UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JULIA BERNSTEIN, et al.,

Plaintiffs,

v.

VIRGIN AMERICA, INC., et al.,

Defendants.

Case No. 15-cv-02277-JST

ORDER RE: MOTION FOR SUMMARY JUDGMENT ON DAMAGES

Re: ECF No. 343

Before the Court is Plaintiffs' motion for summary judgment on damages. ECF No. 343.[1] The Court will grant the motion in part.

I. BACKGROUND

This is a wage-and-hour class action brought by flight attendants who work or have worked for Defendants Virgin America, Inc. and Alaska Airlines, Inc. (collectively, "Virgin") in California.[2] Third Amended Complaint ("TAC"), ECF No. 298 ¶ 2. As set forth in greater detail in the Court's prior orders, *see, e.g.*, ECF No. 121, Plaintiffs allege that Virgin violated various California labor laws regarding payment for hours worked, wage amounts, wage documentation, and the provision of meal and rest breaks. TAC ¶¶ 29-30, 32-33, 35-36, 38-39, 41-42.

On November 7, 2016, the Court granted Plaintiffs' motion for class certification as to the

[1] Plaintiffs have designated their motion as a "motion to enter judgment for a sum certain," ECF No. 343 at 1, but have not identified the authority under which they brought this motion. Because Plaintiffs seek adjudication of the remaining damages issues without a trial, the Court construes the motion as one for summary judgment.

[2] Alaska Airlines, Inc. and Virgin America merged during the course of this lawsuit. The Federal Aviation Administration ("FAA") issued a Single Operating Certificate for Virgin and Alaska Airlines, Inc., on January 11, 2018. ECF No. 274 at 3. Alaska Airlines was added as a defendant on March 20, 2018. ECF No. 298. It answered the Third Amended Complaint on April 18, 2018. ECF No. 310.

following class and subclasses:

> **Class:** All individuals who have worked as California-based flight attendants of Virgin America, Inc. at any time during the period from March 18, 2011 (four years from the filing of the original Complaint) through the date established by the Court for notice of certification of the Class (the "Class Period").
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> **California Resident Subclass:** All individuals who have worked as California-based flight attendants of Virgin America, Inc. while residing in California at any time during the Class Period.
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> **Waiting Time Penalties Subclass:** All individuals who have worked as California-based flight attendants of Virgin America, Inc. and have separated from their employment at any time since March 18, 2012.

ECF No. 104 at 28. The Court later decertified the class only "with respect to any claims based on the completion of incident reports." ECF No. 316 at 15.[3]

The Court granted in part and denied in part Virgin's motion for summary judgment on January 5, 2017. ECF No. 121.

On July 9, 2018, the Court granted in part and denied in part Plaintiffs' motion for summary judgment. ECF No. 317. The Court found that Virgin was liable to the Class and California Resident Subclass for failing to pay (1) for all hours worked and (2) overtime premiums. *Id.* at 9-10. The Court also found Virgin liable to the Class for failing to provide (3) meal periods and rest breaks and (4) accurate wage statements. *Id.* at 10-11. Further, the Court found Virgin liable to the Waiting Time Penalties Subclass for violations of California Labor Code § 203. *Id.* at 11-12. In addition, the Court found Virgin liable to the Class and Subclass for derivative violations of California's Unfair Competition Law ("UCL"). *Id.* at 12. Finally, the Court found Virgin liable for derivative violations of the Private Attorney General Act ("PAGA"). *Id.*

The Court denied Plaintiffs' motion for summary judgment on declaratory and injunctive relief. *Id.* at 13.

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[3] The Court also later certified a subclass of flight attendants who participated in Virgin's Career Choice severance program, in order to address Virgin's affirmative defense that Career Choice participants had waived their claims. ECF No. 327 at 2. On November 1, 2018, the Court granted Plaintiffs' motion to exclude certain Career Choice documents and to strike Virgin's waiver defense under Federal Rule of Civil Procedure 37(c)(1). *See* ECF Nos. 346, 358.

As to damages, the Court did not determine an amount owed, but granted summary judgment on several preliminary issues. As relevant here, the Court held that the regular rate of pay provided the appropriate base for calculating damages for Plaintiffs' claims based on unpaid non-overtime hours. *Id.* at 14-15. The Court also held that the subsequent violation rate applied to calculate PAGA penalties for dates after September 26, 2015. *Id.* at 15-16.

On October 31, 2018, Plaintiffs filed this motion for judgment as to the amount of damages. ECF No. 343.

II. LEGAL STANDARD

Summary judgment is proper when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine only if there is sufficient evidence for a reasonable trier of fact to resolve the issue in the nonmovant's favor, and a fact is material only if it might affect the outcome of the case. *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)). The court must draw all reasonable inferences in the light most favorable to the nonmoving party. *Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1018 (9th Cir. 2010).

Where the party moving for summary judgment would bear the burden of proof at trial, that party "has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). Where the party moving for summary judgment would not bear the burden of proof at trial, that 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. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party satisfies its initial burden of production, the nonmoving party must produce admissible evidence to show that a genuine issue of material fact exists. *Id.* at 1102-03. If the nonmoving party fails to make this showing, the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

III. DISCUSSION

Plaintiffs seek judgment in the amount of $85,410,834.07, plus prejudgment interest of $9,052.12 per day after October 25, 2018 until the Court enters judgment. ECF No. 343 at 7. The $85 million total includes: (1) approximately $45.4 million in damages and restitution for wage-and-hour violations; (2) approximately $6.7 million in statutory penalties; and (3) approximately $33.3 million[4] in civil penalties under PAGA. *Id.* at 13-16, 19-20.[5]

With one exception, Virgin raises no factual disputes as to Plaintiffs' calculation of damages and penalties. ECF No. 352 at 12. Instead, it raises a number of legal and equitable arguments regarding whether certain amounts are recoverable or whether the Court should exercise its discretion to reduce certain components of Plaintiffs' proposed judgment amount.

A. Scope of Arguments

The Court first addresses Virgin's contention that Plaintiffs should receive no damages because the Court's prior findings on liability were erroneous. ECF No. 352 at 13-15. Virgin did not request leave to file a motion for reconsideration, *see* Civil L.R. 7-9(a), and the points Virgin raises in support have been thoroughly litigated already.[6] Moreover, to state the obvious, Virgin's disagreement with the Court's liability rulings does not present a freestanding basis for reducing the amount of damages.

Second, the Court considers Plaintiffs' argument that Virgin is precluded from raising challenges to Plaintiffs' damages request that were not raised in opposition to Plaintiffs' first motion for summary judgment. ECF No. 343 at 16-17, 20. Generally, "a party opposing a summary judgment motion must inform the trial judge of the reasons, *legal or factual*, why

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[4] The precise figure is $33,308,200. *See* ECF No. 343-2 at 59.

[5] Under PAGA, 75 percent of these penalties are distributed to California's Labor and Workforce Development Agency and 25 percent are allocated to the aggrieved employees. Cal. Lab. Code § 2699(i).

[6] Virgin acknowledges this. *See* ECF No. 352 at 15 ("For the reasons set forth in Virgin's Motion for Summary Judgment (Dkt. 60 and 107), Opposition to Plaintiffs' Motion for Summary Judgment (Dkt. 267), Opposition to Plaintiffs' Motion for Class Certification (Dkt. 71), and Motion for Decertification (Dkt. 226 and 279) . . . Defendants should not be liable for any damages, interest or penalties as to Plaintiffs, the Class, or the Subclasses in this case.").

summary judgment should not be entered." *USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276, 1284 (9th Cir. 1994) (citation omitted). Where a party "has a full and fair opportunity to ventilate its views with respect to an issue" at summary judgment, yet does not raise it, the Ninth Circuit deems the argument abandoned on appeal. *BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 826 (9th Cir. 2000). Nonetheless, the application of this waiver or forfeiture doctrine is discretionary, both on appeal and with the district court. *Novato Fire Prot. Dist. v. United States*, 181 F.3d 1135, 1142 n.6 (9th Cir. 1999) (holding that district court did not abuse its discretion in declining to consider new argument on motion for reconsideration); *see also Pac. Fisheries, Inc. v. United States*, 539 F.3d 1143, 1147 (9th Cir. 2008) (noting that "[a]lthough Pacific Fisheries could have raised the argument in its opposition to the government's motion for summary judgment," it was not improper for the district court to consider it later).

Virgin first asserts that, notwithstanding whether Defendant Virgin America waived or abandoned any arguments, Defendant Alaska Airlines should be permitted to raise them now because Alaska Airlines was not added as a defendant until after briefing was completed on Plaintiffs' summary judgment motion. ECF No. 352 at 15-16. Virgin cites no authority to support this proposition. Moreover, Plaintiffs' requested relief is based solely on liability incurred by Virgin America up until December 15, 2017. *See* ECF No. 297 at 3 (stating that Plaintiffs became employees of Alaska Airlines on December 16, 2017); ECF No. 330 at 2 (setting December 15, 2017 as end date for requested relief). As to that liability, Alaska Airlines is part of this litigation as Virgin America's successor in interest. ECF No. 297 at 3-4. "When the successor in interest voluntarily steps into the shoes of its predecessor, it assumes the obligations of the predecessor's pending litigation." *Zest IP Holdings, LLC v. Implant Direct Mfg, LLC*, No. 10CV0541-GPC-WVG, 2013 WL 5674834, at *6 (S.D. Cal. Oct. 16, 2013) (quoting *Minn. Min. & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1263 (Fed. Cir. 1985)). That role does not allow Alaska to raise previously abandoned arguments at this late stage of the litigation. *See id.* (concluding that successor-in-interest could not raise "new claims and defenses" upon being joined).

Second, Virgin argues that it necessarily must be able to raise any arguments regarding damages because Plaintiffs' class certification motion proposed to trifurcate trial into three stages

concerning liability, damages, and derivative claims. ECF No. 352 at 16 (citing ECF No. 70 at 35-36). That contention is misplaced. Although Plaintiffs proposed to *try* their case in this manner, their summary judgment motion sought determinations on their entire case, including the monetary relief at issue here. *See* ECF No. 225 at 28-33. Virgin was obligated to raise its damages arguments at that point. *See USA Petroleum*, 13 F.3d at 1284.

Finally, Virgin raises a similar argument that the fact that the parties stipulated to a briefing schedule for this motion that included an opportunity for Virgin to file an opposition necessarily provides Virgin unconstrained freedom to raise any argument. ECF No. 352 at 16 (citing ECF No. 330 at 3). But giving Virgin an opportunity to contest Plaintiffs' final calculation of damages, based on data that had not yet been provided, *see* ECF No. 343-1 ¶ 28, does not equate to Plaintiffs waiving the right to contest Virgin raising untimely new arguments about the legal availability of damages.

Accordingly, the Court will disregard the arguments that Virgin could have raised previously, but did not.

B. Damages Model

Virgin raises a single factual dispute regarding the model Plaintiffs used to calculate damages. Specifically, Virgin contends that Plaintiffs' expert, Dr. Breshears, improperly assumed that all class members reported to work one hour before a flight, as required by Virgin's own policy. *See* ECF No. 343-2 ¶ 33; ECF No. 352 at 19-20. Given that some flight attendants arrived late to work, Virgin argues, Plaintiffs have failed to provide sufficient evidence to support this element of the damages model. ECF No. 352 at 20. In response, Plaintiffs contend that it is reasonable to use the flight attendant reporting time required by Virgin's written policy. ECF No. 355 at 10-11.[7]

As a threshold matter, Plaintiffs' damages model does not need to capture the precise time each employee reported to work for each shift in order for the Court to award damages. *See Tyson*

[7] Plaintiffs also emphasize that Virgin did not previously object when Dr. Breshears used the same assumption at class certification and in support of Plaintiffs' prior motion for summary judgment. ECF No. 50-8 at 6; ECF No. 232-3 ¶ 30. The Court nonetheless exercises its discretion to consider this argument on the merits.

Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1046 (2016). Rather, the question is whether the damages model is based on "sufficient evidence to show the amount and extent of [each employee's] work as a matter of just and reasonable inference." *Id.* at 1047 (citation omitted); *see also Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1054 (2012) (Werdegar, J., concurring) ("Representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability [under the California Labor Code].").

In *Tyson Foods*, the Supreme Court considered whether a representative study could provide sufficient evidence of the average unpaid time that employees spent changing in and out of equipment at the beginning and end of shifts. 136 S. Ct. at 1042-43. The Supreme Court explained that the answer turned on whether "each class member could have relied on that sample to establish liability if he or she had brought an individual action." *Id.* at 1046. Further, the Supreme Court relied upon its earlier decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), emphasizing that, in the analogous context of the Fair Labor Standards Act, the "'remedial nature of [the Act] and the great public policy which it embodies . . . militate against making' the burden of proving uncompensated work 'an impossible hurdle for the employee.'" *Tyson Foods*, 136 S. Ct. at 1047 (quoting *Anderson*, 328 U.S. at 687). Given the employer's failure to keep records of that time, where the employees make a prima facie showing of the general amount of uncompensated work with reasonable accuracy, "[t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.* at 1047 (quoting *Anderson*, 328 U.S. at 687).

Here, the question is whether it is reasonable to base an employee's hours worked on the times at which the employee was required to report for work. Unlike in *Tyson Foods* and other cases involving allegedly uniform *de facto* off-the-clock policies, Virgin had an official policy requiring flight attendants to report for work at certain times and did not properly compensate its flight attendants for all the resulting time. *Cf. Brinker*, 53 Cal. 4th at 1051 (majority op.) (denying class certification where plaintiff had not "presented substantial evidence of a systematic company

policy to pressure or require employees to work off-the-clock, a distinction that differentiates this case from those . . . in which off-the-clock classes have been certified"). Virgin's assumption that employees were sometimes late is a logical inference based on common experience. But Virgin provides no reason to think the occasional late employee completely undermines Plaintiffs' damages model, particularly since it was Virgin's decision not to require employees to record their precise arrival times. It would be contrary to the purpose of the California Labor Code to shift the burden onto Virgin's employees to produce practically unobtainable evidence in lieu of the records that Virgin decided not to keep. *See Brinker*, 53 Cal. 4th at 1054 (Werdegar, J., concurring).

Nor has Virgin "come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness" of using Virgin's required start time to measure Plaintiffs' work. *Tyson Foods*, 136 S. Ct. at 1047 (citation omitted). Virgin produced an excerpt of a single employee's deposition testimony regarding her own occasional lateness. ECF No. 352-1 at 14. This does not create a genuine issue of material fact whether its employees were late with such frequency as to render Plaintiffs' damages model unreasonable or unjust.

Accordingly, the Court will use Plaintiffs' damages model.

C. Waiting Time Penalties

Virgin also challenges Plaintiffs' ability to recover waiting time penalties under California Labor Code section 203(a). ECF No. 352 at 22-25. Section 203(a) provides that "[i]f an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced."

First, Virgin contends that it did not act "willfully," Cal. Lab. Code § 203(a), given its good faith dispute as to the legality of its practices. ECF No. 352 at 22. In its prior order granting summary judgment on liability, the Court held that Virgin had acted willfully in failing to pay waiting time penalties to the Subclass. ECF No. 317 at 11-12.

Virgin next raises for the first time a defense to liability for waiting time penalties. Even where an employer willfully fails to pay wages, "a good faith dispute that any wages are due will

preclude imposition of waiting time penalties under Section 203." Cal. Code Regs. tit. 8, § 13520. Because Virgin could have raised this defense earlier but did not do so, the Court does not address it further.

Finally, Virgin raises two additional objections to the scope of the Waiting Time Penalties Subclass, arguing that (1) it cannot be liable for waiting time penalties to employees who left Virgin after Plaintiffs' complaint was filed on March 18, 2015, and (2) class members who were not based in California at the time of separation are not "employee[s]" within the meaning of the Labor Code. ECF No. 352 at 23-25. Because Virgin also had numerous prior opportunities to raise these liability arguments, the Court likewise does not consider them.

Accordingly, the Court grants judgment to Plaintiffs on waiting time penalties.

D. Meal Period and Rest Break Claims

Virgin next disputes whether Plaintiffs are entitled to prejudgment interest on their meal period and rest break claims. ECF No. 352 at 25-27.

Plaintiffs argue that they are entitled to prejudgment interest under California Labor Code section 218.6, ECF No. 355 at 19-20, which provides that, "[i]n any action brought for the nonpayment of wages, the court shall award interest on all due and unpaid wages at [a ten percent] rate of interest."[8] Virgin argues that these claims are not "brought for the nonpayment of wages," and therefore section 218.6 does not apply. ECF No. 352 at 26.

In *Kirby v. Immoos Fire Protection, Inc.*, the California Supreme Court held that "a section 226.7 claim" does not "constitute[] an 'action brought for the nonpayment of wages' within the meaning of section 218.5," which authorizes an award of attorneys' fees and costs for such actions. 53 Cal. 4th 1244, 1255 (2012). Multiple district courts have since concluded that *Kirby*'s holding applies to the identical language in section 218.6. *See, e.g., In re: Autozone, Inc.*, No. 3:10-MD-02159-CRB, 2016 WL 4208200, at *7 (N.D. Cal. Aug. 10, 2016); *Van v. Language Line Servs., Inc.*, No. 14-CV-03791-LHK, 2016 WL 3143951, at *18 (N.D. Cal. June 6, 2016). The Court likewise concludes that *Kirby* forecloses Plaintiffs' argument.

[8] Section 218.6 incorporates the rate set in California Civil Code section 3289, which is currently ten percent. *See* Cal. Civ. Code § 3289(b).

Murphy v. Kenneth Cole Productions, Inc., on which Plaintiffs rely, is not to the contrary. 40 Cal. 4th 1094 (2007). The *Murphy* court held that the premium pay provided as a remedy in section 226.7(c)[9] was a wage, not a penalty. *Id.* at 297. The *Kirby* court expressly distinguished *Murphy*, explaining that while section 226.7's *remedy* is a wage, "wages" in section 218.5's "action brought for nonpayment of wages" language refers to "the *legal violation* triggering the remedy," not the remedy itself. 53 Cal. 4th at 1257.

Accordingly, the Court denies Plaintiffs' motion for judgment awarding prejudgment interest on the meal period and rest break claims.[10]

E. PAGA Penalties

Finally, Virgin argues that (1) certain PAGA penalties are not available as a matter of law and (2) the Court should exercise its discretion to reduce the amount of all PAGA penalties.

1. Availability of PAGA Penalties for Inaccurate Wage Statements

Virgin contends that Plaintiffs are not entitled to penalties under both PAGA and California Labor Code section 226(e) for the failure to provide accurate wage statements. ECF No. 352 at 20-22. Even if Virgin had timely raised this argument, the Court would reject it on the merits.

As the Court recently explained in another case, it is necessary "to differentiate between civil and statutory penalties" in this context. *Azpeitia v. Tesoro Ref. & Mktg. Co. LLC*, No. 17-CV-00123-JST, 2017 WL 3115168, at *11 (N.D. Cal. July 21, 2017). "A statutory penalty is directly recoverable by an employee and does not require PAGA compliance, whereas a civil penalty was previously enforceable only by the state's labor enforcement agencies and now requires PAGA compliance." *Id.* Accordingly, the Court concluded in *Azpeitia* that where a

[9] Section 226.7(c) (formerly subdivision (b)) requires an employer who fails to provide a compliant meal or rest period to "pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided."

[10] Although Virgin failed to raise this argument earlier, section 218.6 plainly does not authorize prejudgment interest for these claims. Because Plaintiffs rely solely on Labor Code section 218.6, *see* ECF No. 355 at 19-20, the Court does not consider whether prejudgment interest on these claims is available under Civil Code section 3287(a) or (b).

separate provision of the Labor Code provides for statutory penalties, it does not preclude "additional penalties under PAGA" for the same violations. *Id.*

Virgin's attempt to distinguish *Azpeitia* because it involved recovery under different Labor Code provisions, ECF No. 352 at 21-22, is not persuasive. Virgin does not contest the distinction between statutory and civil penalties, and it does not argue that section 226(e) is a civil penalty. *Cf. Lopez v. Friant & Assocs., LLC*, 15 Cal. App. 5th 773, 781 (2017) (holding that section 226(e) is a "statutory penalty" rather than a "civil penalty" subject to PAGA). The Court concludes that the reasoning in *Azpeitia* applies here.

Virgin's contention that PAGA provides an option for recovery that is mutually exclusive with other remedies, such as statutory penalties, also lacks support in the statutory language. Virgin emphasizes that, under PAGA, "an aggrieved employee *may* recover the civil penalty described in subdivision (f)." ECF No. 352 at 22 (quoting Cal. Lab. Code § 2699(g)(1)). But that very same provision also clearly states that "[n]othing in this part shall operate to limit an employee's right to pursue or *recover other remedies* available under state or federal law, either separately or *concurrently* with an action taken under this part." Cal. Lab. Code § 2699(g)(1) (emphasis added); *see also Stoddart v. Express Servs., Inc.*, No. 2:12-CV-01054-KJM, 2015 WL 5522142, at *9 (E.D. Cal. Sept. 16, 2015) (citing this language and reasoning that "[t]he plain language of the statute makes statutory penalties under section 226(e) of the Labor Code available to plaintiff in addition to civil penalties afforded under PAGA").

Consistent with this language, the California Supreme Court has explained that, under principles of collateral estoppel, nonparty employees may "use the judgment [in a PAGA action] against the employer to obtain remedies other than civil penalties for the same Labor Code violations." *Arias v. Superior Court*, 46 Cal. 4th 969, 987 (2009). And in *Lopez*, the California Court of Appeal expressly contemplated that the same plaintiff could do so for the exact provisions at issue here. 15 Cal. App. 5th at 787 ("A plaintiff prevailing on a section 226(a) PAGA claim could invoke collateral estoppel (issue preclusion) to establish a violation of section 226(a), but not to establish the additional elements of 'injury' and a 'knowing and intentional' violation required for a 226(e) claim."); *see also Caliber Bodyworks, Inc. v. Superior Court*, 134

Cal. App. 4th 365, 384 (2005) (explaining that "causes of action seek[ing] 'other remedies' in addition to civil penalties [are] permissible under section 2699, subdivision (g)(1)," provided that plaintiffs comply with PAGA's procedural requirements).

The Court acknowledges that, as Virgin points out, some district courts have concluded that plaintiffs must choose one of the forms of recovery for violations of Labor Code section 226(a). *See, e.g.*, *Rodriguez v. Scripps Media, Inc.*, No. CV150016FMOAJWX, 2015 WL 13747408, at *6 (C.D. Cal. Jan. 28, 2015); *Guifu Li v. A Perfect Day Franchise, Inc.*, No. 5:10-CV-01189-LHK, 2012 WL 2236752, at *17 (N.D. Cal. June 15, 2012). Nonetheless, for the reasons stated above, the Court finds cases reaching the opposite conclusion more persuasive. *See, e.g.*, *Reynoso v. RBC Bearings, Inc.*, No. SACV1601037JVSJCGX, 2017 WL 6888506, at *4 (C.D. Cal. Sept. 25, 2017) (permitting recovery under both PAGA and section 226(e)); *Cabardo v. Patacsil*, 248 F. Supp. 3d 1002, 1013 (E.D. Cal. 2017) ("Here, Plaintiffs can recover both the statutory penalties set forth in § 226(e) and civil penalties pursuant to PAGA."); *Azpeitia*, 2017 WL 3115168, at *11; *Stoddart*, 2015 WL 5522142, at *9 (permitting recovery under both PAGA and section 226(e)); *cf. Aguirre v. Genesis Logistics*, No. SACV1200687JVSANX, 2013 WL 10936035, at *3 (C.D. Cal. Dec. 30, 2013) (permitting recovery under both provisions but exercising discretion to reduce PAGA penalties).

The Court therefore concludes that Plaintiffs may recover additional PAGA penalties for Labor Code section 226(a) violations.

2. Reduction under Section 2699(e)(2)

Finally, Virgin urges the Court to exercise its discretion to reduce the PAGA penalties to $0, or in the alternative, to 25 percent of the calculated amount (approximately $8.325 million). ECF No. 352 at 16-19. Virgin argues that, given the unsettled issues of liability presented by this case, Virgin's wage practices were supported by its good-faith understanding of the law at the time. *Id.* at 17-18.

PAGA provides that the Court "may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or

confiscatory." Cal. Lab. Code § 2699(e)(2). In exercising this discretion, the Court considers PAGA's "remedial purpose." *Amaral*, 163 Cal. App. 4th at 1213.

As for Virgin's request that the Court award no penalties at all, the California Courts of Appeal have suggested that a "trial court lacks discretion to reduce a civil penalty to zero." *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112, 1135 (2012); *see also Amaral*, 163 Cal. App. 4th at 1210 (rejecting the argument that the trial court "had discretion to forgo imposing any penalties because [the employer] had a good faith dispute about whether wages were due"). Virgin provides no contrary authority or supporting argument.

Virgin's cases in support of its 75 percent reduction are also wholly inapposite. *See* ECF No. 352 at 18-19. In *Fleming v. Covidien Inc.*, the court reduced penalties from $2.8 million to $500,000 where it concluded that plaintiffs "suffered no injury due to the erroneous wage statements," which omitted the requisite employee identification number, the beginning date of the pay period, and the identity of the employer. No. (OPX), 2011 WL 7563047, at *2, 4 (C.D. Cal. Aug. 12, 2011). Moreover, the employer had made good faith efforts to remedy the violations as soon as plaintiffs provided notice to the employer and the LWDA, prior to filing the lawsuit. *Id.* *Aguirre* likewise concerned information missing from wage statements (total hours worked), but no unpaid wages. *See Aguirre*, No. SACV1200687JVSANX, 2013 WL 10936036, at *9 (C.D. Cal. July 3, 2013); *see also* No. SACV1200687JVSANX, 2013 WL 10936035, at *2 (C.D. Cal. Dec. 30, 2013) (reducing PAGA penalties from $1.8 million to $500,000).[11]

The most important factor distinguishing this case is injury. Unlike in Virgin's cases, Plaintiffs have been deprived of compensation for hours worked and statutorily mandated breaks, suffering over $45 million in damages (including interest). However, Virgin raises two additional

[11] The Court GRANTS Virgin's request to take judicial notice of two California trial court opinions. *See* ECF No. 353. These cases are also readily distinguishable. As explained by the reviewing court in *Kaanaana v. Barrett Bus. Servs., Inc.*, the trial court reduced the PAGA penalties for missed meal breaks to 13 percent because "[o]n average, plaintiffs were deprived of 13 percent of the 30-minute meal period"). No. B276420, -- Cal. Rptr. 3d --, 2018 WL 6261482, at *4 (Cal. Ct. App. Nov. 30, 2018); *see also* ECF No. 353 at 7-8. Virgin has made no such showing here. In *Parr v. Golden State Overnight Delivery Service, Inc.*, the court found that the maximum amount was confiscatory based on the employer's inability to pay and was unjust because plaintiffs brought an unnecessarily duplicative action and the inaccurate wage statements where "by no means the most serious" of Labor Code violations. ECF No. 353 at 24-26.

points that support some reduction.

First, Virgin stresses that $33.3 million in PAGA penalties would be confiscatory relative to $45 million in damages. ECF No. 352 at 17. The Court considers this factor. *Cf. Amaral*, 163 Cal. App. 4th at 1214 (reasoning that PAGA penalty that was less than one-third of damages was "proportional to [employer's] misconduct" and not confiscatory). The weight of this factor is lessened, however, given that Virgin has not presented any evidence that the full penalty would be excessive in relation to its ability to pay. *Cf. id.* (also considering employer's sales and profits relative to penalty amount).

Second, Virgin again emphasizes the uncertainty regarding its liability in this case. ECF No. 352 at 17-18. As set forth in the Court's earlier orders, prior law was unsettled regarding the extraterritorial applicability of California's wage-and-hour laws in this context. *See* ECF No. 104 at 11-18; ECF No. 121 at 14. Although the relevant authorities clearly support the outcome in this case, no court had previously resolved the issues. *See Choate*, 215 Cal. App. 4th at 1468 (finding a good faith dispute where the court was "the first case to define the standard for waiver under [California Labor Code] section 227.3"). Similarly, Virgin's preemption arguments, ECF No. 121 at 14-27, were "not unreasonable or frivolous." *Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1202 (2008).

To the extent that Virgin continues to maintain that it is not liable, the amount of PAGA penalties will be immaterial should Virgin prevail on appeal. But whether Virgin's noncompliance was the result of good faith is also relevant to the Court's penalty analysis. *See Amaral*, 163 Cal. App. 4th at 1214 (affirming no reduction where trial court found employer "was on notice that [a wage ordinance] applied to its operations but made no attempt to comply"). In other cases, courts have reduced penalties where employers took steps before or during litigation to comply with their clear obligations under the law. *See Thurman*, 203 Cal. App. 4th at 1136 (noting that "defendants took their obligations under Wage Order No. 9 seriously and attempted to comply with the law"); *Fleming*, 2011 WL 7563047 (considering "prompt steps to correct violations once notified"). Where the law is clear, reducing penalties for these compliance efforts serves the statute's purposes by incentivizing compliance and ensuring that the penalty is

proportional to the employer's course of conduct. *See Amaral*, 163 Cal. App. 4th at 1214. Conversely, when the law is unclear, awarding the maximum penalties may be excessively punitive and their deterrence function weakened.

The Court therefore exercises its discretion to reduce the PAGA penalties by 25 percent, to a total of $24,981,150.

F. Declaratory Relief

Virgin also contends that Plaintiffs have waived their right to request declaratory relief. ECF No. 352 at 27. Plaintiffs respond that the Court's prior order finding that Virgin violated California law is sufficient. ECF No. 355 at 10 n.4 (citing ECF No. 317). In the order cited by Plaintiffs, the Court denied Plaintiffs' motion for summary judgment as to prospective injunctive and declaratory relief. ECF No. 317 at 13. From Plaintiffs' response, it appears that they seek only declaratory relief regarding Virgin's past conduct. To resolve any lingering uncertainty, the Court grants that request.

CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART Plaintiffs' motion for summary judgment on damages. The Court will award Plaintiffs' proposed amount, with two exceptions. First, the Court holds that Plaintiffs are not entitled to prejudgment interest on their meal period and rest break claims under California Labor Code section 218.6. Accordingly, the Court subtracts $60,518.78 in prejudgment interest from the proposed total as of October 25, 2018, and $52.16 in the per-day prejudgment interest following that date. *See* ECF No. 343 at 15. Second, the Court exercises its discretion under California Labor Code section 2699(e)(2) to reduce the remaining PAGA penalties by 25 percent, from $33,308,200 to $24,981,150.

In sum, the Court awards Plaintiffs: (1) $45,337,305.29 in damages and restitution; (2) $3,552.71 per day in continuing prejudgment interest after October 25, 2018; (3) $6,704,810 in statutory penalties; and (4) $24,981,150 in PAGA civil penalties.

Plaintiffs are ordered to serve a proposed form of judgment on Defendants within five court days. Within five court days thereafter, Defendants are ordered either to submit the proposed judgment to the Court, indicating their agreement solely as to form, or serve objections

regarding the form of judgment on Plaintiffs. Within five court days thereafter, Plaintiffs are ordered to submit the proposed form of judgment, a copy of Defendants' objections, and Plaintiffs' responses.

All future dates in this case are otherwise vacated.

IT IS SO ORDERED.

Dated: January 16, 2019

JON S. TIGAR
United States District Judge