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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 ANDREW TAN, et al.,
8 Plaintiffs,
9 v.
10 GRUBHUB, INC., et al.,
11 Defendants.

Case No. [15-cv-05128-JSC](#)

**ORDER RE: DEFENDANTS' MOTION
TO DISMISS SECOND AMENDED
COMPLAINT**

Re: Dkt. No. 50

United States District Court
Northern District of California

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13 In this putative class action, Plaintiffs Andrew Tan (“Tan”) and Raef Lawson (“Lawson,”
14 and together, “Plaintiffs”) sue Grub Hub Holdings Inc. and GrubHub Inc. (“GrubHub” or
15 “Defendants”), a service that provides food delivery to customers via an on demand dispatch
16 system. The gravamen of Plaintiffs’ Second Amended Complaint (“SAC”) is that the delivery
17 driver plaintiffs were misclassified as independent contractors and denied the benefits of
18 California wage-and-hour laws. (Dkt. No. 41.¹) Now pending before the Court is Defendants’
19 motion to dismiss Counts II to V of the SAC for failure to state a claim. (Dkt. No. 50.) Having
20 considered the parties’ submissions, and having had the benefit of oral argument on July 31, 2016,
21 the Court DENIES the motion to dismiss. Plaintiffs have pleaded sufficient facts to plausibly
22 support their claims.

23 **BACKGROUND**

24 The Court previously discussed the factual background of this case in a previous order and
25 incorporates that discussion here. (See Dkt. No. 38 at 1-3.) Following the Court’s dismissal of
26 Plaintiffs’ First Amended Complaint (“FAC”) with leave to amend, Plaintiff filed the SAC, which
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28 ¹ Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 provides additional details regarding delivery drivers’ obligations during their work shifts.

2 According to the SAC, drivers working for GrubHub are required to sign up for work
3 shifts ahead of time (such as 2.5, 3, or 4 hour blocks). (SAC ¶ 14.) During work shifts, drivers
4 must be within a particular assigned area—in Lawson’s case, a 30 square mile area—and be
5 available to accept delivery assignments; drivers are not permitted to leave their zones unless
6 instructed by a GrubHub dispatcher to perform a delivery outside of the assigned area. (Id. ¶¶ 14-
7 15.) Drivers are typically assigned between two and four or more delivery jobs per hour during a
8 shift, with each delivery assignment typically taking between 30 minutes and an hour and a half to
9 complete. (Id. ¶ 16.) If drivers fail to accept at least 75% of all delivery orders assigned to them,
10 GrubHub will terminate them. (Id. ¶ 17.) Further, drivers risk termination if they fail to arrive at
11 restaurants by a certain time designated by GrubHub. (Id. ¶ 18.) Given these restrictions, drivers
12 are required to be in or very near to their cars at all times during their shifts and, as a result, are
13 unable to engage in personal non-work activities. (Id. ¶¶ 18-19.) Thus, Plaintiffs allege, the
14 entirety of drivers’ shift times is compensable working time. (Id. ¶ 14.)

15 The SAC sets forth five causes of action: (1) failure to reimburse for business expenses in
16 violation of California Labor Code § 2802; (2) unlawful and/or unfair business practices under
17 California Business and Professions Code §§ 17200-17208; (3) failure to pay minimum wage in
18 violation of California Labor Code §§ 1197 and 1194; (4) failure to pay overtime in violation of
19 California Labor Code §§ 1194, 1198, 510, and 554; and (5) claim for penalties pursuant to the
20 Private Attorney General Act (PAGA), Cal. Lab. Code § 2698, et seq. Lawson alone brings the
21 first four causes of action; Plaintiffs together bring the PAGA claims.

22 DISCUSSION

23 Defendants move to dismiss portions of the SAC on grounds that: (1) Lawson fails to state
24 plausible claims for relief under California’s minimum wage and overtime laws (Counts III and
25 IV); (2) Lawson fails to state a claim under the UCL (Count II) to the extent it relies upon his
26 defective wage claims; and (3) Plaintiffs fail to state a plausible claim under PAGA (Count V).

27 I. Counts III & IV: California Minimum Wage & Overtime Laws

28 The Court previously dismissed Plaintiff’s minimum wage and overtime claims because

1 Plaintiffs failed to allege sufficient facts that give rise to a plausible inference that they were not
2 paid minimum wage or overtime during at least one work week. (Dkt. No. 38 at 6-12.)
3 Specifically, the Court noted that “[t]here are no allegations about what period of time or type of
4 conduct Plaintiffs are counting as hours worked. Without these basic factual allegations, the Court
5 cannot conclude that Plaintiffs’ minimum wage or overtime claims are plausible.” (Id. at 9.)
6 Moreover, to the extent Plaintiffs contended that all of their shift hours are compensable (this had
7 not been pled in the FAC), the Court was unable to make that determination “absent allegations
8 about the number and timing of assignments, geographical restrictions, and what happens when a
9 driver does not accept an assignment.” (Id. at 12.)

10 Plaintiffs now allege that all of their shift hours are compensable work hours (SAC ¶ 14)
11 and, as noted above, they provide additional facts relating to drivers’ work shifts: in particular, the
12 number and timing of assignments (between two and four or more delivery jobs per hour during a
13 shift, each job typically taking 30 minutes to an hour and a half to complete (id. ¶ 16)),
14 geographical restrictions (drivers must be within a particular assigned area and in or near their cars
15 at all times during their shifts (id. ¶¶ 14-15, 18-19)), and what happens when a driver does not
16 accept an assignment (GrubHub terminates drivers with less than a 75% acceptance rate of orders
17 (id. ¶ 17)). Defendants argue that, even with these additional allegations, Plaintiffs wage-and-hour
18 claims remain deficient.

19 First, Defendants insist that Plaintiffs continue to provide insufficient detail regarding a
20 specific work week in which they were not paid overtime or were not paid minimum wages. (Dkt.
21 No. 50 at 5.) According to Defendants, *Landers v. Quality Communications, Inc.*, 771 F.3d 638
22 (9th Cir. 2014), as amended (Jan. 26, 2015), requires Plaintiffs to allege facts “establishing the
23 particular workweek in which minimum wage and overtime violations purportedly occurred.”
24 (Dkt. No. 50 at 5 (emphasis in original)). But, as the Court previously noted, *Landers* does not
25 require Plaintiffs to identify an exact calendar week or particular instance of denied overtime or
26 minimum wage; instead, the allegations need only give rise to a plausible inference that there was
27 such an instance. (Dkt. No. 38 at 8-9; see also *Boon v. Canon Bus. Solutions, Inc.*, 592 F. App’x
28 631, 632 (9th Cir. 2015); *Varsam v. Lab. Corp. of Am.*, 120 F. Supp. 3d 1173, 1178 (S.D. Cal.

1 2015).) Drawing all inferences in Plaintiffs’ favor, *Manzarek v. St. Paul Fire & Mar. Ins. Co.*,
2 519 F.3d 1025, 1031 (9th Cir. 2008), Plaintiffs’ allegations give rise to the plausible inference that
3 such an instance exists. For example, Plaintiffs allege that “Lawson worked approximately forty-
4 five hours” during the week of November 30, 2015 and “was not paid at time-and-a-half for the
5 hours in excess of forty.” (Id. ¶ 23.) Taking as true Plaintiffs’ allegations that drivers are unable
6 to perform personal non-work activities during a shift (SAC ¶¶ 18-19), one could reasonably infer
7 that Defendants violated the minimum wage and overtime laws where Lawson’s entire 45-hour
8 work week in November 2015 was compensable.

9 Second, Defendants contend that Plaintiffs’ new factual allegations are implausible and do
10 not establish that all of Plaintiffs’ shift hours are compensable. (Dkt. No. 50 at 6-8.) Defendants
11 argue that: (a) the allegations that drivers are “typically assigned . . . between two and four or
12 more delivery jobs per hour” and that each assignment “would typically take between 30 minutes
13 and an hour and a half to complete” are contradictory and thus implausible; (b) the ability of
14 drivers to decline up to 25% of assigned orders means that 25% of shift hours are drivers’ personal
15 time; and (c) because Lawson worked a 30 square mile area, he was thus “free to roam” and not
16 geographically restricted. Defendants are essentially asking the Court, on a motion to dismiss, to
17 draw all inferences in their favor. The Court cannot do so. *Manzarek*, 519 F.3d at 1031. Drawing
18 all inferences in *Plaintiffs’* favor as required, each of the above allegations supports the reasonable
19 inference that all shift time was compensable. For example: (a) while Plaintiffs allege the typical
20 number of assignments per hour and the typical time to complete each assignment, it is plausible
21 that the time to complete assignments may in fact be less for some drivers, such that drivers could
22 complete four or more assignments in an hour; (b) drivers could plausibly decline up to 25% of
23 their assigned orders because they are otherwise already busy with orders (and not simply taking
24 personal time); and (c) although Lawson’s working area was a 30 square mile area, he could still
25 have been restricted—and not free to roam, as Defendants suggest—because drivers were required
26 to be in or very near to their vehicles during shifts (SAC ¶¶ 18-19). While Defendants’ view of
27 the facts may ultimately prevail, the Court cannot presently conclude that the SAC allegations are
28 facially implausible.

1 Third, Defendants claim that Plaintiffs have not provided the requisite detail regarding
2 “what hourly and regular rates of pay they used to compute minimum wage and overtime pay,
3 how they calculated those rates, or which records they consulted in doing so.” (Dkt. No. 50 at 14.)
4 At the pleading stage, the level of detail Defendants seek is not required. As the Court noted
5 before, the Ninth Circuit in *Boon* rejected the district court’s requirement that a complaint “contain
6 an estimate of how much uncompensated time was worked, how often, and at what rate to survive
7 a motion to dismiss.” 592 F. App’x at 632 (internal quotation marks and alteration omitted).
8 Again, the complaint allegations need only give rise to a plausible inference that Plaintiffs were
9 not paid minimum wage or overtime during at least one work week. (Dkt. No. 38 at 9.)
10 Defendants’ reliance on *Yucesoy v. Uber Technologies, Inc.* does not compel a different result.
11 No. 15-CV-00262-EMC, 2015 WL 6955140 (N.D. Cal. Nov. 10, 2015). There, the court
12 dismissed plaintiffs’ minimum wage and overtime claims because they had not pleaded specific
13 facts to support their contention that their waiting time was compensable. *Id.* at *3-4. Thus, it
14 was unclear as to what plaintiffs contended was compensable “work” time and, in turn, the court
15 could not discern the basis for plaintiffs’ theories for their wage and overtime claims. *Id.* Here,
16 Plaintiffs’ allegations overcome this problem by alleging that all shift time is compensable work
17 time. (SAC ¶¶ 14-19.) As stated above, Plaintiffs’ allegations give rise to a plausible inference
18 that they were not paid minimum wage or overtime during at least one work week, and no
19 additional detail is required at this time.

20 Lastly, Defendants argue that Plaintiffs’ minimum wage claim fails because Plaintiffs do
21 not allege the costs or types of costs that were deducted when they made their minimum wage
22 calculations or that such costs were the actual cause of Plaintiffs receiving less than the minimum
23 wage in any given week. (Dkt. No. 50 at 9; Dkt. No. 60 at 8-9.) The SAC places Defendants on
24 notice of the types of expenses that are at issue—namely, “expenses for [the drivers’] vehicles,
25 gas, parking, phone data, and other expenses” (SAC ¶ 21)—and have sufficiently alleged that the
26 payment of such expenses caused Plaintiffs to receive less than the minimum wage. (*Id.* ¶ 22
27 (“Because Plaintiffs and other GrubHub drivers are paid by the delivery, and have been required to
28 bear many of the expenses of their employment, their weekly pay rates have fallen below

1 California’s minimum wage in many weeks.”.) At this stage, the Court need not determine
2 whether the identified expenses actually resulted in Plaintiffs receiving less than the minimum
3 wage; rather, the allegations need only show that such causation is plausible. The Court concludes
4 that it is.

5 Accordingly, the Court DENIES Defendants’ motion to dismiss Plaintiffs’ minimum wage
6 and overtime claims.

7 **II. Count II: Unlawful and/or Unfair Business Practices**

8 The Court dismissed Plaintiffs’ UCL claim with leave to amend to the extent it was based
9 on Plaintiffs’ claims for failure to pay minimum wage and overtime (Counts III and IV). (Dkt.
10 No. 38 at 12-13.) Plaintiffs have now sufficiently pled their minimum wage and overtime claims.
11 The Court therefore DENIES Defendants’ motion to dismiss the UCL claims.

12 **III. Count V: PAGA Claims**

13 The Court previously dismissed Plaintiffs’ PAGA claims for failure to plead administrative
14 exhaustion. (Dkt. No. 38 at 13.) In response, Plaintiffs added the following allegations:

15 33. Plaintiffs Tan and Lawson allege that GrubHub violated
16 PAGA in the following ways: (1) failure to reimburse its drivers for
17 all necessary expenditures incurred in performing their duties,
18 including but not limited to fuel, car maintenance, phones, and data,
19 in violation of Labor Code §2802; (2) failing to pay minimum wage
for each week worked in violation of Ca. Lab. Code §§ 1197 and
1194; (3) failing to pay overtime wages for all hours worked in
excess of forty each week in violation of Cal. Lab. Code §§ 1198,
1194, 510, and 554.

20 34. Plaintiff Andrew Tan provided notice of GrubHub’s
21 violations of various provisions of the California Labor Code as
22 alleged in this complaint to the Labor and Workforce Development
23 Agency (“LWDA”) and GrubHub on November 10, 2015. The
LWDA has not provided a response to Plaintiff Tan’s written notice.
See Cal. Lab. Code § 2699.3(a)(2)(A).

24 35. Plaintiff Raef Lawson provided notice of GrubHub’s
25 violations of various provisions of the California Labor Code as
26 alleged in this complaint to the Labor and Workforce Development
Agency (“LWDA”) and GrubHub on December 3, 2015. The
LWDA has not provided a response to Plaintiff Lawson’s written
notice. See Cal. Lab. Code § 2699.3(a)(2)(A).

27 (SAC ¶¶ 33-35.) Defendants complain that the allegations of administrative exhaustion remain
28 deficient because Plaintiffs failed to plead the specific “facts and theories” that were provided in

1 their written notices to the LWDA. (Dkt. No. 50 at 17.) According to Defendants, “Plaintiffs
2 have not established that they sent the LWDA anything more than a list of purported Labor Code
3 violations by Grubhub.” (Dkt. No. 60 at 14.)

4 Drawing all inferences in Plaintiffs’ favor, the Court finds that Plaintiffs have sufficiently
5 pled administrative exhaustion. Plaintiffs allege that they provided notice to the LWDA of
6 “GrubHub’s violations of various provisions of the California Labor Code as alleged in this
7 complaint” (SAC ¶¶ 34-35 (emphasis added))—that is, Plaintiffs allege, the notices included the
8 specific Labor Code violations along with the supporting factual allegations set forth in the SAC.
9 This is sufficient to plead notice of the “facts and theories” supporting Plaintiffs’ claims. Cal.
10 Lab. Code § 2699.3; Varsam v. Lab. Corp. of Am., 120 F. Supp. 3d 1173, 1182 (S.D. Cal. 2015).

11 The Court had also dismissed with leave to amend Plaintiffs’ PAGA claims to the extent
12 those claims were based on Counts III and IV. (Dkt. No. 38 at 13.) Because Plaintiffs have now
13 sufficiently pled Counts III and IV, the PAGA claims can proceed as well.

14 Accordingly, the Court DENIES Defendants’ motion to dismiss the PAGA claims.

15 **CONCLUSION**

16 For the reasons set forth above, the Court DENIES Defendants’ motion to dismiss.

17 Defendants shall file an answer to the SAC within 14 days of this Order. The Court will
18 hold a further case management conference on September 15, 2016 at 1:30 p.m.

19 **IT IS SO ORDERED.**

20 Dated: July 13, 2016

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23 JACQUELINE SCOTT CORLEY
24 United States Magistrate Judge
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