No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 8 provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Following this Court's rulings in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), "lower federal court decisions seeking to apply the new 'plausibility' standard [have been] wildly inconsistent with each other, and with the conflicting decisions of the Supreme Court." *McCauley v. City of Chicago*, 671 F.3d 611, 622 (7th Cir. 2011) (Hamilton, J., dissenting).

In particular, the level of detail necessary to plead an overtime claim under the Fair Labor Standards Act ("FLSA") "has divided courts around the country." *Davis v. Abington Mem'l Hosp.*, 765 F.3d 236, 241 (3d Cir. 2014). There is "no consensus on what facts must be affirmatively pled to state a viable FLSA claim post-*Twombly* and *Iqbal*." *Landers v. Quality Communications*, 771 F.3d 638, 642 (9th Cir. 2014).

The question presented is:

Whether plaintiffs seeking overtime under the FLSA must support their allegations with detailed facts demonstrating the time, place, manner, or extent of their uncompensated work; or whether it is sufficient if plaintiffs' allegations give defendants fair notice of plaintiffs' claim for overtime and the grounds upon which it rests.

PARTIES TO THE PROCEEDINGS

Petitioner Greg Landers was the plaintiff in the district court and appellant in the Ninth Circuit. Respondents Quality Communications, Inc., Brady E. Wells, and Robert J. Huber were defendants in the district court and appellees in the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Greg Landers respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit is reproduced at App. 1a. The original Ninth Circuit opinion is available at *Landers v. Quality Communications, Inc.*, 771 F.3d 638 (9th Cir. 2014) and is reproduced at App. 22a. The district court's opinion is reproduced at App. 42a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its Opinion and Final Judgment on November 12, 2014. App. 22a. The Ninth Circuit recalled the mandate and issued an amended order and opinion on January 26, 2015. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 8 provides, in relevant part: "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2).

STATEMENT

Imagine a plaintiff files a complaint containing the following allegations:

1. I, John Doe, worked as a clerk for the past three years at a grocery store owned and operated by Defendant Smith.

2. I worked more than forty hours a week.

3. During my employment, my employer required his employees to clock out at the end of their scheduled shifts and continue working off the clock until the assigned work was completed.

Does the complaint state a valid claim under Rule 8?

Astonishingly, the answer to that simple question sharply divides the federal courts. That division, in turn, stems from a fundamental disagreement among judges over the breadth and scope of this Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

On the one hand, the complaint, while not rich in narrative factual detail, gives clear notice of the who (Smith), what (overtime), when (during the last three years), where (at the store), how and why (due to the employer's policy of requiring off-the-clock work). The complaint provides notice of the manner in which the defendant broke the law, and alleges facts which, if proven, would sustain a finding of liability.

On the other hand, jurists who take an expansive view of *Twombly* and *Iqbal* would find the complaint insufficient. In their view, much of the complaint would not be entitled to the presumption of truth because the complaint supposedly parrots the elements of the statute ("I worked more than forty hours a week") and makes statements deemed too "generalized" or

"conclusory" ("[M]y employer required its employees to clock out after reaching forty hours"). Moreover, the complaint, on this view, would fail to marshal enough facts to render the claim "plausible." Courts taking this view, like the panel below, would fault the complaint for failing to allege additional facts, such as:

- Alleging "that [the plaintiff] worked more than forty hours in a *given workweek* without being compensated for the overtime hours worked during *that* workweek[.]" App. 16a (emphasis added).

- "[E]stimating the length of [the plaintiff's] average workweek during the applicable period[.]" App. 17a.

- Estimating the "frequency of [the plaintiff's] unpaid work[.]" App. 20a.

- Estimating "the average rate at which [the plaintiff] was paid[.]" App. 17a.

- Estimating "the amount of overtime wages [the plaintiff] believes [he] is owed[.]" App. 17a.

Which side is right? The Question Presented, which seeks to capture the substance of this fundamental disagreement, bears repeating here: Whether plaintiffs seeking overtime under the Fair Labor Standards Act ("FLSA") must support their allegations with detailed facts demonstrating the time, place, manner, or extent of their uncompensated work; or whether it is sufficient if plaintiffs' allegations give defendants fair notice of

plaintiffs' claim for overtime and the grounds upon which it rests.

Simply put, the persistent disagreement on such a basic, foundational question of civil pleading is intolerable to courts, parties, and practitioners who have to deal with it every day. One federal judge summarized the prevailing sentiment best: "[W]hat was once uniform dogma about the pleading standard for most causes of action is being fragmented on a circuit-by-circuit—or sometimes a judge-by-judge—basis. We district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim." *See* Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 Suffolk U. L. Rev. 851, 852–53 (2008).

A brief description of the background and procedural history of this case follows. Section One describes the allegations contained in Petitioner's complaint. Section Two provides background on the pleading standards contained in Federal Rule of Civil Procedure 8. Section Three summarizes the procedural history of this case and the decisions below.

1. Petitioner's complaint, of course, runs in parallel to the hypothetical example discussed above.

The complaint describes Respondents as "providing electrical contracting services to the cable television industry, *e.g.*, installing, constructing, maintaining, modifying, various electrical installations, including . . . those

involving cable television service, computer internet (DSL) service and telephone service." App. 50a. The pleading identifies Petitioner as "an employee of [Respondents]" working as a "cable service installer[]" or "cable service technician[]," where he provided "such services to [Respondents'] customers," and "worked more than 40 hours per week for [Respondents.]" App. 48a, 50a, 54a.

Petitioner alleges Respondents broke the law in two ways: first, by falsifying payroll records to show that full overtime was paid when in reality little or no overtime was paid; and second, by requiring employees to perform work off the clock and without pay.

According to the complaint, "[t]he compensation system used by [Respondents] for [Petitioner] and those similarly situated was a *de facto* 'piecework no overtime' system." App. 51a. Under that pay scheme, "such employees were being paid a certain amount for each 'piece' of work they performed pursuant to a schedule, [but were] not being paid time and one-half their 'regular hourly rate' for work in excess of 40 hours a week." App. 51a. As the complaint further explained, under the "*de facto* compensation system," Respondents "would produce certain false and misleading payroll records indicating that . . . proper overtime or some measure of overtime was being paid to [Petitioner] and those similarly situated when, in fact, no such overtime was being paid whatsoever." App. 51a. To accomplish this scheme, "[Respondents] would falsely list certain 'overtime hours' and 'regular hours' and 'overtime compensation' on [Petitioner's] . . . pay stubs." App. 52a. These paystubs were "inaccurate" and "based upon completely fictitious and knowingly false

'regular rates' and 'hours worked' that were concocted by [Respondents]." App. 52a.

The complaint also alleges that Respondents forced Petitioner and other employees to work off the clock. From the complaint: "[Respondents] failed to pay [Petitioner and similarly situated employees] for all overtime hours that they worked . . . by requiring [Petitioner] and those similarly situated to [Petitioner] to record or otherwise certify that they were not working during periods of time that [Respondents] required and commanded them to work and when [Respondents] had actual knowledge they were so working." App. 52a.

2. The relevant substance of Rule 8 has remained unchanged since the Federal Rules were adopted in 1938: "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2).

Rule 8 supplanted the hyper-technical code pleading regime. Under the old rules, a pleader was required to plead "facts" rather than "conclusions." But the distinction proved utterly unworkable: "The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described." Weinstein & Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 Colum. L. Rev. 518, 520–521 (1957). The code pleading regime put tremendous "emphasis on the pleadings and . . . extensive related motion practice that served more to delay proceedings and less to expose the facts, ventilate the competing positions, or further adjudication on the merits." Arthur R.

Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 4 (2010) [hereinafter "Miller"].

Rule 8 emphatically rejected this approach. In its place, the Federal Rules created a pleading standard "that relied on plain language and minimized procedural traps." *Id.* at 4–5. Charles E. Clark, the principal architect of the Federal Rules, explained the justification for the change: "Experience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function." Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A.J. 976, 977 (1937).

The Rules' liberal pleading standard was exemplified by the Second Circuit's decision in *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). In that case, the pro se plaintiff alleged, in broken English, a series of grievances against a New York customs agent. *Id.* at 774. The plaintiff's complaint was poorly drafted and "failed to make any coherent legal presentation." Miller at 6. Charles E. Clark, then a sitting circuit judge, wrote for the court overturning the district court's dismissal of the case. *Dioguardi*, 139 F.2d at 774. Judge Clark reaffirmed that the Federal Rules required only "a short and plain statement of the claim showing that the pleader is entitled to relief" and did not require "facts sufficient to constitute a cause of action." *Id.* at 775. *See also* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 1220 (3d ed. 2004) [hereinafter "Wright & Miller"] (explaining that *Dioguardi*

illustrates the liberal pleading philosophy embodied in the Federal Rules).

For fifty years, the factual sufficiency of a complaint was measured against the standard this Court laid down in *Conley v. Gibson*, 355 U.S. 41 (1957). Under that standard, a pleading must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47. Courts "must accept as true all the factual allegations in the complaint." *See United States v. Gaubert*, 499 U.S. 315, 327 (1991). And "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. 45–46. Thus, according to *Conley*, a complaint satisfied Rule 8 without "set[ting] out in detail the facts upon which [the claimant] bases his claim." *Id.* at 47.

This Court replaced *Conley*'s familiar "no set of facts" standard with a "plausibility" requirement in *Twombly* and *Iqbal*. *Twombly* and *Iqbal* both involved extraordinary allegations. The *Twombly* plaintiffs accused essentially the entire telecommunications industry of engaging in a nationwide antitrust conspiracy. The complaint alleged parallel conduct in the market, but asserted no facts demonstrating that the market actors had entered into an agreement. *Twombly*, 550 U.S. at 556. This Court stated that while "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," Rule 8 "requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." *Id.* at 555 (citations omitted). The complaint's "[f]actual allegations must be enough to

raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true . . . ." *Id.* The Court did "not impose a probability requirement at the pleading stage." *Id.* at 556. Rather, the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged misconduct]." *Id.* The Court expressly disavowed "heightened fact pleading of specifics," requiring instead "only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

The allegations in *Iqbal* were even more remarkable: the plaintiff accused several high level United States officials of conspiring to impose harsh conditions of confinement on Muslims following the September 2001 terrorist attacks because of Muslims' race, religion, and national origin. *Iqbal*, 556 U.S. at 667. *Iqbal* articulated a two-step process for evaluating the sufficiency of a complaint. First, courts must review each allegation in a complaint and exclude from consideration those allegations that are stated in a "conclusory" fashion. *Id.* at 680–81.[1] Second, courts must "consider the [remaining] factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief." *Id.*

Both before and after *Twombly* and *Iqbal*, this Court has frequently intervened when lower courts seek to impose heightened pleading regimes inconsistent with the Federal Rules. For example,

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[1] The Court identified two statements—(1) that John Ashcroft was the "principal architect" of the alleged policy, and (2) that Robert Mueller was "instrumental" in adopting and executing it—which the Court deemed "conclusory" and "not entitled to be assumed true." *Id.* at 681.

in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, this Court observed "that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in [Section 1983 cases] with the liberal system of 'notice pleading' set up by the Federal Rules." 507 U.S. 163, 168–69 (1993). Similarly, in *Swierkiewicz v. Sorema N.A.*, this Court held that "the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2)." 534 U.S. 506, 512 (2002). *See also Hill v. McDonough*, 547 U.S. 573, 582 (2006) (unanimously rejecting the proposition that Section 1983 suits challenging a method of execution must identify an acceptable alternative because "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts").[2] These cases reflect the Court's frequent admonition that "adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts." *See Jones v. Bock*, 549 U.S. 199, 224 (2007).

Significantly, this Court has continued to pare back lower courts' attempts to impose heightened pleading standards—even after *Twombly* and *Iqbal*. The plaintiff in *Erickson v.*

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[2] *Cf. Gomez v. Toledo*, 446 U.S. 635, 639–40 (1980) (rejecting a heightened pleading requirement requiring plaintiffs asserting Section 1983 claims to anticipate immunity defenses); *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998) (rejecting a heightened pleading and proof requirement for Section 1983 plaintiffs asserting improper official intent).

Pardus, a prisoner, alleged that a liver condition resulting from hepatitis C required treatment that officials had "commenced but then wrongfully terminated, with life-threatening consequences." 551 U.S. 89 (2007). The lower courts had disregarded these allegations as "conclusory." *Id.* at 92. Citing *Twombly*, the Court reaffirmed that "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 93 (citing *Twombly*, 550 U.S. at 555). This Court held that "[i]t was error for the Court of Appeals to conclude that the allegations in question, concerning harm caused petitioner by the termination of his medication, were too conclusory to establish for pleading purposes that petitioner had suffered [harm]," *id.*, and the court of appeals' contrary conclusion "depart[ed] in [a] stark . . . manner from the pleading standard mandated by the Federal Rules of Civil Procedure." *Id.* at 90. Most recently, in *Johnson v. City of Shelby, Miss.*, the Court summarily rejected the Fifth Circuit's heightened pleading requirement mandating dismissal of complaints failing to invoke Section 1983. 135 S. Ct. 346, 346 (2014). The Court reasoned that the "Federal Rules of Civil Procedure are designed to discourage battles over mere form of statement," and reminded lower courts, once again, that "[f]ederal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 346–47 (citing Fed. R. Civ. P. 8(a)(2)).

3. Shortly after Petitioner filed his complaint, Respondents moved to dismiss. In their motion, Respondents asserted that Petitioner's allegations were "not true," and attached payroll

records purporting to show that Petitioner had been paid properly pursuant to the Department of Labor's piece rate regulations. App. 57a–58a. Respondents' motion did not address Petitioner's allegations that Respondents had falsified Petitioner's payroll records and "required and commanded" Petitioner to work off the clock without compensation. App. 52a. In his response brief, Petitioner reiterated the same payroll falsification and off-the-clock allegations from his complaint, stating "that foregoing allegations expressly allege a non-payment of overtime wages, and the facts supporting such claims. Nothing more is required under *Iqbal*." App. 69a.

The district court granted Respondents' motion to dismiss. The court discounted the facts asserted in the complaint as "general allegations," and held Petitioner had not stated a plausible claim because "[t]he complaint does not make any factual allegations providing an approximation of the overtime hours worked, plaintiff's hourly wage, or the amount of unpaid overtime wages." App. 43a–44a (citing *Lagos v. Monster Painting, Inc.*, No. 2:11–CV–00331–LRH–GWF, 2011 WL 6887116, at *2 (D. Nev. Dec. 29, 2011)). The district court entered judgment in favor Respondents the same day.

Petitioner appealed, and the Ninth Circuit affirmed in a published opinion authored by Judge Rawlinson and joined by Judge Kleinfeld and Judge Gilman (sitting by designation). App. 1a.[3] The court surveyed the case law from outside the circuit, observing that there is "no consensus" among either

[3] All references to the Ninth Circuit's opinion refer to the court's amended opinion.

district or circuit courts "on what facts must be affirmatively pled to state a viable FLSA claim post-*Twombly* and *Iqbal*." App. 10a. After completing its survey, the court laid down a bright-line rule: "[A] plaintiff asserting a claim to overtime payments must allege that she worked more than forty hours in a given workweek without being compensated for the overtime hours worked during that workweek." App. 16a. The court explained that a plaintiff must support that allegation with further factual development: "A plaintiff may establish a plausible claim by estimating the length of her average workweek during the applicable period and the average rate at which she was paid, the amount of overtime wages she believes she is owed, or any other facts that will permit the court to find plausibility." App. 17a.

The court then reviewed the allegations in Petitioner's complaint, but dismissed them as "generalized allegations." App. 19a. The court concluded that Petitioner's "allegations failed to provide sufficient detail about the length and frequency of [his] unpaid work to support a reasonable inference that [he] worked more than forty hours in a given week." App. 20a (citations omitted).

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT OVER WHETHER PLAINTIFFS SEEKING OVERTIME UNDER THE FLSA MUST SUPPORT THEIR ALLEGATIONS WITH DETAILED FACTS DEMONSTRATING THE TIME, PLACE, MANNER, OR EXTENT OF THEIR UNCOMPENSATED WORK.

This Court should grant review, for three fundamental reasons. First, the circuits and lower courts are in disarray. In the five years since *Twombly* and *Iqbal*, courts have become deeply mired in a state of confusion and disagreement over the breadth and scope of this Court's decisions. Second, the result reached by the panel is deeply flawed—inconsistent not only with the text of Rule 8, but with this Court's decisions in *Leatherman*, *Swierkiewicz*, *Twombly*, *Iqbal* and others. Third, the Question Presented is important and recurring. This case is not an isolated mistake, but rather a symptom of a larger problem: a civil pleading regime in disarray in the absence of further guidance from this Court.

A. The Lower Courts Are In Disarray.

Twombly and *Iqbal* have been subjected to a storm of criticism from judges, practitioners, and experts in the field of Civil Procedure. Many have criticized the decisions as wrongly decided. *E.g.*, Miller at 16–17. But the most fervent criticism has faulted the Court for creating confusion by introducing subjective and imprecise language—"implausible" and "conclusory"—and failing to adequately reconcile the decisions with the full body of the Court's pleading jurisprudence. *See, e.g.*, *Boykin v. Keycorp*, 521 F.3d 202, 213–14 (2d Cir. 2008) (Sotomayor, J.) (lamenting that "the appropriate standard for assessing the sufficiency of pleadings under Rule 8(a) is the source of some uncertainty in light of" *Twombly* and criticizing the Court for sending "mixed signals" in its decisions); *McCauley v. City of Chicago*, 671 F.3d 611, 622 (7th Cir. 2011) (Hamilton, J., dissenting) (criticizing "the new and subjective pleading standards" and observing that "lower federal court decisions

seeking to apply the new 'plausibility' standard [have been] wildly inconsistent with each other, and with the conflicting decisions of the Supreme Court"); *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 (D.C. Cir. 2008) (Brown, J.) (noting that "[m]any courts have disagreed about the import of *Twombly*."); Miller at 18–34 ("[I]nconsistencies and uncertainties of application have arisen, causing confusion and disarray among judges and lawyers.").

(1) *Twombly*, *Iqbal*, and pleading claims for overtime.

This confusion, of course, is not limited to claims for overtime under the FLSA. But FLSA claims provide a particularly illustrative case study on the extent to which lower courts have struggled in the wake of *Twombly* and *Iqbal*.

Section 207(a)(1) of the FLSA requires that "for a workweek longer than forty hours," an employee working "in excess of" forty hours shall be compensated for those excess hours "at a rate not less than one and one-half times the regular rate at which [she or] he is employed." 29 U.S.C. § 207(a)(1).

Post-*Twombly* and -*Iqbal*, courts examining FLSA complaints have divided into two groups: (1) courts that still apply a notice pleading standard, and (2) courts that apply a heightened pleading standard. *See Davis v. Abington Mem'l Hosp.*, 765 F.3d 236, 241 (3d Cir. 2014) (citations omitted) ("The level of detail necessary to plead a FLSA overtime claim poses a . . . difficult question—one that has divided courts around the country."); *Butler v. DirectSat USA, LLC*, 800 F. Supp. 2d 662, 667 (D. Md. 2011) (recognizing that "courts across

the country have expressed differing views as to the level of factual detail necessary to plead a claim for overtime compensation under FLSA"). Even within the heightened pleading camp, however, there are significant variations in the extent to which courts require plaintiffs to plead specific, enumerated facts in order to state a claim.

The Eleventh Circuit's opinion in *Secretary of Labor v. Labbe*, 319 Fed. Appx. 761 (11th Cir. 2008), is generally cited as the leading example in the notice pleading group. The complaint in *Labbe* "allege[d] that [the defendant was] a covered employer," "provide[d] a listing of the specific names of the covered employees," and "allege[d] that since June 16, 2002, [the defendant] repeatedly violated stated provisions of the FLSA by failing to pay covered employees minimum hourly wages and to compensate employees who worked in excess of forty hours a week at the appropriate rates." *Id.* at 763. In reversing the district court's dismissal of the complaint, the court observed that "[u]nlike the complex antitrust scheme at issue in *Twombly* that required allegations of an agreement suggesting conspiracy, the requirements to state a claim of a FLSA violation are quite straightforward." *Id.* And while the Secretary's "allegations [were] not overly detailed . . . a claim for relief for failure to pay minimum wage, to provide overtime compensation, or to keep appropriate records under FLSA does not require more." *Id.* at 764. A majority of district courts—too numerous to cite—follow the Eleventh Circuit's approach, requiring nothing more than

Rule 8's "short and plain statement of the claim showing that the pleader is entitled to relief."[4]

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[4] *See, e.g.*, *Pope v. Walgreen Co.*, No. 3:14–CV–439, 2015 WL 471006, at *2-4 (E.D. Tenn. Feb. 4, 2015) (rejecting the assertion that the complaint must include "dates that any Plaintiff worked, . . . the store(s) that any Plaintiff oversaw while in that position, the number of overtime hours that any Plaintiff worked in any week, or . . . an estimate of any Plaintiff's weekly hours" and criticizing the panel decision in this case as "overly harsh and inconsistent with the requirements of Rule 8(a), *Iqbal* and *Twombly*"); *Houston v. JT Private Duty Home Care, LLC*, No. 2:14–cv–245–FtM–38DNF, 2014 WL 4854528, at *4 (M.D. Fla. Sept. 29, 2014) (allegations that the plaintiff was an employee of the defendant, that she worked in excess of forty hours per week for the defendant, and that the defendant failed to pay her at one and one half her regular hourly rate for all hours worked in excess of forty hours was sufficient to state a claim); *Mitial v. Dr. Pepper Snapple Group*, No. 11–81172–CIV, 2012 WL 2524272, at *3 (S.D. Fla. June 29, 2012) ("[R]eject[ing] Defendants' argument that Plaintiff must plead with greater specificity the nature of his job duties, the precise number of hours worked in excess of 40 per week, or how he knows Defendants have actual or constructive knowledge of the unpaid overtime hours. The Complaint alleges that Plaintiff worked more than 40 hours per week and was not compensated overtime pay. . . . [the] FLSA does not require more."); *Martinez v. Regency Janitorial Servs. Inc.*, No. 11–C–259, 2011 WL 4374458, at *3 (E.D. Wis. Sept. 19, 2011) (collecting cases and rejecting the argument that the complaint "must contain additional details such as what type of work was performed, the amount of time the plaintiffs were required to work, . . . where the plaintiffs worked, what shift they worked, the type of work they performed at each location, the specific dates of their employment, and specifically when and how they were denied overtime."); *Monroe v. FTS USA, LLC*, No. 2:08–CV–02100–BBD–DK, 2008 WL 2694894, at *3 (W.D. Tenn. July 9, 2008) (rejecting the argument that the plaintiff must allege specific weeks in

Other courts have imposed heightened pleading requirements on FLSA claims. In *Pruell v. Caritas Christi*, for example, the court held insufficient a complaint alleging that the plaintiffs "regularly worked hours over 40 in a week and were not compensated for such time" because their employer "require[d] unpaid work through meal-breaks due to an automatic timekeeping deduction, unpaid preliminary and postliminary work, and unpaid training sessions." 678 F.3d 10, 13–14 (1st Cir. 2012). The court agreed that the plaintiffs had "described a mechanism by which the FLSA *may have been violated*[,]" . . . but had failed to foreclose the possibility that plaintiffs "could still have been properly compensated under the FLSA[.]" *Id.* at 14. The court held the complaint deficient because it lacked examples of unpaid time, a description of work performed during overtime periods, and estimates of the overtime amounts owed. *Id.*

Other courts, including the panel below, have since followed and expanded on *Pruell*. The Second Circuit, in *Lundy v. Catholic Health System of Long Island Inc.*, first articulated the "particular week" rule: "[A] plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours." 711 F.3d 106, 114 (2d Cir. 2013). The plaintiff alleged she worked without pay through meal breaks, before and after her assigned shifts, and during trainings. *Id.* at 115. The court faulted the plaintiff for failing to identify the frequency with which she worked overtime, a "particular week" where she was denied overtime, the number of breaks she

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which overtime was worked and the number of hours she was underpaid).

missed in a week, or the amount of uncompensated time she worked before and after her shifts. *Id.* The court conceded the plaintiff's complaint "theoretically put her over the 40-hour mark in one or another unspecified week (or weeks); but her allegations supply nothing but low-octane fuel for speculation, not the plausible claim that is required." *Id.*

The Ninth Circuit panel below gave *Twombly* and *Iqbal* their most muscular reading yet: requiring plaintiffs to "allege that [they] worked more than forty hours in a given workweek without being compensated for the overtime hours worked during that workweek[,]" and requiring plaintiffs to *further support those allegations* "by estimating the length of [their] average workweek during the applicable period and the average rate at which [they were] paid, the amount of overtime wages [they] believe[] [they are] owed, or [asserting] any other facts that will permit the court to find plausibility." App. 17a.[5]

The Third Circuit, although professing to follow *Lundy*, has adopted something more akin to a "heightened pleading light" standard for FLSA claims. Citing *Lundy*, the Third Circuit held that "in order to state a plausible FLSA overtime claim, a plaintiff must sufficiently allege [forty] hours of work in a given workweek as well as some uncompensated time in excess of the [forty] hours."

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[5] A minority of district courts have similarly imposed heightened pleading requirements in FLSA cases. *See, e.g.*, *Lagos*, 2011 WL 6887116, at *2 (requiring FLSA complaints to assert factual allegations providing an approximation of the overtime hours worked, plaintiff's hourly wage, and the amount of unpaid overtime wages).

Davis v. Abington Mem'l Hosp., 765 F.3d 236, 242 (3d Cir. 2014). Unlike *Lundy*, however, the Third Circuit concluded that a plaintiff could meet this standard by simply alleging "she 'typically' worked forty hours per week, worked extra hours during such a forty-hour week, and was not compensated for extra hours beyond forty hours . . . she worked during one or more of *those* forty-hour weeks," without the further factual enhancement required by the Second Circuit. *Id.* at 243 (emphasis in original).

(2) *Twombly*, *Iqbal*, and confusion generally.

Lower courts' wildly inconsistent application of *Iqbal* and *Twombly* is not a feature unique to overtime claims; it is symptomatic of a larger problem: courts' inability to reach any consensus on the state of this Court's pleading jurisprudence.

Courts are split on whether *Swierkiewicz* remains good law. *Compare Keys v. Humana, Inc.*, 684 F.3d 605, 609 (6th Cir. 2012) ("The Supreme Court's subsequent decisions in *Twombly* and *Iqbal* did not alter its holding in *Swierkiewicz*."), *with Guirguis v. Movers Specialty Servs., Inc.*, 346 F. App'x 774, 776 n.7 (3d Cir. 2009) ("[B]ecause *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz* . . . .").

Some courts suggest *Twombly* and *Iqbal* are limited to "expensive, complicated litigation." *See Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488–89 (6th Cir. 2009). Others have suggested that "[t]he required level of factual specificity rises with the complexity of the claim." *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011) (citations omitted). Yet others reject these same

propositions. *See West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 98 (3d Cir. 2010) ("*Iqbal* made clear that Rule 8's pleading standard applies with the same level of rigor in "'all civil actions.'").

Courts are split over whether the form complaints contained in the Federal Rules remain valid. *Compare Doe v. Butte Valley Unified Sch. Dist.*, No. CIV. 09-245 WBS CMK, 2009 WL 2424608, at *8 (E.D. Cal. Aug. 6, 2009) (calling into question whether, after *Iqbal*, the form complaints are still sufficient), *with Aktieselskabet*, 525 F.3d at 16–17 (reversing the district court's dismissal and reaffirming that the forms still "suffice under [the] Rules"), *and Hamilton v. Palm*, 621 F.3d 816 (8th Cir. 2010) (Loken, J.) (same).

The best and brightest judges in the country cannot agree on the resolution of simple, run-of-the-mine discrimination claims. *Compare, e.g.*, *Swanson v. Citibank, N.A.*, 614 F.3d 400, 405 (7th Cir. 2010) (Wood, J., joined by Easterbrook, J.) (holding that where a plaintiff alleges racial discrimination in lending and identifies the allegedly discriminatory bank and transaction—and nothing more—the plaintiff has stated a valid claim) *with id.* at 407 (Posner, J., dissenting) (concluding that the same "plaintiff has an implausible case of discrimination").

The primary source of confusion, however, remains *Twombly* and *Iqbal*'s subjective and poorly-defined fact-conclusion dichotomy and "plausibility" standard. As described by Professor Miller:

> The fact–legal conclusion dichotomy presented by *Twombly*'s first step is

> shadowy at best. Worse, the categories are likely to generate motion practice unrelated to the merits. Moreover, it is precisely what the drafters of the original Rules intentionally rejected as counterproductive and sought to eliminate by substituting "short and plain" and "claim for relief" for any reference to the troublesome code categories of "facts," "conclusions," "evidence," and "cause of action."

Miller at 24 (citing 5 Wright & Miller §§ 1215–1218 (discussing the pleading requirements of Rule 8); Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 Colum. L. Rev. 416 (1921) (noting that there is no logical distinction between categories such as "statements of fact" and "conclusions of law")).

Determining what allegations count as "conclusory" or "plausible" depends a great deal on who you ask. *See* Alex Reinert, *Pleading as Information-Forcing*, 75 Law & Contemp. Probs. 1, 10–15 (2012) (canvassing the case law and citing examples of courts' inconsistent treatment of allegations of "disability," "dangerousness," "bribery," "acting under the color of law," "corporate status," whether a person "knew" or was "aware" of a particular fact, "the existence of a contract," and "deliberate indifference" among others). To illustrate the "highly subjective" nature of the fact-conclusion dichotomy, Judge Hamilton on the Seventh Circuit applied *Iqbal*'s analysis to the complaint filed in *Brown v. Board of Education*, 347 U.S. 483 (1954) and concluded that "it would be easy to argue that the plaintiffs in *Brown* failed to state a plausible claim for relief that could survive

dismissal." *See McCauley*, 671 F.3d at 627 (Hamilton, J., dissenting).

Five years after *Twombly* and *Iqbal*, this Court's guidance is needed more than ever.

B. The Ninth Circuit's Decision Conflicts Irreconcilably with the Federal Rules and the Decisions of this Court.

This Court's review is necessary for a second reason: the Ninth Circuit's decision below conflicts with the Federal Rules and this Court's decisions, including *Leatherman*, *Swierkiewicz*, *Twombly*, *Erickson*, *Iqbal* and others.

Petitioners' complaint plainly and palatably asserts "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

The pleading identifies Petitioner as "an employee" who "worked more than 40 hours per week for [Respondents.]" App. 48a, 54a. It alleges Respondents would "produce" false and misleading payroll records. App. 51a. It alleges "[Respondents] would falsely list certain 'overtime hours' and 'regular hours' and 'overtime compensation' on [Petitioner's] . . . pay stubs[,]" and further alleges his paystubs were "inaccurate" and "based upon completely fictitious and knowingly false 'regular rates' and 'hours worked' that were concocted by [Respondents]." App. 52a. The complaint also alleges that "[Respondents] failed to pay [Petitioner] for all overtime hours that [he] worked" by "requiring" Petitioner "to record or otherwise certify that [he was] not working during periods of time that [Respondents] required and commanded

[him] to work and when [Respondents] had actual knowledge [he was] so working." App. 52a.

In affirming the dismissal of Petitioner's complaint, the Ninth Circuit made several fundamental errors. It disregarded the bedrock principle that a pleading must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz*, 534 U.S. at 513 (citing *Conley*, 355 U.S. at 47). Petitioner's allegations provided clear notice of his overtime claim and the grounds—payroll falsification and off-the-clock work—on which it rests.

The court erred again in characterizing Petitioner's factual assertions as "generalized allegations." App. 19a. Petitioner's complaint does not contain "labels and conclusions, [or] a formulaic recitation of the elements of a cause of action" as described in *Twombly*, 550 U.S. at 555. Petitioner's allegations—that Respondents "produced" and "concocted" false payroll records, "required" and "commanded" Petitioner to work off the clock, and "requir[ed]" Petitioner to "certify" that he was not working during periods of time when Respondents "had actual knowledge" he was working—*they are facts*, entitled to be accepted as true. *See Erickson*, 551 U.S. at 93 ("It was error" for the court of appeals to discount the numerous factual allegations "concerning harm caused petitioner by the termination of his medication [as] too conclusory to establish for pleading purposes that petitioner had suffered [harm]."); *Iqbal*, 556 U.S. at 678 (only "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" should be cast aside as conclusory).

What is more, the court erred a third time because the facts alleged in Petitioner's complaint "raise a reasonable expectation that discovery will reveal evidence" of illegal conduct. *Twombly*, 550 U.S. at 556. Here, assuming Petitioner cannot prove his allegations through direct testimony, materials produced in discovery—for example Petitioner's schedule, work logs, and pay stubs—would easily confirm (or refute) the substance of Petitioner's allegations.

The court erred a fourth time in requiring "specific facts" above and beyond the "short and plain statement" required by the Federal Rules. As this Court has repeatedly admonished, "[s]pecific facts are not necessary." *Erickson*, 551 U.S. at 93; *Iqbal*, 556 U.S. at 678 ("Rule 8 does not require detailed factual allegations"). Indeed, the facts mechanically required by the court in all FLSA overtime cases—an allegation of uncompensated overtime tied to a particular week, and estimate of the length of Petitioner's average workweek, the average rate at which Petitioner was paid, the amount of overtime wages Petitioner believes he is owed, App. 17a,—exceed what Petitioner "may ultimately need to prove to succeed on the merits." *Swierkiewicz*, 534 U.S. at 512; *see Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (when an employer fails to keep accurate time records reflecting hours of work, a plaintiff may "show the amount and extent of that work as a matter of just and reasonable inference").

By requiring more than the short and plain statement required by the Rules, the court below improperly created a heightened pleading standard for FLSA overtime cases, something this Court has repeatedly held incompatible with the Rules' notice

pleading requirement. *Leatherman*, 507 U.S. at 168–69; *Swierkiewicz*, 534 U.S. at 512.

The Ninth Circuit's decision cannot be squared with the Federal Rules of Civil Procedure. Moreover, the court's decision demonstrates a fundamental misunderstanding and misapplication of this Court's teachings in *Leatherman*, *Swierkiewicz*, *Twombly*, *Erickson*, and *Iqbal*. Review is warranted to correct these errors and to provide sorely needed guidance to courts and parties moving forward.

C. The Question Presented Is Important and Recurring.

This case is not an isolated occurrence. A substantial number of courts, armed with *Twombly* and *Iqbal*'s plausibility standard, have systematically undermined this Court's notice pleading jurisprudence—with important consequences the more than 300,000 civil cases filed each year in federal courts. "The cumulative effect of these . . . developments . . . come at the expense of access to the federal courts and the ability of citizens to obtain an adjudication of their claims' merits." Miller at 14. Courts, practitioners, and citizens would benefit greatly from further guidance from this Court.

CONCLUSION

Petitioners respectfully request that this petition for a writ of certiorari be granted to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted.

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February 10, 2015

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREG LANDERS, individually and on behalf of others similarly situated *Plaintiff-Appellant*, v. QUALITY COMMUNICATIONS, INC.; BRADY E. WELLS; ROBERT J. HUBER, *Defendants-Appellees*.	No. 12-15890 D.C. No. 2:11-cv-01928-JCM-RJJ ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted
November 8, 2013- San Francisco, California

Filed November 12, 2014
Amended January 26, 2015

Before: Andrew J. Kleinfeld, Johnnie B. Rawlinson, and Ronald Lee Gilman*, Circuit Judges.

Order;
Opinion by Judge Rawlinson

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* The Honorable Ronald Lee Gilman, Senior Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation.

SUMMARY[**]

Labor Law

The panel affirmed the dismissal, pursuant to Rule 8 of the Federal Rules of Civil Procedure, of an action under the Fair Labor Standards Act, alleging failure to pay minimum wages and overtime wages.

The panel held that under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), it is not enough for a complaint under the FLSA merely to allege that the employer failed to pay the employee minimum wages or overtime wages. Rather, the allegations in the complaint must plausibly state a claim that the employer failed to pay minimum wages or overtime wages. Agreeing with the First, Second, and Third Circuits, the panel held that detailed factual allegations regarding the number of overtime hours worked are not required, but conclusory allegations that merely recite the statutory language are not adequate. A plaintiff asserting a claim to overtime payments must allege that she worked more than forty hours in a given workweek without being compensated for the hours worked in excess of forty during that week.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the complaint in this case did not state a plausible claim because it did not allege facts showing that there was a specific week in which the plaintiff was entitled to but denied minimum wages or overtime wages.

COUNSEL

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Malani L. Kotchka (argued) and Steven C. Anderson, Lionel, Sawyer, & Collins, Las Vegas, Nevada, for Defendants- Appellees.

ORDER

The mandate is hereby recalled.

The opinion in the case of *Landers v. Quality Communications, Inc.*, No. 12-15890, filed November 12, 2014, is hereby amended as follows:

1. Slip Opinion, p. 15, first full paragraph, line 10 - replace <specific week> with <given week>.

2. Slip Opinion, p. 17:

a. Line 5 - replace <specific workweek> with <given workweek>.

b. Line 7 - replace <specific workweek> with <given workweek>.

c. Line 11 - replace <able to specify> with <able to allege facts demonstrating there was>.

No further petitions for rehearing will be entertained.

OPINION

RAWLINSON, Circuit Judge:

Plaintiff-Appellant Greg Landers (Landers) appeals from an order dismissing his complaint against Defendants-Appellees Quality Communications, Inc. (Quality), Brady E. Wells, and Robert J. Huber. Landers' complaint alleged violations of the Fair Labor Standards Act (FLSA). Specifically, Landers alleged that Quality failed to pay Landers and other similarly situated employees minimum wages and overtime wages. The district court dismissed Landers's complaint pursuant to Rule 8 of the Federal Rules of Civil Procedure, and Landers filed a timely appeal. We

have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I. BACKGROUND

Landers was employed by Quality as a cable services installer. He brought suit, individually and on behalf of other similarly situated persons, alleging that Quality failed to pay him, and other similarly situated individuals, minimum wages and overtime wages in violation of the FLSA.

In the complaint, Landers alleged that: (1) he was employed by Quality in its cable television, phone, and internet service installation business; (2) his employment was subject to the FLSA's minimum wage and overtime pay requirements; (3) he was not paid at the minimum wage; and (4) he was subjected to a "piecework no overtime" wage system, whereby he worked in excess of forty hours per week without being compensated for his overtime.

In the alternative, Landers alleged that even if he were paid some measure of overtime, the overtime payment was less than that required by the FLSA. According to Landers, Quality failed to compensate him for all of the overtime hours he worked and/or the overtime rate at which he was paid was calculated using an incorrect rate, resulting in an overtime payment that was less than that required by the FLSA. Quality moved to dismiss the complaint pursuant to Rules 8(a)(2) and 12(b)(6) of the Federal Rules of Civil

Procedure. The district court granted the motion, concluding that Landers failed to state a plausible claim for unpaid minimum wages and overtime wages. The district court determined that the complaint did "not make any factual allegations providing an approximation of the overtime hours worked, plaintiff's hourly wage, or the amount of unpaid overtime wages. . . ." Given these deficiencies, the district court concluded that the allegations asserted in the complaint were "merely consistent" with Quality's liability, but fell "short of the line between possibility and plausibility of entitlement to relief," under Rule 8, as construed in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Landers filed a timely appeal challenging the dismissal.

II. STANDARD OF REVIEW

"We review de novo the district court's decision to grant Defendants' motion to dismiss under Rule 12(b)(6) . . . We accept as true all well pleaded facts in the complaint and construe them in the light most favorable to the nonmoving party." *Zadrozny v. Bank of N.Y. Mellon*, 720 F.3d 1163, 1167 (9th Cir. 2013) (citations and internal quotation marks omitted).

III. DISCUSSION

This case presents an issue of first impression in this circuit. Post-*Twombly* and *Iqbal*, this court has not addressed the degree of

specificity required to state a claim for failure to pay minimum wages or overtime wages under the FLSA.

A. Rule 8 Pleading under *Twombly* and *Iqbal*

"The FLSA sets a national minimum wage[] . . . and requires overtime pay of one and a half times an employee's hourly wage for every hour worked over 40 hours in a week. . . ." *Probert v. Family Centered Servs. of Alaska, Inc.*, 651 F.3d 1007, 1009–10 (9th Cir. 2011) (citations omitted); *see also* 29 U.S.C. § 206(a)(1) (minimum wage); 29 U.S.C. § 207(a)(1) (overtime). In determining whether a plaintiff has stated a plausible claim under the FLSA, we look to Rule 8 of the Federal Rules of Civil Procedure. *See, e.g., Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995–97 (9th Cir. 2014).

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that each claim in a pleading be supported by "a short and plain statement of the claim showing that the pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a)(2). Pre-*Twombly* and *Iqbal*, the pleading requirement could be met by a statement merely setting forth the elements of the claim. *See, e.g., AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 696 (9th Cir. 1999) (holding that dismissal under Rule 8 was not warranted even though the plaintiff "failed to plead specific facts in its complaint concerning the nature of the City's alleged negligence"). However, that state of affairs changed when the Supreme Court clarified in

Twombly that to satisfy Rule 8(a)(2), a complaint must contain sufficient factual content "to state a claim to relief that is plausible on its face. . . ." 550 U.S. at 570. Under *Twombly*, a complaint that offers "labels and conclusions, . . . a formulaic recitation of the elements of a cause of action[,]" or "naked assertion[s]" devoid of "further factual enhancement" will not suffice. *Id*. at 555, 557.

This requirement of plausibility was reinforced in *Iqbal*. *See* 556 U.S. at 678 (explaining that to satisfy Rule 8(a)(2), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face") (citation and internal quotation marks omitted). A claim for relief is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . ." *Id*. (citation omitted). This standard does not rise to the level of a probability requirement, but it demands "more than a sheer possibility that a defendant has acted unlawfully. . . ." *Id*. (citation omitted). In keeping with *Twombly*, the Supreme Court held in Iqbal that "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id*. (citation and internal quotation marks omitted).

In evaluating whether a complaint states a plausible claim for relief, we rely on "judicial experience and common sense" to determine whether the factual allegations, which are assumed

to be true, "plausibly give rise to an entitlement to relief." *Id*. at 679.

B. Application of *Twombly* and *Iqbal* to Claims Brought Under the FLSA

Pre-*Twombly* and *Iqbal*, a complaint under the FLSA for minimum wages or overtime wages merely had to allege that the employer failed to pay the employee minimum wages or overtime wages. *See Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100, 1107 (S.D. Cal. 2006) (holding that a complaint citing to the statute was adequate to plead a claim under the FLSA). However, post-*Twombly* and *Iqbal*, we review Landers's complaint to determine whether the allegations plausibly state a claim that Quality failed to pay minimum wages and overtime wages, keeping in mind that detailed facts are not required. *See Twombly*, 550 U.S. at 555.

The district courts that have considered this question are split: some district courts, including the district court in this case, have required plaintiffs to approximate the overtime hours worked or the amount of overtime wages owed, whereas other courts have forgone such a requirement.[1] No circuit court has interpreted Rule

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[1] Compare *Lagos v. Monster Painting, Inc.*, No. 2:11-CV-00331, 2011 WL 6887116, at *2 (D. Nev. Dec. 29, 2011) (relied on by the district court); *De Silva v. North Shore-Long Is. Jewish Health Sys. Inc.*, 770 F. Supp. 2d 497, 509-510 (E.D.N.Y. 2011); *Zhong v. August August Corp.*, 498 F. Supp. 2d 625, 628 (S.D.N.Y. 2007) (requiring the plaintiff to allege

8 as requiring FLSA plaintiffs to plead in detail the number of hours worked, their wages, or the amount of overtime owed to state a claim for unpaid minimum wages or overtime wages. Although the circuit courts are in harmony on what is not required by *Twombly* and *Iqbal*, there is no consensus on what facts must be affirmatively pled to state a viable FLSA claim post-*Twombly* and *Iqbal*.

In *Pruell v. Caritas Christi*, 678 F.3d 10, 13 (1st Cir. 2012), plaintiffs alleged that they had "regularly worked hours over forty in a week and were not compensated for such time . . ." The First Circuit described this allegation as "one of those borderline phrases" that, "while not stating ultimate legal conclusions, are nevertheless so threadbare or speculative that they fail to cross the line between the conclusory and the factual." *Id.* (citation and internal quotation marks omitted). The court observed that this allegation was "little more than a paraphrase of the statute[]" and thus "too meager, vague, or conclusory to . . ." nudge

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the approximate number of hours worked and overtime wages to survive a motion to dismiss), *with Goodman v. Port Auth. of New York and New Jersey*, 850 F. Supp. 2d 363, 379–81 (S.D.N.Y. 2012); *Williams v. Skyline Auto. Inc.*, No. 11 Civ. 4123, 2011 WL 5529820, at *2 (S.D. N.Y. Nov. 14, 2011); *Allen v. City of Chicago*, No. 10 C 3183, 2011 WL 941383, at *6 (N.D. Ill. Mar. 15, 2011); *Carter v. Jackson-Madison Cnty. Hosp. Dist.*, No. 1:10-cv-01155, 2011 WL 1256625, at *4–6 (W.D. Tenn. Mar. 31, 2011); *Noble v. Serco, Inc.*, No. 3:08-76, 2009 WL 1811550, at *2–3 (E.D. Ky. June 25, 2009); and *Monroe v. FTS USA, LLC*, No. 2:08-CV-02100, 2008 WL 2694894, at *3 (W.D. Tenn. July 9, 2008) (rejecting the argument that approximation of overtime hours must be included in the complaint).

plaintiffs' claim "from the realm of mere conjecture. . . ." to the realm of plausibility, as required by *Twombly* and *Iqbal*. *Id*. (citation omitted). The First Circuit noted that the amended complaint lacked examples of unpaid time, a description of work performed during overtime periods, or estimates of the overtime amounts owed. *See id*. at 14. The court concluded that the allegations were "deficient[,] although not by a large margin." *Id*.

In a trilogy of cases, the Second Circuit also grappled with the level of specificity required to state a claim for overtime pay under the FLSA. The first case in this trilogy is *Lundy v. Catholic Health System of Long Island Inc.*, 711 F.3d 106 (2d Cir. 2013). In *Lundy*, the Second Circuit noted that some courts within that circuit had required that a complaint seeking overtime wages under the FLSA contain "an approximation of the total uncompensated hours worked during a given workweek in excess of 40 hours." *Id*. at 114 (citation omitted). In contrast, courts outside the Second Circuit had "done without an estimate of overtime, and deemed sufficient an allegation that plaintiff worked some amount in excess of 40 hours without compensation." *Id*. (citation omitted).

After commenting that the determination of plausibility of a claim is "context-specific . . . " and "requires the reviewing court to draw on its judicial experience and common sense," the court concluded that no plausible FLSA claim was pled. *Id*. (citation and footnote reference omitted). Critically, Plaintiffs had failed to allege "a single workweek in which they worked at least 40 hours and also

worked uncompensated time in excess of 40 hours." *Id*.

Plaintiff No. 1 alleged a typical schedule of three shifts per week that totaled 37.5 hours. On occasion, she worked an additional shift of 12.5 hours or a slightly longer shift. Plaintiff's failure to detail "how occasionally" or "how long" she worked in excess of her regular shift, or that she was denied overtime pay in any of those weeks when she worked in excess of her regular shift doomed her claim. *Id*. at 114–15.

Plaintiff No. 2 alleged that her "typical[]" workweek consisted of "four shifts per week, totaling 30 hours." *Id*. at 115. "[A]pproximately twice a month, she worked five to six shifts instead of four shifts, totaling between 37.5 and 45 hours." *Id*. (citation and internal quotation marks omitted). However, like Plaintiff No. 1, she failed to allege denial of overtime pay in any of the weeks when she worked additional shifts. *See id*.

Plaintiff No. 3 (Lundy) "worked between 22.5 and 30 hours per week[.]" *Id*. (citation omitted). Because his hours worked never exceeded forty in any given week, he was unable to state a valid claim. *See id*. Because no plaintiff alleged both a single workweek composed of at least forty hours *and* uncompensated time in excess of forty hours in that same workweek, the Second Circuit affirmed the dismissal of Plaintiffs' overtime claims. *See id*.

In *Nakahata v. New York-Presbyterian Healthcare System, Inc.*, 723 F.3d 192 (2d Cir. 2013), the Second Circuit once again resolved a case involving plaintiffs alleging that "they were not paid for overtime hours worked." 723 F.3d at 201. The Second Circuit concluded that Plaintiffs' allegations that they "were not compensated for work performed during meal breaks, before and after shifts, or during required trainings . . ." failed to state a plausible claim that they were denied overtime, because the Plaintiffs failed to allege that they "were scheduled to work forty hours in a given week. . . . " *Id.* The court explained that *Lundy*'s requirement that plaintiffs plead with specifity a workweek in which they were entitled to but denied overtime, was designed to ensure that plaintiffs provide "sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week." *Id*. The Second Circuit declined to adopt a requirement that Plaintiffs approximate the number of overtime hours worked. *See id*. n.10.

In the final case of the trilogy, *Dejesus v. HF Management Services, LLC*, 726 F. 3d 85, 89 (2d Cir. 2013), the plaintiff avoided the error of her predecessor plaintiffs. She alleged that in "some or all weeks she worked more than forty hours a week without being paid 1.5 times her rate of compensation." (citation and internal quotation marks omitted). The Second Circuit nevertheless concluded that the plaintiff failed to state a plausible claim for relief because she did not "allege overtime without compensation in a *given* workweek," as required by *Lundy*. *Id*. at 90

(citation and internal quotation marks omitted) (emphasis added). The court explained that *Lundy*'s requirement that plaintiffs allege with specificity a workweek in which they were entitled to but denied overtime payment, "was designed to require plaintiffs to provide some factual context that will nudge their claim from conceivable to plausible. . . ." *Id.* (citation and internal quotation marks omitted). Although the *Lundy* standard did not require "plaintiffs to keep careful records and plead their hours with mathematical precision," the standard could not be satisfied by allegations that do little more than parrot the statutory language of the FLSA. *Id.* Instead, *Lundy* required plaintiffs to draw on their memory and personal experience to develop factual allegations with sufficient specificity that they plausibly suggest that defendant failed to comply with its statutory obligations under the FLSA. *See id.* Notably, as in *Lundy* and *Nakahata*, the Second Circuit again declined to require an approximation of the number of overtime hours worked.

In an unpublished decision, the Eleventh Circuit analogized Plaintiff's allegations in an FLSA case to the allegations of an antitrust violation at issue in *Twombly*. *See Sec'y of Labor v. Labbe*, 319 F. App'x 761, 763 (11th Cir. 2008) (per curiam). The Eleventh Circuit reasoned that a claim for unpaid minimum wages and/or overtime wages under the FLSA was straightforward and did not involve the same level of complexity as the antitrust claims at issue in *Twombly*. Given this dissonance in complexity, the court reasoned that the quantum and specificity of facts necessary to allege a plausible FLSA claim was much lower than

that necessary to allege the antitrust claim at issue in *Twombly*. *See id.* The Eleventh Circuit thus concluded that the Secretary's allegations that "Labbe repeatedly violated stated provisions of the FLSA by failing to pay covered employees minimum hourly wages and to compensate employees who worked in excess of forty hours a week at the appropriate rates[]" stated plausible claims for relief. *Id.*

Most recently, the Third Circuit applied the standards of *Twombly* and *Iqbal* to a claim for unpaid overtime wages in *Davis v. Abington Memorial Hospital*, 765 F.3d 236 (3d Cir. 2014). In *Davis*, each of the plaintiffs alleged that "he or she typically worked shifts totaling between thirty-two and forty hours per week and further allege[d] that he or she frequently worked extra time. . . ." *Id.* at 242 (internal quotation marks omitted). Plaintiffs contended that "[b]ecause they typically worked full time, or very close to it and also worked several hours of unpaid work each week, . . . it is certainly plausible that at least some of the uncompensated work was performed during weeks when the plaintiffs' total work time was more than forty hours. . . ." *Id.* (citations, alterations, and internal quotation marks omitted). The Third Circuit disagreed. Consistent with *Lundy*, the court concluded that the allegations were insufficient to state a plausible claim under the FLSA. Although several of the plaintiffs alleged that their typical workweek was at least forty hours "in addition to extra hours frequently worked during meal breaks or outside of their scheduled shifts[,]" none of the plaintiffs alleged that the extra hours were in fact worked during a typical forty-hour workweek. *Id.*

at 243 (internal quotation marks omitted). Absent that crucial allegation, no plausible claim for overtime wages was stated. *See id*. The Third Circuit explained that a plaintiff need not identify precisely the dates and times she worked overtime. An allegation that a plaintiff typically worked a forty-hour workweek, and worked uncompensated extra hours during a particular forty-hour workweek would state a plausible claim for relief. However, because no such allegation was made by any of the plaintiffs, the Third Circuit affirmed dismissal of the overtime claims. *See id.*

We are persuaded by the rationale espoused in the First, Second and Third Circuit cases. Although we agree with the Eleventh Circuit that detailed factual allegations regarding the number of overtime hours worked are not required to state a plausible claim, we do not agree that conclusory allegations that merely recite the statutory language are adequate. *But see Labbe*, 319 F. App'x at 763. Indeed, such an approach runs afoul of the Supreme Court's pronouncement in *Iqbal* that a Plaintiff's pleading burden cannot be discharged by "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action . . ." *Iqbal*, 556 U.S. at 678 (citation and internal quotation marks omitted).

We agree with our sister circuits that in order to survive a motion to dismiss, a plaintiff asserting a claim to overtime payments must allege that she worked more than forty hours in a given workweek without being compensated for the overtime hours worked during that workweek. *See*

Pruell, 678 F.3d at 13; *see also Lundy*, 711 F.3d at 114; *Davis*, 765 F.3d at 242–43. We are mindful of the Supreme Court's admonition that the pleading of detailed facts is not required under Rule 8, and that pleadings are to be evaluated in the light of judicial experience. *See Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 679. We also agree that the plausibility of a claim is "context-specific." *Lundy*, 711 F.3d at 114. A plaintiff may establish a plausible claim by estimating the length of her average workweek during the applicable period and the average rate at which she was paid, the amount of overtime wages she believes she is owed, or any other facts that will permit the court to find plausibility. *See Pruell*, 678 F.3d at 14. Obviously, with the pleading of more specific facts, the closer the complaint moves toward plausibility. However, like the other circuit courts that have ruled before us, we decline to make the approximation of overtime hours the *sine qua non* of plausibility for claims brought under the FLSA. After all, most (if not all) of the detailed information concerning a plaintiff-employee's compensation and schedule is in the control of the defendants. *See Pruell*, 678 F.3d at 15; *see also* 29 U.S.C. § 211(c) (FLSA provision requiring employers subject to the FLSA to keep records concerning their employees' work schedules and compensation).[2]

We further agree with our sister circuits that, at a minimum, a plaintiff asserting a violation of the FLSA overtime provisions must allege that she worked more than forty hours in a given

[2] This reasoning applies with equal force to Landers's minimum wage claims.

workweek without being compensated for the hours worked in excess of forty during that week. *See Pruell*, 678 F.3d at 13; *see also Lundy*, 711 F.3d at 114; *Davis*, 765 F.3d at 242–43. Applying that standard to the pleadings in this case, Landers failed to state a claim for unpaid minimum wages and overtime wages. The complaint did not allege facts showing that there was a given week in which he was entitled to but denied minimum wages or overtime wages.

In his complaint, Landers alleged the following:

- The compensation system used by the defendants for the plaintiff . . . was a *de facto* "piecework no overtime" system, meaning such employees were being paid a certain amount for each "piece" of work they performed pursuant to a schedule, the plaintiffs not being paid time and one-half their "regular hourly rate" for work in excess of 40 hours a week . . .

- [A]lternatively, defendants utilized a compensation system that did pay some measure of overtime wages upon a designated hourly rate but failed to pay any overtime wages on the additional and substantial portion of the earnings of the plaintiff and those similarly situated that were paid by the defendants solely on a piece rate basis.

- Alternatively, if defendants did not engage in a "piecework no overtime" pay scheme, and paid the plaintiff . . . a facially proper overtime wage demonstrated on their payroll records as time and one-half their regular hourly rate including all piecework earnings, the defendants failed to pay such persons for all overtime hours that they worked . . .

- Defendants, in furtherance of their scheme to deny the plaintiff . . . proper overtime pay as required by the FLSA would falsely list certain "overtime hours" and "regular hours" and "overtime compensation" on the plaintiff's . . . pay stubs, such listings being inaccurate in terms of hours actually worked and not reflecting any attempt to pay time and one-half the employees' true "regular rate" as required by the FLSA . . .

- [T]he named plaintiff . . . [was] entitled to a minimum wage and an overtime hourly wage of time and one-half [his] regular hourly wage for all hours worked in excess of forty hours per week, the named plaintiff . . . worked more than 40 hours per week for the defendants, and the defendants willfully failed to make said overtime and/or minimum wage payments.

Much like the plaintiffs in *Lundy*, Landers presented generalized allegations asserting violations of the minimum wage and overtime provisions of the FLSA by the defendants. Landers

alleged that the defendants implemented a "*de facto* piecework no overtime" system and/or failed to pay minimum wages and/or overtime wages for the hours worked by Landers. Landers also asserted that the defendants falsified payroll records to conceal their failure to pay required wages. 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. Although plaintiffs in these types of cases cannot be expected to allege "with mathematical precision," the amount of overtime compensation owed by the employer, they should be able to allege facts demonstrating there was at least one workweek in which they worked in excess of forty hours and were not paid overtime wages. *Dejesus*, 726 F.3d at 90. Landers's allegations failed to provide "sufficient detail about the length and frequency of [his] unpaid work to support a reasonable inference that [he] worked more than forty hours in a given week." *Nakahata*, 723 F.3d at 201. Instead, as in *Nakahata*, Landers "merely alleged that [he was] not paid for overtime hours worked. . . ." *Id.* Although these allegations "raise the possibility" of undercompensation in violation of the FLSA, a possibility is not the same as plausibility. *Id.* Landers's comparable allegations fail to state a plausible claim under Rule 8. *See id.*

IV. CONCLUSION

Under the post-*Twombly* and *Iqbal* standard, Landers failed to state a plausible claim for relief

under the FLSA. Landers expressly declined to amend his complaint, electing to stand on his claims as alleged. Therefore, we do not remand to the district court for amendment of the complaint. *See Alaska v. United States*, 201 F.3d 1154, 1163–64 (9th Cir. 2000) ("[W]here a party did not seek leave to amend a pleading in the lower court, we would not remand with instructions to grant leave to amend.") (footnote reference omitted). 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.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREG LANDERS, individually and on behalf of others similarly situated, *Plaintiff-Appellant*,	No. 12-15890 D.C. No. 2:11-cv-01928-JCM-RJJ
v.	
QUALITY COMMUNICATIONS, INC.; BRADY E. WELLS; ROBERT J. HUBER, *Defendants-Appellees*.	OPINION

Appeal from the United States District Court
for the District of Nevada
James C. Mahan, District Judge, Presiding

Argued and Submitted
November 8, 2013- San Francisco, California

Filed November 12, 2014

Before: Andrew J. Kleinfeld, Johnnie B. Rawlinson, and Ronald Lee Gilman*, Circuit Judges.

Opinion by Judge Rawlinson

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* The Honorable Ronald Lee Gilman, Senior Circuit Judge for the United States Court of Appeals for the Sixth Circuit, sitting by designation.

SUMMARY**

Labor Law

The panel affirmed the dismissal, pursuant to Rule 8 of the Federal Rules of Civil Procedure, of an action under the Fair Labor Standards Act, alleging failure to pay minimum wages and overtime wages.

The panel held that under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), it is not enough for a complaint under the FLSA merely to allege that the employer failed to pay the employee minimum wages or overtime wages. Rather, the allegations in the complaint must plausibly state a claim that the employer failed to pay minimum wages or overtime wages. Agreeing with the First, Second, and Third Circuits, the panel held that detailed factual allegations regarding the number of overtime hours worked are not required, but conclusory allegations that merely recite the statutory language are not adequate. A plaintiff asserting a claim to overtime payments must allege that she worked more than forty hours in a given workweek without being compensated for the hours worked in excess of forty during that week.

The panel held that the complaint in this case did not state a plausible claim because it did

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

not allege facts showing that there was a specific week in which the plaintiff was entitled to but denied minimum wages or overtime wages.

COUNSEL

Christian James Gabroy, Gabroy Law Offices, Henderson, Nevada; Leon Greenberg and Dana Sniegocki (argued), Leon Greenberg Professional Corporation, Las Vegas, Nevada, for Plaintiff-Appellant.

Malani L. Kotchka (argued) and Steven C. Anderson, Lionel, Sawyer, & Collins, Las Vegas, Nevada, for Defendants- Appellees.

OPINION

RAWLINSON, Circuit Judge:

Plaintiff-Appellant Greg Landers (Landers) appeals from an order dismissing his complaint against Defendants- Appellees Quality Communications, Inc. (Quality), Brady E. Wells, and Robert J. Huber. Landers' complaint alleged violations of the Fair Labor Standards Act (FLSA). Specifically, Landers alleged that Quality failed to pay Landers and other similarly situated employees minimum wages and overtime wages. The district court dismissed Landers's complaint pursuant to Rule 8 of the Federal Rules of Civil Procedure, and Landers filed a timely appeal. We

have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I. BACKGROUND

Landers was employed by Quality as a cable services installer. He brought suit, individually and on behalf of other similarly situated persons, alleging that Quality failed to pay him, and other similarly situated individuals, minimum wages and overtime wages in violation of the FLSA.

In the complaint, Landers alleged that: (1) he was employed by Quality in its cable television, phone, and internet service installation business; (2) his employment was subject to the FLSA's minimum wage and overtime pay requirements; (3) he was not paid at the minimum wage; and (4) he was subjected to a "piecework no overtime" wage system, whereby he worked in excess of forty hours per week without being compensated for his overtime.

In the alternative, Landers alleged that even if he were paid some measure of overtime, the overtime payment was less than that required by the FLSA. According to Landers, Quality failed to compensate him for all of the overtime hours he worked and/or the overtime rate at which he was paid was calculated using an incorrect rate, resulting in an overtime payment that was less than that required by the FLSA. Quality moved to dismiss the complaint pursuant to Rules 8(a)(2) and 12(b)(6) of the Federal Rules of Civil

Procedure. The district court granted the motion, concluding that Landers failed to state a plausible claim for unpaid minimum wages and overtime wages. The district court determined that the complaint did "not make any factual allegations providing an approximation of the overtime hours worked, plaintiff's hourly wage, or the amount of unpaid overtime wages. . . ." Given these deficiencies, the district court concluded that the allegations asserted in the complaint were "merely consistent" with Quality's liability, but fell "short of the line between possibility and plausibility of entitlement to relief," under Rule 8, as construed in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Landers filed a timely appeal challenging the dismissal.

II. STANDARD OF REVIEW

"We review de novo the district court's decision to grant Defendants' motion to dismiss under Rule 12(b)(6) . . . We accept as true all well pleaded facts in the complaint and construe them in the light most favorable to the nonmoving party." *Zadrozny v. Bank of N.Y. Mellon*, 720 F.3d 1163, 1167 (9th Cir. 2013) (citations and internal quotation marks omitted).

III. DISCUSSION

This case presents an issue of first impression in this circuit. Post-*Twombly* and *Iqbal*, this court has not addressed the degree of

specificity required to state a claim for failure to pay minimum wages or overtime wages under the FLSA.

A. Rule 8 Pleading under *Twombly* and *Iqbal*

"The FLSA sets a national minimum wage[] . . . and requires overtime pay of one and a half times an employee's hourly wage for every hour worked over 40 hours in a week. . . ." *Probert v. Family Centered Servs. of Alaska, Inc.*, 651 F.3d 1007, 1009–10 (9th Cir. 2011) (citations omitted); *see also* 29 U.S.C. § 206(a)(1) (minimum wage); 29 U.S.C. § 207(a)(1) (overtime). In determining whether a plaintiff has stated a plausible claim under the FLSA, we look to Rule 8 of the Federal Rules of Civil Procedure. *See, e.g., Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995–97 (9th Cir. 2014).

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that each claim in a pleading be supported by "a short and plain statement of the claim showing that the pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a)(2). Pre- *Twombly* and *Iqbal*, the pleading requirement could be met by a statement merely setting forth the elements of the claim. S*ee, e.g., AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 696 (9th Cir. 1999) (holding that dismissal under Rule 8 was not warranted even though the plaintiff "failed to plead specific facts in its complaint concerning the nature of the City's alleged negligence"). However, that state of affairs changed when the Supreme Court clarified in

Twombly that to satisfy Rule 8(a)(2), a complaint must contain sufficient factual content "to state a claim to relief that is plausible on its face. . . ." 550 U.S. at 570. Under *Twombly*, a complaint that offers "labels and conclusions, . . . a formulaic recitation of the elements of a cause of action[,]" or "naked assertion[s]" devoid of "further factual enhancement" will not suffice. *Id*. at 555, 557.

This requirement of plausibility was reinforced in *Iqbal*. *See* 556 U.S. at 678 (explaining that to satisfy Rule 8(a)(2), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face") (citation and internal quotation marks omitted). A claim for relief is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . ." *Id*. (citation omitted). This standard does not rise to the level of a probability requirement, but it demands "more than a sheer possibility that a defendant has acted unlawfully. . . ." *Id.* (citation omitted). In keeping with *Twombly*, the Supreme Court held in *Iqbal* that "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id*. (citation and internal quotation marks omitted).

In evaluating whether a complaint states a plausible claim for relief, we rely on "judicial experience and common sense" to determine whether the factual allegations, which are assumed

to be true, "plausibly give rise to an entitlement to relief." *Id*. at 679.

B. Application of *Twombly* and *Iqbal* to Claims Brought Under the FLSA

Pre-*Twombly* and *Iqbal*, a complaint under the FLSA for minimum wages or overtime wages merely had to allege that the employer failed to pay the employee minimum wages or overtime wages. *Takacs v. A.G. Edwards & Sons, Inc.*, 444 F. Supp. 2d 1100, 1107 (S.D. Cal. 2006) (holding that a complaint citing to the statute was adequate to plead a claim under the FLSA). However, post-*Twombly* and *Iqbal*, we review Landers's complaint to determine whether the allegations plausibly state a claim that Quality failed to pay minimum wages and overtime wages, keeping in mind that detailed facts are not required. See *Twombly*, 550 U.S. at 555.

The district courts that have considered this question are split: some district courts, including the district court in this case, have required plaintiffs to approximate the overtime hours worked or the amount of overtime wages owed, whereas other courts have forgone such a requirement.[1] No circuit court has interpreted Rule

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[1] *Compare Lagos v. Monster Painting, Inc.*, No. 2:11-CV-00331, 2011 WL 6887116, at *2 (D. Nev. Dec. 29, 2011) (relied on by the district court); *De Silva v. North Shore-Long Is. Jewish Health Sys. Inc.*, 770 F. Supp. 2d 497, 509-510 (E.D.N.Y. 2011); *Zhong v. August August Corp.*, 498 F. Supp. 2d 625, 628 (S.D.N.Y. 2007) (requiring the plaintiff to allege

8 as requiring FLSA plaintiffs to plead in detail the number of hours worked, their wages, or the amount of overtime owed to state a claim for unpaid minimum wages or overtime wages. Although the circuit courts are in harmony on what is not required by *Twombly* and *Iqbal*, there is no consensus on what facts must be affirmatively pled to state a viable FLSA claim post-*Twombly* and *Iqbal*.

In *Pruell v. Caritas Christi*, 678 F.3d 10, 13 (1st Cir. 2012), plaintiffs alleged that they had "regularly worked hours over forty in a week and were not compensated for such time . . ." The First Circuit described this allegation as "one of those borderline phrases" that, "while not stating ultimate legal conclusions, are nevertheless so threadbare or speculative that they fail to cross the line between the conclusory and the factual." *Id.* (citation and internal quotation marks omitted). The court observed that this allegation was "little more than a paraphrase of the statute[]" and thus "too meager, vague, or conclusory to . . ." nudge

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the approximate number of hours worked and overtime wages to survive a motion to dismiss), *with Goodman v. Port Auth. of New York and New Jersey*, 850 F. Supp. 2d 363, 379–81 (S.D.N.Y. 2012); *Williams v. Skyline Auto. Inc.*, No. 11 Civ. 4123, 2011 WL 5529820, at *2 (S.D. N.Y. Nov. 14, 2011); *Allen v. City of Chicago*, No. 10 C 3183, 2011 WL 941383, at *6 (N.D. Ill. Mar. 15, 2011); *Carter v. Jackson-Madison Cnty. Hosp. Dist.*, No. 1:10-cv-01155, 2011 WL 1256625, at *4–6 (W.D. Tenn. Mar. 31, 2011); *Noble v. Serco, Inc.*, No. 3:08-76, 2009 WL 1811550, at *2–3 (E.D. Ky. June 25, 2009); and *Monroe v. FTS USA, LLC*, No. 2:08-CV-02100, 2008 WL 2694894, at *3 (W.D. Tenn. July 9, 2008) (rejecting the argument that approximation of overtime hours must be included in the complaint).

plaintiffs' claim "from the realm of mere conjecture. . . ." to the realm of plausibility, as required by *Twombly* and *Iqbal*. *Id*. (citation omitted). The First Circuit noted that the amended complaint lacked examples of unpaid time, a description of work performed during overtime periods, or estimates of the overtime amounts owed. *See id*. at 14. The court concluded that the allegations were "deficient[,] although not by a large margin." *Id*.

In a trilogy of cases, the Second Circuit also grappled with the level of specificity required to state a claim for overtime pay under the FLSA. The first case in this trilogy is *Lundy v. Catholic Health System of Long Island Inc.*, 711 F.3d 106 (2d Cir. 2013). In *Lundy*, the Second Circuit noted that some courts within that circuit had required that a complaint seeking overtime wages under the FLSA contain "an approximation of the total uncompensated hours worked during a given workweek in excess of 40 hours." *Id*. at 114 (citation omitted). In contrast, courts outside the Second Circuit had "done without an estimate of overtime, and deemed sufficient an allegation that plaintiff worked some amount in excess of 40 hours without compensation." *Id*. (citation omitted).

After commenting that the determination of plausibility of a claim is "context-specific . . . " and "requires the reviewing court to draw on its judicial experience and common sense," the court concluded that no plausible FLSA claim was pled. *Id*. (citation and footnote reference omitted). Critically, Plaintiffs had failed to allege "a single workweek in which they worked at least 40 hours and also

worked uncompensated time in excess of 40 hours." *Id*.

Plaintiff No. 1 alleged a typical schedule of three shifts per week that totaled 37.5 hours. On occasion, she worked an additional shift of 12.5 hours or a slightly longer shift. Plaintiff's failure to detail "how occasionally" or "how long" she worked in excess of her regular shift, or that she was denied overtime pay in any of those weeks when she worked in excess of her regular shift doomed her claim. *Id*. at 114–15.

Plaintiff No. 2 alleged that her "typical[]" workweek consisted of "four shifts per week, totaling 30 hours." *Id*. at 115. "[A]pproximately twice a month, she worked five to six shifts instead of four shifts, totaling between 37.5 and 45 hours." *Id*. (citation and internal quotation marks omitted). However, like Plaintiff No. 1, she failed to allege denial of overtime pay in any of the weeks when she worked additional shifts. *See id*.

Plaintiff No. 3 (Lundy) "worked between 22.5 and 30 hours per week[.]" *Id*. (citation omitted). Because his hours worked never exceeded forty in any given week, he was unable to state a valid claim. *See id*. Because no plaintiff alleged both a single workweek composed of at least forty hours *and* uncompensated time in excess of forty hours in that same workweek, the Second Circuit affirmed the dismissal of Plaintiffs' overtime claims. *See id*.

In *Nakahata v. New York-Presbyterian Healthcare System, Inc.*, 723 F.3d 192 (2d Cir. 2013), the Second Circuit once again resolved a case involving plaintiffs alleging that "they were not paid for overtime hours worked." 723 F.3d at 201. The Second Circuit concluded that Plaintiffs' allegations that they "were not compensated for work performed during meal breaks, before and after shifts, or during required trainings . . ." failed to state a plausible claim that they were denied overtime, because the Plaintiffs failed to allege that they "were scheduled to work forty hours in a given week. . . . " *Id.* The court explained that *Lundy*'s requirement that plaintiffs plead with specifity a workweek in which they were entitled to but denied overtime, was designed to ensure that plaintiffs provide "sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week." *Id*. The Second Circuit declined to adopt a requirement that Plaintiffs approximate the number of overtime hours worked. *See id*. n.10.

In the final case of the trilogy, *Dejesus v. HF Management Services, LLC*, 726 F. 3d 85, 89 (2d Cir. 2013), the plaintiff avoided the error of her predecessor plaintiffs. She alleged that in "some or all weeks she worked more than forty hours a week without being paid 1.5 times her rate of compensation." (citation and internal quotation marks omitted). The Second Circuit nevertheless concluded that the plaintiff failed to state a plausible claim for relief because she did not "allege overtime without compensation in a given workweek," as required by *Lundy*. *Id*. at 90

(citation and internal quotation marks omitted) (emphasis added). The court explained that *Lundy*'s requirement that plaintiffs allege with specificity a workweek in which they were entitled to but denied overtime payment, "was designed to require plaintiffs to provide some factual context that will nudge their claim from conceivable to plausible. . . ." *Id.* (citation and internal quotation marks omitted). Although the *Lundy* standard did not require "plaintiffs to keep careful records and plead their hours with mathematical precision," the standard could not be satisfied by allegations that do little more than parrot the statutory language of the FLSA. *Id.* Instead, *Lundy* required plaintiffs to draw on their memory and personal experience to develop factual allegations with sufficient specificity that they plausibly suggest that defendant failed to comply with its statutory obligations under the FLSA. *See id.* Notably, as in *Lundy* and *Nakahata*, the Second Circuit again declined to require an approximation of the number of overtime hours worked.

In an unpublished decision, the Eleventh Circuit analogized Plaintiff's allegations in an FLSA case to the allegations of an antitrust violation at issue in *Twombly*. S*ee Sec'y of Labor v. Labbe*, 319 F. App'x 761, 763 (11th Cir. 2008) (per curiam). The Eleventh Circuit reasoned that a claim for unpaid minimum wages and/or overtime wages under the FLSA was straightforward and did not involve the same level of complexity as the antitrust claims at issue in *Twombly*. Given this dissonance in complexity, the court reasoned that the quantum and specificity of facts necessary to allege a plausible FLSA claim was much lower than

that necessary to allege the antitrust claim at issue in *Twombly*. *See id.* The Eleventh Circuit thus concluded that the Secretary's allegations that "Labbe repeatedly violated stated provisions of the FLSA by failing to pay covered employees minimum hourly wages and to compensate employees who worked in excess of forty hours a week at the appropriate rates[]" stated plausible claims for relief. *Id.*

Most recently, the Third Circuit applied the standards of *Twombly* and *Iqbal* to a claim for unpaid overtime wages in *Davis v. Abington Memorial Hospital*, 765 F.3d 236 (3d Cir. 2014). In *Davis*, each of the plaintiffs alleged that "he or she typically worked shifts totaling between thirty-two and forty hours per week and further allege[d] that he or she frequently worked extra time. . . ." *Id.* at 242 (internal quotation marks omitted). Plaintiffs contended that "[b]ecause they typically worked full time, or very close to it and also worked several hours of unpaid work each week, . . . it is certainly plausible that at least some of the uncompensated work was performed during weeks when the plaintiffs' total work time was more than forty hours. . . ." *Id.* (citations, alterations, and internal quotation marks omitted). The Third Circuit disagreed. Consistent with *Lundy*, the court concluded that the allegations were insufficient to state a plausible claim under the FLSA. Although several of the plaintiffs alleged that their typical workweek was at least forty hours "in addition to extra hours frequently worked during meal breaks or outside of their scheduled shifts[,]" none of the plaintiffs alleged that the extra hours were in fact worked during a typical forty-hour workweek. *Id.*

at 243 (internal quotation marks omitted). Absent that crucial allegation, no plausible claim for overtime wages was stated. *See id*. The Third Circuit explained that a plaintiff need not identify precisely the dates and times she worked overtime. An allegation that a plaintiff typically worked a forty-hour workweek, and worked uncompensated extra hours during a particular forty-hour workweek would state a plausible claim for relief. However, because no such allegation was made by any of the plaintiffs, the Third Circuit affirmed dismissal of the overtime claims. *See id*.

We are persuaded by the rationale espoused in the First, Second and Third Circuit cases. Although we agree with the Eleventh Circuit that detailed factual allegations regarding the number of overtime hours worked are not required to state a plausible claim, we do not agree that conclusory allegations that merely recite the statutory language are adequate. *But see Labbe*, 319 F. App'x at 763. Indeed, such an approach runs afoul of the Supreme Court's pronouncements in *Iqbal* that a Plaintiff's pleading burden cannot be discharged by "[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action . . ." *Iqbal*, 556 U.S. at 678 (citation and internal quotation marks omitted).

We agree with our sister circuits that in order to survive a motion to dismiss, a plaintiff asserting a claim to overtime payments must allege that she worked more than forty hours in a given workweek without being compensated for the overtime hours worked during that workweek. *See*

Pruell, 678 F.3d at 13; *see also Lundy*, 711 F.3d at 114; *Davis*, 765 F.3d at 242–43. We are mindful of the Supreme Court's admonition that the pleading of detailed facts is not required under Rule 8, and that pleadings are to be evaluated in the light of judicial experience. *See Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 679. We also agree that the plausibility of a claim is "context-specific." *Lundy*, 711 F.3d at 114. A plaintiff may establish a plausible claim by estimating the length of her average workweek during the applicable period and the average rate at which she was paid, the amount of overtime wages she believes she is owed, or any other facts that will permit the court to find plausibility. *See Pruell*, 678 F.3d at 14. Obviously, with the pleading of more specific facts, the closer the complaint moves toward plausibility. However, like the other circuit courts that have ruled before us, we decline to make the approximation of overtime hours the *sine qua non* of plausibility for claims brought under the FLSA. After all, most (if not all) of the detailed information concerning a plaintiff-employee's compensation and schedule is in the control of the defendants. *See Pruell*, 678 F.3d at 15; *see also* 29 U.S.C. § 211(c) (FLSA provision requiring employers subject to the FLSA to keep records concerning their employees' work schedules and compensation).[2]

We further agree with our sister circuits that, at a minimum, a plaintiff asserting a violation of the FLSA overtime provisions must allege that she worked more than forty hours in a given

[2] This reasoning applies with equal force to Landers's minimum wage claims.

workweek without being compensated for the hours worked in excess of forty during that week. *See Pruell*, 678 F.3d at 13; *see also Lundy*, 711 F.3d at 114; *Davis*, 765 F.3d at 242–43. Applying that standard to the pleadings in this case, Landers failed to state a claim for unpaid minimum wages and overtime wages. The complaint did not allege facts showing that there was a specific week in which he was entitled to but denied minimum wages or overtime wages.

In his complaint, Landers alleged the following:

- The compensation system used by the defendants for the plaintiff . . . was a *de facto* "piecework no overtime" system, meaning such employees were being paid a certain amount for each "piece" of work they performed pursuant to a schedule, the plaintiffs not being paid time and one-half their "regular hourly rate" for work in excess of 40 hours a week . . .

- [A]lternatively, defendants utilized a compensation system that did pay some measure of overtime wages upon a designated hourly rate but failed to pay any overtime wages on the additional and substantial portion of the earnings of the plaintiff and those similarly situated that were paid by the defendants solely on a piece rate basis.

- Alternatively, if defendants did not engage in a "piecework no overtime" pay scheme, and paid the plaintiff . . . a facially proper overtime wage demonstrated on their payroll records as time and one-half their regular hourly rate including all piecework earnings, the defendants failed to pay such persons for all overtime hours that they worked . . .

- Defendants, in furtherance of their scheme to deny the plaintiff . . . proper overtime pay as required by the FLSA would falsely list certain "overtime hours" and "regular hours" and "overtime compensation" on the plaintiff's . . . pay stubs, such listings being inaccurate in terms of hours actually worked and not reflecting any attempt to pay time and one-half the employees' true "regular rate" as required by the FLSA . . .

- [T]he named plaintiff . . . [was] entitled to a minimum wage and an overtime hourly wage of time and one-half [his] regular hourly wage for all hours worked in excess of forty hours per week, the named plaintiff . . . worked more than 40 hours per week for the defendants, and the defendants willfully failed to make said overtime and/or minimum wage payments.

Much like the plaintiffs in *Lundy*, Landers presented generalized allegations asserting violations of the minimum wage and overtime provisions of the FLSA by the defendants. Landers

alleged that the defendants implemented a "*de facto* piecework no overtime" system and/or failed to pay minimum wages and/or overtime wages for the hours worked by Landers. Landers also asserted that the defendants falsified payroll records to conceal their failure to pay required wages. Notably absent from the allegations in Landers's complaint, however, was any detail regarding a specific workweek when Landers worked in excess of forty hours and was not paid overtime for that specific workweek and/or was not paid minimum wages. Although plaintiffs in these types of cases cannot be expected to allege "with mathematical precision," the amount of overtime compensation owed by the employer, they should be able to specify at least one workweek in which they worked in excess of forty hours and were not paid overtime wages. *Dejesus*, 726 F.3d at 90. Landers's allegations failed to provide "sufficient detail about the length and frequency of [his] unpaid work to support a reasonable inference that [he] worked more than forty hours in a given week." *Nakahata*, 723 F.3d at 201. Instead, as in *Nakahata*, Landers "merely alleged that [he was] not paid for overtime hours worked. . . ." *Id*. Although these allegations "raise the possibility" of undercompensation in violation of the FLSA, a possibility is not the same as plausibility. *Id*. Landers's comparable allegations fail to state a plausible claim under Rule 8. *See id*.

IV. CONCLUSION

Under the post-*Twombly* and *Iqbal* standard, Landers failed to state a plausible claim for relief

under the FLSA. Landers expressly declined to amend his complaint, electing to stand on his claims as alleged. Therefore, we do not remand to the district court for amendment of the complaint. *See Alaska v. United States*, 201 F.3d 1154, 1163–64 (9th Cir. 2000) ("[W]here a party did not seek leave to amend a pleading in the lower court, we would not remand with instructions to grant leave to amend.") (footnote reference omitted). 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.

AFFIRMED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GREG LANDERS, 2:11-CV-1928 JCM (RJJ)

Plaintiff,

v.

QUALITY COMMUNICATIONS, INC., et al.,

Defendants.

ORDER

Presently before the court is defendants Quality Communications, Inc., et. al.'s motion to dismiss or, alternatively, for summary judgment. (Doc. #7). Plaintiff Greg Landers filed an opposition. (Doc. #12). Defendants then filed a reply. (Doc. #16).

The complaint asserts a Federal Fair Labor Standards Act ("FLSA") claim, alleging that defendants willfully failed to make overtime and/or minimum wage payments. (Doc. #1). Defendants' motion to dismiss argues that the complaint does not allege specific facts showing that plaintiff has a plausible claim. (Doc. #7).

A complaint must include a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). The statement of the claim is intended to "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted). Pursuant to Federal Rule of Civil Procedure 12(b)(6), courts may dismiss causes of action that "fail[] to state a claim upon which relief can be granted."

The court must "accept all factual allegations in the complaint as true." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Further, the court must draw all reasonable inferences in plaintiff's favor. *Twombly*, 550 U.S. at 547. However, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter. . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (internal citations omitted). Although "not akin to a 'probability requirement,'" the plausibility standard asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* "Where a complaint pleads facts that are 'merely consistent' with a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.*

The instant complaint, plaintiff asserts that plaintiff was not paid time and one-half his hourly rate for work he performed in excess of 40 hours a week. Further, plaintiff asserts that defendants produced false and misleading payroll records.

These general allegations are "merely consistent" with defendants' liability. *Iqbal*, 129 S.Ct. at 1949. Accordingly, plaintiff has stopped "short of the line between possibility and plausibility of entitlement to relief." *Id.* The complaint does not make any factual allegations providing an approximation of the overtime hours worked, plaintiff's hourly wage, or the amount of unpaid overtime wages. *See Lagos v. Monster*

Painting, Inc., 2011 WL 6887116, at *2 (D. Nev. Dec. 29, 2011) (stating that a complaint devoid of factual allegations including an approximation of the overtime hours worked, the regular hourly or weekly wage, or the amount of unpaid wages is insufficient to state a plausible claim for relief under the FLSA). Therefore, the complaint does not contain sufficient factual matter to state a claim to relief that is plausible on its face. *Iqbal*, 129 S.Ct. at 1949.

Accordingly,

. . .

. . .

. . .

. . .

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants Quality Communications, Inc., et. al.'s motion to dismiss (doc. #7) be, and the same hereby is, GRANTED.

DATED April 6, 2012.

s/_____
James C. Mahan
UNITED STATES DISTRICT JUDGE

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

———

GREG LANDERS, Individually and on behalf of a class of all similarly situated persons,

Plaintiff,

v.

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

Defendants.

Case No.:

COMPLAINT

———

The Plaintiff, GREG LANDERS, by his attorneys, Leon Greenberg Professional Corporation and Gabroy Law Offices, as and for a Complaint against the defendants, states and alleges, as follows:

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

1. This Court has original federal question jurisdiction over the claims presented in the First Claim for Relief herein pursuant to the Act of June 25, 1938, ch 676, 52 Stat 1069, 29 USC Sections 201-219, known as the Fair Labor Standards Act ("the FLSA" or "the Act"), a law of the United States regulating interstate commerce, and specifically under the provisions of Section 16 of said act, as amended (29 U.S.C. § 216(b)).

2. The plaintiff, GREG LANDERS (the "plaintiff" or "named plaintiff") is a resident of Clark County and the State of Nevada and a former employee of the defendants.

3. The defendant, QUALITY COMMUNICATIONS, INC. (the "corporate defendant"), is a corporation formed and existing pursuant to the Laws of the State of Nevada or another jurisdiction and has its principal place of business in Clark County Nevada or its main place of business in the State of Nevada in Clark County Nevada.

4. The defendants, BRADY E. WELLS and ROBERT J. HUBER, (the "individual defendants") are the owners, manager, officers, directors and/or controlling agents of the corporate defendant and, as detailed herein, have acted as "employers or agents of an employer" of the plaintiff and the putative FLSA collective action members within

the meaning of the FLSA and are as a result fully liable for all claims made herein.

5. The defendants engage in a for-profit business which has gross revenue in excess of $500,000 per annum and are engaged in the production of goods for interstate commerce and/or the use and/or handling of goods which have moved in interstate commerce as such terms are defined in the FLSA and are employers subject to the jurisdiction of the FLSA.

6. The plaintiff has been an employee of the defendants jointly for the purposes of the FLSA during the time period pertinent to this complaint, to wit, during a portion of the three years immediately preceding the initiation of this action. The plaintiff has performed labor and services in various occupations that are subject to the aforesaid provisions of the FLSA. These occupations include, but are not limited to, labor in defendants' cable television, phone, and internet service installation business.

7. That all of the various violations of law that are alleged herein were committed intentionally and/or willfully by the defendants.

COLLECTIVE ACTION ALLEGATIONS

8. Pursuant to Section 16(b) of the FLSA, the individual plaintiff brings this Complaint as a collective action (also commonly referred to as an "opt-in" class), on behalf of himself and all persons similarly situated, to wit, a putative class of cable telephone, television, and internet service installation technicians employed by the defendants in the State of Nevada and/or the United States within three (3) years of the filing of this Complaint until entry of judgment after trial.

9. Plaintiff is informed and believes, and based thereon alleges that there are at least 50 putative collective action members. The actual number of collective action members is readily ascertainable by a review of the defendants' records through appropriate discovery.

10. The number of class members is so numerous that joinder is impracticable and would involve many individual litigations. Disposition of these claims in a collective action rather than in individual actions will benefit the parties and the Court.

11. There is a well-defined community of interest in the questions of law and fact affecting the class as a whole.

12. Proof of a common or single set of facts will establish the right of each member of the class to recover. These common questions of law and fact predominate over questions that affect only individual class members. The individual plaintiff's claims are typical of those of the class.

13. A collective action is superior to other available methods for the fair and efficient adjudication of the controversy. Due to the typicality of the class members' claims, the interests of judicial economy will be best served by adjudication of this lawsuit as a class action. This type of case is uniquely well-suited for class or collective treatment since the employers' practices were uniform and the burden is on the employer to establish that its method for compensating the class members complies with the requirements of the FLSA.

14. The individual plaintiff will fairly and adequately represent the interests of the class and

has no interests that conflict with or are antagonistic to the interests of the class.

15. The individual plaintiff and counsel are aware of their fiduciary responsibilities to the class members and are determined to diligently discharge those duties by vigorously seeking the maximum possible recovery for the class.

16. There is no plain, speedy, or adequate remedy other than by maintenance of this class action. The prosecution of individual remedies by members of the class will tend to establish inconsistent standards of conduct for the defendants and result in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties.

FACTUAL ALLEGATIONS UNDERLYING THE CLAIMS

17. The corporate defendant is in the business of providing electrical contracting services to the cable television industry, *e.g.*, installing, constructing, maintaining, modifying, various electrical installations, including, if they are so engaged to do so, those involving cable television service, computer internet (DSL) service and telephone service, the corporate defendant also employing the plaintiff and the putative FLSA collective action members in connection with its providing of such services to its customers, such persons employed by the defendants typically being called "cable service installers" or "cable service technicians."

18. The individual defendants are directors, owners, officers and active managers of the corporate defendant and have complete control over

the corporate defendant and have the authority and duty to make the corporate defendant's policies comply with the FLSA and have acted as employers for the purposes of the FLSA violations alleged herein in that such individual defendants have acted as agents of an employer knowing of the policies of the corporate defendant alleged herein that have violated the FLSA and/or by ordering, creating, implementing, enforcing, and/or otherwise allowing and directing such policies continue despite having the authority to prevent such policies which violated the FLSA from taking place and despite actual or constructive knowledge that such policies were violating the FLSA and/or by failing to act to prevent or remedy such policies violating the FLSA in a wanton and willful disregard of the FLSA's requirements which the individual defendants were charged with knowing and complying with as a matter of law.

19. The compensation system used by the defendants for the plaintiff and those similarly situated was a *de facto* "piecework no overtime" system, meaning such employees were being paid a certain amount for each "piece" of work they performed pursuant to a schedule, the plaintiffs not being paid time and one-half their "regular hourly rate" for work in excess of 40 hours a week as required by the FLSA and Nevada law based upon the hours they actually worked each week and the total basic "piece rate" they were paid, such *de facto* compensation system existing even though defendants would produce certain false and misleading payroll records indicating that either proper overtime or some measure of overtime was being paid to the plaintiff and those similarly situated when, in fact, no such overtime was being paid whatsoever, or, alternatively, defendants

utilized a compensation system that did pay some measure of overtime wages upon a designated hourly rate but failed to pay any overtime wages on the additional and substantial portion of the earnings of the plaintiff and those similarly situated that were paid by the defendants solely on a piece rate basis.

20. Alternatively, if defendants did not engage in a "piecework no overtime" pay scheme, and paid the plaintiff and those similarly situated to the plaintiff a facially proper overtime wage demonstrated on their payroll records as time and one-half their regular hourly rate including all piecework earnings, the defendants failed to pay such persons for all overtime hours that they worked, the defendants furthering such scheme by requiring the plaintiff and those similarly situated to the plaintiff to record or otherwise certify that they were not working during periods of time that the defendants required and commanded them to work and when the defendants had actual knowledge they were so working.

21. Defendants, in furtherance of their scheme to deny the plaintiff and those similarly situated proper overtime pay as required by the FLSA would falsely list certain "overtime hours" and "regular hours" and "overtime compensation" on the plaintiff's and the putative class member's pay stubs, such listings being inaccurate in terms of hours actually worked and not reflecting any attempt to pay time and one-half the employees' true "regular rate" as required by the FLSA such purported "overtime" payments being based upon completely fictitious and knowingly false "regular rates" and "hours worked" that were concocted by the defendants.

22. Defendants' violations of the FLSA were willful in that defendants were aware the method they were purporting to pay overtime under was illegal and violated the FLSA; such violations were also willful because defendants were aware their "piecework no overtime" pay scheme and/or their scheme to not record the true hours worked by their employees and pay proper overtime for all such hours of work had been the subject of prior lawsuits by private parties alleging such schemes violated the FLSA and prior investigations and settlements supervised by the United States Department of Labor based upon such compensation systems' violation of the FLSA; defendants also evidenced their willful violation of the FLSA by concocting a false payroll record as to overtime pay and hours worked that had no relationship to the overtime hours actually worked or the actual payment of overtime, such false record being manufactured by the defendants in an attempt to conceal their knowing and willful violations of the FLSA.

AS AND FOR A FIRST CLAIM FOR RELIEF PURSUANT TO THE FAIR LABOR STANDARDS ACT AGAINST ALL DEFENDANTS ON BEHALF OF THE NAMED PLAINTIFF AND ALL OTHERS SIMILARLY SITUATED

23. The named plaintiff brings this First Claim for Relief pursuant to 29 U.S.C. § 216(b) against all defendants on behalf of himself and all other similarly situated persons, if any, who consent in writing to join this action.

24. Pursuant to the applicable provisions of the FLSA, 29 U.S.C. § 206 and § 207, the named plaintiff and those similarly situated were entitled to a minimum wage and an overtime hourly wage

of time and one-half their regular hourly wage for all hours worked in excess of forty hours per week, the named plaintiff and those similarly situated worked more than 40 hours per week for the defendants, and the defendants willfully failed to make said overtime and/or minimum wage payments.

25. The named plaintiff on behalf of himself and all other similarly situated persons who consent in writing to join this action, seeks, on this First Claim for Relief, a judgment against all defendants for unpaid overtime wages and/or unpaid minimum wages, and additional liquidated damages of 100% of any unpaid minimum wages and/or overtime wages, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to the named plaintiff and any such other persons who consent to join this action, and the plaintiff also seeks an award of attorney's fees, interest and costs as provided for by the FLSA.

Wherefore, the plaintiff demands a judgment on all claims for relief as alleged aforesaid.

Plaintiff demands a trial by jury on all issues so triable.

Dated: Clark County, Nevada
December 1, 2011

Yours, etc.,

/s/Leon Greenberg
Leon Greenberg, Esq.

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Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GREG LANDERS, individually and on behalf of a class of all similarly situated persons, Plaintiff, v. QUALITY COMMUNICATIONS, INC., BRADY E. WELLS, and ROBERT J. HUBER, Defendants.	Case No.2:11-cv-01928-KJD-RJJ DEFENDANTS' MOTION TO DISMISS COMPLAINT OR ALTERNATIVELY, FOR SUMMARY JUDGMENT

Pursuant to FRCP 8(a)(2), (12)(b)(6) and (d) and (56), defendants Quality Communications, Inc. ("Quality"), Brady E. Wells and Robert J. Huber

move this Court to dismiss the complaint of plaintiff Greg Landers on the ground that it fails to state a claim for relief or alternatively, since there is no genuine issue of any material fact, Quality, Wells and Huber are entitled to judgment as a matter of law. This motion is based on the Complaint and the attached Memorandum of Points and Authorities and exhibits.

Respectfully submitted,

LIONEL SAWYER & COLLINS

By: /s/Malani L. Kotchka
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Las Vegas, Nevada 89101

Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

In his Complaint, Landers alleges that he was formerly employed by Quality. Complaint, ¶ 6. He also alleges that he was paid pursuant to a "piecework no overtime" system. Complaint, ¶ 19. That is not true. According to the Affidavit of Brady Wells, attached hereto and incorporated herein, Landers was always paid piece rate plus overtime pay. Exhibit A. Landers acknowledged this on May 29, 2010, August 6, 2010, and January 28, 2011. Exhibits A, A-1, A-2 and A-3.

Landers was first employed by Quality on September 11, 2009. He voluntarily resigned on July 25, 2011. Exhibit A. Landers did not work any overtime in 2009. Exhibit A-4. In 2010, he worked overtime and was paid an overtime bonus of $197.81. Exhibit A-5. In 2011, he worked overtime and was paid an overtime bonus of $23.40. Exhibit A-6. The overtime bonus was in addition to his piece rate. Exhibit A. Landers' hours worked and his overtime bonuses are reflected in Exhibits A-4, A-5 and A-6. Quality has followed the Department of Labor's coefficient table and always paid overtime to Landers. Exhibits A, A-7.

II. ASHCROFT v. IQBAL

In Ashcroft v. Iqbal, 556 U.S. 129 S. Ct. 1937, 1944 (2009), the United States Supreme Court said:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Ibid. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. at 1949 (emphasis added). Here, Landers has not alleged specific facts showing that he has a plausible claim against Quality, Wells and/or Huber.

The Iqbal Court also said:

> Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.... Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"-"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

Id. at 1950. The Iqbal Court concluded, "Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise." *Id*. at 1954.

III. PIECE RATES

29 C.F.R. § 778.111(a) provides as follows:

> (a) Piece rates and supplements generally. When an employee is employed on a piece-rate basis, his regular hourly

rate of pay is computed by adding together his total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions): This sum is then divided by the number of hours worked in the week for which such compensation was paid, to yield the pieceworker's "regular rate" for that week. For his overtime work the piece-worker is entitled to be paid, in addition to his total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. (For an alternative method of complying with the overtime requirements of the Act as far as pieceworkers are concerned, see § 778.418.) Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked. Thus, if the employee has worked 50 hours and has earned $245.50 at piece rates for 46 hours of productive work and in addition has been compensated at $5.00 an hour for 4 hours of waiting time, his total compensation, $265.50 must be divided by his total hours of work, 50, to arrive at his regular hourly rate of pay--$5.31. For the 10 hours of overtime the employee is entitled to additional compensation of $26.55 (10 hours at $2.655). For the week's work he is thus

> entitled to a total of $292.05 (which is equivalent to 40 hours at $5.31 plus 10 overtime hours at $7.965).

Quality complied with this DOL regulation and 29 U.S.C. § 207(e) when it paid overtime to Landers.

In Onque v. Cox Communications Las Vegas, Inc., 2006 WL 2707466 (D. Nev. 2006), the federal district court granted Cox's motion for partial summary judgment. The court found that because the plaintiff was paid pursuant to a piece rate system, any overtime pay to which she was allegedly entitled should be calculated pursuant to 29 C.F.R. § 778.111(a). Here, there is no dispute that Landers was compensated on a piece rate basis and that for every hour of overtime he worked, his "regular rate" was computed for that week pursuant to 29 C.F.R. § 778.111(a). See Exhibit A-7.

In Amador v. Guardian Installed Services, Inc., 575 F. Supp. 2d 924, 927 (N.D. Ill. 2008), the federal district court found that insulation installers were paid on the basis of piecework. If an installer worked more than 40 hours during a given pay week, overtime pay was calculated by adding the total commission earned to any other earnings for the week. The total was then divided by the total number of hours worked that week to calculate the installer's regular rate of pay. *Id*. The Amador court concluded that the Fair Labor Standards Act required the employee to be compensated for overtime at a rate not less than 1 1/2 times the regular rate. *Id*. at 928-29. Since Guardian followed the law and paid the plaintiffs correctly, the court granted Guardian summary judgment. *Id*. at 930.

Defendants Quality, Wells and Huber respectfully request that this Court dismiss Landers' Complaint for failure to state a claim upon which relief can be granted or alternatively, grant them summary judgment.

Respectfully submitted,

LIONEL SAWYER & COLLINS

By: /s/Malani L. Kotchka
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Attorneys for Defendants

EXHIBIT A

EXHIBIT A

AFFIDAVIT OF BRADY WELLS

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Brady Wells, being duly sworn upon his oath, hereby deposes and says that:

1. I am the Vice President of Quality Communications, Inc.

2. Greg Landers started working for Quality on September 11, 2009 and he voluntarily resigned on July 25, 2011.

3. The "overtime bonus" is the overtime paid to employees. In 2009, Greg Landers never worked over 40 hours a week. In 2010, he earned a total overtime bonus of $197.81. In 2011, Landers earned a total overtime bonus of $23.40.

4. Attached hereto as Exhibit A-1 is the Technician Pay Structure Sheet signed by Greg Landers on May 29, 2010, explaining that he was paid wages by piece rate with overtime pay and that the overtime pay was in addition to his piece rate totals. Attached hereto as Exhibit A-2 is a Technician Pay Structure Sheet signed by Greg Landers on August 6, 2010, explaining that he was paid wages by piece rate plus overtime pay. Attached hereto as Exhibit A-3 is a Technician Pay Structure Sheet signed by Greg Landers on January 28, 2011, explaining that he was paid wages by piece rate plus overtime pay.

5. Attached hereto as Exhibit A-4 are Landers' payroll records for 2009. Attached hereto as Exhibit A-5 are Landers' payroll records for

2010. Attached hereto as Exhibit A-6 are Landers' payroll records for 20 11.

6. Attached hereto as Exhibit A-7 is an explanation of Quality's payroll.

7. During his employment with Quality, Greg Landers was always paid piece work 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.

s/_____
Brady Wells

STATE OF NEVADA
COUNTY OF CLARK

SUBSCRIBED and SWORN to before me
this 21 day of December, 2011 by
Brady Wells

s/_____
Notary Public
Sandra D. Thompson

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GREG LANDERS, Individually and on behalf of a class of all similarly situated persons, Plaintiff, v. QUALITY COMMUNICATIONS, INC., BRADY E. WELLS, and ROBERT J. HUBER, Defendants.	Case No.: 2:11-cv-01928-KJD-RJJ PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT OR ALTERNATIVELY FOR SUMMARY JUDGMENT

Plaintiff, through his attorneys, Leon Greenberg Professional Corporation and Gabroy Law Offices, hereby submits this Response in Opposition to Defendants' Motion to Dismiss Complaint or Alternatively for Summary Judgment. Plaintiff's Response is submitted based upon the attached declaration of plaintiff, the memorandum of points and authorities below, and the other papers and pleadings in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

I. PLAINTIFF HAS PROPERLY PLEADED FACTS STATING A CLAIM FOR RELIEF UNDER THE FAIR LABOR STANDARDS ACT AND THE MOTION TO DISMISS MUST BE DENIED

Defendants, through their citation to *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1944 (2009), claim that plaintiff's complaint fails to state a claim for relief under the Fair Labor Standards Act (the "FLSA") because plaintiff "has not alleged specific facts showing that he has a plausible claim against Quality, Wells and/or Huber." Defendants cite to no authority other than *Iqbal* in support of such claim.

Plaintiff's complaint does allege specific facts showing that defendants violated the FLSA by failing to pay him proper overtime for all hours he worked. Specifically, plaintiff's complaint makes the following allegations:

> 19. The compensation system used by the defendants for the plaintiff and those similarly situated was a *de facto* "piecework no overtime" system, meaning

such employees were being paid a certain amount for each "piece" of work they performed pursuant to a schedule, the plaintiffs not being paid time and one-half their "regular hourly rate" for work in excess of 40 hours a week as required by the FLSA and Nevada law based upon the hours they actually worked each week and the total basic "piece rate" they were paid, such *de facto* compensation system existing even though defendants would produce certain false and misleading payroll records indicating that either proper overtime or some measure of overtime was being paid to the plaintiff and those similarly situated when, in fact, no such overtime was being paid whatsoever, or, alternatively, defendants utilized a compensation system that did pay some measure of overtime wages upon a designated hourly rate but failed to pay any overtime wages on the additional and substantial portion of the earnings of the plaintiff and those similarly situated that were paid by the defendants solely on a piece rate basis.

20. Alternatively, if defendants did not engage in a "piecework no overtime" pay scheme, and paid the plaintiff and those similarly situated to the plaintiff a facially proper overtime wage demonstrated on their payroll records as time and one-half their regular hourly rate including all piecework earnings, t**he defendants failed to pay such persons for all overtime hours that they worked**, the defendants furthering

> such scheme by requiring the plaintiff and those similarly situated to the plaintiff to record or otherwise certify that they were not working during periods of time that the defendants required and commanded them to work and when the defendants had actual knowledge they were so working. (Emphasis added)

The foregoing allegations expressly allege a non-payment of overtime wages, and the facts supporting such claims. Nothing more is required under *Iqbal*.

II. SUMMARY JUDGMENT MUST BE DENIED BECAUSE DISPUTED ISSUES OF MATERIAL FACTS EXIST CONCERNING DEFENDANTS' PAYMENT POLICIES

Summary judgment is only proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Plaintiff's declaration, at Ex. "A," affirms the existence of disputed issues of material fact. Plaintiff asserts that the pay records maintained by the defendant, and submitted in support of the instant motion, are not accurate because they do not reflect all the time he and other installers worked. Plaintiff believes such records are falsely created after the fact, and do not show any overtime compensation, but merely reflect the compensation he earned pursuant to the defendant's piece rate schedule.

As discussed in plaintiff's declaration, defendants could have produced records that show the true and accurate "pieces" performed each week by the plaintiff and his corresponding pay records showing he was paid for each piece of work performed along with an overtime wage (if necessary) for the week. Ex. "A," at ¶ 4. Defendants have failed to do so. Defendants' assertions that they paid the plaintiff properly does not constitute a basis for the Court to grant summary judgment.

Defendants also ignore plaintiff's allegation in paragraph 20 of the complaint, which claims that plaintiff was working significantly more hours each week than his time records reflect. Plaintiff further reaffirms this allegation in his declaration at paragraph 3, in which he states defendants had knowledge that their installers were working over 40 hours per week without defendants recording and paying overtime for those work hours. *See*, Ex. "A" at ¶ 3. Defendants ignore this allegation because it cannot be refuted by defendants' payroll records. If such allegation were *not* the practice at Quality Communications, defendants could attempt to refute it by providing the Court with records showing the a*ctual time worked performing each installation job by the plaintiff*. Plaintiff has already testified that such records are created and maintained within the "TOA" system operated by defendants' superior contractor, Cox Communications Las Vegas, Inc. *See*, Ex. Doc. No. 9, Ex. 1. Defendants' failure to provide the actual installation records which document the time each installer spent performing a specific job is indicative of the falsity of the time records that defendants present to the Court. Disputed issues of material fact exist as to the true hours worked by

the plaintiff and other installers, making summary judgment improper.

CONCLUSION

For all the foregoing reasons, defendants' motion should be denied in its entirety.

Dated this 12th day of January, 2012

Leon Greenberg Professional Corporation

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EXHIBIT "A"

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

———

GREG LANDERS, Individually and on behalf of a class of all similarly situated persons,

Plaintiff,

v.

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

Defendants.

Case No.:

DECLARATION

Gregory Landers, named herein as Greg Landers, hereby affirms, under penalty of perjury, that:

1. I am the plaintiff in this case. I am a former employee of the defendants and worked for them performing cable television, telephone and Internet installations in Las Vegas, Nevada. I am offering this declaration in opposition to defendants' motion to dismiss my lawsuit for unpaid overtime wages.

2. I understand defendants claim it is "not true" that I was paid under a piecework, no overtime, compensation system. Defendants also claim I was paid all required overtime for all of the hours I worked over 40 hours in a week. In support of those claims they present to the Court my weekly payroll statements showing the hours defendants claim I worked and the amounts defendants paid me each week. They also provide certain "technician pay structure" sheets that I was required to sign for defendants.

3. Defendants' claims I was paid proper overtime are untrue. As I have previously advised the Court, defendants would knowingly have me work many weeks in excess of 40 hours but not record on their pay records the full amount of time I worked in each of those weeks. As a result, the majority of my overtime work time, my hours worked in excess of 40 hours per week, was never recorded on defendants' payroll records and never paid to me.

4. I also believe defendants' claim that I was paid certain "overtime bonus" amounts in addition to my piecework payments is false. I have made a claim in this case that defendants were actually

paying me on a "piecework only" system and that the records they produced showing some sort of overtime payments were made to me were false and no such overtime payments were ever made. It is my belief that defendants, each week, even if they listed some sort of overtime payment to me on their payroll, were only paying me for the total amount of piece work I completed as per the piecework schedule, or perhaps less than that total amount. Whether my belief on that point is correct can very likely be established by an examination of my daily work sheets where I recorded each piece of work I completed or the Cox cable records where those installations were recorded, the records of defendants in respect to the actual pieces of work they credited me with each week for payroll purposes, the piece rate schedule, and my payroll records for each week. If those records are compared it can be determined if my payroll records actually show an extra payment to me for overtime in an amount in addition to what was owed to me for my piece rate work for the week or not. I am advised by my attorney that defendants have not presented to them or the court my daily work sheets or the Cox installation records or their records of the piece work they credited to my pay each week. Defendants have produced only my weekly payroll records and piece rate schedule. Defendants should produce those other materials for examination if they wish to establish whether I ever actually received any extra overtime pay.

5. I also did not receive any overtime when I first started working for defendants, for about a three or four week period. During that period I was not paid piece rate but a training wage of about $8.00 an hour. During that time I worked with a regular installer each day for his full shift, five

days a week. That daily shift was typically between 10 to 12 hours. Sometimes during those daily shifts I got a lunch break of no more than one hour, but many times I got very little or no real break during the shift. Defendants only paid me for 8 hours for each of those shifts at the hourly rate of about $8.00 an hour. As a result of the foregoing, I was working more than 40 hours a week during this time but did not receive any overtime (time and one-half pay) for the hours I worked in excess of 40 per week or even any pay at all for many of the hours that I worked.

I have read the foregoing and certify under penalty of perjury that the foregoing is true and correct.

Dated: Affirmed this 11th day of January, 2012

s/_____
Gregory Landers

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

GREG LANDERS, individually and on behalf of a class of all similarly situated persons, Plaintiff, v. QUALITY COMMUNICATIONS, INC., BRADY E. WELLS, and ROBERT J. HUBER, Defendants.	Case No. 2:11-cv-01928-JCM-RJJ REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT OR ALTERNATIVELY, FOR SUMMARY JUDGMENT

MEMORANDUM OF POINTS AND AUTHORITIES

Landers' payroll records are attached as Exhibit A to the Defendants' Motion to Dismiss.

Doc. 7, Exhibit A. As the Court can tell, during most of his employment, Landers worked 32 hours or less a week. Exhibits A-4, A-5 and A-6. He was constantly asking for time off. Exhibit B.

In his Opposition, Landers does not dispute the hours he worked during any particular week. He offers **no factual evidence** of any error in his hours worked or the overtime he was paid. His "beliefs" and the advice of his attorney are not sufficient to controvert his payroll records and his Complaint should be dismissed.

Other than Iqbal, Landers cites no authority in his Opposition. Doc. 12. On page 2 of his Opposition, he admits that the Complaint makes only allegations. He offers no facts based on his personal knowledge which dispute the facts set forth in Exhibit A to Defendants' Motion to Dismiss (Doc. 7). Landers **never** itemizes any overtime hours that he worked and he never offers any documents showing the time that he worked. He needs admissible evidence to counter the Affidavit of Brady Wells. Exhibit A.

In Lagos v. Monster Painting, Inc., 2011 WL 6887116, at *2 (D. Nev. Dec. 29, 2011), Judge Hicks said:

> With one exception, however, Plaintiffs' complaint contains no factual allegations that would provide even an approximation of the overtime hours worked, the regular hourly or weekly wage, or the amount of unpaid overtime wages. Instead, their complaint contains little more than a formulaic recitation of the elements of an FLSA cause of action and the Rule 23 requirements for class

> certification. Such conclusory allegations are not entitled to a presumption of truth and are insufficient to state a plausible claim for relief under the FLSA.

With the exception of one narrow, individual claim, the court dismissed the plaintiffs FLSA claims because the plaintiff failed to provide sufficient factual allegations to state a claim for relief. Id. at *3

In Acosta v. The Yale Club of New York City, 1995 WL 600873, at *4 (S.D.N.Y. Oct. 12, 1995), the court said, "Plaintiffs cite various instances when they worked several extra hours in a given day; however, they do not offer any examples of situations when management employed them for more than 40 hours in a week without paying them overtime." The court further said, "Simply stating that plaintiffs were not paid for overtime work does not sufficiently allege a violation of Section 7 of the FLSA. Plaintiffs must specifically plead which waiters were denied proper overtime pay for each week they worked over forty hours. Plaintiffs' claims for FLSA violations for overtime wages are therefore dismissed." Id. at *4. Here, Landers does not specifically plead that he was denied overtime pay for each week he worked over 40 hours and he does not state the weeks when he was allegedly employed for more than 40 hours in a week without being paid overtime by Quality. As Quality's affidavit and accompanying payroll records show, Landers was paid overtime pay for every week in which he worked over 40 hours. Exhibits A-5 and A-6. These payroll records also show that: (1) in 2009, there were 10 weeks when Landers worked 32 hours or less in a week; (2) in 2010, there were 33 weeks when Landers worked 32 hours or less in

a week; and (3) in 2011, there were 27 weeks when Landers worked 32 hours or less in a week. Exhibits A-4, A-5 and A-6; Exhibit B. Landers' Complaint is nothing more than conclusions and he has not shown that he is entitled to any relief. It should, therefore, be dismissed.

In Villegas v. J.P. Morgan Chase & Co., 2009 WL 605833, at *5 (M.D. Cal. Mar. 9, 2009), the court found that an allegation that the plaintiff did not receive properly computed overtime wages did not state an overtime wage claim. The court said that on the face of the complaint, there were insufficient facts to state a claim for overtime wages and therefore granted the motion to dismiss. Id. Similarly, in Jones v. Casey's General Stores, 538 F.Supp.2d 1094, 1102-03 (S.D. Iowa 2008), the court held that when the plaintiff alleged violations of the FLSA's minimum wage provision, the complaint should allege the hours worked for which minimum wages were not received. In that case, like this case, plaintiff's amended complaint provided only a "generic, conclusory" assertion of a right to relief under the FLSA. Id. The court said, "[T]here is not, on the face of the Amended Complaint, a single *factual* allegation that would permit an inference that even one member of the Plaintiffs' collective has 'a right to relief above the speculative level.'" Id. The court found that Plaintiffs' Amended Complaint was implausible on its face and would not survive a Rule 12(b)(6) motion to dismiss for failure to state a claim. Here, Landers' Complaint contains nothing other than a generic, conclusory right to relief. He does not allege the hours of overtime he worked when overtime pay was allegedly not received.

In Bailey v. Border Foods, Inc., 2009 WL 3248305, at * 1 (D. Minn. Oct. 6, 2009), the court relied on the Iqbal case and held that a formulaic recitation of the elements of a cause of action will not do. The court held that to avoid dismissal, a complaint must include sufficient factual matters accepted as true to state a claim to relief that is plausible on its face. Id. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of a line between possibility and plausibility and therefore must be dismissed. Id. Like Landers here, the Border Foods plaintiffs said they did not "believe" the additional amounts they received were enough to cover the expenses of delivering the pizzas. Id. at *2. In order to state a minimum wage claim, the Border Foods court held that the complaint should indicate the applicable rate of pay and the amount of unpaid minimum wages due. Id. at *2. Landers did not do that in this case. He does not indicate which weeks he was entitled to overtime pay and the amount of overtime wages due.

In Border Foods, the court said, "Plaintiffs have failed to identify their hourly pay rates, the amount of their per-delivery reimbursements, the amounts generally expended in delivering pizzas, or any facts that would permit the Court to infer that plaintiffs actually received less than minimum wage." Id. at *2. Because the plaintiffs did not plead facts that if proved would establish a violation of the minimum wage provision of the FLSA, the court concluded they had failed to state a claim upon which relief could be granted. Id. Here, Landers fails to allege any specific week in which he worked over 40 hours and was not paid overtime. He also fails to allege the amount of overtime wages which he contends is due. In

Rudberg v. State of Nevada, 896 F. Supp. 1017, 1020 (D. Nev. 1995), the court held that parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. The court said, "Affidavits that do not affirmatively demonstrate personal knowledge are insufficient." Id. Here, Landers' Declaration is based on nothing more than "beliefs" and the advice of his attorney. He fails to show any personal knowledge that he was not paid the correct amount of overtime.

Moreover, as Exhibit A demonstrates, Landers was required to record his accurate work time. If he failed to do so, he failed to follow the policy of his employer. Where an employee has prepared and signed a daily work report showing his hours, some courts have deemed the employee estopped from subsequently asserting that such daily reports were incorrect. Mortenson v. Western Light & Telephone Co., 42 F. Supp. 319 (S.D. Iowa 1941); Gale v. Fruehauf Trailer Co., 145 P.2d 125 (Kan. 1944); Dollar v. Caddo River Lumber Co., 43 F. Supp. 822 (W.D. Ark. 1941).

In Brewer v. General Nutrition Corp., 2011 WL 6328701, at *3 (N.D. Cal. Dec. 14, 2011), the court said:

> Even drawing all reasonable inference in favor of Plaintiff, the Court cannot conclude that Plaintiff has alleged that he worked in excess of forty hours per week. An employer does not incur liability under the FLSA for discouraging employees from working overtime, but only for failing to pay extra compensation for time actually worked in excess of forty hours per week.

(Emphasis added.) Landers fails to show that he ever worked over 40 hours a week when he was not paid overtime.

In Zamora v. Washington Home Services, LLC, 2011 WL 6297941, at *3 (D. Md. Dec. 15, 2011), the court said, "The allegation that Washington Home did not pay Zamora (and others similarly situated) overtime wages is also a legal conclusion." The court said under Twombly and Iqbal, the mere possibility that the plaintiff has a meritorious claim is insufficient to state a cognizable claim. Id. Therefore, the court dismissed Zamora's FLSA claim. Accord Ochoa v. Pearson Education, Inc., 2012 WL 95340, at *3 (D. N.J. Jan. 12, 2012) (facts alleged in complaint were insufficient to support a finding of willful violation of the FLSA).

The Defendants do not have the burden of proof in this case. Landers does. Landers has to show with some admissible evidence that he worked more than 40 hours in a specific work week and did not receive overtime pay. He has not done that. Landers' Complaint and Declaration do not show any specific week when he worked overtime hours and was not paid overtime based on his total piecework earnings for the week. Quality has demonstrated by admissible evidence that it did not have a piecework no overtime policy. Exhibit A-7. Since Landers has not shown that he did not receive overtime pay in the form of an overtime bonus from Quality for workweeks in which he worked over 40 hours, his

. . .

. . .

Complaint should be dismissed or alternatively, Quality is entitled to judgment as a matter of law.

Respectfully submitted,

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