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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHAO CHEN, individually and on behalf
of those similarly situated,

Plaintiff,

v.

THE GEO GROUP, INC., a Florida
corporation,

Defendant.

CASE NO. 3:17-5769-RJB

ORDER ON PLAINTIFF'S
MOTION TO DISMISS OR STRIKE
DEFENDANT'S
COUNTERCLAIMS AND
AFFIRMATIVE DEFENSES

THIS MATTER comes before the Court upon Plaintiff Chao Chen's Motion to Dismiss or Strike Defendant's Counterclaims and Affirmative Defenses. Dkt. 37. The Court has considered the motion, Defendant The Geo Group, Inc.'s Response, Plaintiff's Reply, Defendant's Answer, and the remainder of the file herein. Dkts. 33, 37, 38, 39.

This case arises out of the allegation that Defendant failed to compensate Plaintiff and a proposed class of immigration detainees commensurate with the Washington Minimum Wage Act. *See* Dkt. 1. Defendant's Answer alleges two counterclaims, both of which Plaintiff seeks to

1 strike under Fed. R. Civ. P. 12(f) or dismiss under Fed. R. Civ. P. 12(b)(6). *See* Dkt. 33 at ¶¶8.1-
2 8.14, 11.1-12.12. Defendant’s Answer raises fourteen affirmative defenses, all but four of which
3 Plaintiff seeks to strike. *See id.* at 33 at ¶¶8.1-8.14.

4 Facts alleged in the Answer and procedural history are introduced below only where
5 relevant to discussion of each counterclaim and affirmative defense.

6 I. COUNTERCLAIMS (Dkt. 33 at ¶¶11.1-12.12)

7 **A. Standard for relief.**

8 Plaintiff seeks dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Fed. R.
9 Civ. P. 12(b) motions to dismiss may be based on either the lack of a cognizable legal theory or
10 the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica*
11 *Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted
12 and the claim is construed in the plaintiff’s favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir.
13 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed
14 factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief
15 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause
16 of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55 (2007) (internal
17 citations omitted). “Factual allegations must be enough to raise a right to relief above the
18 speculative level, on the assumption that all the allegations in the complaint are true (even if
19 doubtful in fact).” *Id.* at 555. The complaint (or counterclaim) must allege “enough facts to state
20 a claim to relief that is plausible on its face.” *Id.* at 547.

21 Plaintiff also moves to strike under Fed. R. Civ. P. 12(f). Rule 12(f) is designed to help
22 “avoid the expenditure of time and money that must arise from litigating spurious issues by
23 dispensing with those issues prior to trial.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970,
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1 973 (9th Cir. 2010) (citation omitted). Under Rule 12(f), courts may “strike from a pleading an
2 insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R.
3 Civ. P. 12(f). Motions to strike are disfavored, because they “may be used as delaying tactics and
4 because of the strong policy favoring resolution on the merits.” *Barnes v. AT&T Pension Ben.*
5 *Plan-Nonbargained Program*, 718 F.Supp.2d 1167 (N.D.Cal.2010), citing to *Stanbury Law Firm*
6 *v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir.2000).

7 **B. Unjust enrichment (Dkt. 33 at ¶¶11.1-11.14)**

8 Defendant’s counterclaim for Unjust Enrichment alleges that, as required by ICE, GEO
9 operates the Voluntary Work Program, which is not intended to, and does not, create an
10 employer/employee relationship between GEO and detainees, whose participation is voluntary.
11 Dkt. 33 at ¶11.1. The program is intended to promote institutional maintenance and reduce
12 detainee idleness, it is alleged, with no traditional, standard, performance metrics used to
13 measure job performance. *Id.* at ¶11.3. The counterclaim further alleges that if Plaintiff prevails
14 in a Washington Minimum Age Act claim for lost wages, Defendant is entitled to recover “its
15 costs and expenses associated with operating the Voluntary Work Program and caring for
16 plaintiff and any putative class member.” *Id.* at ¶11.14.

17 The Answer separately alleges an affirmative defense for offset of any costs incurred in
18 caring for Plaintiff and costs associated with operating the Voluntary Work Program. Dkt. 33 at
19 ¶8.14. Plaintiff does not seek to strike or dismiss the offset affirmative defense. Dkt. 39 at 5.

20 Plaintiff argues that Defendant is not entitled to any restitution from Plaintiff for housing
21 and other expenses, because Defendant has already been fully paid by ICE for those services.
22 Dkt. 39 at 3. Although Defendant may have conferred a benefit on Plaintiff, e.g., by providing
23 food and lodging, Plaintiff was involuntarily detained and had no input over his conditions. Dkt.
24

1 37 at 6. Under circumstances where ICE paid Defendant for Plaintiff's and other detainees'
2 living expenses, Plaintiff opines, it is not inequitable for Plaintiff to retain the value of his basic
3 necessities. *Id.* Finally, Plaintiff contends, Defendant cannot recover losses incurred because of
4 its illegal failure to observe State wage laws. *Id.* at 7, 8.

5 Defendant responds by again addressing the merits of whether Plaintiff is an "employee"
6 under the Washington Minimum Wage Act. Dkt. 38 at 26, 27. Defendant argues further that
7 "[c]ourts" have allowed "contingent unjust enrichment counterclaims in minimum wage
8 actions." *Id.* Defendant cites to two nonbinding opinions, *Reyes v. LaFarga*, 2013 WL 12097452
9 (D.Ariz. 2013) and *Mann v. Fredricktown Assoc. Limited Partnership*, 2015 WL 4878661
10 (D.Md. 2015).

11 "Unjust enrichment of a person occurs when he has and retains money or benefits which
12 in justice and equity belong to another." *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn.
13 App. 151, 159 (1991). A claim for unjust enrichment has three elements: (1) the defendant [or
14 counter-defendant] receives a benefit, (2) the received benefit is at the plaintiff's [or counter-
15 plaintiff's] expense, and (3) the circumstances make it unjust for the defendant [or counter-
16 defendant] to retain the benefit without payment. *Young v. Young*, 164 Wn. 2d 477, 484-85
17 (2008).

18 The first element is satisfied by the allegation that Defendant conferred on Plaintiff the
19 benefit of food, lodging, and other necessities and amenities. The second element is satisfied
20 under the theory that if Plaintiff receives an award for lost wages from Defendant, Plaintiff has
21 received both the benefit conferred *and* the award for lost wages, both at Defendant's expense.
22 The third element is satisfied under the theory that such compensation would unfairly increase
23 Defendant's burden to comply with ICE contract obligations.

1 Plaintiff's argument, that Defendant cannot recover restitution from Plaintiff because it
2 has already been fully paid by ICE, is relevant to the second and third elements, but not on a
3 motion to dismiss for failure to state a claim. The Court does not here reach the merits of
4 whether Defendant should be precluded from recovery because of its own illegal conduct. That is
5 an equitable argument better reached at trial.

6 As a practical matter, the counterclaim overlaps substantially with Affirmative Defense
7 8.14 (offset). The counterclaim for Unjust Enrichment may be flawed, but the issue raised by
8 Plaintiff is whether Defendant has stated a claim upon which relief can be granted. Defendant
9 has done so.

10 Plaintiff's motion to dismiss the counterclaim for Unjust Enrichment for failure to state a
11 claim should be denied.

12 **C. Declaratory Relief under 28 U.S.C. §2201 (Dkt. 33 at ¶¶12.1-12.12)**

13 The final paragraph of the counterclaim for Declaratory Relief states:

14 The Court should declare that there is no employment relationship between GEO and
15 detainees who participate in the Voluntary Work Program. Further, plaintiff is not an
16 "employee," and GEO is not an "employer" with respect to Voluntary Work Program
participation, and therefore the FLSA's and MWA's minimum wage protections do not
apply to plaintiff or any putative class member.

17 Dkt. 33 at ¶12.12. Immediately following that paragraph, with no separate heading, the Answer
18 reads:

19 GEO prays for the following affirmative relief:

- 20 1. For an order enjoining plaintiffs from claiming the MWA applies to them;
- 21 2. For an order declaring the MWA inapplicable to ICE detainees at the NWDC;
- 22 3. For an order declaring the FLSA inapplicable to ICE detainees at the NWDC;

1 4. For a declaration that GEO has no employment relationship with any detainees who
2 participate in the Voluntary Work Program, including no relationship that requires
3 payment of a minimum wage[.]

4 . . .

5 Dkt. 33 at 13.

6 These counterclaims for declaratory and injunctive relief go to the heart of Defendant’s
7 view of Plaintiff’s claims. The determination of what relief, if any, should be granted to either
8 party is a long way off and should not be decided now.

9 The Court notes that both the prayer for affirmative relief and ¶12.12 seek declaratory
10 relief for an order on the applicability of the FLSA. Plaintiff has explicitly brought this case only
11 under the Washington Minimum Wage Act, not its federal counterpart. Therefore, requests for
12 declaratory relief regarding the FLSA should be stricken. Whether the FLSA has some
13 evidentiary value here remains an open question.

14 Plaintiff’s motion to strike the counterclaims for declaratory and injunctive relief should
15 be denied without prejudice, except relief requested under the FLSA, which should be stricken.

16 Defendant also seeks leave to amend its counterclaim. Dkt. 38 at 10. Defendant may
17 move for leave to amend pursuant to Fed. R. Civ. P. 15 if it chooses.

18 II. AFFIRMATIVE DEFENSES (Dkt. 33 at ¶¶8.1-8.14)

19 **A. Striking certain affirmative defenses under Fed. R. Civ. P. 12(f).**

20 Federal Rule of Civil Procedure 12(f) reads as follows: “The court may strike from a
21 pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous
22 matter.” Plaintiff moves under Rule 12(f) to strike the following affirmative defenses: 8.1
23 (failure to state a claim), 8.2 (statute of limitations), 8.4 (laches), 8.5 (waiver), 8.8 (ripeness), 8.9

1 (justiciability), 8.10 (unclean hands), 8.11 (exhaustion of administrative remedies), 8.12
2 (impropriety of class certification), 8.13 (attorney’s fees/costs). Dkt. 37.

3 ***8.1 Plaintiff has failed to state a claim for which relief may be granted.***

4 Plaintiff argues that failure to state a claim is not an affirmative defense. Dkt. 37 at 12,
5 citing to *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). Plaintiff further
6 contends that while the Court can consider this defense, it has already done so when addressing
7 Defendant’s Motion to Dismiss (Dkt. 28), and the defense should also be stricken “for the
8 purpose of clarity[.]” *Id.*

9 Defendant acknowledges that the Court denied its Motion to Dismiss, but argues that the
10 denial “does not cure the fundamental defects in Mr. Chen’s claim, nor does it prevent GEO
11 from seeking appropriate relief . . . based on those defects [where] the Court identified dismissal
12 arguments as premature[.]” Dkt. 38 at 10. The remainder of Defendant’s argument relitigates the
13 merits of its prior motion. *See id.* at 10-14.

14 Whether failure to state a claim can be raised as an affirmative defense need not be
15 resolved, *but see Zivkovic*, 302 F.3d at 1088, because in this case, the affirmative defense of
16 failure to state a claim is redundant. The Court squarely reached the merits of whether the
17 Complaint fails to state a claim in the Order on The Geo Group, Inc.’s Motion to Dismiss Class
18 Action Complaint for Damages. Dkt. 28 at 13-15. *See* Dkt. 8 at 23-29. The “premature”
19 comment referred to a decision about whether dismissal was warranted on preemption grounds,
20 not for failure to state a claim. Dkt. 28 at 12 (“conflict preemption argument is premature”).

21 Plaintiff’s motion to strike Affirmative Defense 8.1 should be granted and the defense
22 stricken as redundant.

23 ***8.2 Plaintiff seeks relief barred by the statute of limitations.***

1 The Complaint alleges that Plaintiff was detained at the Northwest Detention Center from
2 October 2014 until February 2016, a timeframe that falls within three years of the filing of the
3 Complaint, on September 26, 2017. Dkt. ¶1 at 3.1. The Complaint seeks damages for lost wages
4 for work performed by Mr. Chen, as well as “all civil immigration detainees who . . . have
5 performed work for GEO at NWDC at any time during the three years prior to the filing of this
6 complaint and thereafter.” *Id.* at 5.1. Both parties assume a three-year statute of limitations
7 applies.

8 Plaintiff argues that Defendant has offered no facts indicating it could prevail on this
9 defense, where Defendant’s Answer acknowledges the timeframe of Plaintiff’s detention and the
10 case was filed less than three years later. Dkt. 37 at 12. Further, Plaintiff contends, the Complaint
11 seeks to certify only a class of detainees “who perform or have performed . . . at any time during
12 the three years prior to the filing of this complaint.” *Id.* See Dkt. 1 at ¶1.1.

13 Defendant argues that the affirmative defense of statute of limitations is proper because it
14 sufficiently puts Plaintiff on notice, and striking the affirmative defense now prematurely results
15 in a decision on its merits. Dkt. 38 at 15. Per Defendant, although the Complaint limits the
16 proposed class to detainees who worked within the three years prior to the case, the Complaint
17 does not limit the scope of recovery of the proposed class from recovery outside the statutory
18 period. *Id.* This would allow recovery for, for example, unpaid wages from 2013 (outside the
19 statutory period) for a plaintiff-detainee who worked in 2017 (within the statutory period). *See*
20 *id.*

21 Plaintiff counters this argument by explaining his interpretation of the Complaint: the
22 proposed class is limited “to the work performed within the statutory period.” Dkt. 39 at 8, citing
23 to Dkt. 1 at ¶5.1. Given Plaintiff’s interpretation of his own claim, it is unlikely that the statute of
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1 limitations will be implicated. Nevertheless, naming the defense now is not redundant or
2 insufficient, and protects the defendant, should any claim outside the limitations period appear as
3 the case develops.

4 Plaintiff's motion to strike Affirmative Defense 8.2 should be denied without prejudice.

5 ***8.4 Plaintiff has unreasonably delayed in requesting relief, and his lack of diligence***
6 ***and activity in stating or making a legal claim—to the prejudice of GEO—means his***
7 ***claim is barred by the affirmative defense of laches.***

8 Plaintiff argues that the affirmative defense of laches should be stricken because
9 Defendant has pleaded no set of facts that would give Plaintiff fair notice of an intended basis for
10 the defense suggesting an unreasonable, prejudicial delay. Dkt. 37 at 12. Further, Plaintiff
11 argues, the doctrine of laches cannot be applied to bar a claim that is timely-filed under the
12 relevant statutory period. Dkt. 39 at 9, citing *SCA Hygiene Prod. Aktiebolag v. First Quality*
13 *Baby Prod. LLC*, 137 S.Ct. 954, 960 (2017).

14 Defendant argues that, upon information and belief, Plaintiff knew or should have known
15 the basis for the minimum wage violations at the time he was detained, during 2014-2016, yet he
16 failed to file this case then, which has caused Defendant prejudice. Dkt. 38 at 16. Plaintiff also,
17 again, argues the merits of whether the Washington Minimum Age Act applies. *Id.* at 17.

18 In *SCA Hygiene*, 137 S.Ct. at 960, the Supreme Court of the United States rejected the
19 rationale relied on by Defendant, invoking the maxim that “[l]aches is a gap-filling doctrine, and
20 where there is a statute of limitations, there is no gap to fill.” *Id.* That Court rejected the
21 application of laches to a case filed within the Patent Act’s statute of limitations, reasoning that
22 when Congress has spoken to give a patent owner a certain time period to file a claim, allowing
23 courts to shorten that time on equitable grounds “would give judges a ‘legislation-overriding’
24 role that is beyond the Judiciary’s power.” *Id.* at 960. The Ninth Circuit has recently extended

1 the logic of *SCA Hygiene* to habeas actions, subject to a different statute of limitations. *Grant v.*
2 *Swarthout*, 862 F.3d 914, 919-20 (9th Cir. 2017).

3 This Court sees no reason to depart from *SCA Hygiene*. Its logic applies with equal force
4 to the risk of shortening the three year statutory period in this case. The Complaint seeks relief
5 for lost wages only within the statutory period. *See* Dkt. 1 at ¶1.1. Addressing the merits of a
6 laches affirmative defense could shorten the statutory period for the case to be filed, an outcome
7 that would place the Court in the role of legislator. Laches is an insufficient defense.

8 Plaintiff's motion to strike Affirmative Defense 8.4 should be granted and the defense
9 stricken.

10 ***8.5 Plaintiff waived his claims when he (and/or putative class members) freely elected***
11 ***to participate in the Voluntary Work Program.***

12 Plaintiff argues that Defendant is statutorily precluded from bringing a waiver defense
13 under Washington law, which prohibits any agreement between employers and employees to pay
14 employees below minimum wage. Dkt. 37 at 13, citing RCW 49.60.090(1). It follows, Plaintiff
15 continues, that Plaintiff could not have waived his minimum wage protections even if he wanted
16 to. *Id.*

17 Defendant argues that, by virtue of participating in the Voluntary Work Program,
18 Plaintiff was not an "employee" for Washington State Minimum Wage Act purposes and not
19 subject to, and thus waived, its protections. Dkt. 38 at 17, 18. Defendant maintains that Plaintiff
20 participated in a voluntary program and received an allowance or stipend, electing not to
21 complete the "requisite paperwork" to be treated like an ICE employee. *Id.*

22 The parties' arguments boil down to the issue of whether the Washington Minimum
23 Wage Act applies. Defendant's argument repeats its attack on the issue of whether Plaintiff could
24 be an "employee." Dkt. 28 at 13, 14. RCW 49.60.090(1) provides: "Any agreement between

1 such employee and the employer allowing the employee to receive less than what is due under
2 this chapter shall be no defense to such action.” Under the assumption that Plaintiff is an
3 employee, Washington law precludes Plaintiff from waiving his right to the prevailing minimum
4 wage. Alternatively, under the assumption that Plaintiff was not an employee, *see* Dkt. 28 at 14,
5 ln. 11, 12, Plaintiff would not be entitled to lost wages under the Washington Minimum Wage
6 Act, and waiver would be a nonissue. Under either scenario, the merits of waiver by Plaintiff
7 would not be reached. The affirmative defense of waiver is therefore an insufficient defense.

8 Plaintiff’s motion to strike Affirmative Defense 8.5 should be granted and the defense
9 stricken.

10 ***8.8 Plaintiff’s claim is not ripe AND 8.9 Plaintiff’s claim is not justiciable.***

11 Defendant’s standing argument predominately overlaps with its exhaustion argument. *See*
12 *8.11 below.*

13 Defendant also argues that Plaintiff lacks standing because he was not a lawful
14 permanent resident when detained and was ineligible to work and to bring a lost wages claim.
15 Dkt. 38 at 20.

16 Plaintiff argues that he was, in fact, entitled to minimum wage protections regardless of
17 whether work was performed with employment authorization, because the Washington
18 Minimum Wage Act applies to any “employee” as defined by state law. Dkt. 39 at 11. Plaintiff
19 also argues that, as a threshold matter, ripeness is a subject-matter jurisdictional challenge under
20 Fed. R. Civ. P. 12(b)(1), not an affirmative defense. *Id.*

21 The Court’s subject-matter jurisdiction cannot be waived. Fed. R. Civ. P. 12(h)(3). As a
22 practical matter, whether the ripeness and justiciability affirmative defenses are stricken is
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1 inconsequential to the merits of whether the Court has jurisdiction. The defenses are not
2 insufficient or redundant, and need not be stricken.

3 Plaintiff's motion to strike Affirmative Defenses 8.8 and 8.9 should be denied without
4 prejudice.

5 ***8.10 Plaintiff has unclean hands.***

6 Defendant's theory is that Plaintiff has unclean hands, by filing this case under suspect
7 circumstances, where he may have been motivated by political reasons, coercion, or undue
8 influences. Dkt. 38 at 20. Defendant points to Plaintiff's apparent political influence and the
9 coordination of this lawsuit with another filed by the Washington State Attorney General. *Id.*

10 Plaintiff contends that Defendant has done nothing more than cast baseless, hyperbolic
11 aspersions against Plaintiff, none of which are found in the Answer itself, so the Affirmative
12 Defense, as alleged, is insufficient. Dkt. 39 at 12. Further, according to Plaintiff, the equitable
13 defense of unclean hands does not apply to the Washington Minimum Wage Act. Dkt. 39 at 12.

14 Plaintiff overstates what an affirmative defense must contain. Unlike the complaint,
15 which must contain a "short and plain statement of the claim showing that the pleader is entitled
16 to relief," Fed. R. Civ. P. 12(a)(2), an Answer need only give notice of the defense "in short and
17 plain terms." Fed. R. Civ. P. 12(b)(1)(A). The rule gives examples of properly-termed
18 affirmative defenses, "including: accord and satisfaction; arbitration and award; assumption of
19 risk; contributory negligence; duress; estoppel[.]" Fed. R. Civ. P. 12(c)(1). As alleged by
20 Defendant in this case, the Affirmative Defense is sufficient for Fed. R. Civ. P. 12(b)(1)(A)
21 purposes.

22 Plaintiff's second argument, that the unclean hands doctrine does not apply to the
23 Washington Minimum Wage Act, relies only on persuasive authority. Plaintiff cites to *Bailon v.*
24

1 *Seok AM No. 1 Corp.*, 2009 WL 4884340, at *5 (W.D. Wash. 2009), a case from this district.
2 *Bailon* is of minimal assistance, because it rejected the affirmative defense of unclean hands
3 summarily and as to a “FLSA/MWA” claim. *See id.* at *2 and *5. Defendant has articulated a
4 cognizable theory that provides Plaintiff with notice, and the defense is neither insufficient nor
5 redundant.

6 Plaintiff’s motion to strike Affirmative Defense 8.10 should be denied without prejudice.

7 ***8.11 Exhaustion of administrative remedies.***

8 According to Defendant, Washington law recognizes the “principle in [the Washington
9 Minimum Wage Act]” that administrative remedies must be pursued prior to court intervention.
10 Dkt. 38 at 18, citing to RCW 49.46.040(2). Defendant also argues that Plaintiff should have, but
11 failed to, exhaust federal administrative remedies, on two grounds: so that he could legally work
12 for ICE with an approved I-765 work permit, and because he was a detainee and thus subject to
13 administrative grievance procedures of the Prison Litigation Reform Act (PLRA). *Id.*

14 Defendant has not made any showing that the Washington Minimum Wage Act requires
15 exhaustion of administrative remedies, where Defendant cites only to RCW 49.46.040(2). The
16 subsection states: “With the consent and cooperation of federal agencies charged with the
17 administration of federal labor laws, the Washington State Department of Labor and Industries
18 director may . . . utilize the services of federal agencies and their employees[.]” RCW
19 49.46.040(2) (emphasis added). The statute simply authorizes Washington L&I to partner with
20 federal counterparts and does not speak to a required administrative remedy.

21 Regarding federal administrative remedies, Defendant’s arguments fare no better. First,
22 the issue of whether Plaintiff exhausted administrative remedies for an I-765 work permit is not
23 determinative of whether Plaintiff was an “employee” for Washington Minimum Wage Act
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1 purposes. Under Washington law, courts decide whether a person is an “employee” by applying
2 the economic-dependence test. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851,
3 871 (2012). To this Court’s knowledge—and Plaintiff has not provided authority to the
4 contrary—applying this test does not necessarily implicate consideration of federal
5 administrative remedies. Second, as Plaintiff correctly notes, “an alien detained by [ICE,
6 formerly known as] INS[,] pending deportation is not a “prisoner” within the meaning of the
7 PLRA,” *Agyeman v. I.N.S.*, 296 F.3d 871, 886 (9th Cir. 2002).

8 There is no showing as a matter of law that, under either state or federal law, Plaintiff
9 needed to exhaust administrative remedies precedent to bringing a Washington Minimum Wage
10 Act claim. The defense is insufficient. Plaintiff’s motion to strike Affirmative Defense 8.11
11 should be granted and the defense stricken.

12 ***8.12. Class certification is improper because plaintiff [sic] cannot prove that***
13 ***certification is warranted AND 8.13. Plaintiff is not entitled to attorney’s fees or costs.***

14 Plaintiff argues that Affirmative Defenses 8.12 and 8.13 are not, in fact, affirmative
15 defenses. Dkt. 37 at 15. Plaintiff maintains that striking them will minimize confusion and
16 streamline the pleadings. *Id.*

17 Defendant has not opposed Plaintiff’s motion to strike on these grounds and appears to
18 have abandoned Affirmative Defenses 8.12 and 8.13. *See* Dkt. 38.

19 The Court agrees with Plaintiff. Notwithstanding Defendant’s right to oppose motions for
20 class certification, and for attorney’s fees or costs, these defenses are not truly defenses and are
21 therefore insufficient. Plaintiff’s motion to strike Affirmative Defenses 8.12 and 8.13 should be
22 granted and the defenses stricken.

23 **B. Other affirmative defenses not the subject of Plaintiff’s motion.**

1 Plaintiff did not move to strike Affirmative Defenses 8.3 (preemption), 8.6 (joinder of
2 DHS/ICE), 8.7 (no legal right to work), and 8.14 (offset). This Order makes no finding about
3 them.

4 * * *

5 THEREFORE Plaintiff's Motion to Dismiss or Strike Defendant's Counterclaims and
6 Affirmative Defenses (Dkt. 37) is GRANTED IN PART and DENIED IN PART as follows:

7 Counterclaims:

8 (1) Unjust Enrichment. The motion to dismiss for failure to state a claim is
9 DENIED.

10 (2) Counterclaims for declaratory and injunctive relief. The motion to strike is
11 DENIED WITHOUT PREJUDICE, except relief requested under the FLSA,
12 which is stricken.

13 Affirmative Defenses:

14 (1) The motion is GRANTED as to Affirmative Defenses 8.1 (failure to state a
15 claim), 8.4 (laches), 8.5 (waiver), 8.11 (exhaustion of administrative remedies),
16 8.12 (impropriety of class certification), 8.13 (attorney's fees/costs), which are
17 HEREBY STRICKEN.

18 (2) The motion is DENIED WITHOUT PREJUDICE as to Affirmative Defenses
19 8.2 (statute of limitations), 8.8 (ripeness), 8.9 (justiciability), 8.10 (unclean
20 hands).

21 (3) The Court makes no finding as to Affirmative Defenses 8.3 (preemption), 8.6
22 (joinder of DHS/ICE), 8.7 (no legal right to work), and 8.14 (offset).

23 IT IS SO ORDERED.

1 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
2 to any party appearing *pro se* at said party's last known address.

3 Dated this 28th day of February, 2018.

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6 ROBERT J. BRYAN
United States District Judge

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