SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Sunil R. Kulkarni Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2110

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LAW AND MOTION TENTATIVE RULINGS
DATE: SEPTEMBER 28, 2023 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV384531	Sanchez v. Green Messengers, Inc., et al. (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 2	23CV410212	Card v. Security Industry Specialists, Inc. (PAGA)	RESCHEDULED to October 5, 2023.
LINE 3	22CV405652	Card v. Security Industry Specialists, Inc. (Class Action)	RESCHEDULED to October 5, 2023.
LINE 4	18CV328915	Uzair v. Google, LLC	See tentative ruling. The Court will prepare the final order.
LINE 5	20CV373939	Gonzalez v. Pham, et al. (PAGA)	See tentative ruling. The Court will prepare the final order.
LINE 6			
LINE 7			

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LAW AND MOTION TENTATIVE RULINGS

LINE 8			
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Calendar Line 1

This is a putative class action alleging violations of the Fair Credit Reporting Act (FCRA) by Amazon.com Services, LLC, Amazon Logistics, Inc. (collectively with Amazon.com Services, LLC, "Amazon"), and Green Messengers, Inc. (which is apparently Amazon's subcontractor).[1]

Before the Court is Amazon's motion for summary judgment. For the reasons discussed below, the Court GRANTS the motion.

I. BACKGROUND

Plaintiff alleges that when he applied for employment with Defendants, they provided a disclosure and authorization form to perform a background investigation. (Complaint, ¶ 22.) But the disclosure contained extraneous and superfluous language beyond the disclosure itself and/or was not clear and conspicuous, in violation of the FCRA. (*Id.*, ¶ 23.) Specifically, extraneous information was reflected in "[m]iscellaneous provisions concerning Plaintiff's employment including, but not limited to, 'Time Clock Policy,' 'Uniform Policy,' 'Time Card Authorization,' and 'Paid Sick Leave.' " (*Id.*, ¶ 24.) And the disclosure was not clear and conspicuous because (1) it was not in all capital letters; (2) it was not in boldface to set off the required disclosure; and (3) the disclosure provisions are set out in a dense, small font that reduces clarity. (*Id.*, ¶ 25.)

Based on these allegations, Plaintiff brings a single putative class claim for failure to make proper disclosure in violation of the FRCA, title 15 United States Code section 1681b(b)(2)(A) ("Section 1681b").

II. LEGAL STANDARD

"A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72; see also Code Civ. Proc., § 437c, subd. (p)(2).)

This standard provides for a shifting burden of production; that is, the burden to make a prima facie showing of evidence sufficient to support the position of the party in question. (See *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850–851 (*Aguilar*).) The burden of persuasion remains with the moving party and is shaped by the ultimate burden of proof at trial. (*Ibid.*) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) The opposing party must produce substantial responsive evidence that would support such a finding; evidence that gives rise to no more than speculation is insufficient. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162–163.)

[1] Plaintiff states that Green Messengers is Amazon's subcontractor in his opposition brief, and Amazon does not dispute the accuracy of this statement on reply.

The traditional method for a defendant to meet its burden on summary judgment is by "negat[ing] a necessary element of the plaintiff's case" or establishing a defense with its own evidence. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 334.) The defendant may also demonstrate that an essential element of plaintiff's claim cannot be established by "present[ing] evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence-as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar, supra*, 25 Cal.4th at p. 855.)

On summary judgment, "the moving party's declarations must be strictly construed and the opposing party's declaration liberally construed." (*Hepp v. Lockheed-California Co*. (1978) 86 Cal.App.3d 714, 717 (*Hepp*); see also *Johnson v. American Standard, Inc*. (2008) 43 Cal.4th 56, 64 [the evidence is viewed in the light most favorable to the opposing plaintiff; the court must "liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor"].) Summary judgment may not be granted by the court based on inferences reasonably deducible from the papers submitted, if such inferences are contradicted by others which raise a triable issue of fact. (*Hepp, supra*, 86 Cal.App.3d at pp. 717–718.)

Even if there are some triable issues in the case, the court has the power to summarily adjudicate that one or more causes of action has no merit, there is no affirmative defense to one or more causes of action, there is no merit to a claim for punitive damages (Civil Code section 3294), or one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. (Code Civ. Proc., § 437c, subd. (f)(1).) Absent a stipulation approved by the court, "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Ibid.*)

III. DISCUSSION

In the instant motion, Amazon maintains that it is entitled to summary judgment against Plaintiff for the following reasons: (1) Plaintiff lacks standing to pursue a claim under the FCRA because he did not suffer a cognizable injury; (2) the background check disclosure presented to Plaintiff complies with the FCRA's requirements; and (3) Plaintiff's claim is time-barred.[2]

A. Plaintiff's Standing to Pursue an FCRA Claim

1. *The FCRA Generally and Section 1681b(b)(1)(A)*

The FCRA was enacted in 1969 because Congress found a "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy." (15 U.S.C. § 1681(a)(4).) Its stated purpose

[2] Amazon's request for judicial notice of Plaintiff's Third Amended Complaint in *Hans Sanchez v. Green Messengers, Inc. & Amason.com Services, LLC*, U.S. District Court for the Northern District of California, Case No. 5:20-cv-06538-EJD (Exhibit 12) and supplemental request for judicial notice of the California Supreme Court docket for the petition for the review and de-publication request in *Limon v. Circle Stores, Inc.* (2022) 84 Cal.App.5th 671, Case No. S277435 (petition for review and de-publication request denied on January 25, 2023) are GRANTED. (Evid. Code, § 452, subd. (d).)

was "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter." (15 U.S.C. § 1681(b).) (*Cisneros v. U.D. Registry, Inc.* (1995) 39 Cal.App.4th 548, 559.)

Section 1681b of the FCRA "restricts the circumstances under which a consumer reporting agency may … divulge a consumer report, limiting its ability to disclose to those situations specifically enumerated in the statute 'and no other.' " (*Cisneros v. U.D. Registry, Inc.*, *supra*, 39 Cal.App.4th at p. 561.) One permissible situation is when an agency has reason to believe a person it furnishes a report to "intends to use the information for employment purposes." (15 U.S.C. § 1681b(a)(3)(B).)

Paragraph (b)(1) provides that "[a] consumer reporting agency may furnish a consumer report for employment purposes only if-- [¶] **(A)** the person who obtains such report from the agency certifies to the agency that-- [¶] **(i)** the person *has complied* with paragraph (2) with respect to the consumer report …," and paragraph (b)(2) provides that no report be procured unless "**(i)** a clear and conspicuous disclosure *has been made* in writing to the consumer at any time before the report is procured or caused to be procured, *in a document that consists solely of the disclosure,* that a consumer report may be obtained for employment purposes…." (15 U.S.C. § 1681b(b), emphases added.)

Congress wanted to ensure employers' compliance with the disclosure and authorization provision codified at paragraph (b)(2) in order to "secur[e] job applicants' privacy rights by enabling them to withhold authorization to obtain their consumer reports," as well as to "provid[e] applicants with an opportunity to warn a prospective employer of errors in the report before the employer decides against hiring the applicant on the basis of information contained in the report." (*Syed v. M-I, LLC* (9th Cir. 2017) 853 F.3d 492, 496–497.) To ensure compliance with the statute,

> [t]he FCRA provides a private right of action against those who violate its statutory requirements in procuring and using consumer reports. The affected consumer is entitled to actual damages for a negligent violation. 15 U.S.C. § 1681*o*. For a willful violation, however, a consumer may recover statutory damages ranging from $100 to $1,000, punitive damages, and attorney's fees and costs. 15 U.S.C. § 1681n.

(*Syed v. M-I, LLC, supra*, 853 F.3d at 497.)

2. *Standing in Federal and California Courts*

Given the statements and authorities presented by the parties in support of their arguments, it is useful to articulate the concept of "standing" in state courts as compared to federal courts.

The term "standing" generally refers to the prerequisites necessary to pursue a claim in federal court based on Article III of the U.S. Constitution. (*The Rossdale Group, LLC v.*

Walton (2017) 12 Cal.App.5th 936, 944.) "Article III of the federal Constitution imposes a 'case-or-controversy limitation on federal court jurisdiction,' requiring [a plaintiff to allege] 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.'" (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117, fn. 13, quoting *Gollust v. Mendell* (1991) 501 U.S. 115, 125-26.) "'There is no similar requirement in [California's] state Constitution.'" (*Rossdale, supra*, 12 Cal.App.5th at 944, quoting *Grosset, supra*, 42 Cal.4th at 1117, fn. 13 and citing Cal. Const., art. VI, § 10.) Thus, there is no requirement that a plaintiff establish the existence of a case or controversy, as that term has been defined by federal courts, to seek relief in state court. (*Ibid.*)

California courts are not bound by the requirements of Article III standing, and instead "are guided by 'prudential considerations.'" (*Bilafer v. Bilafer* (2008) 161 Cal.App.4th 363, 370.) In California courts, the term standing is more broadly defined as "the right to relief in court." (*Rossdale, supra*, 12 Cal.App.5th at pp. 944-45 [internal quotation marks and citation omitted].) This right typically belongs to the "real party in interest." (See *Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 991, citing Code of Civil Procedure section 367.) Typically, a party lacks standing in California to assert a claim that belongs to another person; thus, it has often been said that "[a] real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law." (*Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605.) It has also been stated that in order to have standing in California courts, "the plaintiff must be able to allege injury — that is, some 'invasion of the plaintiff's legally protected interests.' [Citation.]" (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175.)

What then is required to assert standing in California courts to assert a claim under the FCRA? In the recently decided case of *Limon v. Circle K Stores, Inc.* (2022) 84 Cal.App.5th 671, which is heavily cited by Amazon, the Fifth District Court of Appeal considered this specific issue.

3. *The Limon Decision*

In *Limon*, the plaintiff alleged that the defendant employer violated the FCRA by failing to provide the required disclosures in connection with his employment application. The trial court sustained the defendant's demurrer to the plaintiff's class action complaint without leave to amend after finding that the plaintiff lacked standing because he failed to allege or suffer any injury. On appeal, the court considered whether and to what extent the plaintiff "must suffer an injury in order to have standing to sue under the FCRA in California courts." (*Limon*, 84 Cal.App.5th at 690.)

While the court acknowledged the Legislature's authority to confer standing on a class of individuals "irrespective of whether they suffered injury" (*Limon* at 695), it explained that "as a general matter, to have standing to pursue a claim for damages in the courts of California, a plaintiff must be beneficially interested in the claim he is pursuing." (*Id*. at 700.) Applying this general principle of standing to the FCRA and, in doing so analyzing the meaning of the relevant terms contained therein, the court concluded that the statute did not excuse plaintiffs from demonstrating a beneficial interest, which it equated to an injury-in-fact. (*Id*. at 697-698.) This requirement is met by an FCRA plaintiff, the court held, when he demonstrates that he suffered an injury that is "(a) concrete and particularized, and (b) actual or imminent, not

conjectural or hypothetical." (*Id*. at 704, quoting *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361-362.)

In addressing injury, the plaintiff claimed that the noncompliant disclosure violated his interests in privacy and access to information, to which the defendant responded that he had received all information required under the FCRA and any "confusion" was insufficient to constitute injury because, in part, the plaintiff testified he would have authorized the defendant to run a consumer report even if he received an "indisputably compliant FCRA form." (*Id*. at 704.) The appellate court concluded that the plaintiff failed to plead an injury sufficient to demonstrate standing because "there was no injury to [plaintiff]'s protected interest in ensuring fair and accurate credit (or background) reporting" because he received a copy of the report, it did not contain injurious or false information, and he did not allege any material risk of future harm. (*Id*. at 705, 707.) The court further opined that based on his deposition testimony, the plaintiff "undoubtedly understood he was advising [defendant] he was willing to have it conduct a background check on him prior to being hired," and rejected his claim of an informational injury because "an informational injury that causes no adverse effect is insufficient to confer standing upon a private litigant to sue under the FCRA." (*Id*. at 705-707.)

4. *Discussion*

Amazon maintains that based on the standard articulated in *Limon,* Plaintiff lacks standing to pursue a claim under the FCRA because he did not suffer any cognizable injury- be it privacy-related or informational.

As a threshold matter, Plaintiff challenges the import of *Limon*, arguing that it is not binding on this court and should not be followed because it conflicts with California Supreme Court and Sixth District authority. Alternatively, he asserts that even if the Court concludes that *Limon* sets forth the standard for standing for a FCRA claim in a California court, he has such standing.

In arguing that *Limon* is not binding, Plaintiff asserts that the decision improperly imposed an external limitation on standing by requiring an injury *in addition* to the violation of the plaintiff's legal rights, and directs the Court to the State Supreme Court's decision in *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, as well as the appellate decisions of *Jasmine Networks v. Superior Court* (2009) 180 Cal.App.4th 980, *Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16 and *National Paint & Coating Assn. v. State of California* (1997) 58 Cal.App.5th 753 as establishing the impropriety of this conclusion. In these decisions, Plaintiff argues, the courts made clear that California law does not impose an Article III standing requirement, and standing requirements external to the substantive elements of a claim are "a creature of federal law" and do not apply under California law. (See Opp. at 10:17-18.) There are several problems with Plaintiff's argument.

First, even if, as Plaintiff contends, the *Limon* decision was "wrong" because it misread California authorities such as *Jasmine*, it remains good law in the state as the California Supreme Court denied review and a request for de-publication of the decision. Second, as Amazon maintains, the "[d]ecisions of every division of the District Courts of Appeal are binding upon … the superior courts of [the] state," with superior courts possessing the discretion to choose between which decision to follow only where there is more than one on a

particular point of law and those decisions conflict. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.) Here, *Limon* is the *only* California appellate decision which addresses the standing required to pursue an FCRA claim in California courts and, as good law, this Court therefore remains bound to follow it.

Third, even if the Court had the ability to reject the *Limon* decision on its merits, nothing in any of the authorities cited by Plaintiff warrants such an action. Plaintiff accurately describes these decisions as holding that the California Constitution does not impose the same standard as Article III with regards to standing; however, he ignores the fact that the *Limon* court *agreed* on this point, stating that "California is not constrained by the case or controversy provisions of Article III." (*Limon*, 84 Cal.App.5th at 697.) But it continued that while California courts have clearly rejected adoption of Article III standing, that did not mean that they had not recognized some *commonality* among standing requirements in the federal and California judicial systems. (*Ibid*.) In this regard, *Limon* explained, California courts have "also equated the 'beneficially interested' test for standing in California to the injury-in-fact prong of the article III test for standing in the federal courts." (*Id*. at 698, citing *People for Ethical Operation of Prosecutors etc. v. Spitzer* (2020) 53 Cal.App.5th 391, 407-408; *Synergy Project Management, Inc. v. City and County of San Francisco* (2019) 33 Cal.App.5th 21, 30-31, etc.) *Limon* then distinguished *Weatherford* and *National Point*, explaining that they merely stood for the proposition that the Legislature may authorize public interest lawsuits by a plaintiff even if that plaintiff has not been injured by the claimed violation, and *not* that a concrete or particularized injury is never required in order for a plaintiff to have standing to sue in California. With regard to *Jasmine*, the court noted that the decision involved interpreting Code of Civil Procedure section 367 and was not an attempt to "delineate the entire scope of California's standing doctrine" and thus did not answer the question of what was required to establish standing for an FCRA claim in California courts. (*Limon*, at 691.)

This court finds the authorities cited by Plaintiff distinguishable or of no import on the issue of FCRA standing in California for the same reasons as the *Limon* court. As for the remaining decision cited by Plaintiff, *Connerly*, that case is distinguishable because it did not involve a claim under the FCRA but instead considered whether the plaintiff's status as a taxpayer granted him standing to challenge the constitutionality of various "affirmative action" statutes. Thus, this case is similarly of no help to Plaintiff.

As *Limon* controls, the question is whether Plaintiff has a cognizable injury. Amazon submits evidence that demonstrates the following: in March 2019, Plaintiff applied for employment with Green Messengers as a delivery driver and understood that if hired by the company, he would be delivering packages to Amazon customers. (Amazon's Separate Statement of Undisputed Material Fact in Support of Motion for Summary Judgment ("UF") 1, 2.) An offer of employment was extended to him, contingent on his satisfying several pre-employment requirements, including passing a drug test and a background check. (UF 3.) Green Messengers presented Plaintiff with an at-will employment letter that stated as much, and Plaintiff, who signed the letter, testified that he understood that his job offer was contingent and that he needed to pass a drug test and a background check in order to be hired, and was acquiescent to both. (UF 4-8.)

The background check, which consisted of a criminal background check and a motor vehicle record check, was performed by Accurate Background ("Accurate"). (UF 10, 11.) To initiate this process, Plaintiff reviewed and completed various documents through an online

platform and provided certain identifying information, including his Social Security number. (UF 14-17.) The screen which informed Plaintiff that this information would be used to perform a background check also contained a box for him to check if he wanted a free copy of the results emailed to him. (UF 18.) After selecting "Continue" on the "Background check" screen, Plaintiff continued to a screen that only displayed a document entitled "Fair Credit Reporting Act Background Check Disclosure" (the "FCRA Disclosure & Authorization") which advised him that a "consumer report, also known as a background check," would be procured on him. (UF 19-22.) At the bottom, Plaintiff was able to select either "Back" or "Agree & Continue" buttons; the latter, if selected, functioned as a combined disclosure and authorization document for FCRA compliance purposes. (UF 23-25.) Plaintiff viewed this screen on March 19, 2019 and authorized the procuring of a background check on him by selecting the "Agree & Continue" button. (UF 26-28.)

After selecting "Agree & Continue," Plaintiff continued to a screen that displayed a separate document titled "Non-Fair Credit Reporting Act Acknowledgments and Authorization for Background Check" ("Additional Background Check Auths."), which identified Accurate as the entity that would perform the background check and listed the company's contact information. (UF 30-32.) Through this screen, a prospective employee provided a further and separate authorization for a background check by clicking on the "Agree & Continue" button. (UF 33.) Plaintiff viewed the Additional Background Check Auths. on March 19, 2019 and selected the "Agree & Continue" button. (UF 34-36.)

After Plaintiff authorized a background check, Green Messengers and Amazon requested that Accurate conduct one on Plaintiff on March 21, 2019, and the company completed the check two days later on March 21, 2019. (UF 37, 38.) All of the information contained in the resulting report was accurate and Plaintiff passed the background check. (UF 39, 40.) Shortly thereafter, Plaintiff began his employment with Green Messengers; he has never applied for employment with Amazon. (UF 41-43.)

On March 19, 2019, Accurate emailed Plaintiff at the address he had provided for his background check, informing him that it was a consumer reporting agency that had been asked to complete a background check on him and in connection with that request it might be sending him documents or notices. (UF 44-46.) Plaintiff opened this email on four different occasions- March 27 and April 5, 8 and 9. (UF 48.) Two days later, Accurate emailed Plaintiff advising him that it may be reporting criminal or other public record about him; Plaintiff opened this email on March 27 and April 8. (UF 49.) Both of the foregoing emails contained Accurate's phone number and email address. (UF 46, 50.) Accurate's records reflect that Plaintiff requested a free copy of his background check report and the company sent him an email containing a hyperlink to access it. (UF 53-57.) Accurate's records that Plaintiff accessed the report on March 27, 2019. (UF 58-60.) While Plaintiff possessed Accurate's contact information (address, phone number, email address), he never contacted and/or visited the company. (UF 62-80.) Plaintiff testified that he is always willing to authorize an employer to conduct a background check before being hired, provided that he is informed that such a check will be run. (UF 83.)

Given the foregoing, Amazon establishes that Plaintiff did not suffer a privacy-related injury because: he was advised and understood that a background check would be obtained on him (UF 3-5, 19-29, 44-60); Plaintiff authorized the procurement of a background check on himself on multiple occasions- signing the At-Will Employment Offer Letter, selecting "Agree

& Continue" on the FCRA Disclosure and Authorization and selecting "Agree & Continue" on the Additional Background Check Auths.- and thus indicated his willingness to submit to one (UF 82, 83, 3-5, 19-29, 30-36). Amazon also establishes that Plaintiff did not suffer any injury to his interest in fair and accurate background reporting because he confirmed that the background report completed on him did not contain any inaccuracies. (UF 39.) Finally, Amazon demonstrates that Plaintiff did not suffer any informational injury because he was presented with an FCRA-compliant background check disclosure (see Section B, below) advising him that a background check would be procured on him in connection with his employment with Green Messengers, and he approved of as much. (UF 19-29, 82, 82.) All told, Amazon has demonstrated that Plaintiff did not "suffer injury to his legally protected interests under the FCRA to confer standing upon him" (*Limon*, 84 Cal.App.5th at 707) and thus lacks standing to pursue his FCRA claim. Accordingly, the Court finds that Amazon has met its initial burden in this regard and therefore the burden shifts to Plaintiff to demonstrate a triable issue of material fact.

To this end, Plaintiff insists that he has standing under *Limon*, i.e., suffered an injury-in-fact, because he did not know that a background check would be done and his consumer report contained derogatory information. The latter assertion, that the report contained derogatory information- particularly Plaintiff's conviction for a misdemeanor charge of driving without a license- is easily dispensed with. In discussing it, Plaintiff notes that the *Limon* court found a lack of standing because the subject report did not contain any "defamatory content or other per se injurious content" (*Limon* at 705) but insists that that it not the case here. But Plaintiff does not dispute that the background check reported on him was *accurate*. (UF 39.) Thus, it did not contain defamatory/injurious per se content and the FCRA does not prohibit the inclusion of truthful conviction information on a background check report, that which Plaintiff characterizes as "derogatory"; rather it is aimed at ensuring that erroneous information in such reports is corrected *before* an adverse hiring decision is made. (*Limon* at 689.) Plaintiff has not demonstrated that that is what happened here.

As for Plaintiff's assertion that he did not know that a background check would be done, as evidence of this he cites his deposition testimony wherein he testified as follows:

Q: So you were okay with a background check being performed, it sounds like, correct?
A: I was okay with them, yes, upon request.
Q: I didn't hear the last part. I didn't catch that.
A: Upon being requested.
Q: And what do you mean, "upon being requested"?
A: As the paper speaks for itself, upon signing the paper, I'm accepting that once they give a background check form to fill out, I'm accepting that I will- I'm going to need to sign that.

(Declaration of Thomas Segal in Support of Opposition to Motion for Summary Judgment, ¶ 3, Exhibit 1 (Plaintiff's Depo.) at 60:15-61:3.)[3]

[3] Plaintiff cites additional testimony at 63:2-7 and 124:13-21, but does not refute Amazon's showing.

But he notably does not cite the testimony that immediately follows, wherein he was shown the screen advising him that a background check would be procured on him that he had clicked "Accept & Continue" on, was asked if he saw the words "background check form" on that screen and responded "no." (Plaintiff's Depo. at 61:4-62:15.) He was then asked and affirmed that he understood that in order to be employed by Green Messengers, he had to pass a background check. (63:4-7.) He testified to this understanding more than once during his deposition. (See UF 6 (Plaintiff's Depo. At 57:3-8.) Plaintiff does not deny clicking on "Accept & Continue" on the various screens described by Amazon, though he responded "no" when asked if he recalled being presented with the FCRA Disclosure & Authorization. (Declaration of Andrew Frederick in Support of Motion for Summary Judgment ("Frederick Decl."), Exhibit 11 (Plaintiff's Depo.) at 72:20-24.)

The Court finds that the testimony cited by Plaintiff does not create a triable issue of fact as to whether he suffered an injury-in-fact under the FCRA. This testimony does not counter Amazon's showing that Plaintiff was informed, and understood, that a background check would be obtained on him, and he was willing to submit to this background check. Again, he does not deny signing/accepting the FCRA Disclosure & Authorization and the Additional Background Check Auths. and him testifying that he does not recall seeing these items does not create a triable issue of material fact as to whether he actually did or not. Further, by signing/accepting the foregoing, Plaintiff is presumed to have read the disclosures and understood their contents. (See, e.g., *Baker v. Italian Maple Holdings, LLC* (2017) 13 Cal.App.5th 1152, 1162, fn. 6.) He also does not deny Amazon's showing that he received an email from Amazon (a) informing him that a background check would be performed and (b) requesting that he provide the information necessary for that check, as well as a subsequent email from Accurate informing Plaintiff that it had been requested to complete a background check on him.

In sum, Amazon has demonstrated that Plaintiff has not suffered an injury-in-fact based on the disclosures at issue. Consequently, he lacks standing to pursue a claim under the FCRA and Amazon is entitled to summary judgment. Despite this showing, the Court will evaluate the merits of Amazon's remaining arguments.

B. Adequacy of Amazon's Background Check Disclosure to Plaintiff

Amazon next asserts that it is entitled to summary judgment because the background check disclosures provided to Plaintiff complied with Section 1681b(b)(2)(A).

1. *Applicable Standards for Compliance with Section 1681b(b)(2)(A)*

As stated above, paragraph (b)(1) of Section 1681b provides that "[a] consumer reporting agency may furnish a consumer report for employment purposes only if-- [¶] **(A)** the person who obtains such report from the agency certifies to the agency that-- [¶] **(i)** the person *has complied* with paragraph (2) with respect to the consumer report …." Paragraph (b)(2), in turn, provides that no report be procured unless "**(i)** a clear and conspicuous disclosure *has been made* in writing to the consumer at any time before the report is procured or caused to be procured, *in a document that consists solely of the disclosure,* that a consumer report may be obtained for employment purposes…." (15 U.S.C. § 1681b(b), emphases added.)

With regard to the standalone disclosure requirement, it has been held that a disclosure form is noncompliant "if it contains any extraneous information beyond the disclosure required by the FCRA." (*Walker v. Fred Meyer, Inc.* (2020) 953 F.3d 1082, 1088, citing *Gilbert v. Cal. Check Cashing Stores, Inc., LLC* (9th Cir. 2019) 913 F.3d 1169, 1176.) However, beyond a plain statement disclosing "that a consumer report may be obtained for employment purposes," the disclosure may also include "some concise explanation of what" the foregoing phrase means. (*Ibid*.)

As for the "clear and conspicuous" requirement, the court in *Gilbert, supra*, explained that "clear means 'reasonably understandable'" and "[c]onspicuous means 'readily noticeable to the consumer'" in the context of the FCRA. (*Gilbert*, 913 F.3d at 1176, quoting *Rubio v. Capital One Bank* (9th Cir. 2010) 613 F.3d 1195, 1200.)

2. *Discussion*

Upon review of the disclosure at issue, the Court agrees with Amazon that they comply with the foregoing standards. The FCRA Disclosure & Authorization is "reasonably understandable" because it contains plain, easy-to-understand language that advised Plaintiff that a consumer report (i.e., background check) would be procured on him in connection with his employment with Green Messengers (who provided services for Amazon). (UF 19-29.) The form was also presented by itself and contained the following title in conspicuous bolded font and capital letters: "**FAIR CREDIT REPORTING ACT BACKGROUND CHECK DISCLOSURE.**" (UF 19-29.) This type of presentation has been held to comply with the FCRA. (See, e.g., *Luna v. Hansen & Adkins Auto Transp., Inc.* (9th Cir. 2020) 956 F.3d 1151, 1153-1154.)

Plaintiff's response to the foregoing showing by Amazon is to question whether the disclosures submitted to the Court are identical to those that actually appear on the website Plaintiff accessed. He focuses on the fact that the individual responsible for authenticating the screen shots of the disclosure for the Court, Amanda Tylosky, an Amazon employee, does not use the phrase "screen" when discussing the forms. The Court views this as nothing more than a red-herring on the part of Plaintiff, who offers nothing beyond pure speculation, rather than affirmative evidence, in support of his suggestion that the disclosure form visuals submitted to the Court by Amazon are not accurate or standalone. Speculation without more does not create a triable issue. (See *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525 [stating that a plaintiff cannot rely on "speculation, conjecture, imagination or guess work" to overcome summary judgment because "[a]n issue of fact can only be created by a conflict of evidence."].) He additionally repeats that he has no recollection of the subject disclosures, but again, his lack of recall does not create a triable issue of material fact, especially with regard to whether these disclosure were FCRA-compliant. Notably, Plaintiff does not address the sufficiency of the disclosures as presented by Amazon in support of this motion and thus impliedly concedes that they comply with the FCRA.

Given that Amazon has established that the disclosures provided to Plaintiff comply with the FCRA, and Plaintiff has not demonstrated to the contrary, the defendants are entitled to summary judgment on this basis in addition to Plaintiff's lack of standing.

C. Timeliness of Plaintiff's Claim

Amazon lastly asserts that that Plaintiff's FCRA claim is indisputably time-barred.

1. *Statute of Limitations for Claims Under the FCRA*

The statute of limitations to bring an FCRA claim is the earlier of "(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or (2) 5 years after the date on which the violation that is the basis for such liability occurs." (15 U.S.C. § 1681p.) It is undisputed that Mr. Sanchez filed his FCRA claim within the five-year "actual violation" window, so the issue is whether he filed it within the two-year "date of discovery" window.

Importantly, an FCRA violation occurs, not at the time a defective disclosure is made, but "where, after violating its disclosure procedures, [the employer] 'procure[s] or cause[s] to be procured' a consumer report about the job applicant. (See 15 U.S.C. § 1681b(b)(2)(A)(i)." (*Syed v. M-I, LLC* (9th Cir. 2017) 853 F.3d 492, 506 (*Syed*).) The plaintiff's discovery or constructive discovery of this violation triggers the two-year statute of limitations. (See *Drew v. Equifax Info. Servs., LLC* (9th Cir. 2012) 690 F.3d 1100, 1109.) It is the defendant's burden to demonstrate when and how a reasonably diligent plaintiff would have discovered the violation. (See *id.* at p. 1110, quoting *Norman-Bloodsaw v. Lawrence Berkeley Lab*, (9th Cir. 1998) 135 F.3d 1260, 1266; see also *Rodriguez v. U.S. Healthworks, Inc*. (N.D. Cal. 2019) 388 F. Supp. 3d 1095, 1103–1107 [citing *Drew*]; *Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1309 [defendant has the burden to prove accrual of the statute of limitations].)

Resolution of the statute of limitations issue is normally a question of fact; however, "whenever reasonable minds can draw only one conclusion from the evidence, the question becomes one of law." (*Nguyen v. Western Digital Corporation* (2014) 229 Cal.App.4th 1522, 1552.)

2. *Discussion*

Amazon asserts that Plaintiff's claim is untimely because he knew, or exercising reasonable diligence should have known, the facts constituting his purported FCRA claim in March 2019, more than two years prior to when he initiated this action in July 2019, for the following reasons: (1) Accurate notified him that a background report was completed on him and provided him with a copy of the report that he accessed through Accurate's online portal on March 27, 2019; (2) Plaintiff had constructive knowledge of a background check being performed because his receiving an offer of employment from Green Messengers was contingent on him having passed such a check; and (3) by exercising reasonable diligence, i.e. contacting Accurate through any of the four means available to him (phone, email, mail and in-person), Plaintiff could have confirmed that a background check on him had been procured.

In his opposition, Plaintiff responds that he needed to undertake an "investigation" to determine the facts of his FCRA claim and whether a he could have discovered his claim if reasonably diligent is only a relevant consideration once it is shown that he had a *reason* to investigate. Plaintiff maintains that he needed to know that Defendants actually procured a

consumer report on him to trigger any obligation to investigate and did not in March 2019 as Amazon contends.

Upon review of the authorities cites by the parties, the Court agrees with Amazon that Plaintiff's FRCA claim is time-barred. Three California federal district decisions cited by Amazon that were subsequent to *Drew, supra- Rodriguez, supra*, 388 F.Supp.3d 1095, 1103-1107 (reversed on other grounds in *Rodriguez v. U.S. Heathworks, Inc.* (9th Cir. 2020) 831 Fed. Appx. 315, 316), *Ruiz v. Shamrock Foods Co.* (C.D Cal. 2018) 2018 U.S. Dist. LEXUS 148929, fn. 6 (affirmed on other grounds in *Ruiz v. Shamrock Foods Co.* (9th Cir. 2020) 804 Fed. Appx. 657) and *Berrellez v. Pontoon Sols., Inc.* (C.D. Cal. 2016) 2016 U.S. Dist. LEXIS 142174- held on similar facts to those present here that a job applicant's FCRA disclosure claim was time-barred based on when they were deemed to have had constructive knowledge of a background check occurring. They were held to have had such constructive knowledge based on (1) their offer letters conditioning a job on passing a background check and (2) the fact that they were subsequently hired. Notably, Plaintiff does not address any of these decisions, instead focusing on authorities which contain broad statements concerning the standard for delayed discovery generally, rather than how those standards are applied to actual facts in FCRA claims.

As the *Rodriguez* court succinctly explained:

> Plaintiff had at least constructive notice that Defendants had pulled a consumer report on Plaintiff because she would not have been able to start her position otherwise, as Plaintiff's employment was conditioned on the successful background check. A reasonably diligent person would therefore have understood that Defendants had pulled the consumer report, starting the statute of limitations.

(*Rodriguez*, 388 F.Supp.3d at 1104.)

Here, the evidence submitted by Amazon establishes that Plaintiff applied for employment with Green Messengers in March 2019, and the company extended an offer of employment to him on March 9, 2019, conditioned upon him passing a background check. (UF 1-7.) It also establishes that Plaintiff understood that his job offer was contingent and that he needed to pass a background check in order to become a Green Messengers employee. (UF 6.) Plaintiff was subsequently hired by and began working for Green Messengers in late March 2019. (UF 41.) Thus, based on standard applied in the aforementioned authorities, Plaintiff had constructive knowledge upon his hiring in March 2019 that a background check had been procured by him. Therefore, the two-year limitations period on a FCRA claim was triggered at that time and ran several months *before* this case was filed in July 2021. Accordingly, the Court concludes that Plaintiff's claim is time-barred and therefore Amazon is also entitled to summary judgment on this basis.

IV. CONCLUSION

Amazon's motion for summary judgment is GRANTED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 2

Case Name:
Case No.:

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Calendar Line 3

Case Name:
Case No.:

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Calendar Line 4

Case Name: *Uzair, et al. v. Google, LLC*
Case No.: 18CV328915

This is a putative class action rising from the automatic renewal of subscriptions for digital content through Defendant Google LLC's Google Play service. In August 2021, the Court granted Plaintiff Abdullah Uzair's motion to certify the class.

In July 2023, Defendant moved to decertify the class. The Court denied the motion, largely for the reasons stated in the Court's concurrently-filed order in *Dutcher v. Google LLC, et al.* (Santa Clara Superior Court Case No. 20CV366905) ("*Dutcher*").

Defendant now moves once again to decertify the class. In connection with the motion, Plaintiff moves to exclude the declaration of Yingyi Yang ("Yang Declaration") submitted by Google in support of its motion for decertification. Plaintiff opposes the motion to decertify and Google opposes the motion to exclude. For the reasons discussed below, the Court DENIED the motion to exclude and GRANTS the motion to decertify.

V. BACKGROUND

A. Factual

The Court adopt the factual background stated at pages 1 through 4 of its August 5, 2021 order granting class certification ("*Uzair* Class Certification Order").

B. Procedural

Based on these allegations, Plaintiff brings this action on behalf of a putative class of Google Play subscribers who live in California. Plaintiffs assert claims for: (1) Unfair Competition Law ("UCL") violations; (2) injunctive relief and restitution under Business & Professions Code section 17535 (the False Advertising Act ("FAA") or False Advertising Law ("FAL")); (3) violation of the Consumer Legal Remedies Act ("CLRA"); (4) common count for money had and received; and (5) declaratory relief.

In May 2021, Plaintiff moved to certify the following class: "All persons in California who purchased a subscription from Google, other than a subscription to Google Drive, billed through the Google Play Store from May 30, 2014 to the present and did not receive a full refund from Google." Defendant opposed the motion, contending, among other things, that Plaintiffs failed to propose a viable theory of classwide restitution.

On August 5, 2021, the Court issued the *Uzair* Class Certification Order, which granted certification of the following class:

> All persons in California who purchased a subscription from Google for a Google app (e.g., Google Music), other than a subscription to Google Driver, billed through the Google Play Store from May 30, 2014 to the present for

personal, family, or household purposes, and who did not receive a full refund from Google.

The Court did not certify a class as to the claim for declaratory relief or based on the theory that Google violated the ARL by failing to disclose the possibility of price increases. Nor did the Court certify a class as to the claim for declaratory relief or based on the theory that Google violated the ARL by failing to disclose the possibility of price increases. Nor did the Court certify a class of purchasers of apps sold through Google Play by third-party developers.

In March 2023, pursuant to a stipulation between the parties, Defendant moved to decertify the class, arguing that Plaintiff's "full refund" theory of restitution was not legally cognizable. The Court had previously rejected this argument as presented in Google's opposition to Plaintiff's motion for class certification. In its order dated July 19, 2023 (the "July 19 Order"), the Court again rejected this argument and denied the motion for decertification, explaining that as the legal issues and factual issues- at least with regard to the full refund theory of classwide restitution- were common in *Uzair* and *Dutcher*, it was "adopt[ing] in full its legal reasoning" from the concurrently filed *Dutcher* class decertification order.[4]

Google now moves to decertify the class for the following reasons: (1) Plaintiff Mr. De La O cannot represent the class as currently defined because it includes services that he cannot represent; and (2) recent, new case law requires the Court to analyze the effect on the current class of uninjured members.[5]

VI. MOTION TO EXCLUDE YANG DECLARATION

Plaintiff moves to exclude the Yang Declaration on the ground that the probative value of her declaration, which specific results of data analysis regarding usage of Google Play that is used to show that the current class contains differently situated subscribers, is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice and of confusing the issues.

Particularly, Plaintiff asserts that the Google has not confirmed which data set Ms. Yang used for her calculations and they have been unable to recreate the calculations made by her. Furthermore, they continue, the admission of the declaration as secondary evidence of the data is improper because the data has not been authenticated and the declaration itself is inadmissible hearsay, with Ms. Yang failing to set forth the necessary foundation to establish an applicable exception, e.g., that the data she offers are "business records."

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[4] In this order, the Court also highlighted the factual issues that made the cases similar.

[5] The Court GRANTS Google's request for judicial notice of (1) the Order on Class Certification in *Dutcher* ("*Dutcher* Class Certification Order") (Exhibit 1), (2) the Order on Class Decertification in *Dutcher* ("*Dutcher* Class Decertification Order") (Exhibit 2) and (3) the Order Denying Class Certification and Vacating Evidentiary Hearing in *Ingalls v. Spotify*, No. 3:16-cv-03533-WHA (N.D. Cal. July 27, 2017) (Exhibit 3). (Evid. Code, § 452, subd. (d).)

According to Plaintiff, he tried to verify the calculations used by Google using PROD_025, the most recent data produced by Defendant at the time it filed the concurrent motion to decertify class, but was unable to do so. When Plaintiff subsequently asked Google to identify the specific data used by Ms. Yang to explain the methodology used by her to generate her reported results, Google eventually acknowledged that she relied on additional data from PROD_026 not included in PROD_025 or previously produced to Plaintiff. Plaintiff asserts that he was still unable to replicate Ms. Yang's calculations, even after using PROD_026 as well. On August 22, 2023, Google admitted that PROD_25 was incomplete and produced PROD_027, which included the missing date. Plaintiff maintains that he is still unable to recreate her calculations, despite this additional production, and opines that it appears, based on preliminary analysis, that Ms. Yang overstates the percentages reported in her declaration.

Google responds that there is no basis to exclude the declaration because: there has been no serious misuse of the discovery process warranting such a drastic remedy; there is no substantial prejudice as Plaintiff has all the data necessary to verify Ms. Yang's calculations and is not prevented from doing so; there is no basis to question the reliability of Ms. Yang's data, which was based on all of the data ultimately provided to Plaintiff, some of which was inadvertently left out of the copies of the data produced to Plaintiff

The Court concludes that there is no basis to resort to the significant step of excluding Ms. Yang's declaration. While Plaintiff insists that it cannot recreate the numbers proffered by Ms. Yang, it notably offers no detail as to the how far off its own calculations are from hers given the data provided to it by Google. Though Plaintiff insists that Google is "overstating" the percentages, to what to degree is this the case? The Court views the lack of clarity in this regard as significant because based on the manner in which Google seeks to use the data contained in the Yang Declaration in its motion to decertify, it is not persuaded that the preciseness of the numbers critical. In other words, the Court is more concerned with what these numbers broadly represent- do they speak to a majority or significant percentage of the total class? If Plaintiff has obtained results that are nearly but not exactly identical to Ms. Yang's, those numbers still have the same effect of providing greater clarification on specific characteristics pertaining to the class.

Nor does the Court find persuasive Plaintiff's insistence that that the Yang declaration is inadmissible because it is not authenticated, is unreliable, and is hearsay. Ms. Yang is a data scientist at Google who can properly attest to the authenticity of the data submitted concerning California Google Play subscribers between May 2014 to November 2022 and used Google's internal SQL database to answer data questions relating to the decertification motion currently before the Court.[6]

In accordance with the foregoing, Plaintiff's motion to exclude is DENIED.

VII. MOTION TO DECERTIFY CLASS

[6] Google's counsel explains as much in his declaration and further states that Defendant has provided Plaintiff with the formulas used by Ms. Yang and is open to further meet and confer if Plaintiff has additional concerns about the results articulated in her declaration.

A. Legal Standard

Whether a class should be certified "is essentially a procedural one that does not ask whether an action is legally or factually meritorious. A trial court ruling on a certification motion determines whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, internal quotation marks, ellipses, and citations omitted.)

"After certification, a trial court retains flexibility to manage the class action, including to decertify a class if the court subsequently discovers that a class action is not appropriate." (*Kight v. CashCall, Inc.* (2014) 231 Cal.App.4th 112, 125-126, internal quotation marks, ellipses, and citations omitted (*Kight*).) A party moving for decertification generally has the burden to show that certification is no longer warranted. (*Id.* at 126.)

To prevail on a decertification motion, a party typically must show new law or newly discovered evidence that makes continued class action treatment improper. (*Kight, supra,* 231 Ca1.App.4th at 125.) "A motion for decertification is not an opportunity for a disgruntled class defendant to seek a do-over of its previously unsuccessful opposition to certification." (*Id*.)

Trial courts have broad discretion in ruling on a decertification motion, since "[t]rial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action and therefore are afforded great discretion in evaluating the relevant factors." (*Kight, supra*, 231 Ca1.App.4th at 126, citation and internal quotation marks omitted.) However, decertification resting on improper legal criteria or incorrect assumptions is an abuse of discretion. (*Id*.)

B. Adequacy of Mr. De La O as Class Representative

Google first asserts that Mr. De La O cannot adequately represent the class based on new services that are now available through Google Play that were not available to him when he initially subscribed to Google Play Music.

“Adequacy of representation depends on whether the plaintiff” s attorney is qualified to conduct the proposed litigation and the plaintiff’s interests are not antagonistic to the interests of the class.” (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The fact that a class representative does not personally incur all of the damages suffered by each different class member does not necessarily preclude the representative from providing adequate representation to the class. (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 238, disapproved on another ground by *Hernandez v. Restoration Hardware, Inc*. (201 8) 4 Cal.5th 260.) Only a conflict that goes to the very subject matter of the litigation will defeat a party’s claim of representative status. (*Ibid*.)

According to Google, when the Court issued its certification order in this action with Mr. De La O as the sole representative in August 2021, the primary app billed through Google Play was Google Play Music. Starting last year, it continues, the list expanded significantly and now includes YouTube TV, NFL Sunday Ticket, and Nest Aware, among others. Google

submits the following chart, with the highlighted portions representing the services added since the issuance of the certification order:

Service	Price	Dates Billed through Google Play Billing	Market / Target Group
Nest Aware	$6/mo	November 2021 - present	Security cloud service to monitor home events through Nest products and store security footage.
Google Play Music (no longer available)	$9.99 - $14.99/mo	November 2011 - December 2020	Music and podcast streaming service
Stadia (no longer available)	$10.00/mo	November 2019 - January 2023	Cloud based gaming service.
Google News	Varies	May 30, 2014 - Jan. 2, 2020	Subscriptions to news services via Google.
YouTube Premium	$13.99/mo	2022 - present	Ad-free streaming of YouTube conte and YouTube Music.
YouTube Music	$10.99/ mo	2022 - present	Ad-free music streaming service.
Google Play Pass	$4.99/mo OR $29.99/yr	September 2019 - present	App subscription for Android device providing access to apps and games without ads.
YouTube TV	$72.99/mo	2022 - present	Streaming television service.
SundayTicket	$299 - $439/yr	April 2023 - present	Allows NFL fans to watch out-of-market Sunday games.

Because Mr. De La O subscribed to different services, Defendant argues, and the services target different consumers, are billed at different prices and are offered under different payment structures, his reasonable reliance on the disclosures he was provided upon subscribing differ from those who subscribed later, and therefore he cannot adequately represent the interests of these class members. This conclusion, according to the Google, was the one reached by this Court in the *Dutcher* Classification Order.

Dutcher is a class action against Google d/b/a YouTube and YouTube, LLC (collectively, "YouTube") for claims similar to those at bench based on YouTube's alleged failure to disclose all required automatic renewal offer terms associated with certain membership programs, particularly YouTube TV, YouTube Music and YouTube Premium (collectively, "YT Subscriptions"). The *Dutcher* plaintiff moved to certify a class of all persons in the state who enrolled in any of YouTube's automatically renewing subscriptions to the YT Subscriptions, excluding those enrolled through the Apple App Store, who, from June 3, 2016 to the date of final judgment, incurred and paid fees in connection with them. The Court certified a class of all persons who enrolled in any of the automatically renewing subscriptions to YouTube TV, but denied certification as to the proposed YouTube Music and YouTube Premium subclasses, finding that the disclosures shown to the latter two groups of subscribers were different. These disclosures, the Court explained, potentially involved different ARL problems, as well as differing evaluations of reasonable reliance given that their "target [consumer] populations" were different.

Google describes the Court as concluding in the *Dutcher* Class Certification Order that while the class representative, Mr. Dutcher, *could* adequately represent a class comprised of subscribers of YouTube TV (and the three subclasses within certified by the Court), he could *not* do so for proposed subclasses for subscribers of YouTube Music and YouTube Premium because he never purchased the latter two services, and the evaluation of reasonable reliance depended on the specific service at issue. This ruling, Google concludes, applies equally to this case. Thus, it maintains, as Mr. Dutcher as a YouTube TV subscriber could not represent a class of YouTube Music or YouTube Premium subscribers, Mr. De La O cannot represent a class that goes beyond Google Play Music and includes YouTube TV or any of the other services.

In opposition, Plaintiff responds that nothing in the *Dutcher* Certification Order affects the certification order issue in this case because the latter does not stand for the proposition that class representatives must subscribe to the same products of class members. The Court's conclusion in the foregoing order, Plaintiff argues, was based on a showing made by Google that the disclosures for each of the three YouTube disclosures at issue were *different*. Here, in contrast, it insists, Google does not argue that the challenged disclosures are different, and the Court previously concluded that the certified class was all presented with the same subscription flows and acknowledgment emails, regardless of subscription. Nor does Google suggest, Plaintiff continues, that the new subscriptions it offers have *different* subscription flows or acknowledgement emails as compared to Google Play Music.

Upon review of the parties' arguments, the Court does not believe that *Dutcher* compels decertification/modification of the certified class. As an initial matter, the Court notes that the conclusions made in *Dutcher* that are highlighted by Google in support of its argument were made in connection with the question of whether there existed the requisite community of interest, particularly with regard to the existence of predominant questions of law or fact, and not specifically whether the class representative could adequately represent a class inclusive of the non-YouTube TV services. In any event, the Court's conclusion that there existed common legal issues for YouTube TV subscribers and *not* YouTube Music and YouTube Premium subscribers was based on a showing that the disclosures shown to the latter two groups were *different* from those shown to the first. Google has not made a similar showing here and the Court cannot conclude, merely because new services were made available to subscribers after

the issuance of the certification order in this action, that different ARL problems are necessarily involved.

While the Court also suggested in its order that Mr. Dutcher's evidentiary showing that he was impacted by all of the various ARL violations alleged in the action, at least with regard to YouTube TV, "didn't mean that he [was] well-equipped to be an adequate representative for subscribers of products he never subscribed to (YouTube Music and Premium)," the Court based this observation on the fact that the ARL violations that he alleged were not for those products, with their differing disclosures. (*Dutcher* Class Certification Order at 21:17-20.) Again, Google has not demonstrated that different ARL problems are now at issue due to the addition of new services to Google Play.

Additionally, the Court does not place significant weight on Google's insistence that Mr. De La O cannot serve as an adequate class representative because the new services target different consumers than himself as a subscriber of Google Music. While the Court suggested in the *Dutcher* Class Certification Order, citing to *In re Vioxx Class Cases* (2009) 180 Cal.App.4th 116, 130, that the evaluation of reasonable reliance by YouTube Music and YouTube Premium subscribers might differ from that of YouTube TV subscribers, this was an after-thought to its conclusion that different ARL problems were involved due to differing disclosures, which was determinative as to whether the factors of commonality and adequacy were met.

Further, as Plaintiff argues, *In re Vioxx Class Cases* involved significant differences in the level of sophistication of class members (purchasers of prescription drugs) that have not been shown to exist here, where the class is entirely made up of ordinary consumers who purchased automatically renewing subscriptions for "personal, family or household purposes," and the ARL does not distinguish between the types of subscription at issue. (*Cf. Uzair* Class Certification Order at 21-22 [agreeing with Plaintiffs that "the existence of the ARL and its specifically enumerated requirements is common evidence that the California Legislature considered these terms *and the manner of their presentation* to be material to the reasonable consumer."] [italics in original].) In short, the Court will not order decertification based on seemingly arbitrary and *unsupported* differences between populations of, e.g., consumers who listen to music, consumers who stream television shows of NFL games, and consumers who use home security decisions.

C. Necessity of Modification of Class Based on New Law

Google next maintains that the class must be modified based on the Ninth Circuit's decision in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods* (9th Cir. 2022) 31 F.4th 651, 669 (*Olean*). It is ultimately Plaintiff's prerogative and burden to determine how to modify the class, Defendant asserts, but based on the foregoing authority, the current class definition cannot stand.

Google explains that while *Olean* did not overrule *Tobacco II* as to its conclusion that class representatives who could not claim an injury can still remain in the class, it held that courts must ensure that the class definition is not fatally broad and is properly tailored. Given this Court's finding in the July 19 Order that Plaintiffs' theory of recovery requires that class members would never have signed up for the services but for Google's disclosures, i.e., actual reliance, Defendant maintains, it is critical to distinguish between class members like Mr. De

La O who allege they never would have signed up in the first place and class members like Mr. Chavez who would have subscribed regardless of the disclosures. The former would have a valid claim under Plaintiff's theory of recovery, Google argues, while the latter would not, and the class data contained in the Yang Declaration indicates that a significant portion of the class falls into the latter grouping such that the class as currently defined is overbroad.

In response, Plaintiff insists that no tailoring of the class is necessary because the definition "include[s] only members who were charged money and not refunded that money, for products that are deemed unconditional gifts."

> In *Olean*,[7] the court explained that:
>
> > [A] court must consider whether the possible presence of uninjured class members means that the class definition is fatally overbroad. When "a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification." (*Messner v. Northshore Univ. HealthSystem* (7th Cir. 2012) 669 F.3d 802, 824; … [U]ltimately, the problem of a potentially "over-inclusive" class "can and often should be resolved by refining the class definition rather than by flatly denying class certification on that basis."
>
> (*Olean*, 31 F.4th at 669, fn. 14.)

In the class certification order in this case, the Court considered the issue of reliance in the context of the typicality requirement, where Google argued that because some of the then-named Plaintiffs did not actually rely on the disclosures, reliance remained an individual question such that the proposed class should not be certified. In addressing this question, the Court noted that Plaintiffs intended to seek a full refund based on Section 17603 of the ARL, the "unconditional gift provision."[8] Google challenged this theory as no longer viable under *Mayron v. Google LLC* (2020) 54 Cal.App.5th 566, but the Court rejected this assertion and

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[7] Plaintiff attempts to discount the import of *Olean* by emphasizing that it is a federal decision which addresses federal procedure. But requirements for class certification are "demonstrated by federal law, to which we look when seeking guidance on issues of class action procedure." (*In re Tobacco II Cases*, *supra*, 46 Cal.4th at 318, internal citations omitted.)

[8] That section provides:

> In any case in which a business sends any goods, wares, merchandise, or products to a consumer, under a continuous service agreement or automatic renewal of a purchase, without first obtaining the consumer's affirmative consent as described in Section 17602, the goods, wares, merchandise, or products shall for all purposes be deemed an unconditional gift to the consumer, who may use or dispose of the same in any manner he or she sees fit without any obligation whatsoever on the consumer's part to the business, including, but not limited to, bearing the cost of, or responsibility for, shipping any goods, wares, merchandise, or products to the business.

(Bus. & Prof. Code, § 17603.)

explained that it was unaware of any authority addressing the issue of whether the gift provision provides a basis for awarding a full refund as restitution in a consumer class action. While it agreed that *Mayron* "casts doubt on this theory of [restitution]," the Court concluded that it was ultimately a "merits issue capable of being resolved on a classwide basis."[9] The Court also concluded, based on *In re Tobacco II Cases* (2009) 46 Cal.4th 298 (*Tobacco II*), that class representatives who could not claim an injury from Google's disclosures could still remain in the class, though they could not serve in such a capacity (e.g., Mr. Chavez).

The Court subsequently provided clarification on this issue, determining in its July 19 Order on Google's first motion for class decertification, as it did in the *Dutcher* Class Decertification Order, that Plaintiff's theory of recovery based on the "unconditional gift provision," i.e., a full refund restitution theory, was legally viable. It further noted that Plaintiff had provided evidence that Mr. De La O would not have subscribed to Google Play or allowed his trial to convert to a paid subscription had the policies at issue been disclosed to him and that "Plaintiffs also allege that all class members would have the same view." (July 19 Order at 4:3-7.)

Given the theory of restitution alleged by Plaintiff, which requires actual reliance, the Court agrees with Google that the class as currently defined is overbroad in the manner discussed in *Olean*, i.e., is inclusive of uninjured class members. While the Court, in its order on class certification permitted Mr. Chavez to remain a member of the class based on *In re Tobacco Cases*, the focus in that case was on the *standing* of the class representative and not on restitution and classwide relief, issues of commonality, which are the focus of the instant motion. Thus, there is no conflict between state (*In re Tobacco Cases*) and federal (*Olean*) law as Plaintiff suggests.

Although it is true, as the *Olean* court conceded, that class certification might be appropriate even where the class includes more than a de minimis number of uninjured class members, that does not mean that certification is proper where the number of uninjured individuals reaches a "great number" such that the class is "over-inclusive" (*Olean*, 31 F.4th at 669, fn. 14.) Here, the evidence proffered by Google supports its contention that the class as currently defined is inclusive of a "great number" of individuals who would have subscribed to Google Play regardless of the disclosures. As Google notes, similar evidence was relied on in *In re Asacol Antitrust Litig.*, a case cited approvingly by the Ninth Circuit in *Olean*, to reach the conclusion that the class as defined was overbroad and properly subject to modification based on that same evidence. (*Olean*, 31 F.4th at 669, fn. 14 [describing as *In re Asacol* as holding that class certification requirements were not met because the plaintiff's evidence showed that thousands of plaintiffs who were loyal to brand name drugs would not have purchased the generic drugs that were the subject of the price-fixing conspiracy].)

As noted above, Plaintiff insists that that no tailoring of the class is necessary because the definition "include[s] only members who were charged money and not refunded that money, for products that are deemed unconditional gifts." But as Google responds, by making the following argument, Plaintiff is departing from his established theory of recovery. To review, at class certification Plaintiff argued that the unconditional gift provision meant that

[9] The Court added that even if Plaintiff's theory of recovery based on the "unconditional gift provision" is ultimately resolved against him, that did not mean that the measure of restitution stated in *In re Vioxx Class Cases* would necessarily raise individual issues

every class member could receive a full refund so long as they purchased an automatically recurring subscription sold in violation of the ARL; it was not necessary to prove actual reliance, i.e., that class members would not have signed up for the subscription but for the alleged ARL violations. Google then moved to decertify arguing, in part, that the unconditional gift theory did not meet the requirements of restitution. Plaintiff responded that the foregoing *was* restitutionary in nature because he, and everyone else in the class, never would have signed up for the subscription if the disclosures had been different. He seemingly now rejects this contention in insisting that all he needs to do is show that the subscriptions should have been an unconditional gift, but the Court adopted his theory as alleged and the class as currently defined does not fit this accepted theory of recovery. That is, the class cannot include those individuals who were not harmed by the purportedly non-ALR compliant disclosures based on a lack of actual reliance. (See, e.g., *Kruger v. Wyeth, Inc.* (2019) 396 F.Supp.3d 931, 946.)

As explained by Google, the only court to consider how to define an ARL class to exclude uninjured members was *Ingalls v. Spotify USA, Inc.*, No. 3:16-cv-03533-WHA (N.D. Cal. July 27, 2017), Dkt. 102 at 2, wherein the court proposed a class of "California residents who subscribed to a free trial, thereafter did not use the service, but were nevertheless charged for it," and described the foregoing as the "clearest-cut group that was likely misled to their detriment due to alleged violations of the [ARL]." (See Google's Request for Judicial Notice, Exhibit 3.) The court believes that a class definition in the vein of the foregoing would be appropriate and comport with the instructions provided by the Court in *Olean* so as to avoid an over-inclusive class which, in the context of this case, means a class that includes both Google Play subscribers who have valid claims under Plaintiff's theory of recovery and others who do not. Because the certified class is too broad, Google's motion to decertify is GRANTED.

VIII. CONCLUSION

Plaintiff's motion to exclude the Yang Declaration is DENIED.

Google's motion to decertify class is GRANTED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

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Calendar Line 5

This is an action under the Private Attorneys General Act ("PAGA") alleging wage statement violations, meal and rest period violations, and failure to pay overtime wages.

Before the Court is Plaintiff Cristina Gonzalez and Defendant Gilroy Gas & Mini-Mart, Inc.'s request for a ruling on issues pertaining to the scope of remedies available to an aggrieved employee under PAGA, the applicable statute of limitations and the applicable recovery period.

IX. BACKGROUND

As alleged in the operative Second Amended Complaint ("SAC"), Plaintiff worked as a mercantile clerk at the gas station known as Gilroy Gas from July 20, 2005 to January 14, 2020. (SAC, ¶ 2.) Each pay period, Defendant Luong Pham gave Plaintiff a carbon copy of a handwritten pay record that did not identify the employer, the employee, the inclusive dates of the pay period, or the hours worked each day at each applicable pay rate. (*Ibid.*) In August 2018, Plaintiff was made a supervisor and was charged with preparing a work schedule comprised of shifts of exactly eight hours in length without a thirty minute uninterrupted meal period or a ten minute uninterrupted rest period. (*Ibid.*)

On August 5, 2020, Plaintiff notified Gilroy Gas and the Labor and Workforce Development Agency ("LWDA") that she was receiving noncompliant wage statements, and Gilroy Gas represented to the LWDA on September 11, 2020 that the issue had been corrected. (SAC, ¶¶ 3, 9.) But the "corrected" pay records do not specify the number of hours worked each day at the corresponding rate of pay. (*Ibid.*) The LWDA took no further action. (*Id.*, ¶ 4.)

During Plaintiff's employment, all policies and practices were determined by Mr. Pham. (SAC, ¶ 13.) Mr. Pham directed Plaintiff to take time between customers to eat, but there was little time to do so, so Plaintiff ate while standing next to the cash register and often did not even have time to wash her hands. (*Id.*, ¶ 14.) Mr. Pham also told Plaintiff that she had no breaks unless she needed to use the restroom, which often required a 4-hour wait because no other employee was working during certain shifts. (*Id.*, ¶ 15.) Further, every pay record Plaintiff received was a carbon copy of a noncompliant, handwritten form that Mr. Pham had prepared. (*Id.*, ¶¶ 16–17.)

From time to time on the weekend, on a holiday, or when Mr. Pham was on vacation, Defendant Quynh Nguyen would visit the gas station to make currency exchanges. (SAC, ¶ 20.) Once, she said Plaintiff and other gas station workers were Mr. Pham's employees, not her own employees. (*Id.*, ¶ 21.)

In December 2016 or January 2017, Mr. Pham hired a professional supervisor, Mayra Perez, for the first time. (SAC, ¶ 22.) Ms. Perez implemented rest periods, although she told Plaintiff that no one had told her to do this. (*Id.*, ¶ 23.) But Ms. Perez did not change Plaintiff's schedule to provide her with a meal period. (*Ibid.*) In late July or early August 2018, Mr. Pham called Plaintiff and told her that Ms. Perez left and he wanted Plaintiff to be the new supervisor. (*Id.*, ¶ 26.)

As a supervisor, Plaintiff was always on call and so worked for one reason or another seven days of every week. (SAC, ¶ 29.) She usually worked between sixteen to eighteen hours on any day she covered another worker's shift, and received text messages and phone calls from workers throughout the day. (*Ibid.*)

Based on these allegations, Plaintiff brings PAGA claims for (1) failure to keep and provide pay records, (2) failure to pay overtime, (3) failure to provide meal periods, (4) failure to provide rest periods, and (5) violations of Industrial Welfare Commission Wage Order No. 7-2001. She further alleges that Mr. Pham and Ms. Nguyen are liable as directors and managers of Gilroy Gas and under the alter ego doctrine. (SAC, ¶¶ 110–120.) The SAC also names Chevron Corporation and Extramile Convenience Stores, LLC as defendants, but Plaintiff dismissed them with prejudice pursuant to a stipulated order filed on May 12, 2022.

X. PAGA STATUTE OF LIMITATIONS, RECOVERY PERIOD AND SCOPE OF REMEDIES

The parties have submitted the following issues for the Court's ruling:

(1) Scope of Remedies

a. What is the scope of remedies available to an aggrieved employee in a complaint filed according to the provisions of PAGA?

(2) Statute of Limitations

a. What is the applicable statute of limitations for remedies available to an aggrieved employee in a complaint filed through PAGA?

b. What is the time period that an aggrieved employee may recover remedies for a violation of the Labor Code and/or wage order in a complaint filed through PAGA?

In her brief, Plaintiff maintains that PAGA adopts the remedies and limitations periods of the underlying Labor Code violations, while Defendant contends that the applicable statute of limitations is one year pursuant to Code of Civil Procedure section 340 ("Section 340"), subdivision (a), and the remedies under PAGA are limited to civil penalties provided under respective provisions of the Labor Code or a default civil penalty of $100 for initial and $200 for subsequent violations where the respective Labor Code provision does not provide a civil penalty.

A. PAGA Generally

PAGA was enacted nearly two decades ago in response to "widespread violations of the Labor Code and significant underenforcement of those laws." (*Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, 1116.) The act "allow[s] employees, acting as private attorneys general, to recover [those] penalties" that could previously only be recovered in actions brought by state labor law enforcement agencies. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 379 [overruled on other grounds in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S. Ct. 1906].) Thus, as employee who brings a PAGA action to recover

civil penalties acts "as the proxy or agent" of the state. (*Id.* at 380; see Lab. Code, § 2699, subd. (a).) "PAGA is designed primarily to benefit the general public, *not* the party bringing the action." (*Kim v. Reins California, Inc.* (2020) 9 Cal.5th 73, 81.)

In order to have standing to bring a PAGA action, a plaintiff must be an "aggrieved employee," which is defined as "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed." (Lab. Code, § 2699, subd. (c).) Before filing suit, the aggrieved employee "must notify the employer and the [LWDA] of the specific labor violations alleged, along with the facts and theories supporting the claim." (*Kim, supra,* 9 Cal.5th at 81.) "If the agency does not investigate, does not issue a citation, or fails to respond to the notice within 65 days, the employee may sue." (*Ibid*., citing Lab. Code, § 2699.3, subd. (a)(2).) Thus, where the state declines to investigate, the employee is "deputized" to "seeking any penalties the state can." (*ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 185.)

B. Statute of Limitations and Period of Recovery

PAGA claims are subject to a one-year statute of limitations as "[a]n action upon a statute for a penalty …." (Code Civ. § 340, subd. (a); see *Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 839.) The period begins to toll upon filing notice to the LWDA for a PAGA investigation; thus, the 65-day period following notice to the LWDA and the employer "is not counted as part of the time limited for the commencement of the civil action to recover penalties" under PAGA. (Lab. Code, § 2699.3, subd. (d).)

As set forth above, Plaintiff maintains that for the purposes of determining the period of recovery for penalties under PAGA, the Act adopts the limitations periods of the underlying Labor Code violations. Thus, for example she asserts, as Section 340 states that an action for a penalty has a statute of limitations of one year unless a different period is specified, and Code of Civil Procedure section 338 provides that a generally applicable statute has a statute of limitations of three years, with Labor Code 226, subdivision (a)[10], which Defendant is alleged to have violated, having a three-year limitations period and specifying compliance for three-years, civil penalties for violation of this provision can be recovered for a three year period.

It is notable that Plaintiff cites no case authority in support of her theory of the period of recovery for penalties under PAGA based on the statute of limitations and this Court is not aware of any court that has interpreted the applicable law in this way. The Court is not persuaded that Plaintiff's theory is valid given the purpose of PAGA and the nature of actions brought pursuant its provisions. As explained above, PAGA allows aggrieved individuals to recover "civil penalties" for violations of underlying Labor Code provisions. While those underlying provisions may provide for ether wages or penalties, numerous courts have made clear that a PAGA claim itself is for a penalty, *only*. (See, e.g., *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 370 [overruled on other ground]; see also *Martinez v. Antique & Salvage Liquidators, Inc.* (N.D. Cal. 2011) 2011 U.S. Dist. LEXIS 12198; *Moreno v. Castlerock Farming & Transp., Inc.* (E.D. Cal. 2022) 2022 U.S. Dist. LEXIS 56254, *42.) Consequently, the Court cannot discern any reason, and Plaintiff has

[10] Under Labor Code section 226, employers must provide accurate itemized statements of wages to their employees. Subdivision (a) of the statute sets forth the specific information that must be included on the wage statements.

offered no persuasive one, why the limitations period set forth in Section 340, subdivision (a), would *not* apply here. To hold as much would be to disregard the express language of the statute.

Plaintiff further insists that the recovery period begins "one year prior to the date of termination of the plaintiff herself," irrespective of when she files her PAGA action, but she cites no authority which stands for this proposition and case law has treated the period of recovery under PAGA for underlying violations as one year back from the filing of the *action*. (See, e.g., *Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 839.)

Consequently, the statute of limitations to bring a PAGA claim is one year, irrespective of the nature of the underlying Labor Code violation, and any remedies available under PAGA are limited to one year from the filing of the action, subject to the tolling exceptions of Labor Code section 2699.3, subdivisions (a)(2) and (d).

C. Scope of Remedies

With regard to what may recovered in a civil action brought by an aggrieved employee, PAGA provides that:

> Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by [LWDA] or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.

(Lab. Code, § 2699, subd. (a).)

Thus, an aggrieved employee is authorized to sue for civil penalties previously only recoverable by the state.

Here, Ms. Gonzalez maintains that a plaintiff who pursues a civil action under PAGA based on a violation of Labor Code section 1194[11] ("Section 1194"), as she does here, may recover liquidated damages pursuant to Labor Code section 1194.2 ("Section 1194.2") because it is the plaintiff's individual cause of action that is the basis for standing to file a representative action on behalf of other aggrieved employees. She makes the same argument as to why she may recover damages pursuant to Labor Code section 226.7 for missed meal and rest periods and civil penalties under Labor Code section 226.3 ("Section 226.3") for violations of Section 226, as well as Labor Code section 558 ("Section 558") for violation of provisions concerning hours and days of work and IWC orders. In contrast, Defendant contends that a PAGA plaintiff's remedies are limited to civil penalties specified in the corresponding provisions of the Labor Code or the default under the Act, i.e., Labor Code section 2699, subdivision (f)(2), and nothing more.

[11] This code section grants an employee the statutory right to recover in a civil action for unpaid minimum wages and overtime compensation.

Resolving the parties' conflict on this issue requires focusing on the nature of a PAGA action. A PAGA claim for civil penalties is "fundamentally a law enforcement action" (*ZB, supra,* 8 Cal.5th at 185, internal quotations omitted) in which the "government entity on whose behalf the plaintiff files suit is … the real party in interest." (*Kim, supra,* 9 Cal5th at 81.) Thus, PAGA's civil default penalties are calculated "to punish the employer for wrongdoing and to deter violations *rather* than compensate employees for actual losses incurred." (*Adoplh, supra,* 14 Cal.5th at 1117, internal citations and quotations omitted, emphasis added.) Statutory damages for Labor Code violations, on the other hand, "primarily seek to compensate employees for actual losses incurred, though like penalties they might also seek to shape employer conduct as a secondary objective." (*ZB,* 8 Cal.5th at 186, internal citations and quotations omitted.) Accordingly, PAGA only creates a cause of action for civil penalties.[12] (*ZB* at 188, citing Lab. Code, § 2699, subd. (a).) The question then becomes, what qualifies a recoverable "civil penalty" under PAGA? The *ZB* court, *supra*, cautioned that "not all statutory remedies for Labor Code violations are 'civil penalties' recoverable in an employee's PAGA action." (*ZB, supra,* 8 Cal.5th at 187.)

Here, it is not clear to the Court why the liquidated damages available under Section 1194.2 for an employer's failure to pay minimum and overtime compensation qualifies as a recoverable "civil penalty" under PAGA, especially given that the statute defines the amount of damages an employee may recover as "an amount equal to the wages unlawfully unpaid and interest therein." (Lab. Code, § 1194.2, subd. (a).) These damages are clearly intended to compensate employees for actual losses incurred by them and thus do not qualify as a "civil penalty." The Court is aware of no authority that provides to the contrary. If Plaintiff desires to recover these damages, she can do so in an individual action but not in the instant one as "there is no individual component to a PAGA action …." (*Kim, supra,* 9 Cal.5th at 87.)

However, Sections 226.3, 226.7 and 558 are different than the foregoing provision, at least in part with respect to Section 558. Section 558 provides for civil penalties for each pay period in which the employee was underpaid, as well as the recovery of unpaid wages. While the California Supreme Court has held that the unpaid wages component of Section 558 is in the nature of compensatory damages and thus *not* included within the civil penalties recoverable by employees under PAGA, it has also concluded that the remaining portions *are*. (See *ZB, N.A. v. Superior Court, supra,* 8 Cal.5th 175, 185 [reasoning that PAGA claims are "representative" actions "in the sense they are brought on the state's behalf," and that as such, an employee may seek any penalties under PAGA that the state can].) Section 226.3 is solely concerned with, and provides for, civil penalties against an employer for violations of Section 226 and thus the nature of the amounts articulated therein is clear and recoverable under PAGA.

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[12] The Court notes that pursuing civil remedies under PAGA does not prevent an employee from separately or concurrently pursuing other wage and hour claims and remedies already available to him or her. (Lab. Code, § 2699, subd. (g)(1) [stating, in relevant part that a civil action under PAGA "shall [not] 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 [the Act]."]

Section 226.7 provides that an employee is entitled to recover "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." (Lab. Code, § 226.7, sub. (c).) While at first blush this appear to be compensatory in nature, this amount had been interpreted as a penalty, both by courts and the Labor Commission, based on the legislative history of the statute, that is meant to encourage employer compliance with meal-period laws. (See, e.g., *Rueles v. Costco Wholesale Corp.* (N.D. Cal. 2014) 67 F.Supp.3d 1137, 1143-1144.)

Thus, because the amounts provided by Section 226.3, Section 226.7 and the non-wage portion of Section 558 qualify as "civil penalties," they are recoverable under PAGA. Liquidated damages under Section 1194.2, however, as compensatory in nature, are not.

XI. CONCLUSION

Based on the foregoing analysis, the Court concludes as follows:

The applicable statute of limitations for a PAGA action is one year pursuant to Code of Civil Procedure section 340, subdivision (a), and this period begins to run upon the last alleged Labor Code violation. Recovery under PAGA is limited to one year back from the filing of the action.

The amounts provided by Labor Code section 226.3, Labor Code section 226.7 and the non-wage portion of Labor Code section 558 are recoverable as civil penalties under PAGA.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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