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

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June 3, 2020

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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

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INTRODUCTION

Under the H-2B visa program, American employers may broaden their search to workers outside the United States, but only after assuring the government that they cannot find American workers to fill their positions. The program benefits employers, giving them access to a broader labor pool. It benefits migrant workers too: They get work opportunities, with the same basic legal protections as any other worker.

Defendants Jessie and Carmen Ramirez wanted to benefit from access to migrant workers but did not want to uphold their end of the bargain. As plaintiffs alleged in great detail, over more than two years, the Ramirezes repeatedly lied to the United States to get H-2B visas and then enticed migrant workers—like plaintiffs—with the promise of fair pay for work done. Plaintiffs left their homes, families, and communities to come to the United States only to find on arrival that things were not as promised. Defendants housed plaintiffs in squalid conditions, had them work 55 to 80 hours per week, and refused to pay plaintiffs what they were owed, sometimes not paying them at all.

Plaintiffs filed this suit under RICO and the FLSA, two statutes that exist to protect against the kind of fraud and wage abuse carried out by defendants. Plaintiffs detailed how the Ramirezes carried out their fraudulent scheme and the myriad ways that it harmed them. Those allegations were more than enough to make out plausible claims under both RICO and the FLSA. As shown below, defendants' answering brief does nothing to undermine that conclusion.

ARGUMENT

I. Plaintiffs pleaded RICO violations.

As our opening brief explains (at 17-19), RICO prohibits a person from conducting an enterprise's affairs through a pattern of fraud. *See* 18 U.S.C. § 1962(c). The pattern must include two or more related acts of fraud that pose a continued threat of criminal activity. *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007). Anyone whose business or property is directly injured by the defendants' fraud can sue under RICO. 18 U.S.C. § 1964(c).

Defendants do not challenge that plaintiffs adequately alleged that (1) the Ramirezes are "persons" under RICO who ran Black Magic, a RICO "enterprise," *see* Pls.' Br. 18-19; (2) defendants committed multiple acts of both mail/wire and visa fraud—acts that satisfy RICO's definition of fraud, *id.* at 20-24; (3) the acts of fraud were related, *id.* at 24; and (4) plaintiffs suffered an injury under RICO, *id.* at 26-28.

Defendants contend only that (1) defendants' alleged fraud was not the proximate cause of plaintiffs' injuries; (2) defendants' alleged fraud was not "continuous"; and (3) by alleging that defendants acted together in carrying out the fraud, plaintiffs failed to meet Rule 9(b)'s heightened pleading standard. Each contention is wrong.

A. Plaintiffs pleaded proximate cause.

Defendants devised and carried out a scheme to lie to the federal government to get H-2B visas, bring plaintiffs to the United States with the understanding that they would be paid according to the information represented in the H-2B visa applications, and then make plaintiffs do more valuable skilled labor while paying them a lower rate. The causal relationship—between defendants' fraud and plaintiffs' harm—is both direct and

straightforward. As our opening brief shows (at 28-31), under any standard that this Court or the Supreme Court has used to determine proximate cause, plaintiffs satisfied it.

1. Foreseeability. The harms inflicted on plaintiffs were not only foreseeable, they were the point of the fraud. Defendants lied to the federal government so that they could get permission to hire guest workers to do manual labor. But when the workers arrived, defendants made them do the more-valuable, and hence higher-paying, work of heavy-truck driving. *See, e.g.*, ROA.75-76, ROA.80, ROA.82, ROA.84-85. The difference between the work that plaintiffs did and the work they were paid for (when they were even paid at all) went into defendants' pockets. There is "no plausible argument" that plaintiffs were "unforeseeable victims"—their underpayment was "the object of" the fraud. *See Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015). That is enough to show proximate cause. *Id.*

Defendants do not disagree that the harm was foreseeable. Instead, they argue that because *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010), rejected foreseeability as "the touchstone of RICO proximate cause," foreseeability is simply irrelevant. Defs.' Br. 20. That's a mistaken understanding of *Hemi*. The four-justice plurality in *Hemi* concluded that foreseeability could not overcome the requirement that the plaintiff's injury be the direct result of the defendant's fraud. *See* 559 U.S. at 12. Put another way, an *indirect* injury does not satisfy proximate cause, even if that injury is foreseeable. *See id.* But *Hemi* does not forbid consideration of foreseeability in assessing proximate cause.

That *Hemi* does not prohibit consideration of foreseeability is clear from this Court's post-*Hemi* cases, which recognize that foreseeability can help determine if an injury is direct. *See Allstate*, 802 F.3d at 676; *Torres v. SGE Mgmt., LLC*, 838 F.3d 629, 637 (5th Cir. 2016) (en banc). Both *Allstate* and *Torres* treat foreseeability as a way of determining if the harm to a plaintiff "was not just incidental" but instead the "objective of the enterprise." *Torres*, 838 F.3d at 637 (quoting *Allstate*, 802 F.3d at 676). Put differently, looking to the "direct and foreseeable consequence" of the fraud, *Torres*, 838 F.3d at 640, ensures that a plaintiff was directly injured and not "wronged by the caprice of chance," *Allstate*, 802 F.3d at 676.

Defendants agree that neither *Allstate* nor *Torres* is "in tension" with *Hemi*. Defs.' Br. 21. Yet instead of addressing each decision's treatment of foreseeability, defendants assert that both *Allstate* and *Torres* were really only about reliance, *id.*, that is, whether RICO requires a victim to have actually relied on the fraud. But that's not what this Court said. Both *Allstate* and *Torres* rejected the defendants' arguments that proximate cause under RICO requires reliance, holding instead that the plaintiffs satisfied proximate cause by showing, among other things, that they were "direct and *foreseeable* victims." *Torres*, 838 F.3d at 640 (emphasis added); *accord Allstate*, 802 F.3d at 676 ("There is no plausible argument that the [plaintiffs] were *unforeseeable* victims or otherwise wronged by the caprice of chance.") (emphasis added).

2. Direct result of a third party's reliance. Our opening brief explains (at 30) that plaintiffs alleged proximate cause for another, independent reason: because the lies on which a third party (the government) relied "directly furthered the scheme that directly injured the plaintiffs." *See Shannon v. Ham*, 639 F. App'x 1001, 1004 (5th Cir. 2016)

(citing *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658 (2008)). Defendants lied to the government and swore that they would be paying plaintiffs the going rate for the work described in defendants' visa applications—manual labor. And they intended all along to make plaintiffs do more-valuable work and pay them the lower rate (again, when they decided to pay them at all). That underpayment to plaintiffs was not an attenuated, happenstantial result of the government's reliance, but the very purpose of defendants' lies.

In response, defendants acknowledge (at 17) that an H-2B fraud in which migrant workers pay their own visa fees for the promise of work in the United States "may create a RICO claim." But defendants contend that plaintiffs here "paid nothing." Defs.' Br. 17. That's just wrong. Plaintiffs alleged that defendants "[c]harged plaintiffs for visa processing fees," among other illegal costs. ROA.84-85 (¶ 74). To be sure, these charges are not *necessary* to show proximate cause under RICO. But to the extent that defendants believe that visa charges are *sufficient* to show proximate cause, plaintiffs agree (and, given plaintiffs' allegations, they suffice to demonstrate proximate cause here).

Defendants also appear to acknowledge that the underpayment to plaintiffs was a direct result of their visa fraud: "Under the Complaint's allegations, there is *no* scenario where the H-2B visas would have been granted *and* Plaintiffs would have been paid the prevailing wage" for the truck driving they were doing. Defs.' Br. 18 (emphasis in original). Despite this concession, defendants make the confounding argument that plaintiffs were not harmed because they were actually the *beneficiaries* of defendants' fraud. According to defendants, plaintiffs were fortunate to be allowed into the United

States on temporary work visas. Defendants ignore the harsh living and working conditions, and then contend (at 18) that plaintiffs somehow benefitted—that is, up until defendants' "later decision" to underpay them.

This argument defies logic. If defendants planned to pay the going rate for heavy trucking and to follow applicable employment laws, and only "later" decided to underpay, Defs.' Br. 18, why go through the added cost and headache of applying for an H-2B visa, as opposed to hiring a ready-and-willing American worker? The commonsense answer to that question is exactly what plaintiffs alleged: Defendants *never* intended to pay the going rate.

That conclusion is buttressed by the harsh reality that, on their arrival, plaintiffs found "that things were not as they had been promised." *See Abraham v. Singh*, 480 F.3d 351, 356 (5th Cir. 2007). Defendants provided plaintiffs squalid living conditions—an overcrowded trailer without functional plumbing—made illegal deductions from their pay for uniforms, electricity, and laundry, and charged them exorbitant amounts for their visas. *See* Pls.' Br. 9-10. The reasonable inference from those facts is that defendants planned on taking advantage of plaintiffs all along, not that they only later made a decision to underpay them. And even if there were some inference from the allegations that could support an explanation for these conditions untied to defendants' fraudulent scheme, it could not be drawn in favor of defendants on a motion to dismiss, when all reasonable inferences must be drawn in plaintiffs' favor.

Defendants' argument is also premised on a number of unsupportable assumptions. First, defendants state that if they had not defrauded the government, plaintiffs "would have gotten nothing." Defs.' Br. 4. That can only be true if accepting defendants' offers

of employment came at zero opportunity cost to plaintiffs. But plaintiffs incurred the cost of leaving their families, homes, communities, and churches, to work for ten months in another country (a cost that defendants frame as an "opportunity," Defs.' Br. 11). They also lost the opportunity to find work that *would have* paid them the going rate. Second, underlying defendants' argument is the notion that, for H-2B workers, *anything* is better than nothing, even if what they receive isn't the wage that corresponds to the work one actually does and even if that wage violates the law.

Defendants cite no support for this idea that underpayment for a migrant worker's labor is not an injury—indeed is a benefit—so long as they get *something*. That is not surprising, given that nothing in the law supports it, and, in fact, it flouts the logic of the H-2B program, which seeks to broaden the labor pool when employers cannot find Americans to hire. In any event, generally it is up to Congress, not defendants, to decide when plaintiffs are injured. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) ("Congress has the power to define injuries…."). And so it cannot be that earning less than the wage that Congress demanded is not a harm.

3. Best situated to sue. Because the object of defendants' fraud was to have plaintiffs perform skilled work but pay them the lower rate for manual labor, the underpayment is a "direct financial injury" to the plaintiffs, *Bridge*, 553 U.S. at 658, making them best situated to sue defendants for their wrongdoing. Any other potential plaintiff would have to "go beyond the first step" in the causal chain, which is disfavored under RICO. *See Hemi Grp.*, 559 U.S. at 10 (quoting *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 271 (1992)).

For the government to sue, it would *first* have to make the same calculation plaintiffs would make in assessing their out-of-pocket injury—wages that plaintiffs were owed for hours actually worked versus wages paid for those hours—and *then* perform the additional complex assessment of the amount of additional taxes that would have wound up in government coffers had lawful wages been paid.

Even more complex would be determining how damages could be shown for a competitor or other potential H-2B applicant. Although defendants gained an unfair advantage in the market, ROA.71-72 (¶¶ 1-2), for an injured competitor to sue, it too would have to make the same calculation as plaintiffs—wages earned for hours worked versus wages paid for those hours—and then show how defendants' underpayment affected that specific competitor's bottom line. That is the kind of "intricate, uncertain inquir[y]" into the competitive marketplace that the Supreme Court refused to consider in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459-60 (2006). And, as defendants highlight (at 22), other potential H-2B visa applicants *might* have been injured by defendants' scheme. But—even assuming that other visa applicants would have standing—calculating those damages would require answering hypothetical questions about who *could have* worked and for how many hours, as compared to plaintiffs here who, as alleged in detail, were actually underpaid for the work that they actually did.

In response to plaintiffs' showing that they are the best situated to sue, defendants simply declare that it isn't so. They say, without any explanation or citation to authority, that a damages calculation would have to take into account whether plaintiffs "could *ever* have been paid American-level wages." Defs.' Br. 23. That's flatly wrong: Whether plaintiffs hypothetically could have found a law-abiding employer has no bearing on the

actual harm defendants inflicted. After all, as the direct result of defendants' fraud, plaintiffs did the work demanded by defendants and then were underpaid or not paid at all.[1]

B. Plaintiffs pleaded that the Ramirezes' fraud was continuous.

Under RICO, predicate fraudulent acts must "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)). Continuity can be shown in two ways: open-ended continuity (in which the fraud threatens to continue into the future) and closed-ended continuity (in which the fraud already has extended over a substantial period). *See Abraham*, 480 F.3d at 355; Pls.' Br. 25.

As observed in our opening brief, this Court has held that fraud in connection with the H-2B program may constitute open-ended continuity. *See* Pls.' Br. 25 (citing *Abraham*, 480 F.3d at 356). Defendants ignore *Abraham*'s on-point discussion of open-ended continuity in the H-2B fraud context. Instead, they argue that plaintiffs never showed *closed*-ended continuity. But plaintiffs' opening brief argued (at 25) *only* open-ended continuity. On that point, defendants are silent.

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[1] Defendants mistake plaintiffs' argument that their financial losses are sufficient injuries under RICO, *see* Pls.' Br. 26, as an argument that a loss of a legal entitlement satisfies proximate cause, *see* Defs.' Br. 21. Plaintiffs' argument about legal entitlements was not about proximate cause, but was limited to showing the kinds of injuries that may trigger RICO liability. On that front, defendants concede that plaintiffs pleaded a RICO injury. Defs.' Br. 22.

To recap: As in *Abraham*, plaintiffs alleged that defendants' scheme was not based on a single illegal transaction. *See Abraham*, 480 F.3d at 356; Pls.' Br. 25. They alleged that in addition to the visa fraud that convinced them to come to the United States in the first place, defendants underpaid them, forced them to live in squalid conditions, and made myriad illegal deductions from their pay. Pls.' Br. 25; *see Abraham*, 480 F.3d at 356. And after defendants were successful with their first batch of fraudulent visa applications in 2015, *see* Pls.' Br. 8, they doubled down and filed another fraudulent application to the Department of Labor the next year, *id.* at 9. Their two-year scheme thus involved more than "isolated instances of fraud," Defs.' Br. 27. And "there is no reason to suppose that this systematic victimization … would not have continued indefinitely had the plaintiffs not filed this lawsuit." *Abraham*, 480 F.3d at 356; *see* Pls.' Br. 25.

C. Plaintiffs pleaded claims against both Jessie Ramirez and Carmen Ramirez.

As our opening brief explained (at 19), plaintiffs alleged that, as part of operating Black Magic, Jessie Ramirez and Carmen Ramirez together carried out a multi-year scheme in which they repeatedly lied to the government and, on the basis of those lies, took advantage of plaintiffs for their own gain. Defendants respond by contending that because plaintiffs alleged that both Jessie and Carmen Ramirez carried out the fraud, the complaint is improper "group pleading." Br. 24-27. Not so.

Courts have rejected under Rule 9(b) guilt-by-association allegations that "provide no basis in fact upon which the Court could conclude that any specific act of any specific defendants is indictable for … fraud." *Brooks v. Blue Cross & Blue Shield of Fla.,*

Inc., 116 F.3d 1364, 1381 (11th Cir. 1997).[2] In those cases, plaintiffs sought to hold multiple officers of a corporation liable for fraudulent statements made by the corporation. *See, e.g.*, *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 645 (5th Cir. 2005). When that occurs, Rule 9(b) prohibits tying *all* defendants to allegations that "suggest only that some of the defendants" actively took part in the fraud. *Id.* That serves Rule 9(b)'s purpose of "weeding out strike suits and fishing expeditions." *IAS Servs. Grp., L.L.C. v. Jim Buckley & Assocs., Inc.*, 900 F.3d 640, 648 (5th Cir. 2018).

The kind of guilt-by-association allegations that fail to suffice under Rule 9(b) are nothing like the allegations here. Plaintiffs alleged that both Ramirezes together controlled every element of Black Magic's day-to-day operations. Plaintiffs alleged that together both Jessie and Carmen Ramirez "devised a scheme intending to defraud," ROA.77 (¶ 27), the government and migrant workers. They both told the government that they were hiring manual laborers, positions that American workers were unlikely to fill, when they actually intended to hire truck drivers, positions that Americans would be likely to take. ROA.73-75. They both then authorized, reviewed, and submitted to the Department of Labor visa-application forms that they swore were true but that they knew to be false. ROA.75-76 (¶¶ 22-23), ROA.78-79 (¶ 32). Plaintiffs alleged the specific dates of the forms, and even the Department of Labor case numbers assigned

[2] The language from *Brooks* quoted here and in defendants brief (at 24) is from the district court's opinion, not from the Eleventh Circuit's opinion. The Eleventh Circuit appended the district court's decision to its opinion and affirmed on a ground unrelated to Rule 9(b). *See Brooks*, 116 F.3d at 1365 ("We have no occasion to reach the remaining issues addressed in other parts of that order and imply no view concerning any of them.").

to the fraudulent forms. *See* ROA.75-76 (¶¶ 22-23), ROA.78-79 (¶ 32). And plaintiffs alleged that the H-2B visas were granted as a result of this multi-year scheme. ROA.78 (¶ 31). These allegations are enough to satisfy Rule 9(b)'s requirement of pleading the "who, what, when, where, and how" of the fraud. *See ABC Arbitrage Pls. Grp. v. Tchuruk*, 291 F.3d 336, 350 (5th Cir. 2002).

That conclusion is underscored here because courts, including this Court, have taken a more "relaxed" approach to the 9(b)-particularity standard when certain facts of a case are known only to defendants, provided that the plaintiffs offer a factual basis for their belief. *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 540 F. Supp. 2d 800, 806 (S.D. Tex. 2007) (citing *United States ex rel. Russell v. Epic Healthcare Mgmt. Grp.*, 193 F.3d 304, 308 (5th Cir. 1999)). After all, "the 'time, place, contents, and identity' standard is not a straitjacket for Rule 9(b)." *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009). Plaintiffs may not have alleged who pushed "send" on the fax machine or who came up with the idea to defraud the government and plaintiffs in the first place. But they pleaded more than sufficient detail to allege that both Jessie and Carmen Ramirez are liable for the fraud.

Defendants fault plaintiffs for referring to the Ramirezes as "defendants." But Rule 9(b) does not prohibit shorthand; it requires only that each individual defendant have been alleged to have committed fraud him or herself. To highlight: Defendants do not argue that the allegations fall short of Rule 9(b) as they apply to either individual defendant. That is, defendants do not argue that if plaintiffs would have alleged that only Jessie Ramirez (or only Carmen Ramirez) perpetrated the fraud, plaintiffs' allegations would not satisfy Rule 9(b). That plaintiffs alleged that *both* defendants

committed the fraud together thus makes no difference. In short, this is far from the situation in which a plaintiff attempts to sue multiple defendants but alleges "only that some"—but not each—"of the defendants" were actually a part of the fraud. *See R2 Invs.*, 401 F.3d at 645. Plaintiffs have satisfied their burden.

II. Plaintiffs pleaded FLSA violations.

Employees covered by the FLSA are legally owed the federal minimum wage and time-and-a-half for each hour worked over 40 in a workweek. 29 U.S.C. §§ 206, 207. Plaintiffs showed that they are covered employees and alleged that, for their entire employment, they were paid less than they were legally owed (and that sometimes defendants did not pay them at all).

Defendants argue that plaintiffs (1) were not employees covered by the FLSA and (2) made only "general allegations," Defs.' Br. 33, of defendants' minimum-wage and overtime violations. On the first point, defendants do not even address the argument made by plaintiffs. On the second, defendants try to impose a novel (and unlawful) heightened pleading standard and then ignore plaintiffs' allegations that would satisfy even that standard.

A. Plaintiffs pleaded that they were covered employees under the FLSA.

For a worker to be covered by the FLSA, the worker must show that she engaged in interstate commerce. *See* 29 U.S.C. §§ 206(a), 207(a). That showing can be made in two ways. Under "individual coverage" a worker personally "engage[s] in commerce or in the production of goods for commerce." 29 U.S.C. § 207(a). Under "enterprise coverage" a worker is employed by "an enterprise engaged in commerce or in the

production of goods for commerce." *Id.* As our opening brief explained (at 33), enterprise coverage covers "virtually every enterprise in the nation" doing $500,000 in 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)). Plaintiffs' opening brief (at 32-36) laid out in detail how plaintiffs' allegations satisfy the FLSA's sweeping enterprise-coverage provision. And they made clear they were arguing *only* enterprise coverage. *See* Pls.' Br. 32.

For that reason, defendants' arguments—which do no more than chide plaintiffs for not addressing this Court's decisions concerning *individual* coverage—are irrelevant. *See Sobrinio v. Med. Ctr. Visitor's Lodge, Inc.*, 474 F.3d 828, 829 (5th Cir. 2007); *Williams v. Henagan*, 595 F.3d 610, 620 (5th Cir. 2010); *see also Garcia v. Green Leaf Lawn Maint.*, No. civ.a. H-11-2936, 2012 WL 5966647, at *2-*3 (S.D. Tex. Nov. 28, 2012) (cited by defendants at 31) (noting that, in *Sobrinio*, "the Fifth Circuit adopted a practical test for whether an employee is personally engaged in commerce," and that, in *Williams*, the plaintiff's lack of engagement in interstate commerce did not "bestow individual coverage under the FLSA.").

As to enterprise coverage—which defendants nowhere address—we rely on our opening brief.

B. Plaintiffs' factual allegations were more than sufficient to make out an FLSA claim.

As our opening brief explains (at 36-40), plaintiffs' allegations are more than sufficient to satisfy their burden at the pleading stage. Defendants ignore almost all of plaintiffs' detailed allegations, cherry-pick two statements from plaintiffs' opening brief,

and then conclude that "these general allegations are not enough" to allege a plausible violation of the FLSA. Defs.' Br. 33. But defendants' summary of plaintiffs' allegations is just not accurate. Plaintiffs alleged the exact dates that they were employed, ROA.82 (¶¶ 51-53), that "[i]n all weeks plaintiffs were employed by defendants" they worked "in excess of 40 hours per week," ROA.85 (¶ 80), and that "[a]t *all* time relevant to this action" defendants "failed to pay the required minimum wages and overtime compensation due to plaintiffs," ROA.86 (¶ 83) (emphasis added). That alone is sufficient to put defendants on notice of the relevant date range and approximate hours underlying plaintiffs' claims. *See* Pls.' Br. 39 (citing cases holding that no more is necessary).

And yet plaintiffs pleaded more. For the minimum-wage violations, they pleaded, for example, that for several pay periods in August and September 2015, they worked 50 to more-than-80 hours per week and were not "paid fully or paid at all." ROA.86 (¶ 87); *see* Pls.' Br. 37. As to overtime, plaintiffs explained that they worked overtime every week—regularly "between 55-80 hours per week," ROA.85 (¶ 80)—and that defendants failed to pay plaintiffs overtime "for *each* hour they worked above 40 in a workweek," ROA.86 (¶ 82) (emphasis added). And although "[t]he complaint need not contain denials of possible exemptions or affirmative defenses allowed by the [FLSA]" because "that is part of the defendant's burden of pleading," 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1239 (3d ed. Apr. 2020 update), plaintiffs made those allegations too, *see* Pls.' Br. 37-38. They alleged that defendants made illegal deductions for uniforms, housing, utilities, unreimbursed visa fees, and

travel expenses. ROA.81, ROA.84-85. If that is not enough to allege a facially plausible claim for relief, it is hard to imagine what would be.

Beyond getting the facts wrong, defendants repeat the district court's mistake and treat plaintiffs' burden as a burden of *proving* their case, as opposed to plausibly alleging it. The only case defendants cite from this Court is a case decided at summary judgment, where plaintiffs must make an evidentiary showing. Defs.' Br. 32 (citing *Johnson v. Heckmann Water Res., Inc.*, 758 F.3d 627, 639 (5th Cir. 2014)). They argue for a similarly rigorous standard at the pleading stage: Defendants argue that plaintiffs "must make some effort to quantify the amount of lost wages" and cannot "simply say so." Defs.' Br. 32. They then contend—without any legal support—that the way for plaintiffs to have made this showing was to "reference[] their time sheets or some other indicia of the amounts of overtime." Defs.' Br. 32. Overall, defendants demand that plaintiffs "*establish* how much compensation" they are due. Defs.' Br. 33 (emphasis added).

At the pleading stage, a plaintiff need not "establish" anything. FLSA claims, like any others governed by Rule 8(a), must rise only to the level of plausibility. *See, e.g.*, *Hoffman v. Cemex, Inc.*, Civ. A. No. 09–3144, 2009 WL 4825224, at *3 (S.D. Tex. Dec. 8, 2009). That means that plaintiffs need not "quantify," Defs.' Br. 32, or "establish," Defs.' Br. 33, precisely how much they are due. They must put defendants on notice of an approximate date range and un- or undercompensated hours, which is all that notice pleading demands. *See, e.g.*, *Traub v. ECS Telecom Servs. LLC*, No. 11-CA-0700, 2011 WL 5555628, at *2 (W.D. Tex. Nov. 15, 2011) ("Though the additional information sought by Defendants might be beneficial, it is not required to survive a motion to dismiss."). And although this Court has not specifically applied the (unquestionably applicable)

notice-pleading standard to the FLSA, "many district courts in the Fifth Circuit have consistently found an FLSA pleading sufficient when it 'puts defendant on notice as to the relevant date range, as well as the approximate number of hours for which plaintiff claims [he or she] was under-compensated ... the FLSA does not require more.'" *Robbins v. XTO Energy, Inc.*, No. 3:16-cv-793-M, 2017 WL 3215291, at *2 (N.D. Tex. July 28, 2017) (citing *Jones v. Warren Unilube, Inc.*, No. 5:16-cv-264-DAE, 2016 WL 4586044, at *2 (W.D. Tex. Sept. 1, 2016) (collecting cases)); *see also* Pls.' Br. 39, 43 n.5 (collecting cases).

The in-circuit decisions that defendants cite don't say anything different. Plaintiffs acknowledge the truism that a complaint must contain more than "[t]hreadbare recitals of the elements of a cause of action." *Whitlock v. That Toe Co., LLC*, No. 3:14-cv-2298-L, 2015 WL 1914606, at *3 (N.D. Tex. Apr. 28, 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). And it is true that a plaintiff might "fail to put defendant on notice of the approximate date ranges and approximate number of hours worked" when he does not provide dates of employment, does not approximate hours, *and* contends that the defendant paid "some" of the required overtime. *England v. Adm'r s of the Tulane Educ. Fund*, No. CV 16-3184, 2016 WL 3902595, at *3 (E.D. La. July 19, 2016). But so long as a plaintiff's "allegations are not so bare-bones or bereft of factual details to support a determination" that they were a covered employee who was underpaid, they will have satisfied their burden at the pleading stage. *See Heilman v. COSCO Shipping Logistics (N. Am.) Inc.*, No. cv H-19-1695, 2020 WL 1452887, at *2 (S.D. Tex. Jan. 22, 2020), *report and recommendation adopted*, No. 4:19-cv-1695, 2020 WL 1650824 (S.D. Tex. Mar. 24, 2020).

What's more, to hold plaintiffs to defendants' exacting pleading requirements would demand that, to survive a motion to dismiss, plaintiffs would often have to rely on the employment records that they would need discovery to get in the first place. Employers, not employees, are required to maintain employment records. 29 C.F.R. § 516.1. Adopting defendants' argument is thus likely to encourage violations of federal law. If an employee is required to produce proof before discovery, as defendants would have it, an employer who is underpaying its employees would be better off not keeping records at all.

III. If the first amended complaint was insufficient, plaintiffs should have been granted leave to amend.

Because plaintiffs' first amended complaint pleaded both RICO and FLSA claims, the Court does not need to address the district court's refusal to grant plaintiffs' motion to amend. But if it does address that question, under Rule 15(a)'s "liberal pleading presumption," reversal is required. *See N. Cypress Med. Ctr. Operating Co. v. Aetna Life Ins. Co.*, 898 F.3d 461, 477 (5th Cir. 2018).

Leave to amend should be granted except in cases of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party," or "futility of the amendment." *N. Cypress Med. Ctr. Operating Co.*, 898 F.3d at 477. As our opening brief shows (at 40-48), the district court was wrong on each of the three grounds that it refused to grant leave to amend: undue delay, failure to take advantage of "numerous opportunities" to replead, and futility. Defendants' responses misstate the law and ignore plaintiffs' proposed complaint.

1. No undue delay. Defendants attempt to fashion a new standard for undue delay. According to defendants "[d]istrict courts act within their discretion when they deny post-dismissal motions to amend." Defs.' Br. 34. The upshot of defendants' view is that, regardless of a lack of prejudice, the district court is free to reject an amendment simply because the request comes after dismissal.

This position reads "undue" out of "undue delay." *See Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981). But "[i]n reviewing the timeliness of a motion to amend, 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. Operating Co.*, 898 F.3d at 478 (quoting *Mayeaux v. La. Health Serv. & Indent. Co.*, 376 F.3d 420, 426 (5th Cir. 2004)). As a result, "courts have not imposed any arbitrary timing restrictions on requests for leave to amend and permission has been granted under Rule 15(a) at various stages of the litigation," including "after a judgment has been entered." 6 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1488 (3d ed. Apr. 2020 update). Indeed, almost four decades ago this Court found that "[i]nstances abound in which appellate courts on review have required that leave to amend be granted after dismissal or entry of judgment." *Dussouy*, 660 F.2d at 598.

The post-dismissal cases defendants cite do not say anything different. *See Bynane v. Bank of New York Mellon*, 866 F.3d 351, 362 (5th Cir. 2017) (denying motion to amend because of *undue* delay); *Whitaker v. City of Houston*, 963 F.2d 831, 837 (5th Cir. 1992) (denying motion to amend because of plaintiff's lack of due diligence). And defendants do not attempt to show under the governing standard that the delay here was undue. The closest they come is the assertion, without further elaboration, that "the prejudice

to Defendants here of reviving Plaintiffs' claims is clear." Defs.' Br. 36. That single, conclusory statement cannot be enough to meet their burden.

2. No repeated failures to cure deficiencies. Defendants contend (at 35) that plaintiffs had "numerous opportunities" to amend their complaint, including when defendants filed their motion to dismiss. Here too defendants misunderstand the law. "Numerous opportunities" refers to "repeated failure to cure deficiencies *by amendments previously allowed*." *Foman v. Davis*, 371 U.S. 178, 182 (1962) (emphasis added). Plaintiffs filed one amendment as of right, *see* Fed. R. Civ. P. 15(a)(1); there simply was no failure to cure, repeated or otherwise.

3. No futility. Defendants assert in one sentence that the district court was right to conclude that an amendment would be futile because plaintiffs could not "establish proximate cause" under RICO or "plead the commerce prong of FLSA coverage." Defs.' Br. 36. They do not address a single new allegation nor respond to plaintiffs' arguments as to why their new allegations, which pointedly address the purported deficiencies identified by the district court, preclude a finding of futility. For that reason, on the futility issue, plaintiffs rest on their opening brief. *See* Pls.' Br. 43-48.

CONCLUSION

For the reasons stated above and in our opening brief, 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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June 3, 2020

CERTIFICATE OF SERVICE

I certify that, on June 5, 2020 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.

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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 5,747 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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