No. 24-2420

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARIA GUADALUPE ELLIS,
on behalf of herself and all others similarly situated,
Plaintiff-Appellant

v.

NIKE USA, INC., and
NIKE RETAIL SERVICES, INC.,
Defendants-Appellees.

On Appeal from the United States District Court for the
Eastern District of Missouri
Case No. 4:23-cv-00632-MTS
Hon. Matthew T. Schelp

DEFENDANTS-APPELLEES' OPENING BRIEF

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SUMMARY OF THE CASE

Plaintiff-Appellant Maria Guadalupe Ellis ("Ellis") filed the underlying action against Defendants-Appellees Nike USA, Inc. and Nike Retail Services, Inc. ("Nike") alleging violations of the Missouri Merchandising Practices Act and other state law claims. Ellis based her claims on allegations that Nike falsely markets and labels certain products in its Sustainability Collection product line when they are not actually made with any "recycled" and "organic fibers."

Nike responded to these claims by filing its first Motion to Dismiss ("MTD") under Rule 12(b)(6), prompting Ellis to amend her Complaint. Ellis' First Amended Complaint ("FAC") was based upon the same unsupported allegations, known as a "greenwashing" theory. Nike filed a second MTD on August 24, 2023. On March 28, 2024, the district court granted Nike's second MTD with prejudice, ruling that the FAC failed to state a claim and instead was based on a set of "bald" and "unadorned" conclusions. Ellis' only pre-dismissal request for leave to amend was a single sentence at the end of her response in Opposition to Nike's second MTD. On April 16, 2024, Ellis filed a Motion for Reconsideration and Leave to Amend, arguing that dismissal of the FAC with prejudice was a manifest error of law. The district court properly denied her belated attempt to save her claims.

Nike respectfully asks this Court to affirm the dismissal of the FAC with prejudice and that Nike be granted 15 minutes of oral argument, as needed.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Eighth Circuit Rule 26.1A, Defendants-Appellees Nike USA, Inc., an Oregon Corporation, and Nike Retail Services, Inc., an Oregon Corporation, hereby disclose the following entities as parent companies, subsidiaries, partners, limited liability entity members and managers, affiliates, or similar entities, as well as unincorporated associations or similar entities:

Defendant-Appellee Nike Retail Services, Inc. is a wholly-owned subsidiary of Defendant-Appellee Nike USA, Inc.

Defendant-Appellee Nike USA, Inc. is a wholly-owned subsidiary of Nike, Inc.

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JURISDICTIONAL STATEMENT

The United States district court for the Eastern District of Missouri has diversity jurisdiction over this case under 28 U.S.C. § 1332.

This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 1294. On July 9, 2024, Ellis filed a notice of appeal from (1) the March 28, 2024 final judgment, in which the district court granted Nike's motion to dismiss with prejudice, and (2) the June 10, 2024 order denying Ellis' motion for reconsideration and for leave to amend.

STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion in denying Ellis' pre-dismissal request for leave to amend, which was made only in a single sentence of its response brief and not in the manner that this Court's precedent requires?

Apposite Cases:

- *Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909, 913 (8th Cir. 2003);
- *Sbfo Operator No. 3, LLC v. Onex Corp.*, 101 F.4th 551, 562 (8th Cir. 2024);
- *United States ex rel. Ambrosecchia v. Paddock Labs., LLC*, 855 F.3d 949, 956 (8th Cir. 2017).

2. Did the district court abuse its discretion in denying Ellis' post-judgment request for leave to amend?

Apposite Cases:

- *Mitan v. McNiel*, 399 F. App'x 144, 145 (8th Cir. 2010);
- *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 782 (8th Cir. 2009);
- *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 824 (8th Cir. 2009).

STATEMENT OF THE CASE

Nike is the world's largest supplier of athletic footwear and apparel. As a global leader in the sportswear industry, it is committed to maintaining and reducing its impact on the environment. App. 56; R. Doc. 21 at p.1.

On May 10, 2023, Ellis filed her original complaint ("Complaint") in the United States District Court for the Eastern District of Missouri, asserting that she purchased three Nike products from a third-party retailer after reviewing allegedly deceptive environmental representations that Nike made on its website, labeling, advertising, and packaging. App. 2-3; R. Doc. 1 at ¶¶ 1-9. Nike moved to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. App. 56; R. Doc. 21. Rather than respond to Nike's MTD, on July 27, 2023, Ellis elected to amend and filed her FAC. App. 118-164; R. Doc. 23.

In her FAC, Ellis challenged in conclusory terms several aspects of Nike's advertising practices. First, the FAC claimed that Nike's statements were false and misleading to the extent they claimed that the Sustainability Collection products contained recycled or organic fibers, or sustainable materials. App. 127-130; R. Doc. No. 23 at ¶¶ 33-35. Second, the FAC claimed that statements and imagery from Nike's "Move to Zero" initiative were false and misleading. App. 127-130; R. Doc. No. 23 at ¶¶ 33-35. Third, Ellis added allegations that Nike's statements were false as to the products set forth in Exhibit A to the FAC because those products are

not "made with recycled and organic fibers." App. 133; R. Doc. No. 23 at ¶ 40. Nike filed its second MTD on the ground that the FAC contained no factual allegations that could plausibly support this "greenwashing" theory.

In the second MTD, Nike identified multiple deficiencies in the FAC. One was the fact that Nike accurately discloses the breakdown of recycled and organic fibers in each of its products—*e.g.*, through physical hangtags and product-specific webpage disclosures. App. 127, 205-244; R. Doc. Nos. 19-24 at ¶ 33, Exs. 3-8. Both the product-specific hangtags and webpages also direct consumers to Nike's sustainability homepage, which provides more information about the sustainable materials that Nike uses and Nike's many environmental efforts. App. 130; R. Doc. 13 at ¶ 35; *see also* App. 194-204; R. Doc. Nos. 17-18 at Exs. 1-2.

Rather than seek to further amend her complaint, Ellis opposed Nike's second motion to dismiss ("second MTD"). In her Opposition to the second MTD, she included a single line requesting leave to amend in the event the district court granted Nike's motion. App. 267; R. Doc. 32 at 18. Ellis did not file a proposed second amended complaint with her Opposition to Nike's second MTD. Nor did she specify how any contemplated amendment could cure the deficiencies identified in Nike's second MTD.

The district court granted Nike's second MTD and dismissed the FAC with prejudice. The district court ruled, "The lynchpin of every claim in [Ellis'] action is

that Nike's products aren't what they say they are … [b]ut the Amended Complaint wholly fails to allege facts making that plausible." App. 296; R. Doc. 34, at 4. The district court further explained:

- "[The FAC] alleges no further information whatsoever to establish how [Ellis] has concluded that these two thousand products contain no recycled or organic fibers and are, in reality, made with virgin synthetic and non-organic materials."
    - "She makes no mention of any testing or analysis."
    - "She says nothing about how their look or feel might indicate their makeup."
    - "She puts forth no allegations surrounding the supplier of Defendants' materials."
    - "She claims nothing about the manufacturing process."
    - "She details no inside knowledge from, say, a whistleblower, for example, who has come forward on this alleged massive corporate lie."
- "Her Amended Complaint says only that she purchased three products from Nike's Sustainability Collection and her unadorned conclusion that more than two thousand of Nike's Sustainability Collection products are not made with *any* recycled and organic fibers."

App. 296; R. Doc. 34, at 4.

Undeterred, Ellis moved for reconsideration. App. 303-305, 642-654; R. Docs. 36, 37. The district court denied Ellis' motion. The court explained that Ellis' pre-dismissal request for leave to amend was insufficient because she was required to, but did not, file a motion for leave to amend or include a proposed amended complaint to the Court. App. 690; R. Doc. 40, at 2. The district court then denied Ellis' post-judgment request for leave to amend because she "was aware that her amended pleadings may have been deficient, yet she chose to proceed forward with her previously Amended Complaint anyway." App. 691; R. Doc. 40, at 3. Ellis "had seven months" to seek leave to amend, the court explained, but instead chose to stand on her legally deficient allegations. App. 691; R. Doc. 40, at 3.

Ellis appealed.

SUMMARY OF THE ARGUMENT

Ellis has twice attempted to portray Nike's use of recycled and organic fibers and candid communications regarding its environmental efforts as a "greenwashing" campaign. Because Ellis' allegations consistently failed to state a claim and she did not properly seek leave to amend, the district court did not abuse its discretion in dismissing Ellis' FAC with prejudice.

First, the district court did not abuse its discretion in rejecting Ellis' perfunctory and improper request for leave to amend. Ellis made a strategic decision

to stand on her allegations and devote 18 pages of argument opposing Nike's second MTD – and only a single line requesting leave to amend in the event her opposition failed. She did not file a pre-dismissal motion for leave to amend. She did not provide a redlined proposed pleading. She did not describe her contemplated amendments at all. Her failure to do so violates well-settled Eighth Circuit authority and procedural rules. The district court was under no obligation to save her from her own inaction and properly refused to do so. *See* Sections B(i)(ii), *infra*.

Second, the district court's decision to dismiss Ellis' claims *with prejudice* was a proper exercise of its discretion. Contrary to Ellis' assertion, dismissal under Rule 12(b)(6) does not require a finding of "intentional delay" or "contumacious conduct." Instead, this Court's precedent confirms that a district court has discretion to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) "where the plaintiff has not indicated how [she] would make the complaint viable, either by submitting a proposed amendment or indicating somewhere in [her] court filings what an amended complaint would have contained." *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772, 782 (8th Cir. 2009); *see* Sections C(i)(ii), *infra*. Ellis has failed to make any such showing.

Third, because the district court dismissed Ellis' claims for the same reasons that Nike pointed out *before* Ellis amended her pleading, it properly denied Ellis'

post-judgment request for leave to amend contained in her Motion for Reconsideration. *See* Sections D(i)(ii), *infra*.

Fourth, Ellis' proposed Second Amended Complaint ("SAC") —included in her post-judgment request for leave to amend—only underscores the propriety of the district court's dismissal with prejudice. The proposed SAC still fails to allege a plausible claim for relief. *See* Section E, *infra*.

ARGUMENT

A. Legal Standards

i. Standard of Review

This Court reviews a district court's decision to deny leave to amend a complaint for abuse of discretion. *See Knowles v. TD Ameritrade Holding Corp.*, 2 F.4th 751, 758 (8th Cir. 2021); *Bell v. Allstate Life Ins. Co.*, 160 F.3d 452, 454 (8th Cir. 1998) (The "decision whether to allow a party to amend [her] complaint is left to the sound discretion of the district court and should be overruled only if there is an abuse of discretion."). "[H]owever, when the district court bases its denial on the futility of the proposed amendments, [this Court reviews] the underlying legal conclusions de novo." *Jackson v. Riebold*, 815 F.3d 1114, 1122 (8th Cir. 2016) (internal quotation marks omitted).

ii. Dismissal Standards

Pre-Dismissal Leave to Amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, a party is entitled to amend his complaint one time as a matter of course within specified time frames. After this, "a party may amend its pleading only with the opposing party's written consent or the court's leave" and "[a]lthough leave to amend 'shall be freely given when justice so requires,' *see* Fed. R. Civ. P. 15(a), plaintiffs do not have an absolute or automatic right to amend." *U.S. ex rel. Lee v. Fairview Health Sys.*, 413 F.3d 748, 749 (8th Cir. 2005) (citing *Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909, 913 (8th Cir. 2003)). "[I]n order to preserve the right to amend the complaint, a party must submit the proposed amendment along with its motion." *Clayton v. White Hall Sch. Dist.*, 778 F.2d 457, 460 (8th Cir. 1985) ("*Clayton*"); *see also Rivera v. Bank of Am., N.A.*, 993 F.3d 1046, 1051 (8th Cir. 2021) (district court's denial of leave to amend complaint is reviewed for abuse of discretion; when request for leave is included only in opposition papers, not through motion seeking leave to amend, district court does not abuse discretion in denying leave on that ground alone).

Dismissal with Prejudice. A district court has discretion to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) "where the plaintiff has not indicated how [she] would make the complaint viable, either by submitting a proposed amendment or indicating somewhere in [her] court filings

what an amended complaint would have contained." *Pet Quarters, Inc.*, 559 F.3d at 782.

Post-Judgment Leave to Amend. In contrast to Rule 15(a)(2)'s "freely given" standard for pre-dismissal requests for leave to amend, post-judgment requests are "disfavored" and "district courts in this circuit have considerable discretion to deny" them, *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 824 (8th Cir. 2009)—especially when the plaintiff chooses to stand on its pleadings in the face of a motion to dismiss that identified the very deficiency that leads to dismissal, *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 665 (8th Cir. 2012).

B. The District Court Did Not Abuse Its Discretion in Refusing to Grant Ellis' Improper Pre-Dismissal Request for Leave to Amend.

"[A] district court [does] not abuse its discretion by denying a request for leave to amend a complaint when the request was raised in a single sentence in response to a motion to dismiss and the party made no motion for leave nor attempted to explain the substance of the proposed amendment." *Rivera v. Bank of Am., N.A.*, 993 F.3d 1046, 1051 (8th Cir. 2021) (citing *Misischia v. St. John's Mercy Health Sys.*, 457 F.3d 800, 805 (8th Cir. 2006)). "[I]n order to preserve the right to amend the complaint, a party must submit the proposed amendment along with its motion." *Clayton v. White Hall Sch. Dist.*, 778 F.2d 457, 460 (8th Cir. 1985). The sole attempt by Ellis to seek leave to amend her FAC prior to dismissal was a single sentence at

the end of her Opposition to the second MTD. The district court therefore correctly denied her request.

i. Ellis was required – and failed – to file a pre-dismissal motion for leave to amend.

It is well-settled in this Circuit that a district court acts within its discretion when it denies leave to amend to a party who fails to file a *motion* for leave to amend. *Carlson v. Hyundai Motor Co.*, 164 F.3d 1160, 1162 (8th Cir. 1999) ("[a] district court does not abuse its discretion in failing to invite an amended complaint when plaintiff has not moved to amend and submitted a proposed amended pleading.").

Here, rather than filing a motion for leave to amend detailing the nature of her proposed amendment, Ellis made only a perfunctory request for leave to amend in the very last line of her opposition brief. *See* App. 267; R. Doc. 32 at p. 18 ("respectfully request[ed] that [the district court] deny [Nike's] Motion to Dismiss or, alternatively, grant [Ellis] leave to amend."). This approach does not suffice in the Eighth Circuit. *See United States ex rel. Ambrosecchia v. Paddock Labs., LLC*, 855 F.3d 949, 956 (8th Cir. 2017) (holding that the district court properly denied leave to amend where plaintiff made only "a one line request in [plaintiff's] brief opposing defendants' motion to dismiss and did not provide the substance of the proposed amendments") (internal quotations omitted); *see also O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 505 (8th Cir. 2009) ("A district court does not abuse its discretion

in denying leave to amend where a plaintiff has not followed applicable procedural rules.").

This Court's decision in *Clayton* confirms the correctness of the district court's ruling. In *Clayton*, this Court held, "in order to preserve the right to amend the complaint, a party must submit the proposed amendment along with its motion." *Clayton*, 778 F.2d at 460. Here, Ellis "did not submit a motion for leave to amend but merely concluded her response to [the defendant's] motion to dismiss with a request for leave to amend" and "did not offer a proposed amended complaint or even the substance of the proposed amendment to the district court." *Clayton*, 778 F.2d at 460. As a result, under *Clayton* and this Court's other precedents cited above, the district court correctly denied leave to amend.

In sum, Ellis' failure to submit a motion for leave to amend the operative complaint gave the district court sufficient reason to refuse such a request. The district court's ruling should be affirmed for this reason alone.

ii. In failing to file a pre-dismissal motion for leave to amend, Ellis also failed to comply with applicable Federal and Local Rules.

The district court's local rules supply an additional ground to affirm its decision. All civil litigants are required to follow applicable procedural rules. *See Beck v. Skon*, 253 F.3d 330, 333 (8th Cir. 2001). The United States District Court for the Eastern District of Missouri's Local Rules *require* submission of "[a]

proposed amendment to a pleading or amended pleading itself … at the time any motion for leave to amend any pleading is filed." *See* E.D. Mo. L.R. 4.07; *UMB Bank, N.A. v. Guerin*, 89 F.4th 1047, 1057 n.5 (8th Cir. 2024) (affirming the district court's dismissal because a "sentence at the end of [a] ... brief addressing Defendants' motion to dismiss … required no response because it did not include a proposed amended complaint" as required by the local rules). Ellis did not comply with this local rule, and the district court properly exercised its discretion in enforcing it.

Even if the district court had been inclined to overlook Ellis' failure to file a motion for leave to amend, the single line in her opposition brief requesting leave to amend provided no indication regarding the substance of any proposed amendment. The district court was "not required to engage in a guessing game" to determine whether Ellis could salvage her allegations. *See Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909, 913 (8th Cir. 2002) (affirming dismissal with prejudice where plaintiff failed to file a motion to amend and failed to specify the proposed new allegations); *Brandt v. Davis*, 191 F.3d 887, 893 (8th Cir. 1999) (finding no abuse of discretion where party failed "to explain how he would amend the complaint to save the claim"); *Sbfo Operator No. 3, LLC v. Onex Corp.*, 101 F.4th 551, 562 (8th Cir. 2024) (affirming the district court's denial of leave to amend where "the [party] fail[ed] to submit a proposed amended complaint, but [] also

merely requested leave in a footnote … without explaining 'how [they] would amend the complaint to save the[ir] claim[s].'").

Ellis failed to comply either with this Court's precedent or the district court's local rules. Her pre-dismissal request for leave to amend was thus doubly deficient, and the district court did not abuse its discretion in denying such leave.

C. The District Court Did Not Abuse Its Discretion in Dismissing Ellis' FAC With Prejudice.

Ellis also incorrectly argues that the district court's dismissal of her FAC with prejudice was "clear error" because there is no pattern of intentional delay or contumacious conduct or a pattern of failed attempts to state a cognizable claim. *See* App. Br. at pp. 9-10 (collecting cases). Ellis' argument misconstrues the applicable legal standard and does not account for her failure to comply with this Court's precedent and the district court's rules. The district court properly dismissed the FAC with prejudice.

i. Neither "intentional delay" nor "contumacious conduct" is required for a dismissal with prejudice under Rule 12(b)(6).

A finding of "intentional delay" or "contumacious conduct" is the standard for dismissal with prejudice as a sanction for failure to prosecute under Rule 41(b) or for disobedience of a court order—not for failure to state a claim under Rule 12(b)(6). *See, e.g.*, *Skelton v. Rapps*, 187 F.3d 902, 908 (8th Cir. 1999) (citing *Clayton*, 778 F.2d at 460)) ("We review a district court's dismissal for failure to

prosecute [under Rule 41(a)] for abuse of discretion,… [since] such a dismissal is a 'drastic and extremely harsh sanction,'" warranted by "delay or contumacious conduct by the plaintiff") (internal citations and quotations omitted). The authority cited in Ellis' opening brief underscores the inapplicability of this standard to the district court's Rule 12(b)(6) dismissal. *See Fletcher v. S. Farm Bureau Life Ins. Co.*, 757 F.2d 953, 954 (8th Cir. 1985) (affirming dismissal with prejudice following plaintiffs' willful disobedience of discovery orders by refusing to submit to IME for over two years); *see also Norman v Arkansas Dept. of Educ.*, 79 F.3d 748, 751 (8th Cir. 1996) (analyzing district court's "power under Fed. R. Civ. P. 41(b) to dismiss a case *sua sponte* for failure to prosecute"); *Navarro v. Chief of Police, Des Moines, Iowa*, 523 F.2d 214, 216-17 (8th Cir. 1975) (reviewing order "dismissing the action under Fed. R. Civ. P. 41(b)").

As set forth above, *Clayton* confirms that the district court correctly denied pre-dismissal leave to amend. *Clayton*, 778 F.2d at 460. Notwithstanding, *Clayton* declined to affirm a district court's dismissal with prejudice for lack of standing under Rule 12(b)(1) in the absence of intentional delay or willful disobedience of a court order. *Id.* Yet all of the precedent on which *Clayton* relied in applying this standard arose in the context of Rule 41(b). *See Pardee v. Stock*, 712 F.2d 1290, 1292 (8th Cir. 1983) ("[d]ismissal with prejudice under Fed. R. Civ. P. 41(b) is a drastic sanction which should be exercised sparingly"); *Cunningham v. Yellowstone*

School District No. 14, 774 F.2d 1170, slip op. at 7 (8th Cir. 1985) (*per curiam*) (same); *Fletcher*, 757 F.2d 261, 263 (same); *Givens v. A.H. Robins Co.*, 751 F.2d 261, 263 (8th Cir. 1984) (same). Other than *Clayton* itself, Ellis has not cited (and Nike has not found) any case where this Court has applied the intentional delay or willful disobedience standard outside the context of a Rule 41(b) dismissal or non-compliance with a court order. *See, e.g.*, *Skelton*, 187 F.3d at 908 (8th Cir. 1999); *Armon v. Berry*, No. 96-1682, 1996 U.S. App. LEXIS 24115, at *2 (8th Cir. Sep. 13, 1996) (reversing dismissal of complaint with prejudice "for noncompliance with [district court's] order" as a "severe sanction"); *Sterling v. United States*, 985 F.2d 411, 412 (8th Cir. 1993) (reviewing "sua sponte dismissal for failure to prosecute" under Rule 41(b)); *David v. Segal*, 962 F.2d 12 (8th Cir. 1992) (under Rule 41(b) "only a clear pattern of delay or 'contumacious conduct' warrants dismissal with prejudice"). And *Clayton* itself did not involve a Rule 12(b)(6) dismissal for failure to state a claim, but rather a dismissal under Rule 12(b)(1) for lack of prudential standing. *Clayton*, 778 F.2d at 460. In fact, this Court has routinely affirmed the dismissal *with prejudice* of a complaint under Rule 12(b)(6) without invoking the intentional delay or willful disobedience standard. *See, e.g.*, *Mitchell v. Morton Cty.*, 28 F.4th 888 (8th Cir. 2022); *Knowles v. TD Ameritrade Holding Corp.*, 2 F.4th 751 (8th Cir. 2021); *see also Orr v. Clement*, 688 F.3d 463, 465 (8th Cir. 2012)

("there is a *presumption* that a dismissal under Rule 12(b)(6) is a judgment on the merits made with prejudice") (emphasis added).

This case involves the failure to state a claim under Rule 12(b)(6), not a failure to prosecute. Because the dismissal was a result of Ellis' repeated failure to state a claim under Rule 12(b)(6)—and not as a sanction under Rule 41(b)—the district court had no need to find delay or contumacious conduct to dismiss the FAC *with prejudice*. Ellis' argument that such conduct a finding was required to support dismissal with prejudice is therefore incorrect.

ii. The District Court did not abuse its discretion in dismissing the FAC with prejudice for failure to state a claim under Rule 12(b)(6).

The district court properly exercised its discretion to dismiss the FAC with prejudice given Ellis' demonstrated inability to state a claim under Rule 12(b)(6). *See Pet Quarters, Inc.*, 559 F.3d at 782 (8th Cir. 2009) (no abuse of discretion in dismissing complaint with prejudice and without opportunity to amend); *see also Knowles*, 2 F.4th at 758 (8th Cir. 2021) (this Court "review[s] the decision to dismiss with prejudice without granting leave to amend for an abuse of discretion."). Despite trying twice, Ellis was unable to allege facts supporting a plausible claim and failed to articulate how she could make her claims viable. The combination of Ellis' failure to state a viable claim (despite already having amended her pleading) and to indicate "how [she] would make the complaint viable, either by submitting a proposed

amendment or indicating somewhere in [her] court filings what an amended complaint would have contained" confirms the propriety of the district court's ruling. *See Pet Quarters, Inc.*, 559 F.3d at 782; s*ee also CNH America LLC v. Int'l Union*, 645 F.3d 785, 795 (6th Cir. 2011) (explaining that "[o]rdinarily, if a district court grants a defendant's 12(b)(6) motion, the court will dismiss the claim without prejudice to give parties an opportunity to fix their pleading defects . . . [b]ut if a party does not file a motion to amend or a proposed amended complaint, it is not an abuse of discretion for the district court to dismiss the claims with prejudice").

Accordingly, the district court did not abuse its discretion in dismissing Ellis' FAC with prejudice.

D. The District Court Did Not Abuse Its Discretion in Denying Ellis' Post-Judgment Request for Leave to Amend.

The district court also properly rejected Ellis' post-judgment request for leave to amend. Post-judgment requests for leave to amend are "disfavored" and "district courts in this circuit have considerable discretion to deny" them. *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 824 (8th Cir. 2009); *see also In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, 623 F.3d 1200, 1208 (8th Cir. 2010) (reiterating that "[p]ost-dismissal motions to amend are disfavored"). District courts have such wide latitude because the "interests of finality dictate that leave to amend should be less freely available after a final order has been entered." *See Hypoguard USA, Inc.*, 559 F.3d at 823.

i. Ellis had notice of the specific shortcomings of her complaints, but she chose to stand on her allegations rather than seek leave to amend.

A district court does not abuse its discretion in denying a post-judgment motion for leave to amend where the plaintiff "chose to stand on his pleadings in the face of the motion to dismiss, which identified the very deficiency upon which the court dismissed the complaint." *Mitan v. McNiel*, 399 F. App'x 144, 145 (8th Cir. 2010) (finding no abuse of discretion in denial of post-judgment motion for leave to amend); *see also Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 665 (8th Cir. 2012) (same). Such is the case here.

Ellis incorrectly asserts that she "received no indication" of the defects in her pleadings. *See* App. Br. at p. 11, fn. 3. The two bases upon which the district court dismissed her claims were specifically identified in *each* of the motions to dismiss filed by Nike. *See* App. 691; R. Doc. 40 at p. 3 ("Both Motions to Dismiss served as notice of the potential deficiencies within Plaintiff's initial and Amended Complaint."). The district court allowed Ellis to amend her Complaint after Nike's initial MTD, and despite setting forth a voluminous amended pleading spanning 47 pages, "it is remarkable how much [Ellis] manage[d] not to say in it." App. 299; R. Doc. 34 at p. 7.

First, the district court correctly noted the implausibility of Ellis' broad allegation that "two thousand of Nike's Sustainability Collection products are not made with any 'recycled and organic fibers.'" App. 298; R. Doc. 34 at p. 6. Ellis could not allege any "information whatsoever to establish how she has concluded that these two thousand products contain *no* recycled or organic fibers and are, in reality, made with virgin synthetic and non-organic materials." App. 296; R. Doc. 34 at p. 4. Nike's first MTD provided Ellis notice of this deficiency before she amended her Complaint (App. 58, 63, 65; R. Doc. 21 at pp. 3, 8, 10) and before the district court's dismissal order (App. 180-82; R. Doc. 28 at pp. 7-9).

In fact, the actual amendments that Ellis made to her Complaint evidence her knowledge of this deficiency. Because she had no knowledge of the actual

composition of Nike's products, Ellis amended her Complaint to falsely allege that Nike had admitted they did not contain recycled or organic fibers. App. 297; R. Doc. 34 at p. 5. The district court flagged this misrepresentation as "unashamedly disregard[ing] Federal Rule of Civil Procedure 11(b)." App. 297; R. Doc. 34 at p. 5. Ellis' failure to seek amendment was not because she was unaware of this deficiency: it was because she could not do anything to rectify it. *See* App. 691; R. Doc. 40 at p. 3 (noting that Ellis "was aware that her amended pleadings may have been deficient, yet she chose to proceed forward with her previously Amended Complaint anyway").

Second, Ellis also received notice of her failure to allege "what specific representations she saw" on multiple occasions. *See* App. 300; R. Doc. 34 at p. 8 (explaining that FAC alleged "nothing about what Plaintiff actually read or heard about the three products she purchased before she purchased them."). Once again, this deficiency was highlighted in both of Nike's motions to dismiss. *See* App. 61; R. Doc. 21 at p. 61 ("[Ellis] makes the generalized allegation that she 'saw the labeling, advertising, [Nike's] website, and read the packaging,' but she does not identify the specific statements that she saw, as required by Rule 9(b)."") (internal citations omitted); App. 179; R. Doc. 28 at p. 6 ("Plaintiff fails to identify what specific statements Nike made on each individual hangtag and why those statements were misleading or false. In fact, Plaintiff only cites a single hangtag, which is not

even the hangtag for one of the products she purchased. She also fails to plead what material facts were allegedly omitted from the materials she reviewed.") (internal citations omitted).

Despite two motions to dismiss, Ellis failed to answer a fundamental question for any fraud claim: "Which [statements] did she see?" App. 300; R. Doc. 34 at p. 8. Ellis' assertion that she had "no indication that any such defects existed" in her deception claim is not supported by the record, which confirms she was on notice.

Ellis' inability to plead these basic facts underscores the propriety of the district court's denial of her post-judgment request for leave to amend. Ellis' choice to delay seeking leave to amend in the face of multiple motions to dismiss identifying the very deficiencies that proved dispositive constitutes precisely the kind of "unexcused delay [that] is sufficient to justify the court's denial." *Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1065 (8th Cir. 2005); *see, e.g.*, *Uradnik v. Inter Fac. Org.*, 2 F.4th 722, 727 (8th Cir. 2021) (explaining that unexcused delay justifies denying leave to amend "when the party knew of the need to change the pleadings and then had her claim dismissed"). As such, the district court did not abuse its discretion in denying Ellis' post-judgment request for leave to amend.

ii. The information in the proposed SAC was available to Ellis and could have been pleaded prior to dismissal.

A district court does not abuse its discretion by denying a post-judgment motion to amend a complaint where the evidence supporting the amendments was previously available, but the party failed to plead it. *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 935 (8th Cir. 2006); *see also Innovative Home Health Care v. P.T.-O.T. Assocs.*, 141 F.3d 1284, 1286 (8th Cir. 1998) (Rule 59(e) motions "cannot be used to . . . raise arguments which could have been offered or raised prior to the entry of judgment."). Because Ellis fails to demonstrate that any evidence of her claims was not previously available, her argument fails.

The district court recognized that "the proposed SAC alleges an independent testing of a sample of Nike's Sustainability Collection clothing and identifies the specific statements Plaintiff relied on when making the purchases." App. 692; R. Doc. 40 at p. 4. Ellis cannot reasonably dispute that she, at all relevant times, was aware of the specific statements she relied upon when making her alleged purchases. Nor can she dispute that she was in possession of the products that she allegedly purchased and could have commissioned testing and alleged facts concerning the results at a much earlier point in this proceeding. After two motions to dismiss, a dismissal with prejudice, and no proper request for leave to amend, it was too late for Ellis to try to fill in the gaps after entry of judgment.

Accordingly, to the extent that any new material information was included in the proposed SAC, it was previously available to Ellis and her election to withhold it is entirely unjustified. The district court correctly denied post-judgment leave to amend for this reason too.

E. Ellis' Proposed Amendments Are Futile.

It is well settled that a district court may dismiss a complaint with prejudice under Rule 12(b)(6) when amendment of a complaint would be futile. *See Pet Quarters, Inc.*, 559 F.3d at 782 (8th Cir. 2009). Nor should a court grant leave to amend post-judgment where the proffered post-judgment amendment suffers from the same legal or other deficiencies as the dismissed pleading. *See In re: Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, 623 F.3d 1200, 1208 (8th Cir. 2010); *Drobnak*, 561 F.3d at 788), or if the proffered amendment is otherwise futile. *United States ex rel. Raynor*, 690 F.3d at 958; *Hintz v. JPMorgan Chase Bank, N.A.*, 686 F.3d 505, 511 (8th Cir. 2012)); *see also Plymouth Cty., Iowa v. Merscorp, Inc.*, 774 F.3d 1155, 1160 (8th Cir. 2014) (amendment allowed only after showing that amendment could save an otherwise meritless claim). The proposed SAC is futile because it fails to address the deficiencies identified by the district court in its dismissal of the FAC. Ellis' conclusion that she "*could* correct any alleged or identified defect in the pleading or otherwise" and "*could* replead her claims … by

asserting more detailed specificity" rings hollow when viewed alongside her proposed SAC. *See* App. Br. at pp. 12-13 (emphasis added).

Indeed, all of Ellis' allegations turn on the false notion that Nike's products are not made from any "recycled" fibers when Nike tells consumers they are. But the proposed SAC *still* does not provide a plausible basis for this conclusion. Instead, Ellis persists in summarily asserting that the products contain no recycled or organic fibers. This unsupported claim was already considered and properly deemed insufficient by the district court.

Ellis purports to rely upon the novel allegation that her counsel commissioned a "well-known" laboratory to "independently test" *two* (out of over *two thousand*) of the products at issue. On this basis, she extrapolates that *none* of the products contain "recycled" fibers or polyester. *See* App. 307, 312, 314, 329, 339; R. Doc. 36-1 at pp. 2, 7, 9, 24, 34. Setting aside for a moment that this information could have been pled at the outset (*see* Section C.2., *supra*), vague allegations of "testing" without explaining how those results came about lack the facts necessary to plausibly support a claim. For example, Ellis does not identify the laboratory, does not explain what tests the laboratory conducted, and does not explain how the laboratory can tell the recycled polyester came from "virgin" polyester.

Nor can Ellis' proposed inclusion of the specific statements she relied on when allegedly making the purchases save her claims. Mere reference to representations

on Nike's website and hangtag labeling statements that certain products from the Sustainability Collection are "Made with at least 75% recycled fibers" and "sustainable" materials do not establish how those representations could be plausibly false, misleading or deceptive. *See, e.g.*, App. 307-08; R. Doc. 36-1 at pp. 2-3. Instead, Ellis continues to allege that those statements are actionable because Nike's own admissions—as evidenced through Exhibit A to the proposed SAC—confirm that none of the products are made with those recycled or sustainable materials. Once again, this is an improper attempt to evade the district court's directives that led to the dismissal of her FAC and do nothing to change the futile nature of her proposed amendment. App. 297; R. Doc. 34 at p. 5.

Moreover, Ellis has also failed to address several other deficiencies outlined in the district court's order dismissing the FAC. *See* App. 297; R. Doc. 34 at p. 5. For example, the proposed SAC says nothing about how the look and feel of the products might indicate their makeup, which would add color to support her conclusion that the products are not made of the exact materials that Nike discloses to consumers. The proposed SAC also puts forward no allegations concerning the supplier of Nike's materials, nor does it touch upon how the manufacturing process could impact the composition of the products that she purchased. The absence of this information—which the district court specifically identified—further dooms the proposed post-judgment pleading.

Ellis' proposed SAC would not survive an attack on the pleadings because they do nothing to rectify the basic deficiencies identified by the district court in dismissing the FAC. The proposed amendments are based on information previously available to her—and which could have been included in a pre-judgment pleading—and continue to double-down on the unsupported conclusion that Nike's products and statements about its products are inconsistent.

In sum, the proposed SAC is based on the same futile theory that the district court correctly dismissed with prejudice. Ellis' further attempt to repackage her allegations should be rejected.

CONCLUSION

The district court's judgment should therefore be affirmed.

DATED this 19th day of September, 2024.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,061 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 using 14-point Times New Roman.

3. Pursuant to 8th Cir. R. 28A(h)(2), the electronic version of this brief has been scanned for viruses and is virus-free.

DATED this 19th day of September, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2024, I electronically submitted for review the foregoing **Defendants-Appellee's Opening Brief** with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be notified and served by the CM/ECF system.

DATED this 19th day of September, 2024.

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