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

Derrick Thomas, *On behalf of himself and those similarly situated*, Plaintiff, v. Papa John's International, Inc., et al, Defendants.	Case No. 1:17-cv-411 Judge Michael R. Barrett

PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

Defendants' briefs in opposition to Plaintiff's Motion to Amend[1] reveal that Defendants will not suffer any significant prejudice if Plaintiff is permitted to amend his Complaint. The current schedule allows Defendants ample time to complete discovery into any viable claim or defense they seek to pursue. And, contrary to Defendants' claims, the discovery completed to date is still relevant to both the claims that have always existed and the unjust enrichment claims.

Because Defendants know they cannot claim to have suffered any notable prejudice by Plaintiff's proposed amendment, their opposition briefs focus on Plaintiff's technical failure to seek leave to amend before the Scheduling Order's deadline. Plaintiff does not dispute the point—

[1] Defendant Papa John's International, Inc. ("PJI"), filed Doc. # 79, and Defendants It's Only Pizza, Inc., It's Only Downtown Pizza, Inc., It's Only Downtown Pizza II Inc., It's Only Papa's Pizza LLC, and Michael Hutmier ("Franchisee Defendants") filed Doc. # 80. All Defendants incorporate each other's arguments in their entirety (Doc. # 79, PageID 1226, fn. 1; Doc. # 80, PageID 1424), so Plaintiff will address both Responses in this single Reply brief.

his motion comes after the deadline. But, "it is well-settled that delay alone is not sufficient reason for denying leave." *Tefft v. Seward*, 689 F.2d 637, 639, fn. 2 (6th Cir. 1982) (citations omitted). Because Defendants will suffer no prejudice other than the typical burdens of defending a wage and hour case, and because Plaintiff has acted with diligence in the context of this case, Plaintiff asks the Court to permit Plaintiff's amendment so that the case can be decided on the merits. As the Supreme Court explained in 1962, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

1. Procedural Posture

This case was filed in 2017, but because of early motions,[2] the Scheduling Order was entered only five months ago, on June 16, 2020. Doc. # 74. The Scheduling Order set dates for motions directed at the pleadings, motions to amend the pleadings, and Plaintiff's contemplated Motion for Rule 23 class certification. *Id*. All other dates, such as the deadline to complete discovery and file dispositive motions, are contingent on the date the Court ultimately rules on the class certification motion. *Id*. The Order does not set any pre-trial or trial dates. *Id*.

In the months since the Scheduling Order was entered, and with the assistance of the Court, the parties have explored the prospect of settling all the claims in this case. *See Docket* (holding status conferences on May 19, 2020, July 8, 2020, and August 18, 2020). The parties submitted position papers on September 1, 2020 in anticipation of a possible settlement

[2] The Court has decided two early motions on threshold issues (denying Defendants' motion to dismiss (Doc. # 40), granting Plaintiff's motion to send notice (Doc. # 51)). Following those rulings, an FLSA collective action notice opt in period commenced.

conference. The Court has not yet scheduled that settlement conference, but Plaintiff anticipates such a conference will be held in the coming months.

Most recently, both sides requested an extension to the class certification deadline so that they could conduct discovery. Doc. #s 78, 81, and 82. On September 30, 2020, the Court granted the parties' request, and extended Plaintiff's Rule 23 class certification deadline until February 15, 2021. Doc. # 83. After Plaintiff's Rule 23 class certification motion is decided, the parties will complete more discovery in preparation for dispositive motions, which must be filed within 180 days of the Court's ruling on class certification. Doc. # 74. If the case is not decided on summary judgment, a trial date will then be set.

Through the present Motion, Plaintiff seeks to add an individual defendant, James Phelps, based largely on the deposition testimony he provided on September 16, 2020, and to add a claim for unjust enrichment, which Plaintiff notified Defendants they intended to assert in June 2020.

2. Legal Standard

Plaintiff's Motion for Leave to Amend is governed by Federal Rules of Civil Procedure 15 and 16. Under Rule 16, the Court can modify its Scheduling Order for "good cause." Fed. R. Civ. P. 16(b)(4). The factors to consider under Rule 16 are the moving party's diligence in attempting to meet the relevant deadlines, and "whether the opposing party will suffer prejudice by virtue of the amendment." *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003).

Under Rule 15, a Court "should freely give leave when justice so requires." Fed. R. Civ. P. 15. The Courts have held that "[f]actors that may affect [a Rule 15(a)] 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." *C.T. v. Red Roof Inns, Inc.*, Case No. 2:19-cv-5384, 2020 WL 6084071, at *1 (S.D. Ohio Aug. 6, 2020) (quoting *Seals v. Gen. Motors Corp.*, 546 F.3d 766, 770 (6th Cir. 2008)). This liberal and generous standard is necessary because "a plaintiff, [upon] a proper subject of relief, [] ought to be afforded an opportunity to test his claim on the merits." *Foman*, 371 U.S. at 182. "The thrust of Rule 15 is to reinforce the principle that cases should be tried on their merits rather than the technicalities of the pleadings." *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982) (citations omitted).

Defendants focus much of their argument on the fact that Plaintiff's motion was filed after the deadline for amendment stated in the Scheduling Order. However, as the Sixth Circuit has explained: "Delay that is neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself to disallow an amendment of a pleading." *Moore v. City of Paducah*, 790 F.2d 557, 561 (6th Cir. 1986) (citations omitted).

As to both amendments, Plaintiff concedes that his Motion was filed outside the Court's Calendar Order entered on June 16, 2020. However, as explained herein, Plaintiff acted diligently and appropriately in seeking amendment when he did. Further, and just as important, Defendants will not be unduly prejudiced by the amendment. They will still be permitted to pursue and present any viable defense they seek to put forward.

3. Argument

3.1. Defendants will not suffer any prejudice if Plaintiff is permitted to amend his Complaint.

Both Defendants claim they will suffer prejudice by the filing of Plaintiff's First Amended Complaint. However, Defendants' claimed prejudices are not actual prejudices, they are simply the ordinary burdens of defending a wage and hour class action. "Although almost every

amendment results in some prejudice to a defendant, a court should prohibit an amended complaint '[o]nly where the prejudice outweighs the moving party's right to have the case decided on the merits …'" *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F.Supp. 723, 732 (N.D. Ill. 1996) (quotations omitted). "Allegations that an amendment will require the expenditure of some additional time, effort, or money do not constitute undue prejudice." *Scott v. Chipotle Mexican Grill, Inc.*, 300 F.R.D. 193, 200 (S.D.N.Y. 2014) (internal citations omitted).

Here, none of the Defendants have articulated a prejudice that justifies preventing Plaintiff from being permitted to pursue his claims on the merits. Discovery, in many ways, is just beginning, and Defendants will have every opportunity to put forward their viable defenses.

3.1.1. Defendants will not suffer prejudice if James Phelps is added as a Defendant.

With respect to the addition of James Phelps, Defendants, without any explanation or specificity, argue that Mr. Phelps's inclusion "would create additional defense costs and additional delay to a case that has already been pending for years." Doc. # 80, PageID 1427.

Defendants offer no specifics regarding these additional defense costs, or the delays they expect to take place. In truth, much of the information relevant to the claims against Mr. Phelps has already been disclosed in the course of discovery, or likely would have been disclosed in the course of conducting discovery into the merits of Plaintiff's claims. As such, it is not clear what additional defense costs the current Defendants would incur. Further, the addition of Mr. Phelps should not result in any delay, as the deadline for dispositive motions is 180 days after the Court *rules* on Plaintiff's class certification motion, which will not even be fully *briefed* until April 12, 2021. Doc. # 83. Between now and then, the parties should have ample time to conduct discovery related to Mr. Phelps that should not result in any delays. Indeed, Defendants have not offered any

examples of how they would have defended the case differently, or otherwise altered their position or strategy if Mr. Phelps had been named as a defendant in the original complaint. "There is no reason to believe [Defendants] would have conducted its defense in a substantially different manner had the amendment been tendered previously." *Grant v. Target Corp.*, 281 F.R.D. 299, 304 (S.D. Ohio 2012) (permitting the amendment to add individual defendants and re-opening discovery where the motion to amend was "filed prior to the close of discovery and prior to the dispositive motions deadlines."); *see also, e.g., In re Flint Water Cases*, 384 F.Spp.3d 802, 839 (E.D. Mich. 2019) (noting that "defendants [did] not explain how they [would] be prejudiced … Plaintiffs [had] not changed their allegations so much that defendants [would have needed] to completely overhaul their strategy.").

3.1.2. Defendants do not suffer undue prejudice by the addition of the unjust enrichment claim.

Defendants also claim that they are prejudiced by the proposed unjust enrichment claim because they will "incur significant costs related to additional discovery," including "the *re-review* of ESI that was previously collected and produced." Doc. # 79, PageID 1237 (emphasis original).

First, Defendants will not have to "re-review" data previously produced (*i.e.*, the data relating to the period from 2014-present) because of the unjust enrichment claims. That data produced by PJI is relevant to Plaintiff's original claims and is still relevant to Plaintiff's unjust enrichment claims.

Second, Defendants are correct that the unjust enrichment claim involves a six-year statute of limitations, which would require Defendants to produce data relating to an earlier time period, in addition to the data they just recently produced. While this creates a burden on Defendants, this burden would have existed even if Plaintiff had asserted the unjust enrichment claim in his original

complaint, because wage and hour laws only require employers to retain records dating back three years. *See* Oh. Const., Art. II, § 34a. The additional discovery burden by itself, however, does not justify denying the motion to amend. "The adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a motion to amend a pleading.'" *Scott*, 300 F.R.D. at 200 (quoting *United States v. Cont'l Illinois Nat'l Bank & Trust Co. of Chicago*, 889 F.2d 1248, 1255 (2d Cir. 1989)); *see also, e.g., Darney v. Dragon Prod. Co., LLC*, 266 F.R.D. 23 (D. Me. 2010) (permitting amendment even where it would alter trial tactics and strategies, discovery would have to be re-opened, and trial to be postponed); *compare IBEW Local 98 Pension Fund v. Best Buy Co.*, 326 F.R.D. 513 (D. Minn. 2018) (denying amendment where facts underlying new claims had already been litigated and arguments rejected).

Further, the stage of litigation allows that additional discovery to be accommodated. The parties have just recently turned to Plaintiff's state law claims as they prepare for Plaintiff's Rule 23 class certification motion. They still have time to investigate and conduct discovery relevant to all claims and defenses that they would like to put forward. The case is not set for trial. The additional discovery here will *not* unduly prejudice the defendants; rather, these costs are nothing more than the standard costs of litigation that would have occurred had Plaintiffs brought this claim in his original Complaint.

Finally, in arguing *against* Plaintiffs' delay in bringing the amended Complaint, Defendants admit that the additional claim "is premised on the *exact* same core facts and allegations that support the Complaint's FLSA and Ohio Minimum Wage Law claims." *See* Doc. # 79, PageID 1230. In *Tefft*, the Court stated that it was "obvious that the facts as set forth in Tefft's original complaint would support" the proposed amended tort claim. *Tefft*, 689 F.2d at 639. "The

amended cause of action is not so different as to cause prejudice to the defendants[.]" *Id.* Thus, while there may be some additional discovery, the new claims stem from the same set of core facts that the parties have been litigating since 2017. There is no surprise or alien claim brought out of thin air; this new legal theory is simply an additional method for recovery arising from the same basic facts as the original claims. Defendants are not unduly prejudiced by the addition of such a claim.

3.2. Plaintiff has not inappropriately delayed in seeking amendment.

Because they have not suffered substantial prejudice, Defendants' briefs in opposition are focused on the fact that Plaintiff filed his Motion to Amend after the deadline set for such a motion in the Scheduling Order. Because the Motion was filed after the deadline, Defendants claim, therefore, the Motion should be denied.

But, "the timeliness of the amendment is not decided in an absolute sense, but in light of the particular facts and history of the case. Specifically, courts consider the stage of the litigation together with the length of time that the moving party was aware of the underlying facts." *Health Republic Ins. Co. v. United States*, __ Fed. Cl. __, 2020 WL 5824232, at *4 (Fed. Cl. Sept. 30, 2020) (quoting *King v. United States*, 119 Fed. Cl. 51, 55 (2014)).

"[D]elay alone is insufficient reason to deny a motion to amend. Rather, the critical factors are notice and substantial prejudice." *Estes v. Kentucky Utilities Co.*, 636 F.2d 1131, 1134 (6th Cir. 1980) (citing *Hageman v. Signal L.P. Gas. Inc.*, 486 F.2d 479, 484 (6th Cir. 1973)). "The prejudice that results … must be due in some way to the fact that that assertion … was tardy." *Estes*, 636 F.2d at 1134. For example, such prejudice exists "when a party has insufficient time to conduct discovery on a new issue raised in an untimely manner." *Id.*; *see also Grant*, 281 F.R.D. at 304

(while any amendment is likely to "result in some delay, delay itself is not a valid for denying leave to amend where little prejudice is shown."); *Uni-World Capital, L.P. v. Preferred Fragrance, Inc.*, 43 F.Supp.3d 236, 253 (S.D.N.Y. 2014) (holding that "[t]his is not a case where the amendment came on the eve of trial and would result in new problems of proof[,]" and that "[n]o trial date has been set, no motion for summary judgment has been filed by defendants, and discovery is not scheduled to be completed for several months."); *Discover Bank v. New Vision Financial, LLC*, No. 2:03-CV-686, 2005 WL 1865369, at *2 (S.D. Ohio Aug. 1, 2005) (granting motion to amend asserting additional claims against new parties after discovery closed and summary judgment motions were filed); *compare Chavez v. Hatterman*, No. 06-cv-02525, 2009 WL 82496, at *3 (D. Colo. Jan. 13, 2009) (denying motion to amend where "discovery had been closed, and Defendants, without sufficient notice, had not had a chance to develop their defenses against this theory through discovery.").

Here, none of those issues are present—the "critical factors" of notice and prejudice support permitting the Plaintiff's requested amendment. Plaintiff has acted with diligence. Given the circumstances and posture of the case, his proposed amendment should be granted.

3.2.1. Plaintiff has acted with diligence in adding James Phelps.

First, the parties were engaged in settlement discussions, with the Court's assistance, from the time the Scheduling Order was entered until September 2020. As soon as it became apparent that the settlement discussions had stalled, or at least been delayed, Plaintiff conducted a deposition of James Phelps, wherein Plaintiff gathered the information that he believes qualifies Mr. Phelps as an "employer" of Plaintiff and the other delivery drivers. Immediately after the deposition was conducted, Plaintiff sought leave to add Mr. Phelps as a defendant. Plaintiff believes

this course of conduct was appropriate. *See, e.g., Mason Tenders District Council of Greater New York v. Phase Constr. Servs., Inc.*, 318 F.R.D. 28, 37-38 (S.D.N.Y. 2016) (permitting amendment based on deposition testimony under very similar circumstances). While it may have been preferable that the deposition have been scheduled earlier, Plaintiff was diligent and acted reasonably in taking the deposition when he did.[3]

Notably, Defendants themselves acknowledged that they held off on conducting discovery while the parties were engaged with the Court in settlement efforts. As Defendants' counsel explained when he contacted Plaintiff's counsel about discovery on September 29, 2020, "It does not look like the parties are making any progress regarding settlement discussions. Accordingly, we need to get started on opt-in and rule 23 class discovery." Ex. 1, Email from Mike DeMarino, Sept. 29, 2020.

Plaintiff believes he acted reasonably in pursuing this discovery into Mr. Phelps when he did. Plaintiff also believes it was appropriate to delay seeking amendment to the complaint with regard to Mr. Phelps until after the deposition took place.

3.2.2. Plaintiff has acted with diligence in adding a claim for unjust enrichment.

Second, with respect to the unjust enrichment claim, Plaintiff put Defendants on notice that he was likely to move to amend to add an unjust enrichment claim in his demand letter dated June 18, 2020. He delayed in actually seeking amendment to add the claim until after the parties' settlement efforts sputtered.

[3] Plaintiff originally sought to take a Rule 30(b)(6) deposition on March 31, 2020, where he likely would have learned the extent of Mr. Phelps involvement. However, because of the uncertainty around COVID-19, and because the parties agreed to exchange information and discuss settlement, Plaintiff agreed to postpone that deposition.

In opposition, Defendants address an argument that they believe Plaintiff to be making, *i.e.*, that Plaintiff's delay should be excused because it was justified by a "change in the law." Doc. # 79, PageID 1229-36. Defendants next claim that such an argument must fail because Plaintiff's counsel has asserted an unjust enrichment claim in a number of other pizza delivery cases. *Id.*

But Plaintiff makes no such argument. Plaintiff does not claim any change in law has taken place, nor does he claim that this Court is bound to follow *Clark*. Instead, Plaintiff claims only that they have considered whether to add a claim for unjust enrichment, and that they notified Defendants of that possibility in June 2020.

Whether to include a claim in any case, even cases of a similar nature, is a strategic decision that each litigant must make. In this particular situation, the *Clark* decision tipped the scales in favor of including the claim of unjust enrichment in this case. At that point, Plaintiff acted promptly to add the claim. Indeed, the fact that Plaintiff considers recent court decisions in his decision-making supports the proposition that he has acted reasonably in pursuing amendment.

3.3. Plaintiff's unjust enrichment claim is not futile.

Defendants also argue that the unjust enrichment claim is futile. Doc. # 79, Page ID 1240-44. "A court may deny a motion for leave to amend for futility if the amendment could not withstand a motion to dismiss." *Joseph v. Joseph*, Case No. 1:16-cv-465, 2017 WL 5953119, at *3 (S.D. Ohio Jan. 10, 2017). "The test for futility … does not depend on whether the proposed amendment could potentially be dismissed on a motion for summary judgment; instead, a proposed amendment is futile only if it could not withstand a Rule 12(b)(6) motion to dismiss." *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 421 (6th Cir. 2000). "At this stage of the litigation, this Court is charged with determining whether the futility of an amendment is so obvious that it

should be disallowed." *Shope v. Morrow County Sheriff's Dep't.*, Civil Action 2:18-cv-214, 2018 WL 4907079, at *2 (S.D. Ohio Oct. 10, 2018) (quoting *Bear v. Delaware Cnty., Ohio*, No. 2:14-CV-43, 2015 WL 1954451, at *3 (S.D. Ohio Apr. 28, 2015)). "Defendants' futility argument would require the Court to address directly the merits of Plaintiff's claims." *Shope*, 2018 WL 4907079, at *2. Rather than delving into this merits-based analysis, this Court can exercise its discretion "to permit the amendment,' after which Defendants may 'raise their merits arguments' through a disposition motion." *Id.* (quoting *Bear*, 2015 WL 1954451, at *3).

Defendant cites several cases for the proposition that federal courts have dismissed unjust enrichment claims where "there is an adequate remedy at law." Doc. # 79, PageID 1242-43. However, all but one of the cases cited were reviewed or decided on motions with substantially higher evidentiary standards than a motion to dismiss. Most of the cases were decided on motions for summary judgment.[4] One case was presented on appeal from an injunction.[5] The only case where the procedural posture was from a motion to dismiss was a California case where the Court also explicitly stated that "there is no cause of action in California for unjust enrichment." *In re Apple and AT & T iPad Unlimited Data Plan Lit.*, 802 F.Supp.2d 1070, 1077 (N.D. Cal. 2011) (quoting *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 794 (2003)).

The relevant standard here is that of a motion to dismiss. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Cummings v. Greater Cleveland Reg. Transit Auth.*, 88 F.Supp.3d 812, 815

[4] *Randolph v. New England Mut. Life Ins. Co.*, 526 F.2d 1383 (6th Cir. 1975); *Duffie v. Michigan Grp., Inc – Livingston*, No. 14-CV-14148, 2016 WL 8259511 (E.D. Mich. Jan. 15, 2016); *Vargas v. Spirit Del. & Distr. Servs., Inc.*, 245 F.Supp.3d 268 (D. Mass. 2017); and *Crigger v. Fagnestock and Co., Inc.*, No. 01-cv-7819, 2003 WL 22170607 (S.D.N.Y. Sept. 18, 2003).

[5] *Aluminum Workers Int'l Union, AFL-CIO, Local Union No. 215 v. Consol Aluminum Corp.*, 696 F.2d 437 (6th Cir. 1982).

(N.D. Ohio 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))). "The plausibility requirement is not 'akin to a probability requirement,' but requires 'more than a sheer possibility that the defendant has acted unlawfully.'" *Cummings*, 88 F.Supp.3d at 815-16 (quoting *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570)).!

Here, the unjust enrichment claim can withstand a motion to dismiss, as evidenced by the order entered in *Clark*. "[U]njust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another." *Hummel v. Hummel*, 14 N.E.2d 923, 923 (Ohio 1938). The common law claim has been broadly invoked to remedy a variety of wrongs. *See generally The Intellectual History of Unjust Enrichment*, 133 Harv. L. Rev. 2077 (2020). To prevail on an unjust enrichment claim, a plaintiff must prove: "(1) a benefit conferred by a plaintiff upon a defendant, (2) knowledge by the defendant of the benefit, and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *Hambelton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183 (1984) (quoting *Hummel*, 14 N.E.2d at 923). Even if a defendant passively retained the benefit, there can still be liability for unjust enrichment if that retention is unjust or unconscionable. *FDIC v. Jeff Miller Stables*, 573 F.3d 289, 294-95 (6th Cir. 2009) (citing *Cosby v. Cosby*, 750 N.E.2d 1207, 1213 (Ohio 2001)).

In *Clark*, Chief Judge Marbley denied Domino's' Motion to Dismiss the unjust enrichment claim. *Clark v. Pizza Baker, Inc.*, Case No. 2:18-cv-157, 2020 WL 5760445. Specifically, the court held "Plaintiff has sufficiently alleged he and similarly situated drivers conferred a benefit on Defendants when using their own vehicles with no or little compensation, which they allege contributed to Defendants' increased profits and competitive pricing. He further alleges

Defendants had knowledge of said benefit[.]" *Id*. at *3. The court further explained that the complaint contained "sufficient facts suggesting that Defendants' reimbursement system for delivery drivers was illegal under the FLSA and that Defendants knew or should have known its compensation system violated federal law," such that any agreement on reimbursement between the parties cannot serve "as the basis for dismissing the unjust enrichment count." *Id*. at *4.

Defendants here argue that (1) Plaintiff has an adequate remedy at law and is not entitled to equitable relief; and (2) Plaintiff is not permitted to plead the unjust enrichment claim alternatively to the statutory claims. Doc. # 79, PageID 1240 and 1243. However, these arguments fail.

First, Defendants are wrong that Plaintiff's unjust enrichment claim cannot exist in harmony with the FLSA claims. In *Clark*, the Court rejected a similar argument that the FLSA provides the "exclusive remedy" for Plaintiff's claims. It explained that "though the claims may have facts in common, Plaintiffs' FLSA claim requires the Court to apply a different test for liability, and thus consider different factors, from the unjust enrichment claim." *Clark*, 2020 WL 5760445 at *4; *see also Carter v. PJS of Parma, Inc.*, No. 1:15-cv-1545, 2016 WL 1316354, at *5 (N.D. Ohio Apr. 4, 2016) (concluding FLSA claim turned on the establishment of an employer-employee relationship while unjust enrichment claim examined the benefit conferred, and therefore "plaintiffs' unjust enrichment claim is neither duplicative of, nor dependent on, their FLSA claim"); *Monahan v. Smyth Automotive, Inc.*, No. 1:10-cv-0048, 2011 WL 379129, at *5 (S.D. Ohio Feb. 2, 2011) ("unjust enrichment, while possibly based on many of the same facts, is not a claim duplicative of an FLSA claim"); *Bonaventura v. Gear Fitness One NY Plaza LLC.*, No. 17-cv-2168, 2018 WL 1605078, at *8 (S.D.N.Y. Mar. 29, 2018) (in denying a defendants' motion

to dismiss FLSA and unjust enrichment claims against a franchisor, the court held that "[Defendant] has not shown that a plaintiff must allege a formal employment relationship to plead a quasi-contractual claim.").[6]

In addition, *Clark* explained that, "[a]t the very least, plaintiffs are permitted to plead claims in the alternative, and a court may not dismiss claims as preempted until the parties have had a chance to develop the facts during discovery to assess whether facts different from those comprising the federal claim support the state common law state claims." *Clark*, 2020 WL 5760445 at *4 (internal citations and quotations omitted). Ohio law "does not stand for the proposition that a plaintiff is precluded from pleading unjust enrichment in the alternative … Rather it provides that a plaintiff may not improve upon an improvident agreement … by seeking additional recovery under the theory of unjust enrichment." *Highman, et al. v. Gulfport Energy Corp.*, Case No. 2:20-cv-1056, 2020 WL 6204344, at *3 (S.D. Ohio Oct. 22, 2020) (quoting *Teknol, Inc. v. Buechel*, No. C-3-98-416, 1999 WL 33117391, at *3 (S.D. Ohio Aug. 9, 1999)). "That case law is still good law, and this Court has continued to adopt, albeit not consistently, that position in reviewing unjust enrichment claims *at the motion to dismiss stage*." *Highman*, 2020 WL 6204344, at *3 (emphasis added). Thus, there is a clear distinction between *recovery* stemming from a contract and unjust enrichment (prohibited) and *pleading* both a contract and unjust enrichment (permitted). *See id*.

[6] *See also, e.g., Cowit v. CitiMortgage, Inc.*, No. 1:12-cv-869, 2014 WL 12749168, at *1 (S.D. Ohio June 2, 2014) (permitting amendment to complaint to add unjust enrichment claim); *Cunningham Prop. Mgmt. Trust v. Ascent Res. – Utica, LLC*, 351 F.Supp.3d 1056, 1066 (S.D. Ohio 2018) (denying motion to dismiss and explaining, "[a]lthough Ohio law precludes a party from maintaining a claim for unjust enrichment where an express contract covering the same subject matter applies, … the scope of the parties' contract remains to be developed in discovery.").

In sum, unjust enrichment is both an alternative theory of recovery and an additional theory of recovery. It is neither contingent upon nor defeated by FLSA liability. As such, Plaintiff's unjust enrichment claim is not futile.

3.4. Plaintiff does not have a dilatory motive.

In a final dubious attempt to convince this Court to deny Plaintiff's Motion, Defendants argue that the recently released Department of Labor ("DOL") Letter on the IRS Business Mileage Rate has "torpedoed" Plaintiff's case. Doc. # 80, PageID 1427. Defendants state that Plaintiff is "[r]eeling" from the impact of the letter and the proposed amendment adding Mr. Phelps is "a feeble attempt to resuscitate his legally implausible complaint." *Id*.

First, the DOL Letter is an unreasonable interpretation of the FLSA and its regulations, and is not entitled to any deference from this Court. Instead, recent precedent in this District rejects the interpretation put forward in the DOL Letter, and explains that employers of minimum wage delivery drivers must either (1) track and reimburse for the delivery drivers' actual expenses, or (2) reimburse at the IRS standard business mileage rate. *See Brandenburg v. Cousin Vinny's Pizza*, Case No. 3:16-cv-00516, 2018 WL 5800594 (S.D. Ohio Nov. 6, 2018) (*Brandenburg I*), *Brandenburg v. Cousin Vinny's Pizza, LLC*, Case No. 3:16-cv-00516, 2019 WL 6310376 (S.D. Ohio Nov. 25, 2019) (*Brandenburg II*), *Hatmaker v. PJ Ohio, LLC*, Case No. 3:17-cv-146, 2019 WL 5725043 (S.D. Ohio Nov. 5, 2019) (*Hatmaker I*), *Hatmaker v. PJ Ohio, LLC*, Case No. 3:17-cv-146, 2020 WL 1129325 (S.D. Ohio Mar. 6, 2020) (*Hatmaker II*); *Arp v. Hohla & Wyss Enterprises, LLC*, No. 3:18-CV-119, 2020 WL 6498956, at *1 (S.D. Ohio Nov. 5, 2020). There is no third option for an employer to determine an arbitrary "approximate" rate. Plaintiff's counsel are happy

to provide additional briefing on this subject, as they have in other cases pending before this Court. But, suffice to say, Plaintiff is not reeling from the Letter—it simply does not apply.

Second, the DOL Letter, even if accepted and followed by this Court, would have absolutely no effect on Phelps's position within this lawsuit. The Letter purports to provide guidance on how to calculate automobile expense reimbursement. It has nothing to do with determining who is an employer under the FLSA.

Plaintiff sought leave to add Mr. Phelps soon after he provided deposition testimony that Plaintiff believes evidences that he is an employer under the FLSA and other wage and hour laws. Rather than dilatory, Plaintiff acted diligently in amending based on information obtained during the normal course of discovery to pursue a valid claim against a person he believes is a viable defendant.

Likewise, Plaintiff notified Defendants over the summer that he intended to amend his complaint to add an unjust enrichment claim if the parties were not able to reach a settlement. Shortly after the parties' settlement negotiations stalled, Plaintiff sought leave to add the unjust enrichment claim. Rather than dilatory, Plaintiff acted diligently in amending based on information obtained during the normal course of discovery. *See Mason Tenders District Council*, 318 F.R.D. at 37-38, *Discovery Bank*, 2005 WL 1865369 at *2; *compare SRI Intern. Inc. v. Internet Sec. Systems, Inc.*, 817 F.Supp.2d 418, 423 (D. Del. 2011) (the court specifically stated that the amendment appeared to be the movant's "ace in the hole to be used if [movant's] other attempts to avoid liability in this case failed.").

4. Conclusion

The spirit and principle of Rule 15 is to permit amendments so that cases may "be tried on their merits rather than the technicalities of pleadings." *Shope*, 2018 WL 4907079, at *2 (quoting *Inge v. Rock Financial Corp.*, 388 F.3d 930, 936 (6th Cir. 2004)). Plaintiff has presented good cause for his Motion outside of the Calendar Order deadlines, and his Motion is not shrouded by bad faith or dilatory motive, and will not cause undue prejudice to the Defendants. Based on the foregoing, Plaintiff respectfully requests that this Court grant Plaintiff's Motion and grant him leave to file the First Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Andrew Kimble
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