No.

IN THE

Supreme Court of the United States

DONOVAN MIDDLETON and HARVESTER NUTRITION, LLC, ET AL.,

Petitioners

v.

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

Respondents

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eighth Circuit affirmed the District Court's judgment granting Defendants' Motion to Dismiss and, thereafter, denied Petitioners' Motion to Alter or Amend Judgment and For Leave to File a Second Amended Complaint. The Eighth Circuit applied a stringent Rule 59(e) standard when addressing Petitioners' post judgment Motion to Amend after a dismissal with prejudice under Rule 12(b)(6). The Eighth Circuit's standard directly conflicts with the standards applied in other Circuits and with this Court's precedent.

Question presented:

1. Should this Court clarify the standard of review in a Rule 59(e) post judgment motion to amend following a dismissal with prejudice under Rule 12(b)(6) to address the lack of uniformity among its Circuits?
2. Should this Court clarify the judicial discretion standard for Rule 59(e) post judgment motions to amend following a dismissal with prejudice under Rule 12(b)(6) to emphasize the judicial policy favoring decisions on the merits as reflected in this Court's precedents and in the spirit of the Federal Rules of Civil Procedure rather than setting procedural traps for litigants which deprive them of their ability to seek remedies for wrongful conduct?

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

Harvester Nutrition, LLC is a limited liability organization organized and existing under the laws of the State of Nevada. Harvester Nutrition, LLC does not have a parent company nor is there a publicly held company that owns 10% or more of its stock or membership shares.

Nutrition Castle, LLC is a limited liability organization organized and existing under the laws of the State of Florida. Nutrition Castle, LLC does not have a parent company nor is there a publicly held company that owns 10% or more of its stock or membership shares.

Bright Future Holdings, LLC is a limited liability organization organized and existing under the laws of the State of Florida. Bright Future Holdings, LLC does not have a parent company nor is there a publicly held company that owns 10% or more of its stock or membership shares.

Vivify, Inc. is a corporation organized and existing under the laws of the State of Florida. Vivify, Inc. does not have a parent company nor is there a publicly held company that owns 10% or more of its stock or membership shares.

Warrior Fitness & Nutrition, Inc. is a corporation organized and existing under the laws of the State of Indiana. Warrior Fitness & Nutrition, Inc. does not have a parent company nor is there a publicly held company that owns 10% or more of its stock or membership shares.

M.G. Nutrition, LLC is a limited liability organization organized and existing under the laws of the State of Utah. M.G. Nutrition, LLC does not have a parent company nor is there a publicly held company that owns 10% or more of its stock or membership shares.

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OPINION BELOW

On June 24, 2020, the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the United States District Court for the District of Nebraska granting Defendants' Motion to Dismiss with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) and the District Court's denial of Petitioners' post judgment Motion to Amend. The Eighth Circuit's decision was an unreported per curium opinion. *See* Appendix A.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules 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 Rules of Civil Procedure 12(b)(6). Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(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 Rules of Civil Procedure 15(a). Amended and Supplemental Pleadings.

(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 with 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 Rules of Civil Procedure 59(e). New Trial; Altering or Amending a Judgment.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

Petitioners filed their Complaint against Respondents on March 9, 2018 in the U.S. District Court for the District of Nebraska (Omaha). [8:18-cv-00115, Dkt. #1]. Respondents thereafter filed their Motion to Dismiss or Compel Mediation, Motion for More Definite Statement, and a Motion to Sever. [Dkt. #30, 26, & 28]. On May 3, 2018, an Order was entered granting a Joint Motion to Stay Proceedings to allow the parties to engage in mediation. [Dkt. #34]. After an unsuccessful mediation attempt, the Stay was lifted on August 6, 2018. [Dkt. #35]. That same

day, Petitioners filed a Motion for Leave to File an Amended Complaint. [Dkt. #36]. The following day the Motion to Dismiss or Compel Mediation was dismissed as moot. [Dkt. #37]. In the following weeks, both parties briefed the pending Motion to Sever and Motion for Leave to Amend. [Dkt. #38, 39, & 40]. On September 24, 2018, Respondents filed a counterclaim against Petitioners. [Dkt. #41]. On November 19, 2018, Magistrate Judge Susan Bazis granted the Motion to Sever the single case into eight separate cases and denied Petitioners' Motion to Amend as moot[1]. [Dkt. #44]. Petitioners separated the claims and filed individual amended complaints in each of the related eight cases which were all assigned to Judge Robert F. Rossiter, Jr. [Dkt. #45]. Respondents thereafter filed their Motion to Dismiss for Failure to State a Claim in each of the eight related cases. [Dkt. #54] . On May 8, 2019, after the Motion to Dismiss had been fully briefed, the District Court entered its Order and Judgment dismissing all eight cases with prejudice. [Dkt. # 67 & 68]. Two days later, Petitioners filed their Motions to Amend Judgment and For Leave to File a Second Amended Complaint. [Dkt. #69]. After that motion had been fully briefed, the District Court entered its Order on August 2, 2019 denying Petitioners' Motion. [Dkt. #72]. Petitioners timely filed their notices of appeal in all eight cases on September 2, 2019. [Dkt. #73]. On September 4, 2019, the Eighth Circuit ordered the cases consolidated for purposes of briefing. After the case was fully briefed, the matter was submitted on June 19, 2020 to a

[1] The court kept the original case number (8:18-cv-00115) and opened the following as related cases: 8:18-cv-00543; 8:18-cv-00544; 8:18-cv-00545; 8:18-cv-00546; 8:18-cv-00547; 8:18-cv-00548; 8:18-cv-00549. For practical purposes, all the docket references made herein refer to the original case.

panel for decision as the parties did not request oral argument. On June 24, 2020, the Eighth Circuit affirmed the District Court's judgment and denial of Petitioners' post judgment Motion for Leave to File Amended Complaint.

II. SUBSTANCE

Petitioners executed multiple separate, but nearly identical, franchise agreements with the same franchisor, Respondent Complete Nutrition Franchising, LLC. [Dkt. #45]. Under those agreements, Petitioners were granted the right to own and operate Complete Nutrition store locations which sold nutritional supplements. [Dkt. #45-17]. The franchisor assumed certain obligations under the franchise agreements including providing initial training, ongoing support, and marketing. [Dkt. #45, pp.17-19]. In exchange, Petitioners agreed to operate their locations in accordance with the Complete Nutrition franchise system, purchase products from the franchisor, and pay ongoing franchise royalty fees. [Dkt. #45-17]. Over time, the Complete Nutrition franchise system began to experience operational issues which Petitioners allege damaged them. Ultimately, Petitioners initiated suit alleging breach of contract, breach of the covenant of good faith and fair dealing, fraudulent misrepresentation, negligent misrepresentation, and violation of the Nebraska Deceptive Trade Practices Act. [Dkt. #1]. Upon motion by Respondent Complete Nutrition Franchising, LLC, Petitioners' claims were severed into eight separate cases. [Dkt. #44]. In her order, Judge Bazis recognized that Respondents were entitled to sever the claims because each franchise agreement was a "separate and distinct" transaction. However, she further recognized that the

claims were substantially similar and ordered that "[t]hese cases should be denoted as related and be assigned to the same judge." Importantly, nowhere in her order does Judge Bazis address the substance or merits of the claims raised in the Complaint. Judge Bazis merely found that there are several contracts involved that are separate and distinct transactions and that there was no apparent relationship between the events underlying the claims. Notably, after the cases were severed, Petitioners filed their Amended Complaints which added defendants and several paragraphs detailing the relationship of the events underlying the Petitioners' claims.

Pursuant to the order severing these cases, Petitioners filed Amended Complaints specific to each Petitioners' claims in eight separate, but related, cases. [Dkt. #45]. Shortly thereafter, Respondents filed their Motion to Dismiss in each of the cases. [Dkt. #54]. On May 8, 2019, the District Court granted the Motions to Dismiss with Prejudice. Judgment was entered that same day. [Dkt. #67 & 68]. Concerning the claims for breach of contract, the District Court found that Petitioners' failure to allege compliance with any conditions precedent in the franchise agreements was fatal to those claims. [Dkt. #67, pp.12-13]. It then dismissed the breach of covenant of good faith and fair dealing based on the Court's finding that Petitioners failed to state a breach of contract claim. [Dkt. #67, pp. 12-13]. Finally, the District Court acknowledged Petitioners' informal requests for leave to amend the complaints but denied those requests without prejudice. [Dkt. #67, p. 15]. On May 10, 2019, just two days after the District Court granted

Respondents' Motions to Dismiss, Petitioners filed their Motion to Amend Judgment and Motion for Leave to File a Second Amended Complaint. [Dkt. #69]. Attached to that motion, Petitioners submitted proposed Second Amended Complaints which were red lined to permit the District Court to determine the changes being made to the complaints. [Dkt. #69-1]. In the proposed Second Amended Complaints, Petitioners removed the claims for fraudulent misrepresentation, negligent misrepresentation, and the statutory claims, leaving only the claims for breach of contract and breach of good faith and fair dealing. Petitioners simply added an allegation in the breach of contract claims that they had complied with any conditions precedent and added more specificity to the claims for breach of the implied covenant of good faith and fair dealing even though the court did not address the merits of those claims in its dismissal. [Dkt. #69, p.2]. The Motions to Amend the Judgment and for Leave to File a Second Amended Complaints were denied on August 2, 2019. [Dkt. #72].

In its Order [Dkt #72] denying Petitioners' Motions to Amend Judgment and for Leave to File Second Amended Complaints, the District Court denied the requests for four reasons. First, the Court stated that Petitioners' informal requests to amend which were contained in Respondents' response in opposition to the Motions to Dismiss failed to comply with NECivR 15.1. Second, the Court stated that Petitioners had numerous opportunities to test the water in this case because they were allegedly advised twice on the potential frailty of their pleadings. The District Court suggested that the first time was the motion to sever. However, the

motion to sever the claims was not tested under Rule 12(b)(6) but merely tested under Rule 20. Neither the Motion to Sever nor Judge Bazis' Order granting the motion to sever put Petitioners on notice of the potential frailty of their pleadings. The only time Petitioners were put on notice was when the Respondents filed their motions to dismiss. Petitioners responded to that motion explaining why their claims should survive and made informal requests to amend should the court disagree. Specifically, Petitioners argued that the only condition precedent to activate the obligations and duties within the contract was the execution of the contract itself which was not only pled but acknowledged by Respondents in its answer and counterclaims. That acknowledgement, in and of itself, was enough to state claims for breach of contract. In the alternative, Petitioners specifically requested leave to add an additional sentence in the breach of contract claims to state that Petitioners had complied with any conditions precedent, if the court deemed it was required. In addition, Petitioners also argued that the breach of the covenant of implied good faith and fair dealing was a separate and distinct claim from the breach of contract claim.

Third, the District Court denied the Proposed Second Amendments as futile simply because they were virtually identical to each other and, as such, lacked facts specific to each case. Petitioners argued that this does not meet the definition of futile. The Petitioners' claims are virtually identical because they are part of the same uniform franchise system and all the franchise agreements are materially the same. The result is that there are only minor differences in the circumstances,

namely the date of execution and the location of the franchise, which were pled distinctly. The claims themselves are not futile simply for the mere fact that they are identical. Finally, the District Court denied Petitioners informal requests for leave to amend because of judicial economy. Its reason was that the court had already gone through the academic exercise of ruling on the Respondents' first and only motion to dismiss. In no way does the decision of the District Court in these cases justify denying Petitioners their ability to have their cases heard on the merits under the guise of promoting judicial economy.

Petitioners timely filed their Notices of Appeal on September 2, 2019. [Dkt. #73]. The Eighth Circuit Court of Appeals consolidated the matters for purposes of briefing and the parties entered into a stipulation in which they agreed that the amended complaint and the subsequent motions, orders and judgment filed in *Middleton, et al. v. Complete Nutrition Franchising, LLC, et al.,* Appeal No. 19-2886, were identical to the seven other cases for purposes of determining the issues before the appellate court.[2] Petitioners limited their appeal to three points: (1) the dismissal of the claims of breach of contract; (2) the dismissal of the claims of breach of the implied covenant of good faith and fair dealing; and (3) the District Court's denial of their Motions to Amend the Judgment and for Leave to File Second Amended Complaints.

First, Petitioners alleged that the District Court erroneously dismissed their claims for breach of contract. According to the District Court, that decision was

[2] The seven cases consolidated under 19-2886 are: 19-2887; 19-2888; 19-2889; 19-2890; 19-2891; 19-2893; 19-2894.

based on Petitioners' failure to plead compliance with any conditions precedent under their franchise agreements. Petitioners alleged that no such conditions existed in the agreements and that pleading compliance with non-existent conditions is not required under Nebraska law.

Second, Petitioners alleged that the District Court's dismissal of the claims for breach of good faith and fair dealing was erroneous. That dismissal was based solely on the District Court's finding that Petitioners failed to state a claim for breach of contract. Petitioners argued that the District Court's analysis was erroneous in that Nebraska law merely requires the existence of a contract for the covenant claims to be viable, not that the express terms of the contract were breached. There was no dispute that a contract existed between the parties.

Lastly, Petitioners alleged that the District Court's denial of Petitioners' post-judgment motion for leave to file amended complaints was an abuse of discretion because there was no undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to Respondents, or futility of the amendment. As illustrated above, there was absolutely no evidence of undue delay, bad faith, or dilatory motive. Furthermore, despite the District Court's assertion, there were no repeated failures to cure deficiencies. Additionally, there was no undue prejudice to Respondents in allowing Petitioners to edit the complaint to add a single sentence, since Respondents acknowledged the existence of valid contracts both in their Answer and Counterclaims. Finally, there was no futility of the amendment because to cure the

perceived deficiency in the pleadings the District Court needed only to allow Petitioners the opportunity to add a single sentence to state that that they complied with any conditions precedent. That single addition would address the sole reason the District Court dismissed those claims and, using the District Court's logic, would revive the claims for breach of implied covenant of good faith and fair dealing.

The Eighth Circuit Court of Appeals response was a two sentence per curiam opinion in which it affirmed the District Court's Judgment and the denial of the post judgment Motions for Leave to File Amended Complaint.

REASONS FOR ALLOWANCE OF THE WRIT

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A pleading that offers "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." *Id.* (citing *Twombly*, 550 U.S. at 555). Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* (citing *Twombly*, 550 U.S. at 557)

A complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* (citing *Twombly*, 550 U.S. at 570).

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* (citing *Twombly,* 550 U.S. at 556). The plausibility standard is not akin to a "probability requirement" but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* (citing *Twombly,* 550 U.S. at 556). Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (citing *Twombly,* 550 U.S. at 557).

When considering a Rule 12(b)(6) motion, the district court must treat all of the well-pleaded allegations of the pleadings as true and construe all of the allegations in the light most favorable to the nonmoving party. *Twombly,* 550 U.S. at 555. However, legal conclusions or unwarranted factual inferences need not be accepted as true. *Id.* Determining whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. *Iqbal,* 556 U.S. at 679. To avoid dismissal under Rule 12(b)(6), a complaint must contain "well-pleaded facts" that allow the court to infer the "mere possibility" of misconduct. *Id.*

When deciding on a Rule 12(b)(6) motion, the court can deny the motion, grant the dismissal, or some combination of the two. In the event that dismissal is granted there are then two additional options: dismissal without prejudice which would allow the plaintiff to refile his claims (absent a statutory issue) or dismissal with prejudice which ends the case altogether and prevents the plaintiff from

pursuing the claims any further. From either point of dismissal, the district court can invoke Fed. R. Civ. P. 15 and grant the plaintiff leave to amend the complaint either upon informal or formal request or on its own accord. However, in the case of a dismissal with prejudice if the court does not grant the leave to amend, plaintiff's only remaining option is to file a post judgment motion for leave to amend the complaint which would then invoke Fed. R. Civ. P. 59(e). Under Rule 59(e), the plaintiff must show that the court overlooked controlling law or facts that would have affected its decision. If that motion is denied, the plaintiff's next available alternative is to appeal the district court's ruling to the appropriate Circuit Court of Appeal. It is here among the Circuits where the conflict lies. Whether to apply a Rule 15 standard of review or a Rule 59 standard of review to a dismissal with prejudice after a 12(b)(6) motion to dismiss has resulted in procedural inconsistencies among the Circuits and with this Court's precedent.

Rule 15(a) declares the leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. *Foman v. Davis*, 371 U.S. 178, 182 (1962). (citing generally 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10). 'The Federal Rules rejects the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Id.* at 181-182. (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957). Under Rule 15(a), a complaint may be amended once as a matter of right and afterward by leave of the court which is to be freely granted. Fed. R. Civ. P. 15(a). This liberal amendment philosophy limits the

district court's discretion to deny leave to amend to only those instances of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, and futility of amendment. *Foman*, 371 U.S. at 182.

Federal Rule of Civil Procedure 59(e) does not specify the grounds on which a court may alter or amend a judgment nor does it provide a standard under which a court may grant relief. Courts, therefore, have ample discretion in deciding whether to grant or deny a motion under Rule 59(e). The Courts of Appeal review rulings on motions to alter or amend judgment for abuse of that discretion. It is clear that a party seeking leave to amend a complaint that has been dismissed with prejudice must demonstrate some basis for altering or setting aside the judgment. Additionally, parties often seek leave to amend their pleading after the court has dismissed the case under Rule 12(b)(6). However, when the leave is sought after the court has dismissed the case with prejudice and entered its judgment, the party is barred from Rule 15 because there is no longer an open case. Rather, the party must seek relief from the judgment – typically under Rule 59(e) – asking the court to re-open the case to allow the amended pleading. *See* Fed. R. Civ. P. 59(e), 3 James Wm. Moore et al., *Moore's Federal Practice* § 15.13[2] (3d ed. 2018); 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1489 (3d ed. 2010).

Petitioners note that Rule 60(b) differs from rule 59(e) in just about every way that matters here. *Banister v. Davis,* 140 U.S. 1698, 1699 (2020). Whereas Rule 59(e) derives from a common-law court's plenary power to revise its judgment

before either party may appeal, Rule 60(b) codifies various writs used to collaterally attack a court's already completed judgment. *Id.* That is because a Rule 60(b) motion, which can arise long after the denial of an initial petition, generally goes beyond pointing out alleged errors in the just-issued decisions. *Id.* A Rule 59(e) motion is a one-time effort to point out alleged errors in a just-issued decision before taking a single appeal. *Id.* It is here that Petitioners focus.

Petitioners recognize that Rule 59(e) encompasses various reconsideration scenarios and agree that the bar should be higher in some circumstances, particularly in cases where there has been ample litigation to make a ruling on the merits of the case, e.g. judgment after trial or summary judgment on the merits. Where Petitioners draw this Court's attention is to the discord among the circuits created by Rule 59(e) heightened standard as applied to dismissal at the initial stage of pleading, specifically where a Rule 12(b)(6) motion to dismiss results in dismissal with prejudice. Some circuits have acknowledged this discord and have adopted a Rule 59(e)/Rule 15 combination standard which captures this Court's sound precedent in *Twombly*, *Iqbal*, *Conley*, and *Foman* so as not to deprive plaintiffs of their day in court. Other circuits ignore the liberal philosophy of Rule 15 and merely apply the heightened standard of Rule 59(e). The potential result under that standard is that "one misstep by counsel may be decisive to the outcome" which is contrary to "the principle that the purpose of pleading is to facilitate a proper decision on the merits" which is in direct conflict with the policy embraced by this Court in *Foman*.

I. REVIEW IS WARRANTED TO RESOLVE DISCORD AMONG CIRCUITS AND THE AMBIGUITY OF WHAT STANDARD TO APPLY.

Below is a survey of the various standards applied by the Circuit Courts when reviewing cases analogous to this one (i.e. where a Rule 12(b)(6) motion resulted in a dismissal with prejudice and the request for reconsideration and leave to amend is considered). The language set forth below are direct quotations from relevant cases:

1. First Circuit Standard: Must be successful on a Rule 59 motion before consideration of Rule 15.

> By contrast, as to post-judgment motions "a district court cannot allow an amended pleading where a final judgment has been rendered unless that judgment is first set aside or vacated pursuant to Fed.R.Civ.P. 59 or 60." *U.S. ex rel. Ge, M.D. v. Takeda Pharmaceutical Company, Ltd.*, 737 F.3d 116, 127-128 (1st Cir. 2013) (quoting *Maldonado v. Dominguez*, 137 F.3d 1, 11 (1st Cir.1998)). "The granting of a motion for reconsideration is `an extraordinary remedy which should be used sparingly.'" *Id.* (citing *Palmer v. Champion Mortg.*, 465 F.3d 24, 30 (1st Cir. 2006)) (quoting 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed.1995)). The moving party "must `either clearly establish a manifest error of law or must present newly discovered evidence.'" *Id.* (citing *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 7 n. 2 (1st Cir.2005)) (quoting *Pomerleau v. W. Springfield Pub. Schs.*, 362 F.3d 143, 146 n. 2 (1st Cir.2004)). A motion for reconsideration "certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Id.* (citing *Aybar v. Crispin-Reyes*, 118 F.3d 10, 16 (1st Cir.1997)) (quoting *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996)).
>
> There was also no abuse in denying Dr. Ge's second request. *Id.* It came after judgment, when the liberal leave to amend language of Rule 15(b) does not apply. *Id.* In order to grant Dr. Ge's second request, the district court would have had first to set aside its judgment pursuant to Dr. Ge's motion to reconsider under Rule 59(e). *Id.* It did not and did not abuse its discretion. *Id.*

2. Second Circuit Standard: Evaluate with due regard to both the value of finality and the liberal policies embodied in Rule 15.

The standards we have developed for evaluating post judgment motions generally place significant emphasis on the 'value of finality and repose.' *Williams v. Citigroup Inc.,* 659 F.3d 208, 213 (2d Cir. 2011) (citing *In re Frigitemp Corp.,* 781 F.2d 324, 327 (2d Cir.1986)). Our precedents make clear, however, that considerations of finality do not always foreclose the possibility of amendment, even when leave to replead is not sought until after the entry of judgment. *Id.* Thus, we have stated that 'in view of the provision in rule 15(a) that 'leave [to amend] shall be freely given when justice so requires,' it might be appropriate in a proper case to take into account the nature of the proposed amendment in deciding whether to vacate the previously entered judgment.' *Id.* (citing *Ruotolo v. City of New York,* 514 F.3d 184, 191 (2d Cir. 2008)(alteration in original) (quoting earlier version of Rule 15) (other internal quotation marks omitted); *see also State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld,* 921 F.2d 409, 418 (2d Cir.1990) ("When the moving party has had an opportunity to assert the amendment earlier, but has waited until after judgment before requesting leave, a court may exercise its discretion [to grant leave to amend] more exactingly.")). Under these formulations, post judgment motions for leave to replead must be evaluated with due regard to both the value of finality and the policies embodied in Rule 15. *Id.*

Particularly instructive in this respect is the Supreme Court's decision in *Foman v. Davis,* 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). *Id. Foman* involved an action to enforce an alleged oral agreement regarding the amount that the plaintiff stood to inherit from her father's estate. *Id.* The district court dismissed the complaint for failure to state a claim on the ground that the alleged oral agreement was unenforceable under the statute of frauds. *Id.* The day after judgment was entered, the plaintiff moved to vacate the judgment and to amend her complaint to seek recovery in quantum meruit. The district court denied that motion. *Id.* (citing *Foman* 371 U.S. at 179). The Supreme Court reversed, construing the motion to vacate as filed pursuant to Rule 59(e) and holding that the district court abused its discretion in denying leave: Rule 15(a) declares that leave to amend "shall be freely given when justice so requires"; this mandate is to be heeded. If 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. 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." *Id.* at 213-14. 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.* at 214. (citing *Foman* 371 U.S. at 182).

3. Third Circuit Standard: Rule 59(e) and 15 turn on the same factors when 12(b)(6) is involved.

A district court may enter final judgment after granting a Rule 12(b)(6) motion to dismiss when the plaintiff has not properly requested leave to amend its complaint. *Burtch v. Milberg Factors, Inc.,* 662 F.3d 212, 230 (3d Cir. 2011) (citing *Fletcher–Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 253 (3d Cir.2007)). After judgment dismissing the complaint is entered, 'a party may seek to amend the complaint (and thereby disturb the judgment) only through Federal Rules of Civil Procedure 59(e) and 60(b).' *Id.* (citing *Fletcher-Harlee* 482 F.3d at 252). After a final judgment is entered, Rules 59(e) and 60(b) provide a window to seek to reopen the judgment and amend the complaint. *Id.* (citing *Fletcher-Harlee* 482 F.3d at 253). Federal Rule of Civil Procedure 59(e) states that '[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.' *Id.* (citing Fed. R. Civ. P. 59(e)). Generally, motions for reconsideration under Rule 59(e) must rely on one of the following three grounds: '(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice.' *Id.* (citing *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir.2010)). The factors that guide our review in a Rule 59(e) motion may be affected by the underlying judgment. *Id.* (see *Adams v. Gould*, 739 F.2d 858, 864 (3d Cir.1984)). In this Circuit, "'where a timely motion to amend judgment is filed under Rule 59(e), the Rule 15 and 59 inquiries turn on the same factors.'" *Id.* (citing *In re Adams Golf, Inc.*, 381 F.3d 267, 280 (3d Cir. 2004) (quoting *Cureton v. NCAA*, 252 F.3d 267, 272 (3d Cir.2001)); see also *Gould*, 739 F.2d at 864). The Rule 15(a) factors include "undue delay, bad faith, prejudice, or futility." *Id.* at 230-31. (citing *Adams Golf*, 381 F.3d at 280).

4. Fourth Circuit Standard: Rule 59(e) is to be grounded on Rule 15(a).

We made clear in *Laber* that "a post-judgment motion to amend is evaluated under the same legal standard"—grounded on Rule 15(a)— "as a similar motion filed before judgment was entered." *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 193 (4th Cir. 2009) (citing *Laber v. Harvey,* 438 F.3d 404, 427 (4th Cir. 2006)). Rule 15(a) directs that leave to amend shall be freely given when justice so requires. *Id.* (citing Fed.R.Civ.P. 15(a)). This directive "gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities."

Id. (citing *Laber*, 438 F.3d at 426). Our court therefore reads Rule 15(a) to mean that leave to amend should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or amendment would be futile. *Id.* (citing *Laber*, 438 F.3d at 426). In *Laber* we offered guidance for evaluating these factors. *Id.* First, "[w]hether an amendment is prejudicial will often be determined by the nature of the amendment and its timing." *Id.* (citing *Laber*, 438 F.3d at 427). Second, delay alone is an insufficient reason to deny a motion to amend; however, when a post-judgment motion to amend is made, "the further the case progressed before judgment was entered, the more likely it is that the amendment will prejudice the defendant or that a court will find bad faith on the plaintiff's part." *Id.* (citing *Laber*, 438 F.3d at 427).

As this court recognized in *Laber* and recently reiterated in *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 470–71 (4th Cir.), cert. denied, —— U.S. ——, 132 S.Ct. 115, 181 L.Ed.2d 39 (2011), the only difference between a pre- and a post-judgment motion to amend is that the district court may not grant the post-judgment motion unless the judgment is vacated pursuant to Rule 59(e) or Fed. R. Civ. P. 60(b). *Hart v. Hanover Cty. Sch. Bd.*, 495 F. App'x 314, 315 (4th Cir. 2012) (see *Katyle*, 637 F.3d at 470; *Laber*, 438 F.3d at 427). "To determine whether vacatur is warranted, however, the court need not concern itself with either of those rules' legal standards." *Id.* (citing *Katyle*, 637 F.3d at 471). Rather, "[t]he court need only ask whether the amendment should be granted, just as it would on a prejudgment motion to amend pursuant to [Rule] 15(a)." *Id.* (citing *Katyle*, 637 F.3d at 471; see also *Laber*, 438 F.3d at 426–29 (analyzing whether the district court erred in denying a post-judgment motion to amend under the more liberal motion to amend standard, rather than the more stringent Rule 59(e) standard, and concluding that the district court erred in denying the Rule 59(e) motion because the plaintiff did not act in bad faith, the amendment was not futile, and the defendant would not be prejudiced)). We review for abuse of discretion a district court's denial of a motion to amend a complaint, regardless of whether that motion is filed pre- or post-judgment. *Id.* at 316 (citing *Laber*, 438 F.3d at 427–28).

5. Fifth Circuit Standard: Rule 59(e) after a 12(b)(6) dismissal is evaluated under the same standard as Rule 15.

The parties dispute whether the plaintiffs' motion for leave to amend falls under Federal Rule of Civil Procedure 15(a), governing the amendment of pleadings, or Rule 59(e), governing the amendment of judgments. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863 (5th Cir. 2003). Although review of both types of motions is nominally under the "abuse of discretion" rubric, see *S. Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir.1993), the district court's discretion is considerably less under Rule 15(a). *Id.* "In

the context of motions to amend pleadings, 'discretion' may be misleading, because FED.R.CIV.P. 15(a) 'evinces a bias in favor of granting leave to amend.' " *Id.* (citing *Martin's Herend Imports v. Diamond & Gem Trading*, 195 F.3d 765, 770 (5th Cir.1999)) (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (5th Cir. Nov.1981)). Rule 15(a) states that leave to amend "shall be freely given when justice so requires." *Id.* By contrast, a motion to alter or amend the judgment under Rule 59(e) "must clearly establish either a manifest error of law or fact or must present newly discovered evidence" and "cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Id.* (citing *Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir.1990)) (quoting *Fed. Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir.1986)); see also *S. Group, Inc.,* 2 F.3d at 611 (recognizing that "[d]enial of a motion to vacate, alter, or amend a judgment so as to permit the filing of an amended pleading draws the interest in finality of judgments into tension with the federal policy of allowing liberal amendments under the rules")). In this Circuit, when a district court dismisses the complaint, but does not terminate the action altogether, the plaintiff may amend under Rule 15(a) with permission of the district court. *Id.* at 864. (See *Whitaker v. City of Houston,* 963 F.2d 831, 835 (5th Cir.1992)). When a district court dismisses an action and enters a final judgment, however, a plaintiff may request leave to amend only by either appealing the judgment or seeking to alter or reopen the judgment under Rule 59 or 60. *Id.* (See *Dussouy*, 660 F.2d at 597 n. 1; see also 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 15.12[2] (3d ed.2003); 6 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1489 (2d ed. 1990) ("Most courts ... have held that once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60.")). In this case, the district court dismissed the action with prejudice, in an order titled, "FINAL JUDGMENT." *Id.* Under the rule in this Circuit, plaintiffs' post-dismissal motion must be treated as a motion under Rule 59(e), not Rule 15(a). *Id.* (see *Whitaker*, 963 F.2d at 835 (stating that a dismissal with prejudice indicates that the district court intended to terminate the action, not merely dismiss the complaint)). Nevertheless, this Court has held that, under these circumstances, the considerations for a Rule 59(e) motion are governed by Rule 15(a): Where judgment has been entered on the pleadings, a holding that the trial court should have permitted amendment necessarily implies that judgment on the pleadings was inappropriate and that therefore the motion to vacate should have been granted. *Id.* Thus, the disposition of the plaintiff's motion to vacate under rule 59(e) should be governed by the same considerations controlling the exercise of discretion under rule 15(a). *Id.* (citing *Dussouy*, 660 F.2d at 597 n. 1). Following *Dussouy*, we review the district court's denial of plaintiffs' 59(e) motion for abuse of discretion, in light of the limited discretion of Rule 15(a). *Id.* The Supreme Court lists five

considerations in determining whether to deny leave to amend a complaint: "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 the allowance of the amendment, [and] futility of the amendment...." *Id.* (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). Absent such factors, "the leave sought should, as the rules require, be 'freely given.'" *Id.* (citing *Foman, 371 U.S. at 182).* "A litigant's failure to assert a claim as soon as he could have is properly a factor to be considered in deciding whether to grant leave to amend. Merely because a claim was not presented as promptly as possible, however, does not vest the district court with authority to punish the litigant." *Id.* (citing *Carson v. Polley*, 689 F.2d 562, 584 (5th Cir.1982)).

6. Sixth Circuit Standard: Must meet 59(e)'s heavy burden.

"In this circuit, a district court may alter a judgment under Rule 59 based on (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Bunn v. Navistar, Inc.*, 797 F. App'x 247, 256 (6th Cir. 2020) (citing *Nolfi v. Ohio Kentucky Oil Corp.*, 675 F.3d 538, 551–52 (6th Cir. 2012) (citing *Leisure Caviar, LLC v. United States Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010)). This standard vests "considerable discretion" in the district court. *Id.* (citing *Leisure Caviar*, 616 F.3d at 615). When deciding whether to grant a Rule 59(e) motion, a district court must consider the "interest of protecting the finality of judgments and the expeditious termination of litigation." *Id.* (citing *Leisure Caviar,* 616 F.3d at 615–16)(quoting *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002)). Otherwise, "plaintiffs could use the court as a sounding board to discover holes in their arguments, then 'reopen the case by amending their complaint to take account of the court's decision.'" *Id.* (citing *Leisure Caviar,* 616 F.3d at 616) (quoting *James v. Watt*, 716 F.2d 71, 78 (1st Cir. 1983)). Therefore, unlike in the context of Federal Rule of Civil Procedure 15(a), "[a] claimant who seeks to amend a complaint after losing the case must provide a compelling explanation to the district court for granting the motion." *Id.* (citing *Leisure Caviar,* 616 F.3d at 617).

A party seeking leave to amend after an adverse judgment faces a heavier burden than for a Rule 15 leave to amend motion prior to a final ruling. *Michigan Flyer LLC v. Wayne Cty. Airport Auth.*, 860 F.3d 425, 431 (6th Cir. 2017) (citing *Leisure Caviar*, 616 F.3d at 616). A Rule 59 motion should only be granted if there was (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice. *Id.* (citing *Leisure Caviar*, 616 F.3d at 615).

7. Seventh Circuit Standard: Courts considering Post-Judgment motions for leave to amend under 59(e) should apply the same standard as Rule 15.

It is true that when a district court has entered a final judgment of dismissal, the plaintiff cannot amend under Rule 15(a) unless the judgment is modified, either by the district court under Rule 59(e) or 60(b), or on appeal. *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 521 (7th Cir. 2015) (citing *Camp v. Gregory*, 67 F.3d 1286, 1289 (7th Cir.1995)) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1111 (7th Cir.1984); see also Fed.R.Civ.P. 59(e) (motion to alter or amend judgment); Fed.R.Civ.P. 60(b) (motion for relief from final judgment)). It is also true that Rules 59(e) and 60(b) provide "extraordinary remedies reserved for the exceptional case." *Id.* (citing *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008)) (citing *Dickerson v. Board of Educ. of Ford Heights*, 32 F.3d 1114, 1116 (7th Cir.1994); see also 6 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1489 (3d ed.) (noting importance of finality of judgments and collecting cases noting same)). Because Rules 59(e) and 60(b) are reserved for extraordinary cases, the Girl Scouts urge us to apply a more demanding standard to post-judgment motions to amend than we do to motions to amend filed prior to the entry of judgment. *Id.* But the extraordinary nature of these remedies does not mean that a different standard applies—at least when judgment was entered at the same time the case was first dismissed. *Id.* When the district court has taken the unusual step of entering judgment at the same time it dismisses the complaint, the court need not find other extraordinary circumstances and must still apply the liberal standard for amending pleadings under Rule 15(a)(2). *Id.* (see *Foster*, 545 F.3d at 584–85 (noting that district courts "routinely do not terminate a case at the same time that they grant a defendant's motion to dismiss"); see also *Bausch v. Stryker Corp.*, 630 F.3d 546, 562 (7th Cir.2010)). Lest there be any doubt about the soundness of applying the liberal amendment policy of Rule 15(a)(2) to post-motion judgment motions for relief, the Supreme Court's decision in *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), itself illustrates the point. *Id.* The district court had granted a motion to dismiss a contract claim based on the statute of frauds and immediately entered judgment dismissing the case. *Id.* (citing *Foman,* 371 U.S. at 179). Plaintiff sought post-judgment relief that was treated as a Rule 59(e) motion, and because of some confusion about the timing of a notice of appeal, the appeal was dismissed. *Id.* (*Foman,* 292 F.2d at 87). The Supreme Court reversed, and it applied the liberal amendment policy of Rule 15(a)(2) to the post-judgment motion for relief. *Id.* (citing *Foman*, 371 U.S. at 182). Consistent with that approach, we have repeatedly applied that same liberal policy of amendment when reviewing district court decisions on post-judgment motions for leave to amend. *Id.* (citing *Bausch*, 630 F.3d at 562; *Foster*, 545 F.3d at 584–85; *Camp*, 67 F.3d at 1290). We have reversed

district court decisions that provide no explanation for why they denied amendment. *Id.* (see *Foster*, 545 F.3d at 584–85 (vacating denial of post-judgment relief made without explanation); accord, *Foman*, 371 U.S. at 182 ("[T]he 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.")). Similarly, we have affirmed a decision to grant post-judgment leave to amend when there was no reason the amendment should otherwise have been denied. *Id.* (See *Camp*, 67 F.3d at 1289–90). Finally, we have reversed a decision denying post-judgment amendment when the reason given by the district court for denying the amendment—futility of amendment—was not supported by the record. *Id.* at 521-22. (See *Bausch*, 630 F.3d at 562). In other words, a district court cannot nullify the liberal right to amend under Rule 15(a)(2) by entering judgment prematurely at the same time it dismisses the complaint that would be amended. *Id.* at 522. As with pre-judgment motions for leave to amend, the district court must still provide some reason—futility, undue delay, undue prejudice, or bad faith—for denying leave to amend, and we will review that decision under the same standard we would otherwise review decisions on Rule 15(a)(2) motions for leave to amend. *Id.*

8. Eighth Circuit Standard: Although Rule 15 cannot be ignored, leave to amend will only be granted if it is consistent with the stringent standards of Rule 59.

After judgment has been entered, district courts may not ignore the considerations of Rule 15, but leave to amend a pleading will be granted only "if it is consistent with the stringent standards governing the grant of Rule 59(e) and Rule 60(b) relief." *United States v. Mask of Ka-Nefer-Nefer*, 752 F.3d 737, 743 (8th Cir. 2014).

9. Ninth Circuit Standard: No Analogous Decisions

Petitioners' research has revealed no reported cases in the Ninth Circuit which are analogous to this case.

10. Tenth Circuit Standard: Must first reopen the case under 59(e) before filing a motion under Rule 15.

After a motion to dismiss has been granted, plaintiffs must first reopen the case pursuant to a motion under Rule 59(e) or Rule 60(b) and then file a motion under Rule 15, and properly apply to the court for leave to amend by

means of a motion which in turn complies with Rule 7. *Glenn v. First Nat. Bank in Grand Junction,* 868 F.2d 368, 371 (10th Cir. 1989). In that event, in accordance with Rule 15, "leave shall be freely given when justice so requires." *Id.* (citing *Foman,* 371 U.S. at 182).

11. Eleventh Circuit Standard: Rule 15 has no application in Rule 59.

Rule 15(a), by its plain language, governs amendment of pleadings before judgment is entered; it has no application after judgment is entered. *OJ Commerce, LLC v. Ashley Furniture Indus., Inc.,* 817 F. App'x 686, 693 (11th Cir. 2020) (citing *Jacobs v. Tempur-Pedic Int'l, Inc.,* 626 F.3d 1327, 1344 (11th Cir. 2010)). "Post-judgment, the plaintiff may seek leave to amend if he is granted relief under Rule 59(e) or Rule 60(b)(6)." *Id.* (citing *Jacobs,* 817 F.App'x at 1344–45, quoting *United States ex rel. Atkins v. McInteer,* 470 F.3d 1350, 1361 n.22 (11th Cir. 2006)). "The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." *Id.* (citing *Arthur v. King,* 500 F.3d 1335, 1343 (11th Cir. 2007) (alteration in original) (quoting *In re Kellogg,* 197 F.3d 1116, 1119 (11th Cir. 1999)). "[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Id.* (citing *Arthur,* 500 F.3d, at 1343)(quoting *Michael Linet, Inc. v. Village of Wellington, Fla.,* 408 F.3d 757, 763 (11th Cir. 2005)).

12. D.C. Circuit Standard: Apply a lower Rule 59 standard (Rule 59(e) motion should be granted unless the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency) then liberal application of Rule 15.

Appellants could amend their complaint after it was dismissed with prejudice "only by filing, as they properly did, a 59(e) motion to alter or amend a judgment combined with a Rule 15(a) motion requesting leave of court to amend their complaint." *Brink v. Cont'l Ins. Co.,* 787 F.3d 1120, 1128 (D.C. Cir. 2015) (citing *Firestone v. Firestone,* 76 F.3d 1205, 1208 (D.C.Cir.1996)). We have said that denial of the Rule 59(e) motion in that situation is an abuse of discretion if the dismissal of the complaint with prejudice was erroneous; that is, the Rule 59(e) motion should be granted unless "the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Id.* (citing *Firestone,* 76 F.3d at 1209 (internal quotation marks omitted)) (*see also Belizan v. Hershon,* 434 F.3d 579, 583 (D.C. Cir. 2006)(same)).

13. Federal Circuit Standard: Normally applies regional circuit law but concludes that Rule 59(e) motion should be considered under standards of Rule 15.

The Federal Circuit normally applies the regional circuit's standards of review. However, in the following case, the Federal Circuit recognized that the Sixth Circuit's standard of review (must meet 59(e)'s heavy burden) conflicted with this Court's precedent and, as such, the Federal Circuit stated that in cases like this one Rule 59(e) requires Rule 15:

> We now turn to Plaintiffs' post-judgment motions. Although the district court found that the proposed amended complaint set forth Plaintiffs' correction-of-inventorship claims with "amazing clarity," it denied Plaintiffs leave to amend their complaint. *CODA Dev. S.R.O. v. Goodyear Tire & Rubber Co.*, 916 F.3d 1350, 1362 (Fed. Cir. 2019). We find this result troubling, particularly given the previously described errors. *Id.* Leave to amend should be "freely give[n] ... when justice so requires." *Id.* (citing Fed. R. Civ. P. 15(a)(2)) (see *Morse v. McWhorter*, 290 F.3d 795, 799–800 (6th Cir. 2002)). The Federal Rules of Civil Procedure favor resolution of cases on their merits. *Id.* (See *Foman v. Davis*, 371 U.S. at 181–82; see also *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 550, 130 S.Ct. 2485, 177 L.Ed.2d 48 (2010) (observing that Rule 15 in particular expresses this preference)). The Supreme Court in *Foman* indicated that, in the absence of any apparent reason (e.g., undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by previously allowed amendments, undue prejudice to the opposing party, futility), leave to amend should be freely given, as Rule 15 requires. *Id.* (citing *Foman,* 371 U.S. at 182). While the post-judgment context introduces competing considerations, *Morse,* 290 F.3d at 800, our vacating the district court's dismissal should remove such considerations from the analysis. *Id.*

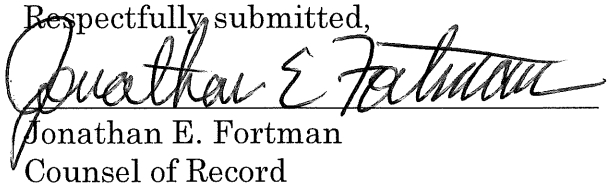
The survey of decisions of the various circuits set forth above displays a blatant conflict among the Circuits regarding an issue of paramount importance to litigants. The clear intent of the Federal Rules of Civil Procedure and the precedents of this Court embodied in *Foman* is to protect litigants such as Petitioners to allow their disputes to be decided on the merits. Instead, the Eighth

Circuit, along with the First, Sixth, Tenth, and Eleventh Circuits, have taken the "approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome" rather than "accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." (quoting *Foman* 371 U.S. at 181-182). In order to protect litigants and to preserve the policy set forth in *Foman,* as adopted in the Second, Third, Fourth, Fifth, Seventh, D.C. and Federal Circuits, Petitioners, on behalf of themselves and all future litigants, request this Court rectify the discord among the Circuits and that it instruct the Circuit Courts that the standard to be applied by Courts considering a Rule 59(e) post judgment motion for leave to file an amended complaint after a Rule 12(b)(6) dismissal with prejudice be the liberal pleading standards of Rule 15 as illustrated in *Foman*.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant review of this matter.

Respectfully submitted,



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