

No. 20-724

# In the Supreme Court of the United States

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DONOVAN MIDDLETON AND HARVESTER NUTRITION, LLC ET AL.

PETITIONERS,

v.

COMPLETE NUTRITION FRANCHISING, LLC AND  
COMPLETE NUTRITION FRANCHISE HOLDINGS, LLC ET AL.

RESPONDENTS.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT

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**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Whether this Court's guidance is required to review the Eighth Circuit Court of Appeals' non-precedential, *per curiam* order affirming the District Court's exercise of its considerable discretion in denying Petitioners' Rule 59(e) Motion for Leave to File Second Amended Complaints following dismissal of their First Amended Complaints with prejudice.

2. Whether this Court's guidance is required to address the well-settled principle that motions requesting leave to amend a pleading after a dismissal, with prejudice, pursuant to Rule 12(b)(6), are subject to the stringent requirements of Rule 59(e).

## **LIST OF PARTIES**

Petitioners are Donovan Middleton and Harvester Nutrition, LLC, Herman Hourie and Nutrition Castle, LLC, Edgar Rojas and Christina Soares, Bright Future Holdings, LLC, Vivify, Inc., Warrior Fitness & Nutrition, Inc., Katherina Jerak, and M.G. Nutrition, LLC.

Respondents are Complete Nutrition Franchising, LLC, Complete Nutrition Franchise Holdings, LLC, CR Holdings, LLC, Dominus Health Intermediate Holdco, LLC, and Dominus Health Holdings, LLC.

## CORPORATE DISCLOSURE STATEMENT

The corporate Respondents in this matter make the following corporate disclosure statements pursuant to United States Supreme Court Rule 29.6:

1. Complete Nutrition Franchising, LLC – Respondent Complete Nutrition Franchising, LLC (“CNF”) identifies the following parent corporations: (1) Complete Nutrition Franchise Holdings, LLC (f/k/a Complete Nutrition Franchise Holdings, Inc.); (2) Dominus Health Intermediate Holdco, LLC; (3) Dominus Health Holdings, LLC; (4) Dominus Health Holdings Purchaser, LLC; (5) CN Franchise Holdco, Inc.; and (6) CR Holdco, Inc. CNF has no publicly held corporations owning 10% or more of its stock or membership shares.

2. Complete Nutrition Franchise Holdings, LLC – Respondent Complete Nutrition Franchise Holdings, LLC (“CNFH”) identifies the following parent corporations: (1) Dominus Health Intermediate Holdco, LLC; (2) Dominus Health Holdings, LLC; (3) Dominus Health Holdings Purchaser, LLC; (4) CN Franchise Holdco, Inc.; and (5) CR Holdco, Inc. CNFH has no publicly held corporations owning 10% or more of its stock or membership shares.

3. CR Holdings, LLC – Respondent CR Holdings, LLC (“CR”) identifies the following parent corporations: (1) Dominus Health Intermediate Holdco, LLC; (2) Dominus Health Holdings, LLC; (3) Dominus Health Holdings Purchaser, LLC; (4) CN Franchise Holdco, Inc.; and (5) CR Holdco, Inc. CR has no publicly held corporations owning 10% or more of its stock or membership shares.

4. Dominus Health Intermediate Holdco, LLC – Respondent Dominus Health Intermediate Holdco, LLC (“DHIH”) identifies the following parent

corporations: (1) Dominus Health Holdings, LLC; (2) Dominus Health Holdings Purchaser, LLC; (3) CN Franchise Holdco, Inc.; and (4) CR Holdco, Inc. DHH has no publicly held corporations owning 10% or more of its stock or membership shares.

5. Dominus Health Holdings, LLC – Respondent Dominus Health Holdings, LLC (“DHH”) identifies the following parent corporations: (1) Dominus Health Holdings Purchaser, LLC; (2) CN Franchise Holdco, Inc.; and (3) CR Holdco, Inc. DHH has no publicly held corporations owning 10% or more of its stock or membership shares.

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**JURISDICTION**

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **Federal Rule of Civil Procedure 8(a). General Rules of Pleading.**

(a) Claim for Relief. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

### **Federal Rule of Civil Procedure 12(b)(6). How to Present Defenses.**

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . .

(6) failure to state a claim upon which relief can be granted[.]

### **Federal Rule of Civil Procedure 15(a). Amendments Before Trial.**

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) Time to Respond. Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

**Federal Rule of Civil Procedure 59(e). Motion to Alter or Amend Judgment.**

A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

## INTRODUCTION

Petitioners have failed to demonstrate a compelling reason necessitating this Court's review of the unpublished, *per curiam*, order of the United States Court of Appeals for the Eighth Circuit, which affirmed the unpublished order of the United States District Court for the District of Nebraska (the "District Court"). Rather, this is a simple case of a group of litigants' failure (and inability) to plead facts in support of their claims and their repeated failure to heed the clear direction of the District Court to bring their independent and distinct claims separately. There are no significant ramifications stemming from the non-precedential decisions below as the District Court's order was intensely fact-driven and appropriately committed to the sound discretion of the District Court. Further, denial of this Petition will not work any undue hardship on any of the Petitioners – all of whom had their day in court – will not prejudice any substantial right, will not affect any important interest under the laws of the United States, nor provide any needed guidance to lower courts or litigants.

Petitioners plead with this Court to reverse the Eighth Circuit's affirmance of the District Court's dismissal of their breach of contract and breach of the implied covenant of good faith and fair dealing claims against Respondents. Petitioners also request this Court reverse the Eighth Circuit's affirmance of the District Court's denial of their post-judgment Rule 59(e) motion for leave to file second amended complaints. The Eighth Circuit and District Court's non-precedential decisions, however, were wholly correct and surely do not rise to the level of importance necessary to support this Court's further review. Rather, Petitioners failed to plead

facts which would have given rise to claims for breach of contract or breach of the implied covenant. Moreover, and in any event, Petitioners cannot state causes of action for breach of contract or breach of the implied covenant because they failed to fulfill their own contractual obligations under the franchise agreements at issue. Finally, Petitioners repeatedly failed to parse out their separate claims, as directed by the Magistrate Judge in her order severing Petitioners' original complaint into eight separate cases. The District Court therefore properly dismissed Petitioners' claims and denied their post-judgment motion for leave to amend, and the Eighth Circuit correctly affirmed.

Thus, even if Petitioners had articulated a legal basis for certiorari and explained how that basis warrants the extraordinary remedy of certiorari, such would be improvident because Petitioners could never state claims for breach of contract or breach of the implied covenant against Respondents. This Court should deny this request for a writ of certiorari and put to rest Petitioners' attempts to extend their day in court (which they have already received).

### **STATEMENT OF THE CASE**

Respondents believe that a short statement of the case is necessitated to place the issues into their proper procedural perspective. Respondent, Complete Nutrition Franchising, LLC ("CNF") was a franchisor of retail stores offering nutrition supplements, health and beauty products, and other related healthcare items to the general public, and permitted its franchisees to use the "Complete Nutrition" trade name, trademark, and its system of operating procedures. (Dkt. #45). Petitioners alleged that over the course of seven years, they each executed individual, separate

franchise agreements with CNF in order to own and operate their own “Complete Nutrition” brand retail store. (*Id.*) Petitioners originally brought suit against CNF, in one consolidated complaint, alleging causes of action for breach of contract, fraudulent misrepresentation, negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, and various statutory claims governing the relationship of franchisors and franchisees. (Dkt. # 1).

On November 18, 2019, upon consideration of Respondents’ motion to sever, the District Court found that “[Respondents] claims do not involve common questions of law or fact. [Respondents] have not alleged a common practice or policy by [CNF].” (Dkt. #44, pg. 4). The District Court severed Respondents’ claims; thereby requiring eight separate and distinct complaints be brought by the individual Petitioners. (*Id.*). The Magistrate Judge therefore directed the Petitioners to prosecute their claims in eight separate lawsuits and to allege facts and causes of action specific to the claims of the named Petitioner(s) in each action against the named Respondent(s). Specifically, the District Court ordered Respondents to “file an amended complaint in their separate actions,” and that “each complaint must be specific to the claims of only the named [Respondent(s)] in that specific case.” (*Id.*, p. 5).

The Petitioners thereafter filed eight separate yet nearly identical Amended Complaints, which added as defendants Respondents Complete Nutrition Franchise Holdings, LLC (“CNFH”), CR Holdings, LLC (“CR”), Dominus Health Intermediate Holdco, LLC (“DHIH”), and Dominus Health Holdings, LLC (“DHH”). (Dkt. #45). The Amended Complaints alleged the same causes of action as the original Complaint.

Respondents moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), each of the Amended Complaints. (Dkt. #54).

On May 8, 2019, the District Court granted Respondents' motions to dismiss. (Dkt. #67). In its well-reasoned Memorandum Opinion and Order, the District Court found that Plaintiffs had each failed to state causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. (*Id.*, pp. 12-13). Specifically, the District Court held that because Petitioners failed to allege that they complied with any conditions precedent under the terms of the Franchise Agreements (a necessary element of a breach of contract claim under Nebraska law), their breach of contract claims must be dismissed. (*Id.*). Further, and with respect to Petitioners' breach of the implied covenant of good faith and fair dealing claims, the District Court held that "because the [Respondents'] covenant claims arise in contract and the [Respondents] have not stated their contract claims, their covenant claims consequently fail." (*Id.*, p. 13). Finally, the District Court noted that Petitioners, after being instructed by the Magistrate Judge to file separate amended complaints supported by facts specific to each of their claims, "each filed practically identical complaints asserting largely the same claims as they advanced in their original complaint." (Dkt. #67, pg. 5). Thus, the District Court entered judgment in favor of Respondents and against Petitioners. (Dkt. #68).

Petitioners then each filed a Motion to Alter or Amend Judgment and for Leave to File Second Amended Complaints. (Dkt. #69). Petitioners attached to their motions proposed Second Amended Complaints which they argued corrected the deficiencies

underlying the dismissal orders, though the District Court, upon review, commented they were again “near carbon-copies of one another.” (Dkt. #72, p. 5). The District Court denied Petitioners’ motions on August 2, 2019. (*Id.*). Central to the District Court’s decision was the fact that the Petitioners, notwithstanding clear direction to plead facts supporting each of their separate cases, repeatedly filed identical pleadings to one another. (*Id.*, p. 7). The District Court also noted the Petitioners’ failure to indicate what exactly Respondents did that gave rise to liability, as well as the length of time in which Petitioners were aware of their pleading deficiencies, along with the fact that the proposed Second Amended Complaints did not properly allege the causes of action Petitioners sought to bring. (*Id.*).

Petitioners filed their Notices of Appeal on September 2, 2019. (Dkt. # 73). Petitioners argued on appeal that the District Court erred in dismissing their claims for breach of contract and breach of the implied covenant of good faith and fair dealing and in denying their Motions to Alter or Amend Judgment and for Leave to File Second Amended Complaints. The parties stipulated to a joint appendix containing the Amended Complaint and subsequent motions, orders, and judgment filed in the case *Middleton et al. v. Complete Nutrition Franchising, LLC, et al.*, Appeal No. 19-2886, as being representative of each of the eight cases. In a very real manner, this stipulation emphasized the fact that Petitioners did not heed the District Court’s warnings to set forth facts specific to the individual claims being made by each separate Petitioner.



Petitioners argued in their appellate briefs that the District Court erred in dismissing their breach of contract claims. Specifically, Petitioners incorrectly asserted that Nebraska law does not require that a party plead compliance with conditions precedent where the contract at issue does not contain conditions precedent to performance. Further, Petitioners argued that the District Court erred in dismissing their breach of the implied covenant of good faith and fair dealing claims on the grounds that Nebraska law merely requires the existence of a contract to plead a breach of the implied covenant. Finally, and notwithstanding the substantial degree of discretion vested in the District Court to decide Rule 59(e) motions, Petitioners argued that the District Court's decisions denying their Rule 59(e) motions should be reversed.

Respondents, on the other hand, argued that the District Court's decision was correct. Namely, Nebraska law contains no exception to pleading the performance of conditions precedent in order to sustain a breach of contract claim. Claims for breach of the implied covenant of good faith and fair dealing are similar, in that they require pleading the existence of a valid contract and Petitioners cited no authority to the contrary. Moreover, Respondents also argued that Petitioners' claims were deficient in that they failed to attribute wrongful conduct to any one of the five named Defendants. Finally, Respondents argued that the District Court was well within its discretion to deny Petitioners' Rule 59(e) motion to file a post-judgment amendment. The District Court (through the Magistrate Judge), in granting Respondents' Motion to Sever, specifically directed the Petitioners to plead facts in support of their distinct

claims, separately. Petitioners, however, failed to heed the District Court's instruction and instead chose to file a number of identical pleadings and other filings with virtually no differentiation among them.

On June 24, 2020, the Appellate Court issued a *per curiam*, non-published, non-precedential order affirming the District Court's Judgment and Orders in every respect. (Petitioners' Appendix ("Pet. App."), 1a). The Appellate Court's order, although five pages in length, included only three sentences affirming the dismissals based on settled law that the complaints were properly dismissed and the District Court did not abuse its discretion in denying leave to amend post judgment. (*Id.*). Tellingly, although now claiming a split between Circuits concerning amendments to pleadings, Petitioners did not seek rehearing or rehearing en banc before the Eighth Circuit. Rather, they directly filed their Petition for Writ of Certiorari on November 18, 2020 with this Court.

#### **REASONS FOR DENYING THE PETITION**

The consolidated decision below does not conflict with a decision of this Court or any Court of Appeals and does not implicate a federal question that has not been decided by this Court. The Eighth Circuit's order is supported on adequate and independent state grounds as well as established federal rules of procedure and supporting case law. Moreover, and in any event, this is surely not a case appropriate for this Court's review on such a sparse, non-precedential order. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. Sup. Ct. R. 10.

## ARGUMENT

Petitioners have not met their burden of establishing the requisite “compelling reasons” for the issuance of a writ of certiorari. Further, Petitioners have not established that the Eighth Circuit’s decision runs contrary to any decision of this Court or the other Circuit Courts of Appeals. To that end, even if there is a split among the Circuits with respect to how to analyze a Rule 59(e) motion following a dismissal with prejudice pursuant to Rule 12(b)(6), this case presents less than ideal circumstances warranting review by this Court. The Eighth Circuit’s order was a short, unpublished, non-precedential order made on the pleadings alone, rendering this case an inopportune occasion to settle a claimed Circuit split. Finally, under either standard Petitioners contend is applied by the various Circuits, the District Court’s decisions granting Respondents’ 12(b)(6) motions to dismiss and subsequently denying Petitioners’ Rule 59(e) motions to alter or amend judgment and for leave to file second amended complaints were well-supported and correct. Accordingly, this Court should deny the Petition.

**A. Petitioners Have Not Met Their Burden in Demonstrating “Compelling Reasons” as to Why Their Petition Should be Granted.**

Petitioners’ do not present “compelling reasons” warranting this Court’s issuance of a writ of certiorari. Supreme Court Rule 10 provides that “[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.” Sup. Ct. R. 10. The Eighth Circuit’s decision to affirm the District Court was a *per curiam*, three sentence, unpublished, non-precedential order. Therefore, the Eighth Circuit’s

decision is binding only on the parties and carries no weight in shaping precedent in the Eighth Circuit or creating a circuit split. Moreover, the Eighth Circuit's decision was consistent with the precedent set forth by this Court and, as set forth below, does not conflict with the jurisprudence of any other Circuit Court of Appeals. Indeed, Petitioners have not presented a procedural issue rising to a level requiring this Court's intervention. For these reasons alone, this case is inappropriate for the issuance of a writ of certiorari.

Further, even if Petitioners had presented a procedural issue warranting this Court's intervention (which they have not), the instant case does not constitute an appropriate occasion for a writ of certiorari. Simply put, even if the issue were appropriate for further consideration, this is not the case or record on which to do so. First, because Petitioners' claims were disposed of on the pleadings pursuant to Rule 12(b)(6), the District Court record is largely undeveloped. The Petitioners did not heed the admonition of the District Court to plead specific facts nor did the parties exchange discovery documents, elicit witness testimony, nor obtain expert opinions. Therefore, and were this Court to grant the Petition and address the issues Petitioners raise, this Court's decision would provide little guidance to lower courts and litigants alike, as this Court's decision would be merely conjecture and speculation about what the Eighth Circuit considered beyond the three sentences of the order and would be untethered to any actual facts in the record. Further, the Petitioners' cause does not represent an instance urgently requiring this Court's intervention. This is not a capital case, nor does it involve a substantial right asserted

by a large group of individuals or other cause necessitating this Court's guidance. Rather, Petitioners' claims purportedly arise from a simple claimed breach of contract and breach of the implied covenant of good faith and fair dealing arising from several franchise agreements they executed with Respondents to own and operate nutrition supplement stores. While Respondents understand the important role this Court serves to clarify the federal laws of the United States and to ensure that justice is carried out, the circumstances of this case are not those worthy of a writ of certiorari.

**B. The District Court and Eighth Circuit Adhered to This Court's Precedent in Denying Petitioners Leave to Amend their Pleadings Post-Judgment.**

Citing *Foman v. Davis* and *Conley v. Gibson* in particular, Petitioners contend that the District Court's decision denying Petitioner's Rule 59(e) motion (and the Eighth Circuit's affirmance thereof) runs contrary to the precedent set forth by this Court.<sup>1</sup> In *Foman*, plaintiff brought suit to recover what she alleged would have been her intestate share of her father's estate, arguing that her father had agreed not to execute a will (which would have given plaintiff an intestate share) in exchange for plaintiff's promise to care for her mother. 371 U.S. at 179. Defendant, plaintiff's father's second wife to whom the father had devised his will, moved to dismiss plaintiff's action under the statute of frauds. *Id.* The district court granted defendant's motion and contemporaneously entered judgment. *Id.* The plaintiff subsequently filed a motion to vacate the judgment and for leave to file an amended complaint, which the district court denied. *Id.*

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<sup>1</sup> What is not at issue here is the dismissal by the District Court of Petitioners' complaints.

Following plaintiff's unsuccessful appeal, this Court granted certiorari. *Id.* at 180. This Court, having construed plaintiff's motion to vacate as having been brought pursuant to Rule 59(e), reversed on the grounds that the district court failed to take into consideration the principles encouraging liberal amendment of pleadings under Rule 15(a). *Id.* at 182. The Court stated:

In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’ Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

*Id.* Of particular importance to the instant case is the fact that the Court in *Foman* articulated that free leave to amend should be granted only “*in the absence of*” issues such as undue delay and repeated failure to cure deficiencies by prior amendment and subject to the district court’s discretion. *Id.* (emphasis added). Liberal leave to amend is not unbounded.

*Conley*, on the other hand, did not discuss a motion to vacate a judgment or to otherwise request leave to amend a pleading post judgment. 355 U.S. 41 (1957). Rather, this Court in *Conley* merely held that under Rule 8(a), pleadings are to be liberally construed so as to do substantial justice between the parties. *Id.* at 48. Petitioners purportedly cite *Conley*, along with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), in an attempt to argue that the District Court and Eighth Circuit in this case failed to liberally construe

Petitioners' Amended Complaints so as to do substantial justice between the parties. In so arguing, Petitioners misconstrue the holdings of the District Court and Eighth Circuit in this case. Respondents' motions to dismiss under Rule 12(b)(6) were not granted and affirmed because the District Court and Eighth Circuit failed to liberally construe Petitioners' allegations. Rather, dismissal was warranted because Petitioners' Amended Complaints were devoid of and failed to plead, despite instructions by the District Court, necessary elements of the claims they sought to bring. *Phipps v. Skyview Farms, Inc.*, 259 Neb. 492, 498 (2000); *see also Fast Ball Sports, LLC v. Metropolitan Entertainment & Convention Authority*, 21 Neb. App. 1, 7-8 (Ct. App. Neb. 2013) ("To recover for breach of contract, a plaintiff must prove that a defendant made a promise, breached the promise, and caused the plaintiff damage and that any conditions precedent were satisfied."). Liberal construction cannot cure a failure to allege necessary facts. Further, the dismissals are not the subject of this Petition; only the denial of leave to amend was brought before this Court.

Moreover, the District Court's decision denying Petitioners' Rule 59(e) motion was wholly consistent with this Court's decision in *Foman*. Specifically, the District Court closely scrutinized Petitioners' undue delay in seeking leave to amend, as well as their failure to cure deficiencies with their pleadings (*i.e.*, failure to plead their distinct cases separately) despite being on direct notice from the District Court. Under *Foman*, leave to amend is to be freely given only "in the absence of any apparent or declared reason," including "undue delay" and "repeated failure to cure

deficiencies by amendments previously allowed[.]” 371 U.S. at 182. The District Court, in clearly articulating Petitioners’ undue delay and failure to cure deficiencies by prior amendment, wholly complied with *Foman* and the express limitations on amendment. The Eighth Circuit rightly deferred to the District Court’s discretion and affirmed. (Pet. App., 1a). There was therefore no departure from this Court’s decision necessitating a writ of certiorari.

**C. The Circuit Courts of Appeals Recognize and Apply a Substantially Uniform Standard for Rule 59(e) Motions to Alter or Amend after a Dismissal with Prejudice Pursuant to Rule 12(b)(6).**

Petitioners also, in an effort to create an issue worthy of this Court’s issuance of a writ of certiorari, contend that the Circuit Courts of Appeals are split with respect to the standard to be applied in deciding a party’s Rule 59(e) motion to alter or amend judgment following a dismissal with prejudice pursuant to Rule 12(b)(6). The Circuits, however, are not split as to this standard. Rather, the Circuits are essentially uniform in applying the strict and rigid guidelines of Rule 59(e) while cognizant of the principles underlying Rule 15(a). Stated differently, while the Circuits may use different language in articulating the applicable standard, and while some Circuits may not reference Rule 15(a) specifically in the context of a Rule 59(e) analysis, the Circuits each consider the same factors which are consistent with this Court’s holding in *Foman v. Davis*, 371 U.S. 178 (1962). In a word, this Court has already articulated guidance to all Federal Courts.



At the outset, Petitioners state that the First, Sixth, Eighth, Tenth, and Eleventh Circuits<sup>2</sup> apply the “stringent” guidelines of Rule 59(e) when deciding whether to grant leave to amend a pleading after a dismissal with prejudice under Rule 12(b)(6). Petitioners contend that these Circuits do not give deference to the more lenient standard of Rule 15(a) for amendment of pleadings, and that the remaining Circuits apply a hybrid standard of review which also gives deference to Rule 15(a)’s more lenient standard. This argument, however, is not correct.

For instance, the First Circuit in the case of *U.S. ex rel. Ge v. Takeda Pharmaceutical Co. Ltd.*, 737 F.3d 116 (1st Cir. 2013) (which Petitioners cite in their petition), did not ignore the Rule 15(a) standard in affirming the denial of appellant’s Rule 59(e) motion to alter or amend. *Id.* at 128. Indeed, that court noted that denial of the argument raised in the Rule 59(e) motion (that newly discovered evidence supported granting leave to amend) had been unduly delayed and could have been presented much earlier in the case. *Id.* Therefore, Rule 15(a) principles, though perhaps not explicitly referenced by rule, were hardly ignored while the First Circuit followed *Foman*.

Similarly, the Sixth Circuit does not ignore Rule 15(a) when deciding a timely motion to alter or amend judgment requesting leave to file an amended pleading under Rule 59(e). In the case of *Morse v. McWorter*, 290 F.3d 795 (6th Cir. 2002), that court explicitly stated that “[w]here a timely motion to amend judgment is filed under Rule 59(e), the Rule 15 and Rule 59 inquiries turn on the same factors.” *Id.* at 799.

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<sup>2</sup> Petitioners do not provide citations to any of the cases which they cite.

Petitioners therefore cannot claim that the Sixth Circuit exclusively enforces the “heavy burden” of Rule 59(e).

The Eighth, Tenth, and Eleventh Circuits each follow suit. Namely, and contrary to Petitioners’ representation, the Eighth Circuit held in *U.S. v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737 (8th Cir. 2014) (which the Eighth Circuit explicitly cited in its decision in this case) that it is well-settled that “district courts in this circuit have considerable discretion to deny a [timely] post judgment motion for leave to amend because such motions are disfavored, but may not ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to test their claims on the merits.” *Id.* at 742-43 (internal quotes omitted). The Tenth and Eleventh Circuits each give a similar degree of deference to Rule 15(a). *See Glenn v. First Nat. Bank in Grand Junction*, 868 F.2d 368, 371 (10th Cir. 1989) (upon the filing of a Rule 59(e) motion, “in accordance with Rule 15, leave shall be freely given when justice so requires.”) (internal quotes omitted); *see also Czeremcha v. International Ass’n of Machinists and Aerospace Workers, AFL-CIO*, 724 F.2d 1552, 1556 (11th Cir. 1984) (“we find it appropriate to adopt the rule that after a complaint is dismissed the right to amend under Rule 15(a) terminates; the plaintiff, however, may still move the court for leave to amend, and such amendments should be granted liberally”).

Clearly, the Circuits are generally uniform in addressing Rule 59(e) motions for leave to amend after dismissing complaints with prejudice. There is, therefore, no material split among the Circuits requiring this Court to weigh in. For this reason,

the Court should deny the petition as additional guidance is neither necessary nor required to provide consistency across all Circuits.

**D. The Eighth Circuit did not Articulate whether it was Applying a Strict Rule 59 Standard or a Hybrid Rule 59(e)/15(a) Combined Standard.**

Petitioners assert that the Eighth Circuit erred in applying a stringent Rule 59(e) standard in reviewing the District Court's orders, rather than the hybrid Rule 59(e)/15(a) standard. Petitioners' argument, however, is largely speculative and surely not supported by the *per curiam* order. Namely, the Eighth Circuit's *per curiam* order states, in its entirety:

In these consolidated appeals, 11 franchisees of the Complete Nutrition franchising system appeal the district court's dismissal of their identical diversity actions raising claims under Nebraska state law. Following a careful review, we conclude that the district court did not err in dismissing the case, *see Plymouth Cty. v. Merscorp, Inc.*, 774 F.3d 1155, 1158 (8th Cir. 2014) (de novo review of dismissal for failure to state a claim); and did not abuse its discretion in denying post-judgment leave to amend, *see United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 743 (8th Cir. 2014) (denial of leave to amend is reviewed for abuse of discretion; district court has considerable discretion to deny post-judgment motion for leave to amend because such motions are disfavored). Accordingly, we affirm. *See* 8th Cir. R. 47B.

(Pet. App., p. 5)<sup>3</sup>. The Eighth Circuit did not state which rule it relied upon in affirming the denial of Petitioners' post-judgment motion but did cite the cases on which it relied and, therefore, on the standards set forth in those cases. While it can only be presumed that it followed Eighth Circuit precedent and applied the guidelines of Rule 59(e) while giving due consideration to Rule 15(a) (*Mask of Ka-Nefer-Nefer*,

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<sup>3</sup> *Middleton et al. v. Complete Nutrition Franchising, LLC, et al.*, 810 Fed.Appx. 482, 484 (8th Cir. 2020).

752 F.3d at 742-43), as instructed by this Court, the Eighth Circuit's discussion of any particular standard represents an additional reason for this Court to deny certiorari. Namely, for this Court to grant certiorari and potentially reverse the decision of the Eighth Circuit would require this Court to assume the Eighth Circuit failed to follow *Foman* and to impose a rationale for the decision beyond what is included in the order. This Court should not be required to engage in such speculative conduct. While Respondents submit that the Eighth Circuit's decision was correct, even if it were not, this Court's review of the issues Petitioners raise is better left for another day.

**E. Under Either Standard of Review, The Eighth Circuit Appropriately Affirmed the District Court's Decision.**

Finally, this Court should reject the Petition because the issuance of a writ of certiorari and argument before this Court would not lead to a different result than that which the Eighth Circuit reached. The District Court was vested with a substantial degree of discretion in deciding Petitioners' post-judgment motion, and the Eighth Circuit rightly applied a deferential standard of review in affirming that decision. The facts in the record indicate that these decisions were correct.

a. Rule 59(e) Standard and District Court Discretion.

A party seeking leave of court to amend a pleading after judgment has been entered must do so through Rule 59(e). The party seeking leave must effectively ask the Court to vacate the judgment, reopen the case, and permit the filing of a new pleading. For this reason, a Rule 59(e) motion to alter or amend a judgment is an extraordinary remedy, and the district courts are endowed with considerable

discretion in determining the outcome of Rule 59(e) motions. As set forth above, however, courts are to give due consideration to Rule 15(a) and the importance of resolving matters on their merits rather than on technicalities, which occurred here.

b. The Eighth Circuit, Giving Due Discretion to the District Court, Applied the Correct Standard of Review and Rightfully Affirmed the District Court's Decision.

The Eighth Circuit rightly gave a substantial degree of discretion to the District Court and affirmed its decision. The record before the Eighth Circuit demonstrated that Petitioners had proven unable to plead their claims against Respondents. Specifically, Petitioners' Amended Complaints and Respondents' Counterclaim made clear that Petitioners could not state claims for breach of contract or breach of the implied covenant of good faith and fair dealing. Namely, Petitioners had failed to perform their own contractual obligations under the franchise agreements at issue. This not only extinguished their ability to plead a necessary element of a breach of contract claim (*i.e.*, compliance with any conditions precedent), but also foreclosed their breach of the implied covenant claims entirely, because Petitioners could not justifiably expect to receive benefits under contracts they themselves had failed to perform.

Further, the record before the Eighth Circuit fully supports the decision to affirm the District Court's denial of Petitioners' Rule 59(e) motion, even under a "lenient" hybrid Rule 59(e)/15(a) standard which Petitioners advocate. That standard would not permit leave to amend in all cases but would merely suggest that leave to amend should be generally granted unless there were issues such as undue delay or

failure to cure deficiencies upon prior amendment, both of which were present in this case.

The District Court, in granting Respondents motion to sever, directed Petitioners to file separate amended complaints which allege distinct facts in support of their separate claims. The Petitioners then proceeded to file eight nearly identical complaints, which at that time included fraud allegations which were required to have been pled with heightened specificity under Rule 9(b). Indeed, even after the District Court granted Respondents' motions to dismiss and Petitioners requested leave to amend attaching proposed second amended complaints to their Rule 59(e) motions, the proposed second amended complaints were still nearly identical. Petitioners wholly overlook the effect of this practice, as it demonstrated a failure to correct pleading deficiencies upon prior notice.

Additionally, the District Court also focused on Petitioners' unreasonable delay in requesting leave of Court to add the necessary allegation that they complied with the conditions precedent in the franchise agreements. Specifically, the Magistrate Judge directed Petitioners to file separate Amended Complaints specific to each Petitioner 180 days before the District Court granted Respondents' motions to dismiss. In the District Court's view, this constituted an unreasonable delay, a conclusion the Eighth Circuit could not overturn absent an abuse of discretion. As set forth herein, however, the Eighth Circuit rightly affirmed.

In sum, regardless of whether Petitioners demonstrated "compelling reasons" warranting issuance of a writ of certiorari (which they have not), and regardless of

what standard of review the Eighth Circuit applied in affirming the District Court's decision, the ultimate outcome of Petitioners' case is the same and this Court should not be required to second guess the discretion of the District Court. For this reason, this Court's intervention is unnecessary. Surely, this Court's limited resources are better used on other matters more worthy of this Court's guidance where this Court has not already spoken. Accordingly, this Court should deny Petitioner's Petition for Writ of Certiorari.

### **CONCLUSION**

For the foregoing reasons, Respondents respectfully request that this Court deny the request for a writ of certiorari, thereby leaving the District Court and the Eighth Circuit's rulings in place; and grant such other relief this Court deems just and appropriate in the circumstances.

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