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2 **IN THE UNITED STATES DISTRICT COURT**
3 **NORTHERN DISTRICT OF CALIFORNIA**

4 NICOLE VILLEGAS, individual and on

5 behalf of all others similarly situated,

No. C 09-00261 SBA

6 Plaintiff,

ORDER

7 v.

[Docket No. 6]

8 J.P MORGAN CHASE & CO. et al.,

9 Defendants.

10

11 Before the Court is Defendants' Motion to Dismiss [Docket No. 6], Plaintiff's Opposition
12 [Docket No. 13] and Reply [Docket No. 14]. Having considered the motions, briefs and
13 declarations, and for the reasons given below, the Court GRANTS in part and DENIES in part the
14 motion.

15 **BACKGROUND**

16 This is a putative wage and hour class action. The case was brought in state court and
17 removed based on the jurisdiction of the Class Action Fairness Act, 28 U.S.C. §§ 1332, 1453.
18 All Plaintiff's claims arise out of state law.

19 **A. Individual Allegations and Causes of Action.**

20 Plaintiff Nicole Villegas was employed by the defendants as a "funder" for three months,
21 terminating on or about September 3, 2008. The defendants are J.P. Morgan Chase & Co.,
22 JPMorgan Chase Bank, N.A., Chase Bank USA, N.A. and Does 1-50. [Compl. ¶¶ 8, 9-12]. Villegas
23 alleges, on behalf of herself, the following facts:

24 (1) she was not paid all wages owed, including commission wages, in a timely fashion at the
25 end of employment. [Compl. ¶8, 41-42].

26 (2) she was not paid overtime wages at the correct overtime rate of pay because the
27 defendants, as a pattern and practice, failed to include all paid non-discretionary
28 commissions/bonuses [sic] other incentive pay into the regular rate when calculating and

1 paying her overtime. [Compl. ¶¶ 8, 48].

2 (3) she was not paid all of her vested unused vacation wages at the end of her employment,
3 or at all. [Compl. ¶¶ 8, 36].

4 (4) the defendants did not keep accurate records of her work and payment. [Compl. ¶ 8].

5 Villegas further alleges the defendants have a policy of not paying members of the class all overtime
6 wages earned [Compl. ¶ 22], not paying them all commission wages earned [Compl. ¶ 22], failing to
7 maintain accurate records [Compl. ¶ 23] and of paying their employees' final wages late. [Comp. ¶
8 22].

9 The above-stated allegations purportedly form the basis of the following causes of action:

10 (1) First Cause of Action: a violation of California Labor § 227.3 for nonpayment of accrued
11 vacation wages at termination;

12 (2) Second Cause of Action: a claim for waiting time penalties under § 203 for the
13 defendants' alleged failure to pay commission wages due and owing upon separation from
14 employment;

15 (3) Third Cause of Action: a claim for waiting time penalties under § 203 for the defendants'
16 alleged failure to properly calculate overtime pay by failing to include non-discretionary
17 commissions/bonuses into the regular rate of pay;

18 (4) Fourth Cause of Action: a claim for waiting time penalties under § 203 for the failure to
19 pay final wages pursuant to §§ 201-204;

20 (5) Fifth Cause of Action: a claim under § 226 for defendants' alleged failure to keep
21 accurate payroll records; and

22 (6) Sixth Cause of Action: a claim for unfair business practices under the California
23 Business and Professions Code § 17200 *et seq.*, for the above-recited Labor Code, *i.e.*, alleged
24 failure to compensate employees for all overtime hours worked, not compensating employees for all
25 commission wages earned, forfeiting earned and unused vacation wages, and failing to keep proper
26 payroll records.

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1 **B. Class Allegations.**

2 Plaintiff purports to bring her claim on behalf of five classes:

3 (1) all past and current non-exempt employees of the defendants, who were employed in
4 California from December 17, 2004, through the present, and who were paid overtime wages and
5 also paid commission wages and other non-discretionary incentive pay or bonuses;

6 (2) past employees of the defendants who were employed in California from December 17,
7 2004, through the present, who were not paid all unused vested vacation wages at the end of their
8 employment;

9 (3) all past and current employees of the defendants who were employed in California from
10 December 17, 2004, through the present, who were provided wage statements;

11 (4) all past employees of the defendants employed in California from December 17, 2004,
12 through the present, who received commission wages beyond 72 hours from the date of termination;
13 and

14 (5) all past employees of the defendants employed in California from December 17, 2004,
15 through the present, whose final pay was paid beyond 72 hours from the date of termination.

16 [Compl. ¶ 19].

17 **LEGAL STANDARDS**

18 Under Federal Rule of Civil Procedure 8(a), a pleading that states a claim for relief must
19 contain “a short and plain statement of the claim showing that the pleader is entitled to relief, and a
20 demand for relief sought.” A pleading that fails to meet this standard may be dismissed under
21 Federal Rule of Civil Procedure 12(b)(6).

22 When a court reviews a motion to dismiss, the complaint must be liberally construed,
23 assuming the facts alleged therein as true and drawing all reasonable inferences from those facts in
24 the plaintiff's favor. *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 1964-65 (2007).
25 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
26 allegations, ... a plaintiff's obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires
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1 more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will
2 not do [. . .]. Factual allegations must be enough to raise a right to relief above the speculative
3 level.” *Id.* at 1964-65 (internal citations omitted).

4 In *Erickson v. Pardus*, --- U.S. ----, 127 S.Ct. 2197 (2007) (per curiam), decided two weeks
5 after *Twombly*, the Court clarified that *Twombly* did not signal a switch to fact-pleading in the
6 federal courts. *Erickson* reaffirms that under Rule 8 “[s]pecific facts are not necessary; the
7 statement need only ‘give the defendant fair notice of what the ... claim is and the grounds upon
8 which it rests.’ ” 127 S.Ct. at 2200, quoting *Twombly*, 127 S.Ct. at 1964. In the wake of *Twombly*
9 and *Erickson*, the Seventh Circuit clarifies the amount of detail that is required by Rule 8(a) and,
10 thus, the detail required for a claim to survive a motion to dismiss: [t]aking *Erickson* and *Twombly*
11 together, we understand the Court to be saying only that at some point the factual detail in a
12 complaint may be so sketchy that the complaint does not provide the type of notice of the claim to
13 which the defendant is entitled under Rule 8.” *Airborne Beepers & Video, Inc. v. AT & T Mobility*
14 *LLC*, 499 F.3d 663, 667 - 668 (7th Cir. 2007).

15 DISCUSSION

16 **I. The Legal Standard for a Motion to Dismiss under 12(b)(6).**

17 As a threshold matter, the Court notes the parties’ respective arguments about the proper
18 standard for a motion to dismiss after the Supreme Court’s opinion in *Twombly*. In spite of
19 arguments to the contrary, the pleading standard under the Federal Rules of Civil Procedure is
20 unchanged and, so too, the 12(b)(6) standard.

21 First, the notice pleading standard was not retired by the Supreme Court in *Twombly*. The
22 Court held that the complaint did not include plausible grounds to infer an unlawful and anti-
23 competitive conspiracy among the defendants because it is perfectly routine market behavior for
24 businesses to resist competition. Thus, the complaint would have needed to allege some additional
25 factual context to raise the inference of an illegal agreement based solely on rational, lawful
26 behavior.

1 By requiring plausibility on the face of the complaint, the Supreme Court was not re-writing
2 Rule 8(a)(2)'s requirement of a short and plain statement. Rule 8(a) does not require a claimant to
3 set out in detail the facts upon which his or her claim is based, however, something more than a
4 blanket assertion of entitlement of relief is required. Rule 8(a) requires a claimant to provide "fair
5 notice" of the nature of the claim and the "grounds upon which it rests." *Twombly*, 127 S.Ct. 1955,
6 fn. 3. See also *Erickson*, 127 S.Ct. at 2200, quoting *Twombly*, 127 S.Ct. at 1964.

7 The *Twombly* standard, moreover, is of general application and is as easily applied to wage
8 and hour litigation as antitrust. As the Seventh Circuit pointed out, *Erickson* and *Twombly* taken
9 together teach that a complaint which cannot survive a 12(b)(6) motion is one that "may be so
10 sketchy that the complaint does not provide the type of notice of the claim to which the defendant is
11 entitled under Rule 8." *Airborne Beepers & Video*, 499 F.3d at 667-668.

12 **II. Dismissal of the Plaintiff's Complaint.**

13 Defendant's primary argument is that Plaintiff's allegations are speculative and the
14 complaint is devoid of any facts to support mere boilerplate, conclusory allegations. Specifically,
15 the defendants assert Villegas has not alleged any facts to support allegations that she herself is even
16 entitled to or owed vacation pay, commissions and overtime wages. Further, that she has alleged no
17 facts which identify any specific company policy or procedure that resulted in the defendants'
18 alleged failure to pay her such wages.

19 The complaint does not provide great factual detail as to Plaintiff Villegas. She worked
20 briefly as a "funder," but the complaint does not state whether she was an exempt or non-exempt
21 employee. Villegas argues that paragraph 8 of the Complaint specifically alleges "Plaintiff was a
22 non-exempt employee – one entitled to overtime wages," but nowhere in paragraph 8 does that
23 language appear. Opp'n at page 7. Paragraph 8 states:

24 Plaintiff NICOLE VILLEGAS was employed by DEFENDANTS as a Funder
25 for approximately 3 months until on or about September 3, 2008.
26 DEFENDANTS did not pay Plaintiff all wages owed, including commission
27 wages, in a timely fashion at the end of employment and did not pay Plaintiff
overtime wages at the correct overtime rate of pay. DEFENDANTS did not
pay Plaintiff all of her vested unused vacation wages at the end of her

1 employment and still have not paid these wages. DEFENDANTS did not
2 keep accurate records of Plaintiff's work and payment. Plaintiff was and is a
3 victim of the policies, practices and customs of DEFENDANTS complained
4 of in this action in ways that have deprived her of the rights guaranteed her by
5 the California Labor Code §§ 201-204, 226, 227.3, 1194, 1194.2, California
6 Business and Profession Code § 17200, et seq. (Unfair Practices Act).
7 Complaint, ¶ 8.

8 As paragraph 8 demonstrates, the facts alleged include (1) she did not receive her vested
9 unused vacation wages at the end of her employment, (2) her final wages were not timely paid, (3)
10 her wages failed to include commissions she was owed, (4) her overtime wages were not properly
11 calculated because they did not include commission wages in the regular rate of pay, and (5) her
12 payroll records were not accurately maintained. [Compl. ¶¶ 8, 36, 48].

13 **A. First Cause of Action: Payment of Unused Vested Vacation Wages.**

14 Section 227.3 of the California Labor Code states:

15 *Unless otherwise provided by a collective bargaining agreement, whenever a*
16 *contract of employment or employer policy provides for paid vacations, and*
17 *an employee is terminated without having taken off his vested vacation time,*
18 *all vested vacation shall be paid to him as wages at his final rate in*
19 *accordance with such contract of employment or employer policy respecting*
20 *eligibility or time served; provided, however, that an employment contract or*
21 *employer policy shall not provide for forfeiture of vested vacation time upon*
22 *termination. [. . .].*

23 Plaintiff alleges in paragraph 36: "Plaintiff had unused vested vacation wages (including, but
24 not limited to, vacation pay, paid time off pay, personal pay day, personal holiday pay, and/or
25 floating holiday pay) that were not paid out to her in a timely fashion at the end of her employment."
26 [Compl. ¶ 36]. This is not a conclusory allegation. The plaintiff states she had unused vacation
27 wages and they were not timely paid when she ended her employment. This allegation surely
28 accomplishes the goals of Rule 8(a): the defendants have notice they are being sued under Labor
Code §227.3 for not paying Villegas vacation wages which she alleges were both vested and unused.
If plaintiff proves these facts, the defendants have violated § 227.3, thus the plaintiff has stated a
claim upon which relief may be granted.

The motion to dismiss the first cause of action is DENIED.

1 **B. Second Cause of Action: Failure to Pay Commission Wages.**

2 Plaintiff alleges in paragraphs 41 and 42 that defendants violated the state Labor Code by not
3 paying her commission wages: “Defendants were required to compensate Plaintiff and class
4 members payment of commission wages *earned by said individuals*” and they “regularly denied
5 Plaintiff and class members payment of commission wages *earned by said individuals.*” [Compl. ¶¶
6 41-42]. Plaintiff is a “said individual” who allegedly earned commission wages and was denied
7 those wages. The defendants have notice of the claim and the grounds upon which the claim rests,
8 and, if plaintiff proves these facts, she is entitled to relief.

9 The motion to dismiss the second cause of action is DENIED.

10 **C. Third Cause of Action: Failure to Pay Overtime Wages.**

11 This claim is problematic for two reasons. First, Plaintiff argues in response to the motion to
12 dismiss for insufficient facts that paragraph 47 of the complaint states the “fact” that she worked
13 more than 40 hours in a work-week and more than 8 hours in a work day, thus entitling her to
14 overtime pay. Opp’n at 7. Paragraph 47 states no such thing. It alleges generally, without reference
15 to the plaintiff, “[a]t all times relevant herein, DEFENDANTS were required to compensate their
16 employees proper overtime wages for overtime hours worked pursuant to California Labor Code §
17 1194.” That is a statement of the law as it applies to employers and not a statement of facts as they
18 apply to the plaintiff. Thus, Paragraph 47 of the Complaint does not provide the factual basis for
19 Villegas’ claim that she was entitled to overtime wages which were either untimely paid, or
20 improperly calculated.

21 Plaintiff attempts to state a claim by reciting that she did not receive properly computed
22 overtime wages. Compl. ¶ 8. This allegation does not state an overtime wage claim because it is not
23 much more informative than an allegation that she was not paid for overtime work in general.
24 Defendants cite to *Zhong v. August August Corp.*, 498 F.Supp.2d 625, 630 (S.D.N.Y. 2007), for the
25 proposition that “[s]imply stating that [a plaintiff] w[as] not paid for overtime work does not
26 sufficiently allege a violation of Section 7 of the FLSA.” (citing *Acosta v. The Yale Club*, 1995 WL
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1 600873 (S.D.N.Y. 1995)). In *Zhong*, the trial court was not persuaded plaintiff had met his burden
2 as to the overtime pay claim because of an internal contradiction in the complaint. The plaintiff
3 referred both to having “regularly worked overtime hours,” and then alleged working hours that only
4 added up to twenty hours in a week. However, the trial court acknowledged that the plaintiff may
5 have been simply describing the plaintiff’s typical weekly hours and the possibility existed that he
6 worked beyond forty hours on one or more occasions, thus creating a plausible claim for overtime
7 hours. *Id.* at 630.

8 On the face of the Complaint, there are insufficient facts to state a claim for overtime wages.
9 For these reasons, the Court GRANTS the motion to dismiss the third cause of action for overtime
10 wages WITH LEAVE TO AMEND.

11 **D. Fourth Cause of Action: Violations of Labor Code §§ 201-203.**

12 The fourth cause of action for untimely non-payment of wages is supported by the allegation
13 in paragraph 8 of the Complaint: “DEFENDANTS did not pay Plaintiff all wages owed, including
14 commission wages, in a timely fashion at the end of employment.” She has alleged she earned
15 commissions that were unpaid, and if she proves that fact, together with the fact that those
16 commission wages remained unpaid at the end of her employment, she is entitled to relief under
17 Labor Code §203.

18 The motion to dismiss the fourth cause of action is DENIED.

19 **E. Fifth Cause of Action: Failure to Maintain Accurate Records of Pay.**

20 The apparent factual basis for the fifth cause of action is recited in paragraph 8 where the
21 plaintiff alleges her payroll records were not accurately maintained. Defendants argue that “to the
22 extent that this cause of action is merely derivative of Plaintiff’s causes of action seeking vacation,
23 commission or overtime wages, Plaintiff’s record-keeping claim should be dismissed for the same
24 reasons as the underlying claims.” Motion at 6. The Court agrees.

25 From the face of the complaint, it is not apparent that Villegas states a claim for which relief
26 can be granted. It appears more likely that she is attempting to take her substantive claims and
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1 bootstrapping a record-keeping violation into the complaint. If the basis for the claim is that the
2 overtime rate is incorrectly calculated, then the claim is entirely derivative of the third cause of
3 action and should be dismissed. If, however, the basis of the fifth cause of action is that the
4 plaintiff's pay records do not accurately record commissions she earned or vacation time she
5 accrued, then she has arguably stated a claim.

6 Without amendment, the complaint merely recites the elements of Labor Code § 226(a) by
7 generally alleging that "Defendants failed to keep accurate records of Plaintiff's and the class
8 members rates of pay, rates of overtime pay, net wages earned, daily or weekly overtime pay,
9 commissions earned and/or vacation earned." Compl. ¶ 60. For this reason, the Court GRANTS
10 with LEAVE TO AMEND the motion to dismiss the fifth cause of action.

11 **F. Sixth Cause of Action: Unfair Business Practice.**

12 The Section 17200 claim is dismissed for failure to state a claim based on violations of
13 California Labor Code Sections 203 and 226. In wage and hour litigation against *Wal-Mart*, this
14 Court held twice that "claims pursuant to Labor Code §§ 203 and 226 cannot support a § 17200
15 claim" and dismissed Section 17200 claims on the pleadings. *In re Wal-Mart Stores, Inc. Wage &*
16 *Hour Litig.*, 505 F.Supp.2d 609, 619 (N.D. Cal. 2007)(Armstrong, J); *Rubin v. Wal-Mart*, 02-4214-
17 SBA (Order Granting Motion to Dismiss, entered February 25, 2009). *See also Tomlinson v.*
18 *Indymac Bank, F.S.B.*, 359 F.Supp. 2d 891, 895 (C.D.Cal.2005) (granting judgment on the pleadings
19 on ground that Labor Code § 203 provides for a penalty, not wages, which cannot be raised through
20 § 17200 claim).

21 Accordingly, the Court GRANTS the motion to dismiss the sixth cause of action with respect
22 to claims based on Labor Code §§ 203 and 226 and DENIES the motion with respect to a claim
23 based on Labor Code § 227.3.

24 **G. Class Allegations.**

25 Because the defendants only specifically address the dismissal of the class allegations in the
26 reply brief, the Court DENIES WITHOUT PREJUDICE the motion to dismiss them. *Zamani v.*
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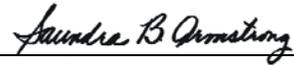
1 *Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (A “court need not consider arguments raised for the first
2 time in a reply brief.”).

3 **CONCLUSION**

4 For the reasons stated, the Court DENIES the motion to dismiss the First, Second and Fourth
5 Causes of Action. The Court GRANTS with LEAVE TO AMEND the motion to dismiss the Third
6 and Fifth Causes of Action. The Court GRANTS in part and DENIES in part the motion to dismiss
7 the Sixth Cause of Action.

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9 IT IS SO ORDERED.

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12 Dated: 3/6/09



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SAUNDRA BROWN ARMSTRONG
United States District Judge