

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Martin Gillard, et al.,

10 Plaintiffs,

11 v.

12 FEC Logging USA LLC,

13 Defendant.
14

No. CV-17-01368-PHX-DLR

ORDER

15
16 Before the Court is a motion to dismiss filed on behalf of Defendant FEC Logging
17 USA Holdings, LLC (“FEC Logging”).¹ (Doc. 39.) The motion is fully briefed and
18 neither party requested oral argument. (Docs. 46, 49.) For the following reasons, FEC
19 Logging’s motion is granted in part.

20 **I. Background**

21 On May 4, 2017, Plaintiffs filed a complaint in this action, raising Fair Labor
22 Standards Act (FLSA), Arizona Wage Act (AWA), and common law breach of contract
23 claims. (Doc. 1) On July 20, 2017, Plaintiffs filed their First Amended Complaint
24 (“FAC”), which made the same allegations, but modified the named defendants.
25 Notably, the FAC added FEC Logging as a defendant. (Doc. 20 ¶ 13.)

26 _____
27 ¹ Plaintiffs also name Good Earth Power AZ, LLC (“GEPAZ”), ZR FEC Ltd.
28 (“ZR FEC”), Good Earth Power Ltd. (“GEP”), Jason Rosamond, Maya Minokva, and
Alawi Zawawi as defendants in this matter. (Doc. 20.) No other defendant has joined in
FEC Logging’s motion.

1 As a general matter, the allegations in the FAC arise out of an employment
2 dispute. In February 2013, Plaintiff Martin Gillard entered into an agreement to serve as
3 Chief Technology Officer for Good Earth Power International Limited (“GEP Int’l”).
4 (Doc. 20 ¶ 16.) At some point thereafter, Gillard’s contract with GEP Int’l was assumed
5 by GEPAZ. (¶ 19.) In November 2013, Plaintiff Darren Gurner was retained to serve as
6 Managing Director of GEPAZ. (¶ 22.) Gillard and Gurner (“Plaintiffs”) both worked for
7 GEPAZ until they were terminated in December 2016. (¶¶ 21, 27.) During their period
8 of employment, Plaintiffs neither received the full value of their respective salaries nor
9 compensation for their equity stake in GEPAZ. (¶¶ 30, 38, 40.)

10 As a result, Plaintiffs brought suit against GEPAZ. Plaintiffs sought to extend
11 GEPAZ’s liability to FEC Logging under the theory of successor liability. Under
12 Plaintiff’s theory, because FEC Logging replaced ZR FEC as the lone Member of
13 GEPAZ in March 2017, it thereby assumed any liabilities of its predecessor in interest.²
14 (Doc. 20 ¶ 13.)

15 FEC Logging has moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to
16 dismiss the amended complaint for failure to state a claim upon which relief may be
17 granted.

18 **II. Legal Standard**

19 When analyzing a complaint for failure to state a claim to relief under Rule
20 12(b)(6), the well-pled factual allegations are taken as true and construed in the light
21 most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th
22 Cir. 2009). Legal conclusions couched as factual allegations are not entitled to the
23 assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and therefore are
24 insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec.*
25 *Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010). Nor is the court required to accept as true

26
27 ² Although not included in its complaint, Plaintiffs’ response memorandum to FEC
28 Logging’s Motion to Dismiss states “it is without dispute that FEC Logging has replaced
Defendant ZR FEC as the lone member of GEPAZ.” (Doc. 46 at 3.) The Court reads
this statement to mean that ZR FEC is the only predecessor in interest to FEC Logging.

1 “allegations that contradict matters properly subject to judicial notice,” or that merely are
2 “unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v. Golden State*
3 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

4 To avoid dismissal, the complaint must plead sufficient facts to state a claim for
5 relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).
6 This plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more
7 than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678
8 (quoting *Twombly*, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely
9 consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and
10 plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557.)

11 **III. Discussion**

12 FEC Logging’s argument as to why Plaintiff’s FLSA claim fails is twofold. First,
13 it contends that the FAC alleges no factual or statutory basis for concluding that FEC
14 Logging is a successor in interest of any of GEPAZ’s prior members. Second, even if
15 successor liability could be inferred, the FAC also fails to allege a basis for holding the
16 predecessor members of GEPAZ liable. Similarly, FEC Logging contends that the AWA
17 and common law claims fail because there are insufficient allegations to find FEC
18 Logging is a successor in interest.

19 **A. FLSA Claim**

20 **i. Successor Liability**

21 Under the general successor liability rule, “when a corporation sells or transfers its
22 principal assets to a successor corporation, the latter will not be liable for the debts and
23 liabilities of the former.” *Winsor v. Glasswerks PHX, LLC*, 63 P.3d 1040, 1045 (Ariz. Ct.
24 App. 2003) (citing *A.R. Teeters & Assocs., Inc. v. Eastman Kodak Co.*, 836 P.2d 1034,
25 1039 (Ariz. Ct. App. 1992)). There are, however, four exceptions to this rule: (1) the
26 successor expressly or impliedly agrees to assume liabilities; (2) the transaction is a de
27 facto consolidation or merger; (3) the successor is a mere continuation of the seller; or (4)
28 the transfer of assets was entered for the purpose of fraudulently escaping liability. *Id.*

1 Notably, courts apply different rules for determining successor liability when a
2 federal employment statute is involved.

3 The Court in *Steinbach* noted,

4 Successorship liability was originally adopted under the
5 NLRA to avoid labor unrest and provide some protection for
6 employees against the effects of a sudden change in the
7 employment relationship. In deciding to extend
8 successorship liability to other contexts, courts have
9 recognized that extending liability to successors will
10 sometimes be necessary in order to vindicate important
11 statutory policies favoring employee protection. Where
12 employee protections are concerned, judicial importation of
13 the concept of successor liability is essential to avoid
14 undercutting Congressional purpose by parsimony in
15 provision of effective remedies.

16 *Steinbach v. Hubbard*, 51 F.3d 843, 846 (9th Cir. 1995) (quotation marks and citations
17 omitted). Under the modified successorship rule for federal employment statutes, courts
18 look at three factors: (1) whether “the subsequent employer was a bona fide successor;”
19 (2) whether “the subsequent employer had notice of potential liability;” and (3) “the
20 extent to which the predecessor is able to provide adequate relief directly.” *Id.* at 846.

21 Plaintiffs’ allegation specific to FEC Logging states in its entirety:

22 [FEC Logging] is a Delaware limited liability company. As
23 of March 31, 2017, FEC Logging is the sole Member of
24 GEPA[Z], and, upon information and belief, is successor in
25 interest to any and all previous members of GEPA[Z].

26 (Doc. 20 ¶ 13.) Plaintiffs’ allegation is a legal conclusion. The FAC offers no other
27 allegations concerning the three factors used to determine successor liability in the FLSA
28 context. Therefore, in accordance with the standards set out in *Twombly* and *Iqbal*, the
Court finds that the FAC fails to state a claim against FEC Logging.

29 **ii. Predecessor Liability**

30 Even assuming Plaintiffs had properly alleged successor liability, the FAC also
31 fails to sufficiently allege a basis for predecessor liability. That is, in order for a
32 successor to have liability, it must be shown not only that it is a successor in interest, but
33 that its predecessor in interest has liability. Although the FAC alleges that FEC Logging

1 is “successor in interest to *any* and *all* previous members of GEP[AZ],” ZR FEC is the
2 only member of GEP[AZ] specifically named in the FAC. (Doc. 20 ¶¶ 5, 9.) Notably,
3 Plaintiffs state in their response memorandum that “it is without dispute that *FEC*
4 *Logging has replaced Defendant ZR FEC as the lone member of GEP[AZ].*” (Doc. 46 at 3
5 (emphasis added).)³ Therefore, Plaintiff must show that ZR FEC, as a prior member of
6 GEP[AZ] would have been liable for the misdeeds alleged.

7 Under Arizona law, members of an LLC are not liable for the obligations and
8 liabilities of the LLC solely by reason of being a member. A.R.S. § 29-651. If, however,
9 the members of an LLC are using the LLC as an “alter ego,” then the limited liability veil
10 can be pierced and the members can be liable for the obligations and liabilities of the
11 LLC. 9 Ariz. Prac., Business Law Deskbook § 3:9 (2017-2018 ed.) (citing *Standage v.*
12 *Standage*, 711 P.2d 612, 615 (Ariz. Ct. App. 1985); *Dietel v. Day*, 492 P.2d 455 (Ariz.
13 Ct. App. 1972)). In order to pierce the limited liability veil, a plaintiff must demonstrate
14 that the corporation is (1) the alter ego of the individual against whom recovery is sought
15 and that (2) recognition of the corporate form would sanction a fraud or promote
16 injustice. *See e.g., Employer’s Liab. Assurance Corp. v. Lunt*, 313 P.2d 393, 395 (Ariz.
17 1957). The Court discusses each prong in turn.

18 **a. Alter-Ego**

19 “In Arizona, the alter-ego status is said to exist when there is such unity of interest
20 and ownership that the separate personalities of the corporation and owners cease to
21 exist.” *In re Keesling*, No. CV 12-01053-PHX-JAT, 2012 WL 5868883, at *3 (D. Ariz.
22 Nov. 19, 2012) (quotation marks and citation omitted). “Alter ego status can be shown
23 by: (1) under-capitalization; (2) failure to maintain a separate corporate identity; (3)
24 diversion of corporate property for personal use; (4) lack of corporate formalities; and (5)

25
26 ³ The Court questions whether this statement is, in fact, “without dispute” given
27 that the FAC also states that “ZR FEC maintains a 70% ownership share of GEP[AZ]”
28 and “describes ZR FEC as “majority member of GEP[AZ].” (Doc. 20 ¶¶ 5, 9 (emphasis
added).) Nevertheless, because the FAC makes no mention of other prior members of
GEP[AZ], nor alleges a basis for these unnamed entities’ liability, the Court limits its
analysis of predecessor liability to ZR FEC.

1 failure to maintain books and records of account in reasonable order.” *Id.* (quotation
2 marks and citation omitted).

3 Generally, the adequacy of capital is measured as of the time of formation of the
4 corporation. That is to say that a “corporation that was adequately capitalized when
5 formed but which subsequently suffers financial reverses is not undercapitalized.” *Norris*
6 *Chem. Co. v. Ingram*, 679 P.2d 567, 570 (Ariz. Ct. App. 1984) (quotation marks and
7 citation omitted). Here, there is no allegation that GEPAZ was undercapitalized at its
8 inception. (Doc. 20 ¶¶ 30-31.)

9 Determining whether there is a separate corporate identity and whether corporate
10 formalities are maintained are fact intensive analyses. Plaintiffs allege that Defendants
11 Rosamond and Zawari “each owned a 50% interest in JARZ Holdings International Ltd.,”
12 which in turn owned “100% of JARZ Technologies Ltd.,” which in turn “owned 100%
13 of ZR Telecoms,” which in turn “owned 100% of ZR FEC.” (¶ 6.) Neither ownership of
14 all the stock of a subsidiary, identity of officers and directors, or a combination of the two
15 is sufficient to justify piercing the corporate veil. *See e.g., Horizon Res. Bethany Ltd. v.*
16 *Cutco Indus., Inc.*, 881 P.2d 1177, 1181 (Ariz. Ct. App. 1994). Rather, such factors are
17 common business practice and exist in most parent and subsidiary relationships. Absent
18 a pleading with more specific factual allegations, the FAC fails to state a plausible cause
19 of action against FEC Logging. *Iqbal*, 556 U.S. at 678.

20 Instead, to determine whether corporate formalities are maintained, courts look to
21 factors such as whether the physical locations of the corporations are different; whether
22 the records of each entity are separately maintained; where there is commingling of
23 funds; whether payrolls are separately administered; and whether contracts are
24 independently negotiated and signed. Here, the FAC simply does not include factual
25 allegations regarding the lack of corporate formalities between GEPAZ and its member
26 ZR FEC.⁴ Nor does the FAC make any allegations concerning the diversion of GEPAZ

27
28 ⁴ The Court notes that while the FAC alleges that GEPAZ conducted business through a host of related entities, “all of which contributed revenues to GEPAZ[Z] and/or provided compensation to Plaintiffs for performance of service,” missing from that list is

1 property for personal use by ZR FEC.

2 **b. Fraud or Injustice**

3 “Fraud may be found where incorporation is for fraudulent purposes or where,
4 after organization, the corporation is employed for fraudulent purposes.” *In re Keesling*,
5 2012 WL 5868883, at *4. A showing of alter-ego alone does not constitute a fraud or
6 injustice, rather “it is incumbent . . . to show by a preponderance of the evidence that the
7 financial setup of the corporation is only a sham and causes injustice.” *Ize Nantan*
8 *Bagowa, Ltd. v. Scalia*, 577 P.2d 725, 729 (Ariz. Ct. App. 1978). Here, the FAC offers
9 no allegation that FEC Logging was created to perpetuate a fraud or an injustice.

10 **iii. Status as Employer**

11 To the extent Plaintiffs claim that FEC Logging can be held liable under the FLSA
12 as an employer, their claims fail. (Doc. 46 at 2.) The FLSA defines “employer” as “any
13 person acting directly or indirectly in the interest of an employer in relation to an
14 employee” 29 U.S.C. § 203(d). In determining whether a party may be held liable
15 under the FLSA as an employer, courts apply an “economic reality” test that considers
16 the “total employment situation” while focusing on four factors: whether the alleged
17 employer (1) had the power to hire and fire employees, (2) supervised and controlled
18 employee work schedules or conditions of payment, (3) determined the rate and method
19 of payment, and (4) maintained employment records. *Boucher v. Shaw*, 572 F.3d 1087,
20 1091 (9th Cir. 2009)

21 According to the FAC, Gillard was terminated effective December 30, 2016, and
22 Gurner notified GEPAZ that he considered himself constructively discharged in January
23 2017. (Doc. 20 ¶¶ 21, 29.) FEC Logging, however, did not become a member of
24 GEPAZ until March 2017. (¶ 13.) Therefore, FEC Logging could not have hired or fired
25 employees, supervised and controlled work schedules, determined rates of payment, or
26 maintained employment records because it did not become a member of GEPAZ until
27 after Plaintiffs’ employment ended.

28 _____
ZR FEC or any of its parent entities. (Doc. 20 ¶ 4.)

1 **B. AWA and Common Law Claims**

2 The FAC also raises a state statutory claim under the AWA and common law
3 claims. With respect to the AWA claim, Plaintiffs make no specific allegations
4 concerning FEC Logging. (Doc. 20 ¶¶ 67-75.) Instead, Plaintiffs allege that “GEPA[Z]
5 has failed to pay the guaranteed salaries and other emoluments it agreed to pay Plaintiffs
6 for the services they performed.” (¶ 72.) Similarly, Plaintiffs’ common law claims fail to
7 mention FEC Logging. (¶¶ 76-127.) As discussed at great length, the FAC alleges only
8 that FEC Logging is “successor in interest to *any* and *all* previous members of
9 GEPA[Z],” and ZR FEC is the only member of GEPAZ specifically named in the FAC.
10 (¶¶ 5, 9.) As such, for liability to attach to FEC Logging, it must be through a successor
11 liability theory. Here, even when the allegations in the complaint are taken as true, FEC
12 Logging cannot plausibly be found liable.

13 As previously discussed, successor liability outside the context of FLSA claims
14 attaches where (1) the successor expressly or impliedly agrees to assume liabilities; (2)
15 the transaction is a de facto consolidation or merger; (3) the successor is a mere
16 continuation of the seller; or (4) the transfer of assets was entered for the purpose of
17 fraudulently escaping liability. *Winsor*, 63 P.3d at 1045. Here, there are no allegations
18 that FEC Logging expressly or impliedly agreed to assume ZR FEC’s liabilities, merged
19 or consolidated with ZR FEC, operates as a mere continuation of ZR FEC, or succeeded
20 ZR FEC to perpetuate a fraud. Instead, Plaintiffs assert only that “upon information and
21 belief, is successor in interest to any and all previous members of GEPA[Z],” without
22 explaining the claimed information upon which this belief is based. (Doc. 20 ¶ 13.)
23 Accordingly, Plaintiffs’ AWA and common law claims against FEC Logging are
24 dismissed.

25 **IV. Leave to Amend**

26 In the final sentence of their response in opposition to the motion to dismiss,
27 Plaintiffs alternatively request leave to amend should the Court conclude that the FAC
28 fails to state a claim against FEC Logging in its current form. Federal Rule of Civil

1 Procedure 15(a)(2) requires the Court to “freely give leave when justice so requires.”
2 Leave need not be granted, however, “where the amendment of the complaint would
3 cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in
4 futility, or creates undue delay.” *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149,
5 1160 (9th Cir. 1989).

6 At the outset, the Court notes that Plaintiffs previously had an opportunity to
7 amend the complaint but chose not to do so. Specifically, the Court issued an order on
8 May 8, 2017, stating, in relevant part:

9 1. Before the filing of any motion to dismiss under Rule
10 12(b)(6), the parties must confer in good faith to determine
11 whether the motion can be avoided. Defendant shall explain
12 to Plaintiff the reasons why Defendant believes the complaint
13 fails to state a claim for relief. The parties shall discuss
14 whether the deficiencies identified by Defendant can be cured
15 through an amended complaint. If the parties agree on this
16 point, Plaintiff shall file an appropriate amended complaint in
17 order to avoid the filing of an unnecessary motion to dismiss.

18 2. *Notwithstanding Plaintiff’s belief that the complaint is
19 sufficient to state a claim for relief, or Defendant’s belief that
20 the complaint is not curable, if Plaintiff believes that a
21 permissible amendment can cure some or all of the purported
22 deficiencies identified by Defendant, Plaintiff is encouraged
23 to file an amended complaint containing all further
24 allegations Plaintiff could make. This would avoid the need
25 for Plaintiff to seek leave to amend should the Court
26 determine that the motion to dismiss is well taken.*

27 (Doc. 7 (emphasis added).) Consistent with this order, before filing their motion for
28 judgment on the pleadings, FEC Logging informed Plaintiffs of the issues it planned to
raise. (Doc. 39 at 2-3, 8-9.) Rather than amend their complaint to address the perceived
defects, Plaintiffs chose to press their FAC and let the Court rule on the issues raised by
FEC Logging.

By requesting leave to amend now, Plaintiffs have flouted the Court’s prior order.
If Plaintiffs can, in fact, allege sufficient facts to cure the defects FEC Logging has
identified, their failure to do so after the parties met and conferred has needlessly delayed
these proceedings and resulted in the unnecessary expenditure of resources, both by the
parties and the Court. To be clear, the Court expects parties to take seriously their

1 obligations to meet and confer and to make every effort to ensure the just, speedy, and
2 inexpensive resolution of cases. The Court’s May 5, 2017 order discouraging motions to
3 dismiss was intended head off precisely this situation.

4 Plaintiffs’ request for leave to amend also violates Local Rule 15.1, which requires
5 a party who moves for leave to amend to “attach a copy of the proposed amended
6 pleading as an exhibit to the motion, which must indicate in what respect it differs from
7 the pleading which it amends[.]” Plaintiffs did not attach a copy of the proposed
8 amended complaint to their response memorandum, nor have they otherwise explained in
9 their response brief what specific supporting allegations they would make to cure the
10 defects identified above. (Doc. 46 at 4.) For all these reasons, Plaintiffs’ request for
11 leave to amend is denied.

12 Plaintiffs may, if they so choose, renew their request for leave to amend if they
13 believe they can allege facts curing the defects identified in this order. If they choose to
14 renew their request, they must do so in a manner that complies Local Rule 15.1.
15 Additionally, because of the current procedural posture of this case, Plaintiffs will need to
16 demonstrate good cause for modifying the scheduling order’s deadline for amending
17 pleadings, which has passed. (Doc. 43); Fed. R. Civ. P. 16(b)(4). A showing of good
18 cause will need to explain why Plaintiffs could not have amended their complaint earlier,
19 either by faithfully complying with the Court’s May 5, 2017 order, or by attaching a copy
20 of the proposed pleading to their first request.

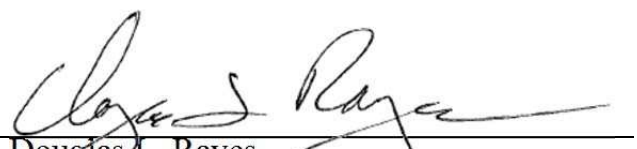
21 **IT IS ORDERED** that FEC Logging’s motion to dismiss (Doc. 39) is
22 **GRANTED.**

23 //
24 //
25 //
26 //
27 //
28 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS FURTHER ORDERED that Plaintiffs' request for leave to amend (Doc. 46 at 4) is **DENIED** without prejudice. If Plaintiffs wish to renew their request, they must do so by no later than **July 3, 2018**. Any proposed amended pleading must be limited to curing the specific defects identified in this order.

Dated this 26th day of June, 2018.



Douglas L. Rayes
United States District Judge