UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHRIS AZPEITIA, et al.,

Plaintiffs,

v.

TESORO REFINING & MARKETING COMPANY LLC, et al.,

Defendants.

Case No. 17-cv-00123-JST

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Re: ECF No. 25

Before the Court is Defendants' Motion to Dismiss. ECF No. 25. Plaintiffs oppose the motion. ECF No. 34. The Court will grant the motion in part and deny the motion in part.

I. BACKGROUND

A. Facts and Procedural History[1]

Plaintiffs Chris Azpeitia, Eileen Foster, Antonio Garcia, and Samantha West bring a putative class action asserting several claims under California wage laws and related statutes against Defendants Tesoro Refining & Marketing Company LLC, and Tesoro Logistics GP, LLC (collectively, "Defendants").

Named Plaintiffs are or were employed as operators at Defendants' Golden Eagle facility located in Martinez, California, and Defendants' Los Angeles Refinery, located in Carson and Wilmington, California. ECF No. 33 ¶ 9. Because the oil refining and distribution process requires constant monitoring, operators work a continuous 12-hour shift and are required to remain on duty during the entire shift. ECF No. 33 ¶ 18; 19.

The gravamen of Plaintiffs' complaint is that Defendants do not authorize or permit

[1] For purposes of this motion, all facts alleged in the complaint will be taken as true and the Court will "construe the pleadings in the light most favorable to the nonmoving party." Knievel v. ESPN, 393 F.3d 1068, 1072 (9th Cir. 2005).

Plaintiffs to take off-duty rest breaks for every four-hour work period or major fraction thereof, as mandated by law. ECF No. 33 ¶ 21. Because Defendants require operators to monitor the refining process, respond to upsets and critical events, and maintain the safe and stable operation of their units, they are required to remain attentive, carry radios, and be reachable throughout their shifts. ECF No. 33 ¶ 20. As a result, Plaintiffs are responsible for their units at all times and do not receive "designated rest breaks or relief." ECF No. 33 ¶ 21.

Plaintiffs assert the following four causes of action under California law: (1) violations of California Labor Code section 226.7 and California's Industrial Welfare Commission ("IWC") Wage Order 1-2001 for failure to provide rest periods; (2) violation of Labor Code section 226 for failure to provide accurate written wage statements; (3) violation of California's Private Attorney General Act ("PAGA") (Cal. Lab. Code § 2698 et seq); and (4) violation of California's Unfair Competition Law ("UCL") (Bus. & Prof. Code § 17200 et seq). ECF No. 33 ¶ 40-66.

On April 14, 2017, Defendants moved to dismiss Plaintiffs' First Amended Complaint ("FAC"), asserting that Plaintiffs' state law claims are preempted by section 301 of the Labor Management Relations Act ("LMRA") and that several of Plaintiffs derivative claims are deficiently pled. ECF Nos. 21, 25. On April 26, 2017, the parties filed a stipulation requesting to direct Defendants' Motion to Dismiss to the Plaintiffs' soon-to-be-filed Second Amended Complaint ("SAC"), which the Court granted. ECF Nos. 31, 32. Plaintiffs filed their SAC on May 3, 2017 to add allegations that they had administratively exhausted their PAGA claims. ECF No. 33 ¶ 55.

II. JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1332(a) because the amount in controversy exceeds $75,000 and the opposing parties are of diverse citizenship.

III. REQUESTS FOR JUDICIAL NOTICE

Before turning to the merits of the motion to dismiss, the Court resolves the Defendants' requests for judicial notice.

"As a general rule, we may not consider any material beyond the pleadings in ruling on a

Rule 12(b)(6) motion." United States v. Corinthian Colleges, 655 F.3d 984, 998-99 (9th Cir. 2011) (internal quotation marks and citations omitted). Pursuant to Federal Rule of Evidence 201(b), however, "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The Court may properly take judicial notice of materials attached to the complaint and of matters of public record. Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). A court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2). However, the Court takes judicial notice only of the existence of the document, not of the veracity of allegations or legal conclusions asserted in it. See Lee, 250 F.3d at 689-90.

Defendants request that the Court take judicial notice of the following documents: (1) the "Joint Stipulation of Class Action Settlement; Settlement Agreement and Release" in Benjamin Burgess v. Tesoro Refining & Marketing Company, United States District Court, Central District of California Case No. 2:10-cv-05870-DMG-PLA, ECF No. 199-1. ECF No. 25-1, Exh. A; (2) "The Order and Final Judgment (a) Confirming Final Certification of Settlement Class; (b) Granting Final Approval of Class Action Settlement; and (c) Granting Plaintiffs' motion for award of Attorneys' Fees" in Burgess, ECF No. 228. ECF No. 25-1, Exh. B; (3) the Collective Bargaining Agreements ("CBAs") and Memoranda of Agreement attached to the concurrently filed Declaration of Karen Kawano. ECF No. 25-2 through ECF No. 25-14; and (4) Form DF-43, Department of Finance Bill Report Deferred to Department of Industrial Relations, Bill No. AB 2509, ECF No. 35-1, Exh. A, and California Legislative Counsel's digest of Senate Bill 1255, ECF No. 35-1, Exh. B. Defendants' request is not opposed.

Because a court "may take judicial notice of proceedings in other courts . . . if those proceedings have a direct relation to matters at issue," Bias v. Moynihan, 508 F.3d 1212, 1225 (9th Cir. 2007), the Court grants requests (1) and (2) for judicial notice. Because a court may "take judicial notice of a CBA in evaluating a motion to dismiss" the Court grants request (3) for

judicial notice of the attached CBAs. Jones v. AT&T, 2008 WL 902292, at *2 (N.D. Cal. Mar. 31, 2008). See also Busey v. P.W. Supermarkets, Inc., 368 F. Supp. 2d 1045, 1049 (N.D. Cal. 2005) (granting judicial notice of a CBA). Because courts may take judicial notice of records and reports of administrative bodies and the legislative history of state statutes, the Court grants request (4) for judicial notice. See Anderson v. Holder, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) (explaining that a court may take judicial notice of legislative history and records and reports of administrative bodies).

IV. LEGAL STANDARDS

A. Motion to Dismiss

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While detailed factual allegations are not required, a complaint must have sufficient factual allegations to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotations and citations omitted). A party may move to dismiss based on the failure to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a motion to dismiss, a pleading must allege "enough facts to raise a reasonable expectation that discovery will reveal evidence" to support the allegations. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007). For purposes of a motion to dismiss, "all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996).

B. Section 301 Preemption

LMRA section 301 provides federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." 29 U.S.C § 185(a). Section 301 embodies "a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202,

209 (1985) (footnote omitted). "This federal common law, in turn, preempts the use of state contract law in CBA interpretation and enforcement." Matson v. United Parcel Serv., Inc., 840 F.3d 1126, 1132 (9th Cir. 2016) (citation and quotation omitted). "To give 'the policies that animate § 301 . . . their proper range,' the Supreme Court has expanded "the pre-emptive effect of § 301 . . . beyond suits alleging contract violations' to state law claims grounded in the provisions of a CBA or requiring interpretation of a CBA." Kobold v. Good Samaritan Reg'l Med. Ctr., 832 F.3d 1024, 1032 (9th Cir. 2016) (quoting Lueck, 471 U.S. at 210–11). However, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by section 301." Lueck, 471 U.S. at 211. "[T]he Supreme Court has repeatedly admonished that section 301 preemption is not designed to trump substantive and mandatory state law regulation of the employee-employer relationship; section 301 has not become a 'mighty oak' that might supply cover to employers from all substantive aspects of state law." Humble v. Boeing Co., 305 F.3d 1004, 1007 (9th Cir. 2002) (citing Lingle v. Norge Div. of Magic Chef Inc., 486 U.S. 399, 408-09 (1988); Livadas v. Bradshaw, 512 U.S. 107, 122 (1994)). "In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." Allis-Chalmers Corp., 471 U.S. at 212.

In Burnside v. Kiewit Pacific Corp., the Ninth Circuit articulated a two prong inquiry to analyze whether section 301 preemption applies. 491 F.3d 1053, 1059-60 (9th Cir. 2007). A court must first determine "whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a CBA. If the right exists solely as a result of the CBA, then the claim is preempted and our analysis ends there." Id. at 1059. However, if the court determines the right underlying the state law claim(s) "exists independently of the CBA" the court proceeds to the second prong, which inquires whether the right is "substantially dependent on analysis of a collective bargaining agreement." Id.

In determining whether the first prong is met (whether a right is independent of a CBA) a

court must evaluate whether the "legal character of a claim" is "independent of rights under the collective-bargaining agreement." Livadas, 512 U.S. at 123. Section 301 preempts the claim if the claim is "founded directly on rights created by a collective bargaining agreement." Caterpillar v. Williams, 482 U.S. 386, 394 (1987).

In determining whether the second prong is met (whether the claim is "substantially dependent" on a CBA) the Court must evaluate whether the claim can be resolved by "'look[ing] to' versus interpreting the CBA. If it is the latter, the claim is preempted, if it is the former, it is not." Burnside, 491 F.3d at 1060 (internal quotation marks and citations omitted). "When the meaning of a contract term is not the subject of dispute, the bare fact that a CBA will be consulted in the course of the state-law litigation plainly does not require the claim to be extinguished." Livadas, 512 U.S. at 124.

"[W]hen the resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a section 301 claim, or dismissed as preempted by federal labor-contract law." Lueck, 471 U.S. at 220. It is usually difficult for an employee to succeed in a suit under section 301 "unless the contractual grievance-arbitration procedure is invoked on her behalf or on behalf of a group of employees of which she is part. If the dispute is not ultimately resolved by arbitration, the employee must establish that the union violated its duty of fair representation by failing to pursue the grievance to arbitration or pursuing it arbitrarily." Kobold v. Good Samaritan Regional Medical Center, 832 F.3d 1024, 1034 (9th Cir. 2016).

V. DISCUSSION

Defendants advance two primary arguments in support of their motion: (1) Plaintiffs' claims are preempted by section 301 of the LMRA because they require interpretation of the CBAs and (2) Plaintiffs' derivative claims fail to state a viable claim for relief.

A. Section 301 Preemption

1. Application of the Burnside Test

In addressing the first prong of the Burnside test,[2] the Court asks whether Plaintiffs' claims involve rights conferred upon an employee by state law or solely by a CBA. Burnside, 491 F.3d at 1059. Here, the Court concludes that Plaintiffs' claims are independently rooted in state law. Plaintiffs assert that Defendants failed to provide them with off-duty rest breaks, as mandated by Labor Code section 226.7[3] and Wage Order 1-2001, since they were required to attend to their job duties during the entirety of their shifts, carry radios, and respond to emergencies that could arise at any time. ECF No. 33 ¶ 20, 21. And while Defendants place numerous CBAs before the Court, none of them forms the basis of Plaintiffs' claims. In other words, Plaintiffs' claims involve rights "conferred upon an employee by virtue of state law, not by a CBA." Burnside, 491 F.3d at 1059. "If the claim is plainly based on state law, § 301 pre-emption is not mandated simply because the defendant refers to the CBA in mounting a defense." Valles v. Ivy Hill Corp., 410 F.3d 1071, 1081 (9th Cir. 2005) (quoting Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 691 (9th Cir. 2001)).

Because the right exists independently of the CBA, the Court addresses the second prong and asks whether the right is "nevertheless substantially dependent on the analysis of a CBA." Burnside, 491 F.3d at 1059. Defendants assert that Plaintiffs' claims challenge collectively bargained rest break policies and require interpretation of the CBAs. ECF No. 25 at 20-23. Defendants cite Raphael v. Tesoro Ref. & Mktg. Co. LLC for the proposition that "the need to interpret the substantive impact of the CBAs becomes more complex because there are a number of CBAs" that apply to the putative class. No. 2:15-cv-02862-ODW, 2015 WL 3970293 (C.D. Cal. June 30, 2015); ECF No. 25 at 21.

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[2] Defendants essentially concede the first prong of the Burnside test by not addressing it.

[3] Labor Code 226.7(b) states that "[a]n employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupations Safety and Health." West's Ann. Cal. Labor Code § 226.7.

Raphael does not help Defendants. In that case, the Court was faced with the question of whether the plaintiff, a commercial truck driver, was subject to a statutory exemption under the Labor Code which excludes commercial truck drivers from protection of the Labor Code if they are covered by a CBA. Unlike here, however, the defendant in that case "presented the Court with a plethora of provisions in need of interpretation throughout the eight separate CBAs covering Raphael and the aggrieved employees he seeks to represent." 2015 WL 3970293, at *6. More importantly, there was no way for the Raphael court to determine whether the statutory exemption at issue applied – and by extension, whether the case belonged in a federal court – without construing terms of the CBAs. Id. (noting that impact of plaintiff's argument that statutory exemption did not apply "is that it introduces a clear dispute between the parties as to the interpretation and application of the CBAs' arbitration provisions").

Here, by contrast, Defendants' motion fails to identify any particular CBA provision that must be interpreted. Although Defendants cite to the CBAs attached to the Declaration of Karen Kawano at Exhs. E, D, F, and G, and state that several of them "specifically define the terms and conditions for the provision of authorized rest breaks," ECF No. 25 at 21, Defendants' listing of provisions of the CBA that might be relevant to a determination of its employees' rights does not meet the "substantially dependent" test. See Densmore v. Mission Linen Supply, 164 F. Supp. 3d 1180, 1194 (E.D. Cal. 2016) ("[Defendant] has failed to point out any specific provisions in the CBAs that are subject to dispute. Rather, as stated above, [Defendant] merely lists the provisions in the CBA that could be relevant to the determination of whether the statutory exemption . . . could apply in this case.").

It is not until their reply that Defendants identify the specific CBA provisions on which adjudication of this case purportedly depends. The Court usually does not consider new facts or argument made for the first time in a reply brief. "It is inappropriate to consider arguments raised for the first time in a reply brief." Ass'n of Irritated Residents v. C & R Vanderham Dairy, 435 F.Supp.2d 1078, 1089 (E.D. Cal. 2006). But even considering the provisions Defendants list in their reply, the Court is not persuaded. Defendants argue that the CBA provision that requires

interpretation is whether "'employees who are forced to forego a Rest Period' includes rest periods not merely entirely missed, but those interrupted by a purported requirement to monitor a radio." ECF No. 35 at 11 (quoting ECF No. 25-9 at 22). On the one hand, Defendants do not explain how the Court must interpret a CBA provision to answer this question. On the other hand, the California Supreme Court recently held in Augustus v. ABM Security Services, Inc., 2 Cal. 5th 257, 270 (2016), that on-call rest breaks are "impermissible." The Augustus court explains that "on-call rest periods do not satisfy an employer's obligation to relieve employees of all work-related duties and employer control." Id. The court noted that "[s]everal options exist for an employer who finds it especially burdensome to relieve employees of all duties during rest periods," including paying the premium set forward in Labor Code section 226.7. Id. at 272. Otherwise, "state law prohibits on-duty and on-call rest periods. During required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." Id. at 260. Thus, under Augustus, Plaintiffs' rights are clear and do not substantially depend on any interpretation of a CBA. Cf. Firestone v. Southern California Gas Co., 219 F.3d 1063 (9th Cir. 2000) (Plaintiffs' claim was preempted because whether the requirements of the state wage law were met substantially depended on interpretation of the CBA's wage calculations). Because the right to rest breaks is independently rooted in state law, and the right to an uninterrupted rest break is clear, it is not substantially dependent on the analysis of a CBA, section 301preemption does not apply.

2. Plaintiffs' Claims Are Not Preempted Because the Right to Rest Breaks Is Non-Negotiable

In addition to failing the Burnside test, Defendants' section 301 preemption argument fails for an additional reason: the right to rest breaks is a nonnegotiable right and thus exempt from section 301 preemption. ECF No. 34 at 9. In Valles, the Ninth Circuit held that nonnegotiable rights are not subject to section 301 preemption, even if employees are covered by a valid CBA. 410 F.3d at 1081 ("[W]e have held that § 301 does not permit parties to waive, in a collective bargaining agreement, nonnegotiable state rights conferred on individual employees.") (internal citation and quotation marks omitted); see also Vasserman v. Henry Mayo Newhall Mem'l Hosp.,

65 F. Supp. 3d 932, 960 (C.D. Cal. 2014).

Although Valles concerned the state law provisions governing meal periods, 410 F.3d at 1081, a California appellate court has held that rest breaks are a non-waivable state-mandated "minimum labor standard." Zavala v. Scott Bros. Dairy, 143 Cal. App. 4th 585, 594 (2006). And rest breaks, like meal periods, are similarly regulated by Labor Code section 226.7 and "address some of the most basic demands of an employee's health and welfare." Valles, 410 F.3d at 1081. Thus, this Court holds that the right to rest breaks is non-negotiable and not subject to section 301 preemption.

3. Plaintiffs' Claims Do Not Violate the Collectively-Bargained Class Settlement

Defendants also argue that "Plaintiffs' claims violate the terms of the collectively-bargained Class Settlement of the Burgess, Delagarza, and USW actions, which directly addressed the issue of certain plant radio usage and provided a collectively-bargained solution to comport wage and hour practices with the various communication requirements of Tesoro's California refineries." ECF No. 25 at 23. The Court concludes that the settlement agreement does not have any terms that must be interpreted in order to resolve Plaintiffs' state law claims.

On March 15, 2013, Defendants and the United Steel Workers union ("USW") (the union which Plaintiffs are members) entered into a "Joint Stipulation of Class Action Settlement" ("Class Settlement") to resolve three class and putative class actions (Delagarza v. Tesoro Refining & Marketing Co., N.D. Cal., Case No. 09-05803 EMC, Burgess v. Tesoro Refining & Marketing Co., C.D. Cal., Case No 10-5870-DMG (PLAx), and United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, ALF-CIO, CLC, and Richard Floyd and Eduardo Carbajal, on behalf of all similarly situated current and former employees v. Shell Oil Co., C.D. Cal., Case No. 08-3693 RGK ["USW"]). ECF No. 25 at 17.

Defendants are correct that in some instances a class settlement may have a preemptive effect under section 301 of the LMRA. See, e.g., Retail Clerks Intern. Ass'n Local Unions Nos. 128 and 633 v. Lion Dry Goods, Inc., 369 U.S. 17, 28 (1962) (holding a strike settlement agreement "plainly . . . falls within § 301(a)"). The settlement at issue here, however, does not

have such an effect. See Dall v. Albertson's, Inc., 234 Fed.Appx. 446, 449 (9th Cir. 2007) (holding that where a settlement agreement is only relevant to the defendant's defenses of waiver, release, and duty to arbitrate, there is no preemption).

First, Defendants do not identify anything in the Class Settlement that purports to expressly govern radio usage during rest breaks. Defendants point to the fact that the Class Settlement acknowledged "'the requirement that [covered employees] generally carry radios or otherwise remain in contact or available to be contacted during meal periods' and fashioned the collectively-bargained solution of providing an on-duty meal period agreement between Tesoro and the USW." ECF No. 25 at 23 (quoting ECF No. 25-1 at 52) (emphasis added). But Plaintiffs' claims regarding rest breaks do not require interpretation of an agreement concerning whether they are required to carry radios during meal periods.

Moreover, the Augustus decision suggests rest breaks cannot be waived with an on-duty agreement. In Augustus, the California Supreme Court differentiated between an employer's ability to authorize on-duty rest breaks versus on-duty meal breaks. See Augustus, 2 Cal. 5th at 266 ("The [Industrial Welfare Commission] could have allowed on-duty rest breaks—and did so in subdivision 11(A) [meal breaks]. Its failure to do so in subdivision 12(A) is a telling indication it did not contemplate on-duty rest periods more generally."). Moreover, Defendants essentially argue that the Class Settlement shows that they are not requiring employees to be on their radios during rest breaks, stating that the "agreement reflects the mutual understanding that carrying radios is only required during meal periods – not during rest periods." ECF No. 25 at 23 (emphasis in original)(citing ECF No. 25-1 at 52). In fact, the agreement says nothing about whether Tesoro expects its employees to carry their radios during rest breaks; the agreement only discusses meal periods. Moreover, the Court must take Plaintiffs' alleged facts as true for purposes of the motion to dismiss, see Knievel, 393 F.3d at 1072, and Plaintiffs claim that they are required to be on their radios during such breaks. Reading the Class Settlement agreement does not assist the Court in addressing those allegations.

The Class Settlement released putative class members' claims regarding rest breaks

through July 19, 2013 (the "Effective Date"). ECF No. 33 ¶ 26; ECF No. 25-1 at 71. There is nothing in the on-duty meal agreement that waives employees' right to duty-free rest breaks after that date. Thus, it appears Plaintiffs are free to assert these rest break and wage statement violation claims provided they have occurred since July 13, 2013 and are rooted in state law.

4. Plaintiffs' Need Not Exhaust Arbitration Procedures

Finally, Defendants argue that Plaintiffs must exhaust arbitration procedures before filing suit. ECF No. 25 at 25-26. "The existence of an arbitration clause in a CBA does not necessarily implicate § 301 preemption." Meyer v. Irwin Industries, Inc., 723 F. Supp. 2d 1237, 1246 (C.D. Cal. 2010) (citing Livadas, 512 U.S. at 128); see also Lingle, 486 U.S. at 411 ("[The Supreme Court] has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes.") (internal quotation marks and citations omitted). Because Plaintiffs' claims are founded on rights guaranteed by California law and do not require interpretation of the CBAs, Plaintiffs' are not required to exhaust the grievance and arbitration procedures set forward in the CBAs.

B. Plaintiffs' Derivative Claims

Defendants also argue that Plaintiffs' derivative claims fail to state a viable claim for relief. Specifically, Defendants assert: (1) under Labor Code section 226, wage statements need not include unearned wages; (2) UCL claims cannot be predicated on rest break penalties or wage statement violations; (3) Plaintiffs cannot seek disgorgement of profits under the UCL; and (4) Plaintiffs' PAGA claims fail to state a claim for relief. The Court addresses each argument in turn.

1. Section 226 Claims

Defendants contend that Plaintiffs' Labor Code section 226 claim should be dismissed because wage statements need not include unearned wages. ECF No. 25 at 26-28.

Labor Code section 226 requires employers to keep accurate itemized pay statements setting forth gross wages, the actual number of hours and minutes worked, and all applicable hourly rates of pay. Cal. Lab. Code §226(a). To recover damages under section 226, an employee

must allege that he or she "suffer[ed] injury as a result of a knowing and intentional failure by an employer to comply" with section 226(a). Id. at § 226(e)(1). An "injury" occurs when, among other events, "the employer fails to provide accurate and complete information as required by any one or more of" the items contained in section 226(a)(1)-(9) and "the employee cannot promptly and easily determine from the wage statement alone one or more of" the items of information provided in the statute. Id. at § 226(e)(2)(B). Wage statements must accurately itemize gross wages earned, (§ 226(a)(1)), total hours worked, (§ 226(a)(2)), and net wages earned (§ 226(a)(5)). If a wage statement fails to accurately itemize any of those items, and an employee "cannot promptly and easily determine from the wage statement alone" total hours worked, or all the applicable hourly rates for each hour worked by the employee, the wage statement violates section 226.

This Court has previously held that payments awarded under Labor Code section 226.7 in respect of missed meal periods are properly classified as wages. Parson v. Golden State, LLC, 2016 WL 1734010, at *4 (N.D. Cal. May 2, 2016). In summarizing the relevant California Supreme Court precedent, Parson clarified that "although an employee who successfully brings a section 226.7 claim is challenging a failure to provide rest breaks, the remedy for that failure is additional wages . . . . Nothing in Murphy or Kirby suggests that wages awarded under section 226.7 be treated any differently than other wages earned by the employee." Id. (citing Murphy v. Kenneth Cole, 40 Cal. 4th 1094 (2007); Kirby v. Immoos Fire Prot., Inc., 53 Cal. 4th 1244 (2012)).

Defendants attempt to distinguish Parson on the ground that Plaintiffs' claim there arose under Labor Code § 204, which concerns the timing of wage payments, rather than under Labor Code § 226, which concerns the content of wage statements. ECF No. 35 at 14-15. But Defendants do not explain how this distinction matters, or why such payments should be considered "wages" in one context but not the other. Defendants also challenge the basis for the Court's decision in Parson by pointing to the legislative history of section 226, but the materials submitted by Defendants are actually consistent with the conclusion that wages for missed rest

periods should be included on an employee's wage statements. See ECF No. 35 at 15 (noting that legislative purpose was to provide for a penalty where "the employee cannot promptly and easily determine from the wage statement alone the amount of the gross or net wages paid to the employee during the pay period") (emphasis in original); ECF No. 35-1 at 20.

Accordingly, the Court declines Defendants' invitation to reconsider its prior ruling in Parson and instead concludes that the payments required by section 226.7 should be considered wages, and that the Plaintiffs may therefore bring a derivative claim under section 226. Defendants' motion to dismiss Plaintiffs' section 226 claim is denied.

2. UCL Claims

Plaintiffs' fourth cause of action is brought under the California Unfair Competition Law ("UCL"), Business and Professions Code § 17200 et seq. and seeks restitution of all lost wages and work benefits, plus interest, disgorgement of profits, and preliminary and permanent injunctive relief. ECF No. 33 ¶ 66. Defendants contend these claims must be dismissed because (1) UCL claims cannot be predicated on Labor Code section 226.7 and 226 violations and (2) disgorgement of profits is not an available remedy under the UCL. ECF No. 25 at 28-29. The Court agrees with Defendants.

a. UCL Claims Predicated on 226.7 Violations

Defendants contend that UCL claims cannot be predicated upon missed rest break violations. "While the scope of conduct covered by the UCL is broad, its remedies are limited, and '[p]revailing plaintiffs are generally limited to injunctive relief and restitution.'" Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144 (2003) (quoting Cel-Tech Communications, Inc v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 127 (1999)).

This Court has previously held that wages awarded under section 226.7 violations do not constitute restitution for the purpose of the UCL. Parson, 2016 WL 1734010, at *6. In Parson, this Court held that "wages awarded for failure to provide rest breaks under section 226.7 would not be earned by the 'employee who has given his or her labor to the employer in exchange for that property.'" Id. at *7 (quoting Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163,

173 (2000)).

Plaintiffs respond that this portion of the Court's prior holding in Parson was in error, because (1) it failed to consider the clear import of the California Supreme Court's holding in Murphy; (2) numerous district courts have concluded that section 226.7 payments for meal breaks are compensatory payments that support a UCL restitution claim; (3) missed rest period payments should be treated the same way; and (4) the California Supreme Court's opinion in Kirby did not overrule the relevant portion of its holding in Murphy. The Court concludes that Plaintiffs are correct.

First, there can be no dispute, as set forth above, that Murphy holds that payments under section 226.7 are "wages." 40 Cal.4th at 1099. Second, it has long been the law that "unlawfully withheld wages are property of the employee within the contemplation of the UCL." Cortez v. Purolator Air Filtration Prod. Co., 23 Cal. 4th 163, 178 (2000). Accordingly, numerous district courts have held that "the recovery of section 226.7 missed meal premiums represent restitution that a plaintiff may recover under the UCL." Cleveland v. Groceryworks.com, LLC, 200 F. Supp. 3d 924, 963 (N.D. Cal. 2016); see also Tomlinson v. Indymac Bank, F.S.B., 359 F. Supp. 2d 891, 896 (C.D. Cal. 2005); Brandon v. Nat'l R.R. Passenger Corp. Amtrak, No. CV 12–5796 PSG (VBKx), 2013 WL 800265, at *4 (C.D. Cal. Mar. 1, 2013); Doe v. D.M. Camp & Sons, No. CIV-F-05-1417 AWI SMS, 2009 WL 921442, at *13 (E.D. Cal. Mar. 31, 2009). As stated earlier, there is no meaningful difference between meal breaks and rest periods for purposes of this analysis. Finally, this Court's reliance on Kirby to reach its conclusion in Parson was misplaced. The California Supreme Court in Kirby concluded that an action to recover section 226.7 payments was not an action to recover "wages" within the meaning of California Labor Code section 1194. Kirby, 53 Cal. 4th at 1254. Kirby left intact, however, Murphy's definition of wages, distinguishing the two cases as follows:

> Our reading of section 218.5 is not at odds with our decision in Murphy. There, we held that the three-year statute of limitations period in Code of Civil Procedure section 338, subdivision (a) governs section 226.7 claims because such claims are "action[s] upon a liability created by statute, other than a penalty or forfeiture" (Code Civ. Pro. § 338, subd. (a)). (See Murphy, supra, 40 Cal.4th at p. 1099, 56 Cal.Rptr.3d 880, 155 P.3d 284.) We said that the "additional hour of pay" remedy

> in section 226.7 is a "'liability created by statute'" and that the liability is properly characterized as a wage, not a penalty. (Murphy, at pp. 1102, 1114, 56 Cal.Rptr.3d 880, 155 P.3d 284.) To say that a section 226.7 remedy is a wage, however, is not to say that the legal violation triggering the remedy is nonpayment of wages. As explained above, the legal violation is nonprovision of meal or rest breaks, and the object that follows the phrase "action brought for" in section 218.5 is the alleged legal violation, not the desired remedy.

Kirby v. Immoos Fire Prot., Inc., 53 Cal. 4th 1244, 1257 (2012); see also Brewer v. Gen. Nutrition Corp., No. 11-CV-3587 YGR, 2015 WL 5072039, at *18 (N.D. Cal. Aug. 27, 2015) (noting that "Kirby did not abrogate Murphy"). Because Kirby leaves intact the essential characterization of section 226.7 payments as "wages," it also continues to acknowledge the Plaintiffs' ownership interest in those wages.[4] Thus, Plaintiffs are entitled to seek restitution under the UCL. Thompson v. Target Corp., No. CV12-10-MWF (MRWX), 2012 WL 12883954, at *4 (C.D. Cal. Aug. 2, 2012) (holding that claim for section 226.7 payments "is restitutionary and [plaintiff] may allege this claim under the UCL").

Thus, Defendants motion to dismiss Plaintiffs' UCL claim predicated on Labor Code section 226.7 violations is denied.[5]

b. UCL Claims Predicated on 226 Violations

Defendants assert that Defendants cannot predicate their UCL claims on Labor Code section 226 violations. ECF No. 25 at 29. Defendants base their argument regarding section 226 claims on the same reasoning as their argument about section 226.7 – an argument the Court rejected. However, Plaintiffs do not respond to this part of Defendants' motion, and it is unclear to the Court what UCL relief the Plaintiffs could seek for a 226 violation. See In Re Wal-Mart Stores, Inc. Wage and Hour Litigation, 505 F. Supp. 2d 609, 619 (N.D. Cal. May 29, 2007)

[4] At least one panel of the California Court of Appeal has already held explicitly that Kirby does not preclude UCL restitution claims based on alleged meal and rest break violations. McCleery v. Allstate Ins. Co., No. B256374, 2016 WL 463275, at *18 (Cal. Ct. App. Feb. 5, 2016). Although McCleery is an unpublished decision, this Court may consider its reasoning. See Smith v. Harrington, No. C 12-03533 LB, 2015 WL 1407292, at *18 (N.D. Cal. Mar. 27, 2015), aff'd sub nom. Smith v. Liddell, No. 15-15826, 2017 WL 1031360 (9th Cir. Mar. 17, 2017). And at least one published opinion allows restitution claims based on section 226.7 premiums in the class action context, although it is unclear whether the issue was litigated. Safeway, Inc. v. Superior Court of Los Angeles Cty., 238 Cal. App. 4th 1138, 1159 (2015).

[5] Plaintiffs also seek injunctive relief. Tesoro does not meaningfully address that claim, and it survives.

("claims pursuant to Labor Code §§ 203 and 226 cannot support a § 17200 claim"). The Court will accordingly take Plaintiffs' silence as a concession, and grant Defendants' motion on this ground. See Linder v. Golden Gate Bridge, Highway & Transportation Dist., No. 4:14-CV-03861-SC, 2015 WL 4623710, at *3 (N.D. Cal. Aug. 3, 2015) (citing Stichting Pensioenfonds ABP v. Countrywide Fin. Corp., 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) ("[I]n most circumstances, failure to respond in an opposition brief to an argument . . . constitutes waiver or abandonment in regard to the uncontested issue.")).

c. Disgorgement of Profits Under the UCL

Plaintiffs' UCL claim seeks "an order [of] disgorgement of all profits gained by operation of the unfair business practices." ECF No. 33 ¶ 65, 66; Prayer for Relief ¶ 10. Defendants argue that such a request is improper and not permitted by the UCL. ECF No. 25 at 29. Plaintiffs do not oppose Defendants' argument on this claim. The Court agrees with Defendants. See Cortez, 23 Cal. 4th at 172 ("the trial court may not make an order for disgorgement of all benefits defendant may have received from failing to pay overtime wages"). Thus, Defendants' motion to dismiss Plaintiffs request for disgorgement of profits under the UCL is granted.

3. PAGA Claims

Defendants raise two issues with respect to Plaintiffs' PAGA claims. First, Defendants assert that because Plaintiffs failed to fulfill PAGA's mandatory exhaustion requirements prior to filing suit, the claims must be dismissed. ECF No. 25 at 30. Second, Defendants contend that because Plaintiffs' Labor Code section 226 and 226.7 claims already provide for penalties, Plaintiffs may not recover additional penalties under PAGA. ECF No. 25 at 30-33. The Court disagrees.

a. Exhaustion Requirements

In 2003, the California legislature adopted PAGA into the state's labor code to allow individual plaintiffs "to bring a civil action to collect civil penalties for Labor Code violations previously only available in enforcement actions initiated by the State's labor law enforcement agencies." Caliber Bodyworks, Inc. v. Superior Court, 134 Cal. App. 4th 365, 374 (2005); See

Cal. Lab. Code § 2699(a); Urbino v. Orkin Serv. of Cal., Inc., 726 F.3d 1118, 1121 (9th Cir. 2013). In order to bring a PAGA claim, a plaintiff must exhaust the administrative procedures set out in section 2699.3, which require giving written notice to the California Labor and Workforce Development Agency ("LWDA") and the defendants via certified mail. Cal. Lab. Code § 2699.3(a)(1)(A). After the LWDA responds that it will not prosecute the action, or after 65 days without notice from the LWDA, the plaintiff may file suit. Id. at § 2699.3(a)(2)(A). A civil action "shall commence only after" the exhaustion requirements are satisfied. Id. at § 2699.3(a). However, a Plaintiff may amend his complaint to plead that the 65 day deadline passed without any notice from the LWDA. "California courts have not held that the failure to exhaust administrative remedies before initiating PAGA actions must le[a]d to dismissal of the PAGA claim." Donnelly v. Sky Chefs, Inc., Case No. 16-cv-03404-JD, 2016 WL 9083158, at *2 (N.D. Cal. Oct. 25, 2016); see also Stagner v. Luottica Retail N. Am., Inc., 2011 WL 3667502, at *7 (N.D. Cal. Aug. 22, 2011) ("In any amended complaint, to satisfy the PAGA requirements, Plaintiff must plead that the [] deadline passed without any notice from the LWDA").

Here, Defendants assert that Plaintiffs' PAGA claims fail because Plaintiffs failed to exhaust the administrative procedures established in section 2699.3 prior to filing suit. ECF No. 25 at 30. Plaintiffs gave notice of their claims to the LWDA on January 10, 2017, the same day Plaintiffs filed this suit. ECF No. 33 ¶ 55, ECF No. 1. Plaintiffs filed a SAC on May 3, 2017, 113 days after giving notice to the LWDA, alleging that they had met the exhaustion requirements. ECF No. 33 ¶ 55. Because Plaintiffs amended their complaint to allege exhaustion, failing to exhaust prior to filing suit is not fatal to their claim.

b. Section 226.7 and Section 226 Penalties

Defendants argue that because Plaintiffs' Labor Code section 226 and 226.7 claims already provide for penalties, Plaintiffs may not recover additional penalties under PAGA. ECF No. 25 at 30-33. Defendants' argument fails to differentiate between civil and statutory penalties and calls for a discussion distinguishing the two. A statutory penalty is directly recoverable by an employee and does not require PAGA compliance, whereas a civil penalty was previously enforceable only

by the state's labor enforcement agencies and now requires PAGA compliance. See Caliber, 134 Cal. App. 4th at 377 (distinguishing statutory penalties as "recoverable directly by employees well before [PAGA]" and civil penalties as "previously enforceable only by the state's labor law enforcement agencies"); see also Noe v. Superior Court, 237 Cal. App .4th 316, 339 (2015).

Defendants contend that because 226.7(c) already provides for penalties for violations of section 226.7, Plaintiffs may not recover additional penalties under PAGA. ECF No. 25 at 32. The Court disagrees. Section 226.7(c) states "[i]f an employer fails to provide an employee a meal or rest or recovery period . . . the employer shall pay the employee one additional hour of pay . . ." Cal. Lab. Code § 226.7(c). Nothing in the statute suggests this is a civil penalty to be collected by California's labor enforcement agencies; rather, the plain language suggests it is instead a statutory penalty directly recoverable by an employee. See Diaz v. A&R Logistics, Inc., 2015 WL 11237469, at *6 (S.D. Cal. Sept. 16, 2015) (explaining the penalty set forward in section 226.7(c) is not a "civil penalty"); see also Culley v. Lincare Inc., 2017 WL 698273, at *7-8 (E.D. Cal. Feb. 21, 2017) (allowing a plaintiff to seek both the statutory remedy provided in section 226.7 as an individual and civil penalties under PAGA). Thus, because Labor Code section 226.7 does not provide for civil penalties, Plaintiffs state a viable claim for recovery of civil penalties for 226.7 violations under PAGA.

Defendants similarly contend that because section 226.3 already provides for civil penalties for section 226 violations, Plaintiffs may not recover additional penalties under PAGA. Section 226.3 provides that "[a]ny employer who violates subdivision (a) of section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars ($250) per employee . . . " Cal. Lab. Code § 226.3 (emphasis added). Although the statute explicitly references a "civil penalty," when the Labor Code provides for a civil penalty but "contains no language suggesting the penalty is recoverable directly by employees" then "no right of action is available other than through a PAGA claim." Noe, 237 Cal. App. 4th at 339. The Court is further persuaded by the fact that Labor Code section 2699.5 explicitly states that "Section 2699.3 appl[ies] to any alleged violation of the following provisions," and includes section 226 (as well as section 226.7) within that list,

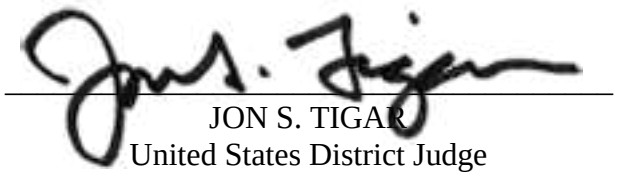
suggesting recovery under PAGA for these claims is permitted. Therefore, Defendants' motion to dismiss Plaintiffs' PAGA claims is denied.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is granted with regard to Plaintiffs' UCL claim under Labor Code section 226 and their claim for disgorgement under the UCL, and denied in all other respects. Because the Court concludes that amendment would be futile, dismissal is without leave to amend. Defendants' requests for judicial notice are granted.

IT IS SO ORDERED.

Dated: July 21, 2017



JON S. TIGAR
United States District Judge