IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C. A. NO. 3:14-cv-02337-JFA

AALIYAH PINCKNEY, MARI WILKINS, and JEREMIAH TINCH, Plaintiffs, v. 7-ELEVEN, INC. d/b/a 7-Eleven Convenience Store #36863, Defendant.	)	**DEFENDANT 7-ELEVEN, INC'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**

Defendant 7-Eleven, Inc. ("7-Eleven"), which is incorrectly identified in the Complaint as 7-Eleven, Inc. d/b/a 7-Eleven Convenience Store #36863, has moved this Court, by counsel, to dismiss the Complaint for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). In the alternative, Defendant has moved for a more definite statement under Fed. R. Civ. P. 12(e) with respect to the claim arising under the Fair Labor Standards Act ("FLSA").

INTRODUCTION

Plaintiffs' Complaint purports to assert individual and collective claims for overtime violations under FLSA and other failure to pay wages claims under the South Carolina Payment of Wages Act. The Complaint provides no detail whatsoever as to the scope or circumstances of each Plaintiff's alleged individual overtime violations. Plaintiffs also fail to allege that 7-Eleven treated a particular group of employees in a consistent unlawful manner, such that a Collective Action is appropriate. Instead, in both the individual and collective allegations, Plaintiffs merely

recite the elements of the cause of action. This type of conclusory pleading is precisely the sort that is unacceptable under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Accordingly, the Court should dismiss the Complaint under Rule 12(b)(6).

FACTUAL BACKGROUND

According to the Complaint, Plaintiffs were employed by a 7-Eleven convenience store owned and managed by 7-Eleven in Irmo, South Carolina. Plaintiffs were hourly employees (Compl. ¶ 15) and allege that 7-Eleven failed to pay Plaintiffs "at the rate of one-and-a-half times their normal rate of pay for all hours worked in excess of forty (40) hours per week" during their employment.[1] (Compl. ¶ 16). Plaintiffs further allege that 7-Eleven failed to pay them "for all compensable time for which the Plaintiffs provided work for the benefit of Defendant." (Compl. ¶ 17). Plaintiffs allege that they would "sometimes work forty-five (45) hours during a workweek but would only be paid for less than 40 hours." (Compl. ¶ 17). Identical allegations are also made on behalf of "members of the Plaintiff class." (Compl. ¶ 17-19).

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), 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). Under this standard, the plaintiff must plead facts that permit the court, based on "its judicial experience and common sense, . . . to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 679. Moreover, although the court must accept all of the complaint's factual allegations as true,

[1] Plaintiff Aaliyah Pinckney was employed by 7-Eleven from June 12, 2013 through October 14, 2013. Plaintiff Mari Wilkins was employed by 7-Eleven from April 15, 2013 through October 15, 2013. Plaintiff Jeremiah Tinch was employed by 7-Eleven from April 15, 2013 through August 15, 2013.

this tenet "is inapplicable to legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements." *Id.* at 678; *see also Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256 (4th Cir. 2009). This legal standard is designed to ensure that a bare-bones complaint "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Francis v. Giacommelli*, 588 F.3d 186, 193 (4th Cir. 2009).

ARGUMENT

The Complaint should be dismissed in its entirety because it lacks sufficient detail to state a claim under *Iqbal* and *Twombly*. Plaintiffs have failed to state any factual allegations pertaining to their wage claims or even to identify the type of overtime claim they are making. Further, Plaintiffs have not alleged any facts that would allow the Court to conclude that there is a class of people similarly situated to the Plaintiffs such that collective treatment is appropriate.

I. PLAINTIFFS' INDIVIDUAL FLSA CLAIMS SHOULD BE DISMISSED BECAUSE THEY DO NOT ALLEGE THE AMOUNT OR CIRCUMSTANCES OF UNCOMPENSATED OVERTIME.

"To assert a claim for overtime compensation pursuant to 29 U.S.C. § 207, a plaintiff must plead (1) that he worked overtime hours without compensation; and (2) that the employer knew or should have known that he worked overtime but failed to compensate him for it." *Butler v. DirectSat USA, LLC*, 800 F.Supp.2d 662, 667 (D. Md. 2011) (citing *Davis v. Food Lion*, 792 F.3d 1274, 1276 (4th Cir. 1986)(internal quotation marks and citation omitted). Where, as here, a plaintiff fails to allege that he "worked at least 40 hours and also worked uncompensated time in excess of 40 hours" in a "single workweek," there is "no plausible claim that the FLSA was violated." *Lundy v. Catholic Health Sys. of Long Island*, 711 F.3d 106, 114 (2d Cir. 2013). Plaintiffs are not required to prove each hour of overtime work, but must "show the amount and

extent of improperly compensated work". *Pforr v. Food Lion, Inc.*, 851 F.2d 106, 108 (4th Cir. 1988).

In the wake of *Twombly* and *Iqbal*, courts have required that, to state a plausible claim under the FLSA, a plaintiff must "sufficiently indicate the compensation he was entitled to and the number of hours worked without proper compensation to survive a motion to dismiss." *Ray v. Bon Secours – St. Francis Xavier Hosp., Inc.*, No. 2:12-cv-01180-DCN, 2012 WL 4591922, at *2 (D.S.C. October 1, 2012) (citing *Jones v. Imaginary Images, Inc.*, No. 3:12-CV-217, 2012 WL 3257888, at *11 (E.D. Va. Aug. 8, 2012)); *see Bowen v. Darby Development Co., Inc.*, 2012 WL 2675323 at *17-18 (D.S.C. Apr. 26, 2012); *see also Ekokotu v. Fed. Express Corp.*, 408 F. App'x 331, 340 (11th Cir. 2011) ("To establish a prima facie case of a FLSA violation, a complainant must show as a matter of just and reasonable inference the amount and extent of his work in order to demonstrate that he was inadequately compensated under the FLSA."). "A complaint that is devoid of such factual detail does not properly state a FLSA unpaid wages claim." *Ray*, 2012 WL 4591922, at *4 (citing *Imaginary Images*, 2012 U.S. Dist. LEXIS 11682, at *11); *see also DeSilva v. North- Shore Long Island Jewish Health System*, 770 F.Supp.2d 497, 510 (E.D.N.Y. 2011) ("[B]ecause plaintiffs have failed to approximate the number of overtime hours that they worked as a result of any of the unpaid work policies, and because they have failed to provide any specific factual allegations for their claims regarding [work policies], the Court finds that plaintiffs have failed to state a claim for a FLSA overtime violation."); *James v. Countrywide Financial Corp.*, 849 F.Supp.2d 296, 321 (E.D.N.Y. 2012) (plaintiff's allegations that he was not paid overtime during fourteen-month time period, without specificity as to the dates and hours worked, were insufficient to survive a motion to dismiss).

Courts have also required that plaintiff allege the basic details of the defendant's

allegedly unlawful timekeeping practices. *See, e.g.*, *Schwartz v. Civotry Sec. Agency*, No. 11-cv-489, 2011 WL 3047639, at *9 (W.D. Pa. June 14, 2011) (holding that allegations must "sufficiently detail how [d]efendant's time keeping practices violated the FLSA"); *DeSilva*, 770 F.Supp.2d at 510 (dismissing a claim where the eight paragraphs pertaining to the operation of allegedly unlawful policies contained only "vague and unfounded conclusions that plaintiffs were not being properly paid."); *James*, 849 F.Supp.2d at 321 (requiring plaintiffs to plead specific facts regarding the allegedly unlawful practices). Facts pertaining to timekeeping practices are necessary to adequately inform the defendant of the type of claim being asserted against it.

As the Court is likely aware, overtime claims can come in many different varieties. Such claims may concern employees clocking out for lunch but continuing to work, performing work tasks before or after a shift, time spent on call, time spent dressing in required attire, or a claim that employees were accorded compensable time in lieu of overtime pay. A plaintiff with a legitimate overtime claim should be able to provide enough factual details in the complaint to put the employer on notice as to what type of overtime violation is being alleged or what specific timekeeping practices are at issue. Indeed, such information is necessary to investigate the alleged violation and prepare a defense thereto. *Sampson v. MediSys Health Network, Inc.*, No. 10-CV-1342, 2011 WL 579155, at *4 (E.D.N.Y. Feb. 8, 2011) ("Without alleging facts that support [their] claim, . . . plaintiffs have not given defendants fair notice of the basis of the FLSA overtime claim as required by *Twombly* and *Iqbal*.").

In this case, Plaintiffs' Complaint fails to approximate the amount of uncompensated overtime hours they claim to have worked and does not set forth the circumstances surrounding the alleged overtime violations about which they complain, or even allege that they worked in

excess of forty hours in any given week. The allegations simply state:

> Defendant 7-Eleven failed to pay the Plaintiffs . . . at the rate of one-and-a-half times their normal rate of pay for all hours worked in excess of forty hours per week. . . . (Compl. ¶ 16).
>
> Defendant also failed to pay the Plaintiffs . . . for all compensable time for which the Plaintiffs provided work for the benefit of Defendant. Plaintiffs sometimes worked hours that did not appear on their pay stub and would sometimes work forty-five (45) hours during a workweek but would only be paid for less than 40 hours. (Compl. ¶ 17). . . .
>
> [C]ompensation was wrongfully excluded by Defendant 7-Eleven in calculating the Plaintiffs' . . . compensable time. (Compl. ¶ 19).
>
> The failure of Defendant to compensate the Plaintiffs . . . for overtime work and for "off the clock hours" as required by the FLSA was knowing, willful, intentional, and done in bad faith. (Compl. ¶ 20).

These conclusory allegations do not sufficiently inform 7-Eleven of the nature of Plaintiffs' claims and are not entitled to a presumption of truth under *Iqbal* and *Twombly*. Further, this Complaint deprives 7-Eleven of the ability to provide a meaningful response because the allegations against it are so unclear. *Sampson*, 2011 WL 579155, at *4.

The Eleventh Circuit recently reiterated the importance of defendants utilizing Fed. R. Civ. P. 12(b) to better identify the issues before diving into discovery when faced with a "shotgun complaint." *Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117, at *21 (11th Cir. 2014) ("A defendant served with a shotgun complaint should move the district court to dismiss the complaint pursuant to Rule 12(b)(6) . . . on the ground that the complaint provides it with insufficient notice to enable it to file an answer."). In *Paylor*, the plaintiff brought a claim under the Family and Medical Leave Act (FMLA), in which the complaint simply alleged that the defendant violated the FMLA by interfering with and/or denying the plaintiff's leave, retaliating against her for attempting to exercise her rights, and ultimately terminating the plaintiff. *Id.* The

court noted that this type of pleading was not sufficient because there was "no specific factual allegation [that informed] the reader how, precisely, the defendant interfered with or retaliated against the plaintiff." *Id*. (emphasis added). "Civil pleadings are supposed to mark the boundaries for discovery; discovery is not supposed to substitute for definite pleading." *Id*. at 24. An obviously very frustrated court went on to describe discovery without an adequately defined complaint as a "goat rodeo," chastising the plaintiff for creating a shotgun pleading and defendant for not doing something about it. *Id*. at 25.

Plaintiff has not stated a plausible claim for relief, and dismissal is warranted. *Zhong v. August Corp.*, 498 F.Supp.2d 625, 630 (S.D.N.Y. 2007) (dismissing claim where plaintiff failed plausibly to allege entitlement to overtime compensation).

II. PLAINTIFFS' COLLECTIVE ACTION CLAIMS FAIL BECAUSE THEY HAVE NOT ALLEGED ANY FACTS THAT WOULD MAKE COLLECTIVE ACTION TREATMENT APPROPRIATE.

An action under the FLSA "may be maintained . . . by any one or more employees for and on behalf of himself or themselves *and other employees similarly situated.*" 29 U.S.C. § 216(b). It appears that Plaintiffs intended to bring this action on behalf of other employees similarly situated to them. (Compl. ¶ 1 ("This action is brought individually and collectively . . .")). Because both causes of action are brought individually for the Plaintiffs and collectively, there are numerous references to "the Plaintiffs and members of the Plaintiff class" throughout the Complaint. (Compl. ¶¶ 1, 14-21, 25- 30). However, the phrase "similarly situated" only appears in the Complaint's introductory paragraph and the Prayer for Relief. Other than the indication that members of the Plaintiff class were hourly employees of 7-Eleven, the purported Plaintiff class is not defined in the Complaint. Because Plaintiffs "neither generally nor specifically name[ ] or reference[ ] any other plaintiffs," there is no basis on which the Court

might determine that similarly situated plaintiffs exist. *Zhong*, 498 F. Supp. 2d at 631 (citing *Schwed v. GE*, 159 F.R.D. 373, 375-76 (N.D.N.Y. 1995)); *see also Jones v. Casey's Gen. Stores*, 538 F.Supp.2d 1094 (S.D. Iowa 2008) ("[W]here a plaintiff brings an FLSA claim for and on behalf of himself . . . and other employees similarly situated, the complaint should indicate who those other employees are." (internal quotation marks omitted)). Without sufficient detail regarding who might appropriately be members of a Plaintiff class, there can be no plausible Collective Action, and the claim must be dismissed.

In addition to being deficient in defining the potential Plaintiff class, the Complaint fails to reference any policy or rule 7-Eleven systematically applied to a group of employees in violation of the FLSA. To bring an action under the FLSA on behalf of those "similarly situated," Plaintiffs must provide, at a minimum, an "identifiable factual nexus" binding "the named plaintiffs and the potential class members together." *Pelczynski v. Orange Lake Country Club, Inc.*, 284 F.R.D. 364, 368 (D.S.C. 2012). Another key factor the Court should consider is "whether the plaintiffs were victims of a common policy or plan that violated the law." *Id.* (citing *Purdam v. Fairfax County Public Schools*, 62 F.Supp.2d 544, 548 (E.D.Va. 2009) (internal quotation marks omitted). Simply alleging that similarly situated individuals exist is insufficient to justify a collective action certification. *MacGregor v. Farmers Ins. Exchange*, No. 2:10-CV-03088, 2011 WL 2981466, at *2 (D.S.C. July 22, 2011). As mentioned above, the Complaint provides no factual allegations that indicate what type of overtime claim is being made. The Collective Action requires Plaintiffs not only to indicate how, specifically, 7-Eleven violated the FLSA, but also to allege facts indicating that a particular class of employees has claims based on the same basic facts and policies. *See Zhong*, 498 F. Supp. 2d at 631(citing *Schwed*, 159 F.R.D. at 375-76) (holding that the Court cannot determine whether similarly

situated employees exist where "there is no reference made to a policy to which other employees are subject"). Because Plaintiffs' Complaint lacks details regarding who is similarly situated to him and what unlawful rules were commonly applied to them, Plaintiffs "ha[ve] not sufficiently alleged an action on behalf of others similarly situated." *Zhong*, 498 F.Supp.2d at 631.

Courts have held that a complaint was insufficient to state a plausible claim for a Collective Action under the FLSA where the complaint included considerably more information than this Complaint includes. For example, in *Jones v. Casey's General Store*, the plaintiffs made the following allegations with regard to their Collective Action:

> The proposed collective class of similarly situated persons is defined as: All persons who are currently or were employed by Defendant during the three-year period immediately preceding the filing of the original complaint as "Assistant Managers" at any Casey's General Store located in the United States. . . . Plaintiffs are similarly situated to the members of the collective class with respect to job title, job description, job duties, and the wage and hour violations alleged in this Complaint, amongst other things. . . . Defendant encouraged, suffered and permitted Plaintiffs and the collective class to . . . work more than forty (40) hours per week without overtime compensation. . . . Defendant operated under a scheme to deprive Plaintiffs and the collective class of minimum wage and overtime compensation by failing to properly compensate them for all time worked. . . . Plaintiffs estimate that there are approximately six thousand (6,000) members of the collective class.

Amended Complaint, ¶ 25-31, Jan. 28, 2008, ECF No. 162, *Jones v. Casey's General Store*, Case 4:07-cv-400-RP-TJS. (Appendix 1). The court in *Jones* held that allowing amendment would be futile because the amended complaint "provide[d] only generic conclusory assertions of a right to relief under the FLSA" and because "there [was] not, on the face of the Amended Complaint, a single *factual* allegation that would permit an inference that even one member of the Plaintiffs' collective ha[d] a right to relief above the speculative level." *Jones*, 538 F.Supp.2d at 1102-03 (quoting *Twombly*, 127 S.Ct. at 1965) (internal quotation marks omitted) (emphasis in

original). In this case, Plaintiff has failed even to attempt to define the class or allege that Defendant "operated under a scheme to deprive" all members of that class of compensation owed. Accordingly, there cannot be a plausible Collective Action, and this aspect of the claim must be dismissed.

III. PLAINTIFFS' CLAIM FOR UNPAID OVERTIME UNDER THE SOUTH CAROLINA PAYMENT OF WAGES ACT SHOULD BE DISMISSED BECAUSE IT IS PREEMPTED BY THE FLSA.

To the extent Plaintiffs assert a claim under the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq*. ("SCPWA") for failure to pay overtime, the Fair Labor Standards Act preempts the claim. *See Nimmons v. RBC Ins. Holdings (USA) Inc.*, CA No. 6:07-cv-2637, 2007 WL 4571179, at *2 (D.S.C. Dec. 27, 2007) (holding that state law claims that are "duplicative of the rights and remedies available under the FLSA" are "not viable and should be dismissed"). The state law claim is preempted because "in the FLSA, Congress manifested a desire to exclusively define the private remedies available to redress violations of the statute's terms." *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 194 (4th Cir. 2007) (quoting *Kendall v. City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999)). "Because the FLSA's enforcement scheme is an exclusive one," state claims pertaining to rights protected by the FLSA "are precluded under a theory of obstacle preemption." *Anderson*, 508 F.3d at 194. South Carolina District Courts have held that this preemption applies to claims under the South Carolina Payment of Wages Act. *McMurray v. LRJ Restaurants, Inc.*, No. 4:10-cv-01435-JMC, 2011 WL 247906, at *2 (D.S.C. Jan. 26, 2011) ("To the extent that Plaintiff seeks compensation under the Wage Act for overtime pay otherwise required by the FLSA . . . , *Anderson* clearly provides that these claims are preempted by the FLSA and must be dismissed."); *Amason v. PK Mgmt., LLC*, No. 3:10-1752-MJP-JRM, 2011 WL 1100211, at * 2 (D.S.C. Mar. 1, 2011) (holding that Plaintiff's

attempt to add a claim under the Payment of Wages Act was futile because "the exclusive remedies available to enforce legal rights created by the FLSA are the statutory remedies provided therein"). Plaintiffs' individual claims based on Payment of Action must be dismissed as preempted. Moreover, because there is no basis in the Payment of Wages Act for a collective action, the class allegations must be dismissed.

IV. PLAINTIFFS' SECOND CAUSE OF ACTION FAILS BECAUSE IT DOES NOT CONTAIN SUFFICIENT FACTUAL MATTER TO STATE A PLAUSIBLE CLAIM FOR RELIEF.

If Plaintiffs' claim under the Payment of Wages Act is not dismissed as preempted, it should be dismissed because Plaintiffs' Second Cause of Action is void of even a single *factual* allegation. The Payment of Wages Act defines wages as:

> "all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract."

S.C. Code Ann. § 41-10-10. In spite of this broad definition of wages, Plaintiffs have failed to allege what type of wages they are owed. (*See* Compl. ¶¶ 23-29). They also fail to provide any information regarding the amount of wages owed, why the wages are owed, when they performed work for which they were not compensated, or in what way 7-Eleven violated South Carolina Code §§ 41-10-40 and 50. These legal conclusions fall short of the standard set by *Twombly* and *Iqbal*, and therefore, this claim must be dismissed.

CONCLUSION

For each of the foregoing reasons, 7-Eleven, Inc., respectfully submits requests that the Complaint be dismissed and that it be awarded its attorney's fees and costs and such other relief

as the Court deems just and proper.

Respectfully submitted,

June 16, 2014

7-ELEVEN, INC.

By /s/Franklin G. Shuler, Jr.
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