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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Stewart Shaver and Maria Shaver, husband
 and wife,

No. CV 11-01815-PHX-NVW

10 Plaintiffs,

ORDER

11 vs.

12 Arizona Fire & Water Restoration, Inc.,

13 Defendant.
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16 Before the Court is Defendant's Motion for Judgment on the Pleadings (Doc. 16).
17 The motion will be denied for the reasons stated below.

18 **I. BACKGROUND**

19 Plaintiff Shaver worked for Defendant Arizona Fire & Water Restoration as a
20 "project manager." Plaintiff's job was to provide written estimates to potential customers
21 (*i.e.*, those needing restoration work after suffering fire damage, water damage, and so
22 forth), and if hired, to oversee the entire restoration project. Plaintiff was terminated by
23 Defendant on March 22, 2011. Based on the compensation plan governing his
24 employment, which he describes in significant detail in the complaint, Plaintiff believes
25 that defendant wrongfully withheld various wages owed to him before and after his
26 termination, including for overtime services. Plaintiff has alleged causes of action for
27 unpaid wages, violation of the Fair Labor Standards Act, breach of contract, and breach
28 of good faith and fair dealing.

1 **II. LEGAL STANDARD**

2 “Rules 12(b)(6) and 12(c) are substantially identical.” *Strigliabotti v. Franklin*
3 *Resources, Inc.*, 398 F. Supp. 2d 1094, 1097 (N.D. Cal. 2005). Rule 12(c) motions for
4 judgment on the pleadings are therefore reviewed under the standard applicable to a Rule
5 12(b)(6) motion to dismiss for failure to state a claim. *See Aldabe v. Aldabe*, 616 F.2d
6 1089, 1093 (9th Cir. 1980). In ruling on a Rule 12(c) motion, the Court must “determine
7 whether the facts alleged in the complaint, to be taken for [the purposes of a Rule 12(c)
8 motion] as true, entitle the plaintiff to a legal remedy.” *Strigliabotti*, 398 F. Supp. 2d at
9 1097. “If the complaint fails to articulate a legally sufficient claim, the complaint should
10 be dismissed or judgment granted on the pleadings.” *Id.* A Rule 12(c) motion is thus
11 properly granted when, taking all the allegations in the pleading as true, the moving party
12 is entitled to judgment as a matter of law. *Knappenberger v. City of Phoenix*, 566 F.3d
13 936, 939 (9th Cir. 2009). As with a motion to dismiss, the analysis is generally limited to
14 the facts as stated in the complaint, but the “court may [also] consider evidence on which
15 the complaint ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the
16 document is central to the plaintiff’s claim; and (3) no party questions the authenticity of
17 the copy attached to the . . . motion.” *Marder v. Lopez*. 450 F.3d 445, 448 (9th Cir.
18 2006).

19 **III. ANALYSIS**

20 **A. Fair Labor Standards Act Claim**

21 Defendant argues that Plaintiff’s overtime claim under the Fair Labor Standards
22 Act fails because plaintiff is an “outside salesperson,” or an “administrative employee,”
23 or a combination of the two — all of which are exempt from overtime requirements.
24 Defendant attempts to establish this contention partially through certain allegations in the
25 complaint, but largely through Plaintiff’s written job description. Plaintiff has not
26 contested the authenticity of this job description, and he relied on it in his complaint, so it
27 may be considered at the motion to dismiss phase even though technically outside the
28 pleadings.

1 However, the Court’s ability to consider it does not mean it must be taken as true.
2 Plaintiff relies on the job description almost entirely for its account of the compensation
3 structure. To that extent, its accuracy is effectively undisputed. But Defendant relies on
4 it for significantly more, teasing from it Plaintiff’s supposed primary activities, even
5 though the job description may not necessarily match what Plaintiff actually did.

6 Perhaps for this reason, decisions discussing the outside salesperson and
7 administrative employee exemptions — including every decision Defendant cites —
8 nearly always result from a summary judgment motion after discovery into the duties the
9 plaintiff in fact performed for his or her employer. *See, e.g., Velazquez-Fernandez v.*
10 *NCE Foods, Inc.*, 476 F.3d 6, 8 (1st Cir. 2007); *Schmidt v. Eagle Waste & Recycling,*
11 *Inc.*, 598 F. Supp. 2d 928, 931 (W.D. Wis. 2009); *Christopher v. SmithKlein Beecham*
12 *Corp.*, No. CV-08-1498-PHX-FJM, 2009 WL 4051075 (D. Ariz. Nov. 20, 2009); *Black*
13 *v. Colaska Inc.*, No. C07-823JLR, 2008 WL 4681567 (W.D. Wash. Oct. 20, 2008).

14 Plaintiff’s actual duties simply cannot be determined at the pleading phase.
15 Accordingly, Defendant’s motion will be denied as to Plaintiff’s Fair Labor Standards
16 Act claim.

17 **B. Statute of Limitations on State Law Claims**

18 Plaintiff’s unpaid wages, breach of contract, and breach of good faith and fair
19 dealing claims all address the same conduct — Defendant’s failure to pay amounts
20 allegedly owed to Plaintiff. Defendant argues that any claim for wages accruing before
21 September 15, 2010 is barred by the statute of limitations. Defendant’s argument may
22 have merit, but on the face of the pleadings alone it is impossible to tell when Plaintiff’s
23 various unpaid wages claims accrued. Further, the scope of discovery would not be
24 materially different if these claims were dismissed now. Accordingly, Defendant’s
25 motion will be denied as to Plaintiff’s unpaid wages, breach of contract, and breach of
26 good faith and fair dealing claims.

1 **IV. CONCLUSION**

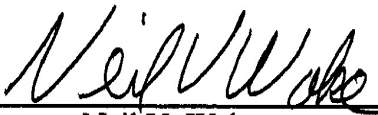
2 Although the Court will deny Defendant’s motion, it does so in the face of a
3 compelling reasons to dismiss this case considering Plaintiff’s counsel’s extreme delays
4 and failure to follow court orders thus far. On the day Plaintiff’s response was originally
5 due, counsel filed a motion for a two-day extension of time because of “long-standing
6 travel plans that changed at the last minute, making the undersigned unable to thoroughly
7 respond to [Defendant]’s Motion by tonight’s deadline.” (Doc. 22.) The Court granted
8 that motion. (Doc. 23.) Two days later — the new due date — at 11:58 p.m., counsel
9 again filed for an extension until the following Monday, based on recently discovered
10 evidence of handwritten notes that Plaintiff while working for Defendant. Counsel did
11 not explain how these notes, which were obviously outside the pleadings, could influence
12 the motion, but asked for further time to fully review these documents, including a “built
13 in . . . cushion . . . to ensure that there is no need for a third extension.” (Doc. 24.) The
14 Court granted that motion, extending the response deadline to the following Tuesday
15 (because of a Monday holiday). (Doc. 25.)

16 On that following Tuesday, counsel filed nothing. The next day, counsel
17 requested “a third and final extension” until the coming Friday. “The reason for this
18 request is because undersigned counsel had planned to Respond . . . over the Holiday
19 weekend, but was unable to due to an unplanned family obligation.” (Doc. 28.) The
20 Court first denied that motion (Doc. 29), then reconsidered and granted a five-day
21 extension, until February 29, 2012 (Doc. 30). On February 29 at 11:57 p.m., counsel
22 filed a fourth motion for extension of time (although styled as his third motion), claiming
23 he had suffered a physical injury. (Doc. 31.) The Court granted that motion, extending
24 Plaintiff’s deadline “to March 12, 2012, at 5:00 p.m. No further extensions will be
25 granted.” (Doc. 32.) March 12 and 5:00 p.m. came and went, with no filing from
26 Plaintiff. Seven hours later — precisely at midnight — counsel filed his response.
27 (Doc. 33.)
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1 In sum, counsel required four extensions of time — one of which was filed after
2 the deadline expired — and when he finally filed his response, it was still late. While
3 counsel may have had valid reasons for certain extensions, that cannot be said of all of
4 them.

5 IT IS THEREFORE ORDERED that Defendant's Motion for Judgment on the
6 Pleadings (Doc. 16) is DENIED.

7 Dated this 5th day of April, 2012.

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11 Neil V. Wake
12 United States District Judge
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