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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CARLY HECK, an individual; SARA LUND, an individual; and ALLY ORTANEZ, an individual,  
  
Plaintiffs,  
  
v.  
  
HEAVENLY COUTURE, INC., a California Corporation,  
  
Defendant.

Case No.: 3:17-CV-0168-CAB-NLS  
  
**ORDER RE MOTION TO DISMISS FIRST AMENDED COMPLAINT AND MOTION TO COMPEL ARBITRATION**  
  
[Doc. Nos. 27 and 28]

This matter is before the Court on Defendant Heavenly Couture’s motion to dismiss the First Amended Complaint (“FAC”) [Doc. No. 27] and motion for an order compelling arbitration and/or immediately staying civil action [Doc. No. 28]. The motions have been fully briefed and the Court deems them suitable for submission without oral argument. For the reasons set forth below, the motion to dismiss the FAC is **GRANTED** without leave to amend, and the motion to compel arbitration and/or stay civil action is deemed moot and **DENIED** without prejudice.

**FACTUAL BACKGROUND**

Plaintiffs Carly Heck, Sara Lund, and Ally Ortanez (collectively “Plaintiffs”) bring this collective action under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (“FLSA”). Plaintiffs were non-exempt, hourly, in-store employees of Defendant Heavenly Couture, Inc., a California corporation which operates a chain of retail clothing stores.

1 Plaintiffs allege Defendant forced Plaintiffs to work uncompensated regular and overtime  
2 hours. Plaintiffs also allege Defendant failed to provide state-law-mandated meal and rest  
3 breaks, and that Defendant attempted to conceal such conduct by failing to provide accurate  
4 wage statements. Plaintiffs allege Defendant maintains a policy requiring employees to  
5 work off the clock during breaks and meal periods, and that Defendant failed to compensate  
6 Plaintiffs for overtime hours worked as required by FLSA and California law.

7 On October 11, 2016, Plaintiffs filed an action in the San Diego Superior Court,  
8 alleging various state law wage and hour claims against Defendant for: (1) failure to pay  
9 meal period premium pay; (2) failure to pay rest break premium pay; (3) failure to pay  
10 overtime wages; (4) failure to pay regular wages; (5) waiting time penalties; (6) violations  
11 of California’s Unfair Competition Law; and (7) failure to provide accurate wage  
12 statements (the “state court action”). [Doc. No. 11-2, ¶2.] Defendant filed a motion to  
13 compel arbitration in the state court action on January 13, 2017. [Doc. No. 11-2, ¶3.] Prior  
14 to the hearing scheduled for February 10, 2017 on that motion, Plaintiffs dismissed the  
15 state court action without prejudice [Doc. No. 11-2, ¶¶3-5] and subsequently filed this  
16 action, which mirrored the state court action but added an additional cause of action under  
17 the FLSA (the “federal court action”). [Doc. No. 1.]

18 On March 9, 2017, Defendant filed a motion to dismiss the original complaint in the  
19 federal court action on the grounds that it failed to state a claim under the FLSA, and on  
20 the grounds that the state law claims do not arise from the same common nucleus of  
21 operative facts as Plaintiff’s sole federal claim. [See generally Doc. No. 10-1.]<sup>1</sup> On June  
22 16, 2017, this Court granted the motion to dismiss with leave to amend as to the FLSA  
23 claim, and declined to exercise supplemental jurisdiction over Plaintiff’s state law claims.  
24 [Doc. No. 22.]

25 On July 7, 2017, Plaintiffs filed the FAC with a single claim for an FLSA violation.  
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28 <sup>1</sup> Defendant also filed a motion to compel arbitration, which was denied as moot. [Doc. No. 22.]

1 [Doc. No. 23.] On July 25, 2017, Defendant filed a motion to dismiss the FAC [Doc. No.  
2 27], and a motion to compel arbitration and/or immediately staying action [Doc. No. 28].  
3 On August 11, 2017, Plaintiffs filed oppositions to the motions. [Doc. Nos. 29, 30.] On  
4 August 18, 2017, Defendant filed replies to the oppositions. [Doc. Nos. 32, 33.]

### 5 **ALLEGATIONS OF FAC**

6 Most of the allegations of the FAC mirror those of the original complaint in the  
7 federal court action. In summary, Plaintiffs allege: Defendant unlawfully forced  
8 Plaintiffs to work uncompensated regular and overtime hours, cheating Plaintiffs out of  
9 premium pay for regular and overtime pay. [Doc. No. 23 at ¶4.] Additionally, Defendant  
10 exploited Plaintiffs by failing to provide legally mandated meal and rest breaks. *Id.*  
11 Defendant attempted to conceal its unlawful conduct by failing to provide accurate wage  
12 statements. *Id.* Defendant failed to pay all wages when due. *Id.*

13 Defendant refused to give Plaintiffs proper meal breaks. Defendant's uniform  
14 policy was for its employees to clock out for their meal periods and return to the sales  
15 floor to continue working. In other words, Defendant required Plaintiffs to work off the  
16 clock and during legally-mandated meal periods. [Doc. No. 23 at ¶14.]

17 Defendant also required Plaintiffs to work more than eight hours in each day,  
18 sometimes requiring that Plaintiffs work more than twelve hours in a day. Additionally,  
19 Defendant required Plaintiffs to work more than forty hours per week. Defendant did not  
20 adequately compensate Plaintiffs for overtime hours worked, as required under the  
21 FLSA. [Doc. No. 23 at ¶15.] Defendant required Plaintiffs to work more than forty hours  
22 per week. *Id.*

23 In addition, the FAC alleges as follows:

24 Defendant's uniform policy required that Plaintiffs worked through their legally-  
25 mandated meal breaks. Defendant also uniformly refused to compensate Plaintiffs for this  
26 time worked. Instead, Plaintiffs were forced to clock out for a meal period, return to the  
27 work floor, and help customers. Plaintiffs were not compensated for regular-pay work  
28 time because they worked off the clock during their meal breaks. For example, if an

1 employee was scheduled to work from 10:00 a.m. to 5:00 p.m., with a planned thirty-  
2 minute meal break, the number of *scheduled* hours would be six and one half. However,  
3 the employee would clock out for their meal break but return to work on the floor, thus  
4 working through their scheduled thirty-minute break, and causing the number of hours  
5 *actually* worked to become seven. Defendant never compensated Plaintiffs for these extra  
6 periods of time worked. [Doc. No. 23 at ¶18.]

7         Additionally, Plaintiffs were sometimes not compensated for overtime hours  
8 because the additional time worked—through their meal break—caused the number of  
9 hours they worked to exceed eight hours in one day (and sometimes twelve hours in one  
10 day). For example, if an employee was scheduled to work from 10:00 a.m. to 6:30 p.m.,  
11 with a thirty-minute meal period built in, the number of hours *scheduled* to be worked  
12 would have been eight. However, because the employee is forced—by Defendant’s  
13 explicit instruction and uniform policy—to work during the scheduled thirty-minute  
14 break, the number of hours actually worked becomes eight and one half. Defendant failed  
15 to ever pay for this extra half hour and never provided overtime pay for causing  
16 Plaintiffs’ shifts to exceed eight hours of time worked. [Doc. No. 23 at ¶19.]

17         Defendant’s uniform policy included instructions directed at each employee—  
18 including Plaintiffs—to falsify their time records in this fashion. In other words,  
19 Defendant required and instructed Plaintiffs and similarly situated employees to falsify  
20 their time records by clocking out for—but not actually taking—their meal breaks. [Doc.  
21 No. 23 at ¶20.]

22         During every workweek in [each] period [that each Plaintiff was employed],  
23 [Plaintiff] was required to follow Defendant’s uniform policies mandating that she:

- 24         a. Clock out for her legally-required meal period, but return to the floor to  
25             continue working through the meal period—during every shift she  
26             worked;
- 27         b. Ensure that her time records inaccurately reflected that she did in fact  
28             take her meal period—during every shift she worked;

- 1 c. Work more than eight hours in a day without receiving the statutorily  
2 required overtime pay—at least once a week; and  
3 d. Work more than twelve hours in a day without receiving the statutorily-  
4 required overtime pay—less than once a week but more than once a  
5 month.” [Doc. No. 23 at ¶¶21-26.]

6 Finally, [each Plaintiff] was explicitly instructed to follow the policies and  
7 procedures listed in the preceding paragraphs, through the duration of her employment.  
8 [Doc. No. 23 at ¶¶ 22, 24, 26.]

### 9 LEGAL STANDARD FOR MOTION TO DISMISS

10 To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain  
11 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
12 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v.*  
13 *Twombly*, 550 U.S. 544, 570 (2007)). Thus, the Court “accept[s] factual allegations in the  
14 complaint as true and construe[s] the pleadings in the light most favorable to the  
15 nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031  
16 (9th Cir. 2008). On the other hand, the Court is “not bound to accept as true a legal  
17 conclusion couched as a factual allegation.” *Iqbal*, 556 U.S. at 678; *see also Lee v. City of*  
18 *Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001) (“Conclusory allegations of law are  
19 insufficient to defeat a motion to dismiss”). Nor is the Court “required to accept as true  
20 allegations that contradict exhibits attached to the Complaint or . . . allegations that are  
21 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Daniels-*  
22 *Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). “In sum, for a complaint to  
23 survive a [12(b)(6)] motion to dismiss, the non-conclusory factual content, and reasonable  
24 inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff  
25 to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted).  
26 Finally, “[l]eave to amend may . . . be denied for repeated failure to cure deficiencies by  
27 previous amendment.” *Abragninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 742 (9th Cir.  
28 2008)(citations omitted).

1 **ANALYSIS OF MOTION TO DISMISS**

2 There are two issues with which the FLSA is concerned: (1) weekly overtime  
3 compensation (29 U.S.C. §207(a)(1)) and (2) payment of federal minimum wage (29  
4 U.S.C. §206(a)).

5 A. Weekly Overtime Pay.

6 The FLSA's overtime compensation provision entitles covered employees to time  
7 and-a-half wages for hours worked in excess of 40 in a workweek. 29 U.S.C. §207(a)(1).  
8 Accordingly, to state a claim the plaintiff must allege that she worked more than 40 hours  
9 per workweek and did not receive the correct overtime pay for that week (or weeks).

10 The Ninth Circuit's decision in *Landers v. Quality Communications, Inc.*, 771 F.3d  
11 638 (9th Cir. 2014), clarified the pleading requirements set forth in *Iqbal* and *Twombly* in  
12 the context of an FLSA unpaid overtime claim. In *Landers*, the plaintiff alleged that he  
13 was not paid minimum wage and was "subjected to a 'piecework no overtime' wage  
14 system, whereby he worked in excess of forty hours per week without being compensated  
15 for his overtime." *Landers*, 771 F.3d at 640. The Ninth Circuit held that these allegations  
16 were inadequate, and that although "detailed factual allegations regarding the number of  
17 overtime hours worked are not required to state a plausible claim, . . . to survive a motion  
18 to dismiss, a plaintiff asserting a claim to overtime payments must allege that she worked  
19 more than forty hours in a given workweek without being compensated for the overtime  
20 hours worked during that workweek." *Id.* at 644-45. To that end, the Ninth Circuit  
21 affirmed dismissal of the complaint, finding that "Landers's allegations failed to provide  
22 sufficient detail about the length and frequency of his unpaid work to support a reasonable  
23 inference that he worked more than forty hours in a given week." *Id.* at 646 (internal  
24 quotations and brackets omitted).

25 In the original complaint in the federal court action, Plaintiffs' allegations failed to  
26 provide sufficient detail regarding the length and frequency of unpaid work. Plaintiffs  
27 asserted that "Defendant required Plaintiffs to work more than forty hours per week." [Doc.  
28 No. 1 at ¶16.] Plaintiffs then asserted that "Defendants did not adequately compensate

1 Plaintiffs for overtime hours worked....” *Id.* These are merely legal conclusions which  
2 recite the elements of a FLSA violation but do not meet the required burden under *Landers*.

3 The FAC fails to cure the defects of the original complaint. Once again, Plaintiffs’  
4 allegations fail to provide sufficient detail regarding the length and frequency of unpaid  
5 overtime work. Just as in the original complaint, Plaintiffs assert that “Defendant required  
6 Plaintiffs to work more than forty hours per week.” [Doc. No. 1 at ¶16 and Doc. No. 23 at  
7 ¶15.] Also remaining unchanged, Plaintiffs assert that “Defendants did not adequately  
8 compensate Plaintiffs for overtime hours worked, as required under the FLSA.” *Id.* These  
9 are merely legal conclusions which recite the elements of a FLSA violation. *Landers*, 771  
10 F.3d at 644-45.

11 Plaintiffs have added some factual allegations in the FAC, including that Plaintiffs  
12 would:

13 “c. [w]ork more than eight hours in a day without receiving the statutorily required  
14 overtime pay—at least once a week; and

15 d. Work more than twelve hours in a day without receiving the statutorily-required  
16 overtime pay—less than once a week but more than once a month.” [Doc. No. 23 at ¶¶21-  
17 26.]

18 However, Plaintiffs fail to show how working over eight or twelve hours in a day  
19 (once per week or once per month) caused them to work over forty hours in one week. For  
20 example, there is no allegation that Plaintiffs worked five or more days per week, such that  
21 working more than 8 hours in a day would cause them to exceed the weekly overtime.  
22 While the additional allegations in the FAC may bolster Plaintiffs’ claims for daily  
23 overtime, which is a state law issue, they do not state an FLSA claim with regard to weekly  
24 overtime pay.

25 B. Minimum wage.

26 The FLSA's minimum wage provision entitles employees to a wage “not less than  
27 \$7.25 an hour.” 29 U.S.C. §206(a). To claim improper compensation under this provision,  
28 the plaintiffs must allege that the wages received fell below this statutory minimum.

1 However, the workweek as a whole, not each individual hour within the work week,  
2 determines an employee's "wages" for purposes of determining FLSA violations. *See* 29  
3 C.F.R. §§776.4(a), 778.104. Thus, an employer's failure to compensate an employee for  
4 any particular hours worked does not necessarily violate the minimum wage provision of  
5 the FLSA. *See Dove v. Coupe*, 759 F.2d 167, 171 (D.C. Cir. 1985). If the total wage paid  
6 to an employee in any given workweek divided by the total hours worked that week equals  
7 or exceeds the applicable minimum wage, there is no FLSA violation. *Adair v. City of*  
8 *Kirkland*, 185 F.3d 1055, 1062 n. 6 (9th Cir. 1999)("even though it is uncompensated, the  
9 employees are still being paid a minimum wage when their salaries are averaged across  
10 their actual time worked"); *Balasanyan v. Nordstrom, Inc.*, 913 F.Supp.2d 1001, 1008  
11 (S.D. Cal. 2012). *See also Sullivan v. Riviera Holdings Corp.*, No. 2:14-cv-00165-APG-  
12 VCF, 2014 WL 290303, at \*1(D. Nev. May 29, 2015). To state a plausible minimum wage  
13 claim under this rule, therefore, a complaint must allege that the plaintiff's weekly wages  
14 fall below the statutory minimum. *Id.*

15 Here, there is no allegation whatsoever as to the amount of Plaintiffs' weekly or  
16 hourly wages. While Plaintiffs allege that some hours worked were unpaid, they do not  
17 provide any allegations to demonstrate that, when the unpaid hours are averaged with the  
18 paid hours in a given workweek, Plaintiffs are paid less than \$7.25 per hour. As a result,  
19 Plaintiffs fail to state an FLSA minimum wage violation.

20 For example, in *Adair*, police officers alleged that they were not compensated for  
21 ten-minute briefings held before their shifts started. *Adair*, 185 F.3d at 1058. "The district  
22 court found that while the ten-minute briefings were compensable work time, attendance  
23 at the briefings was compensated through the officers' salary. The court then found that the  
24 City had complied with the FLSA. Because the salary, when averaged across the total  
25 actual number of hours worked, still paid more per hour than the minimum wage, the court  
26 found that the City complied with the FLSA's minimum wage requirements." *Id.* at 1058–  
27 59. When affirming the district court's ruling, the Ninth Circuit stated that, "[t]he district  
28 court properly rejected any minimum wage claim the officers might have brought by



1 finding that their salary, when averaged across their total time worked, still paid them  
2 above minimum wage.” *Id.* at 1063.

3 In *Sullivan*, claimants alleged an FLSA violation because the defendant “require[d]  
4 them to work approximately 30 minutes off-the-clock per day to transport cash to and from  
5 the ‘cashier's cage’ before and after their scheduled shifts.” *Sullivan*, 2014 WL 2960303,  
6 at \*1. Defendant’s motion to dismiss was granted because “the workweek as a whole, not  
7 each individual hour within the work week, determines an employee's ‘wages’ for purposes  
8 of determining FLSA violations.” *Id.* “The [plaintiffs’] First Claim for Relief, for ‘all hours  
9 worked,’ misunderstands the FLSA. If their average weekly pay does not fall below \$7.25  
10 per hour, then the FLSA does not grant them a remedy for minimum wage violations. This  
11 is so regardless of whether they were actually paid for each hour worked. The [plaintiffs]  
12 have not pleaded sufficient facts for [the Court] to reasonably infer that their average hourly  
13 pay for any given workweek fell below the statutory minimum; indeed, they do not even  
14 plead their current hourly wage.” *Id.* at 2.

15 Here, Plaintiffs allege that they were not paid for meal periods [Doc. No. 23 at ¶14],  
16 but they do not allege how much they were paid per hour or how many hours/days they  
17 worked per week. Thus, similar to ten-minute briefings worked by the officers in *Adair* or  
18 thirty-minute cash transport periods from *Sullivan*, Plaintiffs’ allegedly uncompensated  
19 meal periods, without more, do not state a minimum wage violation. Plaintiffs have not  
20 shown how working uncompensated periods during their workday resulted in them  
21 receiving less than \$7.25 per hour, on average, in a given workweek. There are simply no  
22 facts pleaded to allow the Court to reasonably infer that Defendant failed to pay minimum  
23 wage for all hours worked in a given workweek. Therefore, Plaintiffs fail to state a claim  
24 for an FLSA minimum wage violation.

25 **MOTION TO COMPEL ARBITRATION**


26 Given that the motion to dismiss is granted without leave to amend, the motion to  
27 compel arbitration is denied as moot.

1 **CONCLUSION**

2 To state an FLSA overtime and/or minimum wage violation, Plaintiffs needed to  
3 show—with factual allegations—that they worked greater than forty hours per week or  
4 were not paid at least minimum wage for all hours worked in a week. This means  
5 Plaintiffs have the burden of pleading how often they worked greater than forty hours per  
6 week without overtime pay. Plaintiffs also have the burden of pleading how much they  
7 were paid and whether—averaged across all hours worked per week—this salary dropped  
8 below minimum wage. These factual allegations are simply absent from the FAC,  
9 notwithstanding this Court’s clear directive in the previous order that such allegations  
10 were needed. Given that this is Plaintiffs’ second attempt to state a claim under the  
11 FLSA, as well as the suspicious procedural history of this case, further amendment would  
12 be futile.

13 For the reasons set forth above, the motion to dismiss is **GRANTED WITHOUT**  
14 **LEAVE TO AMEND** and the motion to compel arbitration is **DENIED AS MOOT**.  
15 The Clerk of the Court shall **CLOSE** the case.

16 Dated: October 6, 2017

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19 Hon. Cathy Ann Bencivengo  
20 United States District Judge  
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