IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

| | |
|---|---|
| Jason Patzfahl,<br><br>*On behalf of himself and those similarly situated*,<br><br>Plaintiff,<br><br>v.<br><br>FSM ZA, LLC, *et al.*,<br><br>Defendants. | Case No. 2:20-cv-1202<br><br>Judge Lynn S. Adelman |

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

## 1. Introduction

Defendants ask this Court to dismiss Defendant Perfect Timing, LLC ("Perfect Timing") from this lawsuit on the grounds that Plaintiff has not alleged sufficient facts in his First Amended Complaint ("FAC") to implicate Prefect Timing as Plaintiff's employer. Rather than point to relevant case law from this district or the Seventh Circuit in support of their argument, Defendants stretch to find inapposite case law from other jurisdictions, ostensibly because to apply the relevant, applicable caselaw from this Court is fatal to their argument. As demonstrated below, the caselaw sets forth a minimal notice pleading standard that applies to FLSA cases. Plaintiff's allegations pass the test, even as it is misstated by Defendants. But because "specific facts are not necessary" to properly plead a cause of action under the FLSA, Plaintiff's FAC more than satisfies the correct, liberal notice pleading standard set forth in Rule 8(a). Thus, the Court should find the

FAC sufficient and accordingly deny Defendants' Motion to Dismiss. *Martinez v. Regency Janitorial Servs.*, No. 11-C-259, 2011 U.S. Dist. LEXIS 105980, at *6-8 (E.D. Wis. Sep. 19, 2011) (citing *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. Ill. 2010)).

Getting past the pleading standard, Defendants only seem to take issue with Plaintiff's employer allegations regarding Perfect Timing, but not FSM ZA, LLC or Garrett Burns, despite the fact that Plaintiff's employer allegations regarding all defendants are nearly identical. It appears to Plaintiff that Defendants have filed their Motion to Dismiss as a smokescreen to advance their theory as to the merits of this case—namely that Perfect Timing is not Plaintiff's employer. Notwithstanding Defendants' attempt to frame this argument under Fed. R. Civ. P. 8(a), Defendants' Motion is aimed squarely at the merits of Plaintiff's claims, and is therefore improper. Accepting the allegations set forth in the FAC as true, Plaintiff states a routine FLSA claim against Perfect Timing that must be permitted to proceed.

**2. Background and Procedural Posture**

This is a wage and hour case brought on behalf of delivery drivers who work for Defendants' Toppers Pizza stores. Defendants operate 4 Toppers Pizza locations in Wisconsin. The legal claims at issue are fairly straightforward: Defendants pay their drivers at or close to minimum wage. The drivers use their own cars to complete deliveries. The cars cost money to purchase, maintain, and operate. This is money that *the employer* should have to spend, but, instead, Defendants demand drivers shoulder some of this burden. Because Defendants have not paid the drivers their actual expenses or the IRS standard business mileage rate, Defendants have failed to pay the drivers at least minimum wage. Like dozens of recent cases around the country, Plaintiff

alleges that Defendants violate the Fair Labor Standards Act and state wage and hour laws by under-reimbursing the delivery drivers.

Plaintiff initiated this action on August 6, 2020. Doc. 1. Soon thereafter, on September 9, 2020, Plaintiff filed a Motion to Send Notice to Similarly Situated Employees, asking the Court to conditionally certify an FLSA collective of Defendants Garrett Burns and FSM ZA, LLC's delivery driver employees. Doc. 4. At Defendants' request, the Court permitted the parties to engage in limited initial discovery on issues relating to Plaintiff's request for conditional certification. *See* Docs. 12, 16. The Court set a deadline of March 31, 2021 for the parties to amend their pleadings without having to obtain leave of court. Doc. 17. The Court also identified March 30 as the deadline for Plaintiff to file his Renewed Motion to Send Notice. *Id.* As such, on March 29, 2021 Plaintiff filed his FAC, adding Perfect Timing as a defendant. Doc. 18. Then, to comply with the Court's Scheduling Order, Plaintiff filed his Renewed Motion to Send Notice on March 30, 2021. Doc. 19.

Defendants then filed a Motion to Dismiss the FAC, seeking to remove Perfect Timing—an entity Defendants themselves identified as an owner of Toppers Pizza stores operated by Defendants—from the lawsuit. Doc. 22.

## 3. Argument

### 3.1. Legal Standard

A civil complaint need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "The Rule reflects a liberal notice pleading regime, which is intended to 'focus litigation on the merits of a claim' rather than on technicalities that might keep plaintiffs out of court." *Martinez*, 2011 U.S. Dist. LEXIS 105980, at *4

(quoting *Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009)); *see also Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. Ill. 2010) (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1215 at 165-173 (3d ed. 2004) ("[A]ll that is necessary is that the claim for relief be stated with brevity, conciseness, and clarity.").

Defendants correctly identify that *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." Doc. 22, pp. 3-4. However, Defendants fail to recognize that the Seventh Circuit and courts in this district have clarified these holdings as they apply to the pleading standard set forth in Rule 8(a)(2), specifically in the context of pleading an FLSA claim. Directly on point, the Court in *Martinez* stated that in order to satisfy the pleading standard, "specific facts are not necessary," but noted the "amount of facts that must be alleged in a complaint to present a plausible claim will vary based upon the nature of the claim." *Martinez*, 2011 U.S. Dist. LEXIS 105980 at *6-7 (quoting *EEOC v. Universal Brixius*, 264 F.R.D. 514, 517 (E.D. Wis. 2009)). For instance, straightforward breach of contract claims require less factual specificity than a complex antitrust claim. *Id.* at *7. The Court reasoned:

> In *Twombly*, the plaintiffs attempted to allege a violation of § 1 of the Sherman Act, 15 U.S.C. § 1. In *Iqbal*, the plaintiff attempted to defeat a claim of qualified immunity and demonstrate that high-ranking government officials violated the First and Fifth Amendments by approving a policy that allegedly harmed the plaintiff. The natures of the claims in both these cases were such that they would necessarily require substantially more factually intensive pleadings than many more routine cases. Thus, courts must be cautious so as to not interpret *Twombly* and *Iqbal* as requiring detailed factual recitations for all complaints simply because more detailed factual allegations were required in those cases due to the nature of the claims alleged.

*Id.*

As this Court held in *Martinez*, an "FLSA claim is a fairly straightforward claim. Unlike a case involving financial derivatives or antitrust violations, it does not take much to inform the

defendant of the nature of the plaintiff's claim." *Martinez*, 2011 U.S. Dist. LEXIS 105980 at * 10. Thus, even where an FLSA complaint is cursory or conclusory, it satisfies the liberal notice pleading standard where it puts a defendant on notice of the plaintiff's claims. *Id.* (holding that, although "the plaintiffs surely could have included more information in their complaint, this almost always will be true. The determinative question is not whether the plaintiffs could have added more, but whether they included enough.")

**3.2. Plaintiff's FAC sets forth sufficient allegations to put Perfect Timing on notice of Plaintiff's claims.**

Plaintiff's FAC sets forth a short, plain statement of Plaintiff's claims. The FAC alleges, with fairly specific factual support, that as Plaintiff's employer, Perfect Timing, along with the remaining Defendants, paid Plaintiff and other delivery drivers according to a policy that resulted in minimum wage violations. Doc. 18. Defendants take issue with the sufficiency of Plaintiff's allegations regarding Perfect Timing's status as Plaintiff's employer. Plaintiff alleges Perfect Timing:

- owns and operates Defendants' Toppers Pizza stores (¶ 22, ¶ 23);
- controls Plaintiff's and others' working conditions, including the compensation practices at issue in the litigation (¶ 24);
- maintains authority over plaintiff and other employees in aspects such as hiring, firing, disciplining, timekeeping, payroll, and compensation practices (¶ 26); and
- qualifies as an "employer" as defined by the FLSA (¶ 27).

FAC, Doc. 18.[1] These are not conclusory allegations, but rather set forth specific facts regarding Perfect Timing's role in operating Defendants' Toppers Pizza stores.

Defendants identify two out-of-circuit cases in arguing that these allegations are insufficient to satisfy Rule 8(a)—*Hunter v. Agility Energy, Inc.*, 419 F. Supp. 3d 1269 (D. Utah 2019) and *Diaz v. U.S. Century Bank, Intern. Risk Response, Inc., et al.*, No. 1:12-cv-21224-FAM (S.D. Fla. Mar. 29, 2012). These cases are inapposite for several reasons. Most obviously, one case is from Utah, and the other from Florida. The present case is in Wisconsin. These cases have little precedential value, if any. And when compared to the clearly established precedent in this district, these cases cannot overcome the weight of authority that supports a finding that Plaintiff has adequately pleaded an FLSA cause of action.

*Diaz* was decided in the Southern District of Florida where the Court had specifically applied the more stringent pleading standard of *Iqbal* and *Twombly* to the Fair Labor Standards Act context. *Diaz*, 2012 U.S. Dist. LEXIS 89618 at *7 (citing *Gomez v. Kern*, No. 12-20622, 2012 U.S. Dist. LEXIS 44102, at *2-5 (S.D. Fla. Mar. 29, 2012). Similarly, the District Court for the District of Utah decided *Hunter* based on a standard that requires more factual enhancement than is required here. *Hunter*, 419 F. Supp. 3d at 1277. As demonstrated above, that is not the case in the Eastern District of Wisconsin. Rather, the courts in this district have held that a less factually stringent pleading standard applies to FLSA cases because they set forth more straightforward claims. *Martinez*, 2011 U.S. Dist. LEXIS 105980, at *8.

[1] Notably, these are nearly identical to the allegations Plaintiff sets forth against Defendants FSM ZA, LLC and Garrett Burns in his FAC. *Id.* However, Defendants only challenge the sufficiency of the allegations as against Perfect Timing, ostensibly because, according to their theory of the case, Perfect Timing does not qualify as an employer. This is a merits argument that is suited for a summary judgment motion, but is not appropriate for a motion to dismiss.

In fact, the types of allegations set forth in Plaintiff's FAC "have been repeatedly found sufficient to state a claim under the FLSA." *Id*; *see Delgado v. DirecTV, Inc.*, No. 1:14-cv-01722, 2016 U.S. Dist. LEXIS 33719, at *21-22 (S.D. Ind. Mar. 16, 2016). In *Delgado*, the court expressed agreement "with our sister courts in [the Seventh Circuit] who have held that FLSA claims are 'fairly straightforward' and 'simple' and thus do not require as much to inform Defendants of the nature of Plaintiffs' claims," and further held that "district courts within our Circuit have held that an FLSA plaintiff is not required to forecast evidence or make a case against the defendant, but need only provide enough details to give Defendants 'sufficient notice to enable [them] to begin to investigate and prepare a defense' to a plausible claim." *Delgado*, 2016 U.S. Dist. LEXIS 33719 at *22 (citing *Tamayo v. Blagojevich*, 526 F.3d 1074, 1085 (7th Cir. 2008) (reaffirming "the minimal pleading standard for simple claims"); *see also, e.g., Montero v. JPMorgan Chase & Co.*, 2016 U.S. Dist. LEXIS 5460, at *3 (N.D. Ill. Jan. 15, 2016); *Richardson v. Granite City Hotel & Resorts, L.L.C.*, 2015 U.S. Dist. LEXIS 56168, 2015 WL 1944402, at *3 (S.D. Ill. Apr. 29, 2015); *Bitner v. Wyndham Vacation Resorts, Inc.*, 2013 U.S. Dist. LEXIS 156809, 2013 WL 5878724, at *3 (W.D. Wis. Nov. 1, 2013).

Several courts outside of the Seventh Circuit apply this approach to pleading standards in the context of an FLSA claim. *See Alexander v. HE&M, Inc.*, 2011 U.S. Dist. LEXIS 7190 (E.D. Okla. Jan. 25, 2011); *Spigner v. Lessors, Inc.*, 2011 U.S. Dist. LEXIS 41729 (M.D. Fla. Apr. 18, 2011); *In re Bank of Am. Wage & Hour Empl. Litig.*, 2010 U.S. Dist. LEXIS 112029 (D. Kan. Oct. 20, 2010) (citing *Hawkins v. Proctor Auto Serv. Center, LLC*, 2010 U.S. Dist. LEXIS 30772 (D. Md. Mar. 30, 2010); *Hoffman v. Cemex, Inc.*, 2009 U.S. Dist. LEXIS 114130 (S.D. Tex. Dec. 8, 2009); *Haskins v. VIP Wireless Consulting*, 2009 U.S. Dist. LEXIS 114136, (W.D. Pa. Dec. 7,

2009); *Connolly v. Smugglers' Notch Management Co.*, 2009 U.S. Dist. LEXIS 104991 (D. Vt. Nov. 5, 2009); *Acho v. Cort*, 2009 U.S. Dist. LEXIS 100064 (N.D. Cal. Oct. 27, 2009)); *Flynn v. Stonegate Mortg. Corp.*, 2010 U.S. Dist. LEXIS 90878 (D. Kan. Aug. 30, 2010); *Nicholson v. UTi Worldwide, Inc.*, 2010 U.S. Dist. LEXIS 138468 (S.D. Ill. Feb. 12, 2010); *McDonald v. Kellogg Co.*, 2009 U.S. Dist. LEXIS 37365 (D. Kan. Apr. 27, 2009); *Xavier v. Belfor United States Group, Inc.*, 2009 U.S. Dist. LEXIS 11751 (E.D. La. Feb. 13, 2009); *Puleo v. SMG Prop. Mgmt.*, 2008 U.S. Dist. LEXIS 66582 (M.D. Fla. Aug. 20, 2008); *Sec'y of Labor v. Labbe*, 319 Fed. Appx. 761, 763 (11th Cir. 2008).

This approach makes sense. To accept Defendants' proposed pleading standard would require minimum wage employees to have knowledge of each of their employer's job duties and responsibilities, all the way up the chain of command, in order provide sufficient factual support to even plead a claim that would survive a motion to dismiss. Such a standard is untenable. Rather, FLSA plaintiffs should be, and are, permitted to provide simple allegations that put defendants on notice of the nature of their claims, allowing cases to be decided on their merits, not the mere technicalities Defendants hang their hat on here. Plaintiff has provided detailed factual allegations that are anything but conclusory. But even if Plaintiff's allegations were the formulaic recitations Defendants claim them to be, the allegations would satisfy the relevant pleading standard set forth above because Defendants are on notice of the claims asserted against Perfect Timing and can accordingly begin to prepare a defense—as evidenced by Perfect Timing's response in opposition to Plaintiff's motion to send notice. *See* Doc. 23.

In light of the well-established lenient pleading standard required of an FLSA complaint, Plaintiff has made sufficient factual allegations in his FAC to put Perfect Timing on notice of his claims. As a result, the Court should deny Defendants' Motion to Dismiss.

**3.3. Accepting the allegations in the FAC as true, Perfect Timing qualifies as Plaintiff's employer.**

Defendants seem to take issue with Plaintiff's characterization of Perfect Timing as his employer for reasons beyond just the sufficiency of the factual allegations in the complaint. As noted above, Plaintiff's allegations regarding each defendant's status as an employer are nearly identical. Defendants apparently challenge these allegations based on some factual distinction between Perfect Timing and the other Defendants. Such distinction is improper as the basis for Defendants' Motion to Dismiss. Rather, the appropriate inquiry on a motion to dismiss does not consider facts outside the complaint but instead accepts the allegations as set forth in the complaint as true. *Martinez*, 2011 U.S. Dist. LEXIS 105980 at *5; *Delgado*, 2016 U.S. Dist. LEXIS 33719 at *9.

The FLSA imposes minimum wage and overtime obligations on "employers." *See* 29 U.S.C. 206 ("Every employer shall pay to each of his employees…") *and see* 29 U.S.C. 207 ("…no employer shall employ any of his employees * * * for a workweek longer than forty hours unless such employee receives compensation…"). The FLSA defines "employer" 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). More than one "employer" can be simultaneously responsible for FLSA obligations to an employee. *See, e.g., Okoro v. Pyramid 4 Aegis*, No. 11-C-267, 2012 U.S. Dist. LEXIS 56277, at *29 (E.D. Wis. Apr. 23, 2012). Based on the economic reality test used to evaluate employer status, Plaintiff's allegations sufficiently identify all Defendants as employers, including

Perfect Timing. As the Court must consider only the allegations in the FAC and accept them as true, that is where the inquiry must end. Any implications or outside facts alluded to by Defendants are improper and insufficient to support their Motion to Dismiss. As a result, Defendants' Motion to Dismiss should be denied.

**4. Conclusion**

Consistent with the overwhelming weight of authority set forth above both in this district and across the country, the allegations in Plaintiff's FAC are sufficient to state claim under the FLSA, and the Court should deny Defendants' Motion to Dismiss.

Respectfully submitted,

*/s/Nathan B. Spencer*

Andrew R. Biller (Ohio Bar # 0081452)
Andrew P. Kimble (Ohio Bar # 0093172)
Nathan B. Spencer (Ohio Bar # 0092262)
BILLER & KIMBLE, LLC
8044 Montgomery Rd., Suite 515
Cincinnati, OH 45236
Telephone: (513) 202-0710
Facsimile: (614) 340-4620
*abiller@billerkimble.com*
*akimble@billerkimble.com*
*nspencer@billerkimble.com*

Scott S. Luzi, State Bar No. 1067405
WALCHESKE & LUZI, LLC
15850 W. Bluemound Road, Suite 304
Brookfield, Wisconsin 53005
Telephone: (262) 780-1953
Facsimile: (262) 565-6469
*sluzi@walcheskeluzi.com*

*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

*/s/ Nathan Spencer*
Nathan Spencer