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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TIMOTHY DENTON,

Plaintiff,

v.

G4S SECURE SOLUTIONS (USA) INC.,

Defendant.

No. 2:14-cv-01697-KJM-CKD

ORDER

This matter is before the court on plaintiff’s motion for leave to file an amended complaint. Pl.’s Mot., ECF No. 10. Defendant opposes the motion as to the proposed fifth and sixth claims only, and plaintiff has replied. Opp’n at 11, ECF No. 11; Reply, ECF No. 13. The court held a hearing on this matter on February 27, 2015. John Briscoe appeared for plaintiff and Alison Hong appeared for defendant. For the following reasons, the court GRANTS plaintiff’s motion.

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1 I. FACTS AND PROCEDURAL HISTORY

2 A. Procedural Background

3 Plaintiff filed his complaint in Sacramento County Superior Court on August 2,
4 2013. Notice of Removal ¶ 3, ECF No. 1. He alleged the following claims: (1) retaliation under
5 California Government Code section 12940(h) (Fair Employment and Housing Act, FEHA);
6 (2) failure to prevent retaliation under California Government Code section 12940(k) (FEHA);
7 (3) violation of California Labor Code section 510 (failure to pay overtime); and (4) violation of
8 California Labor Code section 226 (failure to provide accurate wage statements). *Id.* ¶ 4.
9 Defendant filed and served its answer on September 25, 2013 and removed the case to this court
10 on October 1, 2013. *Id.* ¶¶ 6, 7. Plaintiff filed a motion for remand on November 4, 2013, on the
11 grounds defendant had not met its burden of establishing an amount in controversy greater than
12 the jurisdictional requirement of \$75,000. *Id.* ¶ 8. This court granted the motion and remanded
13 the case on January 23, 2014. *Id.* ¶ 9. After engaging in discovery, defendant ascertained the
14 amount in controversy satisfied the jurisdictional requirement and again removed the case on
15 July 18, 2014. ECF No. 1.

16 Plaintiff's Department of Fair Employment and Housing (DFEH) complaint, filed
17 January 14, 2014, alleges plaintiff was discriminated against, harassed and retaliated against
18 based on his race/color and because he engaged in protected activity, which ultimately resulted
19 in his termination. Hong Decl., Ex. B, ECF No. 11-1. The California Labor Workforce and
20 Development Agency (LWDA) sent a letter, dated April 24, 2013, stating defendant failed to pay
21 overtime and failed to issue proper/accurate pay stubs in violation of Labor Code sections 510,
22 1198, and 226(a). *Id.* Plaintiff has not provided any other letter to or from the LWDA that
23 addresses any violation of Labor Code sections 1194, 1194.2, 1197, 1197.1, 1198 as pled in
24 plaintiff's proposed fifth claim for failure to pay minimum wage, or any violation of Labor Code

1 section 201 or 203 as pled in plaintiff’s proposed sixth claim for failure to pay wages upon
2 cessation of employment. *Id.* at 3.

3 On December 31, 2014, following a pretrial scheduling conference, this court
4 issued a pretrial scheduling order setting a January 12, 2015 deadline for any stipulation or
5 motion seeking amendment of the complaint. ECF No. 9. Plaintiff filed his motion for leave to
6 file the amended complaint on January 12, 2015. ECF No. 10. With his reply, plaintiff filed a
7 revised amended complaint striking all language that would suggest plaintiff seeks Private
8 Attorney General Act of 2004 (“PAGA”) civil penalties under the fifth and sixth claims. *See*
9 Cal. Lab. Code § 2698, *et seq.* He has also stricken his prayer for civil penalties under Labor
10 Code section 1197.1. Additionally, to further clarify the fifth cause of action for failure to pay
11 minimum wage, he has inserted into paragraph 25 the following language: “[Plaintiff] was thus
12 not always paid the minimum wage for all time worked, nor for overtime wages as earned.”

13 Reply at 3, ECF No. 13.

14 B. Facts Alleged in Original Complaint

15 Plaintiff’s claims arise from his employment by defendant, a Florida corporation.
16 Compl., Ex. A, ECF No. 1. Plaintiff was hired as a Transportation Officer by defendant on or
17 about February 21, 2011. *Id.* ¶ 7. He was promoted to Bank Captain on or about December 21,
18 2011 and to Area Supervisor on or about June 4, 2012. *Id.* ¶ 8. Shortly thereafter, plaintiff was
19 instructed by employees of the defendant to not record his overtime but told he would instead be
20 awarded “comp time” because they were “hiding his wages under the Regional Trust Account.”
21 *Id.* ¶ 9.

22 On or about December 19, 2012, defendant’s California and Pacific Regional
23 Manager Rod Natale investigated a complaint filed by plaintiff’s co-worker Maurice Bass. *Id.*
24 ¶ 10. When Natale asked plaintiff if he had “witnessed anything out of the ordinary” between

1 Bass and then-Sacramento Branch Manager Malcom Howe, plaintiff stated he witnessed Howe
2 frequently inviting Bass for cigarettes, friction between the two, and inappropriate touching and
3 comments by Howe. *Id.* He stated the conduct made him uncomfortable, that it was wrong, and
4 that he would like to help Bass if possible. *Id.*

5 Shortly thereafter, plaintiff alleges defendant’s employees began to retaliate
6 against plaintiff by excluding him from meetings, shunning him, denying him jobsites, tools
7 necessary to do his job, and issuing him verbal and written warnings. *Id.* ¶¶ 11–13.

8 On February 5, 2013, Natale returned to the Sacramento branch and again
9 questioned plaintiff about Bass. *Id.* ¶ 14. Plaintiff demurred. *Id.* On February 8, 2013, plaintiff
10 was issued two separate write-ups and was assigned a company vehicle he believed to be unsafe
11 and unfit for the road. *Id.* ¶ 15. He instead used his personal vehicle. *Id.*

12 On February 12, 2013, plaintiff filed a complaint with defendant’s Secure Ethics
13 and Compliance Hotline. *Id.* ¶ 16. He complained of his retaliation for participating in an
14 investigation of another employee’s sexual harassment claims. *Id.* On February 25, 2013,
15 Natale called plaintiff regarding his complaint, and asked why plaintiff did not go to him with
16 the issue. *Id.* ¶ 17. Since the filing of the complaint and that conversation, plaintiff has
17 continued to experience retaliation. *Id.* ¶ 18. This alleged retaliatory behavior includes
18 exclusion from meetings, unfair criticism, and treating plaintiff as a salaried employee although
19 he is an hourly worker. *Id.* ¶¶ 18, 19.

20 C. Proposed Additional Claims

21 Since plaintiff filed his original complaint, defendant terminated plaintiff.
22 Plaintiff seeks to add additional factual allegations of his retaliation, and claims under the Labor
23 Code for retaliation, failure to pay all wages due upon termination, and failure to pay minimum

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1 wage. Pl.’s Mot. at 5. Defendant claims it first became aware of these additional claims on
2 January 12, 2015, the deadline to stipulate to an amended complaint or for plaintiff to seek leave,
3 giving defendant little or no time to investigate the new claims. Opp’n at 3; Hong Decl. at 2.

4 II. LEGAL STANDARD

5 Federal Rule of Civil Procedure 15(a)(2) states “[t]he court should freely give
6 leave [to amend its pleading] when justice so requires” and the Ninth Circuit has “stressed Rule
7 15’s policy of favoring amendments.” *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149,
8 1160 (9th Cir. 1989). “In exercising its discretion [regarding granting or denying leave to
9 amend] ‘a court must be guided by the underlying purpose of Rule 15 -- to facilitate decision on
10 the merits rather than on the pleadings or technicalities.’” *DCD Programs, Ltd. v. Leighton*,
11 833 F.2d 183, 186 (9th Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.
12 1981)). However, “the liberality in granting leave to amend is subject to several limitations.
13 Leave need not be granted where the amendment of the complaint would cause the opposing
14 party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue
15 delay.” *Ascon Properties*, 866 F.2d at 1160 (internal citations omitted). It is the consideration of
16 prejudice to the opposing party that carries the greatest weight. *See DCD Programs*, 833 F.2d at
17 185.

18 III. ANALYSIS

19 A. Undue Delay

20 Plaintiff’s motion for leave to file a first amended complaint “is made on the
21 grounds that, since the filing of the current, operative pleading, Plaintiff’s employment with
22 Defendant was terminated, giving rise to new claims.” Pl.’s Mot. at 1. Plaintiff was terminated
23 in December 2013. In the parties’ joint status report, plaintiff anticipated amendment only to
24 include an additional claim for retaliation in light of his termination. Am. Joint Case

1 Management Statement at 4, ECF No. 4. There is no mention of additional wage-related claims.
2 Plaintiff has offered no reason for his delay in seeking to add his sixth claim, failure to pay
3 wages upon cessation of employment. In his moving papers, plaintiff does not explain how his
4 termination gave rise to the proposed new wage claims, or why they are only now discoverable.
5 The facts giving rise to this claim were evident upon termination in December 2013, and plaintiff
6 had engaged in discovery in state court prior to removal and the court's issuance of the
7 scheduling order. However, "delay alone no matter how lengthy is an insufficient ground for
8 denial of leave to amend." *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981).

9 B. Futility

10 "[A] proposed amendment is futile only if no set of facts can be proved under the
11 amendment to the pleadings that would constitute a valid and sufficient claim or defense."
12 *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988). In determining whether a
13 proposed amendment is futile, the court applies the standard articulated in Federal Rule of Civil
14 Procedure 12(b)(6) for determining sufficiency of pleadings. *Id.*

15 a. Administrative Exhaustion

16 Defendant argues plaintiff's newly alleged violations of Labor Code sections
17 1194, 1194.2, 1197, 1197.1 and 1198, as pled in plaintiff's proposed fifth claim for failure to pay
18 minimum wage, and the alleged violation of Labor Code section 201 or 203 as pled in plaintiff's
19 proposed sixth claim for failure to pay wages upon cessation of employment, do not meet the
20 jurisdictional requirements because they were not included in plaintiff's written notice to the
21 LWDA. Opp'n at 2-3. That notice included only the alleged overtime and pay stub violations
22 under Labor Code sections 510, 1198, and 226(a), which plaintiff has pled in his original
23 complaint in the third and fourth claims. Ex. B, ECF No. 11-1. Plaintiff responds that he does
24 not seek PAGA penalties under the newly proposed claims, but seeks only to recover unpaid

1 wages and penalties for minimum wage and waiting violations for himself under Labor Code
2 section 1194.2 and California Labor Code section 203. Reply at 2.

3 It is only when an aggrieved employee pursues a civil action under PAGA that he
4 must give written notice to the LWDA and the employer of the specific provisions of the
5 California Labor Code alleged to have been violated and wait for a notice from the LWDA of its
6 intent not to investigate the alleged violations, or if no notice is received, wait 33 calendar days
7 after providing notice before commencing a civil action. Cal. Lab. Code § 2699.3. PAGA
8 penalties are separate and apart from the actual damages that a plaintiff may recover under other
9 Labor Code sections. *See Thurman v. Bayshore Transit Management, Inc.*, 203 Cal. App. 4th
10 1112, 1144–48 (2012).

11 California Labor Code section 1194 provides that “any employee receiving less
12 than the legal minimum wage . . . is entitled to recover in a civil action the unpaid balance of the
13 full amount of this minimum wage.” *See* Cal. Lab. Code § 1194. California Labor Code section
14 203 provides that “[i]f an employer willfully fails to pay, without abatement or reduction, . . . any
15 wages of an employee who is discharged or who quits, the wages of the employee shall continue
16 as a penalty from the due date thereof at the same rate until paid or until an action therefor is
17 commenced; but the wages shall not continue for more than 30 days.” Cal. Lab. Code § 203(a).
18 Upon discharge, the employees’ earned and unpaid wages are due within 72 hours. Cal. Lab.
19 Code § 201(a). Plaintiff did not include allegations of violations of these sections of the Labor
20 Code in his LWDA letter.

21 To the extent plaintiff seeks only individual recovery provided for by the Labor
22 Code sections he has clarified he relies on, his claims are not barred by administrative
23 exhaustion.

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1 b. Statute of Limitations

2 An amendment is futile if the statute of limitations has run. *See Deutsch v.*
3 *Turner Corp.*, 324 F.3d 692, 718 (9th Cir. 2003). As noted, plaintiff has clarified that the prayer
4 for PAGA penalties under the fifth and sixth claims was included erroneously in the proposed
5 pleading, and he has submitted a corrected pleading with those requests removed. Reply at 1.
6 He also has stricken his prayer for civil penalties under Labor Code section 1197.1. *Id.* Plaintiff
7 does seek liquidated damages “in an amount equal to the wages unlawfully unpaid and interest
8 thereon” under Labor Code § 1194.2 under his proposed fifth claim.

9 Defendant argues plaintiff’s claims for liquidated damages under Labor Code
10 section 1194.2, for failure to pay minimum wage, are time barred under California Code of Civil
11 Procedure section 338(a). That section provides that an action upon a liability created by statute,
12 other than a penalty or forfeiture, has a three year statute of limitation, but a statute imposing a
13 penalty or forfeiture has a one year statute of limitations. Cal. Civ. Proc. Code § 338(a); *see*
14 *also Sarkisov v. StoneMor Partners, L.P.*, 2014 WL 1340762, at *2 (N.D. Cal. Apr. 3, 2014)
15 (two potentially applicable statutes of limitations—one year for penalties, and three years for
16 damages) Claims for liquidated damages under § 1194.2 seek “in effect a penalty,” *Martinez v.*
17 *Combs*, 49 Cal. 4th 35, 48, 109, n.8 (2010), and are therefore subject to the one-year statute of
18 limitations. If defendant is correct that the one year statute of limitations applies, Opp’n at 6,
19 plaintiff must have brought his claim under Labor Code section 1194.2 within one year of his
20 termination on December 20, 2013, by December 20, 2014. *Id.*

21 The Federal Rules of Civil Procedure provide in pertinent part that a new claim
22 asserted in an amended pleading relates back to the date of the original pleading when the new
23 claim “arose out of the conduct, transaction, or occurrence set out-or attempted to be set out-in
24 the original pleading.” Fed. R. Civ. P. 15(c)(1)(B). The court considers *sua sponte* whether the

1 claim here relates back. *Garland v. Lewis*, No. CV 10-9010, 2013 WL 4198278, at *2 (C.D. Cal.
2 Aug. 12, 2013), *aff'd*, 585 F. App'x 392 (9th Cir. 2014). To determine whether a claim relates
3 back, the court “compares the original complaint with the amended complaint and decides
4 whether the claim to be added will likely be proved by the ‘same kind of evidence’ offered in
5 support of the original pleading.” *Percy v. San Francisco Gen. Hosp.*, 841 F.2d 975, 978
6 (9th Cir. 1988). Relation back is “liberally applied especially if no disadvantage will accrue to
7 the opposing party.” *Rural Fire Protection Co. v. Hepp*, 366 F.2d 355, 362 (9th Cir.1966). “It is
8 the ‘conduct, transaction, or occurrence’ test of Rule 15(c) which assures that the relation back
9 doctrine does not deprive the defendant of the protections of the statute of limitations.” *Santana*
10 *v. Holiday Inns, Inc.*, 686 F.2d 736, 739 (9th Cir.1982).

11 Plaintiff’s claim for liquidated damages arises from defendant’s alleged failure to
12 pay plaintiff minimum wage. This wage claim is related to and will require similar evidence, in
13 the form of time records and wage statements, as plaintiff’s original fourth claim for failure to
14 provide accurate wage statements. “So long as a party is notified of litigation concerning a
15 particular transaction or occurrence, that party has been given all the notice that Rule 15(c)
16 requires.” *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1006 (9th Cir. 2014). Here,
17 defendant has been on notice of plaintiff’s allegations of improper wage practices; it is therefore
18 not prejudiced by application of the relation back doctrine. *See Ramirez v. Ghilotti Bros. Inc.*,
19 941 F. Supp. 2d 1197, 1209 (N.D. Cal. 2013) (allowing relation back so plaintiff could amend to
20 include a claim for waiting time penalties, because the penalties related to his existing claims for
21 unpaid work); *see also DeLodder v. Aerotek, Inc.*, No. CV–08–6044, 2009 WL 1684409, at *5
22 (C.D. Cal. June 15, 2009) (same).

23 Plaintiff’s request for liquidated damages is timely. Amendment to include this
24 claim will not be futile.

1 C. Bad Faith

2 Defendant argues the court may infer bad faith because “plaintiff never mentioned
3 any claim for unpaid minimum wages whether in his original complaint, during discovery in
4 state court, or during any meet and confer efforts prior to the pretrial scheduling conference, nor
5 at the pretrial scheduling conference.” Opp’n at 8–9. Indeed, the joint status report does not
6 include any indication plaintiff planned to amend to include additional wage-based claims. Am.
7 Joint Case Management Statement at 4. In his moving papers, plaintiff does not suggest any
8 newly discovered facts giving rise to proposed claims five and six, or why they could not have
9 been pled before. Moreover, plaintiff had an opportunity to conduct discovery in state court, and
10 does not allege that discovery revealed these claims. Defendant posits plaintiff intentionally
11 neglected to assert these claims in an effort to prevent defendant from meeting the amount in
12 controversy necessary for removal. Plaintiff concedes the new wage-based claims are based on
13 facts available to him since his termination in December 2013. This factor weighs against
14 plaintiff.

15 D. Prejudice

16 As noted, prejudice to the nonmoving party is the most significant factor in the
17 court’s analysis. Defendant argues it will be prejudiced by the new claims because the “amount
18 of discovery that Defendant can now conduct will be reduced by the amount of discovery
19 conducted in state court, while at the same time, Plaintiff now adds additional claims which will
20 require further discovery.” Opp’n at 10. Plaintiff, in his reply, asserts he will not oppose any
21 motion to reopen or allow for more extensive discovery. Reply at 2. Plaintiff’s position
22 ameliorates the potential prejudice to defendant. There are no pending dispositive motions, and
23 discovery remains open until September 2015. This factor weighs against defendant.

1 On balance, the applicable factors weigh in favor of granting plaintiff leave to
2 amend, subject to the limitations above.

3 IV. CONCLUSION

4 The motion for leave to amend is GRANTED. Plaintiff shall file an amended
5 complaint consistent with this order within fourteen days.

6 IT IS SO ORDERED.

7 DATED: May 7, 2015.

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10 UNITED STATES DISTRICT JUDGE

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