IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. DRISCOLL, individually and on behalf of all others similarly situated, **Plaintiffs,** **-against-** **THE GEORGE WASHINGTON UNIVERSITY,** **Defendant.**	**1:12-CV-00690-ESH**

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS MOTION TO AMEND THE CLASS ACTION COMPLAINT

Respectfully Submitted,

/s/ Michael J.D. Sweeney

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

For many years, GWU denied its clerical employees overtime wages, claiming that they were exempt from overtime laws. When it finally acknowledged that the employees are due overtime wages, GWU sought to avoid liability for it past practices by making a back overtime wage payment to the employees. The back-wage payment, however, neither compensated the employees for all the overtime hours they had worked nor did it pay them the wage the law requires. Consistent with the Federal Rules of Civil Procedure's pleading policies and the remedial nature of the wage-and-hour statutes implicated, Driscoll seeks to amend the complaint to address concerns GWU raised in it motion to dismiss the complaint and to ensure that the clerical employees have the opportunity to have their rights adjudicated in court.

GWU's has not shown that Driscoll's complaint should be dismissed. As an initial matter, GWU's claims of futility and prejudice are contrary to the pleading policy embodied in the Federal Rules of Civil Procedure. Driscoll's amendments allege facts that clearly give GWU fair notice of his claim and the grounds upon which they rest. GWU cannot show that the amendment at this early stage in the litigation, before discovery or even GWU"s answer, prejudices its ability to defend the action. Moreover, GWU's argument that Fed. R. Civ. P. 23 should yield to local law procedural provisions is meritless as it depends on an interpretation of the DCMWA that is unsupported and contrary to the statute's policy.

Accordingly, the Court should grant Driscoll's motion to amend his complaint and allow the action to proceed.

ARGUMENT

I. DRISCOLL'S PROPOSED AMENDMENTS ARE NOT FUTILE AND THUS NOT SUBJECT TO DISMISSAL

Contrary to GWU's assertion, Driscoll's proposed amendments are not futile because they sufficiently allege facts that state claims for relief. A complaint need only set forth "a short and plain statement of the claim, giving the defendant fair notice of the claim and the grounds upon which it rests." *Mansfield v. Billington*, 432 F. Supp. 2d 64, 69 (D.D.C. 2006), *citing Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is 'plausible on its face.'" *Del Villar v. Flynn Architectural Finishes*, 664 F. Supp. 2d 94, 96 (D.D.C. 2009), *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1973-74 (2007). "When a plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, then the claim has facial plausibility." *Del Villar*, 664 F. Supp. 2d at 96, *citing Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009).

This Court also recognizes that the notice pleading rules are "not meant to impose a great burden on a plaintiff." *U.S. v. Retta*, --- F. Supp. 2d ----, 11–1280 (JEB), 2012 WL 65404, *2 (D.D.C. Jan. 10, 2012), *citing Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense to define more narrowly the disputed facts and issues." *Mansfield*, 432 F. Supp. 2d at 69, *citing Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S. Ct. 99, 103 (1957). Accordingly, "'the accepted rule in every type of case' is that a court should not dismiss a complaint for failure to state a claim unless the defendant can show beyond doubt that the plaintiff can prove no set of

facts in support of his claim that would entitle him to relief." *Mansfield*, 432 F. Supp. 2d at 69, *citing Warren v. Dist. of Columbia*, 353 F.3d 36, 37 (D.C. Cir. 2004); *Kingman Park*, 348 F.3d at 1040.

As discussed below, Driscoll has alleged sufficient facts for both his retaliation claim and his overtime claim to give GWU fair notice of the claims and the grounds upon which they rest and to allow this Court to draw the reasonable inference that GWU is liable for the misconduct alleged. Further, GWU cannot show beyond doubt that Driscoll will not be able to prove any set of facts that will entitle him to relief, particularly as there has not yet been any discovery. Thus, dismissal of Driscoll's claims at this early stage of the proceeding is premature and inappropriate. *See* Fed. R. Civ. P. 8(a)(2) ("A pleading that states a claim for relief must contain: a short and plain statement of the claim showing that the pleader is entitled to relief."); Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice.").

A. Plaintiff Has Alleged Sufficient Facts to Support His Claim of Retaliation

GWU argues that Driscoll's proposed amendments to his retaliation claim are futile because he "fails to allege that he engaged in protected conduct, such as filing a complaint 'in the context of a formal legal action,' that caused his termination." *See* Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Cross Motion to Amend the Amended Complaint ("*Defendant's Memo*") (Doc. 16) at Section II.A., p. 18. However, Section 215 of the FLSA does not require that a complaint be filed in the context of a formal legal action. Rather, Section 215 states that an employer may not "discharge or in any other manner discriminate against any employee because such employee has filed any complaint…" 29 U.S.C. § 215(e). The U.S. Supreme Court has held that "[t]o fall within the scope of the antiretaliation provision [of the FLSA], a complaint must be sufficiently clear and detailed for a reasonable

employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." *See Kasten v. Saint Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011); *see also, Minor v. Bostwick Laboratories, Inc.* 669 F.3d 428, 437-438 (4th Cir. 2012) (holding that the FLSA's antiretaliation provision covers intracompany complaints). Further, in *Saint-Jean v. District of Columbia*, this Court held that in order to make an informal complaint under Section 215, "an employee must… step outside his or her role of representing the company and ... engage in activities that reasonably could be perceived as directed towards the assertion of rights." 08–1769 (RWR), 2012 WL 723715, *7 (D.D.C. Mar. 7, 2012).

The Proposed Second Amended Complaint alleges that, through repeated emails sent to GWU, Driscoll complained about the back overtime payment GWU offered him, questioned GWU's use of the FLSA "halftime method" of calculating overtime, asserted that he was not compensated for all of the overtime hours he worked, asked GWU to explain how they had calculated his back overtime pay, requested that GWU not deposit the back pay into his direct deposit account because he was challenging GWU's calculations, and presented GWU with evidence that he had worked more overtime hours than GWU proposed to compensate him for. *See* Proposed Second Amended Complaint at ¶¶ 57-63. The facts alleged in the Proposed Second Amended Complaint plainly assert that Driscoll's communications with GWU were sufficiently clear and detailed that GWU would understand that Driscoll was asserting his rights to be properly and fully compensated for all of his overtime hours under the FLSA. Further, they clearly allege that, by again and again questioning GWU's methods and calculations, Driscoll stepped outside of his role of representing GWU and repeatedly engaged in activities that were

directed towards the assertion of his right to be properly and fully compensated for all of his overtime hours under the FLSA.

Thus, Driscoll's allegations in the Proposed Second Amended Complaint are sufficient to meet the 29 U.S.C. § 215 standard for filing a complaint. Taken as true, the allegations show that Driscoll put GWU on notice by leveling complaints directly to GWU's Human Resource department and Director of Communications, and he asserted his statutory rights by complaining that GWU was violating the FLSA by improperly using a halftime calculation and not paying all the overtime hours worked. Accordingly, Driscoll's proposed amendments regarding his retaliation claim are not futile and Driscoll's motion should be granted.

B. Plaintiff Has Alleged Sufficient Facts to Support His Claim of Unpaid Overtime Wages

Similarly, under the "extremely liberal" pleading standards of Fed. R. Civ. P. Rule 8(a)(2), *see Saint-Jean*, 2012 WL 723715 at *2, Driscoll has asserted sufficient facts to support his claim of unpaid overtime wages. He has alleged that he and other Executive Aides, Executive Assistants, Executive Coordinators, Executive Support Assistants, and Executive Associates regularly worked more than 40 hours a week and that GWU did not pay them overtime wages for all hours worked over 40 in a week. *See* Proposed Second Amended Complaint at ¶¶ 43-44. That is all that is required. Contrary to GWU's contention, Driscoll is not required to plead the approximate number of overtime hours he allegedly worked. The information is simply not necessary to state a claim for relief that is plausible on its face in the wage-and-hour context. Courts around the country have again and again held that a plaintiff is not required to plead such information in a wage-and-hour complaint. *See, e.g.*, *Dobbins v. Scriptfleet, Inc.*, 8:11–cv–1923–T–24–AEP, 2012 WL 601145, *3-*4 (M.D. Fla. Feb. 23, 2012); *Hofmann v. Aspen Dental Management, Inc.*, 3:10–cv–37–SEB–WGH, 2011 WL 3902773, *3 (S.D. Ind. Sept. 6, 2011);

Butler v. DirectSat USA, LLC, 800 F. Supp. 2d 662, 668 (D. Md. 2011). Moreover, courts have repeatedly upheld complaints pleading substantially the same information that Driscoll pled. *See, e.g.*, *Dobbins*, 2012 WL 601145 at *3-*4; *Hofmann*, 2011 WL 3902773 at *3 ("Plaintiff's allegations regarding FLSA overtime violations are at this stage at least plausible and sufficient to provide adequate notice to Defendant of the claim. The Rule 8(a) and 12(b)(6) pleading standards require nothing more."); *Norceide v. Cambridge Health Alliance*, 814 F. Supp. 2d 17, 26 (D. Mass. 2011); *Butler*, 800 F. Supp. 2d at 668; *Buenaventura v. Champion Drywall, Inc.*, 803 F. Supp. 2d 1215, 1217-18 (D. Nev. 2011); *Xavier v. Belfor USA Group, Inc.*, CA No. 06–491 et al., 2009 WL 411559, *5 (E.D. La. Feb. 13, 2009); *Uribe v. Mainland Nursery, Inc.*, CA No. 07–0229, 2007 WL 4356609, *3 (E.D. Cal. Dec. 11, 2007).

Furthermore, pleading specific hours of work, rates of pay, and wages paid is not required because the burden of maintaining such information lies squarely with GWU. 29 U.S.C. § 211(c); D.C. Code § 32-1008. Plaintiffs are not required nor expected to keep the information. Recognizing that "employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy", the Supreme Court directs that only if the employer has not kept the records are employees required to establish their rate of pay, hours of work, and the like. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). One can only assume that GWU complied with the law and has the information. If not, Driscoll and the class are only required to establish the records after discovery. *Id*.. Requiring him to plead the information now shifts the burden of proof laid out by the Supreme Court. *See Norceide*, 814 F. Supp. 2d at 26 fn 9 ("As the Supreme Court made clear in *Anderson*, [a] lack of records encumbers the employer, not the employee... Extending *Anderson's* burden-shifting doctrine to the pleading stage, in the absence of records, a plaintiff need do no more than allege that she has worked in excess of 40

hours in a week in order to state a claim for an FLSA overtime violation."). As Driscoll has met his light burden under the notice pleading rules, his proposed amendments are not futile and his motion should accordingly be granted.

Additionally, and contrary to GWU's assertion, Driscoll can bring his overtime claims under the D.C. Wage Payment and Collection Law ("WPCL"). [1] D.C. Code § 32-1301 *et seq*. By asserting otherwise, GWU misconstrues Driscoll's claim under the WPCL. He does not deny that GWU did not pay him some OT wages. His claim is that GWU intentionally did not pay him and class members all the wages they were due upon reclassification. He brings his claims for those unpaid wages under the WPCL.

The WPCL provides that "every employer shall pay all wages earned to his employees at least twice during each calendar month, on regular paydays designated in advance by the employer." D.C. Code § 32-1302 (emphasis added). The WPCL broadly defines "wages" as "monetary compensation after lawful deductions, owed by an employer for labor or services rendered, whether the amount is determined on a time, task, piece, commission, *or other basis of calculation*." *Ventura v. Bebo Foods, Inc.*, 738 F. Supp. 2d 8, 20 (D.D.C. 2010) (emphasis in original). Thus, to the extent that plaintiffs can sufficiently prove late and outstanding payments, whether in the form of unpaid tips, wages, or salary, the Court may award those payments under the WPCL. *Ventura*, 738 F. Supp. 2d at 20. Accordingly, this Court has allowed plaintiffs to bring claims for any form of unpaid compensation, including minimum wage and overtime, under the WPCL. S*ee e.g., Thompson v. Linda And A., Inc.*, 779 F. Supp. 2d 139, 142 (D.D.C. 2011) (plaintiffs brought minimum wage claims under FLSA, DCMWA and WPCL); *Morales v.*

[1] This argument is made in more detail in Driscoll's Memorandum of Law in Opposition to Defendant's Motion to Dismiss First Amended Complaint, Doc. No. 11 at pp. 9-17.

Landis Const. Corp., 715 F. Supp. 2d 86, 87 (D.D.C. 2010) (same); *Thompson v. Fathom Creative, Inc.*, 626 F. Supp. 2d 48, 49 (D.D.C. 2009) (same).

In the Proposed Second Amended Complaint Driscoll alleges that GWU failed to pay him and the class all the wages they had earned. GWU concedes that Driscoll is entitled to overtime compensation for the period prior to the reclassification both by making back overtime payments, *see, e.g., Titre v. S.W. Bach & Co.*, No. 05-80077-CIV, 2005 WL 1692508, *2 (S.D. Fla. July 20, 2005) ("If an employee performing the same job as Plaintiff previously had been paid overtime by Defendant, then Defendant (by virtue of those payments) would have implicitly admitted that such employees were not exempt from the overtime provisions of the FLSA."), and in its moving papers. *See* Doc. No. 9-1 at 14 ("At all times, the University paid plaintiff the wages that the University conceded to be owed to him"). Driscoll specifically alleges that GWU failed to pay him and other class members for all the hours they worked, failed to use the proper statute of limitations, used an improper formula for calculating back wages, and failed to include interest or liquidated damages in the payment. Proposed Second Amended Complaint at ¶¶ 49-54. He further alleges that GWU's failure to pay the wages earned was "intentional, willful, and in bad faith". Proposed Second Amended Complaint at ¶ 55-56. Thus, he alleges a claim under the WPCL. As these proposed amendments to the complaint would not be futile, Driscoll's motion should be granted.

II. GWU SUFFERS NO PREJUDICE FROM THE PROPOSED SECOND AMENDED COMPLAINT AND PLAINTIFFS HAVE NOT UNDULY DELAYED THE AMENDMENT

"The decision to grant leave to amend a complaint is left to the court's discretion, but the court must heed Rule 15's mandate that leave is to be 'freely given when justice so requires.' It is an abuse of discretion to deny leave to amend unless there is sufficient reason, such as undue

delay, bad faith or dilatory motive or futility of amendment." *Feinman v. F.B.I.*, 269 F.R.D. 44, 49 (D.D.C. 2010) (citations and quotations omitted). Rule 15(a) does not prescribe any time limit within which a party may apply to the court for leave to amend. *Does I through III v. District of Columbia*, 815 F.Supp.2d 208, 214 (D.D.C. 2011), *citing Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1084 (D.C. Cir.1998). "Although undue delay can be grounds for denial, *see Atchinson v. District of Columbia*, 73 F.3d 418, 426 (D.C. Cir.1996), '[i]n most cases delay alone is not a sufficient reason for denying leave.'" *Does I through III*, 815 F.Supp.2d at 214, *citing Caribbean Broad. Sys., Ltd.*, 148 F.3d at 1084. Moreover, "[c]onsideration of whether delay is undue ... should generally take into account the actions of other parties and the possibility of any resulting prejudice" to those parties if leave to amend were granted. *Does I through III*, 815 F.Supp.2d at 215, *citing Atchinson v. District of Columbia*, 73 F.3d 418, 426 (D.C. Cir. 1996); s*ee also Clark v. Feder Semo & Bard, P.C.*, 560 F.Supp.2d 1, 5 (D.D.C.2008) (noting that "the contention of undue delay is less persuasive in light of the lack of any prejudice").

This Court has held that undue prejudice is not mere harm to the non-movant, but a denial of the opportunity to present facts or evidence which would have been offered had the amendment been timely. *See Council on American-Islamic Relations Action Network, Inc. v. Gaubatz*, 793 F. Supp. 2d 311, 326 (D.D.C. 2011). Undue prejudice may also exist when a party would have chosen different counsel or employed a different litigation strategy had the amendment been made in a timely manner. *See Atchinson v. District of Columbia*, 73 F.3d 418, 427 (D.C. Cir. 1996). Courts have also considered whether a long-delayed amendment would require the parties to conduct substantial additional discovery. *See, e.g., Alley v. Resolution Trust Corp.*, 984 F.2d 1201, 1208 (D.C. Cir. 1993) (granting leave to amend and noting that "[w]e

consider it important ... that plaintiffs have represented in their briefs on appeal the absence of any need to ... engage in additional discovery"). Notably, this Court recognizes that granting leave to amend is especially favored where the proposed changes do not radically reshape the action. *Gaubatz*, 793 F. Supp. 2d at 322.

Driscoll has not unduly delayed in moving to amend the complaint and GWU suffers no prejudice from amendment. This proceeding is still in its early stages, and the parties have yet to engage in any discovery. As Driscoll's proposed amendments do not add any substantive claims of which GWU was not aware, they do not radically reshape the action. The amendments merely seek to amplify the facts supporting existing claims and to bring the claims under D.C. Code § 32-1012 *et seq*. as a class action pursuant to Fed. R. Civ. P. 23 rather than as a collective action as originally pled, i.e., a change in procedure. Indeed, the original complaint already pled class claims under the DC WPCL. As previously discussed, the amendments are not futile as Driscoll's allegations are sufficient to meet the liberal pleading requirements under the Federal Rules of Civil Procedure.

All of the cases cited by GWU involve motions that proposed to add significant new claims and/or futile amendments, after extensive litigation had already occurred. *See Onyewuchi v. Gonzalez*, 267 F.R.D. 417, 418 (D.D.C. 2010) (plaintiff moved to amend two months after close of discovery to add an employment discrimination disparate impact claim); *Chennareddy v. Dodaro*, 698 F. Supp. 2d 1, 7-8 (D.D.C. 2009) (plaintiff moved to add hostile work environment claim almost 9 years after original complaint filed); *Williams v. Savage*, 569 F. Supp. 2d 99 (D.D.C. 2008). (plaintiff moved to make futile amendments after court had already dismissed several of her claims); *Kates v. Crocker Nat. Bank*, 776 F.2d 1396, 1397 (9th Cir. 1985) (plaintiff moved to add intentional infliction of emotional distress claim after summary judgment granted

to defendant). As discussed above, the proposed amendments here are not futile nor do they seek to add significant new claims. Moreover, it is very early in the proceedings. Therefore, the cases relied on by GWU are inapposite.

GWU argues that Driscoll's motion should be denied because GWU's motion to dismiss is pending. However, in *Gaubatz*, *supra*, this Court granted plaintiff's first *and* second motions to amend the complaint, despite defendant's pending motion to dismiss, because the Court had yet to issue a final ruling on the motion to dismiss and discovery pertaining to the merits had not begun. 793 F. Supp. 2d at 325.

Courts require a sufficient basis for denial of leave to amend because the purpose of pleadings under the Federal Rules of Civil Procedure is "to facilitate a proper decision on the merits," not to set the stage for "a game or skill in which one misstep by counsel may be decisive to the outcome." *Nwachukwu v. Karl*, 222 F.R.D. 208, 211 (D.D.C. 2004), *citing Foman v. Davis*, 371 U.S. 178, 181-82 (1962). "Indeed, '[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.'" *Onyewuchi*, 267 F.R.D. at 420, *citing Foman*, 371 U.S. at 182. Under Fed. R. Civ. P. Rule 15(a), the non-movant generally carries the burden in persuading the court to deny leave to amend. *Nwachukwu*, 222 F.R.D. at 211. GWU has not met their burden of stating a sufficient basis for denial of Driscoll's motion to amend. Further, the underlying facts relied upon by Driscoll are the proper subject of relief and Driscoll should be afforded the opportunity to have his claims heard on the merits. Accordingly, Driscoll's motion to amend should be granted.

III. FED. R. CIV. P. 23 GOVERNS THE CLASS PROCESS FOR DC MWA CLAIMS IN FEDERAL COURT

Rule 23 governs the procedure for bringing class claims in federal court unless its application offends the Rules Enabling Act's prohibition on a procedural rule abridging, enlarging, or modifying substantive right. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1456 (2010) (J. Stevens concurring). Because applying Rule 23 to DCMWA claims in federal court does not violate the Rules Enabling Act, 28 U.S.C. 2072 ("*REA*"), Driscoll is entitled to bring his claims in federal court pursuant to Rule 23.

A. The DCMWA Is a Procedural Rule

Like the Fair Labor Standards Act, the DC MWA provides employees with the substantive right to bring claims for unpaid minimum and overtime wages on a class basis. DC Code § 32-1012. The DCMWA provides a procedural mechanism for bringing class claims in local courts known as an "opt-in" provision. The opt-in provision is nearly identical to that included in the FLSA.[2] Accordingly, the DCMWA's opt-in provision should be construed consistently with the FLSA. *Ventura*, 738 F.Supp.2d at 5 (where the two Acts have nearly identical provisions, the DCMWA provisions should construed consistently with the FLSA)

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[2] Section 32-1012 of the DC MWA provides:
(b) Action to recover damages sued for under this subchapter may be maintained in any court of competent jurisdiction in the District of Columbia by any 1 or more employees for and on behalf of the employee and other employees who are similarly situated. No employee shall be a party plaintiff to any action brought under this subchapter unless the employee gives written consent to become a party and the written consent is filed in the court in which the action is brought.

Section 216(b) of the FLSA provides:
An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Courts have consistently recognized that the FLSA opt-in provision is a procedural rule. The D.C. Circuit recognized as much in *Lindsay v. Government Employees Ins. Co.*, holding that the difference between the opt-in provision and Rule 23's opt-out provision is "a *mere* procedural difference." 448 F.3d 416, 424 (D.C. Cir. 2006) (emphasis in original). In *Long John Silver's Restaurants, Inc. v. Cole*, the Fourth Circuit found that the opt-in provision is a procedural device that is subject to a different forum's procedural rules. 514 F.3d 345, 349 -351 (4th Cir. 2008). As Judge Posner explained:

> Courts treat [FLSA opt-in actions] as the equivalent of class actions—and thus for example do not require motions to intervene and do require certification … except that in a collective action unnamed plaintiffs need to opt in to be bound, rather than, as in a class action, opt out not to be bound.

Espenscheid v. DirectSat USA, LLC, -- F.3d --, No. 2-1943, 2012 WL 3156326, *4 (7th Cir. Aug. 6, 2012).

As the DCMWA's opt-in provision is nearly identical to the FLSA's, it too is a procedural rule and Rule 23 governs Driscoll's DCMWA claims in federal court unless its application offends the *REA*. *Shady Grove*, 130 S. Ct. at 1451-52.

B. Applying Rule 23 to DCMWA Claims in Federal Court Does Not Affect Substantive Rights of the Putative Class or GWU

While all procedural rules have some substantive affect, to offend the *REA* the rule must affect a substantive right or remedy. Justice Stevens gave several examples of what procedural laws might create a substantive right protected by the *REA*:

> A rule about how damages are reviewed on appeal may really be a damages cap. A rule that a plaintiff can bring a claim for only three years may really be a limit on the existence of the right to seek redress. A rule that a claim must be proved beyond a reasonable doubt may really be a definition of the scope of the claim. These are the sorts of rules that one might describe as "procedural," but they nonetheless define substantive rights. Thus, if a federal rule displaced such a state rule, the federal rule would have altered the State's "substantive rights."

Shady Grove, 130 S. Ct. at 1453. Rules intended to make it more difficult to bring class claims, however, are not the type that create a substantive right of the character to implicate the *REA*. *Id.* at 1458 -1460.

The DCMWA provides employees with the substantive right to engage in concerted activity, but its opt-in provision is a procedural rule that governs how collective claims are brought in D.C. courts. *See*, *Lindsay*, 448 F.3d at 424. The opt-in provision does not create substantive rights for employers or employees. *Long John Silver's*, 514 F.3d at 351 ("no court has explicitly ruled that the "opt-in" provision of the § 16(b) provision creates a substantive, nonwaivable right."). It does not change a statute of limitations, damages, or burden of proof, nor does it alter an employee's right to seek redress or affect substantive defenses. Because the DCMWA's opt-in provision does not create a substantive right, applying Rule 23 to DCMWA claims in federal court does not offend the *REA*.

GWU's argument that although a procedural rule, the DCMWA's opt-in provision vests a substantive right in employers not to be sued and employees to forgo their claims lacks any support in the law and is contrary to the Act's policy.

To overcome the high bar for showing an *REA* problem, GWU has the burden to show that the D.C. Council intended the opt-in provision to vest the substantive right to employers. *Shady Grove.*, 130 S. Ct. at 1457. Acknowledging the havoc that trying to determine intent can have on administering the federal court system, Justice Stevens was clear that "the bar for finding an Enabling Act problem is a high one. … The mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt." *Id*. at 1457, *see also, id.* at 1454 ("It will be rare that a federal rule that is facially valid under 28 U.S.C. § 2072 will displace a State's definition of its own substantive rights.")

GWU has not offered any evidence that the D.C. Council intended that the opt-in procedure create substantive rights. It offers no legislative history, no policy statements, nothing that supports the notion that the opt-in provision was intended to protect employers from liability for their minimum wage violations, or give litigants more control over their claims than Rule 23 provides, or even why the opt-in provision was included. GWU's claim to these substantive rights is simply speculation, and such speculation is not sufficient to overcome the assumption that a facially valid federal rule of procedure does not displace a State's definition of its own substantive rights. *Id*. at 1457.

Moreover, GWU's claim that the DCMWA's opt-in provision vests a substantive right in employers not to be sued except where an employee affirmatively chooses to pursue his claim is contrary to the Act's policy. The Findings and Declaration of Policy section of the Act makes clear that the DCMWA is intended to protect public rights as well as private ones. D.C. Code § 32-1001 ("Employment of persons at these insufficient rates of pay threatens the health and well-being of the people of the District of Columbia and injures the overall economy."). Such public rights can only be protected when all employees are protected and able to bring their claims. *See*, *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) ("The principal congressional purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working hours") (emphasis added). But protecting an employer from liability unless an employee is brave enough to bring claims allows an employer to escape liability for violations. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."). Indeed, in many cases an employer will save more by cheating the employees out of pay and later paying back wages to

only the 15-30% of the employees that typically opt into an action. Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, Lab. Law. Winter/Spring 2005 311, 313-14 (available on Westlaw) (opt-in rates are typically between 15 and 30% of the class). Whatever the policy behind the DCMWA opt-in procedure, it cannot be an economic incentive to violate the statute.

Similarly, GWU provides no support for the proposition that the D.C. Council intended the DCMWA to create a substantive right for employees to control their claims by not opting into the action. The Supreme Court held long ago that so long as class members' interests are adequately represented and they receive notice of the action and an opportunity to opt out of the class, Rule 23's procedural protections meet the Due Process Clause's protections of absent class members' rights in a Rule 23(b)(3) damages class action. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812–813, 105 S. Ct. 2965, 86 L. Ed. 2d 628, 2 Fed. R. Serv. 3d 797 (1985); *see* Newburg on Class Actions, 1 CLASSACT § 1:15. GWU has provided no evidence that the D.C. Council believed that Rule 23's protections were insufficient and employees needed additional protections. Furthermore, any individual who wishes to control their own claims can do so under Rule 23 by opting out. Fed. R. Civ. P. 23(c)(2)(B)(v) (requiring notice to the class "that the court will exclude from the class any member who requests exclusion").

The legislative history of the FLSA does not support the rights GWU claims. Like the DCMWA, the FLSA is intended to protect all covered workers. *Barrentine*, 450 U.S. at 739 ("The principal congressional purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working hours. . . . [and to ensure that employees] would be protected from the evil of 'overwork' as well as 'underpay.'") (citations omitted). It

would be contrary to that policy for Congress to have intended to create a substantive right for employers to avoid liability. No such purpose is explicit or implicit.

The Congressional purpose behind the opt-in provision (crafted in 1947 before the current class rules were in effect) was concern that disinterested parties and unions were bringing actions that employees might not wish to be part of. *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989).

> In 1938, Congress gave employees and their "representatives" the right to bring actions to recover amounts due under the FLSA. No written consent requirement of joinder was specified by the statute. In enacting the Portal to Portal Act of 1947, Congress made certain changes in these procedures. In part responding to excessive litigation spawned by plaintiffs lacking a personal interest in the outcome, the representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added. *See* 93 Cong. Rec. 538, 2182 (1947) (remarks of Sen. Donnell).

See also, Arrington v. National Broadcasting Co., Inc., 531 F. Supp. 498, 502 (D.D.C. 1982) ("the 'consent in writing' requirement … seek[s] … to eradicate the problem of totally uninvolved employees gaining recovery as a result of some third party's action in filing suit."). As the Third Circuit recently explained:

> The historical evidence establishes that Congress created the opt-in scheme primarily as a check against the power of unions, whose representatives had allegedly manufactured litigation in which they had no personal stake, and as a bar against one-way intervention by plaintiffs who would not be bound by an adverse judgment. Neither purpose speaks to the propriety of an opt-out class action, especially since modern Rule 23 opt-out actions did not exist at the time and had not occurred under the earlier FLSA enforcement scheme.

Knepper v. Rite Aid Corp., 675 F.3d 249, 260 (3rd Cir. 2012)

Congress addressed that concern in 1966 with a new Fed. R. Civ. P. 23. The new rule established a new "'opt-out' class action regime for money damages suits as opposed to the previous 'invitation to joinder' or 'opt-in' regime under the 'spurious class actions' of original Rule 23(a)(3)." Advisory Committee Notes on the 1966 Amendments to Rule 23. As discussed

above, these amendments to Rule 23's procedural protections were intended to and did provide sufficient protections of absent class members' rights in a Rule 23(b)(3) damages class action. *Phillips Petroleum*, 472 U.S. at 812–813. Thus the policy concerns behind the FLSA's 1947 opt-in provision do not apply to the more recent provision in the DCMWA.

Whatever the policy behind the DCMWA opt-in procedure, it cannot be contrary to the legislative policy of the statute—the public interest in all workers receiving.

GWU cannot point to a single case holding that the opt-in provision creates substantive rights. The authority addressing the issue all finds to the contrary—that the provision does not vest a substantive right. *See*, *Lindsay*, 448 F.3d at 424; *Long John Silver's*, 514 F.3d at 349 -351; *Espenscheid*, 2012 WL 3156326 at *4. *See also, Brown v. Sears Holdings Management, Corp.*, No. 09 C 2203, 2009 WL 2514173, *3 (N.D. Ill. Aug. 17, 2009) (the FLSA's opt-in provision does not "share the substantive and nonwaivable character of the various monetary remedies set out in § 216(b)").The cases that GWU relies upon all deal with class action bans, not with the process for bringing class claims. Justice Stevens distinguished this type of a limitation in his *Shady Grove* concurrence, making clear that rules intended to make it more difficult to bring class claims are not the type that create a substantive right of the character to implicate the Rules Enabling Act's restriction. *Shady Grove*, 130 S. Ct. at 1458 -1460. Indeed, that was the holding in *Shady Grove* with which Justice Stevens concurred.

Moreover, the statutory schemes in the cases GWU cites were different from the DCMWA scheme. In finding the Illinois Antitrust Act class action ban a substantive right, Judge Preska explained:

> "Furthermore, courts have observed that the Illinois statute represents a policy judgment as to the feasibility of managing duplicative recovery, which the legislature has entrusted to the Attorney General but not to individual indirect purchasers." That policy judgment is substantive. Indeed, the statute expressly

> cautions courts to take care to follow the Illinois Brick rule and avoid duplicate recoveries.

In re Digital Music Antitrust Litigation, 812 F.Supp.2d 390, 416 (S.D.N.Y. 2011) (citation omitted). *See also, Bearden v. Honeywell Intern. Inc.*, 3:09–1035, 2010 WL 3239285, *10 (M.D. Tenn. Aug. 16, 2010) ("In addition, as explained by the Tennessee Supreme Court, the class-action limitation reflects a policy that the proper remedy for a violation affecting a class of consumers is prosecution by the Attorney General or by the Tennessee Department of Commerce and Insurance—not a private class action.") (internal citations omitted). Unlike these statutes, the DCMWA does not vest authority in another entity to bring an opt-out class action for civil damages.

The fact that the procedural provision is included in the DCMWA as opposed to a more general statute is not determinative of its import. Courts have consistently found that the nearly identical provision in the FLSA does not provide a substantive right to the opt-in procedure. For example, even though the opt-in provision is included in the section of the FLSA providing the right to private action, the Fourth Circuit found that the opt-in procedure had to yield to the procedural rules of another forum allowing an opt-out class. *Long John Silver's*, 514 F.3d at 351; *see also, Brown*, 2009 WL 2514173 at *3 (the FLSA's opt-in provision does not "share the substantive and nonwaivable character of the various monetary remedies set out in § 216(b)").

Like the FLSA on which it was modeled, the DCMWA opt-in provision is a procedural rule. GWU faces a high bar to show that applying Rule 23 in its stead in federal court violates the *REA*. Because the authority addressing the issue all finds that the provision does not create substantive rights and because creating the rights GWU claims are imbedded in the opt-in provision would be contrary to the D.C. Council's stated policy behind the statute, GWU has failed its burden.

C. Applying Rule 23 Does Not Affect the DC MWA Statute of Limitations

While nearly identical language in the DCWPCL and FLSA should be construed consistently, that rule does not apply where the language of the statutes is different. *Calles v. BPA Eastern Us, Inc.*, Civ. A. No. 91–2298–LFO, 1991 WL 274268, *1 (D.D.C. Dec. 6, 1991) (denying a motion to dismiss DC MWA claims based on an interpretation of FLSA provisions not included in the statute). Where the statutory language is substantively different, elements of the FLSA should not be read into the DC MWA. *Id*.

The DCMWA does not track the FLSA language with respect to when an action is commenced for purposes of a class or collective action. The FLSA includes a specific provision that "in the case of a collective or class action" a case "shall be considered to be commenced" for purposes of the statute of limitations on the date the individual claimant files his consent to sue with the court. 29 U.S.C. § 256. The DCMWA has no such provision.

Policy considerations determine whether class members' claims should toll upon the filing of a class complaint, and such considerations favor tolling in suits brought under remedial statutes. *Kleiboemer v. District of Columbia*, 458 A.2d 731, 735 (D.C. Cir. 1983). The Supreme Court explained the basis for the policy: statutes of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared," and a class claim

> notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.

American Pipe & Const. Co. v. Utah, 414 U.S. 538, 554-557, (1974).

The same analysis applies to a class under the DCMWA, whether opt-out or opt-in. A DCMWA class complaint provides the defendant with the information necessary to defend against the claims. There is even less risk of lost evidence under the DCMWA because the statute requires the employer to keep the basic evidence in such actions, the wage and hour actions. D.C. Code § 32-1008. It makes no difference whether the class is opt-in or opt-out, the employer still has all the information necessary to protect it from surprises. Allowing the statute of limitations to toll upon filing is also consistent with the policy behind the DCMWA to protect public rights by ensuring that all workers are paid a fair wage. D.C. Code § 32-1001. Accordingly, the DCMWA statute of limitations should toll upon the filing of a collective action complaint, as it would in a Rule 23 class action. *Kleiboemer*, 458 A.2d at 735.

As the application of Rule 23 would not affect DCMWA's statute of limitations, there is no *REA* violation and Rule 23 applies to Driscoll's DCMWA claims in federal court. *Shady Grove*, 130 S. Ct. at 1456.

D. The DCMWA Is Not A Federal Law For Purposes of the Shady Grove Analysis

The D.C. Code does not have the force of federal law, and it cannot displace federal rules of civil procedure in federal court. Both Congress and the courts recognize that the D.C. Code does not have the force of federal law. The U.S. Code sets forth the grounds for original jurisdiction in federal district courts and specifically provides that "For the purposes of this chapter, references to laws of the United States or Acts of Congress do not include laws applicable exclusively to the District of Columbia." 85 U.S.C. § 1366. Clearly Congress itself recognizes that laws applicable exclusively to the District of Columbia are not federal laws enacted by Congress in the usual sense. The Supreme Court recognizes the D.C. Code to be similar in nature to state and local laws. "Unlike most congressional enactments, the [D.C.] Code

is a comprehensive set of laws equivalent to those enacted by state and local governments having plenary power to legislate for the general welfare of their citizens." *Key v. Doyle,* 434 U.S. 59, 61 (1977) (holding D.C. Code § 18-302 is not a statute of the United States and its constitutionality is reviewable in the Supreme Court only by writ of certiorari.).

The D.C. Circuit also recognizes that the DC Code is local, not federal law:

> When Congress acts as the local legislature for the District of Columbia and enacts legislation applicable only to the District of Columbia and tailored to meet specifically local needs, its enactments should-absent evidence of contrary congressional intent-be treated as local law, interacting with federal law as would the laws of the several states.

District Properties Assoc. v. District of Columbia, 743 F.2d 21, 26 (D.C. Cir. 1984). The DCMWA is a quintessential local law, applicable only to the District of Columbia and tailored to meet local needs, just as other state minimum wage laws are applicable only to those states and tailored to meet those states' needs.

As the D.C. Court of Appeals explained

> Under the Constitution, Congress has authority to act as the local legislature for the District of Columbia, and thus Congress frequently enacts legislation applicable only to the District and tailored to meet local needs. Absent evidence of contrary congressional intent, such enactments should be treated as local law, interacting with federal law as would the laws of the several states. Therefore, we do not interpret the Congress that passed this apparently local legislation as having intended that it should burden federal causes of action any more than would an analogous state ordinance.

Brown v. U.S., 742 F.2d 1498, 1502 (D.C. Cir. 1984). GWU has provided no evidence whatsoever, no legislative history, no policy statements, that in enacting the DCMWA, Congress envisioned itself to be acting as anything other than a local legislature. Congress does not

affirmatively create federal law by simply declining to veto a D.C. law. *James v. City of Costa Mesa*, 684 F.3d 825, 835 (9th Cir. 2012).

Thus, the DCMWA is a local law without the authority to displace or create an exception to the federal rules of civil procedure. *Shady Grove*, 130 S. Ct. at 1456.

IV. DISMISSAL OF DRISCOLL'S CLAIMS IS NOT WARRANTED

For the reasons stated above, this Court should not dismiss any of Driscoll's claims. However, should this Court find that some of Driscoll's claims should be dismissed for any reason, it can and should dismiss only those claims and maintain the others. *See, e.g.*, *Dehaemers v. Wynne*, 522 F. Supp. 2d 240, 249 (D.D.C. 2007) (plaintiff's allowed to amend complaint to add claims under the ADEA, but not add under either the Rehabilitation Act or Title VII, as venue for such claims did not lie in the District of Columbia); *Nichols v. Greater Southeast Community Hosp.*, Civ. A. 03-2081 (JDB), 2005 WL 975643, *4 (D.D.C. Apr. 22, 2005) (plaintiff's motion to amend complaint granted as to adding some defendants, but denied as to adding others); *Stith v. Chadbourne & Parke, LLP.*, 160 F. Supp. 2d 1, 14 (D.D.C. 2001). (plaintiff's motion to amend complaint granted in part to add gender discrimination claim, but denied in part to add defamation claims due to statute of limitations and futility).

Dismissing the entire complaint due to deficiency in some claims is not consistent with the liberal pleading standard of Fed. R. Civ. P. Rule 8(a)(2) and the early stage of the proceeding. Dismissal of claims that can proceed would simply force Driscoll to bring the same claims in another case, which would only lead to delay in adjudicating the claims at issue and to employees losing their claims to the statute of limitations. Such a result is contrary to the Federal Rules of Civil Procedure. Fed. R. Civ. P. Rule 1 (rules should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding).

Likewise, such a result would be contrary to the remedial nature of the wage-and-hour laws at issue. *Tenn. Coal, Iron & R.R. Co., et al. v. Muscoda Local No. 123, et al.*, 321 U.S. 590, 64 S. Ct. 698 (1944); D.C. Code § 32-1001.

Thus, this Court can grant Driscoll's motion to amend in whole or, if it finds it appropriate, in part.

CONCLUSION

Driscoll's Proposed Second Amended Complaint alleges sufficient facts that, accepted as true, state a claim for relief that is plausible on its face. GWU has not shown that it would be prejudice by the amendment in any meaningful way and it claims to futility are not borne out. In particular, it has not established a basis for displacing Rule 23 with a local rule of procedure for claims in federal court. Its argument that the DCMWA intended to vest employers with a substantive right not to face claims lacks authority and it directly contrary to the statute's policy. Accordingly, the Court should grant Driscoll's Motion to Amend the Class Action Complaint.

Dated: August 13, 2012

Respectfully Submitted,

/s/ Michael J.D. Sweeney

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