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 REPLY BRIEF

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases (continued):

Page

Statutes:

Federal Rules of Civil Procedure:

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.

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SECRETARY OF LABOR'S REPLY BRIEF

Plaintiff-Appellant R. Alexander Acosta, Secretary of Labor, United States Department of Labor ("Secretary"), submits this Reply to the Answer Brief filed by Defendant-Appellee Jani-King of Oklahoma, Inc. ("Jani-King").

INTRODUCTION

The Secretary demonstrated in his Opening Brief that the amended complaint states a claim for relief under the Fair Labor Standards Act ("FLSA" or "Act") against Jani-King. Specifically, the amended complaint seeks relief under

the FLSA only for individuals personally performing janitorial work for Jani-King and contains more than sufficient factual allegations relevant to the economic realities of the individuals' working relationship with Jani-King to indicate that the individuals may be its employees under the Act. Accordingly, there was simply no basis for the district court to ignore the amended complaint's plain language and read the amended complaint as seeking relief under the FLSA for any corporate or artificial entity or any persons other than the individuals personally performing work for Jani-King. Moreover, the district court was wrong to suggest that individuals engaged by an employer, but required by the employer to form corporate entities to perform the work, cannot be the employer's employees under the FLSA. As the many cases cited in the Opening Brief make clear, the agreement, structure, and form of the relationship between the employer and the worker do not determine whether the worker is an employee under the FLSA. Instead, the economic realities of the worker's relationship with the employer determine whether the worker is an employee. Thus, the individual janitorial workers can be Jani-King's employees under the FLSA even if they are required to form corporate entities to perform the work.

In its Answer Brief, Jani-King does not attempt to defend the district court's rationale for dismissing the amended complaint, acknowledging that the district court was "incorrect to the extent" that it read the amended complaint to seek relief

for any persons other than individuals. Answer Br., 10 n.2. Instead, Jani-King cites the district court's assertion that the amended complaint "in conclusory fashion lumped together all Janitorial Cleaners procured by Jani-King through its franchise agreements" (Aplt. App. at 183), contends that this allegedly distinct finding by the district court "was correct," states that it moved to dismiss "on that basis," and proclaims "that is the basis on which the dismissal should be affirmed." Answer Br., 10 n.2. In short, Jani-King asserts that the district court set forth a second basis for dismissal that was correct and merits affirmance. Tellingly, however, Jani-King limits to a footnote at the end of the Procedural Background section of its Answer Brief the assertion that the district court provided a "correct" basis for affirming dismissal, see id., and does not anywhere in the Argument section itself pursue this assertion, see id. at 14-25.

Indeed, the district court offered no second basis for dismissal. The district court's statement that the Secretary "in conclusory fashion lumped together all Janitorial Cleaners" clearly refers to its belief that the amended complaint seeks relief under the FLSA for both individuals and corporate entities. In the sentence preceding that statement, the district court found fault with the amended complaint 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 (emphases added). And in a footnote following

that statement, the district court asserted that the amended complaint's allegation that the individuals who perform janitorial work for Jani-King can be its employees regardless of whether Jani-King sells franchises to them through corporate entities owned by them fails because it "*ignores corporate forms*." Aplt. App. at 183 n.9 (emphasis added). In other words, the district court dismissed the amended complaint solely because of its belief that the amended complaint seeks relief under the FLSA for corporate entities in addition to individuals – a belief which even Jani-King now acknowledges was incorrect.

What remains then are arguments by Jani-King that are in no way tethered to the district court's decision on appeal. For the following reasons, those arguments are without merit, and this Court should reverse the district court's dismissal.

ARGUMENT

To state a claim, 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). This Court must accept as true all well-pleaded factual allegations in the amended complaint and view them in the light most favorable to the Secretary. See S.E.C. v. Shields, 744 F.3d 633, 640 (10th Cir. 2014). To survive a motion to dismiss, the amended complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

"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." Id. (citing Twombly, 550 U.S. at 556). This standard ultimately does not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. See id.; Twombly, 550 U.S. at 570.[1]

This Court's motion to dismiss decisions relied on by Jani-King are readily distinguishable from the present case. First, they arose mostly in the context of civil rights cases against multiple government entities and officials. See, e.g., Pahls v. Thomas, 718 F.3d 1210 (10th Cir. 2013) (civil rights action against federal government officials, city, and police department and its officials); Brown v. Montoya, 662 F.3d 1152 (10th Cir. 2011) (section 1983 action against named state and county officials and 1 to 50 John Does); Kan. Penn Gaming, LLC v. Collins, 656 F.3d 1210 (10th Cir. 2011) (section 1983 action against county and county employees); Robbins v. Oklahoma, 519 F.3d 1242 (10th Cir. 2008) (section 1983 action against state, state agency, and known and unknown state employees); Tonkovich v. Kan. Bd. of Regents, 159 F.3d 504 (10th Cir. 1998) (section 1983

[1] Even after Twombly and Iqbal, this Court has noted that granting a motion to dismiss "'is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice.'" Dias v. City & Cnty. of Denver, 567 F.3d 1169, 1178 (10th Cir. 2009) (quoting Duran v. Carris, 238 F.3d 1268, 1270 (10th Cir. 2001)).

action against state university and numerous officials); Mecca v. United States, 389 F. App'x 775 (10th Cir. 2010) (unpublished) (action included Bivens claim against United States Army and multiple officers); Bridges v. Lane, 351 F. App'x 284 (10th Cir. 2009) (unpublished) (section 1983 and Bivens claims against multiple local, state, and federal entities and officials); and VanZandt v. Okla. Dep't of Human Servs., 276 F. App'x 843 (10th Cir. 2008) (unpublished) (section 1983 action against state agency and numerous known and unknown employees).[2] Second, the motions to dismiss in these civil rights cases generally sought dismissal on qualified immunity grounds. As this Court has observed:

> [C]omplaints in § 1983 cases against individual government actors pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants. The Twombly standard may have *greater bite in such contexts*, appropriately reflecting the special interest in resolving the affirmative defense of qualified immunity at the earliest possible stage of a litigation.

Robbins, 519 F.3d at 1249 (quotation marks and citations omitted) (emphasis added); see Kan. Penn Gaming, 656 F.3d at 1215 (citing Robbins).

This Court has reiterated "that 'context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case.'" Robbins, 519 F.3d at

[2] Another motion to dismiss case from this Court relied on by Jani-King was not a civil rights action but nonetheless involved multiple named and unnamed defendants. See Burnett v. Mortg. Elec. Registration Sys., Inc., 706 F.3d 1231 (10th Cir. 2013) (action against company, one named individual, and 50 unidentified individuals).

1249 (alteration omitted) (quoting Phillips v. Cnty. of Allegheny, 515 F.3d 224, 232 (3d Cir. 2008)). Thus:

> In § 1983 cases, defendants often include the government agency and a number of government actors sued in their individual capacities. Therefore it is particularly important in such circumstances that the complaint make clear exactly *who* is alleged to have done *what* to *whom,* to provide each individual with fair notice as to the basis of the claims against him or her, as distinguished from collective allegations against the state.

Id. at 1249-1250 (emphases in original); see Kan. Penn Gaming, 656 F.3d at 1215 (citing Robbins).

The context of the Secretary's claim against Jani-King is different in kind; this is not a civil rights case, there are no qualified immunity concerns, and the claim is against only one defendant. As discussed fully below, the amended complaint makes clear exactly *who* is alleged to have done *what* to *whom*: Jani-King employs and must keep records required by the FLSA regarding individuals engaged by it who personally perform janitorial work for its customers. The amended complaint thus provides the fair notice required to survive a motion to dismiss.

1. Jani-King Is the Only Defendant.

The Secretary's amended complaint seeks relief only against Jani-King. Jani-King is the only person or entity identified as a defendant in the caption of the amended complaint, see Aplt. App. at 80, is defined as the "Defendant" for purposes of the amended complaint, see id., ¶ 1, is the only defendant identified as

a party to the action and the only person or entity other than the Secretary identified as a party, see Aplt. App. at 81-82, ¶¶ 6-7, and is the only person or entity from whom the Secretary seeks relief in the Prayer for Relief, see Aplt. App. at 86, ¶ 23. The amended complaint refers to "Defendant" exclusively in the singular. See Aplt. App. at 80-87.

Despite the plain language of the amended complaint, Jani-King's Answer Brief suggests that there are multiple defendants here and those multiple defendants are its franchisees. See, e.g., Answer Br., 6 ("Jani-King therefore uses the descriptive term 'Franchise Owners' to describe the *targets* of the Amended Complaint, which include individuals who are (1) partners in general partnerships, (2) members in limited liability companies, or (3) shareholders in corporations that own the franchises."); 16 (this Court often requires "a plaintiff raising claims *against multiple defendants* to allege sufficient, particular facts to make the claim plausible as to *each defendant*"); 17 ("The need to plead facts as to *each defendant* is especially acute when *the defendants* are disparately situated and have taken different actions."); 20 ("In a complex, *multi-actor* case like this one, a plaintiff must . . . mak[e] specific allegations regarding *each actor*."); 24 ("[T]he Secretary pleads conclusory, uniform allegations *against* unnamed Jani-King Franchise Owners.") (emphases added). This is simply not a fair reading of the amended complaint: Jani-King is the sole defendant, and its franchisees are not defendants.

See Aplt. App. at 80-87. Thus, Jani-King's attempt to undermine the sufficiency of the Secretary's amended complaint on the ground that there are or should be multiple defendants must fail.

As noted above, the cases primarily relied on by Jani-King in its Answer Brief involved multiple named (and sometimes unnamed) defendants against whom allegations were made generally or aggregately. See cases identified above at pgs. 5-6. This Court was concerned in those cases that the generalized or aggregate allegations failed to put each individual defendant on notice of the claim against him/her. See, e.g., Robbins, 519 F.3d at 1250 ("Given the complaint's use of either the collective term 'Defendants' or a list of the defendants named individually but with no distinction as to what acts are attributable to whom, it is impossible for any of these individuals to ascertain what particular unconstitutional acts they are alleged to have committed."); Burnett, 706 F.3d at 1240 (given "such broad allegations against a large and mostly anonymous group of people," it was not possible to tell which defendant is alleged to have done what or whether there is a reasonable inference that the individual defendant is liable for the alleged misconduct); Brown, 662 F.3d at 1165 (to state a claim against an individual defendant, "[i]t is not enough for the Complaint to lump the four named defendants and presumably the 1-50 John Does into the collective term 'Defendants'"); VanZandt, 276 F. App'x at 849 ("To carry their burden, plaintiffs under the

Twombly standard must do more than generally use the collective term 'defendants.' . . . Plaintiffs fail to individualize each Defendant's alleged misconduct from the Defendants as a collective group."); Mecca, 389 F. App'x at 782 ("there must be something to plausibly suggest" that the named defendants engaged in unlawful conduct; "[v]ague allegations against the entire Army do not suffice").

This Court's concern in those cases relating to proper notice where there are multiple defendants cannot possibly be present here because there is only one defendant. The amended complaint plainly alleges the FLSA violation against Jani-King and no one else. See Aplt. App. at 80-87. The amended complaint thus cannot possibly fail to particularize the alleged violation committed by Jani-King, and Jani-King cannot possibly be confused as to whether it or someone else is alleged to be the employer who must comply with the FLSA's recordkeeping obligations. Those cases and Jani-King's lengthy discussion of them (see Answer Br., 15-18 & 22-24) thus provide no basis for dismissal.

2. The Amended Complaint Seeks Relief Only for Those Individuals Engaged by Jani-King Who Personally Perform Janitorial Work for Its Customers.

The amended complaint contends that Jani-King violated the FLSA with respect to, and seeks relief for, the individuals engaged by Jani-King who personally perform janitorial work for its customers. Specifically, the amended

complaint alleges that Jani-King contracts with customers to provide them cleaning services and "procures workers to perform the janitorial cleaning services for [them]." Aplt. App. at 80-81, ¶¶ 2-3. To describe these workers, the amended complaint uses the defined term "Janitorial Cleaners" to mean the "individuals . . . who personally perform the janitorial cleaning work as designated by [Jani-King]." Aplt. App. at 80-81, ¶ 3. The Janitorial Cleaners are the persons whom the amended complaint alleges to be employees under the FLSA, and for whom the Secretary seeks relief. See Aplt. App. at 81, ¶¶ 4-5; 83, ¶ 14; 85, ¶ 19; 86, ¶ 23.

The defining characteristic of the Janitorial Cleaners is that they are individuals engaged by Jani-King who *personally perform* the janitorial work for its customers. See Aplt. App. at 80-81, ¶ 3. Jani-King engages individuals "directly" and "indirectly . . . through corporate entities owned by one or sometimes two individuals," and those individuals (the Janitorial Cleaners) "personally perform the janitorial cleaning work." Id. As the amended complaint makes clear, the Janitorial Cleaners "are in fact laborers who . . . work jobs such as cleaning carpets and hard floors, disposing of trash, washing windows, and other cleaning services provided to [Jani-King's] clients." Aplt. App. at 83, ¶ 13; see Aplt. App. at 80-81, ¶ 3 (the Janitorial Cleaners "perform cleaning work for [Jani-King's] customers"). Thus, the persons for whom the amended complaint seeks

relief are the individuals whom Jani-King engages and who actually perform the physical labor necessary for Jani-King to satisfy its commitments to its customers.

Jani-King's Answer Brief misses this point and asserts that the amended complaint seeks relief for every Jani-King "Franchise Owner" – a defined term used by Jani-King to refer to individuals who, on their own or through corporate entities, own its franchises. See Answer Br., 6-7. This term, however, is not the same as "Janitorial Cleaner" (which the Secretary uses in the amended complaint) and does not accurately describe the scope of relief sought by the amended complaint. Indeed, the Secretary does not describe the persons for whom the amended complaint seeks relief as every Jani-King franchisee or believe that individuals' status as Jani-King franchisees determines whether they are employees of Jani-King. The Secretary simply notes the Janitorial Cleaners' status as franchisees because, as a factual matter, that is how Jani-King engages the individuals. See Aplt. App. at 80-81, ¶ 3 & 82-83, ¶ 12. Individuals engaged by Jani-King through a franchise or other arrangement and who personally perform janitorial work for it are its workers, and the Secretary believes that the economic realities of the individuals' work for Jani-King show that they are its employees under the FLSA (as opposed to independent contractors).[3]

[3] Jani-King describes generally the franchising business model and cites cases for the proposition that a franchisor's control over its franchisees' business operations does not make the franchisor an employer of the franchisees' employees. See

For these reasons, Jani-King's argument that the amended complaint fails because its allegations do not show that every single "Franchise Owner" is an employee under the FLSA (see Answer Br., 20-22) is beside the point; the Secretary is not alleging that the "Franchise Owners" are Jani-King's employees. Simply put, Jani-King cannot redefine the scope of relief sought by the Secretary. Cf. Firstenberg v. City of Santa Fe, 696 F.3d 1018, 1023 (10th Cir. 2012) ("the plaintiff [is] the 'master' of his claim" and "can elect the judicial forum—state or federal—based on how he drafts his complaint"). Moreover, the cases cited by Jani-King (see Answer Br., 22 (citing Kan. Penn Gaming, 656 F.3d at 1220, and Burnett, 706 F.3d at 1240)) provide no support for its argument. As discussed

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Answer Br., 3-6. The Secretary recognizes that franchising is an entirely legitimate business model that employers can and do pursue, and no franchise arrangement or other business model in and of itself violates the FLSA. Here, Jani-King happens to engage individual workers to perform janitorial work for it through franchise arrangements and corporate forms. These franchise arrangements and corporate forms are not the focus of the amended complaint and do not determine whether the individual workers engaged by Jani-King are its employees under the FLSA. The Secretary understands Jani-King's assertion that there could be individual franchisees who do not personally perform janitorial work for Jani-King because they employ others to perform the work. By the amended complaint's plain language (see Aplt. App. at 80-81, ¶ 3), however, such individual franchisees are not Janitorial Cleaners, and the amended complaint does not seek relief for them. Moreover, the cases cited by Jani-King, Evans v. McDonald's Corp., 936 F.2d 1087 (10th Cir. 1991), Lockard v. Pizza Hut, Inc., 162 F.3d 1062 (10th Cir. 1998), and Woods v. Nicholas, 163 F.2d 615 (10th Cir. 1947), are inapposite. They were not decided under the FLSA, which has its own, strikingly broad standard for determining employment. See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992). In addition, those cases analyzed whether a franchisor was the employer of its franchisees' employees as opposed to whether a franchisor is the employer of individual workers directly engaged by it.

above (see pgs. 5-6 & 9-10), this Court was concerned in those cases about the lack of individualized allegations directed at each defendant when multiple defendants were named; that concern is not present here where there is only one defendant.

Jani-King's argument that factual differences among the "Franchise Owners" – such as "whether the owner is a sole proprietor or only a shareholder in a corporation," their "ownership structure," and "the size of the business or the number of its own employees" (Answer Br., 14 & 19) – warrant dismissal of the amended complaint likewise misses the point. An individual's status as a Jani-King franchisee does not bring him/her within the scope of the relief sought by the amended complaint. Instead, the amended complaint seeks relief for individuals whom Jani-King engages and who personally perform janitorial work for its customers – the "Janitorial Cleaners." See Aplt. App. at 80-81, ¶ 3. Although there is very substantial overlap between Jani-King's franchisees and the individuals engaged by Jani-King who personally perform janitorial work for it, the Secretary is not interested in bringing claims against a franchisor on behalf of its franchisees *because* of that franchise relationship. Rather, the Secretary is interested in bringing claims against a company on behalf of individuals engaged by the company and who personally perform janitorial work for it when the working relationship between the company and the individuals indicates that they may be its employees under the FLSA. That is what the amended complaint does

here, and Jani-King's arguments framed around the individuals' status as its franchisees provide no basis for dismissal.

Jani-King repeatedly mentions that the amended complaint does not identify by name any "Franchise Owner." See Answer Br., 2, 13, 22. However, as emphasized above, the amended complaint seeks relief for the Janitorial Cleaners – not for the "Franchise Owners." See Aplt. App. at 80-81, ¶ 3; 85, ¶ 19; 86, ¶ 23. In any event, the amended complaint's lack of names of the individuals for whom it seeks relief provides no basis for dismissal, and Jani-King cites no cases to the contrary. The amended complaint does not seek any individualized relief, but instead seeks injunctive relief for the Janitorial Cleaners as a group. Cf. Shook v. El Paso Cnty., 386 F.3d 963, 972 (10th Cir. 2004) (lack of identifiability of class members is not a factor when seeking certification of a class for injunctive relief under Federal Rule of Civil Procedure 23(b)(2)).[4] Moreover, this case was at the initial stage before the district court. Further identification of the individuals who are Janitorial Cleaners would likely have occurred during discovery had the case been allowed to proceed.

[4] When the Secretary seeks individualized relief (i.e., back wages) for members of a group, his complaint usually identifies the employees whom his investigation has shown to be due back wages. The Secretary did not do so here because the amended complaint seeks no relief that is particular to any Janitorial Cleaner.

For all of these reasons, the amended complaint provides Jani-King with fair notice of the persons for whom the Secretary seeks relief: the individuals engaged by Jani-King who personally perform janitorial work for its customers.

3. Jani-King Employs under the FLSA the Individuals Engaged by It Who Personally Perform Janitorial Work for Its Customers.

The amended complaint more than adequately alleges what Jani-King does to the Janitorial Cleaners: it employs them under the FLSA but fails to keep the required records. The amended complaint states clearly the Secretary's position that the Janitorial Cleaners are Jani-King's employees under the FLSA (see Aplt. App. at 81, ¶¶ 4-5; 83, ¶ 14; 85, ¶ 19) and his aim to require Jani-King to comply with the Act's recordkeeping obligations regarding them (see Aplt. App. at 80, ¶ 1; 81, ¶ 5; 82, ¶ 11; 85-86, ¶¶ 20-23).

The amended complaint also states the legal basis for the Secretary's claim. First, the amended complaint states that the economic realities of the Janitorial Cleaners' working relationships with Jani-King show that they may be economically dependent on Jani-King and may thus be its employees under the FLSA as opposed to being in business for themselves. See Aplt. App. at 83, ¶ 14 & 85, ¶ 19. Second, the amended complaint, citing the pertinent statutory and regulatory provisions, describes how Jani-King's employment of the Janitorial Cleaners requires it to keep records for them under the FLSA and sets out the

authority for the Secretary to enforce that requirement. See Aplt. App. at 85-86, ¶¶ 20-23.

In addition, the amended complaint provides more than sufficient factual allegations to cross the threshold of plausibility that the Janitorial Cleaners are Jani-King's employees under the FLSA:

- Jani-King engages the Janitorial Cleaners to personally perform janitorial cleaning work for its customers, see Aplt. App. at 80-81, ¶ 3;
- Jani-King negotiates, maintains, and controls the cleaning contracts with its customers and at its sole discretion assigns the cleaning work to the Janitorial Cleaners, see Aplt. App. at 83, ¶¶ 14-15 & 84, ¶ 17;
- the janitorial cleaning work performed by the Janitorial Cleaners includes cleaning carpets and hard floors, disposing of trash, and washing windows, among other cleaning work, see Aplt. App. at 83, ¶ 13;
- the Janitorial Cleaners 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; Jani-King also handles customer service matters, see Aplt. App. at 84, ¶ 17;
- the Janitorial Cleaners buy some tools and equipment to perform the work while Jani-King has invested in and built a corporate infrastructure

to develop and maintain its business and customers, see Aplt. App. at 84-85, ¶ 18;

- Jani-King performs all administrative and financial functions relating to the customer contracts, including pricing, billing, and invoicing, see Aplt. App. at 84, ¶ 16;
- if a Janitorial Cleaner 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 Janitorial Cleaner who obtained the lead to any other Janitorial Cleaner, see Aplt. App. at 83, ¶ 15; and
- the customers pay Jani-King directly for the janitorial work performed, and Jani-King requires the Janitorial Cleaners to report to its office monthly so that it can pay them for their work, see Aplt. App. at 84, ¶ 16.

As the Secretary explained in his Opening Brief (see pgs. 22-25), these factual allegations indicate that, applying an economic realities analysis, the Janitorial Cleaners could be Jani-King's employees under the FLSA. The amended complaint "does not need detailed factual allegations" to survive a motion to dismiss. Twombly, 550 U.S. at 555. Moreover, "[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." Sec'y of Labor v. Labbe, 319 F. App'x 761, 763-64 (11th Cir. 2008) (unpublished) (finding that the Secretary's "not overly detailed" allegations stated a claim for a violation of the FLSA's recordkeeping obligations). The amended complaint's factual allegations are sufficient at the pleading stage to suggest that discovery will reveal evidence that the Janitorial Cleaners are indeed Jani-King's employees under the FLSA. See Twombly, 550 U.S. at 556 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."); see also Skinner v. Switzer, 562 U.S. 521, 529-530 (2011) (on a motion to dismiss, the question is not whether the plaintiff will ultimately prevail on his claim, "but whether his complaint was sufficient to cross the federal court's threshold"). The amended complaint thus provides fair notice of the Secretary's position that the Janitorial Cleaners are Jani-King's employees under the FLSA and more than sufficient legal and factual bases for that position.

Jani-King's arguments to the contrary are unavailing. For example, Jani-King repeatedly cites this Court's admonition that a complaint may be deficient if its allegations cover "a wide swath of conduct, much of it innocent." See Answer Br., 11, 16, 20, 22 (citing Robbins, 519 F.3d at 1247). The amended complaint, however, is tailored narrowly: it makes allegations regarding only Jani-King, only

the individuals engaged by Jani-King who personally perform the janitorial work, and only Jani-King's employment of and failure to keep the required records for these individuals. Jani-King fails to identify the widespread innocent conduct supposedly swept in by the amended complaint, nor is there any.

Jani-King further argues that the amended complaint fails because some of the Secretary's factual allegations are qualified (using terms such as "in most instances" and "with very few exceptions"). See Answer Br., 13 & 19-22. According to Jani-King, these qualifications are an acknowledgment that some Janitorial Cleaners may not be employees. See id. In truth, however, the Secretary gathered information during his investigation regarding many Janitorial Cleaners but not necessarily all of them. The amended complaint's allegations simply reflect that reality.

Moreover, the uniformity of allegations at the pleading stage urged by Jani-King would be nearly impossible for any FLSA group action to satisfy. For example, in an FLSA collective action brought by an employee on "behalf of himself . . . and other employees similarly situated" as permitted by 29 U.S.C. 216(b), the determination regarding whether the employees are sufficiently similarly situated to proceed collectively often happens at two steps: a lenient analysis is applied during the course of discovery and a more strict analysis is applied at the conclusion of discovery. See Thiessen v. Gen. Elec. Capital Corp.,

267 F.3d 1095, 1101-05 (10th Cir. 2001) (finding no error in taking such a two-step approach and noting that this approach arguably is the best approach).[5] Similarly, if this Court reverses and remands, Jani-King will have opportunities before the district court to contest the nature of the group for whom the Secretary seeks relief and point out any differences among the Janitorial Cleaners. However, there is no deficiency in the amended complaint, including the qualifications cited by Jani-King, that prevent this case from proceeding.

Finally, Jani-King states that the amended complaint does not discuss the "operations" of any franchise. See Answer Br., 2 & 13. However, as explained above, this case is not about franchises or "Franchise Owners." Instead, the amended complaint sets forth numerous factual allegations regarding the working relationship between Jani-King and the individuals engaged by it who personally perform janitorial work. The economic realities of that working relationship – not the franchise operations – determine whether the individuals are employees under the FLSA.

[5] Thiessen involved a collective action brought pursuant to the Age Discrimination in Employment Act, which borrows the collective action process available to similarly situated employees under 29 U.S.C. 216(b) of the FLSA. See 267 F.3d at 1102.

CONCLUSION

For the foregoing reasons and the reasons set forth in his Opening Brief, 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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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing Secretary of Labor's Reply 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)(ii) because it contains 4,999 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 Reply 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
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Secretary of Labor's Reply Brief was served this 29th day of January, 2018, via this Court's ECF system and by pre-paid overnight delivery, on the following:

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