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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

Paula Self, Linda Duncan, Sheri Kiddy, Leslie Demull, Timothy Van Hoose, Michael Combs, Isabel Shelton, Ramy Ibrahim, Scott Wright, Wilda Sellers, Damon Hylton, Deyaska Spencer, Larry Clark, Lativia Williams, and Kevin Stagner Individually and on Behalf of Others Similarly Situated,

Plaintiffs,

vs.

TPUSA, Inc. and Teleperformance Group, Inc., Corporations,

Defendants.

**PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR
LEAVE TO FILE THE THIRD
AMENDED COMPLAINT**

Case No.: 2:08-CV-395 PMW

Judge: Hon. Paul M. Warner

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Representative Plaintiffs, Paula Self, Linda Duncan, Sheri Kiddy, Leslie Demull, Timothy Van Hoose, Michael Combs, Isabel Shelton, Ramy Ibrahim, Scott Wright, Wilda Sellers, Damon Hylton, Deyaska Spencer, Larry Clark, Lativia Williams, and Kevin Stagner ("Representative Plaintiffs"), by and through their attorneys Jesse S. Brar and Sharon L. Preston, hereby submit the following Memorandum of Law in Support of Their Motion for Leave to File The Third Amended Complaint.

I. INTRODUCTION

Plaintiffs filed their Second Amended Complaint which asserted claims for unpaid overtime wages under the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* Plaintiffs filed their claim individually and as a collective action under the FLSA, 29 U.S.C. §216(b), on behalf of others similarly situated. Additionally, the Second Amended Complaint also asserted claims for unpaid non-overtime wages (for weeks where plaintiffs and other proposed class members worked less than 40 hours in a week) under state laws including state wage and hour laws, breach of contract, and unjust enrichment. Plaintiffs are seeking class action treatment under Rule 23 of the Fed. R. Civ. P. for their state law claims.

Defendants filed a motion to dismiss Plaintiffs certain claims from Plaintiffs' Complaint, asserting, among other things, that the Utah Payment of Wages Act ("UPWA") does not provide a private right to recover unpaid wages. However, Plaintiffs assert in their separate Response to Defendants' second Motion to Dismiss, that UPWA in fact does provide a private right of action to recover unpaid non-overtime wages. Additionally, Defendants asserted that the Representative Plaintiffs do not have standing to assert claims under the state laws against Defendants on behalf

of persons from states of which the Representative Plaintiffs are not themselves citizens¹. However, as argued in Plaintiffs' separate Response to Defendants' Motion to Dismiss, the Plaintiffs assert that the issue of standing should not be considered prior the determination of class issues, and therefore Plaintiffs' state law claims should be allowed to stand.

In response to the Defendants' Motion for More Definite Statement, Plaintiffs' are filing this Memorandum in Opposition and this Motion for Leave to File the Second Amended Complaint.

II. MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Pursuant to Rule 15, Federal Rules of Civil Procedure, Plaintiffs submit this Motion for Leave to File their Second Amended Complaint for violation of the Fair Labor Standards Act of 1938, 29 U.S.C. §§201 *et seq.*, for unpaid overtime wages; and violations of State laws for unpaid non-overtime wages.

Plaintiffs file this Motion for Leave to File their Second Amended Complaint to add several opt-in plaintiffs as Named Party plaintiffs; clarify the claims for unpaid non-overtime wages under the wage payment laws of the states of Florida, Illinois, Indiana, Ohio, South Carolina, Texas and Utah. Additionally, the Second Amended Complaint adds claims for violations of minimum wage laws for the aforementioned states. Finally, the Second Amended Complaint clarifies Plaintiffs' claims under theories of breach of express or implied contracts for

¹ In the Third Amended Complaint, Plaintiffs have included claims under the state laws of Georgia even though there is no representative plaintiff from Georgia. However, Plaintiffs respective reserve the right to add additional named plaintiffs, including plaintiffs from Georgia.

unpaid non-overtime wages; and under equitable theory of unjust enrichment for non-overtime wages under the laws of the aforementioned states.

For the reasons set forth herein, Plaintiffs pray the Court grant them leave to file their Second Amended Complaint, attached hereto as Exhibit A.

III. LEGAL ARGUMENT

A. **Plaintiffs' Motion for Leave to File Second Amended Complaint Should Be Granted**

Under rule 15(a) of the Federal Rules of Civil Procedure, leave to amend pleadings "shall be freely given when justice so requires." *Fed. R. Civ. P. 15(a)*. Rule 15(a) further states that "[a] party may amend his pleading *once* as a matter of course at any time before a responsive pleading is served...[o]therwise, a party may amend his pleading only by leave of court or by written consent of the adverse party." *Id.* (Emphasis added). "The liberal granting of motions for leave to amend reflects the basic policy that pleadings should enable a claim to be heard on its merits." *Calderon v. Kansas Dep't of Social & Rehab. Servs.*, 181 F.3d 1180, 1886 (10th Cir. 1999) (attached as Exhibit B); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (attached as Exhibit C). Additionally, the Tenth Circuit notes that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Triplett v. Leflore County*, 712 F. 2d 444, 446 (10th Cir. 1983) (attached as Exhibit D).

Rule 15(d) of the Federal Rules of Civil Procedure also allows plaintiffs to supplement their pleadings to set forth post-complaint transactions or occurrences or events. *Gillihan v. Shillinger*, 872 F. 2d 935, 941 (10th Cir. 1989) (attached as Exhibit E). Leave to supplement, like

leave to amend, should be freely given when justice so requires. *Mathews v. Diaz*, 426 U.S. 67, 75, 75 n.9 (1976) (attached as Exhibit F); *See also Walker v. United Parcel Service, Inc.*, 240 F.3d 1268, 1278 (10th Cir. 2001) (Such leave "should be liberally granted unless good reason exists for denying leave, such as prejudice to the defendants.") (attached as Exhibit G).

Generally, the Court will refuse leave to amend only on "a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiency by amendments previously allowed, or futility of amendment." *Maxwell v. Barney*, 2007 U.S. Dist. LEXIS 49181 at *2 (D. Utah 2007) (attached as Exhibit H).

Here, Plaintiffs' motion should be freely granted because: (i) amendment would not be futile. (a) Plaintiffs' claims for unpaid non-overtime wages under the "wage payment" and minimum wage laws of the states of Florida, Illinois, Indiana, Ohio, South Carolina, Texas and Utah provide for recovery of such unpaid wages; and (b) breach of express or implied contracts and equitable theory of unjust enrichment provide for alternative grounds for recovery under the laws of these states; (ii) Defendants will not be unduly prejudiced; and (iii) Plaintiffs have not unduly delayed or acted in bad faith in moving for leave to amend.

1. The Amended Claims Are Not Frivolous, Have Merit, and Are Legally Sufficient

It is well-settled that, "the court may deny a motion to amend when the desired change clearly is frivolous or advances a claim that is legally insufficient on its face, but if a proposed amendment is not clearly futile, then denial of leave to amend is improper." *Adam v. Kansas Wesleyan Univ.*, 1996 U.S. Dist. LEXIS 4192 at *3 (D. KS 1996) (*citing 6 Wright, Miller &*

Kane, Federal Practice and Procedure: Civil 2d, § 1487 at 637 (2nd Ed. 1990) (internal quotation marks omitted) (attached as Exhibit I). “Otherwise, the substantive merits of a claim or defense should not be considered on a motion to amend.” *Id.* (internal quotation marks omitted).

Here, Plaintiffs' Proposed Amended Complaint plainly states causes of action under the laws of the states of Florida, Illinois, Indiana, Ohio, South Carolina, Texas and Utah; and alternative causes of action for breach of express or implied contract, and unjust enrichment.

2. Defendants Will Not Be Unduly Prejudiced

Another factor is whether the amendment would prejudice the nonmoving party. “Courts typically find prejudice *only* when the amendment unfairly affects the defendants ‘in terms of preparing their defense to the amendment’ ... “Most often, this occurs when the amended claims arise out of a subject matter different from what was set forth in the complaint and raise significant new factual issues.” *Edizone, L.C. v. Cloud Nine*, 2008 U.S. Dist. LEXIS 33970 at *12 (*D. Utah April 24, 2008*) (attached as Exhibit J), *citing* *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1205 (10th Cir. 2006).

Defendants will not be prejudiced by the addition of opt-in plaintiffs as Named Party Plaintiffs; and the addition of claims for unpaid wages under state laws, breach of contract, and unjust enrichment. Plaintiffs' motion for leave to amend merely seeks to clarify its earlier complaint and provides alternative grounds for recovery based on facts already alleged, requiring no additional facts or discovery. First, Plaintiffs' claims to recover unpaid non-overtime wages under state wage payment and minimum wage laws, breach of contract, and unjust enrichment are based upon the same set of operative facts as alleged in their initial Complaint and will not

require any additional discovery. Finally, the Defendants are already equipped with all discoveries that are pertinent to Plaintiffs' claims.

3. *Plaintiffs Have Not Unduly Delayed or Acted in Bad Faith*

Plaintiffs have filed their motion for leave to amend in response to Defendants' Motion for More Definite Statement and before the expiration of the time granted to it by the Court (pursuant to the stipulation for grant of extension of time by Defendants). Here, Defendants have not yet filed a responsive pleading, and the discovery has not begun in this case. Plaintiffs file this motion in good faith and have not acted in bad faith. The grant of Plaintiffs' motion to amend would not cause any undue delay in the progress of litigation to trial.

4. *No Reason Exists to Deny Plaintiffs' Motion for Leave to File Second Amended Complaint*

The leave to amend or supplement a complaint "shall be freely given when justice so requires," FRCP 15(a); *see Forman v. Davis*, 371 U.S. 178, 230 (1962). The Supreme Court has stated that a trial court should not deny a motion for leave to amend without an "apparent or declared reason." *Id.* at 182 (U.S. 1962). The *Forman* Court enumerated reasons why a motion to amend could properly be denied: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party... [and] futility of amendment." *Id.* If none of these reasons is present, then "the leave sought should, as the rules require, be freely given." *Id.*

Plaintiffs argue that none of the reasons enumerated by the Supreme Court is present in the instant case before this Court. First, there is no indication, and it is not the case, that leave to amend is requested in bad faith or as a dilatory tactic. Second, the party seeking leave to amend

has not asked the court repeatedly for leave to amend; indeed, this is the first such request. Third, there is no prejudice to Defendants as Defendants are well aware of the facts as they were alleged in the Plaintiffs' initial Complaint. Defendants have been on notice since the filing of the initial Complaint regarding the continued violations of the FLSA (for unpaid overtime wages) and State laws (for unpaid non-overtime wages). Finally, the addition of the new claims is not futile or of the type subject to dismissal under Fed. R. Civ. P. 12(b)(6).

None of the reasons suggested by the Court for denial of a motion to amend exist here. Consequently, Plaintiffs respectfully request that this Court grant the leave to amend.

IV. CONCLUSION

Based on the forgoing reasons Plaintiffs request that Defendants' motion for a more definite statement be denied and Plaintiffs be granted leave of this Court to file the attached Second Amended Complaint pursuant to Fed. R. Civ. P. 15. The Second Amended Complaint is attached as Exhibit A.

Respectfully submitted, this 28th day of August, 2008.

/s/Jesse S. Brar
Jesse S. Brar
Sharon L. Preston
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on August 28, 2008, I electronically filed the foregoing Motion for Extension of Time with the Court using the CM/ECF system which sent notification of such filing to the following:

Gerry B. Holman
Leslie L. Abbott
Hannah J. Cole
Mary C. Dollarhide

/s/Jesse S. Brar
Sharon Preston
Attorney for the Plaintiffs