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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Yusuf M. Bogor, on behalf of himself and
all others similarly situated,

Plaintiff,

vs.

American Pony Express, Inc., an Arizona
Corporation, a.k.a. Allstate Cab Company,
et al.,

Defendants.

No. CV09-2260-PHX-JAT

ORDER

Pending before the Court is Plaintiff’s Motion for Leave to Amend First Amended Complaint (Doc. 83). For the reasons given below, the Court will grant the Motion.

I. BACKGROUND

Defendant American Pony Express, Inc. (“APE”) leases taxicabs to drivers and, in some cases, fulfills transportation contracts with third parties. APE owns approximately 300 taxicabs that operate in Arizona.

Plaintiff Yusuf M. Bogor rented a taxicab from APE from 2000 to February 2009. APE entered into Taxi Cab Lease Agreements with drivers such as Plaintiff who serviced the airport (hereinafter referred to as “Airport Drivers”). APE classified those drivers as independent contractors.

APE paid no wages to Plaintiff and other Airport Drivers. Instead, Plaintiff kept all

1 fares he earned and paid APE \$650 a week to rent APE's taxis. Beginning in March of 2007,
2 Plaintiff also had to maintain a \$1000 refundable deposit for any damage to the taxis.

3 Plaintiff filed the pending motion to amend to add VIP Taxi and its owners and
4 managers as separate Defendants in this case. The current case caption lists VIP Taxi as a
5 trade name of APE. On June 11, 2010, Plaintiff confirmed through a discovery response that
6 VIP Taxi is a separate entity, rather than a trade name. Plaintiff filed his motion to amend
7 within the time allowed by the Court's Rule 16 Scheduling Order.

8 II. LEGAL STANDARD

9 Motions to amend pleadings to add claims or parties are governed by Federal Rule of
10 Civil Procedure 15(a), which provides:

11 (1) ***Amending as a Matter of Course.*** A party may amend its pleading once
12 as a matter of course within . . . (2) ***Other Amendments.*** In all other cases, a
13 party may amend its pleading only with the opposing party's written consent
or the court's leave. The court should freely give leave when justice so
requires.

14 Fed. R. Civ. P. 15(a). Subsection (2) of Rule 15(a) applies here because Plaintiff has already
15 amended his complaint once.

16 Although the decision to grant or deny a motion to amend is within the discretion of
17 the Court, "Rule 15(a) declares that leave to amend 'shall be freely given when justice so
18 requires'; this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see*,
19 *e.g.*, *United States v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001) ("A
20 district court's discretion to deny leave to amend . . . is not absolute.") (citing *Foman*). "This
21 liberality . . . is not dependent on whether the amendment will add causes of action or
22 parties." *DCD Programs, LTD. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

23 The extremely liberal policy in favor of amendments, however, is subject to some
24 limitations. The United States Supreme Court has established that motions to amend
25 should be granted unless the district court determines that there has been a showing of:
26 (1) undue delay; (2) bad faith or dilatory motives on the part of the movant; (3) repeated
27 failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing
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1 party; or (5) futility of the proposed amendment. *Foman*, 371 U.S. at 182; *see, e.g.*,
2 *SmithKline Beecham*, 245 F.3d at 1052. “Generally, this determination should be performed
3 with all inferences in favor of granting the motion.” *Griggs v. Pace Am. Group, Inc.*, 170
4 F.3d 877, 880 (9th Cir. 1999) (citing *DCD Programs*, 833 F.2d at 186). Significantly, “[t]he
5 party opposing amendment bears the burden of showing prejudice,” futility, or one of the
6 other permissible reasons for denying a motion to amend. *DCD Programs*, 833 F.2d at 187.

7 Regarding the futility of amendments, “[a] district court does not err in denying leave
8 to amend where the amendment would be futile . . . or would be subject to dismissal.” *Saul*
9 *v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (citations omitted); *see Miller v. Rykoff-*
10 *Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988) (“A motion for leave to amend may be denied
11 if it appears to be futile or legally insufficient.”) (citation omitted). “However, a proposed
12 amendment is futile only if no set of facts can be proved under the amendment to the
13 pleadings that would constitute a valid and sufficient claim or defense.” *Miller*, 845 F.2d at
14 214; *see Foman*, 371 U.S. at 182 (stating that “[i]f the underlying facts or circumstances
15 relied upon by a [movant] may be a proper subject of relief, he ought to be afforded an
16 opportunity to test his claim on the merits”).

17 **III. ANALYSIS AND CONCLUSION**

18 Defendants have the burden of demonstrating that Plaintiff’s requested amendment
19 would prejudice them, would be futile, or one of the other permissible reasons for denying
20 a motion to amend. *DCD Programs*, 833 F.2d at 187. Defendants do not argue undue delay,
21 bad faith, repeated failure to cure deficiencies, or undue prejudice as a basis for denying the
22 motion to amend. They argue only that the Court should deny the motion because the
23 proposed amendment would be futile.

24 Defendants contend that adding VIP Taxi and its managers as Defendants would be
25 futile because: VIP Taxi did not have a contract with the City of Phoenix to service
26 Skyharbor Airport; VIP Taxi did not have any relationship, contractual or otherwise, with
27 the Plaintiff; VIP Taxi did not have any control over the decisions made regarding the
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1 Airport Drivers; and VIP Taxi did not have any operational control over the Airport Drivers.
2 Plaintiff's wage claims in this case are predicated on an employment relationship.
3 Defendants argue that Plaintiff therefore could not state claims against VIP Taxi and its
4 managers because VIP did not have an employment relationship with the Airport Drivers.

5 Plaintiff counters that the definition of employer under the Fair Labor Standards Act
6 (the "FLSA") has been interpreted expansively to include any party that exercises control
7 over the nature and structure of the employment relationship or economic control over the
8 relationship. *See Lambert v. Ackerley*, 180 F.3d 997, 1091, 1011-12 (9th Cir. 1999).
9 Plaintiff's claims that three of the individuals he seeks to add as Defendants exercised
10 significant control over the Airport Drivers and that two of those individuals had the power
11 to terminate drivers by ceasing their lease agreements. Plaintiff further argues that based on
12 their common control over the Airport Drivers and common business purpose APE and VIP
13 Taxi were joint employers under the FLSA.

14 "[A] proposed amendment is futile only if no set of facts can be proved under the
15 amendment to the pleadings that would constitute a valid and sufficient claim" *Miller*,
16 845 F.2d at 214. At this point in the case, the Court cannot say with certainty that Plaintiff
17 will not be able to offer any facts supporting a valid claim against VIP Taxi and its
18 managers/owners. As the facts emerge in this case, Plaintiff may be able to demonstrate that
19 VIP Taxi and its owners/managers were employers of the Airport Drivers for purposes of the
20 FLSA.

21 The Court therefore finds that Plaintiff's proposed amendment is not futile. Because
22 Defendants have argued no basis other than futility for denying the motion, they have not met
23 their burden.

24 Accordingly,

25 IT IS ORDERED Granting Plaintiff's Motion for Leave to Amend First Amended
26 Complaint (Doc. 83).

27 IT IS FURTHER ORDERED that the Clerk of the Court shall file the Second
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1 Amended Complaint currently lodged at Docket 84.

2 DATED this 16th day of August, 2010.

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James A. Teilborg
United States District Judge

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