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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUAN ANGEL LOPEZ, on behalf of the
general public as private attorney general,

Plaintiff,

v.

S E PIPE LINE CONSTRUCTION
COMPANY, a California Corporation;
and DOES 1 through 50, inclusive,

Defendant.

Case No.: 23-cv-01626-AJB-BLM

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT’S
MOTION TO DISMISS**

(Doc. No. 7)

Presently pending before the Court is Defendant S.E. Pipe Line Construction Co.’s motion to dismiss Plaintiff Juan Angel Lopez’s Complaint. (Doc. No. 7.) The motion is fully briefed, (Doc. Nos. 9 & 10), and the matter is suitable for determination on the papers. For the reasons stated herein, Defendant’s motion to dismiss is **GRANTED IN PART AND DENIED IN PART.**

I. BACKGROUND

Plaintiff brings this representative action for recovery of penalties under the Private Attorneys General Act of 2004 (“PAGA”) based on alleged violations of the California Labor Code and the Industrial Welfare Commission’s (“IWC”) Wage Orders. (Complaint

1 (“Compl.”), Doc. No. 1.) Plaintiff specifically alleges the following underlying violations:
2 (1) failure to pay minimum and overtime wages (Cal. Lab. Code §§ 510, 1194, & 1198);
3 (2) failure to pay all wages earned and owed upon separation from employment (Cal. Lab.
4 Code §§ 201, 202, & 203); (3) failure to pay wages timely during employment (Cal. Lab.
5 Code § 204); (4) failure to provide accurate itemized wage statements (Cal. Lab. Code
6 § 226); and (5) failure to reimburse necessary business expenses (Cal. Lab. Code § 2802).
7 (*See generally id.*)

8 **II. LEGAL STANDARD**

9 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the pleadings
10 and allows a court to dismiss a complaint upon a finding that the plaintiff has failed to state
11 a claim upon which relief may be granted. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.
12 2001). The court may dismiss a complaint as a matter of law for: “(1) lack of cognizable
13 legal theory or (2) insufficient facts under a cognizable legal claim.” *SmileCare Dental*
14 *Grp. v. Delta Dental Plan of Cal.*, 88 F.3d 780, 783 (9th Cir. 1996) (citation omitted).
15 However, a complaint survives a motion to dismiss if it contains “enough facts to state a
16 claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
17 (2007).

18 Notwithstanding this deference, the reviewing court need not accept legal
19 conclusions as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is also improper for the
20 court to assume “the [plaintiff] can prove facts that [he or she] has not alleged”
21 *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S.
22 519, 526 (1983). On the other hand, “[w]hen there are well-pleaded factual allegations, a
23 court should assume their veracity and then determine whether they plausibly give rise to
24 an entitlement to relief.” *Iqbal*, 556 U.S. at 679. The court only reviews the contents of the
25 complaint, accepting all factual allegations as true, and drawing all reasonable inferences
26 in favor of the nonmoving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002).

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1 **III. REQUEST FOR JUDICIAL NOTICE**

2 Under Federal Rule of Evidence 201, a court may take judicial notice of a fact that
3 is “not subject to reasonable dispute because it: (1) is generally known within the trial
4 court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources
5 whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Likewise, a court
6 may take judicial notice of “documents not attached to a complaint . . . if no party questions
7 their authenticity and the complaint relies on those documents.” *Harris v. Cnty. of Orange*,
8 682 F.3d 1126, 1132 (9th Cir. 2012). Judicial notice of matters of public record do not
9 convert a motion to dismiss into a motion for summary judgment. *See Lee v. City of Los*
10 *Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)

11 In support of its motion to dismiss, Defendant requests the Court take judicial notice
12 of five exhibits: (1) a copy of a CBA entitled, “National Distribution Pipeline Agreement;
13 (2) the “California Addendum to the National Distribution Agreement”; (3) the California
14 Industrial Welfare Commission Wage Order 16, covering “Onsite Construction, Mining,
15 Drilling and Logging Industries”; (4) dispatch orders for Plaintiff on February 4, 2021 and
16 February 4, 2022 from his union, UA Local 250 – Los Angeles; and (5) a copy of the
17 August 9, 2023 Order signed by the Honorable Jinsook Ohta of the United States District
18 Court, Southern District of California. (Doc. No. 7-2 at 2–3.) Plaintiff does not oppose
19 judicial notice. (*See generally* Doc. No. 9.)

20 Regarding the first two exhibits, a court may take judicial notice of a CBA in
21 evaluating a motion to dismiss. *Hernandez v. Sysco Corp.*, No.16-cv-06723-JSC, 2017 WL
22 1540652, at *2 (N.D. Cal. Apr. 28, 2017); *Jones v. AT&T*, No. C 07-3888 JF (PR), 2008
23 WL 902292, at *2 (N.D. Cal. Mar. 31, 2008) (“the Court may take judicial notice of a CBA
24 in evaluating a motion to dismiss.”). As such, the Court **GRANTS** judicial notice of
25 Exhibits 1 and 2.

26 Because Exhibits 3 and 4 are matters of public record, the Court **GRANTS** judicial
27 notice for these documents. *See, e.g., United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir.
28 2003) (finding that public records and records and reports of administrative agencies may

1 be subject to judicial notice). The Court **DENIES AS MOOT** Defendant’s request for
2 judicial notice of Exhibit 5, as the Court does not rely on this document in reaching its
3 conclusion below.

4 **IV. DISCUSSION**

5 Defendant seeks to dismiss Plaintiff’s Complaint on the grounds that each of
6 Plaintiff’s alleged Labor Code violations underlying his PAGA claim fails as a matter of
7 law because Plaintiff is a union member subject to a collective bargaining agreement
8 (“CBA”), and therefore, his claims are preempted by Section 301 of the Labor Management
9 Relations Act (“LMRA”). (Doc. No. 7 at 2.) Defendant contends Plaintiff’s PAGA claims
10 are also subject to dismissal based on the exclusions from coverage for employees covered
11 by a CBA in the pertinent Labor Code sections and Wage Order, and because arbitration
12 is the exclusive remedy for Plaintiff’s grievances under the binding CBA. (*Id.*)

13 **A. § 510 and IWC Wage Order 16-2001**

14 Plaintiff’s PAGA claim seeks civil penalties in part for Defendant’s alleged violation
15 of California Labor Code sections 510 and 1194, which regulate the payment of overtime
16 and minimum wages, respectively. Cal. Lab. Code §§ 510, 1194. Defendant argues these
17 underlying claims are preempted because Plaintiff is subject to a CBA that is expressly
18 exempted from sections 510 and 1194. (Doc. No. 7 at 14.)

19 First, section 510 provides that its requirements “do not apply to the payment of
20 overtime compensation to an employee working pursuant to . . . (2) [a]n alternative
21 workweek schedule adopted pursuant to a collective bargaining agreement pursuant to
22 [California Labor Code] Section 514.” Cal. Lab. Code § 510(a)(2). Section 514 provides
23 the following:

24 Sections 510 and 511 do not apply to an employee covered by a valid
25 collective bargaining agreement if the agreement expressly provides for the
26 wages, hours of work, and working conditions of the employees, and if the
27 agreement provides premium wage rates for all overtime hours worked and a
28 regular hourly rate of pay for those employees of not less than 30 percent more
than the state minimum wage.

1 *Id.* § 514. Similarly, IWC Wage Order 16-2001 section 3(H)(1) states:

2 Subsections (A), (B), (C), (D), and (E) of Section 3, Hours and Days of Work,
3 shall not apply to any employee covered by a valid collective bargaining
4 agreement if the agreement expressly provides for the wages, hours of work,
5 and working conditions of the employees, and if the agreement provides
6 premium wage rates for all overtime hours worked and a regular hourly rate
7 of pay for those employees of not less than 30 percent more than the state
8 minimum wage. (See Labor Code Section 514).

7
8 IWC Wage Order 16-2001 § 3(H)(1).

9 In *Curtis v. Irwin Industries, Inc.*, 913 F.3d 1146 (9th Cir. 2019), an employee, like
10 Plaintiff, asserted several California law claims against his employer, including the failure
11 to pay overtime wages pursuant to section 510 and failure to pay minimum wage pursuant
12 to section 1194. *Id.* at 1150. The Ninth Circuit held that the employee’s claims for overtime
13 under section 510 were preempted because the employee was subject to a CBA that met
14 the requirements of section 514. *See id.* at 1153–54. The court further noted:

15 By its terms, . . . the default definition of overtime and overtime rates in
16 section 510 does not apply to an employee who is subject to a qualifying CBA.
17 If [the employee]’s CBAs in this case meet the requirements of section 514,
18 [his] right to overtime “exists solely as a result of the CBA,” and therefore is
19 preempted under § 301.

19 *Id.* at 1154.

20 Here, Defendant has demonstrated that Plaintiff is an employee who is subject to a
21 CBA compliant with section 514. In support of Defendant’s notice of removal, S. E.
22 Pipeline Construction Co.’s Vice President, Shannon Hearn, submitted a declaration in
23 which they confirmed Plaintiff is a member of the United Association of Journeymen and
24 Apprentices of the Plumbing and Pipe Fitting Industry (“Union”), and worked subject to
25 the CBA between S. E. Pipe Line and his union throughout the relevant periods of this
26 lawsuit, specifically Article X of the National Agreement as well as Articles VI and VII of
27 the California Addendum. (Declaration of Shannon Hearn, Doc. No. 3, ¶ 4.) The CBA
28 expressly provides for Plaintiff’s hours of work, wages, and working conditions. (Doc. No.

1 7-2 at 17 (hours of work, overtime, & holiday pay); Doc. No. 7-2 at 35–36 (wages and
2 funds.) The CBA includes Appendix A, which provides a table of wages by skill
3 classification. (Doc. No. 7-2 at 41.) These wages exceed the threshold for the applicable
4 California minimum wage for each corresponding year by more than 30%. (*Compare id.*
5 *with* Minimum Wage, State of California Department of Industrial Relations,
6 https://www.dir.ca.gov/dlse/faq_minimumwage.htm (last visited 01/10/2024).)

7 Rather than argue that the CBA’s terms do not meet the requirements of section 514,
8 Plaintiff attempts to distinguish *Curtis* because, in *Curtis*, the employee conceded that the
9 CBAs at issue generally applied to him, and “claimed that he was being deprived under the
10 pay arrangement laid out in the CBA of rights to which he contended Section 510 entitles
11 him to receive.” (Doc. No. 9 at 11.)

12 However, Plaintiff cannot artfully plead around his CBA in his Complaint because
13 “preemption attaches to a CBA dispute dressed in state law garb.” *Martinez v. Omni Hotels*
14 *Mgmt. Corp.*, 514 F. Supp. 3d 1227, 1236 (S.D. Cal. 2021) (citing *Alaska Airlines Inc. v.*
15 *Schurke*, 898 F.3d 904, 921 (9th Cir. 2018)). Therefore, neither Plaintiff’s neglect in
16 mentioning the CBA in his Complaint, nor his refusal to explicitly concede the CBA
17 applies to him in the first place, is dispositive because Plaintiff does not challenge
18 Defendant’s contention that the CBA governs his employment. *See Franco v. E-3 Systems*,
19 No. 19-cv-01453-HSG, 2019 WL 6358947, at *4 (N.D. Cal. Nov. 8, 2019) (“Plaintiff does
20 not challenge the substance of the CBAs, but instead argues that *Curtis* is distinguishable
21 because ‘in that matter plaintiff conceded that the CBA is applicable to plaintiff.’ But
22 Plaintiff does not (and apparently cannot) dispute that his employment is governed by the
23 CBAs, so the absence of an express concession is of no consequence.” (citation omitted)).
24 The Court therefore **GRANTS** Defendant’s motion to dismiss Plaintiff’s claims brought
25 under California Labor Code section 510 and IWC Wage Order 16-2001 **WITHOUT**
26 **LEAVE TO AMEND.**

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1 **B. § 1194 Minimum Wage Claims**

2 Plaintiff also raises violations of California Labor Code section 1194 seeking the
3 state law mandated minimum wage. (Compl. ¶¶ 43–44.) Defendant contends Plaintiff’s
4 claim for failure to pay minimum wage cannot pass the second prong of the analysis from
5 *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053 (9th Cir. 2007), because the CBA covers
6 multiple classifications of employees, each with a different wage rate. (Doc. No. 7 at 16.)
7 Again, Plaintiff claims that because he does not allege a violation of the CBA’s minimum
8 wage or any rights conferred under the CBA, it is purely a state law claim. (Doc. No. 9 at
9 12.)

10 Under Section 301 of the LMRA, “[s]uits for violation of contracts between an
11 employer and a labor organization . . . may be brought in any district court of the United
12 States.” 29 U.S.C. § 185(a). As recently reaffirmed by the Ninth Circuit, the Supreme Court
13 has interpreted the LMRA to authorize federal courts “to create a uniform body of federal
14 common law to adjudicate disputes that arise out of labor contracts.” *Curtis*, 913 F.3d at
15 1155 (citations omitted). “A state rule that purports to define the meaning or scope of a
16 term in a contract suit therefore is pre-empted by federal labor law.” *Id.* at 1152 (quoting
17 *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985)).

18 However, Section 301 “cannot be read broadly to pre-empt nonnegotiable rights
19 conferred on individual employees as a matter of state law.” *Id.* (quoting *Livadas v.*
20 *Bradshaw*, 512 U.S. 107, 123 (1994)) (quotations omitted). Further, “not every dispute
21 concerning employment, or tangentially involving a provision of a collective-bargaining
22 agreement, is preempted by § 301 or other provisions of federal labor law.” *McCray v.*
23 *Marriott Hotel Servs., Inc.*, 902 F.3d 1005, 1009 (9th Cir. 2018) (quoting *Lueck*, 471 U.S.
24 at 211) (quotations omitted). Claims which have no relationship to a collective bargaining
25 agreement “beyond the fact that they are asserted by an individual covered by such an
26 agreement are simply not pre-empted by § 301.” *Id.* (citation and quotations omitted).

27 The Ninth Circuit has employed a two-step test to ensure that Section 301
28 preemption “extends only as far as necessary to protect the role of labor arbitration in

1 resolving CBA disputes.” *Curtis*, 913 F.3d at 1153 (citation and quotations omitted). First,
2 the court asks whether the asserted cause of action involves a “right [that] exists solely as
3 a result of the CBA[.]” *Burnside*, 491 F.3d at 1059. “If the right exists solely as a result of
4 the CBA, then the claim is preempted, and our analysis ends there.” *Id.* (citing *Lueck*, 471
5 U.S. at 210). If not, the court proceeds to the second step and asks ““whether a plaintiff’s
6 state law right is substantially dependent on analysis of [the CBA],” which turns on whether
7 the claim cannot be resolved by simply ‘look[ing] to’ versus ‘interpreting’ the CBA.”
8 *Curtis*, 913 F.3d at 1153 (citations and quotations omitted and alterations in original).
9 Interpretation is construed narrowly in this context. *Id.* If claims are dependent on
10 interpretation of the CBA, then the claim is preempted by Section 301; if not, the claim
11 may proceed under state law. *Burnside*, 491 F.3d at 1059–60.

12 “[W]hen the meaning of contract terms is not the subject of dispute, the bare fact
13 that a collective-bargaining agreement will be consulted in the course of state-law litigation
14 plainly does not require the claim to be extinguished.” *Livadas*, 512 U.S. at 122–24. Here,
15 the minimum wage claims do not rely on any interpretation of the terms of the CBA.
16 “Courts have routinely held that California wage and hour claims are not preempted” in
17 cases like this one, which assert various wage and hour claims based on a failure to
18 compensate at all for certain hours allegedly worked. *Mauia v. Petrochem Insulation, Inc.*,
19 No. 18-CV-01815-MEJ, 2018 WL 3241049, at *9 (N.D. Cal. July 3, 2018) (collecting
20 cases).

21 Defendant asserts that resolving Plaintiff’s minimum wage claim will require
22 interpretation of the CBA to determine which hourly rate was applicable to Plaintiff and
23 aggrieved employees in order to calculate whether the effective hourly rate fell below the
24 minimum. (Doc. No. 7 at 17.) But the fact that Plaintiff’s minimum wage rate is defined
25 by the CBA does not in itself create a dispute about the CBA’s terms. Defendant has not
26 identified any substantive dispute over the language of the CBA that would require
27 interpretation, and the Court therefore finds that the minimum wage claims arising under
28 California Labor Code section 1194 are not substantially dependent on analysis of the

1 CBA. For that reason, Plaintiff’s minimum wage claim under Labor Code section 1194 is
2 not preempted by the LMRA, and the motion to dismiss this claim is **DENIED**.

3 **C. Failure to Pay Timely Final Wages, Failure to Pay Wages Timely During**
4 **Employment, and Failure to Provide Accurate Wage Statements**

5 Defendant argues Plaintiff’s claims for failure to pay timely final wages, to pay
6 wages timely during employment, and for failure to furnish accurate wage statements are
7 preempted for the same reasons as argued above, because they are derivative of Plaintiff’s
8 substantive claims for overtime pay. (Doc. No. 7 at 17–18.) Because the overtime pay
9 claims are preempted, the derivative claims of failure to pay timely final wages, to pay
10 wages timely during employment, and to provide accurate wage statements are also
11 preempted to the extent they rely upon the overtime claim. *Estrada v. Kaiser Found.*
12 *Hosps.*, 678 Fed. App’x 494, 497 (9th Cir. 2017) (finding that when a claim derives from
13 a preempted claim, the derivative claim also fails); *Jimenez v. Young’s Market Co., LLC*,
14 No. 21-cv-02410-EMC, 2021 WL 5999082, at *13 (N.D. Cal. Dec. 20, 2021) (“Because
15 overtime pay and meal periods claims are preempted, the derivative claims of failure to
16 pay final wages and provide accurate itemized wage statements are also preempted.”).

17 Plaintiff asserts his wage statement claim is not derivative of his overtime claims,
18 but rather, “is predicated on its own separate theory of liability.” (Doc. No. 9 at 13.)
19 However, Plaintiff’s Complaint alleges that his wage statement claim is derivative of his
20 overtime claims, at least in part. For example, the Complaint states “Defendant also failed
21 to provide accurate, lawful itemized wage statements to Plaintiff and the Class Members
22 in part because of the above-specified violations [including failure to pay overtime].”
23 (Compl. ¶ 30.) The Complaint further alleges that “Defendant failed to provide accurate
24 itemized wage statements which failed to include all hours worked, including overtime . .
25 . .” (*Id.* ¶ 50.)

26 Thus, the motion to dismiss is **GRANTED IN PART** to the extent the present
27 allegations are premised on overtime compensation violations.

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1 **D. Failure to Reimburse Necessary Business Expenses**

2 Labor Code section 2802 requires employers to “indemnify his or her employee for
3 all necessary expenditures or losses incurred by the employee in direct consequence of the
4 discharge of his or her duties” Cal. Lab. Code § 2802. Plaintiff alleges Defendant
5 violated section 2802 and related provisions of the IWC Wage Orders by “fail[ing] to
6 reimburse Plaintiff and Class Members for personal cell phone use. Personal cell phones
7 were used for work related purposes.” (Compl. ¶ 29.) Defendant argues the section 2802
8 claim is preempted by the LMRA because it would require interpretation of some portions
9 of the CBA, which refer to the IWC Wage Order. (Doc. No. 7 at 19 (citing Doc. No. 7-2 at
10 38).) The IWC Wage Order in turn states: “When the employer requires the use of tools or
11 equipment or they are necessary for the performance of a job, such tools and equipment
12 shall be provided and maintained by the employer” (IWC Wage Order 16-2001, Doc.
13 No. 7-2 at 48.) As noted by Plaintiff, a separate section of the CBA covers reimbursement
14 for employees staying out of town. (Doc. No. 9 at 14 (citing Doc. No. 7-2 at 36).)

15 Neither of these provisions relates to Plaintiff’s claim for reimbursement based on
16 use of a personal cell phone. Thus, the Court **DENIES** Defendant’s motion to dismiss
17 based on Plaintiff’s section 2802 claim.

18 **E. CBA Arbitration**

19 Lastly, Defendant argues Plaintiff’s PAGA claim must be dismissed because there
20 is a provision in the CBA which requires all disputes be resolved by the CBA’s “exclusive
21 and mandatory grievance and arbitration procedures[,]” which Plaintiff failed to exhaust.
22 (Doc. No. 7 at 20.)

23 Broadly, at this stage, the Court looks to “general state-law principles of contract
24 interpretation, while giving due regard to the federal policy in favor of arbitration by
25 resolving ambiguities as to the scope of arbitration in favor of arbitration.” *Boardman v.*
26 *Pac. Seafood Grp.*, 822 F.3d 1011, 1018 (9th Cir. 2016) (quoted source and internal mark
27 omitted). Supreme Court precedent indicates that, as part of the collective bargaining
28 process, a union may agree on its members’ behalf to require arbitration of employment-

1 related disputes. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 256–57 (2009). But in so far
2 as those agreements relate to statutory claims, there must exist a “clear and unmistakable”
3 waiver of the right to a judicial forum. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70,
4 80–82 (1998). Provisions that attempt “to provide a blanket waiver to all federal and state
5 causes of action[] have been routinely rejected by both the U.S. Supreme Court and Ninth
6 Circuit.” *Smith v. Serv. Emps. Int’l Union, Local 521*, No. 16-CV-02547-LHK, 2016 WL
7 4268713, at *8 (N.D. Cal. Aug. 14, 2016) (collecting cases). Recent, unpublished Ninth
8 Circuit cases cite to the consensus among circuit courts that a CBA must identify specific
9 statutes to provide a clear and unmistakable waiver. *Wawock v. CSI Elec. Contractors, Inc.*,
10 649 F. App’x 556, 558 (9th Cir. 2016) (citing *Ibarra v. UPS*, 695 F.3d 354, 356–60 (5th
11 Cir. 2012)); *see also Powell v. Anheuser-Busch Inc.*, 457 Fed. Appx. 679, 680 (9th Cir.
12 2011).

13 Defendant points to Article XIV of the CBA, which sets forth the exhaustive steps
14 in the grievance procedure that all union employees must meet. (Doc. No. 7 at 20.) The
15 relevant language dictates that if a grievance cannot be settled on the job, it “shall be
16 submitted for arbitration as provided herein.” (Doc. No. 7-2 at 20.) Moreover, the CBA’s
17 grievance procedure incorporates IWC Wage Order 16-2001, and states that “[a]ny claim
18 of violation of this section of this Agreement shall be processed under and in accordance
19 with the grievance procedure contained in Article VIII of this Agreement. That grievance
20 procedure shall be the exclusive method for resolving all alleged violations of this Section.”
21 (*Id.* at 38.) The CBA does not include any reference to the Labor Code, PAGA, or any
22 other state or federal statutes. It does not include any agreement to submit statutory causes
23 of action to arbitration.

24 Plaintiff counters that Article XIV is limited by Article VII(M), which expressly
25 incorporates IWS Wage Order 16-2001, and his claims instead are brought under PAGA
26 for statutory violations. (Doc. No. 9 at 14–15 (citing Doc. No. 7-2 at 38).) Plaintiff asserts
27 that because the Complaint only alleges statutory claims without reference to the CBA, his
28 claims do not involve any dispute concerning the interpretation of the CBA and thus are

1 outside the scope of Articles XIV and VII. (*Id.* at 15.) However, as discussed above, the
2 Court does not find this argument persuasive and Plaintiff cannot plead around the CBA
3 as to his overtime claim. Plaintiff further asserts the CBA does not include a clear and
4 unmistakable waiver of his right to pursue PAGA claims in this forum. (*Id.*)

5 Plaintiff relies on *Vasserman v. Henry Mayo Newhall Memorial Hospital*, 8 Cal.
6 App. 5th 236 (2017), which found no “clear and unmistakable waiver” where the
7 arbitration clause “makes no mention of the Labor Code or any other statute, . . . does not
8 discuss individual statutory rights, nor does it mention waiver of a judicial forum.” 8 Cal.
9 App. 5th 236, 247. Plaintiff asserts that, like in *Vasserman*, the CBA and Addendum do
10 not “explicitly state that a right to a judicial forum has been waived with regards to claims
11 for violations of state law. Neither provides for the arbitration of claims arising from any
12 specific Labor Code provision or other law.” (Doc. No. 9 at 18.)

13 In reply, Defendant asserts the court in *Cortez v. Doty Bros. Equipment Co.*, 15 Cal.
14 App. 5th 1 (2017), ruled as clear and unmistakable the CBA’s arbitration provision which
15 mirrors the arbitration provision at issue here. (Doc. No. 10 at 11.) In *Cortez*, the court
16 stated that while the CBA did not mention the Labor Code, it included an agreement to
17 arbitrate claims “arising under” Wage Order 16. 15 Cal. App. 5th 1, 14. The *Cortez* court
18 found it could not “disregard the reality that an employee may enforce the protections of
19 the wage order in court only by bringing a claim under the Labor Code. *Id.* “To hold that
20 wage and hour disputes arising under Wage Order 16 are arbitrable under the CBA only in
21 theory, but not in practice because they are, by necessity, brought under the Labor Code,
22 would result in the very absurdity courts are required to avoid.” *Id.* Thus, the court held the
23 plaintiff’s actions for overtime pay seeking to enforce the protections in Wage Order 16
24 fell within the agreement to arbitrate. *Id.*

25 The Court does not find a clear and unmistakable waiver of the right to a judicial
26 forum. First, the CBA does not identify the statutes as to which employees are waiving
27 their rights, only mentioning the relevant Wage Order. (*See* Doc. No. 7-2 at 38); *Padilla v.*
28 *Alta Dena Certified Dairy, LLC*, No. CV 19-5020-MWF (RAOx), 2019 WL 7865173, at

1 *4 (C.D. Cal. Sept. 26, 2019) (“Although the CBA states that ‘the minimum requirements
2 concerning meal and rest periods may vary . . . based on . . . the appropriate Industrial
3 Welfare Commission work order,’ this is not sufficient for the Court to conclude that the
4 parties intended to subject all statutory claims arising out of the Wage Order – let alone all
5 other California statutes.”) (internal citation omitted). The CBA does not state that
6 employees are waiving their right to a judicial forum for resolution of claims under the
7 California Labor Code or PAGA, or the provisions of them that are relevant here. *Olea v.*
8 *Teichert Pipelines, Inc.*, No. 2:21-cv-01675-RGK-PD, 2021 WL 1839683, at *5 (C.D. Cal.
9 May 7, 2021) (finding the CBAs were “clear and unmistakable” because they identified
10 Wage Order 16 and the specific California Labor Code sections); *Burmudez v. Dragados*
11 *USA, Inc.*, at *6 (E.D. Cal. Nov. 19, 2021) (holding a waiver was clear and unmistakable
12 which “expressly states that ‘all claims and claims for associated penalties arising under
13 the federal Fair Labor Standards Act, the California Labor Code, and Wage Order 16 will
14 be resolved through the procedures set forth in this Section 9[.]’”). Moreover, Article XIV,
15 which sets out the CBA’s grievance procedure, does not define a “grievance,” nor does it
16 mention any state or federal statutes. (*See id.* at 20.)


17 For these reasons, the Motion to Dismiss is **DENIED** based on the claim that
18 Plaintiff failed to exhaust the grievance and arbitration procedures in the CBA for those
19 claims that are not preempted for the reasons stated above.

20 **V. CONCLUSION**

21 For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART**
22 Defendant S.E. Pipe Line Construction Co.’s motion to dismiss. Should Plaintiff desire to
23 amend his complaint, he must file an amended complaint no later than February 5, 2024.
24 Defendant must file a responsive pleading no later than February 19, 2024.

25 **IT IS SO ORDERED.**

26 Dated: January 16, 2024

27 
28 Hon. Anthony J. Battaglia
United States District Judge

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