**** E-filed February 8, 2011 ****

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EDWIN MARTINEZ, et al.,

Plaintiffs,

v.

ANTIQUE & SALVAGE LIQUIDATORS, INC., et al.,

Defendants.
_____/

No. C09-00997 HRL

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Re: Docket No. 46]

BACKGROUND

This is a wage-and-hour action between Edwin Martinez, Roger Lindolfo, Wilmer Ruiz, Gabriel Franco, Oscar Rodriguez, and Amado Martinez (collectively, "Plaintiffs") and their former employer Antique & Salvage Liquidators, Inc. ("ASL") and its owner Howard Misle ("Misle") (collectively, "Defendants").[1] Plaintiffs bring claims for violation of state and federal overtime law under California Labor Code § 510 and the Fair Labor Standards Act, 29 U.S.C. § 207 (first and second causes of action); failure to provide meal and rest periods in violation of California Labor Code § 226.7 (third cause of action); failure to pay wages due and waiting time penalties in violation of California Labor Code § 203 (fourth cause of action); violation of California Business and Professions Code § 17200 (fifth cause of action); failure to provide proper pay statements in

[1] Plaintiffs' claims against four other defendants were voluntarily dismissed by stipulation of the parties on January 20, 2011, after this motion was fully briefed. Docket No. 64. As such, none of the parties' arguments concerning these defendants will be discussed.

violation of California Labor Code § 226 (sixth cause of action); and violation of the Private Attorneys General Act ("PAGA"), California Labor Code § 2698 et seq. (seventh cause of action). Docket No. 29 ("Second Amended Complaint" or "SAC").

Plaintiffs were hourly employees of defendant ASL, an electronic waste recycler in San Jose, California. ASL is a California corporation owned entirely by Big H Enterprises, Inc. ("Big H"), also a California corporation. Docket No. 49 ("Misle SJ Decl."), ¶ 2. Big H., in turn, is wholly owned by Misle. At all relevant times, Misle served on ASL's board of directors and was its CEO. Id. Misle declares that his role consisted of establishing business policy decisions and making high-level decisions. Id., ¶ 3. He says that generally he was not involved with ASL's day-to-day operations and that he never had any involvement in the hiring, firing, hours, breaks, or compensation of Plaintiffs. Id. Instead, all of ASL's employee issues were handled by ASL's general manager Steve Hart ("Hart") and supervisory employees William McGeever ("McGeever") and Dave Lewis ("Lewis"). Id. Indeed, Misle says it was Lewis who had the power to hire and fire employees who worked in Plaintiffs' positions, who determined their hours, and who paid their compensation. Id.

Prior to August 2007, Plaintiffs and other employees in their positions used a punch clock to track their arrival and departure from the workplace. Docket No. 47 ("Lewis SJ Decl."), ¶ 4. These time cards were maintained by Chris Oliverio. Id. Oliverio, in turn, calculated the time worked by each Plaintiff and then relayed this information to Prime Pay, a payroll service company used by ASL. Id.

Beginning in August 2007, ASL implemented a new system for tracking employee hours. Misle SJ Decl., ¶ 10. This new system scanned the employees' hands when they arrived at and departed the workplace. Id. This information was relayed directly to Prime Pay, which used this data to calculate the working hours and compensation of ASL's employees, including Plaintiffs. Id.

The parties both agree, however, that, in addition to its normal weekday activities, ASL also sponsored offsite collection events during some weekends, and the hand-scan system was not used to track employees' hours for these. According to Lewis, when such events took place, either he or the "lead" employee for each event "would manually take note of the hours spent by each Plaintiff

and have this information input" into the Prime Pay system. Lewis SJ Decl., ¶ 4. "The hours worked by Plaintiffs and other employees [were] relayed to Prime Pay, which would prepare compensation checks for each Plaintiff based on this information." Id.

ASL went out of business on December 18, 2008. Plaintiffs were laid off that same day and their final paychecks were issued on December 19. In their Second Amended Complaint, Plaintiffs allege that they regularly worked more than 8 hours per day and more than 40 hours per week but were not paid overtime wages, were not provided meal or rest breaks, and were not provided accurate and complete pay statements. In their interrogatory responses, though, each Plaintiff stated that he could not recall or was without sufficient recollection to provide which dates they worked more than 8 hours in a day or more than 40 hours in a week or when they were not provided meal or rest breaks. Docket No. 48 ("Pappy SJ Decl."), ¶ 2; Exs. B1-B8, Interrogatory Nos. 2-5, 8-9.

Defendants now move for summary judgment. Specifically, Defendants move for summary judgment in favor of Misle on all of Plaintiffs' claims. Docket No. 46 ("SJ Motion"). Defendants also move for summary judgment in favor of ASL as to Plaintiffs' first through sixth causes of action insofar as the claims relate to events after August 2007 and as to Plaintiffs' PAGA claim. Id.

LEGAL STANDARD

A motion for summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c)(2)); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of informing the court of the basis for the motion, and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits which demonstrate the absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In order to meet its burden, "the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1102 (9th Cir. 2000).

If the moving party meets its initial burden, the burden shifts to the non-moving party to produce evidence supporting its claims or defenses. See FED. R. CIV. P. 56(e)(2); Nissan Fire &

Marine Ins. Co., Ltd., 210 F.3d at 1102. The non-moving party may not rest upon mere allegations or denials of the adverse party's evidence, but instead must produce admissible evidence that shows there is a genuine issue of material fact for trial. See id. A genuine issue of fact is one that could reasonably be resolved in favor of either party. A dispute is "material" only if it could affect the outcome of the suit under the governing law. Anderson, 477 U.S. at 248-49.

"When the nonmoving party has the burden of proof at trial, the moving party need only point out 'that there is an absence of evidence to support the nonmoving party's case.'" Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001) (quoting Celotex Corp., 477 U.S. at 325). Once the moving party meets this burden, the nonmoving party may not rest upon mere allegations or denials, but must present evidence sufficient to demonstrate that there is a genuine issue for trial. Id.

DISCUSSION

A. Misle's Individual Liability

Defendants argue that Plaintiffs' claims against Misle in his individual capacity fail because Misle is not an "employer" under either the FLSA or California law.

1. FLSA Claim against Misle

i. Whether Misle Is an "Employer" under the FLSA

Section 7 of the FLSA provides that an employee who works more than forty hours a week must be paid at least one and one-half times his or her regular rate for those additional hours. 29 U.S.C § 207(a)(1). However, only an "employer" is subject to this provision. Id.

The FLSA defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. § 203(d). This definition is not limited by the common law concept of an "employer," but instead "'is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes.'" Boucher v. Shaw, 572 F.3d 1087, 1090-91 (9th Cir. 2009) (quoting Lambert v. Ackerley, 180 F.3d 997, 1011-12 (9th Cir. 1999) (en banc)). Whether an employer-employee relationship exists depends upon "the circumstances of the whole activity," particularly the "economic reality" of the relationship. Id. The economic reality test requires the court to examine whether the alleged employer: (1) had the power to hire and fire the employee; (2) supervised and controlled employee work scheduled or

conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983) (abrogated on other grounds by Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 539 (1985)).

As stated above, Misle's deposition testimony essentially is that he was only engaged in high-level business policy decisions and was never involved in ASL's day-to-day affairs or in the hiring, firing, hours, breaks, or compensation of Plaintiffs. Misle SJ Decl., ¶ 3. In their opposition, however, Plaintiffs point to certain discovery that arguably suggests that Misle may have maintained enough operational control of ASL to be considered an "employer" under the FSLA. This discovery indicates that Misle often was consulted about ASL's daily operations and he, at least on occasion, may have had input into the amounts of payment for ASL's employees and into when ASL would be wound-up and its employees — including Plaintiffs — would be terminated. See Docket No. 55 ("Pedersen SJ Decl."), Ex. 9 (Transcript of Deposition of William McGeever) at 73:22-74:12, 78:14-17, 122:19-23; Ex. 10 (Transcript of Deposition of Steve Hart) at 28:8-13, 58:4-18, 61:8-11, 62:7-16, 113:2-8, 121:5-122:5. In light of this discovery, the Court finds that Plaintiffs have presented just enough evidence to demonstrate that a genuine issue of material fact exists on this issue. Accordingly, Defendants' motion will be denied as to Plaintiffs' FLSA claim against Misle.[2]

[2] Although Defendants are correct that the cases cited by Plaintiffs involved individual employers who had more involvement that Misle appears to have had (such as signing the employees' checks, interviewing and hiring or firing the employees, determining the employees' hours, etc.), the question is whether there is a genuine issue of material fact, not simply whether there are fewer signs of his supervision or control here than in cases where others were found to be employers. See, e.g., Herman v. RSR Security Servs. Ltd., 172 F.3d 132, 140 (2d Cir 1999) ("employer" hired employees, on occasion supervised and controlled employee work schedules and conditions of employment, sometimes signed payroll checks, and ordered a stop to the illegal pay practice of including security guards as independent contractors); Reich v. Circle C Investments, Inc., 998 F.2d 324, 329 (5th Cir. 1993) (while "employer" did not control the day-to-day operations of the company at issue, he exercised control over the work situation, was the driving force behind the company, hired employees, was identified by several employees as their supervisor, signed payroll checks, and handled company money); Donovan v. Agnew, 712 F.2d 1509, 1514 (1st Cir. 1983) ("Taking an 'economic reality' approach to the facts of this case, we find that the district court did not err in holding appellants personally liable for the unpaid wages of their 99 hourly employees. Our holding is narrow. We review the liability of corporate officers with a significant ownership interest who had operational control of significant aspects of the corporation's day to day functions, including compensation of employees, and who personally made decisions to continue operations despite financial adversity during the period of nonpayment. Under these circumstances, we agree with the district court's holding that appellants were employers within the meaning of the [National Labor Relations Act] chargeable with personal liability for failure to pay minimum and overtime

ii. Whether the Statute of Limitations Bars Plaintiffs' FLSA Claim as to Conduct Prior to February 11, 2008

Defendants also contend that Misle is entitled to summary judgment as to Plaintiffs' FLSA claim for alleged violations prior to February 11, 2008 on statute of limitations grounds. Under the FLSA, an action for overtime pay must be commenced "within two years after the cause of action accrued," unless the cause of action arises "out of a willful violation." 29 U.S.C. § 255(a). In the case of a willful violation, the limitations period is extended to three years. Id.; see Dent v. Cox Communications Las Vegas, Inc., 502 F.3d 1141, 1144 (9th Cir. 2007) (citing McLaughlin v. Richland Shoe Co., 486 U.S. 128, 132-33 (1988)). "A new cause of action accrues at each payday immediately following the work period for which compensation is owed." Dent, 502 F.3d at 1144 (citing O'Donnell v. Vencor Inc., 466 F.3d 1104, 1113 (9th Cir. 2006)). "A violation of the FLSA is willful if the employer 'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA].'" Chao v. A-1 Med. Servs., Inc., 346 F.3d 908, 918 (9th Cir. 2003) (quoting McLaughlin, 486 U.S. at 133). "If an employer acts unreasonably, but not recklessly, in determining its legal obligation" under the FLSA, its action is not willful. McLaughlin, 486 U.S. at 135 n.13.

In their motion, Defendants correctly note that Plaintiffs have presented no evidence that Misle acted willfully. Motion at 12. In response, Plaintiffs explain that "[t]he FLSA violation in this case is two-fold: the hours shaved off the face of Plaintiffs' punch-card time records and hours which, per stated company policy[,] should have been paid, but were not." Opp'n at 20. They then contend that, "[a]ssuming that the Court find that Defendants or Defendants[']agents actually engaged in this activity, it would be clear that this practice could not have been conceived to properly compensate the Plaintiffs for overtime work under the FLSA." Id. at 21. "For this reason," they say that a genuine issue of material fact exists as to whether Misle acted willfully. Id.

But again, as explained earlier, the non-moving party may not rest upon mere allegations, but instead must produce admissible evidence that shows there is a genuine issue of material fact for

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wages as required by the FLSA.") (citation omitted); see also Cai v. Fishi Café, Inc., No. C-05-03175 EDL, 2007 WL 2781242, *5 (N.D. Cal. Sep. 20, 2007) ("employer" collected daily receipts, looked in on restaurant to make sure things were running smoothly, hired and terminated employees, and set pay for employees).

trial. Plaintiffs clearly have not produced any evidence whatsoever on this issue, and so they have not met their burden. Thus, since Plaintiffs have failed to show that Misle acted willfully, the statute of limitations for their FLSA claim is two years. Plaintiffs first brought their FLSA claim against Misle in their First Amended Complaint filed on February 11, 2010. Docket No. 25. This means that any claim based on conduct prior to February 11, 2008 is time barred.

2. California Labor Code Claims against Misle

California Labor Code § 1194 provides a right to sue for unpaid minimum wages or overtime compensation. According to the California Supreme Court, the legislature is presumed to have intended the IWC's wage orders to state who is liable for such claims, and under the IWC definition, "employ" means "to exercise control over the wages, hours or working conditions," "to suffer or permit to work," or "to engage, thereby creating a common law employment relationship."[3] Martinez v. Combs, 49 Cal. 4th 35, 52, 63-64 (2010).

That said, it is clear that "corporate agents acting within the scope of their agency are not personally liable for the corporate employer's failure to pay its employees' wages." Reynolds v. Bement, 36 Cal. 4th 1075, 1087-88 (2005); see also Martinez v. Combs, 49 Cal.4th 35, 66 (2010) ("The opinion in Reynolds . . . properly holds that the IWC's definition of 'employer' does not impose liability on individual corporate agents acting within the scope of their agency."). Since the evidence presented shows that Misle was responsible for establishing business policy decisions and making high-level decisions and generally was not involved with ASL's day-to-day operations and never had any involvement in the hiring, firing, hours, breaks, or compensation of Plaintiffs (Misle SJ Decl., ¶ 3), Misle resembles the typical corporate agent who is not liable as an "employer" under California law, which is narrower than the federal definition. Defendants' motion, then, will be granted in favor of Misle as to Plaintiffs' California Labor Code claims but it will be denied as to their claim for violation of California Business and Professions Code § 17200 because a violation of that section can be based upon an underlying violation of the FLSA. See Cai v. Fishi Café, Inc., No.

[3] Note, however, that the IWC definition is broader than the common law definition. Martinez v. Combs, 49 Cal. 4th 35, 63-66 (2010) (abrogating Reynolds v. Bement, 36 Cal. 4th 1075, 1087 (2005)).

C-05-03175 EDL, 2007 WL 2781242, at *6 (N.D. Cal. Sep. 20, 2007); Harris v. Investor's Business Daily, Inc., 138 Cal.App.4th 28, 32-33 (2006).

B. ASL's Liability

1. Plaintiffs' Claims Based on Post-August 2007 Conduct

As stated earlier, in August 2007, ASL implemented a new system for tracking employee hours that scanned the employees' hands when they arrived at and departed the workplace. Misle SJ Decl., ¶ 10. This information was relayed directly to Prime Pay, who used this data to calculate the working hours and compensation of ASL's employees, including Plaintiffs. Id. Defendants thus move for summary judgment as to Plaintiffs' claims against ASL based on conduct occurring after the implementation of the hand-scanning system.

To meet their initial burden, Defendants submitted the time records for Plaintiffs beginning in August 2007 and pointed out that each Plaintiff stated in their interrogatory responses that he could not recall or was without sufficient recollection to provide which dates they worked more than 8 hours in a day or more than 40 hours in a week. Lewis SJ Decl., ¶ 4; Ex. A; Pappy SJ Decl., ¶ 2; Exs. B1-B8, Interrogatory Nos. 2-5, 8-9. Defendants also noted that ASL employee Dave Lewis stated in his declaration that, prior to this lawsuit, Plaintiffs never complained that the information on the time records was incorrect or that they did not receive the correct amount of compensation (and whenever an error was reported, it was immediately corrected). Lewis SJ Decl., ¶ 4.

In their opposition, Plaintiffs concede that they "do not take issue with [the] accuracy of [the] records generated by the hand-scan system Monday through Friday, when workers actually punched in-and-out using the machine." Opp'n at 14. Instead, Plaintiffs challenge the accuracy of their hours worked on weekends, when the hand-scan system was not used. Id.

In support of their inaccurate weekend hours argument, Plaintiffs point to some weekend events whereby they contend that there is a discrepancy between the hours for which Plaintiffs were paid for and the hours the event should have taken (inclusive of set-up and travel time). Opp'n at 6-7. For example, they describe a weekend event that purportedly took place in San Francisco on August 16, 2008 that began at 9:00 a.m. and ended at 4:00 p.m. Opp'n at 6-7 (citing Pedersen Decl., Ex. 1 (ASL Collection Event Calendar listing events scheduled in August and September

2008)). They also point out that ASL employee William McGeever stated during his deposition that unloading the trucks prior to such an event "probably takes an hour or thereabouts" (although he also stated that the time "depends on the job site") and that ASL employee Dave Lewis stated that he thought that ASL paid employees for travel time if the site was more than 25 miles from ASL's location. Opp'n at 5-6 (citing McGeever SJ Decl. at 98; Lewis SJ Decl. at 86).

According to the payroll records, three Plaintiffs were paid for the hours 8:30 a.m. to 5:00 p.m.; 8:30 a.m. to 4:00 p.m.; and 8:30 a.m. to 4:00 p.m., respectively, for work on August 16, 2008. Pedersen Decl., Ex. 2. Since San Francisco is more than 25 from San Jose, Plaintiffs contend that these Plaintiffs were only paid for one-half hour of set-up time and were not paid for travel time. Opp'n at 7, 15.

While Defendants present credible arguments in response, the Court believes that Plaintiffs have sufficiently demonstrated the existence of a genuine issue of material fact as to whether Plaintiffs were accurately paid during weekend events. Accordingly, the Court will grant Defendants' motion as to Plaintiffs' claims based on their weekday hours after the implementation of the hand-scan system, but will deny Defendants' motion as to Plaintiffs' claims based on their weekend hours for the same time period.

2. Plaintiffs' PAGA Claim

Roughly ten months after being laid off, Plaintiffs submitted a written notice to the California Labor and Workforce Development Agency ("LWDA") and to ASL on October 14, 2009 alleging various violations of California wage and hour laws. SAC, ¶ 64. The LWDA responded 55 days later on December 8, 2010 that it would not be pursuing an investigation. SAC, ¶ 65.

Pursuant to the parties' stipulation and with leave of the court, on February 11, 2010, Plaintiffs filed their First Amended Complaint, adding new defendants and adding for the first time a cause of action under PAGA for "civil penalties" based on predicate violations of Labor Code §§ 510 and 558. After filing their First Amended Complaint, Plaintiffs realized that their PAGA claim did not include all of the underlying wage and hour violations that had been alleged in their written notice to the LWDA. So, on March 29, 2010, again pursuant to the parties' stipulation and with

leave of the court, Plaintiffs filed their Second Amended Complaint, amending their PAGA claim to include additional predicate Labor Code violations.

i. PAGA Has a One-Year Statute of Limitations

Employers are subject to liability for wage-and-hour violations through several avenues under the California Labor Code. As one court in this District previously described:

> An individual may bring a private action for unpaid wages and statutory penalties under certain Labor Code provisions. See, e.g., Cal. Lab. Code §§ 201 (wages upon discharge), 203 (statutory penalties for failure to pay wages upon discharge), 226.7 (mandated meal or rest periods). See also Caliber Bodyworks, Inc. v. Superior Court, 134 Cal.App.4th 365, 377-78, 380 n.16, 36 Cal.Rptr.3d 31 (2005) (explaining that an individual may bring a private action for unpaid wages or statutory penalties under these provisions). In addition, the State's labor law enforcement agencies — the LWDA and its departments and divisions — are authorized to assess and collect civil penalties for specified provisions of the Labor Code. See, e.g., Cal. Lab. Code § 210 (authorizing recovery of civil penalties for unpaid wages). See also Caliber Bodyworks, Inc. v. Superior Court, 134 Cal.App.4th at 370, 36 Cal.Rptr.3d 31 (explaining that the LWDA is authorized to assess and collect civil penalties under specified Labor Code provisions). Finally, PAGA, effective January 1, 2004, permits individuals to bring private actions against an employer for civil penalties under specified sections of the Labor Code. See Cal. Lab. Code § 2699(a). See also Caliber Bodyworks, Inc. v. Superior Court, 134 Cal.App.4th at 374-75, 36 Cal.Rptr.3d 31 (explaining that PAGA allows private actions for civil penalties). "In sum, an employer is potentially liable for unpaid wages and interest, statutory penalties and civil penalties for many violations of Labor Code wage-and-hour provisions." Caliber Bodyworks, Inc. v. Superior Court, 134 Cal.App.4th at 378, 36 Cal.Rptr.3d 31.

Thomas v. Home Depot USA, Inc., 527 F.Supp.2d 1003, 1006-07 (N.D. Cal. 2007).

The California Code of Civil Procedure ("CCP") provides for a one-year statute of limitations for an action upon a statute for a penalty or forfeiture, but provides for a three-year statute of limitations for an action upon a liability created by statute, other than a penalty or forfeiture. See CCP §§ 338(a) & 340(a). Many courts, including this one, have previously made clear that the civil penalties recoverable under PAGA are "penalties" within the meaning of CCP § 340(a). See Baas v. Dollar Tree Stores, No. C07-03108, 2009 WL 1765759, at *5 (N.D. Cal. Jun. 18, 2009) (stating that a PAGA claim is subject to a one-year statute of limitations); Thomas v. Home Depot USA, Inc., 527 F.Supp.2d at 1006 (holding the same); Moreno v. Autozone, Inc., No. C05-04432, 2007 WL 1650942, at *2-4 (concluding that § 340(a) applies to PAGA claims); DeSimas v. Big Lots Stores, Inc., No. C06-6614, 2007 WL 686638, at *3-4 (N.D. Cal. Mar. 2, 2007); Caliber Bodyworks, Inc. v. Superior Court, 134 Cal.App.4th at 374-76.

Plaintiffs contend that courts should look to the whether the underlying labor code provision provides for a penalty or for damages to determine the appropriate statute of limitations. However, this "penalty-versus-compensatory analysis" urged by Plaintiffs is inappropriate in the context of a PAGA claim because, as explained above, PAGA allows aggrieved individuals to recover "civil penalties" for violations of underlying Labor Code provisions. While the provisions underlying a PAGA claim may provide for either wages or penalties, numerous courts have already made clear that a PAGA claim itself is for a penalty. See Thomas v. Home Depot USA, Inc., 527 F.Supp.2d at 1008.[4] As such, a one-year statute of limitations period clearly applies to Plaintiffs' PAGA claim.

ii. Plaintiffs' PAGA Claim Is Not Time-Barred

As discussed above, PAGA allows employees to bring private actions against their employers for civil penalties under specified sections of the Labor Code. See Cal. Lab. Code § 2699(a); Caliber Bodyworks, Inc. v. Superior Court, 134 Cal.App.4th at 374-75. But before an employee may do so, the procedures set forth in Labor Code § 2699.3 must be followed. See Cal. Lab. Code § 2699(a). Under § 2699.3, the applicable procedure depends upon which predicate Labor Code violations are claimed. See Cal. Lab. Code § 2699.3(a), (b) & (c). In the instant case, the predicate violations claimed by Plaintiffs would fall under the procedures set forth in Labor Code § 2699.3(a) (for predicate violations of any of the Labor Code provisions listed in Labor Code § 2699.5) or Labor Code § 2699.3(c) (for predicate violations of Labor Code other than those listed in Labor Code § 2699.5 or Division 5 of the Labor Code). Under either, the aggrieved employee must give written notice by certified mail to the LWDA and the employer of the alleged violations. Cal. Lab. Code §§ 2699.3(a)(1) & (c)(1). Then, under Labor Code § 2699.3(a), the LWDA shall notify the employer and the employee within 30 calendar days if it intends to investigate the allegations itself. Cal. Lab. Code § 2699.3(a)(2)(A). Upon receipt of this non-investigation notice or if no such notice is provided within 33 calendar days, the employee may commence a civil action

[4] Thomas v. Home Depot USA, Inc. is instructive. In that case, the plaintiff argued that the operative statute of limitations for PAGA claims is that of the underlying claim. Thomas v. Home Depot USA, Inc., 527 F.Supp.2d at 1007. Noting that some of the potential predicate violations provided for wages (*e.g.*, Labor Code § 226.7) while others called for penalties (*e.g.*, Labor Code § [225.5]), the court explained that "a PAGA claim is, by definition, a claim for civil penalties." Id. at 1008.

for a claim under PAGA. Cal. Lab. Code § 2699.3(a)(2)(A). Similarly, under Labor Code § 2699.3(c), the employer has the opportunity to cure the alleged violation, but if the employer does not do so within 33 calendar days, the employee may at that point commence a civil action for a claim under PAGA. Cal. Lab. Code § 2699.3(c)(2)(A).

PAGA allows for a tolling of the limitations period during the (at most) 33-day period during which the LWDA is assessing, or the employer may be curing, the alleged violations. Cal. Labor Code § 2699.3(d); see Singer v. Becton, Dickinson And Company, No. C08-00821, 2008 WL 2899825, at *6 (S.D. Cal. July 25, 2008); Moreno v. Autozone, Inc., 2007 U.S. Dist. LEXIS 43873, at *5.

In addition, PAGA also contains a provision that allows a plaintiff to amend an existing complaint to add a PAGA cause of action within 60 days of the tolling period, at least with respect to predicate violations of provisions listed in § 2699.5.[5] See Cal. Lab. Code § 2699.3(a)(2)(C). A plaintiff has this ability "[n]otwithstanding any other provision of law," meaning that a plaintiff can make such an amendment even if it occurs outside of the 1-year limitations period for penalties. *Id*.

Here, pursuant to Labor Code § 2699(a) and (c), Plaintiffs' provided written notice to the LWDA and ASL on October 14, 2009. SAC, ¶ 64. Plaintiffs did not receive a non-investigation notice from the LWDA until 55 days later on December 8, 2009, and ASL did not cure the alleged violations within the 33-day period that ended on November 17, 2009. SAC, ¶¶ 65 & 66. Thus, based on the one-year statute of limitations period and the procedures outlined in § 2699.3(a) and (c), Plaintiffs could have filed their PAGA claim one year and 33 days after the violations occurred. Since Plaintiffs were terminated on December 18, 2008, this means that Plaintiffs had until January 20, 2010 to do so, but they could still amend an existing complaint to add a PAGA claim within 60 days after that — or by March 21, 2010.

Plaintiffs filed their original complaint — which lacked a PAGA claim — on March 6, 2009. They first alleged a PAGA claim in their First Amended Complaint filed on February 11, 2010, which was after the one-year and 33 days limitations period but within the 60-day window thereafter

[5] Labor Code § 2699.3(a)(2)(C) provides in full: "Notwithstanding any other provision of law, a plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under this part at any time within 60 days of the time periods specified in this part."

in which Plaintiffs could amend their existing complaint as a matter of right under Labor Code § 2699.3(a)(2)(C).

Plaintiffs did not add the additional predicate violations to their PAGA claim until they filed their Second Amended Complaint on March 29, 2010 — after the 60-day window in which to amend an existing complaint. In such a case, Plaintiffs' Second Amended Complaint adding additional predicate violations would have to "relate back" to their original complaint.

Defendants cite cases containing solid and persuasive analyses of the relation back doctrine in the context of PAGA claims, but they are distinguishable because they are limited to instances where the required notices to the LWDA and employer were provided after the statute of limitations had already run. See Harris v. Vector Marketing Corp., No. C08-05198, 2010 WL 56179, at *3 (agreeing with the "[t]wo courts in this District [which] have rejected a relation back argument, where, as here, the notice to the LWDA was not made until after the expiration of the limitations period."). Because the LWDA notice is a condition precedent to suit, this notice must be given prior to the running of the statute of limitations. Id.; see also Baas v. Dollar Tree Stores, Inc., No. C07-03108, 2009 WL 1765759, at *5; Moreno, No. C05-04432, 2007 WL 1650942, at *14.

Plaintiffs' situation is different. Plaintiffs timely provided notice to the LWDA and ASL on October 14, 2009. SAC, ¶64. Plaintiffs' situation is more similar to Waisbein v. UBS, Financial Services, Inc., No. C07-02328, 2008 WL 753896 (N.D. Cal. Mar. 19, 2008), a case where the court allowed a plaintiff's PAGA claim to relate back to an earlier, timely-filed complaint when he had given notice to the LWDA before the limitations period had run. That court explained: "California courts have held, under analogous circumstances, that an exhausted claim, although alleged in an amended complaint filed after the expiration of the statute of limitations, relates back to a prior timely-filed complaint based on the 'same set of facts.'" Waisbein, 2008 WL 753896, at *1 (citing State v. Bodde, 32 Cal.4th 1234, 1244 (2004); Goldman v. Wilset Foods, Inc., 216 Cal.App.3d 1085, 1094 (1989); Bahten v. County of Merced, 59 Cal.App.3d 101, 113-15 (1976); FED. R. CIV. P. 15(c)(1)(A)).

Plaintiffs' PAGA claim in their Second Amended Complaint alleges the "same set of facts" as alleged in both their original complaint and in their First Amended Complaint. The PAGA claim

is based on the same alleged failures to pay overtime, allow requires meal periods, and provide accurate pay statements. As such, Plaintiffs' PAGA claim may relate back to Plaintiff's earlier complaint, and Defendants' motion for summary judgment will be denied on this ground.

CONCLUSION

Based on the foregoing, Defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART. Specifically:

A. as to Misle:

1. summary judgment is granted as to Plaintiffs' first, third, fourth, sixth, and seventh causes of action against Misle since Misle is not an "employer" under California law;
2. summary judgment is granted as to Plaintiffs' second and fifth causes of action against Misle insofar as Plaintiffs' claims are based upon conduct occurring before February 11, 2008;
3. summary judgment is denied as to Plaintiffs' second and fifth causes of action against Misle insofar as they are based upon conduct occurring on or after February 11, 2008;

B. as to ASL:

1. summary judgment is granted as to all of Plaintiffs' claims insofar as they are based on Plaintiffs' weekday hours after ASL implemented the hand-scan system; and
2. summary judgment is denied as to all of Plaintiffs' claims insofar as Plaintiffs' claims are based upon Plaintiffs' weekend hours after ASL implemented the hand-scan system or upon Plaintiffs' hours (whether weekday or weekend) before ASL implemented the hand-scan system.

IT IS SO ORDERED.

Dated: February 8, 2011

HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

C09-00997 HRL N**otice will be electronically mailed to:**

Adam Wang	adamqwang@gmail.com, alpedersen@gmail.com, rosilenda@gmail.com
Adam Lee Pedersen	alpedersen@gmail.com
Donn Waslif	dwaslif@mffmlaw.com, dolson@mffmlaw.com, gbirkheimer@mffmlaw.com
Elizabeth Marie Pappy	epappy@mffmlaw.com, cmacias@mffmlaw.com
Mark B. Fredkin	mfredkin@mffmlaw.com, crogers@mffmlaw.com, dolson@mffmlaw.com, dwaslif@mffmlaw.com, gdent@mffmlaw.com, jlira@mffmlaw.com, mramos@mffmlaw.com, wsiamas@mffmlaw.com

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