1 **UNITED STATES COURT OF APPEALS**
2
3 **FOR THE SECOND CIRCUIT**
4
5 August Term, 2012
6
7
8 (Argued: October 25, 2012 Decided: March 1, 2013)
9
10 Docket No. 12-1453
11
12 -x
13
14 DENNIS LUNDY, on behalf of themselves and all other
15 employees similarly situated, PATRICIA WOLMAN, KELLY
16 IWASIUK,
17
18 Plaintiffs-Appellants,
19
20 DAISY RICKS, on behalf of herself and all other employees
21 similarly situated,
22
23 Plaintiff,
24
25 - v.-
26
27 CATHOLIC HEALTH SYSTEM OF LONG ISLAND INCORPORATED, DBA
28 Catholic Health Services of Long Island, GOOD SAMARITAN
29 HOSPITAL MEDICAL CENTER, MERCY MEDICAL CENTER, NEW ISLAND
30 HOSPITAL, AKA St. Joseph Hospital, ST. CATHERINE OF SIENA
31 MEDICAL CENTER, ST. CHARLES HOSPITAL AND REHABILITATION
32 CENTER, ST. FRANCIS HOSPITAL, Roslyn, New York, OUR LADY OF
33 CONSOLATION GERIATRIC CARE CENTER, NURSING SISTERS HOME
34 CARE, DBA Catholic Care Home, JAMES HARDEN,
35
36 Defendants-Appellees,
37
38 LONG ISLAND HEALTH NETWORK, INCORPORATED, BROOKHAVEN
39 MEMORIAL HOSPITAL MEDICAL CENTER INCORPORATED, AKA
40 Brookhaven Memorial Hospital Medical Center, JOHN T. MATHER
41 MEMORIAL HOSPITAL OF PORT JEFFERSON, NEW YORK, INCORPORATED,
42 AKA John T. Mather Memorial Hospital, SOUTH NASSAU
43 COMMUNITIES HOSPITAL, WINTHROP-UNIVERSITY HOSPITAL, TERRY
44 HARGADON, BRIAN CURRIE, KATHLEEN MASIULIS,
45
46 Defendants.
47
48 -x

1 Before: JACOBS, Chief Judge, WALKER, Circuit
2 Judge, and O'CONNOR, Associate Justice
3 (retired).*

4 Plaintiffs, on behalf of a purported class of similarly
5 situated employees, appeal from the orders of the District
6 Court for the Eastern District of New York (Seybert, J.),
7 dismissing their claims under the Fair Labor Standards Act,
8 the Racketeer Influenced and Corrupt Organizations Act, and
9 New York Labor Law. For the following reasons, the judgment
10 is affirmed in part, and in part vacated and remanded.

11
12 MICHAEL J. LINGLE, Thomas &
13 Solomon LLP, Rochester, New York
14 (J. Nelson Thomas, Guy A. Talia,
15 Jessica L. Witenko, on the
16 brief), for Appellants.
17
18 JAMES E. MCGRATH, III, Putney,
19 Twombly, Hall & Hirson LLP, New
20 York, New York (Daniel F.
21 Murphy, Jr., Michael T. McGrath,
22 Randi B. Feldheim, Adriana S.
23 Kosovych, Putney, Twombly, Hall
24 & Hirson LLP, New York, New
25 York, on the brief; Stephen J.
26 Jones, Todd R. Shinaman, Joseph
27 A. Carello, Nixon Peabody LLP,
28 Rochester, New York, on the
29 brief), for Appellees.
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31
32

* The Honorable Sandra Day O'Connor, Associate Justice (retired) of the United States Supreme Court, sitting by designation.

1 DENNIS JACOBS, Chief Judge:

2 Plaintiffs, a respiratory therapist and two nurses,
3 allege that the Catholic Health System of Long Island Inc.,
4 a collection of hospitals, healthcare providers, and related
5 entities (collectively, "CHS"), failed to compensate them
6 adequately for time worked during meal breaks, before and
7 after scheduled shifts, and during required training
8 sessions. They sued on behalf of a purported class of
9 similarly situated employees (collectively, "the
10 Plaintiffs") and take this appeal from orders of the United
11 States District Court for the Eastern District of New York
12 (Seybert, J.), dismissing the claims asserted under the Fair
13 Labor Standards Act ("FLSA"), the Racketeer Influenced and
14 Corrupt Organizations Act ("RICO"), and the New York Labor
15 Law ("NYLL").

16 We affirm the dismissal of the FLSA and RICO claims for
17 failure to state a claim. We also affirm the dismissal of
18 Plaintiffs' NYLL overtime claims, which have the same
19 deficiencies as the FLSA overtime claims. However, because
20 the district court did not explain why Plaintiffs' NYLL gap-
21 time claims were dismissed with prejudice, we vacate that
22 aspect of the judgment and remand for further consideration
23 of the NYLL gap-time claims.

1 **BACKGROUND**

2 The original complaint, alleging violations of FLSA and
3 RICO, was filed in March 2010 by Daisy Ricks, a healthcare
4 employee, on behalf of similarly situated employees, against
5 the Long Island Health Network, Inc., Catholic Health
6 Services of Long Island, and various related entities.[1] The
7 First Amended Complaint, filed in June 2010, substituted
8 Dennis Lundy, Patricia Wolman, and Kelly Iwasiuk as lead
9 plaintiffs, dropped some defendants, and added claims under
10 NYLL and state common law. The twelve causes of action
11 pleaded were FLSA, RICO, NYLL, implied contract, express
12 contract, implied covenants, quantum meruit, unjust
13 enrichment, fraud, negligent misrepresentation, conversion,
14 and estoppel. This case is one of many similar class

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[1] The complicated facts and procedural history of this case are recounted in detail in five orders issued by the district court. See Mem. & Order, Wolman v. Catholic Health System of Long Island, Inc., No. 10-CV-1326 (E.D.N.Y. Dec. 30, 2010) (Special App. 1-19); Mem. & Order, Wolman v. Catholic Health System of Long Island, Inc., No. 10-CV-1326 (E.D.N.Y. May 5, 2011) (Special App. 20-32); Mem. & Order, Wolman v. Catholic Health System of Long Island, Inc., No. 10-CV-1326 (E.D.N.Y. May 24, 2011) (Special App. 33-37); Mem. & Order, Wolman v. Catholic Health System of Long Island, Inc., No. 10-CV-1326 (E.D.N.Y. Feb. 16, 2012) (Special App. 38-74); Mem. & Order, Wolman v. Catholic Health System of Long Island, Inc., No. 10-CV-1326 (E.D.N.Y. Mar. 12, 2012) (Special App. 75-77). We recount only those that bear on the resolution of this appeal.

1 actions brought by the same law firm, Thomas & Solomon LLP,
2 against numerous healthcare entities in the region. A dozen
3 of them are currently on appeal before this Court.[2]
4 The FLSA claims focused on alleged unpaid overtime. In
5 relevant part, FLSA's overtime provision states that "no
6 employer shall employ any of his employees . . . for a
7 workweek longer than forty hours unless such employee
8 receives compensation for his employment in excess of the
9 hours above specified at a rate not less than one and
10 one-half times the regular rate at which he is employed."
11 29 U.S.C. § 207(a)(1).[3]
12 It is alleged that CHS used an automatic timekeeping
13 system that deducted time from paychecks for meals and other
14 breaks even though employees frequently were required to

[2] See Yarus v. N.Y.C. Health & Hosps. Corp., No. 11-710; Megginson v. Westchester Cnty. Health Care Corp., No. 11-713; Megginson v. Westchester Med. Ctr., No. 12-4084; Alamu v. Bronx-Lebanon Hosp. Ctr., No. 11-728; Alamu v. Bronx-Lebanon Hosp. Ctr., No. 12-4085; Nakahata v. N.Y.-Presbyterian HealthCare Sys., No. 11-734; Nakahata v. N.Y. Presbyterian HealthCare Sys., No. 12-4128; Hinterberger v. Catholic Health Sys., No. 12-630; Hinterberger v. Catholic Health Sys., No. 12-918; Gordon v. Kaleida Health, No. 12-654; Gordon v. Kaleida Health, No. 12-670; Lundy v. Catholic Health Sys. of Long Island Inc., No. 12-1453.

[3] In addition to FLSA's overtime provisions, Section 206 of FLSA requires that employers pay a minimum wage. Plaintiffs have not brought minimum wage claims in this case.

1 work through their breaks, and that CHS failed to pay for
2 time spent working before and after scheduled shifts, and
3 for time spent attending training programs.[4]
4 The procedural history of this case was prolonged by
5 four attempts to amend the complaint, and various orders
6 dismissing the claims, as recounted below.
7 A Second Amended Complaint, filed in August 2010,
8 replaced some of the defendants that had been sued in error.
9 On motion, the district court dismissed most of the claims,
10 without prejudice. The FLSA overtime claims were dismissed
11 for failure to approximate the number of uncompensated
12 overtime hours. The FLSA claim for "gap-time" pay (i.e.,
13 for unpaid hours below the 40-hour overtime threshold) was
14 dismissed--with prejudice--on the ground that FLSA does not
15 permit gap-time claims when the employment contract
16 explicitly provides compensation for gap time worked. The
17 RICO claims were dismissed--with prejudice--for insufficient
18 allegations of any pattern of racketeering activity. Once
19 the federal claims were dismissed, the state law claims were
20 dismissed without prejudice.

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[4] Since Plaintiffs were not subject to a collective bargaining agreement while they were employed by CHS, the Labor Management Relations Act is not at issue in this case.

1 The district court granted leave to replead the FLSA
2 overtime claims that were dismissed without prejudice, but
3 cautioned that any future complaint "should contain
4 significantly more factual detail concerning who the named
5 Plaintiffs are, where they worked, in what capacity they
6 worked, the types of schedules they typically or
7 periodically worked, and any collective bargaining
8 agreements they may have been subject to." Special App. 18.
9 The district court said that it would "not be impressed if
10 the Third Amended Complaint prattle[d] on for another 217
11 paragraphs, solely for the sake of repeating various
12 conclusory allegations many times over." Id. at 19.
13 The Third Amended Complaint, filed in January 2011, was
14 largely identical to the Second (with the addition of
15 approximately ten paragraphs). When CHS moved to dismiss,
16 the court issued an order sua sponte urging supplemental
17 briefing and a more definite statement. Observing that
18 Plaintiffs had again failed to achieve sufficient
19 specificity, the court added:

20 [T]he Court does not believe that it would serve
21 anyone's interest to enter another dismissal without
22 prejudice, which would be followed almost assuredly by
23 another amended complaint and then a full round of Rule
24 12(b)(6) briefing. Instead, the Court considers it
25 more appropriate to sua sponte direct Plaintiffs to

1 file a more definite statement, which it will then use
2 to judge the sufficiency of the [Third Amended
3 Complaint].
4
5 Special App. 26. The court expressed concern with the
6 vagueness of the pleading, directed Plaintiffs to stop
7 "hiding the ball," id. at 27, and listed specific
8 information needed for a more definite statement.
9 Plaintiffs failed to issue a more definite statement
10 and instead filed a Fourth Amended Complaint (hereinafter,
11 "the Complaint") in May 2011. The RICO and estoppel claims
12 were dropped, and the remaining causes of action were
13 pleaded as before, supplemented with some more facts.
14 CHS's renewed motion to dismiss was largely granted in
15 February 2012, on the following grounds:
16 1. Plaintiffs insufficiently pled the requisite
17 employer-employee relationship as to each named
18 defendant, because Lundy, Wolman, and Iwasiuk worked
19 only at Good Samaritan Hospital, and because the
20 "economic realities" of the relationships among
21 defendants did not constitute a single employment
22 organization. The FLSA claims against all defendants
23 other than Good Samaritan were dismissed with

1 prejudice.[5]

2 2. The FLSA claims against Defendant James Harden
3 (the CEO, President, and Director of CHS) were
4 dismissed with prejudice because the economic reality
5 of his relationship with Lundy, Wolman, and Iwasiuk did
6 not amount to an employer-employee relationship.

7 3. As to the claim that the automatic timekeeping
8 deductions allegedly violated FLSA as applied to
9 Plaintiffs (even though they were not per se illegal),
10 the Plaintiffs failed to show that they were personally
11 denied overtime by this system.

12 4. As to their FLSA overtime allegations against
13 Good Samaritan, Plaintiffs were required to plead that
14 they worked (1) *compensable hours* (2) in excess of 40
15 hours per week, and (3) that CHS knew that Plaintiffs
16 were working overtime. Only some of the categories of
17 purportedly unpaid work--meal breaks, time before and
18 after scheduled shifts, and training--constituted
19 "compensable" hours.

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[5] The court also rejected arguments that all of the named defendants operated as a single enterprise, or that they were all liable under theories of agency and alter-ego. Even though the district court dismissed the FLSA claims against CHS, we use the term "CHS" in this opinion to refer to Defendants generally.

1 Work during meal breaks is compensable under FLSA
2 if "predominantly" for the employer's benefit. Special
3 App. 62. Although Plaintiffs alleged that their meal
4 breaks were "typically" missed or interrupted, the
5 Complaint "is void of any facts regarding the nature
6 and frequency of these interruptions during the
7 relevant time period or how often meal breaks were
8 missed altogether as opposed to just interrupted."
9 Id. at 63. Absent such specificity, there is no claim
10 for compensable time.
11 Time spent working before and after scheduled
12 shifts is compensable if it is "integral and
13 indispensable" to performance of the job and not de
14 minimis. Id. at 64. Vague assertions that Wolman and
15 Iwasiuk spent fifteen to thirty minutes before their
16 shifts "preparing" their assignments did not state a
17 claim for compensable time. Id. at 64-65. On the
18 other hand, Lundy's allegation--that he had to arrive
19 early to receive his assignment from the nurse working
20 the prior shift and leave late to hand off assignments
21 to the nurse taking over--could be compensable.
22 Time spent at training is not compensable if it is
23 outside regular hours, if attendance is voluntary, if

1 the training is not directly related to the job, and if
2 the employee does not perform productive work during
3 the training. See id. at 66. Wolman and Lundy's
4 allegations regarding monthly, mandatory staff meetings
5 stated claims for compensable time. (Iwasiuk made no
6 allegation of uncompensated trainings.)
7 5. The potentially valid allegations of
8 compensable time nevertheless did not allege that the
9 compensable time exceeded 40 hours, as required for a
10 FLSA overtime claim. Wolman and Iwasiuk's sparse
11 allegations could not support a claim for time in
12 excess of 40 hours. And Plaintiffs conceded that Lundy
13 never actually worked more than 40 hours in one week.
14 The FLSA claims against Good Samaritan were therefore
15 dismissed without prejudice.
16 6. Once the federal claims were dismissed,
17 discretion was exercised against taking jurisdiction
18 over the state law claims, thereby also dismissing them
19 without prejudice.
20 Having done all this, the district court granted Plaintiffs
21 limited leave to file a further complaint alleging only
22 those claims that had been dismissed without prejudice, and
23 again gave specific guidance as to the "contours" of such a
24 complaint. Special App. 70-72.

1 In response to Plaintiffs' inquiry, the district court
2 issued another order a month later, clarifying the scope of
3 the February 2012 order dismissing the Complaint. The court
4 explained that it dismissed all claims against all
5 defendants, except Good Samaritan, and that the FLSA and
6 NYLL claims were dismissed with prejudice, while the
7 remaining state law claims were not. See id. at 76.
8 Plaintiffs mercifully elected to forgo another amended
9 complaint, and instead filed their Notice of Appeal on April
10 11, 2012, indicating their intent to appeal the district
11 court's December 2010 Order dismissing the Second Amended
12 Complaint, the May 2011 sua sponte Order requesting
13 supplemental briefing, the February 2012 Order dismissing
14 the Fourth Amended Complaint, and the March 2012 Order
15 clarifying the scope of the dismissal.
16
17 **DISCUSSION**
18 On appeal, Plaintiffs challenge the dismissal of [1]
19 the overtime claims under FLSA; [2] the gap-time claims
20 under FLSA (and NYLL); [3] the NYLL claims *with prejudice*;
21 and [4] the RICO claims.
22

1 **I**

2 We review de novo dismissal of a complaint for failure
3 to state a claim upon which relief can be granted,
4 "accepting all factual allegations in the complaint as true,
5 and drawing all reasonable inferences in the plaintiff's
6 favor." Holmes v. Grubman, 568 F.3d 329, 335 (2d Cir. 2009)
7 (internal quotation marks omitted). "To survive a motion to
8 dismiss, a complaint must contain sufficient factual matter,
9 accepted as true, to state a claim to relief that is
10 plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662,
11 678 (2009) (internal quotation marks omitted).
12 Nevertheless, "the tenet that a court must accept as
13 true all of the allegations contained in a complaint is
14 inapplicable to legal conclusions." Id. "Threadbare
15 recitals of the elements of a cause of action, supported by
16 mere conclusory statements, do not suffice." Id. Pleadings
17 that "are no more than conclusions . . . are not entitled to
18 the assumption of truth." Id. at 679.
19
20 **II**

21 As to the overtime claims under FLSA, Plaintiffs argue
22 that they sufficiently alleged [i] compensable work that was

1 unpaid, [ii] uncompensated work in excess of 40 hours in a
2 given week, and [iii] status as "employees" of all the
3 Defendants. Although the district court held Plaintiffs'
4 complaint lacking on all three grounds, we affirm on the
5 second ground--the failure to allege uncompensated work in
6 excess of 40 hours in a given week--because it entirely
7 disposes of the FLSA overtime claims.

8 Section 207(a)(1) of FLSA requires that, "for a
9 workweek longer than forty hours," an employee who works "in
10 excess of" forty hours shall be compensated for that excess
11 work "at a rate not less than one and one-half times the
12 regular rate at which he is employed" (i.e., time and a
13 half). 29 U.S.C. § 207(a)(1).[6] So, to survive a motion to
14 dismiss, Plaintiffs must allege sufficient factual matter to
15 state a plausible claim that they worked compensable

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[6] In its entirety, Section 207(a)(1) provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Id.

1 overtime in a workweek longer than 40 hours. Under Federal
2 Rule of Civil Procedure 8(a)(2), a "plausible" claim
3 contains "factual content that allows the court to draw the
4 reasonable inference that the defendant is liable for the
5 misconduct alleged." Iqbal, 556 U.S. at 678; see also Bell
6 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual
7 allegations must be enough to raise a right to relief above
8 the speculative level . . . on the assumption that all the
9 allegations in the complaint are true (even if doubtful in
10 fact)." (internal citation omitted)).

11 We have not previously considered the degree of
12 specificity needed to state an overtime claim under FLSA.
13 Federal courts have diverged somewhat on the question. See
14 Butler v. DirectSat USA, LLC, 800 F. Supp. 2d 662, 667 (D.
15 Md. 2011) (recognizing that "courts across the country have
16 expressed differing views as to the level of factual detail
17 necessary to plead a claim for overtime compensation under
18 FLSA"). Within this Circuit, some courts have required an
19 approximation of the total uncompensated hours worked during
20 a given workweek in excess of 40 hours. See, e.g., Nichols
21 v. Mahoney, 608 F. Supp. 2d 526, 547 (S.D.N.Y. 2009); Zhong
22 v. August August Corp., 498 F. Supp. 2d 625, 628 (S.D.N.Y.

1 2007). Courts elsewhere have done without an estimate of
2 overtime, and deemed sufficient an allegation that plaintiff
3 worked some amount in excess of 40 hours without
4 compensation. See, e.g., Butler, 800 F. Supp. 2d at 668
5 (collecting cases).

6 We conclude that in order to state a plausible FLSA
7 overtime claim, a plaintiff must sufficiently allege 40
8 hours of work in a given workweek as well as some
9 uncompensated time in excess of the 40 hours. See 29 U.S.C.
10 § 207(a)(1) (requiring that, "for a workweek longer than
11 forty hours," an employee who works "in excess of" forty
12 hours shall be compensated time and a half for the excess
13 hours).

14 Determining whether a plausible claim has been pled is
15 "a context-specific task that requires the reviewing court
16 to draw on its judicial experience and common sense."[7]
17 Iqbal, 556 U.S. at 679. Reviewing Plaintiffs' allegations,
18 as the district court thoroughly did, we find no plausible
19 claim that FLSA was violated, because Plaintiffs have not
20 alleged a single workweek in which they worked at least 40

[7] Under 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.

hours and also worked uncompensated time in excess of 40 hours.

1. Wolman was "typically" scheduled to work three shifts per week, totaling 37.5 hours. J.A. 1797. She "occasionally" worked an additional 12.5-hour shift or worked a slightly longer shift, id., but how occasionally or how long, she does not say; nor does she say that she was denied overtime pay in any such particular week. She alleges three types of uncompensated work: (1) 30-minute meal breaks which were "typically" missed or interrupted; (2) uncompensated time before and after her scheduled shifts, "typically" resulting in an additional 15 minutes per shift; and (3) trainings "such as" a monthly staff meeting, "typically" lasting 30 minutes, and respiratory therapy training consisting of, "on average," 10 hours per year. Id.

She has not alleged that she ever *completely* missed *all three* meal breaks in a week, or that she also worked a full 15 minutes of uncompensated time around *every shift*; but even if she did, she would have alleged a total 39 hours and 45 minutes worked. A monthly 30-minute staff meeting, an installment of the ten yearly hours of training, or an

1 additional or longer shift could theoretically put her over
2 the 40-hour mark in one or another unspecified week (or
3 weeks); but her allegations supply nothing but low-octane
4 fuel for speculation, not the plausible claim that is
5 required.
6 2. Iwasiuk "typically" worked four shifts per week,
7 totaling 30 hours. J.A. 1799. She claims that
8 "approximately twice a month," she worked "five to six
9 shifts" instead of four shifts, totaling between 37.5 and 45
10 hours. Id. Like Wolman, Iwasiuk does not allege that she
11 was denied overtime pay in a week where she worked these
12 additional shifts. By way of uncompensated work, she
13 alleges that her 30-minute meal breaks were "typically"
14 missed or interrupted and that she worked uncompensated time
15 before her scheduled shifts, "typically" 30 minutes, and
16 after her scheduled shifts, "often" an additional two hours.
17 Id. Maybe she missed *all* of her meal breaks, and *always*
18 worked an additional 30 minutes before and two hours after
19 her shifts, and maybe some of these labors were performed in
20 a week when she worked more than her four shifts. But this
21 invited speculation does not amount to a plausible claim
22 under FLSA.

1 3. Lundy worked between 22.5 and 30 hours per week,
2 J.A. 1800, and Plaintiffs conceded below--and do not dispute
3 on appeal--that he never worked over 40 hours in any given
4 week.
5 We therefore affirm the dismissal of Plaintiffs' FLSA
6 overtime claims. We need not consider alternative grounds
7 that were conscientiously explored by the district court,
8 such as the lack of an employer-employee relationship
9 between the named Plaintiffs and many of the Defendants, and
10 the insufficient allegations that additional minutes, such
11 as meal breaks, were "compensable" as a matter of law.
12
13 **III**
14 A gap-time claim is one in which an employee has not
15 worked 40 hours in a given week but seeks recovery of unpaid
16 time worked, or in which an employee has worked over 40
17 hours in a given week but seeks recovery for unpaid work
18 under 40 hours. An employee who has not worked overtime has
19 no claim under FLSA for hours worked below the 40-hour
20 overtime threshold, unless the average hourly wage falls
21 below the federal minimum wage. See United States v.
22 Klinghoffer Bros. Realty Corp., 285 F.2d 487, 494 (2d Cir.

1 1960) (denying petitions for rehearing); Monahan v. Cnty. of
2 Chesterfield, 95 F.3d 1263, 1280 (4th Cir. 1996)
3 ("Logically, in pay periods without overtime, there can be
4 no violation of section 207 which regulates overtime
5 payment.").
6 Notwithstanding that Plaintiffs have failed to
7 sufficiently allege any week in which they worked
8 uncompensated time in excess of 40 hours, Plaintiffs invoke
9 FLSA to seek gap-time wages for weeks in which they claim to
10 have worked over 40 hours. The viability of such a claim
11 has not yet been settled in this Circuit, but we now hold
12 that FLSA does not provide for a gap-time claim even when an
13 employee has worked overtime.
14 As the district court explained, the text of FLSA
15 requires only payment of minimum wages and overtime wages.
16 See 29 U.S.C. §§ 201-19. It simply does not consider or
17 afford a recovery for gap-time hours. Our reasoning in
18 Klinghoffer confirms this view: "[T]he agreement to work
19 certain additional hours for nothing was in essence an
20 agreement to accept a reduction in pay. So long as the
21 reduced rate still exceeds [the minimum wage], an agreement
22 to accept reduced pay is valid . . . ." 285 F.2d at 494.

1 Plaintiffs here have not alleged that they were paid below
2 minimum wage.
3 So long as an employee is being paid the minimum wage
4 or more, FLSA does not provide recourse for unpaid hours
5 below the 40-hour threshold, even if the employee also works
6 overtime hours the same week. See id. In this way federal
7 law supplements the hourly employment arrangement with
8 features that may not be guaranteed by state laws, without
9 creating a federal remedy for all wage disputes--of which
10 the garden variety would be for payment of hours worked in a
11 40-hour work week. For such claims there seems to be no
12 lack of a state remedy, including a basic contract action.
13 See, e.g., Point IV (discussing the New York Labor Law).
14 As the district court observed, some courts may allow
15 such claims to a limited extent. Special App. 13 (citing
16 Monahan, 95 F.3d at 1279, and other cases). Among them is
17 the Fourth Circuit in Monahan, which relied on interpretive
18 guidance provided by the Department of Labor. See 29 C.F.R.
19 §§ 778.315, .317, .322. "Unlike regulations," however,
20 "interpretations are not binding and do not have the force
21 of law." Freeman v. Nat'l Broad. Co., 80 F.3d 78, 83 (2d
22 Cir. 1996) (analyzing deference owed to Department of Labor

1 interpretation of FLSA). "Thus, although they are entitled
2 to some deference, the weight accorded a particular
3 interpretation under the FLSA depends upon 'the thoroughness
4 evident in its consideration, the validity of its reasoning,
5 its consistency with earlier and later pronouncements, and
6 all those factors which give it power to persuade.'" Id.
7 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
8 The interpretive guidance on which Monahan relied,
9 insofar as it might be read to recognize gap-time claims
10 under FLSA, is owed deference only to the extent it is
11 persuasive: it is not.[8]
12

---

[8] The district court identified deficiencies in the Fourth Circuit's view and expressed "serious concerns" about allowing gap-time claims under FLSA. Special App. 15. One judge within the Fourth Circuit has acknowledged the force of the competing view:

> While I follow the direction of Monahan and the Department of Labor regulations in this opinion, I note that one could, in the alternative, take the approach that compensation for FLSA overtime hours is the *sole* recovery available under the FLSA maximum hour provision. This approach would leave the contractual interpretation and determination of straight time compensation to state courts, which are better positioned to address these issues.

Koelker v. Mayor & City Council of Cumberland, 599 F. Supp. 2d 624, 635 n.11 (D. Md. 2009) (Motz, J.) (emphasis in original).

1 Section 778.315 of the guidance, which considers the
2 FLSA requirement for time-and-a-half pay, offers the
3 following clarification: "This extra compensation for the
4 excess hours of overtime work under the Act cannot be said
5 to have been paid to an employee unless all the straight
6 time compensation due him for the nonovertime hours under
7 his contract (express or implied) . . . has been paid." 29
8 C.F.R. § 778.315. This interpretation suggests that an
9 employer could violate FLSA by failing to compensate an
10 employee for gap time worked when the employee also works
11 overtime; but the Department of Labor provides no statutory
12 support or reasoned explanation for this interpretation.[9]
13 The Department of Labor adds, also without explanation,
14 that "[a]n agreement not to compensate employees for certain
15 nonovertime hours stands on no better footing since it would
16 have the same effect of diminishing the employee's total
17 overtime compensation." 29 C.F.R. § 778.317. This guidance
18 seems to rely on nothing more than other (unreasoned)

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[9] Section 778.322 appears to merely build from this flawed interpretation: "[O]vertime compensation cannot be said to have been paid until all straight time compensation due the employee under the statute or his employment contract has been paid." 29 C.F.R. § 778.322. Again, the Department of Labor's interpretation is not grounded in the statute and provides no reasoned explanation for this conclusion.

1 guidance, and directly conflicts with Klinghoffer, which
2 ruled that such an agreement would not violate the limited
3 protections of the FLSA. 285 F.2d at 494.
4 Accordingly, we therefore affirm the dismissal of
5 Plaintiffs' FLSA gap-time claims.[10]
6
7 **IV**
8 The claims under the NYLL were dismissed with
9 prejudice. Plaintiffs argue that the district court lacked
10 jurisdiction to dismiss Plaintiffs' NYLL claims because it
11 declined to exercise supplemental jurisdiction once it
12 dismissed the federal claims.
13 In the welter of amended complaints, motions to
14 dismiss, and orders that rule and clarify, the record is
15 somewhat confusing on this point. The state law claims were
16 considered generally in the February 2012 order, in which

[10] Even if we were to assume that an employee who has worked overtime may also seek gap-time pay under FLSA, such a claim would not be viable if the employment agreement provided that the employee would be compensated for all non-overtime hours worked. See Monahan, 95 F.3d at 1272. Here, Plaintiffs allege "binding, express oral contracts" that include an "explicit promise to compensate Plaintiffs and Class Members for 'all hours worked.'" J.A. 1819. Of course in that event a contractual remedy may be available; but the district court dismissed the breach of contract claims and Plaintiffs have not appealed on that ground.

1 the district court "decline[d] to exercise supplemental
2 jurisdiction over Plaintiff's state law claims," thereby
3 dismissing them without prejudice. Special App. 69. But at
4 the same time, the district court stated that Plaintiffs'
5 FLSA and NYLL claims are examined under the same legal
6 standards, and that the analysis dismissing Plaintiffs' FLSA
7 claims "applies with equal force to Plaintiffs' NYLL
8 claims." Id. at 47 n.4; see also id. at 61 n.8. In
9 response to Plaintiffs' motion for partial reconsideration
10 and clarification, the March 2012 order explained that the
11 "NYLL claims against these Defendants were dismissed WITH
12 PREJUDICE." Id. at 76.
13 The exercise of supplemental jurisdiction is within the
14 sound discretion of the district court. See Carnegie-Mellon
15 Univ. v. Cohill, 484 U.S. 343, 349-50 (1988). Courts
16 "consider and weigh in each case, and at every stage of the
17 litigation, the values of judicial economy, convenience,
18 fairness, and comity in order to decide whether to exercise"
19 supplemental jurisdiction. Id. at 350. Once all federal
20 claims have been dismissed, the balance of factors will
21 "usual[ly]" point toward a declination. Id. at 350 n.7.
22

1 "We review the district court's decision for abuse of
2 discretion, and depending on the precise circumstances of a
3 case, have variously approved and disapproved the exercise
4 of supplemental jurisdiction where all federal-law claims
5 have been dismissed." Kolari v. N.Y.-Presbyterian Hosp.,
6 455 F.3d 118, 122 (2d Cir. 2006) (internal citations
7 omitted). The dismissal of state law claims has been upheld
8 after dismissal of the federal claims, particularly where
9 the state law claim implicated federal interests such as
10 preemption, or where the dismissal of the federal claims was
11 late in the litigation, or where the state law claims
12 involved only settled principles rather than novel issues.
13 Valencia ex rel. Franco v. Lee, 316 F.3d 299, 305-06 (2d
14 Cir. 2003). And we have upheld the exercise of supplemental
15 jurisdiction in situations when as here the "state law
16 claims are analytically identical" to federal claims. Benn
17 v. City of New York, 482 F. App'x 637, 639 (2d Cir. 2012);
18 see also Petrosino v. Bell Atl., 385 F.3d 210, 220 n.11 (2d
19 Cir. 2004).
20 In dismissing the NYLL claims with prejudice, the
21 district court relied on the fact that the same standard
22 applied to the FLSA and NYLL claims. That exercise of

1 supplemental jurisdiction was entirely consistent with this
2 Court's precedent.[11] Reviewing the district court's
3 determination for an abuse of discretion, we largely affirm
4 the district court's dismissal of the NYLL claims with
5 prejudice.
6 However, Plaintiffs point out that the district court
7 order was arguably inconsistent in dismissing Plaintiffs'
8 NYLL claims with prejudice notwithstanding its observation
9 that Plaintiffs may have a valid gap-time claim under NYLL.
10 According to the district court: "the NYLL does
11 recognize Gap Time Claims and provides for full recovery of
12 all unpaid straight-time wages owed." Special App. 61 n.9
13 (internal quotations and citations omitted). "Thus, to the
14 extent that the . . . Plaintiffs have adequately pled that
15 they worked compensable time for which they were not
16 properly paid, Plaintiffs have a statutory right under the
17 NYLL to recover straight-time wages for those hours." Id.

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[11] In any event, the district court's dismissal of Plaintiffs' NYLL claims was proper under the Cohill factors: judicial economy, convenience, fairness, and comity. See 484 U.S. at 350. Judicial economy and convenience are served by dismissing Plaintiffs' NYLL claims with prejudice. And considering that Plaintiffs amended their complaint at least four times with express guidance from the district court, they cannot argue now that it is unfair to dismiss their inadequately pleaded NYLL claims.

1 This observation appears consistent with NYLL, which
2 provides that "[i]f any employee is paid by his or her
3 employer less than the wage to which he or she is
4 entitled . . . he or she shall recover in a civil action the
5 amount of *any such* underpayments . . . ." NYLL § 663(1)
6 (emphasis added).
7 We express no view as to the merits of NYLL gap-time
8 claims, or as to the adequacy of Plaintiffs' pleading. But
9 because New York law may recognize Plaintiffs' NYLL gap-time
10 claims, the district court erred in dismissing them with
11 prejudice based solely on its dismissal of Plaintiffs' FLSA
12 claims. We therefore affirm the dismissal of Plaintiffs'
13 NYLL overtime claims, but vacate the dismissal of
14 Plaintiffs' NYLL gap-time claims and remand for further
15 consideration in that narrow respect.
16
17 **V**
18 Finally, Plaintiffs challenge the dismissal of their
19 RICO claims, which alleged that CHS used the mails to
20 defraud Plaintiffs by sending them their payroll checks.
21 The district court dismissed the RICO claims, holding that
22 Plaintiffs had not alleged any pattern of racketeering
23 activity.

1 To establish a civil RICO claim, a plaintiff must
2 allege "(1) conduct, (2) of an enterprise, (3) through a
3 pattern (4) of racketeering activity," as well as "injury to
4 business or property as a result of the RICO violation."
5 Anatian v. Coutts Bank (Switz.) Ltd., 193 F.3d 85, 88 (2d
6 Cir. 1999) (internal quotation marks omitted). The pattern
7 of racketeering activity must consist of two or more
8 predicate acts of racketeering. 18 U.S.C. § 1961(5).
9 The Third Amended Complaint cites the mailing of
10 "misleading payroll checks" to show mail fraud as a RICO
11 predicate act, J.A. 1779, on the theory that the mailings
12 "deliberately concealed from its employees that they did not
13 receive compensation for all compensable work that they
14 performed and misled them into believing that they were
15 being paid properly." Id. at 1764-65; see also id. at 1765-
16 67 (describing the mailing of checks).[12]
17 "To prove a violation of the mail fraud statute,
18 plaintiffs must establish the existence of a fraudulent
19 scheme and a mailing in furtherance of the scheme."

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[12] Federal courts are properly wary of transforming any civil FLSA violation into a RICO case. See, e.g., Vandermark v. City of New York, 615 F. Supp. 2d 196, 209-10 (S.D.N.Y. 2009) (Scheindlin, J.) ("Racketeering is far more than simple illegality. Alleged civil violations of the FLSA do not amount to racketeering.").

1 McLaughlin v. Anderson, 962 F.2d 187, 190-91 (2d Cir. 1992).
2 On a motion to dismiss a RICO claim, Plaintiffs' allegations
3 must also satisfy the requirement that, "[i]n alleging fraud
4 or mistake, a party must state with particularity the
5 circumstances constituting fraud or mistake." Fed. R. Civ.
6 P. 9(b); see McLaughlin, 962 F.2d at 191. So Plaintiffs
7 must plead the alleged mail fraud with particularity, and
8 establish that the mailings were in furtherance of a
9 fraudulent scheme. Id. Plaintiffs' allegations fail on
10 both accounts.
11 As to particularity, the "complaint must adequately
12 specify the statements it claims were false or misleading,
13 give particulars as to the respect in which plaintiff
14 contends the statements were fraudulent, state when and
15 where the statements were made, and identify those
16 responsible for the statements." Cosmas v. Hassett, 886
17 F.2d 8, 11 (2d Cir. 1989). Plaintiffs here have not alleged
18 what any particular Defendant did to advance the RICO
19 scheme. Nor have they otherwise pled particular details
20 regarding the alleged fraudulent mailings. Bare-bones
21 allegations do not satisfy Rule 9(b).
22

1 Almost more fundamentally, Plaintiffs have not
2 established that the mailings were "in furtherance" of any
3 fraudulent scheme. As the district court observed, the
4 mailing of pay stubs cannot further the fraudulent scheme
5 because the pay stubs would have revealed (not concealed)
6 that Plaintiffs were not being paid for all of their alleged
7 compensable overtime. See Special App. 16-17. Mailings
8 that thus "increase[] the probability that [the mailer]
9 would be detected and apprehended" do not constitute mail
10 fraud. United States v. Maze, 414 U.S. 395, 403 (1974); see
11 also Cavallaro v. UMass Mem'l Health Care Inc., No.
12 09-40152, 2010 WL 3609535, at *3 (D. Mass. July 2, 2010)
13 (examining very similar claim of mail fraud based on
14 paychecks and ruling that the mailings "made the scheme's
15 discovery more likely"). We therefore affirm the dismissal
16 of Plaintiffs' RICO claims.
17
18 **CONCLUSION**
19 For the foregoing reasons, we affirm the dismissal of
20 Plaintiffs' claims under FLSA, their NYLL overtime claims,
21 and their RICO claims, but we vacate the dismissal with
22 prejudice of Plaintiffs' gap-time claims under the NYLL, and
23 remand for further consideration in that limited respect.