

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SEAN HARDING, individually and on
behalf of other members of the general
public similarly situated,

CASE NO. 09cv1212-WQH-WMC
ORDER

Plaintiff,

vs.

TIME WARNER, INC., a Delaware
Corporation; and DOES 1-50, Inclusive,

Defendants.

HAYES, Judge:

The matter before the Court is the Motion to Dismiss, filed by Defendant Time Warner, Inc. ("Time Warner") on June 30, 2009. (Doc. # 6).

I. Background

On June 4, 2009, Plaintiff filed the Complaint, alleging federal question jurisdiction pursuant to the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 216(b) and 28 U.S.C. § 1331. (Doc. # 1 ¶ 6). The Complaint has three Counts, each a purported collective or class action.

Count I is a FLSA claim, brought on behalf of Plaintiff and the following: "all current and former non-exempt employees of Time Warner who have worked in the United States at any time during the last three years." (Doc. # 1 ¶ 8). Count I alleges: "Time Warner violated the FLSA by failing to pay and properly calculate overtime. In the course of perpetrating these unlawful practices, Time Warner also willfully failed to keep accurate records of all hours

1 worked by its employees.” (Doc. # 1 ¶ 26). “As a result of the ... willful violations of the
 2 FLSA’s overtime pay provisions,” Plaintiff seeks compensatory damages, liquidated damages,
 3 interest, attorney’s fees and cost. (Doc. # 1 ¶ 31).

4 Count II is a claim for violation of the California Labor Code, brought on behalf of
 5 Plaintiff and “all current and former non-exempt employees of Time Warner who have worked
 6 in the state of California within the last three years.” (Doc. # 1 ¶ 9). Count II alleges:

7 Time Warner maintained (and maintains) a practice of paying employees
 8 without regard to the number of hours actually worked. Time Warner’s practice
 9 included the ‘rounding’ of reported time worked—to the nearest 15
 minutes—without ensuring that the employees were paid for all of the time
 actually worked. In doing so, Time Warner inaccurately under-reported the
 amount of time worked by Plaintiff, and subsequently underpaid the Class.

10 (Doc. # 1 ¶ 33). Count II further alleges that Time Warner violated the California Labor Code
 11 by failing to: “keep accurate ‘Time records’”; “provide ‘all wages’ in a compliant manner”;
 12 “provide Overtime Compensation in a compliant manner”; “provide uninterrupted Meal
 13 Periods”; “provide accurate Itemized Wage Statements”; and “comply with California Labor
 14 Code § 203 with respect to former employee[s] who were discharged, or who quit,
 15 employment.” (Doc. # 1 ¶ 33 (quoting Cal. Labor Code § 204)). As a result of Time Warner’s
 16 alleged violations of the California Labor Code, Plaintiff seeks “to recover wages due to
 17 Plaintiff ... , as well as recovery of interest, reasonable attorneys’ fees, and costs.” (Doc. # 1
 18 ¶ 35).

19 Count III is a claim for violation of the California Business and Professions Code,
 20 brought on behalf of Plaintiff and “all current and former non-exempt employees of Time
 21 Warner who have worked in the state of California within the last four years.” (Doc. # 1 ¶ 9).
 22 Count III alleges that “Time Warner’s actions, including but not limited to the failure to
 23 maintain accurate employee time records, the failure to pay all wages earned, and the failure
 24 to pay overtime compensation, constitute fraudulent and/or unlawful and/or unfair business
 25 practices in violation of California Business and Professions Code §§ 17200, et seq.” (Doc.
 26 # 1 ¶ 37). As a result of the violations alleged in Count III, Plaintiff seeks restitution,
 27 preliminary and permanent injunctive relief, attorneys’ fees and costs. (Doc. # 1 ¶¶ 40-42).

28 On June 30, 2009, Time Warner filed the Motion to Dismiss the Complaint pursuant

1 to Federal Rule of Civil Procedure 12(b)(6), contending that “Plaintiff’s Complaint is
 2 composed of boilerplate recitations of legal elements and conclusory assertions of liability, but
 3 is devoid of the facts required to show an entitlement to relief,” and therefore fails to conform
 4 to the pleading standards required by Rule 8 of the Federal Rules of Civil Procedure. (Doc.
 5 # 6-2 at 4). Time Warner contends that “the Complaint’s lone allegation of fact” is that “Time
 6 Warner’s practices included ‘rounding’ of reported time worked—to the nearest 15
 7 minutes—without ensuring that the employees were paid for all time actually worked.” (Doc.
 8 # 6-2 at 11 (quoting Compl. ¶ 33)). Time Warner contends that “the practice of rounding time
 9 entries to the nearest 15 minutes is permissible in California. Moreover, Plaintiff’s Complaint
 10 is devoid of any facts that would explain how this rounding practice failed to compensate
 11 Plaintiff for all hours actually worked.” (Doc. # 6-2 at 12 (citing the California Division of
 12 Labor Standards Enforcement’s Enforcement Policies and Interpretations Manual (“DLSE
 13 Manual”)).

14 On July 27, 2009, Plaintiff filed an opposition to the Motion to Dismiss, contending that
 15 the Complaint complies with Federal Rule of Civil Procedure 8, and “the purpose of the
 16 discovery process is to flesh out the claims that are made in the Complaint.” (Doc. # 7 at 7).
 17 According to Plaintiff, “this case centers around allegations of illegal ‘rounding’ of
 18 employees[’] time worked by [Time Warner].” (Doc. # 7 at 4). Plaintiff contends that “the
 19 California Supreme Court has expressly rejected the assertion that a DLSE Manual is
 20 precedential authority.” (Doc. # 7 at 3). Plaintiff also contends that the “rounding” allegation
 21 sufficiently alleges that employees were not “paid for all the time they have actually worked.”
 22 (Doc. # 7 at 3-4).

23 On August 3, 2009, Time Warner filed a reply brief in support of the Motion to
 24 Dismiss, contending that “Plaintiff abandons all claims but his rounding claim,” because
 25 Plaintiff only addressed the “rounding” claim in his brief. (Doc. # 9 at 2). Time Warner
 26 maintains that “rounding” is allowed by federal and state law, and Plaintiff’s allegations related
 27 to the “rounding” claim fail to satisfy the pleading standards of Rule 8. (Doc. # 9 at 6-7).

28 **II. Standard of Review**

1 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a claim
 2 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Since 1957, courts addressing
 3 Rule 12(b)(6) motions to dismiss have applied the standard announced in *Conley v. Gibson*,
 4 “that a complaint should not be dismissed for failure to state a claim unless it appears beyond
 5 doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him
 6 to relief.” 355 U.S. 41, 45-46 (1957). In 2007, the Supreme Court held that the *Conley*
 7 standard had “earned its retirement,” and implemented a new standard for addressing whether
 8 a complaint states a claim upon which relief may be granted. *Bell Atlantic v. Twombly*, 550
 9 U.S. 544, 563 (2007); *see also Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1953 (2009)
 10 (“Our decision in *Twombly* expounded the pleading standard for all civil actions...”) (quotation
 11 omitted) (citing Federal Rule of Civil Procedure 8).¹

12 In *Moss v. U.S. Secret Service*, 2009 WL 2052985 (9th Cir., July 16, 2009), the Ninth
 13 Circuit summarized the “recent developments in the Supreme Court’s pleadings
 14 jurisprudence.” “[F]or a complaint to survive a motion to dismiss, the non-conclusory ‘factual
 15 content,’ and reasonable inferences from that content, must be plausibly suggestive of a claim
 16 entitling the plaintiff to relief.” *Id.* at *6 (quoting *Iqbal*, 129 S. Ct. at 1949). The Ninth Circuit
 17 explained:

18 ‘[B]are assertions ... amounting to nothing more than a formulaic recitation of
 19 the elements’, for the purposes of ruling on a motion to dismiss, are not
 20 entitled to an assumption of truth. Such allegations are not to be discounted
 21 because they are ‘unrealistic or nonsensical,’ but rather because they do nothing
 22 more than state a legal conclusion—even if that conclusion is cast in the form of
 23 a factual allegation. Thus, in *Iqbal*, the Court assigned no weight to the
 24 plaintiff’s conclusory allegation that former Attorney General Ashcroft and FBI
 25 Director Mueller knowingly and willfully subjected him to harsh conditions of
 26 confinement ‘solely on account of [his] religion, race, and/or national origin and
 27 for no legitimate penological interest.’

28 *Id.* at *5 (quoting *Iqbal*, 129 S. Ct. at 1951 (internal quotations omitted)). “After dispatching
 the complaint’s conclusory allegations,” a court next must apply “*Twombly*’s plausibility
 standard.” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’ but it asks

1 Federal Rule of Civil Procedure 8 provides, in part: “A pleading that states a claim
 for relief must contain ... a short and plain statement of the claim showing that the pleader is
 entitled to relief.” Fed. R. Civ. P. 8(a)(2).

1 for more than a sheer possibility that a defendant has acted unlawfully. ... Where a complaint
 2 pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line
 3 between possibility and plausibility of entitlement to relief.’” *Iqbal*, 129 S. Ct. at 1949
 4 (quoting *Twombly*, 550 U.S. at 556-57); *see also Moss*, 2009 WL 2052985, at *5. This new
 5 standard is not a “heightened fact pleading” requirement, but “simply calls for enough fact to
 6 raise a reasonable expectation that discovery will reveal evidence of [the claim].” *Twombly*,
 7 550 U.S. at 556.

8 **III. Discussion**

9 The Complaint alleges that Time Warner failed to do the following: “pay and properly
 10 calculate overtime”; “keep accurate records of all hours worked by its employees”; “provide
 11 all wages in a compliant manner”; “provide uninterrupted Meal Periods”; “provide accurate
 12 Itemized Wage Statements”; and “comply with California Labor Code § 203” (Doc. # 1 ¶¶ 26,
 13 33, 37). Each of these allegations are “conclusory allegations,” as defined by *Twombly*, and
 14 will be “assigned no weight.” *Moss*, 2009 WL 2052985, at *5; *cf. Doe v. Wal-Mart Stores,*
 15 *Inc.*, 572 F.3d 677, ---, 2009 LEXIS 15279, at * 10-*11 (9th Cir., July 10, 2009) (“Plaintiffs’
 16 allegations do not support the conclusion that Wal-Mart is Plaintiffs’ employer. Plaintiffs’
 17 general statement that Wal-Mart exercised control over their day-to-day employment is a
 18 conclusion, not a factual allegation stated with any specificity. We need not accept Plaintiffs’
 19 unwarranted conclusion in reviewing a motion to dismiss.”) (citing *Twombly*, 550 U.S. at 555;
 20 *Iqbal*, 129 S. Ct. at 1953); *Jones v. Casey’s Gen. Stores*, 538 F. Supp. 2d 1094, 1102 (S.D.
 21 Iowa 2008) (holding that the following allegations are too conclusory to satisfy the *Twombly*
 22 pleading standard: “Plaintiffs and other assistant managers regularly worked regular time and
 23 overtime each week but were not paid regular and overtime wages in violation of the FLSA”
 24 and “Defendant ... regularly and repeatedly fail[ed] to compensate Plaintiffs and similarly
 25 situated individuals for all hours actually worked” and “Defendant ... fail[ed] to keep accurate
 26 time records to avoid paying them overtime wages and other benefits”); Nienberg Decl., Ex.
 27 2, Doc. # 7-4 (slip op. in *DeLeon v. Time Warner*, No. CV 09-2438 (C.D. Cal., July 17, 2009)
 28 (same)).

1 The Complaint also alleges that Time Warner violated the California Labor Code by
 2 “maintain[ing] ... a practice of paying employees without regard to the number of hours
 3 actually worked.” (Doc. # 1 ¶ 33). The Complaint alleges that this “practice included the
 4 ‘rounding’ of reported time worked—to the nearest 15 minutes—without ensuring that the
 5 employees were paid for all of the time actually worked. In doing so, Time Warner
 6 inaccurately under-reported the amount of time worked by Plaintiff, and subsequently
 7 underpaid the Class.” (Doc. # 1 ¶ 33). Other than the allegation that Time Warner had a
 8 practice of “rounding,” these allegations are too generic and conclusory to satisfy the standard
 9 announced in *Twombly*. *Cf. Jones*, 538 F. Supp. 2d at 1102 (“[W]here the plaintiff alleges
 10 violations of the FLSA’s minimum wage provision, the complaint should, at least
 11 approximately, allege the hours worked for which these wages were not received. ... Plaintiffs’
 12 Amended Complaint provides only generic, conclusory assertions of a right to relief under the
 13 FLSA minimum wage provisions.”). “After dispatching the ... conclusory allegations,” *Moss*,
 14 2009 WL 2052985, at *5, the bare factual allegation of a practice of “rounding” of reported
 15 time worked to the nearest 15 minutes, fails “to raise a reasonable expectation that discovery
 16 will reveal evidence of [the claim].” *Twombly*, 550 U.S. at 556; *cf. 29 C.F.R. § 785.48(b)* (“It
 17 has been found that in some industries, ... there has been the practice for many years of
 18 recording the employees’ starting time and stopping time to the nearest ... quarter of an hour.
 19 Presumably, this arrangement averages out so that the employees are fully compensated for
 20 all the time they actually work.”).

21 The Complaint fails to allege sufficient “non-conclusory factual content” to be
 22 “plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss*, 2009 WL 2052985, at
 23 *6. Therefore, it fails to satisfy Rule 8 and must be dismissed.

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IV. Conclusion

2 IT IS HEREBY ORDERED that the Motion to Dismiss is **GRANTED**. (Doc. # 6).
3 The Complaint is **DISMISSED** without prejudice. No later than twenty days from the date
4 of this Order, Plaintiff may file a motion for leave to amend the Complaint, accompanied by
5 a proposed amended complaint. If Plaintiff does not file a motion for leave to amend within
6 twenty days, the Court will order this case to be closed.

7 || DATED: August 18, 2009

William Q. Hayes
WILLIAM Q. HAYES
United States District Judge