IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Jason Patzfahl, on behalf of himself and those similarly situated,

Plaintiff,

v.

FSM ZA, LLC, d/b/a Toppers Pizza; Perfect Timing, LLC; Garett Burns; Doe Corporation 1-10; John Doe 1-10,

Defendants.

Court File No.: 2:20-cv-01202

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS FSM ZA, LLC, PERFECT TIMING, LLC, AND GARETT BURNS' JOINT MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

I. INTRODUCTION

Perfect Timing, LLC never employed Plaintiff Jason Patzfahl ("Plaintiff"). But, of course, Plaintiff knew this when he filed a suit against his employer, FSM ZA, LLC ("FSM") and FSM's sole owner, Garett Burns ("Burns"), but not Perfect Timing. In fact, Plaintiff did not sue Perfect Timing, LLC in his initial Complaint because Plaintiff had not heard of the company, did not know the company existed, and most importantly, had not performed work for the company in any capacity. However, over the course of discovery, Plaintiff learned that Burns owned a separate entity, Perfect Timing, LLC ("Perfect Timing"), which owned and operated a separate set of pizza stores. So Plaintiff amended his complaint to add Perfect Timing, and then immediately filed a Motion for Conditional Certification.

Typically a defendant who is wrongfully sued is able to convince plaintiff's counsel that the lack of any evidence indicating a defendant is connected to a matter warrants

voluntary dismissal. Where such efforts are unsuccessful, however, such a defendant may conduct limited discovery, file a motion for summary judgment, and may exit the litigation with reduced expense and inconvenience. Here, Perfect Timing cannot achieve such a relatively swift exit due to Plaintiff's pending Motion for Conditional Certification. Plaintiff knows this, and he is betting on it. Because the bar for conditional certification is relatively low, Plaintiff knows that ***if*** he is able to rope Perfect Timing into this lawsuit—even with just the barebones conclusions he has (and despite never working for Perfect Timing)—he might be able to send Perfect Timing employees notice. Plaintiff's counsel might then enter into a representation agreement with Perfect Timing's employees, allowing Plaintiff's counsel to continue to pursue an action against Perfect Timing even after the company is properly dismissed. Because the grounds for Perfect Timing's inclusion in the instant action do not exist, as evidenced by Plaintiff's deficient allegations against the company, the Court must dismiss Plaintiff's First Amended Complaint ("FAC") for failure to state a claim against Perfect Timing and reinstate Plaintiff's initial Complaint as the operative complaint in this action.[1]

[1] Perfect Timing has chosen to respond to Plaintiff's FAC within the time allowed for FSM ZA and Burns to respond to the FAC to promote efficient resolution of the issues presented by the instant Motion. At this time, however, Perfect Timing is under no obligation to respond because Plaintiff has failed to effectuate service of process against Perfect Timing in accordance with Fed. R. Civ. P. 4. In so responding, Perfect Timing does not waive any defenses it has to challenge sufficiency of service of process at a later date.

II. PROCEDURAL POSTURE

Plaintiff filed his initial Complaint on August 6, 2020. ECF No. 1. Plaintiff served his initial Complaint on FSM and Burns on September 15, 2020. ECF No. 8. FSM and Burns answered Plaintiff's initial Complaint on October 8, 2020. ECF No. 9. The Court set March 31, 2021 as the deadline for filing an amended complaint without leave of court. ECF No. 17. Plaintiff filed his First Amended Complaint, seeking to add Perfect Timing as a defendant, on March 29, 2021. ECF No. 18. FSM and Burns were served with Plaintiff's Amended Complaint via the Court's electronic filing service. Civil L. R. 5. Plaintiff has yet to effectuate service on Perfect Timing in accordance with Fed. R. Civ. P. 4. Plaintiff's Motion for Conditional Certification was filed on March 30, 2021. ECF No. 19. In Plaintiff's Motion for Conditional Certification, Plaintiff requests the Court allow Plaintiff to notify "[a]ll current and former delivery drivers employed at any Toppers Pizza location owned/operated by Defendants FSM ZA, LLC, Perfect Timing, LLC, and/or Garett Burns from August 6, 2017 to the date of the Court's Order approving notice." ECF No. 19.

III. ARGUMENT

A. LEGAL STANDARD.

1. Fed. R. Civ. P. Rule 8(a)'s Plausibility Standard and Fed. R. Civ. P. Rule 12(b) Motion to Dismiss.

Per Fed. R. Civ. P. 8(a), a complaint must contain, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(1). The United States Supreme Court, in a well-known pair of cases—*Bell Atlantic*

Corp. v. Twombly, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)—set forth the prevailing pleading standard. First, in *Bell Atlantic Corp. v. Twombly*, the United States Supreme Court found that the term "showing," as used in Fed. R. Civ. P. 8(a)(1), requires a plaintiff's pleadings to include "sufficient factual matter" which, if "accepted as true . . . state[s] a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 663 (summarizing *Twombly*); *Twombly*, 550 U.S. at 570. In *Twombly* the United States Supreme Court set forth a "two-pronged approached" to evaluate the sufficiency of complaints, directing courts to first ignore conclusory statements and formulaic recitations, and then, with conclusory statements and formulaic recitations stricken, to evaluate only the remaining "well-pleaded, nonconclusory factual allegations" for sufficiency. *Twombly*, 550 U.S. at 555, 570. Two years later in *Ashcroft v. Iqbal*, the Supreme Court clarified that *Twombly's* plausibility standard applied to all cases filed in federal courts, and further underscored the importance of factual allegations in federally-filed complaints. *Iqbal*, 556 U.S. 662, 684 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.").

The plausibility standard set forth in *Twombly* and *Iqbal* is, of course, the operating pleading standard for all suits filed in federal court, including complaints filed in the Eastern District of Wisconsin. *See, e.g.*, *E.E.O.C. v. Universal Brixius, LLC*, 264 F.R.D. 514 (E.D. Wis. 2009) (recognizing the effect of *Twombly* and *Iqbal* on the federal pleading standard and finding that a complaint which went "beyond abstract recitations of the elements" and provided "specific factual allegations that suggest the plausibility of the plaintiff's claim" were sufficient to state a claim under Fed. R. Civ. P. 8(a)); *Johnson v.*

Burke, No. 16-cv-592, 2017 WL 1378142 at *1 (E.D. Wis. Apr. 14, 2017) (noting that "to state a cognizable claim, a plaintiff need not provide 'detailed factual allegations' but must offer 'more than labels and conclusions, and a formulaic recitation for the elements of a cause of action will not do"); *Badal v. Ariens Co*., No. 17-C-1704, 2018 WL 3037401 at *9 (E.D. Wis. June 19, 2018) (noting that *Twombly/Iqbal*'s standard applies to employment discrimination cases, and finding that plaintiffs' conclusory allegations were insufficient to state a claim under Fed. R. Civ. P. 8(a)). As such, it governs the analysis of whether the allegations contained within Plaintiff's FAC are sufficient.

B. PLAINTIFF FAILED TO MEET THE PLEADING STANDARD OF FED. R. CIV. P. 8(A); THE COURT MUST DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT.

As set forth in full in Part II above, Plaintiff's allegations which relate to Perfect Timing, LLC fall far short of Fed. R. Civ. P. 8(a)'s plausibility requirement. Plaintiff provides no factual enhancement supporting his allegations that Perfect Timing employed him, but instead rotely recites a "punch list" of economic realities test considerations in an effort to include Perfect Timing, an entity unrelated to Defendant's alleged employment by FSM and Burns, in this lawsuit and, presumably, fish for additional clients. The entirety of Plaintiff's employment-related allegations against Perfect Timing are below:

22. Perfect Timing, LLC is an entity that operates the Defendants' Toppers Pizza Stores.

23. Upon information and belief, Perfect Timing, LLC owns four Toppers Pizza stores in Wisconsin.

24. Perfect Timing, LLC has substantial control over Plaintiff and similarly situated employees' working conditions, and over the unlawful policies and practices alleged herein.

25. Perfect Timing, LLC has direct or indirect control of the terms and conditions of Plaintiff's work and the work of similarly situated employees.

26. At all relevant times, Perfect Timing, LLC maintains control, oversight, and direction over Plaintiff and similarly situated employees, including, but not limited to, hiring, firing, disciplining, timekeeping, payroll, reimbursements, pay rates, deductions, and other practices.

27. Perfect Timing, LLC is an "employer" of Plaintiff and similarly situated employees as that term is defined by the FLSA and Wisconsin wage and hour laws.

FAC ¶¶ 22–27.[2] Such vague and barebones conclusions formed the very basis of the United States Supreme Court's opinions in the seminal cases of *Bell Atlantic Corp. v.*

[2] Notably, these allegations are inconsistent with Plaintiff's testimony given in his February 26, 2021 deposition. Plaintiff's testimony and this argument is presented in greater detail in Defendants' forthcoming opposition brief in response to Plaintiff's Motion for Conditional Certification.

Twombly and *Ashcroft v. Iqbal*, in which the Court found that the pleadings in both cases warranted dismissal for failure to satisfy Fed. R. Civ. P. 8(a)'s pleading burden. *See Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 687. Specifically, in *Ashcroft v. Iqbal*, the plaintiff—a Muslim Pakastani detainee—brought claims for discrimination against government officials, alleging that the officials "knew of, condoned, and willfully and maliciously agreed to subject him to harsh conditions of confinement as a matter of policy, solely on account of his religion, race, and/or national origin and for no legitimate penelogical interest," further alleging that "Ashcroft was the principal architect of this invidious policy and [] Mueller was instrumental in adopting and executing it." *Id.* at 669. The Supreme Court found that Iqbal's discrimination allegations amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim," and were thus "conclusory and not entitled to be assumed as true." *Id.* at 681. The Court further explained that it "[did] not reject [Plaintiff's] bald allegations on the ground that they are unrealistic or nonsensical," but rather because of the "conclusory nature" of the allegations. *Id.* at 681. As a result of its findings, the Supreme Court reversed the finding of the lower court and dismissed Iqbal's complaint.

Complaints containing almost identical allegations regarding the economic realities test specifically have likewise been dismissed by federal courts. For example, in *Hunter v. Agility Energy, Inc*., 419 F. Supp. 3d 1269 (D. Utah 2019), multiple plaintiffs brought FLSA claims against their corporate employer, Agility Energy, Inc., as well as several individual managers for failure to pay overtime wages. Specifically, the plaintiffs in *Agility* alleged that the individual defendants "jointly employed Plaintiffs and controlled salary

and day-to-day operations," and also "1) had the power to hire and fire employees, 2) had the power to control and supervise employee work schedules, and 3) had the supervisory authority over them." *Agility*, 419 F. Supp. 3d 1269, 1275 (D. Utah 2019). With regards to one individual defendant—Dillion Ping—plaintiffs alleged the same, but added that Ping "interviewed, hired, and fired Plaintiff Hunter and [], in response to a complaint from Plaintiffs, told Mr. Landeros (Plaintiff's Field Manager) that the QCM pay structure would not change." *Id.* at 1276. In dismissing the claims against four out of five individual defendants, but not dismissing claims against Ping, the District of Utah found that the allegations against the four released defendants were, with respect to the elements of the economic realities test, "a direct example of a 'formulaic recitation of the elements of the cause of action." *Id.* at 1273. The court added that plaintiffs "simply assert[ed] conclusory statements and ask[ed] the Court to draw lines to the assumption that [the individual defendants] may have operational control over Plaintiff's employment," and also "miss[ed] the target of plausibility of operational control under Rule 12(b)(6)." *Id.* at 1275–77. As to defendant Ping, the court noted that the allegations were sufficient because they "state[d] facts that directly point[ed] to the power Ping had to hire and fire employees," and also "impl[ied] that Ping had supervision or control over the employees' conditions of employment and rate and method of pay." *Id.* at 1276.

Similarly, in *Diaz v. U.S. Century Bank, et al.*, plaintiffs brought claims for violation of the FLSA against three alleged employers. *See* Complaint Under 29 U.S.C. 201-216 Overtime and Retaliatory Discharge Violations at 1, *Diaz v. U.S. Century Bank, Intern. Risk Response, Inc., et al.*, No. 1:12-cv-21224-FAM (S.D. Fla. Mar. 29, 2012), attached

hereto as Exhibit 1. In support of plaintiffs' claims that U.S. Century Bank ("Century Bank") employed plaintiffs, plaintiffs alleged that Century Bank: (1) was "responsible for controlling Plaintiff's hours, [and] determining Plaintiff's pay"; (2) exercised "control over Plaintiffs' work schedule and job duties"; and (3) required plaintiffs to "sign in and out of work according to the schedule set by Defendant, U.S. CENTURY BANK on the U.S. CENTURY BANK employee sign in sheet[.]" *Id.* at 4. Plaintiffs also alleged they "were financially dependent on Defendant, U.S. CENTURY BANK." *Id.* at 4. Century Bank moved to dismiss plaintiffs' claims against the bank for failure to state a claim. In its opinion and order granting Century Bank's motion, the District Court for the Southern District of Florida noted that it was the court's duty to "ascertain 'whether the plaintiff was dependent upon the putative employer,'" as a matter of law by looking to, among other things, the plaintiffs' allegations concerning the elements of the economic realities test. *Diaz v. U.S. Century Bank, International Risk Response, Inc., et al.*, Case No. 12-21224-CIV-MORENO, 2012 WL 2514906 at *1 (S.D. Fla. June 28, 2012). The court then looked to plaintiffs' allegations against Century Bank and found that plaintiffs "did not offer sufficient factual foundation to establish that Century Bank was Plaintiffs' 'employer' pursuant to the Act," commenting that "Plaintiffs for the most part have only made very vague assertions concerning their employment relationship with Century Bank" and "have not provided anything more than . . . general, unsubstantiated claims." *Id.* at *2.

Importantly, the allegations made by the plaintiffs in both *Agility* and *Diaz* were arguably more robust than those made by the Plaintiff in his FAC, and those allegations warranted dismissal of both complaints. Here, Plaintiff has merely restated the elements

of the economic realities test in his FAC and entirely failed to provide the factual enhancement necessary to raise his allegations from "possible" to "plausible." *See* FAC at ¶¶ 12–44. Plaintiff states that Perfect Timing had "control, oversight, and direction over Plaintiff . . . including, but not limited to, hiring, firing, disciplining, timekeeping, payroll, reimbursements, pay rates, deductions, and other practices" (FAC ¶¶ 24–27), but provides ***no facts*** indicating who employed at Perfect Timing exerted control over Plaintiff, ***no facts*** indicating who at Perfect Timing hired or fired Plaintiff, ***no facts*** indicating how Perfect Timing was involved in setting Plaintiff's rate of pay, ***no facts*** indicating how Perfect Timing was involved in disciplining Plaintiff, and ***no facts*** indicating how or to what extent Perfect Timing was involved in timekeeping, payroll, reimbursements, deductions, or any other practices applicable to Plaintiff's Toppers Pizza location—because ***no such facts exist***. Plaintiff's allegations with respect to Perfect Timing are nothing less than effortless, passing references to the elements of the economic realities test. Such slipshod allegations fly in the face of the requirements of Fed. R. Civ. P. 8(a) and the factual enhancement required by *Twombly* and *Iqbal*. Plaintiff's FAC, and Plaintiff's claims against Perfect Timing, cannot proceed under Rule 8(a)'s standard.

Finally, Plaintiff's pending Motion for Conditional Certification underscores the importance of an appropriately searching evaluation of Plaintiff's complaint at this early stage. By ensuring here that Plaintiff is able to plead facts which give rise to a plausible claim that Perfect Timing both (1) employed Plaintiff, and (2) is responsible for the FLSA and state law violations alleged by Plaintiff, the Court not only ensures that Plaintiff has met his pleading burden under the Federal Rules of Civil Procedure, but also ensures that

a defendant is not needlessly subjected to conditional certification and the sending of notice, both of which are likely to disturb its business operations. Here, Plaintiff has provided the Court with no factual allegations which detail Perfect Timing's employment of Plaintiff in Plaintiff's FAC—because none exist. Perfect Timing was not Plaintiff's employer, and Plaintiff has not pled facts which give rise to a plausible claim that it was. On these grounds, Plaintiff's FAC must be dismissed.

IV. CONCLUSION

As detailed above, Plaintiff filed his FAC against an entity—Perfect Timing—which has no prior relationship (employer-employee or otherwise) with Plaintiff. Plaintiff's allegations against Perfect Timing are deficient as a matter of law and cannot be cured. For these reasons, Plaintiff's FAC must be dismissed in its entirety.

Dated: April 12, 2021

s/ Martin D. Kappenman

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