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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK HENDRICKSON, individually
and on behalf of others similarly situated
and/or aggrieved employees of
Defendants in the State of California,

Plaintiff,

v.

WAL-MART ASSOCIATES, INC.; and
DOES 1 through 50, inclusive,

Defendant.

Case No.: 23-cv-00110-AJB-MSB

**ORDER RE: DEFENDANT’S MOTION
TO DISMISS PLAINTIFF’S FOURTH
AMENDED COMPLAINT**

(Doc. No. 40)

Presently pending before the Court is Defendant Wal-Mart Associates, Inc.’s motion to dismiss Count 3 of Plaintiff Mark Hendrickson’s Fourth Amended Complaint (“4AC”) for alleged violations of California’s Unfair Competition Law. (Doc. No. 40.) The motion is fully briefed, (Doc. Nos. 42 & 43), and the matter is suitable for determination on the papers. *See* S.D. Cal. Civ. L. R. 7.1.d.1. For the reasons stated herein, Walmart’s motion to dismiss is **DENIED AS MOOT** and Plaintiff’s claim under the UCL is remanded to the San Diego County Superior Court.

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1 **I. BACKGROUND**

2 Plaintiff is a current employee at Walmart’s El Centro location, where he works both
3 indoors and outdoors. (4AC, Doc. No. 39, ¶¶ 9, 27, 29.) Plaintiff originally filed his
4 complaint in the Superior Court of California, County of San Diego on December 14, 2022.
5 (Doc. No. 1-2.) Walmart thereafter removed the case to federal court. (Doc. No. 1.) Plaintiff
6 asserts four causes of action against Walmart: (1) failure to provide recovery periods (Cal.
7 Lab. Code §§ 226.7 & 6720, and Cal. Code Regs. Tit. 8 § 3395); (2) failure to provide
8 accurate itemized wage statements (Cal. Lab. Code §§ 226, 226.3, and 1198); (3) violation
9 of California’s unfair competition law (“UCL”) (Cal. Bus. & Prof. Code § 17200 *et seq.*);
10 and (4) violation of the Private Attorneys General Act (Cal. Lab. Code § 2698 *et seq.*). (*See*
11 *generally* 4AC.)

12 **II. LEGAL STANDARD**

13 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the pleadings
14 and allows a court to dismiss a complaint upon a finding that the plaintiff has failed to state
15 a claim upon which relief may be granted. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
16 2001). The court may dismiss a complaint as a matter of law for: “(1) lack of a cognizable
17 legal theory or (2) insufficient facts under a cognizable legal claim.” *SmileCare Dental*
18 *Grp. v. Delta Dental Plan of Cal.*, 88 F.3d 780, 783 (9th Cir. 1996) (citation omitted).
19 However, a complaint survives a motion to dismiss if it contains “enough facts to state a
20 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
21 (2007).

22 Notwithstanding this deference, the reviewing court need not accept legal
23 conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for the
24 court to assume “the [plaintiff] can prove facts that [he or she] has not alleged[.]”
25 *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S.
26 519, 526 (1983). On the other hand, “[w]hen there are well-pleaded factual allegations, a
27 court should assume their veracity and then determine whether they plausibly give rise to
28 an entitlement to relief.” *Iqbal*, 556 U.S. at 679. The court only reviews the contents of the

1 complaint, accepting all factual allegations as true, and drawing all reasonable inferences
2 in favor of the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002),
3 *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub. L. No. 110-
4 325, §§ 4(a), 8, 122 Stat. 3555).

5 **III. DISCUSSION**

6 Here, Plaintiff’s third claim alleges Walmart violated the UCL. (4AC ¶¶ 147–72.)
7 Plaintiff’s UCL allegations are derivative of his California Labor Code claims.
8 Specifically, Plaintiff asserts Walmart’s “(i) failure to provide proper recovery periods and
9 pay Plaintiff and the UCL Subclass premium wages for failure to provide compliant
10 recovery periods; (ii) failure to provide to adequate air conditioning, shade, and/or water;
11 (iii) failure to maintain accurate records; and (iv) failure to provide Plaintiff and the UCL
12 Subclass with accurate itemized wage statements” all amount to unfair and/or unlawful
13 business practices in violation of the UCL and the Labor Code. (*Id.* ¶ 150.) Plaintiff seeks
14 equitable remedies in the form of “restitution of all wages and all monies owed[.]” (*Id.*
15 ¶ 172.)

16 **1. Rule 12(g)(2) Waiver**

17 As an initial matter, Plaintiff argues Walmart waived its right under Federal Rule of
18 Civil Procedure 12(g)(2) to bring a motion to dismiss for Plaintiff’s alleged failure that he
19 lacks an adequate remedy at law. (Doc. No. 42 at 10.) Specifically, Plaintiff asserts
20 Walmart did not raise this defense to Plaintiff’s UCL claim until Walmart’s previous
21 12(b)(6) motion to dismiss regarding Plaintiff’s Third Amended Complaint. (*Id.* at 11; *see*
22 Doc. No. 33.) The Court notes Plaintiff did not raise this argument in response to Walmart’s
23 previous motion to dismiss. (*See* Doc. No. 35.)

24 Rule 12(g) provides, “Except as provided in Rule 12(h)(2) or (3), a party that makes
25 a motion under this rule must not make another motion under this rule raising a defense or
26 objection that was available to the party but omitted from its earlier motion.” Fed. R. Civ.
27 P 12(g). However, “[t]he consequence of omitting a defense from an earlier motion under
28 Rule 12 depends on [the] type of defense omitted.” *In re Apple iPhone Antitrust Litig.*

1 (“*Apple*”), 846 F.3d 313, 317–18 (9th Cir. 2017); Fed. R. Civ. P. 12(g)–(h). “Simply put,
2 a defendant who omits a defense under Rules 12(b)(2)–(5) entirely waives that defense,
3 whereas a defendant who omits a defense under 12(b)(6) does not.” *Wagnon v. Rocklin*
4 *Unified Sch. Dist.*, No. 2:17-cv-01666-TLN-KJN, 2021 WL 1214571, at *5 (E.D. Cal. Mar.
5 31, 2021); *see Apple*, 846 F.3d at 317–18; Fed. R. Civ. P. 12(h)(1)–(2). Indeed, the Ninth
6 Circuit has adopted a “very forgiving” approach to Rule 12(g), which allows district courts
7 to consider new arguments in successive motions to dismiss under Rule 12(b)(6) in the
8 interest of judicial economy. *Apple*, 846 F.3d at 318–19; *Cuviello v. City of Vallejo*, No.
9 16-cv-02584-KJM-KJN, 2020 WL 6728796, at *4–5 (E.D. Cal. Nov. 16, 2020) (drawing
10 on the “practical wisdom” of other districts and the Circuit’s “forgiving” stance and
11 considering defendants’ late-filed 12(b)(6) motion on the merits despite the language of
12 Rules 12(g)(2) and 12(h)(2)); *but see In re Packaged Seafood Prods. Antitrust Litig.*, 277
13 F. Supp. 3d 1167, 1174 (S.D. Cal. 2017) (declining to exercise its discretion to disregard
14 Rule 12(g)(2) where the defendant raised a new argument in the 12(b)(6) motion before
15 the court not raised in a previous 12(b)(6) motion to dismiss).

16 Thus, the Court declines to find Walmart waived its inadequate legal remedy defense
17 to Plaintiff’s UCL claim by failing to file it in their first two Rule 12(b)(6) motions.

18 **2. UCL Claim**

19 Walmart argues Plaintiff’s UCL claim must be dismissed because Plaintiff does not
20 allege his legal remedies are inadequate. (Doc. No. 40 at 12–13.) Specifically, Walmart
21 argues Plaintiff seeks restitution solely for the fourth year preceding the three-year statute
22 of limitations governing his Labor Code claims, but the Ninth Circuit has held that a legal
23 claim under the Labor Code is not inadequate simply because of a shorter statute of
24 limitations. (*Id.* at 12 (citing *Guzman v. Polaris Indus. Inc.*, 49 F.4th 1308, 1313 n.2 (9th
25 Cir. 2022)).) The Court agrees.

26 “[T]he UCL provides only for equitable remedies. Prevailing plaintiffs are generally
27 limited to injunctive relief and restitution.” *Hodge v. Superior Ct.*, 145 Cal. App. 4th 278,
28 284, (2006); *accord Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1144

1 (2013) (“Through the UCL a plaintiff may obtain restitution and/or injunctive relief against
2 unfair or unlawful practices.”). Although “[e]quitable jurisdiction is distinct from subject
3 matter jurisdiction, . . . both are required for a federal court to hear the merits of an equitable
4 claim.” *Guzman*, 49 F.4th at 1314; *Schlesinger v. Councilman*, 420 U.S. 738, 754 (1975).
5 Unlike state courts, federal courts have equitable jurisdiction to award equitable relief only
6 where a plaintiff has no adequate legal remedy based on the same harm. *See Sonner v.*
7 *Premier Nutrition Corp.*, 971 F.3d 834, 842 (9th Cir. 2020). Thus, where monetary
8 damages provide an adequate remedy, a federal court may not consider the merits of
9 equitable claims for restitution, disgorgement, or injunctive relief. *See Franklin v. Gwinnett*
10 *Cnty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992); *see, e.g., Feitelberg v. Credit Suisse First Bos.,*
11 *LLC*, 134 Cal. App. 4th 997, 1009 (2005) (noting restitution and injunctive relief are
12 equitable in nature). Plaintiffs bear the burden to establish they lack an adequate damages
13 remedy before they can obtain equitable relief. *See Sonner*, 971 F.3d at 844.

14 Here, Plaintiff asserts he lacks an adequate remedy at law for violations suffered
15 beyond the three-year statute of limitations governing his Labor Code claims. (4AC ¶ 170.)
16 Thus, Plaintiff seeks restitution under the UCL “solely for the fourth year preceding the
17 three-year statute of limitations governing the claims under Labor Code § 226.7.” (*Id.*) To
18 this point, Plaintiff asserts he does not merely seek the same amount in restitution that he
19 seeks in damages for the same harm, and that any remedy that does not provide for the
20 payment of all owed and unpaid wages fails to provide a complete remedy. (Doc. No. 42
21 at 9 (citing *Cook v. Matrix Absence Mgmt., Inc.*, --- F. Supp. 3d ----, No. 23-cv-05690-
22 PCP, 2024 WL 3077160, at *5 n.1 (N.D. Cal. June 20, 2024)).)

23 The Court finds Plaintiff’s argument has been considered—and rejected—by the
24 Ninth Circuit in *Guzman*. *See* 49 F.4th at 1313 n.2. Specifically, the court acknowledged
25 the UCL had a longer statute of limitations than the comparator statute at issue in that case
26 and declined to find the difference makes the legal remedy inadequate so as to require the
27 district court to exercise its equitable jurisdiction. *Id.* at 1311, 1313 n.2, 3. Applying
28 *Guzman*, as it must, the Court similarly rejects Plaintiff’s argument that a shorter statute of

1 limitations period makes the legal remedy under the Labor Code inadequate such that
2 Plaintiff could bring his equitable UCL claim in federal court. Consequently, the Court
3 finds it futile to amend the Complaint to this effect.

4 Finally, Walmart asserts Plaintiff’s UCL claim should be dismissed with prejudice
5 because Plaintiff’s defective UCL claim cannot be cured. (Doc. No. 40 at 13.) Plaintiff
6 responds that if the Court finds Plaintiff has not sufficiently pled a lack of adequate legal
7 remedies, his UCL claim should be remanded to state court, or, alternatively, dismissed
8 without prejudice to re-file in state court. (Doc. No. 42 at 17.) In *Guzman*, the Ninth Circuit
9 noted that because the district court lacked equitable jurisdiction, it should have dismissed
10 the UCL claim before it without prejudice. 49 F.4th at 1315. Thus, the Court turns to
11 whether Plaintiff’s UCL claim should be remanded or dismissed without prejudice to re-
12 file in state court.

13 As explained in *Morgan v. Rohr, Inc.*, No.: 20-cv-574-GPC-AHG, 2023 WL
14 7713582 (S.D. Cal. Nov. 15, 2023), *appeal dismissed sub nom. Morgan v. Hamilton*
15 *Sundstrand Corp.*, No. 23-4236, 2024 WL 1152284 (9th Cir. Feb. 28, 2024), “the claims
16 in *Guzman* were filed in federal court, [and thus] remand was not an option. As such,
17 *Guzman* did not foreclose remand.” 2023 WL 7713582, at *3. The court thus concluded
18 “that *Guzman* does not require a dismissal of the UCL claim and permits the Court to
19 review the facts of the case to determine whether a remand is warranted.” *Id.* Walmart
20 asserts *Morgan* does not apply because there, the court had already certified classes and
21 the parties had engaged in pre- and post-certification discovery. (Doc. No. 43 at 5 (citing
22 *Morgan*, 2023 WL 7713582, at *1, *4).) However, the *Morgan* court also noted that “[t]o
23 the extent that tolling of the statute of limitations is not available, forcing Plaintiffs to refile
24 their claims may extinguish the UCL claims of certain plaintiffs.” 2023 WL 7713582, at
25 *5. “This procedure to extinguish claims timely filed in the proper forum would encourage
26 the sort of gamesmanship disfavored by courts of equity.” *Id.* Indeed, dismissing a
27 plaintiff’s UCL claim without prejudice and requiring them to re-file the case in state court
28 “could place the case in the ‘perpetual loop’ of ‘(1) [P]laintiff’s re-filing in state court,

1 followed by (2) removal by [D]efendant[] and then (3) dismissal by this Court.” *Ruiz v.*
2 *The Bradford Exchange, Ltd.*, No.: 3:23-cv-01800-WQH-KSC, 2024 WL 2844625, at *5
3 (S.D. Cal. May 16, 2024).

4 As noted by *Morgan*, “[a] number of district court decisions have found that remand
5 of a UCL claim was warranted where courts lacked equitable jurisdiction.” *Id.*; *see, e.g.*,
6 *Guthrie v. Transamerica Life Ins. Co.*, 561 F. Supp. 3d 869, 872 (N.D. Cal. 2021); *Haver*
7 *v. Gen. Mills, Inc.*, No.: 3:24-cv-01269-CAB-MMP, 2024 WL 4492052, at *4 (S.D. Cal.
8 Oct. 11, 2024); *Cook*, 2024 WL 3077160, at *5; *Ruiz*, 2024 WL 2844625, at *5–6; *Granato*
9 *v. Apple Inc.*, No. 5:22-CV-02316-EJD, 2023 WL 4646038, at *5 (N.D. Cal. July 19,
10 2023); *Clevenger v. Welch Foods Inc.*, No. SACV 23-00127-CJC-JDEx, 2023 WL
11 2390630, at *4 (C.D. Cal. Mar. 7, 2023). Thus, the Court concludes a court declining to
12 exercise jurisdiction in accordance with equitable principles may partially remand an
13 action.


14 The Court concludes that precedent and interests in fairness and economy all favor
15 remand. Remand will return the UCL claim to the state court “more efficiently.” *Guthrie*,
16 561 F. Supp. 3d at 880.

17 **IV. CONCLUSION**

18 For the foregoing reasons, the Court **DENIES AS MOOT** Walmart’s motion to
19 dismiss. Plaintiff’s UCL claim is to be severed and remanded to the Superior Court of San
20 Diego County (originally filed as Case No. 37-2022-00049939-CU-OE-CTL).

21
22 **IT IS SO ORDERED.**

23 Dated: November 26, 2024

24 
25 Hon. Anthony J. Battaglia
26 United States District Judge
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