No. 19-50638

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RUBEN MOLINA-ARANDA; JOSE EDUARDO MARTINEZ-VELA; JUAN GERARDO LOPEZ-QUESADA,

Plaintiffs-Appellants

v.

BLACK MAGIC ENTERPRISES, L.L.C., doing business as JMPAL TRUCKING; CARMEN RAMIREZ; JESSIE RAMIREZ, III,

Defendants-Appellees

On Appeal from a Final Judgment of the
United States District Court for the Western District of Texas
Case No. 7:16-cv-00376, Hon. Robert Junell

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS RUBEN MOLINA-ARANDA, ET AL.

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August 31, 2019

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Plaintiffs-Appellants

v.

BLACK MAGIC ENTERPRISES, L.L.C., d/b/a JMPAL TRUCKING, et al.,

Defendants-Appellees

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants

Ruben Molina-Aranda

Jose Eduardo Martinez-Vela

Juan Gerardo Lopez-Quesada

Defendants-Appellees

Black Magic Enterprises, L.L.C., d/b/a JMPAL Trucking

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August 31, 2019 /s/ Brian Wolfman
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-appellants request oral argument and believe it would significantly aid the Court. The issues presented in this appeal are whether the district court erred in holding that plaintiffs did not adequately plead their RICO and Fair Labor Standards Act (FLSA) claims and whether that court abused its limited discretion in denying plaintiffs leave to amend the complaint to rectify the purported pleading inadequacies the court identified. Among other benefits, oral argument would allow the Court to explore with counsel the relationship between the facts, as pleaded and proposed, with the elements of a well-pleaded RICO and FLSA claim.

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INTRODUCTION

Guest workers from other countries are especially vulnerable to the abuses of unscrupulous domestic employers.[1] This case is illustrative. Defendants obtained guest-worker visas from the Government under the pretense that plaintiffs would work as manual laborers. But defendants employed plaintiffs as heavy-truck drivers. By lying about the plaintiffs' work, defendants cheated the plaintiffs out of their lawful wages.

Plaintiffs sued defendants under RICO and the Fair Labor Standards Act (FLSA). They based their RICO claim on the simple truth that heavy-truck drivers earn significantly higher wages than manual laborers. To obtain guest-worker visas from the Government, by law defendants had to pay plaintiffs the prevailing wage for their work. Heavy-truck drivers earn about $20 per hour. But defendants falsely claimed that plaintiffs would work as manual laborers, who earn less than $14 per hour. Defendants perpetuated their lie repeatedly—systematically defrauding the Government to obtain visas at guest workers' expense.

Under the FLSA, defendants' employees were owed minimum wage and overtime. Plaintiffs worked 55 to 80 hours per week hauling sand, gravel, and other materials in defendants' trucks, yet, as noted, they were not paid the minimum wage (and sometimes not paid at all), and they were never paid overtime.

In dismissing plaintiffs' claims, the district court erected a nearly-impossible pleading standard for RICO and FLSA claims. It quibbled over whether defendants'

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[1] *See* U.S. Gov't Accountability Office, GAO-10-1053, *H-2B Visa Program: Closed Civil and Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse* 4-5 (2010), https://www.gao.gov/products/GAO-10-1053.

fraudulent visa applications were submitted via mail or wire without addressing plaintiffs' uncontested allegations of visa fraud. The court derided plaintiffs because they did not quantify their lost wages with perfect precision at the pleading stage. It found conclusory plaintiffs' allegations about the hours they worked and the work they performed, while insisting that the trucking company that employed them is a stranger to interstate commerce. The district court did all this even though, "[a]t this stage of the proceedings, a plaintiff need only plausibly allege facts going to the ultimate elements of the claim to survive a motion to dismiss." *Cicalese v. Univ. of Tex. Med. Branch*, 924 F.3d 762, 768 (5th Cir. 2019). And then the court even refused to entertain a proposed second amended complaint that met its concerns. This Court should reverse.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337, 29 U.S.C. § 216(b), and 18 U.S.C § 1965. The district court granted a motion to dismiss regarding the claims at issue here on June 26, 2017. ROA.160-73. Plaintiffs' motions for reconsideration and for leave to amend as to those claims were denied on August 11, 2017, and August 15, 2017, respectively. ROA.258, ROA.259-63. Plaintiffs' request for entry of final judgment on those claims was denied at that time. ROA.263. Later, on June 17, 2019, the court dismissed the case as to all claims and all parties and entered a final appealable judgment. ROA.294. Plaintiffs filed a notice of appeal on July 3, 2019. ROA.296. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Plaintiffs alleged that defendants advertised construction jobs to foreign guest workers but required plaintiffs to work as trucks drivers. Instead of paying the prevailing wage required for truck drivers, defendants paid lower wages applicable for construction workers. As part of this scheme, defendants submitted fraudulent visa forms via the mail or wires to the U.S. Department of Labor, falsifying the type of work plaintiffs would perform.

The first issue is whether the district court erred in holding that plaintiffs failed to state a RICO claim for mail or wire fraud and visa fraud.

2. Under the FLSA, almost every employer engaged in commerce with greater than $500,000 in annual revenue must pay its employees minimum wages and overtime. Plaintiffs alleged they worked 55 to 80 hours per week, were not paid overtime, and were frequently paid less than minimum wage and sometimes not paid at all.

The second issue is whether the district court erred in holding that plaintiffs failed to state a FLSA claim for minimum wages or overtime pay.

3. Plaintiffs requested leave to amend to meet the heightened pleading standards imposed by the district court's dismissal. The proposed second amended complaint, which pleaded plaintiffs' claims with greater specificity, was filed five-and-a-half weeks after the dismissal order. The district court refused it, appearing to reason that any new complaint would be untimely and futile.

The third issue is whether the district court misapplied the liberal amended-pleading rules in refusing to allow plaintiffs' second amended complaint.

STATEMENT OF THE CASE

Plaintiffs are guest workers who worked for defendant Black Magic, run by defendants Carmen Ramirez and Jessie Ramirez. The Ramirezes lied to the U.S. Government to get plaintiffs' work visas, lied to plaintiffs about the kind of work they would be doing (and their working conditions), and then underpaid plaintiffs or failed to pay them at all. Plaintiffs then brought this case alleging RICO and FLSA violations.

I. Legal background

A. The H-2B program

An employer may seek H-2B visas to employ temporary foreign workers for nonagricultural work. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Before filing an H-2B petition with the Department of Homeland Security, an employer must first obtain a "temporary labor certification" from the Department of Labor. 8 C.F.R. § 214.2(h)(6)(iii)(C). An employer must obtain a new certification each year. 8 C.F.R. § 214.2(h)(6)(iv)(B). DOL provides a certification only when (1) "qualified workers in the United States are not available" and (2) "the alien's employment will not adversely affect the wages and working conditions of similarly employed United States workers." 8 C.F.R. § 214.2(h)(6)(iv)(A); *see* 20 C.F.R. § 655.1(a). To obtain certification, an employer must advertise the position to all potential U.S. workers, 20 C.F.R. § 655.10(a), and cannot reject them "for other than a lawful job-related reason," *id.* § 655.51(b).

An employer must pay H-2B workers a wage that "equals or exceeds" the prevailing wage (as determined by the National Prevailing Wage Center based on the average wage of similarly-employed workers) or the minimum wage, whichever is higher. *Id.* §§ 655.10(b)(2), 655.20(a); *see id.* § 655.10(a). An employer cannot evade the prevailing-

wage requirement by charging workers for visa-related fees, work supplies, or unreasonable housing costs. *See id.* § 655.20(c), (k), (o). In addition to paying the prevailing wage, an employer must always pay for H-2B workers' inbound transportation and must pay for their return transportation when they complete 50% of the employment period. *Id.* § 655.20(j).

B. Civil RICO

The Racketeering Influenced and Corrupt Organizations Act of 1970, or RICO, was enacted "to supplement old remedies and develop new methods for fighting crime." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985). One of those methods is a private civil remedy. 18 U.S.C. § 1964(c).

A private plaintiff can sue under RICO when "injured in his business or property by reason of a violation" of the statute's criminal prohibitions. 18 U.S.C. § 1964(c). As relevant here, 18 U.S.C. § 1962(c) makes it a crime for anyone "employed by or associated with an enterprise" to "conduct the enterprise's affairs through a pattern of racketeering activity." *Zastrow v. Hous. Auto Imports Greenway Ltd.*, 789 F.3d 553, 559 (5th Cir. 2015) (quotation marks and citation omitted). A pattern of racketeering activity includes two or more acts that are indictable as mail fraud (18 U.S.C. § 1341), wire fraud (*id.* § 1343), or visa fraud (*id.* § 1546). *Id.* § 1961(1)(B), (5).

C. Fair Labor Standards Act

Congress enacted the Fair Labor Standards Act (FLSA) "to protect all covered workers from substandard wages and oppressive working hours." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2121 (2016) (quotation marks and citation omitted). Under

it, employers must pay covered employees a minimum wage of $7.25 per hour. 29 U.S.C. § 206(a)(1)(C). For work hours greater than forty per week, employers must pay overtime of at least one-and-a-half times the employee's "regular rate." *Id.* § 207(a)(1).

The FLSA protects employees who can show that their employer has over $500,000 in annual revenue and are "covered" by the Act. *See* 29 U.S.C. § 203(s)(1)(A)(ii). A plaintiff may show coverage in one of two independent ways. Under "individual coverage," the FLSA applies when the plaintiff is personally engaged in commerce or the production of goods for commerce. 29 U.S.C. §§ 206(a), 207(a). Under "enterprise coverage," the FLSA applies when the plaintiff is employed by an enterprise that is engaged in commerce or the production of goods for commerce. *Id.* Because almost every business engages in some way in interstate commerce, the FLSA has the practical effect of covering nearly every enterprise doing business of $500,000 a year. *See e.g.*, *Jacobs v. N.Y. Foundling Hosp.*, 577 F.3d 93, 99 n.7 (2d Cir. 2009) (citing *Dunlop v. Indus. Am. Corp.*, 516 F.2d 498, 501-02 (5th Cir. 1975)).

II. Factual background

In reviewing a Rule 12(b)(6) dismissal, this Court "take[s] all factual allegations as true and construe[s] them in the light most favorable to plaintiff[s]." *Kelly v. Nichamoff*, 868 F.3d 371, 374 (5th Cir. 2017). Plaintiffs' first amended complaint alleged the following facts.

Plaintiffs Ruben Molina-Aranda, Jose Eduardo Martinez-Vela, and Juan Gerardo Lopez-Quesada are Mexican citizens. ROA.71 (¶ 1). In 2015, they left Mexico to work for Black Magic Enterprises as heavy-truck drivers under the H-2B guest-worker

program. ROA.71-72, ROA.73-74, ROA.82 (¶¶ 1-2, 13, 51-54). Black Magic—owned and managed by defendants Carmen and Jessie Ramirez, ROA.73 (¶¶ 8-9)—is a U.S. employer that promised to provide plaintiffs with prevailing wages, adequate housing, and reimbursement for plaintiffs' return trips to Mexico, among other employment terms. ROA.84 (¶¶ 72-73).

Defendants never intended to make good on these promises. By lying to the U.S. Government about the kind of work, rates of pay, and other forms of compensation promised to H-2B workers, ROA.75-81, ROA.84 (¶¶ 18-49, 72), defendants were able to hire plaintiffs at a wage rate well below what defendants were required to pay (and would have otherwise paid) for heavy-truck drivers. ROA.71 (¶ 1). By paying less-than-prevailing wages, defendants undercut the interests of U.S. workers and seized an unfair competitive advantage over U.S. businesses that played by the rules. ROA.71-72 (¶¶ 1-2).

More importantly for present purposes, defendants' scheme cheated plaintiffs out of their wages, ROA.84-86 (¶¶ 74-87), forced them to live in and pay for squalid conditions, ROA.81, ROA.84-85 (¶¶ 46, 74), unlawfully charged them travel and visa expenses, ROA.85 (¶¶ 74(e), 76), and made illegal demands during their employment, ROA.85, ROA.86-87 (¶¶ 75-78, 87-94).

A. Defendants' trucking business

Black Magic is a trucking company that "haul[ed] water, waste, raw materials, and other equipment" to oil rigs throughout west Texas. ROA.74 (¶ 17). Before Black Magic's 2017 bankruptcy filing, the company brought in more than $500,000 annually

and employed over eleven drivers, who transported oilfield materials both intra- and interstate using interstate highways. ROA.74, ROA.81-82 (¶¶ 17, 50). The company's heavy trucks, the fuel for those trucks, and the oilfield equipment hauled by the employee-drivers all moved in, or were produced for, interstate commerce. ROA.81-82 (¶¶ 50, 55).

Carmen and Jessie Ramirez jointly managed Black Magic's day-to-day operations and "supervised, directed and controlled" the work of their employees. ROA.83 (¶¶ 59, 62). Their management included signing paychecks, ROA.83 (¶ 64); setting the contract terms, pay rates, and deductions, ROA.83-84 (¶¶ 67-68); maintaining the workers' housing, ROA.84 (¶ 69); preparing payroll records, ROA.84 (¶ 70); and hiring or firing employees, ROA.83, ROA.84 (¶¶ 60-61, 71).

B. Defendants' participation in the H-2B program

Beginning in 2015, defendants plotted to bring foreign workers into the United States under the H-2B visa program to avoid paying the market wage (roughly twenty dollars an hour) for U.S. heavy-truck drivers. ROA.75 (¶¶ 18-20). To weed out U.S. workers—allowing defendants to recruit guest workers instead—defendants advertised only for "construction laborers," a position paying $13.72 per hour. ROA.75 (¶ 20). But, in reality, defendants sought workers to "perform heavy trucking" at an unlawfully low wage. ROA.75 (¶ 22).

In support of their "need" for foreign workers, in February 2015, defendants submitted an H-2B application to DOL certifying that prospective employees would be "perform[ing] tasks involving physical labor at construction sites." ROA.75-76 (¶¶ 22-

23; *see also* ROA.78-79 (¶ 32) (same for 2016). The application also stated that "[o]nce a [local] applicant sees key words like physical labor, … many make a very quick decision to look no further at what we have to offer." ROA.75 (¶ 21). On the basis of these and other false statements, ROA.75-76 (¶ 23), defendants' application was approved for an employment period of almost nine months, starting April 2015. ROA.77, ROA.78 (¶¶ 26, 31).

In January 2016, the Ramirez defendants submitted another application to DOL, making the same false statements as in 2015. ROA.78-79 (¶ 32). Again, defendants sought labor certification for foreign "construction laborers" while intending to employ them as heavy-truck drivers, ROA.77, ROA.79-80 (¶¶ 27, 37)—as they had done before, ROA.82 (¶¶ 51-53). DOL again relied on defendants' misrepresentations to approve their application for an employment period between April 2016 and January 2017. ROA.79, ROA.80 (¶¶ 36, 41).

C. Plaintiffs' employment

After receiving the visas each year, defendants employed and housed H-2B guest workers, including plaintiffs. ROA.80, ROA.82 (¶¶ 42, 51-54). But as summarized in the chart below, plaintiffs' actual employment was a far cry from the work terms offered in defendants' DOL applications. ROA.84-85 (¶¶ 72-74).

Expectations created by defendants' DOL applications	**Reality**
• Employees will "perform tasks involving physical labor at construction sites," ROA.76, ROA.78 (¶¶ 23(a), 32(a)). • Employer "will not place any H-2B workers … outside the area of intended	• Plaintiffs worked as heavy-truck drivers, not manual-construction laborers as defendants represented to DOL, ROA.82 (¶¶ 51–54).

employment or in a job classification not listed on the approved application," ROA.76, ROA.79 (¶¶ 23(f), 32(f)).	
• "The offered wage equals or exceeds the highest of the most recent prevailing wage for the occupation … or the applicable Federal, State, or local minimum wage," ROA.76, ROA.78-79, ROA.84 (¶¶ 23(e), 32(e), 73(a)); 20 C.F.R. § 655.20. • Employer "will pay at least the offered wage … during the entire period of this application," ROA.76, ROA.78-79 (¶¶ 23(e), 32(e)).	• Plaintiffs were paid $12 or less per hour, below the $13.72 required by law for "construction laborers," and well below the $20 prevailing wage for heavy trucking in Martin County, ROA.75, ROA.80-81, ROA.84, ROA.86 (¶¶ 20, 43-44, 74(a), 86). • In some weeks in August and September 2015, plaintiffs were not fully paid or paid at all, ROA.86 (¶ 87).
• Employer "will make all deductions from workers' paychecks required by law and only those additional authorized and reasonable deductions disclosed in the job order," ROA.76, ROA.78 (¶¶ 23(b), 32(b)). • Deductions will be made for housing costs but only if reasonable, ROA.84 (¶ 73(b)). • No charges or deductions will be assessed without employee authorization, ROA.84 (¶ 73(d)).	• Plaintiffs were charged unreasonable amounts, without consent, for housing, uniforms, electricity, and laundry, ROA.81, ROA.84, ROA.85 (¶¶ 45, 74(c), 74(e)). • Amounts deducted for housing—an overcrowded trailer without working plumbing—were higher than the trailer's market value, ROA.81, ROA.85 (¶¶ 46, 74(b)).
• Employer "will not seek … payment of any kind from the worker for any activity related to obtaining certification," including "payment of the employer's attorney or agent fees, application or petition fees, or recruitment costs," ROA.76, ROA.78 (¶¶ 23(c), 32(c)).	• Plaintiffs were charged exorbitant amounts for agent fees, DOL application costs, and visa processing fees, ROA.81, ROA.85 (¶¶ 47, 74(e)).
• If employee is dismissed without cause, employer will "provide return transportation for the worker," ROA.76, ROA.78 (¶¶ 23(d), 32(d)).	• Plaintiffs were fired without cause and without reimbursement for return trips, ROA.81, ROA.85 (¶¶ 48, 74(d), 75).

Defendants' violations of the employment terms stated in their DOL applications ended badly for plaintiffs. The unreasonable deductions from plaintiffs' paychecks for housing, uniforms, and utilities; *plus* the costs and fees associated with the H-2B applications, which defendants unlawfully charged to plaintiffs; *plus* plaintiffs' unreimbursed inbound and outbound travel expenses, caused plaintiffs' wages in some weeks to fall below the minimum wage. ROA.85, ROA.88 (¶¶ 76, 79, 100). In other weeks in August and September 2015, plaintiffs were not "fully paid" or not paid at all. ROA.86 (¶ 87).

Defendants also failed to pay overtime wages. In all weeks of their employment, plaintiffs worked over forty hours and regularly worked between fifty-five and eighty hours. ROA.85 (¶ 80). Plaintiffs should have earned nearly thirty dollars for each weekly work hour over forty—that is, one-and-one-half times the roughly twenty-dollar wage rate for heavy truck drivers in Martin County. ROA.86 (¶¶ 82, 86). In any case, plaintiffs are *at least* entitled to $20.58 for each overtime hour they worked, or one-and-one-half times the $13.72 rate for "construction laborers." ROA.75, ROA.86 (¶¶ 20, 81). Whatever the applicable rate, plaintiffs were paid significantly less than they were owed. ROA.85-86, ROA.88 (¶¶ 80-81, 97).

D. Plaintiffs' firing

After several months of unlawfully low wages and unlawful working conditions, plaintiffs were fired without cause. ROA.81 (¶ 48). The Ramirezes' firing of plaintiff Molina-Aranda was particularly brazen.

In mid-September 2015, Molina-Aranda was driving from Odessa to Black Magic's headquarters in a company truck. ROA.87 (¶ 88). His direct supervisor, the Ramirezes'

son, ordered Molina-Aranda to drive ninety miles per hour, more than fifteen miles per hour over the speed limit. ROA.87 (¶ 89). Molina-Aranda refused, afraid to risk criminal penalties and a speeding ticket that would jeopardize his trucker's license and livelihood. ROA.87 (¶¶ 90, 92). On arriving at headquarters, defendant Jessie Ramirez confronted Molina-Aranda, telling him to "shut up" and that "when he is told to do something—including speeding—he had better do it." ROA.87 (¶ 91). Molina-Aranda was then fired on the spot. ROA.87 (¶ 91).

Neither Molina-Aranda—nor plaintiffs Martinez-Vela and Lopez-Quesada, whose employment ended shortly thereafter, ROA.82 (¶¶ 52-53)—were reimbursed for the transportation, food, or lodging costs of returning home to Mexico, ROA.85 (¶¶ 74(d), 75).

III. Plaintiffs' suit and the district court's decision

Plaintiffs sued Black Magic and the Ramirezes for unpaid minimum wage and overtime under the FLSA and for mail, wire, and visa fraud under RICO. ROA.8, ROA.21-22 (¶¶ 1, 73-87). Plaintiffs also brought state-law claims for contract damages, illegal discharge, and quantum meruit. ROA.23-24 (¶¶ 88-97). After plaintiffs sued, Black Magic filed for bankruptcy. The district court then stayed proceedings against Black Magic pending resolution of the bankruptcy. ROA.48-49. (Plaintiffs' claims against Black Magic were later discharged in bankruptcy, and plaintiffs are no longer pursing them. *See* ROA.292.) Plaintiffs continued to pursue their claims against the Ramirezes.

The Ramirezes moved to dismiss plaintiffs' FLSA and RICO claims. ROA.58. They sought dismissal of the FLSA claims because, they said, plaintiffs failed to plead the number of hours worked, the relevant time period, the amount of compensation due, and that they were "covered" FLSA workers. ROA.61-64. Defendants asserted that plaintiffs' RICO claims should be dismissed because plaintiffs failed to adequately plead predicate acts of mail or wire fraud (ignoring plaintiffs' visa-fraud claim) and failed to establish the causal connection between the racketeering activity and injury. ROA.65-69. Plaintiffs then filed an amended complaint as a matter of course to supersede their initial complaint. ROA.71-93; *see* Fed. R. Civ. P. 15(a)(1)(B). Defendants moved to dismiss that complaint, largely for the reasons given in their first motion to dismiss. ROA.103-119.

The district court granted defendants' motion. ROA.160-173. The court dismissed the RICO mail- and wire-fraud claims because plaintiffs failed to "specify the time, place, and contents of the false representations made through the use of the mail and/or wires, along with the identity of the person making the misrepresentations." ROA.165. The court also found that plaintiffs failed to allege proximate cause and injury from the RICO fraud. Although plaintiffs alleged that the fraud resulted in their being paid "at a rate of less than $12 per hour," the court could not "ascertain with any degree of certainty the injury suffered by [p]laintiffs as a result of … alleged RICO violations" because it could not "determine the difference between the amounts paid … and the prevailing wage for actual work performed." ROA.166. Like defendants, the court failed to address plaintiffs' visa-fraud claim, but dismissed it anyway.

The district court dismissed the FLSA claims for failure to allege that plaintiffs were covered FLSA employees and that defendants violated the overtime and minimum-wage requirements. The court found plaintiffs did not sufficiently plead they were either personally engaged in commerce or worked for an enterprise engaged in commerce when they alleged they "handled goods or materials that were moved in or produced for commerce as 'heavy truck drivers.'" ROA.168. Plaintiffs' contention that "employees haul water, sand, gravel, construction, and oilfield services both interstate and intrastate" amounted to "a conclusory allegation" "devoid of any facts" regarding plaintiffs' relation to interstate commerce. ROA.168-69.

The district court also said that plaintiffs' pleadings did not "establish how much compensation and overtime pay they are due." ROA.171. Though plaintiffs alleged specific date spans and ranges of hours for each plaintiff, ROA.170-71, the court found that plaintiffs had not pleaded "sufficient factual context" regarding their "hours worked, relevant time periods, and the amount of compensation due." ROA.170-71. The district court declined to exercise supplemental jurisdiction over plaintiffs' state-law claims and dismissed them without prejudice. ROA.172.

Plaintiffs then moved for leave to file a second amended complaint. ROA.216-224. The district court denied the motion because, the court maintained, "[p]laintiffs had numerous opportunities to fix their pleading deficiencies," and they could not "articulate a compelling reason for why they should be allowed to amend their complaint for a second time." ROA.261. The court did not state what those "numerous opportunities" were. By filing their proposed second amended complaint five-and-a-half weeks after the court granted defendants' motion to dismiss, the court said,

"[p]laintiffs did not exercise diligence in timely presenting all matters relevant to the pleading deficiencies raised in the [m]otion to [d]ismiss." ROA.261-62.

SUMMARY OF ARGUMENT

Pleading rules seek to notify defendants of plausible claims against them. The district court's dismissal defied those rules by demanding exacting and unnecessary specificity. It then doubled down by rejecting a second amended complaint that met the court's own (overly restrictive) pleading demands.

I. The first amended complaint pleaded a RICO claim. It showed a pattern of mail/wire and visa fraud by alleging the dates and precise contents of defendants' lies to the Government about the work plaintiffs would perform under the H-2B program. But—without addressing visa fraud at all—the district court concluded that the amended complaint failed to plausibly allege *any* RICO predicates because plaintiffs could not divine whether the applications were submitted via mail or wire. Plaintiffs also detailed how defendants' fraud directly injured them through unlawfully low wages. Nonetheless, the district court concluded that the amended complaint failed to allege *any* injury because plaintiffs could not quantify their damages with precision—a stricter standard than applies at any stage of litigation in any type of civil case, much less at the pleading stage.

II. The first amended complaint also pleaded a FLSA claim. It showed that defendants engaged in interstate commerce by employing heavy-truck drivers like plaintiffs who used defendants' trucks (fueled with gas produced for commerce) to transport materials like oilfield equipment across Texas. Plaintiffs also specified how

many hours they worked (55 to 80 weekly), how much they were paid (no more than $12 per hour, sometimes nothing), and how much they were owed ($20 per hour before overtime). Yet the district court found that plaintiffs failed plausibly to allege that defendants did not pay FLSA-required minimum wage or overtime. Here, too, the district court applied a standard that makes pleading a FLSA claim all but impossible.

III. The district court abused its limited discretion in denying leave for plaintiffs to file a second amended complaint. The amended complaint was more than sufficient to state plausible RICO and FLSA claims. But the proposed second amended complaint went even further, simplifying the RICO predicates (to plaintiffs' undisputed allegations of visa fraud), isolating enterprise coverage (which subjects virtually every business with annual revenues like Black Magic's to the FLSA's minimum-wage and overtime requirements), and pleading the FLSA violations with even greater particularity (from specific dates and workweeks, to specific hours and paychecks, to the specific effects of deductions).

STANDARD OF REVIEW

This Court reviews dismissals for failure to state a claim de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs." *Littell v. Hous. Indep. Sch. Dist.*, 894 F.3d 616, 622 (5th Cir. 2018). A denial of leave to amend a complaint is reviewed for abuse of discretion. *N. Cypress Med. Ctr. Operating Co. v. Aetna Life Ins. Co.*, 898 F.3d 461, 477 (5th Cir. 2018). "A trial court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly

erroneous assessment of the evidence." *Wallace v. Andover Corp.*, 916 F.3d 423, 428 (5th Cir. 2019) (quotation marks and citation omitted).

ARGUMENT

To survive a Rule 12(b)(6) motion to dismiss, a complaint "need not contain 'detailed factual allegations'; rather, it need only allege facts sufficient to 'state a claim for relief that is plausible on its face.'" *Littell v. Hous. Indep. Sch. Dist.*, 894 F.3d 616, 622 (5th Cir. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Although the allegations must "raise a right to relief above the speculative level," a complaint "may proceed even if 'recovery is very remote and unlikely.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555-56 (2007)). A plaintiff need only give "fair notice" to the defendants of the claims against them. *Jacked Up, LLC v. Sara Lee Corp.*, 854 F.3d 797, 810 (5th Cir. 2017) (quotation marks and citation omitted).

Under these standards, the plaintiffs' first amended complaint pleaded more than enough facts to state plausible RICO and FLSA claims. This Court need go no further to reverse and remand for proceedings on the merits. In addition, the proposed second amended complaint stated RICO and FLSA claims with even greater specificity, and the district court abused its limited discretion in rejecting it.

I. The amended complaint adequately pleaded a RICO claim.

Section 1962 of RICO criminalizes a host of activities that constitute "racketeering." 18 U.S.C. § 1962. RICO also provides a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c). A plaintiff can thus state a claim by alleging that the defendant's RICO

violation proximately caused an injury to his business or property. *Id.*; *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). Here, the Ramirezes violated RICO under Section 1962(c) by obtaining H-2B visas through repeated fraud. That fraud proximately caused injuries to plaintiffs' business or property by depriving them of the prevailing wage to which they were legally entitled.

A. The Ramirezes violated Section 1962(c) by conducting Black Magic's affairs through a pattern of racketeering activity.

Under Section 1962(c), "a person who is employed by or associated with an enterprise cannot conduct the enterprise's affairs through a pattern of racketeering activity." *Zastrow v. Hous. Auto Imports Greenway Ltd.*, 789 F.3d 553, 559 (5th Cir. 2015) (quoting *In re Burzynski*, 989 F.2d 733, 741 (5th Cir. 1993)). The Ramirezes conducted Black Magic's affairs—which they did not dispute and the district court did not address. And they exercised that control to perpetrate a pattern of fraud.

1. The Ramirezes ran Black Magic.

The Ramirezes did not dispute, and the district court did not address, the threshold requirement that a RICO person be "distinct" from the RICO enterprise. *See Abraham v. Singh*, 480 F.3d 351, 357 (5th Cir. 2007) (individual employee of corporation was a distinct RICO person because corporation is a separate legal entity). The Ramirezes are distinct RICO persons because Black Magic, a Texas limited-liability company, is a separate legal entity. ROA.73 (¶¶ 8-10); *see Spates v. Off. of Att'y Gen.*, 485 S.W.3d 546, 550-51 (Tex. Ct. App. 2016) ("A limited liability company is considered a separate legal entity from its members.").

A RICO defendant must "conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs." 18 U.S.C. § 1962(c). A defendant conducts an enterprise's affairs when he "lead[s], run[s], manage[s], or direct[s]" it. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). Plaintiffs alleged—and the defendants have never contested—that the Ramirezes met this definition: They owned and managed Black Magic and controlled every aspect of plaintiffs' work—hiring and firing them, controlling their worksite and housing, providing their trucks and equipment, assigning their duties, and signing their paychecks. ROA.83, ROA.84 (¶¶ 62, 64-66, 68-69, 72). And they authorized, reviewed, and presented the fraudulent H-2B applications at issue here (with Jessie Ramirez certifying the 2016 application under penalty of perjury). ROA.75-76, ROA.77, ROA.78-79, ROA.80 (¶¶ 23, 28, 32, 35, 38). In sum, plaintiffs have plausibly alleged that the Ramirezes conducted the affairs of their enterprise, Black Magic.[2]

2. The Ramirezes engaged in a pattern of H-2B fraud.

To plead a pattern of racketeering, a plaintiff must plausibly allege two or more predicate acts—including mail fraud (18 U.S.C. § 1341), wire fraud (*id.* § 1343), or visa fraud (*id.* § 1546), *id.* § 1961(1)(B)—that are "related" and "amount to or pose a threat of continued criminal activity." *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 524 (5th Cir. 2016) (quoting *St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009)). Of all

[2] Plaintiffs pleaded that Black Magic was an "enterprise" and the Ramirezes were "person[s]" under RICO. ROA.89 (¶¶ 104-05). Defendants did not dispute these elements, and the district court did not address them. *See* ROA.111-116, ROA.123 n.2, ROA.163-167.

the elements of a RICO claim, the defendants disputed, and the district court addressed, only whether plaintiffs adequately pleaded these predicate acts.

A. The plaintiffs pleaded that the Ramirezes committed at least two predicate acts of mail or wire fraud and two predicate acts of visa fraud. Federal Rule of Civil Procedure 9(b), which applies to RICO fraud claims, "requires particularity in pleading the circumstances constituting fraud." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992). Rule 9(b) requires pleading "the who, what, when, where, and how" of the alleged fraud. *ABC Arbitrage Pls. Grp. v. Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002). "Allegations about conditions of the mind, such as defendant's knowledge of the truth and intent to deceive, however, may be pleaded generally." *Tel-Phonic Servs., Inc.*, 975 F.2d at 1139. Here, plaintiffs' claims of racketeering activity are pleaded with sufficient particularity to put the defendants on notice of the fraud claims.

i. *Mail and wire fraud***.** Mail and wire fraud require (1) a scheme to defraud, (2) involving use of the mail or wire communications, (3) for the purpose of executing the scheme. *United States v. Ingles*, 445 F.3d 830, 835, 838 (5th Cir. 2006); *see* 18 U.S.C. §§ 1341, 1343. The scheme must also involve a material misrepresentation that "has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed." *United States v. Valencia,* 600 F.3d 389, 426 (5th Cir. 2010) (citation omitted). Plaintiffs' amended complaint satisfied this standard.

First, defendants "devised a scheme intending to defraud." ROA.77 (¶ 27). And plaintiffs alleged that the defendants had the requisite "'specific intent to defraud, i.e., a conscious knowing intent to defraud.'" *United States v. Howell*, 328 F. App'x 908, 911 (5th Cir. 2009) (quoting *United States v. Brown*, 459 F.3d 509, 519 (5th Cir. 2006) (mail

fraud)); *see United States v. Reyes*, 239 F.3d 722, 736 (5th Cir. 2001) (same intent standard for wire fraud). Specifically, plaintiffs alleged that defendants submitted to DOL H-2B forms seeking "construction laborers" while "intending to employ the foreign workers as truck drivers" and knowing that "Black Magic would not pay the prevailing wage for the truck driving work performed." ROA.77 (¶¶ 27, 29). Defendants' fraudulent misrepresentations were material because the H-2B visa program requires insufficient U.S. workers to perform the job. 8 C.F.R. § 214.2(h)(6)(iv)(A). Defendants falsified the job description to ensure local workers would not apply by using "key words like physical labor," which they knew would lead local applicants to "make a very quick decision to look no further." ROA.73-74, ROA.75 (¶¶ 13, 21). Defendants thus "intentionally utilized a false job category description" to ensure DOL would approve their application for H-2B visa workers whom defendants could pay lower, construction-worker rates. ROA.75 (¶ 21).

Second, to show use of mail or wire communication, *any* previous or subsequent mail or wire communication related to the scheme is sufficient. *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 675 (5th Cir. 2015) (citing *United States v. Stalnaker*, 571 F.3d 428, 436 (5th Cir. 2009)). As here, mail and wire fraud are implicated when "the mails and wires were surely used to transmit the H-2B documents to the government." *David v. Signal Int'l, LLC*, No. 08-1220, 2012 WL 10759668, at *27 (E.D. La. Jan. 4, 2012). Plaintiffs sufficiently pleaded involvement of the mails or wires by alleging that defendants "used (or caused the use of) the mail and/or wires to transmit [the] Form ETA-9142B (DOL Case Number: H-400-15055-094661), dated February 22, 2015—and other temporary labor certification application materials—between themselves, their agent, and the

DOL in furtherance of this scheme to defraud" from April 1, 2015 through January 15, 2016. ROA.77 (¶¶ 26, 28). Defendants again used mail or wire communications to transmit the same forms for "DOL Case Number[s]: H-400-16018-014304 and/or H-400-16017-320049[], dated January 15, 2016 … between themselves, their agent, and the DOL in furtherance of this scheme to defraud" from April 2, 2016 through January 15, 2017. ROA.79, ROA.80 (¶¶ 36, 38).

Third, use of the mail or wires to execute the scheme requires only that the mailing be "incident to an essential part of the scheme," *Ingles*, 445 F.3d at 835, so that the scheme "depend[s] in some way on the information or documents that passed through the mail," *United States v. Tencer*, 107 F.3d 1120, 1125 (5th Cir. 1997). Use of mail or wire was essential here because the scheme depended on the labor-certification materials being transmitted to DOL for approval so foreign workers could be hired at lower wage rates. *See* ROA.78, ROA.80 (¶¶ 31, 41-42).

ii. *Visa fraud.* Visa fraud has five elements: "(1) the defendant made a false statement, (2) the statement was made knowingly and (3) under oath, (4) the statement concerns a material fact, (5) and the statement was made in an application required by the United States immigration laws and regulations." *United States v. Ongaga*, 820 F.3d 152, 164 (5th Cir. 2016); *see* 15 U.S.C. § 1546(a). Plaintiffs' allegations, which the district court ignored, satisfy each element.

Plaintiffs adequately pleaded the first three elements by alleging that defendants knowingly made a false statement under oath. Unlike mail or wire fraud, visa fraud requires only that one act "knowingly," rather than with "intent to defraud." *United States v. Yong Ping Liu*, 288 F. App'x 193, 199 (5th Cir. 2008). Plaintiffs alleged that Jesse

and Carmen Ramirez "knowingly presented" to DOL ETA-9142B forms, dated February 22, 2015, and January 15, 2016, for case numbers H-400-15055-094661, H-400-16018-014304 and H-400-16017-320049. ROA.75-76, ROA.78-79 (¶¶ 23-24, 32-33). Defendants "kn[ew] that: (1) [the forms] had been certified under penalty of perjury" to be truthful by defendant Jesse Ramirez (in 2016) or by defendants' agent, William Riehl (in 2015), "and (2) [they] contained false statements." ROA.76-77, ROA.79 (¶¶ 24-25, 33-34). As described above (at 20-21), defendants "intentionally and falsely certified to the federal government and to prospective job applicants" that the jobs would involve "physical labor at construction sites." ROA.75 (¶ 22). Defendants transmitted the visa applications "knowing that Black Magic would not pay the prevailing wage for the truck driving work," ROA.77 (¶ 29), despite certifying that they would not employ an H-2B worker "in a job classification not listed on the approved application," ROA.75-76 (¶ 23). Defendants instead employed the H-2B workers as heavy-truck drivers but paid them much lower prevailing wages for construction workers. ROA.80-81 (¶¶ 42-44).

Plaintiffs adequately pleaded the fourth element of falsity of a material fact by alleging that defendants' fabricated job description led to approval of the fraudulent visa forms. *See supra* at 9-10 (chart detailing defendants' falsehoods). A falsehood in the visa-fraud context is material if it "has a natural tendency to influence the decisions of the decision maker." *United States v. Wu*, 419 F.3d 142, 144 (2d Cir. 2005). Defendants stated that local applicants who see descriptions like "physical labor, using hand tools to shovel and rake" will not look further at the job. ROA.75 (¶ 21). Accordingly, defendants falsely advertised the trucking jobs as "'construction laborers' positions," so

no U.S. workers would apply. ROA.75 (¶ 20). DOL thus "certified [d]efendant Black Magic's temporary labor certifications" in "reliance on the materially false representations" of defendants regarding the type of positions H-2B workers would fill. ROA.78 (¶ 31).

Finally, defendants' false statements were made in an application required by U.S. immigration laws and regulations. Plaintiffs alleged that, to receive H-2B visas, defendants needed a DOL "temporary labor certification," which required defendants to "make efforts to recruit local workers at the prevailing wage" that fail to produce U.S. workers. ROA.74 (¶¶ 14-15); *see* 20 C.F.R. § 655.10(a), 655.51. Defendants' false statements on DOL foreign-labor certification Form ETA-9142B regarding the type of work to be completed were thus made in an application required by immigration laws and regulations to employ H-2B visa workers.

B. The RICO predicates (two acts of mail/wire fraud and two acts of visa fraud) were related to each other (which defendants did not dispute below). Predicate acts are related when they were "'committed in furtherance' of the enterprise" or "had the same purpose." *See United States v. Gilmore*, 590 F. App'x 390, 404 (5th Cir. 2014) (quoting *United States v. Delgado*, 401 F.3d 290, 298 (5th Cir. 2005)). The Ramirezes' fraud furthered Black Magic's business because importing H-2B workers "at the lowest wage rates possible" provided "an unfair competitive advantage" over companies that "obeyed the law and paid prevailing wages." ROA.71 (¶ 1). The Ramirezes' fraudulent acts also had the same purpose: securing a DOL temporary labor certification. ROA.77, ROA.79-80 (¶¶ 27, 37).

C. The predicate acts "amount[ed] to or posed a threat of continued criminal activity." *See Snow Ingredients*, 833 F.3d at 524 (quoting *St. Germain*, 556 F.3d at 263). One type of continuity is an "open-ended period of conduct that 'by its nature projects into the future with a threat of repetition.'" *Malvino v. Delluniversita*, 840 F.3d 223, 231 (5th Cir. 2016) (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989)). This Court has already held that fraud in connection with the H-2B program constitutes open-ended continuity. *Abraham*, 480 F.3d at 356. Because the "systematic victimization" of H-2B workers continued for at least two years and was not premised on a "single illegal transaction"—recall that the H-2B program requires a new temporary labor certification annually, 8 C.F.R. § 214.2(h)(6)(iv)(B)—there was "no reason to suppose" that the defendants' visa fraud and other racketeering activity "would not have continued indefinitely had the Plaintiffs not filed this lawsuit." *Abraham*, 480 F.3d at 356.

With the pleading of the Ramirezes' substantive violation of Section 1962(c) established—the Ramirezes' conduct of an enterprise through a pattern of racketeering activity—we now turn to the remaining Section 1964(c) elements.

B. Plaintiffs were directly injured by the Ramirezes' repeated fraud.

A civil-RICO plaintiff must plausibly allege that a Section 1962 violation proximately caused an injury to his business or property. 18 U.S.C. § 1964(c); *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). Here, the Ramirezes' fraud proximately caused plaintiffs to earn less-than-prevailing wages.

1. Plaintiffs were legally entitled to the prevailing wage for heavy trucking.

The "loss of a legal entitlement is sufficient" to plead a RICO injury to business or property, *Gil Ramirez Grp., LLC v. Hous. Indep. Sch. Dist.*, 786 F.3d 400, 410 (5th Cir. 2015), including an employee's legal entitlement to unpaid wages, *Evans v. City of Chicago*, 434 F.3d 916, 928 (7th Cir. 2006), *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965, 967 n.1 (7th Cir. 2013); *see also, e.g.*, *Kriss v. Bayrock Grp., LLC*, 2016 WL 7046816, at *19 (S.D.N.Y. Dec. 2, 2016) (collecting cases).

The amended complaint plausibly alleges a RICO injury because instead of being paid approximately $20 per hour (the prevailing wage for heavy trucking in Martin County, Texas), plaintiffs were paid $12 per hour or less. ROA.80-81 (¶¶ 43-44). Plaintiffs were legally entitled to these lost wages because the Ramirez defendants were required to "offer and pay" the "prevailing wage" to H-2B workers, which is the average wage of "workers similarly employed." 20 C.F.R. § 655.10(a), (b)(2). H-2B regulations prohibited the Ramirez defendants from evading that requirement by charging plaintiffs for their uniforms, visa-related fees, and the unreasonable cost of housing (which they did). *See id.* § 655.20(c), (j), (k), (o); ROA.84-85 (¶¶ 74-75). And although plaintiffs were separately entitled to their return transportation and subsistence costs, 20 C.F.R. § 655.20(j)(1), defendants failed to pay that too, ROA.85 (¶ 75).

Defendants themselves did not dispute that the amended complaint adequately pleaded a RICO injury. The district court concluded, however, that plaintiffs failed to plausibly allege an injury to their "business or property" because the amended

complaint did not specify "whether [p]laintiffs' purported compensation of '$12 per hour or less' includes or excludes the allegedly 'unreasonable' deductions." ROA.166.

But specifying the effect of the deductions was *defendants'* burden—not plaintiffs'. H-2B regulations incorporate FLSA principles to determine "whether deductions are reasonable and payments are received free and clear." 20 C.F.R. § 655.20(b). And under the FLSA, a plaintiff need only allege that "the wages [he] received were less than the statutory minimum"; if he does, "the burden shifts to the employer to prove with proper records" that the deductions were lawful. *Ramos-Barrientos v. Bland*, 661 F.3d 587, 595 (11th Cir. 2011) (quotation marks and citation omitted); *see Brennan v. Veterans Cleaning Serv., Inc.*, 482 F.2d 1362, 1370 (5th Cir. 1973) ("[T]he employer [has] the burden of segregating permissible deductions from impermissible ones."). The district court thus erred by requiring plaintiffs to segregate defendants' impermissible deductions.

In any event, the plaintiffs showed that, with or without deductions, they were legally entitled to more than they received. If plaintiffs' allegation of pay of $12 per hour or less excluded deductions, then plaintiffs were straightforwardly deprived of the prevailing wage they were owed. 20 C.F.R. § 655.20(a)(1). But even if the compensation included deductions, the prevailing-wage requirement was still "not met" because the deductions were unlawful. *Id.* § 655.20(c). Defendants' deductions for uniforms and visa fees were prohibited outright. *Id.* § 655.20(k), (o). And the deductions for plaintiffs' housing—which lacked plumbing, water, and electricity for long periods—were impermissible because the housing conditions violated Texas law. *Id.* § 655.20(c); *see* 29 C.F.R. § 531.31 (prohibiting deductions for items that violate local law); ROA.81 (¶ 46).

Despite this detailed showing, the district court found that it was unable to determine plaintiffs' injuries "with any degree of certainty." ROA.166. But pleading rules require *plausibility*—not the certainty demanded by the district court. For that reason, the Tenth Circuit rejected a similar effort to impose a "heightened pleading requirement" for a RICO injury. *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 885 (10th Cir. 2017). By specifying their approximate wage losses from the Ramirez defendants' RICO violation, plaintiffs pleaded enough facts "to state a claim for relief that is plausible on its face." *Littell v. Hous. Indep. Sch. Dist.*, 894 F.3d 616, 622 (5th Cir. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

2. Plaintiffs' lost wages were directly related to the Ramirezes' H-2B fraud.

Proximate cause under RICO requires "some direct relation between the injury asserted and the injurious conduct alleged." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008) (quoting *Holmes*, 503 U.S. at 268). Because it is "virtually impossible to announce a black-letter rule that will dictate the result in every case," the term "direct" serves "as a reference" for the range of concerns underlying the proximate-cause inquiry. *Holmes*, 503 U.S. at 272 n.20 (quotation marks and citation omitted). These include whether a plaintiff's harms were foreseeable, *see, e.g.*, *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015); whether those harms flow from a third party's reliance on the defendant's wrongful conduct, *see, e.g.*, *Bridge*, 553 U.S. at 656-58; and whether another victim in the causal chain is better-positioned to sue, *see, e.g.*, *id.* at 658.

"Regardless of how proximate cause is sliced," plaintiffs have plausibly alleged it. *Allstate*, 802 F.3d at 676. Though plaintiffs' injuries (lower wages) were directly related

to the defendants' fraud (lying to the Government to pay plaintiffs lower wages), ROA.71, ROA.75, ROA.77, ROA.79-80 (¶¶ 1, 18-19, 27, 37), the district court summarily stated that the amended complaint "fails to adequately allege … proximate cause" without addressing the relationship between the Ramirez defendants' fraudulent H-2B applications and plaintiffs' lost wages. *See* ROA.165-67. That was error.

a. A plaintiff can show a direct relationship by plausibly alleging foreseeable harms. *See, e.g.*, *Bridge*, 553 U.S. at 658; *Torres v. SGE Mgmt., LLC*, 838 F.3d 629, 638 (5th Cir. 2016) (en banc); *see also, e.g.*, *Allstate*, 802 F.3d at 676 (proximate cause satisfied when there was "no plausible argument that the [plaintiffs] were unforeseeable victims").

Plaintiffs' lost wages were a foreseeable consequence of the Ramirezes' lies to the Government about the nature of the H-2B work. Lower wages were mathematically ensured. *See* 20 C.F.R. § 655.10(b)(2) (prevailing wage determined by "the arithmetic mean of the wages of workers similarly employed"). There is thus "no plausible argument" that plaintiffs were "unforeseeable victims" of defendants' fraudulent characterization of their work as lower-paid manual labor rather than higher-paid heavy-truck driving. *Allstate*, 802 F.3d at 676. The "entire structure of the system," *id.*—from the need to obtain the Government's permission to employ plaintiffs under the H-2B program, to the program's requirement that workers be paid the prevailing wage for the work performed, to the Ramirezes' efforts to hire workers with commercial driver's licenses while claiming to be seeking manual laborers—shows that paying plaintiffs less "was the object of the collaboration." *Id.*; *see* ROA.71-72, ROA.75, ROA.77, ROA.78, ROA.80, ROA.81, ROA.89-90 (¶¶ 1-2, 22, 27, 31, 41, 49, 110).

B. Plaintiffs' lost wages were not only foreseeable, but the immediate consequence of third-party (the Government's) reliance on defendants' fraud. In other words, "[t]he lies directly furthered the scheme that directly injured the plaintiffs." *Shannon v. Ham*, 639 F. App'x 1001, 1004 (5th Cir. 2016) (citing *Bridge*, 553 U.S. at 658). That causal chain suffices under *Bridge*, which held that a civil-RICO plaintiff need not allege first-party reliance. 553 U.S. at 644, 648-49, 658-59.

The amended complaint alleges that the Government approved the H-2B applications in reliance on defendants' fraudulent characterization of plaintiffs' work. ROA.78, ROA.80 (¶¶ 31, 41). Through that reliance, defendants' lies directly furthered the scheme (to fraudulently obtain H-2B visas) that directly injured plaintiffs (in the form of a lower prevailing wage). *See Shannon*, 639 F. App'x at 1004 (citing *Bridge*, 553 U.S. at 658). In *Bridge*, "no independent factors" accounted for the plaintiffs' loss of tax liens because the county relied on "false attestations of compliance" with auction rules when approving the defendants' participation. 553 U.S. at 644, 648-49, 658-59. So too here: No independent factors explain plaintiffs' lost wages because the Government relied on the Ramirezes' false descriptions of the H-2B work when approving a lower required prevailing wage.

C. "[N]o more immediate victim is better situated to sue." *Bridge*, 553 U.S. at 658. Recovery by the Government for the "taint of fraud" on the H-2B process would be "speculative and remote" compared to plaintiffs' "direct financial injury." *See Bridge*, 553 U.S. at 658.

Unlike in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010), the Government is not better-positioned to sue

for lost tax revenue. In *Anza*, determining the state's lost tax revenue was "considerably easier" than determining what portion of the decline in the plaintiff-competitor's sales was attributable to the defendant's tax fraud. 547 U.S. at 460. Here, however, it is easier to determine plaintiffs' lost wages than to calculate the Government's loss of tax revenue, which would involve a number of variables including, for example, what tax rate and deductions would have applied to U.S.-based heavy-truck drivers. And in *Hemi Group*, New York State had greater incentive to sue because it taxed cigarettes at nearly double the rate of New York City and millions were at stake for the state. 559 U.S. at 4, 12. Here, by contrast, plaintiffs lost more money (the difference in prevailing wage rates for heavy-truck drivers and manual laborers) than the Government (the difference in tax revenue based on those wage rates). The Government is thus in a far worse position to sue than plaintiffs, who "can be counted on to vindicate the law as private attorneys general." *Bridge*, 553 U.S. at 655 (quoting *Holmes*, 503 U.S. at 269-70).

II. The first amended complaint adequately pleaded FLSA minimum-wage and overtime violations.

The district court also erred in concluding that plaintiffs failed to adequately plead FLSA minimum-wage and overtime claims. The district court held that plaintiffs had not established either that (1) they were covered by the FLSA or (2) defendants had violated the FLSA's minimum-wage and overtime requirements, entitling plaintiffs to compensation and damages. Under controlling law, plaintiffs' first amended complaint plausibly alleged their FLSA claims.[3]

[3] The district court did not address whether—and defendants have not disputed that—plaintiffs satisfy the third element of FLSA minimum-wage and overtime claims:

A. Plaintiffs were covered employees under "enterprise coverage."

To be covered under the FLSA, employees must show that they are or were either (1) personally "engaged in commerce or in the production of goods for commerce" ("individual coverage") or (2) "employed in an enterprise engaged in commerce or in the production of goods for commerce" ("enterprise coverage"). 29 U.S.C. § 207(a). On appeal, plaintiffs argue that they are protected by enterprise coverage.

Under enterprise coverage, the employer must have (1) two or more employees "engaged in commerce or in the production of goods for commerce" (the "engaged in commerce" clause) *or* "handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce" (the "handling" clause), and (2) a "gross annual volume of sales" of at least $500,000. 29 U.S.C. § 203(s)(1)(A)(i), (ii). If an employer meets both, all its employees—even those not personally involved in interstate commerce—are covered. *See Landeros v. Fu King, Inc.*, 12 F. Supp. 3d 1020, 1023 n.2 (S.D. Tex. 2014).

The district court did not question whether plaintiffs sufficiently pleaded the sales-volume threshold required under the second prong of the enterprise-coverage test. *See* ROA.169. Under that prong, plaintiffs focus on the "handling" clause: whether defendants had two or more employees "handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce." 29 U.S.C. § 203(s)(1)(A)(i).

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the existence of an employer-employee relationship during the relevant period. *See Johnson v. Heckmann Water Res. (CVR), Inc.*, 758 F.3d 627, 630 (5th Cir. 2014).

1. Courts almost uniformly agree that the handling clause sweeps broadly. *See, e.g.*, *Sec'y of Labor v. Timberline S., LLC*, 925 F.3d 838, 845-46 (6th Cir. 2019) (citing and discussing cases). It covers "virtually every enterprise in the nation doing the requisite dollar volume of business," *Archie v. Grand Cent. P'ship*, 997 F. Supp. 504, 530 (S.D.N.Y. 1998) (Sotomayor, J.) (citing *Dunlop v. Indus. Am. Corp.*, 516 F.2d 498, 501-02 (5th Cir. 1975)), reaching activities ranging from municipal trash-collecting (where employees used trucks, gas, and other equipment produced for commerce), *Marshall v. Brunner*, 668 F.2d 748, 750-52 (3d Cir. 1982); to local land-development work (where employees operated construction machinery manufactured out of state), *Donovan v. Pointon*, 717 F.2d 1320, 1322 (10th Cir. 1983); to citywide sanitation services (where crews used "bags, brooms, shovels, [and] pails" that traveled in interstate commerce), *Archie*, 997 F. Supp. at 530—among countless examples.

The Department of Labor's view of enterprise coverage is consistent with the clause's expansive language. In a "persuasive" opinion letter, *Polycarpe v. E&S Landscaping Service, Inc.*, 616 F.3d 1217, 1225 (11th Cir. 2010), DOL observed that "literally … any products, supplies, or equipment used by employees that were produced or shipped from outside the State" would result in enterprise coverage. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, 1997 WL 958726, at *1 (Jan. 22, 1997). For example, for a fast-food retailer, "coffee served, cleaning supplies utilized, cooking equipment (ranges, fryers, grills) operated, etc., that have been produced, or shipped by any person from, outside the State would trigger this [handling] provision." *Id.* (emphasis omitted).

2. Given the handling clause's breadth and the rule disfavoring 12(b)(6) dismissals, *see Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013), courts "have not required plaintiffs to allege this [enterprise-coverage] element of an FLSA claim in detail." *Bey v. WalkerHealthCareIT, LLC*, No.16-cv-1167, 2018 WL 2018104, at *4 (S.D. Ohio May 1, 2018) (citation omitted). Plaintiffs "satisfy the minimal requirements for pleading enterprise coverage," *Sotelo v. Interior Glass Design, LLC*, No. 16-cv-24224, 2017 WL 7796725, at *3 (S.D. Fla. Mar. 21, 2017), when their complaint raises "at least a reasonable inference" that defendants are engaged in interstate commerce, *Kidwell v. Digital Intel. Sys., LLC*, No. 13-cv-4064, 2014 WL 4722706, at *6 (N.D. Tex. Sept. 22, 2014). Especially because only defendants, not plaintiffs, enjoy pre-discovery access to "information … concerning business specifics of the defendants' enterprise," courts must use "'judicial experience and common sense' … to carefully search the pleadings for factual allegations making the plaintiffs' claims plausible." *Flores v. Act Event Servs., Inc.*, 55 F. Supp. 3d 928, 938 n.4 (N.D. Tex. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

3. Plaintiffs' specific, concrete allegations amply plead handling-clause enterprise coverage. Plaintiffs maintain that they and other employees drove trucks, which had previously been moved in or produced for commerce (fueled with gasoline also moved in or produced for commerce), to and from oil-rig sites across west Texas. ROA.81-82 (¶¶ 50, 55). These kinds of detailed allegations have been found by courts in this Circuit to satisfy the "minimal" enterprise-coverage standard. *See, e.g.*, *Ecoquij-Tzep v. Le Arlington, Inc.*, No. 16-cv-625, 2017 WL 6527317, at *4-7 (N.D. Tex. Dec. 21, 2017).

It is hard to imagine what else plaintiffs could have pleaded, without extensive (and unreasonable) pre-discovery investigation, which would have satisfied the district court on this score. If the court's concern was that some of plaintiffs' allegations—that the trucks and fuel they handled were "moved in or produced for commerce," ROA.81-82 (¶¶ 50, 55)—simply mirrored the statutory language, *see* ROA.169; 29 U.S.C. § 203(s)(1)(A), that concern would be misplaced. There's nothing wrong with pleading the statutory requirement if the allegation is plausible. And, with all respect, requiring plaintiffs to plead that same standard with elegant variation would make no sense. Having plaintiffs toggle between the statute-based allegation that the relevant items were "moved in or produced for commerce" and, for example, that those items were "transported across state lines," "manufactured for multistate consumption," or anything more specific (or speculative) would only confuse, not clarify, plaintiffs' allegations by obscuring which element of a claim an allegation was addressing. *See Burlington Indus., Inc. v. Dayco Corp.*, 849 F.2d 1418, 1421-22 (Fed. Cir. 1988).

Courts across this Circuit agree. Though "it is not unreasonable" to "ask[] what goods or materials did the employees handle," *Centeno v. Facilities Consulting Grp., Inc.*, No. 14-cv-3696, 2015 WL 247735, at *11 (N.D. Tex. Jan. 20, 2015), plaintiffs "need not plead specific details as to exactly *how* those [goods or] materials moved through commerce," "exactly *which* of [defendants'] products and equipment were manufactured outside" the state, "or *where* they were manufactured," *Gaviria v. Maldonado Bros.*, No. 13-cv-60321, 2013 WL 3336653, at *3 (S.D. Fla. July 2, 2013) (emphases added). Instead, "[p]laintiffs' allegations that these [goods or] materials had previously moved in or been produced for commerce suffices at this stage … [to] plausibly bring

Defendants within FLSA coverage." *Landeros*, 12 F. Supp. 3d at 1025; *see Blundell v. Lassiter*, No. 17-cv-1990, 2018 WL 6738046, at *8-9 (N.D. Tex. May 21, 2018) (vehicles, fuel, computers, and phones that "were moved in and/or produced for commerce" satisfied enterprise coverage); *Ecoquij-Tzep*, 2017 WL 6527317, at *4-7 (food, drinks, spices, and cooking utensils that "discovery will show travelled [sic] through interstate commerce" satisfied enterprise coverage).

Plaintiffs' allegations are thus sufficient for this Court, "drawing upon its 'judicial experience and common sense,' to reasonably infer" handling-clause coverage. *Landeros*, 12 F. Supp. 3d at 1023 (quoting *Iqbal*, 556 U.S. at 678).

B. Defendants failed to pay FLSA minimum wages and overtime.

To establish a FLSA violation, an employee must plead that the employer failed to pay the minimum wage or overtime. 29 U.S.C. §§ 206(a)(1), 207(a)(1). "The remedial nature of [the FLSA] and the great public policy which it embodies … militate against" making pleading "an impossible hurdle for the employee." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1047 (2016) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)). Moreover, the employer, not the employee, has the duty "to keep proper records of wages, hours and other conditions and practices of employment" and is thus in the best position to produce relevant facts about the employee's work. *Anderson*, 328 U.S. at 687; *see* 29 U.S.C. § 211(c). Plaintiffs—who do not yet have access to employment records and who never had the burden to maintain them—plausibly alleged FLSA minimum-wage and overtime violations.

1. Minimum wage

Plaintiffs sufficiently alleged a minimum-wage violation by identifying time periods when they were paid less than the minimum wage of $7.25 per hour, 29 U.S.C. § 206(a)(1)(C), and at times not paid at all. *See Murillo v. Coryell Cty. Tradesmen, LLC*, No. CV 15-3641, 2017 WL 1133113, at *10 (E.D. La. Mar. 27, 2017) (minimum-wage claim sufficient when it alleged that, between 2014 and 2015, defendants "routinely did not pay" plaintiffs, and "arbitrarily underpaid [p]laintiffs for certain periods"). Plaintiffs alleged that they were "not paid fully or paid at all" for "several pay periods during late August and September of 2015" when they worked from 50 to over 80 hours per week, including 272.5 hours for which the plaintiffs were paid nothing. ROA.86 (¶ 87). These allegations alone were sufficient to put defendants on notice of the minimum-wage claims.

But there's more. Once the employee shows he has received less than the statutory minimum wage, "the burden shifts to the employer to prove with proper records the reasonable cost" of deductions from the employee's pay. *Caro-Galvan v. Curtis Richardson, Inc.*, 993 F.2d 1500, 1514 (11th Cir. 1993); *Pedigo v. Austin Rumba, Inc.*, 722 F. Supp. 2d 714, 724 (W.D. Tex. 2010). Though plaintiffs did not have the burden to show that the deductions were unreasonable, they showed it anyway. They alleged that amounts deducted for uniforms, housing, and utilities, and unreimbursed visa fees and travel expenses, caused their "wages to fall below" the FLSA's minimum wage. ROA.85 (¶ 79). A "wage" under the FLSA may include "the reasonable cost … to the employer of furnishing [the] employee with board, lodging, or other facilities." 29 U.S.C. § 203(m)(1). The costs of furnishing "facilities" for the employer's benefit are not

"reasonable" and thus may not be included in computing wages. 29 C.F.R. § 531.3(d). Facilities that primarily benefit the employer include the cost and laundering of uniforms employees are required to wear, 29 C.F.R. § 531.3(d)(2), as well as H-2B transportation and visa fees.[4] "Facilities furnished in violation of any Federal, State, or local law" may not be included in computing wages. *Id.* § 531.31; 29 U.S.C. § 203(m)(1); *see, e.g.*, *Osias v. Marc*, 700 F. Supp. 842, 844-45 (D. Md. 1988) (denying inclusion of housing because it did not comply with local housing codes); *Soler v. G & U, Inc.*, 768 F. Supp. 452, 466-67 (S.D.N.Y. 1991) (same).

Plaintiffs alleged that defendants deducted "an unreasonable amount of money" for housing including a trailer that was "derelict—overcrowded and lacking functional plumbing, water services, or electricity for long periods of time—in violation of Tex. Prop. Code § 92.056." ROA.81 (¶ 46). Defendants made further unreasonable deductions for uniforms and "visa processing fees, electricity, and laundry," ROA.84-85 (¶ 74), and failed to "pay for transportation, food, and lodging" for plaintiffs to get from Mexico to "Lenorah, Texas and back home at the end of the work contract," ROA.85 (¶ 75). Plaintiffs alleged these costs were "primarily for [defendants'] benefit" and therefore not "reasonable" under the FLSA. ROA.85 (¶¶ 76-78).

In sum, plaintiffs adequately alleged minimum-wage violations, and then some.

[4] *See* U.S. Dep't of Labor, Field Assistance Bulletin No. 2009-2: Travel and Visa Expenses of H-2B Workers Under the FLSA 1 (Aug. 21, 2009), https://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.pdf.

2. Overtime

An employer violates the FLSA by failing to pay overtime compensation of one-and-one-half times the employee's regular pay for hours worked beyond forty per week. 29 U.S.C. § 207(a)(1). District courts in this Circuit have "nearly uniformly found" a pleading sufficient when it puts defendants on notice of the relevant date range and the approximate number of hours for which a plaintiff was not paid overtime. *Jones v. Warren Unilube, Inc.*, No. 5:16-CV-264-DAE, 2016 WL 4586044, at *2 (W.D. Tex. Sept. 1, 2016) (quoting *Ecoquij-Tzep v. Hawaiian Grill*, No. 3-16-cv-625, 2016 WL 3745685, at *3 (N. D. Tex. July 12, 2016)); *see Murillo v. Coryell Cty. Tradesmen*, LLC, No. CV 15-3641, 2017 WL 1133113, at *11 (E.D. La. Mar. 27, 2017); *Hoffman v. Cemex, Inc.*, Civ. A. No. 09–3144, 2009 WL 4825224, at *3 (S.D. Tex. Dec. 8, 2009). Other circuits require only that plaintiffs "allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." *E.g.*, *Lundy v. CatholicHealth Sys. of Long Island, Inc.*, 711 F.3d 106, 114 (2d Cir. 2013); *Davis v. Abington Mem. Hosp.*, 765 F.3d 236, 241-43 (3d Cir. 2014). The approach taken by other circuits, *see Hall v. DIRECTV, LLC*, 846 F.3d 757, 776-77 (4th Cir. 2017), strikes an appropriate balance by recognizing employers, not employees, have a duty to keep employment records, *Anderson*, 328 U.S. at 687, while ensuring that pleadings give employers fair notice of the claims, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Plaintiffs' allegations put defendants on notice of the relevant date range and the approximate number of overtime hours worked. Plaintiffs worked over 40 hours "[i]n all weeks" they were employed by defendants, "regularly worked between 55 and 80 hours per week," without being paid overtime wages, ROA.85-86 (¶¶ 80-82), and were

paid regular hourly wages of less than $12 and overtime wages of less than $18 per hour, ROA.86 (¶¶ 81-82). And they alleged the specific dates that defendants employed them: Molina-Aranda worked from July 6, 2015 until September 13, 2015; Martinez-Vela worked from August 3, 2015 until September 26, 2015; and Lopez-Quesada worked from July 6, 2015 until September 26, 2015. ROA.82 (¶¶ 51-53).

To the extent that plaintiffs are "unable to prove the precise extent of the uncompensated work" at this early stage, it is because it is defendants' duty as employers to keep proper employment records, and the precise extent of unpaid wages can be revealed during discovery. *See Anderson*, 328 U.S. at 687.

III. The district court abused its discretion in denying plaintiffs leave to file their second amended complaint.

As just explained, plaintiffs adequately pleaded RICO and FLSA violations in their first amended complaint. But in an effort to meet the court's too-rigorous pleading standard, plaintiffs went further in their second amended complaint, simplifying their RICO claims and adding factual detail to their FLSA allegations. Because plaintiffs' second amended complaint addresses the purported "deficiencies" identified in the district court's dismissal order, ROA.261, the court abused its discretion in refusing plaintiffs' motion to amend.

Although "[l]eave to amend is not automatic," a district court's discretion to reject motions to amend is cabined by Rule 15(a)'s "liberal pleading presumption." *N. Cypress Med. Ctr. Operating Co. v. Aetna Life Ins. Co.*, 898 F.3d 461, 477 (5th Cir. 2018). Indeed, "'[d]iscretion' may be a misleading term, for rule 15(a) severely restricts the judge's freedom" to deny pleading amendments unless for a "substantial reason," *Dussouy v.*

Gulf Coast Inv. Corp., 660 F.2d 594, 597, 598 (5th Cir. 1981)—such as undue delay, bad faith or dilatory motive, undue prejudice to the defendant, repeated failure to fix deficiencies "by amendments previously allowed," or futility, *Foman v. Davis*, 371 U.S. 178, 182 (1962). Absent one or more of these reasons, a judge is bound by Rule 15(a)'s "bias in favor of granting leave to amend." *Mayeaux v. La. Health Serv. & Indent. Co.*, 376 F.3d 420, 425 (5th Cir. 2004).

Here, the district court refused plaintiffs' request to amend on several grounds: (1) timeliness, (2) failure to take advantage of "numerous opportunities" to cure their pleading deficiencies, and (3) futility. ROA.261. None justified the district court's denial.

A. Plaintiffs' motion to amend was timely.

On timeliness, the court remarked only that plaintiffs "did not exercise diligence" in presenting their second amended complaint "before the Court dismissed the case," ROA.261—apparently concluding that plaintiffs' motion was unduly delayed simply because it was presented after the court's dismissal order. But in reviewing whether a motion to amend is timely, "delay alone is insufficient: 'The delay must be *undue*, i.e., it must prejudice the nonmoving party or impose unwarranted burdens on the court.'" *N. Cypress Med. Ctr.*, 898 F.3d at 478 (quoting *Mayeaux*, 376 F.3d at 426). The nonmovants have the burden of showing that the amendment would cause them "serious prejudice." *Dussouy*, 660 F.2d at 598 n.2.

Defendants have not shown—nor even argued, *see* ROA.255-56—that allowing plaintiffs' amendment would prejudice them. Unlike amendments that "plead[] a fundamentally different case" years into the litigation, *Mayeaux*, 376 F.3d at 427,

plaintiffs' amendment—filed only thirty-eight days after the court granted the motion to dismiss—included the same (albeit more detailed) allegations as in their first amended complaint, with *fewer* theories of recovery. In this context, there is no prejudice: Defendants were given "adequate notice of the transactions at issue," *Dussouy*, 660 F.2d at 599, and would not be required to reopen discovery or adopt new defenses at this early stage of the litigation. *See N. Cypress Med. Ctr.*, 898 F.3d at 480; *see also Griggs v. Hinds Junior Coll.*, 563 F.2d 179, 179-180 (5th Cir. 1977) (per curiam).

B. Plaintiffs have not had "numerous opportunities" to cure perceived deficiencies.

The district court also failed to explain how plaintiffs' one previous amendment, made as of right and without need for leave under Rule 15(a)(1), constituted "numerous opportunities" for plaintiffs to have fixed perceived deficiencies. ROA.261.

To our knowledge, this Court has never affirmed a denial of leave to amend based solely on "repeated failure" grounds when the movant has had only one prior chance to amend. *See, e.g.*, *Dueling v. Devon Energy Corp.*, 623 F. App'x 127, 131 (5th Cir. 2015); *Webb v. Havins*, 26 F.3d 1118, *2 (5th Cir. 1994) (per curiam) (table decision); *cf. Hiar v. Hingston*, 96 F.3d 1448, *3 (6th Cir. 1996). What's more, plaintiffs were not and could not have been aware of their pleading deficiencies *before* the court's dismissal order, given that the district court's newly onerous pleading requirements diverge from the standard applied in that court's own prior cases, *see Proft v. Wilson Sys., Inc.*, 217 F. Supp. 3d 946, 949 (W.D. Tex. 2016) (Junell, J.); *Austin v. Portable Mud Sys., Inc.*, No. 7:15-CV-00151, at *9-10 (W.D. Tex. Mar. 31, 2016) (Junell, J.)—not to mention the standard applied by other courts. In the three years before the district court's June 2017 dismissal,

at least eight different courts in this Circuit refused to dismiss FLSA claims pleaded with similar or less specificity than those pleaded here.[5] And this Court has found RICO violations adequately alleged where, as here, the complaint contains details of an H-2B visa-fraud scheme. *Abraham v. Singh*, 480 F.3d 351, 356 (5th Cir. 2007). Plaintiffs had little reason to believe their complaint was defective—and no real opportunity (let alone "numerous opportunities") to fix it before the court deemed it defective.

C. Leave to amend would not be futile.

Because "undue delay" and "repeated failure to cure deficiencies" were not good reasons to deny leave to amend, only the supposed "futility" of amendment remains. *See* ROA.172, ROA.256. And "where 'the district court's denial of leave to amend is based solely on futility, [this Court] appl[ies] a de novo standard of review identical, in practice, to the standard used for reviewing a dismissal under Rule 12(b)(6.)'" *Varela v. Gonzales*, 773 F.3d 704, 707 (5th Cir. 2014) (quoting *City of Clinton v. Pilgrim's Pride Corp.*, 632 F.3d 148, 152 (5th Cir. 2010)). It would not be futile to allow plaintiffs' second amended complaint, which, as plaintiffs explained in the district court (ROA.221-22),

[5] *See Flores v. Act Event Servs., Inc.*, 55 F. Supp. 3d 928, 937-39 (N.D. Tex. 2014) (coverage); *Landeros v. Fu King, Inc.*, 12 F. Supp. 3d 1020, 1023 (S.D. Tex. 2014) (coverage); *Maldanado v. New Orleans Millworks, LLC*, No. 17-cv-1015, 2017 WL 2472358, at *2-3 (E.D. La. June 8, 2017) (overtime violation); *Rodriguez v. Namkeen, Inc.*, No. 15-cv-3370, 2017 WL 2118345, at *3-4 (N.D. Tex. May 17, 2017) (coverage); *Cruz v. Wash Masters Mgmt. LLC*, No. 14-cv-4569, 2015 WL 13649246, at *5 (N.D. Tex. May 29, 2015) (coverage); *Shorts v. Primeco Auto Towing, LLC*, No. 13-2794, 2015 WL 158876, at *2 (S.D. Tex. Jan. 12, 2015) (coverage); *Murphy v. Multi-Shot, LLC*, No. 14-cv-1464, 2014 WL 4471538, at *2 (S.D. Tex. Sept. 10, 2014) (overtime violation); *Glover v. Quality Air Techs., Ltd.*, No. 13-cv-4725, 2014 WL 2883893, at *2 (N.D. Tex. June 25, 2014) (overtime violation).

addresses exactly the perceived deficiencies flagged in the district court's dismissal order.

1. The second amended complaint more than adequately pleaded a RICO claim.

a. Pattern of racketeering activity. To sharpen the district court's focus, the proposed second amended complaint dropped allegations related to mail and wire fraud, relying on visa fraud alone. ROA.232-33, ROA.234-45, ROA.247 (¶¶ 30, 31-33, 42-44, 124). Plaintiffs also reinforced allegations identifying which of the defendants—Carmen, Jessie, or both acting jointly—committed which fraudulent acts, and whether those acts were carried out by defendants themselves or by their agents, William Riehl or Veronica Strickland-Birkenstock. ROA.231-32, ROA.232-33, ROA.233-35 (¶¶ 26-29, 31-33, 35-44, 46-47).

Together with plaintiffs' undisturbed facts, these allegations amply pleaded a pattern of racketeering activity. By simplifying the RICO predicates, the proposed complaint isolated the "who, what, where, when, and how" of visa fraud, which the district court ignored when it dismissed plaintiffs' first amended complaint. *See* ROA.164-65. And by specifying whether defendants committed the fraudulent acts individually or together, plaintiffs responded to the court's concern that they had "lump[ed] together the defendants," ROA.164—although this mischaracterizes plaintiffs' first amended complaint, which makes many allegations specific to each defendant and "blurs" defendants only where, "as a direct result of how … Defendants have chosen to operate," "both [defendants] work together on certain projects." *In re Chrysler–Dodge–Jeep Ecodiesel Mktg.*, 295 F. Supp. 3d 927, 977 (N.D. Cal. 2018). In any event, plaintiffs

addressed the court's concerns, by definition making their second amended complaint not futile.

b. RICO injury. Because the district court concluded that plaintiffs failed to "specifically plead" a RICO injury, ROA.166, plaintiffs' proposed second amended complaint added considerable detail regarding how (and by how much) defendants' unlawful deductions reduced plaintiffs' wages. *See* ROA.236-37, ROA.241, ROA.242, ROA.242-43, ROA. 243-44, ROA.244-45 (¶¶ 51-53, 83, 85-86, 91-93, 97-99, 104). The proposed second amended complaint alleged that defendants deducted between $50 and $130 for housing and electricity, between $19.25 and $22 for uniforms, and $721 altogether for the costs associated with H-2B visa applications. ROA.241, ROA.242 (¶¶ 83, 85-86). It also pleaded that, in some weeks, these deductions caused plaintiff Molina-Aranda's per-hour wage to fall as low as $0, plaintiff Lopez-Quesada's to $1.17, and plaintiff Ramirez-Vela's to $6.84. ROA.242-43 (¶¶ 91-93). Finally, the proposed allegations specified the exact prevailing wage for heavy trucking: $19.94 per hour. ROA.230, ROA.236-37 (¶¶ 23, 51-53).

To the extent the district court felt unable to "ascertain with any degree of certainty" the "difference between the amounts paid … and the prevailing wage rate for actual work performed," ROA.166, that task is now easier to accomplish. With simple subtraction, the court can make to-the-cent calculations of plaintiffs' RICO injury. On this ground alone, the proposed second amended complaint would not be futile.

2. The second amended complaint more than adequately pleaded FLSA minimum-wage and overtime violations.

a. Enterprise coverage. The plaintiffs' second amended complaint added detail to their allegations that defendants' trucks had been "moved in or produced for commerce," giving those trucks' VIN numbers, makes and models, and even out-of-state cities of manufacture. ROA.237-38 (¶¶ 58-59). And although the district court expressed no dissatisfaction with plaintiffs' earlier pleadings as to sales-volume threshold, plaintiffs also added that "between January 1, 2015 and December 31, 2015, Black Magic had $3,380,367.83 in gross revenue," ROA.237 (¶ 57) (which should go without saying is not necessary to make plaintiffs' allegations plausible).

The district court's concern was with plaintiffs' supposedly "conclusory allegation" that the handled materials were "moved in or produced for commerce," ROA.169, and that concern no longer is warranted (though, with respect, it never was). Under the new complaint, the trucks that plaintiffs drove and trailers they hauled were manufactured, variously, in "Santiago, Mexico," "Cleveland, North Carolina," "Chillicothe, Ohio," "Arizona," and "Alabama"—all "outside of the state of Texas." ROA.237-38 (¶¶ 58-59). These allegations are more than enough to plead FLSA coverage.

b. Minimum-wage violation. Plaintiffs' proposed second amended complaint goes further to calculate the amounts they were paid, which fell far below the minimum wage. For example, in one of the weeks when defendants paid him, plaintiff Ramirez-Vela received regular gross wages prior to deductions of only $6.89, less than the federal minimum wage of $7.25 per hour. ROA.236 (¶ 51). Plaintiffs allege the exact number of hours (272.5 combined) that they worked without being paid at all and precisely

when that occurred. ROA.244-45 (¶ 104). Plaintiff Molina-Aranda, for instance, was not paid for 66 hours in the week beginning August 24, 2015, and for 46 hours in the week beginning August 31, 2015. ROA.245 (¶ 104).

Although defendants bore the burden of keeping proper records, plaintiffs even allege the specific amounts unlawfully deducted from their paychecks weekly without their authorization: between $50 and $130 for housing and lights and between $19.25 and $22 for uniforms. ROA.241, ROA.242 (¶¶ 83, 85). Defendants made "periodic deductions" for the $721 each plaintiff allegedly owed them for costs associated with the H-2B visa applications. ROA.242 (¶ 86). Defendants' failure to reimburse plaintiffs for their pre-employment expenses caused plaintiffs' net pay to fall as low as $0, $1.17, and $6.84 per hour for Molina-Aranda, Lopez-Quesada, and Ramirez-Vela, respectively. ROA.242-43 (¶¶ 91-93).

c. Overtime violation. Plaintiffs' proposed second amended complaint includes even more specific examples of their unpaid overtime wages. "For example, between August 10, 2015 and August 16, 2015, [p]laintiff Ramirez-Vela worked 60 hours," and "[f]or the 20 hours of overtime he worked the $11.45 hourly rate [d]efendants paid [him] was much less than the applicable overtime rate required by the FLSA." ROA.243 (¶ 97). Between July 13, 2015 and July 19, 2015, plaintiff Lopez-Quesada worked 35 hours of overtime for a $8.07 hourly rate, and during the same period, plaintiff Molina worked 35.5 hours of overtime for a $12.55 hourly rate, less than the one-and-a-half times the regular rate required by the FLSA. ROA.244 (¶¶ 98-99). These allegations, too, go far beyond the basic pleading standard, which demands only the relevant date

range and approximate hours, by detailing specific date ranges and hourly pay rates for each plaintiff.

IV. The state-law claims should be reinstated.

The district court declined to exercise supplemental jurisdiction over plaintiffs' state-law claims solely because it had dismissed their federal claims. ROA.171-72; *see* 28 U.S.C. § 1367(c). If this Court reverses with respect to any of plaintiffs' federal claims, the supplemental state-law claims must be reinstated and considered on remand in the first instance.

CONCLUSION

The district court's dismissal of the amended complaint should be reversed. Alternatively, the district court's denial of leave to amend should be reversed. Either way, the case should be remanded for further proceedings on all of plaintiffs' federal and state-law claims.

Respectfully submitted,*

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CERTIFICATE OF SERVICE

I certify that, on August 31, 2019, this brief was filed using the Court's CM/ECF system. All attorney participants in the case are registered CM/ECF users and will be served electronically via that system.

In addition, because Defendants-Appellees Carmen Ramirez and Jessie Ramirez III are not currently represented by counsel in this Court, undersigned counsel has served each Defendant-Appellee with a hard copy of this brief by first-class U.S. mail at their last known address (*see* ROA.305): 3392 Lenorah Loop, Lenorah, TX 79749.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,868 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond.

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