IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Derrick Thomas, *On behalf of himself and those similarly situated,* Plaintiff, v. Papa John's International, Inc.; It's Only Downtown Pizza, Inc.; It's Only Pizza, Inc.; It's Only Downtown Pizza II Inc.; It's Only Papa's Pizza LLC; and Michael Hutmier, Defendants.	Case No. 1:17-CV-00411 Judge Michael R. Barrett

DEFENDANT PAPA JOHN'S INTERNATIONAL, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

Defendant Papa John's International Inc. ("PJI") respectfully submits this memorandum of law in opposition to the Motion for Leave to File First Amended Complaint (the "Motion") filed by Plaintiff Derrick Thomas ("Thomas" or "Plaintiff").

PRELIMINARY STATEMENT

Three years and three months into this litigation, Plaintiff's proposed First Amended Complaint ("FAC") attempts to add a new defendant and a new state-law claim for an Ohio class under Rule 23. (ECF No. 77.) The Court should deny Plaintiff's Motion for a host of reasons, including a lack of good cause, prejudice to PJI, delay, and futility. Accordingly, Plaintiff cannot, as he must, meet his burden under *both* Fed. R. Civ. P. 16(b) and 15(a) to amend the Complaint.[1]

Plaintiff cannot demonstrate good cause under Rule 16(b) because he has not shown that with due diligence he could not have amended the Complaint before the deadline in the Court's Scheduling Order. Nowhere in his Motion does Plaintiff explain, much less justify, why he could not have asserted an unjust enrichment claim at the beginning of this case or at least within the three years leading up to the Scheduling Order's deadline. This omission is fatal to Plaintiff's Motion.

Instead, Plaintiff's sole argument is that "good cause" exists because "Plaintiff's unjust enrichment theory has just recently been accepted by another court in the Southern District of Ohio." (ECF No. 77 at 9.) According to Plaintiff, Judge Algernon Marbley's decision on September 28, 2020 – which denied the dismissal of an unjust enrichment claim – somehow excuses his late amendment. (*Id.*)

[1] PJI's Opposition is directed to Plaintiff's proposed unjust enrichment claim. Contemporaneous to this filing, the Franchisee Defendants (It's Only Downtown Pizza, Inc.; It's Only Pizza, Inc.; It's Only Downtown Pizza II Inc.; It's Only Papa's Pizza LLC; and Michael Hutmier) are submitting an Opposition directed to Plaintiff's proposed amendment adding Chip Phelps as a defendant. PJI, therefore, joins in, and incorporates by reference herein, the Franchisee Defendants' Opposition.

Not only does this argument lack *any* legal support, worse, it suffers from a level of implausibility that borders on disingenuous. Plaintiff's attorneys, Andrew Biller and Andrew Kimble, routinely bring delivery driver reimbursement lawsuits, and they have asserted nearly identical claims for unjust enrichment in at least *six* other such lawsuits. Four of those lawsuits were brought right here in the Southern District of Ohio, and two were brought in the Northern District of Ohio. Importantly, all of the unjust enrichment claims in those cases were asserted *before* this Court's Scheduling Order deadline. Hence, with minimal diligence, Plaintiff could have easily amended the Complaint before the Scheduling Order deadline.[2]

In addition, adding an unjust enrichment claim is prejudicial to PJI. Plaintiff's unjust enrichment claim significantly expands the scope of the putative Rule 23 class, doubling the class period and stretching it back nearly a decade to June 16, 2011. As a result, PJI will expend significant resources on collecting, processing, and reviewing new data and Electronically Stored Information ("ESI"), as well as reviewing ESI that was previously collected and produced. Because Plaintiff's proposed amendment is prejudicial to PJI, Plaintiff cannot demonstrate "good cause" under Rule 16(b) or meet the requirements of Rule 15(a).

Plaintiff's Motion should be denied for the additional and independent reason that Plaintiff's proposed amendment is futile. Because Plaintiff has an adequate remedy at law under the Fair Labor Standards Act ("FLSA") and the Ohio Constitution, Article II, ("Ohio Minimum Wage Law"), and Plaintiff, in fact, asserts claims under those statutes, Plaintiff is not entitled to equitable relief and his unjust enrichment claim cannot survive a motion to dismiss. As such, Plaintiff cannot satisfy Rule 15(a), and the Court should deny Plaintiff's Motion.

[2] For similar reasons, Plaintiff has engaged in undue delay under Rule 15(a).

In sum, Plaintiff's amendment would be fundamentally unfair to PJI, and Plaintiff has not demonstrated good cause or any other justification to allow it at this late stage. Plaintiff's proffered excuses have all the hallmark attributes of neglect and the proposed FAC guarantees to unnecessarily complicate this case, while increasing discovery costs to PJI. Plaintiff's implied suggestion that he could not have amended the Complaint prior to Judge Marbley's decision on September 28, 2020, simply cannot be reconciled with his counsel's history of comfortably asserting unjust enrichment claims before that decision. Whatever the reason, Plaintiff must now live with the decision to not assert an unjust enrichment claim, and PJI should not be subject to Plaintiff's ever-evolving theories of liability. The time has come, as it does in all litigation, for Plaintiff to stand upon the allegations he is asserting. For all of these reasons, the Court should deny Plaintiff's Motion.

RELEVANT BACKGROUND

Plaintiff filed his Complaint over three years ago – on June 16, 2017. (ECF No. 1.) On September 5, 2017, PJI moved to Dismiss, Transfer the Case to the Southern District of New York, or Stay the Case. (ECF No. 10.) Two months later, PJI also filed a Motion to Strike or, In the Alternative, to Stay Plaintiff's Motion for Conditional Certification. (ECF No. 25.)

On September 30, 2018, the Court denied PJI's Motion to Dismiss and ruled that PJI's Motion to Stay was moot. (ECF No. 40.) Pursuant to the Court's Scheduling Order, Plaintiff had until August 3, 2020 to seek leave to file an amended complaint. (ECF No. 74.)

The Court never issued a stay in this case, and Plaintiff was at all times free to move to amend the Complaint. Plaintiff does not argue otherwise. Even if Plaintiff believed he could not move to amend the Complaint while PJI's Motion to Stay was pending, Plaintiff still had nearly two years to conduct discovery and/or amend the Complaint within the Scheduling Order deadline

– from September 30, 2018 (the date the Court ruled that a stay was moot), until August 3, 2020 (the Scheduling Order deadline to amend).

ARGUMENT

I. PLAINTIFF CANNOT MEET HIS BURDEN UNDER RULE 16(b) OR RULE 15(a) TO AMEND THE COMPLAINT TO ADD NEW A NEW CLAIM

Generally, motions to amend pleadings are governed by Rule 15(a) of the Federal Rules of Civil Procedure. *Cooke v. AT&T Corp.*, No. 2:05-CV-374, 2007 WL 188568, at *1 (S.D. Ohio Jan. 22, 2007). When, as here, "the court has issued a scheduling order setting a deadline for motions to amend the pleadings, however, a subsequent motion for leave to amend must first be analyzed under Rule 16(b) before determining whether the motion satisfies Rule 15(a)." *Id.* In other words, Rule 16 "prescribes the time by which any motion for leave to amend must be filed; Rule 15 provides guidance to the courts on deciding the merits of *timely* motions." *Id.* (emphasis added). After a scheduling order has been issued, Rule 16(b) permits the Court to modify that order only upon a "showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension." *Id.*

A. Plaintiff Cannot Satisfy Rule 16(b)'s Good Cause Requirement Because He Cannot Demonstrate That Despite Due Diligence He Could Not Have Met The Scheduling Order Deadline

"Diligence of the moving party highlights the primary element in meeting 16(b)'s 'good cause' standard; as explained by the 1983 Advisory Committee Notes, 'the court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension.'" *Id.*; *Greene v. Ab Coaster Holdings, Inc.*, No. 2:10-CV-234, 2012 WL 2342927, at *3 (S.D. Ohio June 20, 2012) (denying an amendment and stating "[t]he party seeking an extension must show that despite due diligence it could not have reasonably met the scheduled deadlines.") (quotation omitted).

Here, there is simply no explanation offered, much less good cause established, to justify Plaintiff's late amendment. Critically, Plaintiff does not argue that he lacked the information necessary to assert an unjust enrichment claim against the Defendants at the inception of this case, or that despite due diligence he could not have met the Scheduling Order deadline.[3] Nor can he, as Plaintiff's unjust enrichment claim is premised on the *exact* same core facts and allegations that support the Complaint's FLSA and Ohio Minimum Wage Law claims. Those allegations are that Defendant's vehicle reimbursement policy failed to sufficiently reimburse delivery drivers for their vehicle costs, which in turn drove their wages below the statutory minimums. (ECF No. 1 ¶ 7); *Cooke*, 2007 WL 188568, at *2 (denying an amendment where "Plaintiffs offer no evidence to show they were unaware of critical facts that prohibited them from amending their complaint.").

Instead of demonstrating that despite due diligence he could not have met the Scheduling Order deadline, Plaintiff *exclusively* argues that "good cause" exists because "Plaintiff's unjust enrichment theory has just recently been accepted by another court in the Southern District of Ohio." (ECF No. 77 at 9.) "As such," Plaintiff argues, "in this changing landscape of legal applications in the delivery driver-pizza company context," he should be permitted to bring a similar unjust enrichment claim. (*Id*. at 3.)

Plaintiff's Motion, however, does not offer a single case in support of this argument. A larger and more serious flaw in Plaintiff's argument is that it is not plausible and borderline disingenuous. Plaintiffs' attorneys, Andrew Biller and Andrew Kimble, routinely bring delivery driver reimbursement lawsuits, and they have asserted claims for unjust enrichment in *at least six*

[3] In support of his argument to name Chip Phelps as a defendant, Plaintiff expressly states that the information learned in Mr. Phelps' deposition was "was unknown to Plaintiff before the Calendar deadline . . . ." (ECF No. 77 at 9.) In contrast, Plaintiff makes no such argument with respect to demonstrating "good cause" to allow his late unjust enrichment claim. Plaintiff's silence on this issue is a tacit admission that he possessed everything needed (facts and law) to assert an unjust enrichment claim within the Scheduling Order deadline, but unjustifiably failed to do so.

other such lawsuits. (Declaration of Gerald L. Maatman Jr., ¶¶ 5-9.) Four of those lawsuits were brought right here in the Southern District of Ohio, and two were brought in the Northern District of Ohio. (*Id*.) The earliest of those lawsuits was filed on September 11, 2019 (over a year ago) and one of the Southern District of Ohio cases was filed as long ago as November 22, 2019. (*Id*.) Critically, the unjust enrichment claims in those lawsuits were all asserted well before this Court's August 3, 2020 amendment deadline. (ECF No. 74.) Those cases are listed below:

- *William Bailey v. Six Slice Acquisitions LLC*,
  Case No.: 1:20-CV-432 (S.D. Ohio May 28, 2020)
- *Paul Mullins v. Data Management Co*.,
  Case No.: 1:20-CV-214 (S.D. Ohio, Mar. 16, 2020)
- *Michael Bradford v. Team Pizza Inc*.
  Case No.: 1:20-CV-60 (S.D. Ohio Jan. 24, 2020)
- *Kirk Waters v. Pizza To You LLC*,
  Case No.: 3:19-CV-372 (S.D. Ohio Nov. 22, 2019)
- *Vince Montemarano v. Master Group Enterprises LLC. et al*.
  Case No.: 1:19-CV-2387 (N.D. Ohio Oct. 14, 2019)
- *Matthew Branning v. Romeo's Pizza Inc*.,
  Case No.: 1:19-CV-2092 (N.D. Ohio Sept. 11, 2019)

(Maatman Dec. ¶¶ 5-9, Exs. 1-6.) It simply does not makes sense that Plaintiff's counsel could assert an unjust enrichment claim in *each* of these six other delivery driver lawsuits, but somehow they were not prompted to do so in this case until Judge Marbley rendered his decision on September 28, 2020.[4] (ECF No. 77 at 3.)

Confronted with a similar implausible excuse, the Sixth Circuit rejected a plaintiff's proposed amendment under Rule 16(b). In *Carrizo (Utica) LLC v. City of Girard, Ohio*, 661 F.

[4] "[A]n attorney's knowledge is imputed to his client." *Britt v. Gwyn*, 902 F.2d 32 (6th Cir. 1990) (citing *Gerl Constr. Co. v. Medina County Board of Com'rs*, 24 Ohio App.3d 59, 66 (1985)); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396 (1993) ("clients must be held accountable for the acts and omissions of their attorneys").

App'x 364, 367–68 (6th Cir. 2016), plaintiff sought leave to amend the complaint to add two new claims – breach of contract and slander of title. *Id*. Plaintiff argued that these claims could not have been brought until there was a finding that the lease at issue was invalid. *Id*. The Sixth Circuit rejected this argument and affirmed the district court's denial of the amendment. *Id*. at 369. Crucial to the Sixth Circuit's holding was that plaintiff's original complaint "included claims . . . that depended on a finding that the lease was invalid." *Id*. The Sixth Circuit explained that because plaintiff "brought some claims before the deadline that depended on a determination of the lease's validity" it was appropriate for the district court to conclude that there was "no reason why [plaintiff] could not have brought the slander-of-title and breach-of-contract claims before the deadline." *Id*.

The Sixth Circuit's logic in *Carrizo* highlights the inconsistency in Plaintiff's position. None of the unjust enrichment claims brought by Plaintiff's counsel in their six other delivery driver lawsuits depended on Judge Marbley's decision on September 28, 2020. Yet Plaintiff now asks the Court to believe that Judge Marbley's September 28, 2020 decision, a non-binding authority before this Court, was somehow the triggering event that prompted him to add an unjust enrichment claim. Consistent with *Carrizo*, the Court should reject Plaintiff's justification as incredible. As described above, Plaintiff's counsel asserted six other similar unjust enrichment claims *before* the Scheduling Order's deadline, and there is no reason why Plaintiff could not have done the same here. *See DN Reynoldsburg v. Shoe Show, Inc*., No. 2:18-CV-1190, 2019 WL 4233129, at *3 (S.D. Ohio Sept. 6, 2019) (finding no "good cause" where other evidence "disproves Plaintiff's assertion that it was unaware" and that "Plaintiff has misrepresented its knowledge of the time when it first learned of Defendant's intent to bring this defense.").

At the end of the day, Plaintiff's halfhearted suggestion that his proposed unjust enrichment claim is novel and groundbreaking simply cannot be reconciled with Mr. Kimble and Mr. Biller's history of asserting these claims. *See In re Emerson Elec. Co. Wet/Dry Vac Mktg. & Sales Litig.*, No. 4:12-MD-2382-HEA, 2020 WL 3832571, at *2 (E.D. Mo. July 8, 2020) (rejecting plaintiff's proposed amendment as not based on an "issue novel, ground-breaking, or new"). The Court should find that Plaintiff's "explanation for his failure to timely move for leave to amend is implausible and insufficient." *Curol v. Energy Res. Tech., Inc.*, No. CIV.A. 03-3126, 2004 WL 2609963, at *3 (E.D. La. Nov. 16, 2004).

Rather, the only credible explanation for Plaintiff's tardiness is oversight or deliberate choice. Neither, however, demonstrates diligence or good cause. *See Wagner v. Mastiffs*, No. 2:08-CV-431, 2011 WL 124226, at *4 (S.D. Ohio Jan. 14, 2011) ("Of course, '[c]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief."') (citation omitted); *Cooke*, 2007 WL 188568, at *2 ("oversight is ordinarily incompatible with a finding of diligence"); *Majestic Bldg. Maint., Inc. v. Huntington Bancshares In*c., No. 2:15-CV-3023, 2018 WL 3358641, at *4 (S.D. Ohio July 10, 2018) (same); *North Start Mut. Ins. Co. v. Zurich Ins. C*o., 269 F.Supp.2d 1140, 1145 (D. Minn. 2003) ('"[C]arelessness, inadvertence, or inattention' is not compatible with a finding of diligence so as to support modification of scheduling order deadlines.") (citation omitted); *see also In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 843 (6th Cir. 2020) (reversing and finding no good cause where plaintiffs "did not bring their dispensing claims earlier because they expressly chose not to bring them."); *United States v. Univ. Hosp., Inc.*, No. 1:05-CV-445, 2008 WL 11374344, at *3 (S.D. Ohio May 7, 2008) (finding lack of good cause where "Plaintiff clearly made a strategic decision to litigate this case on a narrow front.").

Even if Plaintiff's argument were plausible, it would nevertheless fail because it is undeveloped and substantively deficient. Although Plaintiff cannot bring himself to assert that his late amendment should be excused because Judge Marbley's decision represents a controlling change in substantive law, that is clearly the implication that Plaintiff intends the Court to infer.

Plaintiff, however, offers no authority or support for such a breathtaking conclusion.[5] Indeed, there is none. While some courts have concluded that a supervening change in controlling law may support a finding of "good cause," (*see, e.g.*, *Elsevier Inc. v. Grossmann*, No. 12 CIV. 5121 (KPF), 2017 WL 1843298, at *9 (S.D.N.Y. May 8, 2017), PJI has not located any authority to suggest that courts in the Southern District of Ohio consider this factor. Plaintiff, moreover, offers no evidence that Judge Marbley's decision in *Clark v. Pizza Baker, Inc*., No. 2:18-cv-15 (S.D. Ohio), ECF No. 151 represents, in Plaintiff's words, a change in the legal "landscape." (ECF No. 77. at 3.) Also, the *Clark* decision is not "controlling law." *See Camreta v. Greene,* 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation omitted). In the absence of any authority that Judge Marbley's decision in *Clark* is a *supervening change in controlling law*, the Court should find a lack of good cause.

The Court should reject Plaintiff's "good cause" argument for yet another reason. Plaintiff argues that "good cause" exists and that he acted diligently because he "has not delayed in seeking amendment" after learning of Judge Marbley's September 28, 2020 decision. (ECF No. 77 at 9.)

[5] To extent that Plaintiff's Reply brief will attempt to develop this argument for the first time, the Court should reject it as waived. *See Davis v. CSX Transportation, Inc*., No. 2:12-CV-470, 2015 WL 11123313, at *2 (S.D. Ohio Mar. 2, 2015) ("Arguments raised for the first time in a reply brief are waived.") (citing *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010)). To the extent that Plaintiff's Reply brief offers case law regarding this issue for the first time, and to the extent the Court is inclined to consider such authority and argument, PJI respectfully requests the opportunity to file a sur-reply to address these new arguments. *Hina v. Anchor Glass Container Corp.*, No. 2:05-CV-008, 2008 WL 2201979, at *4 (S.D. Ohio May 23, 2008) (granting leave to file sur-reply to address new issues raised for the first time in reply memorandum).

But this argument conflates Rule 15(a)'s "undue delay" factor with Rule 16(b)'s diligence requirement. Contrary to Plaintiff's belief, "[t]he focus of the diligence issue under Rule 16(b) is not how quickly counsel moved to amend once he became aware of this information." *Stanich v. Hissong Grp., Inc.*, No. 2:09-CV-143, 2011 WL 1560650, at *4 (S.D. Ohio Apr. 25, 2011) (denying motion to amend).

Instead, Plaintiff "must demonstrate that [he] could not reasonably have amended . . . prior to the deadline, despite [his] due diligence." *Id.; see also Greene v. Ab Coaster Holdings, Inc.*, No. 2:10-CV-234, 2012 WL 2342927, at *3 (S.D. Ohio June 20, 2012) ("[t]he party seeking an extension must show that despite due diligence it could not have reasonably met the scheduled deadlines."); *Klotz v. Lowe's Home Centers, LLC*, No. 4:17-CV-282 CAS, 2018 WL 837736, at *3 (E.D. Mo. Feb. 13, 2018) (denying proposed amendment and finding no good cause where plaintiff sought "to assert a claim he knew about when the case was filed.").

Nowhere in Plaintiff's Motion does he demonstrate, as he must, that despite his due diligence, he could not have amended the Complaint prior to the Scheduling Order's deadline. Since the inception of this case, Plaintiff has had all of the facts necessary to assert an unjust enrichment claim, and his counsel were well aware of such a theory. There was nothing preventing Plaintiff from amending the Complaint before the Scheduling Order's deadline, and he could have easily done so with the slightest amount of diligence.

Courts in this jurisdiction and jurisdictions around the country routinely deny amendments when, as here, plaintiffs fail to act diligently in moving to amend or when they possessed the necessary information to amend within the scheduling order deadline. "A plaintiff does not establish good cause for an amendment if he is aware of the facts underlying the proposed amendment but fails to move to amend the complaint before the deadline." *Williams v. Collins*,

No. 1:15-CV-337, 2016 WL 10636361, at *2 (S.D. Ohio Mar. 23, 2016) (citing *Ross v. American Red Cross*, 567 Fed. Appx. 296, 306 (6th Cir. 2014); *United States v. Univ. Hosp., Inc.*, No. 1:05-CV-445, 2008 WL 11374344, at *3 (S.D. Ohio May 7, 2008) (denying an amendment for lack of good cause where " Plaintiff has failed to establish why it could not have or did not put forth its alternative theory of liability in the three years since it originally filed its complaint)*; Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 341 (2d Cir. 2000) (affirming denial of leave to amend for lack of good cause under Rule 16(b) where plaintiff "had all the information necessary to support a breach of contract claim, and nothing he learned in discovery or otherwise altered that fact."); *ADA-ES, Inc. v. Big Rivers Elec. Corp.*, No. 4:18-CV-00016-JHM, 2020 WL 3065102, at *4 (W.D. Ky. June 9, 2020) ("Because ADA could have asserted this good faith claim when it filed its first amended complaint nearly three years ago and permitting such an amendment now would create needless delay, the request to add this claim is DENIED."); *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) ("[W]e have held that a district court does not abuse its discretion in denying a motion to amend where the movant presents no new facts but only new theories and provides no satisfactory explanation for his failure to fully develop his contentions originally.").

In sum, Plaintiff has failed to demonstrate that with due diligence he could not have met the deadline to amend. To the contrary, Plaintiff had all he needed to assert an unjust enrichment claim at the outset of this case, and beyond that, there was still was ample time to amend within the three years prior to the Scheduling Order's deadline.

1. *PJI Will Suffer Prejudice If Plaintiff Is Allowed To Amend The Complaint*

Plaintiff cannot demonstrate "good cause" for yet another critical reason. "[I]n addition to Rule 16's explicit 'good cause' requirement . . . a determination of the potential prejudice to the nonmovant also is required when a district court decides whether or not to amend a scheduling

order." *Leary v. Daeschn*er, 349 F.3d 888, 909 (6th Cir. 2003). "[T]he absence of prejudice to the opposing party is not equivalent to a showing of good cause." *Wagner*, 2011 WL 124226, at *4. Hence, even Plaintiff's amendment would not prejudice PJI, Plaintiff "must still provide good cause for failing to move to amend by the Court's deadline." *Jules v. Police Dep't Vill. of Obetz*, No. 2:11-CV-582, 2013 WL 526441, at *2 (S.D. Ohio Feb. 11, 2013).

Here, Plaintiff's proposed unjust enrichment claim prejudices PJI in at least two fundamental ways. First, it forces PJI to incur significant costs related to additional discovery, specifically, the collecting, processing, reviewing, and hosting of additional ESI. Second, it forces PJI to incur discovery costs related to the *re-review* of ESI that was previously collected and produced.

More specifically, Plaintiff's proposed unjust enrichment claim has a six year statute of limitations, which is *double* the limitations period for the Complaint's FLSA and Ohio Minimum Wage law claims. As a result, Plaintiff's proposed unjust enrichment claim stretches the class period back nearly a *decade* to June 16, 2011. (ECF No. 77.) Doubling the class period to include an entirely new claim will fundamentally alter the parameters of discovery in this case and cause PJI prejudice by forcing it to engage in costly and piecemeal discovery of ESI.

PJI has already produced approximately 15,000 documents spanning 38,000 pages, as well as structured polling data spanning over 350,000 records. This exported data was based on the operative Complaint's class period, and likewise the ESI was collected from ESI custodians identified as relevant based on the operative Complaint's class period. (Maatman Decl. ¶ 10.) To complete that production, PJI incurred costs associated with collecting, processing, reviewing, and producing ESI. (*Id.*) Stretching the class period back another three years – after PJI's ESI production is now complete – is the definition of inefficient, as it will force PJI to incur discovery

costs for attorney labor hours, paralegal labor hours, vendor labor hours, and vendor processing and hosting fees, all of which should have been encompassed within PJI's now-complete efforts to conduct its initial ESI collection and production. (*Id.* ¶ 11.) PJI estimates this cost to be $100,000. (*Id.*)

In addition to collecting and producing *new* ESI, PJI will likewise have to *re-review* all of the ESI it has previously collected. An Ohio common law claim for unjust enrichment has different elements than a FLSA claim, and consequently, PJI will have to re-review documents previously collected to determine if they are relevant to Plaintiff's new theory of liability, where they may not have been relevant before. For the same reasons, PJI will also have to re-review the ESI that it has already produced to determine if any of the documents are likely to be relied upon by Plaintiff at depositions, and/or are relevant to PJI's defense of an unjust enrichment claim.

Courts have denied amendments on these grounds and found prejudice to the non-moving party when, as here, a plaintiff seeks to add an entirely new claim that requires additional discovery at a cost to defendants. *See Majestic Bldg. Maint., Inc.* 2018 WL 3358641, at *4 (finding prejudice because "such an amendment thus would require additional factual investigation and document review"); *Jules* No. WL 526441, at *3 (finding prejudice and denying an amendment of new claim "outside the original scope of the claims he alleges in the operative complaint" because "Defendants would need to conduct additional discovery").

Plaintiff's argument that PJI will not suffer prejudice wholly ignores these issues. (ECF No. 77 at 12.) Although Plaintiff correctly points out that discovery has not yet closed, nowhere does Plaintiff address the prejudice resulting from re-viewing ESI or the costs associated with the piecemeal collection, review, and production of ESI. Plaintiff's lack of foresight runs counter to the classic proverb, "measure twice and cut once." PJI should not be forced to absorb the

significant financial burden that flows from Plaintiff's oversight or strategic decision to not pursue an unjust enrichment claim at the beginning of the case.

Because Plaintiff has not demonstrated that the addition of his unjust enrichment claim will not prejudice PJI, the Court should find that Plaintiff has not demonstrated "good cause." Accordingly, Plaintiff cannot meet his burden under Rule 16(b), and the Court should deny Plaintiff's Motion.[6]

B. Plaintiff Also Cannot Satisfy Rule 15(a)'s Requirements

Even if Plaintiff demonstrates "good cause" under Rule 16(b) – which he has not – Plaintiff must also demonstrate that an amendment is proper under Rule 15(a). *See DN Reynoldsburg*, 2019 WL 4233129, at *3. Factors that may affect that determination include undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendment, undue prejudice to the opposing party, and futility of the amendment. *Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 459 (6th Cir. 2001). Any of these grounds independently provide reason to deny the Motion and several are present here.

1. *Plaintiff Engaged In Undue Delay And PJI Will Suffer Undue Prejudice If Plaintiff Is Permitted To Amend*

PJI incorporates its argument from Sections A and A.1., *supra*, regarding delay and prejudice as if fully set forth herein. As discussed in detail above, Plaintiff possessed all of the necessary information to amend, and there is no excuse for Plaintiff's delay because his unjust enrichment claim could have been asserted nearly three years ago. *See supra* pp. 5-8; *Cassidy v. Teaching Co., LLC*, No. 2:13-CV-884, 2014 WL 12717971, at *3 (S.D. Ohio Aug. 19, 2014)

[6] Because Plaintiff has "not established the good cause required for a modification of the case schedule under Rule 16(b)" the "Court need not undertake any analysis under Rule 15(a)." *Greene v. Ab Coaster Holdings, Inc.*, No. 2:10-CV-234, 2012 WL 2342927, at *4 (S.D. Ohio June 20, 2012). Nevertheless, for sake of thoroughness, PJI addresses Rule 15(a)'s requirements in Section B, *infra*.

(denying amendment under Rule 15(a) where case had been pending for over a year); *Tolliver v. Collins*, No. 2:08-CV-722, 2011 WL 4916193, at *2 (S.D. Ohio Oct. 14, 2011) (denying leave to amend under Rule 15(a) where plaintiff offered no explanation for his delay).

Similarly, for the reasons set forth in Section A.1., *supra*, adding an unjust enrichment claim at this point in the case will significantly prejudice PJI. *See Duchon v. Cajon Co.*, 791 F.2d 43, 48 (6th Cir. 1986) (affirming denial of leave to amend under Rule 15(a) and stating "Prejudice . . . is a legitimate basis for denial of leave to amend"); *Cassidy*, No. 2:13-CV-884, 2014 WL 12717971, at *3 (denying amendment under Rule 15(a) that would "result in unreasonable burden on defendant in the form of increased litigation expenses").

Thus, Plaintiff engaged in undue delay and his proposed unjust enrichment claim prejudices PJI. As such, Plaintiff cannot demonstrate that his amendment is satisfies Rule 15(a).

2. *Plaintiff's Proposed Amendment Is Futile Because The Unjust Enrichment Claim Cannot Survive A Rule 12(b)(6) Motion To Dismiss*

Plaintiff's request for leave to amend should be denied on the basis of futility alone. It is well established that leave to amend need not be granted where the proposed amendment would be futile. *See McDonald v. Lasslett*, No. 18-2435, 2019 WL 2592572, at *2 (6th Cir. 2019). "A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss." *Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010) (citation omitted). "Leave to amend may independently be denied on grounds of futility if the proposed amendment fails to state a legally cognizable claim." *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 726 (2d Cir. 2010).

Plaintiff's proposed amendment is futile because Plaintiff's unjust enrichment claim fails as a matter of law and is subject to dismissal under Rule 12(b)(6). Because Plaintiff has an adequate remedy at law under the FLSA and Ohio minimum wage statute, and Plaintiff, in fact, asserts

claims under those statutes, Plaintiff is not entitled to equitable relief and his unjust enrichment claim cannot survive a motion to dismiss.

Ohio law governs Plaintiff's common law unjust enrichment claim. Under Ohio law, an unjust enrichment claim seeks an equitable remedy and "Ohio law has consistently held that where there is an adequate remedy at law, an equitable remedy is improper." *McNulty v. PLS Acquisition Corp*., Nos. 79025, 79125, 79195, 2002 WL 31875200, ¶ 80 (Ohio App. 8 Dist. Dec. 26, 2002); *see also Associated Estates Corp. v. Bartell*, 492 N.E.2d 841, 847 (Ohio App. 8 Dist. Feb. 25, 1985) ("since there is an adequate remedy at law, equity will not intervene); *Saraf v. Maronda Homes, Inc. of Ohio*, No. 02AP-461, 2002 WL 31750249, ¶ 11 (Ohio App. 10 Dist. Dec. 10, 2002) ("The doctrine of unjust enrichment provides an equitable remedy . . . ."); *Dobbs Law of Remedies*, 4.1(2), at 556 (2d ed. 1993) ("[I]f the plaintiff has no substantive claim grounded in tort, contract, or statute, then if the plaintiff's claim is viable at all, it must be one for restitution to prevent unjust enrichment. That is so because restitutionary ideals form the only substantive basis for the claim.").

Consistent with this rule, Ohio courts, including the Ohio Supreme Court, have dismissed or otherwise rejected unjust enrichment claims in a variety of contexts. For example, in *N. Olmsted City Sch. Dist. Bd. of Edn. v. Cleveland Mun. Sch. Dist. Bd. of Edn*., 844 N.E.2d 832, 837,839 (Ohio 2006), the Ohio Supreme Court affirmed the judgment of the court of appeals that unjust-enrichment recovery was unavailable. There, a plaintiff school district sought personal property tax money that it claimed was improperly credited to another school district. *Id*. at 832-33. The Ohio Supreme Court concluded that plaintiff could not recover under a theory of unjust enrichment because specific remedies were available under a statutory scheme:

> We determine that, given the remedies contained within the statutory scheme, it is not appropriate to provide an additional remedy through an unjust-enrichment recovery.

> If the General Assembly wishes to provide additional remedies, that is its prerogative, but this is not a situation in which extrastatutory remedies are appropriate, and we decline to recognize further avenues for recovery.

Id. at 838-39; *see also Brown v. Ohio Tax Commr.*, No. 11AP-349, 2012 WL 6062851, ¶ 21 (Ohio App. 10 Dist. Dec. 6, 2012) (reversing trial court for not dismissing an unjust enrichment claim where plaintiff had an adequate remedy under Ohio statutory tax scheme); *Garb-Ko, Inc. v. Benderson*, No. 12AP-430 2013 WL 1303815, ¶ 29 (Ohio App. 10 Dist. Mar. 29, 2013) (finding unjust enrichment claim failed to state a claim where there was an adequate remedy at law under the lease); *RFC Capital Corp. v. EarthLink, Inc.*, No. 03AP-735, 2004 WL 2980402, ¶ 81 (Ohio App. 10 Dist. Dec. 23, 2004) (finding that plaintiff could not seek an unjust enrichment claim where there was an adequate remedy in tort for impairment); *Banks v. Nationwide Mut. Fire Ins. Co.*, No. 99AP-1413, 2000 WL 1742064, at *5 (Ohio Ct. App. Nov. 28, 2000) ("The law, therefore, need not imply a debt at equity to provide a remedy. Indeed, under plaintiff's theory, almost every alleged consumer fraud would be actionable as 'unjust enrichment' . . . .").

Following this principle, the Sixth Circuit has affirmed the dismissal of unjust enrichment claims where, as here, there is an adequate remedy at law. S*ee Randolph v. New England Mut. Life Ins. Co.*, 526 F.2d 1383, 1387 (6th Cir. 1975). The Sixth Circuit has likewise admonished that "because equitable relief is an extraordinary remedy to be cautiously granted, it follows that the scope of relief should be strictly tailored to accomplish only that which the situation specifically requires and which cannot be attained through legal remedy." *Aluminum Workers Int'l Union, AFL-CIO, Local Union No. 215 v. Consol. Aluminum Corp.*, 696 F.2d 437, 446 (6th Cir. 1982).

Other courts have reached the same conclusion. *See, e.g., Duffie v. Michigan Grp., Inc. - Livingston*, No. 14-CV-14148, 2016 WL 8259511, at *1 (E.D. Mich. Jan. 15, 2016) (dismissing unjust enrichment claim because plaintiff had an adequate remedy under the FLSA, and holding:

"plaintiff's unjust enrichment claim must be dismissed in its entirety, because a full, complete, and adequate remedy existed at law . . . ."); *Vargas v. Spirit Delivery & Distribution Servs., Inc.*, 245 F. Supp. 3d 268, 280 (D. Mass. 2017) (finding quantum meruit unavailable where the Massachusetts Wage Act provided an "adequate remedy at law"); *In re Apple and AT & T iPad Unlimited Data Plan Litig.*, 802 F. Supp. 2d 1070, 1077 (N.D. Cal. 2011) ("[P]laintiffs cannot assert unjust enrichment claims that are merely duplicative of statutory or tort claims."); *Crigger v. Fahnestock and Co., Inc.*, No. 01–cv–7819, 2003 WL 22170607, at *12 (S.D.N.Y. Sept. 18, 2003) (dismissing an unjust enrichment claim that recast plaintiff's fraud claim and holding that "where a remedy at law will provide an adequate action for compensatory damages, a court will not allow a claim in equity").

Lastly, Plaintiff will no doubt argue that even if there is an adequate remedy at law, plaintiffs are permitted to plead an unjust enrichment claim in the alternative. This is incorrect. Allowing Plaintiff to alternatively plead an unjust enrichment claim would impermissibly enlarge Plaintiff's substantive rights under Ohio state law, in violation of the Federal Rules of Civil Procedure. Adhering to this rule, courts in this jurisdiction "have dismissed unjust enrichment and quasi-contract claims 'even though Fed. R. Civ. P. 8(e)(2) permits alternative pleading, because the Federal Rules of Civil Procedure do not alter substantive rights among the parties' established by state law." *Colley v. Procter & Gamble Co.*, No. 1:16-CV-918, 2016 WL 5791658, at *15 (S.D. Ohio Oct. 4, 2016) (dismissing an unjust enrichment claim because there was an adequate remedy at law and rejecting plaintiff's contention that it could be pleaded in the alternative); *Klusty v. Taco Bell Corp.*, 909 F. Supp. 516, 521 (S.D. Ohio 1995) (dismissing an unjust enrichment claim pleaded alternatively when there was an adequate remedy at law: "Ohio does not recognize unjust enrichment as an alternative theory of recovery when an express contract covers the same

subject."). Hence, although "Rule 8(e)(2) of the Federal Rules of Civil Procedure allows a party to set forth alternate or hypothetical claims" courts in this jurisdiction are clear that "[t]hey do not confer substantive rights on the parties that do not exist in state law." *Davis & Tatera, Inc. v. Gray-Syracuse, Inc.*, 796 F. Supp. 1078, 1086 (S.D. Ohio 1992) (dismissing unjust enrichment claim).

Accordingly, Plaintiff's unjust enrichment claim is futile and the Court should deny Plaintiff's proposed amendment on this basis alone.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion and grant any other relief it deems just and appropriate.

DATED: October 26, 2020

Respectfully submitted,

PAPA JOHN'S INTERNATIONAL, INC.

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CERTIFICATE OF SERVICE

I certify that on October 26, the foregoing document was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Gerald L. Maatman, Jr.