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 **DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

I. INTRODUCTION

Perfect Timing, LLC ("Perfect Timing") is an entity that Plaintiff had no contact with and had never heard of until discovery in this lawsuit because it owns and operates a different store, for which Plaintiff never worked. This made it impossible for Plaintiff to in good faith provide the necessary substance to state a viable claim. To distract from this reality, in Plaintiff's Opposition to Defendant's Motion to Dismiss, ECF No. 26 ("Plaintiff's Opposition Brief") Plaintiff presents a novel legal theory: despite two binding United States Supreme Court opinions and over twelve years of well-settled federal jurisprudence among ninety-four federal district courts and thirteen circuit courts regarding Fed. R. Civ. P. 8(a), the Eastern District of Wisconsin has retained notice pleading—at least as it relates to pleading FLSA claims. According to Plaintiff, pleading standards are now so lenient that they apparently allow a Plaintiff to file suit against a company that never employed Plaintiff and was at all times unrelated to Plaintiff and his employment.

At the end of the day, Plaintiff has not pled his claims against Perfect Timing to the level required by Rule 8's plausibility pleading threshold. The Court cannot allow Plaintiff to engage in such a costly expedition against an entity for which Plaintiff indisputably never worked. While the federal plausibility pleading standard is not burdensome or demanding, accepting Plaintiff's allegations against Perfect Timing would mean no standard exists. Because *Twombly* and *Iqbal* remain binding precedent on federal courts, and because Plaintiff's allegations against Perfect Timing in Plaintiff's First Amended Complaint ("FAC") fall far short of Fed. R. Civ. P. 8(a)'s requirements, Plaintiff's FAC must be dismissed.[1]

II. ARGUMENT

A. PLAINTIFF'S CHARACTERIZATION OF THE FEDERAL PLEADING STANDARD AS A "LENIENT, NOTICE PLEADING STANDARD" IS FALSE.

1. Plausibility Pleading.

An overly permissive notice pleading standard was directly repudiated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In *Twombly* the United States Supreme Court critiqued the previous overly lenient approach as "best forgotten as an incomplete, negative gloss on an accepted pleading standard," and explaining that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 546. The Court

[1] Since Defendants filed their Motion to Dismiss Plaintiff's FAC, Defendants have waived service of process and thus no longer dispute adequacy of service under Fed. R. Civ. P. 4. The present Motion remains Defendants' response although it predates formal service of process by Plaintiff.

continued, explaining that "[t]he need at the pleading stage for allegations plausibility suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief,'" naming this standard the "plausibility standard." *Id.* at 557. Although the plausibility standard was set forth in the context of antitrust claims, the United States Supreme Court's opinion in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) confirmed the standard applied to all claims filed in federal court. *See id.*

This District, along with every other federal district court, has adopted plausibility pleading. This court routinely cites to *Twombly* and *Iqbal*, indicating that in the Eastern District of Wisconsin, "[t]o survive a motion to dismiss, a plaintiff need not provide 'detailed factual allegations' but must offer 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Tate v. Atonement Evangelical Lutheran Church of Milwaukee Inc.*, No. 16-CV-236, 2016 WL 6768973, at *1 (E.D. Wis. Nov. 15, 2016). While the Seventh Circuit continues to recognize "notice pleading," such recognition is in name only; case law indicates that the Seventh Circuit has incorporated the basic principles of plausibility pleading standards into its operative pleading standard. *See Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010) (recognizing plausibility pleading and explaining that "[a]s we understand it, the [United States Supreme] Court is saying instead that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together.").

It appears, however, that Plaintiff is a bit late to the party. While Plaintiff appears to acknowledge *Twombly* and *Iqbal*, Plaintiff's argument misapplies plausibility pleading

as described by the United States Supreme Court and adopted by the Eastern District of Wisconsin and the Seventh Circuit. This misunderstanding is apparent in claims such as: "caselaw sets forth a minimal notice pleading standard," "Plaintiff's FAC more than satisfies the correct, liberal notice pleading standard," and "even where an FLSA complaint is cursory or conclusory, it satisfies the liberal notice pleading standard . . . ." Pl.'s Brf. at 1, 5. Such statements directly contradict guidance set forth by the United States Supreme Court.

2. Cases from this District and the Seventh Circuit Support Plaintiff's Argument.

Plaintiff next asserts that "Defendants stretch to find inapposite case law from other jurisdictions," concluding that this is because "applicable caselaw from this Court is fatal to their argument." Pl.'s Brf. at 1. In response, Plaintiff cites a single case from this District, *Martinez v. Regency Janitorial Services Inc*., No. 11-C-259, 2011 WL 4374458 (E.D. Wis. Sept. 9, 2011), which does not support his argument. Indeed, Plaintiff incorrectly cites *Martinez* throughout his Brief in support of the proposition that Fed. R. Civ. P. Rule 8(a)(2), as it is applied today, sets forth a "lenient notice pleading standard." Pl.'s Brf. at 2–6. However, this citation ignores the fact that the cited text from *Martinez*, taken from *Brooks v. Ross*, 578 F.3d 574 (7th Cir. 2009), never establishes, advances, advocates for, or applies notice pleading, but affirms that *Twombly* and *Iqbal* raised the threshold for a complaint to survive a motion to dismiss. *See id.* at 581 ("*Twombly*'s plausibility requirement applies across the board . . . ."). In fact, in *Brooks* the Seventh Circuit case which described and applied the current federal ***plausibility*** pleading standard, declaring

that "[a]ny doubt that *Twombly* had repudiated the general notice-pleading regime of Rule 8 was put to rest . . . ." and further stating that *Iqbal* "clarified that *Twombly*'s plausibility requirement applies across the board[.]" *Id.* The Seventh Circuit described the new federal pleading standard as requiring enough facts "to raise a right to relief above the speculative level," explaining that courts need not accept legal conclusions as true, nor must they accept "[t]hreadbare recitals of the elements of a cause of action[.]" *Id.* In other words, the Seventh Circuit indicated the pleading requirements to be ***exactly those stated by Defendants in their Moving Brief***, and those requirements which cause Plaintiff's claims against Perfect Timing to fail.[2]

Importantly, at issue in *Martinez* was not whether plaintiffs had to plead specific facts (this is plainly not required under the federal plausibility pleading standard and Defendants do not argue that it is), but whether plaintiffs included "enough" facts in their complaint to satisfy Fed. R. Civ. P. 8(a)'s threshold. *Id.* at *3. In holding that the plaintiffs had sufficiently pled their claims, the *Martinez* court ultimately found that the complaint—unlike Plaintiff's FAC at issue here—"clearly does more than simply recite the statutory elements of a claim," describing in detail plaintiffs' wage and hour allegations, of which there were many. *Id.* at *4.

Here, Plaintiff's FAC merely recites the elements of the economic realities test and provides no factual allegations which could colorably support Plaintiff's inclusion of

[2] Additionally, while *Martinez*, and other case law from this District and the Seventh Circuit, acknowledge the practical application of plausibility pleading could require plaintiffs to plead more facts for complex claims than straightforward claims, this does not give Plaintiff the green light to pursue a straightforward claim with ***no facts at all*** against one Defendant.

Perfect Timing into the instant action. Plaintiff has never been employed by, involved with, ***or even known of*** Perfect Timing until Plaintiff learned, through the discovery process, that Garett Burns ("Burns") owned an additional (unrelated) company. Here, Plaintiff has provided barebones, conclusory allegations in an attempt to include an unrelated entity into this lawsuit. *See* FAC ¶¶ 21–29; *infra* Part B. Because Plaintiff has failed to meet his burden, and because no factual circumstances can be pled by Plaintiff to cure these deficiencies, Plaintiff's FAC must be dismissed.

Plaintiff similarly misrepresents the view of the Southern District of Indiana in Plaintiff's discussion of *Delgado v. DirecTV, Inc.*, No. 1:14-cv-01722, 2016 WL 1043725 (S.D. Ind. Mar. 16, 2016). While Plaintiff quotes *Delgado* for the proposition that a plaintiff "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," Plaintiff conveniently glosses over the Southern District of Indiana's discussion of *Twombly* and *Iqbal* as "introduc[ing] a more stringent formulation of the pleading requirements under Rule 8," and requiring "more than labels and conclusions . . . [or] a formulaic recitation of the elements of a cause of action[.]" *Id.* at *3. While the *Delgado* court does note that the pleading standard under Fed. R. Civ. P. 8(a) is still relatively lenient, and does still require a plaintiff put a defendant on notice of claims, it does not exclude the additional pleading requirements from its analysis. *See id.* Here, all Plaintiff has provided are conclusory statements and formulaic recitation of the economic realities considerations against Perfect Timing. Pursuant to *Martinez* and *Delgado*—the very cases cited by Plaintiff himself—Plaintiff's allegations against Perfect Timing are insufficient to clear the relatively low

threshold set by Fed. R. Civ. P. 8(a). Plaintiff should not be rewarded for his inartful pleadings with access to employees of an entirely unrelated entity. Plaintiff's FAC must be dismissed.

3. Plaintiff's Case Citations in Support of his Position are Misleading and Do Not Support His Argument.

Plaintiff clumsily argues two cases cited by Defendants—*Hunter v. Agility Energy, Inc*., 419 F. Supp. 3d 1269 (D. Utah. 2019) and *Diaz v. U.S. Century Bank, Intern. Risk Response,* Inc., No. 12-21224-civ, 2012 WL 2514906 (S.D. Fla. June 28, 2012)—are "inapposite" because the United States District Court for the District of Utah, and the United States District Court for the Southern District of Florida, while applying the same federal pleading standard in the same factual context, sit in other states. Pl.'s Brf. at 6 ("[O]ne case is from Utah, and the other from Florida. The present case is in Wisconsin."). Plaintiff, however, doesn't even buy his own argument, citing on page 7 of his Opposition Brief to cases from the Eastern District of Oklahoma, Middle District of Florida, District of Kansas, District of Maryland, Southern District of Texas, Western District of Pennsylvania, District of Vermont, Northern District of California, Southern District of Illinois, and Eastern District of Louisiana in support of his argument. *See* Pl.'s Brf. at 7–8; *Martinez*, 2011 WL 4374458 at *4.[3]

Clearly, as recognized by Plaintiff, there is value in (correctly) citing federal district court opinions which apply the same standard in same factual contexts. Given the dearth

[3] These citations prove problematic for Plaintiff in other ways; while the string cite appears to be taken from Martinez, many of the cases do not stand for the proposition for which Plaintiff cites them, specifically, that "[s]everal courts outside of the Seventh Circuits apply this approach to pleading standards in the context of an FLSA claim." Pl.'s Brf. at 7.

of such case law in this District, the opinions issued by the District of Utah and the Southern District of Florida in *Hunter* and *Diaz* are squarely on-point with the issues presented by this Motion—namely, the application of the federal plausibility pleading standard to meager facts alleging a defendant employed a plaintiff. Ultimately, as set forth in greater detail in Defendants' Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's FAC, ECF No. 22 ("Defendants' Moving Brief"), the *Hunter* and *Diaz* courts, when faced with threadbare recitals of the economic realities test (which were more robust than those offered by the Plaintiff here), found that the allegations were insufficient to state a claim under Fed. R. Civ. P. 8(a) and ordered dismissal of the claims. *See* Defs' Brf. at 7–10; *Hunter*, 419 F. Supp. 3d at 1275–77; *Diaz*, 2012 WL 2514906 at *2.

Although circuit courts have applied slightly varying standards, they all agree on the fundamentals of Fed. R. Civ. P. 8(a) post-*Twombly/Iqbal*: (1) the plaintiff must plead enough facts to give rise to a claim that is plausible on the face of the complaint; and (2) the court need not accept "abstract recitations of the elements of a cause of action or conclusory legal statements." *See, e.g.*, *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010). Both of these principles lead to one finding when applied to Plaintiff's claims against Perfect Timing: Plaintiff's allegations are deficient, and must be dismissed.

B. FACTS PLED IN PLAINTIFF'S FAC REGARDING PERFECT TIMING ARE INSUFFICIENT

Equally as puzzling as Plaintiff's adherence to notice pleading is Plaintiff's attempt to brand Defendants' insistence on Plaintiff's compliance with Fed. R. Civ. P. 8(a) as a demand for specific facts. *See* Pl.'s Brf at 1, 4. Nowhere in Defendants' Moving Brief do

Defendants argue for the inclusion of any specific facts into Plaintiff's FAC—Defendants merely request Plaintiff set forth a bare minimum of facts which show that Plaintiff is entitled to relief against Perfect Timing. Defendants are confident that because Plaintiff has had no relationship at all with Perfect Timing, Plaintiff cannot produce facts sufficient to justify Perfect Timing's inclusion in this suit.

The allegations against Perfect Timing in Plaintiff's FAC best demonstrate the need for this Court to insist Plaintiff plead additional facts or risk dismissal of his FAC. As the FAC stands, each of the statements Plaintiff attempts to position as facts are clearly rote elemental recitations or bare legal conclusions, and cannot be accepted as "facts." For example, Plaintiff is able to summarize the purported "facts" involving Perfect Timing in just a few brief bullet points, arguing that 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).

Pl.'s Brf. at 5. While Plaintiff's summary of the facts supporting the "control" element of the economic realities test may initially strike the reader as incredibly vague, it is important to note that the allegations in Plaintiff's FAC provide no additional enhancement, stating:

> 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.

FAC ¶¶ 25.

Plaintiff again evades any thoughtful consideration of his allegations, stating that "[t]hese are not conclusory allegations, but rather set forth specific facts regarding Perfect Timing's role in operating Defendants' Toppers Pizza stores." Pl.'s Brf. at 6. Of course, Plaintiff's allegations here are ***textbook examples*** of conclusory allegations and threadbare recitals of the elements. As highlighted in Defendants' Moving Brief, Plaintiff "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 . . . ." Defs' Mov. Brf. at 10. District courts applying the same pleading standard under the same circumstances have dismissed Plaintiffs' complaints for failure to comply with Fed. R. Civ. P. 8(a). *See Hunter v. Agility Energy, Inc*., 419 F. Supp. 3d 1269 (D. Utah 2019); *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. This Court must do the same.

C. PLAINTIFF CANNOT PLEAD FACTS SUPPORTING AN EMPLOYER/ EMPLOYEE RELATIONSHIP BETWEEN HIMSELF AND PERFECT TIMING.

Finally, in an attempt to distract the Court from Plaintiff's deficient pleadings, Plaintiff contends that Defendants moved to dismiss Perfect Timing as an apparent attempt to advance Defendants' merits-based arguments. *See* Pl.'s Brf. at 2. In support of this theory Plaintiff points to the fact that Defendants moved to dismiss only Perfect Timing even though the allegations against FSM and Burns were "nearly identical" to the allegations against Perfect Timing.

The allegations against Perfect Timing are conclusory, rote, and insufficient—full stop. While the allegations against Perfect Timing, Burns, and FSM are nearly identical, Defendants did not move to dismiss the allegations against FSM and Burns initially, and did not move to dismiss them from the FAC, for reasons of efficiency. Simply put, Defendants believe Plaintiff's allegations against FSM and Burns are likewise deficient, but believe Plaintiff could add facts which would allow Plaintiff to overcome his pleading burden with respect to FSM and Burns only. However, Defendants know that Plaintiff cannot remedy his FAC with respect to the allegations against Perfect Timing. Perfect Timing has no connection to Plaintiff other than being an entirely separate company which is also owned by Burns. Plaintiff never delivered pizza for Perfect Timing. Plaintiff never received a paycheck from Perfect Timing. Plaintiff has no personal knowledge of any of the pay policies which apply to Perfect Timing's employees.

Typically, when a plaintiff sues the wrong defendant the parties may engage in discovery and the defendant may move for summary judgment to exit the case. Here,

Plaintiff attempts to rope Perfect Timing into conditional certification in an effort to fish for additional claims and clients. Given the costs and disruption that is at stake Perfect Timing must aggressively respond to Plaintiff's unwarranted strategy. Perfect Timing is unrelated to Plaintiff's claims, as evidenced by Plaintiff's threadbare allegations against the company, Plaintiff's FAC, and his claims against Perfect Timing, must be dismissed.

III. CONCLUSION

To succeed here, where Plaintiff has only pled conclusory allegations and mindlessly recited the elements of the economic realities test, Plaintiff truly would need to change the federal pleading standard. Because Plaintiff's allegations against Perfect Timing are insufficient, for the reasons set forth in Defendant's Moving Brief as well as this Reply Brief, the Court must grant Defendants' Motion and dismiss Plaintiff's FAC.

Dated: May 17, 2021

s/ Martin D. Kappenman

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