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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kathy Arrison and Tristan Smith, individually, and on behalf of a Class of others similarly situated,

Plaintiffs,

v.

Walmart, Inc. and Wal-Mart Associates, Inc.,

Defendants.

Case No. 2:21-cv-00481-SMB

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT [FED. R. CIV. P. 12(b)(6)]

ORAL ARGUMENT REQUESTED

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Walmart Inc. and Wal-Mart Associates, Inc. (collectively, "Walmart") respectfully move the Court for an Order dismissing Count III of Plaintiffs' Amended Complaint (Dkt. No. 26) for failure to state a claim a claim against Defendants upon which relief can be granted.

This Motion is supported by the following Memorandum of Points and Authorities, the Court's entire file in this matter, and any oral argument that the Court may wish to hear.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case presents the question whether a health screening process designed to ensure a safe environment for employees and customers during the COVID-19 pandemic unjustly enriched Walmart at the expense of its employees. Walmart employees Kathy Arrison and Tristan Smith ("Plaintiffs") allege the company is required under principles of equity to compensate them for the time spent answering screening questions and receiving a temperature check prior to each shift.

Plaintiffs' unjust enrichment claim fails because they concede (as they must) that they benefited from the health screenings. To plead a cause of action for unjust enrichment, Plaintiffs must allege facts that raise a plausible inference that (1) Walmart obtained a benefit *at Plaintiffs' expense*, and (2) there is no justification for Walmart retaining that benefit without compensating them. Plaintiffs cannot establish these elements if the relevant activity benefitted *both* parties. Such is the case here. The complaint acknowledges that health screenings protected Plaintiffs from an outbreak of COVID-19 that could have infected them and "hundreds to thousands" of Walmart employees. Amended Complaint ("Compl.") (Dkt. No. 26), ¶ 39. They also allege that the screenings were necessary for the continued operation of their stores and thus their continued employment.

By alleging the health screening benefitted them, Plaintiffs have pled themselves out of a claim for unjust enrichment. Accordingly, the Court should dismiss their unjust enrichment cause of action pursuant to Fed. R. Civ. P. 12(b)(6) because it fails to state a claim upon which relief may be granted.

II. BACKGROUND

Arrison was employed at a Walmart store in Scottsdale, Arizona, and Smith is a current employee at a Walmart store in Mesa, Arizona. Compl. ¶¶ 8-9. They allege that Walmart implemented a "company-wide policy" in "the Spring of 2020" that "requir[ed] its workers to undergo a mandatory COVID-19 screening each shift." *Id.* ¶ 1. According to the complaint, the screening involves a temperature check and a series of questions regarding symptoms, travel, and potential COVID-19 exposure. *Id.* ¶¶ 25-26. Plaintiffs do not allege that they performed any work during the screening. Although they concede that Walmart compensated employees with 5 minutes of pay per shift for going through the screening, beginning in November 2020,[1] they contend that Walmart should pay them additional money for the time spent undergoing the screenings. *Id.* ¶ 14, 48.

Plaintiffs suggest that "[t]he COVID-19 examinations are primarily, if not entirely for Walmart's benefit." *Id.* ¶ 39. However, they acknowledge these health screenings helped ensure the safety of all employees, including themselves. *Id.* ¶ 37 ("[t]he COVID-19 screenings were . . . necessary to ensure a safe environment" at Walmart's stores). In fact, "[i]f Walmart did not have the COVID-19 screening, workers could have unintentionally brought the virus into the Walmart facilities causing a mass breakout of the virus infecting hundreds to thousands of other workers and customers of Walmart." *Id.* ¶ 39.

[1] The evidence will show that Walmart maintained a policy to pay for all of the time spent undergoing these health screenings. However, Walmart accepts Plaintiffs' allegations as true for purposes of this motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The screenings not only provided safety to Plaintiffs and their coworkers, they also were "necessary to ensure that the virus did not disrupt Walmart's business operations." *Id.* Therefore, they allowed "the company's stores [to] remain in operation," which in turn allowed "Walmart's workers [to] continue to work through the pandemic." *Id.* ¶ 2.

Plaintiffs allege the time spent undergoing health screenings is "compensable work" under Arizona's wage laws (*id.* ¶¶ 44-48), and plead statutory claims for unpaid wages and recordkeeping violations (*id.* ¶¶ 57-66). In the alternative, they plead an equitable claim for unjust enrichment based on the allegedly unpaid time. *Id.* ¶¶ 67-77. They assert this claim on behalf of Walmart's hourly employees in Arizona who participated in the screening and seek "disgorge[ment]" of "the value of [Walmart's] ill-gained benefits to [them] and all similarly situated employees." *Id.*, p. 16 (Prayer for Relief).

III. LEGAL STANDARD

A complaint fails to state a valid claim under Rule 12(b)(6) if it lacks a cognizable legal theory or sufficient factual allegations to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). While a court considering a Rule 12(b)(6) motion to dismiss "must take all of the factual allegations in the complaint as true," the court is "'not bound to accept as true . . . legal conclusion[s] couched as . . .factual allegation[s].'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *In re VeriFone Sec. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993).

To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" not just possible. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility" of

liability, the complaint must be dismissed. *Id*. at 679. The dismissal should be without leave to amend and with prejudice if it is clear that the complaint's deficiencies cannot be cured and amendment would be futile. *Steckman v. Hart Brewing, Inc*., 143 F.3d 1293, 1298 (9th Cir. 1998).

IV. ARGUMENT

"An unjust enrichment claim requires proof of five elements: '(1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law.'" *Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 318 (Ariz. Ct. App. 2012) (quoting *Freeman v. Sorchych*, 226 Ariz. 242, 251 (Ariz. Ct. App. 2011)). "In short, unjust enrichment provides a remedy when a party has received a benefit at another's expense and, in good conscience, the benefitted party should compensate the other." *Id.*

"To survive a motion to dismiss," therefore, the complaint "must contain sufficient factual matter" to support each of these five elements. *Iqbal*, 556 U.S. at 678. Plaintiffs have not done so because they allege that the COVID-19 screening conferred significant benefits on them, not just on Walmart. As a matter of law, the fact that they benefitted forecloses any claim that Walmart was enriched "at [their] expense" or that it "in good conscience" they must be compensated for their time. Each of these deficiencies independently requires dismissal.

A. Plaintiffs Failed To Allege Facts Showing That Walmart Was Enriched At Their Expense

To state a claim, Plaintiffs must do more than allege that Walmart benefitted from the COVID-19 screening; they must plausibly allege that Walmart did so "at [their] expense." *Wang*, 230 Ariz. at 318. This element is not satisfied where the plaintiff or defendant engaged in an activity that benefitted both of them. *E.g., City of Sierra Vista v. Cochise Enters., Inc.*, 144 Ariz. 375, 381-82 (Ariz. Ct. App. 1984) ("no impoverishment" where both parties benefit). "Exchanges where both parties benefit do

not constitute unjust enrichment." *Howard v. Gap, Inc.*, No. 06-cv-06773, 2007 WL 164322, at *4 (N.D. Cal. Jan. 19, 2007).

Freeman illustrates this point. There, the court rejected the plaintiff's unjust enrichment claim where the plaintiff sought reimbursement after paying for improvements to a roadway over which both parties held easements. 226 Ariz. at 251-52. The court held that the defendant was not enriched "at the plaintiff's expense" because although the defendant benefitted from the improvements, the plaintiff benefitted as well. *Id.*

The court reached a similar conclusion in *Sierra Vista*, where the City required a home developer to integrate the sewer lines for its homes with the City's system at its own expense. 144 Ariz. at 380. The court found there was "no impoverishment," because "the hook-up to the City sewer system enhanced the value of [the developer's] lots by making them eligible for financing and saleable." *Id.* at 382.

In contrast, Arizona courts generally permit unjust enrichment claims to proceed only where the plaintiff did not derive a benefit from the transaction. For example, in *Doe v. Ariz. Hosp. & Healthcare Ass'n*, No. 07-cv-1292, 2009 WL 1423378 (D. Ariz. Mar. 19, 2009), the plaintiffs (temporary nurses) adequately alleged that the defendants were enriched at their expense by alleging that the defendants saved money by suppressing their wages through a price-fixing scheme. *Id.* at *12; *see also Labrecque v. NewRez LLC*, No. 19-cv-00465, 2020 WL 3276699, at *7 (D. Ariz. June 16, 2020) (mortgage servicer enriched at borrower's expense when it deducted money from borrower's escrow account to cover a late fee on property taxes that was assessed due to the mortgage servicer's own negligence).

Here, Plaintiffs plead facts demonstrating they too benefitted from the activity that allegedly enriched Walmart. They acknowledge the screening "ensure[d] a safe environment" during a pandemic. Compl. ¶ 37. Indeed, "[i]f Walmart did not have the COVID-19 screening," Plaintiffs claim, "workers could have unintentionally brought

the virus into the Walmart facilities causing a mass breakout of the virus infecting hundreds to thousands of other workers and customers of Walmart." *Id.* ¶ 39.

Plaintiffs also concede that the screening enabled their continued employment, as the screening was "necessary to ensure that the virus did not disrupt Walmart's business operations." *Id*. Because of "Walmart's COVID-19 policies," "the company's stores [were able to] remain in operation" and Plaintiffs accordingly have "continue[d] to work through the pandemic." *Id.* ¶ 2. Thus, according to the facts alleged—which the Court "must accept as true," *Iqbal*, 556 U.S. at 678—the screening allowed Walmart to continue operating and therefore allowed Plaintiffs to continue working.

Plaintiffs' attempt to downplay the benefits conferred on them by alleging, in conclusory terms, that the time spent undergoing COVID-19 screening "was primarily, if not entirely, for Walmart's benefit and to Plaintiffs' detriment." Compl. ¶ 69. But their opinion regarding the relative benefits of the screening is immaterial. The complaint's non-conclusory allegations unquestionably plead a benefit, because they allege that the screening protected Plaintiffs' health and ability to work. Plaintiffs cannot avoid dismissal by denying what the facts they pled demonstrate on their face. *VeriFone*, 11 F.3d at 868 ("Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.").

Because the complaint makes clear that Plaintiffs benefitted from the transaction that purportedly enriched Walmart, they have failed adequately to allege that Walmart "received a benefit at [their] expense[.]" *Wang*, 230 Ariz. at 318. For this reason alone, the claim fails.

B. Plaintiffs Also Failed To Allege Facts Showing That It Would Be Unjust For Walmart To Retain Any Benefit That It Derived.

Plaintiffs' complaint also fails to plead facts that demonstrate it would be unjust for Walmart to benefit from the screenings. "'[T]he mere receipt of a benefit is insufficient' to entitle a plaintiff to compensation" for alleged unjust enrichment. *Freeman*, 226 Ariz. at 251 (quoting *Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz.

48, 54 (1985)). The plaintiff must also show that there is no justification for the defendant's benefit, such that injustice would result unless the defendant made restitution. *Loiselle v. Cosas Mgmt. Grp., LLC*, 224 Ariz. 207, 210 (Ariz. Ct. App. 2010). For example, "a person may be entitled to restitution if the benefit was conferred through mistake or coercion," *id.*, or some other "improper conduct," *Wang*, 230 Ariz. at 319-20.

Anderson v. Bass Pro Outdoor World, LLC, 355 F. Supp. 3d 830 (W.D. Mo. 2018), which involved an unjust enrichment claim under Arizona law, demonstrates this principle. In *Anderson*, the plaintiff alleged the defendant enticed customers to visit its stores by advertising a product that it did not have in sufficient quantities, and then profited when customers who were unable to buy the product made other purchases. The court dismissed the unjust enrichment cause of action for failure to state a claim because it was not unjust for the defendant to retain profits from purchases that benefitted both parties. *Id.* at 839.

The court in *Howard v. Gap, Inc.* reached the same conclusion applying New York law, which has a substantially identical test.[2] 2007 WL 164322, at *4. The plaintiff alleged that Gap, her employer, was unjustly enriched because it required her to buy its clothing to wear at work but did not reimburse her. *Id.* The court held that the claim failed as a matter of law because, even if Gap required the plaintiff to purchase its products, she benefitted from obtaining clothing at fair market value that she could wear outside of work. *Id.* "Since she received something of objective value, equity and good conscience do not demand that she receive restitution. Thus, plaintiff has failed to plead a claim for unjust enrichment." *Id.*

Watson v. Aegis Commc'ns Grp. LLC, 2014 WL 3687327 (W.D. Mo. July 24, 2014) is in accord. There, an employee who performed work at a call center in India as

[2] Under the New York test, "plaintiff must allege (1) that defendant benefitted; (2) at plaintiff's expense; and (3) equity and good conscience require restitution." *Howard*, 2007 WL 164322, at *4 (citing *Kaye v. Grossman*, 202 F.3d 611, 616 (2d Cir. 2000)).

part of his employer's "Cross-Shoring program," alleged that the employer was unjustly enriched because the employee received only "a $100 stipend, housing, meals, [and] training courses through Cornell University" during the program, instead of his regular salary of $19.25 per hour. *Id.* at *7. The court found "no evidence that Defendants were unjustly enriched by this arrangement," even though "Plaintiff may ultimately demonstrate that Defendants got the better end of the bargain," because both parties received a benefit from the arrangement. *Id.*; *see Anderson*, 355 F. Supp. 3d at 839 (noting the similarity between Arizona and Missouri unjust enrichment law).

Here, Plaintiffs do not plead any *facts* showing that Walmart unjustly benefitted from COVID-19 screening allegedly implemented, in part, to protect them. Their only allegation on point is a threadbare recitation of the element itself: "Walmart's acceptance and retention of the benefit of the employees' unpaid labor was unjust and inequitable and resulted in Walmart being unjustly enriched." Compl. ¶ 75. But this allegation is simply a legal conclusion, and cannot justify denial of a motion to dismiss. *VeriFone*, 11 F.3d at 868. Likewise, Plaintiffs' allegation that the time spent undergoing COVID-19 screening "was primarily, if not entirely, for Walmart's benefit and to Plaintiffs' detriment" (Compl. ¶ 69) is no more than a conclusory statement that fails to convey any facts suggesting that Walmart's retention of such a benefit would be unjust under the circumstances.

The factual (non-conclusory) allegations in the complaint belie any argument that Walmart unjustly benefitted from the health screenings. Plaintiffs admit that the screenings were mutually beneficial, because they "ensure[d] a safe environment" by preventing a "mass breakout of the virus" (Compl. ¶¶ 37, 39), and that they were "necessary" to "the company's stores . . . remain[ing] in operation," which allowed them "to continue to work through the pandemic" (*id.* ¶ 2).

At bottom, Plaintiffs' claim is that their time spent undergoing health screenings is "compensable work" under Arizona wage laws. *See, e.g.*, Compl. ¶ 31. But unjust enrichment is an equitable claim, which recognizes that "'the mere receipt of a benefit is

insufficient' to entitle a plaintiff to compensation" unless injustice would result. *Freeman*, 226 Ariz. at 251. "[E]quity" and "good conscience" do not demand restitution by Walmart, because Plaintiffs also clearly benefitted from the screening. *Wang*, 230 Ariz. at 318. Whatever rights Plaintiffs may have under the wage laws, they are not at issue here. Their claim for unjust enrichment must be dismissed.

C. The Court Should Dismiss Plaintiffs' Claim With Prejudice.

Granting leave to amend a deficient complaint is not proper where "the proposed amended pleading would be futile." *Steckman*, 143 F.3d at 1298. An amendment would be futile here because, as shown above, Plaintiffs' allegations establish a mutual benefit that precludes an unjust enrichment claim.

Plaintiffs may not revive their claim by abandoning the allegations that demonstrate a mutual benefit from the screening. "Allegations in a complaint are considered judicial admissions." *Hakopian v. Mukasey*, 551 F.3d 843, 846 (9th Cir. 2008). "[W]hile notice pleading does not demand that a complaint expound the facts, a plaintiff who does so is bound by such exposition." *Bender v. Suburban Hosp., Inc.*, 159 F.3d 186, 192 (4th Cir. 1998).

In short, because Plaintiffs are bound by their allegations that preclude a finding that Walmart benefitted unjustly or at their expense, any amendment would be futile. Therefore, the Court should dismiss the claim with prejudice. *E.g.*, *Deaton v. McElhaney*, No. 08-cv-1396, 2009 WL 2096012, at *1, *5-6 (C.D. Cal. July 14, 2009) (dismissal with prejudice under Rule 12(b)(6) where allegations in complaint showed the plaintiff had no viable claim).

V. CONCLUSION

Based on the foregoing, Walmart respectfully requests that the Court dismiss Plaintiffs' complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF CONSULTATION

Pursuant to LR Civ 12.1(c), and the Court's April 7, 2021 Order (Dkt. No. 8), counsel for Walmart certifies that it met and conferred in good faith with Plaintiffs' counsel on June 23, 2021 by telephone regarding Walmart's intention to file a Rule 12(b)(6) motion to dismiss count III of the complaint. Counsel for Walmart notified Plaintiffs' counsel of the issues asserted in the motion and the parties were unable to agree that the pleading was curable in any part by a permissible amendment offered by Plaintiff.

Respectfully submitted,

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