No. 17-6179

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

R. ALEXANDER ACOSTA, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellant,

v.

JANI-KING OF OKLAHOMA, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Oklahoma (No. CV-16-1133-W, Honorable Lee R. West)

SECRETARY OF LABOR'S OPENING BRIEF

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STATEMENT OF PRIOR OR RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C)(1), the Secretary of Labor states that there are no prior or related cases.

GLOSSARY

Pursuant to Tenth Circuit Rule 28.2(C)(6), the following is a glossary of acronyms used in this brief:

"Act" or **"FLSA"** means the Fair Labor Standards Act.

"WHD" means the Department of Labor's Wage and Hour Division.

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SECRETARY OF LABOR'S OPENING BRIEF

Plaintiff-Appellant R. Alexander Acosta, Secretary of Labor, United States Department of Labor ("Secretary"), submits this brief in support of his appeal of the district court's decision to dismiss his amended complaint against Defendant-Appellee Jani-King of Oklahoma, Inc. ("Jani-King").

JURISDICTIONAL STATEMENT

The Secretary sued Jani-King in the District Court for the Western District of Oklahoma pursuant to the Fair Labor Standards Act ("FLSA" or "Act") alleging

violations of the Act's recordkeeping requirements and seeking injunctive and other relief. See Aplt. App. at 80-87.[1] The district court had jurisdiction pursuant to section 17 of the FLSA, 29 U.S.C. 217, as well as 28 U.S.C. 1331 (federal question jurisdiction) and 1345 (jurisdiction over suits by the United States).

This Court has jurisdiction over the Secretary's appeal pursuant to 28 U.S.C. 1291. The district court dismissed the Secretary's amended complaint with prejudice and entered final judgment for Jani-King on June 9, 2017. See Aplt. App. at 185. The district court's order dismissing the amended complaint and its judgment for Jani-King fully and finally disposed of the Secretary's claims against Jani-King.[2] On August 4, 2017, the Secretary filed a notice of appeal seeking review by this Court of the June 9, 2017 order dismissing the amended complaint

[1] "Aplt. App." refers to the Secretary's Appendix, which was filed with this Court on the same day as this brief.

[2] After the district court entered final judgment, Jani-King filed a motion seeking attorney's fees pursuant to the Equal Access to Justice Act. The motion has been fully briefed and is pending with the district court. The pending motion does not deprive this Court of jurisdiction pursuant to 28 U.S.C. 1291. See Budinich v. Becton Dickinson & Co., 486 U.S. 196, 202-03 (1988) ("Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a 'final decision' for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case."); McKissick v. Yuen, 618 F.3d 1177, 1196 (10th Cir. 2010) ("[T]he Supreme Court has laid down 'a uniform rule that *an unresolved issue of attorney's fees for the litigation in question*' doesn't prevent a district court judgment from being final and appealable; rather, the district court retains jurisdiction over the fee issue while the court of appeals has jurisdiction over the appeal.") (quoting Budinich, 486 U.S. at 202, and adding emphasis).

and the judgment for Jani-King. See Aplt. App. at 186-87. The Secretary's notice of appeal was timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUE

Whether the district court erred by failing to recognize that the Secretary's amended complaint adequately alleges that the individuals engaged by Jani-King and personally performing janitorial work on its behalf for its customers are its employees under the FLSA notwithstanding the franchise arrangements and corporate forms used by Jani-King to engage the individuals to perform the work.

STATEMENT OF THE CASE

A. Relevant FLSA Provisions

The FLSA affords minimum wage and overtime pay protections to employees of a covered employer. See 29 U.S.C. 206(a), 207(a). It in turn defines "employee" as "any *individual* employed by an employer." 29 U.S.C. 203(e)(1) (emphasis added). A covered employer must make and keep certain records "prescribe[d] by regulation" regarding the "persons employed" by it. 29 U.S.C. 211(c). The records that covered employers generally must make and keep regarding employees subject to the Act's minimum wage and overtime pay protections are prescribed in 29 C.F.R. 516.2. The Secretary (and only the Secretary – not private parties) has authority to investigate employers' compliance with the FLSA's recordkeeping requirements and to seek injunctive relief against

an employer who violates those requirements. See 29 U.S.C. 211(a), 215(a)(5), 217.

B. Factual Background

1. Jani-King provides janitorial services to its customers in the Oklahoma City area. See Aplt. App. at 80, ¶ 2. It engages individuals to perform the janitorial work on its behalf. See Aplt. App. at 80-81, ¶ 3. The individuals' work includes cleaning carpets and floors, disposing of trash, washing windows, and performing other cleaning services for Jani-King's customers. See Aplt. App. at 83, ¶ 13.

Jani-King engages the individuals to perform the janitorial work through a franchise arrangement. See Aplt. App. at 80-81, ¶ 3 and 82-83, ¶ 12.[3] In many instances, an individual performing the work is the party to the franchise arrangement with Jani-King. See id. In other instances, two individuals performing the work together (such as spouses or two family members) may be parties to a franchise arrangement with Jani-King. See id.

More recently, Jani-King has required individuals, in order to commence performing work for it, to form corporate entities that are the named parties to the

[3] The franchise arrangements are memorialized in written franchise agreements. Jani-King submitted to the district court a version of its form franchise agreement. See Aplt. App. at 107-139. It described the submitted version of its form agreement as its "current form of franchise agreement." Aplt. App. at 104. The submitted version of its form agreement appears to be dated April 2015. See Aplt. App. at 107-139.

franchise arrangements with Jani-King. See Aplt. App. at 80-81, ¶ 3 and 82-83, ¶ 12. Jani-King has also required individuals who are parties to current or expiring franchise arrangements, in order to continue to perform work for it, to transfer the arrangements to corporate entities formed by the individuals without any material change in the individuals' performance of the janitorial work for Jani-King. See Aplt. App. at 83, ¶ 12.[4] Individuals who form corporate entities as required by Jani-King nonetheless personally perform the janitorial work on behalf of Jani-King. See Aplt. App. at 80-81, ¶ 3 and 82-83, ¶¶ 12-13. The individuals perform work that is integral to Jani-King's business and, in most instances, rely exclusively on Jani-King for work. See Aplt. App. at 83, ¶ 14.[5]

2. Jani-King negotiates, owns, maintains, and controls the cleaning contracts with its customers and assigns the contracts to its individual workers to

[4] The version of the form franchise agreement submitted by Jani-King requires individuals to enter the agreement as a corporation or a limited liability company. See Aplt. App. at 107, 118 (§ 4.16). As of November 2016, according to information in a declaration submitted by Jani-King to the district court, the minority of its franchisees are "duly-formed business entities." Aplt. App. at 104. Based on the investigation of Jani-King by the Department of Labor's Wage and Hour Division ("WHD"), most of these "business entities" formed to perform janitorial work for Jani-King are owned by one or two individuals. According to Jani-King's information, the majority of its franchisees are individuals or partnerships of individuals: most are individuals and a small number are partnerships of individuals. See id.

[5] The version of the form franchise agreement submitted by Jani-King is for an initial 10-year term and may be renewed for up to three subsequent, additional 10-year periods unless terminated earlier. See Aplt. App. at 128-29 (§ 9).

service. See Aplt. App. at 83, ¶¶ 14-15. It reassigns the contracts among its individual workers at its discretion. See id., ¶ 15. In the rare instance when an individual worker obtains a customer lead, Jani-King prepares and executes a contract with the customer, and retains the discretion to assign that contract to another worker. See id. Jani-King has sole discretion on all aspects of the cleaning contracts. See id.[6]

Jani-King handles the administrative and financial functions under the cleaning contracts, including pricing, billing, and invoicing. See Aplt. App. at 84, ¶ 16. Customers make their payments for the janitorial work directly to Jani-King. See id. The individuals who perform the work pay Jani-King franchise fees, finder's fees, continuing royalties, and other fees for the opportunity to perform the work in exchange for payments from Jani-King for the work. See Aplt. App. at 80-81, ¶ 3 and 83, ¶ 13.[7] The individual workers are required to report once per

[6] The version of the form franchise agreement submitted by Jani-King places non-competition obligations on the individuals who become franchisees that, among other prohibitions, prohibit the individuals from engaging in the commercial cleaning industry outside of their work for Jani-King during the term of the agreement and two years thereafter within their assigned territory, and during the term of the agreement and for one year thereafter in any territory in which a Jani-King franchise operates. See Aplt. App. at 123-25 (§ 5).

[7] The version of the form franchise agreement submitted by Jani-King provides that the franchisee pays Jani-King, among other payments: an initial franchise fee in exchange for Jani-King's offering the franchisee the opportunity to perform janitorial work for Jani-King's customers in accordance with Jani-King's contracts with its customers; a monthly royalty fee equal to 10% of the franchisee's monthly

month to Jani-King's office to receive their payments. See Aplt. App. at 84, ¶ 16. In addition, the individual workers bear certain expenses to perform the work, such as buying cleaning tools and equipment. See Aplt. App. at 84-85, ¶ 18. However, the individual workers' investment to perform the work is limited compared to the investment of Jani-King, which has invested in and developed an infrastructure to obtain, maintain, and control its janitorial business. See id.

The individual workers do not exercise managerial skill or business initiative. See Aplt. App. at 84, ¶ 17. Jani-King controls the assignment of cleaning work to them, and they perform the work in accordance with Jani-King's cleaning policies, subject to the pricing terms and schedules in the cleaning contracts between Jani-King and its customers. See id. The individuals' work is subject to Jani-King's review and approval to ensure compliance with its cleaning contracts, standards, and policies. See id. Jani-King handles customer service matters and is responsible for marketing and advertising with very few exceptions. See id.

3. Jani-King is an employer covered by the FLSA. See Aplt. App. at 82, ¶ 10. Jani-King treats the individuals whom it engages to perform janitorial work as

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gross revenue; a monthly advertising fee equal to between 1.5% and 2% of the franchisee's monthly gross revenue; finder's fees for certain additional work assigned by Jani-King; a monthly technology fee equal to between 2.5% and 5% of the franchisee's monthly gross revenue; and a monthly accounting fee equal to 3% of the franchisee's monthly gross revenue. See Aplt. App. at 110-15 (§§ 4.3-4.9).

independent contractors instead of employees, see Aplt. App. at 81, ¶ 4, and accordingly does not afford them the FLSA's minimum wage or overtime pay protections, see 29 U.S.C. 206(a), 207(a), or keep the records (e.g., records of hours worked) that the FLSA requires employers to keep regarding their employees, see 29 U.S.C. 211(c).

C. Procedural History

1. The Original Complaint

The Secretary filed a complaint against Jani-King in the District Court for the Western District of Oklahoma alleging that Jani-King is an employer covered by the FLSA, the individuals performing the janitorial work are employees under the FLSA as opposed to independent contractors, and Jani-King is violating the FLSA's recordkeeping requirements by failing to keep records regarding its employees. See Aplt. App. at 6-11. The Secretary sought a permanent injunction directing Jani-King to keep the required records regarding the employees. See Aplt. App. at 6, 10-11.[8]

Jani-King moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and (7). See Aplt. App. at 12-28. It argued pursuant to Rule

[8] WHD's investigation of Jani-King found that individual workers were due back wages from Jani-King under the FLSA as a result of minimum wage and overtime pay violations; however, the lack of records of the individuals' hours worked made it very difficult for WHD to calculate the amount of back wages due. Accordingly, the Secretary's complaint alleged recordkeeping violations.

12(b)(7) that the Secretary failed to name and join in his complaint Jani-King's franchisees, who are necessary parties to the litigation "given the profound effect the government's suit would have on their property rights." Aplt. App. at 12. It also argued pursuant to Rule 12(b)(6) that the complaint failed to "plausibly suggest that every Jani-King franchisee has been 'misclassified' as an independent contractor instead of an employee, particularly given that the government pleads no basis to ignore corporate formalities and treat lawfully formed businesses—many with multiple employees and significant yearly revenue—as individual natural persons, subject to [the FLSA]." Aplt. App. at 12-13. Jani-King attached to its motion a declaration testifying to the nature of its franchisees and a version of its form franchise agreement. See Aplt. App. at 29-64.[9]

The district court denied Jani-King's motion to dismiss to the extent that it sought dismissal pursuant to Rule 12(b)(7), but granted the motion pursuant to Rule 12(b)(6). See Aplt. App. at 65-79. Although the district court was ruling on a motion to *dismiss the complaint*, it stated over the Secretary's objections that it was "permitted to consider" and "has examined" the version of the form franchise agreement submitted by Jani-King because it believed that the Secretary's allegations were "taken, in part, from a Jani-King franchise agreement," the

[9] The submitted declaration did not corroborate Jani-King's assertion that many of its franchisees have multiple employees. See Aplt. App. at 29-30. Indeed, WHD's investigation of Jani-King found that only a very small number of the franchisees hired employees.

Secretary "reli[ed] on the document's terms," and "this franchise agreement is to some degree central to the Secretary's claim." Aplt. App. at 66-67 n.2.

The district court stated that a corporate entity can never be an individual, which is a requirement under the FLSA to be an employee, see Aplt. App. at 73, and that Jani-King "may only be held liable for its failure, if any" to preserve records of "its employees—those individuals it employs," Aplt. App. at 74. Relying on the form franchise agreement submitted by Jani-King, the district court found the complaint to be deficient for failing to distinguish between those cleaners or franchisees, "if any, who are individuals and thus, arguably qualify as 'employees' under the FLSA" and those cleaners or franchisees, "if any, that are not individuals, but may be instead, as the record reflects, 'either a corporation or limited liability company.'" Aplt. App. at 73 (quoting section 4.16 of the version of the form franchise agreement submitted by Jani-King, Aplt. App. 43). Because the complaint lacked "factually-supported allegations" showing that "each" of the cleaners or franchisees "are indeed individual 'laborers,'" the district court concluded that the complaint was "not sufficient to support the reasonable inference that Jani-King has violated the FLSA in connection with each and every" cleaner or franchisee and that dismissal was thus warranted. Aplt. App. at 74 (emphasis in original, footnote omitted). The dismissal was without prejudice, and

the district court granted the Secretary leave to amend the complaint. See Aplt. App. at 78-79.

2. The Amended Complaint

On April 10, 2017, the Secretary filed an amended complaint. See Aplt. App. at 80-87. The amended complaint recognizes that Jani-King engages individuals to perform the janitorial work through franchise arrangements and that sometimes corporate entities formed by an individual or two individuals are the parties to the franchise arrangements. See Aplt. App. at 80-81, ¶ 3 and 82-83, ¶ 12.[10] The amended complaint does not allege that any corporate entities or non-individuals are Jani-King's employees. See Aplt. App. at 80-87. Instead, it alleges that the individuals who personally perform the janitorial cleaning work for Jani-King (through the franchise arrangements) are employees under the FLSA and seeks to require Jani-King to keep records regarding those individuals. See Aplt. App. at 80-81, ¶ 3 (defining the term "Janitorial Cleaners" to refer to "all such individuals . . . who personally perform the janitorial cleaning work as designated by [Jani-King]"); 81, ¶ 5 ("Because the Janitorial Cleaners who perform work on [Jani-King's] behalf are employees under the FLSA, [Jani-King] must comply with Act's recordkeeping requirements regarding them."); 82, ¶ 11 ("The Secretary

[10] Because the district court, in dismissing the Secretary's original complaint, had considered the version of the form franchise agreement submitted by Jani-King, the Secretary addressed in the amended complaint the requirement that individual franchisees form corporate entities.

brings this action seeking proper recordkeeping of hours and pay as required by the FLSA for individuals whom [Jani-King] employs as janitorial cleaners but whom [Jani-King] characterizes as independent contractors."); 83, ¶ 14 ("[T]hese individuals [i.e., the Janitorial Cleaners] are employees of [Jani-King] under the FLSA."); 85, ¶ 19 ("[T]he working relationship between [Jani-King] and the Janitorial Cleaners performing cleaning work on [Jani-King's] behalf demonstrates that these individuals are [Jani-King's] employees."); 80, ¶ 1 (asking the district court to enjoin Jani-King from violating the FLSA's recordkeeping requirements and to require Jani-King to make and keep records of "the individuals employed" by it); 86, ¶ 23 (same).

Jani-King moved to dismiss the amended complaint. See Aplt. App. at 88-103. It restated its arguments relying on Rule 12(b)(7), asserting that the Secretary's requested relief "would constitute an unconstitutional taking," and that the amended complaint should be dismissed for failure to join all of the affected franchisees. Aplt. App. at 90, 97-101. Jani-King also restated its arguments pursuant to Rule 12(b)(6), asserting that "the government lacks statutory authority to reclassify lawfully organized and existing business entities as 'employees'" and does not "plead facts and law supporting such a theory," and that the amended complaint fails "to plausibly suggest that every Jani-King franchisee is other than an independent contractor." Aplt. App. at 90. According to Jani-King, the

amended complaint "seeks to treat business entities (corporations and LLCs) as if they were 'individuals'" and "pleads no factual basis entitling it to ignore corporate forms." Aplt. App. at 93. Because "a corporate entity can never be an 'individual,' which is a statutory prerequisite to status as an 'employee,'" the Secretary's claim "continues to fail at the elemental level of statutory grammar, plain meaning, and logical interpretation." Id. Jani-King further argued that the amended complaint's allegations regarding the economic realities of the cleaners' working relationship with Jani-King "show nothing more than a garden-variety franchisor-franchisee relationship," and the allegations "even assuming their truth—do not, as a matter of law, establish" that the cleaners are employees. Aplt. App. at 94-96. Jani-King attached to its motion to dismiss, and relied on, the same declaration testifying to the nature of its franchisees and version of its form franchise agreement that it had attached to its prior motion to dismiss. See Aplt. App. at 104-139.

3. Dismissal of the Amended Complaint

On June 9, 2017, the district court granted Jani-King's motion to dismiss. See Aplt. App. at 172-184. The district court discussed the standard for resolving motions to dismiss in light of Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009), see Aplt. App. at 172-75, 179, and summarized the amended complaint's allegations, see Aplt. App. at 175-79,

180-81. As it did when granting the prior motion to dismiss, the district court stated that it was "permitted to consider" and "has examined" the version of the form franchise agreement submitted by Jani-King because it believed that the Secretary's allegations were "taken, in part, from a Jani-King franchise agreement," the Secretary "relied in part on and/or referred to the document's terms," and "the franchise agreement is central to the Secretary's claim." Aplt. App. at 173-74 n.2.

The district court then explained its basis for dismissal. See Aplt. App. at 182-83. It stated that because the FLSA defines "employees" as "individuals," business entities and corporate entities can never be employees under the FLSA because they are not individuals. See Aplt. App. at 182. The district court recognized that the Secretary sought Jani-King's compliance with the FLSA's recordkeeping obligations for individuals employed as janitorial cleaners, see id. (citing paragraph 11 of the amended complaint, Aplt. App. at 82), but nonetheless faulted the Secretary for "not distinguish[ing] between those Janitorial Cleaners procured to perform cleaning services who are artificial entities and those Janitorial Cleaners who are individuals," Aplt. App. at 182-83. According to the district court, the Secretary "has instead in conclusory fashion lumped together all Janitorial Cleaners procured by Jani-King through its franchise agreements." Aplt. App. at 183. The district court rejected the Secretary's allegations that Jani-King

sells franchises to individuals directly or through corporate entities owned by the individuals and that those individuals may be Jani-King's employees. Aplt. App. at 183 n.9 (citing paragraphs 3 and 4 of the amended complaint, Aplt. App. at 80-81). In the district court's view, the Secretary "ignores corporate forms, and the amended complaint contains no well-pleaded factual allegations that permit the Court to do so." Id. The district court concluded that, "[b]ecause the factual allegations in the amended complaint do not plausibly suggest that the FLSA applies to, and protects, all Janitorial Cleaners as that term is used in this case," the Secretary's claim is not plausible as required by Twombly. Aplt. App. at 183.

"Because [of] the amended complaint's lack of plausible allegations that show which of Jani-King's Janitorial Cleaners are individuals and thus . . . entitled to FLSA protection is dispositive," the district court did not consider Jani-King's argument that the amended complaint failed to sufficiently plead that the economic realities of the cleaners' working relationship with Jani-King show that they are employees given that the economic realities analysis "is used to determine whether an individual qualifies as an 'employee' entitled to FLSA protection." Aplt. App. at 183-84 n.11 (emphasis in original). And because dismissal was "warranted under Rule 12(b)(6)," the district court did not address Jani-King's Rule 12(b)(7) argument. Aplt. App. at 184 n.12. The dismissal was with prejudice, see Aplt.

App. at 184, and the district court entered judgment for Jani-King, see Aplt. App. at 185.[11]

SUMMARY OF ARGUMENT

1. The Secretary's amended complaint alleging that Jani-King violated the FLSA's recordkeeping provisions states a claim that is sufficient to withstand dismissal at the pleading stage. The amended complaint specifically alleges that the individuals engaged by Jani-King to personally perform janitorial work on its behalf for its customers are its employees under the FLSA. It recognizes that Jani-King uses franchise arrangements to engage the individuals to perform the janitorial work and that in some cases the individuals must form corporate entities in order to enter the franchise arrangements, but this in no way undermines the viability of the claim that the individuals performing the janitorial work are employees. Consistent with the FLSA's definition of "employee" as "any individual employed by an employer," the amended complaint does not allege that any corporate entity or other non-individual is an employee under the FLSA. Instead, the amended complaint seeks an injunction on behalf of the individuals engaged by Jani-King to perform janitorial work for it, regardless of the structure or form overlaying that engagement, ordering Jani-King to make and keep employment records regarding those individuals as required by the FLSA.

[11] Copies of the district court's order dismissing the amended complaint and its judgment are attached to the end of this brief.

The district court read the amended complaint and its use of the term "Janitorial Cleaners" to seek relief on behalf of persons other than individuals and found fault with the amended complaint for failing to distinguish between individuals and corporate entities. However, given the plain language of the amended complaint's allegations, there was simply no basis for the district court to read the amended complaint in that manner. The amended complaint explicitly limits "Janitorial Cleaners" to individuals, and it repeatedly makes clear that it seeks relief on behalf of the *individuals* performing work for Jani-King. Thus, the amended complaint is consistent with the FLSA's definition of "employee" and plainly seeks relief that is available under the FLSA. The district court erred in ruling otherwise.

2. In addition, the district court erred to the extent that it suggested that individuals who perform work for an employer through corporate entities formed by the individuals cannot be the employer's employees under the FLSA. The district court rejected the amended complaint's allegation that Jani-King engages individual janitorial workers directly or through corporate entities formed by the individuals because the amended complaint ignores "corporate forms" and contains "no well-pleaded factual allegations" permitting the district court to do so. However, it is well settled under the FLSA that whether a worker is an employee of an employer is not determined by how the parties label the relationship, the

intent of any contract between the parties, or the structure overlaying the parties' relationship. Instead, the economic realities of the individual worker's relationship with the employer determine whether the individual is an employee.

In this regard, the FLSA in no way prohibits or discourages employers from engaging workers through franchise arrangements or other corporate forms, and no business model in and of itself violates the FLSA. However, an employer's use of franchise arrangements and corporate forms does not preclude the Secretary or courts from looking beyond those arrangements and evaluating whether individual workers engaged by the employer are employees under the FLSA. An employer who requires an individual worker to form a corporate entity to perform work is not shielded from meaningful review of whether the nature of the individual worker's relationship with the employer is that of an employee under the FLSA. Indeed, longstanding caselaw shows that the substance of the worker's relationship with the employer rather than the form of the relationship determines whether the worker is an employee under the Act.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). See S.E.C. v. Shields, 744 F.3d 633, 640 (10th Cir. 2014).

ARGUMENT

I. THE AMENDED COMPLAINT STATES A CLAIM FOR RELIEF UNDER THE FLSA, AND THE DISTRICT COURT, WHICH FUNDAMENTALLY MISREAD THAT COMPLAINT, ERRED IN RULING OTHERWISE

To state a claim for relief, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Proc. 8(a)(2). "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.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570); see Twombly, 550 U.S. at 570 ("[W]e do not require heightened fact pleading of specifics, but only enough facts 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." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556); see Khalik v. United Air Lines, 671 F.3d 1188, 1193 (10th Cir. 2012) ("[T]he *Twombly*/*Iqbal* standard recognizes a plaintiff should have at least some relevant information to make the claims plausible on their face."). Rule 8(a)(2) thus "still lives" following Twombly and Iqbal. Khalik, 671 F.3d at 1191. The Twombly/Iqbal standard ultimately "'is a middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which

the Court stated will not do.'" Shields, 744 F.3d at 640-41 (quoting Khalik, 671 F.3d at 1191).

A. Contrary to the District Court's Conclusion, the Amended Complaint Plainly States a Claim for Relief under the FLSA for the *Individuals* Performing Janitorial Work for Jani-King.

The amended complaint states a claim for relief under the FLSA that is plausible on its face. Under the FLSA, only individuals can be employees. See 29 U.S.C. 203(e)(1). Given the FLSA's definition of "employee" and its use of "individual," a claim seeking relief for a corporate entity under the protections that the FLSA affords to employees would not be plausible. Instead, the amended complaint seeks relief, in the form of an injunction requiring Jani-King to comply with the FLSA's recordkeeping obligations, only on behalf of "the *individuals* employed" by Jani-King. Aplt. App. at 80, ¶ 1 and 86, ¶ 23 (emphasis added). As the amended complaint makes clear, it seeks the "proper recordkeeping of hours and pay as required by the FLSA for *individuals* whom [Jani-King] employs as janitorial cleaners but whom [Jani-King] characterizes as independent contractors." See Aplt. App. at 82, ¶ 11 (emphasis added).

Specifically, in support of the claim for relief on behalf of Jani-King's individual workers, the amended complaint alleges the following relevant factual information:

- Jani-King engages individuals to personally perform janitorial cleaning work for its customers as designated by Jani-King, see Aplt. App. at 80-81, ¶ 3;
- the janitorial cleaning work performed by the individuals is laborious and includes cleaning carpets and hard floors, disposing of trash, washing windows, and performing other cleaning work, see Aplt. App. at 83, ¶ 13;
- Jani-King engages the individuals through franchise arrangements, see Aplt. App. at 80-81, ¶ 3 and 82-83, ¶ 12;
- Jani-King primarily sells the franchises directly to individuals (i.e., sole proprietors) who perform the janitorial cleaning work, see id.;
- Jani-King sometimes sells the franchises to two individuals (e.g., husband and wife) in their individual capacities who perform the janitorial cleaning work, see id.;
- more recently and as required by Jani-King, Jani-King sells the franchises to individuals through corporate entities formed by one or sometimes two individuals for the purpose of performing the janitorial work, see id.;
- some individuals who have performed janitorial work for Jani-King may have been required by Jani-King to transfer their franchises to newly formed corporate entities in order to continue performing the work

without any material change in the performance of their work, see Aplt. App. at 82-83, ¶ 12;

- pursuant to the franchise agreements, the individuals pay Jani-King franchise fees, finder's fees, royalties, and other payments and incur expenses for the opportunity to perform cleaning work for Jani-King's customers – work for which Jani-King pays them, see Aplt. App. at 80-81, ¶ 3, and 83, ¶ 13; and
- Jani-King improperly classifies these individuals as independent contractors under the FLSA and does not comply with the Act's recordkeeping requirements regarding them, see Aplt. App. at 81, ¶¶ 4-5.

The amended complaint also contains numerous factual allegations relevant to the economic realities of the *individuals'* working relationship with Jani-King, including allegations demonstrating that their work is integral to Jani-King's business, their lack of skill or business initiative, Jani-King's control over the relationship, their lack of opportunity for profit or loss, and their limited investment as compared to Jani-King's investment:[12]

[12] This Court considers the following economic realities factors: (1) the degree of control by the employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the employer's business. See Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998) (citing Henderson v. Inter-Chem Coal Co., 41 F.3d 567, 570 (10th Cir. 1994)). None of

- the individuals perform janitorial cleaning work, and Jani-King's business is to provide janitorial cleaning services, see Aplt. App. at 80, ¶ 2 and 83, ¶¶ 13-14 (indicating that their work is integral to Jani-King's business);
- the work performed consists of cleaning carpets and hard floors, disposing of trash, washing windows, and performing other cleaning work, see Aplt. App. at 83, ¶ 13 (indicating that the individuals do not exercise skill);
- the individuals perform the work in accordance with Jani-King's required cleaning policies and subject to Jani-King's review and approval to ensure compliance with the policies, and Jani-King handles customers service matters, see Aplt. App. at 84, ¶ 17 (indicating Jani-King's control);
- Jani-King controls the customer relationships by negotiating and maintaining the cleaning contracts, performing all administrative functions relating to the contracts, and taking sole responsibility for pricing, billing, and invoicing, see Aplt. App. at 83-84, ¶¶ 14-16 (indicating Jani-King's control and the individuals' lack of opportunity for profit or loss);

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these factors "alone is dispositive," and courts must instead apply "a totality-of-the-circumstances approach." Id. at 1441 (citing Henderson, 41 F.3d at 570).

- if an individual obtains a customer lead, Jani-King must approve the terms of any contract with the customer, prepares and executes the contract, decides who services the contract, and may assign the contract away from the individual who obtained the lead to any other worker, see Aplt. App. at 83, ¶ 15 (indicating Jani-King's control and the individuals' lack of opportunity for profit or loss);
- Jani-King controls for whom the individuals perform janitorial work, assigning at its sole discretion its customer contracts to the workers; many individuals rely exclusively on Jani-King for janitorial work, see Aplt. App. at 83, ¶¶ 14-15 (indicating Jani-King's control, and that the individuals lack opportunity for profit or loss and do not exercise business initiative);
- the individuals pay Jani-King franchise fees, finder's fees, and royalties, among other payments, in order to perform the janitorial work; they then perform the work subject to the pricing terms negotiated by Jani-King with its customers; the customers pay Jani-King directly, and Jani-King pays the individuals, see Aplt. App. at 83, ¶ 13, and 84, ¶¶ 16-17 (indicating that Jani-King controls the economics of the relationship and that the individuals therefore lack opportunity for profit or loss); and

- the individuals' investment – buying tools and equipment – is for the purpose of performing the janitorial work for Jani-King as opposed to being a capital investment, is limited, and is minimal compared to Jani-King's investment to develop and maintain its business, see Aplt. App. at 84-85, ¶ 18 (indicating that the individuals' actual investment relative to that of Jani-King is small).[13]

In sum, the amended complaint is clear on its face that the Secretary seeks relief only on behalf of individuals engaged by Jani-King to personally perform janitorial work for it. The amended complaint recognizes that Jani-King engages those individuals through franchise arrangements and that, in some cases, corporate entities formed by the individuals are parties to the franchise arrangements. However, the amended complaint's focus is on the individuals whom Jani-King engages, by whatever means, to perform janitorial work on its behalf for its customers. The amended complaint claims that it is those *individuals* who are Jani-King's employees under the FLSA, thereby making a plausible claim

[13] As noted above, the district court declined to consider Jani-King's argument that the amended complaint failed to sufficiently plead that the economic realities show that workers are employees given its ruling that the amended complaint's "lack of plausible allegations" showing "which of Jani-King's Janitorial Cleaners are individuals" was "dispositive." Aplt. App. at 183-84 n.11. Thus, this Court need not address that issue in the first instance given the basis of the district court's ruling. Nonetheless, the amended complaint contains sufficient factual allegations showing that the economic realities of the individuals' relationship with Jani-King indicate that they are employees under the FLSA.

that should have been allowed to proceed. The district court's conclusion to the contrary is reversible error.

B. There Is No Basis for Reading the Amended Complaint as Seeking Relief under the FLSA for Any Corporate Entity or for Any Persons Other than Individuals.

The district court failed to read fairly the plain meaning of the amended complaint's allegations. See Shields, 744 F.3d at 640 (the court must accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the plaintiff). Indeed, despite the plain meaning of the allegations, the district court found the amended complaint to be deficient for "not distinguish[ing] between those Janitorial Cleaners procured to perform cleaning services who are artificial entities and those Janitorial Cleaners who are individuals" and "instead in conclusory fashion lump[ing] together all Janitorial Cleaners procured by Jani-King through its franchise agreements." Aplt. App. at 182-83. According to the district court, the amended complaint does "not plausibly suggest that the FLSA applies to, and protects, all Janitorial Cleaners as that term is used in this case." Aplt. App. at 183.

However, the amended complaint uses the defined term, "Janitorial Cleaners," to describe the group on whose behalf relief is sought and defines that term as the *individuals* engaged by Jani-King directly or through corporate entities to personally perform the janitorial cleaning work for its customers:

> [Jani-King] . . . procures workers to perform janitorial cleaning services for its customers by selling franchises directly to individuals or sometimes indirectly to individuals through corporate entities owned by one or sometimes two individuals (*all such individuals* hereinafter referred to as "Janitorial Cleaners") who personally perform the janitorial cleaning work as designed by [Jani-King].

Aplt. App. at 80-81, ¶ 3 (emphasis added). Thus, the term "Janitorial Cleaners" is explicitly defined in the amended complaint as being limited to "individuals"; all "Janitorial Cleaners" are individuals. See id. The amended complaint uses the term "Janitorial Cleaners" throughout, and nothing in its use of the term can be fairly read to indicate that "Janitorial Cleaners" include any corporate entity or any person other than the individual janitorial workers.

Moreover, in light of the district court's stated basis for dismissing the Secretary's original complaint, the Secretary made clear in the amended complaint, as discussed above, that he is seeking relief only on behalf of individuals personally performing janitorial work for Jani-King (as only individuals can be employees under the FLSA). See Aplt. App. at 80-86, ¶¶ 1, 3, 4, 5, 11, 12, 14, 19, 23. For example, paragraph 11 of the amended complaint states: "The Secretary brings this action seeking proper recordkeeping of hours and pay as required by the FLSA for *individuals* whom [Jani-King] employs as janitorial cleaners but whom [Jani-King] characterizes as independent contractors." Aplt. App. at 82, ¶ 11 (emphasis added). The amended complaint alleges that "the working relationship between [Jani-King] and the Janitorial Cleaners performing cleaning work on

[Jani-King's] behalf demonstrates that these *individuals* are [Jani-King's] employees." Aplt. App. at 85, ¶ 19 (emphasis added). And, the amended complaint seeks an injunction requiring Jani-King to keep the records required by the FLSA regarding "the *individuals* employed" by it. Aplt. App. at 80, ¶ 1 and 86, ¶ 23 (emphasis added).

Accordingly, the district court's assertions that the term, "Janitorial Cleaners," includes, and that the Secretary seeks relief for, persons other than individuals are simply not a fair reading of the amended complaint's allegations. The allegations are consistent with the FLSA's definition of "employee," see 29 U.S.C. 203(e)(1), and asserting that the amended complaint fails to distinguish between "individuals" and "artificial entities" fundamentally misreads the amended complaint. There is no basis in the amended complaint or its use of the defined term "Janitorial Cleaners" to conclude that the Secretary seeks relief for any corporate entity or "artificial" entity or otherwise seeks relief beyond the relief available under the FLSA. For the foregoing reasons, the district court erred in dismissing the amended complaint.[14]

[14] This Court's decision in Barlow v. C.R. England, Inc., 703 F.3d 497 (10th Cir. 2012), which was not cited by the district court, provides no support for dismissing the amended complaint. In Barlow, the worker was employed as a security guard; when his employer was looking to replace its janitorial services provider, he formed a company with his girlfriend to provide the services and performed the work with his girlfriend in addition to his security guard work. See id. at 500-01. This Court affirmed the district court's application of the economic realities

II. THE DISTRICT COURT WAS WRONG TO IN ANY WAY SUGGEST THAT INDIVIDUALS ENGAGED BY AN EMPLOYER TO PERSONALLY PERFORM WORK FOR IT BUT REQUIRED BY THAT EMPLOYER TO FORM CORPORATE ENTITIES CANNOT BE THE EMPLOYER'S EMPLOYEES UNDER THE FLSA

In addition to failing to read fairly the amended complaint's plainly-stated claim for relief under the FLSA for the individuals performing work for Jani-King, the district court seemed to suggest that individuals who perform work for an employer through corporate entities formed by the individuals cannot be the employer's employees under the FLSA. Specifically, the district court rejected the amended complaint's allegations that Jani-King engages individual janitorial workers directly or through corporate entities formed by the individuals. Aplt. App. at 183 n.9 (citing paragraphs 3 and 4 of the amended complaint, Aplt. App. at 80-81). The district court found fault with the amended complaint for "ignor[ing] corporate forms" and "contain[ing] no well-pleaded factual allegations that permit the Court to do so." Id. The district court's apparent suggestion, however, is

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factors, its finding that some factors favored employee status and others favored independent contractor status, its conclusion that the worker was in business for himself as a janitor based on an application of the economic realities factors, and its grant of summary judgment to the employer on the worker's FLSA claim. See id. at 506-07. A grant of summary judgment after applying an economic realities analysis to the facts of a specific janitorial worker, however, provides no support for the district court's decision here to dismiss the amended complaint for purportedly failing to limit the scope of the FLSA claim to individuals. The district court here did not allow for the development of a factual record or apply an economic realities analysis to the facts of this case; instead, it erroneously dismissed a claim at its inception.

contrary to well-settled FLSA principles that the economic realities of an individual's working relationship with the employer – not the label ascribed, the agreement governing, or the form or structure overlaying the relationship – determine whether the individual is an employee under the FLSA.

A. The Economic Realities Determine Whether an Individual Is an Employee under the FLSA.

The FLSA defines "employee" as "any individual employed by an employer." 29 U.S.C. 203(e)(1) (emphasis added). The Act defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. 203(d), and defines "employ" to "include[ ] to suffer or permit to work," 29 U.S.C. 203(g). In interpreting these definitions, the Supreme Court has noted that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame," United States v. Rosenwasser, 323 U.S. 360, 362 (1945), and that "the term 'employee' had been given 'the broadest definition that has ever been included in any one act,'" id. at 363 n.3 (quoting 81 Cong. Rec. 7657 (1937) (statement of Senator Black)). The Supreme Court has further noted that the "striking breadth" of the Act's definition of "employ" "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992).

The Supreme Court had made clear that, given the Act's definitions, the test of employment under the FLSA is economic reality. See Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 (1985). The economic realities of the worker's relationship with the employer rather than any technical concepts used to characterize that relationship is the test of employment. See Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961). Courts must examine the economic realities of the relationship to determine whether the worker "follows the usual path of an employee." Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947). When specifically considering whether an individual worker is an employee under the FLSA or an independent contractor, this Court applies an economic realities analysis to determine whether the individual is economically dependent on the business to which he renders service (and thus is an employee under the FLSA) or is, as a matter of economic fact, in business for himself (and thus is an independent contractor). See Baker, 137 F.3d at 1440; see also Henderson, 41 F.3d at 570; Dole v. Snell, 875 F.2d 802, 804 (10th Cir. 1989) ("[T]he Supreme Court has directed that the economic realities of the relationship govern.").

The Supreme Court has rejected arguments that the agreement between an employer and a worker or the structure of their relationship – as opposed to the economic realities of their relationship – determine whether the worker is an

employee under the FLSA. For example, in Rutherford Food, the employer agreed with a group of workers to contract out one discrete part of its meat processing line (which was otherwise worked by its employees). See 331 U.S. at 724-26. The Supreme Court ruled that, notwithstanding this structure, because the workers worked "as a part of the integrated unit of production under such circumstances . . . [they] were employees of the establishment." Id. at 729. "Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act." Id.

In Goldberg, the workers paid a fee to become "members" of a cooperative in which they had a voting and ownership interest and for which they exclusively sewed products. See 366 U.S. at 29-30. The Supreme Court parsed through the structure and noted that membership in the cooperative did not prevent the workers from being the cooperative's employees under the FLSA:

> There is no reason in logic why these members may not be employees. There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. . . . We fail to see why a member of a cooperative may not also be an employee of the cooperative. In this case the members seem to us to be both "members" and "employees."

Id. at 32. Indeed, "[a]part from formal differences, they are engaged in the same work they would be doing whatever the outlet for their products." Id. at 32-33. Because economic realities rather than technical concepts is the test of employment, the workers were employees. See id. at 33.

And in Tony & Susan Alamo, the employer religious foundation argued that its "associates," who operated the foundation's business enterprises, were not employees because they were part of the ministry, did not expect compensation, and testified that they were not employees. See 471 U.S. at 300-01. The Supreme Court stated that the associates' "protestations, however sincere, cannot be dispositive," and that the FLSA's purposes "require that it be applied even to those who would decline its protections." Id. at 301-02. Considering the economic realities, the Supreme Court ignored the structure placed on the "associates" and determined that they were employees because they were entirely dependent on the foundation for long periods of time and must have expected compensation for their services. See id.

Applying these Supreme Court precedents, courts of appeals reject arguments that the structure or contractual designation or label, as opposed to the economic realities of the working relationship, determine employee status under the FLSA. For example, this Court has repeatedly stated that, in determining whether an individual is an employee under the FLSA, a court's inquiry is not limited by any contractual terminology used by the parties or by traditional common law concepts of "employee" or "independent contractor." See Baker, 137 F.3d at 1440; Henderson, 41 F.3d at 570; Dole, 875 F.2d at 804.

In Safarian v. American DG Energy Inc., 622 F. App'x 149, 151 (3d Cir. 2015), a case that is particularly on point, the district court had focused on evidence that the employer and the individual worker structured the working relationship as an independent contractor relationship, including that the individual worker "billed" the employer for the work through a corporate entity that the individual had formed and used the corporate entity "to claim tax advantages," to rule that the individual was not an employee under the FLSA. The Third Circuit reversed because the district court "did not reason through" the economic realities of the working relationship and instead "focused on the *structure*" of the relationship, explaining:

> [I]t is the economic realities of the relationship . . . , not the structure of the relationship, that is determinative. Indeed, the issue arises *because* the parties structured the relationship as an independent contractor, but the caselaw counsels that, for purposes of the worker's rights under the FLSA, we must look beyond the structure to the economic realities.

Id. (emphases in original). "The fundamental point here is that courts must look to the economic realities, not the structure, of the relationship between the workers and the businesses." Id. at 152.

Other courts of appeals agree. See, e.g., Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1311 (11th Cir. 2013) (the "inquiry is not governed by the 'label' put on the relationship by the parties or the contract controlling that relationship"); Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1544-45 (7th Cir. 1987) ("The

FLSA is designed to defeat rather than implement contractual arrangements. . . . In this sense 'economic reality' rather than contractual form is indeed dispositive."); Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 667 (5th Cir. 1983) (explaining that "[a]n employee is not permitted to waive employee status," and affirming that welders were employees despite having signed independent contractor agreements); Real v. Driscoll Strawberry Assoc., Inc., 603 F.2d 748, 755 (9th Cir. 1979) (although each individual worker signed an agreement labeling the worker as an independent contractor, that contractual language is "not conclusive" as the economic realities, and not "contractual labels, determine employment status for the remedial purposes of the FLSA"); Usery v. Pilgrim Equip. Co., 527 F.2d 1308, 1315 (5th Cir. 1976) ("We reject both the declaration in the lease agreement that the operators are 'independent contractors' and the uncontradicted testimony that the operators believed they were, in fact, in business for themselves as controlling FLSA employee status. Neither contractual recitations nor subjective intent can mandate the outcome in these cases. Broader economic realities are determinative.") (internal footnotes omitted).

In sum, numerous longstanding decisions of the Supreme Court, this Court, and other courts of appeals make clear that the economic realities of the individual worker's relationship with the employer for whom the individual performs work – as opposed to the structure or form of the relationship (or whether the individual

performs the work through a company formed by the individual) – determine employee status under the FLSA.

B. The Individual Janitorial Workers Can Be Jani-King's Employees under the FLSA Even If Required to Form Corporate Entities to Perform the Work.

The individual workers' formation of corporate entities as required by Jani-King to perform the janitorial work does not mean that the individuals cannot be employees under the FLSA. The economic realities of the individuals' working relationship with Jani-King – not the agreement or structure overlaying that relationship – determine whether the individuals are employees under the FLSA. The district court's apparent suggestion that the existence of the corporate entities removes the individual workers from the FLSA's protections is wrong.[15]

The district court stated that, based on the FLSA's definition of "employee" and the definition's use of "individual," a corporate entity cannot be an

[15] There was no evidentiary basis or foundation for the district court to consider, when evaluating the sufficiency of the Secretary's complaints, the April 2015 version of the form franchise agreement submitted by Jani-King. The district court correctly refused to consider the declaration submitted by Jani-King purporting to authenticate the form franchise agreement. See Aplt. App. at 174 n.2. There was no evidentiary basis to conclude that the version of the form franchise agreement submitted by Jani-King applied to all, or even most, of its franchisees at that time. In any event, consideration of the April 2015 version of the form franchise agreement and its new requirement (compared to prior versions of the form agreement) that individuals form corporate entities before becoming Jani-King's franchisees would not have provided any basis to dismiss the Secretary's complaints. As discussed, the individual workers' formation of corporate entities in order to perform the janitorial work does not prevent them from being employees under the FLSA's economic realities standard.

"employee" under the Act. See Aplt. App. at 182. That statement is obviously correct; only individuals can be employees under the FLSA's definition of "employee," see 29 U.S.C. 203(e)(1). Yet, that statement does not address the relevant question here: whether the Secretary stated a claim that *individuals* engaged by, and personally performing janitorial work on behalf of, Jani-King are employees under the FLSA notwithstanding the fact that in order to perform that work they are engaged through a franchise arrangement that may in turn require them to form a corporate entity. As the caselaw discussed above demonstrates, the economic realities of the working relationship between Jani-King and the individuals engaged by it to perform janitorial work on its behalf for its customers determine whether the individuals are its employees under the FLSA. The individuals' status as franchisees and/or their formation of corporate entities to perform the work does not, as the district court seemed to suggest, preclude them from being employees under the FLSA. See, e.g., Goldberg, 366 U.S. at 32 ("There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. . . . We fail to see why a member of a cooperative may not also be an employee of the cooperative.").

In addition, the district court, in response to the amended complaint's allegation that "because Jani-King sells its franchises to individuals, either directly or through corporate entities owned by these individuals, . . . the individuals should

be considered Jani-King's 'employees,'" stated that "[s]uch contention ignores corporate forms, and the amended complaint contains no well-pleaded factual allegations that permit the Court to do so." Aplt. App. at 183 n.9 (citing paragraphs 3 and 4 of the amended complaint, Aplt. App. at 80-81). The district court misses the point.

As discussed above, the FLSA's definitions of the scope of the employment relationship and the many Supreme Court and courts of appeals decisions applying those definitions remove from the analysis corporate forms when determining whether individuals subject to those corporate forms are employees under the FLSA. Contrary to the district court's suggestion, the Secretary need not in the amended complaint account for the corporate forms that overlay Jani-King's relationships with the individual workers whom it engages. Instead, the economic realities analysis for employment under the FLSA dispenses with such corporate forms and focuses on the economic realities of the individual's working relationship with the employer. See, e.g., Safarian, 622 F. App'x at 151 (caselaw under the FLSA affirms that the economic realities of the relationship, not its structure, are determinative). Jani-King cannot evade its obligations under the FLSA to the individual workers by interposing corporate entities between it and the workers where the economic realities of its relationships to the workers is one of employer to employee.

In sum, in considering the sufficiency of the amended complaint and determining whether the claim should proceed, the district court was wrong to suggest in any way that the corporate entities through which Jani-King engaged individuals to perform janitorial work precluded the Secretary's claim that the individuals are employees under the FLSA.

CONCLUSION

For the foregoing reasons, the Secretary requests that this Court reverse the district court's dismissal of the amended complaint and remand the case for further proceedings.

Respectfully submitted,

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STATEMENT REQUESTING ORAL ARGUMENT

The Secretary requests that this Court hold oral argument. The dismissal at an early stage of an FLSA action brought by the Secretary is significant and merits careful review. The Secretary believes that oral argument will ensure that this Court has before it all of the underlying factual allegations and legal arguments that it needs for its review, and will assist this Court in reaching a decision.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing Secretary of Labor's Opening Brief:

(1) complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) and Tenth Circuit Rule 32(a) because it was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font; and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 9,189 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(f) and Tenth Circuit Rule 32(b).

/s/ Dean A. Romhilt
DEAN A. ROMHILT

CERTIFICATE OF DIGITAL SUBMISSION

With respect to the foregoing Secretary of Labor's Opening Brief, I certify that:

(1) all required privacy redactions have been made per Tenth Circuit Rule 25.5;

(2) the version of the Brief submitted electronically to this Court via its ECF system is an exact copy of the hard copies of the Brief filed with the Court; and

(3) the version of the Brief submitted electronically to this Court via its ECF system was scanned for viruses by the McAfee VirusScan Enterprise and AntiSpyware Enterprise Program, Version 8.8, and according to the program, the version is free of viruses.

/s/ Dean A. Romhilt
DEAN A. ROMHILT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Secretary of Labor's Opening Brief was served this 30th day of October, 2017, via this Court's ECF system and by pre-paid overnight delivery, on the following:

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ATTACHMENTS

(District Court's June 9, 2017 Order Dismissing Amended Complaint and its June 9, 2017 Judgment)