed their motion to dismiss, Petitioners could have amended their Complaint as a matter of right pursuant to Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure, but they chose instead to defend the Complaint as sufficiently pled. (Res.App.34a). In a sentence at the bottom of the last page of their brief in opposition to Respondents' motion to dismiss, Petitioners wrote: "[s]hould the Court believe that Plaintiffs' Complaint is somehow deficient, the appropriate remedy is not to dismiss but to allow Plaintiffs leave to file an amended complaint." (Res.App.34a).

Respondents' reply brief in support of their motion to dismiss, filed on June 23, 2014, reiterated the reasons why the Complaint had not plausibly alleged an employment relationship or a FLSA violation. (Res.App.55a). The reply brief also notified Petitioners that they had not properly requested leave to amend their Complaint by citing to pertinent caselaw establishing that a one-sentence statement about amendment in a motion response did not amount to a proper request for leave to amend. (Res.App.55a). Despite Respondents' arguments and citations to established law, including caselaw pointing out that Petitioners had not properly requested leave to amend, Petitioners chose not to seek the Court's leave to file an amended complaint.

On July 2, 2014, forty days after Respondents' motion to dismiss was filed and nine days after Respondents filed their reply pointing out that Petitioners had not properly requested leave to amend their complaint, the District Court issued an order granting Respondents' motion. (Pet.App.12a-19a). The District Court held that the Complaint did not contain any well-pled facts establishing an employer-employee relationship between any Petitioner and any Respondent, nor did it include any well-pled facts supporting a theory of joint employment. (Pet.App.16a). The District Court also held that Petitioners had not adequately pled a FLSA violation. (Pet.App.17a). Finally, the District Court noted that Petitioners had not moved for leave to amend and did not file a proposed amendment. (Pet.App.18a). Instead, Petitioners chose "to stand on and defend [their] original complaint." (Pet.App.19a). Consequently, the District Court ordered dismissal of the Complaint without inviting Petitioners to file an amendment. (Pet.App.19a).

Importantly, the District Court did not enter judgment against Petitioners at the time it entered its order dismissing their Complaint. Rather, the District Court waited seven days, until July 9, 2014, to enter judgment in Respondents' favor. (Res.App.71a). During this seven-day period, Petitioners took no steps to amend their Complaint.

Two days after the Court entered judgment in Respondents' favor, on July 11, 2014, Petitioners filed a motion under Rules 59(e) and 60(b) asking the District Court to grant the extraordinary remedy of vacating the judgment, re-opening the case, and

allowing them to file an amended complaint even though they had numerous opportunities prior to the entry of judgment, and even after their Complaint was dismissed, to amend the Complaint.[2] (Res.App.73a). It was only then—forty-nine days after Respondents filed their motion to dismiss which identified the very pleading deficiencies on which the District Court based its dismissal, and eighteen days after Respondents filed their reply brief notifying Petitioners that they had not properly requested leave to amend their complaint—that Petitioners submitted a proposed amended complaint. (Res.App. 73a, 75a). Notably, all of the new facts that Petitioners included in the proposed amended complaint came from sources—such as paychecks, W-2s, handbooks, uniform logos and Petitioners' own memories—that Petitioners possessed at the time they filed the initial Complaint. (*See* Res.App. 75a, 161a). They could have included those facts in their initial Complaint, but simply chose not to do so.

On September 11, 2014, the District Court denied Petitioners' motion to vacate and set aside its judgment and allow post-judgment leave to amend,

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[2] In their Statement of the Case, Petitioners write that the "district court granted a motion to dismiss for insufficient pleading and denied petitioners' subsequent motion for leave to amend the complaint to correct the deficiency." (Pet.3). They also at points characterize their post-judgment motion as one "for reconsideration." (Pet.6-8, 10). This phrasing paints an inaccurate picture of the underlying record. Petitioners did not file a motion for leave to amend their complaint after dismissal, nor did they file a reconsideration motion. Rather, Petitioners filed a motion to vacate and set aside a judgment after judgment against them was entered.

holding that Petitioners failed to seek leave to amend or to submit a proposed amended complaint at any point before judgment was entered, despite having more than ample opportunity to do so. (Pet.App.20a). In reaching its conclusion, the District Court relied on well-established Eighth Circuit precedent, as well as "Rule of Civil Procedure 15(a)(2), 59(e), and 60(b)." (Pet.App.20a).

Petitioners appealed the District Court's dismissal and denial of their motion for post-judgment leave to amend to the Eighth Circuit Court of Appeals. In their brief, Petitioners acknowledged that they were in possession of facts regarding their purported employment relationship with Respondents at the time they filed suit but chose instead to assert conclusory allegations in the Complaint. (Res.App. 157a). Notwithstanding Petitioners' failure to take advantage of the opportunities to amend before judgment was entered against them, Petitioners argued to the Court of Appeals that the District Court had abused its discretion in denying their post-judgment request to amend. Specifically, Petitioners stated that the District Court erred because "their claims should be addressed on the merits as required under Fed. R. Civ. P. 15(a)(2) and the First Amended Complaint addressed the pleading deficiencies found by the court." (Res.App.168a-169a). Petitioners offered no explanation for their delay in failing to seek leave to amend during the pendency of the motion to dismiss or between the time when the motion was granted and when judgment was entered. (*See generally* Res.App.157a, 265a).

The Court of Appeals was not persuaded, holding:

> Ash and Jewsome appear to conflate their right to request post judgment leave to amend with their right to receive leave to amend. . . . Ash and Jewsome essentially argue that because it is preferable that claims brought in federal court be tested on their merits, the district court's denial of post-judgment leave to amend—which did prevent their claim from proceeding on the merits—was almost by definition an abuse of discretion. . . . Asserting simply that their claim should be tested on the merits, Ash and Jewsome offer nothing to explain why their litigation decisions did not amount to undue delay, or why the resulting delay was otherwise excusable.

(Pet.App.9a–11a). Accordingly, the Eighth Circuit upheld the District Court's denial of post-judgment leave to amend. Importantly, the "undue delay" analysis applied by the Eighth Circuit in its opinion affirming the District Court's orders is the standard articulated by this Court for judging whether a party should properly be granted leave to amend under Rule 15(a). *See Foman*, 371 U.S. at 182 (noting "undue delay" as reason to deny leave to amend under Rule 15(a)).

Petitioners Ash and Jewsome now petition the Court to grant certiorari.

REASONS FOR DENYING THE PETITION

I. THE CIRCUIT COURTS ARE NOT DIVIDED OVER THE STANDARD APPLICABLE TO POST- JUDGMENT REQUESTS FOR LEAVE TO AMEND.

Petitioners contend that certiorari is appropriate because a "deep split" exists among and within the circuit courts, and "completely different standards" are used to determine when a district court's discretionary denial of a post-judgment request to amend a complaint is abusive. (Pet.9-10). In reality, there are no such conflicts, and the Circuits consider the same Rule 15 and Rule 59 and 60 factors when reviewing the decisions of lower courts in light of the unique facts and circumstances of each case.

A. The Eighth Circuit's Decision Is Correct, Consistent with This Court's Guidance in *Foman*, and Consistent with Rules 15, 59 and 60.

Rule 15 declares that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). In furtherance of the interest in allowing claims to be tested on their merits, *Foman* instructs that lower courts should heed the policy considerations of Rule 15 even in the post-judgment context. *See* 371 U.S. at 182. *Foman* does not, however, mandate that all post-judgment requests for leave to amend be "freely" given, as Petitioners argue. (Pet.1). Nor does *Foman* instruct lower courts to disregard the interests in finality of judgments

embodied by Rules 59 and 60 when a movant requests leave to amend after a final judgment has been entered. Rather, *Foman* acknowledges the reality that "the grant or denial of an opportunity to amend is within the discretion of the District Court," but cautions that the "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion. . . ." 371 U.S. at 182. In other words, *Foman* does not announce a standard for granting leave to amend post-judgment, as Ash and Jewsome repeatedly assert in their petition. Instead, *Foman* states that denying leave to amend requires, at a minimum, "any justifying reason" to be considered a valid exercise of discretion.

Importantly, in *Foman*, the Court recognized a number of "justifying reasons" why leave to amend could be denied consistent with Rule 15(a)(2). *Id.* Those reasons included "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Id.*

Further, as the federal courts have widely recognized, after judgment has been entered against a plaintiff, there is an additional and different consideration in the finality of judgments that must be taken into account when considering whether leave to amend should be granted at such a late stage (in addition to traditional factors such as the existence of "undue delay"). *See, e.g.*, *Williams v. Citigroup, Inc.*, 659 F.3d 208, 2013 (2d Cir. 2011) ("Where, however, a party does not seek leave to file

an amended complaint until after judgment is entered, Rule 15's liberality must be tempered by considerations of finality."). The interest in finality of judgments is embodied and recognized in Rules 59 and 60 of the Federal Rules of Civil Procedure. *See* 12-59 MOORE'S FEDERAL PRACTICE–Civil § 59.30 ("Rule 59 is silent with respect to the grounds for such a motion. . . . However, this discretion is not limitless: the reconsideration of a previous order is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.") *and* § 60.48 ("The 'extraordinary circumstances' requirement exists in order to balance the broad language of Rule 60(b)(6) with the interest in the finality of judgments.") (internal citations omitted).

Every single circuit court has recognized the importance of paying due consideration to the principle of finality of judgments embodied in Rules 59 and 60 when considering post-judgment requests to amend a complaint or set aside judgment. *See Williams*, 659 F.3d at 213 ("[P]ost judgment motions for leave to replead must be evaluated with due regard to both the value of finality and the policies embodies by Rule 15."); *Ahmed v. Dragovich*, 297 F.3d 201, 208 (3d Cir. 2002) (Rule 15(a) should "not . . . be employed in a way that is contrary to the philosophy favoring finality of judgments . . . ") (citations omitted); *Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011) ("To give Rule 60(b)(6) broad application would undermine numerous other rules that favor the finality of judgments, such as Rule 59. . . . "); *S. Constructors Grp., Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993) (noting that "a motion to vacate, alter, or amend a judgment so as to

permit the filing of an amended pleading draws the interest in finality of judgments into tension with the federal policy of allowing liberal amendments under the rules"); *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615-16 (6th Cir. 2010) (stating that "when a Rule 15 motion comes after judgment against the plaintiff, . . . [c]ourts in that setting must consider the competing interest of protecting the finality of judgments and the expeditious termination of litigation"); *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510, 521 (7th Cir. 2015) (noting importance of finality of judgments and stating that Rules 59(e) and 60(b) provide extraordinary remedies reserved for the exceptional case); *Streambend Properties II, LLC v. Ivy Tower Minneapolis, LLC*, 781 F.3d 1003, 1010 (8th Cir. 2015) ("When a party moves to amend a complaint after dismissal, a more restrictive standard reflecting interests of finality applies."); *Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996), as amended (Sept. 4, 1996) ("[C]onsistent with our policy of promoting the finality of judgments[,] . . . once judgment has been entered in a case, a motion to amend the complaint can only be entertained if the judgment is first reopened under a motion brought under Rule 59 or 60."); *The Tool Box, Inc. v. Ogden City Corp.*, 419 F.3d 1084, 1087 (10th Cir. 2005) ("To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation.") (citations omitted); *Lussier v. Dugger*, 904 F.2d 661, 667 (11th Cir. 1990) ("After a judgment has been entered, the interest in finality

may be deemed 'compelling.'") (citation omitted); *Bldg. Indus. Ass'n of Superior California v. Norton*, 247 F.3d 1241, 1245 (D.C. Cir. 2001) (noting that requiring "a Rule 59 or 60 motion prior to post-judgment amendment is employed to serve the judicial policy favoring finality of judgments and the expeditious termination of litigation"). As Justice Breyer recognized when writing for the First Circuit in *James v. Watt*, 716 F.2d 71 (1st Cir. 1983) (Breyer, J.), upholding denial of a post-judgment request for leave to amend where the plaintiffs waited until after judgment had been entered against them before seeking leave to amend their complaint:

> To require the district court to permit amendment here would allow plaintiffs to pursue a case to judgment and then, if they lose, to reopen the case by amending their complaint to take account of the court's decision. Such a practice would dramatically undermine the ordinary rules governing the finality of judicial decisions, and should not be sanctioned in the absence of compelling circumstances.

Id. at 78.

However, consideration of the interest in finality of judgments in the post-judgment context does not indicate that the amendment standard under Rule 15(a)(2) is inapplicable or ceases to apply. Rather, the standards may be considered together and collectively when examining if a "justifying reason" (as described in *Foman*) or "compelling circumstances" (as described by Justice Breyer in *James*) exist to allow post-judgment leave to amend. Careful

examination of the opinions of the Circuit Courts reveals no "deep split" in recognizing this common-sense proposition.

A prime example of this is the Eighth Circuit's opinion in this case. Here the District Court and the Eighth Circuit considered Rule 15(a)(2)'s "freely given" standard alongside Rule 59 and 60 considerations concerning the finality of judgments when evaluating a post-judgment leave to amend. *See* (Pet.App.7a) (noting that "'[a]lthough a district court 'may not ignore the [Federal Rule of Civil Procedure] 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits,' it has 'considerable discretion to deny a post judgment motion for leave to amend because such motions are disfavored.'") (quoting *U.S. ex rel. Roop v. Hypoguard U.S.A., Inc.*, 559 F.3d 818, 824 (8th Cir. 2009); *see also* (Pet.App.20a) (noting express consideration of "Rule of Civil Procedure 15(a)(2), 59(e), and 60(b)" when deciding Petitioners' motion to vacate and set aside judgment).[3]

Consistent with Rule 15(a)(2) standards requiring evaluation of whether there has been "undue delay" in seeking amendment, and also recognizing the

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[3] Petitioners inaccurately attempt to cast the Eighth Circuit's analysis of post-judgment requests for leave to amend in this and other cases as a heightened "disfavored motion" standard. (Pet.8). In reality, the Eighth Circuit has simply noted that pre-judgment requests for amendment are favored over post-judgment requests because the former does not disturb a judgment. As discussed herein, there is nothing wrong with expressing a preference for pre-judgment motions that do not disturb judgments.

importance of finality of judgments embodied in Rules 59 and 60, if a case progresses to the point where judgment has been entered some explanation must be offered by the plaintiff as to why the judgment should now be set aside and a new complaint allowed. If no such explanation is offered, and if the facts or legal theory were in the plaintiff's possession and could have been asserted earlier, this constitutes "undue delay" and setting aside a judgment to allow for an amended complaint is not warranted. *See, e.g.*, *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 379 (4th Cir. 2012) (affirming denial of Rule 59 motion to reconsider and motion to amend where plaintiffs provided "no excuse for failing to include these additional allegations . . . in the original complaint"); *Vielma v. Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000) (noting that the Fifth Circuit has "consistently upheld the denial of leave to amend where the party seeking to amend has not clearly established that he could not reasonably have raised the new matter prior to the trial court's merits ruling"); *FDIC v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986) (denying post-judgment Rule 59 motion to amend complaint and holding "[t]hese motions cannot be used to raise arguments which could, and should, have been made before the judgment issued") (internal citations omitted). As the Sixth Circuit noted in *Leisure Caviar* :

> In post-judgment motions to amend . . . the Rule 15 and Rule 59 inquiries turn on the same factors. A court acts within its discretion in denying a Rule 15 and a Rule 59 motion on account of 'undue delay'—

> including delay resulting from a failure to incorporate previously available evidence—and ought to pay particular attention to the movant's explanation for failing to seek leave to amend prior to the entry of judgment.

616 F.3d at 616 (internal citations and quotations omitted).

Similarly, as the Seventh Circuit recognized in *Figgie Int'l, Inc. v. Miller*, 966 F.2d 1178 (7th Cir. 1992), whether Rule 15(a)'s "freely given" standard is applied alone or whether a more stringent standard considering Rules 59 and 60 is applied, if a party offers no valid explanation for the delay in asserting facts known to it before judgment is entered, then leave to amend should not be granted:

> In a post-judgment situation, delay without explanation is sufficient reason to deny a motion to amend. Figgie argues that because the motion for leave to amend was filed a little over three months after the original complaint, this does not constitute undue delay. However, Figgie has not provided an adequate explanation for failing to ask for leave to amend before judgment was entered. Both the Arthur Andersen memorandum and Mueller's alleged testimony, which formed the basis of the amended complaint, were available to Figgie well before summary judgment was granted June 6, 1991. Therefore, Figgie's lack of diligence in bringing the claim pre-judgment constitutes undue delay. . . .

> Figgie's undue delay and bad faith in bringing the motion to amend after judgment had been entered provide ample reason to deny the Rule 59(e) motion under Rule 15(a) standards.

Id. at 1179-81 (internal citations omitted).

In this case, as the Eighth Circuit plainly recognized, Petitioners failed to offer any explanation for the delay in pleading facts clearly known to them at the time the original Complaint was filed or the delay in seeking leave to amend after their Complaint was dismissed and before judgment in Respondents' favor was entered. The Court of Appeals first noted that:

> Ash and Jewsome fail to address the factual basis of the district court's decision. Ash and Jewsome did not seek leave to amend their complaint until nine days after the district court granted the motion to dismiss and two days after judgment was entered. The defendants' motion to dismiss, filed 47 days before the district court dismissed the case, put Ash and Jewsome on notice of the possible deficiencies in their original complaint.

(Pet.App.10a). The Court of Appeals then expressly noted that, "[a]sserting simply that their claim should be tested on the merits, Ash and Jewsome offer nothing to explain why their litigation decisions did not amount to undue delay, or why the resulting

delay was otherwise excusable."[4] (Pet.App.11a). As in *Leisure Caviar* and *Figgie Int'l*, this is the classic case where under either Rule 15(a)'s "undue delay" standard or Rule 59's and 60's "compelling circumstances" or "extraordinary circumstances" standard, leave to amend was not warranted and refusal to grant such leave is not an abuse of discretion because no valid explanation for delay in asserting facts plainly known to the Petitioners has been (or could be) offered.

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[4] In their Petition, Petitioners take issue with the time counsel for a plaintiff may have to devote to redrafting a complaint, conducting additional legal research and "undertak[ing] additional investigation necessary to plead in more detail. . . ." (Pet.19). Requiring further diligence to address deficiencies identified in an original pleading is not antithetical to the Rules. Further, in this case Petitioners and their counsel actually held back facts they already knew from their original Complaint—no further diligence was required to assert them. Petitioners also contend that requiring plaintiffs to concurrently seek leave to amend while defending a motion to dismiss amounts to "requir[ing] plaintiffs to plead to a higher standard than Rule 8 requires." (Pet.19-20). This contention is not true. Petitioners' position was aptly rejected by the Eighth Circuit, which held that "[t]he court is unpersuaded by Ash and Jewsome's argument that it is somehow 'self-defeating' to favor seeking leave to correct deficiencies in a complaint while simultaneously defending against a motion to dismiss that complaint. . . . [T]he decision whether to request leave to amend or stand on the complaint is an ordinary tactical decision that is commonly required of litigants. Such decisions are not always easy to make, but we see no reason to conclude that this relatively common circumstance is somehow fundamentally unfair to plaintiffs." (Pet.App.10a-11a.n.3).

B. The Second, Fourth, Fifth, Seventh and Eleventh Circuits Do Not Ignore Rule 59 and 60 Considerations When Evaluating a Post-Judgment Request to Amend

Avoiding the fact that, under any applicable standard, Petitioners were not entitled to post-judgment leave to amend their Complaint, Petitioners attempt to secure certiorari review of their case by bootstrapping it to a contention that there is a "deep split" among the circuit courts regarding the standard to be used to determine when a district court's discretionary denial of a post-judgment request to amend a complaint is abusive. (Pet.9-10). In support of their argument that a conflict exists among the Circuits, Petitioners contend that, unlike the Eighth Circuit, the Second, Fourth, Fifth, Seventh and Eleventh Circuits "take the opposing view that the Rule 15 standard continues to govern a motion to amend a complaint when it is incorporated into a motion to reconsider [after judgment has been entered]." (Pet.10). According to Petitioners, in these circuits, regardless of whether leave to amend is sought pre- or post-judgment, the entry of judgment is of no consequence at all. Instead, the only consideration is the text of Rule 15 and its policy of "freely given" amendments. That assertion is demonstrably untrue.

As an initial matter, as explained above, the Eighth Circuit does not disavow Rule 15 considerations when evaluating a post-judgment leave to amend. Rather, the Eighth Circuit considers Rule 15(a)(2)'s "freely given when justice so requires" standard, including the analysis of whether there has

been undue delay in seeking amendment, in the context of Rule 59 and 60 considerations supporting the finality of judgments. *See, U.S. ex rel Roop v. Hypoguard U.S.A., Inc.,* 559 F.3d 818, 824 ("[D]istrict courts in this circuit have considerable discretion to deny a post judgment motion for leave to amend because such motions are disfavored, but may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits.").

Further, the Second, Fourth, Fifth, Seventh and Eleventh Circuits similarly consider Rule 15 standards alongside Rule 59 and 60 considerations at the post-judgment stage. In *Fannon v. Guidant Corp.*, 583 F.3d 995 (7th Cir. 2009), the Seventh Circuit considered whether the district court abused its discretion when denying the plaintiffs' Rule 59 motion for reconsideration of judgment dismissing their complaint. *Id.* at 1002–03. In finding no abuse of discretion, the *Fannon* Court stated that the district court was entitled to consider that the plaintiffs had "apparently made a strategic decision not to put their new evidence into the record before the court ruled on [the defendant's] motion to dismiss." *Id.* at 1003. Addressing the plaintiffs' argument that the district court should have evaluated their motion to reopen and allowed the filing of their proposed amended complaint under Rule 15, the Seventh Circuit stated the following:

> The entry of a final judgment under Rule 58 is a watershed point in any litigation. Rule 15(a) is silent about any period after final judgment. But there are two rules of civil

> procedure that expressly address this phase of the suit: Rule 59 and Rule 60. Those rules logically affect all the rest of the rules directed to proceedings in the district courts. The district court correctly assessed whether the plaintiffs were entitled under the standards of Rule 59(e) to have the judgment altered or amended. As we said in *Hecker*, '[o]nce judgment has been entered, there is a presumption that the case is finished, and the burden is on the party who wants to upset that judgment to show the court that there is good reason to set it aside.' The plaintiffs here did not meet that burden.

Id. at 1004 (quoting *Hecker v. Deere & Co.*, 556 F.3d 575, 591 (7th Cir. 2009)) (citation omitted). Accordingly, the Seventh Circuit expressly recognizes that Rule 59 and Rule 60 considerations are appropriately accounted for in evaluating a request for post-judgment leave to amend.

Fannon is not in any way inconsistent with *Runnion,* the Seventh Circuit case on which Petitioners rely in their petition. *See* (Pet.11-12). *Runnion* is unique in that the district court took the "unusual step" of terminating the case at the same time it dismissed the plaintiff's complaint. 786 F.3d at 521. Critically, and distinguishable from both *Fannon* and the Eighth Circuit's opinion below, the Seventh Circuit held that "[w]hen the district court has taken the unusual step of entering judgment <u>at the same time</u> it dismisses the complaint, the court need not find other extraordinary circumstances and

must still apply the liberal standard for amending pleadings under Rule 15(a)(2)." *Id.* at 521 (emphasis added). In other words, the Seventh Circuit held that under the facts in *Runnion*, simultaneous dismissal of the complaint and entry of judgment constituted valid "extraordinary circumstances" under Rules 59 and 60 warranting setting aside the judgment and considering whether an amended complaint should be allowed under Rule 15(a)(2)'s "freely given when justice so requires" standard. The *Runnion* case did not overrule *Fannon*, nor did it reject the notion that Rule 59 and 60 considerations can and should be considered alongside Rule 15 considerations when evaluating a post-judgment request for leave to amend.

Moreover, there is no question that *Runnion* is inapposite to the instant case. Here, judgment was not entered simultaneously with the order dismissing the case. Rather, judgment was entered a full week after Respondents' Motion to Dismiss was granted, and during the seven-day period between the order of dismissal and entry of judgment, Petitioners took no steps to seek amendment of their Complaint to plead facts they admittedly knew even before their original Complaint was filed—a delay which the Eighth Circuit correctly noted remains unexplained. (Pet.App.10a). Thus, even under the Seventh Circuit's decision in *Runnion*, Petitioners cannot show they were entitled to a post-judgment amendment under Rule 15 or that denying such leave was an abuse of discretion.

Petitioners also wrongly submit that the Second, Fourth, Fifth and Eleventh Circuits would have

applied only Rule 15 standards in the case below and ignored Rule 59 and 60 considerations. (*See* Pet.12) In *Williams*, the Second Circuit case cited by Petitioners, the court unequivocally stated that "[w]here, however, a party does not seek leave to file an amended complaint until after judgment is entered, Rule 15's liberality must be tempered by considerations of finality." 659 F.3d at 213. Likewise, in *Laber v. Harvey*, 438 F.3d 404 (4th Cir. 2006), the Fourth Circuit recognized that "the district court may not grant the post-judgment motion unless judgment is vacated pursuant to Rule 59(e) or Fed. R. Civ. P. 60(b)." *Id.* at 427; *see also Mayfield*, 674 F.3d at 379 (affirming denial of Rule 59 motion to reconsider and motion to amend where plaintiffs "provided no excuse for failing to include these additional allegations . . . in the original complaint"). Accordingly, it is clear that the Second and Fourth circuits also consider both Rule 15 *and* Rule 59 and 60 considerations when evaluating a post-judgment request for leave to amend.

In *U.S. ex rel. Spicer v. Westbrook*, 751 F.3d 354 (5th Cir. 2014), the Fifth Circuit did state that "following a dismissal with prejudice, the considerations for the Rule 59(e) motion are governed by Federal Rule of Civil Procedure 15(a)." *Id.* at 367. However, nothing about the *Westbrook* opinion rejects consideration of Rule 59 and 60 principles or holds that those rules have no applicability in considering a post-judgment leave to amend. To the contrary, the *Westbrook* opinion only states that the "considerations for the Rule 59(e) motion" must include Rule 15(a)'s "freely given when justice so requires" standard. As demonstrated above,

simultaneous consideration of Rule 15 and Rule 59 standards when evaluating a post-judgment request for leave to amend is the same position taken by the Second, Fourth, Seventh and Eighth Circuits. (*See* Pet.9, 17)

Further, the Fifth Circuit has also "consistently upheld the denial of leave to amend where the party seeking to amend has not clearly established that he could not reasonably have raised the new matter prior to the trial court's merits ruling." *Vielma*, 218 F.3d at 468. Thus, whether by lack of diligence or deliberate delay, a party's "strategic decision to risk dismissal, with the expectation that they would be granted leave to amend," is sufficient grounds on which to deny a post-judgment motion to amend. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 865 (5th Cir. 2003). Accordingly, when viewed collectively, the Fifth Circuit's rulings clearly establish that post-judgment requests for leave to amend pose different considerations than pre-judgment requests. Further, those same decisions recognize the interest in finality of judgments embodied in Rules 59 and 60 and that such judgments are not to be disturbed where facts and legal theories could have been asserted in earlier pleadings but were held back in a "strategic decision to risk dismissal"—as is exactly the case here.

As for the Eleventh Circuit, Petitioners cite *Thomas v. Town of Davie*, 847 F.2d 771 (11th Cir. 1988), for the proposition that Rule 15 standards apply in the Eleventh Circuit when a plaintiff seeks to amend after a judgment has been entered. (*See* Pet.12). This is a misreading of the full body of Eleventh Circuit precedent. The Eleventh Circuit has

plainly recognized that Rule 59 considerations are entirely relevant in the context of a post-judgment motion to amend. *See Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327 (11th Cir. 2010). In *Jacobs*, the plaintiff asserted that the district court abused its discretion under Rule 15 by refusing to allow a post-judgment amendment. *Id.* at 1344. In affirming the district court's denial of post-judgment leave to amend, the Eleventh Circuit held that "Rule 15(a), by its plain language, governs amendment of pleadings before judgment is entered; it has no application after judgment is entered." *Id.* (emphasis in original). Instead, according to the *Jacobs* Court, in the post-judgment context, "the plaintiff may seek leave if he is granted relief under Rule 59(e) or Rule 60(b)." *Id.* (citations omitted).

Thus, there is simply no basis to suggest that the Second, Fourth, Fifth, Seventh and Eleventh Circuits all agree that plaintiffs are entitled to Rule 15's liberal amendment policy both before and after judgment has been entered and without consideration for the standards embodied in Rules 59 and 60. Instead, consistent with *Foman*, these Circuits review the exercise of discretion with due consideration to the different interests of Rule 15 and Rules 59 and 60, examining whether there was a justifiable reason on which to deny leave to amend.

C. The Cited Decisions from the First, Sixth and Ninth Circuits are Consistent with *Foman* and Decisions from the Other Circuits.

Petitioners continue their unsupported argument that a "conflict" exists among the circuits by asserting that the decisions from the First, Sixth and Ninth Circuits hold that "Rule 15's mandate that leave to amend be 'freely give[n]' no longer applies" in the post-judgment context. (Pet.12–13). While the cited decisions from these circuits acknowledge the valid interests in finality of judgments once judgment has been entered, they do not reject the applicability of Rule 15(a) considerations in the post-judgment context. In fact, all of the circuit decisions cited by Petitioners that uphold the denial of post-judgment leave to amend do so for justifiable reasons, which is what *Foman* holds is required under Rule 15.

Petitioners first cite *In re Genzyme Corp. Securities Litigation*, 754 F.3d 31 (1st Cir. 2014), a First Circuit case in which the plaintiffs alleged that the defendants violated the Securities Exchange Act by making false statements to investors. *Id.* at 40. The defendants moved to dismiss the plaintiffs' complaint pursuant to Rule 12(b)(6), and the district court granted the motion after concluding that the complaint did not plausibly allege facts showing scienter. *Id.* The plaintiffs then moved for relief from judgment and sought leave to amend their complaint to include additional allegations, but the district court denied both motions, finding that "any new evidence plaintiffs wished to present could have been presented earlier." *Id.* On appeal, the First Circuit affirmed, noting that the order of dismissal came

over two years after the complaint had been filed and "plaintiffs admit[ted] that most of this purportedly new evidence was available to them well before the order of dismissal." *Id.* at 46–47. Given the justifiable reason provided for denying the plaintiffs' leave to amend—undue delay and holding back evidence prior to dismissal—Petitioners' contention that *In re Genzyme Corp. Securities Litigation* is somehow inconsistent with *Foman* and Rule 15 is incorrect.

Petitioners next cite *Clark v. United States*, 764 F.3d 653 (6th Cir. 2014), a Sixth Circuit case explaining that in "post judgment motions to amend, the Rule 15 and Rule 59 inquiries turn on the same factors." *Id.* at 661 (citations and quotations omitted). Thus, the Sixth Circuit (like the First, Second, Fourth, Fifth, Seventh, Eighth and Eleventh Circuits) explicitly recognizes the interplay between Rules 15 and 59 and the different policy interests to be considered under each rule, including allowing leave to be "freely given when justice so requires" so that cases are decided on their merits and also not unnecessarily disturbing the finality of a judgment. *See also Leisure Caviar*, 616 F.3d at 616 ("In post-judgment motions to amend . . . the Rule 15 and Rule 59 inquiries turn on the same factors.") (internal citations and quotations omitted). This approach complies with *Foman*'s requirement that denial of post-judgment leave to amend be supported by "any justifying reason."

Petitioners next cite *Weeks v. Bayer*, 246 F.3d 1231 (9th Cir. 2001), a Ninth Circuit case in which the plaintiff never sought to amend during the seven months while the defendant's motion to dismiss was

pending, and only sought an amendment after final judgment was entered. *Id.* at 1236. Although the Ninth Circuit's opinion discussed only Rule 59 considerations, it is irrefutable that *Weeks* is consistent with *Foman* in light of the plaintiff's delay in seeking an amendment. *Foman* itself recognizes that delay can be a basis for denying leave to amend. Further, the *Weeks* decision does not reject the principle that Rule 15 considerations are appropriately considered in an analysis of whether post-judgment leave to amend should be granted.

D. The D.C. Circuit Decisions Are Not Inconsistent.

Petitioners' argument that the D.C. Circuit is divided against itself on this "basic question of pleading procedure" is also misplaced. Without any explanation, Petitioners contend that *Brink v. Continental Ins. Co.*, 787 F.3d 1120 (D.C. Cir. 2015), is somehow inconsistent with *Firestone v. Firestone*, 76 F.3d 1205 (D.C. Cir. 1996). (*See* Pet.14). Most importantly, Petitioners omit the fact that the passage they cite in *Brink* actually quotes from and relies upon *Firestone*. *See Brink*, 787 F.3d at 1128–29. The law cited in both cases states that denying a Rule 59(e) motion is an abuse of discretion if the dismissal of the original complaint with prejudice was erroneous. *Compare id. with Firestone*, 76 F.3d at 1208–09. Petitioners have not argued that the District Court erred by dismissing their original complaint. Nor have they provided any explanation for why they contend that decisions in the D.C. Circuit are inconsistent with one another or any of the other circuit court rulings discussed above.

II. THE COURTS OF APPEALS ARE NOT DIVIDED OVER HOW TO MEASURE AND CONSIDER UNDUE DELAY

Petitioners' related circuit split argument concerning what constitutes "undue delay" is likewise not the "deep conflict" described in their petition. Petitioners argue that the Second, Sixth, and Seventh Circuits reject that an "undue delay" finding can be based on a party's failure to seek an amendment prior to dismissal, while the First, Third, and Eighth Circuits allow for consideration of this time period. (Pet.15–17). However, Petitioners overstate the holdings of these decisions and fail to account for their significant contextual differences. To be sure, the cases cited do provide examples of courts having both accepted and rejected that the plaintiff's failure to seek amendment during the time a motion to dismiss is pending constituted sufficient grounds to deny a post-dismissal motion for leave to amend. But there is not a "deep split" in how courts have examined and treated this issue. Rather, there is little more than a distinction without legal significance, and certainly not evidence of a "fundamental disagreement" among the circuits. (*See* Pet.9, 17).

Petitioners first cite the Second Circuit's decision in *Williams* as prohibiting consideration of the time that a motion to dismiss was pending in determining whether there has been "undue delay." (Pet.15). In *Williams*, however, the defendant's motion to dismiss requested that the plaintiff's state law claims be dismissed without prejudice to allow reassertion in state court. 659 F.3d at 211. The district court nevertheless dismissed the entire

complaint and entered final judgment the next day. *Id.* When the plaintiff subsequently moved to amend, the district court denied the request, stating vaguely that the plaintiff should have requested leave to amend "in the first instance." *Id.* at 212. Based on those unique circumstances, the Second Circuit reversed the district court stating that *Foman* "cannot be reconciled with the proposition that the liberal spirit of Rule 15 necessarily dissolves as soon as final judgment is entered." *Id.* at 214 (emphasis added). Thus, *Williams* does not hold that the time during which a motion to dismiss is pending can never be considered as a basis for denying a party's post-judgment motion to amend.

Petitioners next cite *Morse v. McWhorter*, 290 F.3d 795 (6th Cir. 2002), a Sixth Circuit case. In *Morse*, the defendants moved to dismiss, and the magistrate judge recommended granting the motion "without prejudice to re-file upon disclosing more specific facts." *Id.* at 798. The plaintiffs objected to the magistrate judge's report but also requested "leave to re-plead, consistent with the recommendation of the Report and Rule 15(a)." *Id.* However, the district court dismissed the complaint with prejudice, entered judgment for the defendants, and denied the plaintiff's post-judgment motion to amend. *Id.* The Sixth Circuit reversed, explaining that:

> [t]he far better practice would have been for the plaintiffs to tender a second amended complaint with their objections to the magistrate's report, instead of only requesting leave to amend. But without precedent notifying the plaintiffs that merely submitting

> objections to the magistrate's report was inadequate, we are reluctant to penalize the proposed class.

Id. at 800. Thus, *Morse* also was unique in that the plaintiffs affirmatively requested leave to amend in their objections to a report that had itself only recommended dismissal with leave to replead. In other words, *Morse* does not hold that the time in which a motion to dismiss was pending can never justify a finding of undue delay in the Sixth Circuit.

Petitioners next cite *Runnion* as holding that the Seventh Circuit prohibits considering the time a motion to dismiss is pending to justify a finding of undue delay. (Pet.15-16). However, as discussed above, *Runnion* applies only in cases where "judgment was entered at the same time the case was first dismissed," *see* 786 F.3d at 521, and thus does not have the far-reaching application stated by Petitioners.

Consistent with the limited holdings of the above decisions, the First, Third, and Eighth Circuits have had occasion to consider other circumstances in which a party's failure to seek amendment before dismissal justifies a finding of undue delay. For example, the opinion below upheld the District Court's decision to deny Petitioners' motion to amend because Petitioners failed to seek leave to amend at any time after Respondents filed their motion to dismiss, or after dismissal but before judgment was entered seven days later. (*See* Pet.App.9a–11a). Petitioners also failed to provide any justifiable explanation for not alleging facts admittedly in their possession at the time they filed their Complaint, or

for waiting to seek an amendment to include those facts, until after judgment had been entered. (Res.App.73a, 157a, 265a). Considering also that the Complaint's pleading deficiencies were the very basis for Respondents' motion to dismiss, the Eighth Circuit had sufficient reason to uphold the District Court's denial of Petitioners' post-judgment request to amend.

In *ACA Financial Guaranty Corp. v. Advest,* Inc., 512 F.3d 46 (1st Cir. 2008), the First Circuit case cited by Petitioners, the court rightly explained that "[e]ach case will turn on its own circumstances." *Id.* at 57. There, as here, the plaintiffs could have moved to amend but did not, despite multiple opportunities. *Id.* Also like in this case, the plaintiffs "took no action to add new allegations even though they knew what they would add if they amended." *Id.* Relying on *James*, the First Circuit rejected the plaintiffs' argument that they were entitled to "wait and see" if their complaint would be rejected by the district court under such circumstances. *Id.* (quoting *James*, 716 F.2d at 78). The Third Circuit arrived at the same conclusion under analogous circumstances in *Jang v. Boston Scientific Scimed, Inc.*, 729 F.3d 357 (3d Cir. 2013), and rejected this "wait and see" approach to pleading. *Id.* at 368.

III. ASH AND JEWSOME'S PETITION SHOULD BE DENIED BECAUSE THIS CASE WAS CORRECTLY DECIDED BELOW AND COMPLIES WITH THIS COURT'S *FOMAN* DECISION

In light of the above, it is apparent that Petitioners have failed to show a "deep split" among the circuit courts or that this case is a proper vehicle

to disturb the circuit courts' considerations of undue delay and the interest in finality of judgments when addressing post-judgment motions for leave to amend. Whether evaluated under Rule 15, Rules 59 and 60, or both, leave to amend is properly denied when the moving party knew about the facts on which the proposed amendment was based but chose to omit those necessary allegations from their original pleadings, delaying asserting them until after a motion to dismiss was granted and declining to seek leave to amend after the motion was granted but before judgment was entered.[5]

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[5] Petitioners submit that their proposed amended complaint would have been allowed in a circuit with "less stringent amendment rules." (Pet.22). Petitioners are mistaken, however, because not once have they offered an explanation for why they withheld facts that could have and should have been included in their original Complaint, or why they failed to seek amendment post-dismissal and pre-judgment. *Foman* and every Circuit recognize that such "undue delay" is a basis for denying leave to amend. Further, Petitioners' argument that allowing district court judges to make such discretionary determinations will result in a "judge-to-judge" amendment standard is meritless. (Pet.21). The vesting and exercise of judicial discretion regarding such matters is not unusual, nor is it inappropriate. The Federal Rules of Civil Procedure are replete with situations where discretionary determinations are vested in district court judges. The reason for this is because proper application of the Rules often turns on the individual facts and circumstances of each case. Moreover, Petitioners' argument that, without direction from this Court, plaintiffs will be required to plead an "indisputably plausible claim" to avoid the entry of judgment is plain wrong. (Pet.19–20). The Rules contemplate plaintiffs pleading their claims sufficiently in the first instance. If, however, an amendment is necessary, Rules 15, 59 and 60 provide various avenues for amendment at different stages of litigation when appropriate and where factors such as "undue

The fact remains that the Petitioners initiated this lawsuit by filing a factually deficient pleading, even though they possessed facts about their purported employment relationship with Respondents which they chose not to plead. Faced with a motion to dismiss, Petitioners made the strategic decision not to amend their Complaint to assert the additional facts they knew, but instead to defend it as sufficiently pled. When the District Court dismissed the Complaint for lacking any facts to suggest an employment relationship, the dismissal order pointed out that Petitioners had never sought leave to amend. Yet, Petitioners inexplicably waited nine more days, including two days after judgment was entered, to seek an amendment to their Complaint. To this day, Petitioners have never offered an explanation for why they chose to wait until after the entry of judgment to seek an amendment to include facts previously known to them, the absence of which was the very subject of Respondents' motion to dismiss. Petitioners' delay and "wait and see" approach without any compelling justification is exactly the tactic that Justice Breyer cautioned in *James* would undermine the ordinary rules governing finality of judgments and should not be sanctioned here. *See* 716 F.2d at 78.

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delay" are not present. The idea that plaintiffs are permitted to plead their claims insufficiently, do nothing in the face of a motion to dismiss or order of dismissal, and then reopen a case at will post-judgment would turn the liberal amendment policies of Rule 15 into carte blanche power to manage the courts' dockets and offer absolutely no protection at all for judgments previously entered.

Under any standard articulated by the circuit courts, and consistent with *Foman*, the District Court acted within its discretion when it denied Petitioners' post-judgment leave to amend. Petitioners were provided with every opportunity to amend their Complaint prior to dismissal and the entry of judgment, yet they chose not to amend or to provide any excuse for their delay. Accordingly, this case does not provide the proper means through which to resolve any existing conflicts among the circuits on these issues.

Further, Petitioners acknowledge in their petition that the Court of Appeals found that they offered no excuse for their delay, yet they continue to assert that they "should not be penalized for not amending the complaint during the pendency of the motion to dismiss that they opposed." (Pet.9). By failing to explain why their delay was excusable to either court below, Petitioners have waived their right to attempt to do so now. *See Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 522 (1991) (declining to consider issue that was "not argued to either of the lower courts, and . . . not considered by either court below in deciding this case"); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645–46 (1992) (declining to consider issue because "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]") (citations omitted).

CONCLUSION

For all of the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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NOVEMBER 18, 2015

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PLAINTIFFS' COMPLAINT (APRIL 21, 2014)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LINDA S. ASH and ABBIE JEWSOME on Behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

ANDERSON MERCHANDISERS, LLC,
a Delaware Corporation,
Registered Agent: CT Corporation System
120 South Central Ave.
Clayton, MO 63105

WEST AM, LLC, a Delaware Corporation,
Registered Agent: CT Corporation System
120 South Central Ave.
Clayton, MO 63105

WEST AM, LLC, a Delaware Corporation,
Registered Agent: The Corporation Company, Inc.
112 SW 7th Street, Suite 3C
Topeka, KS 66603

ANDERSON MERCHANDISERS, LLC,
a Texas Corporation,
Registered Agent: CT Corporation System
1999 Bryan St., Ste 900
Dallas, TX 75201-3136

ANCONNECT, LLC, a Texas Corporation,
Registered Agent:
350 N. St. Paul St., Suite 2900
Dallas, TX 75201,

Defendants.

Case no.: _____

Jury Trial Requested

COMPLAINT
Collective Action under Fair Labor Standards Act

COME NOW, the Plaintiffs Linda S. Ash and Abbie Jewsome, on behalf of themselves and all others similarly situated, by and through their attorneys, and bring this action against Defendants Anderson Merchandisers, LLC, a Delaware corporation, West AM, LLC, a Delaware corporation, Anderson Merchandisers, LLC, a Texas corporation and ANConnect, LLC, a Texas corporation (hereafter collectively "Defendants") for damages and other relief relating to violations of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"). Plaintiffs' FLSA claims are asserted as a collective action pursuant to 29 U.S.C. § 216(b). The following allegations are based on personal knowledge as to Plaintiffs' conduct and are made on information and belief as to the acts of others.

JURISDICTION AND VENUE

1. This Court has original jurisdiction to hear this Complaint and to adjudicate the claims stated

herein under 28 U.S.C. § 1331, this action being brought under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*

2. Venue is proper in the United States District Court for the Western District of Missouri pursuant to 28 U.S.C. § 1391(b) because Defendants operate their business in this district and are subject to this Court's personal jurisdiction, and a substantial part of the events or omissions giving rise to the claim alleged herein occurred in this district.

PARTIES

3. Defendant Anderson Merchandisers, LLC is an active Delaware limited liability company registered to do business in the State of Missouri and, upon information and belief, other states nationwide.

4. Defendant West AM, LLC is an active Delaware limited liability company registered to do business in the States of Missouri, Kansas, Arkansas and, upon information and belief, other states nationwide.

5. Defendant Anderson Merchandisers, LLC is an active Texas limited liability company registered to do business in the State of Texas and, upon information and belief, other states nationwide.

6. Defendant ANConnect, LLC is an active Texas limited liability company registered to do business in the State of Texas and, upon information and belief, other states nationwide.

7. Defendants are engaged in interstate commerce by, among other things, providing merchandising and promotional services throughout retail stores in

the United States. On Defendants' website, it states that its associates work "coast to coast" and provide their services to stores "nationwide."

8. During all relevant times, defendants Anderson Merchandisers, LLC, a Delaware corporation, West AM, LLC, a Delaware corporation, Anderson Merchandisers, LLC, a Texas corporation, and ANConnect, LLC, a Texas corporation, were part of an integrated enterprise and, as such, were plaintiffs' employer. During all relevant times, and upon information and belief, all of these defendants shared interrelated operations, centralized control of labor relations, common management and common ownership and/or financial control.

9. Defendants are, and have been, an "employer" engaged in interstate commerce and/or the production of goods for commerce within the meaning of the FLSA, 29 U.S.C. § 203(d).

10. Plaintiff Linda S. Ash resides in Jackson County, Missouri. Plaintiff Ash works for Defendants as a full-time Territory Sales Lead (a/k/a Sales Merchandiser) and performs these duties for compensation in Missouri.

11. Plaintiff Abbie Jewsome resides in the State of Kansas. Plaintiff Jewsome works for Defendants as a full-time Territory Sales Lead (a/k/a Sales Merchandiser) and performs these duties for compensation in Kansas.

12. Plaintiffs, and others similarly situated, are current or former employees of Defendants within the meaning of the FLSA, 29 U.S.C. § 203(e)(1).

13. Plaintiffs and others similarly situated have been employed by Defendants within three years prior to the filing of this lawsuit. *See* 29 U.S.C. § 255(a).

14. Plaintiffs bring this action on behalf of themselves and other similarly situated employees pursuant to 29 U.S.C. § 216(b).

15. Plaintiffs and others similarly situated are individuals who are, or were, employed by Defendants as Territory Sales Lead (a/k/a Sales Merchandiser) (hereafter collectively referred to as "merchandisers"), or as employees with similar job duties throughout the country during the applicable statutory periods.

FACTUAL ALLEGATIONS

16. Plaintiffs and others similarly situated worked as full-time merchandisers for Defendants.

17. Defendants describe their services to their customers as connecting consumer brands to shoppers throughout the Wal-Mart stores through a broad array of point-to-point services that provide customized marketing and merchandising programs for their customers in order to maximize their customers' sales, increase efficiencies and reduce costs.

18. As merchandisers, Plaintiffs and others similarly situated had or have the primary duty of product promotions, product placement and signage, sales floor presentation, and other point of sale techniques regarding customers' products at Wal-Mart stores.

19. Defendants classify the Plaintiffs and other similarly situated employees as non-exempt and entitled to overtime pay under the FLSA.

20. The FLSA requires covered employers, such as Defendants, to compensate all non-exempt employees at a rate of not less than one and one-half times the regular rate of pay for work performed in excess of forty (40) hours per workweek. When calculating the regular rate of pay, it shall include all nondiscretionary compensation.

21. Regardless of location, Defendants, upon information and belief, failed to pay Plaintiffs and others similarly situated one and one-half times the correct regular rate of pay for all hours worked in excess of forty per workweek.

22. Regardless of location, Defendants, upon information and belief, attempted to pay overtime to the Plaintiffs and others similarly situated based upon the "fluctuating workweek" as set forth in 29 C.F.R. § 778.114 in that they only paid overtime to said persons at a rate of one-half their regular rate of pay for all hours worked in excess of forty per work week.

23. Regardless of location, Defendants, upon information and belief, failed to meet the necessary requirements under 29 C.F.R. § 778.114 to pay Plaintiffs and others similarly situated overtime under the "fluctuating workweek" in that said persons were not paid a fixed salary per workweek regardless of hours worked, and said persons' hours did not fluctuate week to week as required under the regulation. In turn, Plaintiffs and others similarly

situated were denied overtime compensation owed under the FLSA.

24. Regardless of location, Defendants, upon information and belief, required Plaintiffs and others similarly situated to perform work tasks during uncompensated meal breaks. In turn, Plaintiffs and others similarly situated were denied overtime compensation owed under the FLSA.

25. Regardless of location, Defendants, upon information and belief, were aware and/or encouraged Plaintiffs and others similarly to perform work off the clock. In turn, Plaintiffs and others similarly situated were denied overtime compensation owed under the FLSA.

26. Regardless of location, Defendants, upon information and belief, failed to include all income when calculating the regular rate of pay. In turn, Plaintiffs and others similarly situated were denied overtime compensation owed under the FLSA.

27. Defendants were aware, or should have been aware, that Plaintiffs and other similarly situated employees were not paid a fixed salary per workweek regardless of hours worked, that said persons' hours did not fluctuate week to week as required under the regulation, that said persons were required to perform work during uncompensated meal breaks, that said persons did not report all hours worked, and that Defendants failed to include all compensation paid when calculating the regular rate of pay.

28. Defendants' conduct was willful and in bad faith.

29. Upon information and belief, Defendants did not keep accurate records of these hours worked by Plaintiffs and others similarly situated as required by law.

30. Defendants were aware of the hours and overtime hours that Plaintiffs and others similarly situated worked.

FLSA COLLECTIVE ACTION ALLEGATIONS

31. Plaintiffs, on behalf of themselves and others similarly situated, re-allege and incorporate by reference the above paragraphs as if fully set forth herein.

32. Plaintiffs file this action on behalf of themselves and all individuals similarly situated. The proposed Collective Class for the FLSA claims is defined as follows:

> All persons who worked as full time Territory Sales Leads and/or Sales Merchandisers (or persons with similar job duties) for Defendants at any time since three years prior to the filing of this Complaint (hereafter the "FLSA Collective").

33. Plaintiffs have consented in writing to be a part of this action pursuant to 29 U.S.C. § 216(b). Plaintiffs' signed consent forms are attached as Exhibit A.

34. During the applicable statutory period, Plaintiffs and the FLSA Collective routinely worked in excess of forty (40) hours per workweek without receiving overtime compensation at the rate of one

and one-half times their regular rate for their overtime hours worked.

35. Defendants failed to preserve records relating to these hours worked as required by 29 C.F.R § 516.2.

36. Plaintiffs and the FLSA Collective are victims of Defendants' widespread, repeated, systematic and consistent illegal policies that have resulted in violations of their rights under the FLSA, 29 U.S.C. § 201 *et seq.*, and that have caused significant damage to Plaintiffs and the FLSA Collective.

37. Defendants willfully engaged in a pattern of violating the FLSA, 29 U.S.C. § 201 *et seq.*, as described in this Complaint in ways including, but not limited to, failing to pay Plaintiffs and other similarly situated employees a fixed salary per workweek regardless of hours worked and knowing that said persons' hours did not fluctuate week to week as required under the regulation; requiring said persons to perform work during uncompensated meal breaks, knowing that said persons did not report all hours worked, and failing to include all compensation paid when calculating the regular rate of pay

38. Defendants' conduct constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255.

39.Defendants are liable under the FLSA for failing to properly compensate Plaintiffs and others similarly situated, and, as such, notice should be sent to the FLSA Collective. There are numerous similarly situated current and former employees of

Defendants who have suffered from Defendants' common policies and practices as set forth herein, and who would benefit from the issuance of a Court-supervised notice of this lawsuit and the opportunity to join. Those similarly situated employees are known to Defendants and are readily identifiable through Defendants' records.

CAUSES OF ACTION

COUNT I—OVERTIME VIOLATIONS UNDER FEDERAL LAW. The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* On Behalf of Plaintiffs and Those Similarly Situated

40. Plaintiffs, on behalf of themselves and others similarly situated, re-allege and incorporate the preceding paragraphs by reference as if fully set forth herein.

41. The FLSA, 29 U.S.C. § 207, requires employers to pay employees one and one-half times the regular rate of pay for all hours worked over forty (40) hours per workweek.

42. Defendants suffered and permitted Plaintiffs and the FLSA Collective to routinely work more than forty (40) hours per week without paying overtime compensation one and one-half times the correct regular rate of pay for all hours worked over forty (40) hours per workweek, requiring them to work during uncompensated breaks, knowing that they did not report all hours worked, and failing to include all compensation when calculating the regular rate of pay.

43. Defendants' actions, policies, and/or practices as described above violate the FLSA's overtime requirement by regularly and repeatedly failing to properly compensate Plaintiffs and the FLSA Collective for overtime worked.

44. Defendants knew, or showed reckless disregard for the fact, that they failed to pay these individuals overtime compensation in violation of the FLSA.

45. As the direct and proximate result of Defendants' unlawful conduct, Plaintiffs and the FLSA Collective have suffered, and will continue to suffer, a loss of income and other damages. Plaintiffs and the FLSA Collective are entitled to liquidated damages, attorney's fees and costs incurred in connection with this claim.

46. By failing to accurately record, report, and/or preserve records of hours worked by Plaintiffs and the FLSA Collective, Defendants have failed to make, keep, and preserve records with respect to each of its employees sufficient to determine their wages, hours, and other conditions and practice of employment, in violation of the FLSA, 29 U.S.C. § 201, *et seq.*

47. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a) as Defendants knew, or showed reckless disregard for, the fact that their compensation practices were in violation of these laws.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and others similarly situated, pray for relief as follows:

a) Designation of this action as a collective action on behalf of the FLSA Collective and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated members of the FLSA Collective apprising them of the pendency of this action, and permitting them to assert timely FLSA claims in this action by filing individual consent forms pursuant to 29 U.S.C. § 216(b);

b) Judgment against Defendants finding they failed to pay the FLSA Collective overtime as required under the FLSA;

c) Judgment against Defendants for the FLSA Collective for unpaid back wages, and back wages at the applicable overtime rates;

d) An amount equal to their damages as liquidated damages;

e) A finding that Defendants' violations of the FLSA are willful;

f) All costs and attorneys' fees incurred prosecuting this claim;

g) An award of prejudgment interest (to the extent liquidated damages are not awarded);

h) Leave to add additional plaintiffs by motion, the filing of consent forms, or any other method approved by the Court;

i) Leave to amend to add additional state law claims; and

j) All further relief as the Court deems just and equitable.

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DEFENDANTS' MOTION TO DISMISS (MAY 23, 2014)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LINDA S. ASH and ABBIE JEWSOME on Behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

ANDERSON MERCHANDISERS, LLC
WEST AM, LLC, WEST AM, LLC,
ANDERSON MERCHANDISERS, LLC
and ANCONNECT, LLC,

Defendants.

Case No.4:14-CV-0358-DW

Defendants Anderson Merchandisers, LLC, West AM, LLC, West AM, LLC, Anderson Merchandisers, LLC and ANCONNECT, LLC ("Defendants"), by and through counsel, hereby move this Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), for an Order dismissing Plaintiffs' Complaint, with prejudice, for failure to state a claim upon which relief can be granted.

Plaintiffs' Complaint does not satisfy the pleading requirements of the Federal Rules of Civil

Procedure and the United States Supreme Court's standards made clear in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007), and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). It fails to adequately plead that any of the Defendants were Plaintiffs' FLSA employer(s), and by failing to sufficiently allege employer relationships as to any Defendant, the Complaint also fails to sufficiently allege standing as to any Defendant. Also, the FLSA claims and collective allegations are nothing more than a litany of legal conclusions reciting legal elements of the claims. The Complaint lacks sufficient facts to support and make plausible the FLSA claims of the named Plaintiffs or the putative collective class. Accordingly, the Complaint should therefore be dismissed. The facts, arguments and authority in support of this Motion are set forth in Defendants' Memorandum in Support of Its Motion to Dismiss which is being filed contemporaneously herewith and is incorporated herein by reference.

Respectfully submitted this 23rd day of May, 2014.

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DEFENDANTS' SUGGESTIONS IN SUPPORT OF THEIR MOTION TO DISMISS (MAY 23, 2014)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LINDA S. ASH and ABBIE JEWSOME on Behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

ANDERSON MERCHANDISERS, LLC, WEST AM, LLC, WEST AM, LLC, ANDERSON MERCHANDISERS, LLC and ANCONNECT, LLC,

Defendants.

Case No.4:14-CV-0358-DW

I. INTRODUCTION

Plaintiffs' Complaint does not satisfy the pleading requirements of the Federal Rules of Civil Procedure and the United States Supreme Court's standards made clear in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007), and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). It fails to adequately plead that any of the Defendants were Plaintiffs' FLSA employer(s). By failing to

sufficiently allege employer relationships as to any (let alone each) Defendant, the Complaint also fails to sufficiently allege standing as to any (let alone each) Defendant. Moreover, the FLSA claims and collective allegations are nothing more than a litany of legal conclusions reciting legal elements of the claims. The Complaint lacks sufficient facts to support and make plausible the FLSA claims of the named Plaintiffs or the putative collective class. As demonstrated herein, Plaintiffs' use of conclusory labels devoid of factual enhancement in an attempt to improperly expand the scope of this lawsuit to encompass a nationwide putative class is a litigation strategy that has routinely been rejected by federal courts. The Federal Rules of Civil Procedure and Supreme Court precedent in *Twombly* and *Iqbal* likewise require that it be rejected here. Plaintiffs' Complaint fails to sufficiently allege employer relationships or standing as to any defendant, and also fails to allege plausible claims on behalf of either plaintiff or the putative collective class, and should therefore be dismissed.

Defendants' purpose in bringing this motion is not theoretical. Rather, the scope of the defendants named by Plaintiffs in this action and Plaintiffs' attempt to improperly expand the scope of this case beyond their individual circumstances have very real implications. This motion is premised on the need to prohibit the unjustified and implausible expansion of this proceeding. The Supreme Court has instructed that a "district court must . . . insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Twombly,* 550 U.S. at 558. "Rule 8 does not unlock the doors of

discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 129 S. Ct. at 1950. Only a complaint that states a plausible claim for relief survives a motion to dismiss, and determining whether a complaint states a plausible claim for relief will be a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

II. ARGUMENT

A. Applicable Legal Standard

In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court accepts as true the factual allegations contained in a complaint. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 163-65 (1993). However, the United States Supreme Court has explained that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 127 S.Ct. at 1964-65. Such "[f]actual allegations must be enough to raise a right of relief above the speculative level," and plaintiffs must state "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1965, 1974.

In *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), the Supreme Court reemphasized the *Twombly* pleading requirements and highlighted the following:

(1) a pleading offering only "labels and conclusions" or a "formulaic recitation

of the elements of a cause of action" does not comply with Fed. R. Civ. P. 8;

(2) Fed. R. Civ. P. 8 "demands more than an unadorned, the defendant-unlawfully-harmed me accusation . . . "; and

(3) a complaint will not survive a motion to dismiss if it contains merely "naked assertions devoid of further factual enhancement."

Id. at 1949 (internal quotation marks and citations omitted). Therefore, the Court held that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," and only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 1949-50 (emphasis added). "A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth." *Id.* at 1940.

Plaintiffs' Complaint is exactly the type of pleading that the Supreme Court has said cannot survive a motion to dismiss. It contains only threadbare recitals, conclusions and mere recitations of the elements of the Plaintiffs' claims, and, therefore, it must be dismissed.

B. Plaintiffs Fail to Plead Employer Status Vis-à-vis Any of the Defendants

As an initial matter, the Complaint must be dismissed because it fails to establish a critical threshold element of a FLSA claim—*i.e.*, which, if

any, of the Defendants is the Plaintiffs' actual employer. The FLSA applies only to "employees" who are "employed" by "employers." *See* 29 U.S.C. § 207(a)(1); *see also* 29 U.S.C. § 203(e)(1). The FLSA's definition of "[e]mploy includes to suffer or permit work," and an "employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. §§ 203(d), (g).

While broad, the FLSA's "employer" definition is not without limits. To determine whether an employment relationship exists under the FLSA, courts look to the "economic reality" of the totality of the circumstances bearing on whether the putative employee is economically dependent on the alleged employer. *See Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998). This test applies four factors, asking whether the alleged employer: (1) had the power to hire and fire the employee; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1981); *see also Muhammad v. Platt College*, No. 94-1750, 1995 WL 21648, at *1 (8th Cir. 1995) (applying the *Bonnette* factors to conclude that an inmate who worked as a tutor for a local college was not employed by the college under the FLSA).

The Complaint here does not come close to pleading facts sufficient to identify an FLSA employer. In fact, it does not even allege for which of the five Defendants either of the Plaintiffs actually works. It simply lumps all five of the Defendants

together and alleges that each of the Plaintiffs "works for Defendants" and that they are "employed by Defendants." Complaint, Dkt. #1, ¶¶ 10-13. There is absolutely nothing that would even begin to suggest which, if any, of the five Defendants hired the Plaintiffs, supervises or sets their work schedules and terms and conditions of employment, pays them, or determines their rates and methods of payment or otherwise establish which entity is their actual FLSA employer.

The Complaint also alleges in conclusory fashion that, "during all relevant times, and upon information and belief, all of [the] defendants shared interrelated enterprise, and, as such, were plaintiffs' employer." Complaint, Dkt. #1, ¶ 8. Thus, Plaintiffs are trying to establish that the Defendants are, collectively, a single employer under the FLSA via the theory of integrated enterprise liability.[1] Complaint, Dkt. #1, ¶ 8. But the integrated or single enterprise test has been flatly rejected as the proper test to use when evaluating joint employer relationships under the FLSA, and has never been applied by the Eighth Circuit. *See, e.g., McDonald v. JP Marketing Assocs., LLC,* 2007 WL 1114159, at *4-5 (D. Minn. Apr. 13, 2007) (applying integrated enterprise test to joint employer analysis for plaintiff's Title VII claim but applying *Bonnette* economic realities test to joint employer analysis for plaintiff's FLSA claim); *Roman*

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[1] Indeed, Plaintiffs recite the factors established in *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 392 (8th Cir.1977), concerning integrated enterprise liability in the Title VII and NLRA context. Those elements are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control.

v. Gaupos III, Inc., 970 F. Supp. 2d 407, 414-415 (D. Md. 2013) (distinguishing cases that applied the "single integrated enterprise" test and noting that not one federal appellate case has applied the concept to determine the scope of FLSA liability) (emphasis added).

Further, while the FLSA does extend coverage to "enterprises" as that term is used in the statute,[2] "the finding of an enterprise is relevant only to the issue of coverage. Liability is based on the existence of an employer-employee relationship." *Cornell v. CP Center, LLC*, 410 F. App'x 265, 267 (11th Cir. 2011); *see also Chao v. A-One Medical Servs.*, 346 F.3d 908, 917 (9th Cir. 2003) (acknowledging that the jurisdictional question of coverage is separate and distinct from the question of liability as joint employers under the FLSA).

And, even if the integrated enterprise/single employer test did apply to establish joint employers under the FLSA (which it does not), the Complaint here would still fail to plead facts sufficient to support such a theory. Even under different statutes, such as Title VII, where integrated enterprise liability is possible, it arises only when one entity is a plaintiff's legal employer, and the plaintiff seeks additionally to hold another entity liable because of corporate interrelation. *See Arculeo v. On-Site Sales & Mktg., LLC*, 425 F.3d 193, 197-98 (2d Cir. 2005). In short, to state a claim for single enterprise liability, a plaintiff must first plead facts sufficient to establish that one of the defendants is his nominal employer. *See Cavallaro v. UMass Memorial Health*

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[2] 29 U.S.C. § 203(r).

Care, Inc., 2011 WL 2295023 (D.Mass. June 8, 2011). Plaintiffs have completely failed to meet that requirement.

Also, the Complaint only asserts, in conclusory fashion, that all of the Defendants were "part of an integrated enterprise." Complaint, Dkt. #1, ¶ 8. It does not allege how the Defendants' operations are interrelated, what common management, ownership or financial control they share or how their labor relations are centralized, which would be the critical facts needed to assert a single employer liability claim. Rather the Complaint simply parrots, with virtually no alteration, a legal statement of the factors considered in an integrated enterprise inquiry without any factual allegations supporting the contention that those factors are met with regard to Defendants.

Simply stated, it is impossible to proceed with an FLSA claim without first sufficiently pleading the proper employer, and Plaintiffs have not done so. Therefore, as this Court recently held in dismissing FLSA claims against defendants in another case, the Complaint is fatally flawed and must be dismissed. *See Loyd v. Ace Logistics*, LLC, 2008 WL 5211022, at *3 (W.D. Mo. Dec. 12, 2008) (dismissing two defendants because plaintiffs failed to adequately plead employment with either of them); *see also Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 201 (2d Cir. 2013)(noting that a plaintiff's "actual and direct employer is an essential element of notice pleading[.]"); *Roman v. Gaupos III, Inc.*, 970 F. Supp. 2d 407, 415-16 (D. Md. 2013) (granting motion to dismiss four corporate defendants for whom the plaintiff did not work);

White v. Classic Dining Acquisition Corp., No. 1:11–cv–712–JMS–MJD, 2012 WL 1252589, at *2-3 (S.D. Ind. Apr. 13, 2012) (dismissing claims against twenty-six of the twenty-eight defendants for failure to allege employment relationship)*; Cavallaro*, 2011 WL 2295023 (dismissing FLSA claims against 10 defendants where plaintiffs failed to plead sufficient facts to plausibly support an inference that even one of them, let alone all, was the actual employer).

C. Plaintiffs Fail to Plead Standing

Plaintiffs have also failed to plead that they have standing to assert claims against any of the Defendants. To satisfy the case-or-controversy requirement of Article III of the United States Constitution, Plaintiffs must show that they (1) have suffered an "injury-in-fact"; (2) that is "'fairly traceable' to the actions of the defendant;" and, (3) that the injury will likely be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992)). Because Plaintiffs have failed to allege that they actually work for any of the Defendants, they have failed to plausibly plead that they have suffered any injury in fact traceable to any of the Defendants. Therefore, Plaintiffs lack standing to assert any claims against any of the Defendants, either on behalf of themselves or any other individuals, and the Complaint must be dismissed. *See Martinez v. Cargill Meat Solutions*, 265 F.R.D. 490, 497 (D. Neb. 2009) (noting in an FLSA collective action that a named party is not a proper representative of the class as to those claims for which he himself lacks standing); *Cavallaro v. UMass Mem'l Health Care, Inc.*, 678 F.3d 1, 9-10 (1st

Cir. 2012) (affirming dismissal of FLSA claims for lack of standing because named plaintiffs did not sufficiently allege they were employees of any of the multiple defendants; noting that even on a joint employer theory "some direct employer needs to be identified before anyone in the group could be liable on the theory that some or all were responsible"); *Lucas v. BMS Enters.*, 2010 WL 2671305, at *2-3 (N.D. Tex. July 1, 2010) ("To demonstrate that they have standing, named plaintiffs in a class-action suit must meet every element of standing as to each defendant, including alleging that they were injured by each defendant named in the suit"); *Chuy v. Hilton Mgmt.*, L.L.C., 2010 WL 1854120, at *2-3 (M.D. Fla. May 10, 2010) (dismissing wage claims for lack of standing against defendant because no named plaintiff alleged employment by that defendant).

D. Plaintiffs Fail to Plausibly Plead a FLSA Overtime Violation

The Complaint also lacks sufficient facts to plausibly establish a FLSA violation. Section 207(a)(1) of the FLSA requires that "for a workweek longer than forty hours," an employee working "in excess of" 40 hours shall be compensated for those excess hours "at a rate not less than one and one-half times the regular rate at which [she or] he is employed." 29 U.S.C. § 207(a)(1). Those are the bare statutory elements of an FLSA claim.

The Complaint does nothing more than restate those statutory elements in conclusory fashion by alleging that Defendants violated the FLSA by not paying overtime for hours worked in excess of 40 per week at the correct rate and requiring Plaintiffs to

work "off-the-clock" and/or during meal breaks. *See* Dkt. #1, Complaint, ¶¶ 19-30. The Complaint provides absolutely no facts to support these bare statutory elements. It does not allege any specific time(s) (or time period) when Plaintiffs were allegedly not paid overtime, what their schedules were, when they worked during meal periods or worked "off-the-clock," what work Plaintiffs allegedly performed off-the-clock or during meal periods, how much overtime work they performed, who instructed Plaintiffs to do work off-the-clock or during meal periods or what rates of pay Plaintiffs received that they contend were incorrect. And, the Complaint does not specify which Defendant allegedly committed which violation. In short, all that the Complaint contains are conclusory statements of the bare legal elements of an FLSA claim without any factual context or enhancement.

Courts have not hesitated to dismiss FLSA claims where, as here, plaintiffs have failed to adequately plead the necessary factual underpinnings. The Second Circuit Court of Appeals recently analyzed the level of specificity required to plead a plausible FLSA overtime claim in *DeJesus v. HF Management Services, LLC.,* 726 F.3d 85 (2d Cir. 2013). There the plaintiff alleged that she worked "more than forty hours per week during 'some or all weeks' of her employment" and was not paid time-and-a-half for each hour in excess of 40 hours. The Second Circuit held that such bare allegations amounted only to a recitation of the statutory language of the FLSA and were insufficient to state a claim. *Id.* at 87. In so holding, *DeJesus* cited with approval *Pruell v. Caritas Christi*, where the First

Circuit Court of Appeals noted "such a formulation was 'one of those borderline phrases' that while not stating an 'ultimate legal conclusion[],' was 'nevertheless so threadbare or speculative that [it] fail[ed] to cross the line between the conclusory and the factual.'" 678 F.3d 10, 13 (1st Cir. 2012); *see also Evans v. Joy,* 2012 WL 3868083 at *2 (D. Neb. Sept. 6, 2012) (dismissing claim for overtime where the complaint failed to allege any facts to support the claim, such as his scheduled work hours, the number of uncompensated hours that plaintiff worked and when he worked those hours); *Jones v. Casey's General Stores,* 538 F.Supp.2d 1094, 1102 (S.D. IA 2008) (FLSA claims dismissed where plaintiff failed to plead facts to support the claim, including hours worked that were not paid); *Bailey ex rel. v. Border Foods, Inc.,* 2009 WL 3248305 at *2 (D.Minn. Oct. 6, 2009) (dismissing FLSA minimum wage claim based on conclusory allegations and where plaintiffs failed to plead their hourly rates, amount of reimbursements or any other facts to support their FLSA claims); *LePage v. Blue Cross & Blue Shield of Minnesota,* 2008 WL 2570815 at *2 (D. Minn. June 25, 2008) (dismissing FLSA claim based on conclusory allegations).

Furthermore, because the Complaint is completely devoid of any factual context, Defendants have no idea as to when Plaintiffs allegedly performed overtime work, worked during a meal period or off-the-clock, or who allegedly told Plaintiffs to perform this work. Therefore, it is impossible for Defendants to investigate the allegations and prepare to defend against them. Defendants are completely hamstrung in their ability to assess this

case and prepare their defense, which is exactly the situation that Rule 8 of the Federal Rules was enacted to avoid. Accordingly, dismissal of the Complaint is entirely appropriate and, indeed, necessary. *See Twombly*, 127 S.Ct. 1955; *Iqbal*, 129 S.Ct. 1937.

E. Plaintiffs Fail to Properly Plead Collective Action Allegations

Additionally, Plaintiffs have failed to plead sufficient facts to show that relief on a collective basis is appropriate. In the wake of *Twombly* and *Iqbal*, courts have repeatedly held that collective action claims must comply with the pleading requirements of Rule 8(a). *See, e.g., Jones v. Casey's General Stores*, 538 F.Supp.2d 1094, 1102 (S.D. IA 2008) ("where a plaintiff brings an FLSA claim 'for and on behalf of himself and other employees similarly situated,' the complaint should indicate who those other employees are, and allege facts that would entitle them to relief.") (emphasis added); *Manning v. Boston Medical Center Corp.*, 2012 WL 1355673 at *8 (D.Mass. April 18, 2012) ("Before being permitted to proceed, a plaintiff must properly allege a factual basis showing that there are similarly situated persons entitled to relief pursuant to 29 U.S.C. § 216(b) and/or that common issues of fact that predominate are sufficient to pass muster under the traditional Fed. R. Civ. P. 12(b)(6) standard."); *Zhong v. August Corp.*, 498 F. Supp. 2d 625, 628 (S.D.N.Y. 2007) ("[W]here a plaintiff brings a [wage-and-hour] claim for and on behalf of himself and other employees similarly situated, the complaint should indicate who those other employees are, and allege facts that would entitle them to relief.").

Again, this requirement exists because "[a] district court must . . . insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Twombly*, 550 U.S. 544, 558 (2007).

Collective action allegations that contain a litany of legal conclusions and boilerplate recitations of the elements of a cause of action do not pass muster and must be dismissed. *See, e.g., Landry v. Peter Pan Bus Lines, Inc.*, 2009 WL 9417053, at *3 (D. Mass. Nov. 20, 2009) (dismissing collective action claims because complaint "does not set forth factual allegations creating a 'plausible' entitlement to relief for anyone other than [the individual named plaintiff]"). A plaintiff must plead facts that plausibly support the existence of other employees who have experienced the same harms as he has experienced. *See, e.g., Manning,* 2012 WL 1355673 at **8-9, 11. The Complaint fails to meet this standard.

Plaintiffs allege that "Plaintiffs and the FLSA Collective routinely worked in excess of forty hours per workweek without receiving overtime compensation" and that "Plaintiffs and the FLSA Collective are victims of Defendants' widespread, repeated, systematic and consistent illegal practices. . . ." Dkt. #1, Complaint, ¶¶ 34-36. But these are bare legal conclusions, and Plaintiffs fail to plead any facts to support them. They do not specify when or how much time the FLSA Collective allegedly worked in excess of forty hours, when they worked overtime, what the allegedly "widespread, repeated, systematic and consistent illegal practices" are, which Defendant (and which employees of the Defendant) allegedly committed the practices, etc. Such facts are

necessary to establish standing to bring a claim against any of the Defendants, to establish an employer relationship under the FLSA, and to establish an entitlement to overtime for activities performed after 40 hours in a week as to Plaintiffs and the putative collective group members they seek to represent. The absence of such facts means that the collective allegations cannot survive and must be dismissed. *See, e.g., Manning, supra; Dyer v. Lara's Trucks, Inc.*, 2013 WL 609307 (N.D. Ga. Feb. 19, 2013) (dismissing FLSA collective action allegations because phrase "similarly situated in terms of job duties, pay, and compensation" is a legal conclusion insufficient under *Twombly* and *Iqbal*) ; *Kemp v. Target Corp.*, 2013 WL 5289799, at *3-4 (N.D. Ala. Sept. 18, 2013) (dismissing FLSA collective action allegations because phrase "similarly situated in terms of job duties, pay, and compensation" is a legal conclusion insufficient under *Twombly* and *Iqbal*.); *St. Croix v. Genetech, Inc.*, 2012 WL 2376668, at *3 (M.D. Fla. June 22, 2102) (dismissing FLSA collective action allegations where the plaintiff "fail[ed] to set forth any facts supporting her allegations that other Genentech employees are or were similarly situated"); *Pickering v. Lorillard Tobacco Co.*, 2011 WL 111730, at *2 (M.D. Ala. Jan. 13, 2011) (dismissing FLSA collective action allegations because phrase "all similarly situated employees" is insufficient under *Twombly* and *Iqbal*, and noting that "all similarly situated sales representatives" would also be insufficient).

III. CONCLUSION

Plaintiffs have completely failed to plead any claim upon which relief can be granted against any of

the Defendants. Plaintiffs have failed to plausibly plead employer status as to any Defendant, standing against any Defendant, any FLSA violation on behalf of themselves or as to a putative collective member, or that any collective members are similarly situated. Consequently, Plaintiffs Complaint should be dismissed in its entirety.

Respectfully submitted this 23rd day of May, 2014.

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PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (JUNE 6, 2014)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LINDA S. ASH and ABBIE JEWSOME on Behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

ANDERSON MERCHANDISERS, LLC, et al.,

Defendants.

Case No.4:14-CV-0358-DW

COME NOW the Plaintiffs, by and through their respective counsel of record, and hereby provide these Suggestions in Opposition to Defendants' Motion to Dismiss (Docs. 9-10).

I. Introduction

Defendants ask this Court to dismiss Plaintiffs' case at the outset—without the benefit of discovery or a factual record—because Plaintiffs did not include in their Complaint a detailed factual exposition of the evidence they intend to produce at trial in support of their claims. This, however, is the pleading stage of

the litigation, and Plaintiffs must do no more than provide a short, plain statement of their claims. In fact, Plaintiffs have offered sufficient factual allegations to show their claims are plausible on their face, which is all that is required under *Iqbal* and *Twombly*. Defendants' Motion to Dismiss is an attempt to delay the proceedings, as evidenced by the fact that not one of the four named corporate entities acknowledges being Plaintiffs' employer, and to pre-litigate this case without affording Plaintiffs the opportunity to conduct appropriate discovery necessary to formulate a factual record. Defendants' Motion should be denied. Alternatively, should the Court believe Plaintiffs' Complaint is deficient, Plaintiffs should be allowed to file an amended complaint to cure any deficiencies identified by the Court.

II. Argument

Defendants overstate the level of specificity required in a complaint. In considering a motion to dismiss, the Court must accept as true the allegations in the complaint, construe the complaint in the light most favorable to the plaintiff and draw all inferences in plaintiff's favor. *See Ashley County, Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009).

The question of how much detail is required in a complaint is answered by F.R.C.P. 8(a)(2): "a short and plain statement of the claim showing that the pleader is entitled to relief." The U.S. Supreme Court interpreted this to mean a party must plead facts demonstrating a claim for relief "is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). A claim is "plausible on its face" when the complaint includes "factual content that

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). A complaint may proceed even if it appears "that a recovery is very remote and unlikely." *Twombly*, 127 S. Ct. at 1965. Neither detailed factual allegations nor heightened fact pleading of specifics are required. *See id.* at 1964, 1974.

Defendants rely on select quotations from *Twombly* and *Iqbal* in an effort to advance an interpretation of those cases that, in effect, would raise the bar to such heights that every complaint filed by a plaintiff would be met by a Rule 12 motion citing a lack of factual detail. The Eighth Circuit rejected this strategy in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009): "Twombly and Iqbal did not change (the) fundamental tenet of Rule 12(b)(6) practice." *Id.* at 594 (holding the district court erred in dismissing plaintiff's claim by failing to draw reasonable inferences in favor of the nonmoving party as is required). As the Eighth Circuit explained, "Rule 8 does not [ ] require a plaintiff to plead 'specific facts' explaining precisely how the defendant's conduct was unlawful. Rather, it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior, so long as the facts pled 'give the defendant fair notice of what the claim is and the grounds upon which it rests,' and 'allow [ ] the court to draw the reasonable inference' that the plaintiff is entitled to relief." *Id.* at 595 (internal citations omitted).

This evaluation requires the complaint be read as a whole, "not parsed piece by piece to determine whether each allegation, in isolation, is plausible."

Id. at 594. Ultimately, evaluation of a complaint upon a motion to dismiss is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (*quoting Iqbal*, 129 S. Ct. at 1950). As set forth below, Plaintiffs' Complaint very clearly articulates claims of unlawful conduct that are plausible on their face. Defendants have fair notice of what those claims are and the grounds upon which they rest, and their Motion to Dismiss should be denied.

A. Plaintiffs Have Sufficiently Pleaded that the Defendants are Joint Employers

Defendants argue first that Plaintiffs have not adequately pleaded that the four corporate entities named as defendants were their FLSA employer.[1] They do not argue that Plaintiffs have sued the wrong corporate entity as their FLSA employer; instead their argument is that Plaintiffs have not sufficiently pleaded that Defendants were Plaintiffs' employer. Defendants' argument assumes that one of the four defendants is easily identifiable as Plaintiffs' direct employer.[2] In a telling tactical move, all four

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[1] There are four corporate entities that are defendants in this action although one entity is listed twice in the Complaint's case caption. Plaintiffs listed West AM, LLC twice because that entity has different registered agents in Missouri and Kansas. Out of an abundance of caution, Plaintiffs served both registered agents of defendant West AM, LLC, as reflected in the case caption.

[2] In the *Cavallaro v. UMass Memorial Health Care, Inc.* opinion cited by Defendants at 5-6 of their Suggestions, the court recognized as "implicit" in the FLSA employer analysis this underlying "assumption that the entity for which plaintiffs work is *identifiable*." 2011 WL 2295023, at *5 (D. Mass. June 8,

Defendants take the position that Plaintiffs have failed to sufficiently allege employer relationships as to any of them. Not a single one of them concedes that it is or was Plaintiffs' employer. Either Defendants are no different from Plaintiffs and unable to identify a single corporate entity that employed Plaintiffs or they are trying to play a shell game with their corporate identities, which are both perplexing and frequently shifting.

When identifying the four corporate entities to be named as defendants in their Complaint, Plaintiffs did not randomly draw names out of a hat. To the contrary, Plaintiffs examined the information available to them at this pre-discovery pleading stage of the litigation, information that was not only limited but confusing and seemingly conflicting—*e.g.,* paystubs and W-2s issued during the relevant time period by varying Anderson corporate entities, handbook policies and procedures, logos on Plaintiffs' uniforms and business cards, miscellaneous employment-related memoranda given to Plaintiffs at work, information published on Anderson Merchandisers's website and corporate filings with various Secretaries of State—and concluded they had no choice but to name the four interrelated corporate entities as defendants, at least at the outset of the litigation. After Plaintiffs have the opportunity to discover evidence exclusively

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2011) (emphasis added), vacated and remanded in part, affirmed in part, 678 F.3d 1, 10 (1st Cir. 2012) (allowing plaintiffs, whom the court believed knew the identity of the direct employer but refused to plead it for strategic reasons, leave to amend to correct pleading deficiencies). Plaintiffs here are unable to pinpoint a single entity that employed them but not for strategic reasons. If anyone is strategically failing to identify a single employer of Plaintiffs, it is Defendants.

in the possession of Defendants—*e.g.*, employment records, corporate organization and ownership records, and documents reflecting method of payment and administration of pay and benefits and other managerial processes, directives, and mandates—some Defendants may be dismissed while still others, including individual defendants, may need to be added in an amended complaint. It is simply too early in the litigation to make that determination when Plaintiffs have not had the opportunity to discover key evidence in Defendants' exclusive possession. *See New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 291 (1st Cir. 1987) (holding district court abused its discretion in dismissing complaint without permitting discovery and opportunity to amend the defective complaint where facts needed to plead fraud and RICO violations with specificity were within defendant's control).

Plaintiffs allege in ¶ 8 of their Complaint—based on the information now available to them—that the four named corporate Defendants shared interrelated operations, centralized control of labor relations, common management and common ownership, and/or financial control. For purposes of the Rule 12(b)(6) review requested by Defendants' Motion to Dismiss, these factual allegations regarding the interrelationship between the four corporate Defendants must be accepted as true and viewed in the light most favorable to Plaintiffs. *See Ashley County*, 552 F.3d at 665. As such, Plaintiffs have adequately pleaded that the four corporate entities named as Defendants acted as their FLSA employer.

Defendants argue that Plaintiffs' Complaint should be dismissed against all four Defendants because

Plaintiffs' chosen language regarding Defendants' interrelationship is typically associated with the "integrated enterprise" test" and, they claim, the proper test to be applied is the "economic realities" analysis. Not only is Defendants' argument premature and more appropriate for a summary judgment motion rather than a Rule 12(b)(6) motion, but there is not one specific test or set of factors that all courts have applied when analyzing employer-employee relationships in FLSA cases. *See Zachary v. Rescare Oklahoma*, 471 F. Supp. 2d 1175, 1178-79 (N.D. Okla. 2006) (noting that courts have employed a "variety of tests" in analyzing joint employment under the FLSA) (citations omitted); *see also Cornell v. CF Ctr., LLC*, 2011 WL 196947, at * 2-3 (11th Cir. Jan. 21, 2011) (denying motion for judgment on the pleadings and finding multiple corporate defendants were "joint employers" under the FLSA where they acted in one purpose that was furthered by the employment of plaintiffs; stating that case-by-case inquiry about joint employment "turns on no formula"). And contrary to Defendants' suggestion, some courts in FLSA cases have applied the integrated enterprise test and accepted the exact factors pleaded by Plaintiffs. *See, e.g., Takacs v. Hahn Automotive Corp.*, 1999 WL 33117265, at *5 (S.D. Ohio Jan. 4, 1999) (applying integrated enterprise test and finding a sufficient degree of interrelatedness between defendants such that plaintiffs were justified in believing that one defendant was responsible for other defendant's failure to comply with FLSA); *Szymula v. Ash Grove Cement Co.*, 941 F. Supp. 1032, 1036 (D. Kan. 1996) (recognizing that "under the FLSA, a parent corporation may be liable for the acts of its subsidiaries when the various entities act

as an integrated enterprise"). In reality, the two tests examine similar factors to determine the same thing, namely whether multiple entities acted jointly or as joint employers of the plaintiff. *See Zachary,* 471 F. Supp. 2d at 1179 (finding parent company defendant was "joint employer" with subsidiary defendant for FLSA purposes).[3]

Moreover, several courts in FLSA cases have found sufficient indicia of joint employment even where the economic realities factors, which Defendants urge the Court to apply, do not exist. *See, e.g.*, *Zachary,* 471 F. Supp. 2d at 1179 (stating that "joint employment may be found even when an entity 'does not hire and fire its joint employees, directly dictate their hours, or pay them.'") (citation omitted); *Takacs*, 1999 WL 33117265, at *9 (rejecting defendants' argument that plaintiffs failed to prove they were plaintiffs' FLSA employers because plaintiffs failed to establish they possessed power to hire and fire, controlled employees' work schedules or determined rate or method of payment; "These facts, however, are not dispositive, and they do not prevent the Court from finding centralized control of labor

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[3] The factors associated with the "integrated enterprise" test include: interrelation of operations; centralized control of labor relations; common management; and/or common ownership or financial control. *See Takacs*, 1999 WL 33117265, at *4. Factors associated with the "economic realities" test include: power to hire and fire the employee; supervision and control of employee work schedules or conditions of employment; determination of the rate and method of payment; and/or maintenance of employment records. *See Zachary*, 471 F. Supp. 2d at 1179 (citing *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)).

relationship and personnel management for purposes of FLSA liability.").

The Eighth Circuit has not yet adopted or set out any specific test to determine whether an entity may be held to be a joint employer under the FLSA. *See Arnold v. DirecTV, Inc.*, 2011 WL 839636, at *6 (E.D. Mo. Mar. 7, 2011). However, the U.S. Supreme Court has recognized the "striking breadth" of the FLSA's definition of the people considered to be "employees" under the Act. *Nationwide Mut. Ins. Co. v. Darden,* 112 S. Ct. 1344, 1350 (1992). In light of the Supreme Court's direction that "employee" should be interpreted broadly under the Act, the employer-employee relationship also should be treated as a flexible concept for FLSA purposes. *See Zachary,* 471 F. Supp. 2d at 1179 ("Regardless of the specific factors used, the concept of joint employment should be 'defined expansively.'") (citation omitted).

While Defendants disagree with Plaintiffs' choice of wording traditionally associated with the integrated enterprise test rather than the words used in the economic realities test, now is not the time for analyzing the evidence in the framework of any specific test. Defendants' suggested rigid, formulaic approach should be rejected, particularly at this case's infant stage. Indeed, the only issue of significance at this early stage of the litigation, and for purposes of a Rule 12(b)(6) review, is whether Plaintiffs have sufficiently pleaded the interrelationship between the Defendants such that they are joint employers.

The Western District of Missouri court in *Arnold v. DirecTV, Inc.* was faced with and ultimately rejected the same argument asserted by the defendants here. 2011 WL 839636, at *6-7. Similar to

Plaintiffs here, the plaintiffs in *Arnold* alleged in their complaint simply that they were "jointly employed" by the various corporate defendants. The defendants moved to dismiss plaintiffs' FLSA claims arguing, as Defendants argue here, that under the pleading standards established in *Iqbal*, plaintiffs' bare allegation that the defendants were "joint employers" was conclusory and that plaintiffs' complaint failed to plead any facts supporting that allegation.

Applying the broad definition of "employer" under the FLSA recognized by the Supreme Court, and acknowledging defendants' high hurdle in a Rule 12(b)(6) review, the court in *Arnold* found that the plaintiffs had met the pleading standards for an employer-employee relationship. 2011 WL 839636, at *6 (relying on *Tahir v. Avis Budget Group, Inc.*, 2009 WL 4911941, at *9 (D.N.J. Dec. 14, 2009) (holding that mere allegation that a parent company was plaintiff's employer under the FLSA was sufficient to survive 12(b) motion) and citing *Lang v. DirecTV, Inc.*, No. 10–1085 (E.D.La.2010) (Order of Aug. 13, 2010) (denying motion to dismiss)). The court in *Arnold* concluded that this "matter is one that is appropriate for consideration on a motion for summary judgment, but not on a motion to dismiss." 2011 WL 839636, at *6.

The court in *Arnold* rejected the conclusion reached in one of the cases cited by Defendants here, *Loyd v. Ace Logistics, LLC*, 2008 WL 5211022, at *4 (W.D. Mo. Dec. 12, 2008) (cited in Defendants' Suggestions in Support at 6). *See Arnold*, 2011 WL 839636, at *7. *Arnold*'s conclusion—simply alleging a joint employer relationship is sufficient to survive a

Rule 12 motion—was later followed by Judge Kays in the Western District of Missouri. *See McClean v. Health Sys., Inc.*, 2011 WL 2650272, at *2 (W.D. Mo. July 6, 2011) (citing both *Loyd* and *Arnold* but holding that alleging a joint employer relationship for two of the defendants was sufficient to survive Rule 12 motion). Moreover, Plaintiffs allege here that all defendants were part of an "integrated enterprise," which distinguishes this case from the facts in *Loyd*. *See White v. 14051 Manchester, Inc.*, 2012 WL 2117811, at *3 (E.D. Mo. June 11, 2012) (differentiating *Loyd* by finding that since plaintiff alleged an "enterprise relationship" among the defendants, they met the employer pleading requirements to survive a Rule 12 motion).

This is the pleading stage of the litigation. Plaintiffs are not required to set forth evidentiary proof in their Complaint, especially when the evidence is completely in the possession of Defendants, not Plaintiffs. This evidentiary burden need not be met until after the parties conduct discovery. Plaintiffs' allegations of interrelationship and common control are sufficient to survive a Rule 12(b)(6) review. Defendants' Motion on this point should be denied.

B. The Plaintiffs Have Standing Under Article III

Defendants next argue that Plaintiffs have not adequately pleaded that Defendants have caused them injury-in-fact and therefore Plaintiffs lack standing under Article III to assert any claims against Defendants, either on behalf of themselves or any other individuals. In support they cite four FLSA

cases. *See* Defendants' Suggestions in Support at 7. None is on point here.

In *Martinez v. Cargill Meat Solutions,* 265 F.R.D. 490 (D. Neb. 2009), the court found when ruling on plaintiffs' motion for conditional class certification that one of the named plaintiffs lacked standing to sue on behalf of the class because there was nothing in the record indicating that plaintiff suffered the same injury as the other putative class members—*i.e.*, there was nothing indicating that this particular plaintiff was required to don and doff protective equipment and/or clean and sanitize work equipment and tools, and nothing to indicate that the claimed time spent doing these tasks exceeded the amount for which he was paid. *Id.* at 497.

In contrast, Plaintiffs allege that all four Defendants caused injuries-in-fact to both Plaintiffs and others similarly situated in four different ways: (1) by failing to pay them one and one-half times the correct regular rate of pay for all hours worked in excess of 40 per week; (2) by requiring them to perform work tasks during uncompensated meal breaks; (3) by knowing and/or encouraging them to perform work off the clock; and (4) by failing to include all income when calculating their regular rate of pay. *See* Complaint ¶¶ 20-21, 24-26. Plaintiffs also allege that all four of these practices resulted in the four Defendants denying Plaintiffs and others similarly situated overtime compensation owed under the FLSA. *Id.* Plaintiffs have sufficiently alleged injury-in-fact and standing.

Defendants have misread the second FLSA case upon which they rely, *Cavallaro v. UMass Mem'l Health Care, Inc.*, 678 F.3d 1 (1st Cir. 2012).

Defendants state that the court was "affirming dismissal of FLSA claims for lack of standing[.]" Defendants' Suggestions at 7. The court did not affirm a dismissal but instead "vacated" the judgment against plaintiffs on their FLSA claims and remanded with instructions to allow plaintiffs (who had already amended their complaint twice) to amend again concerning their employer allegations under the FLSA. *Id.* at 10 (emphasis added). And the court never even mentioned standing in its opinion. *Id.* The *Cavallaro* case is actually supportive of Plaintiffs' position, *infra* at 15, that they should be allowed leave (for the first time) to amend the Complaint should the Court find it deficient.

The other two unpublished cases relied upon by Defendants are equally unsupportive of their position and are a re-characterization of their argument about their employer status, which is refuted above in Section A, *supra* at 3-8. In *Lucas v. BMS Enters.*, 2010 WL 2671305 (N.D. Tex. July 1, 2010), there were sixteen named defendants. The court noted that it had previously denied one of the defendants' motion to dismiss based on its argument that plaintiffs failed to allege facts that showed it was plaintiffs' employer as defined by the FLSA when plaintiffs alleged that their employer "consisted of multiple entities . . ." *Id.* at *1 (citation omitted). A group of seven of the sixteen defendants—but not all of them, as here—then filed a motion to dismiss, arguing that plaintiffs failed to plead facts adequate to establish a plausible claim that these particular seven entities were plaintiffs' employers. *Id.* The court found that the plaintiffs failed to allege that they were injured by the conduct of these seven

defendants but, significantly, granted plaintiffs leave to file an amended complaint to cure the pleading deficiency. *Id.* at 4.

Finally, in *Chuy v. Hilton Mgmt., L.L.C.*, 2010 WL 1854120 (M.D. Fla. May 10, 2010), plaintiffs brought a claim under the Florida minimum wage law and alleged only that they worked for one of the two defendants, Hilton Management, L.L.C. ("Hilton"), but not for the other defendant, Waldorf-Astoria Management, L.L.C. ("Waldorf-Astoria"). *Id.* at *2-3. Plaintiffs did not allege an integrated enterprise or other joint employer theory between Hilton and Waldorf-Astoria. *Id.* Plaintiffs argued that the two defendants' previous joint interpleader complaint in an unrelated matter somehow entitled plaintiffs to bring a class action on behalf of individuals who worked for Waldorf-Astoria, even though plaintiffs were employees only of Hilton. *Id.* Not surprisingly, the court rejected plaintiffs' argument and found that plaintiffs alleged they were employed by Hilton and therefore only had standing to bring claims against Hilton for employees who worked at hotels operated by Hilton. *See id.* at *3.

Unlike these cases, Plaintiffs here have alleged that all four Defendants are their "employer" under the FLSA by virtue of interrelated operations, centralized control of labor relations, common management and common ownership and/or financial control. *See* Complaint ¶ 8; *see also* Section A, *supra* at 3-8. Plaintiffs also alleged that all four Defendants caused injuries-in-fact to Plaintiffs and others similarly situated in four different ways, as outlined above. Defendants' standing argument lacks merit and their Motion to Dismiss should be denied.

C. The Plaintiffs Have Met the Twombly/Iqbal Pleading Standards for Their FLSA Collective Claim

Defendants argue that the Complaint does not provide specific enough details surrounding their alleged FLSA violation (*e.g.,* time periods, schedules, exactly when Plaintiffs worked "off the clock," and description of work performed "off the clock" or collective action allegations) under *Twombly/ Iqbal*. *See* Defendants' Suggestions in Support at 8. Defendants' argument for more specific pleading under *Twombly/Iqbal* has routinely been rejected within Missouri and other circuits as well.

Plaintiffs are not required to plead the specifics sought by Defendants under Rule 8. Plaintiffs have pleaded four specific policies implemented by Defendants that violate the FLSA. They have alleged that these policies impact a well-defined group of employees (who work more than 40 hours a week) by denying them overtime. Despite Defendants' protests, it is hard to believe that they do not know what claims are being alleged against them. The case law set forth below demonstrates that they should.

In *Nobles v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 1131100 (W.D. Mo. Mar. 28, 2011), the defendant made the same arguments in a motion to dismiss regarding the plaintiff's FLSA collective action claims. Plaintiffs there described a policy whereby defendants required work to be performed off the clock. *Id.* at *3. Plaintiffs alleged that they performed work during these uncompensated periods, that they often worked over 40 hours in a work week and, due to State Farm's practice and policy, that they were denied overtime compensation

for the overtime work at issue. *Id.* The court found that plaintiffs had met the federal pleading requirements. *Id.* at *3-4. The court also found that the plaintiffs met the collective action pleading requirements. *Id.* at *4. The plaintiffs asserted that State Farm's practice and policy of requiring work tasks to be performed before and after shifts applied to similarly situated employees, and as such, they are also be entitled to relief. *Id.* Correctly, the court found that "[w]hether such a proffered class is certifiable will be determined at a later stage of litigation." *Id.* The court rejected defendant's argument that plaintiffs must provide details regarding the alleged illegal policy because, under *Twombly,* plaintiffs are not required to plead such specificity. *Id.* "That Plaintiffs have described what comprises their overtime tasks, how those tasks relate to their job duties, and the practice and policy by which State Farm prevents appropriate compensation is sufficient at this stage of litigation." *Id.*

Plaintiffs' FLSA collective pleading meets the requirements set forth in *Nobles*. Plaintiffs describe in detail Defendants' common policy of not paying all "merchandisers," *see* Complaint ¶¶ 15, 32, the correct overtime rate of pay, *see* Complaint ¶¶ 22-23. This includes specifics on how Defendants incorrectly calculate the overtime rate of pay and how doing so violates their attempt to comport with the "fluctuating work week" method under 29 C.F.R. § 778.114. Plaintiffs also allege that Defendants applied a policy to all merchandisers whereby they failed to include all compensation in calculating the regular rate of pay. *See* Complaint ¶ 26. Plaintiffs pleaded

Defendants' policy requiring all merchandisers to perform work tasks, *see* Complaint ¶¶ 17-18, during uncompensated meal breaks, *see* Complaint ¶ 24. Plaintiffs also describe that all merchandisers were subject to Defendants' policy requiring them to perform work tasks "off the clock." *See* Complaint ¶ 25. Plaintiffs allege that all merchandisers were required to work more than 40 hours per work week. *See* Complaint ¶¶ 34, 42. Finally, Plaintiffs clearly allege that all of these common policies denied merchandisers overtime as required under the FLSA. *See* Complaint ¶¶ 21-26, 37. In summary, Plaintiffs here have met all the pleading requirements set forth in *Nobles*.

Nobles is not alone. In *Arnold v. DirecTV, Inc.*, 2011 WL 839636, at *7, defendants argued that the FLSA collective complaint was deficient under *Iqbal.* In rejecting this argument, the court in *Arnold* found that "allegations—such as Defendants' alleged policies" describing how overtime pay was denied—were sufficient. *Id. (citing Secretary of Labor v. Labbe,* 2008 WL 4787133, at *2 (11th Cir. 2008) (holding that a complaint alleging that an employer failed to pay covered employees minimum hourly wages and to compensate employees who worked in excess of 40 hours a week at the appropriate rates stated a claim under the FLSA)) (other citation omitted). Here, Plaintiffs' Complaint asserts the same level of specificity.

The opinions of the Western District of Missouri courts in *Nobles* and *Arnold* are not alone. The impact of *Twombly/Iqbal* on FLSA collective action complaints was thoroughly addressed in *McDonald v. Kellogg Co.*, 2009 WL 1125830, at *1 (D. Kan. Apr.

27, 2009). There, defendant demanded a level of specificity in plaintiffs' complaint that was rejected by the court, which stated that *Twombly* rejects a heightened pleading standard. *Id.* (citing *Twombly,* 550 U.S. at 569 n. 14). "[F]ederal courts in the wake of *Twombly* have held that extensive pleading is not required in the context of an FLSA claim and that allegations need only satisfy the requirements of Rule 8." *Id.* at *1.[4] The court in *McDonald* found that "plaintiffs have alleged that defendant has violated the FLSA through its policy and practice of refusing to pay employees, including plaintiffs, the appropriate rate for hours worked in excess of 40 hours per week." *Id.* at *2. And "[t]hose allegations satisfy Rule 8(a)." *Id.* Plaintiffs here too have met these requirements.

Significantly, Defendants rely heavily on and direct this Court to a district court opinion that was

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[4] *See also Secretary of Labor v. Labbe,* 2008 WL 4787133, at *1 (in the FLSA context, *Twombly* requires only that complaint allege a failure to pay overtime compensation to covered employees); *Xavier v. Belfor USA Group., Inc.,* 2009 WL 411559, at *5 (E.D. La. Feb.13, 2009) (plaintiffs stated a claim under FLSA where they alleged that they routinely worked more than 40 hours per week, that they were not paid overtime compensation and that they were covered employees); *Puleo v. SMG Property Management, Inc.,* 2008 WL 3889727, at *2 (M.D. Fla.2008) (pursuant to *Twombly*, plaintiff set forth plausible claim for overtime compensation under FLSA where he alleged that he was a covered employee and that employer unlawfully withheld overtime compensation); *Uribe v. Mainland Nursery, Inc.,* 2007 WL 4356609, at *2–3 (E.D. Cal. Dec.11, 2007) (plaintiffs' FLSA claim satisfied *Twombly* where plaintiffs alleged that defendant failed to compensate them at the appropriate rate for hours worked in excess of 40 hours per week and alleged that plaintiffs were non-exempt employees).

reversed on appeal in relevant part. *See* Defendants' Suggestions in Support at 10-11 (citing *Manning v. Boston Med. Ctr. Corp.*, 2012 WL 1355673 (D. Mass. April 18, 2012), *rev'd,* 725 F.3d 34 (1st Cir. 2013)). Defendants argue that the district court in *Manning* dismissed the plaintiff's FLSA and collective claims for failing to meet the Rule 8 standards. But the First Circuit reversed in relevant part, finding that the facts alleged by plaintiffs—the intersection of several employment practices requiring them to work through their scheduled breaks, before and after work hours, and during training sessions and defendants' suffering and permission of this work taking place—"taken in toto, are sufficient to establish a plausible inference of defendants' knowledge." 725 F.3d at 44-45. Plaintiffs here too have met this pleading standard.

Plaintiffs also have met the pleading requirements regarding the collective class claims. The First Circuit in *Manning* addresses Defendants' argument that Plaintiffs did not sufficiently plead collective allegations. "A court should typically await the development of a factual record before determining whether the case should move forward on a representative basis." 725 F.3d at 59. Alleging that all collective class members were subject to the same policy that denied them overtime compensation is sufficient to meet the pleading requirements. *Id.* The court in *Arnold v. DirecTV, Inc.* reached the same conclusion regarding development of collective claims. 2011 WL 839636, at *8. "The Court will address whether the case can proceed as a collective action upon a motion for conditional certification of the opt-in class, and later when the Court considers

the merits of the FLSA claim." *Id. Accord Tahir,* 2009 WL 4911941, at *8 ("Defendants' attack on those portions of [the] Complaint that relate to the pleading of a collective action is misplaced at [the motion to dismiss] stage of the litigation.").

The court in *Perrin v. Papa John's Int'l, Inc.*, 818 F. Supp. 2d 1146, 1151-52 (E.D. Mo. 2011), reached the same conclusion regarding the pleading of collective FLSA claims. There, defendants argued that plaintiff simply assumed that others' experiences were similar to his own and that he failed to provide facts "connecting the dots" between his claims and the claims of the putative plaintiffs. *Id.* The court rejected this argument, finding the Rule 8 pleading requirements were met under *Twombly* because plaintiff alleged that all class members were employed in the same position and subject to the same pay policies and practices. *Id.*

Plaintiffs here have pleaded the necessary factors regarding the collective claims. Defendants' Motion to Dismiss should be denied.

D. Alternatively, Plaintiffs Should be Granted Leave to Amend

Should the Court believe that Plaintiffs' Complaint is somehow deficient, the appropriate remedy is not to dismiss but to allow Plaintiffs leave to file an amended complaint to cure any deficiencies identified by the Court. *See Wisdom v. First Midwest Bank*, 167 F.3d 402, 409 (8th Cir. 1999), *appeal after remand,* 210 F.3d 380 (8th Cir. 2000)*; Becher,* 829 F.2d at 291*; Cavallaro, Inc.,* 678 F.3d at 1. In any event, Defendants' Motion should be denied.

Respectfully submitted,

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ATTORNEY FOR PLAINTIFFS

REPLY SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS (JUNE 23, 2014)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LINDA S. ASH and ABBIE JEWSOME on Behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

ANDERSON MERCHANDISERS, LLC, et al.,

Defendants.

Case No.4:14-CV-0358-DW

Plaintiffs' response to Defendants' Motion to Dismiss effectively asks this Court to ignore the Supreme Court's pleading requirements explained in *Twombly* and *Iqbal* and to condone Plaintiffs' lack of compliance with them. Contrary to Plaintiffs' arguments in opposition, Defendants do not overstate the level of specificity required in a complaint. Rather, Defendants note that the Supreme Court requires Plaintiffs to plead sufficient facts–not mere conclusory labels and allegations–before claims may proceed, particularly where allowing insufficiently pleaded claims will not

provide sufficient notice to Defendants of the claims against them and will "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). Plaintiffs' response fails to recognize the impact of the *Twombly* and *Iqbal* decisions upon the *factual specificity* required for a complaint. In light of these decisions, a complaint must contain more than mere labels, conclusions and formulaic recitations of the elements of a cause of action to survive a motion to dismiss. A complaint must set forth sufficient facts to support the claims alleged, and those facts are missing from Plaintiffs' Complaint. Accordingly, Defendants' motion should be granted.

I. ARGUMENT

A. Plaintiffs Fail to Plead Facts Establishing An Employment Relationship.

A critical, threshold problem with the Complaint is that it fails to establish that an employer-employee relationship exists between the Plaintiffs and any of the Defendants, let alone that the Defendants are all joint employers. Plaintiffs acknowledge in their Opposition that they have not provided any facts to support their employer/joint employer allegations but contend that information that would enable them to identify their employer is "exclusively in the possession of the Defendants." Plaintiffs' Suggestions in Opposition to Defendants' Motion to Dismiss ("Opposition"), p. 4. That is simply untrue.

Plaintiffs acknowledge they possessed sufficient information, including paystubs, W-2s, uniforms and business cards, handbooks, employee memoranda

and corporate filings, when they drafted the Complaint and could easily have included this information in the Complaint. *Id.* at pp. 3-4. For example, they could have identified the entity that issued their paychecks and tax documents or that issued their employee handbooks, and they could have included information from corporate filings about the alleged interrelatedness of the Defendants (*e.g.*, alleged shared officers, addresses, registered agents, etc.). Such facts are important to the determination of who is Plaintiffs' FLSA employer. *See, Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1981) (noting factors relevant to assessing whether an employment relationship exists under the FLSA). Yet Plaintiffs included none of that information in the Complaint, nor did they allege any other facts that would begin to suggest an employment relationship with any of the Defendants or any interrelationship among Defendants. Instead, Plaintiffs simply stated that all Defendants "were Plaintiffs' employer" and that "all of the Defendants . . . were part of an integrated enterprise." Compl. (Dkt. # 1), ¶ 8. Contrary to Plaintiffs' assertions, those conclusory statements are not factual allegations. They are legal conclusions and precisely the type of statements the Supreme Court determined do not meet federal pleading requirements. *Iqbal*, 129 S.Ct. at 1949-50 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").[1]

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[1] *Ashley County Ark. v. Pfizer, Inc.*, 552 F.3d 659 (8th Cir. 2009), which is the case that Plaintiffs rely upon in support of their assertion that this Court must accept as true their

Plaintiffs' attempt to distract from this pleading failure by accusing Defendants of not identifying who Plaintiffs' actual employer is, and by suggesting that Defendants are "trying to play a shell game with their corporate identities." Opp., p. 3. Based on the information admittedly in their possession, including W-2s and handbooks, Plaintiffs should have no trouble identifying their FLSA employer. And, if based on this information Plaintiffs are confused about who their proper FLSA employer is, then there is nothing stopping them from pleading actual facts supporting who they believe the FLSA employer may be and explaining any confusion. What Plaintiffs may not do, however, is impermissibly shift the burden to Defendants to correct the factual deficiencies in their Complaint by arguing that Defendants need to volunteer factual information in motions practice. Nor may they feign ignorance of who their FLSA employer is, and as a result make vague and factually unsupported allegations of an "integrated enterprise," which would inappropriately expand these proceedings beyond their individual circumstances and to multiple corporate entities without an appropriate factual basis to do so.

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allegation that the Defendants are interrelated, was a pre-*Iqbal* decision. Given that the Supreme Court specifically held in *Iqbal* that courts should not accept legal conclusions as true when evaluating the sufficiency of a complaint, Plaintiffs' reliance upon *Ashley* is misplaced.

B. Plaintiffs Fail to Allege Facts to Prove Joint Employer Status Under Either the Economic Realities or the Inapplicable Integrated Enterprise Test.

Plaintiffs go to great lengths to argue which legal analysis (*i.e.*, integrated enterprise or economic realities) this Court should use when determining whether the Defendants are joint employers for FLSA purposes. *See* Opp., pp. 5-8. While the appropriate analysis this Court should use to determine whether any of the Defendants were actually joint employers under the FLSA is the economic realities test outlined in *Bonnette, supra,* and not the integrated enterprise test,[2] the real problem is that the Complaint does not allege sufficient facts that could conceivably support a joint employer relationship among the Defendants under any test.

As this Court noted in *Loyd v. Ace Logistics*, LLC, 2008 WL 5211022 (W.D.Mo. Dec. 12, 2008), to survive a motion to dismiss, a plaintiff seeking to impose liability upon several defendants under a

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[2] Although Plaintiffs contend that courts are split as to which test applies, the majority of the cases that Plaintiffs cite actually all employed some version of the economic realities test. *See, e.g.*, *Zachary v. Rescare Oklahoma, Inc.*, 471 F. Supp. 2d 1175, 1179-81 (N.D. Okla. 2006) (a court "must always consider the 'economic realities' of the employment relationship in light of all the circumstances presented. . . . The most commonly applied factors . . . appear to be the *Bonnette* factors. . . .); *Cornell v. CF Ctr., LLC*, No. 10–12653, 410 Fed. Appx. 265, 268 (11th Cir. Jan. 21, 2011) (applying several factors applied in *Bonnette* and recognizing that whether a party qualifies as a joint employer depends on the "economic reality" of the situation).

joint employer theory must do more than simply allege that he was employed by the defendants. He must plead facts that would support joint employer liability (*e.g.,* that the defendants had the power to hire and fire him, controlled his work schedules or conditions of employment, determined his rate and method of pay and maintained his employment records). *Id.* at *3-4 (plaintiff's conclusory statement that she was "employed as a driver for the defendants" insufficient to support a joint employer claim under the FLSA). The Complaint fails to provide any such information. Indeed, it pleads not a single fact about how any of the named Defendants are related. Moreover, although Plaintiffs contend that *Arnold v. DirecTV, Inc.,* 2011 WL 839636 (E.D. Mo. Mar. 7, 2011), shows that they "have sufficiently pleaded the interrelationship among the Defendants such that they are joint employers," that case is directly contrary to this Court's holding in *Loyd* and the Supreme Court's holdings in *Twombly* and *Iqbal*. A bald assertion that plaintiffs were "jointly employed" by defendants does not provide enough facts to state a claim for relief that is plausible on its face, as required by *Twombly*.

Plaintiffs' contention that this Court has followed *Arnold* and has allowed complaints that simply allege that a joint employer relationship exists, without more factual context, to survive a motion to dismiss is not accurate. In *McClean v. Health Systems, Inc.,* 2011 WL 2650272 (W.D. Mo. July 6, 2011), the plaintiffs sued 35 defendants and alleged that one defendant owned the other 34 defendants. The complaint specifically alleged that the two named plaintiffs were employed by one

particular defendant and that all 35 defendants were joint employers "because [one of the defendants] owns, operates, and controls the [other defendants] including instituting common and centralized management, common payroll practices including wage rates and employment classifications, common human resources practices, and compliance oversight"–allegations significantly more extensive than the allegations pled here. 2011 WL 2650272, at *2. Although the court held that the plaintiffs alleged sufficient facts to establish a joint employer relationship between themselves and two of the defendants, the court also held that plaintiffs failed to establish a joint employer relationship among any of the other 33 defendants, because nowhere in the complaint had plaintiffs alleged that any of the other defendants "had control over *their* hiring and firing, work schedules, conditions or employment, rate and method of pay or employment records." *Id.* (emphasis in original). Accordingly, *McClean* does not stand for the premise that a bald, conclusory statement that a group of defendants were "joint employers" is sufficient to survive dismissal. Rather, it makes clear that plaintiffs are required to allege facts that specify how defendants are interrelated and to what degree each defendant controls the plaintiffs' employment. Here, Plaintiffs failed to allege that any of the Defendants actually employed them, let alone facts that would show interrelatedness among all Defendants. Nowhere do Plaintiffs allege any Defendants "had control over <u>their</u> hiring and firing, work schedules, conditions or employment, rate and method of pay or employment records." *Id.* Therefore, Plaintiffs have failed to properly allege a joint employment relationship among any Defendants.

Likewise, *White v. 14051 Manchester, Inc.*, 2012 WL 2117811 (E.D. Mo. June 11, 2012), which Plaintiffs contend supports their assertion that an allegation that all defendants are part of an "integrated enterprise" is sufficient to establish a joint employer relationship, is distinguishable. In *White* former servers and bartenders at a sportsbar sued multiple locations of the sportsbar, which were separate legal entities, and two individuals who the plaintiffs alleged controlled the hiring, firing and pay practices for all locations. The plaintiffs alleged employment by the sportsbar, and although they did not specify at which location, they alleged there was an employee sharing agreement among all of the locations and that the individual plaintiffs had authority to hire and fire employees and maintained control of pay practices. Accordingly, the *White* complaint provided actual factual allegations about how the operations of the locations were integrated, while the Complaint here contains no such allegations and instead simply alleges in conclusory fashion that all Defendants are an "integrated enterprise."

C. Plaintiffs Cannot Establish Standing Without Alleging an Employer Relationship.

As Defendants explained in their initial brief in support of their Motion, Plaintiffs lack standing to pursue their claims against Defendants. Plaintiffs' rebuttal focuses only on the "injury in fact" portion of the standing requirement. What Plaintiffs fail to recognize is that without alleging facts that would first establish which, if any, Defendants they actually worked for, they cannot plausibly plead that they have suffered any injury in fact traceable to any

of the Defendants. In short, all of the allegations concerning an alleged injury are irrelevant if a complaint fails to first establish which employer caused the alleged injury. All of the cases that Defendants cited in their initial brief prove this to be true.[3]

Plaintiffs' assertion that Defendants have "misread" *Cavallaro* by stating in a parenthetical reference that the First Circuit affirmed the dismissal of the plaintiffs' FLSA claims for lack of standing, instead of noting that procedurally the order below was vacated, is a semantic point that ignores the reality of that decision. The court only vacated the dismissal because it determined that plaintiffs should have been granted an opportunity to amend their complaint. Importantly, the First Circuit agreed with the district court's holding that the plaintiffs failed to adequately allege an employment relationship that would establish standing:

> Here, plaintiffs say that their allegations were nevertheless sufficient because all of the UMass-affiliated entities operated as a "joint employer" or "integrated enterprise"—theories that might (or might not) extend liability beyond their direct employer. [citations omitted.] But, as the district court

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[3] *See, Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61(1992)); *Martinez v. Cargill Meat Solutions*, 265 F.R.D. 490, 497 (D. Neb. 2009); *Lucas v. BMS Enters.*, 2010 WL 2671305 (N.D. Tex. July 1, 2010) *Chuy v. Hilton Mgmt.*, L.L.C., 2010 WL 1854120 (M.D. Fla. May 10, 2010); *Cavallaro v. UMass Mem'l Health Care, Inc.,* 678 F.3d 1, 9 (1st Cir. 2012).

> said, even on these theories some direct employer needs to be identified before anyone in the group could be liable on the theory that some or all were responsible.

Id. (emphasis added). Plaintiffs' implication that *Cavallaro* had nothing to do with standing is wrong. The First Circuit specifically endorsed the district court's dismissal of the plaintiffs' complaint for lack of standing, which held:

> Absent any facts that hint at an employment relationship between plaintiffs and defendants, there simply is no basis for an inference that the alleged FLSA violations are fairly traceable to defendants' actions. Accordingly, there is no standing to sue and this Court lacks jurisdiction over the matter.

Cavallaro v. UMass Mem'l Health Care, Inc., No. 09–40152–FDS, 2011 WL 2295023, at *6 (D. Mass. June 8, 2011). Therefore, contrary to Plaintiffs' semantic assertions, *Cavallaro* does, in fact, support Defendants' argument that Plaintiffs have failed to plausibly plead standing.

D. Plaintiffs Have Not Sufficiently Pled an FLSA Violation.

Plaintiffs also fail to recognize that the critical problem with their FLSA claims is, once again, that they plead no facts in support of their alleged FLSA violations. The Complaint merely recites the statutory elements of the claims (*e.g.,* that Plaintiffs were required/encouraged to perform work off the clock and were denied overtime, that Plaintiffs

worked during meal breaks, that Plaintiffs were paid a fixed salary but did not work fluctuating hours). *See* Complaint. It does not provide a single fact to support those bald, conclusory statements. The Complaint does not suggest when the violations allegedly occurred, which Defendant committed the alleged violation(s), which Plaintiff allegedly suffered which violation, which supervisor allegedly instructed or required Plaintiffs to work through meal periods or off the clock, how much or how often Plaintiffs worked off-the-clock, etc.

Defendants do not suggest that Plaintiffs must provide extensive details of the alleged violations. But, *Twombly* and *Iqbal* make it clear that they must at least provide some facts. And, with good reason, because Defendants are now faced with the proposition of defending against Plaintiffs' sweeping claims of multiple, ambiguous FLSA violations for a broad class of employees throughout the nation. The very concept of notice pleading embraced by *Twombly* and *Iqbal* is that Defendants must have some sense of how Plaintiffs claim the alleged FLSA violations occurred in order to know how to go about defending themselves (not all the precise details of how the violations occurred, but at least some basic factual allegations to render them plausible). The Eight Circuit cases Plaintiffs cite in their Opposition readily confirm this. *See, e.g., Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) ("Rather, it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior, so long as the facts plead 'give the defendant fair notice of what the claim is and the grounds upon which it rests,' and 'allow [] the court to draw the reasonable inference'

that the plaintiff is entitled to relief.") (internal citations omitted; emphasis added). In their Complaint, Plaintiffs provide no details of <u>any</u> sort about how the alleged FLSA violations occurred. Mere allegations that Plaintiffs were required "to perform work during uncompensated meal breaks" or "to perform work off the clock" (Complaint, ¶¶ 24-25) say nothing. Defendants need at least some allegations regarding <u>how</u> this allegedly occurred to have fair notice of how to defend against these claims.[4] And without sufficient factual allegations,

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[4] In their Opposition, Plaintiffs attempt to characterize their allegations that Defendants failed to pay them overtime "for all hours worked in excess of 40 per week", required them "to perform work during uncompensated meal breaks" and "to perform work off the clock," and "fail[ed] to include all income [in] their regular rate of pay" as "four specific policies implemented by Defendants that violate the FLSA." Opp., pp. 9, 11. This contention–in effect, that Defendants have a "policy" of routinely violating the FLSA–has absolutely no factual support in the Complaint and is false. This Court cannot assume that Defendants have a "policy" of routinely violating the FLSA just because Plaintiffs say so without any factual support. *See, e.g.*, *Landry v. Peter Pan Bus Lines, Inc.*, CIV.A. 09-11012-RWZ, 2009 WL 9417053, at *1 (D. Mass. Nov. 20, 2009) (dismissing collective action allegations because plaintiff's allegations "that an unspecified number of individuals, working in unspecified jobs, at unspecified places, were compensated according to an unspecified policy or practice, resulting in an underpayment of wages in violation of the FLSA" amounted to "only the legal conclusion, that employees were not paid overtime duly owed, and legal conclusions are not entitled to an assumption of truth."); *DeSilva v. N. Shore-Long Island Jewish Health Sys., Inc.*, 770 F. Supp. 2d 497, 510 (E.D.N.Y. 2011) (dismissing complaint where plaintiffs "failed to provide any specific factual allegations for their claims" regarding an "unpaid training policy" and "unpaid pre- and post-schedule work policy" and noting "[the] allegations regarding these policies consist only of

the alleged violations are not plausible–they are just as likely not to have occurred at all. The Court, for the benefit of Defendants, should "insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed," and should not condemn Defendants to the task of conducting an enormous fact-finding and information gathering mission to even understand what Plaintiff are claiming. *Twombly,* 550 U.S. at 558

Although Plaintiffs contend that this Court has "routinely rejected" the idea that a plaintiff must plead more than barebones legal elements of an FLSA claim to survive a motion to dismiss, the cases that Plaintiffs rely upon for this premise involve complaints that had far more factual details than the Complaint here. For example, in *Perrin v. Papa Johns*, 818 F.Supp.2d 1146 (E.D.Mo. 2011), the plaintiff alleged very detailed facts as to how the putative class members were similarly situated to the plaintiff:

> Plaintiff has alleged: that all of Defendants' other delivery drivers were paid at or near the federal or state minimum wage prior to May 2009; that studies during the

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four paragraphs per policy that contain nothing but vague and unfounded conclusions that plaintiffs were not being properly paid."). Plaintiffs have to plead facts that plausibly could support the conclusion that Defendant had such "policies," which Plaintiffs have not done (and cannot do). This is the classic example of Plaintiffs trying to get into discovery with a conclusory allegation that "defendants violated the law" and by avoiding having to plead some factual support for such a vague contention.

> applicable limitations period by reputable companies estimate that the average cost of owning and operating a vehicle ranges between $0.45 and $0.55 per mile; that the IRS business mileage reimbursement rate during the same period ranged between $0.445 and $0.585 per mile; that delivery drivers incur more frequent maintenance costs and higher costs due to repairs associated with driving than the average driver and experience more rapid depreciation, lower gas mileage, and higher repair costs due to the driving conditions and the nature of the delivery business, including "frequent starting and stopping of the engine, frequent braking, short routes as opposed to highway driving, and driving under time pressures"; that all of Defendants' delivery drivers were reimbursed for their automobile expenses at substantially similar reimbursement rates; that the delivery drivers "completed deliveries of similar distances and at similar frequencies" as Plaintiff Perrin; and that the reimbursement rates ranged between $0.15 and $0.24 per mile.

Id. at 1152. The allegations in the Complaint here are paltry by comparison and far fall short of the minimum factual requirements mandated by *Twombly* and *Iqbal*. It is telling that throughout their Opposition, Plaintiffs spend the bulk of their time discussing other cases and holdings, but never compare the conclusory allegations in their own Complaint to the more substantive allegations in the

cases they cite. Such comparison would readily highlight the inapplicability of those cases, and further expose the severe deficiencies in the Complaint.

II. CONCLUSION

Plaintiffs' Complaint lacks plausible factual allegations necessary to survive a motion to dismiss. Accordingly, Defendants' motion should be granted and the Complaint dismissed.[5]

Respectfully submitted this 23rd day of June, 2014.

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[5] At the bottom of the last page of their Opposition, Plaintiffs state they should be granted leave to amend "[s]hould the Court believe that Plaintiffs' Complaint is somehow deficient." (Opp. at 15.) This is not a proper request for leave to amend, as Plaintiffs fail to provide any basis for how they would amend their Complaint and fail to properly file a motion seeking leave. *See, e.g., Calderon v. Kansas Dept. of Social and Rehabilitation Servs.*, 181 F.3d 1180, 1187 (10th Cir. 1999) ("[Plaintiff's] single sentence, lacking a statement for the grounds for amendment and dangling at the end of her memorandum, did not rise to the level of a motion for leave to amend" and the court did not abuse its discretion by ignoring request for leave to amend.); *Glenn v. First Nat. Bank in Grand Junction*, 868 F.2d 368, 370 (10th Cir. 1989) (Plaintiffs' bare request for leave to amend in opposition to motion to dismiss did not properly move the court for leave to amend and court committed no error by ignoring request and dismissing complaint.).

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Attorneys for Defendants

JUDGMENT
(JULY 9, 2014)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LINDA S. ASH and ABBIE JEWSOME, on Behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

ANDERSON MERCHANDISERS, LLC, et al.,

Defendants.

Civil No. 14-00358-CV-W-DW

Decision by Court. The issues have been considered and a decision has been rendered by the Court.

IT IS ORDERED AND ADJUDGED that Defendants Anderson Merchandisers, LLC, West AM, LLC, Anderson Merchandisers, LLC, and ANCONNECT, LLC's Motion to Dismiss is GRANTED, and Plaintiffs' Complaint is DISMISSED.

ANN THOMPSON,
Clerk of Court

/s/ Terri Moore
(by) Terri Moore, Deputy Clerk

Date: July 9, 2014

PLAINTIFFS' MOTION UNDER RULE 60(B) OR RULE 59(E) TO VACATE JULY 2, 2014 ORDER AND JULY 9, 2014 CLERK'S JUDGMENT, RE-OPEN CASE AND SUBSTITUTE COMPLAINT WITH FIRST AMENDED COMPLAINT ATTACHED TO MOTION AS EXHIBIT A (JULY 11, 2014)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LINDA S. ASH and ABBIE JEWSOME, on behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

ANDERSON MERCHANDISERS, LLC, et al.,

Defendants.

Case No.: 4:14-cv-0358-DW

COME NOW the Plaintiffs Linda Ash and Abbie Jewsome, by and through their respective counsel of record, and move under Rule 60(b) or Rule 59(e) to vacate the July 2, 2014 Order (Doc. 13) and July 9, 2014 Clerk's Judgment (Doc. 14), instruct the Clerk to re-open the case and substitute the Complaint (Doc. 1) with the First Amended Complaint attached to this Motion as Exhibit A.

Alternatively, Plaintiffs request that the July 2, 2014 Order be amended to provide that the dismissal of the Complaint was without prejudice, that the July 9, 2014 Clerk's Judgment be vacated, that the Clerk be instructed to re-open the case and that Plaintiffs' First Amended Complaint be substituted for the original Complaint.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

EXHIBIT A–FIRST AMENDED COMPLAINT (JULY 11, 2014)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LINDA S. ASH and ABBIE JEWSOME, on behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

ANDERSON MERCHANDISERS, LLC,
a Delaware Corporation,
Registered Agent: CT Corporation System
120 South Central Ave.
Clayton, MO 63105

WEST AM, LLC, a Delaware Corporation,
Registered Agent:CT Corporation System
120 South Central Ave.
Clayton, MO 63105,

ANCONNECT, LLC, a Texas corporation, Formerly Known As ANDERSON MERCHANDISERS, LLC,
a Texas corporation,
Registered Agent:
350 N. St. Paul St., Suite 2900
Dallas, TX 75201,

Defendants.

Case No.: 4:14-cv-0358-DW

Jury Trial Requested

FIRST AMENDED COMPLAINT
Collective Action under Fair Labor Standards Act

COME NOW, the Plaintiffs Linda S. Ash and Abbie Jewsome, on behalf of themselves and all others similarly situated, by and through their attorneys, and file this First Amended Complaint against joint employers Defendants Anderson Merchandisers, LLC, a Delaware corporation; West AM, LLC; and ANConnect, LLC, which for part of the relevant time period was known as Anderson Merchandisers, LLC, a Texas corporation, for damages and other relief relating to violations of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"). Plaintiffs' FLSA claims are asserted as a collective action pursuant to 29 U.S.C. § 216(b). The following allegations are based on personal knowledge as to Plaintiffs' conduct and are made on information and belief as to the acts of others.

JURISDICTION AND VENUE

1. This Court has original jurisdiction to hear this Complaint and to adjudicate the claims stated herein under 28 U.S.C. § 1331, this action being brought under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*

2. Venue is proper in the United States District Court for the Western District of Missouri pursuant to 28 U.S.C. § 1391(b) because Defendants operate their business in this district and are subject to this

Court's personal jurisdiction, and a substantial part of the events or omissions giving rise to the claim alleged herein occurred in this district.

PARTIES

3. Plaintiff Linda S. Ash resides in Jackson County, Missouri. Plaintiff Ash currently works for Defendants as a full-time Territory Sales Lead (a/k/a Sales Merchandiser) and performs these duties for compensation in Missouri and Kansas. Plaintiff Ash began as a part-time employee in this position in or about September 2011, began as a full-time employee in or about October 2012, and continues to work in this position as of this filing.

4. Plaintiff Ash was hired as a Sales Representative for "Anderson Merchandisers" by her District Sales Manager, Pam Rella, of "Anderson Merchandisers."

5. Plaintiff Abbie Jewsome resides in the State of Kansas. Plaintiff Jewsome works for Defendants as a full-time Territory Sales Lead (a/k/a Sales Merchandiser) and performs these duties for compensation in Kansas. Plaintiff Jewsome began in this position in or about August 2004 and continues to work in this position as of this filing.

6. Plaintiff Jewsome was hired as a Sales Representative for "Anderson Merchandisers" by her then District Sales Manager, Sheila Randall. Randall preceded Jewsome's current District Sales Manager Pam Rella.

7. In March 2014 the job title of Plaintiffs Ash and Jewsome and other similarly situated Sales Representatives (a/k/a Sales Merchandisers) in

Missouri, Kansas and throughout the United States was changed by "Anderson Merchandisers" from Sales Representative to Territory Sales Lead. Their job duties did not change when their job title changed.

8. Defendants employ other Territory Sales Leads (a/k/a Sales Merchandisers) similarly situated to Plaintiffs in Missouri, Kansas and throughout the United States. Plaintiffs and others similarly situated are individuals who are, or were, employed by Defendants as Sales Representatives and/or Territory Sales Leads (a/k/a Sales Merchandisers) or as employees with the same primary job duties and subject to the same illegal pay policies and practices set forth herein throughout the country. Hereafter these persons will be collectively referred to as "merchandisers" or "others similarly situated."

9. District Sales Manager Rella's business card states she is the "District Sales Manager/156" for "Anderson Merchandisers." District Sales Manager Rella offices out of her home in Blue Springs, Missouri.

10. The work schedules for Plaintiffs Ash and Jewsome are supervised by their District Sales Manager, which is currently Pam Rella.

11. The work schedules of Plaintiffs Ash and Jewsome and others similarly situated are created and conditions of employment controlled by the corporate office of "Anderson Merchandisers" in either Amarillo or Plano, Texas.

12. Plaintiffs Ash and Jewsome were issued business cards that feature the "Anderson Merchandisers" logo, identify them as a "Sales Representa-

tive" and provide their contact information at the following address in Texas–despite the fact that neither does any work in Texas: PO Box 32270 79120, 421 S.E. 34th Avenue, Amarillo, TX 79103. Plaintiffs were not reissued new business cards that identify them as Territory Sales Leads (*i.e.,* the replacement title for Sales Representative).

13. Like the business cards for Plaintiffs Ash and Jewsome, District Sales Manager Rella's business card features the "Anderson Merchandisers" logo and provides her contact information at the following address in Texas although she offices out of her home in Blue Springs, Missouri: PO Box 32270 79120, 421 S.E. 34th Avenue, Amarillo, TX 79103.

14. On their business cards, the same two phone numbers are listed for Plaintiffs Ash and Jewsome and District Sales Manager Rella: (806) 376-6251; and (800) 999-0904. Amarillo, Texas, is included in the 806 area code exchange but Plano is not. Both numbers are answered by the same recorded message, which begins, "Thank you for calling ANConnect and Anderson Merchandisers." Different extension numbers for each user are included next to these phone numbers on their business cards. Others who can be reached via these same two phone numbers include but are not limited to Phil Street (Rella's Regional Sales Manager), Marla Layne (Senior VP In-Store Operations), Jerry Judson (VP In-Store Operations), Bill Lardie (CEO of Anderson Merchandisers and ANConnect), Chuck Taylor (Chief Financial Officer of Anderson Merchandisers), Scott McDaniel (current President of Anderson Merchandisers), Steve McClanahan (current

President of ANConnect) and Charlie Anderson (CEO of the Anderson Companies).

15. Plaintiffs Ash and Jewsome and others similarly situated were told to call the same (806) 376-6251 and/or (800) 999-0904 numbers listed in their business cards to call the corporate office in Texas with questions. When those numbers are called, a recorded message says, "Thank you for calling ANConnect and Anderson Merchandisers."

16. Plaintiffs Ash and Jewsome were told that the website for "Anderson Merchandisers" is www.amerch.com. This web address is included on the business cards for Plaintiffs Ash and Jewsome and others similarly situated and District Sales Manager Pam Rella. The "Anderson Merchandisers" logo in on the homepage for that website.

17. Plaintiffs Ash and Jewsome were told when they were hired by their District Sales Manager that they work for "Anderson Merchandisers" but there is no corporate entity known only as "Anderson Merchandisers" registered to do business in Missouri, Kansas, Texas or Delaware.

18. Defendant Anderson Merchandisers, LLC is registered as a Delaware corporation. Anderson Merchandisers, LLC was formerly known as Western Merchandisers, Inc., which changed its name to Anderson Merchandisers, LLC in 1994. The Delaware corporation is registered to do business in Missouri where Plaintiff Ash works on Defendants' behalf in Wal-Mart stores and also in Texas where "Anderson Merchandisers" has its home office in either Amarillo or Plano, Texas. It also is registered to do business in other states throughout the country

including but not limited to California and Washington. This entity is not registered to do business in Kansas where Plaintiffs Ash and Jewsome work in Wal-Mart stores on Defendants' behalf.

19. Defendant Anderson Merchandisers, LLC was registered to do business in Texas as a Texas corporation until April 2013 when it was amended and now goes by the name ANConnect, LLC, which is a Texas corporation and registered to do business in Texas and other states throughout the country including but not limited to California. To effect this change of the corporate name, a Certificate of Amendment was submitted to the Texas Secretary of State by Bill Lardie who then President of Anderson Merchandisers, LLC and who currently serves as CEO of "both Anderson Merchandisers and ANConnect."

20. Anderson Merchandisers, LLC, the Texas corporation now known as ANConnect, LLC, was known as Anderson Merchandisers, L.P. until September 2012, when a Certificate of Conversion was submitted to the Texas Secretary of State by Charlie Anderson, who is CEO of the "Anderson Companies" according to www.amerch.com. ANConnect, LLC is not registered to do business in either Missouri or Kansas. When Anderson Merchandisers, LLC, the Texas corporation, was formed in September 2012, Charlie Anderson and Bill Lardie were listed as the governing members of the corporation on the Certificate of Formation submitted to the Texas Secretary of State.

21. Defendants Anderson Merchandisers, LLC and ANConnect, LLC both operate as subsidiaries of

"Anderson Media Corporation," which is a Delaware corporation and which in turn operates as a subsidiary of Anderson News LLC, which is in turn owned by Brookvale Holdings LLC. Charlie Anderson is CEO of the "Anderson Companies" and an officer and director of Anderson Merchandisers, LLC, and Anderson News, LLC.

22. Defendant West AM, LLC is a Delaware corporation and registered to do business in both Missouri and Kansas as well as other states throughout the country including but not limited to Arkansas, California, Iowa, Oklahoma and Oregon. It was created as a Delaware corporation in September 2010 and has been active and in good standing in both Missouri and Kansas since October 2010. Bill Lardie and Chuck Taylor are officers and/or directors of West AM, LLC. According to www.amerch.com, Lardie has been President of "Anderson Merchandisers" since 1994 and is now CEO of "both Anderson Merchandisers and ANConnect" and Taylor has been the Chief Financial Officer for "Anderson Merchandisers" for over 15 years and is now COO/CFO for ANConnect. Taylor completed the Application for Registration of a Foreign Limited Liability Company for West AM, LLC in both Missouri and Kansas. The address for West AM, LLC provided to the Kansas Secretary of State is in Amarillo, Texas. It is not registered to do business in Texas.

23. Both Plaintiffs were hired by, and report to, their District Sales Manager—currently Pam Rella. But neither Plaintiff knows with certainty which corporate entity—Anderson Merchandisers, LLC, ANConnect, LLC or West AM, LLC—employs Rella.

24. District Sales Manager Rella reports to a Regional Sales Manager. Upon information and belief, Plaintiffs' current Regional Sales Manager is Phil Street. Street has attended district sales meetings also attended by Plaintiffs. Again, Plaintiffs do not know with certainty which corporate entity—Anderson Merchandisers, LLC, ANConnect, LLC or West AM, LLC—employs Street.

25. Upon information and belief, the rate of pay and method of payment for Plaintiffs Ash and Jewsome and others similarly situated was determined by someone who works at the corporate office for "Anderson Merchandisers" in either Amarillo or Plano, Texas. On February 17, 2014, Jerry Judson, VP In-Store Operations for "Anderson Merchandisers," issued a memorandum to Sales Representatives including Plaintiffs Ash and Jewsome regarding a new "field team compensation plan" which "supports our company direction and initiatives." In the memo Judson thanks them for their commitment to "Anderson Merchandisers." The memo has the "Anderson Merchandisers" logo at the top.

26. Plaintiffs do not know with certainty which corporate entity—Anderson Merchandisers, LLC, ANConnect LLC or West AM, LLC—employs VP Jerry Judson or where he bases his work. Upon information and belief, he works at the home office for "Anderson Merchandisers" in either Amarillo or Plano, Texas.

27. Upon information and belief, employee records for Plaintiffs Ash and Jewsome and others similarly situated are maintained by the Human Resources department, which is located at the home office for "Anderson Merchandisers" in either Amarillo

or Plano, Texas. Plaintiffs Ash and Jewsome and others similarly situated were told to call the same (800) 999-0904 and/or (806) 376-6251 numbers as listed on their business cards if they needed to call Human Resources. When those numbers are called, a recorded message says, "Thank you for calling ANConnect and Anderson Merchandisers."

28. Plaintiffs Ash and Jewsome and others similarly situated wear uniforms with an "Anderson Merchandisers" logo on them.

29. Plaintiffs Ash and Jewsome and others similarly situated were given access to an "Anderson Merchandisers Associates Handbook," which they were instructed to access on a website called ambuzz.com. To enter that website, an employee's username and password must be entered from a computer with an IP address recognized by the server at the home office in either Amarillo or Plano, Texas.

30. In the "Anderson Merchandisers Associates Handbook" is a section entitled "Company History," which states, "Anderson Merchandisers, LLC ('Anderson Merchandisers' or the 'Company') is a leading store marketing, merchandising and sales organization. The Company is characterized by a professional management team, commitment to cutting-edge technology and dedicated, highly trained workforce that allows for rapid, quality service to our customers."

31. According to the "Anderson Merchandisers Associates Handbook," the company's "General Office is currently located in Plano, Texas."

32. According to the "Anderson Merchandisers Associates Handbook," "Anderson Merchandisers is a part of Anderson Media and was established in 1917."

33. In a section entitled "Company Structure," the "Anderson Merchandisers Associates Handbook" states that "Anderson Merchandisers is comprised of two distinct divisions which are (1) corporate office and support teams, and (2) the sales team."

34. According to the "Anderson Merchandisers Associates Handbook," the handbook "presents the policies and procedures to be followed by all Anderson Merchandisers associates and also includes policies specific to Sales and iTeam associates."

35. Plaintiffs Ash and Jewsome and others similarly situated were given by the "Anderson Merchandisers" corporate office, via their District Sales Managers, cell phones with an application called Dash-Ex and other user-specific identifying information already installed on the phones.

36. On a daily basis, Plaintiffs Ash and Jewsome and others similarly situated are expected to check the Dash-Ex application on their cell phones on a daily basis for updates to the list of "Activities" to be performed by them each day of the week. There are approximately 60 separate "Activities" on each list. The "Activities" are assigned a priority ranging from 1 to 5 and a date range for completion.

37. District Sales Manager Pam Rella gave Plaintiffs Ash and Jewsome their cell phones but said she received the phones from the home office in Texas.

38. When Plaintiff Ash once needed a new cell phone, District Sales Manager Rella told her she would need to get Plaintiff Ash a new one from the corporate office in Texas. Once the new phone had been mailed to Rella, she notified Ash that she had received her new phone from the home office in Texas and that Ash needed to come pick it up at Rella's house in Blue Springs, Missouri.

39. Upon information and belief, the home office in either Amarillo or Plano, Texas creates and updates the lists of "Activities" that Plaintiffs Ash and Jewsome and others similarly situated are expected to check and complete each day.

40. On a weekly basis, the District Sales Managers including Plaintiffs Ash and Jewsome's District Sales Manager Rella lead a conference call with the merchandisers in their districts to discuss and prioritize the "Activities" the merchandisers are expected to complete throughout the week. The District Sales Managers including Rella in turn participate in a weekly conference call with their Regional Sales Managers and other District Sales Managers in their region and then discuss with the merchandisers in their respective districts the information they learned from their Regional Sales Managers.

41. There is tremendous pressure placed on Plaintiffs Ash and Jewsome and others similarly situated by their managers to complete their assigned "Activities" each week.

42. Several years ago and before Plaintiff Ash began her employment, Plaintiff Jewsome and others

similarly situated were required to travel to the home office in Amarillo, Texas to receive job training.

43. Plaintiffs Ash and Jewsome and others similarly situated are required to attend regional meetings at which District Sales Managers and Regional Sales Managers are in attendance. Plaintiffs Ash and Jewsome specifically recall another District Sales Manager whose first name was Starr attending a regional meeting with them. Plaintiffs Ash and Jewsome do not know exactly which corporate entity employs Starr but they believe she bases her work somewhere around Joplin or Springfield, Missouri.

44. Upon information and belief, Plaintiffs Ash and Jewsome's Regional Sales Manager Phil Street reports to either Tom Clark or Marla Layne. Upon information and belief, Clark is a Divisional Sales Manager and Layne is the Senior VP In-Store Operations. Both Clark and Layne have attended regional meetings attended by Plaintiff Jewsome. Plaintiffs do not know exactly which corporate entity employs either Clark or Layne but, upon information and belief, they base their work out of the home office in either Amarillo or Plano, Texas.

45. After Tom Clark and Phil Street visited one of the Wal-Mart stores in Kansas assigned to Plaintiff Jewsome, District Sales Manager Pam Rella issued discipline to Plaintiff Jewsome for a problem with her performance observed by Clark and Street and Rella herself was disciplined for the same performance issue. Upon information and belief, Rella's discipline was issued by Street.

46. Since January 1, 2014, both Plaintiffs Ash and Jewsome's paychecks have been issued by

"Anderson Merchandisers." These checks provide an address for Anderson Merchandisers in Amarillo, Texas. Before 2013, their paychecks were issued by "West AM, LLC." These checks issued before January 1, 2014, also provide an Amarillo, Texas address although the P.O. Box number is different for the two issuers. Both sets of checks—before and after January 1, 2014—provide the same phone number for the check issuer: (806) 376-6251, which is the same number as that listed on the business cards for Plaintiffs Ash and Jewsome and others similarly situated and District Sales Manager Rella and which is answered by a recorded message that states, "Thank you for calling ANConnect and Anderson Merchandisers."

47. The IRS requires that wages paid by an employer to an employee be reported on IRS Form W-2. 26 C.F.R. § 1.6041-2.

48. Plaintiff Jewsome's W-2 for 2010 was issued by "West AM LLC."

49. Plaintiffs Ash and Jewsome's W-2s for 2011, 2012 and 2013 were issued by "Anderson Merchandisers West," which is not a legally recognized corporate entity on the Secretary of State websites for Missouri, Kansas, Delaware or Texas. Under the section labeled "Employer's name, address and zip code," these W-2s state, "Anderson Merchandisers West, 421 East 34th Street, Amarillo, TX 79103."

50. The address on the 2011, 2012 and 2013 W-2s—421 East 34th Street, Amarillo, TX 79103—is the same address provided by Charlie Anderson in the Certificate of Merger submitted to the Texas Secretary of State in September 2012 for Anderson

Merchandisers, LLC (the Texas corporation that later became ANConnect, LLC); provided by Charlie Anderson in the Certificate of Conversion to the Texas Secretary of State in September 2012 for both Anderson Merchandisers, LP and Anderson Merchandisers, LLC (the Texas corporation that later became ANConnect LLC); provided to the Texas Secretary of State for ANConnect LLC; provided for ANConnect LLC on the "ANConnect LLC Employee's Profit Sharing Plan and Trust"; and provided for Anderson Merchandisers LP on the "Anderson Merchandisers, LP Employees' Profit Sharing Plan and Trust."

51. The address for Anderson Merchandisers, LLC (the Delaware corporation) provided to the Texas Secretary of State is 5601 Granite Parkway, Suite 1400, Plano, TX 79024, which is the same address provided on the "Contact Us" page for "Anderson Merchandisers" on www.amerch.com.

52. According to www.amerch.com, the corporate office for "Anderson Merchandisers" is located in Amarillo, Texas, although the address on the "Contact Us" page on that website is in Plano, Texas.

53. A January 6, 2014 Company Announcement posted on www.amerch.com and directed to "Anderson Associates, Customers and Suppliers" states, "In May 2013 our board of directors authorized the Anderson Merchandisers management team to divide the company into two separate units. . . . The decision was made to establish the headquarters of Anderson Merchandisers in Plano, TX."

54. The January 6, 2014 Announcement posted on www.amerch.com further explains, "Since the opening of the Plano office, Anderson Merchandisers has developed multi-year agreements with non-entertainment brands in the grocery, electronics, hardware, wireless, health and beauty and automotive categories. The new Anderson Merchandisers is off to a sensational start. A new name, ANConnect, was chosen for the original purchasing, pick pack, and delivery company based in Amarillo, TX. . . . Since opening in May, ANConnect has distributed non-entertainment products for health and beauty, electronics and other categories."

55. According to a letter from Charlie Anderson, the CEO for the "Anderson Companies" posted on www.amerch.com, Anderson Merchandisers was recently divided into two parts: "Anderson Merchandisers" and "ANConnect." "Anderson Companies" is the parent company of "Anderson Merchandisers" according to Mr. Anderson's bio on www.amerch.com.

56. The January 6, 2014 Company Announcement posted on www.amerch.com states that "Bill Lardie, who served as president of both ANConnect and Anderson Merchandisers," is now CEO of both companies and "will continue to operate from both the Amarillo and Plano offices."

57. On August 1, 2011, Bill Lardie, President of "Anderson Merchandisers," sent a letter to Plaintiff Jewsome and, upon information and belief, to others similarly situated thanking her for being an "Anderson Merchandisers' Gold Badge Associate" and notifying her that he had installed the "Gold Badge Hotline," which "will enable you to leave me a

message regarding any comments, suggestions, opportunities or even to just say hi by simply dialing 71000 in the voice mail system." The number for the voice mail system is the same (800) 999-0904 number that is included on the business cards for Plaintiffs Ash and Jewsome and others similarly situated as well as District Sales Manager Rella and that is answered by a recording that says, "Thank you for calling ANConnect and Anderson Merchandisers." Lardie's letter also congratulates the recipient including Plaintiff Jewsome for being a "prestigious Gold Badge Associate" and wishes her "many, many more years of success with Anderson Merchandisers." The letter has the "Anderson Merchandisers" logo at the top.

58. On July 1, 2014, Bill Lardie, who is now CEO of both Anderson Merchandisers and ANConnect, sent a letter to Plaintiff Jewsome and, upon information and belief, to others similarly situated reminding her to renew her Sam's Club Membership Card and congratulating her on "reaching another year of success." Lardie's letter states, "You and your fellow 1,200+ Gold Badge Associates are what make this company great, and I appreciate all you do." Included in the letter is a phone number to call with questions about the Sam's Club memberships. The phone number is the same (800) 999-0904 number that is included on the business cards for Plaintiffs Ash and Jewsome and others similarly situated as well as District Sales Manager Rella and that is answered by a recording that says, "Thank you for calling ANConnect and Anderson Merchandisers." Lardie's letter has the "Anderson Merchandisers" logo at the top.

59. Plaintiff Jewsome was invited to participate in, and does participate in, an employee profit sharing plan now entitled "ANConnect LLC Employee's Profit Sharing Plan and Trust." Her personal contributions to that Plan have been matched by employer-contributed funds. Her benefits profile for the last quarter of 2013 reflects that the Plan's company sponsor is ANConnect, LLC. The Plan previously was known as "Anderson Merchandisers, LP Employees' Profit Sharing Plan and Trust." Her benefits profile for the third quarter of 2011 reflects that the Plan's company sponsor was Anderson Merchandisers, LP, which in 2012 was converted to Anderson Merchandisers, LLC, the Texas corporation, which became ANConnect LLC in April 2013.

60. In January 2014 Plaintiff Ash was injured on the job at Wal-Mart and filed a claim for workers' compensation. The insured entity who provided the insurance coverage for her claim as an injured employee was Anderson Media Corporation, which is the parent corporation of both ANConnect, LLC and Anderson Merchandisers, LLC.

61. Upon information now available to Plaintiffs and belief, Plaintiffs Ash and Jewsome and others similarly situated are employed by Anderson Merchandisers, LLC, a Delaware corporation registered to do business in Missouri and Texas where the "Anderson Merchandisers" home office is located, which they believe also employs Defendants' District Sales Managers such as Pam Rella who hired and supervises Plaintiffs and others similarly situated, controls their work schedules and conditions of employment through the "Activities" lists assigned to

them daily by the home office through the Dash-Ex applications on their corporate-issued cell phones, stores employee records at the home office in either Amarillo or Plano, Texas, and determines their method of pay.

62. Upon information now available to Plaintiffs and belief, Anderson Merchandisers, LLC, the Delaware corporation, operates as their joint employer with West AM, LLC and the corporate entity formerly known as Anderson Merchandisers, LLC, a Texas corporation and now known as ANConnect, LLC. West AM LLC was registered to do business in both Missouri and Kansas by "Anderson Merchandisers's" Chief Financial Officer Chuck Taylor and issued paychecks and W-2s to the Plaintiffs, and the IRS requires a W-2 to be issued by the "employer." ANConnect, LLC, was formerly known as Anderson Merchandisers, LLC but as a Texas rather than Delaware corporation and operates at the same address as that provided as the "employer's address" on Plaintiffs' W-2s. ANConnect, LLC also provides the Employee's Profit Sharing Plan and Trust in which both Plaintiffs were invited to participate and in which Plaintiff Jewsome participates and in which her personal contributions are matched by her employer's contributions. Bill Lardie, who has written letters to Plaintiffs Jewsome and others similarly situated thanking her for her years of service as an Anderson associate and wishing her many more years of success, is the CEO of both Anderson Merchandisers and ANConnect and is an officer and/or director of both West AM, LLC and ANConnect, LLC.

63. All Defendants are engaged in interstate commerce by, among other things, providing merchandising and promotional services throughout retail stores in the United States. On Defendants' website, it states that its associates work "coast to coast" and provide their services to stores "nationwide."

64. Plaintiffs, and others similarly situated, are current or former employees of Defendants within the meaning of the FLSA, 29 U.S.C. § 203(e)(1).

65. Plaintiffs and others similarly situated have been employed by Defendants within three years prior to the filing of this lawsuit. *See* 29 U.S.C. § 255(a).

66. Plaintiffs bring this action on behalf of themselves and other similarly situated employees pursuant to 29 U.S.C. § 216(b).

FACTUAL ALLEGATIONS

67. Plaintiffs and others similarly situated worked as full-time merchandisers for Defendants.

68. Defendants describe their services to their customers as connecting consumer brands to shoppers throughout the Wal-Mart stores through a broad array of point-to-point services that provide customized marketing and merchandising programs for their customers in order to maximize their customers' sales, increase efficiencies and reduce costs.

69. As merchandisers, Plaintiffs and others similarly situated had or have the primary duty of product promotions, product placement and signage,

sales floor presentation, and other point of sale techniques regarding customers' products at Wal-Mart stores.

70. Defendants classified the Plaintiffs and other similarly situated employees as non-exempt and entitled to overtime pay under the FLSA.

71. The FLSA requires covered employers, such as Defendants, to compensate all non-exempt employees at a rate of not less than one and one-half times the regular rate of pay for work performed in excess of forty (40) hours per workweek. When calculating the regular rate of pay, it shall include all nondiscretionary compensation.

72. Regardless of location, throughout the Plaintiffs' dates of employment with Defendants, and over the past three years from the date of this filing regarding the others similarly situated, Defendants failed to pay Plaintiffs and others similarly situated one and one-half times the correct regular rate of pay for all hours worked in excess of forty per workweek in violation the FLSA. This policy and practice violated the FLSA and was implemented by Defendants as follows:

a. Regardless of location, Defendants attempted to pay overtime to the Plaintiffs and others similarly situated based upon the "fluctuating workweek" as set forth in 29 C.F.R. § 778.114 in that they only paid overtime to said persons at a rate of one-half their regular rate of pay for all hours worked in excess of forty per work week. However, Defendants failed to meet the necessary requirements under 29 C.F.R.

§ 778.114 to pay Plaintiffs and others similarly situated overtime under the "fluctuating workweek" in that said persons were not paid a fixed salary per workweek regardless of hours worked, and said persons' hours did not fluctuate week to week as required under the regulation. In turn, Plaintiffs and others similarly situated were denied the proper overtime rate of pay under the FLSA of one and one-half the regular rate of pay for hours worked in excess of forty per workweek. Examples of this included, but are not limited to:

i. Plaintiff Ash worked less than 80 hours per pay period but was not paid a fixed salary regardless of hours worked as reflected in paychecks issued on May 16, 2012, and March 19, 2014.

ii. Plaintiff Jewsome worked less than 80 hours per pay period but was not paid a fixed salary regardless of hours worked as reflected in paychecks issued on January 4, 2014, and April 26, 2014.

b. Regardless of location, Defendants through its District Managers' directions and conduct, was aware and/or required Plaintiffs and others similarly situated to perform compensable work tasks "off the clock" during evening and weekend hours and during uncompensated meal breaks. This included, but is not limited to, performing computer-related work tasks and phone conferences during the evening

and weekend hours, and performing their primary job duties described in ¶ 69 above during uncompensated meal breaks. In turn, Plaintiffs and others similarly situated were denied compensation at the overtime rate of pay for these hours. By way of example, this includes, but is not limited to, the following:

i. On a daily basis, Plaintiffs and others similarly situated are expected to check and update an application called "Dash-Ex" on their company-issued cell phones. From the "Dash-Ex" application, Plaintiffs and others similarly situated are informed by the corporate office of the list of "Activities" expected to be performed by them that day. There are approximately 60 separate "Activities" on each list. The "Activities" are assigned a priority ranging from 1 to 5 and a date range for completion. These "Activities" that each Plaintiff and others similarly situated is assigned and expected to complete each day cannot be completed without the Plaintiffs and others similarly situated working overtime.

ii. Plaintiffs Ash and Jewsome and others similarly situated regularly have to work overtime to complete their assigned "Activities."

iii. Defendants' District Sales Managers such as Rella know that the Plaintiffs and others similarly situated work

overtime on a regular basis in order to complete their assigned "Activities."

iv. Although Defendants' District Sales Managers such as Rella know that the Plaintiffs and others similarly situated must work overtime to complete their assigned "Activities," District Sales Managers such as Rella regularly instruct the Plaintiffs and others similarly situated that Defendants do not allow them to work overtime.

v. Despite the instruction not to work overtime, Defendants' District Sales Managers such as Rella know that Plaintiffs and others similarly situated regularly work overtime to complete their assigned "Activities."

vi. Defendants' District Sales Managers such as Rella regularly send e-mails after regular work hours to Plaintiffs and others similarly situated regarding work issues and tasks to be performed right away, and they expect the Plaintiffs and others similarly situated to check for and respond to those e-mails right away outside of regular work hours.

vii. Plaintiffs and others similarly situated are not compensated for the required time they spend checking and responding to e-mails they receive from their managers outside of regular work hours.

viii. Defendants' District Sales Managers such as Rella regularly call Plaintiffs and others similarly situated on their company-issued cell phone after regular work hours and expect them to answer those calls outside of regular work hours. Further, they expect Plaintiffs and others similarly situated to perform work tasks discussed in those phone calls right away and outside of regular work hours.

ix. Plaintiffs and others similarly situated are not compensated for the required time they spend answering their managers' calls outside of regular work hours and performing work tasks discuss in those phone calls right away and outside of regular work hours.

x. Defendants' District Sales Managers such as Rella expect Plaintiffs and others similarly situated to work on completing their assigned "Activities" over their lunch breaks even though they knew the Territory Sales Leads were required to and did clock out for lunch.

xi. Plaintiffs and others similarly situated are not compensated for the time they spend completing their assigned "Activities" over their lunch breaks.

c. Regardless of location, Defendants failed to include all income when calculating the regular rate of pay for Plaintiffs and others

> similarly situated. In particular, Defendants failed to include the weekly mileage allowance (often denoted as "WMA" on paystubs) when calculating the regular rate of pay up through March 16, 2014. Therefore, the regular rate of pay was lower than required under the FLSA, which in turn lowered the overtime rate of pay. Due to this policy and practice, Plaintiffs and others similarly situated were denied overtime compensation owed under the FLSA. Examples of this included, but are not limited to, defendants' failure to include the WMA when calculating the regular rates of pay for Plaintiffs Ash and Jewsome on their paychecks for the pay period ending March 15, 2014.

73. Defendants were aware, or should have been aware, that Plaintiffs and other similarly situated employees were not paid a fixed salary per workweek regardless of hours worked, that said persons' hours did not fluctuate week to week as required under regulation, that said persons were required to perform work during evening and weekend hours off the clock and during uncompensated meal breaks, that said persons did not report all hours worked, and that Defendants failed to include all compensation paid when calculating the regular rate of pay.

74. Defendants' conduct alleged herein was willful and in bad faith.

75. Defendants did not keep accurate records of these hours worked by Plaintiffs and others similarly situated as required by law.

76. Defendants were aware of the hours and overtime hours that Plaintiffs and others similarly situated worked.

FLSA COLLECTIVE ACTION ALLEGATIONS

77. Plaintiffs, on behalf of themselves and others similarly situated, re-allege and incorporate by reference the above paragraphs as if fully set forth herein.

78. Plaintiffs file this action on behalf of themselves and all individuals similarly situated. The proposed Collective Class for the FLSA claims is defined as follows:

> All persons who worked as full time Territory Sales Leads and/or Sales Merchandisers (or persons with similar job duties) for Defendants at any time since three years prior to the filing of this Complaint (hereafter the "FLSA Collective").

79. Plaintiffs have consented in writing to be a part of this action pursuant to 29 U.S.C. § 216(b). Plaintiffs' signed consent forms are attached as Exhibit A.

80. During the applicable statutory period, Plaintiffs and the FLSA Collective routinely worked in excess of forty (40) hours per workweek without receiving overtime compensation at the rate of one and one-half times their regular rate for their overtime hours worked.

81. Defendants failed to preserve records relating to these hours worked as required by 29 C.F.R § 516.2.

82. Plaintiffs and the FLSA Collective are victims of Defendants' widespread, repeated, systematic and consistent illegal policies that have resulted in violations of their rights under the FLSA, 29 U.S.C. § 201 *et seq.*, and that have caused significant damage to Plaintiffs and the FLSA Collective.

83. Defendants willfully engaged in a pattern of violating the FLSA, 29 U.S.C. § 201 *et seq.*, as described in this Complaint in ways including, but not limited to, failing to pay Plaintiffs and other similarly situated employees a fixed salary per workweek regardless of hours worked and knowing that said persons' hours did not fluctuate week to week as required under the regulation; requiring said persons to perform work during uncompensated meal breaks, knowing that said persons did not report all hours worked, and failing to include all compensation paid when calculating the regular rate of pay

84. Defendants' conduct constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255.

85. Defendants are liable under the FLSA for failing to properly compensate Plaintiffs and others similarly situated, and, as such, notice should be sent to the FLSA Collective. There are numerous similarly situated current and former employees of Defendants who have suffered from Defendants' common policies and practices as set forth herein,

and who would benefit from the issuance of a Court-supervised notice of this lawsuit and the opportunity to join. Those similarly situated employees are known to Defendants and are readily identifiable through Defendants' records.

CAUSES OF ACTION

COUNT I—OVERTIME VIOLATIONS UNDER FEDERAL LAW. The Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* On Behalf of Plaintiffs and Those Similarly Situated

86. Plaintiffs, on behalf of themselves and others similarly situated, re-allege and incorporate the preceding paragraphs by reference as if fully set forth herein.

87. The FLSA, 29 U.S.C. § 207, requires employers to pay employees one and one-half times the regular rate of pay for all hours worked over forty (40) hours per workweek.

88. Defendants suffered and permitted Plaintiffs and the FLSA Collective to routinely work more than forty (40) hours per week without paying overtime compensation one and one-half times the correct regular rate of pay for all hours worked over forty (40) hours per workweek, requiring them to work during evening and weekend hours off the clock and during uncompensated breaks, knowing that they did not report all hours worked, and failing to include all compensation when calculating the regular rate of pay.

89. Defendants' actions, policies, and/or practices as described above violate the FLSA's overtime

requirement by regularly and repeatedly failing to properly compensate Plaintiffs and the FLSA Collective for overtime worked.

90. Defendants knew, or showed reckless disregard for the fact, that they failed to pay these individuals overtime compensation in violation of the FLSA.

91. As the direct and proximate result of Defendants' unlawful conduct, Plaintiffs and the FLSA Collective have suffered, and will continue to suffer, a loss of income and other damages. Plaintiffs and the FLSA Collective are entitled to liquidated damages, attorney's fees and costs incurred in connection with this claim.

92. By failing to accurately record, report, and/or preserve records of hours worked by Plaintiffs and the FLSA Collective, Defendants has failed to make, keep, and preserve records with respect to each of its employees sufficient to determine their wages, hours, and other conditions and practice of employment, in violation of the FLSA, 29 U.S.C. § 201, *et seq.*

93. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a) as Defendants knew, or showed reckless disregard for, the fact that their compensation practices were in violation of these laws.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and others similarly situated, pray for relief as follows:

a) Designation of this action as a collective action on behalf of the FLSA Collective and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated members of the FLSA Collective apprising them of the pendency of this action, and permitting them to assert timely FLSA claims in this action by filing individual consent forms pursuant to 29 U.S.C. § 216(b);

b) Judgment against Defendants finding they failed to pay the FLSA Collective overtime as required under the FLSA;

c) Judgment against Defendants for the FLSA Collective for unpaid back wages, and back wages at the applicable overtime rates;

d) An amount equal to their damages as liquidated damages;

e) A finding that Defendants's violations of the FLSA are willful;

f) All costs and attorneys' fees incurred prosecuting this claim;

g) An award of prejudgment interest (to the extent liquidated damages are not awarded);

h) Leave to add additional plaintiffs by motion, the filing of consent forms, or any other method approved by the Court;

i) Leave to amend to add additional state law claims; and

j) All further relief as the Court deems just and equitable.

Respectfully Submitted,

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PLAINTIFFS' SUGGESTIONS IN SUPPORT OF MOTION UNDER RULE 60(B) OR RULE 59(E) TO VACATE JULY 2, 2014 ORDER AND JULY 9, 2014 CLERK'S JUDGMENT, RE-OPEN CASE AND SUBSTITUTE FIRST AMENDED COMPLAINT (JULY 11, 2014)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LINDA S. ASH and ABBIE JEWSOME, on Behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

ANDERSON MERCHANDISERS, LLC, et al.,

Defendants.

Case No.: 4:14-cv-0358-DW

Pursuant to Local Rule 7.0(c), Plaintiffs Linda Ash and Abbie Jewsome, by and through their counsel of record, provide these Suggestions in Support of their Motion Under Rule 60(b) or Rule 59(e) To Vacate the July 2, 2014 Order (Doc. 13) and July 9, 2014 Clerk's Judgment (Doc. 14), Re-Open the Case and Substitute the Complaint (Doc. 1) with the First Amended Complaint attached to Plaintiffs' Motion as Exhibit A.

Plaintiffs move to vacate the Court's Order of July 2, 2014 and the ensuing July 9, 2014 Clerk's Judgment under Rule 60(b) or, alternatively, under Rule 59(e). On July 2, 2014, the Court ordered that Defendants' Motion to Dismiss under Rule 12(b)(6) (Doc. 9) was granted and that Plaintiff's Complaint (Doc. 1) was dismissed and directed the clerk to mark the case as closed. *See* July 2, 2014 Order at 6 (Doc. 13). The Clerk's Judgment subsequently was entered on July 9, 2014 (Doc. 14). Although Plaintiffs requested leave to amend their Complaint in their Suggestions in Opposition to Defendants' Motion to Dismiss if the Court found the Complaint to be deficient (Doc. 11 at p.15), the Court found that "to preserve the right to amend a complaint a party must submit a proposed amendment along with its motion," and dismissed the case without first allowing Plaintiffs to file a motion to amend with a proposed amendment. *See* July 2, 2014 Order at 6 (quoting *United States v. Mask of Ka-Nefer-Nefer*, 2014 WL 2609621, at * 4 (8th Cir. June 12, 2014) (citations and quotations omitted)). In *Mask*, the Eighth Circuit found that "it is well-settled that plaintiffs 'remain free where dismissal orders do not grant leave to amend to seek vacation of the judgment under Rules 59 and 60(b) and offer an amended complaint in place of the dismissed complaint.'" *See id.* (quotation omitted). Accordingly, Plaintiffs seek vacation of the July 2, 2014 Order and July 9, 2014 Clerk's Judgment under Rules 60(b) and/or 59(e) and offer a First Amended Complaint in place of the dismissed Complaint.[1]

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[1] The opinion in *Mask* was not decided until June 12, 2014, six days after Plaintiffs filed their Suggestions in Opposition to

I. Plaintiffs Meet the Standard Under Rule 60(b) to Vacate the Judgment and Allow Them to File Their First Amended Complaint in Place of the Dismissed Complaint

The Eighth Circuit recently noted that the district court "may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits" and dictated that post-judgment "leave to amend will be granted if it is consistent with the stringent standards governing the grant of Rule 59(e) and Rule 60(b) relief." *See Mask*, 2014 WL 2609621, at *4 (emphasis added) (citations omitted). Here, Plaintiffs meet both standards under Rule 60(b), as well as Rule 59(e) (see *infra* at 7-9), and they should be allowed leave to substitute their First Amended Complaint in order to meet Rule 15(a)(2)'s requirement that their claims be tested on the merits.

Rule 60 sets forth the circumstances under which a court may grant relief from a judgment or order. Rule 60(b) is entitled "Grounds for Relief From a Final Judgment, Order or Proceeding," and provides, "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons," including "any [reason] that justifies relief." The Eighth Circuit in *Mask* found that a "district court has discretion under Rule 60(b) to grant post-judgment leave to file an amended complaint if the

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Defendants' Motion to Dismiss (Doc. 11). Defendants did not cite the *Mask* opinion in their arguments, including their Reply Suggestions in Support filed on June 23, 2014 (Doc. 12).

motion is 'made within a reasonable time,' Rule 60(c)(1), and the moving party shows 'exceptional circumstances' warranting 'extraordinary relief.'" *Id.* at *5 (citations omitted).

Here, Plaintiffs' Motion has been made within a reasonable time and, unlike the circumstances in *Mask,* there are exceptional circumstances here that warrant providing Plaintiffs their requested post-judgment leave to amend. In *Mask,* the plaintiff never sought leave to amend before the entry of dismissal. *See id.* Here, however, Plaintiffs requested leave to amend in writing in their Suggestions in Opposition to Defendants' Motion to Dismiss (Doc. 11 at p.15). Although the Court found this request for leave to be deficient because it did not attach the proposed amendment, Plaintiffs did attempt to seek leave to replace the Complaint with a First Amended Complaint in the event the Court found the original Complaint to be deficient. This was prior to the Court's Order dismissing the Complaint. There was no such pre-dismissal request of any kind made by the plaintiff in *Mask*.

Two other circumstances differentiate this case from *Mask*. First, in *Mask*, the plaintiff delayed over eleven months after they were on notice of possible pleading deficiencies from defendant's motion to dismiss in requesting leave for the first time after dismissal of the complaint. *See id.* at *4. Here, there was no such delay, as Plaintiffs made a timely request for leave only 14 days after Defendants' Motion to Dismiss (Doc. 11 at 15) and before the Court dismissed the original Complaint. Any delay between May 23 when Defendants filed their Motion to Dismiss and now is non-prejudicial to Defendants

and such delay is an insufficient reason to deny leave to amend post dismissal. *See, e.g., Roberson v. Hayti Police Dep't*, 241 F.3d 992, 993-94, 995-96 (8th Cir. 2001) (reversing district court's refusal to allow post-dismissal amendment of complaint even though plaintiff failed to file amendment for eleven months after dismissal; finding "[d]istrict court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving partly, futility of the amendment, or unfair prejudice to the non-moving party can be demonstrated.").

Second, the situation in *Mask* was significantly different from this case because there was a parallel action pending in *Mask* that provided the "opportunity to 'test the merits'" of the claim. *See Mask*, 2014 WL 2609621, at *5. Here, there are no other pending actions on the merits of the claims. The proposed amendment is necessary so that Plaintiffs will have an opportunity to test their claims on the merits.

The Eighth Circuit dictated this result in *Sanders v. Clemco Industries* where it reversed the district court's post-dismissal denial of the plaintiff's motion to amend the judgment to allow amendment of the complaint to cure pleading deficiencies. 823 F.2d 214, 216 (8th Cir. 1987). The plaintiff argued that granting leave to amend would not prejudice the defendants and denying leave would result in substantial injustice in that plaintiff would be denied a legal remedy. The Eighth Court agreed, finding that the district court had abused its discretion in denying post-dismissal leave to amend and holding that amendment should have been allowed under Rule 15(a)'s requirement that "leave shall be freely

given when justice so requires" when amendment was "necessary to afford [p]laintiffs 'an opportunity to test his claims on the merits.'" Denying Plaintiffs this opportunity here would result in a substantial injustice. *See id*.

This is the first amendment that Plaintiffs seek, there has been no prejudicial delay and Plaintiffs will have no opportunity to test the merits of their claims unless their Motion is granted. *See, e.g., Mask*, 2014 WL 2609621, at *5 (citations omitted) (setting forth cases finding that plaintiff's non-prejudicial delay in seeking post-dismissal leave to amend insufficient reason to deny leave and allowing post-dismissal leave to amend "where the amendment was needed to afford plaintiff 'an opportunity to test his claim on the merits'"); *Haynes v. City of Chicago*, 2014 WL 274107, at *2 (N.D. Ill. January 24, 2014) (granting plaintiff's request to re-open case under both Rules 60(b) and 59(e) to amend complaint; acknowledging that plaintiff "was not given an opportunity to amend his complaint," which was contrary to general rule of thumb that plaintiff generally should be given one opportunity to amend unless there was undue delay by plaintiff). *See also In re Weichman*, 422 B.R. 143, 160-61 (Bankr. N.D. Ind. 2010) ("Thus, when the court has determined that a Rule 12(b)(6) motion should be granted with respect to a complaint, the court will provide the plaintiff with one chance to file an amended complaint before the complaint or case is dismissed with prejudice, if 'a more carefully drafted complaint might state a claim.'"); 5 Wright & Miller, *Federal Practice & Procedure*, § 1357 at 611-13 ("A dismissal under Rule 12(b)(6) generally is not

on the merits and the court normally will give plaintiff leave to file an amended complaint.").

In the cases relied upon by the Court in its July 2, 2014 Order dismissing Plaintiffs' Complaint for failure to plead sufficient facts to support an employment relationship or an FLSA violation, the plaintiffs were given opportunities to amend (for a third time) or allowed to have the case proceed on the merits as to at least one of the defendants. *See, e.g., Cavallaro v. UMass Mem'l Healthcare, Inc.*, 678 F.3d 1, 9-10 (1st Cir. 2012) (providing plaintiffs with a third opportunity to amend their complaint to cure pleading deficiencies concerning employer relationship in FLSA action); *Lloyd v. Ace Logistics, LLC,* 2008 WL 5211022 (W.D. Mo. Dec. 12, 2008) (dismissing one defendant on the basis of Rule 12(b)(6) and plaintiff's failure to plead sufficient facts alleging that defendant was plaintiff's employer but allowing case to proceed on the merits against other defendant who admitted it was plaintiffs' employer). Justice requires that Plaintiffs be allowed to substitute their Complaint with the First Amended Complaint.

Attached to Plaintiffs' Motion is a proposed First Amended Complaint that cures the deficiencies found by the Court. It specifically identifies by name and title who hired Plaintiffs and who Plaintiffs believe controls their work schedules and conditions of employment. It identifies where Plaintiffs believe their employment records are maintained and who Plaintiffs believe determined their method of pay.[2] It

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[2] While Plaintiffs generally know they work for "Anderson Merchandisers," there is no such corporate entity by that exact name in existence. Plaintiffs know the names of the individuals who hired them and the name of the individual who supervises

specifically identifies who required Plaintiffs to work off the clock and what work they were required to do off the clock and without compensation. And it identifies specific examples of paychecks evidencing that Defendants failed to pay Plaintiffs for a minimum of 40 hours per week, as required by the fluctuating workweek exemption to the FLSA. Th1e proposed First Amended Complaint identifies where exactly Plaintiffs work, what it is they do and for how long they have done it. Finally, the First Amended Complaint alleges that all similarly situated employees are subject to the same illegal

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them but they do not know with certainty the corporate entity that employs these individuals. They know that people in the "home office in Texas" establish their work schedules, control their conditions of employment, store their employee records and determine their method of pay but again they do not know with certainty exactly which corporate entity employs those individuals or performs those functions. Without the benefit of discovery, Plaintiffs cannot know these facts and complexities of Defendants' corporate structure, which are perplexing, frequently shifting, seemingly conflicting and understood only by defendants at this stage. This is not a situation where the direct employer is easily identifiable to Plaintiffs, as was the case in the *Cavallaro v. UMass Memorial Health Care, Inc.* opinion cited by the Court at 4 of its July 2, 2014 Order. There, the court recognized as "implicit" in the FLSA employer analysis this underlying "assumption that the entity for which plaintiffs work is identifiable." 2011 WL 2295023, at *5 (D. Mass. June 8, 2011) (emphasis added), vacated and remanded in part, affirmed in part, 678 F.3d 1, 10 (1st Cir. 2012). Even though the court there believed the plaintiffs knew the identity of the direct employer but refused to plead it for strategic reasons, the court still allowed the plaintiffs leave—for a third time—to amend to correct pleading deficiencies. Plaintiffs' direct employer here is far from easily identifiable, as evidenced by the numerous specific and detailed allegations set forth in the First Amended Complaint attached as Exhibit A to Plaintiffs' Motion.

policies or practices. This will be Plaintiffs' first amendment and it cures deficiencies found by the Court. Plaintiffs' Motion should be granted pursuant to Rule 60(b), and the proposed First Amended Complaint should be substituted for the dismissed Complaint because, like the cases cited in *Mask*, the post-dismissal amendment is "needed to afford plaintiff 'an opportunity to test his claim on the merits.'" *See Mask*, 2014 WL 2609621, at *5 (citations omitted); *See also Haynes v. City of Chicago,* 2014 WL 274107, at *2.

II. Plaintiffs Also Meet the Standard Under Rule 59(e) to Vacate the Judgment and Allow Them to File Their First Amended Complaint in Place of the Dismissed Complaint

Rule 59(e), entitled "Motion to Alter or Amend a Judgment," provides that "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Unlike the plaintiff in *Mask*, Plaintiffs' Motion here is timely, as it has been filed well under 28 days after the entry of the judgment, or by July 30, 2014. *See Mask,* 2014 WL 2609621, at *4 (noting 28-day deadline under Rule 59(e) and holding that the district court lacks jurisdiction over a motion under Rule 59(e) if not filed within the 28-day time period). A motion under Rule 59(e) to alter or amend the judgment should be granted if it shows "the need to correct a clear error of law *or* prevent manifest injustice." *See Innovative Home Health Care, Ins. v. PT-OT Assoc.*, 141 F.3d 1284, 1286 (8th Cir. 1998) (emphasis added) (court did not abuse its discretion when it granted motion to alter or amend judgment and dismissed counterclaims

without prejudice because of complexity of state law issues).

Here, Plaintiffs' Motion should be granted under Rule 59(e) to prevent manifest injustice. Plaintiffs attempted to move to amend their Complaint just two weeks after Defendants' Motion to Dismiss at the very outset of the case and before dismissal. The case is still in its infancy and there will not be any significant prejudice to Defendants. There is no bad faith on the part of the Plaintiffs who, understandably, have incomplete information in their possession about the complexities of Defendants' confusing and seemingly conflicting corporate structure. Further, in pleading the FLSA claims, the Plaintiffs followed case law in the Western and Eastern Districts of Missouri regarding the necessary factual allegations. *See Nobles v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 1131100 (W.D. Mo. Mar. 28, 2011) (rejecting same arguments for dismissal based on deficiencies in pleading FLSA violations as presented by Defendants in this case), *Arnold v. DirecTV, Inc.*, 2011 WL 839636 (E.D. Mo. Mar. 7, 2011) (rejecting same arguments for dismissal based on deficiencies in pleading FLSA joint employer and violations as presented by Defendants in this case).

Finally, and significantly, if the Court does not grant their Motion, Plaintiffs Linda Ash and Linda Jewsome will be denied the opportunity to have their case heard on the merits. *See, e.g., In re Bear Stearns Companies, Inc. Securities, Derivative and ERISA Litigation*, 2011 WL 4357166, at *2 (S.D.N.Y. Sept. 13, 2011) (granting plaintiffs' motion under Rule 59(e) to amend order to provide that dismissal of the first amended complaint was without prejudice

and granting leave to file a second amended complaint) (noting that the following analysis was instructive in ruling on Rule 59(e) motion: "A sound theory of pleading should normally permit at least one amendment of a complex ERISA complaint that has failed to state a claim where, as here, the Plaintiffs might be expected to have less than complete information about defendants' organization and ERISA responsibilities, where there is no meaningful evidence of bad faith on the part of the plaintiffs, and where there is no significant prejudice to defendants."). *See also Ferluga v. Eickhoff,* 236 F.R.D. 546, 549-550 (applying Rule 59(e) standard and changing dismissal of claims to dismissal without prejudice and allowing plaintiff to file third amended complaint after dismissal of claims for failure to state a claim; "court cannot say that it appears beyond a doubt that [plaintiff] could prove no set of facts which would entitle him to relief if he were allowed to amend his complaint"). *See generally Thomas*, 847 F.2d at 773 (citations omitted) (stating that in cases where a plaintiff was not afforded leave to amend in response to Rule 12(b)(6) motion to dismiss and subsequently seeks to amend after dismissal by asking the district court to vacate its order of dismissal pursuant to Rule 59(e), the standard to apply in deciding such a motion is found in Rule 15(a), which directs that leave to amend "shall be freely given when justice so requires."); *Ross v. A.H. Robins Co.,* 607 F.2d 545, 547 (2nd Cir. 1979) (reversing dismissal with prejudice; noting that it is "hesitant to preclude the prosecution of a possibly meritorious claim because of defects in the pleadings.").

Conclusion

For all of the foregoing reasons, Plaintiffs' Motion to Vacate the July 2, 2014 Order and July 9, 2014 Clerk's Judgment Under Rule 60(b) or Rule 59(e), Re-Open the Case and Substitute the First Amended Complaint for the Complaint should be granted. Plaintiffs should be allowed to substitute their proposed First Amended Complaint for the Complaint that was dismissed by the Court's July 2, 2014 Order, and the Clerk should be instructed to re-open the case.

Alternatively, Plaintiffs request that the July 2, 2014 Order be amended to provide that the dismissal of the Complaint was without prejudice, that the July 9, 2014 Clerk's Judgment be vacated, that the Clerk be instructed to re-open the case and that Plaintiffs' First Amended Complaint be substituted for the original Complaint. *See, e.g., In re Bear Stearns,* 2011 WL 4357166, at *1, 3 (granting plaintiff's motion seeking amendment of order dismissing plaintiffs' first amended complaint to provide that the dismissal was without prejudice and granting plaintiffs leave to file second amended complaint).

Respectfully submitted,

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DEFENDANTS' SUGGESTIONS IN OPPOSITION TO PLAINTIFFS' MOTION TO VACATE JULY 2, 2014 ORDER AND JULY 9, 2014 CLERK'S JUDGMENT, RE-OPEN CASE AND SUBSTITUTE COMPLAINT WITH FIRST AMENDED COMPLAINT (JULY 28, 2014)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LINDA S. ASH and ABBIE JEWSOME, on Behalf of Themselves and Others Similarly Situated,

Plaintiffs,

v.

ANDERSON MERCHANDISERS, LLC, et al,

Defendants.

Case No.4:14-CV-00358-DW

I. INTRODUCTION AND RELEVANT FACTUAL BACKGROUND

On May 23, 2014, Defendants filed a Motion to Dismiss the Complaint for failure to state a claim. Defendants described, in detail, how the Complaint failed to meet the *Twombly/Iqbal* requirements and was merely a series of legal conclusions with no facts

to support its conclusory allegations. Plaintiffs responded to the Motion on June 6, 2014, but rather than seek to amend the Complaint to cure the deficiencies and present the Court with a proposed amended version of the Complaint to consider, Plaintiffs made the calculated decision to stand on their Complaint and argue that it was sufficient as pled. The Court ultimately agreed with Defendants that the Complaint failed to meet the pleading requirements of the Federal Rules of Civil Procedure, granted Defendants' Motion, and entered judgment in favor of Defendants. (Dkt. # 13, 14.)

Plaintiffs now ask this Court to vacate that judgment and re-open the case and allow Plaintiffs to file an amended complaint. In short, Plaintiffs now acknowledge that there are significant deficiencies with the Complaint and ask this Court for a second bite at the apple; a legal "do-over." They argue that "justice requires" the Court to grant their Motion. However, as the Court is well-aware, post-dismissal motions for leave to amend are not subject to the same standard (i.e., that leave to amend shall be "freely given") as pre-dismissal motions for leave to amend. *See Plymouth County, Iowa ex rel. Raymond v. MERSCORP, Inc.*, 287 F.R.D. 449, 463-464 (N.D. Iowa 2012) (noting that different considerations apply to pre- and post-dismissal motions and that those considerations include interest in finality of judgments). Vacating a judgment is an extraordinary remedy only appropriate in the most extraordinary of circumstances, which simply do not exist here. Plaintiffs had their opportunity to correct the deficiencies with the Complaint, but they chose not to do so, and they must bear the consequences of that decision. Fur-

thermore, permitting Plaintiffs to substitute the Proposed Amended Complaint ("PAC") (Dkt. #15-1) for the initial Complaint would be futile, as the PAC still lacks sufficient facts to state a plausible overtime claim under the FLSA. Therefore, this Court should deny Plaintiffs' Motion.

II. ARGUMENT AND CITATION OF AUTHORITY

A. There Are No Exceptional Circumstances Warranting the Extraordinary Remedy of Post-Dismissal / Post-Judgment Leave to Amend Under Rule 60

1. Relief Under Rule 60 Is Extraordinary and Only for Exceptional Circumstances; It Is Not "Freely Given"

Rule 60 of the Federal Rules of Civil Procedure enumerates six grounds for vacating a judgment: 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence that, with reasonable diligence, could not have been discovered earlier; 3) fraud, misrepresentation or misconduct by an opposing party; 4) the judgment is void; 5) the judgment has been satisfied, released or discharged; or, 6) any other reason that justifies relief. Fed.R.Civ.P. 60(b). The final, "catch-all" provision applies "where exceptional circumstances have denied the moving party a fair opportunity to litigate his claim and have prevented the moving party from receiving adequate redress."[1] *Davenport Ltd. Partnership v. Singer*, 2011

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[1] Plaintiffs do not specifically identify which of the six factors they seek relief under, although they do quote the catch-all provision in their Motion, so Defendants presume that Plaintiffs are moving under the catch-all provision. (*Pls.' Mot.* at 6.)

WL 5444055, at *1 n.1 (D. Neb. 2011) (citing *Harley v. Zoesch*, 413 F.3d 866, 871 (8th Cir. 2005)).

The Eighth Circuit has emphasized that vacating a judgment is an extraordinary remedy that can be granted only in extraordinary circumstances. *See United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 743 (8th Cir. 2014) (denying post-judgment motion for leave to amend, noting such relief is only warranted when moving party shows exceptional circumstances warranting extraordinary relief); *Jones v. Swanson*, 512 F.3d 1045, 1048 (8th Cir. 2008) (vacating judgment is an extraordinary remedy to be granted only in exceptional circumstances); *see also Ackermann v. United States*, 340 U.S. 193, 199 (1950) (holding that a party seeking relief from a judgment must show "extraordinary circumstances" that justify the reopening of a final judgment). And, "exceptional circumstances are not present every time a party is subject to potentially unfavorable consequences as a result of an adverse judgment properly arrived at. Rather, exceptional circumstances are relevant only where they bar adequate redress." *U.S. Commodity Futures Trading Comm'n v. Arrington*, 2014 WL 685331, at *30 (D. Neb. Jan. 28, 2014) (citing *Atkinson v. Prudential Prop. Co., Inc.*, 43 F.3d 367, 373 (8th Cir. 1994)). Accordingly, relief under Rule 60 is "exceedingly rare," as it "requires an 'intrusion into the sanctity of final judgment.'" *Id.* (quoting *Watkins v. Lundell*, 169 F.3d 540, 544 (8th Cir. 1999)).

Further, clearly the evidence would not support vacating the Court's judgment on any of the other five grounds.

In their Motion, Plaintiffs include numerous references to Federal Rule of Civil Procedure 15 and the fact that, under Rule 15, leave to amend a pleading is to be "freely given when justice so requires." (*See, e.g.*, Pls.' Mot. at 4.) Plaintiffs fail to acknowledge that there is a considerable difference between the standards that apply to pre-dismissal and post-dismissal motions for leave to amend. While pre-dismissal motions for leave to amend are, generally speaking, freely granted, post-dismissal motions for leave to amend are disfavored, and courts have wide discretion to deny them. *See Raymond*, 287 F.R.D. at 462-463; *Horras v. American Capital Strategies, Ltd.*, 729 F.3d 798 (8th Cir. 2013); *Mask*, 752 F.3d at 743. That discretion is particularly suited to situations, like here, where: (1) Plaintiffs chose to stand on their pleading in the face of a motion to dismiss attacking the sufficiency of their allegations rather than exercising their right to amend; and (2) the proposed amendment would be futile because it does not cure the deficiencies that existed in the original complaint.

2. Plaintiffs Have Not Shown, And Cannot Show, Exceptional Circumstances Justifying Extraordinary Relief Under Rule 60

In their Motion, Plaintiffs argue that they are entitled to the extraordinary remedy of vacating this Court's judgment dismissing their Complaint on two grounds, none of which even comes close to an "exceptional circumstance" justifying such extraordinary relief.

a. Plaintiffs Did Not Previously Request Leave to Amend

First, Plaintiffs argue that they sought leave to amend their Complaint prior to its dismissal. (*See* Pls.' Mot. at 3.) Plaintiffs' argument is based on a fiction that this Court has already rejected, and ignores controlling Eighth Circuit authority to the contrary. Not until filing this Motion have Plaintiffs ever sought leave to amend their Complaint. While in the very last paragraph of their response to Defendants' Motion to Dismiss, Plaintiffs wrote, "should the Court believe that Plaintiffs' Complaint is somehow deficient, the appropriate remedy is not to dismiss but to allow Plaintiffs leave to file an amended complaint to cure any deficiencies," this statement is plainly not a motion for leave to amend. (Plaintiffs' Suggestions in Opposition to Defendants' Motion to Dismiss (Dkt. #11) at 15.) It fails to explain why leave to amend should be granted under the applicable standards of Rule 15, and it provides no information about how Plaintiffs plan to cure the Complaint's deficiencies. It is nothing more than a statement (and an incorrect one at that) about what Plaintiffs believe the law required the Court to do in the event the Court were to grant Defendants' Motion to Dismiss. As this Court properly recognized, just like many other courts, such a cursory reference to a potential amended pleading in response to a motion to dismiss does not constitute a motion for leave to amend. *See, e.g.,* July 2, 2014 Order at 4 ("Importantly, Plaintiffs have not separately moved for leave to amend and have not filed a proposed amendment."); *Calderon v. Kansas Dept. of Social and Rehab. Servs.*, 181 F.3d 1180, 1187 (10th Cir.

1999) ("single sentence, lacking a statement for the grounds for amendment and dangling at the end of her memorandum, did not rise to the level of a motion for leave to amend" and the court did not abuse its discretion by ignoring it); *Glenn v. First Nat. Bank in Grand Junction*, 868 F.2d 368, 370 (10th Cir. 1989) (same). To allow such a cursory statement to constitute a motion for leave to amend would eviscerate Rule 15, permitting plaintiffs to do nothing more than summarily ask for leave to amend a complaint and substantially change the direction and focus of the lawsuit. The Federal Rules of Civil Procedure do not permit such a result.

Contrary to Plaintiffs' mischaracterization of the record, it is clear what Plaintiffs chose to do in response to Defendants' Motion to Dismiss—they chose to stand on and defend their original Complaint as properly pled and elected not to amend their Complaint. And, notably, during the period of time in which Defendant's Motion to Dismiss was pending, Plaintiffs were free to amend their Complaint without Court permission. *See* Fed.R.Civ.P. 15(A)(1)(b) (providing that a party may amend his or her pleading once as a matter of course within 21 days after the service of a motion under Fed.R.Civ.P. 12). In such circumstances, "the Eighth Circuit Court of Appeals has recognized that a district court does not abuse its discretion in denying a post-dismissal motion for leave to amend, where the plaintiff chose to stand on its original pleadings in the face of a motion to dismiss that identified the very deficiency upon which the court dismissed the complaint." *Raymond*, 287 F.R.D. at 464 (citing *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655 (8th Cir. 2012)).

Plaintiffs' argument now, post-judgment and post-dismissal, that the statement they included at the conclusion of their response to Defendants' Motion to Dismiss was a formal motion for leave to amend is simply not credible.

Furthermore, as the Court noted in its dismissal order, Plaintiffs did not include a proposed amended complaint with their response to Defendants' Motion to Dismiss. (*See* July 2, 2014 Order at 4.) It is well-settled in the Eighth Circuit that "to preserve the right to amend a complaint, a party must submit a proposed amendment along with its motion." *Mask,* 752 F.3d. at 743 (citing *Wolgin v. Simon*, 722 F.2d 389, 395 (8th Cir. 1983)). In fact, Plaintiffs' response failed to offer "even the substance of the proposed amendment[,]" which further supports denial of the instant motion. *See In re 2007 Novastar Fin. Inc., Sec. Litig.*, 579 F.3d 878, 884–85 (8th Cir. 2009) (affirming denial of leave to amend where plaintiff "'did not submit a motion for leave to amend but merely concluded her response to [defendant's] motion to dismiss with a request for leave to amend and did not offer a proposed amended complaint or even the substance of the proposed amendment to the district court.'") (quotation omitted, emphasis added). Plaintiffs' failure to include a proposed amended complaint with their response to Defendants' Motion to Dismiss is but further proof that Plaintiffs made the calculated decision to defend the Complaint as pled, rather than seek leave to amend, and Plaintiffs did not properly preserve their right to amend the Complaint under well-established Eighth Circuit precedent.

Given these facts, the Court was well within its right to dismiss the Complaint and subsequently enter judgment without "inviting" Plaintiffs to amend the Complaint. *See Mask*, 752 F.3d at 743 (a trial court is well within its right to dismiss a complaint and is not required to "invite" a motion for leave to amend when a party does not file such a motion). A plaintiff does not enjoy an absolute or automatic right to amend a deficient pleading. *U.S. ex rel Roop v. Hypoguard U.S.A., Inc.*, 559 F.3d 818, 822 (8th Cir. 2009). The situation here—where Plaintiffs are asking this Court for judicial reprieve after vigorously defending their initial Complaint—has been flatly rejected by the Eighth Circuit as "balderdash." *See id.* at 823. In *Roop*, the defendant moved to dismiss the complaint on grounds that it did not plead facts sufficient to state a claim. The plaintiff responded to the motion to dismiss in the exact same way that Plaintiffs responded to Defendants' Motion here: he argued at length that the complaint sufficiently pled a claim but included a single paragraph at the end of his response stating that he should be granted leave to amend if the court found the complaint deficient. The plaintiff did not attach a copy of his proposed amended complaint to his response. The court dismissed the complaint and entered judgment in favor of the defendant, and the plaintiff filed a motion to alter or amend the judgment and for leave to file an amended complaint, which the district court denied. On appeal, the Eighth Circuit held the district court was squarely within its right in dismissing the complaint without first allowing the plaintiff the opportunity to amend, because "though the district court 'should freely give leave [to amend] when justice so requires,' . . . plaintiffs

do not enjoy 'an absolute or automatic right to amend' a deficient . . . [c]omplaint." *Id.* at 822 (citation omitted). And, the Eighth Circuit noted that, rather than attempt to cure the deficiencies with his initial complaint, the plaintiff "adopted a strategy of vigorously defending" the pleading.[2]

This case is also analogous to *Horras*, *supra*, where the Eighth Circuit upheld the district court's denial of the plaintiff's post-judgment motion for leave to amend on the basis of unexcused delay. There, the defendant moved to dismiss the complaint for failure to state a claim, and in response the plaintiff argued that the complaint was sufficient as pled. The trial court granted the motion, and the plaintiff then filed a post-judgment motion for relief from judgment and for leave to amend and submitted a proposed amended complaint with his motion. The district court denied the motion based on the plaintiff's delay in seeking leave to amend. The Eighth Circuit affirmed, finding that the motion to dismiss adequately put the plaintiff on notice that there were deficiencies with the complaint and, therefore, of his need to amend, but the plaintiff took no steps to amend until after dismissal. Thus, the

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[2] Plaintiffs' reliance upon *Sanders v. Clemco Industries*, 823 F.2d 214 (8th Cir. 1987) is misplaced. In *Sanders*, defendant never filed a motion to dismiss. Rather, the trial court dismissed the complaint *sua sponte* on the grounds that it failed to allege sufficient facts to establish jurisdiction. *Id.* at 216. Therefore, unlike Plaintiffs here, the plaintiff in *Sanders* did not make a deliberate choice not to file a motion for leave to amend and instead to stand on his original complaint "in the face of a motion to dismiss that identified the very deficiency upon which the court dismissed [that] complaint." *See Raymond*, 287 F.R.D. at 464.

trial court was well within its "considerable discretion" to deny the plaintiff's post-judgment motion. 729 F.3d at 804-05.

In short, Plaintiffs had every opportunity to request leave to amend prior to dismissal but did not do so. Plaintiffs took a legal gamble, and it did not pay off, but the risk was theirs to take and the consequences theirs alone to bear. This Court is under no obligation to grant Plaintiffs judicial reprieve from their actions, nor should it do so (particularly given that, as discussed below, the PAC still has many deficiencies and would not survive a motion to dismiss).

b. Plaintiffs Have Not Been Denied the Opportunity to "Test Their Claims on the Merits"

The second argument Plaintiffs advance in support of their contention that the situation here "justifies relief" from the Court's judgment is that denying their motion would deprive them of the opportunity to test their claims on the merits. (*See* Pls.' Mot. at 4-5.) Plaintiffs' contention is wrong. Plaintiffs had a full opportunity to test the merits of their claims in this lawsuit. Those claims were found to be implausible and lacking in foundation and properly were dismissed. Also, Plaintiffs had an opportunity even after Defendants filed their Motion to Dismiss to determine that their Complaint was deficient and to submit an amended complaint without leave of Court. *See* Fed.R.Civ.P. 15(A)(1)(b). Nothing about this Court's order of dismissal deprived Plaintiffs of the right to test the merits of their claims.

Plaintiffs attempt to distinguish this case from *Mask* on the grounds that "there was a parallel action proceeding in *Mask* that provided the 'opportunity to "test the merits"' of the claim." (*See* Pls.' Mot. at 4.) To the extent Plaintiffs are arguing that this Court may not dismiss their Complaint because there is no other action currently pending to which they can transfer their claims, such an argument would virtually extinguish this Court's right to enforce federal pleading standards by dismissing inadequate complaints, and neither the *Mask* case nor any other Eighth Circuit case supports such a far-reaching and absurd proposition.[3]

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[3] The *Mask* opinion draws a clear line between cases where a request for post-dismissal leave to amend the pleadings is properly denied and where such a request may be granted. The delineating point is whether "the plaintiff was put on notice of the need to change the pleadings before the complaint was dismissed, but failed to do so." *Mask*, 752 F.3d at 743-744 (quotation omitted). In *Mask*, as here, denial of the plaintiff's post-dismissal request for leave to amend was proper because the plaintiff chose "to stand on and defend its original complaint" in the face of a motion to dismiss which put the plaintiff on notice of its pleading deficiencies. *Id.* at 742. By contrast, two of the three cases in the *Mask* opinion which discuss when a plaintiff should be granted post-dismissal leave to amend a complaint "to test his claim on the merits" involved situations where the plaintiff was not on notice of particular pleading deficiencies prior to dismissal of his complaint. *See, e.g.*, *Sanders*, 823 F.2d at 216 (8th Cir. 1987) (district court dismissed complaint *sua sponte* and thus plaintiff never faced motion to dismiss alerting him to deficiencies of complaint); *Buder v. Merril Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 691-92 (8th Cir. 1981) (district court dismissed complaint based on intervening circuit court opinion holding that shorter statute of limitations applied to claims asserted). In the third case, *Roberson v. Hayti Police Dep't*, 241 F.3d 992, 993 (8th Cir. 2001), a *pro se* plaintiff sued police officers who allegedly shot

B. There Is No Manifest Injustice to be Corrected Under Rule 59(e)

Plaintiffs also advance the alternative argument under Fed.R.Civ.P. 59(e) that this Court's judgment should be vacated and they should be granted leave to amend their Complaint to prevent "manifest injustice." (*See* Pls.' Mot. at 8-9.) Motions under Rule 59(e) "serve a limited function: correcting manifest errors of law or fact or to present newly discovered evidence." *Smithrud v. City of St. Paul*, 746 F.3d 391, 397 (8th Cir. 2014) (citing *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (citation omitted) (internal quotation marks omitted)). "While the court has considerable discretion in ruling on a Rule 59(e) motion, the reconsideration and amendment of a previous order is an unusual measure. As a rule a court should be loathe to revisit its own prior decisions in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Daniel v. Fulwood*, 893 F. Supp. 2d 42, 43 (D.D.C. 2012) (internal citations and quotations omitted). Further, amending a judgment under Rule 59(e) "is not to be lightly granted . . . and the motion must 'clearly establish' that reconsideration is warranted. When there exists no independent reason for reconsideration other than mere

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him. The plaintiff twice requested appointment of counsel, and the district court finally appointed counsel for the plaintiff, but in the same order appointing counsel the court prohibited the plaintiff from amending his complaint. *Id.* at 993-994. Plaintiffs' situation here is of their own doing and does not remotely resemble the shocking circumstances that warranted relief for the plaintiff in *Roberson*.

disagreement with a prior order, reconsideration is a waste of judicial time and resources and should not be granted." *Perkins v. Iberville Parish Sch. Bd.*, 2013 U.S. Dist. LEXIS 93355, at *7 (E.D. La. July 2, 2013) (internal citations and quotations omitted). "The manifest injustice standard presents plaintiff with a high hurdle." *Westerfield v. U.S.*, 366 Fed. Appx. 614, 619 (6th Cir. 2010).

In support of their request under Rule 59(e), Plaintiffs first argue that "[t]he case is still in its infancy and there will not be any significant prejudice to Defendants," and that "[t]here is no bad faith on the part of the Plaintiffs." (Pls.' Mot. at 8.) However, Plaintiffs fail to explain how the procedural posture of this case, a lack of prejudice to Defendants, or their "good faith" amount to manifest injustice, nor do they cite any authority to support such a finding. These facts on their face clearly do not amount to a manifest injustice that must be corrected by amending this Court's judgment.

Indeed, "manifest injustice does not exist where, as here, a party could have easily avoided the outcome, but instead elected not to act until after a final order had been entered." *Davis v. D.C.*, 413 F. App'x 308, 311 (D.C. Cir. 2011) (citation omitted). Here, when presented with Defendants' Motion to Dismiss outlining the many reasons their Complaint was deficient, Plaintiffs could have elected to amend their Complaint to cure these deficiencies without even having to seek leave from the Court to do so. Instead, they chose to defend their Complaint as well-pled, and that tactical decision is fatal to their argument that the dismissal of their Complaint constituted "manifest injustice." *See Raymond,* 287

F.R.D. at 464 ("a district court does not abuse its discretion in denying a post-dismissal motion for leave to amend, where the plaintiff chose to stand on its original pleadings in the face of a motion to dismiss that identified the very deficiency upon which the court dismissed the complaint").

The only other argument Plaintiffs advance in support of their contention that this Court should amend its judgment to grant Plaintiffs leave to amend their Complaint to prevent "manifest injustice" is that failure to do so will deny Plaintiffs "the opportunity to have their case heard on the merits." (Pls.' Mot. at 8-9.) As discussed in Section II.A.2.b. above, this is simply not true. Further, there is plainly no "manifest injustice" in dismissing Plaintiffs' Complaint for failure to comply with the pleading standards of the Federal Rules of Civil Procedure. *See*, *e.g.*, *Perkins*, 2013 U.S. Dist. LEXIS 93355, at *10 (denying Rule 59(e) motion and noting that "[n]o manifest injustice results when the Court makes a determination that Plaintiff failed to state a cause of action and dismisses with prejudice Plaintiff's claims based on federal law"); *Daniel*, 893 F. Supp. 2d at 46 (denying Rule 59(e) motion and finding no manifest injustice in decision dismissing plaintiff's complaint for failure to state a plausible claim).[4]

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[4] Plaintiffs' reliance on *In re Bear Stearns Companies, Inc. Securities, Derivative and ERISA Litigation*, 2011 WL 4357166, at *3 (S.D.N.Y. Sept. 13, 2011) is misplaced, as in that case "the revelation of new evidence" was a central reason the court granted the plaintiffs' post-dismissal request for leave to amend. No new evidence exists here to warrant reconsideration.

C. The Judgment Should Not be Vacated or Amended Because the Proposed Amended Complaint Would Not Survive a Motion to Dismiss

It is well-settled that a court should not grant relief from judgment under Rules 59(e) or 60 where a proposed amended complaint would not survive a motion to dismiss for failure to state a claim. *Davenport*, 2011 WL 5444055 at *1; *Vaughn v. I.R.S. of U.S.*, 2013 WL 5567712, at *3 (E.D. Mo. Oct. 9, 2013) (denying as futile plaintiff's Rule 59(e) motion to amend judgment to permit filing amended complaint), *aff'd*, 557 F. App'x 605, 605 (8th Cir. 2014). While Plaintiffs contend that their PAC "cures the deficiencies found by the Court" (Pls.' Mot. at 6-7), careful examination reveals that it still fails to set forth facts to plausibly establish a valid FLSA overtime claim and, therefore, would not survive a motion to dismiss.

The PAC alleges only one Count—a claim for overtime violations under the FLSA. (*See id.* at ¶¶ 86-93.) The factual basis for Plaintiffs' single Count in their PAC is that:

> Defendants suffered and permitted Plaintiffs and the FLSA Collective to routinely work more than forty (40) hours per week without paying overtime compensation one and one-half times the correct regular rate of pay for all hours worked over forty (40) hours per workweek, requiring them to work during evening and weekend hours off the clock and during uncompensated breaks, knowing that they did not report all hours worked,

> and failing to include all compensation when calculating the regular rate of pay.

(*Id.* at ¶ 88.) These allegations are a classic example of conclusory statements that do not rise to the level of a plausible claim under the FLSA. *See*, *e.g.*, *Pruell v. Caritas Christi*, 678 F.3d 10, 13 (1st Cir. 2012) (allegations that plaintiffs "regularly worked hours over 40 in a week and were not compensated for such time, including the applicable premium pay" were "so threadbare or speculative that they fail[ed] to cross 'the line between the conclusory and the factual'") (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 n.5); *Attanasio v. Cmty. Health Sys., Inc.*, 2011 WL 5008363 (M.D. Pa. Oct. 20, 2011) (allegations that defendants "fail[ed] to provide all proper compensation for time [plaintiffs] spent engaged in meal break work and uniform maintenance work" were insufficient to allege FLSA violation).

Further, Plaintiffs' allegations in the "FACTUAL ALLEGATIONS" section of their PAC (which are much more sparse than the plethora of new allegations under the heading "PARTIES" which are aimed at establishing an employment relationship with Defendants) do nothing to make these conclusory statements in the PAC's only Count more factually concrete or plausible. For example, Plaintiffs allege that "Plaintiffs and others similarly situated perform[ed] compensable work tasks 'off the clock' during evening and weekend hours and during uncompensated meal breaks," and that such tasks included "performing computer-related work tasks and phone conferences during the evening and weekend hours, and performing their primary job duties . . . during uncompensated meal breaks." (Dkt.

#15-1 at ¶ 72.b.) Plaintiffs also allege that Defendants failed to include their weekly mileage allowance when calculating their regular rate of pay. (*Id.* at ¶ 72.c.) However, nowhere in their Complaint do Plaintiffs allege that such work occurred or such mileage was not included in regular rate calculations in a workweek in which Plaintiffs or others allegedly similarly situated worked more than 40 hours a week and thus were entitled to overtime pay.[5] This is fatal to their PAC. Even assuming the allegations in Plaintiffs' PAC were true, they are just as consistent with a conclusion that such "off the clock" work occurred in weeks where no overtime was worked and thus no overtime pay was due.[6] "[T]o state a plausible FLSA overtime claim, a plaintiff must

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[5] Plaintiffs do allege that the mileage allowance was not included "when calculating the regular rates of pay for Plaintiffs Ash and Jewsome on their paychecks for the pay period ending March 15, 2014." (Dkt. #15-1 at ¶ 72.c.) However, Plaintiffs never allege whether either Ash or Jewsome worked more than 40 hours during a workweek falling within that pay period.

[6] Plaintiffs do not assert a violation of the FLSA's minimum wage standards. Accordingly, the alleged "off the clock" work identified by Plaintiffs would only plausibly lead to any liability if such work occurred in a workweek where Plaintiffs actually worked overtime, as the FLSA does not recognize any "gap time" claim for improperly paid non-overtime hours. *See, e.g.*, *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 201 (2d Cir. 2013) ("[T]he FLSA does not provide a cause of action for unpaid gap time. The FLSA statute requires payment of minimum wages and overtime wages only, see 29 U.S.C. §§ 201–19 (2006); therefore, the FLSA is unavailing where wages do not fall below the statutory minimum and hours do not rise above the overtime threshold.") (citation omitted).

sufficiently allege 40 hours of work in any given workweek as well as some uncompensated time in excess of 40 hours." *Lundy v. Catholic Health System of Long Island, Inc.*, 711 F.3d 106, 114 (2nd Cir. 2013). In other words, a plaintiff must provide at least one example of a week where he worked in excess of forty hours but was not properly compensated for that overtime. *Id.*; *see also Nakahata*, 723 F.3d at 201 ("Plaintiffs have merely alleged that they were not paid for overtime hours worked. These allegations—that Plaintiffs were not compensated for work performed during meal breaks, before and after shifts, or during required trainings—raise the possibility that Plaintiffs were undercompensated in violation of the FLSA and NYLL; however, absent any allegation that Plaintiffs were scheduled to work forty hours in a given week, these allegations do not state a plausible claim for such relief."); *Jones v. Casey's Gen. Stores*, 538 F. Supp. 2d 1094, 1102 (S.D. Iowa 2008) ("where the plaintiff alleges violations of the FLSA's minimum . . . wage provision[ ], the complaint should, at least approximately, allege the hours worked for which these wages were not received.") (quotation omitted). Plaintiffs make no such allegations here.

Plaintiffs' misguided attempt to buttress their "off the clock" allegations with allegations regarding specific tasks and activities they allegedly performed does not save the PAC. Plaintiffs allege that "[t]hese 'Activities' that each Plaintiff and others similarly situated is assigned and expected to complete each day cannot be completed without the Plaintiffs and others similarly situated working overtime," that Defendants knew Plaintiffs worked overtime, and

that Plaintiffs were told that Defendants do not allow them to work overtime. (Dkt. 15-1 at ¶ 72.b.) However, in addition to their failure to identify in the PAC a single week in which they actually worked overtime doing these activities, Plaintiffs fail to allege that they were not paid for any overtime worked doing these activities (even if they worked such overtime contrary to a manager's instructions). Accordingly, even assuming the allegations in Plaintiffs' PAC were true, they are consistent with a conclusion that Plaintiffs worked overtime and were paid for it and thus no FLSA overtime violation occurred.

Finally, while Plaintiffs allege that "Defendants failed to meet the necessary requirements under 29 C.F.R. § 778.114 to pay Plaintiffs and others similarly situated overtime under the 'fluctuating workweek' in that said persons were not paid a fixed salary per workweek regardless of hours worked, and said persons' hours did not fluctuate week to week as required under the regulation," (*Id.* at ¶ 72.a.), Plaintiffs do not include a claim for unpaid overtime due to a fluctuating workweek violation in the single Count in their PAC. Rather, as noted above, Plaintiffs' Count for FLSA overtime violations concerns only an alleged failure to pay overtime at one and a half times the correct regular rate and failure to pay overtime for work performed during evening and weekend hours and during compensated breaks. (*Id.* at ¶ 88.) Further, the only specific examples of workweeks that Plaintiffs discuss among their fluctuating workweek allegations occurred during pay periods in which Plaintiffs worked on average less than 40 hours per week, and thus it is

unlikely any overtime pay was due. (*Id.* at ¶ 72.) Still further, if Plaintiffs identify in their PAC pay periods in which they worked an average of less than 40 hours per week and include in the same complaint claims for overtime compensation, the only logical conclusion is that Plaintiffs' work hours fluctuated. Thus, such a fluctuating workweek claim would be implausible because Plaintiffs' factual allegations are consistent with a conclusion that this method of pay was permissible and appropriate under the FLSA.

Because the PAC does not sufficiently plead a cognizable FLSA overtime claim, there is no reason for this Court to vacate or alter its judgment to allow Plaintiffs to pursue what would ultimately be a futile amendment to the Complaint. *See Mask*, 752 F.3d at 744 (finding that the district court did not err in refusing to grant post-judgment leave to amend a complaint, where the proposed amended complaint did not cure the deficiencies with the complaint); *Roop,* 559 F.3d at 823 (proposed amended complaint did not cure deficiencies with the initial pleading); *Drobnak v. Andersen Corp.*, 561 F.3d 778 (8th Cir. 2009) (no abuse of discretion in denying post-judgment motion for leave to amend, where the proposed amended complaint did not allege sufficient facts to support plaintiff's claims); *Raymond*, 287 F.R.D. at 464 (denying post-dismissal leave to amend where PAC did not cure deficiencies).

III. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion.

Respectfully submitted this 28th day of July, 2014.

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PLAINTIFFS' REPLY SUGGESTIONS IN SUPPORT OF MOTION UNDER RULE 60(B) OR RULE 59(E) TO VACATE JULY 2, 2014 ORDER AND JULY 9, 2014 CLERK'S JUDGMENT, RE-OPEN CASE AND SUBSTITUTE FIRST AMENDED COMPLAINT (AUGUST 11, 2014)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LINDA S. ASH, et al.,

Plaintiffs,

v.

ANDERSON MERCHANDISERS, LLC, et al.,

Defendants.

Case No.: 4:14-cv-0358-DW

In their Suggestions in Opposition to Plaintiffs' Motion ("Opposition"), Defendants urge the Court to deny Plaintiffs the opportunity to have their case heard on the merits, even though Plaintiffs' proposed First Amended Complaint ("FAC") cures the deficiencies identified in the Court's July 2, 2014 Order of dismissal. Defendants' main argument is that the proposed FAC is futile, and thus Plaintiffs' Motion should be denied. All of the Defendants'

arguments are flawed, and Plaintiffs' Motion should be granted.

I. Plaintiffs Have Shown Exceptional Circumstances Under Rule 60(b) and the Court *Must* Consider Rule 15's Mandate that Leave be Freely Given to Afford Parties an Opportunity to Have Their Claims Heard on the Merits

Rule 15's mandate is leave to amend should be "freely given when justice so requires." Defendants argue this has no application because the posture of the case is post-dismissal. *See* Opposition at 3-4. This argument contradicts the Eighth Circuit's recent reaffirmation that the district court *must* consider Rule 15's requirement that leave be freely given in favor of giving parties an opportunity to test their claims on the merits if the standards of Rules 60(b) or 59(e) are met. *See United States v. Mask of Ka-Nefer-Nefer*, 2014 WL 2609621, at *4 (8th Cir. June 12, 2014) (court "may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits" and post-judgment "leave to amend will be granted if it is consistent with the stringent standards governing the grant of Rule 59(e) and Rule 60(b) relief.") (emphasis added) (quoting *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 823-24 (8th Cir. 2009)). Rule 15's standard that leave be freely given in favor of affording parties an opportunity to test their claims on the merits must now be part of the Court's analysis.

Defendants acknowledge that, prior to dismissal, Plaintiffs requested the "remedy" of allowing them "leave to file a first amended complaint." But, relying

heavily on *Roop*, Defendants devote much of their Opposition arguing that Plaintiffs did not properly request leave to amend because they did not submit a proposed FAC pre-dismissal. In *Roop*, the court quickly disregarded this same argument by noting that the plaintiff "corrected his pre-judgment failing by submitting a proposed pleading with his post-judgment motion." 559 F.3d at 824. The court then examined the proposed amended complaint and found that it still did not cure the Rule 9(b) deficiencies. The futility of the proposed amendment, not the existence of a post-judgment procedural filing, was the basis for affirming the post-judgment denial of plaintiff's motion for leave to amend. *See id.* at 824-25. Here, unlike *Roop*, the Plaintiffs' proposed FAC cures the deficiencies found by the Court.

Finally, Defendants rely on the opinions in *Mask* and *Horras* to argue that the Court should not now grant Plaintiffs leave to amend. Those cases are factually different because those plaintiffs never asked for permission to amend pre-dismissal, as Plaintiffs did here. *See Horras v. American Capital Strategies, Ltd.,* 729 F.3d 798, 805 (8th Cir. 2013) (plaintiff never attempted to seek leave to amend prior to dismissal but instead plaintiff's counsel stated at hearing that "the initial Complaint was a model of pleading that did not require any further factual support."); *Mask*, 2014 WL 2609621, at *5 (plaintiff never attempted to seek leave to amend prior to dismissal). Moreover, in *Mask*, the parallel proceeding affording plaintiff an opportunity to test the case on the merits was central to the court's affirmation of the denial of leave to amend. Here, Defendants make a half-hearted suggestion that

Plaintiffs "had a full opportunity to test the merits of their claims in this lawsuit." *See* Opposition at 8 (stating merely that Plaintiffs' "claims were found to be implausible and lacking in foundation and properly were dismissed."). There can be no credible argument that dismissal of claims under Rule 12(b)(6) for failing to provide the additional specifics outlined in this Court's Order is a test on the merits. *See, e.g., Mask*, 2014 WL 2609621, at *5 (citing cases granting Rule 60(b) motions and allowing post-dismissal leave to amend when it was "needed to afford plaintiff 'an opportunity to test his claim on the merits.'") (citations omitted).

In sum, the relevant factors for consideration now show that Plaintiffs have met Rule 60(b)'s standard to vacate the judgment: Plaintiffs will be denied the opportunity to have their claims heard on the merits; the proposed FAC cures the pleading deficiencies; Plaintiffs requested permission to seek leave to amend and were not provided an opportunity to file a Rule 15 motion if the Court accepted Defendants' argument in their Motion to Dismiss;[1]

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[1] In *Nakahata v. New York-Presbyterian Healthcare System, Inc.*, 723 F.3d 192, 198 (2d Cir. 2013), a case cited in Defendants' Opposition to support their futility argument (at 13), the Second Circuit found the trial court abused its discretion in failing to provide the plaintiffs an opportunity to amend in response to the court's dismissal order. "The District Court ordered the cases terminated with no indication that final judgment should await a motion for leave to amend." *Id.* "Absent an opportunity to seek leave to amend, Plaintiffs cannot be held accountable for failing to make the necessary motion." *Id.* The court further found this error was not harmless–even though the trial court had permitted the plaintiffs to re-file their FLSA claims in a new action–because the plaintiffs lost the chance to pursue claims that became time-

the case was ordered terminated with no indication that final judgment should await a motion for leave to amend; there has been no delay on the part of Plaintiffs; and there is no prejudicial delay to Defendants. Accordingly, Plaintiffs have shown unique and exceptional circumstances warranting extraordinary relief. *See, e.g., Roberson v. Hayti Police Dep't*, 241 F.3d 992, 993-94, 995-96 (8th Cir. 2001) (finding "[d]istrict court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving partly, futility of the amendment, or unfair prejudice to the non-moving party can be demonstrated.").

II. Plaintiffs Also Have Shown Manifest Injustice to be Corrected Under Rule 59(e)

Defendants argue that "manifest injustice does not exist where, as here, a party could have easily avoided the outcome, but instead elected no to act until after a final order had been entered." *See* Opposition at 10 (citing *Davis v. D.C.*, 413 F. App'x 308 (D.C. Cir. 2011)). Arguing again that Plaintiffs could have elected to amend their complaint, they cite *Plymouth County, Iowa ex rel. Raymond v. MERSCORP, Inc.*, 287 F.R.D. 449, 464 (N.D. Iowa 2012). In *Raymond*, the court examined at length another case, *Ready-Mix*, where the plaintiffs made a

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barred in the interim between the filing of the original consolidated complaints and the filing of the new complaint. "Because Plaintiffs were prejudiced through lost causes of action resulting from the termination of the original complaints, we hold that the District Court abused its discretion in not permitting Plaintiffs to file an amended complaint." *Id.* at 199.

conditional request for leave to amend in a footnote and filed a proposed amended complaint that made no substantive changes but only added additional parties. *See id.* at 458 (citing *In re Iowa Ready-Mix Concrete Antitrust Litig.,* 768 F.Supp.2d 961, 977-78 (N.D. Iowa 2011)). Recognizing that plaintiffs there did not give any indication of the substance of a proposed future amendment, the court concluded in *Ready-Mix* "that the best course [was] to grant the plaintiffs a reasonable time within which to offer a proposed amended complaint, then determine whether the proposed amendment is sufficient to allow this case to proceed." *Id.*

The court in *Raymond* ultimately did not follow its decision in *Ready-Mix* because it found that in the present case, it appeared "beyond doubt" that plaintiff could allege no set of facts in support of a claim that "would make the claim anything other than futile" and the court refused to accept the completely different legal theory on which the post-dismissal proposed complaint was based. *Id.* at 459, 464. This reasoning does not apply here where Plaintiffs' proposed FAC is not futile, cures the specific deficiencies identified by the Court, and does not set forth any new or different legal theories.

Plaintiffs have not had the opportunity to test their claims on the merits. The Court should grant their Motion to allow them an opportunity to be heard on the merits and prevent manifest injustice here.[2]

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[2] In a footnote, Defendants argue that Plaintiffs' reliance on *In re Bear Stearns Companies, Inc. Securities, Derivative and ERISA Litigation*, 2011 WL 4357166, at *2 (S.D.N.Y. Sept. 13,

III. Plaintiffs' Proposed FAC Is Not Futile and the Court Should Allow Its Substitution

Lastly, Defendants argue that Plaintiffs' Motion should be denied because the proposed FAC does not set forth sufficient facts to plausibly establish a valid FLSA violation.[3] Defendants' attempt to litigate this entire matter based on the pleadings should be rejected. Plaintiffs' proposed FAC certainly reveals a "plausible" claim as required by *Twombly* and puts Defendants on notice of its basis. *See Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007) (requiring that a party plead facts demonstrating that a claim for relief "is plausible on its face"); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955) (holding it is sufficient to plead facts

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2011), which granted plaintiffs' Rule 59(e) motion where, as here, plaintiffs had less than complete information about defendants' organization, is misplaced because there was a *revelation* of new evidence in that case. *See* Opposition at 11, n.4. In their proposed FAC, Plaintiffs do in fact cite new evidence dated July 1, 2014 (*see* Ex. A to Plaintiffs' Motion at ¶ 58). In any event, new evidence is not required to grant a Rule 59(e) Motion. *See, e.g., Ferluga v. Eickhoff,* 236 F.R.D. 546, 549-550 (applying Rule 59(e) manifest injustice standard and changing dismissal of claims to dismissal without prejudice and allowing plaintiff to file *third* amended complaint after 12(b)(6) dismissal of claims; "court cannot say that it appears beyond a doubt that [plaintiff] could prove no set of facts which would entitle him to relief if he were allowed to amend his complaint").

[3] In challenging the proposed FAC, Defendants do not assert their main argument from the Motion to Dismiss, namely that the original Complaint did not properly establish an employer-employee relationship under the FLSA. Defendants thus implicitly seem to admit that the proposed FAC pleads sufficient facts establishing an employment relationship.

indirectly showing unlawful behavior so long as the facts pled "'give the defendant fair notice of what the claim is and the grounds upon which it rests.'"). Without question, the proposed FAC states a plausible claim for relief and satisfies each of the Court's concerns raised in the July 2, 2014 Oder regarding the lack of specificity in the original Complaint.

Defendants urge the Court to look only at FAC ¶ 88 to determine whether Plaintiffs' proposed FAC has stated a plausible claim for relief. If the Court were to rely on only FAC ¶ 88, then Defendants may have a viable argument regarding conclusory allegations. But, Defendants disregard the detailed factual allegations set forth in FAC ¶¶ 67-84, which are re-alleged and incorporated in Count I (*see* ¶ 86). Plaintiffs plead with factual specificity Defendants' practice of requiring that work be performed "off the clock" and specifically detail how this occurs, the nature of the work, and who was instructing Plaintiffs to perform the overtime work. *See* FAC ¶ 72.b.i-ix. Plaintiffs also specifically plead when the illegal conduct occurred. Regarding off-the-clock work, Plaintiffs plead that they and others similarly situated routinely worked over forty hours each workweek during the past three years. *See* FAC, ¶¶ 72, 80, 88, 89. Under these circumstances, Defendants requiring off-the-clock work causes that work to be owed at the overtime rate of pay, *i.e.,* the time and one-half rate. *See* FAC, ¶¶, 72, 72.b.

Plaintiffs also specifically plead two other FLSA violations that show how Defendants failed to correctly calculate the rate of pay. First, Plaintiffs give specifics on how Defendants fail to include the mileage allowance in calculating the regular rate of

pay for a specified period of time. This occurred at all times prior to March 2014. *See* FAC, ¶¶ 72, 72.c. Second, Plaintiffs give specifics on how Defendants fail to meet the requirements of the fluctuating work week ("FWW"), and therefore, incorrectly paid overtime at the one-half rate. Given the allegation that Plaintiffs, and others similarly situated, routinely worked in excess of 40 hours every week, these incorrect calculations of the overtime rate of pay applied each week. While it is not necessary for Plaintiffs to plead the specific weeks when Defendants' illegal conduct occurred, they have done so, namely all weeks over the past 3 years.

Defendants, who likely will never be satisfied that Plaintiffs' allegations are detailed enough, now raise the argument that Plaintiffs "must sufficiently allege 40 hours of work in any given workweek as well as some uncompensated time in excess of 40 hours." *See* Opposition at 13 (citing a Second Circuit case). First, Plaintiffs have identified given workweeks—all weeks over the past three years. Second, Defendants' argument for such specifics has been rejected by courts in this district. *See Nobles v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 1131100, at *1 (W.D. Mo. Mar. 28, 2011) (finding that plaintiffs stated FLSA claim when they alleged they "<u>often</u> work over forty hours in a work week in addition to <u>routinely</u> working before and after shifts and during lunch breaks"). In *Nobles*, Judge Laughery specifically noted that:

> Plaintiffs are not required to allege the number of hours of overtime they worked. Plaintiffs have sufficiently described an ongoing policy by which State Farm

> routinely requires that work tasks such as logging into computer programs, answering emails, and completing phone calls be performed before and after shifts and during lunch breaks. While Plaintiffs do not propose a numerical figure, they adequately describe the time worked for which they did not receive wages.

Id. (emphasis added). The court further found:

> State Farm similarly argues that Plaintiffs provide little detail as to State Farm's policy and practice. However, even under *Twombly*, Plaintiffs are not required to plead with such specificity. That Plaintiffs have described what comprises their overtime tasks, how those tasks relate to their job duties, and the practice and policy by which State Farm prevents appropriate compensation is sufficient at this stage of litigation. Plaintiffs have adequately plead their FLSA claim.

Id. at *4 (emphasis added). The same conclusion was reached by the court in *Arnold v. DirecTV, Inc.*, 2011 WL 839636 (E.D. Mo. Mar. 7, 2011) (holding that plaintiffs plead more than a legal conclusion because "they set forth factual allegations—such as Defendants' alleged policies of not compensating Plaintiffs for the performance requiring technicians to attend meetings, and of imposing "charge backs."). Here, Defendants' same argument fails under Missouri case law and the *Twombly/Iqbal* standards. *See also Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 44-45 (1st Cir. 2013) (requiring "that plaintiffs . . . describe the specific managers they talked with, and document, by time, place, and date, the instances . . . would

exceed Rule 8's requirement of a 'short and plain statement' making out a claim for relief.").

Regarding their FWW allegations, Plaintiffs correctly plead Defendants' failure to pay proper overtime and its failed attempt to meet the requirements under 29 C.F.R. § 778.114. To benefit from the FWW regulation and avoid paying overtime at the one and one-half rate, all the following elements must be met under 29 C.F.R. § 778.114:

> 1) the employee's hours must fluctuate from week to week; 2) the employee must receive a fixed weekly salary that remains the same regardless of the number of hours that the employee works during the week; 3) the fixed amount must be sufficient to provide compensation at a regular rate not less than the legal minimum wage; 4) the employer and the employee must have a clear, mutual understanding that the employer will pay the employee the fixed weekly salary regardless of the hours worked; and 5) the employee must receive a fifty percent overtime premium in addition to the fixed weekly salary for all hours that the employee works in excess of forty during that week.

Kanatzer v. Dolgencorp, Inc., 2010 WL 2720788, at *6 (E.D. Mo. July 8, 2010) (citing 29 C.F.R. § 778.114) (emphasis added). Plaintiffs pleaded Defendants' failure to meet two of the requirements under § 778.114. *See* FAC, ¶ 72.a. If the Defendants failed either of the two FWW requirements as alleged, Plaintiffs have correctly pled that the Defendants did not properly pay overtime at the one and one-half rate. *See* FAC, ¶¶ 71-72. Plaintiffs plead that they

routinely worked over 40 hours each week over the past 3 years, and that Defendants applied their failed application of the FWW over this time frame. *See* FAC ¶¶ 72, 72.a.

Defendants criticize Plaintiffs for including examples in FAC § 72.a.i and ii where Plaintiffs worked less than 40 hours per week. This demonstrates Defendants' lack of understanding regarding the requirements for the FWW under 29 C.F.R. § 778.114. Pursuant to that regulation, Defendants must pay the same dollar amount each and every week regardless of hours worked plus an additional half-time rate for any hours worked over forty. *See Boyle v. Barber & Sons, Co.*, 2005 WL 6561489, at *2 (W.D. Mo. Mar. 4, 2005) (for FWW to apply, a "fixed salary is compensation . . . for the hours worked each work week, whatever their number). Plaintiffs' paycheck examples demonstrate occasions where they were not paid a fixed salary regardless of hours worked. Indeed, the examples illustrate that Defendants paid Plaintiffs based on number of hours worked—and not a fixed amount—which demonstrates a clear violation of the FWW.[4]

[4] Plaintiffs selected the few bi-weekly paychecks where Plaintiffs were paid for less than 80 hours because paystubs that fall under 40 hours per workweek are the ones that would demonstrate whether an employer pays the FWW fixed amount or whether they violate the FWW by reverting to paying the employee based on hours worked. These exemplar stubs demonstrate that Defendants paid the same hourly rate for workweeks below 40 hours as the hourly rate paid for weeks that were above 40 (*i.e.,* they are being paid a pure hourly rate of pay and not a fixed salary regardless of hours worked as required under 29 C.F.R. § 778.114 yet Defendants still pay overtime at a 50% premium rather than the full time and a half regularly required by the FLSA).

See Evans v. Lowe's Home Centers, Inc., 2006 WL 1371073, at *4 (M.D. Pa. May 18, 2006) ("Plaintiffs allege that Lowe's actually paid some DMs and ADMs less than their weekly salary for weeks in which they worked less than forty hours. This alleges a violation of the fluctuating work week authorized by the FSLA because the subject DMs and ADMs were not paid the fixed salary for forty hours.").

Defendants also argue that the four examples cited in the proposed FAC demonstrate hours fluctuating from week to week, and therefore, the FAC on its face demonstrates no viable claim for overtime. Despite the fact that the FWW violation would still exist based on Defendants' failure to pay a fixed salary, the FAC's four examples do not reflect an acceptable "fluctuation" under the FWW. Given that the four examples reflect bi-weekly hourly pay amounts for 75.08, 79.13, 79.95 and 79.99 hours, and that the FAC alleges Plaintiffs and others similarly situated routinely worked over 40 hours each workweek inclusive of their numerous uncompensated off-the-clock work hours, the "fluctuations" all exist above forty hours per week. If the fluctuations occur only above the 40-hour mark, an employer does not meet the "fluctuating hours" requirement under 29 C.F.R. § 778.114. *See Hasan v. GPM Investments, LLC*, 896 F. Supp. 2d 145, 150 (D. Conn. 2012) (rejecting defendant's argument that hours fluctuated because the "variance, between weeks with a moderate amount of overtime hours, and weeks where a majority of hours worked exceeded the 40-hour

threshold, is not the same as the up and down fluctuation contemplated by the DOL").[5]

[5] Defendants also argue in a footnote that Plaintiffs do not properly assert a violation of the FLSA's minimum wage standard, and that the FLSA does not recognize any claim for gap time for improperly paid non-overtime hours. *See* Opposition at 13, n.6. Plaintiffs have never asserted a minimum wage claim and do not allege that they are entitled to compensation for off-the-clock work if that work did not rise above the 40-hour/week overtime threshold. But again, the FAC alleges Plaintiffs and others similarly situated *routinely* worked over 40 hours each workweek inclusive of their uncompensated off-the-clock work, therefore, such off-the-clock work would include overtime.

Conclusion

For all of the foregoing reasons, Plaintiffs' Motion to Vacate the July 2, 2014 Order and July 9, 2014 Clerk's Judgment Under Rule 60(b) or Rule 59(e), Re-Open the Case and Substitute the First Amended Complaint for the Complaint should be granted.

Respectfully submitted,

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APPELLANTS' BRIEF
(NOVEMBER 24, 2014)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LINDA S. ASH and ABBIE JEWSOME on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

v.

ANDERSON MERCHANDISERS, L.L.C. (a Delaware Corp.), ANDERSON MERCHANDISERS, L.L.C. (a Texas Corp.), WEST AM, L.L.C., and ANCONNECT, L.L.C.,

Defendants-Appellees.

No. 14-3258

Appeal from the United States District Court for the Western District of Missouri; case no.: 4:14-cv-0358-DW; Hon. Dean Whipple presiding; Order granting motion to dismiss and order denying Plaintiff's Motion Under Rule 60(b) or Rule 59(e) to Vacate the July 2, 2014 Order and July 9, 2014 Clerk's Judgment, Re-Open the Case and Substitute the Complaint with the First Amended Complaint.

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Summary of the Case & Request for Oral Argument

Appellants Linda S. Ash and Abbie Jewsome, on behalf of themselves and others similarly situated, filed a collective action complaint under § 216(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, against Appellees. The Appellees moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6) for failing to state a claim upon which relief can be granted. The district court granted the Motion to Dismiss and denied an alternative request for leave to amend that was set forth in Appellants' response to the Motion to Dismiss. Nine days later, via a Rule 59(e) and 60(b), Appellants moved the district court for leave to amend and attached a proposed First Amendment Complaint. The district court denied that motion as well.

While five other Circuits have addressed Rule 8's FLSA pleading requirements under *Twombly* and *Iqbal*, this is a case of first impression for this Court. Also, Appellants' claims were not dismissed on their merits, but instead, on alleged deficiencies in factual pleading. Appellants were afforded no opportunity to amend despite presenting a proposed amended complaint. Doing so violated this Court's warning to district courts that Federal Rule of Civil Procedure

15(a)(2) requires all claims be tested on their merits. For these reasons, the Appellants believe oral argument is necessary given the importance of these issues. The Appellants would request 20 minutes for their argument.

Jurisdictional Statement

Jurisdiction in the Court of Appeals is based on 28 U.S.C. § 1291 as an appeal from a final order and judgment of the district court entered September 11, 2014, disposing of all of Appellants' claims.[1] Appellants' notice of appeal was timely filed on October 1, 2014, pursuant to Fed. R. App. P. 4(a)(1)(A). (J.A. 169).[2]

Statement of Issues

1. Did the district court err when it dismissed Appellants' Complaint under Fed. R. Civ. P. 12(b)(6) by finding a failure to meet the *Twombly / Iqbal* pleading requirements regarding the employer relationship and FLSA claims? *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009); *White v.*

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[1] Appellants' July 11, 2014 motion under Rule 59(e) was filed within 28 days of the district court's July 2, 2014 Order granting Appellees' motion to dismiss. (J.A. 83). The appeal deadline was tolled until the district court issued an order on the Rule 59(e) motion. See Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills, 141 F.3d 1284, 1286 (8th Cir. 1998) ("A case in which a timely Rule 59(e) motion has been filed lacks finality because the motion tolls the time limitation for appeal in order to provide the trial court with jurisdiction to resolve the motion."). Therefore, the district court's September 11, 2014 Order began the thirty day time frame to file a notice of appeal.

[2] Appellants reference the Joint Appendix as "J.A. ___."

14051 Manchester, Inc., 4:12CV469 JAR, 2012 WL 2117811(E.D. Mo. June 11, 2012); *Davis v. Abington Memorial Hospital*, 765 F.3d 236 (3rd Cir. 2014).

2. Did the district court err when it denied the Appellants' motion under Fed. R. Civ. P. 59(e) and 60(b) to set aside its judgment and permit Appellants to file their proposed First Amended Complaint? *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737 (8th Cir. 2014); *Sanders v. Clemco Industries*, 823 F.2d 214 (8th Cir. 1987); *Starkey v. JPMorgan Chase Bank, NA*, 573 F. App'x 444 (6th Cir. 2014).[3]

Statement of the Case

On April 21, 2014, the Appellants Linda Ash and Abbie Jewsome currently work for Appellees as Territory Sales Leads (a/k/a "Merchandisers"). (J.A.7-9). Appellees provide their customers with services described as: "connecting consumer brands to shoppers throughout the Wal-Mart stores through a broad array of point-to-point services that provide customized marketing and merchandising programs for their customers in order to maximize their customers' sales, increase efficiencies and reduce costs." (J.A. 9). Merchandisers have the primary duty of product promotions, product placement and signage, sales floor presentation, and other point of sale techniques regarding Appellees customers' products at Wal-Mart stores. (J.A. 10). The Appellees classify Merchandisers as nonexempt under the

[3] The Appellants set forth three issues in their Statement of Issues for appeal. However, after further research, Appellants determined that the "abuse of discretion" issue should only be addressed under one issue. Therefore, the second listed issue has been disregarded.

FLSA, and therefore, entitled to receive overtime pay. (*Id.*).

A. The Complaint.

Ash and Jewsome ("Plaintiffs") filed a collective class action under § 216(b) of the FLSA on behalf of themselves and:

> All persons who worked as full time Territory Sales Leads and/or Sales Merchandisers (or persons with similar job duties) for Defendants at any time since three years prior to the filing of this Complaint (hereafter the "FLSA Collective").

(J.A. 12). Regarding their employer entity(s), Ash and Jewsome examined the information available to them at the pre-discovery pleading stage of the litigation. That information was both confusing and limited. Plaintiffs generally know they work for "Anderson Merchandisers." They wear uniforms with an "Anderson Merchandisers" logo and carry business cards with the same logo. But, their W-2s and paychecks were issued by "West AM LLC" or "Anderson Merchandisers West," both of which have Texas addresses. Plaintiffs were invited to participate in the Employee Profit Sharing Plan of "ANConnect LLC." When Plaintiffs called the "home office" number in Texas, a recorded message announced: "Thank you for calling ANConnect and Anderson Merchandisers." Plaintiffs know the names of the individuals who hired and supervise them, but do not know the corporate entity that employs them. They know people in the Texas "home office" set their work schedules, control their conditions of employment,

store their employee records, and determine their method of pay. But again, Plaintiffs do not know with certainty which corporate entity employs those individuals. (See J.A. 96-110, setting forth this information in their possession as presented in the proposed First Amended Complaint, *see also* J.A. 49-50, pointing out the same in Suggestions in Opposition to Motion to Dismiss).

Without discovery, Ash and Jewsome cannot fully understand Appellees' corporate structure-which is perplexing, frequently shifting, seemingly conflicting, and understood only by the Defendants-Appellants at this stage. With the information available, Appellants concluded that a number of entities could be "employers" as defined under the FLSA. This is especially true given the broad employer definition under that Act. Based on the information available, Plaintiffs brought their collective action overtime claims against four entities: Anderson Merchandisers, L.L.C. (both the Delaware and Texas entities); West AM, L.L.C.; and ANConnect, L.L.C. (the "Defendants") (J.A. 7-9). In paragraph 8 of the Complaint, Plaintiffs allege:

> During all relevant times, defendants Anderson Merchandisers, LLC, a Delaware corporation, West AM, LLC, a Delaware corporation, Anderson Merchandisers, LLC, a Texas corporation, and ANConnect, LLC, a Texas corporation, were part of an integrated enterprise and, as such, were plaintiffs' employer. During all relevant times, and upon information and belief, all of these defendants shared interrelated operations, centralized control of labor

> relations, common management and common ownership and/or financial control.

(J.A. 8). In paragraphs 10-13 and 16 of the Complaint, Plaintiffs alleged that they, and all others similarly situated, were jointly employed by these four entities under the FLSA. (*Id.*).

In paragraph 34 of the Complaint, Plaintiffs alleged that they and the FLSA Collective "routinely worked in excess of forty (40) hours per workweek without receiving overtime compensation at the rate of one and one-half times their regular rate for their overtime hours worked." (J.A. 12). Summarizing their FLSA violations, in paragraph 42, the Plaintiffs pled:

> Defendants suffered and permitted Plaintiffs and the FLSA Collective to routinely work more than forty (40) hours per week without paying overtime compensation one and one-half times the correct regular rate of pay for all hours worked over forty (40) hours per workweek, requiring them to work during uncompensated breaks, knowing that they did not report all hours worked, and failing to include all compensation when calculating the regular rate of pay.[4]

(J.A. 13-14). Additional details were provided in the Complaint. Describing overtime hours routinely

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[4] Plaintiffs pled they were not being paid for "all overtime hours worked." There were occasions where some, but not all, overtime worked was paid by Defendants. Plaintiffs point this out because as discussed herein, and alleged in the Complaint, when this partial overtime was paid, Defendants paid it at the incorrect rate.

worked but not paid for, Plaintiffs pled in paragraph 24 that they, and others similarly situated, were required to perform work tasks during uncompensated meal breaks and doing so denied them overtime compensation. (J.A. 11). In paragraph 25, Plaintiffs also alleged that they, and others similarly situated, were required to perform work off the clock, which in turn denied them overtime pay. (*Id.*). Plaintiffs described their work tasks. (J.A. 10, ¶ 18). Regarding when the overtime violations occurred, Plaintiffs alleged that they were currently employed as Merchandisers by Defendants. (J.A. 9, ¶¶ 10-11). As Merchandisers, Plaintiffs' pled that they "routinely" worked over forty hours per week without being paid this overtime. (J.A. 12, ¶¶ 34, 42). Plaintiffs alleged that this occurred over the three years prior to their April 21, 2014 filing.[5] (J.A. 12, ¶ 32). In other words, Plaintiffs alleged that they were denied this overtime pay for weeks worked from April 21, 2011 forward.

Regarding the overtime rate of pay, Plaintiffs alleged that Defendants violated the FLSA by failing to pay "one and one-half" their regular rate of pay. (J.A. 10, Complaint, ¶ 21). In paragraph 22, Plaintiffs pled that Defendants paid overtime at "one-half" the regular rate of pay under the "fluctuating work week method" (hereafter "FWW") under 29 C.F.R. § 778.114. (J.A. 10, ¶¶ 22-23). But, Plaintiffs alleged Defendants violated the ability to use the FWW method because Merchandisers were not being paid a set salary regardless of hours worked, and their

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[5] The statute of limitations under the FLSA is two years unless a willful violation occurred, then it would be three years. Jarrett v. ERC Properties, Inc., 211 F.3d 1078, 1082 (8th Cir. 2000).

hours did not fluctuate. (*Id.*). Also, the Plaintiffs alleged that Appellees failed to include all compensation when determining the Merchandisers' regular rate of pay. (J.A. 11, ¶ 26).

B. Defendants' Motion to Dismiss

On May 23, 2014, the Defendants filed a Motion to Dismiss the Complaint under Fed. R. Civ. P 12(b)(6) for failing to meet the pleading requirements set forth in *Twombly / Iqbal*. (J.A. 29-30). Defendants argued that Plaintiffs failed to sufficiently plead an FLSA "employer" relationship regarding any of the four entities. (J.A. 31-35). Defendants also argued that the Complaint set forth a "litany of legal conclusions" and lacked sufficient facts to support an FLSA claim by the Plaintiffs and the putative class. (J.A. 38-38). The Defendants did not file an answer to the Complaint, and nowhere in their Motion to Dismiss did they acknowledge whether any of the entities were the Plaintiffs' "employer" under the FLSA.

On June 6, 2014, the Plaintiffs filed their response to Defendants' motion. The Plaintiffs rebutted each of Defendants' grounds for dismissal and argued lack of merit under existing "on point" case law. (J.A. 47-61). At the end of their brief, the Plaintiffs stated the following:

> Should the Court believe that Plaintiffs' Complaint is somehow deficient, the appropriate remedy is not to dismiss but to allow Plaintiffs leave to file an amended complaint to cure any deficiencies identified by the Court. *See Wisdom v. First Midwest Bank*, 167 F.3d 402, 409 (8th Cir. 1999),

> appeal after remand, 210 F.3d 380 (8th Cir. 2000); *Becher*, 829 F.2d at 291; *Cavallaro, Inc.*, 678 F.3d at 1.

(J.A. 61).

C. The Order Dismissing the Complaint

On July 2, 2014, the district court entered an order granting the Defendants' Motion to Dismiss. (J.A. 76). On July 9, 2014, the court entered the Clerk's Judgment. (J.A. 82). The district court found that Plaintiffs' allegations regarding the employer relationship among the Defendants were "conclusory allegations . . . not supported by facts." (J.A. 78). "[T]he complaint does not contain any well-pleaded facts that would support an employer-employee relationship between any Plaintiff and any Defendant, or any fact that would support a theory of joint employment." (J.A. 79). Instead, the district court found that "Plaintiffs reli[ed] on 'labels and conclusions.'" (*Id.*).

The district also court found that Plaintiffs failed to adequately plead their FLSA claims. (J.A. 79-80). In quoting limited paragraphs from the Complaint, the court found that Plaintiffs only pled legal conclusions without any supporting facts supporting. (J.A. 80). The district court relied on *Attanasio v. Cmty. Health Sys., Inc.*, 2011 WL 5008363 (M.D. Pa. Oct. 20, 2011), in holding that an FLSA complaint must set forth "where exactly they work, what it is they do, [and] how long they have done it for." (J.A. 80). Citing *Attanasio*, the district court stated further:

> For example, the Complaint does not identify when the specific FLSA violation(s) occurred, does not state which Defendant committed the alleged violation(s), and does not identify any particular individual that instructed Plaintiffs to perform overtime work.

(J.A. 80). The district court did not address two "on point" District ofMissouri cases supporting the Appellants' position that the Rule 8 pleading requirements were met for this FLSA claim.[6]

Finally, the district court addressed the Plaintiffs' alternative request for leave to amend the Complaint. (J.A. 81). It rejected this request because "Plaintiffs have not separately moved for leave to amend and have not filed a proposed amendment." (*Id.*). Citing *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737 (8th Cir. 2014), the court found Plaintiffs did not preserve the right to amend the complaint because they never submitted a proposed amendment. (*Id.*). Also, the court stated that it was not required to invite the Plaintiff to file a motion for leave to amend, and that Plaintiffs had "chosen to stand and defend [their] original complaint." (*Id.*).

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[6] In their suggestions in opposition to the Motion to Dismiss, Appellants discussed *Nobles v. State Farm Mut. Auto. Ins. Co.*, 2011 WL 1131100 (W.D. Mo. Mar. 28, 2011); *Arnold v. DirecTV, Inc.*, 4-10-cv-0352-AGF, 2011 WL 839636 (E.D. Mo. Mar. 7, 2011). (J.A. 57-59).

D. The Order Denying Plaintiffs' Rule 59(e) and 60(b) Motion.

On July 11, 2014, the Plaintiffs filed a motion Under Rule 60(b) or Rule 59(e) to Vacate the July 2, 2014 Order and July 9, 2014 Clerk's Judgment, Re-Open the Case and Substitute the Complaint with the First Amended Complaint.[7] (J.A. 83, 85). The Plaintiffs attached a proposed First Amended Complaint. (J.A. 95). The First Amended Complaint cured the insufficient pleading under the *Attanasio* decision relied upon by the district court. Given the available information, the Appellants set forth fifty-eight paragraphs detailing the basis for naming the four entities as defendant employers. (J.A. 96-110, ¶¶ 4-62). Appellants set forth seventeen paragraphs describing their work, where they work, when the illegal conduct occurred, and the supervisors involved at this time (J.A. 111-115, ¶ 72).

Under Rules 59(e) and 60(b), and citing this Court's opinion in United States v. Mask of Ka-Nefer-Nefer, the Appellants requested the district court to set aside its order and judgment and permit filing the First Amended Complaint. (J.A. 83). Appellants pointed out the factual basis for bringing claims against the four entities. (J.A. 49-50). Appellants pointed out that their claims should be addressed on their merits as required under Fed. R. Civ. P. 15(a)(2) and the First Amended Complaint

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[7] Appellants followed direction from this in Court in *Mask*, 752 F.3d at 742-43, which found that "it is well-settled that plaintiffs 'remain free where dismissal orders do not grant leave to amend to seek vacation of the judgment under Rules 59 and 60(b) and offer an amended complaint in place of the dismissed complaint.'"

addressed the pleading deficiencies found by the court. (J.A. 86-90).

On September 11, 2014, the district court issued a two page order denying the Plaintiffs' motion. (J.A. 167). The court found no basis to disturb its prior order and no need to review the proposed First Amended Complaint. (J.A. 167-68) Despite being provided with a proposed First Amended Complaint, the court maintained its position that Appellants chose to stand by their pleadings and not correct the deficiencies set forth in the Defendants' motion to dismiss. (*Id.*). The district court does not mention or address the proposed First Amended Complaint anywhere in its order. On October 1, 2014, the Plaintiffs filed a notice of appeal regarding both district court orders. (J.A. 169).

Summary of Argument

The Appellants' Complaint meets Rule 8's pleading requirements for FLSA claims as required by *Twombly* and *Iqbal*. Given the limited pre-discovery information available, and based on good faith, Appellants sufficiently alleged a joint enterprise relationship among the four corporate defendants. These entities are certainly "plausible" employers under the FLSA's expansive "employer" definition. Appellants are not required to prove all elements of a joint enterprise at the pleading stage. Challenging "employer" status is better suited for summary judgment after some discovery has been conducted.

Appellants sufficiently pled their FLSA claims under existing Circuit Court and District of Missouri standards. Appellants described the work performed and how Appellees' policy requiring work during

unpaid breaks and off-the-clock denied them overtime pay. They alleged routinely working over forty hours per week for a specified period of time, and that Appellees' policies denied them overtime pay. Appellants pled that they were denied the appropriate overtime rate of pay. This included specific allegations as to how Appellees illegally applied the fluctuating workweek overtime rate and failed to include all compensation in determining the overtime rate. Doing so clearly pleads a plausible claim under the FLSA. It gave Appellees fair notice of the claim and the grounds upon which it rests. The court can draw reasonable inference that the Appellees are liable for the misconduct alleged. The allegations in the Complaint were not based on any suspicion.

Pleading standards for FLSA claims under Rule 8 is an issue of first impression for this Court. It should adopt the less onerous standard from the Fourth and Eleventh Circuits—which Appellants easily meet. This comports with *Twombly* and *Iqbal*'s findings as well as the broad remedial nature of the FLSA. But, if it adopts the "middle-ground approach" advocated by the First, Second, Third, and Ninth Circuits, Appellants' Complaint would still comply. Regardless, this Court should not adopt the heightened pleading standard from the Middle District of Pennsylvania utilized by the district court.

If this Court determines that the Complaint does not meet Rule 8's requirements, Appellants should be afforded an opportunity to amend. The district court refused to review the proposed First Amended Complaint. Instead, it wrongfully claimed Appellants stood by their original Complaint unwilling to plead

its heightened standard. Appellants correctly sought leave under Rules 59(e) and 60(b) so their claims could be heard on their merits. But, the district court abused its discretion by (i) refusing to review the First Amended Complaint due to a self-created procedural deadline, (ii) disregarding this Court's repeated warnings under Rule 15(a)(2) and not allowing the claims to be tested on their merits, and (iii) applying a new pleading standard without affording Appellants an opportunity to comply with it.

Argument

I. The Complaint Met the *Twombly/Iqbal* Standard Under Rule 8

A. Standard of Review on Appeal

"[This Court] reviews *de novo* the grant of a motion to dismiss for . . . failure to state a claim under Fed. R. Civ. P. 12(b)(6)." *Hastings v. Wilson*, 516 F.3d 1055, 1058 (8th Cir. 2008). In doing so, a court must accept as true the allegations in the complaint, construe the complaint in the light most favorable to the plaintiff, and draw all inferences in plaintiff's favor. *Ashley County, Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009).

B. Legal Standard Under Rule 8(a)(2) and Twombly/Iqbal.

The amount of detail required in a complaint is set forth in Fed. R. Civ. P. 8(a)(2): "a short and plain statement of the claim showing that the pleader is entitled to relief." The U.S. Supreme Court interpreted this to mean a party must plead facts demonstrating

a claim for relief "is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). A claim is "plausible on its face" when the complaint includes "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] pleading which offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Id.* (citation omitted). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. "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." *Id.* The pleading must be above the speculative level, and contain something more than statements that create a "suspicion" of a legal right of action. *Twombly*, 550 U.S. at 555 (citations omitted).

In *Twombly*, based on information and belief grounded in circumstantial evidence in the form of rate prices, the plaintiffs alleged defendants conspired to prevent competitive entry into the local phone market. *Id.* at 551. The plaintiffs "flatly pled" that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another." *Id.* at 555. The Supreme Court found a failure to plead a "plausible" claim. Instead, the plaintiffs pled a conceivable one. *Id.* at 570. Plaintiffs simply pled legal conclusions. *Id.* at 555. In summary, pleading a suspicion of violating the law is not sufficient. In *Iqbal*, the court found that plaintiffs

only provided a formulaic recitation of a constitutional discrimination claim. 556 U.S. at 681. "It is the conclusory nature of respondent's allegations . . . that disentitles them to the presumption of truth." *Id.*

This Court addressed *Twombly* and *Iqbal* in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009). "Twombly and Iqbal did not change (the) fundamental tenet of Rule 12(b)(6) practice." *Id.* at 594. As this Court explained:

> Rule 8 does not [ ] require a plaintiff to plead 'specific facts' explaining precisely how the defendant's conduct was unlawful. Rather, it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior, so long as the facts pled 'give the defendant fair notice of what the claim is and the grounds upon which it rests,' and 'allow [ ] the court to draw the reasonable inference' that the plaintiff is entitled to relief.

Id. at 595 (internal citations omitted). As discussed below, the Appellants' Complaint set forth facts meeting the standards described in *Braden* regarding a plausible "employer" relationship among the four Defendants and sufficient facts regarding the FLSA violations.

1. A Sufficient Employer Relationship was Pled

Appellants alleged that four related entities acted as their "employers" under the FLSA. Appellants possessed limited information at the pre-discovery pleading stage. This limited information was complex and at times conflicting, e.g., there were varying and

sometimes inconsistent corporate names during the relevant time period on Appellants' paystubs and W-2s, employee handbook, company policies and procedures, logos on uniforms and business cards, miscellaneous employment-related memoranda given to Appellants at work, information published on Anderson Merchandisers' website, and corporate filings with various Secretaries of State.[8]Appellants concluded they had little choice but to name the four corporate entities as defendants under the FLSA, and in turn, pled the joint enterprise relationship.[9]

Requiring Appellants to plead facts conclusively supporting a joint employment relationship before discovery would create an impossible hurdle at the outset of litigation. Accordingly, Appellants pled that, based on the information now available to them, the four named corporate defendants shared interrelated operations, centralized control of labor relations, common management and common

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[8] These issues were pointed out to the district court in the Appellants' response to the Motion to Dismiss. (J.A. 49-50).

[9] This is not a situation where the direct employer is easily identifiable to Appellants, as was the case in the *Cavallaro v. UMass Memorial Health Care, Inc.* opinion cited by the district court in its July 2, 2014 Order. (J.A. 79). There, the court recognized as "implicit" in the FLSA employer analysis this underlying "assumption that the entity for which plaintiffs work is identifiable." 2011 WL 2295023, at *5 (D. Mass. June 8, 2011) (emphasis added), vacated and remanded in part, affirmed in part, 678 F.3d 1, 10 (1st Cir. 2012). Even though the district court there believed the plaintiffs knew the identity of the direct employer but refused to plead it for strategic reasons, the court still allowed the plaintiffs leave—for a third time—to amend to correct pleading deficiencies. Appellants' direct employer here is far from easily identifiable.

ownership, and/or financial control. (J.A. 8, ¶ 8). Appellants also pled that all four entities were their "employers" under the FLSA. (J.A. 8-9, ¶¶ 9, 12-15). Doing so is consistent with applicable case law. *See e.g., White v. 14051 Manchester, Inc.*, 4:12CV469 JAR, 2012 WL 2117811, at *3 (E.D. Mo. June 11, 2012) (alleging an "enterprise relationship" among the defendants meets the employer pleading requirements to survive a Rule 12 motion); *Takacs v. Hahn Automotive Corp.*, C-3-95-404, 1999 WL 33117265, at *5 (S.D. Ohio Jan. 4, 1999) (applying integrated enterprise test and finding a sufficient degree of interrelatedness between defendants such that plaintiffs were justified in believing that one defendant was responsible for other defendant's failure to comply with FLSA); *Szymula v. Ash Grove Cement Co.*, 941 F. Supp. 1032, 1036 (D. Kan. 1996) (recognizing that "under the FLSA, a parent corporation may be liable for the acts of its subsidiaries when the various entities act as an integrated enterprise").

The Eighth Circuit has not adopted any specific test or pleading requirement for joint employers under the FLSA. *See Arnold v. DirecTV, Inc.*, 4-10-cv-0352-AGF, 2011 WL 839636, at *6 (E.D. Mo. Mar. 7, 2011). However, in doing so, this Court should keep in the mind the FLSA's broad remedial nature and expansive definitions. The FLSA defines "employer" broadly to include any person acting directly or indirectly in the interest of an employer in relation to an employee. 29 U.S.C. § 203(d). The U.S. Supreme Court recognized the "striking breadth" of the FLSA's definition of persons to be considered "employees"

under the Act. *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1350 (1992).

In light of this direction, and the broad statutory definition, most Circuits have found that "employer" under the FLSA should be interpreted in an expansive manner. See *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cnty., Md.*, 684 F.3d 462, 472 (4th Cir. 2012) ("[t]he statutory definition of an 'employer' [in the FLSA] is broad, encompassing entities that act 'directly or indirectly in the interest' of an employer with respect to an employee" and "[t]he term 'is not limited by the common law concept of employer, and is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes.") (citation omitted); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1309 (11th Cir. 2013) (acknowledging overwhelming weight of authority applying a broad definition of employer under FLSA); *Sasso v. Cervoni*, 985 F.2d 49, 50 (2d Cir. 1993) (same); *Boucher v. Shaw*, 572 F.3d 1087, 1090 (9th Cir. 2009) ("We have held that the definition of 'employer' under the FLSA is not limited by the common law concept of 'employer,' but 'is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes.'") (citations omitted); *Reich v. Circle C Investments, Inc.*, 998 F.2d 324, 329 (5th Cir. 1993) ("The FLSA's definition of employer must be liberally construed to effectuate Congress' remedial intent."); *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984) (same).

Appellants should not be required to plead any more particularly at this case's infant stage regarding the "employer" relationship with the four corporate entities named as Defendants. The only

issue under a Rule 12(b)(6) review is whether Appellants sufficiently pled the interrelationship between the defendants such that they are joint employers. Given the information available, it is "plausible" that the four entities are Appellants' employers under the FLSA. Case law within this Circuit provides guidance and confirms Appellants' approach.

In *Arnold*, the plaintiffs pled that they were "jointly employed" by various corporate defendants. 2011 WL 839636, at *6-7. Citing *Twombly* and *Iqbal*, the defendants moved to dismiss the FLSA claims under Rule 12(b)(6). Like here, the defendants argued that plaintiffs' bare allegation of "joint employers" was conclusory, and that the complaint failed to plead any supporting facts. Applying the broad definition of employer under the FLSA, and acknowledging the high hurdle in granting a Rule 12(b)(6) motion, the Eastern District of Missouri found that the plaintiffs had met the pleading standards. *Id.* at *6. Realizing the need for discovery to ultimately resolve employer relationship issues, *Arnold* concluded that this "matter is one that is appropriate for consideration on a motion for summary judgment, but not on a motion to dismiss." *Id.* *6. This makes the most sense. It requires the defendants to admit or deny the employer relationship (instead of playing shell games with their corporate identities) and permits discovery on the issue.

Arnold rejected *Loyd v. Ace Logistics, LLC*, 08-CV-00188-W-HFS, 2008 WL 5211022, at *4 (W.D. Mo. Dec. 12, 2008), a Western District opinion which

required more detailed pleading. *Id.* at *7.[10] But, *Arnold* was later adopted in the Western District in *McClean v. Health Sys., Inc.*, 11–03037–CV–S–DGK, 2011 WL 2650272, at *2 (W.D. Mo. July 6, 2011) (addressing both *Loyd* and *Arnold*, but siding with *Arnold* in holding that an allegation of a joint employer relationship was sufficient to survive Rule 12(b)(6) motion).

This is the pleading stage. Appellants are not required to set forth evidentiary proof in their Complaint. This is especially true when Appellees possess this information. Ultimately, determining whether joint employment exists is appropriate with a summary judgment motion rather than Rule 12(b)(6). *See e.g., Ayala v. Metro One Sec. Sys., Inc.*, No. 11-CV-233 JG ALC, 2011 WL 1486559, at *6 (E.D.N.Y. Apr. 19, 2011) (in rejecting motion to dismiss, court found plaintiff "is entitled to discovery of any facts within the defendants' possession that may reveal the defendants to be a single integrated enterprise."); *Olvera v. Bareburger Grp. LLC*, No. 14 CIV. 1372 PAE, 2014 WL 3388649, at *6 (S.D.N.Y. July 10, 2014) ("Although plaintiffs may ultimately fail to prove that the franchisor defendants were joint employers under the FLSA and NYLL, they have pled enough facts to survive a motion to dismiss, and are thus entitled to test their claims in

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[10] It is worth noting in *Loyd* that one of the named defendants answered affirming the employer relationship. Regarding the other parent corporation defendant, the district court dismissed this party but stated that it could be added later in the case after discovery had been conducted. So, its circumstances vary from here since no named defendant is admitting or denying an FLSA employer relationship.

discovery."); *Myers v. Garfield & Johnson Enterprises, Inc.*, 679 F.Supp.2d 598, 611 (E.D. Pa. 2014) (denying the defendant's motion to dismiss the plaintiff's Title VII and PHRA claims brought pursuant to a joint employer theory of liability because plaintiff had not yet had the opportunity to conduct discovery); *Braden v. County of Washington*, No. CIV. A. 08-574, 2008 WL 5129919, at *3 (W.D. Pa. Dec. 5, 2008) (denying motion to dismiss because "factual development will be required to address" whether a joint employer relationship can be established).

The district court should have denied Appellees' motion to dismiss and required them to admit or deny an "employer" relationship in an Answer. In turn, after some discovery has been completed, entities that believe evidence is not sufficient to establish an FLSA employer relationship could move for summary judgment. As of now, based on information available, Appellants properly met their good faith pleading requirements regarding these four entities acting as their "plausible" FLSA employer.

2. Sufficient Allegations of an FLSA Violation Were Pled.

Appellants alleged as current Merchandisers that they worked over forty hours per workweek without receiving overtime. They alleged that this routinely occurred on a weekly basis from April 21, 2011 to the present. Going beyond statutory elements, Appellants pled that merchandisers were required to perform work tasks (defined in Complaint ¶¶ 17-18) during uncompensated meal breaks and outside regular work hours when they were off the

clock. Both of these practices denied them overtime pay. Appellants also pled Appellees' failure to pay the correct overtime rate of pay. Again, going beyond reciting this legal conclusion, Appellants pled specifics on how this occurred. This included detailed pleading of how Appellees improperly applied the "fluctuating work week" under 29 C.F.R. § 778.114 and failed to include all compensation when calculating the regular rate of pay. Appellants repeatedly pled that all of these policies and facts denied Merchandisers overtime as required under the FLSA. Assuming all these facts to be true, Appellants are "entitled to relief" under the FLSA. This claim is "plausible" in that a "reasonable inference" exists "that the defendant is liable for" violating the FLSA. *Twombly*,127 S. Ct. at 1974. "Fair notice" has been provided as to what the claims are and on what grounds they rest. *Braden*, 2008 WL 512919, at *3. It is difficult to understand Appellees' claim that they have no idea what these claims are about.

The level of pleading required under Rule 8 in an FLSA claim varies among courts. The Eighth Circuit has yet to address this issue. The Fourth and Eleventh Circuits have adopted a "less onerous pleading requirement," which has been applied in the Eastern District of Missouri. The First, Second, Third and Ninth Circuits have adopted a "middle-ground approach" to factual pleading in FLSA matters. This approach has been applied in both the Eastern and Western Districts of Missouri. But here, the district court applied a heightened pleading standard from the Middle District of Pennsylvania. *See* July 2, 2014 Order at 5 (citing *Attanasio*, 2011

WL 5008363). Given the broad remedial nature of the FLSA, this Court should adopt the Fourth and Eleventh Circuit's "less onerous" pleading requirement. Regardless, Appellants met the "middle-ground approach" by pleading sufficient factual details beyond the statutory elements of being denied overtime pay under the FLSA. This Court should not adopt the district court's heightened standard which has been rejected by every Circuit to date.

a. The "Less Onerous" FLSA Pleading Standard:

A "less onerous" FLSA pleading standard was recently adopted by the Eastern District of Missouri in *Williams v. Central Transport International, Inc.*, No.: 4:13-cv-2009, 2014 WL 1344513 (E.D. Mo. April 4, 2014). There, the court undertook a survey of opinions regarding FLSA pleading under Rule 8. *Id.* at *3-4. *Williams* rejected a heightened pleading requirement and joined the Fourth and Eleventh Circuits in finding that a plaintiff only needs to allege each element of the FLSA claim to meet Rule 8 requirements under *Twombly*. *Id.* at *3 (citing *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 349 (4th Cir. 2005); *Sec'y of Labor v. Labbe*, 319 Fed. App'x 761, 763–64 (11th Cir. 2008) (to properly plead an FLSA claim, all that is required is an allegation of a failure to pay overtime compensation to covered employees).

In *Chao*, the district court granted defendant's motion to dismiss plaintiff's FLSA claim. But, this was done without prejudice and permitted an amended complaint to be filed. 415 F.3d at 344. After the amended complaint was filed, defendants again

move to dismiss for failing to state a claim. *Id.* In granting the motion, the district court required identification of supervisors in charge, dates of employment, and nature of employment relationship. *Id. Chao* also dealt with "joint enterprise" allegations among several defendants. *Id.* The Fourth Circuit found that the complaint sufficiently alleged all elements of an FLSA claim. *Id.* at 348. Defendants were an "employer" or enterprise covered by the Act. *Id.* The complaint identified the employees who allegedly worked overtime without appropriate pay. *Id.* It stated that defendants violated the overtime provisions and described how this occurred. *Id.* Finally, it sought relief for a specified period of time (within the FLSA two year statute of limitations). *Id.*

In *Labbe*, the Eleventh Circuit reasoned that a claim for unpaid wages or lost overtime under the FLSA was straightforward compared to the level of complexity that existed in *Twombly*'s anti-trust claim. 319 F. App'x at 763. The quantity and specificity of facts necessary under the FLSA is much lower. *Id.* Pleading that defendant repeatedly violated the FLSA by failing to pay overtime to employees who worked in excess of forty hours per week was sufficient. *Id.*

Williams pointed out that *Twombly* requires only "enough facts to state a claim to relief that is plausible on its face." *Id.* at *3 (quoting *Twombly*, 550 U.S. at 570). "Thus, the plaintiff here must simply allege enough facts showing that: (1) he was employed by defendant; (2) the work involved

interstate activity; and (3) plaintiff performed work for which he was under-compensated." *Id.*[11]

Appellants certainly meet the requirements under the "less onerous" approach adopted by the Fourth and Eleventh Circuits as discussed in *Williams*. They have pled employment with defendants and work involving interstate commerce. Appellants alleged that they routinely work in excess of forty hours per workweek, and working through unpaid breaks and other "off the clock" work denied them overtime pay. They also specifically described how Appellees applied the incorrect overtime rate of pay.

b. The "Middle-Ground" FLSA Pleading Standard.

While the "less onerous" standard should be adopted by this Court, the Appellants would still meet the "middle-ground" approach applied by the First, Second, Third, and Ninth Circuits. In *Davis v. Abington Memorial Hospital*, 765 F.3d 236 (3rd Cir. 2014), the Third Circuit recognized courts are divided over the pleading requirements for FLSA claims. *Id.*

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[11] *Williams* found two cases as instructive: *Nicholson v. UTi Worldwide, Inc.*,2010 WL 551551 (S.D. Ill. Feb. 12, 2010) (Rule 8 met where plaintiff alleged having to work before and after shifts and during breaks without pay finding that "[a]lthough [plaintiff] does not specifically allege he worked more than forty hours in one week, he alleges he worked 'overtime.' Viewing that allegation in [plaintiff's] favor and in the context of the pleading, the [c]ourt construes that to mean more than forty hours a week."); *McDonald v. Kellogg Co.*, 2009 U.S. Dist. LEXIS 37365 (D. Kan Apr. 27, 2009) (Rule 8 met were plaintiff alleged a policy and practice of not paying overtime and refusing to pay employees appropriate rate for overtime hours worked).

at 241. Davis adopted the Second Circuit's "middle-ground" approach set forth in *Lundy v. Catholic Health System of Long Island, Inc.*, 711 F.3d 106, 241-42 (2d Cir. 2013). "[I]n order to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege [forty] hours of work in a given workweek as well as some uncompensated time in excess of the [forty] hours." *Id.* (citing *Lundy*, 711 F.3d at 114) (citing 29 U.S.C. § 207(a)(1)).

In *Lundy* and *Davis*, the plaintiffs alleged failing to pay for time worked during uncompensated breaks, outside of scheduled shifts and during training time. *Id.* at 241-42. But, unlike here, the plaintiffs failed to plead that they were working more than 40 hours per workweek when the off-the-clock work occurred. In *Lundy*, the plaintiffs alleged that they "typically" worked 37.5 or 30 hours per workweek. 711 F.3d at 114. They pled not being compensated for time during meal breaks, work done outside their schedule, or during training. *Id.* Since plaintiffs pled that they typically worked under 40 hours per workweek, the court was left to guess whether the additional off-the-clock time was for regular pay (*i.e.*, "gap time" not permitted for recovery under the FLSA), overtime pay, or both. *Lundy* held that the overtime claims as pled were implausible. *Id.* at 115.

Similarly, in *Davis*, one plaintiff alleged that she "typically" worked shifts totaling between 32 and 40 hours per workweek. 765 F.3d at 242. This plaintiff encountered the same problem as in *Lundy*. Other plaintiffs in *Davis* alleged that they "typically" worked 40-hour workweeks but failed to allege that they performed the off-the-clock work at issue during

these typical weeks. *Id.* Like *Lundy, Davis* found that a failure to plead these facts made the FLSA claim implausible. *Id.* Regardless, *Davis* found that the detailed pleading required by the district court in this matter falls outside the "middle-ground" approach.

> For instance, a plaintiff's claim that she "typically" worked forty hours per week, worked extra hours during such a forty-hour week, and was not compensated for extra hours beyond forty hours he or she worked during one or more of those forty-hour weeks, would suffice.

Id. at 243 (emphasis added).

On November 12, 2014, the Ninth Circuit addressed FLSA pleading requirements under the *Twombly/Iqbal* standard. *Landers v. Quality Communications, Inc.*,12-15890, 2013 WL 5840039 (9th Cir. Nov. 12, 2014). Acknowledging that this was a case of first impression for the Ninth Circuit, *Landers* observed that the First, Second, Third, and Eleventh Circuits had addressed this issue. *Id.* at *2, *3-5.[12] Some of these opinions have been discussed herein, *i.e., Lundy, Davis*, and *Labbe, supra*.

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[12] *Pruell v. Caritas Christi*, 678 F.3d 10, 13 (1st Cir. 2012); *Lundy v. Catholic Health System of Long Island*, 711 F.3d 106 (2d Cir. 2013); *Nakahata v. New York-Presbyterian Healthcare System, Inc.*, 723 F.3d 192 (2d Cir. 2013); and *Dejesus v. HF Management Services, LLC*, 726 F.3d 85 (2d Cir. 2013). *Id.* pgs. *3-4. It also discussed *Sec'y of Labor v. Labbe*, 319 F.App'x 761 (11th Cir. 2008) (per curiam), and the more recent *Davis v. Abington Memorial Hospital*, 765 F.3d 236 (3d Cir. 2014). *Id.* at *5.

In addition to these three cases, *Landers* discusse *Pruell v. Caritas Christi*, 678 F.3d 10 (1st Cir. 2012). There, the plaintiffs simply alleged that they regularly worked over forty hours in a workweek and were not paid overtime. *Id.* at *13. Regarding plaintiffs' allegations, the court found: "while not stating ultimate legal conclusions, [they] are nevertheless so threadbare or speculative that they fail to cross the line between the conclusory and the factual." *Id.* This one allegation was "too meager, vague, or conclusory to . . ." nudge plaintiffs' claim "from the realm of mere conjecture . . . to the realm of plausibility," as required by *Twombly* and *Iqbal*. *Id.* The court stated that while the complaint was not deficient by a "wide margin," pleading examples of unpaid time, a description of work performed, or estimate of overtime work would have met the requirements. *Id.* at 14.

Not discussed in *Landers*, a post-*Pruell* First Circuit opinion addressed FLSA pleading requirements-*Manning v. Boston Med. Ctr. Corp.*, 725 F .3d 34 (1st Cir. 2013). There, the court found that a plaintiff was required to plead: (1) he was employed by defendant; (2) the work involved interstate activity; and (3) plaintiff performed work for which he was under-compensated. *Id.* at 43. Also, a "claim for unpaid overtime wages must demonstrate that the plaintiffs were employed 'for a workweek longer than forty hours' and that any hours worked in excess of forty per week were not compensated 'at a rate not less than one and one-half times the regular rate.'" *Id.* at 43. (quoting 29 U.S.C. § 207(a)(1)). Plaintiff met all these elements in *Manning*. Regarding the work weeks at issue, *Manning* found this element was met

when reviewing the complaint as a whole. A plaintiff alleged that she "regularly" worked more than forty hours per work week. Therefore, allegations of unpaid work during breaks, before or after shifts, and in training periods, would thus entitle plaintiff to overtime compensation. *Id.* at 46.

As one can see, *Landers* correctly acknowledged differences among courts. *Id.* at *3. Landers found that no Circuits were in "consensus on what facts must be affirmatively pled to state a viable FLSA claim post-*Twombly* and *Iqbal*." *Id.* But, it concluded that no Circuit "has interpreted Rule 8 as requiring plaintiffs to plead in detail the number of hours worked, their wages, or the amount of overtime owed to state a claim for unpaid minimum wages or overtime wages." *Id.*

In *Landers*, the plaintiff pled a failure to pay minimum wage and being subject to a "piecework no overtime" wage system whereby he worked in excess of forty hours per week without being paid overtime. *Id.* at *1. Plaintiff pled that defendant failed to pay for all overtime hours worked and/or the overtime rate was incorrect, resulting in an overtime payment less than what was required under the FLSA. *Id.* Defendant moved to dismiss under Rules 8(a)(2) and 12(b)(6). *Id.*

Landers was persuaded by the findings in the First, Second, and Third Circuits. *Id.* at *6 (citing *Pruell, Lundy*, and *Davis, supra*). But, it also agreed with the Eleventh Circuit's findings in *Labbe*, that "detailed factual allegations regarding the number of overtime hours worked are not required to state a plausible claim . . ." *Id.* "After all," detailed employment records concerning the plaintiffs' compensation and

schedule is in control of the defendants in these matters. *Id.* But, "conclusory allegations that merely recite the statutory language are inadequate." *Id.* Regarding what was required, *Landers* held:

> a plaintiff asserting a claim to overtime payments must allege that she worked more than forty hours in a given workweek without being compensated for the overtime hours worked during that workweek.

Id. In making these allegations, the plaintiff can estimate the length of her average workweek and any other facts that will permit the plausibility of her claim. *Id.* In *Landers*, the plaintiff merely alleged that he was not paid for overtime hours worked with no other detail as to what weeks of his employment this applied. *Id.* At *7. The plaintiff in *Landers* expressly declined the district court's request to amend his complaint and elected to stand by his claims as alleged (*e.g.*, the Ninth Circuit indicated willingness for plaintiff to amend to meet the determined standard). For that reason, the Ninth Circuit did not remand the matter back to the district court for amendment. *Id.*

A Western District of Missouri case appears to apply the "middle-ground" approach. In *Nobles v. State Farm*, the plaintiffs pled that they performed work during uncompensated periods and that they "often" worked over 40 hours in a week. They alleged that due to this practice and policy, they were denied overtime compensation for this work. 2011 WL 1131100, at *3. The court found that plaintiffs met the *Twombly/Iqbal* pleading requirements.

> Plaintiffs are not required to allege the number of hours of overtime they worked. Plaintiffs have sufficiently described an ongoing policy by which State Farm routinely requires that work tasks such as logging into computer programs, answering emails, and completing phone calls be performed before and after shifts and during lunch breaks. While Plaintiffs do not propose a numerical figure, they adequately describe the time worked for which they did not receive wages.

Id. at *3-4 (emphasis added). State Farm similarly argued that plaintiffs provided insufficient detail as to its policy and practice. But, *Nobles* found, "even under *Twombly*, Plaintiffs are not required to plead with such specificity." *Id.* at *4.

> That Plaintiffs have described what comprises their overtime tasks, how those tasks relate to their job duties, and the practice and policy by which State Farm prevents appropriate compensation is sufficient at this stage of litigation. Plaintiffs have adequately pled their FLSA claim.

Id. The plaintiffs also met the collective action pleading requirement.[13] *Id.* Similarly, in *Arnold v. DirecTV*, the Eastern District of Missouri denied the defendants' motion to dismiss the FLSA collective compliant. Plaintiffs' "allegations—such as Defendants'

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[13] The plaintiffs in *Arnold* asserted that State Farm's practice and policy of requiring work tasks to be performed before and after shifts applied to similarly situated employees, and as such, they are also entitled to relief. 2011 WL 839636, at *4.

alleged policies" describing how overtime pay was denied—were sufficient. 2011 WL 839636, at *4 (citing *Secretary of Labor v. Labbe*, 2008 WL 4787133, at *2 (11th Cir. 2008)).

All these cases mostly track the same requirements for pleading an FLSA claim under Rule 8. Something other than basic allegations that plaintiff worked more than forty hours without receiving overtime pay is required. This includes some description as to what time frame applies (*e.g.*, the "given weeks") as well as basic facts describing how overtime was denied. However, all the Circuits clearly reject the district court's reliance on the heightened pleading requirements from *Attanasio*, *supra*. Where one works, who their supervisor is, description of work performed, when specific FLSA violations occurred, and who instructed work off the clock are unnecessary allegations when meeting Rule 8's requirements post-*Twombly/Iqbal.*

If this Court were to adopt the approaches discussed in the First, Second, Third and Ninth Circuits, Appellants' Complaint would comply. Appellants alleged a policy of requiring work through unpaid breaks and "off the clock" and that this denies them overtime pay. Appellants described the overtime work performed. They pled that Appellees use the inappropriate overtime rate of pay under the FWW and fail to include all compensation in calculating this rate as required under the FLSA. Appellants alleged routinely working more than forty hours per week and the workweeks at issue are all workweeks

from April 21, 2011 to the present.[14] This goes far and beyond parroting FLSA language. It identified the workweeks at issue and described how Appellees deny the overtime pay in sufficient detail. More than a "plausible" claim is alleged, and Appellees are certainly on notice of the basis for the claim.

This Court should not confuse proper FLSA pleading with allegations of "parroting" statutory language. Most times, pleading the FLSA elements equates pleading sufficient facts. As an example, Smith pleads currently working for ACME on its widget assembly line. Smith pleads that ACME is an "employer" under the FLSA. Smith pleads that while he worked for ACME, he routinely worked over forty hours each week and ACME required him to perform work off the clock with no overtime. Smith seeks lost overtime for the past three years. This meets the FLSA pleading standards under Rule 8 as discussed above. This is not pleading a simple statutory violation. That would entail Smith only pleading that his employer ACME failed to pay him overtime for hours worked.

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[14] In *Manning*, *supra*, alleging that you regularly work more than 40 hours per week coupled with having to perform unpaid work during unpaid breaks, before and after shifts, and unpaid training creates a plausible claim for overtime. 725 F.3d at 46. In *Chao*, *supra*, court found weeks at issue were identified because plaintiff sought pay for weeks within two years from the filing date under the FSLA's statute of limitations. 415 F.3d at 344.

II. The District Court Abused its Discretion in Denying Appellants' Rule 59(e) and 60(b) Motion.

Rule 15(a)(2) requires claims to be tested on their merits. Despite the district court's broad discretion in denying post-judgment motions under Rules 59(e) and 60(b), this Court has repeatedly warned courts of Rule 15(a)(2)'s requirement. Not allowing Appellants' claims to be tested on their merits is a "manifest injustice" under Rule 60(b) and "justifies relief" under Rule 59(e). The district court abused its discretion by failing to review the proposed First Amended Complaint, failing to allow the amendment so the claims could be tested on their merits, and imposing a new heightened FLSA pleading standard without allowing Appellants an opportunity meet them via amendment. Therefore, if this Court finds Appellants' initial Complaint deficient under Rule 8 for pleading an FLSA claim, Appellants should be granted leave to file their First Amended Complaint.

A. Standard of Review on Appeal for Post-Judgment Motions.

Review on appeal of a district court's decision to deny a post-judgment Rule 59(e) or 60(b) motion is abuse of discretion. *See Christensen v. Qwest Pension Plan*, 462 F.3d 913, 920 (8th Cir. 2006); *Arnold v. Wood*, 238 F.3d 992, 998 (8th Cir. 2001). Regarding post-judgment motions to amend, this Court has routinely found no abuse of discretion where there was inadequate pleading, futility of the proposed amendment, or other questionable behavior by plaintiff. *See Horras v. Am. Capital Strategies,*

Ltd., 729 F.3d 798, 804 (8th Cir. 2013) *cert. denied*, 134 S. Ct. 1346, 188 L. Ed. 2d 310 (2014) ("A district court may appropriately deny [post-judgment] leave to amend where there are compelling reasons such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment.") (citations omitted); *Drobnak v. Andersen Corp.*, 561 F.3d 778, 788 (8th Cir. 2009) ("Given the shifting theories of liability, the absence of factual support, and plaintiffs' less-than-forthcoming approach to this case, we conclude that the district court's frustration was well founded and that its dismissal with prejudice was appropriate."); *U.S. ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 824 (8th Cir. 2009) (proposed post-judgment amendment denied because it re-argued the same issue). There was no evidence before the district court that any of these circumstances existed here. Mainly, this is due to the district court not even reviewing the First Amended Complaint.

Despite a district court's broad discretion, this Court has repeatedly warned courts not to ignore Rule 15(a)(2)'s requirement that all claims be tested on their merits. *See Mask*, 752 F.3d at 743 (in reviewing post-judgment motion to amend, and despite abuse of discretion standard, a district court "may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits."); *Pub. Pension Fund Grp. v. KV Pharm. Co.*, 679 F.3d 972, 987 (8th Cir. 2012) (same); *Roop*, 559 F.3d at 824 (district court "may not ignore the Rule 15(a)(2) considerations that favor

affording parties an opportunity to test their claims on the merits . . . .").

The Eleventh Circuit found "a district court's discretion to dismiss a complaint without leave to amend is severely restricted by Fed. R. Civ. P. 15(a), which directs that leave to amend 'shall be freely given when justice so requires.'" *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988). "Unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Id.* "The same standards apply when a plaintiff seeks to amend after a judgment of dismissal has been entered by asking the district court to vacate its order of dismissal pursuant to Fed. R. Civ. P. 59(e)." *Id.* (citations omitted). This Court appears to follow *Thomas'* logic. All the cases where no abuse of discretion was found, a substantial reason existed supporting the district court's denial for leave to amend.

B. Appellants' Ability to Amend is "Justified Relief" and Would Cure a "Manifest Injustice."

Nine days after the district court dismissed Appellants' Complaint, they filed a motion under Rules 59(e) and 60(b) seeking leave to amend.[15] This Court recently stated that "leave to amend will be granted if it is consistent with the stringent standards governing the grant of Rule 59(e) and Rule 60(b) relief." *Mask*, 752 F.3d at 742-43 (citations omitted). Rule 60(b) provides, "[o]n motion and just terms, the court may relieve a party or its legal

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[15] This met the 28 day filing requirement under Rule 59(e) and the "reasonable time" filing requirement under Rule 60(c)(1).

representative from a final judgment, order, or proceeding for the following reasons," including "any [reason] that justifies relief." A motion under Rule 59(e) to alter or amend the judgment should be granted if it shows "the need to correct a clear error of law or prevent manifest injustice." *Innovative Home Health Care, Ins. v. PT-OT Assoc.*, 141 F.3d 1284, 1286 (8th Cir. 1998). For purposes of this appeal, there is little difference in seeking relief under Rule 59(e) or Rule 60(b). Other than one having a set filing deadline, both present the district court broad discretion and an opportunity to correct a "manifest injustice" or an issue "justifying relief."

In their Rule 59(e) and 60(b) motion, Appellants argued to the district court that their claim must be tested on its merits under Rule 15(a)(2). (J.A. 85). Appellants stated that the only way this can occur is by allowing an amended complaint to provide the additional facts requested regarding the employer relationship and FLSA claim. Appellants attached a thoroughly pled First Amended Complaint. Not allowing this leave would be a "manifest injustice." Granting leave to file the First Amended Complaint is "justified relief."

In denying Appellants' motion, the district court did not discuss the First Amended Complaint. It simply stated, "The Court finds no basis to disturb its prior Order or Judgment." (J.A. 167-68). The district court continued to claim that Appellants were standing by their original Complaint. Of course, this is simply incorrect given the filing of the proposed First Amended Complaint.

C. The District Court Abused its Discretion:

The district court abused its discretion in three ways. First, it refused to review the proposed First Amended Complaint. Appellants speculate that the court refused to do so under a self-created procedural deadline. Second, by not reviewing the First Amended Complaint, the district court dismissed Appellants' claims without them being tested on their merits—violating the repeated warning from this Court regarding Rule 15(a)(2). Finally, the court adopted a heightened pleading requirement from the Middle District of Pennsylvania. Every Circuit, and all District Court of Missouri opinions, reject this heightened FLSA pleading requirement. Not permitting the Appellants an opportunity to meet this new standard via amendment was an abuse of discretion.

1. The District Court Abused its Discretion by Failing to Review the Proposed First Amended Complaint.

Nowhere in its September 11, 2014 order does the district court address the proposed First Amended Complaint. It is apparent no review was done since the court claimed Appellants were standing by their initial Complaint. Appellants speculate that the district court took issue of <u>when</u> the proposed amendment was filed. In a footnote, the district court stated Appellants could have submitted their proposed amendment after the May 23, 2014 Motion to Dismiss was filed, but before the July 2, 2014 order. (J.A. 168, fn. 1). Since they did not, it was determined Appellants chose to stand by their original Complaint. No Federal Rule of Civil

Procedure limits leave to amend during this time frame. Yet, Appellants' failure to do so appears to be the basis for the district court's refusal to review the proposed First Amended Complaint.

Implementing this timeframe deadline to amend creates a requirement outside the Federal Rules of Civil Procedure. In essence, it would require a plaintiff responding to a Rule 12(b)(6) motion to either oppose the motion or concede to all of defendant's arguments by seeking leave to cure all alleged deficiencies. Requiring a plaintiff to do both within this timeframe is inherently unfair. It creates a self-defeating pleading practice for plaintiffs (*i.e.*, arguing that your Complaint meets Rule 8 requirements while alternatively seeking leave to correct all the alleged Rule 8 deficiencies). Nothing in the Rules of Civil Procedure requires this approach. If permitted, it will encourage Rule 12 motions in all cases and lead to wasted time and resources for the parties and courts.

Instead, a district court should permit the plaintiffs to defend their Complaint when challenged under Rule 12(b)(6).[16] If any deficiencies are found, the court can exercise its discretion and invite a remedy via amendment. If the court chooses not to exercise this discretion, the plaintiff can seek leave to

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16 If an obvious mistake is set forth in a Rule 12(b)(6) motion, then a plaintiff could seek leave to amend to correct the deficiency as part of the response (*e.g.*, pled a claim outside the statute of limitations, failed to include a necessary element in legal claim, etc.). This is not the case here. Appellants' pleading standards were well founded in Circuit case law and District Courts in Missouri.

amend under Rules 59(e) or 60(b).[17] But, denying both of these routes-as the district court has done here-denies a claim to be heard on its merits. Doing so is an abuse of discretion.

2. The District Court Abused its Discretion in Failing to Allow Appellants' Claims to be Tested on Their Merits.

The district court erroneously concluded that Appellants chose to stand by their original Complaint. Appellants indicated a willingness to amend, if necessary, when responding to the motion

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[17] *See Haynes v. City of Chicago*, 2014 WL 274107, at *2 (N.D. Ill. January 24, 2014) (granting plaintiff's request to re-open case under both Rules 60(b) and 59(e) to amend complaint; acknowledging that plaintiff "was not given an opportunity to amend his complaint," which was contrary to the rule of thumb that plaintiff generally should be given one opportunity to amend unless there was undue delay by plaintiff); *In re Bear Stearns Companies, Inc. Securities, Derivative and ERISA Litigation*, 2011 WL 4357166, at *2 (S.D.N.Y. Sept. 13, 2011) (granting plaintiffs' motion under Rule 59(e) to amend order to provide that dismissal of the first amended complaint was without prejudice and granting leave to file a second amended complaint - noting that the following analysis was instructive in ruling on Rule 59(e) motion: "A sound theory of pleading should normally permit at least one amendment where, as here, the Plaintiffs might be expected to have less than complete information about defendants' organization and ERISA responsibilities, where there is no meaningful evidence of bad faith on the part of the plaintiffs, and where there is no significant prejudice to defendants."); 5 Wright & Miller, *Federal Practice & Procedure*, § 1357 at 611-13 ("A dismissal under Rule 12(b)(6) generally is not on the merits and the court normally will give plaintiff leave to file an amended complaint.").

to dismiss.[18] Submitting a proposed First Amended Complaint certainly relayed that Appellants were not "standing by their original Complaint." By not allowing the Appellants to file their First Amended Complaint, the district court violated one of the most important tenants of Rule 15(a)(2)—a claim should be tested on its merits. Doing so is an abuse of discretion. The dismissal of the Appellants' original Complaint was not merit based. Instead, it was due to an alleged failure to provide sufficient factual details regarding the employer relationship and FLSA work environment. Similarly, denying leave to file the First Amended Complaint was not merit based (*e.g.*, futility). Instead, it appears to have been based on missing a timeframe for filing. If defects in Appellants' initial Complaint exist, amendment should be allowed to correct them. *See Ross v. A.H. Robins Co.*, 607 F.2d 545, 547 (2d Cir. 1979) (reversing dismissal with prejudice; noting that it is "hesitant to preclude the prosecution of a possibly meritorious claim because of defects in the pleadings.").

Dismissing claims without testing their merits has been rejected by this Court. This is especially the case when the district court refuses to review a

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[18] "[I]ndications of a plaintiff's willingness to amend, if existing pleadings are found to be deficient, does suggest that post-dismissal leave to amend should be granted . . ." *In re Iowa Ready-Mix Concrete Antitrust Litig.*, 768 F. Supp. 2d 961, 977 (N.D. Iowa 2011) (emphasis added). Even though the plaintiff in *Ready-Mix* did not file a post-judgment motion for leave to amend, the district court ordered an amended complaint be filed to remedy the deficiencies. *Id.* at 978. "[T]he interests of justice may be best served . . . so that the plaintiffs' claims can be addressed on the merits" under Rule 15(a)(2). *Id.*

proposed amended complaint. This Court addressed a post-judgment motion to amend in *Sanders v. Clemco Industries*, 823 F.2d 214, 216 (8th Cir. 1987). There, the defendant simultaneously filed an answer to the complaint and a motion for summary judgment. *Id.* at 215. Not ruling on the summary judgment motion, the district court *sua sponte* dismissed the complaint for lack of jurisdiction. *Id.* at 216. After this dismissal, the plaintiff filed a motion to amend the judgment and allow an amended complaint, which was denied. *Id.* On appeal, the plaintiff argued that granting leave to amend would not prejudice the defendants and denying leave would result in substantial injustice in that plaintiff would be denied a legal remedy. *Id.* This Court agreed. "[T]he district court's refusal to permit amendment of the complaint to correct these defects was not in keeping with the liberal amendment policy of Fed. R. Civ. P. 15(a) and constituted abuse of discretion." *Id.* at 217-218 (emphasis added). While the circumstances leading to the dismissal vary from the matter at hand, the same result occurred. The plaintiff was denied their day in court to test their claims on their merits. Here, amending the complaint would cause no prejudice to Appellants and would remedy the substantial injustice on Appellants—testing their claims on their merits.

The Sixth Circuit also found that denying a post-judgment leave to amend a complaint under a Rule 59(e) or 60(b) would be an abuse of discretion. The "default rule is that 'if a party does not file a motion to amend or a proposed amended complaint' in the district court, 'it is not an abuse of discretion for the district court to dismiss the claims with prejudice.'"

Starkey v. JPMorgan Chase Bank, NA, 573 F. App'x 444, 449-50 (6th Cir. 2014) (quoting *Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 844 (6th Cir. 2012)) (emphasis added). In *Starkey*, plaintiffs failed to seek any leave to amend with the district court. *Id.* "[The plaintiffs] could have . . . moved to vacate or set aside the district court's judgment after it granted Chase's motion to dismiss under Rule 59 or 60." *Id.* "Because the [plaintiffs] took none of those steps, the district court did not abuse its discretion in dismissing their complaint with prejudice." *Id.* at 449-50. (emphasis added). Here, Appellants took these exact steps. Disregarding them was an abuse of discretion.

The Second Circuit found that the district court has to afford plaintiff an opportunity to amend before dismissing the claim. In *Nakahata v. New York-Presbyterian Healthcare System, Inc.*, 723 F.3d 192 (2d Cir. 2013), the trial court dismissed plaintiffs' FLSA complaint for failing to state a claim. But, the court permitted the plaintiffs the ability to re-file their lawsuit (*i.e.*, it was dismissed without prejudice). *Id.* at 197. Plaintiffs re-filed the complaint, but also appealed the court's decision to dismiss without granting them leave to amend to meet the court's pleading standards. *Id.* The trial court was found to have abused its discretion in failing to provide plaintiffs an opportunity to seek leave to amend in response to the court's order of dismissal of the complaint. *Id.* at 198. "The District Court ordered the cases terminated with no indication that final judgment should await a motion for leave to amend . . . . Absent an opportunity to seek leave to amend, Plaintiffs cannot be held

accountable for failing to make the necessary motion." *Id.*

In denying Appellants' Rule 59(e) and 60(b) motion, the district court relied on this Court's holding in *United States v. Mask of Ka-Nefer-Nefer*. *Mask* actually supports Appellants' position. In *Mask*, the district court denied post-judgment leave to amend under Rule 60(b).[19] 752 F.3d at 744. This Court reviewed whether granting post-judgment leave under Rule 60(b) was appropriate. *Id.* at 743-44. "We have recognized that the normal standards for granting Rule 60(b)(1) relief 'seem ill-suited' to determining when a plaintiff whose complaint has been dismissed 'should be permitted, post-judgment, to try again.'" *Id.* In Mask, the plaintiff knew for eleven months during ongoing litigation about the alleged deficiencies, but failed to take action until after dismissal. *Id.*

In weighing varying precedent, *Mask* recognized circumstances where post-judgment leave to amend should be permitted under Rule 60(b). "[C]ases have stated that a plaintiff's non-prejudicial delay in seeking post-dismissal leave to amend is not sufficient reason to deny leave to add a legal theory or an additional defendant, or to cure a jurisdictional defect." *Id.* at 744. (emphasis added) (citations omitted). More importantly, *Mask* distinguished these other cases with the matter at hand because "these cases all presented situations where the amendment was needed to afford plaintiff 'an

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[19] The *Mask* plaintiff missed its Rule 59(e) filing deadline, and therefore, Rule 60(b)'s "reasonable time" requirement in seeking to have the court's order set aside was applied. *Id.* at 743.

opportunity to test his claim on the merits.'" *Id.* (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962) (emphasis added). This Court found that plaintiff did not meet these standards because he had an opportunity to "test his claims on the merits" via a parallel action before the district court. *Id.* The dismissed claim could still be pursued and tested on its merits. *Id.* This is the most important distinction of *Mask*'s application to Appellants' case. An amendment does not cause any prejudice to the Appellees, but more importantly, it is the only way Appellants can test their claims on their merits.

Instead, the district court relied upon case law factually opposite to the scenario at hand. In not allowing Appellants any opportunity for leave to amend, the district court cited cases whereby the plaintiffs failed to offer any pre or post-judgment amended complaint. Appellants offered a proposed First Amended Complaint. The district court ignored it and wrongfully concluded that Appellants stood by their Complaint.

3. The District Court Abused its Discretion by Not Permitting Appellants Leave to Amend to Meet its New Pleading Requirement:

The district court applied a heightened FLSA pleading requirement from the Middle District of Pennsylvania. This standard was significantly different from Circuit Courts addressing this issue. And, the district court's pleading standard directly contradicted opinions in other Missouri District Courts. Regardless of what standard is adopted by

this Court, it is one of first impression. If the existing Complaint does not meet the determined standard, the Appellants should be afforded an opportunity to do so via amendment.

As demonstrated in *Landers*, *supra*, courts should inherently afford plaintiff an opportunity to amend in order to meet a new FLSA pleading standard. *See also e.g., Immigrant Assistance Project of Los Angeles Cnty. Fed'n of Labor (AFL-CIO) v. I.N.S.*, 306 F.3d 842, 860 (9th Cir. 2002) (where new legal requirements were developed after plaintiff filed initial complaint, plaintiff must be afforded the opportunity to amend to meet the new requirements); *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 881 (9th Cir. 2011) *overruled on other issues by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) ("[I]n light of the new standards announced in this decision, the district court on remand should permit Payne to amend her complaint in order to flush out her specific claims and enable the court to determine which claims require IDEA exhaustion and which do not."). Given the volume of cases from existing Circuits, and the Western and Eastern Districts of Missouri, Appellants reasonably pled the established standards for FLSA claims in their Complaint.[20] The district court abused its discretion by not permitting Appellants to plead the newly imposed standards from the Middle District of Pennsylvania.

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[20] *See* section I, *supra*.

III. The First Amended Complaint Cures the Alleged Deficiencies.

If this Court adopts the "less onerous," or "middle-ground" FLSA pleading requirement, Appellants believe their initial Complaint meets either standard (*see* section I, *infra*). If this Court disagrees, then the Appellants' lengthy First Amended Complaint would clearly comply. The same would be true if this Court adopts the district court's heightened FLSA pleading requirement. If this Court determines that Appellants' initial Complaint is insufficient, Appellants request that this Court find that their First Amended Complaint comports with requirements of Rule 8 regarding their FLSA claims.

A district court can deny a Rule 59(e) or 60(b) motion seeking leave to amend if the proposed amended complaint would be futile. *See Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 55 (2nd Cir. 1995) (request was properly denied, because "[o]ne good reason to deny leave to amend is when such leave would be futile"). But here, the First Amended Complaint was not reviewed. The district court makes no mention of futility or any other comment regarding the proposed First Amended Complaint.

The First Amended Complaint clearly meets the perceived deficiencies set forth by the district court in its July 2, 2014 Order of dismissal. It discusses in great detail the basis for naming all four entities as joint employers. (J.A. 96-110; ¶¶ 3-62). It identifies by name and title who hired Appellants and who they believe controls their work schedules and conditions of employment. (J.A. 96-97, 109; ¶¶ 4, 6, 10-11, 61). It identifies where Appellants believe their employment records are maintained and who

determined their method of pay. (J.A. 101, ¶ 25). It specifically identifies who required Appellants to work off the clock and what work they were required to do without compensation. (J.A. 112-115; ¶ 72.b). It identifies specific examples of paychecks evidencing Appellees violating the fluctuating workweek method of paying overtime. (J.A. 112, ¶ 72.a.i-ii). The proposed First Amended Complaint identifies where Appellants work, what they do, and for how long they have done it. (J.A. 96-97, 111; ¶¶ 3-7, 69). Finally, the First Amended Complaint alleges that all similarly situated employees are subject to the same illegal policies or practices. (J.A. 111-119; ¶¶ 69-93). If this Court adopts the heightened pleading requirement, the First Amended Complaint meets it.

Conclusion

Appellants' Complaint met Rule 8's pleading requirements as discussed under *Twombly* and *Iqbal*. Otherwise, the Appellants should be afforded an opportunity to amend. The district court refused to review the proposed First Amended Complaint. Instead, it wrongfully claimed Appellants stood by their original Complaint unwilling to plead its required heightened standard. Appellants correctly sought leave under Rules 59(e) and 60(b) so their claims could be heard on their merits. But, the district court abused its discretion by (i) refusing to review the First Amended Complaint due to a self-created procedural deadline, (ii) disregarding this Court's repeated warnings and not allowing the claims to be tested on their merits under Rule 15(a)(2), and (iii) applying a new pleading standard without affording Appellants an opportunity to meet it.

WHEREFORE, the Appellants ask for the following relief:

1. Find that Appellants' April 21, 2014 Complaint meets the pleading requirement for an FLSA claim under Rule 8(a)(2) and reverse the district court's July 2, 2014 Order granting Appellees' Motion to Dismiss; or alternatively
2. If this Court finds that Appellants' Complaint does not meet the pleading requirement for an FLSA claim under Rule 8(a)(2), find that the district court abused its discretion and reverse its September 11, 2014 order, set aside its judgment, and find that Appellants' First Amended Complaint meets the pleading requirement for an FLSA claim under Rule 8(a)(2); or
3. If this Court finds that Appellants' First Amended Complaint does not meet the pleading requirement it determines for an FLSA claim under Rule 8(a)(2), then remand the matter back to the district court setting aside its September 11, 2014 order and order that Appellants be afforded an opportunity to file an amended complaint meeting the standards established by this Court in this case of first impression.

Respectfully submitted,
this 21st day of November, 2014

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APPELLEES' BRIEF
(JANUARY 7, 2015)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LINDA S. ASH and ABBIE JEWSOME on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

v.

ANDERSON MERCHANDISERS, L.L.C., WEST AM, L.L.C., and ANCONNECT, L.L.C.,

Defendants-Appellees.

Case No. 14-3258

On Appeal from the United States District Court for the Western District of Missouri; Case no.: 4:14-cv-0358-DW. The Honorable Dean Whipple Presiding

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SUMMARY OF THE CASE

Plaintiffs filed a Complaint alleging that Defendants violated the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"). Defendants moved to dismiss for failure to state a claim on which relief could be granted. Plaintiffs opposed the motion, but did not seek leave to amend their Complaint to cure the Complaint's defects, nor did they explain how, if at all, they could remedy those defects. The District Court granted the motion and did not invite Plaintiffs to amend the Complaint. The District Court subsequently entered judgment in Defendants' favor, and Plaintiffs filed a motion to vacate the judgment and for leave to amend, which was denied.

The District Court did not err in dismissing the Complaint. The Complaint failed to meet the standard of Fed. R. Civ. P. 8, as interpreted by the United States Supreme Court, for pleading an FLSA claim. Also, because Plaintiffs chose to stand on their pleading and vigorously defend it rather than seek leave to amend it, the District Court did not err in denying Plaintiffs' post-judgment motion.

This case presents a matter of first impression for this Court—i.e., the pleading requirements for an FLSA overtime claim—and, therefore, Defendants believe a thirty-minute oral argument would be appropriate.

DEFENDANTS' CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1A, Defendants Anderson Merchandisers, LLC, West AM, LLC and ANCONNECT, LLC make the following disclosures:

Defendants Anderson Merchandisers, LLC and ANCONNECT, LLC each have two members, Anderson Media Corp and First Media Capital Corporation. Defendant West AM, LLC's members are individuals, not other business entities. No publicly traded entity holds more than a 10% ownership interest in any Defendant.

STATEMENT OF THE ISSUES

1. Whether, under the pleading standards established in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), Plaintiffs' Complaint pled sufficient facts to state a plausible overtime claim under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, which is a matter of first impression for this Court. *Landers v. Quality Comm'cns, Inc.*, 771 F.3d 638 (9th Cir. 2014); *Lundy v. Catholic Health System of Long Island, Inc.*, 711 F.3d 106 (2d Cir. 2013); *Cavallaro v. UMass Mem'l Healthcare, Inc.*, 678 F.3d 1, 10 (1st Cir. 2012); *Loyd v. Ace Logistics, LLC*, 2008 WL 5211022 (W.D. Mo. Dec. 12, 2008).

2. Whether the District Court acted within its discretion by denying Plaintiffs' post-judgment motion to vacate the judgment and for leave to amend the Complaint. *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737 (8th Cir. 2014); *U.S. ex rel Roop v. Hypoguard U.S.A., Inc.*, 559 F.3d 818, 822 (8th Cir. 2009); *Horras v. American Capital Strategies, Ltd.*, 729 F.3d 798 (8th Cir. 2013); *Mitan v. McNiel*, 399 F. App'x 144 (8th Cir. 2010).

STATEMENT OF THE CASE

On April 21, 2014, Plaintiffs filed a collective action Complaint ("Complaint") in the U.S. District Court for the Western District of Missouri, seeking relief, on behalf of themselves and others similarly situated, for alleged violations of the overtime provisions of the FLSA. (J.A. 6-20.)[1] The Complaint named four defendants: Anderson Merchandisers,

[1] Defendants refer to the Joint Appendix as ("J.A. __").

LLC (Delaware), Anderson Merchandisers, LLC (Texas), West AM, LLC, and ANConnect, LLC. (J.A. 6-8.)

The Complaint alleged that the four defendants "shared interrelated operations, centralized control of labor relations, common management and common ownership and/or financial control" and therefore "were part of an integrated enterprise and, as such, were Plaintiffs' employer," but it did not include any facts to support those conclusory allegations. (J.A. 8, ¶8). The only other statements in the Complaint concerning an employment relationship were that Plaintiffs: "work[ed] for Defendants" (J.A. 9, ¶¶ 10-11, 16); were "employees of Defendants" (J.A. 9, ¶ 12; 14, ¶ 46); were "employed by Defendants" (J.A. 9, ¶¶ 13, 15); and "Defendants suffered and permitted Plaintiffs . . . [to] work," (J.A. 14, ¶ 42). However, the Complaint did not plead any facts to support these conclusions or suggest that an employment relationship actually existed between Plaintiffs and any of the Defendants.

The Complaint also alleged that Plaintiffs "routinely" worked more than 40 hours per week but were not paid overtime at the "correct rate," and that Defendants required Plaintiffs to work "off the clock" and during unpaid meal breaks. (J.A. 10-12, ¶¶ 20-26, 34, 42.) Importantly, though, the Complaint did not contain any facts to support those allegations, such as when Plaintiffs allegedly worked during unpaid meal periods or off the clock, what tasks such work entailed, or who allegedly told them to perform this work. (*See generally* J.A. 8-12.) The Complaint also failed to allege facts to establish that Plaintiffs were not paid proper overtime during any weeks in

which they actually worked more than forty hours and were, therefore, entitled to overtime compensation. (*Id.*)

On May 23, 2014, Defendants moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)") for failure to comply with the pleading requirements of Fed. R. Civ. P. 8 ("Rule 8") as interpreted by the Supreme Court in *Twombly* and *Iqbal*. (J.A. 21-42.) Specifically, Defendants argued that the Complaint failed to plead a plausible employment relationship between either Plaintiff and any Defendant (and therefore failed to adequately plead standing), failed to plead a plausible FLSA overtime violation, and failed to properly plead collective action allegations. (*Id.*) Rather than simply amend their Complaint, which, pursuant to Fed. R. Civ. P. 15(a)(1)(B) ("Rule 15(a)(1)(B)"), Plaintiffs were entitled to do as a matter of right during the 21 days following Defendants' filing of their motion to dismiss, Plaintiffs filed a response brief vehemently defending the Complaint as sufficiently pled. (J.A. 43-62.) In a sentence at the bottom of the last page of their brief, Plaintiffs wrote: "[s]hould the Court believe that Plaintiffs' Complaint is somehow deficient, the appropriate remedy is not to dismiss but to allow Plaintiffs leave to file an amended complaint." (J.A. 61.)

On July 2, 2014, the District Court issued an order (the "Dismissal Order"), granting Defendants' motion to dismiss on two grounds. First, the court held that "the Complaint [did] not contain any well-pled facts that would support an employer-employee relationship between any Plaintiff and any Defendant, or any fact that would support a theory of

joint employment." (J.A. 79.) Second, the court held that Plaintiffs failed to adequately plead an FLSA violation because the "alleged FLSA violations [were] only supported by conclusions and not facts." (J.A. 80.) In addition, relying on this Court's decision in *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 742 (8th Cir. 2014), the court noted that Plaintiffs had not moved for leave to amend and did not file a proposed amendment but, instead, chose "'to stand on and defend [their] original complaint,'" and ordered dismissal of the Complaint without inviting Plaintiffs to amend it. (J.A. 81 (quoting *Mask*, 752 F.3d at 742).)

On July 9, 2014, the District Court entered judgment in Defendants' favor. (J.A. 82.). On July 11, 2014, Plaintiffs filed a motion under Fed. R. Civ. P. 59(e) ("Rule 59(e)") and Fed. R. Civ. P 60(b) ("Rule 60(b)") asking the court to grant the extraordinary remedy of vacating the judgment, re-opening the case, and allowing them to file an amended complaint, even though Plaintiffs had ample opportunity prior to the entry of judgment to amend the Complaint. (J.A. 83-94 (hereinafter, "Motion for Post-Judgment Leave to Amend").) It was only then—49 days after Defendants filed their motion to dismiss which identified the very pleading deficiencies on which the District Court based the Dismissal Order—that Plaintiffs submitted a proposed amended complaint. (J.A. 95-123.) And, all of the new facts that Plaintiffs included in the proposed amended complaint came from sources—such as paychecks, W-2s, handbooks, and uniform logos and Plaintiffs' own memories—that Plaintiffs admit they possessed at the time they filed the initial Complaint.

On September 11, 2014, the District Court denied Plaintiffs' Motion for Post-Judgment Leave to Amend, holding that Plaintiffs failed to move for leave to amend or submit a proposed amended complaint at any point before the court entered judgment, despite having more than ample opportunity to do so. (J.A. 167-168.) In reaching this conclusion, the court relied on well-established precedent from this Court that a district court does not abuse its discretion by denying a post-dismissal motion for leave to amend where a plaintiff chose to stand on his pleadings rather than amend in the face of a motion to dismiss identifying the pleading's deficiencies. (*Id.*)

SUMMARY OF THE ARGUMENT

The District Court properly held that the Complaint failed to plead the facts necessary to state a plausible FLSA overtime claim because it failed to plead facts to establish: (1) an employer-employee relationship; or (2) that Plaintiffs worked overtime and were not properly compensated for that work. The court's holding is consistent with the Supreme Court's guidance and accords with decisions from every federal appellate court to have addressed the pleading requirements for FLSA overtime claims in the post-Iqbal era.

Also, the District Court properly decided (1) not to invite Plaintiffs to file an amended complaint when it dismissed the Complaint, and (2) to deny Plaintiffs' Motion for Post-Judgment Leave to Amend. Plaintiffs had ample opportunity to amend the Complaint between the time Defendants filed their motion to dismiss, which put Plaintiffs on

notice of the Complaint's deficiencies, and the date the District Court entered judgment. Established precedent from this Court put Plaintiffs on notice that if they decided to "stand" on their pleading in the face of Defendants' motion to dismiss, rather than amend the Complaint or offer the Court the substance of a proposed amended complaint for consideration (either in the form of a proposed amended complaint or a discussion of the substance of new factual allegations to be included in such an amended pleading), the District Court could dismiss the Complaint without inviting Plaintiffs to amend. Nonetheless, Plaintiffs chose not to amend. Indeed, even after the District Court dismissed the Complaint, Plaintiffs took no immediate action but, instead, waited until after the court entered judgment and then asked for the extraordinary remedy of vacating the judgment and granting leave to amend the Complaint. The Court did not abuse its discretion by denying this request.

ARGUMENT

I. The District Court Properly Dismissed Plaintiffs' Complaint for Failure to State a Claim Under the FLSA

A. Standard of Review

This Court reviews the dismissal of a complaint for failure to state a claim *de novo*. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009); *Horras v. Am. Capital Strategies, Ltd.*, 729 F.3d 798, 801 (8th Cir. 2013) (applying pleading standards from *Twombly* and *Iqbal* during *de novo* review of dismissal of complaint for failure to state a claim).

B. Pleading Requirements to State a Claim for Relief Under Rule 8(a)(2)

To state a claim on which relief can be granted, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has interpreted Rule 8 to mean that "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Such "[f]actual allegations must be enough to raise a right of relief above the speculative level," and plaintiffs must state "enough facts to state a claim to relief that is plausible on its face." *Id.* at 555, 569.

In *Iqbal*, the Supreme Court reemphasized the *Twombly* pleading requirements and identified two "working principles" underlying *Twombly's* analytical framework. *Id.* First, "legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not entitled to an assumption of truth. *Id.* (citation omitted). Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* (citation omitted). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," whereas a complaint that pleads facts "merely consistent with" a defendant's liability "stops short of the line between possibility and plausibility[.]" *Id.* at 678 (citations omitted). Applying these two working principles, the Supreme Court noted that Rule 8 "does not unlock the doors of discovery for a plaintiff

armed with nothing more than conclusions." *Id.* at 555, 569.

C. The Complaint Fails to Adequately Plead Employer Status Vis-à-vis Any of the Defendants

The District Court did not err by dismissing the Complaint because the Complaint failed to plead facts to establish a threshold element of any FLSA overtime claim: the existence of an employer-employee relationship. For this reason alone, the Complaint was fatally flawed, and dismissal was appropriate.

The FLSA's overtime requirement only applies to "employees" who are "employed" by an "employer." 29 U.S.C. § 207(a)(1) ("no employer shall employ any of his employees . . . for a workweek longer than forty hours" without compensating those employees with overtime pay) (emphasis added); *see also Reimer v. Champion Healthcare Corp.*, 258 F.3d 720, 725 (8th Cir. 2001) ("[T]he FLSA applies only when the employee is working for the employer") (quotation marks and citation omitted). The FLSA defines "[e]mploy" as "to suffer or permit work," 29 U.S.C. § 203(g), and "employer," in relevant part, as "any person acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* at § 203(d).

While broad, the FLSA's "employer" definition is not without limits. "In determining whether an entity functions as an individual's employer, courts generally look to the economic reality of the arrangement." *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (citing *Goldberg v. Whitaker House Coop.,*

Inc., 366 U.S. 28, 33 (1961)). In making this determination, courts consider factors including whether the alleged employer(s): (1) had the power to hire and fire the employee; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained the employee's employment records.[2]

The Complaint did not plead facts to establish any of these factors. The only allegations the Complaint contained regarding an employer-employee relationship were:

- various iterations of the legal conclusion that Plaintiffs "work[] for Defendants," were "employed by Defendants," or were "employees of Defendants," (*see*, *e.g.*, J.A. 9, ¶¶ 10-13);
- an allegation paraphrasing the FLSA's definition of "employ" by stating "Defendants suffered and permitted Plaintiffs . . . [to] work," (J.A. 14, ¶ 42); and
- a conclusory allegation that Defendants "shared interrelated operations, centralized control of labor relations, common management and common ownership and/or

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[2] *See, e.g., Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1981) (applying the four factors listed above to determine existence of employer/employee relationship); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (same); *Muhammad v. Platt College*, 1995 WL 21648, at *1 (8th Cir. 1995) (unpublished) (same); *Baker v. Stone Cnty., Mo.*, 41 F. Supp. 2d 965, 980 (W.D. Mo. 1999) (same); *Loyd v. Ace Logistics, LLC*, 2008 WL 5211022, at *3 (W.D. Mo. Dec. 12, 2008) (same).

> financial control" and therefore "were part of an integrated enterprise and, as such, were plaintiffs' employer," (J.A. 8, ¶ 8);

Allegations that an individual works for, is employed by or is an employee of an entity are "mere conclusions . . . not entitled to the assumption of truth." *See Iqbal*, 556 U.S. at 678. Similarly, the allegation that "Defendants suffered and permitted Plaintiffs . . . [to] work" was a mere recitation of statutory language and was not entitled to an assumption of truth under *Twombly* and *Iqbal*. And, the allegations that Defendants were an "integrated enterprise" simply recited the elements of the "integrated enterprise" test,[3] without alleging any facts to establish how Defendants' operations were interrelated, what links existed among Defendants' management and ownership, or how Defendants were financially interrelated. In short, these allegations were precisely the type of "formulaic recitation" of elements that cannot withstand a motion to dismiss. *See Iqbal*, 556 U.S. at 678.[4]

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[3] *Compare Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 793 (8th Cir. 2009) (Listing integrated enterprise factors as: "the degree of interrelation between the operations, the degree to which the entities share common management, centralized control of labor relations, and the degree of common ownership or financial control.") with J.A. 8, ¶8 ("defendants shared interrelated operations, centralized control of labor relations, common management and common ownership and/or financial control.").

[4] Moreover, the integrated or single enterprise test has been flatly rejected as the proper test to use when evaluating whether multiple entities are a plaintiff's "employer" for purposes of FLSA liability. Whether multiple entities constitute a single enterprise is relevant only to determining whether an

Plaintiffs' failure to include any facts regarding who had the power to hire and fire them, who supervised and controlled their work schedules or conditions of employment, who determined their rate and method of payment, or who maintained their employment records—which are the main factors recognized by other federal appellate courts and by district courts in this Circuit as important to establishing an employment relationship under the FLSA (*see* note 4, *supra*)—is especially significant because Plaintiffs admittedly had access to exactly that information when they drafted the Complaint. Plaintiffs admit that they knew "the names of the individuals who hired them" and "the name of the individual who supervises them." (J.A. 90 n. 2.) They further admit they knew that "people in the 'home office in Texas' establish their work schedules,

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entity is covered by the FLSA, not whether multiple entities may be liable as a joint employer. *See*, *e.g.*, *Patel v. Wargo*, 803 F.2d 632, 637 (11th Cir. 1986) ("[T]he enterprise analysis is different from the analysis of who is liable under the FLSA. The finding of an enterprise is relevant only to the issue of coverage.") (emphasis added). When, in contrast, employees allege multiple entities are their FLSA employer for liability purposes, courts apply an economic realities test that considers factors such as those from *Bonnette* described *supra*—not an integrated enterprise coverage test. Regardless, the Complaint still failed to plead facts sufficient to support an integrated enterprise theory. Under statutes such as Title VII, where integrated enterprise liability is possible, it arises only when one entity is a plaintiff's legal employer, and the plaintiff seeks additionally to hold another entity liable because of corporate interrelation. *See Arculeo v. On-Site Sales & Mktg., LLC*, 425 F.3d 193, 198 (2d Cir. 2005). Therefore, to state a claim for single enterprise liability, a plaintiff must still first plead facts sufficient to establish that one of the defendants is his employer, which Plaintiffs failed to do.

control their conditions of employment, store their employee records and determine their method of pay." (*Id.*) Nevertheless, Plaintiffs chose not to include any of these facts in the Complaint. Plaintiffs also acknowledge they had several other resources at their disposal from which they could have drawn additional facts including "Plaintiffs' paystubs and W-2s, employee handbook, company policies and procedures, logos on uniforms and business cards, miscellaneous employment-related memoranda given to Plaintiffs at work, information published on Anderson Merchandisers' website, and corporate filings with various Secretaries of State." (*See* App. Br. at 16.) However, Plaintiffs did not use these resources, and instead relied solely upon conclusory statements, which do not satisfy Rule 8, that all Defendants "were Plaintiffs' employer" and "were part of an integrated enterprise." *See Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

The District Court's finding that, by failing to plead the necessary factual underpinnings, Plaintiffs failed to plausibly allege an employment relationship was in accord with *Twombly* and *Iqbal*, and with decisions by many other federal courts, including other district courts in this Circuit. *See Cavallaro*, 678 F.3d at 10 (plaintiffs failed to state FLSA claim because they did not sufficiently allege employment by any one of several defendants, and even under "joint employer" or "integrated enterprise" theory "some direct employer needs to be identified before anyone in the group could be liable"); *Loyd*, 2008 WL 5211022, at *3 (dismissing two defendants because

plaintiffs failed to plausibly allege either defendant was their joint FLSA employer); *McClean v. Health Sys., Inc.*, 2011 WL 2650272, at *2 (W.D. Mo. July 6, 2011) (dismissing 34 of 36 defendants because plaintiffs failed to plausibly allege an employment relationship with any of the 34 entities).

Furthermore, although Plaintiffs claim their bare allegations were "consistent with applicable case law," (*see* App. Br. at 17), none of the cases they cite provides persuasive, let alone binding, authority to support their argument. Two of those cases—*Takacs v. Hahn Automotive Corp.*, 1999 WL 33117265 (S.D. Ohio Jan. 4, 1999), and *Szymula v. Ash Grove Cement Co.*, 941 F. Supp. 1032 (D. Kan. 1996)—predate both *Twombly* and *Iqbal*, do not even discuss pleading standards, and are therefore completely irrelevant. The three other cases are equally unpersuasive. In *McClean*, the plaintiffs sued 36 defendants, alleging that one defendant owned the others and, therefore, that all defendants were the plaintiffs' "joint employer." 2011 WL 2650272, at *1 n.1, *2. The court dismissed the plaintiffs' claims against all but two defendants because the plaintiffs did not allege the others "had control over *their* hiring and firing, work schedules, conditions of employment, rate and method of pay or employment records." *Id.* at *2. Significantly, the plaintiffs in *McClean*, unlike Plaintiffs here, actually pled that two entities had control over their hiring, firing, work schedules and conditions of employment. *Id.* Accordingly, *McClean* does not stand for the premise that conclusory allegations, such as those in the Complaint, that a group of defendants were "joint employers" or an "integrated enterprise" are

sufficient to allege a plausible employer/employee relationship, but, instead, proves that plaintiffs are required to allege facts explaining how each defendant had control over their hiring and firing, work schedules, conditions of employment, rate and method of pay or employment records to properly identify a FLSA employer.

Likewise, *White v. 14051 Manchester, Inc.*, 2012 WL 2117811 (E.D. Mo. June 11, 2012), does not indicate that merely "alleging an 'enterprise relationship' among the defendants meets the employer pleading requirements to survive a Rule 12 motion." (*See* App. Br. at 17.) In *White*, former employees at a restaurant sued multiple locations of the restaurant, which were each separate legal entities, and two individuals. *Id.* at *1-*3. The plaintiffs alleged employment by the restaurants (as a group), that there was an employee sharing agreement among all locations, and the two individual defendants had hiring and firing authority and controlled pay practices at all locations. *Id.* at *3. Thus, the complaint in *White* survived a motion to dismiss because it provided factual allegations about how the operations of the locations were integrated and who had hiring and firing authority. Here, Plaintiffs' Complaint contains no such allegations and simply conclusory alleges that Defendants were an "integrated enterprise."

Finally, in *Arnold v. DirecTV, Inc.*, 2011 WL 839636 (E.D. Mo. Mar. 7, 2011), the plaintiffs pled far more detailed allegations of an employment relationship than Plaintiffs pled in the Complaint. When denying the defendants' motion to dismiss for failure to allege a plausible employment relationship,

the court noted the plaintiffs had alleged "that they were required to wear 'DirecTV' uniforms and display 'DirecTV' magnets and window stickers on their vehicles" and that these allegations "len[t] support for [plaintiffs'] assertion that the named Defendants were employers under the [FLSA]." *Id.* Thus, while Defendants submit that *Arnold* (an unreported, non-binding district court case) was wrongly decided because bare bones allegations regarding uniforms and window stickers do not come close to alleging facts to support the plausible conclusion under the economic realities test that an entity is an employer of a plaintiff, the case is distinguishable because the *Arnold* plaintiffs, unlike Plaintiffs here, included *some* non-conclusory factual allegations regarding an employer/employee relationship.[5]

Furthermore, although Plaintiffs contend the District Court should have waited until after discovery to address any issues related to the existence of an employment relationship among Plaintiffs and Defendants, that premise is flatly wrong. (*See* App. Br. at 19-21.) First, it squarely contradicts the central tenet of *Twombly* and *Iqbal* that "Rule 8 does not unlock the doors of discovery for a plaintiff armed with nothing more than

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[5] Plaintiffs also cite six cases for the proposition that "employer" under the FLSA "should be interpreted in an expansive manner." (*See* App. Br. at 18-19.) Defendants do not dispute that "employer" is broadly construed under the FLSA, but it does not follow from this principle that FLSA plaintiffs are relieved of their obligation to plead "more than labels and conclusions" to withstand a motion to dismiss. *See Twombly*, 550 U.S. at 555 (2007).

conclusions." *See Iqbal*, 556 U.S. at 678-79 (citing *Twombly*, 550 U.S. at 556). The very concept of notice pleading embraced by the Supreme Court prohibits such "fishing expeditions."

Also, three of the four cases Plaintiffs cite for this misguided proposition actually undermine Plaintiffs' argument. In *Ayala v. Metro One Security Systems, Inc.*, 2011 WL 1486559 (E.D.N.Y. Apr. 19, 2011), *Olvera v. Bareburger Group, LLC*, 2014 WL 3388649 (S.D.N.Y. July 10, 2014), and *Myers v. Garfield & Johnson Enterprises, Inc.*, 679 F. Supp. 2d 598 (E.D. Pa. 2010), the courts expressly stated that a complaint must plead sufficient facts to plausibly allege an employment relationship to allow a plaintiff to proceed to discovery.[6] Moreover, in all three cases, the courts denied the defendants' motion to dismiss because the plaintiffs pled non-conclusory facts that supported a plausible inference that the defendants were the plaintiffs' employer. *See Ayala*, 2011 WL 1486559, at *5 (plaintiff alleged the defendants shared a single CEO and common office space, jointly owned controlling shares of stock, and shared control of hiring practices); *Olvera*, 2014 WL

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[6] *See Ayala*, 2011 WL 1486559, at *5 ("for Ayala's claims against Loss Prevention to survive a 12(b)(6) motion to dismiss, his complaint must contain sufficient 'factual content' for the Court to infer that he can plausibly make out the elements of the single employer doctrine."); *Olvera*, 2014 WL 3388649, at *2 ("[D]efendants' motion to dismiss turns on a single question: Does the FAC plead facts sufficient to allege a plausible claim that the franchisor defendants were the plaintiffs' 'employers' under the FLSA[]?"); *Myers*, 679 F. Supp. 2d at 604 ("[P]laintiff's complaint does include factual allegations that, if true, could plausibly lead to a conclusion that Jackson Hewitt was her employer").

3388649, at *5 (complaint alleged franchisors guided the franchisees on how to hire and train employees, monitored employee performance, specified methods to prepare customer orders, and required use of certain systems for tracking hours and wages); *Myers*, 679 F. Supp. 2d at 610-611 (plaintiff alleged numerous facts to support a joint employer relationship, including that the plaintiff was covered by the franchisor's workplace policies, the franchisor required specific training, and the plaintiff was actually told the franchisor was her employer). These cases prove that to proceed to discovery, an FLSA plaintiff must plead facts to support a plausible employment relationship, which Plaintiffs plainly failed to do. [7]

Further, Plaintiffs' contention that Defendants were in exclusive possession of the information concerning an employee/employer relationship between Plaintiffs and Defendants (s*ee* App. Br. at 20) is completely unfounded and contradicted by their own

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[7] By contrast, in *Braden v. County of Washington*, 2008 WL 5129919, at *3 (W.D. Pa. Dec. 5, 2008), which involved a retaliation claim under the Family Medical Leave Act ("FMLA") against a county and a county court, the district court stated without explanation that "[s]uch facts as who Braden's employer was and the structure of her employment are the types of facts that must be uncovered through discovery." Because the plaintiff "pled that the County [was] her employer and the County approved her FMLA leave," the court held the plaintiff stated a claim for relief. *Id.* This holding is contrary to *Twombly's* and *Iqbal's* holdings that conclusory allegations are insufficient to state a claim, and it is at odds with decisions by district courts in this circuit, all of which require at least some factual allegations to plausibly allege an employment relationship. *See*, *e.g.*, *Loyd*, 2008 WL 5211022, at *3; *McClean*, 2011 WL 2650272, at *2.

statements. Based on the information admittedly in their possession, including paystubs, W-2s, and handbooks, Plaintiffs could have included factual allegations concerning an employee/employer relationship, many of which they recite in their brief submitted to this Court, in their Complaint. (S*ee* App. Br. at 20.) And, if Plaintiffs were still confused about who their FLSA employer was, they could have pled facts supporting who they believed their employer was and explaining their confusion. They did not, instead pleading in conclusory fashion in order to improperly expand the putative class size that four different entities where their "employers." Plaintiffs cannot shift their pleading burden to Defendants by claiming the District Court should have required Defendants to "admit or deny an 'employer' relationship in an Answer," bear the cost and inconvenience of overreaching discovery in a putative nationwide collective action, and then move for summary judgment if they "believe[d] [the] evidence [was] not sufficient to establish an FLSA employer relationship." (*Id.* at 21.) Indeed, the burden was on Plaintiffs to plead facts sufficient to establish an employer-employee relationship, and the District Court correctly recognized that they did not satisfy their burden.

D. The Complaint Failed to Adequately Plead a FLSA Overtime Violation

1. This Court Should Adopt the Pleading Standard for FLSA Claims Adopted by Every Other Federal Circuit to Consider the Issue Post-*Iqbal*

Although it is a matter of first impression for this Court, every federal appellate court (including the First, Second, Third, and Ninth Circuits) to have addressed the issue of what facts a plaintiff must plead to state a plausible FLSA overtime violation in light of *Twombly* and *Iqbal* has held that a far greater degree of factual specificity is required than what Plaintiffs pled in their Complaint. *See Pruell v. Caritas Christi*, 678 F.3d 10, 13-14 (1st Cir. 2012); *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 114 (2nd Cir. 2013); *Davis v. Abington Mem'l Hosp.*, 765 F.3d 236, 243 (3d Cir. 2014); *Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 645 (9th Cir. 2014). The standards adopted by these courts do not set an unreasonably high bar for plaintiffs. They require only that plaintiffs draw on their own memories and personal experiences to allege basic facts before requiring defendants to endure the significant costs and inconvenience associated with discovery in overreaching putative collective actions.

In *Pruell*, the first federal appellate court decision to address the pleading standards for FLSA overtime claims post-*Iqbal*, the plaintiffs alleged that they "regularly worked hours over 40 in a week and were not compensated for such time, including the applicable premium pay" and that they were

required to work off-the-clock and during unpaid meal periods, but they failed to provide any details about the nature of this alleged work. 678 F.3d at 13. The First Circuit held that the complaint's allegations were "little more than a paraphrase of the statute" and "[did] not provide examples (let alone estimates as to the amounts) of such unpaid time for either plaintiff or describe the nature of the work performed during those times," and, as such, failed to state a plausible FLSA claim. *Id.* at 13-14.[8]

In the wake of *Pruell*, the Second, Third and Ninth Circuits each held that, to state an FLSA overtime claim, at a minimum, a plaintiff must allege that she worked more than 40 hours in a given workweek without being compensated for the hours worked in excess of 40 n]one of the named plaintiffs. *See Lundy*, 711 F.3d at 114; *Davis*, 765 F.3d at 243; *Landers*, 771 F.3d at 645.

In *Lundy*, two named plaintiffs alleged that they "typically" worked shifts totaling 37.5 and 30 hours per week, respectively, "typically" had to work during unpaid meal breaks and off the clock, and "sometimes" had to work additional shifts that resulted in working more than 40 hours in a week. 711 F.3d. at 114-115. However, they did not allege that they were denied overtime pay in a week where they actually worked those additional shifts, and, although the alleged meal break and off the clock work might

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[8] The Second Circuit reached a similar conclusion in *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 201 (2d Cir. 2013) (plaintiffs who allege work during unpaid meal periods and off-the-clock work must provide detail about this unpaid work to support a reasonable inference they worked more than 40 hours in a given week).

"theoretically" put plaintiffs over 40 hours "in one or another unspecified week (or weeks)," the Second Circuit held the plaintiffs failed to allege a plausible FLSA overtime violation. *Id.* The court held that "to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." *Id.* at 114.

In *Davis*, the plaintiffs claimed the defendants violated the FLSA's overtime provisions by not paying them proper overtime compensation for work performed during meal breaks, off the clock, and at training programs. 765 F.3d at 241. They alleged they "typically" worked between 32 and 40 hours per week and "frequently" worked extra time. *Id.* at 242. The Third Circuit expressly agreed with *Lundy's* 'given workweek' standard and held that the plaintiffs failed to state a plausible claim because "[n]one of the named plaintiffs . . . alleged a single workweek in which he or she worked at least 40 hours and also worked uncompensated time in excess of 40 hours." *Id.* at 243.

The plaintiff in *Landers* alleged, in relevant part, that the defendant violated the FLSA's overtime provisions by paying him for each "piece" of work he performed but not paying him overtime compensation for work beyond 40 hours per week. 771 F.3d at 645. The Ninth Circuit expressly agreed with the First, Second and Third Circuits and held that: "at a minimum, a plaintiff asserting a violation of the FLSA overtime provisions must allege that she worked more than forty hours in a given workweek without being compensated for the hours worked in excess of forty during that week." *Id.*

In summary, the 'given workweek' standard adopted by the First, Second and Ninth Circuits comports with the pleading requirements established by the Supreme Court in *Twombly* and *Iqbal* in two important ways. First, it requires plaintiffs to include some specific facts to flesh out conclusory allegations that otherwise simply paraphrase the legal elements of an FLSA overtime claim, such as an allegation (like the one in the Complaint) that a plaintiff "routinely worked in excess of forty (40) hours per workweek without receiving overtime compensation at the rate of one and one-half times their regular rate of pay for their overtime hours worked." (J.A. 12, ¶ 34.)[9] Such allegations are "devoid of any numbers to consider beyond those plucked from the statute" and, as such, are exactly the type of allegation that *Twombly* and *Iqbal* forbid. *See Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85, 89 (2d Cir. 2013).

Second, the standard requires plaintiffs to "connect the dots" between times they performed work off the clock and/or during unpaid meal breaks and an overtime violation. Pleadings that, like the Complaint, only allege that plaintiffs "routinely" or "regularly" worked more than 40 hours per week, and sometimes worked during unpaid meal breaks or off the clock, do not establish that working off the clock or during meal breaks actually resulted in

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[9] This allegation simply paraphrases the FLSA's requirement that "for a workweek longer than forty hours," an employee working "in excess of" 40 hours shall be compensated for those excess hours "at a rate not less than one and one-half times the regular rate at which [she or] he is employed." 29 U.S.C. § 207(a)(1).

unpaid overtime. Such allegations "stop[] short of the line between possibility and plausibility" because they are "merely consistent" with a possible FLSA violation but are just as consistent with a scenario in which a plaintiff performed work during meal breaks or off the clock but did not work more than 40 hours and therefore was not entitled to overtime compensation. *See Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted).

In *Nakahata*, the Second Circuit recognized this problem and explained how the 'given workweek' standard adopted by *Lundy*, *Davis*, and *Landers* helps to solve it:

> [Plaintiffs'] allegations—that [they] were not compensated for work performed during meal breaks, before and after shifts, or during required trainings—raise the possibility that Plaintiffs were under-compensated in violation of the FLSA []; however, absent any allegation that Plaintiffs were scheduled to work forty hours in a given week, these allegations do not state a plausible claim for such relief. To plead a plausible FLSA overtime claim, Plaintiffs must provide sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week.

723 F.3d at 201 (emphases added).

Further, the 'given workweek' standard adopted in *Lundy*, *Davis*, and *Landers* is not onerous or difficult for plaintiffs to meet. As the Second and

Ninth Circuits noted, it requires only that plaintiffs draw on their own memory and experience, and "it is employees' memory and experience that lead them to claim in federal court that they have been denied overtime in violation of the FLSA in the first place." *See Dejesus*, 726 F.3d at 90; *see also Landers*, 771 F.3d at 646 (plaintiffs "should be able to specify at least one workweek in which they worked in excess of forty hours and were not paid overtime wages.") Simply stated, the pleading standards for FLSA overtime claims adopted by every single federal appellate court in the post-*Iqbal* era are appropriate and consistent with the Supreme Court's interpretation of Rule 8, and Defendants urge this Court to follow the course charted by its sister appellate courts.[10]

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[10] At one point in their brief, Plaintiffs actually make the incredible assertion that "[m]ost times, pleading the FLSA elements equates [sic] pleading sufficient facts." (App. Br. at 33,) And, they offer "as an example" of what they deem sufficient FLSA pleading a situation where a plaintiff pleads "while he worked for ACME, he routinely worked over forty hours each week and ACME required him to perform work off the clock with no overtime." (*Id.* at 33-34.) This "argument" by Plaintiffs is an entirely unsupported and complete rejection of the holdings in *Pruell*, *Lundy*, *Davis*, and *Landers*, not to mention an about face from the Supreme Court's holdings in *Twombly* and *Iqbal* stating exactly the opposite (that formulaic pleading of legal elements does not state a plausible claim that can survive dismissal). It also shows just how far FLSA pleading could devolve if the standard urged by Plaintiffs is adopted. In Plaintiffs' example, defendant ACME would have absolutely no notice of how and under what circumstances the plaintiff claimed he worked off the clock without proper compensation. This would run directly afoul of this Court's holding that Rule 8 requires a plaintiff to plead at a minimum facts which "give the defendant fair notice of what the claim is

2. Plaintiffs Incorrectly Assert that the Complaint Met the Appropriate FLSA Pleading Standard

Plaintiffs brazenly assert (without discussion of or citation to their actual allegations) that the Complaint "described the overtime work performed," and satisfied the pleading standards set forth by the First, Second, Third and Ninth Circuits, but it plainly does not. (*See* App. Br. at 33; J.A. 11, ¶¶ 24, 25.) The Complaint fails to provide a single example or description of the allegedly unpaid work and how it occurred, which the First Circuit found essential to stating a plausible FLSA overtime claim.[11] *Pruell*,

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and the grounds upon which it rests." *Braden*, 588 F.3d at 595 (internal citations omitted).

[11] In their brief, Plaintiffs assert that they "alleged a policy of requiring work through unpaid breaks and 'off the clock' and that this denies them overtime pay." (App. Br. at 33.) Once again, Plaintiffs badly mischaracterize their allegations. Allegations that Defendants failed to pay Plaintiffs overtime "to perform work during uncompensated meal breaks" and "to perform work off the clock" at undisclosed times and under undisclosed circumstances do not plausibly allege a "policy" Defendants maintain in violation of the FLSA. Rather, they are (at best for Plaintiffs) conclusory allegations that independent FLSA violations *may* have occurred which cannot survive a motion to dismiss. *See, e.g., Landry v. Peter Pan Bus Lines, Inc.*, CIV.A. 09-11012-RWZ, 2009 WL 9417053, at *1 (D. Mass. Nov. 20, 2009) (dismissing collective action allegations because plaintiff's allegations "that an unspecified number of individuals, working in unspecified jobs, at unspecified places, were compensated according to an unspecified policy or practice, resulting in an underpayment of wages in violation of the FLSA" amounted to "only the legal conclusion, that employees were not paid overtime duly owed, and legal conclusions are not entitled to an assumption of truth."); *DeSilva v. N. Shore-Long Island Jewish Health Sys., Inc.*, 770

678 F.3d at 14. Further, only two paragraphs from the Complaint allege that Plaintiffs worked more than 40 hours per week without receiving proper overtime compensation,[12] and both paragraphs are the type of formulaic "paraphrase[s] of the statute" that the First Circuit found "too meager, vague, or conclusory" to state a plausible claim. *Id.* at 13. Specifically, Paragraph 34 alleges that Plaintiffs "routinely worked in excess of forty (40) hours per workweek without receiving overtime compensation at the rate of one and one-half their regular rate for overtime hours worked." (J.A. 12, ¶ 34.) The First Circuit described a nearly identical allegation in *Pruell* (*see* 678 F.3d at 13) as "little more than a paraphrase of the statute." Paragraph 42 likewise repeats the FLSA's statutory language, while adding a series of conclusory statements with no supporting facts to flesh them out, stating: "Defendants suffered or permitted Plaintiffs and the FLSA Collective to routinely work more than forty (40) hours per week without paying overtime compensation one and one-half the correct regular rate of pay for all hours worked over forty (40) per workweek, requiring them to work during uncompensated breaks, knowing that they did not report all hours worked, and failing to include all compensation when calculating the

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F. Supp. 2d 497, 510 (E.D.N.Y. 2011) (dismissing complaint where plaintiffs "failed to provide any specific factual allegations for their claims" regarding an "unpaid training policy" and "unpaid pre- and post-schedule work policy" and noting "[the] allegations regarding these policies consist only of four paragraphs per policy that contain nothing but vague and unfounded conclusions that plaintiffs were not being properly paid.").

12 *See* J.A. 12, ¶ 34 and 13, ¶ 42.

regular rate of pay." (J.A. 13, ¶ 42.) The paragraph fails to provide any facts at all, such as what work Plaintiffs allegedly performed during uncompensated breaks, to make these conclusory statements plausible. These boilerplate allegations are precisely the type of recitation of statutory language without well-pled facts that are not entitled to an assumption of truth under *Twombly* and *Iqbal*.

The Complaint also fails to meet the 'given workweek' standard adopted by the Second, Third and Ninth Circuits in *Lundy*, *Davis*, and *Landers*. It fails to plead that Plaintiffs worked more than 40 hours in a particular week without receiving proper overtime compensation for hours worked in excess of 40 during that week. The Complaint does not allege anywhere that work performed off the clock or during meal breaks caused Plaintiffs to work more than 40 hours in a given workweek and that they did not receive proper overtime compensation for that work. Such "connect-the-dots" type allegations are precisely what the 'given workweek' standard adopted in *Lundy*, *Davis*, and *Landers* requires.

Plaintiffs also misconstrue the standard as merely requiring "some description as to what time frame applies (e.g., the 'given weeks') as well as basic facts describing how overtime was denied." (*See* App. Br. at 32.) Again, what the standard actually requires is that a plaintiff allege that he or she worked more than 40 hours in a given workweek but was not compensated for the hours worked in excess of 40 during that particular week; it requires specific examples to make the claimed legal violations plausible, not just general statements.

Plaintiffs then claim that the Complaint "alleged routinely working more than forty hours per week and the workweeks at issue are all workweeks from April 21, 2011 [three years prior to the date the Complaint was filed] to the present." (*Id.* at 33.) Contrary to Plaintiffs' assertion, nowhere in the Complaint are there any allegations that Plaintiffs worked more than 40 hours per week every week since April 21, 2011. The only place that this date range appears in the Complaint is Paragraph 32, which is the "proposed Collective Class" definition.[13] Plaintiffs' attempt to "bootstrap" their class definition into an FLSA overtime claim that would satisfy the 'given workweek' standard adopted in *Lundy*, *Davis*, and *Landers* fails, as the class definition does not even come close to providing sufficient facts to satisfy that standard. The definition does not assert that Plaintiffs performed uncompensated overtime work during the entire class time period, and simply attempts to establish a three-year limitations period. It does not allege that any FLSA violations actually occurred during that time period.

3. The "Less Onerous" Pleading Standard Advanced by Plaintiffs Is Obsolete

Plaintiffs also urge this Court to adopt a "less onerous" pleading standard for FLSA overtime claims which they claim was applied by the Fourth Circuit in *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 349 (4th Cir. 2005), and the Eleventh Circuit in *Secretary of Labor v. Labbe*, 319 Fed. App'x 761, 763-

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[13] *See* J.A. 12, ¶ 32.

64 (11th Cir. 2008). (*See* App. Br. at 23-26.) However, neither case is controlling on this Court, and both cases are obsolete because they predate and directly contradict *Iqbal*.

In *Chao*, the Fourth Circuit found that sparse, conclusory allegations that the defendant was "an employer and/or enterprise covered by the [FLSA]"; that certain employees worked overtime "without proper remuneration"; and, that the defendant "repeatedly violated" the overtime and record-keeping provisions of the FLSA satisfied Rule 8. 415 F.3d at 344, 348-349. However, *Chao* applied the "no set of facts" standard from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which the Supreme Court expressly renounced in *Twombly*. *See* 550 U.S. at 563, 570.

Labbe is also a pre-*Iqbal* decision where the Eleventh Circuit held, in an unpublished opinion, that allegations that the defendant "repeatedly violated stated provisions of the FLSA by failing to pay covered employees minimum hourly wages and to compensate employees who worked in excess of forty hours a week at the appropriate rates[]" stated plausible claims for relief under the FLSA. 319 Fed. App'x at 763. The court, relying upon *Chao* without recognizing that *Chao* applied an obsolete standard, reasoned that FLSA claims are less complex than the antitrust claims at issue in *Twombly*, and therefore held that a lower degree of factual specificity was required. *Id*. As the Ninth Circuit recently recognized in *Landers*, however, *Labbe's* holding that conclusory allegations that merely recite the statutory language are adequate "runs afoul of the Supreme Court's pronouncement in *Iqbal* that a Plaintiff's pleading burden cannot be discharged by '[a] pleading that

offers labels and conclusions or a formulaic recitation of the elements of a cause of action . . .'" 771 F.3d at 644 (quoting *Iqbal*, 556 U.S. at 678 (citation and internal quotation marks omitted)).[14]

4. The District Court Applied the Appropriate Pleading Standard and Correctly Determined that the Complaint Failed to Plead an FLSA Overtime Claim

Plaintiffs also repeatedly, and incorrectly, claim the District Court improperly applied a "heightened pleading standard" from *Attanasio v. Community Health Systems, Inc.*, 2011 WL 5008363 (M.D. Pa. Oct. 20, 2011). (*See* App. Br. at 13, 23, 32.) What Plaintiffs misunderstand, though, is that the District Court properly *applied* the pleading standards articulated in *Iqbal* and *Twombly*, and in doing so, the court *relied* upon *Attanasio* and other court decisions for guidance as to the level of detail that might satisfy the standard. In fact, the portion of *Attanasio* that the District Court relied upon accords perfectly with *Iqbal's* and *Twombly's* holding that a complaint filled with "naked assertions devoid of further factual enhancement" cannot survive a motion to dismiss. *See Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555, 557) (internal quotation

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[14] In furtherance of their argument that the Court should apply the "less onerous" standard from *Labbe* and *Chao*, Plaintiffs note that the Eastern District of Missouri recently relied on *Labbe* and *Chao* in *Williams v. Central Transport International, Inc.*, 2014 WL 1344513 (E.D. Mo. Apr. 4, 2014). (*See* App. Br. at 23-24). The fact that a district court in this Circuit errantly chose to rely on *Labbe* and *Chao's* outdated pleading standards in no way suggests this Court should do the same.

marks omitted). The District Court quoted this excerpt from *Attanasio*:

> [t]he Plaintiffs wholly fail to plead where exactly they work, what it is they do, how long they have done it for, and other basic facts that would add credence to their bare legal recitations . . . [s]uch pleadings . . . are insufficient to maintain a cause of action.

(J.A. 80) (quoting *Attanasio*, 2011 WL 5008363, at *6 (ellipses in original).) The idea that a complaint lacking "basic facts that would add credence to . . . bare legal claims" is "insufficient to maintain a cause of action" is *the core tenet* of *Iqbal* and *Twombly* and is certainly not a "heightened" pleading standard.

Plaintiffs take particular issue with the District Court's holding that:

> [T]he alleged FLSA violations are also only supported by conclusions and not facts. For example, the Complaint does not identify when the specific FLSA violation(s) occurred, does not state which Defendant committed the alleged violation(s), and does not identify any particular individual that instructed Plaintiffs to perform overtime work.

(J.A. 80.) (emphasis added). But, the court's providing these examples in no way indicates that it applied a heightened pleading standard to the Complaint. The court did not hold that each of those facts must be included to state a plausible FLSA claim; it simply noted that a complaint that includes those facts comes much closer to stating a plausible

FLSA claim than the Complaint did, which conforms with the Supreme Court's guidance that determining whether a plausible claim has been pled is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679 (citation omitted). As such, the District Court properly concluded that the Complaint failed to plead an FLSA overtime claim under the appropriate, post-*Iqbal* standard.

II. The District Court Did Not Abuse Its Discretion by Declining to Invite Plaintiffs to Amend the Complaint Before Entering Judgment or by Denying Plaintiffs' Motion for Post-Judgment Leave to Amend

A. Standards of Review

This Court reviews the denial of leave to amend a complaint for abuse of discretion and reviews questions of futility *de novo*. *U.S. ex rel Roop v. Hypoguard U.S.A., Inc.*, 559 F.3d 818, 822 (8th Cir. 2009). The Court reviews the denial of a post-judgment motion for leave to amend under Rule 59(e) or 60(b) for abuse of discretion. *Horras*, 729 F. 3d at 804. "Although a district court 'may not ignore the [Federal Rule of Civil Procedure] 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits,' it has 'considerable discretion to deny a post judgment motion for leave to amend because such motions are disfavored.'" *Id.* at 798 (quoting *Roop*, 559 F.3d at 824).

B. The District Court Did Not Abuse Its Discretion by Declining to Invite Plaintiffs to Amend

The District Court acted well within its discretion when it declined to invite Plaintiffs to amend the Complaint. At the very end of their opposition to Defendants' Motion to Dismiss, Plaintiffs wrote that "[s]hould the Court believe [the Complaint] is somehow deficient, the appropriate remedy is not to dismiss but to allow Plaintiffs leave to file an amended complaint." (J.A. 61.) But, Plaintiffs did not describe how they proposed to amend the Complaint to address the deficiencies pointed out in the motion, nor did they submit a proposed amended complaint with their opposition brief. Indeed, at no point prior to entry of judgment did Defendants formally seek to amend the Complaint, despite having ample opportunity to do so.

This Court has repeatedly held that a district court does not abuse its discretion by not granting leave to amend when a plaintiff fails to submit a proposed amended complaint or describe what revisions he would make to his pleading if allowed to amend. *See*, *e.g., Drobnak v. Andersen Corp.*, 561 F.3d 778, 788 (8th Cir. 2009) ("A district court does not abuse its discretion in failing to invite an amended complaint when plaintiff has not moved to amend and submitted a proposed amended pleading.") (internal quotation marks and citation omitted).[15]

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[15] *See also Roop*, 559 F.3d at 822 (court did not abuse discretion by denying request for leave to amend where plaintiff "failed to describe the amendments he would submit"); *Mask*, 752 F.3d at 742 (rejecting plaintiff's argument that court

"[T]o preserve the right to amend a complaint a party must submit a proposed amendment along with its motion." *Id.* (*citing Wolgin v. Simon*, 722 F.2d 389, 395 (8th Cir. 1983)).[16]

The District Court did not abuse its discretion by relying upon this well-established precedent and denying Plaintiffs' improper request to amend. Plaintiffs did not separately move for leave to amend, nor did they submit a proposed amended pleading with their response to the motion to dismiss or provide any details as to how they proposed to amend the Complaint. (J.A. 43-61.) Accordingly, Plaintiffs failed to preserve their right to amend, and the District Court did not err by not permitting them leave to amend the Complaint. *See Wolgin*, 722 F.2d at 395; *Mask*, 752 F.3d at 742; *Roop*, 559 F.3d at 822; *Drobnak*, 561 F.3d at 788.

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departed from "typical practice" by dismissing complaint without leave to amend).

[16] In *Wolgin*, as here, the plaintiff included a conditional request for leave to amend in his opposition to defendants' motion to dismiss but failed to submit a proposed amendment or describe what such an amendment would contain. 722 F.2d at 394. The district court granted the motion to dismiss and initially granted the plaintiff leave to amend his complaint. *Id.* at 390. Five days later, however, the district court issued a *nunc pro tunc* order revoking the leave to amend. *Id.* Even with such an abrupt reversal of course, this Court found no abuse of discretion and announced: "We hold that to preserve the right to amend a complaint a party must submit a proposed amendment along with its motion." *Id.* at 395.

C. The District Court Acted Within Its "Considerable Discretion" by Denying Plaintiffs' Motion for Post-Judgment Leave to Amend Under Rule 60(b) or 59(e)

It was only after the District Court entered judgment in Defendants' favor that Plaintiffs filed a Motion for Post-Judgment Leave to Amend, asking the court to vacate the Dismissal Order and judgment, re-open the case and permit Plaintiffs to substitute a proposed amended complaint. (J.A. 85-94.) This was the very first time that Plaintiffs submitted a proposed amended complaint or otherwise indicated how they proposed to amend their pleading to address the deficiencies noted in Defendants' motion to dismiss.

The District Court denied Plaintiffs' motion because Plaintiffs did not separately move for leave to amend and did not file a proposed amendment prior to the entry of judgment, but instead chose to stand on the deficient complaint in the face of a motion to dismiss identifying the very deficiencies that resulted in dismissal, and concluded that this did not constitute an "extraordinary circumstance" justifying setting aside its judgment under Rules 59(e) and 60(b). (J.A. 167.) The court was well within its discretion (and in accord with many decisions by this Court) in doing so. *See Mitan v. McNiel*, 399 F. App'x 144, 145 (8th Cir. 2010); *Horras*, 729 F.3d at 804-805; *Mask*, 752 F.3d at 743-44; *Roop*, at 822, 824.

Rule 59(e) motions "serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 934 (8th Cir.2006) (internal quotations and citations omitted).

A motion under Rule 59 "is not intended to routinely give litigants a second bite at the apple, but to afford an opportunity for relief in extraordinary circumstances." *Dale and Selby Superette & Deli v. U.S. Dep't Ag.*, 838 F. Supp. 1346, 1348 (D. Minn. 1993).

Rule 60(b) likewise requires a movant to show "exceptional circumstances" warranting "extraordinary relief." *Mask*, 752 F.3d at 743 (citation omitted). Specifically, Rule 60(b)(6), which is a final "catch-all" provision allowing a court to vacate a judgment for "any other reason that justifies relief" and is the provision Plaintiffs relied on in their Motion for Post-Judgment Leave to Amend,[17] applies "only where exceptional circumstances prevented the moving party from seeking redress through the usual channels." *Atkinson v. Prudential Prop. Co.*, 43 F.3d 367, 373 (8th Cir. 1994) (citation and quotation marks omitted).

Applying Rule 60(b) and Rule 59(e) in the context of a motion for post-judgment leave to amend, this Court devised the following standard: "[D]istrict courts in this circuit have considerable discretion to deny a post judgment motion for leave to amend because such motions are disfavored, but may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits." *Roop*, 559 F.3d at 824. And, the Court recently clarified that post-judgment leave to amend will be granted only "if it is consistent with the stringent standards governing the grant of Rule

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17 *See* App. Br. at 37-38.

59(e) and Rule 60(b) relief." *Mask*, 752 F.3d at 743 (citation omitted).

Applying this standard, this Court has repeatedly held that a district court does not abuse its discretion by denying a post-dismissal motion for leave to amend where, as here, the moving party "chose to stand on his pleadings in the face of the motion to dismiss, which identified the very deficiency upon which the court dismissed the complaint." *Mitan*, 399 F. App'x at 145; *Horras*, 729 F.3d at 804-805 (court did not abuse discretion by denying post-judgment motion for leave to amend where motion to dismiss put plaintiff on notice of deficiencies in complaint but plaintiff took no steps to amend until after dismissal).[18] Thus, the District Court acted well-within its "considerable discretion" by denying Plaintiffs' Post-Judgment Motion for Leave to Amend. Plaintiffs stood on and vigorously defended the Complaint in the face of Defendants' motion to dismiss, which identified the very deficiencies upon which the District Court dismissed the Complaint, even though they had at least three opportunities before the court entered judgment to submit an amended complaint.

Plaintiffs' first opportunity to amend the Complaint began on May 23, 2014, when Defendants

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[18] *See also Roop*, at 822, 824 (court did not abuse discretion by denying post-judgment motion for leave to amend where plaintiff "adopted a strategy of vigorously defending his initial Complaint, despite its numerous and obvious Rule 9(b) deficiencies"); *Mask*, 752 F.3d at 743-44 (court did not abuse discretion by denying post-judgment motion for leave to amend where plaintiff knew of "the possible need to amend its pleading and elected to 'stand or fall' on its untested legal theory").

filed the Motion to Dismiss that specifically identified the Complaint's deficiencies. For the next 21 days, Plaintiffs could have filed an amended complaint as a matter of right under Rule 15(a)(1)(B), and doing so would have mooted Defendants' motion. They chose not to do so.

Instead, on June 6, 2014, Plaintiffs filed an opposition to the Motion to Dismiss, vigorously defending the Complaint. (J.A. 43-62.) At the bottom of the last page of their opposition, Plaintiffs stated: "[s]hould the Court believe that Plaintiffs' Complaint is somehow deficient, the appropriate remedy is not to dismiss but to allow [Plaintiffs] leave to file an amended complaint." (J.A. 61.)[19] Notably, even when Plaintiffs filed this opposition, they still had seven days remaining to amend as a matter of right. Instead, they made the calculated decision to stand on the Complaint. And, importantly, Plaintiffs *did not* identify or describe in their opposition the types of factual allegations they were prepared to add to the Complaint to address the deficiencies identified

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[19] Plaintiffs contend in their brief that this insertion constituted "an alternative request for leave to amend." (*See, e.g.,* App. Br. at i.) It is not such a request—it is nothing more than an incorrect statement about what Plaintiffs believed the law required the District Court to do in the event the court were to grant to motion to dismiss. Such a cursory reference to a potential amended pleading in a responsive brief does not constitute a proper request or motion for leave to amend. *See, e.g.*, *Calderon v. Kansas Dept. of Social and Rehab. Servs.*, 181 F.3d 1180, 1187 (10th Cir. 1999) ("single sentence, lacking a statement for the grounds for amendment and dangling at the end of her memorandum, did not rise to the level of a motion for leave to amend" and the court did not abuse its discretion by ignoring it); *Glenn v. First Nat. Bank in Grand Junction*, 868 F.2d 368, 370 (10th Cir. 1989) (same).

by Defendants—a fact which this Court has pointed to as the bare minimum a plaintiff must do in order to properly preserve and request leave to amend. *See In re 2007 Novastar Fin. Inc., Sec. Litig.*, 579 F.3d 878, 884–85 (8th Cir. 2009) (affirming denial of leave to amend where plaintiff "'did not submit a motion for leave to amend but merely concluded her response to [defendant's] motion to dismiss with a request for leave to amend and did not offer a proposed amended complaint or even the substance of the proposed amendment to the district court.'") (quotation omitted, emphasis added).

Furthermore, when Defendants filed their reply brief in support of the Motion to Dismiss, which pointed out that Plaintiffs had not properly requested leave to amend, Plaintiffs were put on notice they had not properly sought leave to amend (or, at a minimum, that Defendants disputed whether they had properly done so). This filing should have prompted Plaintiffs to carefully examine this Court's decisions to assess whether they had properly sought leave to amend. But, instead, Plaintiffs let this second opportunity to properly plead their claim pass.

Nine days after Defendants filed their reply brief challenging whether Plaintiffs had properly sought leave to amend, the District Court granted Defendants' motion to dismiss. The court noted that Plaintiffs "[had] not separately move[d] for leave to amend and [had] not file[d] a proposed amendment," and the court recognized that *Mask* "reaffirmed 'that to preserve the right to amend a complaint a party must submit a proposed amendment along with its motion,'" and that "'a district court in granting a

motion to dismiss is not obliged to invite a motion for leave to amend if plaintiff did not file one.'" (J.A. 81 (quoting *Mask*, 752 F.3d at 742).) The court concluded that "[b]ecause [Plaintiffs] ha[d] chosen to stand on and defend [their] original complaint," the court would dismiss the case "without first inviting a motion to amend." (*Id.*) (citation omitted.)

Another full week passed before the District Court entered judgment in Defendants' favor. (J.A. 82.) During that time, Plaintiffs were armed with specific guidance from the District Court about how to properly seek leave to amend and, thus, had a third opportunity to correct the deficiencies with the Complaint by filing a motion properly seeking leave to amend. They did not. Instead, they waited until after entry of judgment and then sought the extraordinary remedy of vacating the Dismissal Order and judgment, re-opening the case, and substituting the proposed amended complaint for the Complaint.

In short, while Plaintiffs portray their current predicament as the result of unforeseeable circumstances beyond their control, nothing could be further from the truth. Plaintiffs had <u>many</u> opportunities to avoid the situation in which they now find themselves, but they failed to take advantage of any of them. "Numerous cases" have held that such "[u]nexcused delay is sufficient to justify the court's denial if the party is seeking to amend the pleadings after the district court has dismissed the claims it seeks to amend, particularly when the plaintiff was put on notice of the need to change the pleadings before the complaint was

dismissed, but failed to do so." *Mask*, 752 F.3d at 743-44.

Indeed, the situation here—i.e., asking a court for judicial reprieve after vigorously defending an initial pleading—has been flatly rejected by this Court as "balderdash." *See Roop*, 559 F.3d at 823. In *Roop*, the defendant moved to dismiss the complaint for failure to state a claim, and, just like Plaintiffs here, the plaintiff opposed arguing the complaint was sufficient and included a statement at the end of the opposition that he should be granted leave to amend if the court found the complaint deficient. And, just as Plaintiffs failed to do here, the plaintiff in *Roop* did not attach a copy of his proposed amended complaint to his response. The district court dismissed the complaint and entered judgment in favor of the defendant, and the plaintiff filed a motion to alter or amend the judgment and for leave to file an amended complaint, which the district court denied. On appeal, this Court held the district court was squarely within its right in dismissing the complaint without first allowing the plaintiff the opportunity to amend, because "though the district court 'should freely give leave [to amend] when justice so requires,' . . . plaintiffs do not enjoy 'an absolute or automatic right to amend' a deficient . . . [c]omplaint." *Id.* at 822 (citation omitted). And, the Court noted that, rather than attempt to cure the deficiencies with his initial complaint, the plaintiff "adopted a strategy of vigorously defending" the pleading. *Id.* at 823.

This case is also analogous to *Horras*, *supra*, where this Court upheld the district court's denial of the plaintiff's post-judgment motion for leave to

amend on the basis of unexcused delay. The defendant moved to dismiss the complaint for failure to state a claim, and in response, the plaintiff argued that the complaint was sufficient as pled. The district court granted the motion to dismiss and entered judgment in the defendant's favor, and the plaintiff filed a post-judgment motion for leave to amend and submitted a proposed amended complaint. The district court denied that motion based on the plaintiff's delay in seeking leave to amend. This Court affirmed, finding that the motion to dismiss adequately put the plaintiff on notice that there were deficiencies with the complaint and, therefore, of his need to amend, but the plaintiff took no steps to amend until after dismissal and entry of judgment. Thus, the district court was well within its "considerable discretion" to deny the plaintiff's post-judgment motion. 729 F.3d at 804-05.

Plaintiffs do not make a meaningful attempt to address the numerous cases from this Court, such as *Roop* and *Horras*, that have held, under very similar facts, that a district court does not abuse its discretion by denying a post-judgment motion for leave to amend, and none of the arguments Plaintiffs advance in support of their contention that the court erred are persuasive. Plaintiffs first argue that the District Court abused its discretion by "failing to review the [Proposed] Amended Complaint." (*See* App. Br. at 39.) However, Plaintiffs provide no authority whatsoever in support of their proposition that failing to review a proposed amended complaint attached to a Rule 59 or Rule 60 motion constitutes an abuse of discretion. And that is clearly not the case where, as here, the District Court denied the

motion in part on the grounds that Plaintiffs did not separately move for leave to amend and did not file a proposed amendment prior to the entry of judgment, and instead chose to stand on the deficient Complaint. (J.A. 167.) In other words, a review of the proposed amended complaint was not even material to resolution of the motion in light of Plaintiffs conduct in delaying their attempts to amend the Complaint until after judgment had been entered.

Also, even if such a review were material to a resolution of the motion (it is not), Plaintiffs included in their motion a detailed description of the new information in the proposed amended complaint and how they believed that information "cure[d] the deficiencies found by the Court." (J.A. 90-91.) Therefore, regardless of whether the court reviewed the actual proposed amendment, it was certainly aware of what new information the proposed amended complaint contained. Indeed, in its order denying Plaintiffs' Motion for Post-Judgment Leave to Amend, the court expressly stated that it "ha[d] considered the record, the parties' arguments, and applicable law" and "[a]fter that consideration" it found no basis to disturb the Dismissal Order. (J.A. 167.)

Plaintiffs further argue that requiring plaintiffs faced with a motion to dismiss to move for leave to amend their complaint and submit a proposed amendment is unfair, "creates a self-defeating pleading practice for plaintiffs," and will "lead to wasted time and resources for the parties and the courts." (*See* App. Br. at 39-40.) On the contrary, this rule incentivizes plaintiffs to comply with *Iqbal* and *Twombly* by including in their initial pleading the

important basic facts in their possession. It also enhances efficiency by preventing precisely the scenario here, in which a plaintiff files a bare bones complaint and chooses not to include important and accessible facts, and, therefore, prompts a motion to dismiss that otherwise might have been avoided, and then vigorously defends the deficient complaint instead of simply filing a motion to amend and proposed amendment (or amending as a matter of right).

Plaintiffs also argue that the District Court's order denying their Motion for Post-Judgment Leave to Amend deprived them of the opportunity to test their claims on the merits. (*See* App. Br. at 41-46.) However, Plaintiffs had a full opportunity to test the merits of their claims, and the claims were found to be implausible, lacking in foundation and properly were dismissed. Also, as noted above, Plaintiffs had multiple opportunities even after Defendants filed their motion to dismiss to submit an amended complaint. But Plaintiffs failed to take advantage of any of those opportunities. Nothing about the order denying their motion deprived Plaintiffs of the right to test the merits of their claims. Rather, Plaintiffs failed to do what was necessary to advance their claims beyond the pleading stage despite multiple opportunities to do so and specific guidance and direction from Defendants and the District Court as to how their claims were deficient. As this Court has held, dismissal of Plaintiff's deficient Complaint in these circumstances without inviting or granting them leave to amend is not an inappropriate deprivation of Plaintiff's legal rights, nor is it an

abuse of the court's discretion. *See Mask*, 752 F.3d at 743-44; *Roop*, 559 F.3d at 823.

Plaintiffs reliance on *Sanders v. Clemco Industries*, 823 F.2d 214, 216 (8th Cir. 1987), for the broad proposition that "[d]ismissing claims without testing their merits has been rejected by this Court" is misplaced. (*See* App. Br. at 42.) In *Sanders*, the defendant never filed a motion to dismiss. Rather, the trial court dismissed the complaint *sua sponte* because it failed to allege sufficient facts to establish jurisdiction. *Id.* at 216. Therefore, unlike Plaintiffs here, the plaintiff in *Sanders* did not make a deliberate choice to stand on his original complaint "in the face of a motion to dismiss that identified the very deficiency upon which the court dismissed [that] complaint."[20] *See Plymouth Cnty., Iowa Ex Rel.*

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[20] Plaintiffs also badly misconstrue the Sixth Circuit's unpublished holding in *Starkey v. JPMorgan Chase Bank, NA*, 573 Fed. App'x. 444, 449-50 (6th Cir. 2012). *Starkey* did not categorically "[find] that denying a post-judgment leave to amend a complaint under a Rule 59(e) or 60(b) (sic) would be an abuse of discretion." (See App. Br. at 43.) Rather, the Sixth Circuit found no abuse of discretion by dismissing the plaintiffs' complaint with prejudice where they did not file a post-judgment motion for leave to amend. It noted that the Sixth Circuit's "default rule is that if a party does not file a motion to amend or a proposed amended complaint in the district court, it is not an abuse of discretion for the district court to dismiss the claims with prejudice." *Id.* at 449 (internal quotation marks and citation omitted). This rule actually supports the District Court's decision to dismiss Plaintiffs' Complaint without leave to amend since Plaintiffs did not move for leave to amend or submit a proposed amendment prior to the Dismissal Order. The fact that the Sixth Circuit went on to note that the plaintiffs "could have . . . moved to vacate or set [aside] the district court's judgment after it granted [defendant's] motion to dismiss under Rule 59 or 60" in no way indicates that the

Raymond ("Raymond") v. MERSCORP, 287 F.R.D. 449, 464 (N.D. Iowa 2012).

Plaintiffs' attempt to distinguish this case from *Mask* also fails. They argue that the plaintiff in *Mask* "had an opportunity to 'test his claims on the merits' via a parallel action before the district court." (*See* App. Br. at 46.) To the extent Plaintiffs argue that the District Court abused its discretion by denying their Motion For Post-Judgment Leave To Amend because there was no other pending action to which Plaintiffs could have transferred their claims, such an argument would virtually extinguish a district court's right to enforce federal pleading standards by dismissing inadequate complaints, and neither *Mask* nor any other case from this Court supports such a far-reaching and absurd proposition.

Plaintiffs also quote language from *Mask* stating that "cases have stated that a plaintiff's non-prejudicial delay in seeking post-dismissal leave to amend is not sufficient reason to deny leave [to amend]." (*See* App. Br. at 45 (quoting *Mask*, 752 F. 3d at 744) (brackets added).) But, Plaintiffs ignore the opposite proposition, also stated in *Mask* and much more applicable to this case, that:

> Numerous cases have ruled that unexcused delay <u>is sufficient</u> to justify the court's denial if the party is seeking to amend the pleadings after the district court has dismissed the claims it seeks to amend, <u>particularly when the plaintiff was put on</u>

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district court would have abused its discretion by denying such a motion had the plaintiffs filed one. *Id.*

> notice of the need to change the pleadings before the complaint was dismissed.

Id. (citation and internal quotation marks omitted) (emphases added). *Mask* thus draws a clear line between cases where a request for post-dismissal leave to amend the pleadings is properly denied and where such a request may be granted. The delineating point is whether "the plaintiff was put on notice of the need to change the pleadings before the complaint was dismissed, but failed to do so." *Id.* (quotation omitted).[21] And, the District Court's denial of Plaintiffs' post-dismissal request for leave to amend was proper, just as it was in *Mask*, because Plaintiffs chose "to stand on and defend [their] original complaint" in the face of a motion to dismiss that put them on notice of the deficiencies in the Complaint. *Id.* at 742.

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[21] This delineating principle explains why two of the three opinions cited in *Mask* as cases where post-dismissal leave to amend a complaint was warranted to allow a plaintiff "to test his claim on the merits" came out the way they did. *See Sanders*, discussed on page __ *supra*; *Buder v. Merril Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 691-92 (8th Cir. 1981) (court dismissed complaint based on intervening circuit court opinion holding shorter statute of limitations applied to claims asserted). In the third case, *Roberson v. Hayti Police Dep't*, 241 F.3d 992, 993 (8th Cir. 2001), a *pro se* plaintiff sued police officers who allegedly shot him. The plaintiff twice requested appointment of counsel, and the district court finally appointed counsel for the plaintiff, but in the same order appointing counsel the court prohibited the plaintiff from amending his complaint. *Id.* at 993-994. Plaintiffs' situation here is of their own doing and does not remotely resemble the shocking circumstances that warranted relief for the plaintiff in *Roberson*.

Finally, Plaintiffs allege that, "the district court relied upon case law factually opposite to the scenario at hand" because it "cited cases whereby the plaintiffs failed to offer any pre *or post-judgment* amended complaint." (*See* App. Br. at 46) (emphasis in original.) That is simply not true. The District Court cited *Mask*, *Mitan*, *Raymond*, and *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 2014 WL 3573662, at * 2 (D. Minn. July 21, 2014). In all four of those cases, the plaintiffs, like Plaintiffs, submitted a proposed amended complaint with their motions for post-judgment leave to amend. *See Mask*, 752 F.3d at 744; *Raymond*, 287 F.R.D. at 465-467; *Insulate SB*, 2014 WL 3573662, at *3. The District Court's reliance on these cases was perfectly appropriate and provides but further proof that the court did not abuse its discretion by denying Plaintiffs' Motion for Post-Judgment Leave to Amend.[22]

D. The District Court Did Not Err Because the Proposed Amended Complaint Was Futile

In its order denying post-judgment leave to amend, the District Court stated that "[Plaintiffs'] arguments are rejected for the reasons stated in the [Dismissal Order], and for the additional reasons stated by Defendants." (J.A. 167) (emphasis added.)

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[22] Plaintiffs also recycle their argument, addressed in Section I.D.4., *supra*, that the District Court applied "a heightened pleading standard from the Middle District of Pennsylvania" when it granted Defendants' Motion to Dismiss, and therefore, that the District Court's actions deprived Plaintiffs of "an opportunity to meet this new standard." (*See* App. Br. at 38-39.) This argument fails for the reasons stated in Section I.D.4., *supra*.

One of the central arguments that Defendants made in their opposition to the Motion For Post-Judgment Leave To Amend was that allowing substitution of the proposed amended complaint would be futile. (J.A. 139-143.)

A district court does not err by denying leave to amend a complaint where the proposed amended complaint would not survive a motion to dismiss. *See*, *e.g.*, *Zutz v. Nelson*, 601 F.3d 842, 852 (8th Cir. 2010). While Plaintiffs contend that their proposed amended complaint "[c]ures the [a]lleged [d]eficiencies" in the Complaint and "comports with requirements of Rule 8 regarding their FLSA claims" (*see* App. Br. at 47-48), it still fails to set forth facts to plausibly establish a valid FLSA overtime claim and, therefore, would not have survived a motion to dismiss.

The proposed amended complaint alleges only one Count—a claim for overtime violations under the FLSA. (J.A. 118-119, ¶¶ 86-93.) The "factual basis" for that claim was nearly identical to the conclusory allegations contained in Paragraph 42 of the Complaint and discussed on page 28, *supra*. (Compare J.A. 118, ¶ 88 *with* J.A. 13-14, ¶ 42.) [23] These allegations are a classic example of conclusory statements that do not rise to the level of a plausible claim under the FLSA. *See*, *e.g.*, *Pruell*, 678 F.3d at 13 (allegations that plaintiffs "regularly worked hours over 40 in a week and were not compensated for such time, including the applicable premium pay"

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[23] The only difference between the two paragraphs is that Plaintiffs added the conclusory phrase "during evening and weekend hours off the clock" to Paragraph 88 of the proposed amendment.

were "so threadbare or speculative that they fail[ed] to cross 'the line between the conclusory and the factual'") (quoting *Twombly*, 550 U.S. at 557 n. 5).

Further, the "FACTUAL ALLEGATIONS" section of the proposed amended complaint did nothing to make the conclusory statements in the only Count more factually concrete or plausible. For example, Plaintiffs alleged that "Plaintiffs and others similarly situated perform[ed] compensable work tasks 'off the clock' during evening and weekend hours and during uncompensated meal breaks," and that such tasks included "performing computer-related work tasks and phone conferences during the evening and weekend hours, and performing their primary job duties . . . during uncompensated meal breaks." (J.A. 112-113, ¶ 72.b.) Plaintiffs also alleged that Defendants failed to include their weekly mileage allowance when calculating their regular rate of pay. (J.A. 115, ¶ 72.c.) However, nowhere did Plaintiffs allege that such work occurred or such mileage was not included in a workweek in which Plaintiffs or others allegedly similarly situated worked more than 40 hours a week and thus were entitled to overtime pay.[24] In other words, the proposed amended complaint did not meet the 'given workweek' standard articulated in *Lundy*, *Davis*, and *Landers*, and, therefore, even assuming its

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[24] Plaintiffs do allege that the mileage allowance was not included "when calculating the regular rates of pay for Plaintiffs Ash and Jewsome on their paychecks for the pay period ending March 15, 2014." (J.A. 115, ¶ 72.c.) However, Plaintiffs never allege whether either Ash or Jewsome worked more than 40 hours during a workweek falling within that pay period.

allegations were true, they were just as consistent with a conclusion that such "off the clock" work occurred in weeks where no overtime was worked and thus no overtime pay was due. (*See supra*, Section I.D.)

Plaintiffs' attempt to buttress their "off the clock" allegations with allegations regarding specific tasks they allegedly performed could not save the proposed amended complaint. Plaintiffs alleged that "[t]hese 'Activities' that each Plaintiff and others similarly situated [were] assigned and expected to complete each day [could not] be completed without the Plaintiffs and others similarly situated working overtime," that Defendants knew Plaintiffs worked overtime, and that Plaintiffs were told that Defendants did not allow them to work overtime. (J.A. 112-113, ¶ 72.b.) However, in addition to their failure to identify a single week in which they actually worked overtime doing these activities, Plaintiffs *failed to allege that they were not paid for any overtime worked* performing those activities (even if they worked such overtime contrary to a manager's instructions). Accordingly, even assuming the allegations in Plaintiffs' proposed amended complaint were true, they are consistent with a conclusion that Plaintiffs were properly paid for any overtime hours they worked.

Finally, while Plaintiffs allege that "Defendants failed to meet the necessary requirements under 29 C.F.R. § 778.114 to pay Plaintiffs and others similarly situated overtime under the 'fluctuating workweek,'" (J.A. 112, ¶ 72(a)), the proposed amended complaint did not actually include in its single Count a claim for unpaid overtime based upon

a fluctuating workweek violation. Rather, as noted above, the sole basis of the FLSA overtime claim is that Defendants allegedly failed to pay overtime at one and a half times the correct regular rate for overtime work performed during evenings, weekends and meal breaks. (J.A. 118, ¶ 88.) And, the only examples of workweeks that Plaintiffs provided regarding their fluctuating workweek allegations were pay periods in which Plaintiffs worked on average less than 40 hours per week, and thus it is unlikely any overtime pay was due. (J.A. 112, ¶ 72(a).)

In summary, the proposed amended complaint failed to sufficiently plead an FLSA overtime claim, and it would have been futile for the District Court to have granted Plaintiffs leave to file it. Therefore, the District Court did not err by denying Plaintiffs' Motion for Post-Judgment Leave to Amend. *See Mask*, 752 F.3d at 744 (district court did not err in refusing to grant post-judgment leave to amend where the proposed amendment did not cure the complaint's deficiencies); *Roop*, 559 F.3d at 823 (same); *Drobnak*, 561 F.3d at 788 (same).

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's order dismissing Plaintiffs' Complaint without leave to amend, and should affirm the District Court's order denying Plaintiffs' Motion for Post-Judgment Leave to Amend.

Respectfully submitted this 7th day of January, 2015.

/s/ Daniel B. Boatright

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APPELLANTS' REPLY BRIEF
(FEBRUARY 4, 2015)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LINDA S. ASH and ABBIE JEWSOME on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

v.

ANDERSON MERCHANDISERS, L.L.C. (a Delaware Corp.), ANDERSON MERCHANDISERS, L.L.C. (a Texas Corp.), WEST AM, L.L.C., and ANCONNECT, L.L.C.,

Defendants-Appellees.

No. 14-3258

Appeal from the United States District Court for the Western District of Missouri; case no.: 4:14-cv-0358-DW; Hon. Dean Whipple presiding; Order granting motion to dismiss and order denying Plaintiff's Motion Under Rule 60(b) or Rule 59(e) to Vacate the July 2, 2014 Order and July 9, 2014 Clerk's Judgment, Re-Open the Case and Substitute the Complaint with the First Amended Complaint.

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REPLY ARGUMENT

Appellees cannot overcome the uncontroverted fact that they possess the information necessary to address the economic reality factors. This is not a case where the "employer" is easily identifiable. Given the information in Appellants' possession, and presented to the district court, Appellants pleading the elements of a "joint enterprise" among the four defendants should survive the Rule 8 scrutiny. Regarding the FLSA claim, Appellees fail to demonstrate having no knowledge regarding the basis of Appellants' overtime claims under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq*. The information provided in the Complaint articulates how Appellants' FLSA claim is plausible on its face. Appellees present nothing to counter this fact.

Also, Appellees fail to address controlling precedent in defending the district court's denial of leave to amend. Also, Appellees did not address the uncontroverted fact that Appellants' claims were never tested on their merits. Instead, they claim that Appellants failed to meet three self-created "opportunities" to amend. Leave to amend should have been allowed at the district court level as

sought by Appellants. It was timely (Appellants seeking leave to amend five business days after the district court's July 2, 2014 order), and Appellees would not have been prejudiced. Indeed, Appellees do not discuss either of these essential elements under Rule 15(a). Instead, they rely on their three "opportunities" argument. Such deadlines are defied by logic and rejected by existing precedent. In the end, Appellees cannot overcome the district court's abuse of discretion in denying leave to amend. Appellants' case must be heard on its merits.

I. Appellees Fail to Demonstrate that the Complaint does not Meet Rule 8's Requirements Under *Twombly* and *Iqbal* Regarding the Employer Relationship and FLSA Claims

A. Appellants Cannot Plead Corporate Information in Appellees' Sole Possession

Appellees repeatedly argue that the Complaint was properly dismissed for failing to plead facts supporting the "economic realities" test. *See, e.g.*, Appellees' Brief at 10-12, 14-15, 19. The district court accepted this position when dismissing the Complaint. It found that Appellants failed to include "facts supporting an employer-employee relationship between any Plaintiff and any Defendant" including "whether the alleged employer: '(1) has the power to hire and fire the employee, (2) supervises and controls the employee's work schedule or conditions of employment, (3) determines the rate and method of payment, and (4) maintains employment records.'" (J.A. 78-79) (quoting *Baker v. Stone Cnty.*, 41 F. Supp. 2d 965, 980 (W.D. Mo. 1999)). But, therein lies

the rub. Appellees possess the information demanded by the district court. Without discovery, Appellants can only guess which entity applied to each factor given the limited, varying, and conflicting information in their possession.

Unlike *Twombly* and *Iqbal*, Appellants are not hoping to discover and establish a speculative legal claim by conducting discovery. Instead, discovery is necessary to establish whether all, or some, of the corporate entities in play are "employers" under the FLSA's broad definition. Appellants presented good faith pleading regarding the corporate defendants based on information available. All this information was shared with the district court in the briefing process.

In opposition to the motion to dismiss, Appellants explained to the district court that they did not have access to the "economic reality" information possessed only by the defendants. (J.A. 50). More importantly, in establishing a basis for naming all four defendants, Appellants explained that they were faced with conflicting and confusing paystubs and W-2s, as well as handbooks, logos, business cards, and other miscellaneous employment related memos. Also, there is inconsistent information on corporate filings with secretary of states' offices. (J.A. 49-50). Throughout the motion to dismiss briefing process, Appellees provided no position on whether any of the four entities were the employer. They run from any explanation regarding the confusing corporate structure among the four entities and their undeniable appearance in the Appellants' employment experience. Given this, the district court possessed information warranting a denial of the

motion to dismiss so discovery could be conducted regarding this issue.

Demonstrating good faith and lack of speculation when naming the four defendants, in their Rule 59(e)/60(b) motion, Appellants further described to the district court the basis for naming all entities. (*See* J.A. 90-91, 96-110). While Appellants generally know they work for "Anderson Merchandisers," there is conflicting information regarding that particular name as it applies to varying corporate entities. "Anderson Merchandisers, LLC" is a legally recognized Delaware corporation, but is not registered to do business in Kansas where Appellants perform work on Appellees' behalf.[1] Anderson Merchandisers' "home office" is apparently in Texas. There is a Texas corporation by the same name. But, like the Delaware corporation, the Texas "Anderson Merchandisers, LLC" is not registered to do business in Kansas or Missouri where Appellants work. Moreover, the Texas entity recently changed its name to "ANConnect, LLC." This newly named entity is not registered to do business in Missouri or Kansas. Appellants explained that they know the names of the individuals who hired and supervise them and the location of what was identified as the "home office" in Texas. But, it is uncertain whether this "home office" is where their work schedules are

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[1] Appellant Linda Ash also works for Appellees in some Wal-Mart stores in Missouri where Anderson Merchandisers, LLC became registered to do business about a month before the Complaint was filed and over two years after Ash began her employment. Appellant Abbie Jewsome does not work for Appellees in Missouri, only in Kansas, where Anderson Merchandisers, LLC, is not registered to do business.

established, conditions of employment are controlled, method of pay is determined, and employee records stored. If so, Appellants do not know which entity employs persons in the Texas home office performing such tasks. Appellees remain silent on these facts.

When the Complaint was filed, limited information was available regarding who "employed" them under the FLSA's broad definition. The information in their possession as employees was not helpful. Their uniforms and business cards, their supervisors' business cards, and their employee handbook bore the logo "Anderson Merchandisers."[2] But, their paystubs and W-2s were issued by non-Anderson Merchandisers entities (one of which does not exist as a legally recognized corporate entity). Appellants were invited to participate in an "employee" profit sharing plan from "ANConnect." The telephone number for the "home office" in Texas is answered by an automated message that thanks you for calling both "ANConnect" and "Anderson Merchandisers."[3] Finally, corporate filings with the Texas, Missouri and Kansas Secretaries of State revealed inconsistent contenders for the identity of the corporate entity that employs Appellants.

Even if Appellants included this limited and inconclusive information in the Complaint, the district court would still have dismissed it applying

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[2] Again, this gave no guidance as to whether this was the Delaware and/or Texas "Anderson Merchandisers, LLC."

[3] Whether the announced ANConnect is the substitute for the Texas "Anderson Merchandisers, LLC" is unclear. The same can be said whether the announced Anderson Merchandisers is the Delaware and/or Texas "Anderson Merchandisers, LLC."

its burden for pleading facts supporting the "economic realities" factors. Appellees continue that position when urging this Court to disregard *Arnold v. DirecTV, Inc.*, 2011 WL 839636 (E.D. Mo. Mar. 7, 2011).[4] *See* Appellees' Brief at 16. Appellees argue, "[*Arnold*] was wrongly decided because bare bones allegations regarding uniforms and window stickers do not come close to alleging facts to support the plausible conclusion under the economic realities test that an entity is an employer of a plaintiff . . . ." *Id.* at 16. This "bare bone" information was all Appellees' had at the time of pleading. Taking the same scenario into account, *Arnold* was correct in allowing discovery to ultimately resolve employer relationship issues, concluding this "matter is one that is appropriate for consideration on a motion for summary judgment, but not on a motion to dismiss." 2011 WL 839636, at *6.

Given the layers of corporate entities in play, and each one's involvement with Appellants' employment, Appellants were given little choice but to plead the joint enterprise elements. This is sufficient under the FLSA's broad definition for employers. Without discovery, Appellants cannot provide the specific facts supporting the economic realities test. Appellees have taken no position on whether any of the named entities are Appellants' employers. By not having to admit or deny such allegations in an answer, Appellees are allowed to play the "prove it" game at the pleading stage. This game continues while as they hide behind a shell

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[4] Appellants cited *Arnold* for support that a sufficient employer relationship was pled. *See* Appellants' Brief at 19-20.

game of corporate entities. *Twombly* and *Iqbal*'s Rule 8 pleading analysis does not apply to party identification, especially given the facts of this case.

This is not a situation where the employer is easily identifiable, or where one of the named defendants admitted employer status. Therefore, it is unlike the cases argued by Appellees. *See* Appellees' Brief at 13-18 (citing *Cavallaro v. UMass Memorial Health Care, Inc.*, 2011 WL 2295023 (D. Mass. June 8, 2011), *vacated and remanded in part, affirmed in part*, 678 F.3d 1, (1st Cir. 2012); *Loyd v. Ace Logistics, LLC*, 2008 WL 5211022 (W.D. Mo. Dec. 12, 2008); *McClean v. Health Sys., Inc.*, 2011 WL 2650272 (W.D. Mo. July 6, 2011); *White v. 14051 Manchester, Inc.*, 2012 WL 2117811 (E.D. Mo. June 11, 2012); *Ayala v. Metro One Security Systems, Inc.*, 2011 WL 1486559 (E.D.N.Y. Apr. 19, 2011); *Olvera v. Bareburger Group,LLC*, 2014 WL 3388649 (S.D.N.Y. July 10, 2014); and *Myers v. Garfield & Johnson Enterprises, Inc.*, 679 F. Supp. 2d 598 (E.D. Pa. 2010)).

As an example, Appellees and the district court rely on *Cavallaro, supra.* Yet, that court recognized as "implicit" in the FLSA employer analysis an underlying "assumption that the entity for which plaintiffs work is identifiable." 2011 WL 2295023, at *5. But, this situation does not always exist. Here, the "employer" status is not implicit. Which of the four entities employs Appellants is not easily identifiable. Furthermore, in the cases relied upon by Appellees, the courts dismissed <u>some</u> defendants but allowed claims to proceed against <u>other</u> entities that were easily identified as employers. *See* Appellees' Brief at 13-14 (citing *Loyd*, 2008 WL 5211022, at *4;

McClean, 2011 WL 2650272, at *2 (W.D. Mo. July 6, 2011)). Again, that does not exist here give Appellees' possession of the necessary information.

Taking advantage of Appellants' lack of knowledge of its corporate structure, Appellees attempt to distinguish cases relied on by Appellants. Appellees point to specific facts pled in those cases that were not pled here. For example, Appellees argue that the complaint in *White v. 14051 Manchester, Inc.*, 2012 WL 2117811 (E.D. Mo. June 11, 2012), "survived a motion to dismiss because it provided factual allegations about how the operations of the locations were integrated and who had hiring and firing authority." *See* Appellees' Brief at 15. Like *Arnold*, *surpa*, Appellants do not have access to this information beyond mere speculation. Without discovery, Appellants would have to guess which entities played what role under the economic realities factors.

Requiring Appellants to plead the facts required by the district court–which corporate entity hired them, which corporate entity supervises them, which corporate entity controls their work schedules or conditions of employment, which corporate entity determines their rate and method of payment and which corporate entity maintains their employment records–creates an impossible hurdle at the outset of litigation given the limited and contradicting information available. Discovery of information in Appellees' exclusive possession is needed to ultimately resolve the employer relationships at issue here, leaving the issue ripe for summary judgment, if necessary. *See Arnold*, 2011 WL 839636, at *6 (the employer relationship issue "is one that is

appropriate for consideration on a motion for summary judgment, but not on a motion to dismiss."); *Braden v. County of Washington*, 2008 WL 5129919, at *3 (W.D. Pa. Dec. 5, 2008) ("[s]uch facts as who Braden's employer was and the structure of her employment are the types of facts that must be uncovered through discovery.").

The only issue under a Rule 12(b)(6) review is whether Appellants sufficiently pled the interrelationship between the defendants such that they are joint employers. This standard takes into account information possessed at the time of pleading. *See Arnold*, 2011 WL 839636, at *6 (rejecting defendants' argument that plaintiffs' bare allegation of "joint employers" without supporting facts was insufficient and finding plaintiffs met the pleading standard). Given the information available, and the undisputedly broad and expansive manner in which "employer" must be interpreted under the FLSA,[5] Appellants have met their good faith pleading requirement. The district court's dismissal order should be reversed.

B. Appellees Fail to Demonstrate Not being on Notice of the FLSA Claims Being Asserted and the Basis Upon Which They Stand

Appellees correctly agree that FLSA pleading requirements is a matter of first impression for the Eighth Circuit. They are incorrect, however, that all courts examining the issue after *Twombly* and *Iqbal*

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[5] *See* Appellees' Brief at 16 n. 5: "Defendants do not dispute that 'employer' is broadly construed under the FLSA."

have adopted the same standard. Regardless, under existing standards, Appellees fail to present any convincing argument of ignorance regarding Appellants' FLSA claims. Nowhere in their briefing do they sufficiently explain their confusion regarding these claims.

The Ninth Circuit recently addressed FLSA pleading requirements. In *Landers v. Quality Communications, Inc.*, 771 F.3d 638 (9th Cir. 2014), the court examined the same cases cited by Appellees and, unlike Appellees, acknowledged the differences in FLSA pleading standards among circuits. *Id.* at 642-44 (discussing *Pruell v. Caritas Christi*, 678 F.3d 10, 13-14 (1st Cir. 2012); *Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106, 114 (2d Cir. 2013); *Davis v. Abington Mem'l Hosp.*, 765 F.3d 236, 243 (3d Cir. 2014)). The court in *Landers* found that no Circuits were in "consensus on what facts must be affirmatively pled to state a viable FLSA claim post-*Twombly* and *Iqbal*." *Id.* at 642.

While the Ninth Circuit in *Landers* was persuaded by the findings of the First, Second and Third Circuits in *Pruell, Lundy* and *Davis*, it also agreed with the Eleventh Circuit's pre-*Iqbal*/post-*Twombly* finding in *Secretary of Labor v. Labbe*, 319 Fed. App'x 761, 763-64 (11th Cir. 2008), that "detailed factual allegations regarding the number of overtime hours worked are *not* required to state a plausible claim . . . ." *Landers*, 771 F.3d at 644 (emphasis added). That court recognized, as Appellants repeatedly explained to the district court, that detailed employment information concerning compensation and schedules are in the defendants-employers' control. *Id.* at 645. Rejecting application

of a heightened pleading standard, and instead adopting a middle-ground approach, the Ninth Circuit held that "a plaintiff asserting a claim to overtime payments must allege that she worked more than forty hours in a given workweek without being compensated for the overtime hours worked during that workweek." *Id.* at 644-45.

The plaintiff in *Landers* merely alleged that he was not paid for overtime hours worked with no allegations as to which weeks this applied (*e.g.*, some or all the weeks). *Id.* at 645. Here, Appellants identified the weeks at issue by claiming a denial of overtime pay throughout all their employment as Merchandisers. Interestingly, in the end, the minimal factual pleading in *Landers* was not the basis for the Ninth Circuit upholding dismissal. *Id.* at 646. Instead, dismissal with no opportunity for leave to amend was upheld due to plaintiff's bull-headed decision of denying the district court's invitation to amend and provide the requested additional information. *Id.* Here, despite requests in response to the motion to dismiss and the more formal Rule 59(e)/60(b) motion, Appellants were never extended such an invitation.[6]

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[6] In *Nakahata v. New York-Presbyterian Healthcare System, Inc.*, 723 F.3d 192, 198 (2d Cir. 2013), the Second Circuit found that the trial court had abused its discretion in failing to provide the plaintiffs an opportunity to seek leave to amend in response to the court's order of dismissal. "The District Court ordered the cases terminated with no indication that final judgment should await a motion for leave to amend . . . . Absent an opportunity to seek leave to amend, Plaintiffs cannot be held accountable for failing to make the necessary motion." *Id.*

Instead, the district court dismissed the Complaint with prejudice and ordered the clerk to close the file. (J.A. 81). Citing to *Attanasio v. Community Health Systems, Inc.*, 2011 WL 5008363 (M.D. Pa. Oct. 20, 2011), the district court found the Complaint failed to adequately state an FLSA violation because it failed to include certain facts. As set forth in *Attanasio*, the district court found that: "the Complaint does not identify when the specific FLSA violation(s) occurred, does not state which Defendant committed the alleged violation(s), and does not identify any particular individual that instructed Plaintiffs to perform overtime work." (J.A. 80-81) (citing *Attanasio*, 2011 WL 5008363, at *6).

Appellees suggest that the district court did not *require* Appellants to plead these specific facts. *See* Appellees' Brief at 32. However, these were the district court's articulated grounds as the basis for dismissal. As discussed in *Davis* and *Landers*, *supra*, no circuit has required *Attanasio*'s heighten pleading factors in an FLSA claim. Attempting to distance themselves from the district court's application of this standard, Appellees claim this pleading requirement was a mere suggestion. Nothing in the district court's order supports this argument. The lack of *Attanasio*'s specifics was the basis for dismissal. It is telling that Appellees run from the district court's language rather than embrace it. By arguing these were *suggestions* from the district court, Appellees actually concede the factors sought are *not* necessary allegations under Rule 8 post-*Twombly/Iqbal.*

Applying the middle-ground approach,[7] sufficient allegations of an FLSA violation were pled in the Complaint to survive Rule 12(b)(6) dismissal. Appellants pled a policy of requiring work through unpaid breaks and "off the clock," which denies them overtime pay; a description of the overtime work performed; Appellees' use of the inappropriate overtime rate of pay under the Fluctuating Work Week; failure to include all compensation in calculating the overtime rate; that they routinely work more than 40 hours per week; and the workweeks at issue are from April 21, 2011, to the present.

More than a "plausible" FLSA violation is alleged. Appellees most certainly are on notice of the basis for the claim. Appellants met the Rule 8 requirements in their Complaint. The district court's July 2, 2014 order should be reversed.

II. Defending A Rule 12(b)(6) Motion to Dismiss Cannot per se be Grounds for Dismissing a Case Without Testing the Claims on Their Merits

Appellees argue that the district court did not abuse its discretion in denying Appellants' Rule 59(e)/60(b) motion. "Plaintiffs stood on and vigorously defended the Complaint in the face of Defendants' motion to dismiss, which identified the very

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[7] Adopted by the Ninth Circuit in *Landers* and by the First, Second and Third Circuits in *Pruell*, *Lundy* and *Davis* as well as by the Western and Eastern Districts of Missouri in *Nobles v. State Farm Mutual Auto. Ins. Co.*, 2011 WL 1131100 (W.D. Mo. Mar. 28, 2011), and *Arnold v. DirecTV, Inc.*, 2011 WL 839636 (E.D. Mo. Mar. 7, 2011).

deficiencies upon which the district court dismissed the Complaint even though they had at least three opportunities before the court entered judgment to submit an amended complaint." (Appellees' Brief, pg. 38-39) (emphasis in original). Appellees argue that failure to seek leave to amend at these "three opportunities" should lead to a case being dismissed without being tested on its merits. Yet, there is no rule of civil procedure leading to such an inequitable result. Also, Appellees fail to demonstrate any prejudice they would incur had the district court permitted leave to amend outside their "three opportunities."

Before addressing these "opportunities," like the district court, Appellees are incorrect in arguing that Appellants repeatedly stood by their first Complaint (*i.e.*, failed to provide a proposed First Amended Complaint to the district court). One was provided. This is uncontroverted. Regardless, the claimed "first opportunity" to amend arose after Appellees filed their motion to dismiss. But, seeking leave to correct alleged Rule 8 deficiencies while arguing one's Complaint meets Rule 8 requirements creates a self-defeating pleading practice. Instead, plaintiffs should be permitted to defend their Complaint when challenged under Rule 12(b)(6) without fear of dismissal with prejudice. If deficiencies are found, the district court could exercise its discretion and invite a remedy via amendment. *See Nakahata*, 723 F.3d at 198-99 (finding trial court abused its discretion by failing to provide plaintiffs opportunity to seek leave to amend in response to dismissal order). If the district court chooses not to exercise this discretion, then plaintiffs can seek leave to

amend under Rules 59(e)/60(b). Appellants took this second step as procedurally outlined by this Court. *See United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 742-43 (8th Cir. 2014) (reaffirming use of Rules 59(e) or 60(b) when discussing the district court's requirement to consider Rule 15 giving parties an opportunity to test their claims on the merits). Appellants should not have to guess what changes, if any, a district court might require when a defendant files a Rule 12(b)(b) motion. Instead, they should be able to defend a Rule 12(b)(6) motion without fear of their case being summarily dismissed with prejudice.

Regarding the employer entities, Appellants still do not have access to the information that the district court maintains should have been pled. Therefore, Appellants could not have amended their Complaint as required by the district court without discovery on this topic. *See In re Bear Stearns Companies, Inc. Securities, Derivative & ERISA Litigation*, 2011 WL 4357166, at *2 (S.D.N.Y. Sept. 13, 2011) (granting plaintiff's 59(e) motion and leave to file second amended complaint; "A sound theory of pleading should normally permit at least one amendment where, as here, the Plaintiffs might be expected to have less than complete information about defendants' organization and ERISA responsibilities, where there is no meaningful evidence of bad faith on the part of the plaintiffs, and where there is not significant prejudice to defendants.").

Appellees claim the "second opportunity" arose after the filing of their reply brief in support of their motion to dismiss. This is no different than the inherently unfair and self-defeating pleading practice

addressed under the "first opportunity." Moreover, it does not change the fact that Appellees had all of the information regarding the employer entities. *In re Bear Stearns*, 2011 WL 4357166, at *2.

Appellees claim the "third and final opportunity" to submit an amended complaint occurred between the district court's July 2, 2014 order of dismissal and the July 9, 2014 entry of judgment. Failing to file within this window, according to Appellees, should deny Appellants the opportunity to have their case reviewed on its merits. Compared to the other "timing" arguments, this one makes the least sense.[8] Again, there is no rule of civil procedure requiring a motion for leave be filed between these two dates.[9] Any existing procedural deadlines were met with Appellants' Rule 59(e)/60(b) filing.[10] The Appellant's motion for leave was timely.

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[8] Demonstrating the futility of this argument, Appellants began preparing a First Amended Complaint and motion for leave after the July 2, 2014 order. It was after the close of business on Wednesday, July 2, 2014, when Appellants' counsel learned of the district court's dismissal Order (which was issued at 5:03 p.m. that evening). Appellants' counsels' offices were closed on Friday, July 4, 2014, to observe our national holiday. They were actively preparing their motion and proposed First Amended Complaint when the Clerk entered judgment on Wednesday afternoon, July 9, 2014 at 2:28 p.m. Less than 48 hours later, at 12:45 p.m. on Friday, July 11, 2014, Appellants filed their motion for leave and proposed First Amended Complaint. (J.A. 3-4).

[9] This window of time would inevitably vary among district courts.

[10] This filing date clearly meets the twenty-eight (28) day deadline under Rule 59(e) and the "reasonable time" filing requirement under Rule 60(c)(1).

Importantly, Appellees present no substantive argument how an amendment outside the "three opportunity" deadlines would be prejudicial. *See Oliver Schools, Inc.*, 930 F.3d at 253 ("In the Second Circuit, when a motion to dismiss is granted the usual practice is to grant leave to amend the complaint. Where the possibility exists that the defect can be cured and there is no prejudice to defendant, leave to amend at least once should normally be granted as a matter of course") (internal citations omitted). Seeking leave to amend in this case's infant stage, five business days after the district court's July 2, 2014 dismissal, cannot be prejudicial. Expending time answering and litigating against a newly filed First Amended Complaint is not prejudicial. *See e.g.*, *Wert v. U.S. Bancorp*, No. 13-CV-3130-BAS BLM, 2014 WL 7330891, at *6 (S.D. Cal. Dec. 18, 2014) (" . . . this action remains in the early stages of litigation. In fact, this action has not yet even moved beyond the pleading stage . . . no discovery has been propounded. [Arguing the] proposition that they 'will be forced to incur unnecessary litigation costs due to the late addition of new claims'" does not create prejudice).

Appellees claim that Appellants neglected to address *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818 (8th Cir. 2009), and *Horras v. American Capital Strategies, Ltd.*, 729 F.3d 798 (8th Cir. 2013). In both cases, this Court upheld denials of post-dismissal motions for leave to amend. But, these cases do not involve plaintiffs seeking leave in the district court under Rules 59(e) or 60(b). Instead, the plaintiffs sought leave <u>for the first time</u> before this Circuit—never giving the district court an

opportunity. Here, Appellants correctly followed this Court's guidance in *Mask* and provided the district court the opportunity to permit leave. *Roop* and *Horras* do not stand for the denial of all post-judgment motions for leave to amend. This would completely disregard Rule 15(a)(2)'s requirement that claims be tested on their merits. Non-prejudicial and timely motions seeking leave to amend should be granted, even if leave is sought post-judgment. *See Sanders v. Clemco Industries*, 823 F.2d 214, 217-218 (8th Cir. 1987) ("[T]he district court's refusal to permit amendment of the complaint to correct these defects was not in keeping with the liberal amendment policy of Fed. R. Civ. P. 15(a) and constituted abuse of discretion."); *Starkey v. JPMorgan Chase Bank, NA*, 573 F. App'x 444, 449-50 (6th Cir. 2014) ("[The plaintiffs] could have . . . moved to vacate or set aside the district court's judgment after it granted Chase's motion to dismiss under Rule 59 or 60. Because the [plaintiffs] took none of those steps, the district court did not abuse its discretion in dismissing their complaint with prejudice."); *Nakahata* 723 F.3d at 198 (The trial court was found to have abused its discretion in failing to provide plaintiffs an opportunity to seek leave to amend in response to the court's order of dismissal of the complaint).

Mask stated that a district court must permit post-judgment non-prejudicial leave to amend in order to afford the plaintiff an opportunity to test his claims on the merits. 752 F.3d at 744; *see also Sanders*, 823 F.2d at 216 (a motion under Rule 59(e) to alter or amend the judgment should be granted if it shows "the need to correct a clear error of law or

prevent manifest injustice."). The district court does not address this Rule 15(a)(2) requirement. Nowhere in its September 11, 2014 order does the district court discuss the merits of the proposed First Amended Complaint. Yet, Appellees argue that the district court did not abuse its discretion in denying Appellants' Rule 59(e)/60(b) motion because "the proposed Amended Complaint was futile." Appellees' Brief at 50. This determination of futility is nowhere in the district court's order.

By its actions, the district court disregarded its ultimate obligation under Rule 15(a)(2). "[A] district court's discretion to dismiss a complaint without leave to amend is severely restricted by Fed. R. Civ. P. 15(a), which directs that leave to amend 'shall be freely given when justice so requires.'" *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988) (internal citation omitted).

> Unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial. The same standards apply when a plaintiff seeks to amend after a judgment of dismissal has been entered by asking the district court to vacate its order of dismissal pursuant to Fed. R. Civ. P. 59(e).

Id. (citations omitted).

The district court had broad discretion under both Rules 59(e) and 60(b) to correct the injustices described in Appellants' Brief, *i.e.*, failing to review the Amended Complaint, failing to allow claims be tested on their merits, and imposing a new pleading requirement without providing an opportunity to

meet it. *See* Appellants' Brief at 39; *Innovative Home Health Care, Ins. v. PT-OT Assoc.*, 141 F.3d 1284, 1286 (8th Cir. 1998) (a motion under Rule 59(e) to alter or amend the judgment should be granted if it shows "the need to correct a clear error of law or prevent manifest injustice."). By denying Appellants' Rule 59(e)/60(b) motion and refusing to allow Appellants to file their First Amended Complaint, conduct discovery of facts in Appellees' possession and test their claims on the merits, the district court abused its discretion. Its September 11, 2014 order denying Appellants' motion should be reversed.

CONCLUSION

In the end, Appellees cannot overcome the fact that they possess all the information necessary to address the economic reality factors. Appellants naming all four defendants were based on the information at hand. It is undeniable that the basis for Appellants' FLSA claims is sufficient to put Appellees on notice. Appellants go beyond reciting statutory elements in describing the FLSA violations. Finally, if this Court finds that Appellants' initial Complaint failed to meet the Rule 8 requirements, the district court abused its discretion in not permitting an amendment. The most important tenant of Rule 15(a)(2)—claims should be tested on their merits—was violated by the district court's September 11, 2014 order.

Respectfully submitted,
this 21st day of November, 2014

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