No. 14-969

In The
Supreme Court of the United States

GREG LANDERS,

Petitioner,

v.

QUALITY COMMUNICATIONS, INC.,
BRADY E. WELLS, and ROBERT J. HUBER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner has presented compelling reasons to grant the Petition, where the Ninth Circuit's opinion that a plaintiff must allege at least **one workweek** when he worked in excess of 40 hours and was not paid for the excess hours in that workweek does not conflict with a published decision of this Court or a Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, there is no parent or publicly held company owning ten percent or more of the stock of Quality Communications, Inc.

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STATEMENT OF THE CASE

After advertising for at least two years (Res. App. at 27a-36a), Petitioner Landers' attorney filed a collective and class action overtime complaint under the Fair Labor Standards Act against the Respondents. Pet. App. at 46a-55a. The Complaint parroted the advertising. Res. App. at 28a-36a. Respondents filed a Motion to Dismiss Complaint or Alternatively, for Summary Judgment and submitted to the district court Landers' payroll records and e-mails requesting to work less than 40 hours a week. Dkts. 7, Exhibit A, and 16, Exhibit B, U.S. District Court.

On the same day Respondents filed their Motion to Dismiss, Landers filed his Motion for Circulation of Notice of the Pendency of This Action pursuant to 29 U.S.C. § 216(B) and for Other Relief. Dkt. 9, U.S. District Court. The district court, relying on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), granted Respondents' Motion to Dismiss. Pet. App. at 42a-45a. Landers appealed to the Ninth Circuit and the Ninth Circuit, agreeing with the First, Second and Third Circuits, affirmed the district court. Pet. App. at 16a-21a.

The Ninth Circuit found that Landers expressly declined to amend his complaint (Pet. App. at 21a) and held:

> We decline to impose a requirement that a plaintiff alleging failure to pay minimum wages or overtime wages must approximate the number of hours worked without compensation. However, at a minimum the plaintiff

> must allege at least one workweek when he worked in excess of 40 hours and was not paid the excess hours in that workweek, or was not paid minimum wages. Landers's allegations fell short of this standard, and the district court properly dismissed his complaint for failure to state a plausible claim.

Pet. App. at 21a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI

Landers has not met the "compelling reasons" this Court considers in review on a writ of certiorari. Supreme Court Rule 10(a). The Ninth Circuit's decision is not in conflict with any published decision of another United States Court of Appeals on the same important matter. Here, the Ninth Circuit entered a decision which agrees with decisions of the First, Second and Third Circuits (Pet. App. at 16a, 17a-18a), including the Second Circuit's decision in *Dejesus v. HF Management Services, LLC*, 726 F.3d 85 (2d Cir. 2013). Pet. App. at 13a. On January 13, 2014, this Court denied a petition for writ of certiorari in *Dejesus*, 134 S. Ct. 918 (2014). No significant legal developments have taken place since this Court denied the petition in *Dejesus*. Therefore, the Petition should be denied for this reason alone.

Rule 10 further provides, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The asserted error here is the misapplication of a properly stated rule of law, the *Twombly* and *Iqbal* decisions. Landers' Petition essentially asks this Court to reconsider its *Twombly* and *Iqbal* decisions, which the Ninth Circuit correctly applied in this case. Since the Ninth Circuit followed the decisions of *Twombly, Iqbal* and the Second Circuit in *Dejesus* and since Landers has not shown a compelling reason to grant certiorari pursuant to Supreme Court Rule 10, the petition for writ of certiorari should be denied.

II. RESPONDENTS OBJECT TO THE QUESTION PRESENTED

Respondents object to the "question presented" based on what occurred in the proceedings below. The Ninth Circuit did **not** hold that Landers must support his overtime allegations with "detailed facts demonstrating the time, place, manner, or extent of their uncompensated work." The Ninth Circuit held:

> Notably absent from the allegations in Landers's complaint, however, was any detail regarding a given workweek when Landers worked in excess of forty hours and was not

> paid overtime for that given workweek and/ or was not paid minimum wages.

Pet. App. at 20a. The Ninth Circuit **expressly** said:

> We decline to impose a requirement that a plaintiff alleging failure to pay minimum wages or overtime wages must approximate the number of hours worked without compensation. **However, at a minimum the plaintiff must allege at least one workweek when he worked in excess of forty hours and was not paid for the excess hours in that workweek, or was not paid minimum wages.** Landers's allegations fell short of this standard, and the district court properly dismissed his complaint for failure to state a plausible claim.

Pet. App. at 21a (emphasis added).

III. LANDERS WANTS ONLY TO UNLOCK THE DOORS OF DISCOVERY

Without meeting even the very minimum standard set by the Ninth Circuit, Landers wanted to unlock the doors to discovery based on a class action complaint. Because his "complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise." *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009). As the *Iqbal* court held, "[T]he Federal Rules also do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Id*.

The real question in these class action FLSA cases is when do plaintiffs get to conduct discovery. At the oral argument before the Ninth Circuit, the panel engaged in a colloquy with Landers' attorney. Judge Rawlinson said, "So I find it hard to believe that he wouldn't have some idea of when he was required to work overtime before putting the defendant to the task of bringing forth all those records." Res. App. at 4a-5a.

Unlike other motions to dismiss, this motion was related to the merits. In his Petition, Landers ignores the part of Rule 8(a)(2) requiring a "**showing** that the pleader is entitled to relief." *Iqbal,* 556 U.S. at 677-78 (emphasis added). All of the allegations detailed by Petitioner on page 24 of his Petition that Respondents allegedly produced and concocted false payroll records, required and commanded Petitioner to work off the clock and required Petitioner to certify that he was not working during periods of time when Respondents had actual knowledge he was working could all be true and yet not establish that any overtime is owed to Landers. Landers' complaint is nothing more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, citing *Twombly*, 556 U.S. at 678. The actual payroll records submitted by the Respondents to the district court refuted the substance of Landers' allegations in his complaint. Dkt. 7, Exhibit A, U.S. District Court.

Moreover, the Affidavit of Brady Wells submitted in Pet. App. at 64a-65a addressed the other allegations in Landers' complaint. He said:

> 7. During his employment with Quality, Greg Landers was always paid piecework plus overtime whenever he worked over 40 hours in a workweek.
>
> 8. In 2011, Landers made frequent requests for time off. He often did not want to work even a 40-hour week.

Pet. App. at 65a. In the absence of the identification of even one workweek when Landers worked over 40 hours and was not paid overtime, his complaint should be dismissed. The Petition should be denied.

IV. LANDERS' PETITION IS ABOUT HIS LAWYERS

This is a lawsuit about plaintiffs' lawyers in class action FLSA litigation. On the same day when Respondents filed their motion to dismiss, Landers filed his Motion for Circulation of Notice of the Pendency of this Action Pursuant to 29 U.S.C. § 216(B) and For Other Relief. Dkt. 9, U.S. District Court.

In *Dejesus v. HF Management Services, LLC*, 726 F.3d 85 (2d Cir. 2013), the plaintiff's counsel, like Landers' counsel, declined to attempt to amend her complaint to add specifics while the district court kept the door open for her to do so. The Second Circuit said, "We would like to believe that the decision not to amend was made for some reason that benefited Dejesus, rather than as an effort on counsel's part to obtain a judicial blessing for plaintiff's counsel in these cases to employ this sort of bare bones

complaint." *Id*. at 90. Landers' Petition is an effort on counsel's part to obtain a judicial blessing for plaintiff's counsel in these cases to employ a bare bones complaint. The real objective is not to represent the individual plaintiff such as Landers but to represent an FLSA class.

At the oral argument before the Ninth Circuit, Judge Kleinfield said:

> Why wouldn't you do it anyway unless this action is just for the lawyers instead of for the plaintiffs? I mean if it's just for the lawyers, you'd rather not limit it to one plaintiff's piddly little overtime possibly if your only guy who's come forward is owed $742 it's sort of not worth fooling with and you don't want the defendants to know they've got such a small deal that they're facing. I can't see why you would write a complaint this way and refuse to amend it unless the only party seeking money is the attorneys for representing a whole bunch as opposed to a plaintiff trying to get his time and a half. I mean if he did plead the way that form that I read you, at the beginning of the argument says to plead, it would make it perfectly obvious that they could just give you an offer of judgment for a little more than your claim and it would be over. And I can't see why you wouldn't do that and get the money for the client unless this case isn't for the client, it's for the lawyers.

Res. App. at 9a-10a.

Landers admits that without discovery, he cannot state a claim for relief. In his Opening Brief to the Ninth Circuit, Landers said, "Landers does not seek leave to amend his complaint to meet the District Court's legally erroneous standard, nor does he believe he could meet that standard." He said, "Without discovery Landers cannot provide a good faith approximation of his damages because of the week to week variation in the amount of piecework he performed and the hours he worked." Ninth Circuit, Appellant's Opening Brief, p. 25 and n. 6. Clearly, if there had been any workweek when Landers worked over forty hours and was not paid time and one-half, he could have told the court.

V. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT

Landers argues that the Ninth Circuit's decision conflicts with this Court's decisions in *Erickson v. Parduce*, 551 U.S. 89 (2007), and *Johnson v. City of Shelby Mississippi*, 574 U.S. ___, 135 S. Ct. 346 (2014). In *Erickson*, this Court pointed out that petitioner had been proceeding from the litigation's outset without counsel. This Court held that a pro se complaint however artfully pleaded must be held to less stringent standards than formal pleadings drafted by lawyers. It concluded that the petitioner's case could not be dismissed on the ground that petitioner's allegations of harm were too conclusory to

put these matters in issue. Here, the complaint was drafted by a class action lawyer, not a pro se litigant.

Furthermore, in *Johnson*, this Court held that no heightened pleading rule required the plaintiff seeking damages for violations of constitutional rights to invoke Section 1983 expressly in order to state a claim. This Court pointed out that its decisions in *Twombly* and *Iqbal* were not on point:

> . . . for they concern the *factual* allegations a complaint must contain to survive a motion to dismiss. A plaintiff, they instruct, must plead facts sufficient to show that her claim had substantive plausibility. Petitioners' complaint was not deficient in that regard. Petitioners stated simply, concisely and directly events that, they allege, entitled them to damages from the City.

135 S. Ct. at 347.

The Ninth Circuit did not require a heightened pleading standard in regard to a legal theory in Landers' complaint. Rather, the Ninth Circuit addressed the **factual** allegations an FLSA complaint for overtime must contain to survive a motion to dismiss. The Ninth Circuit held:

> However, at a minimum the plaintiff must allege at least one workweek when he worked in excess of forty hours and was not paid for the excess hours in that workweek, or is not paid minimum wages. Landers's allegations fell short of this standard, and the

> district court properly dismissed his complaint for failure to state a plausible claim.

Pet. App. at 21a. Therefore, the Ninth Circuit's decision does not conflict with the post-*Twombly* and *Iqbal* decisions of this Court.

CONCLUSION

This Petition raises no significant or important issues. The Ninth Circuit's well-considered opinion on the required factual content of an FLSA overtime class action complaint is in accord with the published decisions of the First, Second and Third Circuits. There is no circuit split. Since the Petitioner has not established any compelling reason for the Court to grant the Petition, review by this Court is unnecessary and unwarranted. Respectfully, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE
NINTH CIRCUIT COURT OF APPEALS,
CIRCUIT JUDGES KLEINFELD,
GILMAN & RAWLINSON
NOVEMBER 8, 2013

GREGORY LANDERS v.
QUALITY COMMUNICATIONS
CASE NO. 12-15890

Sniegocki — Déjà vu I suppose.

Rawlinson — All over again.

Sniegocki — All right. Good morning, again and may it please the Court, my name is Dana Sniegocki and I'll be arguing this appeal on behalf of the appellant, Gregory Landers. I suppose Landers is a character you are slightly familiar with at this point.

Kleinfeld — This is a whole different deal in terms of why he lost. Let me ask you about the sufficiency of his complaint.

Sniegocki — Okay.

Kleinfeld — I used to like when I was representing a plaintiff to give the defense as little information as possible so that they might get sandbagged not realize what a problem they have. And a great tool for doing that was the forms at the back of the federal rules of civil procedure which has its uses too. There is this Form 11 which is just wonderful, a complaint for

negligence. It's not the same as an FLSA complaint, but it gives you an idea. Because the pleading forms at the very beginning, the federal rules say they are sufficient. That's all you have to do. Just pre-*Twombly,* just notice pleading. You state the jurisdiction and then it says you have to say the date and the place where the defendant negligently drove a motor vehicle against the plaintiff and as a result, the injury, lost wages, pain and suffering and then incurred medical expenses of blank. Therefore, plaintiff demands judgment against the defendant for blank and the forms indicate you're supposed to fill in the blanks. Now that seems to be what bothered the district judge here. He said an approximation will do, but this fellow doesn't even approximate. He doesn't even say I was supposed to work 11, 12 hours a day and they were just giving me straight time. And he doesn't say anything except that there was a violation of the FLSA basically. Why, and then I thought when I first started reading this well, obviously this should have been a dismissal with leave to amend out of dismissal to without leave to amend but then I read the plaintiff saying we don't want to amend. We don't have that information and well, if they don't want to amend, then they don't get leave to amend. And it wouldn't mean anything anyway, so why isn't the complaint insufficient

because even under the barest *pre-Twombly, pre-Iqbal* notice pleading, it still didn't say enough about what this lawsuit is for.

Sniegocki Well, first off, I would like to address the point regarding the district court not granting leave to amend. I do believe that that is incorrect. The district court should have absolutely . . .

Kleinfeld But . . .

Rawlinson Even if the . . .

Kleinfeld You didn't want it.

Sniegocki It's true, we did not want it under the standard that . . .

Kleinfeld You told the district judge you didn't want it.

Sniegocki We did not want it under the standard that the district court was requiring us to plead. Having us to be able to plead that kind of specificity . . .

Kleinfeld He didn't ask for specificity, he asked for approximation.

Sniegocki He did ask for, right, approximate wages owed, the overtime hours that were worked and I believe it was perhaps the dates on which . . .

Kleinfeld It's just a pleading. It doesn't have to be under oath. It can be an approximation. It doesn't have to be under oath.

Sniegocki The plaintiff is without that information, that's information that's contained within the appellee's records . . .

Kleinfeld You don't have some feel for when he would generally go to work in the morning, coming home at night?

Sniegocki Well, I, in the kind of work that the appellee does here, you know, he's a blue collar worker, he's . . .

Kleinfeld Everybody knows when they set the alarm for and when they leave for work and how long it takes them to get there and how much complaining they're getting from their family about being late for dinner. Everybody knows that kind of thing.

Sniegocki I think the complaint does, it does not provide for the approximations but the appellee's, the appellants position is that it does not require that, there is no requirement . . .

Rawlinson But the judge disagreed with that. And *Iqbal* and *Twombly* tell us there has to be some level of detail. You can't just say you owed me overtime and you didn't pay me overtime, I win. There has to be some level of detail and if you go to work every single day, you have some inkling as to, you know, I put in a long day today, you know, a lot of people keep journals as to when they're working, especially when they're working overtime. So I find

it hard to believe that he wouldn't have some idea of when he was required to work overtime before putting the defendant to the task of bringing forth all those records.

Sniegocki I understand that. I think the, you know, first of all in the line of work that I do and my firm does, we love the plaintiffs that do keep the journals, Unfortunately it is very rare for . . .

Kleinfeld Without the journals, here's the kind of underlying structural problem here. As you know from my question, I see it the same as Judge Rawlinson. I know when I set my alarm clock and when I look at my watch and think, gees, better get to court. And I know how late I can get home without my wife complaining that I'm late. And I think most people know that kind of thing. But even aside from how much he's likely to know, when you read this complaint, it really doesn't say I worked a lot of overtime. It says this company has a procedure which is not consistent with the Act. Well, when you're in law school, you walk home from class and you spot torts all over the place. But since you are not the person who suffered an injury from the tort, your spotting the tort is immaterial to any lawsuit and this complaint reads kind of like that. He's spotting a company that is not following the rules, but he's not saying they hurt him.

Sniegocki Well, he is alleging that he did work more than 40 hours a week. I can point you to paragraph 19 of . . .

Kleinfeld I'm looking at 19 and he's talking about the compensation system.

Sniegocki Right.

Kleinfeld He's not talking about himself. I mean, he could say all the same bad stuff about the bad compensation system and it would be perfectly consistent to say but I never worked any overtime myself.

Sniegocki I do believe that in paragraph 19 . . .

Kleinfeld Where does he say?

Sniegocki I mean, he does allege that when in fact there were times that he worked over 40 hours per week.

Kleinfeld Where?

Sniegocki I don't . . .

Kleinfeld We are looking at it.

Sniegocki [Fading away] I have it summarized here.

Rawlinson We want the actual language from the complaint.

Sniegocki I understand.

Kleinfeld Your brief and a reference and all that stuff is not as good as actual, the thing itself.

Rawlinson That's what I tell my law clerks, source stuff, source documents, I want a source document.

Sniegocki Okay, paragraph 19 here, it says the compensation system used by the defendants for the plaintiff, for the plaintiff, and those similarly situated was a de facto "piecework no overtime" system, meaning that such employees which would include the plaintiff here were being paid a certain amount . . .

Kleinfeld Not necessarily.

Rawlinson Right.

Kleinfeld I don't know if it's him. I mean . . .

Sniegocki Well, the compensation . . .

Kleinfeld You could say that even though you've never been a cable installer, I assume I don't really know. Are you a cable guy?

Sniegocki I'm not a cable guy.

Rawlinson [Laughter]

Kleinfeld Even you could say and probably did say that this company has an illegal compensation system and that its employees are working overtime without getting time and a half that they're entitled to. Even though you've never worked there, and he could say it too.

Sniegocki I think if you'd look at the second line here, it says, the first line says the compensation system used by the defendants for the plaintiff and for those similarly situated . . . So there he's saying . . .

Kleinfeld Yes, that's about the system, not about how long he worked.

Sniegocki Right which compensation system applies to him.

Rawlinson So on line 24 and 25 is where you come the closest. You said they failed to pay any overtime wages on the additional and substantial portion of the earnings of the plaintiff. That's the closest you come.

Sniegocki Uh, yes.

Rawlinson And I'm not sure that's close enough.

Gilman You know, let me ask you this. I'm particularly puzzled by the fact that Landers filed a declaration in response to Quality's motion to dismiss and I'm looking at paragraph 5 of that declaration where more detail is given. I mean during that period, I was not paid piece rate, a training wage of about $8 an hour, the daily shift was typically between 10 and 12 hours, yet they pay me only for 8 hours. I mean that's more detail but that was never, that's absent from his complaint.

Sniegocki It is true that that is absent from the complaint, but the complaint is filed to just really to put Quality on notice of . . .

Gilman But once you were aware that maybe this was insufficient, why didn't you ask the court to allow you to amend and put the kind of thing in the complaint that you put in the response to the motion to dismiss?

Sniegocki Well I believe that we didn't think that kind of sufficiency was necessary for . . .

Rawlinson Well, then why put it in the declaration if you didn't think it was necessary?

Sniegocki Well, necessary for the complaint.

Kleinfeld Why wouldn't you do it anyway unless this action is just for the lawyers instead of for the plaintiffs? I mean if it's just for the lawyers, you'd rather not limit it to one plaintiff's piddly little overtime possibly if your only guy who's come forward is owed $742, it's sort of not worth fooling with and you don't want the defendants to know they've got such a small deal that they're facing. I can't see why you would write a complaint this way and refuse to amend it unless the only party seeking money is the attorneys for representing a whole bunch as opposed to a plaintiff trying to get his time and a half. I mean if he did plead the way that form that I read you, at the beginning of the argument says to plead,

it would make it perfectly obvious that they could just give you an offer of judgment for a little more than your claim and it would be over. And I can't see why you wouldn't do that and get the money for the client unless this case isn't for the client, it's for the lawyers.

Sniegocki Well no, it's not just a, the case is not about the lawyers. The case was filed as a putative collective action, so it was on behalf of not just Landers, but all the other installers who worked for Quality. That is really the foundation of the complaint here. And I do want to note, the notation in the appellant's opening brief about not seeking leave to amend or feeling that amending the complaint wouldn't matter really comes down to the kind of specificity that the district court was requiring. It's just something that Landers cannot give. The district court's order specifically stated factual allega-, that in order to properly plead a FLSA claim, he would need to include factual allegations that provide for an approximation of the overtime hours.

Kleinfeld Approximation, so he could say gee, you know, judging from when I left for work and when I got home, ordinarily, and how long the drive takes, I must have been working 2, 3 hours a day of overtime every day for 8 months and that gives you a good approximation and

push it up a little bit on the assumption you might have left something out. And then you can amend up or down as you get some more information in discovery.

Sniegocki Another thing, okay, I do understand that, but it wasn't only the approximation of hours worked that the district court was requesting. He also . . .

Kleinfeld Wage rate would matter too, I mean if he gets $9 an hour . . .

Sniegocki The issue comes in with the rate.

Kleinfeld Or $14 an hour, that will affect what time and a half is.

Sniegocki That is correct.

Kleinfeld And I would think he'd know his wage rate.

Sniegocki He doesn't know his wage rate. The problem is that Mr. Landers works under a piecework system and under a piecework system, he's paid for each specific piece.

Kleinfeld So he knows how many installations he does each day.

Sniegocki Right, but each thing is paid at a different dollar amount so his piecerate earnings will vary day to day, they'll vary hour to hour, they'll vary day to day and his regular rate will fluctuate from week to week. He doesn't have a regular hourly rate.

Kleinfeld Oh it's not like $400 per installation?

Sniegocki No. He is paid $2 to you know put this plug in the wall. I'm inventing this obviously. Five dollars for something else, so he is never paid the same amount of money every day. He is never paid the same amount of money every week. He could not specify with even an approximation what his regular hourly rate would be. It is going to fluctuate, so on the weeks where, you know, the company is dead and there's not a lot of business, his regular hourly rate would be significantly lower than it would be on days where he has a lot of work and he's working . . .

Kleinfeld Is there something in the record that shows this? I had assumed it would be per installation. I didn't realize that it would be so . . .

Sniegocki Well, we don't have the records, we didn't even get to the discovery phase, we don't have any indication. I mean this is just what the plaintiff alleges that he was paid on a piecework basis. We didn't have an opportunity to get . . .

Gilman You've got paystubs, right? I mean he knew . . .

Sniegocki I don't even know that he had, he may have had one or two paystubs that he kept, but he did not, we didn't have the

whole slew of them to present and do an analysis and say . . .

Gilman — The checks from the company are direct deposits that show dollars and he knew how many hours . . .

Sniegocki — Well he might not have known, that's the other thing is that even if he knew, you know, in this week he earned $1,500, if his paystubs don't show how many hours he worked or if he doesn't even retain those paystubs at the time he files a complaint, he would not be able to approximate his hourly wage. The amount of overtime hours he . . .

Kleinfeld — Do we have a sworn declaration?

Sniegocki — Sorry.

Kleinfeld — These things that you're saying now sound extraordinary to me. Do we have a sworn declaration from your client that says in maybe an opposition to the motion to dismiss?

Sniegocki — Yeah, there is this sworn declaration that specifies how he was paid.

Kleinfeld — I know it specifies it. It's all statutory terms. It's the kind of thing that I could draft for an imaginary client. I didn't see anything that says here's why I can't approximate my pay but I might have missed it so I'd like you to point to it.

Sniegocki Well, I don't know that there's any language in there that includes that he cannot because the decision requiring him to approximate this only came after the motion to dismiss. So he had no basis to specify here's why I can't make an approximation. He didn't know that an approximation was required of him.

Rawlinson Alright counsel, you're almost out of time.

Sniegocki I am.

Rawlinson We'll give you a minute or two for rebuttal.

Sniegocki Thank you.

Rawlinson We'll hear from the defense.

Kotchka Yes, Your Honors. Malani Kotchka again for Quality Communications. You were inquiring whether there were, the piece rates were in the file in the record, they are. They're located at SE 12-19. They're called pay structure sheets and on these sheets are listed the pieces or the rates for the different tasks that the installers perform and it's also an acknowledgment signed by Mr. Landers saying he acknowledges that it's his responsibility to keep time and time has to be accurate and also that he acknowledges that he is paid a piece rate plus overtime system. And indeed, the payroll records which we put in with our motion to dismiss show that he was paid overtime for the

weeks when he worked over 40 hours a week. Judge Gillman, you talked briefly about paragraph 5, I think, of his affidavit. The problem with this and the reason why I think he has not made a bigger presentation about his estimates in paragraph 5 are that all of these allegations about the training period occurred outside the statute of limitations. He filed his action in December 2011. These events, if they were even true, would have occurred back in September 2009 and so they would have been beyond the two-year statute. Even then, you can't tell from this paragraph that he worked over 40 hours in a week. He says he regularly worked with other installers and their shift varied between 10 to 12 hours, sometimes he got a lunch break, sometimes he didn't. Even using the arithmetic that he uses in this section, you don't automatically get to any workweek that he worked over 40 hours and wasn't paid overtime. And so I think that that's probably . . .

Kleinfeld The declaration that you just . . .

Kotchka The declaration is at SE 53-55. But the district court of course, didn't reach this. We had moved for summary judgment as an alternative basis, but the district court did not go that far. The district court relied on the complaint because there is a growing body of law in the district courts in Nevada that are requiring

these wage and hour suits to allege an approximate amount of hours worked and overtime paid and the hours, the overtime hours.

Rawlinson I don't know if I would go that far, but I think that there has to be a little more detail, how much detail would meet the *Iqbal* and *Twombly* standards, I'm not sure, but I'm not sure that each employee would be able to give a detailed approximation of the number of hours worked and the wages, but they should be able to give a little more detail other than I just worked overtime.

Kotchka Yes Your Honor, and the other district court case is *Hernandez v. Hillsboro Enterprises.* It is cited in our Rule 28(j) letter that we submitted to the Court.

Rawlinson Is it your?

Kleinfeld Sorry, go ahead.

Rawlinson Is it your understanding also that the plaintiff declined to amend the complaint when given the opportunity to do so?

Kotchka Yes, yes, and he is quite candid in his briefs that he does not want another opportunity. He states on page 25 of his opening brief that he does not seek leave to amend his complaint because he cannot be any more specific. He admits in footnote 6 on that same page that without discovery, he cannot prove any

damages. On page 5 of his reply, he admits Landers provides no such hours worked and overtime owed statement in his complaint because he cannot in good faith provide one. Thus, candidly contrary to *Iqbal,* he is trying to unlock the doors of discovery with nothing more than conclusions. I have brought to your attention a Second Circuit case that just came out. It's called *De Jesus v. H F Management Services* . . .

Kleinfeld . . . separation, I'm not really clear. Is paragraph 5 of the declaration, is that all the time barred by the limitations?

Kotchka Yes, Your Honor. And that's why he's . . .

Kleinfeld That is approximation. In that paragraph, he says his daily shift was typically between 10 and 12 hours, often no lunch break, he only got paid for 8, his rate was $8 an hour so he's working more than 40 hours a week without overtime. That is just what the district judge was looking for in the complaint but, and that is an approximation but that's not the approximation for the period covered by the complaint?

Kotchka No, Your Honor, it's not. And that's why there are no time frames. He refers to this training wage, but he doesn't tell you when he was making that training wage and I think it was a very deliberately calculated on his lawyer's part because it's outside the statute of

limitations and if he put a date on it, it would be easy to see that and to point that out to the Court.

Gilman — Did you ever _____ As far as I can tell, this is somewhat a case of first impression in the Ninth Circuit as the Ninth Circuit, I couldn't find a case that's confronted this precise question of how much does a plaintiff have to plead in a Fair Labor Standards Act case. Are you aware of any case like that?

Kotchka — No, Your Honor, I think you're right. In terms of the district court's adoption of this approximation of the hours worked and the rate, I think this is new for the Ninth Circuit. I could not find any case that addressed it specifically either, but that's why it's important for you to look at the Pruell case from the First Circuit and this *De Jesus* case which I was just about to tell you from the Second Circuit because the Second Circuit adopted precisely the same test that our district courts are using in Nevada. They say it's a context specific task in that the complaint was devoid of any numbers other than the numbers lifted from the statute, which is the 1.5 times the rate over 40 and that's exactly what he alleges in paragraph 24 of his complaint.

Rawlinson — What about the declaration language that Judge Kleinfeld read to you. If it were timely, would that meet the pleading

requirement that's been articulated by the Nevada district court?

Kotchka I think it would. If he clearly says he worked over 40 hours a week and he gives you an estimation of the hours and what he was paid and why that doesn't comply with this statute, I think that does meet the criteria.

Rawlinson But so your position is that he is unable to amend the complaint to include that type of detail for the years in question.

Kotchka Correct. And one of the things the *De Jesus* court pointed out was that in that case too, the lawyer or the plaintiff was offered an opportunity to be more specific and that lawyer turned it down as well and the Second Circuit said this, "While we would like to believe that the decision not to amend was made for some reason that benefitted *De Jesus* rather than as an effort on counsel's part to obtain a judicial blessing for plaintiff's counsel in these cases to employ this sort of barebones complaint." And that's exactly what I think is going on here. Mr. Greenberg wants a blessing from this Court that the degree of specificity he put in the complaint is okay, that he doesn't have to allege anything more and that's because he's not really bringing this case on behalf of Mr. Landers, he's bringing the case on behalf

of this class that he hopes that can be conditionally certified.

Rawlinson What page was that you were reading from in *De Jesus?*

Kotchka In the *De Jesus* case, it's at page 90. And the cite is 726 F.3d 85.

Rawlinson Right.

Kotchka It came out in August of this year. So anyway, we have two circuit decisions on this issue now, we have the First and we have the Second, we hope that the Ninth will soon follow. The other thing I wanted to briefly raise about Mr. Landers is that we also have a claim preclusion argument because Mr. Landers sued Quality in December 2011 in federal court and then went over to state court on March, in March 2012.

Kleinfeld It looks to me like you're tying to get res judicata from a judgment that's not final. Is it? At least when you were briefing it . . .

Kotchka Okay.

Kleinfeld And you don't get res judicata from a nonfinal judgment.

Kotchka Well, it is final under Nevada law. Under Nevada law, until it has been reversed on appeal, the judgment is viewed as final.

Kleinfeld I don't think they give you res judicata effect from it under Nevada law, do they?

Kotchka Yes, they do. They do specifically in the Nevada case which is on point is the *Five Star Capital Corp. v. Ruby* case. There are only three elements for claim preclusion. One is the parties are the same, the final judgment is valid and the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. The Nevada Supreme Court has said that in the *Gandhour* case that a judgment is final until it's reversed on appeal. So they do give res judicata effect to the lower court judgment.

Kleinfeld In the Landers judgment, it wasn't a judgment on the merits, it was just a judgment that the court lacked jurisdiction because he had not yet exhausted his administrative claim and the court could entertain the claim on the merits after he exhausted his administrative process.

Kotchka That was the holding, Your Honor, but the court did issue a summary judgment and it is a judgment under Nevada law.

Rawlinson Well, we don't have to get to that issue unless we . . .

Kotchka Correct. Unless you reverse the district court on the *Iqbal* finding, you don't have to.

Rawlinson Well, could, was this issue raised to the district court or was the Nevada case not final when it was at the district court level?

Kotchka It was not final when it was before the district court, it came out afterwards and that's why we put it in our supplemental excerpts of record.

Rawlinson Well, what we could do is if we decide to, and I'm just speaking for myself, and I'm just musing, if we decided to vacate and remand to the district court, the district court could also consider the res judicata.

Kotchka That's true.

Rawlinson Okay.

Kotchka That's true. Unless you have any questions of me, I think I'm through.

Rawlinson Thank you. Alright, we'll give you one minute for rebuttal.

Sniegocki Okay, I wanted to quickly discuss the, appellee's counsel mentioned that the time that is approximated or the hours worked that were specified in the declaration, that there were some kind of basis for not including a date because that date was outside of the statute of limitations. The FLSA actually enjoys a two-year statute of limitations as a default, but there is a potential for a third year if

the plaintiffs can show that there was a willful violation, meaning . . .

Kleinfeld Why wouldn't you plead this paragraph 5 and supplementary excerpt 54, why wouldn't you just plead that in the complaint? It's just what the district judge asked for.

Sniegocki The district judge asked for it in his decision. We were not aware that that was a requirement. There was no, there really is no authority in this circuit that such specificity is a requirement. The district judge in his order relied on . . .

Kleinfeld Why didn't you move for leave to amend?

Sniegocki The judgment was entered. It was entered without leave to amend and at that point we filed the appeal.

Rawlinson Oh but in your brief you say that you think the district court applied the incorrect standard and you don't seek leave to amend.

Sniegocki Right. We do not seek leave to amend under that standard because as I explained before, it would be impossible for us to give the kind of specificity that the district judge required. What's in that declaration is not all of the specificity that the district judge required, he required . . .

Kleinfeld It looks like it to me.

Sniegocki He required a lot more. He required factual allegations providing for an approximation of the overtime hours worked, meaning every hour that . . .

Rawlinson That means your best guess, with some specificity. If we think that that's sufficient, why wouldn't you take a chance at least to try to appease the district court and satisfy the request for specificity? I don't understand.

Sniegocki Well perhaps we could have, perhaps we could have on that, but there was also this separate, these other two separate requirements that he plead his hourly wage and the amount of unpaid overtime wages that are owed. That was an impossibility at where we were with the record. There was no record in discovery. That information could have been supplemented in Rule 26 disclosures, but at the pleading stage, there was no way.

Rawlinson So you're saying that your client had no idea what his hourly wage was?

Sniegocki Absolutely not. His hourly wage was a straight piece rate . . .

Kleinfeld He must have said some idea how much money he made, I mean when you, when you try to . . .

Sniegocki His paychecks were . . .

Kleinfeld Buy things, you think about how much money you make and whether you can afford it.

Sniegocki It's true. His paychecks would vary from week to week. Like I explained he was paid . . .

Kleinfeld They varied from $18,000 to $300,000 per week or from . . .

Sniegocki That would be nice.

Kleinfeld From $900 to $1800 per week?

Sniegocki No, certainly, I mean, it would be on a smaller scale, but . . .

Kleinfeld That's what I mean and . . .

Sniegocki Can't come up with an hourly wage and . . .

Rawlinson Okay, if you as the attorney asks somebody, how much is your paycheck every week and they say anywhere between $1800 every two weeks or every month, between $1800 and $2000. Hey, how many hours a week do you approximately work? And you do the math.

Sniegocki I suppose in that sense, there could have been something that came up, but as I explained in the piecework realm, there is no typical hourly wage. It's not like we're talking about an hourly worker who makes $10 an hour.

Rawlinson Well that's not true. I worked in a factory for much of my younger life and there is, you get a set hourly wage and then additional money is added on to that depending on your productivity. So you can take the final salary that you get and divide that by the number of hours that you worked and that gives you your hourly wage.

Sniegocki I don't believe that there was any actual hourly wage paid to him.

Rawlinson Alright. Any other questions? Alright, thank you counsel. Thank you to both counsel. The case as argued is submitted for decision by the Court. That concludes our calendar for the week. We are adjourned.

EXHIBIT I

James E. Smith
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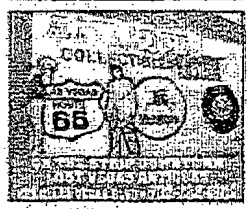

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COX CABLE OVERTIME LAWSUIT INFORMATION CENTER

FOR NEVADA INSTALLERS WORKING FOR COX SUBCONTRACTORS

COX CABLE INSTALLER OVERTIME LAWSUIT FOR UNPAID OVERTIME WAGES FOR NEVADA INSTALLERS

This website provides information on the currently pending lawsuit in Nevada seeking to collect unpaid overtime wages believed to be owed to Cox Cable installers in Nevada.

WHY WOULD COX INSTALLERS BE OWED OVERTIME?

Based upon information provided to the attorneys bringing this lawsuit, many or most Cox subcontractors would pay their installers on a "per job" or "piece rate" system. Those installers would often work more than 40 hours per week but would receive no extra overtime pay, just their "per job" or "per piece" payments. It is believed many installers worked very long hours, many hours in excess of 40 per week, and would be owed substantial sums of unpaid overtime wages.

It also appears some Cox subcontractors made up false or misleading records that appeared to show they were paying overtime to their installers when they were not. Those records do not prevent the installers from

collecting the actual overtime pay they are owed.

WHO ARE THE. DEFENDANTS IN THIS CASE?

Currently Cox Cable, Sierra Communications, VIP installs, and Quality Communications are defendants in this case. The attorneys handling this case are interested in hearing from installers who worked for any of those subcontractors or any other Cox subcontractors and who were not paid overtime.

HOW WOULD OVERTIME AMOUNTS OWED TO AN INSTALLER BE DETERMINED AND PROVED?

The process of determining overtime, which is time and one-half pay, owed to an installer, who was not being paid an hourly rate, is a little confusing. The best way to understand this is through an example:

Let's say the installer did $1000 of "piece rate" installations for a week and worked 50 hours. This means he was paid an effective hourly rate of $20 per hour (1000 divided by 50). But he got no overtime pay and should have been paid time and one-half, or $30 an hour, for the hours he worked over 40 during the week (a total of 10 hours). So he is owed the difference, or $10 an hour for 10 hours of overtime for the week, or $100 for the week.

In respect to proving the amounts of overtime owed to an installer, the amounts paid

each week to the installers is known from the payroll records. The hours they worked may not be accurately recorded by the subcontractors and it is believed some subcontractors created false time records showing installers did not work over 40 hours a week. Those false records do not prevent the installers from collecting their overtime pay. Nor do the installers have to have precise, exact, records of their hours of work each week. They can testify as to the typical, approximate, actual hours they worked and how false records were made and if that testimony is believed by the Court collect for their unpaid overtime hours. In addition, it is believed Cox has installation records that would help show the time records of some of its subcontractors are false.

WHAT CAN I DO TO TRY AND COLLECT MY UNPAID OVERTIME WAGES?

Contact this office at 702-383-6085 to find out about how to file a claim and for more information about this case. There is no charge to speak with an attorney and you do not need to give your name and all calls will be kept confidential. The time to file a claim (the statute of limitations) may be as short as two years from when you worked a week for which you were not paid overtime, so you may need to file a claim right away to keep your overtime pay from being lost forever. Or send us an email at leongreenberg at overtimelaw.com

WANT INFORMATION ON THE ATTORNEYS HANDLING THIS LAWSUIT?

Go to our firm's website, overtimelaw.com

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COX CABLE OVERTIME INFORMATION CENTER

FOR NEVADA INSTALLERS WORKING FOR COX SUBCONTRACTORS

COX CABLE INSTALLER CLAIMS FOR UNPAID OVERTIME WAGES FOR NEVADA SUBCONTRACTOR INSTALLERS

This website provides information on potential claims against Cox Cable subcontractors in Nevada for unpaid overtime wages. There are also five currently pending lawsuits in Nevada seeking to collect unpaid overtime wages believed to be owed to Cox Cable installers in Nevada. This website is for persons interested in those lawsuits and for persons who worked for other Cox Cable subcontractors not involved in those lawsuits.

WHY WOULD COX INSTALLERS BE OWED OVERTIME?

Based upon information provided to the attorneys running this website, it appears that many or most Cox subcontractors in Nevada would and do pay their installers on a "per job" or "piece rate" system. Those installers often work more than 40 hours per week but receive no extra overtime pay, just their "per job" or "per piece" payments. It is believed many installers worked very long hours, many hours in excess of 40 per week, and would be owed substantial amounts of unpaid overtime wages.

It also appears some Cox subcontractors have made up false or misleading records that appeared to show they were paying overtime to their installers when they were not. Those records do not prevent the installers from collecting the actual overtime pay they are owed.

WHO ARE THE DEFENDANTS IN THE CURRENT CASES?

Currently Cox Communications Las Vegas, Sierra Communications, VIP Installs, MC Communications, Pride Communications and Quality Communications are defendants in these lawsuits for overtime pay. The attorneys running this website are interested in hearing from installers who worked for any of those subcontractors or any other Cox subcontractors and who were not paid proper overtime.

HOW WOULD OVERTIME AMOUNTS OWED TO AN INSTALLER BE DETERMINED AND PROVED?

The process of determining overtime, which is time and one-half pay, owed to an installer who was not being paid an hourly rate, is a little confusing. The best way to understand this is through an example:

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In respect to proving the amounts of overtime owed to an installer, the amounts paid each week to the installers are known from the payroll records. The hours they worked may not be accurately recorded by the subcontractors and it is believed some subcontractors created false time records showing installers did not work over 40 hours a week. Such false records do not prevent the installers from collecting their overtime pay. Nor do the installers need to have precise, exact, records of their hours of work each week. They can testify as to the typical, approximate, actual hours they worked and how false records were made by their subcontractor employer. If that testimony by the installer is believed by the Court the installer can collect for their unpaid overtime hours. In addition, it is believed Cox has installation records that would help show the time records of some of its subcontractors are false.

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