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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

**JOHN PEREZ and on behalf of all
other similarly situated individuals,**

Plaintiff,

**LEPRINO FOODS COMPANY, a
Colorado Corporation; LEPRINO
FOODS DAIRY PRODUCTS
COMPANY, a Colorado Corporation;
and DOES 1-50, inclusive,**

Defendants.

CASE NO. 1:17-CV-00686-AWI-BAM

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM**

(Doc. 26)

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I. Introduction

On April 13, 2017, Plaintiff John Perez (“Plaintiff”) filed the instant wage and hour class action on behalf of himself and other similarly situated non-exempt, hourly unionized employees at the cheese processing plant operated by Defendants Leprino Foods Company and Leprino Foods Dairy Products Company (collectively “Leprino” or “Defendants”) in East Lemoore, California (the “East Lemoore Plant”). Leprino removed the action to this Court on May 18, 2017. This Court granted Leprino’s motion for judgment on the pleadings as to Plaintiff’s first, second, and eighth causes of action for failure to pay minimum wages, failure to pay all wages due, and conversion, respectively. Doc. 24 at 6-8, 10-13. Leave to amend was granted, with express limitations. Doc. 24 at 13. Plaintiff filed an amended complaint, realleging the dismissed

1 causes of action, within the time permitted. Second Amended Complaint, Doc. 25 (“SAC”).
2 Leprino now moves to dismiss Plaintiff’s third and eighth causes of action for failure to pay
3 overtime wages and conversion. Doc. 26. Leprino further moves for an order striking Plaintiff’s
4 prayer for injunctive relief, contending that Plaintiff lacks standing to seek that relief. Plaintiff
5 has filed no opposition. Defendant has filed no reply.

6 For the following reasons, the Leprino’s motion will be granted.

7 **II. Background**

8 A. Allegations of the Complaint

9 Plaintiff and the putative class members are all “non-exempt, hourly employees, who
10 work pursuant to a Collective Bargaining Agreement (“CBA”) between Leprino and the
11 Teamsters Union.” SAC at ¶ 4. Plaintiff attached the CBA to his second amended complaint.
12 SAC at ¶ 4; Docs. 10-1, 25-1 (“CBA”).

13 The central factual allegation underlying Plaintiff’s action is that Leprino has a practice
14 of requiring Plaintiff and the putative class members to “work substantial amounts of time
15 without pay.” SAC at ¶ 3. Specifically, Leprino does not “pay Plaintiff and [the putative] [c]lass
16 [m]embers for all required pre- and post-shift work activities that are necessary and integral to
17 their overall employment responsibilities, such as: donning and doffing required sanitary gear [],
18 walking to production lines, waiting in line to sanitize, and waiting for [sanitary gear] and/or
19 supplies.” SAC at ¶ 5. Plaintiff details the ordinary pre-shift activities of putative class members:
20 When employees arrive at Lemoore East plant the must “first report to a ‘clean locker’ to be
21 issued clean work shirts and trousers for the day.... From their clean lockers, workers must next
22 walk over to their personnel lockers where they keep tools and required [person protective
23 equipment], such as ... work boots and helmets. At their personnel lockers[,] workers changed
24 out of their street clothes and into their sanitary work equipment. After putting on their required
25 equipment, workers then punch in for their required shift, roughly 5 minutes before paid work
26 time begins in order to allow them time to walk to their respective work areas.” SAC at ¶ 7.
27 “Workers are not paid for all the time spent donning and doffing....” SAC at ¶ 7.

28 Next, Plaintiff sets forth allegations regarding three of Leprino’s meal and rest break

1 policies. First, Plaintiff and putative class members were “required to remain on call during meal
2 and rest breaks and to respond to communications from supervisory personnel. Plaintiff and
3 [putative] [c]lass members are either required to carry a radio in order to communicate with
4 supervisory personnel concerning work issues during meal and rest breaks, and/or are required to
5 respond to calls over the intercom during meal and rest breaks, including returning to the
6 production floor prior to the conclusion of their meal and rest breaks.” SAC at ¶ 10. This policy
7 applied to all putative class members. SAC at ¶ 10. Plaintiff alleges a second meal break policy
8 that applied to “many, though not all,” putative class members—employees were “provided with
9 ... paid, on duty meal breaks and thus were kept on duty during their 30 minute meal breaks.”
10 SAC at ¶ 11. Finally, Plaintiff alleges a third meal break policy applicable to employees who
11 “worked ... shifts in excess of ten hours.” SAC at ¶ 12. Those employees “were not afforded a
12 second off-duty 30-minute meal period.... [R]ather, they were [nominally] afforded a third rest
13 break.” SAC at ¶ 12. However, during the third rest break, employees were required “to remain
14 on duty and answer questions from the production floor.” SAC at ¶ 12.

15 B. The Collective Bargaining Agreement¹

16 The CBA between Leprino and Teamsters Local #517 (“Teamsters”) is operative
17 between January 1, 2014 and December 31, 2018. The CBA is comprehensive; it covers topics
18 including hours of work, holidays, wage rates, meal periods, rest periods, sick leave, vacation,
19 and retirement, to name a few. *See* CBA at 2.

20 Leprino emphasizes the following sections of the CBA:

- 21 1. The lowest hourly wage rate for any employee provided for in the CBA is \$12.99. CBA
22 at 13, 43.
- 23 2. “Employees who are required to change into and out of uniforms will ... be paid a total
24 of 14 minutes of additional compensation for donning and doffing at the straight time
25 rate for each shift worked. This compensated time is not considered hours worked.”
26 CBA at 14.

27 ¹ In its order on Defendants’ motion for judgment on the pleadings, this Court held that CBA, attached by Plaintiff
28 to the FAC (and now to the SAC) was appropriately considered in resolving that motion. Doc. 24 at 4-5. The same
remains true here.

1 3. “Time and one-half (1 ½) will be paid for all hours worked above eight (8) hours within
2 nine and one-half (9 ½) consecutive hours in any one (1) day, or forty (40) hours in any
3 one (1) week, whichever is greater....” CBA at 4.

4 Leprino also emphasizes that the CBA contains a five-step process for resolving grievances,
5 culminating in arbitration. CBA at 29-31.

6 **III. Legal Standard**

7 A. Proper procedural device for challenging a demand for injunctive relief.

8 Leprino moves to strike Plaintiff’s demand for injunctive relief on the ground that
9 Plaintiff is no longer an employed by Defendants and, as such, he lacks Article III standing. Doc.
10 26 at 3, 17-18.

11 “The court may strike from a pleading an insufficient defense or any redundant,
12 immaterial, impertinent, or scandalous matter.” Fed. Rule Civ. Proc. 12(f). The Ninth Circuit has
13 stated that “Rule 12(f) does not authorize district courts to strike claims for damages on the
14 ground that such claims are precluded as a matter of law.” *Whittlestone, Inc. v. Handi–Craft Co.*,
15 618 F.3d 970, 974–75 (9th Cir. 2010). District courts in this Circuit have extended *Whittlestone*
16 to include the general proposition that no a prayer for injunctive relief (and any prayer for relief,
17 generally) is appropriately stricken pursuant to Rule 12(f). *Stromberg v. Ocwen Loan Serv’g,*
18 *LLC*, 2017 WL 2686540, *12 (N.D. Cal. June 22, 2017) (prayer for injunctive relief is not
19 appropriately stricken pursuant to Rule 12(f)); *Grayson v. Cty. Of Marin*, 2015 WL 720830, *2
20 (N.D. Cal. Feb. 18, 2015) (same); *McGuire v. Recontrust Co.*, 2013 WL 5883782, *3 (E.D. Cal.
21 Oct. 30, 2013) (same); *see Oushana v. Lowe’s Co. Inc.*, 2017 WL 5070271, *2 (E.D. Cal. Nov.
22 3, 2017) (punitive damages); *First Nat. Ins. Co. of Am. v. Peralta Cmty. Coll. Dist.*, 2013 WL
23 622944, *8 (N.D. Cal. Feb. 15, 2013) (attorney fees). Instead, arguments that a claim is
24 inadequately pled or cannot be granted as a matter of law are appropriately resolved pursuant to a
25 Rule 12(b)(6) motion or a Rule 56 motion. *Whittlestone*, 618 F.3d at 974.

26 “[W]here a motion is in substance a Rule 12(b)(6) motion, but is incorrectly denominated
27 as a Rule 12(f) motion, a court may convert the improperly designated Rule 12(f) motion into a
28 Rule 12(b)(6) motion.” *Consumer Solutions Reo, LLC v. Hillery*, 658 F. Supp. 2d 1002, 1020–21

1 (N.D. Cal. 2009). The motion to strike injunctive relief will be considered as though it was
2 properly brought as a Rule 12(b)(6) motion.

3 B. Legal standard for motion to dismiss for failure to state a claim.

4 Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed where a
5 plaintiff fails “to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A
6 dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the
7 absence of sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside*
8 *Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008); *Navarro v. Block*, 250 F.3d 729, 732 (9th
9 Cir. 2001).

10 In reviewing a complaint under Rule 12(b)(6), all allegations of material fact are taken as
11 true and construed in the light most favorable to the non-moving party. *Mollett v. Netflix, Inc.*,
12 795 F.3d 1062, 1065 (9th Cir. 2015); *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 919 (9th
13 Cir. 2008). This rule does not apply to “a legal conclusion couched as a factual allegation,”
14 *Papasan v. Allain*, 478 U.S. 265, 286 (1986), “allegations that contradict matters properly
15 subject to judicial notice,” or material attached to or incorporated by reference into the
16 complaint. *Spewell v. Golden State Warriors*, 266 F.3d 979, 988–89 (9th Cir. 2001). A court’s
17 consideration of documents incorporated by reference, or by judicial notice will not convert a
18 motion to dismiss into a motion for summary judgment. *United States v. Ritchie*, 342 F.3d 903,
19 907–08 (9th Cir. 2003); *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

20 Leave to amend should be granted unless amendment would be futile, the party seeking
21 amendment acted in bad faith or unduly delayed, or such amendment would unfairly prejudice
22 the opposing party. *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994).

23 **IV. Discussion**

24 A. Plaintiff’s Third Cause of Action: Failure to Pay Overtime Wages

25 As explained in the Court’s prior order, generally, California Labor Code Section 510
26 requires an employer to pay a non-exempt employee overtime for any work in excess of eight
27 hours in one workday or forty hours in one workweek. Cal. Labor Code § 510(a); Cal. Code
28 Regs. tit. 8 § 11080(3)(A)(1). However, as also explained, California Labor Code Section 514

1 provides that Section 510 does “not apply to an employee covered by a valid collective
2 bargaining agreement if the agreement expressly provides for the wages, hours of work, and
3 working conditions of the employees, and if the agreement provides premium wages for all
4 overtime hours worked and a regular hourly rate of pay for those employees of not less than 30
5 percent more than the state minimum wage.” Cal. Labor Code § 514. Leprino now contends that
6 the overtime claims alleged in favor of Plaintiff and the putative class members are “preempted
7 by [the Labor Management Relations Act (“LMRA”),] Section 301 and must be dismissed. Doc.
8 26 at 11; *see* 29 U.S.C. § 185(a).

9 Section 301 is “construed [] broadly to cover most state-law actions that require
10 interpretation of labor agreements.” *Builders & Contractors v. Local 302*, 109 F.3d 1353, 1356
11 (9th Cir. 1997); *accord Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation*
12 *Trust for So. Cal.*, 463 U.S. 1, 23 (1983) (“The preemptive force of [Section] 301 is so powerful
13 as to displace entirely any state cause of action ‘for violation of contracts between an employer
14 and a labor organization.’ Any such suit is purely a creature of federal law, notwithstanding the
15 fact that state law would provide a cause of action in the absence of [Section] 301.”) However,
16 “not every dispute concerning employment, or tangentially involving a provision of a [CBA], is
17 preempted by [Section] 301.” *Kobold v. Good Samaritan Regional Medical Center*, 832 F.3d
18 1024, 1032 (9th Cir. 2016) (quoting *Allis-Chalmers Corp. v. Lueck*, 481 U.S. 202, 209 (1985)).
19 The Ninth Circuit has set out a two-step inquiry to analyze Section 301 preemption of state law
20 claims:

21 First, a court must determine whether the asserted cause of action involves a right
22 conferred upon an employee by virtue of state law, not by a CBA. If the right
23 exists solely as a result of the CBA, then the claim is preempted, and [the]
24 analysis ends there. [] If the court determines that the right underlying the
25 plaintiff’s state law claim(s) exists independently of the CBA, it moves to the
26 second step, asking whether the right is nevertheless substantially dependent on
analysis of a collective-bargaining agreement. [] Where there is such substantial
dependence, the state law claim is preempted by [Section] 301.[fn] If there is not,
then the claim can proceed under state law.

27 *Kobold*, 832 F.3d at 1032-1033 (internal citation and quotation marks omitted). Leprino argues
28 in the alternative that (1) that the right to overtime compensation sought by Plaintiff exists only

1 as a result of the CBA because California Labor Code Section 514 creates an exception,
2 applicable in this case, to the overtime pay requirements of California Labor Code Section 510
3 any time a valid CBA exists that includes pay for “overtime” hours, as defined by the CBA
4 rather than Section 510, and (2) even if a state law right to overtime compensation exists in this
5 situation, whether that obligation was appropriately complied with requires interpretation of the
6 CBA’s overtime provisions. Doc. 26 at 12-15. The Court need only address Leprino’s first
7 argument. In resolving Leprino’s first argument, the Court must revisit the decision to deny
8 Leprino’s motion for judgment on the pleadings as to Plaintiff’s overtime claim. *See* Doc. 20 at
9 9.

10 As to the first argument, Leprino relies upon *Vranish v. Exxon Mobil Corp.*, 223
11 Cal.App.4th 103, 109-111 (Cal. Ct. App. 2014), for the proposition that California Labor Code
12 Section 514 renders Section 510 inapplicable when a CBA provides for, *inter alia*,² payment of
13 overtime hours worked as defined by the CBA, even if the CBA defines overtime differently
14 than does Section 510. *Vranish* does stand for that proposition. *Id.* (“Nothing in [S]ection 514
15 requires [the employer] to look to the definition of ‘overtime’ as that word is defined in [S]ection
16 510.”); *accord Sperry v. Securitas Security Services, USA, Inc.*, 2014 WL 1664916, *5 (N.D.
17 Cal. Apr. 25, 2014); *Kilbourne v. Coca-Cola Company*, 2014 WL 11397891, *6-7 (S.D. Cal July
18 14, 2014) (“[S]ection 510 does not determine when Plaintiff works ‘overtime hours’ and is thus
19 entitled to overtime compensation. Instead, the CBAs do.”); *see also Araquistain v. PG&E Co.*,
20 229 Cal.App.4th 227, 235-237 (Cal.Ct.App. 2014) (expanding on *Vranish* to explain that labor
21 unions are also free to set the terms of meal periods, including the length and whether employees
22 are relieved of duty in a manner that provides lesser protection than the California Labor Code
23 would in other circumstances).³ Despite the Court’s prior order, Leprino is correct that the CBA

25 ² In addition to the payment of overtime requirement, as noted above, Section 514 requires the CBA to provide for
26 the wages, hours of work, and working conditions of the employees and a regular hourly rate of pay for those
27 employees of not less than 30 percent more than the state minimum wage. The only disputed question is whether the
28 CBA provides for payment of all overtime hours worked.

³ Leprino’s present argument was not presented to the Court in its motion for judgment as a matter of law. Instead,
the Court relied upon *Gregory v. SCIE, LLC*, 317 F.3d 1050, 1053 (9th Cir. 2003), for the proposition that Section
514 required a CBA to pay overtime hours worked as defined by Section 510. In the face of *Vranish*, it is clear that
this Court’s prior order in reliance on *Gregory* regarding a question of California law cannot stand.

1 in this action meets the requirements of Section 514 for exclusion from the grasp of Section 510:
2 it provides for (1) wages, hours of work, and working conditions of the putative class members,
3 (2) a premium wage for all overtime worked (as appropriately defined by the CBA), and (3)
4 provides a regular hourly rate of at least 30% more than the state minimum wage. The overtime
5 requirements of Section 510 do not apply to the putative class members. As a result, Plaintiff's
6 Section 510 claim fails and any right to overtime compensation can arise only from the CBA.

7 Plaintiff's third cause of action will therefore be dismissed without leave to amend.

8 B. Plaintiff's Eighth Cause of Action: Conversion

9 The Court previously dismissed Plaintiff's eighth cause of action with leave to amend.
10 Doc. 20 at 10-12. Plaintiff's theory of recovery was that putative class members were not paid
11 for "off-the-clock," and unrecorded, hours worked. *Id.* at 11 The Court explained that Plaintiff
12 failed to allege that a specific sum, capable of identification, had been converted. *Id.* As this
13 Court explained in *Alvarenga v. Carlson Wagonlit Travel, Inc.*, 2016 WL 466132, *4-5 (E.D.
14 Cal. Feb. 8, 2016) , such situations include situations "such as where an agent accepts a sum of
15 money to be paid to another and fails to make the payment..., where a check is wrongfully taken
16 from another's desk..., where a defendant wrongfully uses a credit card to transfer recorded
17 sums of money to that defendant's account..., where a plaintiff alleges entitlement to all of the
18 funds in a particular account..., or where a defendant stole bonuses related to the sale of specific
19 automobiles." 2016 WL 466132 at *4 (citations omitted); *see Vahora v. Masood*, 2017 WL
20 1213424, *20 (E.D. Cal. Apr. 3, 2017) (allowing a conversion claim regarding a specific
21 percentage of a partnership's assets and profits, which were "definite, recordable amounts.")
22 The Court required Plaintiff to "specifically allege the basis for [his] claim and how a specific
23 sum that was allegedly converted could be ascertained...." *Id.* The Court warned that "a claim
24 that Defendants, over time, failed to pay Plaintiff an incalculable amount of wages—regardless
25 of why the amount is incalculable—will not suffice." *Id.* Plaintiff's second amended complaint
26 includes the following language response to the Court's requirement:

27 The amounts converted is capable of being ascertained by (1) reference to or
28 conduct of time studies stating the time unpaid by Defendants (thus permitting

1 calculation of the amount unpaid), (2) testimony of Plaintiff, the putative class
2 members and other witnesses, including Defendants' employees and officers,
3 related to the time unpaid by Defendants, (3) surveys of putative class members,
4 and (4) Defendants' documents on time studies and video of the plant showing the
5 duration of unpaid work activities.

6 SAC at ¶ 98. Otherwise, Plaintiff's conversion cause of action is identical. Defendants contend
7 that Plaintiff's conversion claim fails because he cannot articulate a converted sum capable of
8 identification and insofar as it is premised upon failure to pay overtime wages and meal period
9 premiums. The Court only addresses Defendants' first argument

10 Plaintiff's allegations make clear that precise calculation of a specific sum of money
11 owed is not possible. Plaintiff, in sum, acknowledges that no records exist from which exact
12 calculation of a sum converted can be drawn. All of Plaintiff's proposals suggest a need to
13 recreate records that would permit an approximation of a sum owed. Because no precise sum
14 capable of being ascertained is alleged, Plaintiff's eighth cause of action for conversation is not
15 cognizable and must be dismissed without leave to amend.

16 C. Plaintiff's Demand for Injunctive Relief

17 Leprino moves to dismiss Plaintiff's demand for injunctive relief—compelling a change
18 in Leprino's future employment practices—because, as a non-employee of Leprino, Plaintiff
19 lacks standing to seek such relief. The Court agrees. “[I]t is well-settled that former employees
20 lack standing to seek injunctive relief to ensure their former employer's compliance with” the
21 California Labor Code. *Mie Yang v. Francesca's Collections, Inc.*, 2018 WL 984637, *8 (N.D.
22 Cal. Feb. 20, 2018) (citing, *inter alia*, *Price v. Starbucks Corp.*, 192 Cal.App.4th 1136, 1143 n.7
23 (Cal. Ct. App. 2011)); *Stearne v. Heartland Payment Systems, LLC.*, 2018 WL 746492, *2 (E.D.
24 Cal. Feb. 6, 2018); *Aldapa v. Fowler Packing Co., Inc.*, --- F.R.D. ----, 2018 WL 534039, *7
25 (E.D. Cal. Jan. 24, 2018) (holding that a former employee cannot seek injunctive relief on behalf
26 of a putative class of present employees); *Byrd v. Masonite Corp.*, 2015 F.Supp.3d 859, 865
27 (C.D. Cal. 2016) (“Former employees lack standing to bring a claim for injunctive relief against
28 their employers because such employees do not stand to benefit from the injunction”).

Accordingly, Plaintiff's demand for injunctive relief will be dismissed for lack of standing.

///

1 **V. Order**

2 Based on the foregoing, IT IS HEREBY ORDERED that Defendants' motion to dismiss
3 is GRANTED:

- 4 1. Plaintiff's Third Cause of Action is DISMISSED without leave to amend;
5 2. Plaintiff's Eighth Cause of Action is DISMISSED without leave to amend;
6 3. Plaintiff's demand for injunctive relief is DISMISSED without leave to amend.

7 This matter proceeds forward on the remaining claims of the Second Amended Complaint.

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9 IT IS SO ORDERED.

10 Dated: March 22, 2018



11 SENIOR DISTRICT JUDGE
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