

On May 27, 2014, Hannah LeVecque, Beth Dazet, Nicholas Passafiume, Celeste Wing, and Matthew Violette filed a complaint against Argo Marketing Group, Inc., Jason Levesque, and Daniel Molloy. *Class and Collective Action Compl.* (ECF No. 1). On July 28, 2014, Argo filed an answer and counterclaim. *Answer and Countercl. of Def. Argo Mktg. Grp., Inc.* (ECF No. 11). Also on July 28, 2014, Jason Levesque and Daniel Molloy (Individual Defendants) filed motions to dismiss for failure to state a claim. *Def. Jason Levesque's Mot. to Dismiss* (ECF No. 12) (*Levesque First Mot.*); *Def. Daniel Molloy's Mot. to Dismiss* (ECF No. 13) (*Molloy First Mot.*). On July 30, 2014, Argo filed an amended answer. *Am. Answer of Def. Argo Mktg. Grp., Inc.* (ECF No. 16). On August 18, 2014, the Plaintiffs filed an amended complaint, as well as an objection to the Individual Defendants' motions to dismiss. *First Am. Class and Collective Action Compl. and Demand for Jury Trial* (ECF No. 17) (*First Am. Compl.*); *Pls.' Objection to Defs. Jason Levesque and Daniel Molloy's Mots. to Dismiss* (ECF No. 18) (*Pls.' First Opp'n*). That same day, the Plaintiffs filed a motion to strike the Individual Defendants' affidavits in support of their motions to dismiss. *Pls.' Mot. to Strike Defs.' Affs.* (ECF No. 19) (*Pls.' Mot. to Strike*). On September 2, 2014, Argo filed an answer to the amended complaint. *Answer of Def. Argo Mktg. Grp., Inc. to First Am. Compl.* (ECF No. 21).

Also on September 2, 2014, the Individual Defendants filed replies to the Plaintiffs' responses to the motions to dismiss and moved to dismiss the Plaintiffs' First Amended Complaint. *Def. Jason Levesque's Reply to Pls.' Objection to Mot. to Dismiss and Mot. to Dismiss Pls.' First Am Compl.* (ECF No. 20) (*Levesque Reply*);

Def. Daniel Molloy's Reply to Pls.' Objection to Mot. to Dismiss and Mot. to Dismiss Pls.' First Am. Compl. (ECF No. 22) (*Molloy Reply*). On September 8, 2014, the Individual Defendants filed responses to the Plaintiffs' motion to strike. *Defs.' Jason Levesque and Daniel Molloy's Opp'n to Pls.' Mot. to Strike Affs.* (ECF No. 26) (*Defs.' Strike Opp'n*). On September 22, 2014, the Plaintiffs filed a reply to the Individual Defendants' response to their motion to strike. *Reply to Defs.' Opp'n to Pls.' Mot. to Strike Affs.* (ECF No. 27) (*Pls.' Strike Reply*). On September 23, 2014, the Plaintiffs filed a response to the Individual Defendants' motions to dismiss their First Amended Complaint. *Pls.' Objection to Defs. Jason Levesque and Daniel Molloy's Mots. to Dismiss the First Am. Compl.* (ECF No. 28) (*Pls.' Second Opp'n*). Finally, on October 7, 2014, the Individual Defendants filed replies to the Plaintiffs' response to their motions to dismiss. *Def. Jason Levesque's Reply Mem. in Support of Mot. to Dismiss First Am. Compl.* (ECF No. 29) (*Levesque Second Reply*); *Def. Daniel Molloy's Reply Mem. in Support of Mot. to Dismiss First Am. Compl.* (ECF No. 30) (*Molloy Second Reply*).

B. The Allegations in the First Amended Complaint

In their First Amended Complaint, the Plaintiffs summarize their grievance by alleging that they have filed the lawsuit “to recover for wage theft.” *First Am. Compl.* ¶ 1. They explain that the Defendants “unlawfully refused to pay Plaintiffs in full for all on duty time throughout their contiguous workday, including bathroom breaks, required daily rest breaks, and on duty time after clocking in at the beginning of a shift when that time was spent for the benefit of Defendants.” *Id.* In addition,

they claim that “by refusing to credit Plaintiffs with all on duty time throughout their work week and by failing to accurately calculate Plaintiffs’ regular hourly rate of pay, Defendants also unlawfully failed to pay Plaintiffs for all overtime hours worked.”

Id. Finally, they say, after Plaintiffs LeVecque and Passafiume “repeatedly complained about Defendants’ violations of state and federal wage and overtime laws, they were both unlawfully terminated in retaliation for making those complaints.”

Id. In ten counts, they seek remedies under the FLSA, the Maine Employment Practices Act (MEPA), and the Maine Minimum Wage and Overtime Law. *Id.* at 1-34.

The Plaintiffs allege that Argo Marketing Group, Inc. is a corporation organized under the laws of Maine with a principal executive office at 64 Lisbon St., Lewiston, Maine. *Id.* ¶ 12. They also allege that Argo was their employer within the meaning of their state law claims. *Id.* ¶¶ 18-19. They further allege that Jason Levesque “is the Chief Executive Officer and sole owner of Argo” and Daniel Molloy “is the Chief Operating Officer at Argo.” *Id.* ¶ 14. The First Amended Complaint claims that Mr. Levesque and Mr. Molloy were “Plaintiffs’ employer within the meaning of the FLSA, 29 U.S.C. § 201 *et seq.* because [they] acted directly and indirectly in the interest of Defendant Argo in relation to its employees.” *Id.* ¶¶ 15-16. They make similar allegations against Messrs. Levesque and Molloy under the MEPA and the Maine Minimum Wage and Overtime Law. *Id.* ¶¶ 20-23.

The First Amended Complaint makes the following allegations against Messrs. Levesque and Molloy:

- (1) Plaintiffs were repeatedly told by their coaches and center managers that Defendants Levesque and Molloy made the decisions about pay. Plaintiffs were told by their supervisors and managers that Levesque had “the final say on everything.” *Id.* ¶ 38;
- (2) Defendant Levesque makes the final decisions about Argo’s pay structure and system, including how bonuses will be determined and whether break and bathroom time will be paid or unpaid. *Id.* ¶ 39;
- (3) Defendant Levesque determines all bonuses, commissions, and raises. *Id.* ¶ 40;
- (4) Defendant Levesque pays a great deal of personal attention to the details of Argo’s finances. When asked about one of his favorite online resources, Levesque replied that it was QuickBooks, noting that it was “not internet based, but God I love looking at money. Every single moment you’re looking at the books, looking at your profitability.” *Id.* ¶ 41;
- (5) In October 2013, fifteen employees received \$1.50 raises (five at each call center location). Each call center manager nominated ten employees. Defendants Levesque and Molloy then decided which five from each center would receive the raise. Levesque

emailed each of the employees selected for the raise to congratulate them on their selection. *Id.* ¶ 42;

(6) Regarding bonuses, the employees were told “that Defendant Levesque, along with Defendant Molloy, made the final decision on whether an employee would or would not receive the bonus.” *Id.* ¶ 43;

(7) Levesque visited the Portland call center approximately once a month, and when there, he would personally inspect each employee’s call statistics that were used to calculate employees’ pay. During one visit, he awarded Plaintiff LeVecque a \$100 bonus based on her previous day’s performance. *Id.* ¶ 44;

(8) When complaints were made about waiting time, bathroom and rest breaks, the employees were told that “the decisions were made by Levesque and Molloy concerning the pay violations alleged in this lawsuit.” *Id.* ¶ 45;

(9) A call center manager forwarded to Levesque a written complaint by Plaintiff Violette about being shorted because of improper timekeeping, and Plaintiff was told that Levesque would contact him directly about the complaint. *Id.* ¶ 46;

(10) Levesque told prospective employees of Argo that he had an open door policy and if they ever had a discrepancy in their paycheck they could come to him directly. *Id.* ¶ 49;

- (11) Plaintiffs LeVecque, Passafiume, and Dazet each met with Levesque to discuss the underpayments at issue in this lawsuit. *Id.* ¶ 50;
- (12) Levesque made the decision to switch from one central call tracking system to another; these were the programs that tracked and categorized Plaintiffs' work time. *Id.* ¶¶ 7, 52;
- (13) A supervisor accused Plaintiff Dazet of making a pay complaint to the Department of Labor. Thereafter, Levesque accused Plaintiff of "jeopardizing [his] business," and said, "if you are not happy, you can leave." *Id.* ¶ 55;
- (14) Levesque personally approved overtime hours for some employees. *Id.* ¶ 56;
- (15) Molloy, together with Levesque, made decisions about pay, including base pay, raises, and bonuses. *Id.* ¶ 57;
- (16) Molloy personally calculated the pay and bonuses due to employees each week, which included his authority to change the raw data on the spreadsheets he used to calculate the efficiency bonus. *Id.* ¶¶ 58, 61;
- (17) Molloy used a spreadsheet to determine whether time worked was compensable or not. Mr. Molloy's spreadsheet listed wait time as "lag time." Mr. Molloy told Plaintiff LeVecque that "lag time" was not compensable. *Id.* ¶¶ 59-60;

- (18) Plaintiff LeVecque sent an email to Molloy (among others) specifically concerning the pay disputes at issue in this lawsuit. She was told by the center manager that Molloy had “thr[own] [her] a bone” by giving her some of her requested pay and that if “we” (presumably the center manager and Molloy) investigated her complaint any further, she might owe Argo money. *Id.* ¶ 62;
- (19) Plaintiff Passafiume sent an email to Molloy concerning the pay disputes at issue in this lawsuit. Molloy responded that he would “run a complete analysis” of the complaint. *Id.* ¶ 63; and
- (20) Molloy made the decision to (1) deny Plaintiff LeVecque a promotion to a “coach” position; (2) demote Plaintiff LeVecque; (3) deny Plaintiff Passafiume a raise even after Plaintiff met the criteria for the raise that had been sent by his center manager; and (4) terminate Plaintiff Passafiume’s employment. *Id.* ¶¶ 54, 64, 68-70.

II. THE PARTIES’ POSITIONS

A. The Motions to Dismiss

1. The Individual Defendants’ First Motion to Dismiss

The premise of the Individual Defendants’ motions to dismiss is that the law does not impose personal liability on managers or supervisors for violations of the FLSA, MEPA or the Maine Minimum Wage and Overtime Act. *Levesque First Mot.* at 1-11; *Molloy First Mot.* at 1-11. Under the FLSA, although there is a general rule

against personal liability when the plaintiffs were employed by a corporation, the Individual Defendants acknowledge that the First Circuit has adopted an “economic reality” test to determine whether individual defendants may be held liable under the FLSA. *Levesque First Mot.* at 4; *Molloy First Mot.* at 4 (citing *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 677-79 (1st Cir. 1998)). They say that the First Circuit test limits personal liability to “corporate officers with a significant ownership who had operational control of significant aspects of the corporation’s day-to-day functions, including compensation of employees, who personally made decisions to continue operations despite financial adversity.” *Levesque First Mot.* at 6; *Molloy First Mot.* at 6 (quoting *Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st Cir. 1983)). They maintain that the Plaintiffs failed to allege facts sufficient to bring a FLSA claim against the Individual Defendants. *Levesque First Mot.* at 6-8; *Molloy First Mot.* at 6-8.

The Individual Defendants contend that the standard for the imposition of personal liability for employees under Maine law, including the MEPA and the Maine Minimum Wage and Overtime Act, is even more onerous. *Levesque First Mot.* at 8-9; *Molloy First Mot.* at 8-9. They say that to reach the Individual Defendants, the Plaintiffs would either have to pierce the corporate veil or demonstrate that the corporate officers participated in wrongful acts and those wrongful acts must be separate and distinct from the acts of the corporation. *Id.* They argue that the Plaintiffs’ Complaint failed to allege facts sufficient to fit under either theory. *Levesque First Mot.* at 9-10; *Molloy First Mot.* at 9.

Turning to Count IV, the breach of contract count, the Individual Defendants urge the dismissal of that count on the ground that there was never any contract between the Plaintiffs and either Mr. Levesque or Mr. Malloy and that the Plaintiffs have not alleged that there was one. *Levesque First Mot.* at 10; *Molloy First Mot.* at 9-10.

Finally, the Individual Defendants argue that the retaliation claims are subject to dismissal because none of the statutes allows for individual supervisory liability for retaliation claims. *Levesque First Mot.* at 10-11; *Molloy First Mot.* at 10-11. Moreover, they assert that the Complaint does not allege facts that support a conclusion that either of them was involved in the termination of either Ms. LeVecque or Mr. Passafiume. *Levesque First Mot.* at 10; *Molloy First Mot.* at 10. Mr. Levesque affirmatively states that he was “not personally involved in the decision to terminate Mr. Passafiume and Ms. [LeVecque].” *Levesque First Mot.* at 10-11. Mr. Molloy observes that the Complaint “is completely absent any facts showing how he was involved in the termination decision which several of the Plaintiffs claim constitute ‘retaliation.’” *Molloy First Mot.* at 10.

2. The Plaintiffs’ Response

The Plaintiffs respond that “Levesque and Molloy are ‘employers’ under the FLSA because of their roles as corporate officers in Defendant Argo Marketing Group, Inc., . . . their intimate involvement in Argo’s operations, and Levesque’s sole ownership of the Company.” *Pls.’ First Opp’n* at 1. Furthermore, the Plaintiffs argue that the Individual Defendants’ motions “are now moot” because the Plaintiffs had

amended their Complaint as a matter of right, filing their First Amended Complaint with “additional factual support for holding Defendants Levesque and Molloy individually liable.” *Id.* at 1-2. Also, the Plaintiffs note that the Amended Complaint clarifies that the breach of contract claim is not against Messrs. Levesque and Molloy but against Argo only, and therefore, the motion to dismiss Count IV, the breach of contract count, should be dismissed as moot because Count IV is no longer against either individual Defendant. *Id.* at 2. Next, referring to a separately-filed motion to strike, the Plaintiffs urge the Court to grant their motion to strike and not to convert the motion to dismiss to a motion for summary judgment under Federal Rule of Civil Procedure 12(d). *Id.* at 3-6.

Turning to the FLSA, the Plaintiffs say that individuals who own businesses may be liable under the FLSA. *Id.* at 6 (citing *Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 47-48 (1st Cir. 2013)). They also contend that corporate officers with operational control of a corporation may be personally liable under the FLSA. *Id.* at 7 (citing *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 34 (1st Cir. 2007); *Donovan*, 712 F.2d at 1511). They then argue that the allegations of Mr. Levesque’s ownership and Mr. Levesque and Mr. Malloy’s control of Argo in the First Amended Complaint are sufficient to withstand dismissal. *Id.* at 8-12.

Regarding the state law claims against the Individual Defendants, the Plaintiffs conceded that this District has twice ruled against their position on this same issue and that “if this Court adopts the reasoning of those cases, the State law claims against Defendants Levesque and Molloy will be dismissed.” *Id.* at 13 (citing

Saunders v. The Getchell Agency, 1:13-cv-00244-JAW, 2014 U.S. Dist. LEXIS 16728 (D. Me. Feb. 11, 2014); *Affo v. Granite Bay Care, Inc.*, 2:11-cv-482-DBH and 2:12-cv-115-DBH, 2013 U.S. Dist. LEXIS 76019 (D. Me. May 30, 2013)). The Plaintiffs nevertheless argue that the Court should reconsider these rulings. *Id.* at 13-15. They say that *Affo* and *Saunders* “do not sufficiently credit the Maine Law Court’s stated reason for applying the federal definition of ‘employer’ to Maine’s wage and hour law, that doing so ‘is consistent with the overall remedial nature’ of those laws and consistent with its precedent that ‘[r]emedial statutes should be liberally construed to further the beneficent purposes for which they are enacted.’” *Id.* at 13 (quoting *Dir. of the Bureau of Labor Standards v. Cormier*, 527 A.2d 1297, 1300 (Me. 1987)). They argue that in *Cormier* the Maine Law Court approved application of the FLSA’s broad definition of employer and said that it provided “useful guidance” in “formulating a coherent state law concept of ‘employer’ for purposes of enforcing’ Maine wage and hour statutes.” *Id.* at 13-14 (quoting *Cormier*, 527 A.2d at 1300). The Plaintiffs assert that the *Affo* and *Saunders* cases “do not further the Law Court’s goal of establishing a coherent definition of employer.” *Id.* at 14.

3. The Individual Defendants’ Reply and Motion to Dismiss First Amended Complaint

In their reply, the Individual Defendants respond to the new allegations contained in the Plaintiffs’ First Amended Complaint. *Levesque Reply* at 1-2; *Molloy Reply* at 1-2. Despite the new allegations, the Individual Defendants maintain that the “unadorned assertions” in the First Amended Complaint fail to “rectify the pleading deficit.” *Levesque Reply* at 3; *Molloy Reply* at 2.

As regards Mr. Levesque, he argues that the Plaintiffs' new facts are based on statements "made by lower management, not Defendant Levesque," and that they fail to tie his actions to the specific wrongdoing alleged in the First Amended Complaint. *Levesque Reply* at 3-4. He distinguishes *Manning* from this case, observing that the CEO in *Manning* had been involved in "overall hospital budget making," in making decisions "to allocate substantial resources to certain projects and to cut others," and in training, payroll operations, and recruiting. *Id.* at 4-5.

Citing the Plaintiffs' expressed desire to engage in discovery on specific issues, Mr. Levesque and Mr. Malloy say that Plaintiffs have effectively admitted in their opposition that they "have been reckless in bringing individual claims against Mr. Levesque (and Mr. Molloy) and are hoping to 'find' the facts to support such claims at a later date, though none currently exist." *Id.* at 5; *Molloy Reply* at 5.

As regards Mr. Molloy, he argues that the *Manning* standard distinguishes between a supervisor-owner and just a supervisor. *Molloy Reply* at 2-3. He says that to prove a FLSA claim against a supervisor, the Plaintiffs must demonstrate that he was involved in "setting or enforcing [] unlawful pay practices at issue." *Id.* at 3 (quoting *Manning*, 725 F.3d at 50). He contends that "[m]ere involvement in 'maintaining records' or 'payroll functions' is not enough to support a reasonable inference of liability." *Id.* (quoting *Manning*, 725 F.3d at 50). He cites *Yayo v. Museum of Fine Arts*, No. 13-11318-RGS, 2014 U.S. Dist. LEXIS 86992, at *26 (D. Mass. June 26, 2014) as emphasizing that an employee must control, direct or participate to a substantial degree in formulating and determining the policy of the

corporation. *Molloy Reply* at 3. Further, he says that the Plaintiffs have not fit their allegations about his job duties with their wage and overtime claims. *Id.* at 4-5.

4. Plaintiffs' Response to Individual Defendants' Motion to Dismiss First Amended Complaint

On September 23, 2014, the Plaintiffs responded to the Individual Defendants' motion to dismiss their First Amended Complaint. *Pls.' Second Opp'n* at 1-14. In their response, the Plaintiffs maintain that there are two ways in which a plaintiff may prove a case of individual liability under the FLSA: (1) by facts demonstrating that the person actually played a role in the decisions that caused the violations or (2) by facts demonstrating that the person had sufficient organizational control over the organization to allow an inference that the party could have caused the violations. *Id.* at 1-2. They claim that they have "done both." *Id.* at 2.

The Plaintiffs say that the standard under the First Circuit case of *Baystate* is whether the person had "personal responsibility for making decisions about the conduct of the business that *contributed* to violations of the Act." *Id.* at 3 (quoting *Baystate*, 163 F.3d at 678) (emphasis in Plaintiffs' original). Next, they argue that *Manning* does not require that the Plaintiffs produce evidence that the "individual made a specific decision or took a particular action that directly caused the plaintiff's undercompensation" so long as they make allegations of "significant operational control." *Id.* (quoting *Manning*, 725 F.3d at 50-51). The Plaintiffs then itemize the allegations in the First Amended Complaint that they contend support claims under these legal standards for purposes of withstanding the motions to dismiss. *Id.* at 4-9. They say these alleged facts make Mr. Levesque out to be an "active, heavily

involved owner and CEO.” *Id.* at 9. They claim that these alleged facts confirm that Mr. Molloy was “the highest ranking employee other than Defendant Levesque” and “the employee responsible for making decisions concerning the pay disputes at issue here.” *Id.* at 10. Finally, they argue that the Individual Defendants have failed to distinguish this case from *Manning*. *Id.* at 11-14.

5. Individual Defendants’ Replies to Plaintiffs’ Response

On October 7, 2014, the Individual Defendants filed replies to the Plaintiffs’ response. *Levesque Second Reply* at 1-5; *Molloy Second Reply* at 1-5. In the replies, the Individual Defendants essentially reiterate the points in their earlier-filed memoranda.

B. The Motion to Strike

1. The Plaintiffs’ Motion to Strike

With each motion to dismiss, the Individual Defendants filed an affidavit in support of his motion to dismiss. *Levesque First Mot. Attach. 1 Aff. of Jason Levesque (Levesque Aff.)*; *Molloy First Mot. Attach. 1 Aff. of Daniel Molloy (Molloy Aff.)*. The Levesque affidavit contains fifteen paragraphs and the Molloy affidavit contains eighteen; they both describe their personal roles within Argo and Argo’s business structure. *Id.* On August 18, 2014, the Plaintiffs moved to strike the affidavits, arguing that they do not fit within the scope of documents properly considered in a motion to dismiss. *Pls.’ Mot. to Strike* at 1-2. They contend that the Individual Defendants are attempting to have the Court treat the motions to dismiss as motions for summary judgment and that the Court should decline to do so. *Id.* at 2.

2. The Individual Defendants' Response to the Motion to Strike

On September 8, 2014, the Individual Defendants responded to the Plaintiffs' motion to strike. *Def's.' Strike Opp'n* at 1-5. They say that even if the Court does not consider the affidavits, it should still grant the motions to dismiss. *Id.* at 2. Next, they urge the Court to convert their motions to dismiss to motions for summary judgment. *Id.* at 2-5.

3. The Plaintiffs' Reply to the Individual Defendants' Response to the Motion to Strike

On September 22, 2014, the Plaintiffs filed their reply. *Pls.' Strike Reply* at 1-3. They say the Individual Defendants have conceded that the affidavits are not properly considered in a motion to dismiss and they argue that the Court should not convert the Defendants' motions to dismiss into motions for summary judgment. *Id.*

III. LEGAL STANDARD

A. Motion to Dismiss

According to Rule 8(a), “[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). The United States Supreme Court has observed that “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). To survive a motion to dismiss, the plaintiff must plead “sufficient facts to show that he has a plausible entitlement to relief.” *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 41 (1st Cir.

2009) (citing *Iqbal*, 556 U.S. at 678). The First Circuit illuminated the proper analytic path in *Schatz*:

Step one: isolate and ignore statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements. Step two: take the complaint’s well-pled (i.e., non-conclusory, non-speculative) facts as true, drawing all reasonable inferences in the pleader’s favor, and see if they plausibly narrate a claim for relief.

Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012) (internal citations omitted). Although the Court must accept all factual allegations in the complaint as true, it is “not bound to credit ‘bald assertions, unsupported conclusions, and opprobrious epithets.’” *Campagna v. Massachusetts Dep’t of Envtl. Prot.*, 334 F.3d 150, 155 (1st Cir. 2003) (quoting *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 16 (1st Cir. 1989)). Instead, “plaintiffs are obliged to set forth in their complaint ‘factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable legal theory.’” *Dartmouth Review*, 889 F.2d at 16 (quoting *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988)).

B. Motion to Strike

In addition to reviewing the allegations in a complaint, the law allows the Court to consider a limited set of documents in ruling on a motion to dismiss, including documents attached to the complaint or any other documents “integral to or explicitly relied upon in the complaint, even though not attached to the complaint.” *Trans-Spec Truck Serv., Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008) (quoting *Clorox Co. P.R. v. Proctor & Gamble Comm. Co.*, 228 F.3d 24, 32 (1st Cir.

2000) (quoting *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996))) (internal quotation marks omitted). In general, the exceptions are “for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs’ claim; or for documents referred to in the complaint.” *Bruns v. Mayhew*, 1:12-cv-00131-JAW, 2012 U.S. Dist. LEXIS 165380, at *18-19 (D. Me. Nov. 20, 2012) (quoting *Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 34 (1st Cir. 2001) (quoting *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993))) (internal quotation marks omitted). “Where there exists ‘a genuine dispute’ over the documents sought to be considered on a motion to dismiss, ‘the legal sufficiency of the cause of action is better tested in a motion for summary judgment.’” *Ramirez v. DeCoster*, 2:11-cv-00294-JAW, 2012 U.S. Dist. LEXIS 86266, at *27-28 (D. Me. June 21, 2012) (quoting *Knowlton v. Shaw*, 708 F. Supp. 2d 69, 75 (D. Me. 2010)). The Court retains the discretion to convert a motion to dismiss into a motion for summary judgment. *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 38 (1st Cir. 2007) (“[C]onversion is wholly discretionary with the district court”).

IV. DISCUSSION

A. Motion to Strike

The Court will not consider the affidavits from Messrs. Levesque and Molloy in ruling on the motions to dismiss and it strikes those affidavits. To the extent a court may consider documents outside the pleadings when ruling on a motion to dismiss, it is for documents to which there is no dispute. *Bruns*, 2012 U.S. Dist. LEXIS 165380, at *18-19. Here, the parties clearly do not agree about the accuracy

of the contents contained in the attached affidavits, and to consider the affidavits for their truth would run counter to the Court's obligation to "assume the truth of all well-plead[ed] facts and give the plaintiff[s] the benefit of all reasonable inferences therefrom." *Genzyme Corp. v. Fed. Ins. Co.*, 622 F.3d 62, 68 (1st Cir. 2010) (quoting *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5 (1st Cir. 2007)).

Nor will the Court convert the motions to dismiss into motions for summary judgment. Again, here, Messrs. Levesque and Molloy are making factual assertions about their respective roles in the way Argo did business and the Plaintiffs have palpable doubts about whether those assertions tell the whole story. If the Court converted the motions to dismiss into motions for summary judgment at this early stage, the Plaintiffs would be required to present facts without discovery, and the Plaintiffs might lose, not because the facts were not there to support their contentions, but because they were never given a chance to discover them. The wiser course is to allow the parties to engage in discovery, to see if the parties are able to narrow the factual disputes, and for the Individual Defendants to return to the Court in fully-developed motions for summary judgment. *See Michaud v. NexxLinx of Me., Inc.*, No. 1:13-cv-270-GZS, 2013 U.S. Dist. LEXIS 155359, at *3 (D. Me. Oct. 30, 2013) ("Summary judgment is the proper procedural vehicle for the Court to consider the various contracts and affidavits the parties have submitted in connection with the motion to dismiss").

B. Motions to Dismiss

1. The FLSA Claims

From the Court’s perspective, the most significant dispute between the parties is whether the Plaintiffs should be allowed to maintain their FLSA claims against the Individual Defendants based on the allegations in the First Amended Complaint. The Court readily concludes that the allegations in the First Amended Complaint survive dismissal.

In *Manning*, the First Circuit applied the “economic reality” test first announced in *Agnew* to FLSA claims of individual liability, conceding that the test is “context-dependent” and “fact-based.” 725 F.3d at 47. The standard as described in *Manning* requires an assessment of “the totality of the individual’s level of involvement with the corporation’s day-to-day operations, as well as their direct participation in creating or adopting the unlawful pay practices.” *Id.*

As for Mr. Levesque, the Plaintiffs claim that he was the Chief Executive Officer and sole owner of Argo. *First Am. Compl.* ¶ 14. In *Manning*, the First Circuit identified ownership as “highly probative of an individual’s employer status” because it “suggests a high level of dominance over the company’s operations.” 725 F.3d at 48; *see also Baystate*, 163 F.3d at 678 (explaining that a factor such as ownership status, while not determinative, is “important to the analysis because [it] suggest[s] that an individual controls a corporation’s financial affairs and can cause the corporation to compensate (or not to compensate) employees in accordance with the FLSA”). The Plaintiffs’ First Amended Complaint alleges much more than Mr. Levesque’s mere ownership. *First Am. Compl.* ¶¶ 38-57. For example, the Plaintiffs allege that Mr. Levesque “personally approved overtime for call center employees”

and, together with Mr. Molloy, decided “about pay, including base pay, raises, and bonuses.” *Id.* ¶¶ 56-57. Similarly, the Plaintiffs claim that Mr. Levesque had “the final say on everything” and made “the final decisions about Argo’s pay structure and system, including how bonuses will be determined and whether break and bathroom time will be paid or unpaid.” *Id.* ¶¶ 38-39. They also allege that Mr. Levesque told potential employees of the company that they could come see him directly if they saw a discrepancy in their paychecks. *Id.* ¶ 49. These allegations, taken as true, allow for a reasonable inference that Mr. Levesque could cause Argo “to compensate (or not to compensate) employees in accordance with the FLSA.” *Baystate*, 163 F.3d at 678.

The Plaintiffs’ FLSA case against Mr. Molloy is more difficult because he is not alleged to have been an owner and the First Circuit has cautioned against holding supervisory employees “personally liable for the unpaid wages of other employees.” *Manning*, 725 F.3d at 47 (internal citations and quotation marks omitted). Nevertheless, the test is fact-based: whether the defendant is “a corporate officer with operational control of a corporation’s covered enterprise, rather than a mere employee.” *Id.* at 48 (internal citations and quotation marks omitted). Here, the Plaintiffs have claimed that Mr. Molloy was the Chief Operating Officer of Argo and that he and Mr. Levesque “direct[ed] the day-to-day operations.” *First Am. Compl.* ¶ 14. The First Amended Complaint alleges that Mr. Molloy, together with Mr. Levesque, “made the decisions about pay.” *Id.* ¶ 38. It claims that Mr. Molloy, along with Mr. Levesque, decided who got raises, *id.* ¶ 42, and who got bonuses, *id.* ¶ 43, and the base pay for individual employees. *Id.* ¶ 57. The First Amended Complaint

also alleges that Mr. Molloy made the decision to terminate Nicholas Passafiume, and to deny Hannah LeVecque a promotion and to demote her from a position. *Id.* ¶¶ 54, 64, 68. Furthermore, the Plaintiffs claim that Mr. Molloy was personally responsible for calculating the pay and bonuses due each employee and that he calculated the amount of time that was “talk time,” unpaid time, and “lag time,” *id.* ¶¶ 59-60, and that he had the authority to change the raw data on the spreadsheets that he used to calculate pay. *Id.* ¶ 61. Taking the allegations as true, a reasonable inference can be drawn that Mr. Molloy was “not just any employee with some supervisory control over other employees.” *Chao*, 493 F.3d at 34. In *Chao*, key facts that led the First Circuit to conclude that the president of a corporation was properly held personally liable included facts that resemble those alleged against Mr. Molloy:

He was the president of the corporation, and he had ultimate control over the business’s day-to-day operations. In particular, it is undisputed that [the individual defendant] was the corporate officer principally in charge of directing employment practices, such as hiring and firing employees, requiring employees to attend meetings unpaid, and setting employees’ wages and schedules. He was thus instrumental in “causing” the corporation to violate the FLSA.

Id.

In the Court’s view, the allegations in the First Amended Complaint, which the Court assumes to be true for purposes of ruling on these motions, plainly contain enough facts to withstand dismissal of the FLSA counts as to both Mr. Levesque and Mr. Molloy.

2. The Maine State Law Claims

Although the Plaintiffs invited this Court to reconsider Judge Hornby's ruling in *Affo*, 2013 U.S. Dist. LEXIS 76019, and its ruling in *Saunders*, 2014 U.S. Dist. LEXIS 16728, the Court declines to do so. Applying the rulings in those cases to the Plaintiffs' First Amended Complaint, the Court dismisses Defendants Jason Levesque and Daniel Molloy as individual Defendants from Counts II, III, VI, VII, IX, and X.

3. The Breach of Contract Claims

On August 18, 2014, the Plaintiffs filed their First Amended Complaint. *First Am. Compl.* They did so as a matter of right under Federal Rule of Civil Procedure 15(a)(1)(B). In their original Complaint, the Plaintiffs demanded damages from the alleged breach of contract from all the Defendants "jointly and severally." *Compl.* at 28. In their First Amended Complaint, which is now the operative pleading, the Plaintiffs dropped their damages claim for breach of contract against Mr. Levesque and Mr. Molloy. *First Am. Compl.* at 33 ("to be paid by Defendant Argo"). The Plaintiffs have no claim for breach of contract against either Mr. Levesque or Mr. Molloy and, in light of their dropping these claims in the face of a motion to dismiss, they would have a difficult, if not impossible time, resurrecting them.

V. CONCLUSION

The Court DISMISSES as moot Defendant Jason Levesque's Motion to Dismiss (ECF No. 12) and Defendant Daniel Molloy's Motion to Dismiss (ECF No. 13).

The Court GRANTS in part and DENIES in part Defendant Jason Levesque's Reply to Plaintiffs' Objection to Motion to Dismiss and Motion to Dismiss Plaintiffs'

First Amended Complaint (ECF No. 23) and Defendant Daniel Molloy's Reply to Plaintiffs' Objection to Motion to Dismiss and Motion to Dismiss Plaintiffs' First Amended Complaint (ECF No. 24) as follows:

- (1) The Court DENIES the Defendants' motions insofar as they demand dismissal of the Federal Labor Standards Act Counts I, V, and VIII against them individually;
- (2) The Court GRANTS the Defendants' motions insofar as they demand dismissal of the state of Maine claims, specifically, Counts II, III, VI, VII, IX, and X; and
- (3) The Court DISMISSES as moot the Defendants' motions insofar as they demand dismissal of the breach of contract claims against them as individuals in Count IV of the original Complaint.

The Court GRANTS the Plaintiffs' Motion to Strike Defendants' Affidavits (ECF No. 19).

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 25th day of February, 2015

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