Case No. S227228

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

MICHAEL WILLIAMS, an individual,
Petitioner,
v.
SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
Respondent.

Court of Appeal of the State of California
2nd Civil No. B259967
Superior Court of the State of California
County of Los Angeles
The Honorable William F. Highberger, Judge Presiding
Civil Case No. BC503806

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTY IN INTEREST MARSHALLS OF CA, LLC; [PROPOSED] BRIEF OF *AMICUS CURIAE* THE EMPLOYERS GROUP

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Cal. R. Ct. 8.520(f), the Employers Group respectfully requests permission to file this *Amicus Curiae* brief in support of Real Party in Interest Marshalls of CA, LLC ("Respondent").

The *Amicus Curiae* brief will assist the Court in deciding this matter in two respects. First, Amicus proposes an approach for addressing the constitutional right to privacy in the discovery context that gives effect to this Court's decision in *Hill v. National Collegiate Athletic Association*, 7 Cal. 4th 1 (1994) regarding affirmative claims for invasion of privacy while recognizing that rigid application of *Hill* in the discovery context is unwarranted. Second, Amicus proposes an analytical framework for managing discovery in PAGA actions, based on the Court of Appeal's decision and general principles of civil discovery and privacy law, which properly respects the traditional discretion of trial courts to manage discovery, balances the competing interests of privacy and judicial efficiency with a plaintiff's legitimate need for the information requested, and prevents misuse of the litigation process to conduct fishing expeditions at the expense of both litigants and courts.

With scarce statutory guidance on how discovery in a PAGA action should proceed, Amicus believes that the frameworks it sets forth in its brief will help this Court formulate a rule for discovery in PAGA cases that can provide guidance to courts struggling with these issues.

No party or counsel for a party in this pending appeal either authored any part of the *Amicus Curiae* brief nor made any monetary contribution intended to fund the preparation or submission of the brief. Further, no person or entity, other than Amicus, made a monetary contribution intended to fund the preparation or submission of this brief.

THE AMICUS CURIAE

The Employers Group is the nation's oldest and largest human resources management organization for employers. It represents California employers of all sizes and every industry. The Employers Group has a vital interest in seeking clarification and guidance from this Court for the benefit of its employer members and the millions of individuals they employ. As part of this effort, the Employers Group seeks to enhance the predictability and fairness of the laws and decisions regulating employment relationships.

Because of its collective experience in employment matters, including its appearance as amicus curiae in state and federal forums over many decades, the Employers Group is uniquely positioned to assess both the impact and implications of the legal issues presented in employment cases such as this one. The Employers Group has been involved in many significant employment cases, including: *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007); *Prachasaisoradej v. Ralph's Grocery Co.*, 42 Cal. 4th 217 (2007); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094 (2007); *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007); *Smith v. L'Oreal USA, Inc.*, 39 Cal. 4th 77 (2006); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028 (2005); *Lyle v. Warner Bros. Television Productions*, 38 Cal. 4th 264 (2006); *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005); *Grafton Partners L.P. v. Superior Court*, 36 Cal. 4th 944 (2005); *Miller v. Department of Corrections*, 36 Cal. 4th 446 (2005); *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004); *State Department of Health Services v. Superior Court*, 31 Cal. 4th 1026 (2003); *Colmenares v. Braemar Country Club, Inc.*, 29 Cal. 4th 1019 (2003); *Echazabel v. Chevron*, 122 S. Ct. 2045 (2002); *Konig v. Fair Employment & Housing Comm'n*, 28 Cal. 4th 743 (2002); *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317 (2000); *Armendariz v. Foundation Health Psychcare Services*, 24 Cal. 4th 83 (2000); *Cortez v. Purolator Air Filtration Products*

Co., 23 Cal. 4th 163 (2000); *Carrisales v. Department of Corrections*, 21 Cal. 4th 1132 (1999); *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999); *Green v. Ralee Engineering Co.*, 19 Cal. 4th 66 (1998); *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143 (1998); *Reno v. Baird*, 18 Cal. 4th 640 (1998); *Jennings v. Marralle*, 8 Cal. 4th 121 (1994); *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174 (1993); *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083 (1992); *Rojo v. Kliger*, 52 Cal. 3d 65 (1990); *Shoemaker v. Myers*, 52 Cal. 3d 1 (1990); and *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988).

INTEREST OF AMICUS CURIAE

The California Labor Code Private Attorneys General Act of 2004 ("PAGA") is quickly becoming the centerpiece of wage and hour litigation in California. Since this Court's opinion in *Arias v. Superior Court*, 46 Cal. 4th 969 (2009) that PAGA actions do not have to meet class certification requirements, trial courts have struggled with how to manage discovery in PAGA litigation in a manner that properly balances the competing interests at stake. A lack of clarity has made PAGA susceptible to abuse by litigants who file PAGA complaints as a fishing expedition—i.e., to *investigate* employers rather than assert legitimate already-identified claims on behalf of the state. Amicus views this case as an opportunity for the Court to provide guidance to lower courts and litigants regarding the appropriate analysis applicable to discovery issues in PAGA actions, which can have a profound impact on how courts control and manage PAGA litigation.

CONCLUSION

For all of the foregoing reasons, Amicus Curiae respectfully requests that the Court accept the accompanying brief for filing in this case.

Dated: May 9, 2016.

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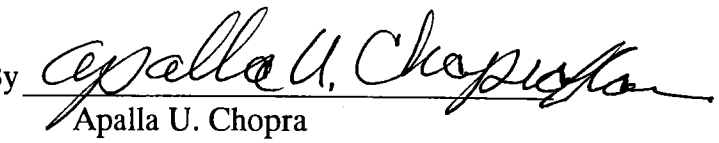
By 
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I. INTRODUCTION.

The California Labor Code Private Attorneys General Act ("PAGA") authorizes an employee to stand in the shoes of the government to recover penalties under the Labor Code, but it does not authorize private plaintiffs to engage in fishing expeditions to investigate potential violations of the law. That, however, is exactly what Petitioner Michael Williams ("Williams") seeks to do here. The Court of Appeal explained that Williams' request for the contact information of 16,000 Marshalls employees was "a classic use of discovery tools to wage litigation rather than facilitate it." *Williams v. Superior Court*, 236 Cal. App. 4th 1151 (2015). As Real Party in Interest Marshalls of CA, LLC ("Marshalls") explains in its Answering Brief on the Merits ("Answering Brief"), the Court of Appeal was correct, and it and the Superior Court sensibly denied such discovery in this case.

Williams' appeal presents two basic questions: (1) Is there a legally protectable privacy right in the personal contact information of third parties?; and (2) In a PAGA action, should a named plaintiff be entitled to access this information, irrespective of the potential protections provided to third parties, without demonstrating that the affected third parties may be "aggrieved employees" under PAGA?

The answer to the first question is yes. This Court has recognized a protectable privacy right in residential contact information many times. There is, however, a lack of clarity about how to apply this Court's prior precedent, in particular, *Hill v. National Collegiate Athletic Association*, 7 Cal. 4th 1 (1994), when assessing how to appropriately protect third party privacy interests in the civil discovery context. Amicus proposes an approach, firmly grounded in this Court's precedents, which gives effect to *Hill* but recognizes that its rigid application in the discovery context is unwarranted.

The answer to the second question is no. A plaintiff's mere allegation of a PAGA claim does not justify the disclosure of the contact information of third-party employees before there is some basis to conclude that they and the named plaintiff suffered wage and hour violations (i.e., were "aggrieved employees" under PAGA). This is true irrespective of any privacy right at issue.

In its Answering Brief, Marshalls persuasively argues why, in PAGA cases, this Court should not interfere with the traditional discretion of trial courts to manage discovery. Williams, by contrast, requests a rule that strips the trial courts of their discretion and requires them to compel extensive, invasive, and potentially needless discovery at the outset of any PAGA action—a rule this Court should reject. Amicus proposes an alternative analytical framework, based on the Court of Appeal's decision and general principles of civil discovery and privacy law, that will guide lower courts in managing discovery in the increasing number of PAGA representative actions being filed in the State.

Amicus proposes a three-step process:

In the first stage of discovery in a PAGA action, a plaintiff's "first task will be to establish he was himself subjected to violations of the Labor Code." *Williams*, 236 Cal. App. 4th at 1159. Unless a plaintiff can show he or she is an "aggrieved employee" under PAGA, information related to other employees, particularly when a privacy right is at stake, outweighs the plaintiff's interests in discovery.

If a plaintiff makes a showing that he or she is an aggrieved employee and has adduced some evidence that similarly situated employees have been subjected to the same alleged conduct, the PAGA action can proceed to the second stage, which would allow for discovery related to other employees at the same work location, unit or shift.

In the final stage, broader discovery—including potentially statewide discovery—should be permitted if the plaintiff demonstrates a factual basis that employees statewide are aggrieved by the same alleged conduct, and that the action can be managed on a representative basis.

This case is of great importance to Amicus' members. Williams is one of many plaintiffs currently using PAGA to turn private litigation into a public inquest, and employers and the privacy rights of third-party employees are consistently caught in the cross hairs. In short, *Williams* should not only be affirmed, but can serve as a model to be followed in other representative employment actions. As the Court of Appeal put it, "The courts will not lightly bestow statewide discovery." *Williams*, 236 Cal. App. 4th at 1159. Amicus submits that the "measured approach" to discovery in PAGA actions outlined above is necessary to avoid abuse and waste and to protect the privacy rights of third parties. *Id.*

II. ARGUMENT AND AUTHORITIES.

A. Marshalls' Employees Have A Privacy Interest In Their Personal Contact Information That Must Be Balanced Against A Plaintiff's Countervailing Interest In Discovery.

1. This Court's *Hill* Test Should Not Be Rigidly Applied In The Discovery Context.

In *Hill*, this Court set out a framework for assessing affirmative causes of action for invasion of privacy under the California Constitution. 7 Cal. 4th 1. That test, however, should not be rigidly applied in the discovery context because it improperly places the initial burden of proof on the incorrect party, and fails to consider, from the outset, the competing interests that are present in any discovery dispute.

Under *Hill*, a plaintiff bringing a privacy claim must establish three things: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy; and (3) a serious invasion of privacy. *Id.* at 39-40. "A

defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests." *Id.* at 40.

How and in what context *Hill* should be applied, however, is unclear. In *Hill*, this Court stated that a plaintiff bringing an affirmative claim for an invasion of privacy must meet the first three requirements before the court can balance countervailing interests. *Id.* But in *Loder v. City of Glendale*, 14 Cal. 4th 846 (1997), this Court reflected more flexibility in its application of *Hill*. *Loder*, like *Hill*, involved an affirmative privacy challenge to a drug-testing program. In *Loder*, this Court explained: "The three 'elements' set forth in *Hill* . . . should not be interpreted as establishing significant new requirements or hurdles that a plaintiff must meet in order to demonstrate a violation of the right of privacy . . . without any consideration of the legitimacy or importance of a defendant's reasons for engaging in the allegedly intrusive conduct and without balancing the interests supporting the challenged practice against the severity of the intrusion imposed by the practice." *Id.* at 891.

While *Loder* recognizes that *de minimis* or insignificant privacy claims may be disposed of under *Hill* without the balancing of competing interests, the Court explained that using the test to do more than filter out miniscule privacy intrusions "would constitute a radical departure from all of the earlier state constitutional decisions of this [C]ourt." *Id. Loder* clarifies that "[t]he three 'elements' set forth in *Hill* . . . should not be interpreted . . . without balancing the interests . . . ." *Id.* Their only purpose is to "weed out claims that involve so insignificant or *de minimis* an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant." *Id.* at 893. Amicus agrees.

The threshold requirements in *Hill* are not rigid criteria—at least not in the vast majority of cases. Williams contends that courts should compel discovery, even if it infringes on protectable privacy interests, if the individual resisting disclosure fails to satisfy any one of *Hill*'s threshold requirements. Amicus proposes that, in the discovery context, once a protected privacy interest in the information sought is established, the court should proceed immediately to balancing that interest against the other party's interest in disclosure, and that the three threshold requirements to a privacy claim in *Hill* should be viewed as factors to aid in that analysis. *Id.* at 891.

This more flexible application of *Hill* avoids the problem of trying to fit a square peg into a round hole. Indeed, this Court has recognized that a privacy interest when addressed in the context of an affirmative cause of action is simply different than a privacy interest raised in the discovery context. As this Court explained in *County of Los Angeles*: "The question in *Hill* was whether California Constitution, article I, section I supports a cause of action for invasion of privacy. Here, the question is somewhat different. The County claims it is obligated to assert employees' privacy rights and that this obligation relieves it of any duty to honor the union's requests. Nevertheless, *Hill* provides a *useful framework* for examining how competing interests are managed in the privacy context." *Cnty. of L.A. v. L.A. Cnty. Emp. Relations Comm'n*, 56 Cal. 4th 905, 926 (2013) (emphasis added).

County of Los Angeles concerned a union's request for "the home addresses and phone numbers of all represented employees . . . ." *Id.* at 911. In parts of *County of Los Angeles*, this Court took the flexible approach to the *Hill* analysis Amicus suggests. For example, this Court found that "the reasonableness of [representative employees'] privacy expectation was reduced in light of the widespread, settled [labor-relations]

rules requiring disclosure elsewhere." *Id.* at 929. Despite the employees' reduced expectation of privacy, however, the Court still found it necessary to engage in the balancing-of-interests stage of the analysis. *Id.* at 930-31.

In *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007), this Court also applied *Hill* to a request for employee contact information. *See id.* at 373 ("Pioneer's failure to demonstrate that its customers entertained a reasonable expectation of privacy, or would suffer a serious invasion of their privacy, could end our inquiry as these elements are essential to any breach of privacy cause of action under *Hill* before any balancing of interests is necessary."). But then, this Court went on to balance the respective interests at stake. *Id.* ("But a brief examination of the respective interests involved here helps reinforce our conclusion that the trial court's order was not an abuse of discretion.").

There are good reasons for this Court to clarify that *Hill* should not be applied with rigidity in the discovery context.

First, a plaintiff asserting a claim for privacy invasion has the burden of proving the elements of that cause of action. *Hill*, 7 Cal. 4th at 38 ("a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following . . . ."). Conversely, when a discovery request implicates a right to privacy, the party propounding the discovery has the burden of showing that the invasion is justified, both under regular discovery rules and under constitutional principles. *Columbia Broad. Sys., Inc. v. Superior Court*, 263 Cal. App. 2d 12 (1968) (courts must consider the "purpose and validity of" discovery); *Planned Parenthood Golden Gate v. Superior Court*, 83 Cal. App. 4th 347, 359 (2000) (party propounding discovery must show more than simple relevance when privacy rights are at issue). In essence, application of the *Hill* test in a discovery context flips the respective burdens of the parties in an illogical way. It would not make sense for the

person resisting disclosure to have to demonstrate a "serious invasion of privacy" without considering the nature of the discovery requested. Even if the degree of the invasion is minor, the need for the discovery may be infinitesimal, and requiring disclosure without balancing the two interests would improperly favor a litigant's right to discovery under the California Code of Civil Procedure over an individual's right to privacy under the California Constitution. *Cal. Logistics, Inc. v. State*, 161 Cal. App. 4th 242, 250 (2008) ("The California Constitution is 'the supreme law of our state.'").

Second, in the discovery context, the need of the party seeking information informs *Hill* factors two and three (i.e., the reasonable expectation of privacy of the party resisting discovery, and the seriousness of the invasion). For example, an employee might reasonably expect that his or her contact information would be shared with a plaintiff where the employee was subject to the same conduct about which plaintiff complains, but not reasonably expect the release of private information where no nexus between the plaintiff and employee exists. Similarly, the seriousness of the invasion of privacy, in the discovery context, can only be understood when balanced against the need for the discovery—even if the invasion is limited, the need may be less compelling. By contrast, while context is sometimes necessary to assess a privacy cause of action, the defendant might not raise countervailing interests as an affirmative defense at all—for example, in the context of a data security breach. In short, in a discovery dispute (unlike in a case involving an affirmative privacy claim), there will always be competing interests, and those interests should be considered together, not separately.

2. Personal Contact Information Is Private, And This Conclusion Is Supported By The *Hill* Factors.

a. There Is A Protectable Privacy Interest In Personal Contact Information.

One of the questions posed by this Court is whether trial courts should first determine separately in each case whether employees have a protectable privacy interest in their contact information, or whether a protectable privacy interest in such material may be assumed. This is the first factor in the *Hill* analysis. As Marshalls explains in its Answering Brief, however, this Court and other courts have recognized on multiple occasions that informational privacy of this type is entitled to protection. (Answering Br. at 50-52.) Consequently, in direct response to this Court's question, a protectable privacy interest in employee contact information may be assumed—trial courts do not have to determine whether one exists on a case-by-case basis.

Indeed, the California Constitution expressly protects individuals' right of privacy. Cal. Const. art. I, § 1. "[L]egally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 332 (1997) (citation and internal quotation marks omitted). The right to informational privacy is at issue here.

"'Courts have frequently recognized that individuals have a substantial interest in the privacy of their home.'" *Cnty. of L.A.*, 56 Cal. 4th at 927, quoting *Planned Parenthood Golden Gate*, 83 Cal. App. 4th at 359. "In particular, the 'privacy interest in avoiding unwanted communication' is stronger in the context of an individual's home than in a more public

setting." *Id.*, quoting *Hill v. Colorado*, 530 U.S. 703, 716 (2000). "Accordingly, home contact information is generally considered private." *Id.* In fact, this Court recently and expressly recognized that "employees have a legally protected interest in their home addresses and telephone numbers." *Cnty. of L.A.*, 56 Cal. 4th at 927.

Employees also have a privacy interest in not being directly solicited by plaintiffs' attorneys. California's Rule of Professional Conduct 1-400 prohibits the transmission of communications or solicitations by attorneys "in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct." The mandatory disclosure of employees' private contact information for the purpose of enabling communication by a plaintiff's attorney necessarily involves "intrusion"—intrusion into their privacy.

b. Disclosure Of Employees' Contact Information Would Seriously Intrude On Their Reasonable Expectation Of Privacy.

For the reason noted above (*see supra* at 4-8), the *Hill* factors should not be rigidly applied in a discovery context. But even so, *Hill* factors two (i.e., reasonable expectation of privacy) and three (i.e., serious invasion of privacy) are present here, while, as explained above, the first *Hill* factor (i.e., a protectable privacy interest) should be assumed. Thus, whether assessed as part of a broader balancing of interests (as they should be) or in a rigid formulation (as they should not be), all three factors exist in this case.

Williams relies primarily on *Pioneer*, 40 Cal. 4th 360, in arguing that the privacy rights of Marshalls' employees do not deserve protection. Williams is wrong. In *Pioneer*, which was not an employment case, this Court held that the privacy rights of consumers who affirmatively complained to a company about its products would not have a reasonable

expectation of privacy in the disclosure of their contact information to an attorney representing similar consumers:

> Pioneer's complaining customers might reasonably expect to be notified of, and given an opportunity to object to, the release of their identifying information to third persons. Yet it seems unlikely that these customers, having already voluntarily disclosed their identifying information to that company in the hope of obtaining some form of relief, would have a reasonable expectation that such information would be kept private and withheld from a class action plaintiff who possibly seeks similar relief for other Pioneer customers, unless the customer expressly consented to such disclosure. If anything, these complainants might reasonably expect, and even hope, that their names and addresses would be given to any such class action plaintiff.

Pioneer, 40 Cal. 4th at 372.

That does not mean, however, that employees who have *never* complained would similarly want their information given to a plaintiff's lawyer. In the subsequent case *County of Los Angeles*, this Court distinguished *Pioneer*:

> There . . . the customers had already disclosed their contact information to the manufacturer when complaining about an allegedly defective product. The question was whether a second disclosure of that information to a class action plaintiff asserting the same complaint would constitute a serious invasion of privacy.

Cnty. of L.A., 56 Cal. 4th at 930.

Here, Williams does not seek the contact information of Marshalls employees who submitted complaints against Marshalls—he seeks the contact information of all Marshalls employees in California. As this Court explained in *County of Los Angeles*, "employees gave their home addresses and telephone numbers to [Marshalls] for the limited purpose of securing employment. A job applicant who provides personal information to a prospective employer can reasonably expect that the employer will not divulge the information outside the entity except in very limited

circumstances." *Id.* at 928. Disclosures for taxation or employee benefit purposes may be among the legitimate exceptions, "[b]ut beyond these required disclosures, it is reasonable for employees to expect that their home contact information will remain private 'in light of employers' usual confidentiality customs and practices.'" *Id.*

As to whether there was a serious invasion, *Pioneer* is distinguishable for the same reasons. Again, in *Pioneer*, "the question was whether a second disclosure of that information to a class action plaintiff asserting the same complaint would constitute a serious invasion of privacy." *Cnty. of L.A.*, 56 Cal. 4th at 930. A subsequent disclosure of information a person has already volunteered for the exact purpose the person provided it is a less significant invasion of privacy than the initial disclosure of information a person has never previously revealed. *Id.*

The Marshalls employees at issue here did not voluntarily disclose their information to complain about wage and hour issues. Therefore, the *initial* disclosure of their contact information to a wage and hour attorney would be a greater intrusion on their privacy than the disclosure of the contact information of the customers in *Pioneer* who had divulged that same information once before. *Pioneer*, 40 Cal. 4th at 522; *Cnty. of L.A.*, 56 Cal. 4th at 930. Unlike the consumers in *Pioneer*, Marshalls' employees have a reasonable expectation of privacy in their contact information, and the disclosure of that information to Williams' counsel would seriously invade their privacy.[1]

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[1] Amicus acknowledges that a handful of Courts of Appeal have interpreted *Pioneer* to mean that employees who have not complained or voluntarily disclosed their contact information have no reasonable expectation of privacy preventing that information from being provided to a class action plaintiff. *See, e.g., Belaire-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th 554, 561 (2007); *Puerto v. Superior Court*, 158 Cal. App. 4th

B. The Balancing Of Countervailing Interests Necessitates A Measured Approach To Discovery In PAGA Actions.

The balancing of interests is always necessary in discovery disputes, whether involving private information or not. On one side of the scale is the parties' need for the information and on the other side are the interests against disclosure, which can, of course, include privacy, the burden associated with securing the requested information, and/or the need to avoid unnecessary expense. And the relative weight of those interests can shift as a case progresses. *Williams*, 236 Cal. App. 4th at 1159 (denying discovery now but recognizing that Williams may later set "forth facts justifying statewide discovery").

These balancing principles are nothing new. In *Greyhound Corp. v. Superior Court*, this Court emphasized that trial courts should weigh various factors when determining whether to grant or deny discovery in all instances: "In the exercise of its discretion the court should weigh the relative importance of the information sought against the hardship which its production might entail, and it must weigh the relative ability of the parties to obtain the information before requiring the adversary to bear the burden or cost of production, keeping in mind the statutory admonition of entering an order consistent with justice." 56 Cal. 2d 355, 383-84 (1961) (superseded on other grounds). A similar balancing-test formulation is codified in California Code of Civil Procedure § 2017.020, which directs courts to resolve discovery disputes by balancing "the burden, expense, or intrusiveness of [requested] discovery" against "the likelihood that the

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1242, 1253 (2008); *Crab Addison, Inc. v. Superior Court*, 169 Cal. App. 4th 958, 973 (2008). Amicus believes those cases were wrongly decided because they failed to consider the unique set of facts in *Pioneer*, which were distinguished in the employment context in *County of Los Angeles*.

information sought will lead to the discovery of admissible evidence." Cal. Civ. Proc. Code § 2017.020.

This balancing, inherent in any discovery dispute, takes on a new dimension when privacy interests are at stake since privacy interests demand additional protection. "[W]hen the constitutional right of privacy is involved, the party seeking discovery of private matter must do more than satisfy the [Code of Civil Procedure] section 2017 standard." *Planned Parenthood Golden Gate*, 83 Cal. App. 4th at 359 (citations and internal quotation marks omitted). In such circumstances, the "court must 'indulge in a careful balancing' before ordering disclosure. It follows that a court must not generously order disclosure of the private [] affairs of nonparties without a careful scrutiny of the real needs of the litigant who seeks discovery." *Schnabel v. Superior Court*, 5 Cal. 4th 704, 713 (1993) (citations omitted).

Trial courts are "in the best position" to balance these interests pursuant to their discretion to manage litigation in their court rooms. *Price v. Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974) (disapproved of on other grounds); *Perlan Therapeutics, Inc. v. Super. Ct.*, 178 Cal. App. 4th 1333, 1349 (2009) ("Trial courts are also best situated to judge whether the parties are acting in good faith with regard to their discovery positions or, alternately, engaging in abusive litigation tactics."). Indeed, a trial court's discretion is heightened in actions like those under the PAGA, which are not expressly governed by formal rules or procedures. California Code of Civil Procedure § 187 states:

> When jurisdiction is . . . conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; ***and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code.***

(emphasis added); *see also Citizens Utils. Co. v. Superior Court*, 59 Cal. 2d 805, 812-13 (1963).

In PAGA cases, the correct procedure is "not specified by statute or by rules adopted by the Judicial Council." *Citizens Utils. Co.*, 59 Cal. 2d at 812-13. To this end, numerous trial courts have weighed the various interests at stake in PAGA cases and devised case management techniques similar to the framework Amicus proposes below. *See, e.g., Rix v. Lockheed Martin Corp.*, No. 09CV2063 MMA NLS, 2012 WL 13724, *2-4 (S.D. Cal. Jan. 4, 2012) (denying motion to compel contact information after denying certification of class claims but allowing PAGA claims to proceed); *Currie-White v. Blockbuster, Inc.*, No. C 09-2593 MMC (MEJ), 2010 WL 1526314, at *3 (N.D. Cal. Apr. 15, 2010) (limiting access to contact information to the locations where the plaintiff worked early in the case); *Martinet v. Spherion Atl. Enters., LLC*, No. CIV. 07CV2178 W AJB, 2008 WL 2557490, at *2 (S.D. Cal. June 23, 2008) (limiting the plaintiff's initial discovery requests for contact information to the plaintiff's workplace location); *Franco v. Bank of Am.*, No. 09CV1364-LAB BLM, 2009 WL 8729265, at *4 (S.D. Cal. Dec. 1, 2009) (granting discovery of employee contact information at two bank branches at the beginning of the litigation); *Stafford v. Dollar Tree Stores, Inc.*, No. 2:13-CV-1187 KJM CKD, 2014 WL 6633396, *2-4 (E.D. Cal. Nov. 21, 2014) (bifurcating individual PAGA claims from representative PAGA claims pursuant to the defendant's motion after denying the defendant's motion to dismiss); *Garvey v. Kmart Corp.*, No. 11-02575 WHA, 2012 WL 2945473, *6 (C.D. Cal. July 18, 2012) (limiting "aggrieved employees" to one work location).

While the absence of statutes or rules of court governing discovery in PAGA cases enhances a trial court's discretion, however, it also makes clear the need for guidelines within which to exercise that discretion. To this end, Amicus proposes a three-step framework that gives effect to the

unique nature of PAGA and the traditional balancing of competing interests in a discovery context: Step 1 - discovery regarding the plaintiff's "own" claims; Step 2 - discovery regarding "local" claims; and Step 3 - if appropriate, discovery geared toward determining whether "local practices extend statewide."[2] It is a process similar to that adopted by the Court of Appeal below, which should be used as a model to guide other courts supervising PAGA actions.

1. Stage 1: Discovery Tailored To The Plaintiff's Individual Claim.

As the Court of Appeal noted, at the onset of a PAGA action, a "plaintiff's need for the discovery [of other employees' information] at this time is practically nonexistent. His first task will be to establish that he was himself subjected to violations of the Labor Code." *Williams*, 236 Cal. App. 4th at 1159. This rule correctly balances competing interests. At this initial stage, other employees' rights to privacy, judicial economy, and other countervailing interests very clearly outweigh a PAGA plaintiff's virtually non-existent need for discovery regarding any other employees. In other words, there is virtually no weight to be given to the plaintiff's request for information at this stage.

To be sure, the Court of Appeal devoted little attention to this stage of discovery because of the procedural posture of the case. The trial court ordered the defendant to produce contact information for other employees

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[2] These stages may overlap, and in some circumstances, it might be appropriate to consider steps concurrently—e.g., when the inquiry into an employee's individual PAGA claim may reveal information demonstrating that PAGA violations were widespread across the state. The purpose of the framework is not to impose a rigid formula but, instead, to emphasize the factual predicate necessary for a plaintiff to access incrementally broader discovery at each stage.

who worked in the same store as the plaintiff, but not at the defendant's other stores in California. The plaintiff petitioned for reversal of the order denying statewide discovery, but the defendant did not petition for reversal of the order granting local discovery. Accordingly, the Court of Appeal did not address whether the plaintiff had properly been granted discovery regarding anyone other than himself. Based on the Court of Appeal's conclusion that the plaintiff had not fulfilled his "first task" of establishing "he was himself subjected to violations of the Labor Code," however, the trial court should have denied third-party discovery entirely. If it turns out that Williams has not suffered any wage and hour violation himself, he will be unable to proceed as a PAGA representative, and the parties will have wasted resources and infringed on employees' privacy rights unnecessarily.

Limiting a plaintiff at the outset of a PAGA action to discovery related to his or her individual PAGA claim is also necessary to prevent abuse. "Any discovery request, even an initial one, can be misused in an attempt to generate settlement leverage by creating burden, expense, embarrassment, distraction, etc." *Obregon v. Superior Court*, 67 Cal. App. 4th 424, 431 (1998). And naturally, a plaintiff whose PAGA claim has no factual basis is more likely to "use discovery devices . . . as weapons to wage litigation" in order to gain unmerited leverage in a case than a plaintiff with the facts on his or her side. *Williams*, 236 Cal. App. 4th at 1156 (quoting *Calcor Space Facility v. Super. Ct.*, 53 Cal. App. 4th 216, 221 (1997)). Thus, rather than seeking discovery regarding *other employees*' PAGA claims, at this initial stage, discovery should be limited to Williams' *own* PAGA claim to determine if he has actually suffered a wage and hour violation. *See* Cal. Civ. Proc. Code §§ 2017.020 (requiring courts to balance need for discovery with its burden and intrusiveness) & 2019.020(b) (empowering courts to order that discovery be conducted in stages "in the interests of justice").

This is entirely consistent with the statutory purpose and language of PAGA. To state a viable PAGA claim, a plaintiff must be an "aggrieved employee." Cal. Lab. Code § 2699(a) & (c). Indeed, PAGA expressly "require[s] a plaintiff to have suffered injury resulting from an unlawful action" under the California Labor Code. *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal. 4th 993, 1001 (2009); Cal. Lab. Code § 2699(a) & (c). The proponents of PAGA pointed out the law's standing requirement to address the concerns of other legislators about potential abuse by private litigants. The bill's analysis states:

> The sponsors are mindful of the recent, well-publicized allegations of private plaintiff abuse of the UCL, and have attempted to craft a private right of action that will not be subject to such abuse. First, unlike the UCL, this bill would not open private actions up to persons who suffered no harm from the alleged wrongful act. Instead, private suits for Labor Code violations could be brought only by an 'aggrieved employee'—an employee of the alleged violator against whom the alleged violation was committed.

(Petitioner's Appendix ("PA") 181-82.)

Requiring a PAGA plaintiff to show his own injury first is also consistent with California Code of Civil Procedure § 598, which empowers courts to "make an order . . . that the trial of any issue or any part thereof shall precede the trial of any other issue . . . ." Implicit in the power to bifurcate is "the power to limit discovery to the segregated issues." *Ellingson Timber Co. v. Great N. Ry. Co.*, 424 F.2d 497, 499 (9th Cir. 1970). Similarly, California Code of Civil Procedure § 2019.020 permits courts to "establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice." Both of these procedures can and should be brought to bear in PAGA litigation to focus discovery on a plaintiff's individual issues before allowing more intrusive discovery. *See, e.g., Stafford*, 2014 WL 6633396, at *2-4

(bifurcating the plaintiff's individual and representative claims to address manageability and judicial economy concerns).

The purpose of bifurcation is "the expeditious decision of cases." *Horton v. Jones*, 26 Cal. App. 3d 952, 405 (1972). Implicit in this concept is that a determination against the plaintiff on the first issue tried would preclude the plaintiff from prevailing on subsequent issues, and could make trial of the subsequent issues unnecessary, thus preserving judicial resources. *In re Estate of Young*, 160 Cal. App. 4th 62, 90 (2008) (explaining that bifurcation serves judicial economy when "the time spent in trying the issue of damages is wasted if the verdict or finding is against liability"). Bifurcation of discovery between individual and representative issues is appropriate here for the same reason. If Williams is not an "aggrieved employee" himself, he cannot proceed on behalf of others, and he, therefore, has no need for discovery into the affairs of others.[3]

2. Stage 2: Discovery Of Local Wage And Hour Violations.

If and only if the plaintiff makes a preliminary showing of being an "aggrieved employee," then the parties may turn to discovery intended to uncover evidence of violations suffered by other employees. *Williams*, 236 Cal. App. 4th at 325 ("It was eminently reasonable for the trial judge to proceed with discovery in an incremental fashion, first requiring that plaintiff provide some support for his own, local claims and then perhaps

[3] The debate over whether an employee may assert an *individual* PAGA claim, as opposed to suing on behalf of other aggrieved employees, does not impact the bifurcation of discovery at this stage. *See, e.g., Reyes v. Macy's, Inc.*, 202 Cal. App. 4th 1119, 1123 (2011) (holding that a "plaintiff asserting a PAGA claim may not bring the claim simply on his or her own behalf but must bring it as a representative action"). Amicus only proposes bifurcating discovery between individual and representative *issues*, not bifurcating the trial of individual and representative *claims*.

later broadening the inquiry . . . ."). At this stage, the plaintiff's interest in discovery may justify an intrusion into other employees at a *local* and discrete level—but still does not justify an intrusion into other employees *statewide*. Before further broadening the scope of discovery, the plaintiff must show not only that he or she was an "aggrieved employee," but also that the injury is capable of being resolved as to other employees on a representative basis. The first step in establishing this is adducing evidence that the plaintiff's injury has been suffered by employees at the same work location, unit or shift.

This is a sensible approach that takes into account that many PAGA actions are dismissed because there is simply no way they can proceed on a representative basis. *See, e.g., Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974, 1002 n.13 (2013) (dismissing PAGA claim as unmanageable after denying certification of class claims); *Ortiz v. CVS Caremark Corp.*, No. C–12–05859 EDL, 2014 WL 1117614, at *3-5 (N.D. Cal. Mar. 19, 2014) (finding PAGA claims unmanageable because they would require "detailed inquiries about each employee"); *Raphael v. Tesoro Ref. & Mktg. Co.*, No. 2:15-CV-02862-ODW, 2015 WL 5680310, at *2-3 (C.D. Cal. Sept. 25, 2015) ("The Court would have to engage in a multitude of individual inquiries making the PAGA action unmanageable and inappropriate."); *Amey v. Cinemark USA Inc.*, No. 13-CV-05669-WHO, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015) (dismissing PAGA claim because undefined and overbroad definition of "aggrieved employees" made the claim unmanageable).[4]

[4] While the same manageability concerns exist with class actions, a class action plaintiff must establish that the putative class can be certified before the case can proceed as a class action, and manageability factors into that analysis. *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 29 (2014) (explaining that "[t]rial courts must pay careful attention to manageability

As an alternative to outright dismissal, the case *Garvey*, 2012 WL 2945473, provides an apt example of an incremental approach to PAGA litigation similar to the one Amicus recommends. There, the plaintiff brought a PAGA action alleging that the defendant Kmart had violated a California regulation requiring employers to provide employees with suitable seating. The court noted "possible problems of manageability" with maintaining the statewide PAGA action, so it permitted the action to proceed as to employees of the "Tulare Kmart store" where the plaintiff worked, while leaving open the possibility of a statewide action later. *Id.* at *7; *see also* Cal. Civ. Proc. Code § 2019.020 (empowering courts to sequence discovery).

This case presents another good example. The trial court permitted discovery as to employees at one of Marshalls' stores (where the plaintiff worked), but denied discovery as to 128 other stores. Should Williams demonstrate that his claims can be established on a representative basis at that one store, the court can broaden discovery later (if the evidence so warrants). But should Williams fail to do so, the court has protected both the rights of third parties and the resources of the litigants and the court. The correct balance of competing interests at this stage is to allow discovery of only *local* claims—i.e., those of third-party employees at the same work location where the plaintiff worked—while delaying broader discovery until supported by an appropriate evidentiary showing.

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when deciding whether to certify a class action" and courts must decertify the class if proved to be unmanageable). This Court has recognized that trial courts overseeing PAGA actions lack the benefit of a formal class-certification procedure. *Arias v. Superior Court*, 46 Cal. 4th 969 (2009).

3. Stage 3: Potential Statewide Discovery.

The Court of Appeal held that it was reasonable for the trial court to conclude that the discovery of statewide employee contact information would be justified only after the plaintiff had established that "Marshalls' employment practices are uniform throughout the company." *Williams*, 236 Cal. App. 4th at 1159. As the court concluded: "The courts will not lightly bestow statewide discovery power to a litigant who has only a parochial claim." *Id.* In stage three, a plaintiff would have the potential to obtain statewide discovery if stages one and two have produced evidence that he or she was individually aggrieved and that the action is potentially susceptible to common proof.

Williams argues that "by requiring that Williams establish 'uniform practices' in order to obtain further discovery, the Court of Appeal implicitly imposed a 'commonality' requirement inapplicable to PAGA actions." (Opening Br. on the Merits at 34.) If Williams is suggesting that he can somehow proceed in a representative PAGA action without establishing liability using common proof, however, Williams is wrong.

"There are two forms of representative actions: those that are brought as class actions and those that are not." *Arias*, 46 Cal. 4th at 977 n.2. With respect to either, however, it has always been the law that "in any case in which a defendant can demonstrate a potential for harm or show that the action is not one brought by a competent plaintiff for the benefit of injured parties, the court may decline to entertain the action as a representative suit." *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal. 4th 116, 138 (2000).

Indeed, years before the inception of formal class action procedure, this Court imposed limits on representative actions. In its 1948 decision *Weaver v. Pasadena Tournament of Roses Ass'n*, 32 Cal. 2d 833, 841 (1948), for example, this Court explained that "the fact that 'numerous

parties' have separate and distinct claims against the same person or persons will not alone suffice to sustain a representative suit where there is no community of interest." In that case, four plaintiffs filed suit against the operators of the Rose Bowl on behalf of themselves and all others similarly situated seeking damages for the alleged wrongful refusal of admission. *Id.* at 839. This Court held that the suit was not cognizable as a representative suit because "[w]hile each would be 'similarly situated' in that his cause of action arises under the same statute, his recovery would rest on a distinct premise correlative with varying proof as to the facts of his particular case." *Id.* at 840. In other words, the Court held that representative treatment of the suit was inappropriate because of the lack of common evidence demonstrating that the parties were similarly situated. *See also Bronco Wine Co. v. Frank A. Logoluso Farms*, 214 Cal. App. 3d 699, 720 (1989) (inquiring into commonality to weed out unmanageable non-class representative actions); *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 895 (1999) (same).

Thus, while it is true that PAGA cases are not class actions, courts must still determine whether PAGA cases are capable of being adjudicated based on representative proof. The difference is that, in cases under PAGA, courts are not bound by formal class certification procedures in doing so—they can test the case's suitability for representative treatment at any stage in the proceedings through various methods, including controlling discovery.

It is axiomatic that Williams, in this case, cannot present evidence at trial regarding the individual facts and circumstances surrounding more than 16,000 employees. The courts simply cannot accommodate that type of proof. If Williams cannot establish his claims using common evidence, he cannot do so at all. And if that is the case, there is no reason whatsoever to permit invasive and burdensome discovery regarding more than 16,000

employees. The bottom line is that compelled disclosure of information on a statewide level, particularly information of a private nature, without first establishing that the claim is susceptible to common proof, is unwarranted *per se* in a PAGA action.

III. CONCLUSION.

Williams seeks information to investigate *potential* wage and hour violations, not gather evidence of alleged wage and hour violations he has already identified. Claims of Williams' type are the exact reason more control of discovery in PAGA actions is needed. This Court should use this case to establish a uniform framework that stages PAGA discovery in a way that appropriately balances the countervailing interests at stake.

Dated: May 9, 2016.

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By: 

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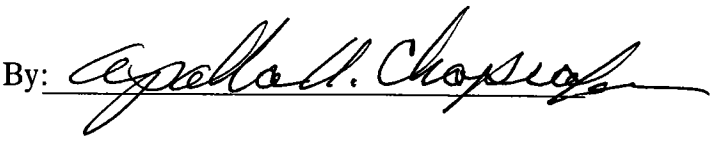
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.504(d)(1) of the California Rules of Court, I hereby certify that this Petition contains 6,945 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: May 9, 2016

O'MELVENY & MYERS LLP

By: 

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United States District Court,
N.D. California.

Joseph Amey, et al., Plaintiffs,
v.
Cinemark USA Inc, et al., Defendants.

Case No. 13–cv–05669–WHO
|
Signed May 13, 2015

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ORDER RE MOTION FOR CLASS CERTIFICATION, MOTION TO DENY CLASS CERTIFICATION, AND JUDGMENT ON THE PLEADINGS

Re: Dkt. Nos. 82, 84, 95

WILLIAM H. ORRICK, United States District Judge

***1** Plaintiffs Joseph Amey, Silken Brown, and Mario De La Rosa seek to represent a proposed wage and hour class consisting of all non-exempt employees of defendants Cinemark USA Inc. and Century Theaters, Inc. ("Cinemark") because of alleged violations of the California Labor Code, the California Business and Professions Code, and the Private Attorneys General Act ("PAGA"). Plaintiffs claim that Cinemark's uniform policies regularly deprived employees of meal and rest breaks, failed to provide them with reporting time pay, forced them to work off-the-clock without pay, and failed to report the proper hours worked and hourly rates on their wage statements.

There are three major issues to resolve on plaintiffs' motion to grant, and Cinemark's motion to deny, class certification, and on Cinemark's motion for judgment on the pleadings. First, are there common questions of law presented in this case, and do they predominate over questions that only affect certain individual members of the class? Aside from possible claims concerning the wage statement, the answer is "No." Plaintiffs have not shown that there is a uniform policy or practice that would give rise to common questions under Federal Rule of Civil Procedure 23. The evidence indicates that Cinemark's written policies complied with all applicable employment laws, and that departures from these policies resulted from individual aberrations rather than from Cinemark's systematic practices. Plaintiffs' motion for class certification is DENIED.

Second, should plaintiffs' PAGA claims be allowed to proceed? Because the notice to Cinemark and the Labor and Workforce Development Agency on the wage statement claim failed to allege the facts and theories that support the wage and hour claim plaintiffs now want to pursue, that PAGA claim under section 226(a)(9) is DISMISSED because plaintiffs failed to exhaust administrative remedies. So are the other PAGA claims because they are unmanageable in that numerous individualized assessments would be necessary to identify the aggrieved individuals from amongst the members plaintiffs seek to represent and determine who has been injured.

Third, may plaintiffs assert claims that were not pleaded under California Labor Code section 226 regarding a misstatement on the wage statements that failed to list the proper overtime rate? Plaintiffs originally pleaded a derivative claim contending that Cinemark's failure to pay for meal and rest breaks and overtime caused the wage statement violation. Shortly before filing their motion for certification, plaintiffs shifted their theory when they realized that Cinemark's wage statement contained the wrong rate for premium pay. Cinemark did not properly receive notice of these claims. Plaintiffs' "direct" wage statement claims for failure to properly list the overtime rate cannot be certified because they were pleaded as "derivative" claims relating to unrecorded hours worked off-the-clock, and never amended.

BACKGROUND

I incorporate the facts set forth in my prior order denying Cinemark's motion to deny certification. *See* Order at 1–3 (Dkt. No. 80). Cinemark employs both salaried and non-salaried, or non-exempt, employees. Smith Depo. 26:7–27:25 (Dkt. No. 100–19). General managers, who are typically responsible for overall operations of each theater, are salaried, while all other employees, including theater managers, senior assistant managers, and assistant managers, are hourly. *Id.* The plaintiffs' proposed class consists of all non-exempt employees of Cinemark's California theaters since December 3, 2008. Mot. Cert. 12 (Dkt. No. 84). There are 10,000 members of the putative class who work at 63 theaters across California. *Id.*

***2** Plaintiff Amey is currently employed as an Assistant General Manager at the Greenback theater in Sacramento. Amey Depo. at 43:5–13 (Dkt. No. 83–1). He has worked for Cinemark since 2003, and held positions in Concessions and the Box Office before he was promoted to Assistant Store Manager in 2005. *Id.* at 44:20–45:3. He has worked at four different theaters. Amey Decl. ¶ 2 (Dkt. No. 84–2).

Plaintiff Brown is a former employee who worked as a Concession Worker, Box Office Cashier, and Usher and performed some janitorial duties at the San Francisco–Westfield Mall theatre for seven months. Brown Depo. 46:2–48:1 (Dkt. No. 83–9). Plaintiff De La Rosa is a former employee who worked as a Projectionist, Rover, and in various Usher positions at the theatre in Tracy, California for one and one-half years. De La Rosa Depo. 35:10–15, 64:10–21, 88:6–18 (Dkt. No. 83–12).

On December 3, 2012, Brown and De La Rosa filed a class action complaint against defendants Cinemark USA, Inc. and Century Theaters, Inc. in the Superior Court for San Francisco ("*Brown* Complaint"). After an amended complaint was filed in August 2013, the *Brown* Complaint was removed to this Court on August 29, 2013. On July 25, 2013, plaintiff Amey filed a class action complaint against defendant Cinemark USA, Inc. in Los Angeles County ("*Amey* Complaint"). On August 26, 2013, the *Amey* Complaint was removed to the Central District of California, and subsequently transferred to the Northern District in December 2013. The *Amey* and *Brown* cases were related and then consolidated by stipulation of the parties on March 17, 2014, with the *Amey* case designated as lead case. Dkt. No. 50.

The *Amey* complaint alleges causes of action on behalf of "all non-exempt" employees of defendants for: (i) failure to provide meal and rest periods (California Labor Code §§ 226.7, 512); (ii) unlawful failure to pay wages for all time worked (California Labor Code §§ 200–204, 510, 1194, and 1198); (iii) failure to provide accurate itemized wage statements (California Labor Code §§ 226, 1174); (iv) failure to pay wages upon termination (California Labor Code § 203); (v) Unfair Business Competition (California Business & Professions Code § 17200); and (vi) violation of the Private Attorneys General Act ("PAGA") (California Labor Code § 2699). *See Amey* Compl. (Dkt. No. 1). The same claims are asserted in the *Brown* Complaint on behalf of concession workers and ushers. [1] *See Brown* Compl. (Dkt. No. 43–2).

1 The *Brown* Complaint also asserts a violation for failure to pay minimum wages due under Labor Code §§ 1194, 1197, 1197.1. *Brown* Compl. ¶¶ 62–72.

The class as pleaded between the *Amey* and *Brown* complaints covers 16 different job positions, including: Bartender, Box Office, Concessions Worker, Cook, Janitor, Kitchen Support Worker, Maintenance Worker, Maintenance Supervisor, Restaurant Worker, Security, Server, Ushers, Ushers–B (Ushers with Booth experience, meaning they are trained to operate the theatre's projection equipment), and VIP Room Worker, as well as Senior Assistant Managers and Assistant Managers. *See* Dkt. No. 71–8 at 5; Mot. Dismiss 3 (Dkt. No. 82).

On September 5, 2014, I denied Cinemark's motion to deny certification, stating that plaintiffs were entitled to class-wide discovery before I could determine whether certification was appropriate. Order at 1–2. At the same time, I expressed my concerns about the size and diversity of plaintiffs' proposed class. *Id.* at 5.

***3** After conducting discovery, plaintiffs sought certification of all Cinemark employees "who are and/or were employed as non-exempt employees in one or more of Defendants' California theaters since December 3, 2008." Mot. Cert. 12. At the same time, Cinemark brought a second motion to deny certification and to dismiss the plaintiffs' PAGA claims on the grounds that PAGA claims must meet —and in this case fail to meet—the requirements of Rule 23. Mot. Dismiss 1–2. It also sought judgment on the pleadings with respect to plaintiffs' claim for failure to provide accurate itemized wage statements on the basis that it does not state a claim upon which relief can be granted and because plaintiffs failed to exhaust administrative remedies as required by PAGA. Mot. J. Pleadings 1–2 (Dkt. No. 95). I heard oral argument on April 29, 2015.

LEGAL STANDARD

I. MOTION FOR JUDGMENT ON THE PLEADINGS

"[J]udgment on the pleadings is properly granted when there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Lopez v. Regents of Univ. of California,* 5 F.Supp.3d 1106, 1112 (N.D.Cal. 2013). A motion under Rule 12(c) for failure to state a claim is treated in the same way as a Rule 12(b)(6) motion. *Id.*; *see also McGlinchy v. Shell Chem. Co.,* 845 F.2d 802, 810 (9th Cir. 1988). In resolving a motion for judgment on the pleadings, the court may generally consider only the contents of the complaint, and any documents upon which the complaint relies or that are attached to it. *Lopez,* 5 F.Supp.3d at 1113.

To satisfy the standard under Rule 12(b)(6), the trial court considers all allegations of material fact to be true, and construes them in the light most favorable to the nonmoving party. *Id.* It does not accept conclusory allegations of law or unreasonable inferences. *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). In other words, the plaintiff must include factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

II. MOTION FOR CLASS CERTIFICATION

Before certifying a class under Rule 23, "the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has met the prerequisites of Rule 23." *Mazza v. Am. Honda Motor Co.,* 666 F.3d 581, 588 (9th Cir. 2012). The burden is on the party seeking certification to establish that Rule 23 is satisfied. *Id.*

Rule 23 calls for a two-step process. First, the moving party must show that: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (iv) the representative parties will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a). Next, one of the three requirements of Rule 23(b) must be satisfied. Here, the plaintiffs move under Rule 23(b)(3), which provides that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). In addition, an "implied prerequisite to certification" is that the class must be sufficiently ascertainable or definite. *Whiteway v. FedEx Kinko's Office & Print Servs., Inc.,* No. C 05–2320 SBA, 2006 WL 2642528, at *3 (N.D.Cal. Sept. 14, 2006). "The Court must be able to determine class members without having to answer numerous fact-intensive questions." *Id.* (internal citations and quotations omitted).

***4** While the court must treat the substantive allegations in the class action pleadings as true, it is also "at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Hanon v. Dataproducts Corp.,* 976 F.2d 497, 509 (9th Cir. 1992) (internal citations and quotations omitted). The court may consider supplemental evidence that is submitted by the parties. *Bowerman v. Field Asset Servs., Inc.,* No. 13–CV–00057–WHO, 2015 WL 1321883, at *3 (N.D.Cal. Mar. 24, 2015).

DISCUSSION

I. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Before addressing the merits of plaintiffs' motion, I must explain my rulings on Cinemark's objections to plaintiff's evidence.

A. The Evidentiary Objections

1. Dr. Fountain

Federal Rule of Evidence 702 governs the admission of expert testimony. An expert may provide testimony that is helpful to the trier of fact if (i) it is based on sufficient facts or data; (ii) it is the product of reliable principles and methods; and (iii) the expert has reliably applied these principles and methods to the facts of the case. FED. R. EVID. 702; *see also York v. Starbucks Corp.,* No. CV 08–07919 GAF PJWX, 2011 WL 8199987, at *11 (C.D.Cal. Nov. 23, 2011). In addition, the expert's specialized knowledge must assist the trier of fact in understanding the evidence. FED. R. EVID. 702.

Cinemark objects to plaintiffs' statistical expert, Dr. Fountain, as unreliable because his calculations are based upon data that reflected employees' scheduled shifts instead of the "punch data" which reflected the hours actually worked

by employees. Oppo. Mot. Cert. 16 (Dkt. No. 98). They request that I strike his evidence, relying in part on *York v. Starbucks Corp. Id.* at 17. In *York*, the court struck similar evidence from the same expert, Dr. Fountain, because it was unreliable. 2011 WL 8199987, at *16. However, in that case Dr. Fountain admitted that "he knew nothing about the process for determining the final pay dates, and that these dates might have been erroneous." *Id.* at *14. He made no such admission in this case. Importantly, Cinemark does not contend that the data upon which Dr. Fountain relied was inaccurate, but that punch data would be more accurate in determining when employees worked. Oppo. Mot. Cert. 16. It points out that the schedule data that Dr. Fountain used was provided by Cinemark. *Id.* at 23.

While a district court may exclude expert evidence where "there is simply too great an analytical gap between the data and the opinion proffered," *see Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997), I find that Cinemark's scheduling data is relevant to its corporate policies regarding meal and rest breaks. The plaintiffs claim that "Dr. Fountain's analysis was not intended to show exactly how many violations occurred, because liability rests on Cinemark's common policies and practices." Reply Mot. Cert. 8 (Dkt. No. 108). Instead, the statistics cited by Dr. Fountain purportedly demonstrate that Cinemark's policies facilitate labor code violations. *Id.* The weaknesses in Dr. Fountain's declarations go to the weight I place on the evidence, and not to its admissibility.

When looking at the weight of the evidence, I find merit in Cinemark's contention that Dr. Fountain ignored potentially more reliable data of when employees actually punched in and out. First, Cinemark points out that the punch data reveals less labor code violations than the scheduling data, and Dr. Fountain's declaration, indicates. Cinemark's expert, Michael Buchanan, testified that punch data for employees' clock-in and clock-out times revealed as low as 891 out of 390,493 missed meal breaks in shifts of over five hours, or 0.23 percent. Buchanan Decl. ¶ 25 (Dkt. No. 98–7).

*5 Next, the data analyzed does not reveal potentially valid reasons for the employees' missed breaks or early departure from work, such as disciplinary reasons, illness, or voluntary reasons. Fountain Depo. 69:1–70:5 (Dkt. No. 100–7). It also did not differentiate on a year-by-year or month-by-month basis, by location, or by position within the theater. *Id.* at 80:1–25. Buchanan illustrated how punch data provides more accurate information, and that it also reveals less instances of wage violations. *See* Buchanan Decl. ¶¶ 19–21, 25.

For these reasons, I overrule Cinemark's objection. I will not strike Dr. Fountain's evidence. That said, I do not find that it proves to be very relevant or helpful in determining issues of class certification. If anything, it underscores the fact that Cinemark's policy of giving employees breaks was designed to be flexible and that actual compliance varied by manager.

2. Matthew Aragon

Cinemark requests that I strike the declaration of Matthew Aragon because it was unable to depose him. Oppo. Mot. Cert. 17. It claims that it was unable to serve a deposition subpoena on Aragon and that plaintiffs could not produce Aragon. *Id.* In their reply, the plaintiffs do not address this argument or provide any reason for their failure to produce Aragon for a deposition.

I sustain Cinemark's objection. Because it was not able to depose Aragon, I will not consider his declaration. *See,* e.g., *Soto v. Castlerock Farming & Transp., Inc.,* No. 1:09–CV–00701–AWI, 2013 WL 6844377, at *12–13 (E.D.Cal. Dec. 23, 2013) *report and recommendation adopted,* No. 1:09–CV–00701–AWI, 2014 WL 200706 (E.D.Cal. Jan. 16, 2014); *Rojas v. Marko Zaninovich, Inc.,* No. 1:09–CV–00705 AWI, 2012 WL 439398, at *2 (E.D.Cal. Feb. 9, 2012) *report and recommendation adopted in part,* No. 1:09–CV–00705 AWI, 2012 WL 1232273 (E.D.Cal. Apr. 12, 2012) *amended on reconsideration in part,* No. CIV–F–09–0705 AWI, 2013 WL 1326582 (E.D.Cal. Mar. 29, 2013); *Evans v. IAC/Interactive Corp.,* 244 F.R.D. 568, 571 (C.D.Cal. 2007).

3. Other witnesses

The plaintiffs submitted declarations from numerous potential class members, including the named plaintiffs, in support of their contention that Cinemark implemented a policy of understaffing that led to chronic labor code violations. *See* Dkt. Nos. 84–1, 84–2, 84–3. Cinemark asks that this Court disregard "some or all" of the named plaintiffs' declarations as well as the declarations of other class members. Oppo. Mot. Cert. 18–20.

It is true that plaintiffs' declarations, when considered along with the excerpted deposition testimony of the declarants submitted by Cinemark, are not always probative of plaintiffs' argument. The depositions often contradict the declarations or even provide support for Cinemark's position.[2] In addition, many of the declarations lack substantial facts or other indicia of personal knowledge. Several declarants described

Cinemark policies in theaters other than the ones in which they worked based upon visiting other theaters as a consumer, or dropping off supplies. *See* Poncia Decl. ¶ 7 (Dkt. No. 84–2); Garrett Decl. ¶ 7 (Dkt. No. 84–2); Johnson Decl. ¶ 8 (Dkt. No. 84–2). And many of the declarations contain bare, formulaic assertions that Cinemark failed to consistently provide timely, uninterrupted meal breaks and that they were subject to the same Cinemark policies as other employees. *See,* e.g., Poncia Decl. ¶¶ 3–5; Kohler Decl. ¶¶ 4–5 (Dkt. No. 84–2); Goniwicha Decl. ¶ 10 (Dkt. No. 84–2). Meanwhile, in deposition testimony these witnesses testified that there were differences in the way that staffing and breaks were administered even in the same theater. *See,* e.g., Poncia Depo. 117:18–118:7 (Dkt. No. 100–15); Kohler Depo. 91:4–92:6 (Dkt. No. 100–10); Goniwicha Depo. 33:22–24 (Dkt. No. 100–9).

2 For example, Ariana Kohler stated in her declaration that her meal breaks were almost always late, but when deposed stated that her meal breaks often were four hours into her shift or that she could not remember when they were at all. *See* Kohler Decl. ¶ 5; Kohler Depo. 105:1–06:13. Sasha Burnside stated in her declaration that she sometimes failed to receive a meal break, but during her deposition admitted that she could not recall a time that she did not receive a meal break. Burnside Decl. ¶ 5; Burnside Depo. 113:9–14:6. Racheal Rodgers stated in her declaration that she did not recall receiving reporting time pay, but in her deposition stated that she never checked for such pay and did not know if she received it. Rodgers Decl. ¶ 9; Rodgers Depo. 82:21–84:2; *see also* Melendez Depo. 97:1–98:7 (contradicting statements in declaration); Rivera Depo. 175:10–76:8 (same).

***6** At the same time, it is not appropriate to strike the declarations; once again, the issues in the testimony relate to the strength of the evidence and not to the admissibility. Cinemark's citation to *Yeager v. Bowlin* is inapposite. *See* Oppo. Mot. Cert. 18. There, the Ninth Circuit found that the district court did not abuse its discretion in invoking the sham affidavit rule, which provides that a party cannot create an issue of fact for the purposes of a motion for summary judgment by introducing a declarant's testimony that is inconsistent with a prior declaration. 693 F.3d 1076, 1080–81 (9th Cir. 2012). *Yaeger* does not stand for the proposition that a court must strike any declaration that contradicts deposition testimony. Nor do the other cases that Cinemark relies upon, *Juarez v. Jani–King of California, Inc.*, and *Evans v. IAC/Interactive Corp.* Oppo. Mot. Cert. 19–20. In both of those cases, the court found declarations to be unpersuasive but did not strike them. *See Juarez v. Jani–King of California, Inc.,* 273 F.R.D. 571, 577 (N.D. Cal. 2011); *Evans,* 244 F.R.D. at 578.

Therefore, I overrule Cinemark's objection. Although I will consider the declarations of the named plaintiffs and the other class members, I give greater weight to the more detailed depositions. The declarations do little to advance plaintiffs' position. *See Brewer v. Gen. Nutrition Corp.,* No. 11–CV–3587 YGR, 2014 WL 5877695, at *12 (N.D.Cal. Nov. 12, 2014) ("Plaintiffs' proffered declarations were obviously prepared by counsel, and rely on certain stock language repeated across declarations. This is not reason in and of itself to doubt the veracity of the declarant. However, this evidence carries less weight than spontaneous statements made [in] putative class members' depositions, particularly where the deposition testimony is at odds with the declaration.").

B. Class Certification

Plaintiffs' proposed class definition is "[a]ll persons who are and/or were employed as non-exempt employees in one or more of Defendants' California theaters since December 3, 2008." Mot. Cert. 12. They have not set forth any proposed subclasses in their motion for certification. However, they argue that there are several questions of fact common to the class, including wage statement violations, meal and rest break violations, uncompensated overtime violations, and reporting time pay ("RTP") violations. *Id.* at 1–2.

The central obstacle to class certification in this case is the existence of common questions of fact across the class, implicating both the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3).[3] While Rule 23(a)(2) focuses on whether there is "[e]ven a single [common] question," Rule 23(b)(3) asks whether common questions predominate over individualized ones. *Wal–Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541, 2556 (2011) (internal citations and quotations omitted).

3 Because I hold that the plaintiffs' proposed class cannot survive the predominance inquiry of Rule 23(b)(3) or the commonality inquiry of 23(a)(2), I do not address the other Rule 23 requirements.

A common contention under Rule 23(a)(2) "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S.Ct. at 2551. There need only be one common question to the class in order to satisfy

Rule 23(a)(2). *Id.* at 2556. By contrast, the predominance requirement of Rule 23(b)(3) is generally satisfied if a party can show that an employer used a standard policy that was uniformly implemented. *See Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 399 (C.D.Cal. 2008) *aff'd sub nom. Kamar v. RadioShack Corp.*, 375 Fed.Appx. 734 (9th Cir. 2010) ("When the claim is that an employer's policy and practices violated labor law, the key question for class certification is whether there is a consistent employer practice that could be a basis for consistent liability."). Individualized damages calculations alone cannot defeat certification, although they are a relevant factor for courts to consider. *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010); *Harris v. Vector Mktg. Corp.*, 753 F.Supp.2d 996, 1022 (N.D.Cal. 2010).

***7** The plaintiffs argue that there are common questions of law and fact because Cinemark implemented uniform policies across its theaters in California that resulted in violations of the Labor Code. They contend that Cinemark has a uniform practice of understaffing theaters and "keeping theater staff to a bare minimum at all times." Mot. Cert. 4. This allegedly results in the routine denial of employees' meal and rest break periods, reporting time pay violations, and uncompensated overtime. Plaintiffs assert that this problem is particularly severe on weekends and holidays. *Id.* at 7–8.

Cinemark's rules and policies are recorded in several written documents. First, it issued employee guidelines that are provided to all employees and typically kept in the break rooms of theaters. Amey Depo. 55:21–56:3; Employee Guidelines (Dkt. No. 99–14, Ex. C).[4] Second, it issued policies and procedures that are specific to California employees. *See* Meal & Rest Break Policy (Dkt. No. 99–15, Ex. A); Reporting Time Pay Procedures (Dkt. No. 99–14, Ex. D). Third, it provided personnel guidelines that discuss employee expectations as well as breaks. Personnel Guidelines (Dkt. No. 84–2.Ex. Q). In resolving the motion for class certification, I consider all of plaintiffs' evidence and the depositions of plaintiffs' witnesses submitted by Cinemark. I do not need to discuss the many witness declarations submitted by Cinemark in opposition to plaintiffs' motion for certification. *See* Dkt. No. 98–2.

4 Cinemark submitted two versions of the employee guidelines, one edition from 2003 and one edition from 2013. *See* Dkt. No. 99–14 at Ex. B, Ex. C. Because these versions do not differ in any respect that is material to this case, I will refer to the 2013 version throughout this order.

Generally, class certification should be approached on a claim-by-claim basis. *Harris,* 753 F.Supp.2d at 1012. The plaintiffs' claims that are relevant to this motion are as follows: (i) failure to provide meal and rest periods in violation of California Labor Code §§ 226.7 and 512; (ii) failure to pay wages for overtime work in violation of California Labor Code §§ 200–204, 510, 1194, and 1198; (iii) failure to provide accurate itemized wage statements in violation of California Labor Code §§ 226 and 1174;[5] and (iv) failure to pay reporting time pay, as well as the other mentioned violations, in violation of California Business and Professions Code §§ 17200 et seq. *See Amey* Compl. ¶ 27–49, *Brown* Compl. ¶¶ 44–48, 56–90.[6]

5 I address this issue in Section III, below.

6 Plaintiffs brought other causes of action as well that are not at issue or that are derivative claims that are resolved in the resolution of the named claims.

1. Meal and rest break violations

Cinemark's written meal break policy provides that employees shall take a meal period of no less than 30 minutes on or before the end of every fifth hour of work. Meal & Rest Break Policy at 1–2. This policy is included in the employee guidelines, the personnel guidelines and the California guidelines. *See* Personnel Guidelines at 13; Employee Guidelines at 34; Meal & Rest Break Policy at 1–2. The employee guidelines state that employees may not work during breaks, may leave the premises during breaks, and must clock in and out during breaks. Employee Guidelines at 34. In addition, managers are prohibited from discouraging employees from taking breaks. *Id.* at 35. Meal periods cannot be waived. *Id.*

The Meal & Rest Break Policy provides the same information and provides that employees shall be paid an extra hour for any day in which they do not take a meal break, take a meal break late, or take a meal break that is less than 30 minutes long. Meal & Rest Break Policy at 1. General managers must notify employees of these policies, schedule proper meal breaks, and ensure that employees take the breaks and properly clock in and out. *Id.* at 2. They are also prohibited from changing employees' meal break punch times. *Id.*

***8** According to the evidence, the practice of scheduling meal breaks differed depending on the manager. *See,* e.g.,

Amey Depo. 169:7–13; Garrett Depo. 107:12–20, 113:3–9 (Dkt. No. 1008); Krick Depo. 80:11–81:5 (Dkt. No. 100–11); Rivera Depo. 90:19–91:18 (Dkt. No. 100–16); Cott Depo. 140:16–41:14 (Dkt. No. 100–4). Although general managers sometimes set employee schedules and meal breaks, in some theaters assistant managers took on these responsibilities; the practice varied from theater to theater. Amey Depo. 169:7–13; Garrett Depo. 107:12–18, 113:3–9; Krick Depo. 80:11–81:5; Rivera Depo. 96:16–97:11; Cott Depo. 140:16–41:14. Some managers included meal breaks in the employee schedule, while others did not. *See* Rodgers Depo. 88:2389:1 (Dkt. No. 100–18) (schedule did not include breaks); Amey Depo. 123:11–22 (made rest break schedule daily); Brown Depo. 70:5–10.

Cinemark's clocking system will not allow an employee to clock back in early from a meal break. Smith Depo. 71:15–72:21. When an employee clocks in a meal break later than the time required by law, or does not take a break at all, Cinemark's system automatically generates a premium payment for that employee. *Id.* at 72:6–73:17. Employees are required to review their punch records weekly. Amey Depo. 155:17–19. If the punch records are incorrect, employees are told to inform a manager, who will correct the errors. *Id.* at 155:20–156:6.

Cinemark's written policy regarding rest breaks provides that employees shall receive 15 minute rest breaks for every four hours that they work. Meal & Rest Break Policy at 2. In contrast to meal breaks, rest breaks are less often scheduled in advance, with assistant managers usually in charge of ensuring that employees receive rest breaks. *See,* e.g., Goniwicha Depo. 111:2–12:18 (meal and rest breaks were on a schedule posted on filing cabinet, each department had separate break schedules for employees and for managers); Amey Depo. 169:11–13. If an employee skips or takes a late rest break, no premium payment is automatically generated in Cinemark's clocking system. Smith Depo. 75:11–16. If an employee misses a rest break, Cinemark's official policy directs that the employee should sign a form at the end of the day stating why he did so, and he will get paid for the missed rest break. *Id.* at 76:3–25.

In arguing that Cinemark has a policy that facilitates meal and rest break violations, plaintiffs do not contend that Cinemark's *written* policies violate wage and hour laws. Nor do they provide any direct evidence that Cinemark has such an informal policy, such as testimony from salaried general managers regarding Cinemark's managerial training or any written memoranda. Instead plaintiffs rely almost entirely on circumstantial evidence: declarations from nonexempt employees, including assistant managers, and the statistical evidence from Dr. Fountain.

First, plaintiffs point to the lack of a policy requiring employees to remove their name tags or leave the theater floor during breaks. Mot. Cert. 8–9. However, Cinemark does not *require* employees to keep their name tags on during breaks, and employees are able to spend their breaks in areas where there are no customers. Plaintiffs also emphasize that Cinemark's timekeeping system will not allow employees to clock back in early. *Id.* at 6–10. But this just as easily may reinforce, rather than inhibit, a policy of providing full-length breaks.

Next, plaintiffs argue that Cinemark has a policy of understaffing on weekends, holidays, and other busy times. *Id.* at 7–8. However, witness testimony indicates that Cinemark increases staffing during those times, and plaintiffs have not presented any other evidence that Cinemark has a uniform policy of understaffing. *See* Rivera Depo. 140:11–41:13 (theater understaffed when there was a bad estimate of business); *see also* Amey Depo. 68–70; Brown Depo. 96:4–98:18; De La Rosa Depo. 81:16–84:23.

***9** The gravamen of plaintiffs' argument is that "[b]y incorrectly *scheduling* breaks, and then by making breaks dependent on managers' permission, Cinemark has uniformly violated the Labor Code." Reply Mot. Cert. 8. However, this reasoning has been rejected by the Supreme Court, which found that: "[o]n its face, of course, [managerial discretion] is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business." *Dukes,* 131 S.Ct. at 2554.

The central focus of plaintiffs' argument is precisely what makes their meal and rest break claims unsuitable for class certification. The overwhelming weight of the evidence demonstrates that the greatest factor in determining whether an employee actually received compliant meal and rest breaks was the manager on duty. Amey Depo. 189:15–90:9; Burnside Depo. 56:15–25 (Dkt. No. 100–3), 132:2–133:8; Goniwicha Depo. 112:22–15:19; Krick Depo. 53:23–55:25, 78:20–79:9; Cott Depo. 140:16–25; Melendez Depo. 60:17–62:10 (Dkt. No. 100–13); De La Rosa Depo. 68:1669:18; *see also* Rivera Depo. 71:2–25 (different theaters were staffed

differently). The plaintiffs have not produced sufficient evidence to show that managers' failure to provide these breaks was uniform or reflected a policy that was instituted by Cinemark.

Significantly, in depositions many witnesses indicated that they received their full breaks on time when the manager on duty ran a "pretty tight ship," was "by the book," or was otherwise a "good" manager. De La Rosa Depo. 69:20–70:21, 150:1–54:21; Roberson Depo. 124:15–25:3 (Dkt. No. 100–17); Rivera Depo. 73:19–25; Cott Depo. 230:2–12, 248:25–49:20; Krick Depo. 55:12–13; Melendez Depo. 61:18–62:6, 69:3–11, 83:22–83:16; Burnside Depo. 57:6–58:1. By contrast, when employees did not receive timely breaks, it was due to managers who were disorganized, forgetful, and generally unable to effectively implement Cinemark's corporate policies. *See* Rodgers Depo. 32:20–33:24 (stating that after 2008, senior managers told employees that "they had gotten in trouble by corporate and that we had to have our breaks by our five-hour mark or we would get [a] write-up."); Lopez Depo. 153:2–15 (Dkt. No. 100–12) (more difficult to get breaks when there was no manager oversight); Amey Depo. 93:2–4 (assistant managers responsible for enforcing corporate policies); Krick Depo. 79:3–14. The evidence seriously undermines plaintiffs' contention that Cinemark had an unwritten uniform policy of denying breaks.

Witness declarations indicate that assistant managers often did not take breaks in order to ensure that their employees could. Nearly all of the plaintiffs' witnesses who were assistant managers stated that their employees always received timely rest breaks. *See* Amey Depo. 60:2022, 78:6–10; Garrett Depo. 113:11–14:8; Goniwicha Depo. 103:9–25, 109:23–11:1; Krick Depo. 85:10–86:4; Roberson Depo. 94:3–14; Rivera Depo. 132:17–33:5; Cott Depo. 226:8–19. Instead of showing a uniform policy of denying breaks to all class members, this evidence indicates that all non-managerial employees received adequate breaks.

The reasoning of *York v. Starbucks Corp.* is particularly applicable to this case. In addressing a similar a case involving meal and rest break violations under California law, the court stated:

> [W]hether and when an employee took a rest break was dependent on the manager who was in charge of the shift. And whether an employee was interrupted during a break turned on the many variables that could affect the demands placed on employees at any given time during the work day ... *This evidence shows that the reasons why employees may have missed breaks has less to do with corporate policy and much more to do with individual circumstances.*

***10** *York*, 2011 WL 8199987, at *27 (emphasis added). The evidence in that case, in which the court denied certification, is parallel to the conduct outlined above. *See also Villa v. United Site Servs. of California, Inc.*, No. 5:12–CV–00318–LHK, 2012 WL 5503550, at *9 (N.D.Cal. Nov. 13, 2012).

The evidence reveals several other facts that fully defeat plaintiffs' theory of class certification. Some witnesses testified that they did not inform management of the fact that they had missed meal and/or rest breaks. *See,* e.g., Goniwicha Depo. 158:3–25, 162:18–22. Sometimes employees voluntarily assisted customers while on break, voluntarily took a shorter rest break because there was nothing to do, or waived their rest break altogether. *See* Rivera Depo. 151:1252:13 (missed meal and rest breaks were always by choice); Kohler Depo. 85:5–14 (Dkt. No. 10010); Burnside Depo. 92:7–9. Some witnesses stated that employees would occasionally forget to clock out for the meal breaks, or would take breaks late despite being told to take them earlier. Amey Depo. 61:5–10; Garrett Depo. 104:20–106:18.

Such evidence "does not and cannot show why any particular meal break was taken at a particular time and, more to the point, whether the break was taken at a time preferred by the employee for whatever reason or was mandated by a manager who ignored the requirement that he provide his subordinates with a timely meal break." *York*, 2011 WL 8199987, at *26; *see also Kimoto v. McDonald's Corps.*, No. CV 06–3032PSGFMOX, 2008 WL 4690536, at *6 (C.D.Cal. Aug. 19, 2008) (punch data not dispositive because "there is no financial incentive for an employee to clock in and out for a ten-minute rest period, since that employee will get paid regardless. Thus, without other evidence, the Court cannot assume that the employees accurately recorded the timing of their breaks").

Plaintiffs also did not establish that Cinemark uniformly failed to provide meal break pay when breaks were missed or late. Many witnesses did not know or could not remember whether they had been paid premium payments. Kohler Decl. ¶¶ 6–7; Burnside Decl. ¶¶ 5, 7 (Dkt. No. 842);

Krick Depo. 120:4–14 (Dkt. No. 84–2). Although there is evidence that general managers, senior assistant managers, and assistant managers altered employees' punch records to reflect timely breaks when they were in fact missed or late, plaintiffs presented no evidence that this was connected to any policy of Cinemark's, instead of individual managers' efforts to avoid getting in trouble. *See* Goniwicha Depo. 107:6–14 (sometimes adjusted time cards for valid reasons); Rivera Depo. 39:18–20 (same); Amey Depo. 87:14–88:5 (received meal break pay for missed breaks even when someone clocked him in and out); De La Rosa Depo. 193:17–96:8. Witness testimony even fails to specify that the alleged violations occurred within the class period—some of plaintiffs' evidence cites to violations that occurred before the class period. Rodgers Depo. 96:2–98:5 (meal and rest break violations occurred before 2008).

All of these facts contradict plaintiffs' position that Cinemark deliberately designed a system whereby employees would be prevented from taking breaks. Plaintiffs failed to establish that Cinemark implemented a standard policy in a uniform manner throughout the proposed class. There is not a single common question of law to the class, and plaintiffs have not satisfied the commonality and predominance requirements of 23(a)(2) and 23(b)(3). I will not certify the proposed class with respect to the meal and rest break claims. *See York*, 2011 WL 8199987, at *27, 32 (denying class certification because neither commonality nor predominance was satisfied); *Ramirez v. United Rentals, Inc.*, No. 5:10–CV–04374 EJD, 2013 WL 2646648, at *6 (N.D. Cal. June 12, 2013), *appeal dismissed* (Aug. 8, 2013) (same).

2. Failure to pay reporting time pay

***11** The plaintiffs argue in a conclusory manner that Cinemark has a policy of sending employees home before they worked half of their shift without providing employees with reporting time pay ("RTP"). Mot. Cert. 6. The only practice that they point to in support of this contention is Cinemark's policy of requiring managers to complete paperwork before employees may receive RTP, instead of providing it automatically when employees leave work before completing half of their shift. *Id.* Plaintiffs claim that this "reinforces the company policy against complying with reporting time law." *Id.*

The Cinemark employee guidelines state that:

> On occasions when business volume is slower than anticipated, nonessential Employees may volunteer to leave early. In such instances, the Employee is paid for the actual hours worked. If an Employee is sent home involuntarily other than as a disciplinary reason for tardiness or because the Employee is unfit to work before he or she has worked half of his or her scheduled shift, Cinemark will pay the Employee "reporting time pay" to the extent required by law.

Employee Guidelines at 34. Cinemark's other written policies recognize that "the company is required by law to pay [employees] for at least a half-day of work" when they are sent home before completing one-half of their shift. Reporting Time Pay Procedures at 1. General managers are responsible for entering RTP into the electronic system. *Id.* Employees are not entitled to RTP if they leave for medical or disciplinary reasons. *Id.* Witness testimony indicates that managers sent employees home early when business was slow, with decisions about whether and who to send home early varying by the manager in charge. *See*, e.g., Amey Depo. 199:5–200:22; Rivera Depo. 98:7–100:12.

The plaintiffs' argument for class certification fails. There is no evidence of a uniform policy of failing to credit employees with RTP when they were sent home before completing half of their shift. As with the meal and rest break claims, whether an employee was sent home early depended almost entirely on the manager on duty, which undermines plaintiffs' argument that there was a uniform policy.

Many employees, especially managers, were rarely or never sent home early and before completing half of their shift. *See* Garrett Depo. 150:12–23; Krick Depo. 148:12–49:14; Brown Depo. 167:22–68:13; De La Rosa Depo. 202:20–05:3. Moreover, many witnesses were unable to state conclusively that when they were sent home before completing half of their shift, Cinemark denied them RTP. *See*, e.g., Amey Depo. 202:3–6 (sent home after completing half shift or paid for half shift); Roberson Depo. 141:10–42:13; Rodgers Depo. 82:21–84:2. The plaintiffs' evidence of reporting time pay violations also does not account for instances where employees were sent home early because they were disciplined, volunteered, or because of a manager's personal dislike of them that did not reflect any policy of Cinemark. *See* Amey Depo. 202:16–03:23; Burnside Depo. 102:1–11; Morales Depo. 42:3–43:23 (Dkt. No. 100–14); Rivera Depo. 100:13–19; Lopez Depo. 231:4–17, 233:7–22.

Ultimately, there is very little evidence of employees being sent home (i) before completing half of their shift; (ii) involuntarily and not for disciplinary or medical reasons; and (iii) without being credited with reporting time pay.[7] Of all the deposed witnesses who claimed to have been sent home early, only one established all three of these requirements with certainty. *See* Burnside Depo. 97:21–25, 99:10–14, 106:2–4 (went home early due to sickness or doctor's appointment once a month and never checked to see if received reporting time pay); Poncia Depo. 86:9–17 (was not positive that she did not receive RTP); Morales Depo. 42:3–43:13, 126:3–8 (left early for disciplinary reasons, and thought he was entitled to RTP for all scheduled hours, and not only one-half of scheduled shift); Rodgers Depo. 82:21–84:2 (did not check to see if she received RTP; sometimes left voluntarily or due to illness); Cott Decl. ¶ 10 (Dkt. No. 84–2) (did not specify that he went home involuntarily and not for disciplinary or medical reasons); Roberson Depo. 142:6–43:6 (did not know if she was paid RTP). This employee, Amber Lopez, stated that at some theaters RTP was never paid, but at others it was always paid. Lopez Depo. 49:6–52:25. Her testimony undercuts the existence of a uniform policy implemented by Cinemark.

7 In spite of their "best recollection" that they were not paid RTP, several witnesses admitted during their depositions that they never checked whether they were paid and did not know with certainty that they were not. *See,* e.g., Burnside Decl. ¶ 9; Burnside Depo. 106:1–4; Poncia Decl. ¶ 6; Poncia Depo. 86:9–23; Rodgers Decl. ¶ 9 (Dkt. No. 84–3); Rodgers Depo. 82:21–84:2.

***12** Plaintiffs were unable to persuasively establish that any of their proffered witnesses experienced routine RTP violations, let alone a uniform company policy of denying RTP to employees. There is no common question under Rule 23(a)(2) or 23(b)(3). Plaintiffs' reporting time pay claims are not certified as a class claim.

3. Uncompensated overtime

The plaintiffs argue that Cinemark routinely circumvented overtime pay requirements by forcing employees to work off-the-clock before or after they clocked in and out of work. Mot. Cert. 7. They state that Cinemark's policy of understaffing and its strong discouragement of overtime work forced employees to work off-the-clock in order to finish their tasks without getting disciplined. *Id.* They also point to Cinemark's prohibition of overtime work without prior express permission from managers. *Id.*

To prevail on their claim for uncompensated overtime or off-the-clock work, the plaintiffs should establish that "(1) [an employee] performed work for which he did not receive compensation; (2) that defendants knew or should have known that [the employee] did so; but that (3) the defendants stood 'idly by.' " *York,* 2011 WL 8199987, at *17. Cinemark's written policies provide that employees who work overtime are entitled to overtime pay. *See* Employee Guidelines at 34. However, overtime is discouraged and employees may be disciplined for working overtime without permission. *Id.* Employees must also obtain express permission from managers before working overtime. *Id.*

The plaintiffs have not asserted that Cinemark failed to pay employees for overtime hours worked on the clock, but instead state that employees must frequently work off-the-clock to finish tasks. However, some class members never experienced any overtime pay violations. *See* Poncia Decl. ¶ 3; Kohler Decl. ¶ 3. Some employees stated that they were always properly compensated for overtime work, while others did not tell their managers that they worked off-the-clock. Rodgers Depo. 72:2–73:10; Rivera Depo. 123:9–21; Brown Depo. 144:22–45:10; Melendez Depo. 31:1–9.

The witnesses' descriptions of the violations contradict a corporate policy regarding overtime. The nature of the tasks that employees were asked to do—taking out the trash, finishing tasks that they forgot—is indicative less of a corporate policy of forcing employees to work overtime without compensation than of aberrations from this policy by individual employees or managers. *See* Goniwicha Depo. 76:4–14 (only worked overtime when something "happened just out of the normal," like power outage); De La Rosa Depo. 252:18–53:9 (doing certain tasks after clocking out felt like a "favor."). Some employees completed tasks off-the-clock at night because they were waiting for others to finish so that they could leave in a group for safety reasons. *See,* e.g., Cott Depo. 132:1–7. As with the meal and rest break claims, plaintiffs' work requirements depended on the manager, with certain managers asking employees to work after they had clocked out and others never doing so. Cott Depo. 152:11–53:11 (more rule-oriented managers wouldn't ask employees to work off-the-clock); Brown Depo. 140:11–17.

Courts have found that class certification is inappropriate when faced with similar arguments because the fact that

"assistant store managers had an incentive to work off the clock [does not mean] that they actually did so and that [defendants] knew of such off-the-clock work." *Koike v. Starbucks Corp.*, No. C 06–3215 VRW, 2008 WL 7796650, at *8 (N.D. Cal. June 20, 2008) *aff'd*, 378 Fed.Appx. 659 (9th Cir. 2010); *see also Brewer*, 2014 WL 5877695, at *13 ("GNC's policies and efforts to keep clerical hours within budget are not enough to establish substantial evidence of a systematic company policy to pressure or require employees to work off the clock") (internal citations and quotations omitted); *York*, 2011 WL 8199987, at *29. There is not enough evidence to demonstrate that Cinemark knowingly caused employees throughout the proposed class to work off-the-clock without providing them with compensation. As with the plaintiffs' other claims, this claim is not suitable for class certification.

II. PAGA CLAIMS

A. Plaintiffs Failed to Exhaust the Wage Statement Claim

*13 In its motion for judgment on the pleadings, Cinemark contends that the PAGA claim arising under Labor Code § 226(a)(9) should be dismissed because plaintiffs failed to properly exhaust administrative remedies as required by section 2699.3 of the California Labor Code. Mot. J. Pleadings 13–16.[8] This provision provides that before bringing civil claims under PAGA, aggrieved employees or representatives must give "written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation." CAL. LAB. CODE § 2699.3(a)(1).

8 Cinemark also briefs this argument in its motion to deny certification. Mot. Dismiss 20–22. I address this as part of Cinemark's motion for judgment on the pleadings because my analysis parallels my dismissal of plaintiffs' claims under Rule 12(b)(6). *See Ovieda*, 2013 WL 3887873, at *1 (addressing administrative exhaustion on Rule 12(c) motion); *Lessard v. Trinity Prot. Servs., Inc.*, No. 2:10–CV–01262–MCE, 2010 WL 3069265, at *1 (E.D.Cal. Aug. 3, 2010) (addressing on Rule 12(b)(6) motion).

The purpose of the notice requirement is to give employers notice and to inform the Labor and Workforce Development Agency ("LWDA") of the potential labor code violations so that it may choose whether to investigate or prosecute on its own. *Id.* "To constitute adequate notice under § 2699.3(a), the notice must allege at least some 'facts and theories' specific to the plaintiff's principal claims; merely listing the statutes allegedly violated or reciting the statutory requirements is insufficient." *Ovieda v. Sodexo Operations, LLC*, No. CV 12–1750–GHK SSX, 2013 WL 3887873, at *3 (C.D.Cal. July 3, 2013) (internal citations and quotations omitted).

Regarding her claim under section 226, Brown sent a notice letter to the defendants that stated:

> California Labor Code section 226(a) requires employers to make, keep and provide true, accurate, and complete employment records. CINEMARK did not provide Ms. Brown and other aggrieved employees with properly itemized wage statements. The wage statements they received from CINEMARK were in violation of California Labor Code section 226(a). The violations include, without limitation, failing to state the total hours they worked as a result of working off-the-clock and not recording or paying for those hours.

Dkt. No. 83–17 at 2. Amey's notice letter provides even less information. It states only that the defendants "willfully fail[ed] to provide Plaintiff and Class Members with accurate semimonthly itemized statements of the total number of hours each of them worked, the applicable deductions, and the applicable hourly rates in effect during the pay period." Dkt. No. 83–18 at 1. Their complaints also allege the wage statement claims as derivative from the other asserted wage and hour violations.

Plaintiffs contend that the notice letter was sufficient because it accused Cinemark of failing to provide the "applicable hourly rates in effect during the pay period." Oppo. Mot. Dismiss 17 (Dkt. No. 101). According to plaintiffs, this statement reflects their "core" theory that Cinemark's wage statements did not properly list overtime rates. *Id.* Plaintiffs' argument is unpersuasive because this phrase does no more than recite the language of section 226(a)(9). *See* CAL. LAB. CODE § 226 (statement must show "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate"). Parroting the statute that was violated is insufficient to provide notice under Section 2699.3. *See Archila v. KFC U.S. Properties, Inc.*, 420 Fed.Appx. 667, 669 (9th Cir. 2011).

***14** Plaintiffs cite a string of cases in support of their position, claiming that it is unreasonable to expect them to include every theory and detail of their allegation under section 226 prior to discovery. Oppo. Mot. Dismiss 18–19. While I agree with this general proposition, it does not allow plaintiffs to provide such bare notice as in this case. After analyzing the numerous cases cited by the parties, it is clear that plaintiffs are required to provide at least some information regarding the theories relating to the alleged violations. They failed to do so here.

In *Ovieda,* the plaintiffs' notice letter included conclusory factual allegations that the defendants did not comply with the Labor Code requirements regarding meal and rest breaks. *See* 2013 WL 3887873, at *3–4. The court concluded that "[t]he notice contains no facts specific to Ovieda's principal meal and rest break claim and unpaid wages claim and no information about what Defendants' allegedly illegal policy and practices are." *Id.* at *4. In doing so, it distinguished cases that the plaintiffs rely upon in their opposition, *Cardenas v. McLane FoodServices, Inc.,* 796 F.Supp.2d 1246, 1261 (C.D.Cal. 2011), and *Lessard v. Trinity Prot. Servs., Inc.,* No. 2:10–CV–01262–MCE, 2010 WL 3069265, at *3 (E.D.Cal. Aug. 3, 2010). *See id.*; Oppo. Mot. Judgment Pleadings at 19–22.

In *Singletary v. Teavana Corp.,* the court granted summary judgment where the notice letters "clearly failed to provide any factual allegations whatsoever." No. 5:13–CV–01163–PSG, 2014 WL 1760884, at *3 (N.D.Cal. Apr. 2, 2014) (internal citations and quotations omitted). The court found that as a result, the letters could not provide adequate notice under Ninth Circuit law. *Id.*; *see also Archila,* 420 Fed.Appx. at 669 (affirming dismissal of PAGA claims based upon failure to exhaust administrative remedies where "demand letter merely lists several California Labor Code provisions Archila alleges KFC violated" and requests an investigation); *Wong v. AT & T Mobility Servs. LLC,* No. CV 10–8869–GW FMOX, 2012 WL 8527485, at *3 (C.D.Cal. July 2, 2012); *Soto v. Castlerock Farming & Transp. Inc.,* No. CIV–F–09–0701 AWI, 2012 WL 1292519, at *8 (E.D.Cal. Apr. 16, 2012). [9]

9 Because I GRANT defendants' motion for judgment on the pleadings, plaintiffs' request for judicial notice is DENIED as moot. See Dkt. No. 85.

The cases cited by plaintiffs are distinguishable and affirm that the notice letter in this case does not contain sufficient detail regarding the theories of plaintiffs' claims. In *Cardenas v. McLane FoodServices, Inc.,* cited by plaintiffs, the notice letter identified a group of employees who were based in Southern California. 796 F.Supp.2d 1246, 1259–60 (C.D.Cal. 2011). When the defendants objected to the later inclusion of other employees, the court held that the notice letter did not need to provide "every potential fact or every future theory." *Id.* at 1260. *Cardenas* did not discuss the threshold adequacy of a notice letter. It stands for the proposition that a party's theory that was properly provided in the notice letter may be expanded later. *See also Ovieda,* 2013 WL 3887873, at *4 ("*Cardenas* ... is not directly relevant because the defendant did not dispute that the plaintiffs set forth sufficient facts to support their claims of labor violations").

The other cases to which the plaintiffs cite are similarly distinguishable. In *Gonzalez v. Millard Mall Services, Inc.,* the court found that notice was sufficient when the notice letter contained specific information that the defendants issued checks out of an out-of-state bank and failed to include the address of that bank on checks. No. 09CV2076–AJB WVG, 2012 WL 3629056, at *6 (S.D.Cal. Aug. 21, 2012). In *Lessard v. Trinity Protection Services, Inc.,* the notice letter described the defendants' specific policies. No. 2:10–CV–01262–MCE, 2010 WL 3069265, at *3 (E.D.Cal. Aug. 3, 2010). In *Hoang v. Vinh Phat Supermarket, Inc.,* the plaintiffs provided numerous facts about the defendants' policies and how they applied to the plaintiffs. No. CIV. 2:13–00724 WBS, 2013 WL 4095042, at *9 (E.D.Cal. Aug. 13, 2013). [10] And in *Moua v. International Business Machines Corp.,* in what it described as a "close call," the court found that a notice letter was sufficient because it named specific employees and identified some facts and theories of the alleged violations. No. 5:10–CV–01070 EJD, 2012 WL 370570, at *5 (N.D. Cal. Jan. 31, 2012). The court did not discuss the language of the actual notice letter. [11]

10 *Medlock v. Taco Bell Corp.* is similarly distinguishable, as the notice letter provided substantial facts and theories, such as that employees received incentives that were not incorporated into their overtime rate. *See* No. 1:07–CV–01314–SAB, 2014 WL 2154444, at *3 (E.D.Cal. May 22, 2014).

11 Plaintiffs also cite to *Wren v. RGIS Inventory Specialists.* Oppo. Mot. Dismiss 19–20. That case is not on point because it did not address the issue before me. Instead, the court stated that "to the extent there was any question regarding the sufficiency of that notice, the corrected notice resolved that issue." *Wren v. RGIS*

Inventory Specialists, No. C–06–5778 JCS, 2007 WL 484793, at *2 (N.D.Cal. Feb. 9, 2007). Because this issue can be resolved without examining the briefs filed in other cases, but by examining opinions in this district and others, plaintiffs' request for judicial notice is DENIED. *See* Dkt. No. 101–1. Similarly, plaintiffs' request for judicial notice of the complaint in *Jaimez, et al. v. DAIOHS U.S.A., Inc., et al.,* No. BC372665 (L.A.Super.Ct. July 19, 2010), *see* Dkt. No. 103–4, and defendants' request for judicial notice of the reply brief in *Holak v. K Mart Corp.,* No. 1:12–CV–00304–AWI–MJS, *see* Dkt. No. 105, are DENIED as I do not need to rely on them.

***15** Plaintiffs also cite to *York v. Starbucks Corp.,* which does appear to support their position. Oppo. Mot. Dismiss 19. However, the bulk of the cases cited by both parties indicates that the notice letter in this case is insufficient. Given the standard for notice under PAGA illustrated in the cases discussed, I do not find *York* to be persuasive in this case.

In concluding that plaintiffs' section 226 claims do not meet the notice requirements of section 2699.3, I find that the notice letters did not give the LWDA or Cinemark any specific information regarding the potential violations, such as the fact that Cinemark listed the same pay rate for both overtime pay and regular pay. The notice letters contain the allegation that Cinemark failed to record, state, or pay for hours worked by employees off-the-clock. Inclusion of this one factual allegation, while it may suffice to state a claim under Rule 12(b)(6), does not adequately give notice of the "facts and theories" of plaintiffs' claim under section 226. That sole factual allegation in the notice is unrelated to plaintiffs' new claim that the overtime rate was listed as the same as employees' hourly rate. This bare allegation cannot give proper notice either to the defendants or to the LWDA.

Because they failed to adequately exhaust administrative remedies, the plaintiffs' claims under PAGA for violations of section 226 are dismissed with prejudice. *See Ovieda,* 2013 WL 3887873, at *5 (C.D.Cal. July 3, 2013) ("allowing an amended notice to be submitted after the civil action has already been filed defeats the very purpose of the exhaustion requirement"). [12]

12 Although plaintiffs argued at the hearing that the defendants would suffer no prejudice if I allowed them to cure their failure to provide notice, they ignore the fact that section 2699.3 is also designed to provide notice to the LWDA. The failure to properly notify the LWDA, and possibly prevent future litigation, cannot be remedied.

B. The Other PAGA Claims Also Fail

Cinemark makes two arguments for dismissing the remainder of the PAGA claims. The first is that PAGA claims must satisfy the class certification requirements of Rule 23. Mot. Dismiss 12. This argument is precluded by case law in this district, the Ninth Circuit, and California. [13]

13 In support of this contention, defendants cite to one case decided in this district, *Taylor v. W. Marine Products, Inc.,* No. C 13–04916 WHA, 2014 WL 1248162 (N.D.Cal. Mar. 26, 2014). Mot. Dismiss 12. However, *Taylor* discussed the status of PAGA and class claims in the context of Article III standing, and is not on point. 2014 WL 1248162, at *2–3.

Although the Ninth Circuit has not expressly ruled on "whether a federal court may allow a PAGA action otherwise within its original jurisdiction to proceed under Rule 23 as a class action," it has declared that "Rule 23 and PAGA are more dissimilar than alike." *Baumann v. Chase Investment Services Corp.,* 747 F.3d 1117, 1124 (9th Cir.) *cert. denied,* 135 S.Ct. 870 (2014). Before and after *Baumann,* courts in this district have routinely held that "PAGA actions, though representative, need not be brought as class actions under Rule 23." *See,* e.g., *Willner v. Manpower Inc.,* 35 F.Supp.3d 1116, 1135 (N.D.Cal. 2014) ("the vast majority of courts in this district ... have held that representative PAGA claims need not be certified under Rule 23 to proceed") (internal citations and quotations omitted); *Villalpando v. Exel Direct Inc.,* No. 12–CV–04137 JCS, 2014 WL 1338297, at *20–21 (N.D.Cal. Mar. 28, 2014); *Ortiz v. CVS Caremark Corp.,* No. C–12–05859 EDL, 2014 WL 1117614, at *2 (N.D.Cal. Mar. 19, 2014); *Gallardo v. AT & T Mobility, LLC,* 937 F.Supp.2d 1128, 1138 (N.D.Cal. 2013); *Moua v. Int'l Bus. Machines Corp.,* No. 5:10–CV–01070 EJD, 2012 WL 370570, at *3 (N.D.Cal. Jan. 31, 2012). Likewise, the California Supreme Court has found that PAGA claims do not need to satisfy class action requirements. *See Arias v. Superior Court,* 46 Cal.4th 969, 981–86 (2009). I follow the majority of courts in holding that the plaintiffs' PAGA claims are not subject to the requirements of Rule 23. [14]

14 In doing so, I reject plaintiffs' argument that Cinemark's motion is untimely and must be resolved under Federal Rule of Civil Procedure 12. Oppo. Mot. Dismiss 3; *see also Moua,* 2012 WL 370570 (addressing issue on Rule

15 motion); *Willner,* 35 F.Supp.3d 1116 (addressing on motion for summary judgment).

***16** The second argument to dismiss the PAGA claims does have merit, though not in the broad terms asserted by Cinemark. It argues that plaintiffs' PAGA claims "would be unmanageable as a representative action," Mot. Dismiss 17, because plaintiffs cannot show any identity of interest with those they seek to represent under Labor Code § 2699(g)(1) and 2699(i). *Id.*

I disagree with the contention of Cinemark that the manageability requirement should be imposed on PAGA claims by analogizing them to claims in unfair competition or pattern-or-practice discrimination cases. Mot. Dismiss 17–18. This argument cannot bear the weight Cinemark puts on it, and other courts have rejected similar arguments. *See,* e.g., *Plaisted v. Dress Barn, Inc.,* No. 2:12–CV–01679–ODW, 2012 WL 4356158, at *2 (C.D.Cal. Sept. 20, 2012); *Alcantar v. Hobart Serv.,* No. ED CV 11–1600 PSG, 2013 WL 146323, at *3–4 (C.D.Cal. Jan. 14, 2013). In addition to the inherent differences between PAGA suits and unfair competition and pattern-or-practice suits, the cases to which Cinemark cites address manageability at later stages of the lawsuit. *See Bronco Wine Co. v. Frank A. Logoluso Farms,* 214 Cal.App.3d 699, 720–21 (Ct.App. 1989), *reh'g denied and opinion modified* (Nov. 2, 1989) (resolving pretrial motion); *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.,* 72 Cal.App. 4th 861, 874–75 (1999) (resolving motion brought after the close of evidence); *E.E.O.C. v. Bloomberg L.P.,* 778 F.Supp.2d 458, 462 (S.D.N.Y. 2011) (resolving on motion for summary judgment); *E.E.O.C. v. CRST Van Expedited, Inc.,* 611 F.Supp.2d 918, 952–54 (N.D.Iowa 2009) (same).

There is no per se rule that should be applied to PAGA claims that do not meet Rule 23 requirements. However, when the evidence shows, as it does here, that numerous individualized determinations would be necessary to determine whether any class member has been injured by Cinemark's conduct, then allowing a representative action to proceed is inappropriate.

In *Ortiz v. CVS Caremark Corp.,* the court dismissed a PAGA claim because it was unmanageable. No. C–12–05859 EDL, 2014 WL 1117614, at *3–4 (N.D.Cal. Mar. 19, 2014). It did so because of the "multitude of individualized assessments" that case would have required. *Id.* at *4. Several other courts have adopted the reasoning of *Ortiz,* and dismissed PAGA claims where there is a large number of allegedly aggrieved individuals that would require individual assessments. *See Litty v. Merrill Lynch & Co.,* No. CV 14–0425 PA PJWX, 2014 WL 5904904, at *3 (C.D.Cal. Nov. 10, 2014) (same); *Bowers v. First Student, Inc.,* No. 2:14–CV–8866–ODW EX, 2015 WL 1862914, at *4 (C.D.Cal. Apr. 23, 2015). Similarly, *Stafford v. Dollar Tree Stores, Inc.* addressed a motion to bifurcate individual and representative PAGA claims. It found that "in light of the number of potential aggrieved employees, judicial economy favors deferring the representative portion of the PAGA claim" until the named plaintiff could first establish that he was an aggrieved employee with the right to bring the action. No. 2:13–CV–1187 KJM CKD, 2014 WL 6633396, at *2–4 (E.D.Cal. Nov. 21, 2014). Thus, *Stafford* expressed concerns about manageability related to the numerous "aggrieved employees" that the plaintiff sought to represent.

Related to the argument on unmanageability is plaintiffs' failure to adequately identify the aggrieved individuals. *See* Reply Mot. Dismiss at 5–7 (Dkt. No. 106).[15] Several courts have dismissed representative PAGA claims on this basis. In *Chie v. Reed Elsevier, Inc.,* the Hon. Edward Chen in this District dismissed PAGA claims for failure to identify the aggrieved individuals from a pool of roughly 300 employees. No. C–11–1784 EMC, 2011 WL 3879495, at *4 (N.D.Cal. Sept. 2, 2011). There, the plaintiffs did not "provide any other description of the aggrieved employees" other than that they could be ascertained by reviewing payroll records. *Id.* Judge Chen found that specificity as to the aggrieved employees is particularly important in representative actions, and that the information provided did "not give Defendants fair notice as to what the scope of the PAGA claim is." *Id.*

15 Cinemark cites to "at least 10 Federal Courts" that "dismissed PAGA claims either because they couldn't identify the aggrieved individuals or because the claims would be unmanageable." Tr. 28:1–18 (Dkt. No. 114). Cinemark's statement is misleading. Many of the cases it lists either do not discuss PAGA at all or do not stand for the proffered conclusions. However, a few of these cases that I discuss do support Cinemark's position.

***17** In *Jeske v. Maxim Healthcare Services, Inc.,* the defendants objected to pleadings of PAGA violations because the plaintiff did not sufficiently define the "aggrieved employees." No. CV F 11–1838 LJO JLT, 2012 WL 78242, at *13 (E.D.Cal. Jan. 10, 2012). The court agreed, finding that the complaint failed "to identify how particular aggrieved employees were subject to particular violations" and that the plaintiff had failed "to justify the complaint's overly broad scope of aggrieved employees." *Id.* Therefore, it refused "to

sanction PAGA claims for imprecisely defined aggrieved employees." *Id.*

There are more than 10,000 class members in this case. Notice of Removal ¶ 22 (Dkt. No. 1). As described above, many of them worked for managers who followed Cinemark's compliant wage and hour policy, and plaintiffs offer no easy way to identify those who may actually be aggrieved. The complaint states only that "Plaintiff (and each and every other Class Member) are each an "aggrieved employee," as defined by California Labor Code § 2699(c)." *Amey* Compl. ¶ 62; *see also Brown* Compl. ¶ 72 (not defining aggrieved employees). Similar to the cases cited above, the "aggrieved employees" are not defined with sufficient particularity to give Cinemark notice of the scope of the PAGA claim, and it would require too great a number of individualized assessments to determine the scope. Accordingly, the PAGA claims are dismissed. If plaintiffs wish to seek leave to amend the non-wage statement PAGA claims, they may do so in accordance with the procedure described in the Conclusion and explain why amendment would not be futile and prejudicial to Cinemark.

III. WAGE STATEMENT CLAIMS

As discussed is Section II. A above, Cinemark objects to plaintiffs' wage statement claims because the operative complaints did not state a claim for "direct" wage statement violations, but rather for "derivative" claims based upon Cinemark's failure to pay employees for missed meal and rest breaks and for off-the-clock work. Mot. J. Pleadings 1–2. It asserts that plaintiffs acknowledged that their claims were derivative and that the new claims deprive it of fair notice. *Id.* at 11–12. Cinemark denies having any notice of the direct claim under 226(a)(9). Reply Mot. J. Pleadings 11–12 (Dkt. No. 104).

Cinemark moved both for judgment on the pleadings on the section 226 claim and for denial of class certification on this ground.[16] There are different standards that apply to each motion.

16 Cinemark requests judicial notice of a number of documents in support of this motion. Dkt. No. 97. Because these documents are filed in the docket of this case, the request for judicial notice is GRANTED.

As an initial matter, I address the parties' dispute about the standard for granting a Rule 12(c) motion after substantial discovery has taken place, as in this case. Oppo. Mot. J. Pleadings 2 (Dkt. No. 103). The plaintiffs cite dicta in *Grajales v. Puerto Rico Ports Authority* for the proposition that "[a]pplying the [Rule 12(b)(6)] plausibility standard to a complaint after discovery is nearly complete would defeat [the] core purpose" of Rule 12(b)(6) in avoiding unnecessary discovery. 682 F.3d 40, 46 (1st Cir. 2012); Oppo. Mot. J. Pleadings 2. One district court within the Ninth Circuit has discussed *Grajales* and adopted its reasoning to deny a Rule 12(c) motion because it was brought too late in the proceedings. *See Perez v. Oak Grove Cinemas, Inc.*, No. 3:13–CV–00728–HZ, 2014 WL 1796674, at *3–4 (D.Or. May 5, 2014).

***18** I am unaware of any other court within the Ninth Circuit besides *Oak Grove Cinemas* that has adopted the reasoning of *Grajales*. Neither case is binding on me. Other courts in this district have rejected similar arguments, finding that a "claim that a Rule 12(c) motion is not appropriate where there has been substantial discovery does not appear to be supported by Rule 12(c)"). *Perez v. Wells Fargo & Co.*, No. C 14–0989 PJH, 2014 WL 6997618, at *6 (N.D.Cal. Dec. 11, 2014). I agree with this reasoning. Rule 12 provides that parties may move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." FED. R. CIV. P. 12(c). I will consider Cinemark's Rule 12 motion and apply the same standard that is uniformly used in resolving Rule 12(c) motions—failure to state a claim under Rule 12(b)(6).

Cinemark argues that the operative complaints do not plead a violation of Labor Code § 226(a)(9) for failure to provide accurate overtime rates on wage statements.[17] Mot. J. Pleadings 8. The plaintiffs respond that the "requirements to state a Section 226 claim are minimal" and that they have included sufficient information in their complaints. Oppo. Mot. J. Pleadings 10.

17 I reject the plaintiffs' contention that the defendants waived the defense of failure to state a claim by failing to raise it in their prior motions. Here, the failure to exhaust defense is in essence a failure to state a claim defense, which may be raised by a motion under 12(c). *See Ovieda*, 2013 WL 3887873, at *2.

Brown's third cause of action pleads a violation of California Labor Code § 226(a) for "non-compliant wage statements." It states that "[d]efendants have intentionally and willfully failed to provide employees with complete and accurate wage statements. The deficiencies include, among other things, the failure to state all hours worked as a result of failing to record and state the hours Plaintiffs and class members worked off-the-clock." *Brown* Compl. ¶ 58. It continues to

allege that specifically, the plaintiffs "were denied both their legal right to receive and their protected interest in receiving, accurate, itemized wage statements under California Labor Code section 226(a). In addition, because Defendants failure to provide the accurate number of total hours worked on wage statements, Plaintiffs have been prevented by Defendants from determining if all hours worked were paid and the extent of the underpayment." *Id.* ¶ 60.

Amey's third cause of action provides that "[d]efendant has failed to provide timely, accurate itemized wage statements to Plaintiff and Class Members in accordance with California Labor Code § 226. Plaintiff is informed and believes and, on that basis, alleges that none of the statements provided by Defendant accurately reflected actual gross wages earned, net wages earned, or the appropriate deductions for any Class Member." *Amey* Compl. ¶ 49.

Purely as a matter of pleading, I agree with plaintiffs. Unlike the cases cited by Cinemark, including my prior orders in *Khan v. K2 Pure Solutions, L.P.*, No. 12–CV–05526–WHO, 2013 WL 6503345, at *8 (N.D.Cal. Dec. 4, 2013) and *Lefevre v. Pac. Bell Directory*, No. 14–CV–03803–WHO, 2014 WL 5810530, at *4 (N.D.Cal. Nov. 7, 2014), the complaint in this case is not devoid of any facts. Instead, plaintiffs allege that employees worked off-the-clock and that Cinemark failed to correctly record all hours worked on wage statements, including those worked off-the-clock. *Brown* Compl. ¶ 58. This is a factual assertion that goes beyond mere recitation of the statutory language, so I will not dismiss this claim for that reason. *See Lefevre*, 2014 WL 5810530, at *2–3.

***19** That derivative wage statement claim that plaintiffs made in their complaints, however, would fail certification for the reasons previously discussed—there are no common questions and individualized determinations would predominate. That is no longer the theory plaintiffs wish to pursue. Instead, they wish to assert a "direct" wage statement claim based on the failure of Cinemark's wage statements to accurately reflect the rate of premium pay. Oppo. Mot. J. Pleadings 10–11. Note that this is not a claim that overtime rates were calculated incorrectly for any class member and not paid, but only that the wage statement itself repeated the same rate for premium pay as regular hours. Mot. Cert. 4. That claim is not currently alleged.

Plaintiffs argue that Cinemark had notice of their intent to certify the "direct" wage statement claim because it was pursued by Cinemark in depositions and in other written discovery, and pursued by plaintiffs in "extensive written discovery," in their deposition of Cinemark's corporate designees, and in their motion for class certification. Oppo. Mot. J. Pleadings 13–14. Their argument is flawed.

Cinemark's actual notice of the claim would not necessarily absolve plaintiffs of their failure to properly allege the direct wage statement claim. But more importantly, plaintiffs' arguments that defendants in fact had notice that they intended to pursue the direct wage statement claim are misleading. That plaintiffs conducted discovery regarding the "direct" claim and that they brought it in their motion for class certification does not indicate that Cinemark knew that plaintiffs intended to pursue a claim not alleged in the complaints. Evidence about Cinemark's records of overtime work is germane to other pleaded claims, such as failure to compensate for off-the-clock work.

In addition, the facts contradict plaintiffs' argument that Cinemark's knowledge of the direct wage statement claims is reflected in its own discovery. Cinemark's deposition questions did not directly relate to the failure to properly list overtime rates on wage statements, but asked more generally if witnesses noticed any errors or had any confusion about their wage statements. *See* Oppo. Mot. J. Pleadings 15; Smith Depo. 222:2–223:3 (discussing the fact that Cinemark does payroll in-house and that it was responsible for mistakes on pay stubs). This is consistent with Cinemark's position that "[p]laintiffs had a derivative wage statement claim that required proof of injury so, of course, Cinemark's counsel questioned Plaintiffs about that claim." Reply Mot. J. Pleadings 12.

Holak v. K Mart Corp., No. 1:12–CV–00304 AWI, 2014 WL 2565902, at *27 (E.D. Cal. June 6, 2014) *report and recommendation adopted in part sub nom.* No. 1:12–CV–00304–AWI, 2014 WL 4930762 (E.D.Cal. Sept. 30, 2014), supports dismissal of this claim. There, the court addressed the same issue involving pleadings of wage statement violations. The plaintiff had alleged nearly identical violations of 226(a) based upon the defendants' "failure to record off-the-clock work." *See id.* at 27–28. In its motion for class certification, the plaintiff sought to certify a wage statement claim based upon the defendants' failure state the proper overtime rate on some pay statements. *Id.* at *27. The court concluded:

> The manner in which the complaint was phrased gave Defendant no notice of claims that the overtime rate

> was incorrectly stated separate and apart from incidents relating to failure to account for hours worked after clocking out. As Plaintiff did not plead the claim in her complaint, it would be inappropriate to certify a class based on the claim.

Id. at *28.

This reasoning is persuasive. Not only are the asserted claims in this case identical to those asserted in *Holak*, but plaintiffs' wage statement claims in the operative complaints are derivative of their direct claims. To allow the plaintiffs, without amendment, to convert their derivative wage statement claim to a direct claim on a theory alleged nowhere in the complaint would be unfair to the defendants and improper as a matter of pleading.

***20** At oral argument, plaintiffs asked leave to amend their complaint to assert the direct wage statement claim. It is quite late in this case to allow amendment, and I am concerned about the prejudice to Cinemark if I allowed amendment, as well as the ability of plaintiffs to plead a plausible wage statement claim under section 226 given the type of mistake alleged. I will allow plaintiffs to file a 15–page brief by June 2, 2015 that addresses the standard of review for amending a class claim after certification has been denied, any argument concerning prejudice, and how discovery thus far would support an amended claim. Plaintiffs should attach a proposed amended complaint to their amended claim with sufficient detail to meet all of the requirements of a section 226 claim. If they wish to amend the PAGA claims discussed in the previous section, they should include argument on that as well. Cinemark may respond with a 15–page opposition by June 12, 2015. No reply brief is allowed. I will set a hearing if I think further argument would be valuable.

CONCLUSION

Because the plaintiffs have not established that Cinemark has a uniform policy of failing to provide employees with meal or rest breaks, failing to provide reporting time pay, or failing to pay employees for all time worked off-the-clock, they cannot establish any questions of fact that are common to the proposed class. Instead, individualized determinations that will vary by manager and by theater predominate in this action. Therefore, the plaintiffs cannot meet the commonality or predominance requirements of Rule 23. In addition, plaintiffs' wage statement claims cannot be certified because they failed to properly plead violations of Labor Code § 226(a)(9) as a "direct" wage statement claim. All of plaintiffs' claims that are derivative of the ones discussed are also not suitable for class certification.

For the above reasons, plaintiffs' motion for class certification is DENIED. Cinemark's motions for judgment on the pleadings and to deny class certification are GRANTED in part and DENIED in part. As described in the preceding section, if plaintiffs wish to amend their wage statement claims or their non-wage statement PAGA claims, they may file a 15–page brief that addresses the Court's concerns, accompanied by a proposed amended complaint, by June 2, 2015. Cinemark may file a 15–page opposition brief by June 12, 2015. No reply brief is allowed.

IT IS SO ORDERED.

All Citations

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End of Document

2010 WL 1526314
Only the Westlaw citation is currently available.

United States District Court,
N.D. California.

Melissa S. CURRIE-WHITE, individually and on behalf of all others similarly situated, Plaintiff,
v.
BLOCKBUSTER, INC.; and Does 1 through 50, inclusive, Defendants.

No. C 09-2593 MMC (MEJ).
|
April 15, 2010.

Attorneys and Law Firms

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Daryl Steven Landy, Morgan Lewis & Bockius LLP, Palo Alto, CA, Michelle Anne Griffith-Jones, Morgan Lewis & Bockius LLP; Irvine, CA, for Defendants.

Lindsey Katherine Schroeder, Morgan, Lewis & Bockius, LLP, Palo Alto, CA.

ORDER RE: DISCOVERY DISPUTE (DKT.# 59)

MARIA-ELENA JAMES, United States Chief Magistrate Judge.

I. INTRODUCTION

***1** Before the Court is the joint discovery dispute letter ("Joint Letter") filed by Plaintiff Melissa Currie-White ("Plaintiff") and Defendant Blockbuster Inc. ("Defendant") on February 16, 2010. (Dkt.# 59.) After consideration of the parties' papers, relevant legal authority, and good cause appearing, the Court ORDERS as follows.

II. BACKGROUND

Plaintiff, a current employee of Defendant, filed this putative class action against Defendant under the Labor Code Private Attorneys General Act of 2004, Cal. Labor Code §§ 2698, *et seq.*, alleging that Defendant violated the Labor Code and section 14 of Wage Order 7-2001 ("Wage Order"). (Joint Letter at 1; Pl's. First Amended Compl. ("FAC") ¶ 1, Dkt. # 27.) Plaintiff alleges that, under the Wage Order, Defendant is required to provide suitable seats for its employees, and argues that Defendant failed to provide seats for employees working as Customer Service Representatives.[1] (Joint Letter at 1; FAC ¶ ¶ 4, 7, Dkt. # 27.) Plaintiff seeks certification under Federal Rule of Civil Procedure ("Rule") 23 of the following class: "All persons who, during the applicable statute of limitations, were employed by Blockbuster in the State of California in the position of Customer Service Representative, or similar position that regularly involves or has involved the operation of a cash register, and were not provided with a seat." (FAC ¶ 8, Dkt. # 27.)

1 The relevant portion of the Wage Order provides that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits use of seats." The Wage Order further provides that "[w]hen employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties." Wage Order 7-2001, Section 14; Joint Letter at 1.

At issue is Plaintiff's Interrogatory No. 2, which asks Defendant to provide the name, home address, and home telephone number of "each person who held the position of Customer Service Representative (including any similar position that regularly involves the operation of a cash register) in a Blockbuster store in the State of California at any time between April 24, 2008 and the present[,]" the store or stores where that person worked, and the position or positions held. (Joint Letter, Ex. 1.) In responding to Plaintiff's Interrogatory No. 2, Defendant objected to Plaintiff's request as unduly burdensome and overbroad. (Jones Decl., Ex. 2, Dkt. # 44.)[2] Defendant further objected that the information

sought in Interrogatory No. 2 is private and must be protected as such. *Id.*

2 In the Joint Letter, the parties stated that Exhibit 2 to the Joint Letter was Defendant's Responses to Plaintiff's First Set of Interrogatories. (Joint Letter at 1.) However, the actual Exhibit 2 was Defendant's Special Interrogatories to Plaintiff.

III. DISCUSSION

In the Joint Letter, Plaintiff argues that she is entitled to an order compelling Defendant to produce the names, addresses and telephone numbers ("contact information") of the putative class members. (Joint Letter at 1.) Plaintiff argues that this contact information is necessary to assemble information she needs to meet the elements required for class certification under Rule 23, and argues that the putative class members will likely be the most knowledgeable regarding key facts in the case relevant to class certification issues. *Id.* at 2. Additionally, Plaintiff argues that the contact information is likely to lead to information that would substantiate the following class allegations: (1) that the layout of Defendant's stores are similar and that no seats are provided in any stores; (2) that the nature of cashier work in Defendant's stores is similar, and that the nature of the work reasonably permits use of a seat; (3) that common questions of law and fact predominate over individual issues; (4) that Plaintiff's claim of injury resulting from Defendant's failure to provide seats is typical of the class; and (5) that a class action is the superior means of adjudication for this case. *Id.* at 2. Plaintiff also argues that the contact information is necessary for her to determine the existence of a class or set of subclasses. *Id.*

***2** In response, Defendant argues that Plaintiff's request for contact information of all current and former employees of Defendant during the relevant time period is burdensome in that it includes more than 9,000 individuals from over 500 stores throughout California. *Id.* at 3. Defendant argues that producing the contact information for these 9,000-plus individuals is not necessary for Plaintiff to satisfy Rule 23 class certification requirements. *Id.* at 4. Defendant further argues that because Plaintiff seeks to interview each putative class member to determine what their actual job duties were, whether they were provided with a seat, and if not, whether they suffered injury as a result of having no seat, this case is the antithesis of a class action as it requires interviews of individual class members to determine the circumstances of their situation. *Id.* Defendant argues that Plaintiff's alleged need for such expansive discovery demonstrates the individualized nature of her claims. *Id.* at 4. Defendant further argues that the putative class members have a reasonable expectation of privacy in their identities and contact information, and that it cannot release the contact information without the express consent of the putative class members. *Id.* at 5. Finally, Defendant argues that if the Court grants Plaintiff's request and orders Defendant to produce information responsive to Plaintiff's Interrogatory No. 2, the scope should be limited to those individuals who worked at the same stores as Plaintiff during the relevant time period. *Id.*

A. Legal Standard

Prior to class certification under Rule 23, discovery lies entirely within the discretion of the Court. *Vinole v. Countrywide Home Loans, Inc.* 571 F.3d 935, 942 (9th Cir.2009) ("Our cases stand for the unremarkable proposition that often the pleadings alone will not resolve the question of class certification and that some discovery will be warranted."). The plaintiff has the burden to either make a prima facie showing that the Rule 23 class action requirements are satisfied, or to show "that discovery is likely to produce substantiation of the class allegations." *Manolete v. Bolger,* 767 F.2d 1416, 1424 (9th Cir.1985).

A court must determine whether the action may be maintained as a class action as soon as is practicable after the action is filed. Fed.R.Civ.P. 23(c)(1). Accordingly, discovery is likely warranted where it will resolve factual issues necessary for the determination of whether the action may be maintained as a class action, such as whether a class or set of subclasses exist. *Kamm v. California City Development Co.,* 509 F.2d 205, 210 (9th Cir.1975). To deny discovery where it is necessary to determine the existence of a class or set of subclasses would be an abuse of discretion. *Doninger v. Pacific Northwest Bell, Inc.,* 564 F.2d 1304, 1313 (9th Cir.1977) (citing *Kamm,* 509 F.2d at 210).

The disclosure of names, addresses, and telephone numbers is a common practice in the class action context. *See Babbit v. Albertson's Inc.,* 1992 WL 605652, at *6 (N.D.Cal. Nov.30, 1992) (at pre-certification stage of Title VII class action, defendant employer ordered to disclose names, addresses, telephone numbers and social security numbers of current and past employees); *see also Putnam v. Eli Lilly & Co.,* 508 F.Supp.2d 812, 814 (C.D.Cal.2002) (ordering production of the names, addresses, and telephone numbers of putative class members, subject to a protective order, including those who worked in a sales division other than the plaintiff's own).

B. Application to the Case at Bar

***3** The Court finds that the case at bar is factually analogous to the *Putnam* case cited above, a putative class action in which the court, at the pre-certification stage, was faced with the question of whether to order disclosure of contact information for 348 employees of the defendant, both inside and outside of the plaintiff's sales division. *Putnam,* 508 F.Supp.2d at 813. As in this case, the plaintiff in *Putnam* argued that the contact information of other employees was necessary in order for the plaintiff to substantiate class allegations. *Id.* The defendant argued that the plaintiff was not entitled to the contact information of its employees in sales divisions other than the plaintiff's division, and even if the plaintiff were so entitled, those employees and putative class members had a reasonable expectation of privacy in their contact information. *Id.* at 814. The court found that the contact information of other employees of the defendant, especially those employees in sales divisions other than the plaintiff, would be useful to the plaintiff in meeting the commonality and typicality prongs of Rule 23. *Id.* The court further found that Plaintiff's need for the information outweighed the defendant's privacy concerns for its employees, and that a protective order would be sufficient to address those concerns. *Id.*

Likewise, in this case, the Court finds that Plaintiff is entitled to the contact information of putative class members, both in the two stores where Plaintiff worked and at other stores throughout the state. Plaintiff seeks this information in order to substantiate class allegations and to meet the certification requirements under Rule 23. The contact information and subsequent contact with potential class members is necessary to determine whether Plaintiff's claims are typical of the class, and ultimately whether the action may be maintained as a class action. However, the Court agrees with Defendant's argument that production of contact information for over 9,000 individuals in over 500 stores would be burdensome at this early pre-certification stage.

Some courts have limited pre-certification discovery of contact information to a representative group. *See Martinet v. Spherion Atlantic Enterprises, Inc.,* 2008 U.S. Dist. LEXIS 48113, at *6-7, 2008 WL 2557490 (S.D.Cal.2008) (limiting production of contact information for putative class members to the office where the plaintiff worked, as the plaintiff sought information for 10,000-plus employees encompassing many different job industries and many job positions unique from the plaintiff's); *Acevedo v. Ace Coffee Bar, Inc.,* 248 F.R.D. 550, 556 (N.D.Ill.2008) (production of potential class members' contact information limited to commissary employees, as the plaintiff had not yet made a showing that all hourly employees were subject to challenged practices).

Thus, while Defendant's burdensomeness objections have merit, the Court finds that Plaintiff is entitled to discovery of contact information for a representative number of putative class members in order to substantiate her class allegations. However, the Court declines to limit production of contact information to only the two stores where Plaintiff worked because, unlike the plaintiff in Martinet, the job duties of Defendant's in-store employees are likely similar to Plaintiff's. Accordingly, Defendant shall produce the contact information of putative class members for the two stores in which Plaintiff worked, plus ten additional stores which Plaintiff shall select.

***4** Additionally, the Court is aware of the protective order already in place in this matter, (Dkt.# 52), which should adequately address the privacy at issues here. However, in an abundance of cation, the parties are ORDERED to meet and confer to draft any additions/modifications to the protective order for the discovery at issue.

IV. CONCLUSION

Based on the foregoing, the Court ORDERS as follows. Defendant is ORDERED to disclose to Plaintiff the contact information of putative class members for the two stores at which Plaintiff worked, consistent with the language of Plaintiff's Interrogatory No. 2. (Joint Letter, Ex. 1, Dkt. # 59.) Additionally, Plaintiff shall select ten (10) of Defendant's stores for which the contact information of putative class members will be disclosed to her, consistent with the language of Plaintiff's Interrogatory No. 2. *Id.* Plaintiff and Defendant are ORDERED to meet and confer and subsequently file a joint stipulation and proposed order memorializing their agreement regarding the ten stores selected and the method for disclosure. Furthermore, the parties shall include in the joint stipulation and proposed order any modifications they wish to make to the protective order already in place in this matter. (Dkt.# 52.) The parties are ORDERED to file the joint stipulation and proposed order within fourteen days of this Order.

IT IS SO ORDERED.

All Citations

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End of Document

2009 WL 8729265
Only the Westlaw citation is currently available.
United States District Court,
S.D. California.

Juan FRANCO, on behalf of himself and on behalf of all persons similarly situated, Plaintiff,
v.
BANK OF AMERICA, Defendant.

No. 09cv1364–LAB (BLM).
|
Dec. 1, 2009.

Attorneys and Law Firms

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Bethany A. Pelliconi, Matthew Charles Kane, Michelle Renee Walker, Sylvia Jihae Kim, McGuirewoods LLP, Los Angeles, CA, Aparajit Bhowmik, Blumenthal Nordrehaug & Bhowmik, La Jolla, CA, for Defendant.

ORDER DENYING IN PART AND GRANTING IN PART PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF CONTACT INFORMATION OF PUTATIVE CLASS

BARBARA L. MAJOR, United States Magistrate Judge.

***1** On November 4, 2009, Plaintiff filed a motion to compel production of contact information of the putative class. Pursuant to this Court's briefing schedule, on November 9, 2009, Defendant timely opposed the motion and the Court took the matter under submission pursuant to Civil Local Rule 7.1(d)(1). Having considered the briefing filed by the parties and the applicable law, and good cause appearing, Plaintiff's motion is **DENIED IN PART AND GRANTED IN PART.**

FACTUAL AND PROCEDURAL BACKGROUND

On June 24, 2009, Plaintiff, a former Bank of America employee, filed the present class action lawsuit against Bank of America. As described in the first amended complaint ("FAC") that was filed on November 19, 2009, Plaintiff is seeking damages, restitution and injunctive relief for (1) unfair competition in violation of Cal. Bus. & Prof.Code § 17200 *et seq.;* (2) failure to pay earned wages and overtime compensation in violation of Cal. Lab.Code §§ 204, 210, 218, 510, 1194 and 1198; (3) failure to provide accurate itemized statements in violation of Cal. Labor Code § 226; (4) failure to provide meal periods in violation of Cal. Labor Code §§ 226.7 and 512; (5) violation of the Fair Labor Standards Act, 29 U.S .C. § 216 ("FLSA"); and (6) Labor Code Private Attorney General Act. Cal. Labor Code § 2698. Plaintiff alleges that Defendant failed to pay him and other employees for the actual number of hours worked (regular and overtime) during the class period. Plaintiff specifically contends that he and other employees were instructed not to record their overtime hours and that they were required to work during meal breaks to complete mandatory training which could not be completed at any other time. FAC.

The Court held a telephonic case management conference ("TCMC") for this matter on September 25, 2009. After the TCMC, the Court ordered the parties to distribute a *Belaire* notice permitting members of the putative class to opt out of having their identifying information disclosed to Plaintiff's counsel on or before October 30, 2009. Doc. 15. On October 29, 2009, Plaintiff's counsel called the Court's chambers and alleged that Defendant's counsel was not cooperating with his efforts to comply with the Court's order to distribute the *Belaire* notice. A follow up TCMC held on October 30, 2009, revealed that the heart of the dispute is whether the *Belaire* notice should be sent to Tellers, Senior Tellers and Sales and Service Specialists who work or worked at the two Bank of America branch offices where Plaintiff worked, or to employees in those positions who work or worked at any Bank of America branch office in California.

Plaintiff alleges that Defendant has a company-wide policy and practice instituted by Defendant's corporate office that results in the nonpayment of overtime hours to employees. FAC. Because of this alleged company-wide policy and practice, Plaintiff argues that he is entitled to contact information for Tellers, Senior Tellers and Sales and Service Specialists employed in any Bank of America branch office in California. Doc. 20–1.

***2** Defendant, on the other hand, argues that contacting all such employees from every Bank of America branch office in California would be unreasonable, over broad, and unduly harassing to the Defendant and overly intrusive to Defendant's current and former employees. Doc. 23. In support of its position, Defendant notes that the difference

in the number of involved employees varies from less than 100 at the two banks to approximately 27,000 throughout California. Doc. 23. Defendant also asserts that there is no company-wide policy or practice related to the unlawful withholding of overtime payments from employees, and, in fact, provided a written policy requiring the payment of all overtime worked by overtime-eligible associates. Doc. 23, Exhibit 1. Defendant argues that because Plaintiff has failed to provide any evidence supporting his company-wide policy theory, contact information should only be provided for Tellers, Senior Tellers and Sales and Service Specialists who work or worked at the two Bank of America branch offices where Plaintiff worked. Doc. 23.

As will be discussed more fully below, the Court **DENIES IN PART AND GRANTS IN PART** Plaintiff's motion to compel production of contact information of the putative class.

LEGAL STANDARD

The scope of discovery is defined by Rule 26(b), which permits litigants to obtain discovery regarding "any matter, not privileged, that is relevant to the claim or defense of any party ..." Rule 26(b)(1). "Relevant" information includes any information "reasonably calculated to lead to the discovery of admissible evidence," and need not be admissible at trial. *Id.* District courts enjoy broad discretion both to determine relevancy for discovery purposes, *see Hallett v. Morgan,* 296 F.3d 732, 751 (9th Cir.2002), and to limit discovery to prevent its abuse, see Rule 26(b)(2). To the extent that the discovery sought is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive," the court is directed to limit the scope of the request. Fed.R.Civ.P. 26(b)(2). Limits should also be imposed where the burden or expense outweighs the likely benefits. *Id.* How and when to limit discovery in this way, however, remains within the court's discretion.

The term *Belaire* notice comes from *Belaire–West Landscape Inc. v. Superior Court,* 149 Cal.App.4th 554, 57 Cal.Rptr.3d 197 (2007). It refers to an opt-out notice that was sent to potential class members in *Belaire* to inform them of the lawsuit and explain that if they did not want to have their contact information sent to plaintiff's counsel, they could complete and return an enclosed post card. *Id* . at 557, 57 Cal.Rptr.3d 197. The notice was found to be appropriate where the trial court "properly evaluated the rights and interests at stake, considered the alternatives, balanced the competing interests, and permitted the disclosure of contact information regarding Belaire–West's current and former employees unless, following proper notice, they objected in writing to the disclosure." *Id.* at 562, 57 Cal.Rptr.3d 197. The notice was not found to present a serious invasion of potential class members' privacy interests. *Id.*

DISCUSSION

***3** The parties already have agreed [1] on all aspects of the *Belaire* notice with the exception of whether the notice should be sent to the designated employees who work or worked at the two Bank of America branch offices where Plaintiff worked, or at any Bank of America branch office in California. Doc. 19. Therefore, Plaintiff's right to a portion of the contact information he is seeking is not at issue. What remains to be determined, is whether Plaintiff's desire to compel production of contact information for all of Defendant's California branch offices should be limited at this juncture because it is overly broad, burdensome and does not outweigh the likely benefits.

1 In its opposition, Defendant raises a concern that there is no longer an agreement between the parties on which employee positions and what time period should be covered by the *Belaire* Notice. Initially, as discussed in the October 30, 2009 Telephonic Case Management Conference, the parties had reached an agreement on all aspects of the *Belaire* Notice with the exception of whether the notice should be sent to two branch offices or to any branch office in California. Doc. 19. This agreement established the time frame of the Belaire notice from January 31, 2007 to present day. Doc. 23–3, Exhibit 3. The parties now indicate that there has been some movement away from the previous agreements. Doc. 23. However, the Court has considered the facts and finds that the previous agreement was appropriate. Therefore, the *Belaire* notice will be sent to employees and former employees working as Tellers, Senior Tellers and Sales and Service Specialists at any time between January 31, 2007 and the present.

While courts generally allow plaintiffs to obtain discovery from defendants related to class certification issues, plaintiffs bear the burden of showing that such discovery is likely to produce substantiation of the class allegations. *Mantolete v. Bolger,* 767 F.2d 1416, 1424 (9th Cir.1985). If a plaintiff is

unable to meet this burden, a court's refusal to allow discovery is not an abuse of discretion. *Id.*

Here, Plaintiff supports his request for state-wide contact information by providing a declaration stating that he was told by the manager at the West Glendale branch office where he worked, and the manager at the Los Angeles branch office where he is currently working, that Defendant is shorthanded and cannot pay overtime wages due to a shortage of Full Time Equivalent Hours ("FTE"). Doc. 20–2. Plaintiff also states that he observed that other Sales Service Specialists, Tellers and Personal Bankers at the two branch offices where he has worked, were subjected to the same violations of the California Labor Code that he experienced. *Id.* Finally, Plaintiff's declaration states that he spoke with or knew of at least five other Bank of America employees in different branch offices in California who did not receive payment for overtime hours worked. *Id.* Two of those employees worked as Personal Bankers in the West Glendale branch office where Plaintiff used to work. One of the employees was a Teller in the Los Angeles branch office where Plaintiff is currently working, and the other two employees held positions that Plaintiff cannot recall and worked in branch offices in California where Plaintiff never worked. Additionally, Plaintiff has submitted copies of two class action complaints (*Harris v. Bank of America Corp.*, Case No. BC357822 and *Anderson v. Bank of America Corp.*, Case No. BC350582) filed in Los Angeles against Defendant alleging similar California Labor Code violations.

Defendant responded to Plaintiff's evidence of an alleged companywide policy and practice of unlawfully withholding overtime payments by providing copies of its time keeping policy, manager and associate training materials regarding timekeeping compliance, screen shots of the time entry system, and Plaintiff's timekeeping compliance training record. Doc. 23, Exhibits 1–5. Defendant also provided a declaration from its Vice President and Human Resources Manager, Rai Otero, stating that Defendant's corporate policies require that all overtime eligible employees be paid for all hours actually worked, and that FTEs do not impact or modify Defendant's corporate timekeeping policies. Doc. 23–2. Defendant also provided a declaration from another of its Vice Presidents, Lori McCarthy Lopez, stating that Defendant's timekeeping policy is included in training materials for managers and overtime eligible employees in all of the Bank's retail banking centers in California, and that retail bank managers in California are required to take a course on the matter annually. All associates in California are also required to complete annual timekeeping training. Doc. 23–1.

***4** At this stage in the proceedings, the Court finds that the scope of the *Belaire* notice proposed by Plaintiff is overly broad and unduly burdensome. Plaintiff has not provided sufficient facts to support his claim of a company-wide policy and practice by Defendant to withhold regular and overtime wages from its employees, especially in light of Defendant's evidence of contrary company-wide policies. While the allegations in Plaintiff's declaration support his request for the contact information of the approximately 100 current and former employees in the branch offices where Plaintiff worked, it does not support his request for the contact information of the approximately 27,000 such employees located throughout California. *See, e.g., Tracy v. Dean Witter Reynolds*, 185 F.R.D. 303, 305–313 (D.Col.1998) (denying plaintiff's request for discovery from other offices where evidence did not substantiate plaintiff's allegations that class extended beyond local office and stating "[c]lass plaintiffs are not permitted to send notices to prospective members of a class if the only evidence of a class action consists of the bare allegations of the complaint, or of counsel.") Additionally, the *Harris* and *Anderson* complaints that Plaintiff provided are not sufficient to show that broader discovery will substantiate his class allegations. *See Mantolete*, 767 F.2d at 1425 (finding that plaintiff's submission of two additional complaints filed against defendant in other locations with similar claims did not "provide a likelihood that discovery measures will produce persuasive information substantiating class allegations." (quoting *Doninger v. Pacific Northwest Bell Inc.*, 564 F.2d 1304, 1313 (9th Cir.1977))).

CONCLUSION

Based on the Court's review of the briefing submitted, and for the reasons set forth herein, Plaintiff's motion to compel production of contact information of the putative class is **DENIED IN PART AND GRANTED IN PART** as follows:

(1) Plaintiff's request for an order compelling the production of contact information for Tellers, Senior Tellers and Sales and Service Specialists employed in the two Bank of America branch offices where Plaintiff worked (6400 San Fernando Road, Glendale, California and 4510 Franklin Avenue, Los Angeles, California) is **GRANTED;**

(2) Plaintiff's request for an order compelling the production of contact information for Tellers, Senior Tellers and Sales and Service Specialists employed in all Bank of America branch offices in California is **DENIED;** and

(3) **It is further ordered** that the relevant time period is January 31, 2007 to the present.

All Citations

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End of Document

2012 WL 2945473
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

Lisa GARVEY, individually and on behalf of others similarly situated cashiers in the Tulare Kmart store, Plaintiff,
v.
KMART CORPORATION, Defendant.

No. C 11–02575 WHA.
|
July 18, 2012.

ORDER CERTIFYING CLASS, APPOINTING CLASS COUNSEL, AND APPOINTING CLASS REPRESENTATIVE

WILLIAM ALSUP, District Judge.

INTRODUCTION

***1** In this proposed class action involving seats for Kmart cashiers, plaintiff moves for class certification. For the reasons stated below, the motion is **GRANTED IN PART.** This order certifies the following class under Rule 23(b)(3): All persons who, during the applicable statute of limitations, were employed as a Cashier for defendant at its Tulare Kmart store and were not provided with a seat while working the front-end cash registers.

STATEMENT

The background of this action has been described in a prior order (Dkt. No. 68). To sum up, plaintiff Lisa Garvey alleges that defendant Kmart Corporation violated California Wage Order 7–2001(14) by not providing seats to its cashiers. Garvey pursues her Private Attorney General Act claim as a class action, seeking to represent other Kmart cashiers in California. Kmart has approximately 100 retail stores in California. Garvey worked as a seasonal cashier in the Tulare Kmart store for approximately two months in 2010.

Section 14 of California's Industrial Welfare Commission Wage Order 7–2001 states:

> 14. Seats
>
> (A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.
>
> (B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

CAL.CODE REGS. TIT. 8 § 11070(14). California's Private Attorneys General Act of 2004 permits an "aggrieved employee" to institute an action "on behalf of himself or herself and other current or former employees" to collect civil penalties for a violation of any provision of the California Labor Code. CAL. LAB.CODE § 2699(a).

Garvey moves to certify the following class under Rule 23(b)(3): "All persons who, during the applicable statute of limitations [one year], were employed as a Cashier for defendants at their Kmart retail stores (including Big Kmart and Kmart Supercenter) in the State of California and were not provided with a seat while working the front-end cash registers" (Br.3).

ANALYSIS

Pursuant to Rule 23(a), for a named plaintiff to obtain class certification, the court must find: (1) numerosity of the class; (2) there are common questions of law or fact; (3) that the named plaintiff's claims and defenses are typical; and (4) that the representative parties can fairly and adequately protect the interests of the class. In addition to the explicit requirements of Rule 23, an implied prerequisite to class certification is that the class must be sufficiently definite; the party seeking certification must demonstrate that an identifiable and ascertainable class exists. *Xavier v. Philip Morris USA Inc.*, No. C3:10–cv–02067 (N.D. Cal. April 18, 2011) (Alsup, J.). A class can be certified under Rule 23(b)(3) if "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

1. ASCERTAINABILITY.

A. Identifying Cashiers Who Worked Behind the Register.

***2** Garvey has identified an objective and reliable method for obtaining the names of Kmart cashiers working behind the register during the class period at the Tulare Kmart store. Specifically, Kmart's "point of sale" record reasonably identifies which particular cashier worked at a register and for how long each pay period in the Tulare store. The "point of sale" record is a log of when an unique password, which was not used by more than one cashier at the same store during the same time period, was used on a particular register (Grabau Dep. at 114). This information, coupled with employment and scheduling records, can produce a reliable list of Kmart cashiers who worked at registers during the class period at the Tulare Kmart store (*see* Grabau Dep. at 101–02).

Kmart argues that there are flaws with using the "point of sale" record. *First,* there are instances where employees switched passwords with each other if one password malfunctioned (De Ruyter Decl. ¶ 14). *Second,* training passwords were used by multiple trainees (Aparicio Decl. ¶¶ 6, 9; Chavez Decl. ¶ 9). *Third,* the record does not account for time-periods where the cashier left his or her station temporarily to perform other duties but did not log off the register (Grabau Dep. at 103). *Lastly,* plaintiff Garvey agreed that she would not be using the "point of sale data" at the class certification stage (Dkt. No. 40 at 15; Dkt No. 44). Kmart's arguments are unpersuasive.

At this stage, Garvey does not need to submit electronic records with Kmart's suggested level of precision, such as accounting for times of malfunctioning equipment or accounting for instances of training, in order to reasonably ascertain class members. Instead, Garvey only has the burden to offer a record that is objective and reasonably reliable for the Tulare Kmart store. The point of sale records and electronic scheduling reasonably reflects whether a cashier spent the majority of his or her shift working at a register at the Tulare Kmart store. Also, Garvey has not used "point of sale data" at the class certification stage in violation of her agreement with Kmart. Instead, Garvey has only pointed out that the record exists and can be used to identify class members after the class is certified.

B. Cashiers Who Were Not Provided With Seating.

Garvey has limited her proposed class to cashiers "who were not provided with a seat while working the front-end cash registers" (Br.3). Kmart argues that Garvey cannot met her burden of identifying which cashiers were not provided with a seat. At this stage, Garvey does not need to ascertain whether each individual cashier was provided with a seat because there is substantial evidence that Kmart had *a uniform policy* of not providing seats to its cashiers at its Tulare Kmart store.

"Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment ." *Brinker Restaurant Corp. v. Superior Court,* 53 Cal.4th 1004, 1033 (2012). Even if there is an express policy in compliance with labor regulations, "an employer may not undermine a formal policy [that is in compliance with labor regulations] by pressuring employees to perform their duties in ways that [violate the regulations]." *Id.* at 1040. Plaintiff needs to offer "substantial evidence" of the company-wide policy or practice that violated regulations. *Id.* at 1051–52.

***3** Here, there is substantial evidence that Kmart had a common policy of not providing seats to its cashiers in its Tulare Kmart store. Indeed, Kmart and its own witnesses have repeatedly argued that they did not believe that it was good business for cashiers to have seats (Opp. at 8; Johnson Dep. at 14–15, 53–54, Ortega Decl. ¶ 22.). Aimee Grabau, Kmart's director of human resources in California, testified: "We don't provide seats for our associates up at the front and we don't certainly encourage that our associates are using seats up at the front to perform their job" (Grabau Dep. at 42). Kmart's job description for cashiers stated that the "physical demands" for the position would require "constant" standing and "never" sitting (Righetti Decl. Exh. 5). There is also evidence that requests for seats by cashiers were denied (*see, e.g.,* Dkt. No. 57–3a at ¶¶ 4, 5; Dkt. No. 57–3b at ¶ 4).

Kmart argues that it had a policy, allegedly communicated to all California store managers, that its cashiers could receive seating upon request (Grabau Dep. at 128–29). While this may be true, there is little evidence showing that this purported policy was actually told to cashiers in the Tulare store. At least some Kmart cashiers did not know seats were available (*see, e.g.,* Dkt. No. 57–3a at ¶¶ 4, 5; Dkt. No. 57–3b at ¶ 4). And three Kmart managers did not know about this policy during the class period (Dkt. No. 57–6 at 10–11; Dkt. No. 57–7 at 13–15, Dkt. No. 57–8 at 15). Plaintiff Garvey, who worked in the Tulare store, did not know about

this policy. At least for the Tulare store, at this stage, there is an ascertainable class.

2. RULE 23(a)(1): NUMEROSITY.

After oral arguments, Garvey submitted a statement that there are 71 individuals who were employed as cashiers at the Kmart Tulare store during the class period. This order finds that the number of class members is so numerous that joiner would be impracticable.

3. RULE 23(a)(2) AND (3): COMMONALITY AND TYPICALITY; AND RULE 23(b)(3).

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.
>
> *Wal–Mart Stores, Inc. v. Dukes,* 131 S.Ct. 2541, 2551 n. 5 (2011). The class members' "claims must depend upon a common contention.... That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2551.

***4** The common issue is whether Kmart's policy of not providing seats to its cashiers in the Tulare store violates Section 14 because the nature of a Kmart cashier's work reasonably permits the use of seats. There is substantial evidence that Kmart cashiers spent the majority of their time working behind registers during the class period (*see, e.g.,* Righetti Decl. Exh. 5; Blake Dep. at 23; Richardson Dep. at 16). It is undisputed that common tasks for every Kmart cashier working at his or her register included (1) scanning items, (2) placing unwanted items in a bin below the cash register or bringing it to the customer service desk, (3) removing security devices that may be on an item, (4) watching for theft by looking at the bottom of customers' carts, (5) placing items into a plastic bag, and (6) handing bags to customers or placing loaded bags on a counter (Opp. at 4–5).

A trier of fact could determine whether these common tasks could reasonably be performed while seated, and such a determination would apply to all Kmart cashiers at its Tulare store. The controversy is appropriate for class treatment because Kmart had a common policy of not providing seats. A class action is superior to other methods for fairly and efficiently adjudicating the controversy because it would not be cost-effective for each Kmart cashiers to bring individual lawsuits, given that each cashier only has a relatively small financial interest. Plaintiff Garvey's claim is typical of the class claim because she was a Kmart cashier at the Tulare store, performed tasks common to Kmart cashiers, and was not provided with a seat.

Kmart counters by arguing that there are too many individual inquiries: (1) the variation in physical stature of each cashier, (2) the variation in cash-register configurations, (3) the time spent at the front-end cash register versus performing other duties in the store, and (4) the amount of damages due each cashier if liability is found. This order finds that none of these minor variances are sufficient to defeat class certification when Kmart cashiers spent the majority of their time performing common tasks at their registers, and Kmart has a common policy of not providing seats.

First, Kmart argues that each cashier's physical stature will be relevant in determining whether the nature of the work permits seating for any particular cashier. This argument is unpersuasive. One can always dream up a scenario where an employee, due to his or her exceptional situation, will not benefit from a particular labor regulation. This type of general speculation alone cannot defeat class certification; tangible and plausible examples of individual issues need to be given. Here, Kmart offers only one example of how a cashier's physical stature will affect whether the nature of a Kmart cashier's work permits seating: ergonomic research indicates that women should not handle more than 6.6 lbs while seated and men should not handle more than 11 lbs while seated (Fernandez ¶ 28). This example is unpersuasive. Even with suitable seating, Kmart cashier would not be forced to sit while handling large and heavy items. Cashiers would be able to stand if they thought they needed more leverage to lift heavier items. [1]

1 Kmart's ergonomic expert opines that some cashiers would be too "lazy" to follow instructions to stand to lift heavier items (Fernandez ¶ 21). This testimony is stricken because it is beyond the scope of the ergonomic expert's expertise.

> The remainder of the expert report offers only general principles that age, gender, and ethnicity affect a person's physical strength and range of motion; and that physical strength and range of motion would affect the ergonomics of physical labor. These general principles, without tying these opinions to tangible examples for Kmart cashiers, are insufficient to show that individual inquiries outweigh the predominate issue of whether the common duties for all Kmart cashiers permits seating.

***5** Kmart argues that there are "at least five different configurations for the checkout register areas in the nearly 100 California Kmart stores," and the configuration would affect whether there could be suitable seating. This argument is unpersuasive at this stage. For the purposes of this order, only cashiers working in the Tulare Kmart store will be in the certified class. The Tulare store likely had the same or very similar configurations at all registers; there is no evidence to the contrary.

Kmart argues that there are individual issues of how long each cashier spent behind his or her register because cashiers can be away from their register for the majority of a shift, week, or pay period. Kmart is correct that there is likely to be variation as to how long each cashier spent behind a register for any given shift. However, these time-periods not behind a register were the exceptions, and not the norm, for Kmart cashiers during the class period. The normal expectation was for Kmart cashiers to work behind registers (*see, e.g.,* Righetti Decl. Exh. 5; Blake Dep. at 23; Richardson Dep. at 16). When deciding the controversy of whether "the nature of the work" permits suitable seating, it is predominately more important for the trier of fact to consider the common tasks performed by all Kmart cashiers while behind the register, where cashiers spent the *majority* of their working hours during the class period, instead of time away from the register.

Lastly, Kmart argues that there are individual issues about the amount of statutory damages due if liability is found. A violation of Section 14 may subject an employer to a penalty of up to $100 per person, per pay period, for the initial violation, and $200 per person, per pay period, for each subsequent violation. CAL. LAB.CODE § 2699(f)(2). Kmart argues that only individual inquiries can determine whether any cashier logged enough time behind a register, or actually requested and received a seat, for each pay period. This argument is unpersuasive. As discussed, Kmart had a common policy of not providing seats and the question of whether this policy violated Section 14(A) is amenable to class adjudication. California labor law is clear that "[a]s a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." *Brinker Restaurant Corp. v. Superior Court,* 53 Cal.4th 1004, 1022 (2012); *see also Hilao v. Estate of Marcos,* 103 F.3d 767, 782 (9th Cir.1996) (approving the use of a statistical sample of the class claims to determine damages). So too here. The issue of damages can arguably be resolved through sampling after the common issue of liability is resolved.

4. RULE 23(a)(4): ADEQUACY OF CLASS COUNSEL.

Rule 23(a)(4) requires that the representative plaintiff and class counsel fairly and adequately represent the interests of the class. Plaintiff Garvey's typicality has already been discussed. Proposed class counsel, Attorneys James Clapp, Kevin McInerney, and Matthew Righetti, have many years of experience prosecuting California wage and hour class actions (Clapp Decl. ¶ 2, McInerney Decl. ¶¶ 2–5, Righetti Decl. ¶¶ 2–6). They will fairly and adequate represent the interests of the class.

***6** Kmart argues that class counsel is inadequate because this action is just one of many "suitable-seating" suits (allegedly 15 in total) they concocted against California retailers, and that counsel afterward found a patsy plaintiff against Kmart. In support, Kmart cites the deposition of Miles Locker, plaintiff's purported expert witness on the history of California's labor law, who stated that he, Attorney Righetti, and

> some other attorneys ... were having a discussion just batting around some ideas about, you know, different areas of law that, you know, might be developed further, and they invited me to this discussion for any ideas that I might have.... I said that, ... one of the provisions of the IWC orders that [Department of Labor Standards Enforcement] never had the resources to really enforce were the seating requirements, and that I thought now with the ... existence of PAGA, that it would be an area that could be enforced by private litigants

(Locker Dep. at 22–29). Kmart also cites the deposition of plaintiff Lisa Garvey, who testified that she only

contemplated filing suit against Kmart *after* Attorney Righetti sent her a letter (Garvey Dep. at 14–17). Without more, this evidence is insufficient to show that class counsel constructed this lawsuit before they had a plaintiff, are the driving force behind the lawsuit, and only have a puppet plaintiff. For example, there is no evidence that plaintiff Garvey is unfamiliar with details of this lawsuit. And while neither side gives detailed information about Attorney Righetti's solicitation of plaintiff Garvey (nor appends the letter/newsletter received by Garvey), Kmart does not argue that Attorney Righetti violated California Rule of Professional Conduct Rule 1–400(B), which prohibits solicitation delivered in person or by telephone. Attorney Righetti submits his declaration that the newsletter received by plaintiff Garvey was in compliance with Rule 1–400 (Righetti Reply Decl. ¶ 3). To sum up, there is insufficient evidence showing that class counsel has acted improperly.

5. CLASS CERTIFICATION FOR ONLY CASHIERS WORKING IN THE TULARE STORE AND NOT STATEWIDE.

This order only certifies a class comprised of cashiers working in the Tulare Kmart store, and not statewide for all California Kmarts, as plaintiff had requested. As discussed with counsel at the hearing, there are possible problems of manageability concerning statewide certification. This certified class of cashiers working in the Tulare Kmart store will be tried to completion, through trial and subject to decertification if warranted. This will illuminate the extent to which there are genuine individual issues that preclude class certification on a statewide basis. Therefore, this order holds in abeyance the extent, if at all, any other Kmart stores will be certified.

CONCLUSION

For the reasons stated, Garvey's motion for class certification is **GRANTED IN PART.** This order certifies the following class under Rule 23(b)(3) to pursue a claim for violation of Wage Order 7–2001(14) against Kmart:

> ***7** All persons who, during the applicable statute of limitations, were employed as a Cashier for defendant at its Tulare Kmart store and were not provided with a seat while working the front-end cash registers.

This class includes, without limitation, the 71 individuals identified in plaintiff's list of Tulare Kmart cashiers during the class period (Dkt. No. 89). The class definition shall apply for all purposes, including settlement. This order **APPOINTS** Lisa Garvey as class representative. Pursuant to Rule 23(g), this order **APPOINTS** Attorneys James Clapp, Kevin McInerney, and Matthew Righetti as class counsel.

Counsel shall have until **JULY 31** to vet the names listed in plaintiff's statement (Dkt. No. 89) as being included in the class and to advise the Court of any and all corrections. Also by **JULY 31,** counsel shall submit an agreed-on form of class notice and plan of dissemination and time table.

IT IS SO ORDERED.

All Citations

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United States District Court,
S.D. California.

Philip MARTINET, Individually, On Behalf of All Others Similarly Situated, and on Behalf of the General Public, Plaintiff,
v.
SPHERION ATLANTIC ENTERPRISES, LLC, A Delaware Limited Liability Company, Defendants.

Civil No. 07cv2178 W(AJB).
|
June 23, 2008.

Attorneys and Law Firms

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Order Granting In Part and Denying In Part Defendant's Motion for Protective Order [Doc. No. 22]

ANTHONY J. BATTAGLIA, United States Magistrate Judge.

*1 The Defendants filed a motion for protective order seeking to limit the scope of discovery sought by the Plaintiff, arguing that the Plaintiff is not entitled to state-wide discovery absent a showing of Rule 23 Class-Action requirements. The Plaintiff has filed an opposition arguing that the Defendants' motion is premature and without merit. The Defendants filed a reply. This motion was taken under submission without oral argument pursuant to Local Rule 7.1(d)(1).

Background

Plaintiff, Philip Martinet, a former non-exempt employee of the Defendants,[1] brings this employment action alleging violations of the California Labor Code on behalf of himself and Defendants' other current and former California hourly, non-exempt employees. Plaintiff also brings this action on behalf of the State of California pursuant to the Labor Code Private Attorneys General Act of 2004 ("PAGA") (Labor Code § 2698 *et seq.*) and on behalf of the general public pursuant to California's Unfair Competition Law ("UCL") (Bus. & Prof.Code § 17200 *et seq.*). Plaintiff's First Amended Complaint alleges nine causes of action under the California Labor Code and UCL: (1) Unlawful deductions of earned wages in violation of California Labor Code §§ 204 & 221; (2) Failure to pay overtime in violation of California Labor Code §§ 510 & 1194; (3) Failure to provide meal breaks or compensation in lieu thereof in violation of California Labor Code §§ 226.7, 512; Cal.Code Reg., Title 8 § 11040); (4) Failure to provide rest periods or compensation in lieu thereof in violation of California Labor Code §§ 226.7; Cal.Code Reg., Title 8 § 11040); (5) Failure to reimburse for reasonable business expenses in violation of California Labor Code § 2802; (6) Failure to provide properly itemized wage statements in violation of California Labor Code § 226, 226.3; (7) Failure to pay compensation at the time of termination in violation of California Labor Code §§ 201-203; (8) Unlawful and unfair business practices (California Business & Professional Code § 17200 *et seq.*); and; (9) Labor Code Private Attorney General Act of 2004 (California Labor Code § 2698 *et seq.*).

1 The Plaintiff was employed by Defendant Spherion Atlantic Enterprises LLC from July 1, 2007 until the date of separation of employment on August 18, 2007.

With regard to these claims, Plaintiff seeks to represent a class and subclass respectively defined as: (1) All current and former California-based, hourly, non-exempt employees of Defendant Spherion Atlantic Enterprises LLC who were employed from September 25, 2003 until the present (hereinafter, "the class"); and (2) All current and former California-based, hourly, non-exempt employees of Defendant Spherion Atlantic Enterprises LLC who separated or terminated their employment with Spherion between September 25, 2004 and the present (hereinafter, "the sub-class").

Discussion

The Defendant has filed this moion for protective order arguing that Plaintiff's pre-class certification discovery seeking information relating to thousands of its state-wide employees at hundreds of different offices and franchises is unreasonably broad, unduly burdensome, and irrelevant to certification of a class common to the Plaintiff. The Defendant seeks the protective order, not with regard to any specific request, but rather with regard to the scope of discovery sought by the Plaintiff. The Defendant contends that the Plaintiff has not met his burden of demonstrating that he has satisfied the requirements of Rule 23 or that the discovery sought is likely to substantiated his class allegations. The Defendant also argues that the statewide discovery sought by Plaintiff with regard to Defendant's current and former California-based, hourly, non-exempt employees is irrelevant and over broad because Spherion has over fifty (50) offices in California, that place thousands of employees at tens of thousands of different job assignments in different industries throughout the state that are subject to fifteen (15) different California Wage orders. The Defendant argues that the roughly 10,000 employees covered by Plaintiff's class definition during the four year period specified, cannot be adequately represented by the Plaintiff, because each of the different positions has its own unique set of practices, procedures and operative employment documents based upon the position's job description and the particular industry or area of employment.

*2 Alternatively, the Plaintiff argues that Defendant's request for a protective order is premature and without merit because the Defendant has failed to establish good cause under Rule 26(c) and the Plaintiff is entitled to the requested discovery, which is relevant to certification of the class.

Upon review of the document requests and interrogatories at issue in this motion in light of the First Amended Complaint and the arguments set forth by the parties, the Court finds the relevant time period, as well as the scope of the requests as currently set, to be over broad and burdensome at this stage in the proceedings. First, with regard to the relevant time period set by the Plaintiff for these requests, the Court finds the time period of September of 2003 to present to be excessive in light of the Plaintiff's relevantly short period of employment with the Defendant, which lasted from July 1, 2007 until August 18, 2007. The Court finds that the Plaintiff has failed to demonstrate good cause warranting discovery three years prior to his employment. In light of Defendant's arguments that responding to Plaintiff's request would be unduly burdensome requiring 24,800 man hours at an estimated expense of over $550,000.00, the Court hereby GRANTS IN PART Defendant's motion for protective order, limiting the relevant time period for Plaintiff's requests to January 1, 2007 to December 31, 2007.

With regard to the scope of Plaintiff's requests, which seek discovery related to all California-based, hourly, non-exempt employees, the Court finds that the Plaintiff has failed to demonstrate good cause warranting this type of expansive discovery of Defendant's roughly 10,000 employees at Defendant's 50 offices throughout the State of California. As such, the Court hereby GRANTS IN PART Defendant's motion for protective order, limiting the scope of Plaintiff's requests to Defendant's San Diego County office where the Plaintiff was employed. If, upon review of the documents and responses produced by the Defendant in response to these request, the Plaintiff is able to evidence support for the allegations set forth in the First Amended Complaint, the Plaintiff may seek leave of this Court to expand the scope of discovery beyond that which is set forth in this order.

Conclusion

For the reasons set forth above, the Court hereby GRANTS IN PART Defendant's motion for protective order limiting the relevant time period to 2007 for Plaintiff's requests and limiting the scope of Plaintiff's requests to Defendant's San Diego County office where the Plaintiff was employed. The Defendant's motion for protective order is DENIED IN PART with regard to Plaintiff's Request for Production of Documents Nos. 1, 2, 9, 14, 22-24, since these requests deal solely with the Plaintiff and are relevant when limited to the 2007 time period set forth above. The Defendant shall provide responses to the remainder of the Plaintiff's requests in compliance with the limitations set forth in this Order ***on or before July 11, 2008.***

*3 IT IS SO ORDERED.

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United States District Court, N.D. California.

Elizabeth Ortiz, et al., Plaintiffs,
v.
CVS Caremark Corporation, et al., Defendants.

No. C–12–05859 EDL
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|
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Attorneys and Law Firms

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ORDER GRANTING DEFENDANTS' MOTION TO STRIKE

ELIZABETH D. LAPORTE, United States Chief Magistrate Judge

***1** Plaintiffs filed this case as a putative class action seeking damages for unpaid off-the-clock work for inter-store merchandise deliveries and mileage reimbursement under California labor statutes. Plaintiffs also brought a claim based on California's Private Attorney General Act ("PAGA"), Cal. Labor Code section 2699(a). The Court previously denied Plaintiffs' Motion for Class Certification, but Plaintiffs wish to proceed with a representative action under PAGA on behalf of themselves and other aggrieved employees who performed such inter-store transfers. Defendants have moved to strike the PAGA claim. For the reasons stated at the hearing and in this Order, Defendants' Motion to Strike is granted.

Legal Standard

A court may "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Pro. 12(f). The purposes of a Rule 12(f) motion is to avoid spending time and money litigating spurious issues. *See Fantasy, Inc. v. Fogerty,* 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds,* 510 U.S. 517 (1994).

Discussion

Under PAGA, an "aggrieved employee" may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. *See* Cal. Lab.Code, § 2699(a). Of the civil penalties recovered, seventy-five percent goes to the Labor and Workforce Development Agency, with the remainder to the "aggrieved employees." *Id.* § 2699(I).

Here, Plaintiffs allege that they brought the PAGA claim on behalf of themselves and all other current or former employees of Defendants based on alleged violations of the Labor Code. FAC ¶ 92. Plaintiffs allege that Defendants failed to pay at least minimum wage for all hours worked in violation of Labor Code sections 1194, 1198; failed to pay overtime in violation of Labor Code sections 510, 1194, 1198; failed to provide meal periods in violation of Labor Code section 22 226.7, 512; failed to provide rest periods in violation of Labor Codes section 226.7; failed to indemnify Plaintiffs for business related expenses in violation of Labor Code section 2802; failed to pay Plaintiffs twice each calendar month on designated paydays for all wages earned in violation of Labor Code section 204; failed to pay Plaintiffs who have terminated or will terminate their employment with Defendants prior to entry of judgment in this case all wages owed to them at termination in violation of Labor Code sections 201, 202; and failed to furnish accurate, itemized wage statements in violation of Labor Code section 226(a). FAC ¶ 94. Based on these violations, Plaintiffs allege that they are entitled to civil penalties under PAGA. FAC ¶ 96.

Defendants argue that Plaintiffs' PAGA claim must comply with the representative action requirements in Federal Rule of Civil Procedure 23, and because the Court has denied Plaintiffs' class certification motion, Plaintiffs cannot satisfy Rule 23 as to the PAGA claim. Alternatively, Defendants argue that Plaintiffs' PAGA claim is unmanageable as a representative action and should be dismissed on that basis.

1. Plaintiffs need not satisfy the representative action requirements of Rule 23 in order to maintain their PAGA claim

*2 An aggrieved employee suing in a representative capacity under PAGA is not required to satisfy class action requirements if the action is brought in state court. *See Arias v. Superior Court,* 46 Cal.4th 969, 980 (2009). However, the Ninth Circuit has yet to decide whether plaintiffs bringing a PAGA claim in federal court must satisfy the requirements of Rule 23, and the district courts in California are split on the issue. Decisions finding in favor of the application of Rule 23 rely primarily on a determination that PAGA is a procedural statute rather than a substantive one, and therefore, is not determinative of the procedures required in federal court. *See Thompson v. APM Terminals Pacific Ltd.,* 2010 WL 6309364 (N.D.Cal. Aug. 26, 2010); *see also Halliwell v. AT Solutions,* 2013 U.S. Dist. LEXIS 166583, at *9–10 (S.D.Cal. Nov. 7, 2013); *Ivey v. Apogen Techs., Inc.,* 2011 WL 3515936 (C.D.Cal. Aug. 10, 2011); *Adams v. Luxottica U.S. Holdings Corp.,* 2009 WL 7401970 (C.D.Cal. July 24, 2009).

Other decision have held that PAGA claims need not meet federal class action requirements because of the distinctions between a PAGA representative action and a true class action. *See Willner v. Manpower, Inc.,* 2012 U.S. Dist. LEXIS 62227, at *25–26 (N.D.Cal. May 3, 2012) (reconsidering ruling made in *Thompson:* "This Court had previously sided with the minority of courts which found that PAGA claims had to satisfy the class action requirements of Rule 23. However, upon further consideration and review of the authority subsequent to the Court's opinion, the Court reconsiders its prior position.... The Court finds that the reasoning of these courts which have determined that representative PAGA claims need not be brought as class actions is persuasive. PAGA claims are fundamentally different from class actions."); *Moua v. International Business Machines Corp.,* 2012 U.S. Dist. LEXIS 11081, at *10–11 (N.D.Cal. Jan. 31, 2012) ("Having reviewed the relevant case law, this court is persuaded to find that PAGA plaintiffs are not required to meet the class action standard contained in Rule 23. As other district courts have observed, PAGA transcends the definition of what is simply procedural. The statute's plain purpose is to protect the public interest through a unique private enforcement process, not to allow a collection of individual plaintiffs to sue the same defendant in one consolidated action for the sake of convenience and efficiency. Comparing PAGA to a statute or rule of procedure which merely directs the fine details of litigation unfairly minimizes this purpose."); *Sample v. Big Lots Stores, Inc.,* 2010 WL 4939992 (N.D.Cal. Nov. 30, 2010) ("[A] PAGA claim serves to vindicate the public through the imposition of civil penalties, as opposed to conferring a private benefit upon the plaintiff and the represented employees."); *Ochoa–Hernandez v. CJADER Foods, Inc.,* 2010 WL 1340777 (N.D.Cal. Apr. 2, 2010) (emphasizing the distinctions between class actions and PAGA claims); *see also Molina v. Dollar Tree Stores, Inc.,* 2013 U.S. Dist. LEXIS 138642, at *32 (C.D.Cal. Aug. 9, 2013); *Pedroza v. PetSmart, Inc.,* 2013 U.S. Dist. LEXIS 53794, at *49–50 (C.D.Cal. Jan. 28, 2013); *Alcantar v. Hobart Servs.,* 2013 U.S. Dist. LEXIS 5443, at *7–8 (C.D.Cal. Jan. 14, 2013); *Gonzalez v. Millard Mall Servs., Inc.,* 281 F.R.D. 455, 469 (S.D.Cal.2012); *McKenzie v. Federal Express Corp.,* 765 F.Supp.2d 1222, 1234 (C.D.Cal. Apr. 14, 2011); *Cardenas v. McLane Food Service, Inc.,* 2011 WL 13126 (C.D.Cal. Jan. 31, 2011); *Mendez v. Tween Brands, Inc.,* 2010 WL 2650571 (E.D.Cal. July 1, 2010); *Machado v. M.A.T. & Sons Landscape, Inc.,* 2009 WL 2230788 (C.D.Cal. July 23, 2009). This Court agrees with the majority of decisions in this district that Plaintiffs need not satisfy the Rule 23 requirements in order to bring their PAGA claim.

*3 The recent Ninth Circuit case, *Baumann v. Chase Investment Servs. Corp.,* No. 12–55644 (9th Cir. Mar. 13, 2014), supports the distinction between PAGA and Rule 23 class actions, although it does not decide the issue. *Id.,* slip op. at 15 ("We do not today decide whether a federal court may allow a PAGA action otherwise within its original jurisdiction to proceed under Rule 23 as a class action. We hold only that PAGA is not sufficiently similar to Rule 23 to establish the original jurisdiction of a federal court under CAFA."). Following an overview of PAGA, the *Baumann* court concluded that "a PAGA suit is fundamentally different than a class action." *Id.,* slip op. at 13 (quoting *McKenzie v. Fed. Express Corp.,* 765 F.Supp.2d 1222, 1233 (C.D.Cal.2011), which used that reasoning to hold that Rule 23 did not apply to PAGA claims in federal court). The court also noted that the nature of PAGA penalties is "markedly different than damages sought in Rule 23 class actions." *Id.* In conclusion, the *Baumann* court stated that "Rule 23 and PAGA are more dissimilar than alike. A PAGA action is at heart a civil enforcement action filed on behalf of and for the benefit of the state, not a claim for class relief." *Id.,* slip op. at 14.

Defendant's citation to *Urbino v. Orkin Servs. of Cal.,* 726 F.3d 1118 (9th Cir. 2013) does not compel a different result.

Urbino did not address the interplay between Rule 23 and PAGA, or the obligation of a plaintiff bringing a PAGA claim to comply with Rule 23. Instead, *Urbino* addressed the question of whether the recoveries at issue in the PAGA claim could be aggregated to meet the amount in controversy requirement for diversity jurisdiction. The *Urbino* court held that the recoveries could not be aggregated, so the trial court lacked jurisdiction. In addition, *Urbino* did not accept or reject the California Supreme Court's interpretation of PAGA in *Arias*. Further, as later cases have pointed out, *Urbino* only addressed diversity jurisdiction, whereas this case was brought under the federal Class Action Fairness Act. *Cf. Pagel v. Dairy Farmers of Am., Inc.*, 2013 U.S. Dist. LEXIS 176273, at 14, 17 (C.D.Cal. Dec. 11, 2013) (noting that *Urbino* was "a diversity class action, not a CAFA case," and that "the Ninth Circuit's decision in *Urbino* addressed the aggregation question only in the context of diversity jurisdiction, not in the context of CAFA."); *Willner*, 2012 U.S. Dist. LEXIS 62227, at *24–25 ("Since PAGA plaintiffs neither represent the rights of a class nor recover damages, a PAGA claim neither purports to be a class action nor intends to accomplish the goals of a class action. It is not brought "on behalf of all [class] members," so it is does not fall under the terms of Rule 23. Instead, a PAGA claim is a private law enforcement action designed to further the reach of the LWDA."). Moreover, *Urbino* focused on the fact that the primary benefit of a PAGA claim would inure to the state, which was not a citizen for diversity purposes—a distinction reinforced in *Baumann*. The *Urbino* court did not extensively opine on the nature of PAGA in particular, nor did it specifically reject the law enforcement nature of a PAGA claim.

2. Plaintiffs' PAGA claim is dismissed as unmanageable

Defendants argue that Plaintiffs' PAGA claim is unmanageable as a representative action and therefore should be dismissed, although Defendants conceded at the hearing that they had not found any federal cases dismissing a PAGA claim as unmanageable. Plaintiffs argue generally that PAGA claims are routinely managed by trial courts, and that plaintiffs often rely on surveys or statistical data in PAGA cases. While Plaintiff referred to cases in which courts allowed the use of statistics or surveys to prove damages, they could not point to any case that allowed such proof of liability, as Plaintiffs propose to do here. [1] Moreover, in many of the cases on which Plaintiffs rely, the burden of proof was on the defendant to counter liability, for example, where the defendant had to demonstrate that it kept adequate records to defeat a PAGA claim. *See Alcantar v. Hobart Serv.*, 2013 U.S. Dist. LEXIS 5443, at *9 (C.D.Cal. Jan. 14, 2013). Here, however, Plaintiffs do not allege that Defendants failed to keep records that were legally required to be kept, nor do Plaintiffs otherwise shift the burden of proof to Defendants. Therefore, manageability issues are magnified in this case.

1 The California Supreme Court granted review of *Duran v. U.S. Bank Nat'l Ass'n*, 203 Cal.App.4th 212 (2012), *review granted*, 275 P.3d 1266 (2012), regarding the use of statistical data or survey evidence to prove damages in a wage and hour case.

***4** For the reasons set forth below, the Court finds that the PAGA claim in this case is unmanageable. In reaching this decision, the Court does not conclude that PAGA claims are unmanageable in general, but only that the circumstances of this case make the PAGA claim here unmanageable because a multitude of individualized assessments would be necessary. *Cf. Plaisted v. Dress Barn, Inc.*, 2012 WL 4356158, *2 (C.D.Cal. Sept. 20, 2012) ("And unlike class or representative actions seeking damages or injunctive relief for injured employees, the purpose of PAGA 'is to incentivize private parties to recover civil penalties for the government that otherwise may not have been assessed and collected by overburdened state enforcement agencies.' To hold that a PAGA action could not be maintained because the individual assessments regarding whether a violation had occurred would make the claim unmanageable at trial would obliterate this purpose, as every PAGA action in some way requires some individualized assessment regarding whether a Labor Code violation has occurred.").

A. Claim for compensation for off-the-clock work

To prove an off-the-clock claim, a plaintiff must demonstrate that she actually worked off the clock, that she was not compensated for it, and that the employer was aware or should have been aware that she was performing off the clock work. *See York v. Starbucks Corp.*, 2011 U.S. Dist. LEXIS 155682, at *85–86 (C.D.Cal. Nov. 23, 2011). Defendants argue that because the answers to these questions would vary widely among the aggrieved employees, Plaintiffs' PAGA claim seeking penalties for uncompensated off-the-clock work should be dismissed as unmanageable. Plaintiffs argue that if Defendants failed to compensate an employee for work performed off-the-clock, then Defendants are liable to pay a penalty under PAGA.

Plaintiffs' argument assumes too much. Plaintiffs must also prove that Defendants were aware or should have been aware that employees were working off the clock, which is contested. To resolve that issue, Plaintiffs would have to present evidence about each IST to demonstrate that Defendants knew or should have known that an employee had conducted that IST and did so off the clock. Further, Plaintiffs would have to overcome the presumption that the employees were not working off the clock because Defendants did keep records of employees clocking in and out: "[t]hat employees are clocked out creates a presumption they are doing no work, a presumption ... the putative class members have the burden to rebut. As all parties agree, liability is contingent on proof [the employer] knew or should have known off-the-clock work was occurring." *Brinker Restaurant Corp. v. Superior Court,* 53 Cal.4th 1004, 1051 (2013). Proof of this claim would be unmanageable, and could not be done with statistical or survey evidence but only with detailed inquires about each employee claimed to have done so and her manager's knowledge thereof.

B. Claim for unreimbursed mileage

As stated in the Court's order denying class certification, Plaintiffs' unreimbursed mileage claim would require individualized inquiries about whether the claimed expenses were necessary and incurred in direct consequence of the discharge of the employee's duties, whether the employee actually sought reimbursement from Defendants for the expenses and whether Defendants reimbursed the employee for the expense. Order at 18. The threshold question of whether an employee incurred expenses varied widely in this case, as does the question of whether an expense was necessary. *See Grissom v. Vons Cos., Inc.,* 1 Cal.App.4th 52, 58 (1991) (stating that the necessity of an expense under section 2802 is a question of fact that demands an inquiry into what was reasonable under the circumstances). Thus, proof of this claim would be unmanageable.

Plaintiffs argue that Defendants have essentially admitted that they violated the Labor Code by failing to reimburse mileage claims, so Defendants are liable. However, although there is evidence that at least some employees did not get reimbursed, apparently often because they did not apply for mileage, there is evidence that some employees used Defendant's vehicles rather than their own, and even if some employees were not reimbursed for mileage while conducting ISTs in their own vehicles, the Court would still need to receive evidence relating to which employees were affected and which were not.

C. Claim for under-reimbursed mileage

***5** Plaintiffs' third subclass rests on the argument that the IRS standard rate is the presumptively reasonable mileage rate. *See Gattuso v. Harte Hanks Shoppers, Inc.,* 42 Cal.4th 554, 564–66 (2007). As the Court stated in its order denying class certification:

> The *Gattuso* case does not hold that the IRS rate is presumptively reasonable; rather, the *Gattuso* Court stated that the IRS rate was widely used by private business employers and that California Labor Code section 2802 permits use of the IRS rate to calculate expense reimbursement. The *Gattuso* court also noted that there are two ways to compensate for mileage: (1) the actual expense method, which requires employees to keep detailed and accurate records of amounts spent in fuel, maintenance, repairs, insurance, registration and depreciation, apportioned between personal and business use; and (2) the mileage reimbursement method, which requires employees only to submit the number of miles driven to the employer, which then multiplies the work-required miles by a predetermined amount that approximates the per-mile cost of owning and operating a vehicle. *Gattuso,* 42 Cal.4th at 568.

Ortiz, et al. v. CVS Caremark Corp., et al., 2013 WL 6236743, 12 (N.D.Cal. Dec. 2, 2013).

Defendants here used the mileage reimbursement method. Plaintiffs argued at the hearing that because Defendants have the burden of demonstrating that the rate was reasonable, this portion of the PAGA claim is manageable. Plaintiffs' argument, however, is based on a misreading of *Gattuso,* which states in relevant part:

> Because a mileage rate used in the mileage reimbursement method is merely an approximation of actual expenses, the mileage reimbursement

> method is inherently less accurate than the actual expense method.... If the employee can show that the reimbursement amount that the employer has paid is less than the actual expenses that the employee has necessarily incurred for work-required automobile use (as calculated using the actual expense method), the employer must make up the difference.

Id. at 569. Thus, any challenge to Defendants' mileage reimbursement method would require Plaintiffs to show that the mileage reimbursement was less than each employee's actual expenses, which would require highly individualized questions such as the make and vintage of each vehicle used, whether it was financed or leased and, if so, at what cost, and the type of fuel used.

Conclusion

For the reasons stated at the hearing and in this Order, Defendants' Motion to Strike is granted.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2014 WL 1117614

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2015 WL 5680310
Only the Westlaw citation is currently available.
United States District Court,
C.D. California.

Cyrus Raphael; individually, and on behalf of other aggrieved employees pursuant to the California Private Attorneys General Act, Plaintiff,
v.
Tesoro Refining and Marketing Co. LLC; and Does 1–50, Defendants.

Case No. 2:15-cv-02862-ODW
|
Signed September 25, 2015

Attorneys and Law Firms

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ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS [29]

OTIS D. WRIGHT, II UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

***1** Plaintiff Cyrus Raphael ("Raphael") has brought suit against his former employer, Tesoro Refining and Marketing Co., LLC ("Tesoro"), on behalf of himself and other aggrieved employees of Tesoro under the California Private Attorneys General Act ("PAGA") for violations of several provisions of the California Labor Code ("CLC"). Tesoro now moves for judgment on the pleadings to dismiss Raphael's claims. For the reasons discussed below, the court **GRANTS** Tesoro's Motion for Judgment on the Pleadings. [1] (ECF No. 29.)

1 After carefully considering the papers filed in support of and in opposition to the Motion, the court deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15.

II. FACTUAL BACKGROUND

Raphael was an employee of Tesoro working in the County of Los Angeles, California from approximately April 2007 until March 2014. (ECF No. 25, First Amended Compl. ["FAC"] ¶ 13.) During this time period, Raphael alleges that Tesoro engaged in "a uniform policy and systematic scheme of wage abuse" against him and the other aggrieved employees. (*Id.* ¶ 20.) Raphael further alleges that Tesoro violated various CLC provisions in the following ways: (1) failure to pay for overtime hours worked; (2) failure to provide uninterrupted meal and rest periods; (3) failure to pay at least minimum wage for all hours works; (4) failure to pay all wages owed upon discharge or resignation; (5) failure to pay within a period of time statutorily permissible; (6) failure to provide complete and accurate wage statements; (7) failure to keep complete and accurate payroll records; (8) failure to reimburse for necessary business-related expenses; and (9) failure to property compensate employees. [2] (*Id.* ¶¶ 30-42.)

2 Raphael has alleged violations of CLC §§ 201, 202, 203, 204, 226(a), 226.7, 510, 512(a), 1174(d), 1194, 1197, 1197.1, 1198, 2800, and 2802.

Shortly after Raphael filed his complaint with the Los Angeles County Superior Court, Tesoro removed the suit to federal court pursuant to 28 U.S.C. § 1331. (ECF No. 1, Notice of Removal 1.) Raphael moved to remand the case but was unsuccessful. (*See* ECF No. 23.) Tesoro subsequently challenged Plaintiff's original Complaint and this Court dismissed with leave to amend. (ECF Nos. 11, 24.) Plaintiff filed his First Amended Complaint and Tesoro filed its amended Answer. (ECF Nos. 25, 26) Tesoro now moves for judgment on the pleadings. Raphael timely opposed (ECF No. 34) and Tesoro failed to reply. Tesoro's Motion is now before the Court for consideration. (ECF No. 29.)

III. LEGAL STANDARD

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). Like a motion under Rule 12(b)(6), a motion for judgment on the pleadings

pursuant to Rule 12(c) challenges the legal sufficiency of the opposing party's pleadings. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *Ross v. U.S. Bank Nat'l Assn.*, 542 F. Supp. 2d 1014, 1023 (N.D. Cal. 2008). A motion to dismiss under either Rule 12(b)(6) or (c) is proper where the plaintiff fails to allege either a cognizable legal theory or where there is an absence of sufficient facts alleged under a cognizable legal theory. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("*Twombly*"); *see also Shroyer v. New Cingular Wireless Serv., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). Where a claim fails as a matter of law, a Rule 12(c) motion "may save the parties needless and often considerable time and expense which otherwise would be incurred during discovery and trial." *Miller v. Indiana Hosp.*, 562 F. Supp. 1259, 1268 (W.D. Pa. 1983), reversed on other grounds, 843 F.2d 1139 (3rd Cir. 1988); *Alexander v. City of Chicago*, 994 F.2d 333, 336 (7th Cir. 1993).

IV. DISCUSSION

A. Class Certification of PAGA Claim

***2** Tesoro argues the PAGA action must be dismissed because Raphael has failed to allege and establish that class certification is appropriate within the ninety days required by Local Rule 23-3. (Mot. 5.) Alternatively, Raphael argues that PAGA actions do not have to meet class action requirements. (Opp. 3.)

The Ninth Circuit has yet to decide whether plaintiffs bringing a PAGA claim in federal court must satisfy the requirements of Rule 23, and the district courts in California are split on the issue. *Ortiz v. CVS Caremark Corp.*, No. C-12-05859, 2014 WL 1117614 (N.D. Cal. March, 18, 2014). However, there have been numerous rulings in this district holding that PAGA claims must comply with Rule 23 guidelines and failure to move for class certification will result in dismissal. Most recently, in April 2015 this very Court granted a motion to strike PAGA claims for failure to move for class certification of PAGA claims within the ninety-day deadline under Rule 23. *Bowers v. First Student*, No. 2:14-CV-8866-ODW, 2015 WL 1862914 (C.D. Cal. April 23, 2015). Additionally, the court in *Fields v. QSP, Inc.* granted judgment on the pleadings for the same reason. No. CV 12-1238-CAS 2012, WL 2049528 at *5 (C.D. Cal. June 4, 2012). Finally, the court in *Adams v. Luxottica U.S. Holdings Corp.* stated, "[h]aving failed to comply with certification requirements of Rule 23, plaintiffs lack standing to represent the rights and interests of third parties. Although PAGA authorizes representative actions, California state law cannot alter federal procedural and jurisdictional requirements." No. SA-CV-07-1465 AHS, 2009 WL 7401970 at *2 (C.D. Cal. July 24, 2009). The Court is inclined to follow its prior rulings and similar rulings in this district, and therefore, holds that Raphael lacks standing to represent the rights and interests of the aggrieved employees in the instant case.

B. Highly Individualized Assessments Make The PAGA Claim Unmanageable

Even if Rule 23 did not apply to PAGA representative claims, such claims can be stricken if they are found to be "unmanageable." *See Litty v. Merrill Lynch & Co.*, No. CV-14-0425-PA, WL 5904904 at *3 (C.D. Cal. Nov. 10, 2014). The plaintiff in *Ortiz* brought similar claims as Raphael here. In *Ortiz*, the plaintiff sought damages against her former employer for unpaid off-the-clock work, failure to pay at least minimum wage for all hours worked, failure to pay overtime, failure to provide meal periods, failure to provide rest periods, failure to pay terminated employees and failure to furnish accurate wage statements. *Ortiz*, 2014 WL 1117614 at *1. The court dismissed the PAGA claim because a multitude of individualized assessments would be necessary, making the PAGA claim unmanageable. *Id.* at *4. The court noted that in order to prove an off-the-clock claim, a plaintiff must demonstrate that she actually worked off the clock, that she was not compensated for it, and that the employer was aware or should have been aware that she was performing off the clock work. *Id.* (citing *York v. Starbucks Corp.*, No. 13-CV-05669-WHO, 2011 U.S. Dist. LEXIS 155682, at *85–86, 2011 WL 8199987 (C.D. Cal. Nov. 23, 2011).) The court then held that to prove their off-the-clock claim, "Plaintiffs would have to present evidence about each [individual] ... Proof of this claim would be unmanageable, and could not be done with statistical or survey evidence but only with detailed inquiries about each employee claimed to have done so and her manager's knowledge thereof." *Id.*

***3** Similarly here, Raphael's claims are on behalf of himself and thousands of other current or past employees. Tesoro provided a non-exhaustive list of twenty-six relevant inquiries and requirements the court finds essential to assess in order to determine the appropriate penalties. (Opp'n 9–11.) The Court would have to engage in a multitude of individualized inquires making the PAGA action unmanageable and inappropriate.

Additionally in *Ortiz*, the court held the plaintiffs' unreimbursed mileage claim would require individualized

inquiries about whether the claimed expenses were necessary and incurred in direct consequence of the discharge of the employee's duties, whether the employee actually sought reimbursement from defendants for the expenses and whether defendants reimbursed the employee for the expense. *Ortiz,* 2014 WL 1117614 at *4. Here, Raphael seeks reimbursement for "tools, mileage, and the use of their personal cell phone to carry out their job duties." (FAC ¶ 64.) Similar to *Ortiz,* gathering inquires for each of these expenses from Raphael and all aggrieved employees would be nothing short of unmanageable.

C. Insufficient Facts and Theories Alleged

1. Within the LWDA Letter

Under PAGA, an individual seeking civil penalties must first exhaust his or her administrative remedies by "giv[ing] written notice by certified mail to the [Labor and Workforce Development Agency] and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation." Cal. Lab. Code §§ 2699.3(a)(1) and 2699.3(b)(1). The statute explicitly provides that one must complete this exhaustion prior to filing suit. *See* Cal. Lab. Code § 2699.3(a) ("A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 ... shall commence only after the following requirements have been met ..."). "[C]ompliance with the prefiling notice and exhaustion requirements of [PAGA] is mandatory." *Caliber Bodyworks, Inc. v. Super. Ct.,* 134 Cal. App. 4th 365, 384 (2005). Failure to comply with these statutory prerequisites is fatal to a PAGA cause of action. *Id.* at 381–82.

Pursuant to California Labor Code § 2699.3(a)(1), the aggrieved employee must give written notice by certified mail to the Labor and Workforce Development Agency ("LWDA") and the employer "of the specific provisions of [the California Labor Code] to have been violated, ***including the facts and theories to support the alleged violation.***" Cal. Lab. Code Sec. 2699.3(a)(1) (emphasis added). To constitute adequate notice under Section 2699.3(a), the notice must allege at least some "facts and theories" specific to the plaintiff's principal claims; ***merely listing the statutes allegedly violated or reciting the statutory requirements is insufficient.*** *Amey v. Cinemark USA Inc.,* No. 13-CV-05669-WHO, 2015 WL 2251504, *1 (N.D. Cal. May 13, 2015) (emphasis added). The employee in *Amey* submitted a notice that stated:

> California Labor Code section 226(a)requires employers to make, keep and provide true, accurate, and complete employment records. CINEMARK did not provide Ms. Brown and other aggrieved employees with properly itemized wage statements. The wage statements they received from CINEMARK were in violation of [Section 226(a)]. The violations include ... failing to state the total hours they worked as a result of working off-the-clock and not recording or paying for those hours.

Id. at *14. The court dismissed the PAGA claims with prejudice and concluded that "[p]arroting the statute that was violated is insufficient to provide notice under Section 2699.3." *Id.* at *13.

***4** Raphael's letter submitted to the LWDA on January 22, 2015 is almost identical in structure to that of *Amey.* Two sections of the letter are as follows:

> California Labor Code sections 226.9and 512 require employers to pay an employee an additional hour of pay at the employee's regular rate for each meal or rest period that is not provided. During the relevant time period, Tesoro required [Plaintiff] and other aggrieved employees to work during meal and rest periods and failed to compensate them properly for missed meal and rest periods.
>
> California Labor Code section 226requires employers to make, keep and provide complete and accurate itemized wage statements to their employees. During the relevant time period, Tesoro did not provide [Plaintiff] and other aggrieved employees with complete and accurate itemized wage statements. The wage statements they received from Tesoro were in violation of California Labor Code section 226(a). The violations include, but are not limited to, the failure to include total hours worked by [Plaintiff] and other aggrieved employees.

(ECF No. 30, Req., Ex. A.[3]) The exceedingly detailed level of specificity for Section 2699.3(a)(1) is not satisfied here. Instead, Raphael mimicked the statute violated, and therefore, the claims will be dismissed.

3 Although exhibits outside the complaint are generally not considered at the motion to dismiss stage, the Ninth Circuit has established that documents referred to in a complaint may be considered for the purposes of evaluating such a motion. *Branch v. Tunnell*, 14 F.3d, 449, 453 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d, 1119 (9th Cir. 2002). In this case, the Complaint relies upon the text of the letter submitted to the LWDA and Raphael does not contest the authenticity of the letter. Therefore, the Court may appropriately consider the letter for purposes of this motion.

2. Within the Amended Complaint

Lastly, the Court revisits its Order Granting Tesoro's Motion to Dismiss. (ECF No. 24, Order.) Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that each claim in a pleading be supported by "a short and plain statement of the claim showing that the pleader is entitled to relief ..." Fed. R. Civ. P. 8(a)(2). To satisfy Rule 8(a)(2) and survive dismissal under Rule 12(b)(6) or (c), a complaint must contain sufficient factual matter "to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "Threadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In its Order, the Court noted the amendments which needed to be made within Raphael's Amended Complaint in order to comply with the Federal Rules. Specifically, the court noted Raphael "include[d] no relevant facts or dates during which these alleged violations occurred, instead he claim[ed] that 'at all relevant times' Tesoro failed to comply with a laundry list of regulations" and issued blanket statements and conclusory language for the majority of his claims. (Order 5.) Moreover, the Court clearly states that "at a *minimum* the plaintiff must allege at least one work week when he worked in excess of forty hours and was not paid [overtime or regular wages]." (Order 4.)

***5** Raphael seems to have ignored the Court's instruction. The only dates Raphael included in his FAC read "from approximately April 2007 to approximately March 2014." (FAC ¶ 13.) Moreover, Raphael failed to allege one single work week when he worked in excess of forty hours and was not paid. Instead, he continued to use the blanket statement "relevant time period." (*See generally* FAC.) Because Raphael failed to amend his complaint in accordance with the Court's requests, Tesoro's motion for judgment on the pleadings is granted without leave to amend. *See Cano v. Glover*, 143 Cal. App. 4th 326, 330 (2006) (where the court dismissed the action with prejudice after plaintiff failed to amend the allegations of his complaint to satisfy the court and was given several opportunities to do so.)

V. CONCLUSION

For the reasons discussed above, the Court **GRANTS** Tesoro's Motion for Judgment on the Pleadings with prejudice. (ECF No. 29.) The Clerk of Court shall close this case.

IT IS SO ORDERED.

All Citations

Slip Copy, 2015 WL 5680310

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Only the Westlaw citation is currently available.
United States District Court,
S.D. California.

Thomas RIX, an individual, on behalf of himself, and on behalf of all persons similarly situated, Plaintiff,
v.
LOCKHEED MARTIN CORPORATION, a Maryland Corporation, and Does 1 to 10, Defendants.

Civil No. 09cv2063 MMA (NLS).
|
Jan. 4, 2012.

Attorneys and Law Firms

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ORDER REGARDING JOINT MOTION FOR DISCOVERY DISPUTE NUMBER TWO, DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION TO COMPEL

NITA L. STORMES, United States Magistrate Judge.

I. PROCEDURAL HISTORY

***1** This case was filed as a purported class action in which Plaintiff Thomas Rix ("Plaintiff") alleges violations of the Fair Labor Standards Act and state labor laws against his former employer, defendant Lockheed Martin ("LM"). Plaintiff alleges LM wrongfully classified his employment position as Industrial Security Representative ("ISR") and the position of Industry Security Representative, Senior ("ISRSR", collectively "ISRS") as exempt positions based on job title alone. On February 3, 2010, Plaintiff filed the operative First Amended Complaint, alleging six causes of action: (1) Unfair business practices in violation of Cal. Bus. & Prof.Code § 17200 *et seq.;* (2) Failure to pay overtime compensation under Cal. Lab.Code §§ 510, 515.5, 551, 552, 1194 and 1198; (3) Failure to provide meal and rest periods under Cal. Lab.Code §§ 226.7 and 512; (4) Failure to provide accurate itemized statements under Cal. Lab.Code § 226; (5) Violation of Fair Labor Standards Act ("FLSA") 29 U.S.C. § 201, *et seq.;* and (6) Labor Code Private Attorney General Act § 2698 ("PAGA"). [Docket No. 21 .]

On March 14, 2011, the Court denied Plaintiff's Motion to Certify a Class Action, finding that individual inquiries will predominate over common questions and, therefore, Plaintiff cannot meet the predominance requirement of Rule 23(b)(3). [Docket No. 62 at 12.] After the Court denied class certification, LM moved to Strike or, in the alternative, Dismiss Plaintiff's PAGA Representative Claim. [Docket No. 67.] LM argued, *inter alia,* that the PAGA claim cannot proceed because it "would be unmanageable, impracticable, and raise serious due process concerns." [Docket No. 67 at 1.] Plaintiff opposed the motion, arguing that the case could be decided on common evidence. The Court denied the Motion to Strike or Dismiss, finding that it was premature. [Docket No. 77 (the "Order .").]

II. The Joint Motion for Resolution of a Discovery Dispute

The parties filed a joint discovery motion in order to decide whether, despite Plaintiff's representations that he will refute the application of the exemption based on common evidence, Plaintiff is entitled to discovery as to each and every allegedly aggrieved employee.[1] Plaintiff is currently seeking to compel, for each and every allegedly aggrieved employee: 1) contact information; 2) identification and production of every document that supports the contention that the employee was correctly classified as exempt; 3) identification of all witnesses with knowledge that supports the classification; 4) all time records; and 5) all payroll information.

1 LM has determined that there are 90 ISRS who were employed in the state of California during the relevant time period. (White Decl. ¶ 4.)

Plaintiff argues that the Order (denying the Motion to Strike or Dismiss) specifically granted him the right to the sought discovery. LM counters that the Order proves that Plaintiff is not entitled to the discovery and that the discovery is unduly burdensome. The Court will address each issue in turn.

III. DISCUSSION

A. Discovery at Issue

***2** The parties have identified three interrogatories and three document requests at issue. This small number of discovery requests, however, encompasses an enormous scope of discovery. Plaintiff seeks to compel further responses to Interrogatory No. 13 which asks: "Please IDENTIFY all ISRs who were employed by you during the RELEVANT TIME PERIOD." LM provided the information for the ISRS who worked at the Palmdale facility, the facility where Plaintiff worked, who did not object to disclosure of their information.

Plaintiff also seeks to compel a response to Interrogatory No. 16, which asks: "For each workweek IDENTIFIED in YOUR response to Interrogatory No. 14, please IDENTIFY all DOCUMENTS that support DEFENDANT'S contention that the Defendant's classification of the ISR as exempt from overtime during that workweek was correct."

Plaintiff also seeks to compel a response to Interrogatory 17, which asks: "For each workweek IDENTIFIED in YOUR response to Interrogatory No. 14, please IDENTIFY all witnesses with knowledge of facts that support DEFENDANT'S contention that the Defendant's classification of the ISR as exempt from overtime during that workweek was correct." LM responded with objections to this interrogatory.

Plaintiff also seeks to compel a further response to Request for Production No. 49, which seeks: "All DOCUMENTS evidencing the records of hours worked by the ISRs during the RELEVANT TIME PERIOD, including all entries made into DEFENDANT'S electronic time recording systems." LM has produced the records for all ISRS who worked at the Palmdale facility, who did not object to disclosure of their information.

Plaintiff also seeks to compel a further response to Request for Production No. 50, which seeks: "All DOCUMENTS evidencing the payroll records for the ISRs during the RELEVANT TIME PERIOD." LM has produced the records for all ISRS who worked at the Palmdale facility, who did not object to disclosure of their information.

Finally, Plaintiff also seeks to compel a response to Request for Production No. 52, which seeks: "All DOCUMENTS identified in YOUR response to PLAINTIFF'S Interrogatories, Set Three, served herewith." LM did not produce any documents in response to this broad request.

B. The Order Does Not State that the Discovery Sought Must Be Allowed

Plaintiff argues that the Order establishes his right to the discovery sought:

> Defendant must comply with Plaintiff's requests for discovery needed for trial. Defendant has already attempted to strike Plaintiff's PAGA cause of action which was denied by the District Court. In so doing, the District Court ruled that Plaintiff is entitled to pursue civil penalties pursuant to PAGA on behalf of all Aggrieved Employees, [Doc. No. 77]. Defendant is, therefore, collaterally estopped under the law of the case from seeking to limit the scope of the PAGA cause of action.

[Docket No. 83–1 at 3.]

The clear words of the Order refute Plaintiff's argument. In denying the Motion to Strike or Dismiss as premature, the Court reasoned:

> ***3** For Plaintiff to recover penalties under PAGA, Plaintiff will have to prove Labor Code violations for each and every individual on whose behalf he seeks to recover. *See, Hibbs–Rines v. Seagate Technologies, LLC,* 2009 WL 513496 *4 (N.D.Cal.2009). This, however, does not necessarily lead to the conclusion that litigating Plaintiff's PAGA claim will be inevitably unmanageable. Discovery has been stayed regarding Plaintiff's PAGA representative claim, and it has not yet been determined how many violations Plaintiff will seek to establish, and how many allegedly aggrieved ISRs could be potentially included. The Court tentatively concludes it would be premature to strike Plaintiff's PAGA claim at this stage of the proceedings, given the reasonable possibility that Plaintiff could ultimately seek to litigate a

> manageable PAGA claim. For similar reasons, the Court also tentatively concludes Defendant's due process concerns, which also rest in large part on manageability concerns and Defendant's opportunity to present a complete defense as to each allegedly aggrieved employee, do not warrant striking Plaintiff's PAGA claim at this time.

[Docket No. 77 at 2, (the "Order").][2]

2 On July 29, 2011, the Court issued a tentative ruling. [Docket No. 77.] On August 1, 2011, the court held oral argument and entered an order affirming the tentative ruling. [Docket No. 78.]

As LM argues, the District Court's Order does not collaterally estop it from arguing that this discovery is improper or that the discovery is unduly burdensome. The District Court was considering a wholly separate question: whether the PAGA claim could go forward. It is simply not logical to conclude that, in denying a motion as premature, the Court ruled that any discovery issued by the Plaintiff would necessarily be proper. Because the Court has never considered whether the benefit of the discovery sought outweighs its burden, LM is entitled to argue that the discovery should not be had.

C. The Discovery Sought is Burdensome

Plaintiff seeks the exact same discovery he would seek if a class had been certified: all time and payroll records, each of the ISRS' contact information, and information about witnesses, documents and facts to support LM's affirmative defense that each ISRS is exempt.

As LM correctly points out, the discovery sought includes any document that shows, for each workweek, that each employee was performing exempt work. Such documents could include all performance evaluations, emails, schedules, and reports. Similarly, LM argues that disclosure of every witness with knowledge of each of the ISRS' work duties would be unduly burdensome because it would require identification of every supervisor, co-worker, and customer of each of the ISRS. Additionally, LM has ascertained that there are 90 ISRS who were employed in the relevant time period. (White Decl. ¶ 4.) LM further argues that, given the nature of the work performed by the ISRS, these documents "will necessarily address highly confidential national defense subjects." (Docket No. 83 at 13.) LM also argues that the privacy rights of their employees are affected as well, especially the employees who have already opted out of having their information shared with Plaintiff. Finally, LM argues that the burden of locating, reviewing and producing documents for each of the 90 ISRS employees for each of the 148 workweeks in question is unduly burdensome. Thus, although LM has not identified the burden with specificity, it has shown that the discovery sought is burdensome.

D. Plaintiff's Assertion that the Case Can Be Proven With Common Evidence

***4** In Opposing the Motion to Dismiss or Strike, Plaintiff argued:

> Plaintiff is prepared to prove by a preponderance of the evidence that Defendant had a common scheme in place whereby Defendant classified these employees as exempt from overtime and related state law requirements based on job title alone, without any individual audit as to actual time spent performing the assigned tasks, that the subject employees were all public safety employees and that these challenged employees did not and could not exercise any independent judgment or discretion as to any matter of significance for the workweeks in question.

[Docket No. 68 at 5.] (emphasis added.) Plaintiff expounded on this argument later in the brief:

> Moreover, the evidence above details **how Plaintiff intends to present the common evidence to refute the Defendant's claim of an exemption.** First, Plaintiffs will demonstrate that the work performed is public security work, which has been uniformly held to be non exempt. Second, the evidence will show that the government directives preclude the use of independent judgment and discretion by these employees. Third, Plaintiffs will prove that

> because Defendant performed no contemporaneous audit or study of any employees' work and therefore, Defendant cannot meet its burden for even one aggrieved employee [sic].

Id. at 17–18 (emphasis added.)

Plaintiff argues that the discovery sought is necessary to prove damages for the PAGA claim. LM argues Plaintiff should not be allowed to defeat a Motion to Strike by arguing the action can be adjudicated based on common evidence and then to force LM to produce the same burdensome discovery it formerly disavowed in order to proceed with the PAGA claim. LM further argues that the discovery sought here supports its contention that the PAGA claim will be unmanageable. (Docket No. 83 at 10.) Plaintiff does not address his prior representations that the type of discovery he now seeks would be unnecessary.

Defendant is correct that this discovery motion has provided new information as to Plaintiff's intended scope of the PAGA claim. It is now clear that Plaintiff is seeking to pursue the PAGA claim for every ISR and ISRSR. Additionally, LM has determined that are 90 ISRS who were employed in California from September 21, 2008 to July 31, 2011. (White Decl. ¶ 4.) Thus, adjudication of the PAGA claim will require 90 individualized inquiries into whether each and every one of the ISRS was properly categorized as exempt for each and every relevant work week. Plaintiff has sought every fact, witness and document relating to whether each of the 90 ISRS was properly categorized as exempt for each of the 148 relevant workweeks.

In light of Plaintiff's representation that the litigation of the PAGA claim would be "manageable" because the case can be made with common evidence, the discovery sought is unduly burdensome at this time. Accordingly, Plaintiff's request to compel discovery is Denied Without Prejudice. [3]

[3] The Court notes that the discovery sought is extremely broad and that LM has raised significant issues as to the burden of producing the discovery. In any future motion, Plaintiff must be prepared to explain why more narrow discovery is insufficient and LM must be prepared to state with specificity the burden of any discovery that it claims is unduly burdensome. Moreover, the parties are specifically informed that the Chambers Rules governing Joint Motion for Discovery Disputes do not contemplate that arguments will be made both in a joint motion and in separately filed briefs by both sides. The parties are to avoid this cumbersome process in the future and file a single joint motion that contains the requests and responses at issue and no more than 10 pages of points and authorities for each side.

IV. CONCLUSION

***5** For the foregoing reasons, and Good Cause Appearing, It Is Hereby Ordered that:

1. Plaintiff's request to compel discovery is Denied Without Prejudice;

2. LM may, no later than **January 27, 2012,** file a motion challenging the PAGA claim;

3. After any motion challenging the PAGA claim is adjudicated (or the deadline to file the motion has passed without the filing of such a motion) and after a new meet and confer effort is completed, Plaintiff may initiate a new Joint Motion to Resolve a Discovery Dispute relating to the discovery requests covered herein.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 13724

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Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

Richard STAFFORD, Individually, Plaintiff,
v.
DOLLAR TREE STORES, INC., Defendant.

No. 2:13–cv–1187 KJM CKD.
|
Signed Nov. 20, 2014.
|
Filed Nov. 21, 2014.

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ORDER

KIMBERLY J. MUELLER, District Judge.

*1 Defendant Dollar Tree Stores' (Dollar Tree) motion to bifurcate plaintiff's individual and representative claims is currently pending before the court. The court ordered the motion submitted without a hearing and now GRANTS the motion.

I. BACKGROUND

On November 19, 2012, plaintiffs Jay Narvaez and Lisa Hornsby filed a complaint in Los Angeles County Superior Court alleging a number of wage and hour class claims and a Private Attorney General Act (PAGA) claim against Dollar Tree. ECF No. 1 at 33–60. Their first amended complaint was filed in the Superior Court on January 7, 2013, adding Richard Stafford as a plaintiff. ECF No. 1 at 87–114. Defendant removed the case to the Central District on February 5, 2013. *Id.* at 4–5.

On February 12, 2013, plaintiff Stafford filed a Second Amended Complaint (SAC) in the Central District, removing the class claims and alleging the following claims, all stemming from his work as an assistant manager at a Dollar Tree Store: (1) failure to provide meal periods, Cal. Lab.Code §§ 226.7(a), 512(a), and 1198; (2) failure to provide rest periods, Cal. Lab.Code §§ 226.7(a) and 1198; (3) failure to pay minimum and regular wages, Cal. Lab.Code §§ 1197 and 1198; (4) failure to pay overtime wages, Cal. Lab.Code §§ 510 and 1198; (5) failure to maintain accurate records, Cal. Lab.Code § 1198; (6) failure to provide and maintain accurate itemized wage statements, Cal. Lab.Code §§ 226(a) and 1198; and (7) failure timely to pay wages due during employment, Cal. Lab.Code §§ 204(a) and 1198. Plaintiff alleges he is an "aggrieved employee" within the meaning of the PAGA, California's Private Attorney General Act, Cal. Lab.Code §§ 2699, *et seq.* ECF No. 12 at 6–7. Neither Narvaez nor Hornsby were listed as plaintiffs in the Second Amended Complaint. *Id.* at 1.

On February 26, 2013, defendant filed a motion to dismiss or to transfer. ECF No. 15. On March 7, 2013, plaintiff filed a motion to remand. ECF No. 22. On June 22, 2013, the Central District court denied the motions to remand and to dismiss and granted the motion to transfer the case to the Eastern District, where a related case had been filed. ECF No. 37.

On November 7, 2013, plaintiff filed a second motion to remand in this court. ECF No. 46. This court denied the motion on March 28, 2014. ECF No. 58.

On July 7, 2014, defendant filed the motion to bifurcate plaintiff's individual and representative claims. ECF No. 72. Plaintiff has opposed and defendant has filed a reply. ECF Nos. 74 & 76.

II. THE MOTION TO BIFURCATE

A. Standard

Rule 42(b) of the Federal Rules of Civil Procedure provides in relevant part:

> For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims,

> crossclaims, counterclaims, or third-party claims.

A court "has broad discretion to bifurcate a trial to permit deferral of costly and possibly unnecessary proceedings pending resolution of potentially dispositive preliminary issues." *Jinro America Inc., v. Secure Invs., Inc.,* 266 F.3d 993, 998 (9th Cir.), *amended on denial of reh'g,* 272 F.3d 1289 (9th Cir.2001). Courts are more reluctant to bifurcate proceedings when there is "an overlap of factual issues." *Hunter v. City & Cnty. of San Francisco,* No. 11–4911, 2012 WL 4831634, at *10 (N.D.Cal. Oct.10, 2012). Three factors are relevant to the inquiry: convenience, prejudice to the parties, and judicial economy. *Id.; see also Conboy v. Wynn Las Vegas LLC,* No. 2:11–CV–1649 JCM (CWH), 2013 WL 1701073, at *14 (D.Nev. Apr.18, 2013) (stating that a court considering bifurcation weighs "convenience, prejudice, judicial economy, risk of confusion and whether the issues are clearly separable"). If bifurcation is ordered, the court has the "power to limit discovery to the segregated issues." *Ellingson Timber Co. v. Great N. Ry. Co.,* 424 F.2d 497, 499 (9th Cir.1970) (per curiam).

B. The Requests for Judicial Notice

***2** Defendant has asked the court to take judicial notice of a tentative ruling certifying the class in *Richard Reyes v. Dollar Tree Stores, Inc.,* Los Angeles County Superior Court, No. BC488217; an order granting the motion for class certification in the *Reyes* case; a copy of a letter from California's Labor and Workforce Development Agency (LWDA) dated December 21, 2012, declining to investigate plaintiff's allegation against Dollar Tree; and an Amended Statement of Decision filed in *Driscoll v. Granite Rock Co.,* Santa Clara County Superior Court, No. 1–08–CV–103426. Def.'s Request for Judicial Notice, ECF No. 73. Plaintiff does not object.

Plaintiff has asked the court to take judicial notice of the First Amended Class Action Complaint filed June 6, 2014, in *Stafford v. Dollar Tree Stores, Inc.,* Solano County Superior Court, No. FCS043461. Defendant has not objected.

The court grants the parties' requests for judicial notice of documents from the *Reyes* proceedings in state court proceedings and from the LWDA. Fed.R.Evid. 201; *Harris v. Cnty. of Orange,* 682 F.3d 1126, 1132 (9th Cir.2012) ("We may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts.") (internal quotations omitted); *Sarkisov v. StoneMor Partners,* No. C 13–04834 WHA, 2014 WL 1340762, at *6 (N.D.Cal. Apr.3, 2014) (taking judicial notice of the pre-litigation letter from LWDA). It declines to take judicial notice of the *Driscoll* order, as this order is not relevant to resolution of the instant motion.

C. Analysis

Defendant argues that through his PAGA claims plaintiff purports to represent more than 3000 other current and former store managers from December 17, 2011 through the present for alleged wage and hour violations, even though plaintiff has not yet shown his own rights under the Labor Code have been violated. It also notes that a class action is pending in this court, with the same plaintiff, seeking damages for the same Labor Code violations. Mot. to Bifurcate, ECF No. 72 at 8 (referencing *Stafford v. Dollar Tree Stores, Inc.,* No. 2:14–cv–1465 KJM CKD (*Stafford II*)). Defendant says that plaintiff's second claim for failure to provide meal and rest breaks for assistant managers echoes the same claim in the *Reyes* case in Los Angeles County Superior Court, which will make discovery difficult because of the problems of interviewing the *Reyes* class members who are not represented by class counsel. It asks that discovery and trial of plaintiff's individual entitlement to PAGA penalties proceed first. Only if plaintiff shows he is an aggrieved employee, then the case should proceed with discovery and trial as to the representative claims. *Id.*

Plaintiff opposes the motion, saying that bifurcation is inappropriate because he is acting as the proxy for the LWDA and requiring him to prove his individual case first undercuts the public policy underlying PAGA. Opp'n, ECF No. 74 at 5, 9. He also says bifurcating discovery will only complicate the case when it is consolidated with *Stafford II,* the class action pending in this court, raising the same issues.[1] *Id.* at 6. Plaintiff argues also that bifurcating discovery will not promote judicial efficiency because of the difficulty determining whether the information sought in discovery is relevant to individual or group violations. He says his counsel's representation of the members of the PAGA action means that defendant's counsel would not be able to speak to them informally despite the *Reyes* action.

1 There are pending motions for judgment on the pleadings and for remand in the *Stafford* class action in Solano County.

*3 In reply, defendant notes this case has not been consolidated with the *Stafford* class action, that plaintiff's counsel does not represent the other aggrieved employees covered by this PAGA action, and that requiring plaintiff to prove he is aggrieved will not undercut the purposes underlying PAGA litigation. Reply, ECF No. 76 at 3.

Under the PAGA, California Labor Code § 2699:

> (a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency ... for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself ... and other current or former employees pursuant to the procedures specified in Section 2699.3.
>
> ....
>
> (c) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.

Section 2699(f)(2) establishes the civil penalty recoverable under these provisions as $100 for each aggrieved employee per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation when penalties are not otherwise specified in the Labor Code. The LWDA is entitled to 75 percent of any penalties recovered, with the remaining 25 percent distributed to the aggrieved employees. Cal. Lab.Code § 2699(i). As a prerequisite to filing suit, the aggrieved employee must first give notice of the alleged violations to LWDA and bring suit only after LWDA has declined to act or has failed timely to respond to the notice. Cal. Lab.Code § 2966.3. The aggrieved employee cannot pursue a PAGA action if the agency or another party is pursuing enforcement against the employer on the same claims under the same provisions of the Labor Code. Cal. Lab.Code § 2699(h). *See generally Thomas v. Aetna Health of Cal.*, No. 1:10–cv–01906 AWI SKO, 2011 WL 2173715, at *9 (E.D.Cal. June 2, 2011).

The Ninth Circuit has noted that "PAGA plaintiffs are private attorneys general who, stepping into the shoes of the LWDA, bring claims on behalf of the state agency." *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123 (9th Cir.2014), *pet. for cert. filed*, 83 USLW 3126 (Sept. 3, 2014). The California Supreme Court characterizes a PAGA plaintiff "as the proxy or agent of the state's labor law enforcement agencies," who "represents the same legal right and interest as state labor law enforcement agencies-namely civil penalties that would otherwise have been assessed and collected by the Labor Workforce Development Agency." *Arias v. Sup.Ct.*, 46 Cal.4th 969, 986, 95 Cal.Rptr.3d 588, 209 P.3d 923 (2009). Nevertheless, every PAGA action "requires *some* individualized assessment regarding whether a Labor Code violation has occurred." *Plaisted v. Dress Barn, Inc.*, No. 2:12–cv–01679 ODW (SHx), 2012 WL 4356158, at *2 (C.D.Cal. Sep. 20, 2012) (emphasis in original); *but see Alcantar v. Hobart Serv.*, No. ED CV 11–1600 PSG (SPx), 2013 WL 146323, at *5 (C.D.Cal. Jan. 14, 2013) (suggesting that survey evidence might be used to determine penalties). The Ninth Circuit has said that despite the enforcement aspects of PAGA, the wage and hour claims of aggrieved employees are held individually and so cannot be aggregated to satisfy the amount-in-controversy requirement for removing a diversity action. *Urbino v. Orkin Servs. of Cal., Inc.*, 726 F.3d 1118, 1122 (9th Cir.2013) (stating an aggrieved employee's claims to vindicate breaches of the Labor Code "are held individually. Each employee suffers a unique injury-an injury that can be redressed without the involvement of other employees"). Moreover, even though the plaintiff in a PAGA action "need not have suffered all PAGA violations for which she seeks to pursue civil penalties," *Jeske v. Maxim Healthcare Servs ., Inc.*, No. CV F 11–1838 LJO JLT, 2012 WL 78242, at *13 (E.D.Cal. Jan.10, 2012), PAGA "require [s] a plaintiff to have suffered an injury resulting from an unlawful action." *Amalgamated Transit Union, Local 1756 v. Sup.Ct.*, 46 Cal.4th 993, 1001, 95 Cal.Rptr.3d 605, 209 P.3d 937 (2009).

*4 In *Patel v. Nike Retail Services*, the court noted the tension between *Baumann* and *Urbino*, said that *Urbino* examined "the employees' interests *vis-à-vis* each other" and concluded that for purposes of aggregating the penalties owed to the state and to the plaintiff, "[t]he Labor Code violations Plaintiff Patel allegedly suffered are not unique from the ones the LWDA might seek to vindicate; both 'claims have as their source the exact same injuries.' " —— F.Supp.2d ——, 2014 WL 3611096, at *9 (N.D.Cal.2014). Accordingly, while plaintiff and the LWDA share the same interest, which gives the suit its enforcement character, the other PAGA plaintiffs have individual interests, which will require at least some individual proof.

Defendant has presented evidence that there are 3,205 people who served as assistant managers in the 457 California Dollar

Tree Stores between December 17, 2011 and June 30, 2012, with a total 161,571 workweeks for these employees. Decl. of David McDearmon, ECF No. 72–2 ¶ 4. The scope of the individualized assessments necessary to demonstrating Labor Code violations is suggested by the potential number of aggrieved employees, a number plaintiff has not challenged.

Neither side has cited nor has the court found any case discussing bifurcation of the PAGA plaintiff's claims from the representative claims. Plaintiff says that bifurcation would undercut the enforcement aspects of PAGA while defendant argues it would save the parties and the court from the burdensome discovery needed to prove the threshold individual violations.

What gives plaintiff the right to serve as "a proxy or agent" for the LWDA's enforcement division is his status as an aggrieved employee, one who has been injured by defendant's violation of at least one provision of the Labor Code. Plaintiff has presented nothing rebutting defendant's evidence that over 3,000 potential PAGA employees are part of this suit. And while the court does not necessarily accept defendant's claim that it will interview and depose each of the assistant managers, neither does it at this stage accept plaintiff's claim that the ultimate proof can be based entirely on policies and survey evidence, given the individual nature of the claims. *See, e.g., Ortiz v. CVS Caremark Corp.*, 3:12–cv–05859, 2014 WL 1117614, at *4 (N.D.Cal. Mar.19, 2014) (discussing the potential unmanageability of PAGA action, which would require "a multitude of individualized assessments.").

Without even considering the potential problems the pendency of both the *Reyes* and the *Stafford* class actions, in light of the number of potential aggrieved employees, judicial economy favors deferring the representative portion of the PAGA claim until plaintiff's status as an aggrieved employee with the right to bring this action is established. Plaintiff has not pointed to any definite prejudice from bifurcation, but argued more generally that the public purpose of the PAGA enforcement action will not be served by delay. He has not acknowledged, however, that PAGA's public purpose would be ill-served if the court finds he has not been aggrieved by a Labor Code violation. The court agrees there likely will be some judgment calls made regarding whether particular discovery relates to individual or representative claims, but that is not a sufficient basis to deny bifurcation.

***5** IT IS THEREFORE ORDERED that:

1. Defendant's motion to bifurcate, ECF No. 72, is granted; plaintiff's individual Labor Code claims will be determined before the representative PAGA claims; and

2. The case is set for a further scheduling conference on December 11, 2014. The parties' joint statement concerning the bifurcated schedule is due within seven days before the further scheduling conference.

All Citations

Slip Copy, 2014 WL 6633396

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CERTIFICATE OF SERVICE

I, Elizabeth G. Lorenzana, declare:

I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 400 South Hope Street, Los Angeles, California 90071-2899. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence collected from me would be processed on the same day, with postage thereon fully prepaid and placed for deposit that day with the United States Postal Service. On May 9, 2016, I served the following:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF REAL PARTY IN INTEREST MARSHALLS OF CA, LLC; [PROPOSED] BRIEF OF *AMICUS CURIAE* THE EMPLOYERS GROUP

by putting a true and correct copy thereof in a sealed envelope, with postage fully prepaid, and placing the envelope for collection and mailing today with the United States Postal Service in accordance with the firm's ordinary business practices, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 9, 2016, at Los Angeles, California.

Elizabeth G. Lorenzana

SERVICE LIST

WILLIAMS v. S.C. (MARSHALLS OF CA)
Case Number S227228

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