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NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Casey Corbin, et al.,
Plaintiffs,
vs.
GoDaddy.com, Inc., an Arizona
corporation,
Defendant.

No. CV-10-1313-PHX-GMS

ORDER

Pending before the Court are a Motion to Dismiss (Doc. 20) Counts one and two of Plaintiffs’ First Amended Complaint (Doc. 19) and a Motion to Strike (Doc. 23), filed by Defendant GoDaddy.com, Inc. (“GoDaddy”).¹ After reviewing the pleadings, and having determined that oral argument is unnecessary,² the Court grants the Motion to Dismiss and the Motion to Strike.

¹ Defendant’s first Motion to Dismiss (Doc. 7) is moot because Defendant relies on the same arguments in its second Motion to Dismiss (Doc. 20), which was filed after Plaintiffs amended their complaint.

² Defendant’s request for oral argument is denied because the parties have had an adequate opportunity to present their written arguments, and oral argument will not aid the Court’s decision. *See Lake at Las Vegas Investors Grp., Inc. v. Pac. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

1 **BACKGROUND**

2 Plaintiffs Casey Corbin, Christopher Flournoy, Toby Harris, Benny Henriksen, Alan
3 Reeser, John Does 1-100, and Jane Does 1-100 (collectively “Plaintiffs”) allege the
4 following. (Doc. 19). Plaintiffs were employed by Defendant GoDaddy, an Arizona
5 corporation, as Inbound Technical Sales and Support Specialists for various periods of time
6 between 2004–2010. GoDaddy enticed potential employees with advertisements promising
7 that Inbound Technical Sales and Support Specialists have salaries of “\$12.00 per hour +
8 bonus to start” and that they are eligible for bonus pay during training. GoDaddy advertises
9 that average earnings for these employees is between \$35,000 and \$45,000 per year and that
10 top earners earn \$60,000 per year. During training, employees are presented with a matrix
11 showing that they will earn bonus payments through the sale of products and services. At
12 times GoDaddy refers to the bonus payments as commission payments. (Doc. 19, Ex. 1).
13 Plaintiffs relied upon the promise of bonuses/commissions in completing their work for
14 GoDaddy and reasonably expected to receive such payments based on their sales volume.

15 Plaintiffs assert the following claims: 1) violation of the Fair Labor Standards Act
16 (“FLSA”) as to all Plaintiffs and all similarly situated individuals opting in because GoDaddy
17 wrongfully withheld overtime pay from Plaintiffs by excluding their non-discretionary bonus
18 payments from their normal rates of pay for purposes of calculating overtime pay pursuant
19 to 29 U.S.C. § 207(a) and (e)(3); 2) violation of A.R.S. § 23-355 as to all Plaintiffs and the
20 state class for denying them earned bonuses based on employment of a subjective and
21 arbitrary “Quality Assurance” factor, which was applied at will by GoDaddy; and 3)
22 wrongful termination of Plaintiff Harris. Defendant moves to dismiss Counts one and two.

23 **DISCUSSION**

24 **I. Legal Standard**

25 To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil
26 Procedure 12(b)(6), a complaint must contain more than “labels and conclusions” or a
27 “formulaic recitation of the elements of a cause of action”; it must contain factual allegations
28 sufficient to “raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*,

1 550 U.S. 544, 555 (2007). While “a complaint need not contain detailed factual allegations
2 . . . it must plead ‘enough facts to state a claim to relief that is plausible on its face.’”
3 *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*,
4 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content
5 that allows the court to draw the reasonable inference that the defendant is liable for the
6 misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550
7 U.S. at 556). The plausibility standard “asks for more than a sheer possibility that a
8 defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent
9 with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of
10 entitlement to relief.’” *Id.* (internal citations omitted) (quoting *Twombly*, 550 U.S. at 557).
11 Similarly, legal conclusions couched as factual allegations are not given a presumption of
12 truthfulness, and “conclusory allegations of law and unwarranted inferences are not sufficient
13 to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998). When
14 analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll allegations of
15 material fact are taken as true and construed in the light most favorable to the nonmoving
16 party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). Courts generally will not
17 consider evidence or documents beyond the complaint in the context of a Rule 12(b)(6)
18 motion to dismiss. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).³

19 **II. Analysis**

20 **A. Count One: Violation of Fair Labor Standards Act**

21 Count one is an FLSA claim, brought on behalf of Plaintiffs and “[a]ll current and
22 former GoDaddy employees who were employed as Inbound Technical Sales and Support
23 Specialists and who have received or been entitled to receive bonus payments and have
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25 ³ Accordingly, Defendant’s Motion to Strike the exhibits attached to Plaintiffs’
26 Response and the new factual allegations contained therein is granted. (Doc. 23). Pursuant
27 to Federal Rule 12(d), the Court disregards “matters outside the pleadings,” including the
28 four earnings statements attached to the Response (Doc. 21, Ex. A), and the factual
allegations presented for the first time in the Response. (Doc. 23).

1 worked overtime for Defendant and whose normal rate of pay for overtime payment purposes
2 was calculated by excluding non-discretionary bonus payments.” (Doc. 19, ¶ 39). Count one
3 alleges that “GoDaddy wrongfully withheld overtime pay from the Plaintiffs by excluding
4 the Plaintiffs’ non-discretionary bonus payments from their normal rates of pay for purposes
5 of calculating their overtime pay in violation of 29 U.S.C. § 207(a) and (e)(3).” (*Id.* at ¶ 56).

6 The FLSA provides that a covered employer shall not employ any employee “for a
7 workweek longer than forty hours unless such employee receives compensation for his
8 employment in excess of the hours above specified at a rate not less than one and one-half
9 times the regular rate at which he is employed.” 29 U.S.C. § 207(a)(1). The FLSA defines
10 “regular rate” as “all remuneration for employment”, but excluding payment in which “both
11 the fact that payment is to be made and the amount of the payment are determined at the sole
12 discretion of the employer at or near the end of the period and not pursuant to any prior
13 contract, agreement, or promise causing the employee to expect such payments regularly.”
14 29 U.S.C. § 207(e)(3) (emphasis added).

15 Even viewing the Complaint in the light most favorable to Plaintiffs, the Court finds
16 that Plaintiffs have not pled sufficient facts to establish a FLSA claim. In their general
17 allegations Plaintiffs assert the following facts, which they subsequently incorporate into
18 their specific claims: (1) “During training, employees are presented with a complex bonus
19 structure which is not provided to them in writing.” (Doc. 19, ¶ 22); (2) “The amount of each
20 employee’s bonus payments is based upon total sales, however, GoDaddy selectively refuses
21 bonuses to employees regardless of sales numbers on the basis of a ‘Quality Assurance’
22 factor which is, upon information and belief, subjective and arbitrary.” (*Id.* at ¶ 23); and (3)
23 “Plaintiffs were denied bonuses based on a subjective Quality Assurance factor applied at
24 will by GoDaddy.” (*Id.* at ¶ 24). The foregoing allegations appear to admit that a subjective
25 Quality Assurance factor was part of the bonus formula. In such a circumstance, both the fact
26 and the amount of GoDaddy’s bonus payments were in the sole discretion of the employer.
27 Thus, Plaintiffs fail to state a plausible claim pursuant to 29 U.S.C. § 207(e)(3). To the
28 contrary, the allegations strongly suggest that the bonus payments, which were selectively

1 denied to employees on the basis of a subjective and arbitrary Quality Assurance factor, fall
2 squarely within GoDaddy's discretion. Plaintiffs' assertion, despite this admission, that the
3 bonus system is non-discretionary, as defined in 29 U.S.C. § 207(e), (Doc. 19, ¶ 52), is also
4 insufficient to support their claim because it constitutes a legal conclusion that appears to be
5 contradicted by Plaintiffs' own factual allegations.⁴

6 Accordingly, Plaintiffs have not pled sufficient facts to demonstrate that Defendant's
7 exclusion of the bonus payments in calculating overtime pay could plausibly be in violation
8 of the FLSA. Specifically, they have failed to allege facts to establish that the term "regular
9 rate," as defined under the FLSA, could be inclusive of GoDaddy's bonus payments, which
10 as alleged by Plaintiffs, were contingent upon a subjective and arbitrary factor. Because
11 Plaintiffs' factual allegations with respect to their FLSA claim are insufficient to state a claim
12 to relief that is plausible on its face, Count one is dismissed, with leave to amend.

13 **B. Count Two: Violation of A.R.S. § 23-355**

14 Count two of Plaintiffs' Amended Complaint alleges that "GoDaddy wrongfully
15 withheld bonus payments from Plaintiffs by employing a subjective and arbitrary Quality
16 Assurance factor to deny earned bonus/commission payments." (Doc. 19, ¶ 68). Similar to
17 Count one, Defendant seeks dismissal of this count on grounds that it fails to state a plausible
18 claim where Plaintiffs themselves have acknowledged the discretionary nature of any
19 bonuses.

20 A.R.S. § 23-355 provides that "if an employer . . . fails to pay wages due any
21 employee, the employee may recover in a civil action against an employer or former
22 employer an amount that is treble the amount of the unpaid wages." Under § 23-350(5),
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24 ⁴ Defendant additionally contends that this count should be dismissed because
25 Plaintiffs have "failed to assert that they received any bonus payments during any of the same
26 weeks in which they also worked overtime . . . and if Plaintiffs did not earn any bonuses
27 during the same weeks when they worked overtime, there cannot be an FLSA violation."
28 (Doc. 20). Defendant's argument is unpersuasive because at this stage of the litigation
Plaintiffs need not plead such highly specific factual allegations. Nonetheless, for the reasons
addressed above, Plaintiffs have failed to allege sufficient facts to state a FLSA claim.

1 “wages” means:

2 nondiscretionary compensation due an employee in return for labor or services
3 rendered by an employee for which the employee has a reasonable expectation
4 to be paid whether determined by a time, task, piece, commission or other
5 method of calculation. Wages include . . . commissions, bonuses and other
6 amounts promised when the employer has a policy or practice of making such
7 payments.

8 Plaintiffs contend that the application of a “subjective and arbitrary Quality Assurance
9 Factor” does not render the bonus payments discretionary for purposes of A.R.S. § 23-355.
10 (Doc. 19, ¶ 68). The Court respectfully disagrees. While A.R.S. § 23-350(5) expressly
11 includes “bonuses” in its definition of “wages,” the bonuses must qualify as
12 “nondiscretionary compensation” in order to fall within the scope of the statute.

13 By its terms, A.R.S. § 23-355 “subjects an employer to treble damages for failing to
14 pay nondiscretionary compensation for labor or services actually performed *and* for which
15 the employee had a reasonable expectation, no matter how the compensation is calculated
16 or whether labeled as wages, sick pay, vacation pay, severance pay, commissions or
17 bonuses.” *Schade v. Diethrich*, 158 Ariz. 1, 13, 760 P.2d 1050, 1062 (1988) (emphasis
18 added) (citing *Abrams v. Horizon Corp.*, 137 Ariz. 73, 77, 669 P.2d 51, 55 (1983)). Like the
19 FLSA, the bonus payments must qualify as “nondiscretionary compensation” in order to fall
20 within the scope of the Arizona wage statute. Here, Plaintiffs have conceded that “GoDaddy
21 selectively refuses bonuses to employees regardless of sales numbers on the basis of a
22 ‘Quality Assurance’ factor which is, upon information and belief, subjective and arbitrary.”
23 (Doc. 19, ¶ 23). Such a factual allegation indicates that the bonus payments were contingent
24 upon a “subjective and arbitrary” Quality Assurance score, and thus discretionary in nature.
25 Accordingly, Plaintiffs have failed to allege sufficient facts to demonstrate that the bonus
26 payments fall within the scope of “wages” as defined by A.R.S. § 23-350(5), and therefore
27 the claim is dismissed, with leave to amend.
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1 **CONCLUSION**

2 Defendant's Motion to Dismiss is granted with respect to Counts one and two.
3 Plaintiffs have failed to state a claim against Defendant with regard to both counts. At the
4 same time, the Court "should freely give leave [to amend] when justice so requires." FED.
5 R. Civ. P. 15(a)(2). The Ninth Circuit has characterized this as a standard of "extreme
6 liberality." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (internal
7 quotation marks omitted). Given that Plaintiffs may be able to allege sufficient facts with
8 regard to Counts one and two, dismissal is with leave to amend. However, this is
9 Plaintiffs' final opportunity to amend their Complaint.

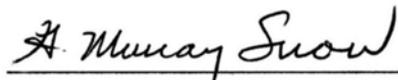
10 **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss (Doc. 7) is
11 **DENIED** as moot.

12 **IT IS FURTHER ORDERED** that Defendant's Motion to Dismiss (Doc. 20) is
13 **GRANTED**. Counts one and two are dismissed.

14 **IS IT FURTHER ORDERED** that Plaintiffs may file an Amended Complaint
15 **within 15 days** of the date of this Order.

16 **IT IS FURTHER ORDERED** that Defendant's Motion to Strike (Doc. 23) is
17 **GRANTED**.

18 **DATED** this 2nd day of March, 2011.

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21 _____
22 G. Murray Snow
23 United States District Judge
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