UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 18-10668-MWF (AFMx) **Date: March 19, 2019**
Title: Michael Saunders v. Ameriprise Financial Services, Inc.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER RE: MOTION TO DISMISS PLAINTIFF MICHAEL SAUNDERS' COMPLAINT [9]

Before the Court is the Motion to Dismiss Plaintiff Michael Saunders' Complaint (the "Motion"), filed by Defendant Ameriprise Financial Services, Inc. ("Ameriprise"), on February 1, 2019. (Docket No. 9). Plaintiff filed an Opposition on February 25, 2019. (Docket No. 12). Ameriprise filed its Reply on March 4, 2019. (Docket No. 13). The Court read and considered the papers filed in connection with the Motion, and held a hearing on March 18, 2019.

For the reasons discussed below, the Motion is **DENIED** in its entirety. Plaintiff has adequately alleged that he received a transition bonus in the form of a forgivable loan and used the proceeds of that bonus for necessary business expenses. Therefore, Plaintiff has adequately alleged claims for failure to reimburse business expenses, repayment of wages, failure to pay overtime wages, and violation of the UCL. Ameriprise's position here is contrary to the language and spirit of Rule 8.

I. BACKGROUND

A. Plaintiff's Complaint

On November 21, 2018, Plaintiff commenced this putative class action in the Los Angeles County Superior Court. (Notice of Removal ("NoR") ¶ 1 (Docket No. 1)).

Plaintiff's Complaint contains the following allegations:

Ameriprise "provides financial planning, asset management and insurance services to individuals, businesses and institutions." (NoR, Ex. A ("Complaint") ¶ 6). Ameriprise employs approximately 10,000 financial advisors and operates through five segments: (1) Advice and Wealth Management, (2) Asset Management, (3) Annuities, (4) Protection, and (5) Corporate and Other. (*Id.*). Relevant here is the Advice and Wealth Management segment, which "provides financial planning and advice, as well as full service brokerage and banking services, primarily to retail clients through [Ameriprise's] financial advisors." (*Id.*).

Since September 11, 2011, Plaintiff has been employed by Ameriprise as a Financial Advisor Associate Vice President in the Advice and Wealth Management segment. (*Id.* ¶ 11). Plaintiff is currently on medical disability leave. (*Id.*).

Plaintiff alleges that to recruit and train financial advisors, Ameriprise "utilizes both transition and production 'bonuses' which are given to financial advisor employees in the form of 'forgivable' loans." (*Id.* ¶ 12). A transition bonus, which appears to be given to new employees, is "structured on paper as a loan generally at below market rate interest [and] usually five to seven years" and the balance of the loan and interest "is paid off or 'forgiven' by the broker dealer." (*Id.* ¶ 13). A production bonus is offered to "more tenured brokers," but the "form of such notes is similar to those of the transition bonuses." (*Id.* ¶ 14).

The uniform and standardized language relating to the substantive terms of the promissory notes for either bonus does not materially differ. (*Id.* ¶ 15). For instance, the Transition Bonus Promissory Note and Production Bonus Promissory Note expressly provide that "the proceeds of the loan . . . are intended to assist Employee in continuing to achieve similar commercial performance to the degree that such performance is in the interests of customers of [Ameriprise]." (*Id.* ¶ 16). The promissory notes also provide that "if the undersigned's employment with [Ameriprise] terminates for any reason . . . the unpaid balance of the principal sum, plus accrued interest shall be due and payable as of the date of termination." (*Id.* ¶ 17).

Plaintiff alleges that "[s]uch money is and was used by [him] . . . for necessary expenditures incurred in the discharge of [his] duties but such monies were not

reimbursed by [Ameriprise]." (*Id.* ¶ 19). As one example, Ameriprise "has maintained policies and practices that require Financial Advisors to subsidize the pay of [Ameriprise's] Financial Consultants and Client Associates by requiring Financial Advisors to divert a portion of their compensation to the Financial Consultants and Client Associates." (*Id.* ¶ 20). Financial advisors specifically "pay a portion of their compensation as referral fees to internally generated business even though the referrals are an integral part of the job function of other bank employees and even though selling financial products to the referrals is an integral part of the Financial Advisors' expected employment." (*Id.* ¶ 21). In effect, Ameriprise is alleged to have forced "Financial Advisors to subsidize the compensation of certain employees . . . ." (*Id.*).

As another example, Ameriprise has also "maintained company-wide policies and/or practices that require Financial Advisors, Financial Consultants, or the functional equivalent however titled, to pay the ordinary business expenses of [Ameriprise] without reimbursement." (*Id.* ¶ 22). Financial advisors are specifically "forced to bear the costs of settlements, judgments, awards and errors . . . [and Ameriprise's] ordinary business expenses" without reimbursement. (*Id.*).

Plaintiff brings this action on behalf of himself and the following putative class:

> **Plaintiff Class**: All individuals employed by [Ameriprise] as a Financial Advisor, Advisor or the functional equivalent however titled during the Class Period [from November 21, 2014, through and including the date judgment is rendered in this matter].

(*Id.* ¶¶ 26–27).

Plaintiff asserts four claims for relief: (1) failure to reimburse necessary business expenditures in violation of California Labor Code §§ 2800 and 2802; (2) repayment of wages in violation of California Labor Code § 221; (3) failure to pay overtime in violation of California Labor Code §§ 510 and 1194; and (4) unfair business practices under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.* (*Id.* ¶¶ 34–68).

On December 27, 2018, Ameriprise timely removed the action, invoking the Court's jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d). (NoR ¶ 7).

B. Request for Judicial Notice

Along with the Motion, Ameriprise requests that the Court take judicial notice of the Complaint in *Saunders v. Ameriprise Financial Services, Inc., et al.*, No. BC664017, a pending case in the Los Angeles County Superior Court where Plaintiff is asserting numerous disability claims under state law. (Request for Judicial Notice ("RJN") (Docket No. 10)). Plaintiff did not oppose the RJN.

As a general rule, "a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). An exception to this general rule exists for (1) materials that are attached to or necessarily relied upon in the complaint, and (2) matters of public record. *Id.* at 688–89.

The Court concludes that Ameriprise's request document is an official public record. Accordingly, the RJN is **GRANTED**. As noted below, the Court is ***not*** relying on Plaintiff's deposition testimony.

II. LEGAL STANDARD

"Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013).

In ruling on the Motion under Rule 12(b)(6), the Court follows *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The Court must disregard allegations that are legal conclusions, even when disguised as facts. *See id.* at 681 ("It is the conclusory nature

of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014). "Although 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof is improbable,' plaintiffs must include sufficient 'factual enhancement' to cross 'the line between possibility and plausibility.'" *Eclectic Properties*, 751 F.3d at 995 (quoting *Twombly*, 550 U.S. at 556–57) (internal citations omitted).

The Court must then determine whether, based on the allegations that remain and all reasonable inferences that may be drawn therefrom, the Complaint alleges a plausible claim for relief. *See Iqbal*, 556 U.S. at 679; *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). "Determining whether a complaint states a plausible claim for relief is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Ebner v. Fresh, Inc.*, No. 13-56644, 2016 WL 5389307, at *2 (9th Cir. Sept. 27, 2016) (as amended) (quoting *Iqbal*, 556 U.S. at 679). Where the facts as pleaded in the Complaint indicate that there are two alternative explanations, only one of which would result in liability, "plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible." *Eclectic Properties*, 751 F.3d at 996–97; *see also Somers*, 729 F.3d at 960.

III. DISCUSSION

Ameriprise argues that Plaintiff's four claims for relief should all be dismissed because he "fails to allege facts sufficient to meet the pleading requirements." (Mot. at 5–12).

A. Failure to Reimburse Necessary Business Expenses

Under California law, an employer "shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties . . . ." Cal. Labor Code § 2802.

Ameriprise first argues that Plaintiff's claim for failure to reimburse necessary business expenses in violation of section 2802 should be dismissed because "[m]erely alleging a failure to reimburse unspecified work-related expenses is not enough." (*Id.* at 5). Ameriprise contends that Plaintiff "does not provide sufficient detail regarding what business expenses were incurred by [him], when he incurred those costs and the amount claimed, or why such expenses were necessary to perform his job functions." (*Id.* at 6). Ameriprise also relies on large portions of Plaintiff's deposition testimony in the pending action in Superior Court to argue that any purported unreimbursed expenses to which Plaintiff may be entitled "appear[] to be related to a trip he made to Houston prior to June 2015, a claim which would be barred by the three-year statute of limitations . . . ." (*Id.* at 6–10; Reply at 2–3).

In response, Plaintiff argues that he and members of the putative class "utilized their own monies for necessary expenditures incurred in the discharge of [their] duties, including, without limitation, the costs of the wages of support staff, the costs associated with internal referrals of business, and ordinary business expenses." (Opp. at 7 (citing Compl. ¶¶ 19, 37)). Plaintiff also argues that "it is clear that the purpose of the money is so financial advisors can generate more business and commissions for [Ameriprise]" and that "such monies were not reimbursed by Defendant." (Opp. at 7; *see* Compl. ¶¶ 18–19). Plaintiff finally argues that, "[i]n the face of [his] clear and unambiguous allegations," Ameriprise's reliance on "incomplete deposition testimony from a separate action" is impermissible. (Opp. at 7).

The Court agrees with Plaintiff. Contrary to Ameriprise's contention, Plaintiff has specifically alleged that he received a bonus and that "[s]uch money is and was used by [him] . . . for necessary expenditures incurred in the discharge of [his] duties but such monies were not reimbursed by [Ameriprise]." (*See* Compl. ¶ 19). Plaintiff also specifically alleges that these necessary expenditures include "pay[ing] a portion of [Plaintiff's] compensation as referral fees to internally generated business even though the referrals are an integral part of [his] job function" and even though "selling financial products to the referrals is an integral part of the Financial Advisors' expected employment." (*See id.* ¶ 21).

Ameriprise appears to require Plaintiff to provide a detailed list of every business expense incurred, "when they were incurred, the amount, or whether they were necessary and incurred in direct consequence of the discharge of his duties." (Opp. at 2). But such a heightened pleading requirement is not required. *See Beal v. Lifetouch, Inc.*, No. 10-cv-8454-JST (MLGx), 2011 WL 995884, at *2 (C.D. Cal. Mar. 15, 2011) (finding sufficient the allegations that defendants "required Plaintiff and class members to use personal cellular telephones for business purposes" and that "Defendants did not provide Plaintiff and Class members any reimbursement for use of their personal cellular telephones for business purposes"); *Dawson v. Hitco Carbon Composites, Inc.*, No. 17-cv-7337-PSG (FFMx), 2017 WL 7806358, at *6–7 (C.D. Cal. May 5, 2017) (denying motion to dismiss claim for unreimbursed business expenses where the plaintiff alleged that he and other class members "incurred necessary business-related expenses throughout their employment for which they were not fully reimbursed," such as the costs incurred to comply with a dress code).

At the hearing, Ameriprise reasserted the argument that Plaintiff needs to provide more specific details. Ameriprise requested, for instance, that Plaintiff identify whether he receive both the transition and production bonuses; whether the amount was forgiven; and if forgiven, whether it was in full or in part. But as indicated by Plaintiff at the hearing, the specific factual details pertaining to his claims—and indeed, to the claims of the class members—are information that can be obtained through initial disclosures and ongoing discovery. Moreover, Ameriprise's position here is inconsistent with both the language and spirit of Rule 8, and is not supported by any Ninth Circuit case interpreting *Twombly* and *Iqbal*.

To the extent Ameriprise relies upon Plaintiff's deposition testimony in another pending case in Superior Court, the Court may not rely on such materials and must accept as true the facts alleged in the Complaint. The deposition testimony does not fall into one of the exceptions to this basic legal principal. The deposition testimony is not an exhibit attached to the Complaint. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (the moving party may rely only on the face of a complaint or attached documents). The testimony is obviously not incorporated by reference, *id*., nor would the Court be required to consider it even if it were. *Davis v. HSBC Bank Nevada, N.A.*,

691 F.3d 1152, 1159 (9th Cir. 2012) (concluding that the relevant case law has "recognized consistently that the district court may, but is not required to incorporate documents by reference"). Nor will the Court treat the Motion as one for summary judgment. Fed. R. Civ. P. 12(d).

Accordingly, the Motion is **DENIED** to the extent it seeks dismissal of Plaintiff's claim for unreimbursed necessary business expenses.

B. Repayment of Wages

Under California law, it "shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee." Cal. Labor Code § 221.

Ameriprise argues that while "it appears that Plaintiff's theory is that the transition and/or production bonus loans given to financial advisors also constitute a violation of [section 221]," Plaintiff has failed to state any facts that he personally received or was required to repay any part of any wages back to Ameriprise. (Mot. at 10). Ameriprise further contends that Plaintiff has provided "neither the material terms of the loans nor facts sufficient to show that he received such loans, when they were received, under what circumstances or the terms under which they would be earned and forgiven." (Reply at 3). The Court again disagrees.

As noted above and in his Opposition, Plaintiff explicitly alleges that he did in fact received the loan as compensation and was obligated to repay the money. (*See* Opp. at 8 (citing Compl. ¶ 19 ("Such money ***indeed is and was used by Plaintiff*** and the members of the Class for necessary expenditures incurred in the discharge of the employees' duties but such monies were not reimbursed by [Ameriprise].") (emphasis added))). At this early stage, that is all that is required under section 221. *See, e.g.*, *Goyal v. CSX Intermodal Terminals, Inc.*, No. 17-cv-6081-EMC, 2018 WL 4649828, at *8 (N.D. Cal. Sept. 25, 2018) (noting that business expenses, including "expenses that are 'inevitable in almost any business operation,'" must be borne by the company even where "the [employees] had executed written contracts agreeing to [a] method of salary calculation" that deducts business expenses from wages") (citation omitted);

Aguilar v. Zep Inc., No. 13-cv-563-WHO, 2014 WL 4245988, at *16 (N.D. Cal. Aug. 27, 2014) ("[R]outine business expenses cannot be deducted from employee pay, and the fact that the [employees] consented to the practice is irrelevant.").

Accordingly, the Motion is **DENIED** to the extent it seeks dismissal of Plaintiff's claim for repayment of wages.

C. Failure to Pay Overtime Wages

Ameriprise argues that "Plaintiff's boilerplate and conclusory allegation that overtime wages were not paid . . . falls woefully short of the pleading standard." (Mot. at 10–11). For support, Ameriprise cites to two cases, *Landers v. Quality Comms. Inc.*, 771 F.3d 638 (9th Cir. 2014), and *Tan v. GrubHub, Inc.*, 171 F. Supp. 3d 998 (N.D. Cal. 2016). (*Id.*). The Court is not persuaded because *Landers* and *Tan* are easily distinguishable.

In *Landers*, the Ninth Circuit considered a claim for failure to pay overtime wages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216 *et seq.*, and concluded that "[a]lthough [the plaintiff's] allegations 'raise the possibility' of undercompensation in ***violation of the FLSA***, a possibility is not the same as plausibility." 771 F.3d at 646 (emphasis added). Here, Plaintiff is bringing a claim for failure to pay overtime wages under California Labor Code section 510 rather than the FLSA.

In *Tan*, while the district court ultimately concluded that the plaintiff's allegations were not sufficient to state a cause of action for violation of California's overtime laws, it also noted that to the extent *Landers* is relevant, it "does not require the plaintiff to identify an exact calendar week or particular instance of denied overtime." 171 F. Supp. 3d at 1008. So contrary to Ameriprise's contention that Plaintiff must assert facts about specific periods of time where Ameriprise withheld overtime or regular pay, Plaintiff's "allegations need only give rise to a plausible inference that there was such an instance." *Id.* Here, Plaintiff has sufficiently done just that.

In addition to the allegation previously discussed, Plaintiff also alleges that he and the other class members "were not paid overtime when they worked in excess of eight (8) hours in a given day . . . [because Ameriprise] attribute[d] commission wages paid in one pay period to other pay periods in order to satisfy California's compensation requirements." (Compl. ¶¶ 48–49). Moreover, Ameriprise is alleged to have "maintained company-wide policies and/or practices that improperly classified employees who hold or held the positions of Financial Advisors, Financial Consultants; or the functional equivalent however titled and failed to pay them all overtime wages owed." (*Id.* ¶ 50). These allegations are sufficient to give rise to a plausible inference that there was an instance of withheld overtime wages.

For the first time in its Reply, Ameriprise also argues that based upon the allegations in the Complaint, the Court "could only conclude Plaintiff is an exempt employee . . . [and he] does not allege any facts as to why he was not properly classified as exempt from the overtime laws." (Reply at 6–7). Ameriprise further argues that "Plaintiff's failure to plead any facts in support of his claim that he is not exempt is fatal to his claims given what he has pleaded." (*Id.* at 8–9).

Ameriprise, curiously relying upon the language of the FLSA and cases citing to the FLSA for support even though Plaintiff is bringing his claim solely under California law, does not even attempt to show why such language and cases are sufficiently analogous. More fatally, however, Ameriprise did not raise this argument in its Motion and, of course, the Court will not consider an argument raised for the first time in the Reply. *See, e.g.*, *Turtle Island Restoration Network v. U.S. Dept. of Commerce*, 672 F.3d 1160, 1166 n.8 (9th Cir. 2012) ("[A]rguments raised for the first time in a reply brief are waived.") (internal quotation marks and citations omitted).

Accordingly, the Motion is **DENIED** to the extent it seeks dismissal of Plaintiff's claim for failure to pay overtime wages.

D. UCL Claim

California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising." Cal. Bus. & Prof.

Code § 17200. "Because the statute is written in the disjunctive, it is violated where a defendant's act or practice violates any of the foregoing prongs." *Davis*, 691 F.3d at 1168. The UCL "does not proscribe specific activities," but rather, "borrows violations of other laws and treats them as unlawful practices that the [UCL] makes independently actionable." *Puentes v. Wells Fargo Home Mortg., Inc.*, 160 Cal. App. 4th 638, 643–44, 72 Cal. Rptr. 3d 903 (2008) (internal quotation marks and citations omitted).

To establish standing under the UCL, a plaintiff must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice." *Kwikset Corp. v. Sup. Ct.*, 51 Cal. 4th 310, 322, 246 P.3d 877 (2011) (italics in original). "A plaintiff fails to satisfy the causation prong of the statute if he or she would have suffered 'the same harm whether or not a defendant complied with the law.'" *Junod v. Mortg. Elec. Registration Sys.*, 584 F. App'x 465, 469 (9th Cir. 2014) (quoting *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497, 156 Cal. Rptr. 3d 912 (2013)).

Ameriprise offers two reasons why Plaintiff's UCL claim should be dismissed, both of which the Court finds unavailing:

First, Ameriprise argues that "Plaintiff lacks standing to bring a [UCL] claim as someone who has not pled any injury or damage to himself as a result of any of the allegedly unlawful business practices." (Mot. at 12; Reply at 9). The Court disagrees because, as noted above, Plaintiff has specifically alleged that he received a transition bonus and suffered an economic injury in the form of lost income due to Ameriprise's practice of requiring financial advisors to use their bonus to discharge their duties.

Second, Ameriprise argues that because Plaintiff's predicate claims fail, his "derivative unfair business practices claim likewise fails." (Mot. at 12). But to the extent it is premised on other claims of various labor violations under California law, Plaintiff's UCL claim survives for the reasons previously articulated.

Accordingly, the Motion is **DENIED** to the extent it seeks dismissal of Plaintiff's UCL claim.

IV. CONCLUSION

For the reasons discussed above, the Motion is **DENIED** in its entirety. Ameriprise shall answer the Complaint by **April 1, 2019**.

IT IS SO ORDERED.