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

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| Derrick Thomas,<br><br>*On behalf of himself and those similarly situated,*<br><br>Plaintiff,<br><br>v.<br><br>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,<br><br>Defendants. | Case No. 1:17-CV-411<br><br>Judge Michael R. Barrett |

**FRANCHISEE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT**

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, (collectively, "It's Only") and Michael Hutmier hereby furnish their Response in Opposition to *Plaintiff's Motion for Leave to File First Amended Complaint* (Doc. 77).

Plaintiff filed his Complaint on June 16, 2017, over three years ago. He now wants to amend it because his legal position has grown tenuous. Plaintiff seeks to amend his Complaint to (1) add a claim for unjust enrichment and (2) name as a defendant an owner of the franchise Defendants, Mr. James "Chip" Phelps, in an individual capacity. As explained below, this Court should deny Plaintiff's motion for leave to amend because the Calendar Order (Doc. 74) provided that motions for leave to amend the complaint should be filed on or before August 3, 2020 (some two years after this action was filed).

## I. ARGUMENT

### A. Plaintiff's request to add an unjust enrichment count should be denied.

Defendants It's Only and Michael Hutmier hereby wholly incorporate by reference the arguments set forth in Defendant's Papa John's International, Inc.'s Response in Opposition filed on the same date as this response.

### B. Plaintiff cannot demonstrate good cause to amend his Complaint to add Mr. Phelps as a party and the Court should deny Plaintiff leave to amend.

While leave to amend should be freely given, this Court must find good cause exists in order to allow Plaintiff to amend his Complaint beyond the scheduling order:

> Seeking leave to amend a complaint after the scheduling order's deadline implicates two Federal Rules of Civil Procedure, Rule 15 and Rule 16. Rule 15 provides that "The court should freely give leave" to amend a pleading "when justice so requires." Rule 16 requires the district court to enter a scheduling order that includes a deadline for amending pleadings. Rule 16 also establishes that the district court can modify its scheduling order "only for good cause." Consequently, notwithstanding Rule 15's directive freely to give leave to amend, a party seeking leave to amend after the scheduling order's deadline must meet Rule 16's good-cause standard in order for the district court to amend the scheduling order. Parties "can demonstrate 'good cause' for their failure to comply with the original schedule[] by showing that despite their diligence they could not meet the original deadline."

*Carrizo (Utica) LLC v. City of Girard*, 661 F. App'x 364, 367 (6th Cir. 2016) (internal citations omitted). The Scheduling Order in this case provided a clear deadline to amend pleadings on August 3, 2020. (Doc. 74). A showing of good cause will be defeated by undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, or undue prejudice to the opposing party. *Leary v. Daeschner*, 349 F.3d 888, 905 (6th Cir. 2003); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Plaintiff cannot show good cause given its undue delay and the prejudice to the Defendants if leave were to be granted.

Plaintiff contends that Mr. Phelps should be added as a defendant because Plaintiff claims he only recently discovered Phelps's status as an alleged "employer" under the FLSA. Plaintiff's attorneys routinely bring delivery driver lawsuits, including at least four in this judicial district. They clearly know how to identify a potential FLSA employer from early in litigation; they do not need three years of litigating to figure out who may be a delivery driver's boss. Indeed, Plaintiff named Michael Hutmier, Mr. Phelps's business partner, as an alleged "employer" defendant in Plaintiff's original Complaint. The decision to name Michael Hutmier and not Mr. Phelps is one that Plaintiff must now live with at this late date in the litigation.

**1. Plaintiff unduly delayed and has a dilatory motive.**

The Courts of this Circuit consistently prohibit amendment of a Complaint and find undue delay or dilatory motive, where the lawsuit was initiated over two years prior. *Parker v. Breck's Ridge, LLC*, U.S. Dist. LEXIS 87053, at *2 (S.D. Ohio 2019); *DN Reynoldsburg v. Shoe Show, Inc.*, 2019 U.S. Dist. LEXIS 152172, at *3 (S.D. Ohio 2019); *Carrizo* at 369; *Shane v. Bunzl Distribution USA, Inc.*, 275 F. App'x 535, 537 (6th Cir. 2008); *Leary* at 905. In this case, the Complaint was filed over three years ago.

Plaintiff requests to amend his Complaint because, allegedly, he first discovered Mr. Phelps's alleged FLSA employer status at Phelps's September 9, 2020 deposition. (D. Mot., 8-9). Yet, Plaintiff knew about Mr. Phelps since at least October 8, 2018, over two years ago. On October 8, 2020 Mr. Phelps filed a Declaration with the Court identifying him as an owner and operator of the Franchisee Defendants. (Doc. 43-2). The declaration shows that Phelps is personally knowledgeable about the delivery zones and driver reimbursement matters. (*Id*. ¶¶ 2, 9-11). On top of that, on November 20, 2018, in their Rule 26(a) disclosures, the Franchisee Defendants identified Mr. Phelps to Plaintiff as a knowledgeable person and shareholder. Given

all of this, if Phelps ever was to be named as a party to the case, the time to do so was not three years into the litigation.

Sheer failure to acknowledge and plan around known deadlines should prohibit leave to amend. *See Greene v. Ab Coaster Holdings, Inc.*, 2012 WL 2342927, at *3 (S.D. Ohio 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*, 2018 WL 837736, at *3 (E.D. Mo. 2018) (denying proposed amendment and finding no good cause where plaintiff sought "to assert a claim he knew about when the case was filed.").

**2. Adding Mr. Phelps as a party is unduly prejudicial to Defendants and Plaintiff did not act diligently.**

Under the law of this Circuit, a Court must find both that (1) there is good cause for Plaintiff to amend his complaint after the scheduling order and that he acted diligently in such amending and (2) that such amendment would not prejudice the defendant. *Leary v. Daeschner*, 349 F.3d 888, 909 (6th Cir. 2003) ("Thus, in addition to Rule 16's explicit 'good cause' requirement, we hold that 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."); *Brown v. Shelby Cty. Bd. of Educ.*, 2016 U.S. App. LEXIS 23870, at *29 (6th Cir. 2016) ("Where the deadline for filing amendments has passed, a district court should not grant a motion to amend unless the plaintiff shows good cause for not previously seeking to amend and the defendant would not suffer prejudice. The plaintiff must show that he could not have met the deadline despite due diligence.") (internal citations omitted.).

The only explanation for Plaintiff's inexcusable delay is sheer tardiness. However, tardiness does not provide evidence of diligence or good cause. *See Wagner v. Mastiffs*, 2011 WL 124226, at *4 (S.D. Ohio 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 Inc*., 2018 WL 3358641, at *4 (S.D. Ohio 2018) (same); *North Start Mut. Ins. Co. v. Zurich Ins. Co*., 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*., 2008 WL 11374344, at *3 (S.D. Ohio 2008) (finding lack of good cause where "Plaintiff clearly made a strategic decision to litigate this case on a narrow front.").

Plaintiff chose not to seek leave to add Mr. Phelps after his declaration, but he now seeks leave to add Mr. Phelps as a Defendant after the Department of Labor recently torpedoed his case. On August 31, 2020, the Department of Labor issued guidance stating that "The IRS Business Mileage Rate is Optional, Not Required." FLSA Opinion 2020-12. Reeling from this, Plaintiff now seeks to amend his complaint in a feeble attempt to resuscitate his legally implausible complaint. But adding Mr. Phelps as a defendant at this late stage would unduly prejudice the Defendants. It would create additional defense costs and additional delay to a case that has already been pending for years.

## II. CONCLUSION

Plaintiff (1) was not diligent, (2) unduly delayed, (3) seeks to prejudice defendants, and (4) has demonstrated a dilatory motive by attempting to add a new party and a new count to his Complaint over three years since this lawsuit's inception and over two months since the expiration

of the Scheduling Order. Therefore, Plaintiff cannot demonstrate good cause to amend and his motion should be denied.

Respectfully submitted,

*/s/ Brian P. O'Connor*
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing has been served upon all attorneys and parties of record registered electronically via the Court's ECF system on October 26, 2020.

*/s/ Brian P. O'Connor*
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