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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PATRICK BRADFORD,
Plaintiff,
v.
PROFESSIONAL TECHNICAL
SECURITY SERVICES INC (PROTECH),
et al.,
Defendants.

Case No. [20-cv-02242-WHO](#)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
REMAND AND MOTION TO DISMISS**

Re: Dkt. Nos. 6, 17, 18

Plaintiff Patrick Bradford filed suit in San Francisco County Superior Court against his former employer, defendant Professional Technical Security Services, Inc. (“Protech”), alleging a single claim under California’s Private Attorneys General Act (“PAGA”) for violation of various Labor Code sections. Protech removed the case, invoking this court’s federal question jurisdiction on grounds that Bradford’s claim is preempted by Section 301 of the Labor Relations Management Act (“LMRA”), 29 U.S.C. § 185. It moves to dismiss on these same grounds because Bradford failed to allege compliance with the exclusive and mandatory grievance and arbitration procedures set out in his collective bargaining agreement (“CBA”) prior to filing suit. Bradford opposes the motion and moves to remand.

While I find that Bradford’s PAGA theory alleging violation of Labor Code section 204 is preempted by the LMRA, the remaining Labor Code violations that make up his PAGA claim are not preempted and I lack jurisdiction to keep them. Accordingly, I DENY Protech’s motion to dismiss and GRANT Bradford’s motion to remand, except as to Labor Code section 204.¹

¹ The hearing scheduled for May 21, 2020 was vacated as unnecessary and Bradford’s ex parte application for order continuing hearing to June 24, 2020 is DENIED. [Dkt. No. 18].

BACKGROUND

I. FACTUAL BACKGROUND

A. The Complaint

Bradford was employed by Protech as a non-exempt employee with the job title of “security guard” from June 18, 2019 until September 20, 2019. Notice of Removal, Ex. A Complaint (“Compl.”) [Dkt. No. 1-1] ¶ 7; Declaration of Raymond Smith In Support Of Defendant’s Notice of Removal [Dkt. No. 1-2] ¶ 3. The central allegation of his Complaint is that he and other similarly aggrieved employees were consistently denied meal and rest breaks in violation of Labor Code sections 512(a) and 226.7. Compl. ¶¶ 10-11. He also brings related claims based on Protech’s failure to compensate for on-the-clock work during meal and rest breaks:

- Failure to pay for all hours worked (Compl. ¶ 12);
- Failure to pay overtime (Compl. ¶ 13);
- Failure to provide accurate wage statements (Compl. ¶ 14);
- Failure to keep accurate payroll records (Compl. ¶ 15);
- Violations of Labor Code sections 1198 and 1199 based on same allegations for minimum wages and/or overtime (Compl. ¶ 16);
- Failure to timely pay wages (Compl. ¶ 17);
- Failure to timely pay all wages upon separation (Compl. ¶ 18).

Altogether, the Complaint includes a single PAGA claim premised on the alleged violations of Labor Code sections 201-202, 204, 216, 221-223, 226, 226.7, 226.8, 245-248.5, 510, 511, 512, 558, 558.1, 1174, 1194, 1197, 1198, 1199.

B. The Applicable Collective Bargaining Agreement

During his employment, Bradford was a member of the Service Employees International Union, United Services Workers West (“Union”) and worked for Protech pursuant to a CBA agreed to by the Union, Protech, and several other security guard companies that provide union services in the San Francisco Bay Area. Defendant Professional Technical Security Services, Inc.’s Request for Judicial Notice In Support of Motion to Dismiss [Dkt. No. 6-2], Ex. 1

1 (hereinafter “CBA”).² The CBA has been applied to all members of the Union since August 5,
2 2017 and remains in effect through June 30, 2021. *Id.*

3 The CBA sets forth, among other things, the terms and conditions of employment, hours of
4 work, regular and overtime compensation rates, meal periods, rest breaks, and mandatory
5 grievance and arbitration procedures for all claims and disputes related to these issues. Pursuant to
6 the CBA, Union members were paid union-negotiated wages and provided union-negotiated
7 overtime compensation breaks, union representation and other benefits. In return, Union members
8 were required to raise any issue related to the terms and conditions of their employment and
9 pursue those claims through the Union, in accordance with the obligatory grievance and arbitration
10 provisions of the CBA.

11 The CBA provides that “[t]he Union and Employer intend that the grievance and
12 arbitration provisions in the [CBA] shall be the exclusive method of resolving all disputes between
13 Employer and Union and the employees covered by this Agreement unless otherwise set forth or
14 required under applicable law.” CBA at Article 25.9. The grievance and arbitration provisions
15 expressly apply to “Wage and Hour Claims or Disputes,” including:

16 All state and federal statutory claims for alleged unpaid wages, claims
17 relating to uniform maintenance, training time, rest periods, meal
18 periods, recovery periods, overtime pay, vacation pay, expense
19 reimbursement, penalties (including claims brought under Labor
20 Code sections 2698- 2699.5 (PAGA)), and all other wage and hour
related matters, expressly including claims arising under the Fair
Labor Standards Act, California Labor Code Sections 201, 203, 204,
226, 226.7, 227.2, 510-512, 551-558, and 1194, and/or Employer
obligations under any applicable California Wage Orders that could
have been brought in state or federal court.

21 *Id.*

22 The grievance and arbitration procedures implement a four-step process. See CBA at
23

24 ² I GRANT Protech’s request for judicial notice of the CBA. Bradford objected on grounds that
25 the CBA is not specifically alleged within the four corners of the Complaint and is not a matter of
26 public record. See Plaintiff Patrick Bradford’s Objections to Defendant’s Request for Judicial
27 Notice in Support of Motion to Dismiss [Dkt. No. 15]. However, consideration of a CBA is
28 appropriate to determine preemption on a motion to dismiss without converting it to a motion for
summary judgment. See *Hall v. Live Nation Worldwide, Inc.*, 146 F. Supp. 3d 1187, 1192-
93 (C.D. Cal. 2015) (granting judicial notice of CBAs to determine preemption); *McGhee v.*
Tesoro Ref. & Mktg. Co. LLC, No. 18-CV-05999-JSW, 2020 WL 1310528, at *2 (N.D. Cal. Feb.
21, 2020) (same).

1 Article 25.2. If parties are unable to informally resolve a Wage and Hour Claim or Dispute
2 through these steps, the Union may elect to pursue that claim in arbitration on behalf of either an
3 individual employee or all employees allegedly affected by the policy or decision giving rise to the
4 grievance. Id. at Article 25.10(b).

5 **II. PROCEDURAL BACKGROUND**

6 Bradford filed his Complaint in the California Superior Court of San Francisco; it was
7 removed to this court on April 2, 2020 on the basis that his claims are preempted by federal law
8 under the LMRA. See Notice of Removal [Dkt. No. 1] ¶ 10. On April 9, 2020, Protech moved to
9 dismiss the Complaint. See Defendant Professional Technical Security Services, Inc.’s
10 Memorandum of Points and Authorities in Support of Motion to Dismiss (“MTD”) [Dkt. No. 6-
11 1].³ Bradford filed an opposition followed by a “corrected” opposition two days later. See
12 Corrected Plaintiff Patrick Bradford’s Memorandum of Points and Authorities in Opposition to
13 Professional Technical Security Services, Inc.’s Motion to Dismiss (“Oppo.”) [Dkt. No. 14].⁴ On
14 May 13, 2020, Bradford moved to remand, reiterating arguments made in his opposition to motion
15 to dismiss. See Plaintiff Patrick Bradford’s Notice of Motion and Motion for Order Remanding
16 Case Back to State Court (“MTR”) [Dkt. No. 17].

17 **LEGAL STANDARD**

18 **I. MOTION TO REMAND**

19 A defendant may remove a case from state to federal court by filing a notice of removal
20 that lays out the grounds for removal. 28 U.S.C. § 1441(a). The district court must remand the
21 case to state court if it lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). The burden of
22

23 ³ Sergio Reyes is also named as a defendant in his individual capacity. Protech contends that he
24 has not been served yet or made an appearance in this case but that its argument in support of its
25 motion extend to allegations against Reyes. MTD 5 n.1. Bradford does not address this point.

26 ⁴ Protech argues that I should disregard Bradford’s untimely amended opposition because it
27 includes substantive arguments that were not included in the originally-filed opposition and
28 Bradford did not seek court approval for the late filing. See Defendant Professional Technical
Security Services, Inc.’s Reply Brief in Support of Motion to Dismiss (“Reply”) [Dkt. No. 16] 5-6
& Ex. A (redline comparison between originally-filed opposition and corrected opposition). His
corrected opposition does not include substantial substantive changes or arguments. Objection
overruled.

1 establishing federal jurisdiction lies with the party asserting it. *Hertz Corp. v. Friend*, 559 U.S.
2 77, 96 (2010). The Ninth Circuit “strictly construe[s] the removal statute against removal
3 jurisdiction.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (citations omitted). “Federal
4 jurisdiction must be rejected if there is any doubt as to the right of removal in the first
5 instance.” *Id.*

6 **II. MOTION TO DISMISS**

7 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint
8 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to
9 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its
10 face.” See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible
11 when the plaintiff pleads facts that “allow the court to draw the reasonable inference that the
12 defendant is liable for the misconduct alleged.” See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
13 (citation omitted). There must be “more than a sheer possibility that a defendant has acted
14 unlawfully.” *Id.* While courts do not require “heightened fact pleading of specifics,” a plaintiff
15 must allege facts sufficient to “raise a right to relief above the speculative level.” See *Twombly*,
16 550 U.S. at 555, 570.

17 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the
18 court accepts the plaintiff’s allegations as true and draws all reasonable inferences in favor of the
19 plaintiff. See *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court
20 is not required to accept as true “allegations that are merely conclusory, unwarranted deductions of
21 fact, or unreasonable inferences.” See *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.
22 2008).

23 If the court dismisses the complaint, it “should grant leave to amend even if no request to
24 amend the pleading was made, unless it determines that the pleading could not possibly be cured
25 by the allegation of other facts.” See *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). In
26 making this determination, the court should consider factors such as “the presence or absence of
27 undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous
28 amendments, undue prejudice to the opposing party and futility of the proposed

1 amendment.” See *Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989).

2 **DISCUSSION**

3 **I. PREEMPTION UNDER THE LABOR MANAGEMENT RELATIONS ACT**

4 Section 301(a) of the LMRA gives federal courts exclusive jurisdiction to hear “[s]uits for
5 violation of contracts between an employer and a labor organization.” 29 U.S.C. § 185(a). It
6 provides that:

7 Suits for violation of contracts between an employer and a labor
8 organization representing employees in an industry affecting
9 commerce as defined in this chapter, or between any such labor
organizations, may be brought in any district court of the United
States having jurisdiction of the parties, without respect to the amount
in controversy or without regard to the citizenship of the parties.

10 *Id.* By enacting this statute, Congress charged federal courts with a “mandate . . . to fashion a
11 body of federal common law to be used to address disputes arising out of labor contracts.” *Allis-*
12 *Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985); see also *Local 174, Teamsters v. Lucas Flour*
13 *Co.*, 369 U.S. 95, 104 (1962) (explaining that “in enacting [section] 301 Congress intended
14 doctrines of federal labor law uniformly to prevail over inconsistent local rules”); *Textile Workers*
15 *Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) (concluding that “the substantive law to
16 apply in suits under [section] 301(a) is federal law, which the courts must fashion from the policy
17 of our national labor laws”). As a result of this broad federal mandate, the Supreme Court has
18 explained, the “preemptive force of [section] 301 is so powerful as to displace entirely any state
19 cause of action for violation of contracts between an employer and a labor organization.”
20 *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (internal quotation
21 marks omitted).

22 The Ninth Circuit has articulated a two-part test to determine whether a cause of action is
23 preempted by the LMRA. *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007).
24 The court must first consider “whether the asserted cause of action involves a right conferred upon
25 an employee by virtue of state law, not by a CBA.” *Id.* If the right exists solely as a result of a
26 CBA, the claim is preempted and the court’s analysis ends. *Id.* If, however, the right exists
27 independently of a CBA, the court must consider “whether it is nevertheless ‘substantially
28 dependent on analysis of a collective-bargaining agreement.’” *Id.* (quoting *Caterpillar, Inc. v.*

1 Williams, 482 U.S. 386, 394 (1987)). If such analysis is required, the claim is preempted. *Id.* at
2 1059-60. This is true even where plaintiffs have not alleged a breach of contract in their
3 complaint, if their claim is either grounded in the provisions of the labor contract or requires
4 interpretation of it. *Id.* at 1060. If no such analysis of a CBA is required, the claim may proceed
5 under state law. *Id.*

6 **A. Legal Character of the Claim**

7 To determine whether a particular right inheres in state law or, instead, is grounded in a
8 CBA, the court has to consider “the legal character of a claim, as ‘independent’ of rights under the
9 collective-bargaining agreement [and] not whether a grievance arising from ‘precisely the same set
10 of facts’ could be pursued.” *Burnside*, 491 F.3d at 1060. Section 301 preempts the claim if it is
11 “founded directly on rights created by collective bargaining agreements.” *Sarmiento v. Sealy, Inc.*,
12 No. 18-CV-01990-JST, 2019 WL 3059932, at *3 (N.D. Cal. July 12, 2019) (citing *Caterpillar*,
13 482 U.S. at 394).

14 **1. Section 204 – Failure to Timely Pay Wages**

15 Labor Code Section 204 provides statutory requirements for the timely payment of wages,
16 and a violation of it can support a penalty under PAGA. See Compl. ¶ 17. The statutory default
17 under section 204(a) is that all wages be paid at least twice a month. Cal. Lab. Code § 204(a).
18 However, section 204(c) makes clear that employers need not comply with section 204’s default
19 statutory requirements when a CBA creates a different pay arrangement. See Cal. Labor Code §
20 204(c) (“However, when employees are covered by a collective bargaining agreement that
21 provides different pay arrangements, those arrangements shall apply to the covered employees.”).

22 Protech points out that the CBA here provides for pay arrangements that differ from the
23 statutory default: “[E]mployees shall be paid not later than seven (7) days following completion of
24 each pay period. All payments issued to employees must specifically state by date the period
25 covered by such payments.” CBA at Article 21.1. Article 21.3 further provides: “The Employer
26 will cause a separate payment to be made on any verified pay discrepancy exceeding \$25, after the
27 employee notifies the Employer’s accounting department by completing and submitting the
28 Employer’s Payroll discrepancy form. The payment shall be made available by no later than three

1 (3) days, excluding Saturdays, Sundays and holidays, but if not, the Union or the employee may
2 bring the matter to the attention of the responsible manager by submitting such in writing to him
3 or her.” Id. at Article 21.3.

4 When a governing CBA provides for pay arrangements that differ from the statutory
5 default and meets the requirements of a statutory exemption, that particular labor right “exists
6 solely as result of the CBA.” See *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1155 (9th Cir. 2019)
7 (applicable CBA met statutory exemption requirements for section 514 and therefore plaintiff’s
8 claim for overtime pay was controlled by his CBA and failed step one of the preemption analysis);
9 *Marquez v. Toll Glob. Forwarding*, No. 18-56060, 2020 WL 2188730, at *2 (9th Cir. May 6,
10 2020) (governing CBA met section 512(e)’s exemption requirements and thus plaintiff’s “right to
11 meal periods ‘exist[ed] solely as a result of the [CBAs]’”) (quoting *Curtis*, 913 F.3d at 1155).
12 Because the CBA here meets the statutory exemption requirements provided in section 204(c),
13 Bradford’s PAGA claim for violation of section 204 is preempted under the first step of the
14 *Burnside* test. See *Hall v. Live Nation Worldwide, Inc.*, 146 F. Supp. 3d 1187, 1203 (C.D. Cal.
15 2015) (section 204 claims existed solely as a result of the CBA); *Landy v. Pettigrew Crewing,*
16 *Inc.*, Case No. 19CV07474RGKAFM, 2019 WL 6245525, at *4 (C.D. Cal. Nov. 22, 2019)
17 (section 204 claims were preempted at step one and therefore federal question jurisdiction was
18 appropriate); see also *id.* (“[Section] 204(c) operates similarly to the statute discussed in *Curtis*:
19 where a CBA provides for a different pay arrangement from that which exists under state law, a
20 covered employee’s right to timely payment ‘exists solely as a result of the CBA.’”) (quoting
21 *Curtis*, 913 F.3d at 1154).

22 Bradford’s opposition fails to address Protech’s argument regarding his section 204 claim.
23 Because the CBA here provides for a different pay arrangement than the statute, Bradford’s right
24 to timely payment exists solely as a result for the CBA and is preempted. Protech’s motion to
25 dismiss to this portion of Bradford’s PAGA claim is GRANTED for failure to exhaust mandatory
26 grievance procedures set forth in the CBA.⁵

27 _____
28 ⁵ Because Bradford’s section 204 claim is preempted “at step one of the preemption analysis,” I
need not address the second step for this particular claim. *Curtis*, 913 F.3d at 1155.

1 **2. Other Labor Code Violations**

2 The rest of Protech’s motion focusses on step two of the Burnside test, implicitly
3 conceding that the remaining PAGA theories involve a right conferred upon an employee by virtue
4 of state law, not by the CBA. Protech glibly states that “[e]ach underlying violation that
5 implicates a provision of the CBA requires a similar analysis” as its analysis for section 204,
6 MTD 17, but fails to cite any legal authority that allows an entire PAGA claim to be dismissed on
7 preemption grounds as long as some but not all of the underlying Labor Code violations are
8 preempted.

9 **B. Whether the Claim Requires Interpretation of the CBA**

10 To determine whether a state law right is “substantially dependent” on the terms of a CBA,
11 the court must decide “whether the claim can be resolved by ‘look[ing] to’ versus interpreting the
12 CBA.” Burnside, 491 F.3d at 1060 (quoting Livadas v. Bradshaw, 512 U.S. 107, 125 (1994)).
13 “Although the look to/interpret distinction is not always clear or amenable to a bright-line test,
14 some assessments are easier to make than others.” Id. (internal quotation marks and citations
15 omitted).

16 For example, neither “look[ing] to the CBA merely to discern that none of its terms is
17 reasonably in dispute . . . , nor the simple need to refer to bargained-for wage rates in computing
18 [a] penalty . . . is enough to warrant preemption.” Burnside, 491 F.3d at 1060 (internal quotation
19 marks and citations omitted); Livadas, 512 U.S. at 124 (“[W]hen the meaning of contract terms is
20 not the subject of dispute, the bare fact that a [CBA] will be consulted in the course of state-law
21 litigation plainly does not require the claim to be extinguished.”).

22 Similarly, “alleging a hypothetical connection between the claim and the terms of the CBA
23 is not enough to preempt the claim.” Burnside, 491 F.3d at 1060 (quoting Cramer v. Consol.
24 Freightways, Inc., 255 F.3d 683, 691 (9th Cir. 2001)). Indeed, the Ninth Circuit has stressed that
25 “in the context of [section] 301 complete preemption, the term ‘interpret’ is defined narrowly—it
26 means something more than ‘consider,’ ‘refer to,’ or ‘apply.’” Balcorta v. Twentieth Century-Fox
27

1 Film Corp., 208 F.3d 1102, 1108 (9th Cir. 2000). Moreover, “the totality of the policies
2 underlying [section] 301—promoting the arbitration of labor contract disputes, securing the
3 uniform interpretation of labor contracts, and protecting the states’ authority to enact minimum
4 labor standards—guides our understanding of what constitutes ‘interpretation.’” Id. at 1108-1109.

5 **1. Section 226.7– Failure to Provide Rest Breaks**

6 Bradford alleges that he and other similarly aggrieved employees “were never relieved of
7 their duties for purposes of taking a rest break, including but not limited to monitoring their
8 company provided cell phones.” Compl. ¶ 11. He further alleges that Protect “prohibited
9 [employees] from leaving the work premises during their shifts” and did not provide “premium
10 wages to compensate [employees] for workdays they did not receive all legally required and fully
11 compliant rest periods.” Id.

12 The CBA’s rest break provision provides that employees are “entitled” to fifteen-minute
13 rest breaks for every four hours of work, as opposed to the ten-minute rest breaks required by the
14 Industrial Welfare Commission’s Wage Orders, which employers must “authorize and permit.”
15 CBA at Article 13.6; Industrial Welfare Commission Wage Order 4-2001, Cal. Code Regs. 8 §
16 11040. The CBA also requires certain employers to continue providing longer breaks if they had
17 done so prior to the date of the CBA. See CBA at Article 13.6. Protech argues that Bradford’s
18 allegation that he was denied or prevented from taking rest breaks is substantially dependent on
19 what these terms mean, and whether “entitled” under the CBA creates different rights and
20 obligations than “authorize and permit” under California’s wage orders. MTD 15.

21 Bradford’s response does not engage in the second step of the Burnside analysis.⁶ Instead,

22 _____
23 ⁶ I briefly address Bradford’s other arguments here. Bradford contends that his PAGA claim is not
24 subject to the CBA because the State of California is the real party in interest and not a party to the
25 CBA. Oppo. 2-4. But the Ninth Circuit has held that “an individual employee, acting as an agent
26 for the government, can agree to pursue a PAGA claim in arbitration.” *Valdez v. Terminix Int’l*
27 *Co. Ltd. P’ship*, 681 F. App’x 592, 594 (9th Cir. 2017); see also *Wulfe v. Valero Ref. Co.-Cal.*,
28 641 F. App’x 758, 760 (9th Cir. 2016) (“The district court did not err in compelling arbitration of
Wulfe’s [PAGA] claim.”). While some California lower courts have articulated a different
standard, the California Supreme Court has not addressed the issue. *Schwendeman v. Health*
Carousel, LLC, No. 18-CV 07641-BLF, 2019 WL 6173163, at *7 (N.D. Cal. Nov. 20, 2019). As
a result, courts in this District have concluded that employees can agree to arbitrate PAGA claims,
consistent with the Ninth Circuit’s rulings in *Valdez* and *Wulfe*. Id.

1 he argues that his right to be afforded rest breaks in compliance with California law is a
2 nonnegotiable right that arises under state law and therefore would exist with or without the CBA
3 and cannot be waived. Oppo 8. This does not help: even assuming under the first prong of the
4 Burnside analysis that his rest period claim arises out of state law and not the CBA, his claim may
5 still be preempted if it fails the second prong of the Burnside analysis. See *Valles v. Ivy Hill*
6 *Corp.*, 410 F.3d 1071, 1081-82 (9th Cir. 2005) (“[I]t is conceivable that a State could create a
7 remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective-
8 bargaining agreement for its application. Such a remedy would be preempted by [section] 301.”)
9 (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 n.7 (1988)).

10 The analogous rest break provisions in another security guard union CBA at issue in
11 *Atuatasi v. Securitas Sec. Servs. USA, Inc.*, No. 18-CV-2786-VAPPLAX, 2018 WL 2748259
12 (C.D. Cal. Jun. 6, 2018) sheds light on the analysis needed here. Members of that union were
13 similarly provided fifteen minute breaks for each four hours worked. *Atuatasi*, 2018 WL 2748259
14 at *5. The court found that the provisions were unambiguous and rejected defendant’s argument
15 that there was a need to interpret the CBA to determine “when to take a break, how long a break
16 would be, and how the break would be treated in terms of compensation.” *Id.* Those were
17 questions of law, not contract interpretation. The same is true here.

18 Protech’s argument that the term “entitled” needs to be interpreted in order to resolve
19

20 Next, he cites to *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) for the
21 contention that statutory claims like PAGA cannot be arbitrated. Oppo. 4-6. The Supreme Court
22 in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 263 (2009) clarified that the facts underlying
23 *Barrentine*, and other cases in that line, “reveal the narrow scope of the legal rule”; those cases
24 “did not involve the issue of the enforceability of an agreement to arbitrate statutory claims,” but
25 rather “involved the quite different issue [of] whether arbitration of contract-based claims
26 precluded subsequent judicial resolution of statutory claims.” *Id.* at 264.

27 He also argues that the CBA effectively waives his state mandated minimum labor standard of rest
28 periods, meal periods, overtime, minimum wages and waiting time penalty by requiring him file a
grievance within 14 days. Oppo. 7. He claims this is evidence that the Union somehow breached
its duty of fair representation and negotiated an unconscionable CBA. *Id.* at 8. This argument is
outside the scope of the motions decided here. The question before me is whether Bradford’s
PAGA claim is preempted by the CBA. Whether the CBA’s arbitration clause is unconscionable
is a contract defense to the enforceability of the CBA. See *Meza v Oldcastle Bldg. Envelope Inc.*,
No. BC523286, 2014 WL 12726685, at *5 (Cal. Super. Ct. Aug. 08, 2014) (noting plaintiff’s
unconscionability arguments were moot given LMRA preemption).

1 Bradford’s rest break claim is unconvincing. A comparison with the Ninth Circuit’s recent
2 decision in *Marquez v. Toll Glob. Forwarding*, No. 18-56060, 2020 WL 2188730 (9th Cir. May 6,
3 2020) shows why. The CBAs there “permit[ted]” driver employees to take “any and all meal and
4 rest periods that the Employee was entitled to by law,” and further provided that “Employees may
5 not leave a load unattended to take a meal or rest break.” *Marquez v. Toll Glob. Forwarding*
6 (USA) Inc., No. 18CV03054ODWASX, 2018 WL 3218102, at *3 (C.D. Cal. Jun. 28, 2018), *aff’d*
7 sub nom. *Marquez*, 2020 WL 2188730. It was not entirely clear what it meant to “permit” an
8 employee to take a break. *Id.* Deciding plaintiff’s claims also required interpretation of what
9 “load” is, what it means to “leave a load,” and what “unattended” means. *Id.* Therefore,
10 plaintiff’s rest break claim failed step two of the *Burnside* test because his claim was substantially
11 dependent on analysis of the CBAs and “[would] require interpretation of several terms of the
12 CBAs” including “the terms ‘permit,’ ‘load,’ ‘unattended,’ and ‘leave a load.’” 2020 WL
13 2188730, at *2. The parties “actively dispute[d] the meaning of these terms.” *Id.*

14 The term “entitled” does not raise a similar level of ambiguity here. Protech fails to show
15 that there is an active dispute over the term that it would require interpretation of it as opposed to
16 merely applying it. See *Valles*, 410 F.3d at 1076 (“[W]hen the meaning of contract terms is not
17 the subject of dispute, the bare fact that a [CBA] will be consulted in the course of state-law
18 litigation plainly does not require the claim to be extinguished.”) (emphasis added) (citation
19 omitted).

20 Bradford’s motion to remand his PAGA claim alleging violation of Labor Code section
21 226.7 is GRANTED and Protech’s motion to dismiss is DENIED as moot.

22 2. Section 512(a) – Failure to Provide Meal Periods

23 Bradford alleges that he and similarly aggrieved employees typically worked eight or
24 twelve-hour shifts but that Protech failed to give a thirty-minute meal break at the end of their fifth
25 hour in an eight-hour shift or a second thirty-minute meal break at the end of their tenth hour in a
26 twelve-hour shift. Compl. ¶ 10. He further alleges that Protech prohibited employees from
27 “leaving their work sites during their shifts, including during any purported breaks.” *Id.*

28 The CBA provides that “[u]nless the employee is relieved of all duty during a thirty (30)

1 minute meal period, the meal period may be considered an “on duty” meal period, and shall be
2 counted as time worked and paid at the employee’s regular wage rate.” CBA at Article 13.7. It
3 allows “on duty” meal periods “only when the nature of the work prevents an employee from
4 being relieved of all duty and when an on-the-job paid meal period is agreed to in a written
5 agreement between the Employer and employee.” Id.

6 These CBA provisions are similar to the CBA at issue in *Atuatasi*, 2018 WL 2748259, at
7 *5. That CBA also stated that security officers shall be provided a “paid, on-duty meal break”
8 consisting of thirty (30) minutes and that the on-duty meal period should be considered “time
9 worked”. Id. The court found that these provisions were unambiguous and rejected defendant’s
10 argument that the CBA needed to be interpreted to determine what constitutes a meal period
11 because that is “a question of state law, not contract interpretation.” Id. The same is true here.

12 Protech further argues that the CBA contains unique provision regarding “emergency
13 situations,” an undefined term that I would need to interpret in order to assess the meal period
14 allegations raised in the Complaint. MTD 15. Under the CBA, “[w]hen an employee is working
15 in an emergency situation where the period exceeds twelve (12) hours, and the employee has made
16 an effort to notify the Employer of the situation, the Employer will make a reasonable effort to
17 arrange for the employee to eat after twelve (12) hours and every six (6) consecutive hours
18 thereafter. If the Employer fails to provide a meal, the employee should be paid in lieu thereof
19 fifteen dollars (\$15.00) per meal in the next pay period.” CBA at Article 13.5 (emphasis added).
20 Protech contends that I would be required to interpret the specific terminology used in the CBA by
21 analyzing and determining what constitutes an “emergency situation” and “reasonable effort,” and
22 how this provision modifies the other meal period requirements under Article 13.7 of the CBA and
23 the Labor Code. MTD 15.⁷

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25 _____
26 ⁷ Bradford again does not directly respond to this argument. Instead, he reiterates that his right to
27 be afforded meal periods is a minimum requirement of state labor law and therefore would exist
28 with or without the CBA and cannot be waived. *Oppo* 12. As stated above, even assuming under
the first prong of the *Burnside* analysis that Bradford’s meal period claim arises out of state law
and not the CBA, his claim can still be preempted if it fails the second prong of the *Burnside*
analysis.

1 Protech has “failed to show anything more than a ‘hypothetical connection between the
2 claim and the terms of the CBA.’” *McGhee v. Tesoro Ref. & Mktg. Co. LLC*, No. 18-CV-05999-
3 JSW, 2020 WL 1310528, at *4 (N.D. Cal. Feb. 21, 2020) (quoting *Cramer*, 255 F.3d at 691). In
4 *McGhee*, defendants similarly argued that the court would need to interpret a CBA provision that
5 provides for an “off-duty meal period” in which employees were “free to leave the premises”
6 unless “the needs of the business require otherwise.” *Id.* The court held that the meal period
7 allegations would merely require it to “look” at the relevant CBAs as evidence of [defendant’s]
8 procedures but the ‘focus remain[ed] on [defendant’s] actions, not the CBAs’ authorizations.” *Id.*
9 “Put differently, whether [defendant] violated or complied with the CBAs has no import whether
10 they also violated California law.” *Id.* (citation omitted); *Burnside*, 491 F.3d at 1060 (finding
11 irrelevant “whether a grievance [under a CBA] arising from ‘precisely the same facts’ could be
12 pursued”); see also *Cramer*, 255 F.3d at 691-92 (“A creative linkage between the subject matter of
13 the claim and the wording of a CBA provision is insufficient; rather, the proffered interpretation
14 argument must reach a reasonable level of credibility.”).

15 Similarly, the meal period allegation here would only require me to “look” at the
16 “emergency situation” exception provided in the CBA. Protech’s hypothetical connection
17 between the term “emergency situation” and Bradford’s claim is insufficient.⁸

18 Bradford’s PAGA claim alleging violation of Labor Code section 512(a) is not preempted
19 because it is not substantially dependent on the terms of the CBA. His motion to remand is
20 GRANTED and Protech’s motion to dismiss is DENIED as moot.

21 **3. Other Labor Code Violations**

22 The parties do not sufficiently address the remaining Labor Code violations alleged in
23

24 ⁸ This case also differs from other cases that have found section 512 claims were preempted
25 because the claims required interpretation of the CBAs. See, e.g., *Buck v. Cemex, Inc.*, No. 1:13-
26 CV-00701-LJO, 2013 WL 4648579, at *6 (E.D. Cal. Aug. 29, 2013); *Raphael v. Tesoro Ref. &*
27 *Mktg. Co. LLC*, No. 2:15-CV-02862-ODW EX, 2015 WL 3970293, at *7 (C.D. Cal. Jun. 30,
28 2015). In those cases, interpretation of disputed CBA provisions was necessary to determine if the
statutory exemption in section 512(e) applied to the meal period claims. Here, Protech does not
argue that any of the CBA provisions show that section 512(e)’s statutory exemption applies to the
meal period claim; rather, it argues that the CBA provisions on meal periods must be generally
interpreted in order to resolve the meal period claim.

1 Bradford’s single PAGA claim. A review of the Complaint, however, reveals that the remaining
2 allegations are derivative of Bradford’s claims regarding meal periods and rest breaks:

- 3 • Failure to pay for all hours worked because Bradford and similarly aggrieved
4 employees “were not paid for time spent on-the-clock while on their respective meal
5 and rest breaks while being required to monitor company provided cell phones.”
6 Compl. ¶ 12;
- 7 • Failure to pay overtime by “failing to correctly calculate . . . total number of works
8 worked by [Bradford] and similarly aggrieved employees (by virtue of [Protech’s]
9 failure to compensate for all on-the-job work [it] required aggrieved employees to
10 perform during meal and rest breaks) and not paying proper overtime rates for all
11 overtime worked.” Compl. ¶ 13;
- 12 • Violations of Labor Code sections 1198 and 1199 arising from same alleged violations
13 with respect to minimum and/or overtime wages. Compl. ¶ 16;
- 14 • Failure to pay all wages earned and unpaid upon discharge or resignation based on
15 allegation that Protech “has not paid for, inter alia, uncompensated time due to [it] not
16 paying meal and rest break premium pay.” Compl. ¶ 18.

17 Bradford does not clearly link his allegation that Protech failed to provide accurate wage
18 statements and keep accurate payroll records to his meal and rest breaks claim. See Compl. ¶¶ 14,
19 15. But viewing the Complaint as a whole, it appears that these two claims are also derivative.

20 Accordingly, Bradford’s motion to remand the remainder of the Labor Code violations that
21 make up his PAGA claim is GRANTED and Protech’s motion to dismiss is DENIED as moot.
22 These allegations are derivative of his claims for meal and rest break violations, which, as
23 discussed above, are not preempted. See *Atuatasi*, 2018 WL 2748259, at *6 (granting motion to
24 remand on plaintiff’s claim for failure to provide accurate wage statements because it was
25 derivative of his other claims for failure to provide meal and rest breaks and overtime
26 compensation, which were not preempted by the LMRA).

27 **CONCLUSION**

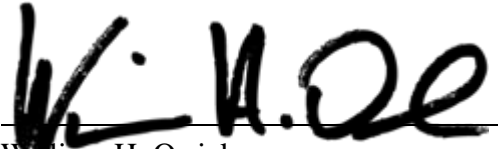
28 Bradford’s PAGA claim alleging violation of Labor Code section 204 is preempted by the

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LMRA and is DISMISSED because Bradford failed to exhaust the CBA’s arbitration procedures. But the remainder of his PAGA claim alleging violation of Labor Code sections 226.7 and 512(a), and all other derivative claims, is not preempted. The remaining PAGA claim is REMANDED to California Superior Court of San Francisco.

IT IS SO ORDERED.

Dated: May 27, 2020



William H. Orrick
United States District Judge