

11-0734-cv, 11-0710-cv, 11-0713-cv, 11-0728-cv  
Nakahata, et al., v. New York-Presbyterian Healthcare System, Inc., et al.

1 **UNITED STATES COURT OF APPEALS**

2  
3 **FOR THE SECOND CIRCUIT**

4  
5 August Term, 2012

6  
7 (Argued: November 9, 2012 Decided: July 11, 2012)

8  
9 Docket Nos. 11-0734, 11-0710, 11-0713, 11-0728

10  
11 - - - - -x

12  
13 MASAHIRO NAKAHATA, on behalf of herself and all other employees  
14 similarly situated, DIANA GARDOCKI, on behalf of herself and all  
15 other employees similarly situated,

16  
17 Plaintiffs-Appellants,

18  
19 DIANE LEE SUSSMAN, STEVIE HARISTON, CAROLE TASSY, MARY MAHONEY,  
20 LINDA MARRONE, MARY OLDAK, VOLVICK DESIL, STEPHANIE UHRIG,

21  
22 Plaintiffs,

23  
24 - v.-

25  
26 NEW YORK-PRESBYTERIAN HEALTHCARE SYSTEM, INC., HERBERT PARDES,  
27 NEW YORK AND PRESBYTERIAN HOSPITAL, WAYNE OSTEN,

28  
29 Defendants-Appellees,

30  
31 NEW YORK-PRESBYTERIAN FUND, INC., NEW YORK-PRESBYTERIAN  
32 HOSPITAL, BROOKLYN HOSPITAL CENTER, HOLY NAME HOSPITAL, INC.,  
33 HOLY NAME MEDICAL CENTER, LAWRENCE HOSPITAL CENTER, MARY IMOGENE  
34 BASSETT, ONAL CARE NEW MILFORD HOSPITAL, INC., NEW YORK  
35 COMMUNITY HOSPITAL OF BROOKLYN, INC., NEW YORK DOWNTOWN  
36 HOSPITAL, NEW YORK HOSPITAL MEDICAL CENTER OF QUEENS, NEW YORK  
37 METHODIST HOSPITAL, WESTCHESTER SQUARE MEDICAL CENTER, INC.,  
38 NYACK HOSPITAL, PALISADES MEDICAL CENTER, STAMFORD HOSPITAL,  
39 VALLEY HOSPITAL, WHITE PLAINS MEDICAL CENTER, WINTHROP-  
40 UNIVERSITY HOSPITAL, WYCHOFF HEIGHTS MEDICAL CENTER, ST. MARY'S  
41 HEALTHCARE SYSTEM FOR CHILDREN, INC., A. SOLOMON TORRES, NEW  
42 YORK SOCIETY FOR THE RELIEF OF THE RUPTURED AND CRIPPLED,  
43 MAINTAINING THE HOSPITAL FOR SPECIAL SURGERY, MARY IMOGENE  
44 BASSETT HOSPITAL, NEW MILFORD HOSPITAL, INC., NORTHERN  
45 WESTCHESTER HOSPITAL ASSOCIATION, WHITE PLAINS HOSPITAL MEDICAL

1 CENTER, WYCKOFF HEIGHTS MEDICAL CENTER, NEW YORK GRACIE SQUARE  
2 HOSPITAL, INC., AMSTERDAM NURSING HOME CORPORATION,

3  
4 Defendants.

5  
6 - - - - -x

7  
8 JONATHAN YARUS, on behalf of themselves and all other employees  
9 similarly situated, MOHAMED ALI, on behalf of himself and all  
10 other employees similarly situated,

11  
12 Plaintiffs-Appellants,

13  
14 LLOYD BLACKWOOD, on behalf of themselves and all other employees  
15 similarly situated, MARTIN UKEJE, TAE JOO KIM, SHARON CAMPBELL,  
16 JEROME CROMWELL, HELENA ACHAMPONG, ERNESTINE DANIEL, VOLVICK  
17 DESIL, STEPHANIE UHRIG, GAIL WHICKUM,

18  
19 Plaintiffs,

20  
21 - v.-

22  
23 NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, BELLEVUE  
24 HOSPITAL CENTER, KINGS COUNTY HOSPITAL CENTER, JACOBI MEDICAL  
25 CENTER, ELMHURST HOSPITAL CENTER, HARLEM HOSPITAL CENTER,  
26 METROPOLITAN HOSPITAL CENTER, ALAN D. AVILES, LINCOLN MEDICAL  
27 AND MENTAL HEALTH CENTER, NORTH CENTRAL BRONX HOSPITAL, CONEY  
28 ISLAND HOSPITAL, WOODHULL MEDICAL AND MENTAL HEALTH CENTER,  
29 QUEENS HOSPITAL CENTER,

30  
31 Defendants-Appellees.

32  
33 - - - - -x

34  
35 PATRICIA MEGGINSON, on behalf of herself and all other employees  
36 similarly situated,

37  
38 Plaintiff-Appellant,

39  
40 HELEN BRUGGER, on behalf of herself and all other employees  
41 similarly situated, MARY OLDAK, MICHELLE ALVAREZ, STEPHANIE  
42 UHRIG,

43  
44 Plaintiffs,

45  
46 - v.-

1 WESTCHESTER COUNTY HEALTH CARE CORPORATION, WESTCHESTER MEDICAL  
2 CENTER, MARIA FARERI CHILDREN'S HOSPITAL, MICHAEL D. ISRAEL,  
3 PAUL S. HOCKENBERG,

4  
5 Defendants-Appellees,

6  
7 KERRY ORISTANO, PAULA REDD ZEMAN,

8  
9 Defendants.

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11 - - - - -x  
12  
13 OLUSOLA ALAMU, on behalf of himself and all other employees  
14 similarly situated, JACQUELINE COOPER-DAVIS, on behalf of  
15 herself and all other employees similarly situated,

16  
17 Plaintiffs-Appellants,

18  
19 - v. -

20  
21 BRONX-LEBANON HOSPITAL CENTER, INCORPORATED, BRONX-LEBANON  
22 HOSPITAL CENTER-FULTON DIVISION, BRONX-LEBANON HOSPITAL CENTER-  
23 CONCOURSE DIVISION, MIGUEL A. FUENTES, JR., SHELDON ORTSMAN,

24  
25 Defendants-Appellees,

26  
27 SELENA GRIFFIN-MAHON,

28  
29 Defendant.\*

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31 - - - - -x  
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33  
34 Before: LOHIER, Circuit Judge, POGUE, Judge\*\*

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\* The Clerk of the Court is directed to amend the official caption as shown above.

\*\* Donald C. Pogue, Chief Judge of the United States Court of International Trade, sitting by designation. Debra A. Livingston, Circuit Judge, recused herself before oral argument. The two remaining members of the panel, who are in agreement, have decided this case in accordance with Second Circuit Internal Operating Procedure E(b).

1 Plaintiffs-Appellants in four related cases appeal from a  
2 single order of the United States District Court for the  
3 Southern District of New York (Crotty, J.) dismissing their  
4 claims that Defendants-Appellees violated the Fair Labor  
5 Standards Act, New York Labor Law, Racketeer Influenced and  
6 Corrupt Organizations Act, and New York common law. For the  
7 following reasons, the judgment is affirmed in part, vacated in  
8 part, and remanded.

9 MICHAEL J. LINGLE (Guy A. Talia,  
10 J. Nelson Thomas, on the brief),  
11 Thomas & Solomon LLP, Rochester,  
12 New York, for Appellants.  
13

14 JAMES S. FRANK (Kenneth W. DiGia,  
15 Kenneth J. Kelly, on the brief),  
16 Epstein Becker & Green, P.C., New  
17 York, New York, (Terence K.  
18 McLaughlin, Willkie Farr &  
19 Gallagher LLP, New York, New York,  
20 on the brief), for Appellees New  
21 York-Presbyterian Healthcare  
22 System, Inc., et al.  
23

24 VICTORIA SCALZO, Assistant  
25 Corporation Counsel of the City of  
26 New York, New York, New York  
27 (Kristin M. Helmers, Blanche  
28 Greenfield, on the brief), for  
29 Michael A. Cardozo, Corporation  
30 Counsel of the City of New York,  
31 for Appellees New York City Health  
32 and Hospitals Corporation, et al.  
33

34 LEONARD M. ROSENBERG and SALVATORE  
35 PUCCIO (Lauren M. Levine, on the  
36 brief), Garfunkel Wild, P.C.,  
37 Great Neck, New York, for  
38 Appellees Westchester County  
39 Healthcare Corp., et al.

NANCY V. WRIGHT (Ricki E. Roer,  
Scott R. Abraham, on the brief),  
Wilson Elser Moskowitz Edelman &  
Dicker LLP, New York, New York,  
for Appellee Bronx-Lebanon  
Hospital Center, Inc., et al.

POGUE, Judge:

This is an appeal from an order by the United States District Court for the Southern District of New York dismissing the complaint in each of four cases: Nakahata v. New York-Presbyterian Healthcare System, Inc., No. 10 Civ. 2661; Yarus v. New York City Health and Hospitals Corp., No. 10 Civ. 2662; Megginson v. Westchester Medical Center, No. 10 Civ. 2683; and Alamu v. The Bronx-Lebanon Hospital Center, Inc., No. 10 Civ. 3247. Nakahata v. New York-Presbyterian Healthcare Sys., Inc., 2011 WL 321186 (S.D.N.Y. Jan. 28, 2011) ("Nakahata I"). Plaintiffs – current and former healthcare employees – allege that the Defendants – healthcare systems, hospitals, corporate heads, and affiliated entities – violated the Fair Labor Standards Act ("FLSA"), New York Labor Law ("NYLL"), Racketeer Influenced and Corrupt Organizations Act ("RICO"), and New York common law by failing to compensate Plaintiffs for work performed during meal breaks, before and after scheduled shifts, and during required training sessions. The District Court dismissed the four complaints in their entirety for failing to

1 state a claim pursuant to Federal Rule of Civil Procedure  
2 12(b) (6) .

3 We affirm in part the District Court's decision and remand  
4 in part. We affirm the dismissal, with prejudice, of the FLSA  
5 gap-time, RICO, and certain common law claims. We also affirm  
6 the dismissal of the FLSA and NYLL overtime claims, but we  
7 remand these claims with leave to replead. We reserve judgment  
8 on the dismissal of the NYLL gap-time claims and remand for  
9 reconsideration. Finally, we vacate the dismissal of certain  
10 common law claims and remand with leave to replead.

#### 11 12 **BACKGROUND**

13 The four cases before us on appeal are but a few among many  
14 such actions brought by a single law firm, Thomas & Solomon LLP,  
15 and premised on a stock set of allegations concerning  
16 underpayment in the healthcare industry. This is the second  
17 decision of this Court addressing these allegations, following  
18 the recent opinion in Lundy v. Catholic Health System of Long  
19 Island Inc., 711 F.3d 106 (2d Cir. 2013). Several related cases  
20 remain pending before this Court.<sup>1</sup>

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<sup>1</sup> See Hinterberger v. Catholic Health Sys., Inc., No. 12-0630; Hinterberger v. Catholic Health Sys., Inc., No. 12-0918; Gordon v. Kaleida Health, No. 12-0654; Gordon v. Kaleida Health, 12-0670; Nakahata v. New York-Presbyterian Healthcare Sys., Inc., No. 12-4128; Meggison v. Westchester Med. Ctr., No. 12-4084; Alamu v. The Bronx-Lebanon Hosp. Ctr., No. 12-4085.

1       The parties are healthcare workers, on behalf of a putative  
 2 class, and their alleged employers. The named Plaintiffs,  
 3 identified only as "employees" or "employees of the defendants,"  
 4 are Masahiro Nakahata and Diana Gardocki, Nakahata 2d Am. Compl.  
 5 ¶ 62; Patricia Megginson, Megginson Am. Compl. ¶ 61; Olusola  
 6 Alamu and Jacqueline Cooper-Davis, Alamu Am. Compl. ¶ 64; and  
 7 Jonathan Yarus and Mohamed Ali, Yarus Am. Compl. ¶ 52.  
 8 Plaintiffs filed their suits as putative collective and class  
 9 actions on behalf of "those employees of defendants who were  
 10 suffered or permitted to work by defendants and not paid their  
 11 regular or statutorily required rate of pay for all hours  
 12 worked." Alamu Am. Compl. ¶ 65; Megginson Am. Compl. ¶ 62;  
 13 Nakahata 2d Am. Compl. ¶ 63; Yarus Am. Compl. ¶ 53. The  
 14 Defendants named in the complaints include corporate healthcare  
 15 systems, individual hospitals in those systems, persons in  
 16 corporate leadership roles, and affiliated healthcare  
 17 facilities.<sup>2</sup>

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<sup>2</sup> Named Defendants include (1) The Bronx-Lebanon Hospital Center, The Bronx-Lebanon Hospital Center-Fulton Division, The Bronx-Lebanon Hospital Center-Concourse Division, Miguel A. Fuentes, Jr. (President and CEO of Bronx-Lebanon Hospital Center), and Sheldon Ortsman (former Vice President of the Human Resources Division of Bronx-Lebanon Hospital Center), Alamu Am. Compl. ¶¶ 18, 40, 52; (2) Westchester Medical Center, Westchester County Health Care Corporation, Maria Fareri Children's Hospital at Westchester Medical Center, Michael D. Israel (President and CEO of Westchester Medical Center), and Paul S. Hochenberg (Senior Vice President of Human Resources for Westchester Medical Center), Megginson Am. Compl. ¶¶ 18, 41, 51;

1 Plaintiffs allege that it is Defendants' policy not to pay  
 2 employees for all hours worked, including some overtime hours.  
 3 In particular, Plaintiffs allege: (1) Defendants have a policy  
 4 of automatically deducting time for meal breaks from employees'  
 5 paychecks despite consistently requiring employees to work  
 6 during meal breaks; (2) employees engage in work activities both  
 7 before and after their shift without compensation; and (3)  
 8 Defendants require employees to attend training sessions for  
 9 which they are not compensated. Based on these allegations,  
 10 Plaintiffs seek to recover unpaid compensation pursuant to the  
 11 FLSA, NYLL,<sup>3</sup> and New York common law. Plaintiffs further allege

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(3) New York-Presbyterian Healthcare System, Inc., The New York and Presbyterian Hospital, Herbert Pardes (President and CEO of New York-Presbyterian Healthcare System), and Wayne Osten (Senior Vice President and Director for New York-Presbyterian Healthcare System), Nakahata 2d Am. Compl. ¶¶ 18, 41, 51; and (4) New York City Health and Hospitals Corporation, Bellevue Hospital Center, Kings County Hospital Center, Jacobi Medical Center, Elmhurst Hospital Center, Harlem Hospital Center, Metropolitan Hospital Center, Lincoln Medical and Mental Health Center, North Central Bronx Hospital, Coney Island Hospital, Woodhull Medical and Mental Health Center, Queens Hospital Center, and Alan D. Aviles (President and CEO of New York City Health and Hospitals Corporation), Yarus Am. Compl. ¶¶ 18, 39.

Plaintiffs' complaints also include extensive lists of affiliated healthcare facilities that Plaintiffs allege are under the operational control of the named Defendants. See Alamu Am. Compl. ¶¶ 19-20; Megginson Am. Compl. ¶¶ 19-20; Nakahata 2d Am. Compl. ¶¶ 19-20; Yarus Am. Compl. ¶¶ 19-20. These lists comprise several dozen entities and do not require reproduction in full.

<sup>3</sup> Plaintiffs in Yarus v. New York City Health and Hospitals Corp., No. 11-0710, withdrew their NYLL claims prior to the District Court's decision. Pls.' Mem. L. Opp'n Defs.' Mot.



1 that their paychecks were misleading and part of a fraudulent  
2 scheme to hide the underpayment in violation of RICO and New  
3 York common law.

4 Defendants moved the District Court to dismiss the  
5 complaint in each case for failure to state a claim. The  
6 District Court, observing that all four complaints "contain[ed]  
7 strikingly similar allegations and deficiencies," Nakahata I,  
8 2011 WL 321186 at \*1, issued a single opinion dismissing each  
9 complaint in its entirety and terminating all four cases. Id. at  
10 \*7. The District Court permitted Plaintiffs to file new actions  
11 repleading the FLSA and NYLL claims, but it did not permit  
12 refiling of the RICO and common law claims. Id. at \*6-7.  
13 Plaintiffs both appealed the District Court's decision and filed  
14 new actions alleging claims pursuant to the FLSA and NYLL.

#### 15 16 **JURISDICTION & STANDARD OF REVIEW**

17 The District Court had original jurisdiction over  
18 Plaintiffs' FLSA and RICO claims pursuant to 28 U.S.C. § 1331  
19 (2006). See 29 U.S.C. § 216(b) (2006) (creating a civil right of  
20 action for violation of the FLSA); 18 U.S.C. § 1964(c) (2006)  
21 (creating a civil right of action for violation of RICO). The  
22 District Court had supplemental jurisdiction over the NYLL and

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Dismiss at 1 n.1, Nakahata I, 2011 WL 321186 (No. 10 Civ. 2662),  
ECF No. 96. Therefore, our decision with regard to the NYLL  
claims does not apply to the Plaintiffs in Yarus.

1 common law claims pursuant to 28 U.S.C. § 1367. We have  
2 jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

3 We review a dismissal for failure to state a claim de novo.  
4 Harris v. Mills, 572 F.3d 66, 71 (2d Cir. 2009). When reviewing  
5 the sufficiency of the complaint, we take all factual  
6 allegations as true and draw all reasonable inferences in the  
7 plaintiff's favor. Id.

8 A well-pled complaint "must contain sufficient factual  
9 matter, accepted as true, to 'state a claim to relief that is  
10 plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678  
11 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570  
12 (2007)); see also Harris, 572 F.3d at 71-72. To be plausible,  
13 the complaint need not show a probability of plaintiff's  
14 success, but it must evidence more than a mere possibility of a  
15 right to relief. Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at  
16 556. Determining plausibility is a context specific endeavor,  
17 see Starr v. Sony BMG Music Entm't, 592 F.3d 314, 328-29 (2d  
18 Cir. 2010) (Newman, J., concurring), that requires the court to  
19 draw upon its experience and common sense, Iqbal, 556 U.S. at  
20 679.

21 Allegations of fraud are subject to a heightened pleading  
22 standard. When alleging fraud, "a party must state with  
23 particularity the circumstances constituting fraud," Fed. R.  
24 Civ. P. 9(b), which we have repeatedly held requires the

1 plaintiff to "(1) specify the statements that the plaintiff  
2 contends were fraudulent, (2) identify the speaker, (3) state  
3 where and when the statements were made, and (4) explain why the  
4 statements were fraudulent." Mills v. Polar Molecular Corp., 12  
5 F.3d 1170, 1175 (2d Cir. 1993) (citing Cosmas v. Hassett, 886  
6 F.2d 8, 11 (2d Cir. 1989)); see also Anatian v. Coutts Bank  
7 (Switz.) Ltd., 193 F.3d 85, 88 (2d Cir. 1999). In addition, the  
8 plaintiff must "allege facts that give rise to a strong  
9 inference of fraudulent intent." First Capital Asset Mgmt., Inc.  
10 v. Satinwood, Inc., 385 F.3d 159, 179 (2d Cir. 2004) (citation  
11 omitted).

## 12 13 **DISCUSSION**

14 On appeal, Plaintiffs challenge the dismissal of the FLSA  
15 and NYLL claims, dismissal of the common law claims, dismissal  
16 of the RICO claims, and the determination that there was no  
17 basis for a collective or class action. Plaintiffs have also  
18 requested assignment of a new district court judge on remand.  
19 Before discussing these challenges, however, we address  
20 Plaintiffs' argument that the District Court improperly denied  
21 leave to amend the complaints.

## I

We review a district court's denial of leave to amend for abuse of discretion. See Anatian, 193 F.3d at 89. As a general principle, district courts should freely grant a plaintiff leave to amend the complaint. Kleinman v. Elan Corp., 706 F.3d 145, 156 (2d Cir. 2013). Nonetheless, "we will not deem it an abuse of the district court's discretion to order a case closed when leave to amend has not been sought." Anatian, 193 F.3d at 89 (quoting Campaniello Imps., Ltd. v. Saporiti Italia, S.p.A., 117 F.3d 655, 664-65 n.3 (2d Cir. 1997)) (internal quotation marks omitted). Nor will we upset a decision denying leave to amend if the denial was harmless error. See In re "Agent Orange" Prod. Liability Litig., 517 F.3d 76, 104 (2d Cir. 2008).

While we will not upset a denial of leave to amend where the plaintiff failed to seek such leave, the record in this case indicates that Plaintiffs were not provided an opportunity to seek leave to amend in response to the District Court's order of dismissal. The District Court ordered the cases terminated with no indication that final judgment should await a motion for leave to amend. See Nakahata I, 2011 WL 321186, at \*7. The clerk of the court entered final judgment the next business day after the opinion was issued. Judgment, Special App. to Nakahata Pls.' Br. 15. Absent an opportunity to seek leave to amend,

1 Plaintiffs cannot be held accountable for failing to make the  
2 necessary motion.

3 Nor can we deem this error harmless. The District Court  
4 did permit Plaintiffs to refile their FLSA and NYLL claims in a  
5 new action, which obviated much - but not all - of the prejudice  
6 Plaintiffs experienced from the denial of leave to amend. The  
7 option to file a new action preserved the FLSA and NYLL claims  
8 that remained timely on the date the new action was filed, but  
9 Plaintiffs lost the opportunity to pursue claims that became  
10 time-barred pursuant to the statute of limitations<sup>4</sup> in the  
11 interim between the filing of the original complaints and the  
12 filing of the new complaints. The cause of action for FLSA and  
13 NYLL claims accrues on the next regular payday following the  
14 work period when services are rendered. 29 C.F.R. § 790.21(b)  
15 (2012) (last revision 1947 Supp.); see also Rigopoulos v.  
16 Kervan, 140 F.2d 506, 507 (2d Cir. 1943); McMahon v. State, 19  
17 N.Y.S.2d 639, 642 (N.Y. Ct. Cl. 1940). Because each paycheck  
18 represents a potential cause of action, it is likely that the  
19 statute of limitations expired on some causes of action in the  
20 period between the filing of the original complaints and the  
21 filing of the new complaints; therefore, some causes of action

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<sup>4</sup> The limitations period for the FLSA is two years or, if the violation was willful, three years. 29 U.S.C. § 255(a) (2006). The limitations period for the NYLL is six years. N.Y. Lab. Law § 663(3) (McKinney 2002).

1 became time-barred upon termination of the original complaints.  
 2 In other words, every two, three, or six year anniversary of  
 3 payment - depending on the statute of limitations applicable -  
 4 that fell within the period between filing of the original  
 5 complaints and filing of the new complaints was the occasion of  
 6 a lost cause of action.<sup>5</sup> Because Plaintiffs were prejudiced  
 7 through lost causes of action resulting from the termination of  
 8 the original complaints, we hold that the District Court abused  
 9 its discretion in not permitting Plaintiffs to file an amended  
 10 complaint.<sup>6</sup>

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<sup>5</sup> This assumes that Plaintiffs were employed by Defendants prior to the statute of limitations period, a fact which is not pled in the complaints. This is a serious deficiency in the complaints, but, as discussed above, Plaintiffs should be provided the opportunity to amend lest they be time-barred from pursuing legitimate claims.

<sup>6</sup> Plaintiffs did pursue those FLSA and NYLL claims that were not time-barred by filing new actions in the Southern District of New York: Nakahata v. New York-Presbyterian Healthcare System, Inc., No. 11 Civ. 6658; Megginson v. Westchester Medical Center, No. 11 Civ. 6657; Alamu v. The Bronx-Lebanon Hospital Center, No. 11 Civ. 6366; and Ali v. New York City Health and Hospitals Corp., 11 Civ. 6393.

The District Court again dismissed three of these actions, Nakahata, Megginson, and Alamu, for failure to state a claim, Nakahata v. New York-Presbyterian Healthcare Sys., Inc., 2012 WL 3886555 (S.D.N.Y. Sept. 6, 2012) ("Nakahata II"), and the Nakahata II decision is currently before this Court on appeal in Nakahata v. New York-Presbyterian Healthcare System, Inc., No. 12-4128; Megginson v. Westchester Medical Center, No. 12-4084; and Alamu v. The Bronx-Lebanon Hospital Center, No. 12-4085. The complaints filed in the cases heard collectively as Nakahata II are more detailed than those filed in the cases heard collectively as Nakahata I, and those more detailed allegations may address some of the deficiencies discussed below. Because

## 1 II

2 Plaintiffs allege twelve claims in their complaints, but  
3 the heart of their case is the allegation that Defendants failed  
4 to compensate them appropriately for all hours worked in  
5 violation of the FLSA and NYLL. Plaintiffs allege broadly that  
6 "Plaintiffs and Class members regularly worked hours both under  
7 and in excess of forty per week and were not paid for all of  
8 those hours." Alamu Am. Compl. ¶ 148; Megginson Am. Compl.  
9 ¶ 145; Nakahata 2d Am. Compl. ¶ 146; Yarus Am. Compl. ¶ 136.  
10 Plaintiffs' allegation that Defendants did not compensate them  
11 for hours worked in excess of forty per week alleges an overtime  
12 claim, whereas their allegation that Defendants did not  
13 compensate them for hours worked under forty per week alleges a  
14 gap-time claim.

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the more detailed complaints will be tested by this Court in its review of Nakahata II, the District Court may appropriately stay proceedings in this case on remand, pending the outcome of our decision in Nakahata II.

The fourth action filed in response to Nakahata I, Ali, remains pending before the District Court. That case was filed by one, but not both, of the named plaintiffs in Yarus. In this regard, Plaintiff Ali is in a position similar to that of the plaintiffs in the three cases discussed above. Plaintiff Yarus has no second case pending either in the District Court or before this Court, but his claims have been preserved through appeal. As a result, on remand the time period for which causes of action are available may be different for Plaintiffs Ali and Yarus because Plaintiff Ali has pursued some causes of action in a separate case, whereas Plaintiff Yarus has not.

1 The District Court dismissed both the FLSA and NYLL claims  
2 for lack of sufficient factual allegations. In particular, the  
3 District Court found three categories of facts lacking: (1) when  
4 unpaid wages were earned and the number of hours worked without  
5 compensation; (2) specific facts of employment including dates  
6 of employment, pay, and positions; and (3) the entity that  
7 directly employed the Plaintiffs. Nakahata I, 2011 WL 321186,  
8 at \*4. Although the overtime and gap-time claims were dismissed  
9 on the same grounds, we will discuss the claims separately.

10 The FLSA mandates that an employee engaged in interstate  
11 commerce be compensated at a rate of no less than one and one-  
12 half times the regular rate of pay for any hours worked in  
13 excess of forty per week,<sup>7</sup> 29 U.S.C. § 207(a) (2006); the NYLL  
14 adopts this same standard, N.Y. Comp. Codes R. & Regs. tit. 12,  
15 § 142-2.2 (2011) (incorporating the FLSA definition of overtime  
16 into the NYLL). As noted in the recent decision, Lundy v.  
17 Catholic Health System of Long Island Inc., 711 F.3d 106, 114  
18 (2d Cir. 2013), "to survive a motion to dismiss [an FLSA  
19 overtime claim], Plaintiffs must allege sufficient factual  
20 matter to state a plausible claim that they worked compensable  
21 overtime in a workweek longer than 40 hours."

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<sup>7</sup> The FLSA also permits employers and employees in the healthcare field to agree that overtime will be calculated on the basis of eighty hours worked over two weeks instead of forty hours worked over one week. 29 U.S.C. § 207(j) (2006).



1 Prior to the decision in Lundy, we had not considered the  
2 degree of specificity necessary to state an FLSA overtime claim  
3 - an issue that has divided courts around the country, see  
4 Butler v. DirectSat USA, LLC, 800 F. Supp. 2d 662, 667-68 (D.  
5 Md. 2011) (discussing the varying levels of specificity required  
6 in different jurisdictions). After reviewing the disparate case  
7 law on this question, Lundy "conclude[d] that in order to state  
8 a plausible FLSA overtime claim, a plaintiff must sufficiently  
9 allege 40 hours of work in a given workweek as well as some  
10 uncompensated time in excess of the 40 hours." Lundy, 711 F.3d  
11 at 114.

12 Lundy was an appeal from an Eastern District of New York  
13 decision dismissing essentially the same allegations presented  
14 in this case.<sup>8</sup> The plaintiffs in Lundy filed several amended  
15 complaints in the district court; therefore, the claims were  
16 pled with greater factual specificity than the complaints now  
17 before us. In particular, the Lundy complaint pled the number  
18 of hours the plaintiffs were typically scheduled to work in a  
19 week. See id. at 114-15. Given the number of hours worked in a  
20 typical week and the alleged time worked without pay, Lundy

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<sup>8</sup> Some of the claims raised in this case were not raised in Lundy, as will be discussed in detail below; however, the core claims of both cases - FLSA, NYLL, and RICO claims premised on unpaid hours worked during lunch breaks, before and after shifts, and at required trainings - are the same. Lundy, 711 at 113.

1 concluded that the plaintiffs could not plausibly allege work in  
2 excess of 40 hours in any given week;<sup>9</sup> therefore, Lundy affirmed  
3 the district court's dismissal.

4 The complaints currently before us contain no similar  
5 specificity.<sup>10</sup> Plaintiffs have merely alleged that they were not  
6 paid for overtime hours worked. These allegations - that  
7 Plaintiffs were not compensated for work performed during meal  
8 breaks, before and after shifts, or during required trainings -

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<sup>9</sup> For example, one of the Lundy plaintiffs alleged that she was typically scheduled to work 37.5 hours per week over three shifts with an additional 12.5 hour shift on occasion. She further alleged that she typically worked through her 30 minute meal break, worked an additional 15 minutes before or after her scheduled shift, and was required to attend monthly staff training of 30 minutes and an additional respiratory therapy training totaling 10 hours per year. Assuming she missed a meal and worked an additional 15 minutes every shift, the Lundy court deduced that she had alleged a total of only 39 hours and 45 minutes per week of work. Therefore, she had failed to allege work in excess of 40 hours in any given week. Id. at 114-15.

<sup>10</sup> Although the complaints currently before us clearly do not meet the Lundy standard, we should note that the standard employed by the District Court in this case was more demanding than that employed in Lundy. Compare Nakahata I, 2011 WL 321186, at \*4 ("At a minimum, [the complaint] must set forth the approximate number of unpaid regular and overtime hours allegedly worked."), with Lundy, 711 F.3d at 114 ("[A] plaintiff must sufficiently allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours.").

While the standard we reaffirm today does not require an approximate number of overtime hours, we reiterate that determining whether a claim is plausible is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense," Lundy, 711 F.3d at 114 (quoting Iqbal, 556 U.S. at 679), and that "[u]nder a case-specific approach, some courts may find that an approximation of overtime hours worked may help draw a plaintiff's claim closer to plausibility," id. at 114 n.7.

1 raise the possibility that Plaintiffs were undercompensated in  
2 violation of the FLSA and NYLL; however, absent any allegation  
3 that Plaintiffs were scheduled to work forty hours in a given  
4 week, these allegations do not state a plausible claim for such  
5 relief. To plead a plausible FLSA overtime claim, plaintiffs  
6 must provide sufficient detail about the length and frequency of  
7 their unpaid work to support a reasonable inference that they  
8 worked more than forty hours in a given week. For these  
9 reasons, the District Court properly dismissed the FLSA and NYLL  
10 overtime claims.

11 Because we hold that the Plaintiffs failed to plead  
12 sufficient facts to make it plausible that they worked  
13 uncompensated hours in excess of 40 in a given week, we need not  
14 decide whether the District Court's other bases for dismissal  
15 were proper. Nonetheless, because we will remand this claim for  
16 amended pleadings, we note that Plaintiffs' actual and direct  
17 employer is an essential element of notice pleading under these  
18 circumstances. What aspects of Plaintiffs' position, pay, or  
19 dates of employment are necessary to state a plausible claim for  
20 relief consistent with this decision and Lundy is a case-  
21 specific inquiry for the trial court. Iqbal, 556 U.S. at 679.  
22 As the District Court noted, however, generalized allegations  
23 that may prove false at trial are not necessarily the basis for

1 dismissal at the pleadings stage. See Nakahata I, 2011 WL  
2 321186, at \*4 n.11.

3 While Plaintiffs' overtime claims fail for the reasons  
4 discussed above, their allegations can also be read to state a  
5 gap-time claim. Gap-time claims are those "in which an employee  
6 has not worked 40 hours in a given week but seeks recovery of  
7 unpaid time worked, or in which an employee has worked over 40  
8 hours in a given week but seeks recovery for unpaid work under  
9 40 hours." Lundy, 711 F.3d at 115.

10 As discussed in Lundy, the FLSA does not provide a cause of  
11 action for unpaid gap time. Id. at 116-17. The FLSA statute  
12 requires payment of minimum wages and overtime wages only, see  
13 29 U.S.C. §§ 201-19 (2006); therefore, the FLSA is unavailing  
14 where wages do not fall below the statutory minimum and hours do  
15 not rise above the overtime threshold. Lundy, 711 F.3d at 115.  
16 The FLSA is unavailing even when an employee works over 40 hours  
17 per week and claims gap-time wages for those hours worked under  
18 40 per week, unless the wages fall below the minimum threshold.  
19 This is because the statutory language simply does not  
20 contemplate a claim for wages other than minimum or overtime  
21 wages. Id. at 116-17. For this reason, we affirm the District  
22 Court's dismissal with prejudice of any gap-time claims made  
23 pursuant to the FLSA.

1 Plaintiffs may, however, have a gap-time claim pursuant to  
2 the NYLL. Lundy acknowledged, without deciding, that a gap-time  
3 claim would be consistent with the language of NYLL § 663(1),  
4 which states that “[i]f any employee is paid by his or her  
5 employer less than the wage to which he or she is entitled . . .  
6 he or she shall recover in a civil action the amount of any such  
7 underpayments . . . .” N.Y. Lab. Law § 663(1) (McKinney Supp.  
8 2012), as amended by Wage Theft Prevention Act, ch. 564, § 16,  
9 2010 N.Y. Sess. Laws 1446, 1457 (McKinney); Lundy, 711 F.3d at  
10 118. Lundy remanded the NYLL gap-time claim because, while the  
11 District Court had acknowledged the possibility of such a claim,  
12 it inconsistently dismissed all of the NYLL claims with  
13 prejudice. Lundy, 711 F.3d at 118.

14 In this case, the District Court dismissed the gap-time  
15 claims on the same basis as the overtime claims without  
16 acknowledging the separate standard for a gap-time claim.  
17 Unlike an overtime claim, a gap-time claim requires no predicate  
18 showing of minimum hours worked; rather, an allegation of hours  
19 worked without compensation may give rise to a gap-time claim.  
20 Nonetheless, in the first instance it is for the trial court to  
21 decide whether the allegations in the complaints are plausible.  
22 Because the District Court did not consider the NYLL gap-time  
23 claims separately from the overtime claims, and because  
24 Plaintiffs will have an opportunity to amend their pleadings, we

1 remand the NYLL gap-time claims to the District Court to  
2 consider in light of any amended pleadings.

3  
4 **III**

5 In addition to their FLSA and NYLL claims, Plaintiffs  
6 allege nine common law claims.<sup>11</sup> The District Court dismissed  
7 the common law claims with prejudice on the grounds that they  
8 were preempted by collective bargaining agreements and on the  
9 basis of pleading deficiencies unique to each claim.<sup>12</sup> We  
10 address these arguments in turn.

11 The District Court dismissed the common law claims as  
12 preempted by applicable collective bargaining agreements  
13 ("CBAs") and § 301 of the Labor Management Relations Act  
14 ("LMRA"), 29 U.S.C. § 185 (2006). Nakahata I, 2011 WL 321186, at  
15 \*2, \*6. No CBAs were pled or attached to the complaints;  
16 rather, the Defendants attached the CBAs, or relevant portions  
17 thereof, to their motions to dismiss.

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<sup>11</sup> Plaintiffs allege (1) breach of an implied oral contract, (2) breach of an express oral contract, (3) breach of an implied covenant of good faith and fair dealing, (4) quantum meruit, (5) unjust enrichment/restitution, (6) fraud, (7) negligent misrepresentation, (8) conversion, and (9) estoppel. Nakahata I, 2011 WL 321186, at \*1 n.3.

<sup>12</sup> The parties also addressed FLSA preemption of the common law claims in their briefs; however, FLSA preemption was only given cursory treatment in the District Court's opinion and was not essential to the disposition. Therefore, we do not address FLSA preemption.

1 We do not consider matters outside the pleadings in  
2 deciding a motion to dismiss for failure to state a claim.  
3 Global Network Commc'ns, Inc. v. City of New York, 458 F.3d 150,  
4 154-55 (2d Cir. 2006). Rather, where matter outside the  
5 pleadings is offered and not excluded by the trial court, the  
6 motion to dismiss should be converted to a motion for summary  
7 judgment. Fed. R. Civ. P. 12(d) ("If, on a motion under Rule  
8 12(b)(6) or 12(c), matters outside the pleadings are presented  
9 to and not excluded by the court, the motion must be treated as  
10 one for summary judgment under Rule 56."). "As indicated by the  
11 word 'shall,' the conversion of a Rule 12(b)(6) motion into one  
12 for summary judgment under Rule 56 when the court considers  
13 matters outside the pleadings is strictly enforce[d] and  
14 mandatory." Global Network Commc'ns, 458 F.3d at 155 (citations  
15 omitted) (internal quotation marks omitted). Because the CBAs  
16 at issue here were submitted with Defendants' motions to  
17 dismiss, and not excluded from consideration, the District Court  
18 could have decided these issues pursuant to the summary judgment  
19 standard of Rule 56, but it did not. We cannot affirm the  
20 dismissal on the basis of LMRA preemption pursuant to Rule  
21 12(b)(6) because such dismissal was premised on matter outside  
22 of the pleadings, and was, therefore, inappropriate. Id.

23 Nor do we agree with the District Court that Plaintiffs  
24 were responsible for pleading the CBAs in the complaints. The

1 plaintiff is master of the complaint and may assert state law  
 2 causes of action that are independent of the CBA. See  
 3 Caterpillar Inc. v. Williams, 482 U.S. 386, 394-95 (1987). It  
 4 is a defendant's responsibility to raise preemption by the CBA  
 5 as a defense, but, as discussed above, a motion addressed to the  
 6 adequacy of the pleadings is not necessarily the proper place  
 7 for preemption to be decided. Cf. Drake v. Lab. Corp. of Am.  
 8 Holdings, 458 F.3d 48, 66 (2d Cir. 2006) ("For those claims for  
 9 which preemption cannot be easily determined from the pleadings,  
 10 our standard of review requires us to affirm the district  
 11 court's decision to deny the defendant-appellants' motion to  
 12 dismiss, with the understanding that the claims may ultimately  
 13 prove to be preempted at a later stage of the litigation.")  
 14 (emphasis added) (citation omitted) (internal quotation marks  
 15 omitted).<sup>13</sup>

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<sup>13</sup> The District Court cited I. Meyer Pincus & Assocs. v. Oppenheimer & Co., 936 F.2d 759 (2d Cir. 1991), for the proposition that the CBAs should be considered because they are integral to the issues raised in the complaint. Nakahata I, 2011 WL 321186, at \*1 n.5. In Pincus, we held that where the plaintiff's claims were grounded solely in the language of a prospectus, the prospectus was integral to the complaint and would be considered in deciding a motion to dismiss despite not having been attached to the complaint. Pincus, 936 F.2d at 762. To do otherwise would have "create[d] a rule permitting a plaintiff to evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach the prospectus to the complaint or to incorporate it by reference." Id.

Pincus, however, is distinguishable from this case. Unlike the complaint in Pincus, the complaints currently before us do not ground their claims in the CBAs. Nor, is it Plaintiffs'



1 The District Court also identified deficiencies unique to  
2 each common law claim. Some of the deficiencies may be  
3 corrected through amended pleading. We remand Plaintiffs'  
4 claims for breach of express and implied oral contracts, quantum  
5 meruit, and unjust enrichment for reconsideration in light of  
6 any amended pleading. The District Court's dismissal of those  
7 claims relied on the existence of a collective bargaining  
8 agreement, which was not included with the pleadings and could  
9 not be considered on a motion to dismiss. The claim for breach  
10 of an implied covenant of good faith and fair dealing was  
11 properly dismissed insofar as it duplicates the breach of  
12 contract claims, see Harris v. Provident Life and Accident Ins.  
13 Co., 310 F.3d 73, 80 (2d Cir. 2002); however, if Plaintiffs can  
14 state such a claim on a basis independent of the breach of  
15 contract claims, they may do so in the amended pleading.

16 Plaintiffs' other common law claims are unavailing on the  
17 facts of this case, and the dismissal with prejudice is  
18 affirmed. We affirm the District Court's dismissal with  
19 prejudice of the fraud and negligent misrepresentation claims  
20 premised on the mailing of paychecks for the same reasons  
21 discussed below regarding the RICO claims. Dismissal of the

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responsibility to plead the CBAs. In short, the CBAs are not  
integral to the complaint in the same way that the prospectus in  
Pincus was integral; rather, the CBAs have been raised as an  
affirmative defense and can properly be considered on a motion  
for summary judgment.

1 conversion claim with prejudice is affirmed because Plaintiffs  
2 never had ownership, possession, or control of the wages in  
3 question prior to the alleged conversion. See ESI, Inc. v.  
4 Coastal Power Prod. Co., 995 F. Supp. 419, 433 (S.D.N.Y. 1998)  
5 (recognizing that New York law requires prior ownership,  
6 possession, or control to assert a claim for conversion).  
7 Regarding estoppel, Plaintiffs assert that Defendants should be  
8 estopped from asserting a statute of limitations defense. It is  
9 not entirely clear whether such a claim may be made in the  
10 complaint or must be asserted in response to a statute of  
11 limitations defense under New York law,<sup>14</sup> but we need not resolve  
12 this issue. The Plaintiffs may raise equitable estoppel in  
13 response to a statute of limitations defense on remand;  
14 therefore, they have suffered no prejudice in this regard, and  
15 the dismissal was harmless error if error at all.

16 Therefore, the District Court's dismissal of the common law  
17 claims with prejudice is affirmed in part and vacated in part.  
18 Those claims that Plaintiffs may replead are remanded to the  
19 District Court.

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<sup>14</sup> Compare Tierney v. Omnicom Grp. Inc., No. 06 Civ. 14302, 2007 WL 2012412, at \*10 (S.D.N.Y. July 11, 2007) (dismissing a claim for estoppel because the court understood estoppel to be an affirmative defense not a cause of action), with Forman v. Guardian Life Ins. Co. of Am., 901 N.Y.S.2d 906 (Table), 2009 WL 3790200, at \*5 (N.Y. Sup. Ct. Sept. 25, 2009) (recognizing an equitable estoppel claim but relying on New York Appellate Division cases that discuss equitable estoppel as an affirmative defense).

1  
2 **IV**

3 In addition to the claims for unpaid wages, Plaintiffs  
4 allege that the Defendants committed mail fraud in violation of  
5 RICO. Plaintiffs allege that their paychecks, delivered through  
6 the U.S. mail, misleadingly purported to pay Plaintiffs for all  
7 hours worked. Plaintiffs further allege that the purportedly  
8 complete paychecks concealed a scheme by Defendants to  
9 undercompensate the Plaintiffs.

10 RICO makes it unlawful "for any person employed by or  
11 associated with any enterprise . . . to conduct or participate,  
12 directly or indirectly, in the conduct of such enterprise's  
13 affairs through a pattern of racketeering activity . . . ." 18  
14 U.S.C. § 1962(c) (2006); First Capital Asset Mgmt., Inc. v.  
15 Satinwood, Inc., 385 F.3d 159, 173 (2d Cir. 2004). Mail fraud,  
16 pursuant to 18 U.S.C. § 1341, is among the activities defined as  
17 racketeering. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 482  
18 n.3 (1985) (quoting 18 U.S.C. § 1961(1) (1982 ed., Supp. III)).

19 The District Court dismissed the RICO claims because the  
20 paychecks did not perpetuate a fraud; rather, they disclosed any  
21 alleged underpayment. Nakahata I, 2011 WL 321186, at \*5. Lundy  
22 endorsed this reasoning, holding that the "mailing of pay stubs  
23 cannot further the fraudulent scheme because the pay stubs would  
24 have revealed (not concealed) that Plaintiffs were not being  
paid for all of their alleged compensable overtime." Lundy, 711

1 F.3d at 119. Thus, the District Court properly dismissed the  
2 RICO claims, and, because the claims cannot be pled on these  
3 facts, they were properly dismissed with prejudice.  
4

5 **v**

6 Finally, Plaintiffs challenge the District Court's  
7 conclusion that there is no basis for a collective or class  
8 action and request that the case be remanded to a new judge.  
9 Neither argument has merit. First, the District Court dismissed  
10 the Megginson, Alamu, and Yarus Plaintiffs' motions to certify  
11 the collective and class actions as moot following dismissal of  
12 the complaints in their entirety, which was not error. Nakahata  
13 I, 2011 WL 321186, at \*7. Furthermore, Plaintiffs may renew  
14 their motions for certification on remand, so there was no  
15 prejudice. Second, Plaintiffs' have failed to show any lack of  
16 impartiality on the part of the District Court, and we find no  
17 reason to believe that the District Court will be unable to  
18 effectuate the remand order; therefore, the request for remand  
19 to a new judge is denied. Cf. Shcherbakovskiy v. Da Capo Al  
20 Fine, Ltd., 490 F.3d 130, 142 (2d Cir. 2007) (reassigning a case  
21 on remand where the trial judge "rendered a visceral judgment on  
22 appellant's personal credibility, namely that his denial of  
23 control was 'nonsense,' 'drivel,' a 'fraud,' and a 'lie'").  
24

1 **CONCLUSION**

2 Consistent with the foregoing opinion, the District Court's  
3 dismissal with prejudice of the FLSA gap-time, conversion,  
4 estoppel, fraud, negligent misrepresentation, and RICO claims is  
5 AFFIRMED. We REMAND the FLSA and NYLL overtime claims, the NYLL  
6 gap-time claims, the breach of express and implied oral contract  
7 claims, the breach of an implied covenant of good faith and fair  
8 dealing claims, the quantum meruit claims, and the unjust  
9 enrichment claims for amended pleading. Therefore, we VACATE  
10 the order terminating the case and REMAND for further  
11 proceedings consistent with this opinion.