SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2170

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department7@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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LAW AND MOTION TENTATIVE RULINGS
DATE: MAY 2, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	17CV318072	Safi v. Fogo de Chao, Inc., et al. (Included in Fogo De Chao Wage and Hour Cases, JCCP5034)	See Line 1 for Tentative Ruling.
LINE 2	22CV402169	Guiffre v. Bi-Rite Restaurant Supply Co., Inc. (Class Action)	See Line 2 for Tentative Ruling.
LINE 3	22CV402514	Ruiz v. Condon-Johnson & Associates, Inc. (Class Action)	See Line 3 for Tentative Ruling.
LINE 4	23CV411829	Ruiz v. Condon-Johnson & Associates, Inc. (PAGA)	See Line 3 for Tentative Ruling.
LINE 5	21CV378464	Cativo v. ATMHS, LLC, et al.	Order of Examination: this matter was previously continued by written stipulation to 6/6/2024 at 1:30 PM.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	21CV375422	Temujin Labs Inc. v. Fu	Order of Examination: this matter is off calendar at the request of the moving party.
LINE 7	20CV372622	Temujin Labs Inc. v. Abittan, et al.	Order of Examination: This matter is off calendar at the request of the moving party.
LINE 8	19CV352557	Csupo, et al. v. Alphabet, Inc. (Class Action)	See Line 8 for Tentative Ruling.
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Fogo De Chao Wage and Hour Cases*
Case Nos.: JCCP No. 5034 (Lead Case No. 17CV318072)

In this coordinated wage and hour class action and Private Attorneys General Act ("PAGA") proceeding, Plaintiffs[1] move for class certification and submit a proposed trial plan. Defendants[2] oppose these motions. As discussed below, the Court DENIES Plaintiffs' motion for class certification.

I. BACKGROUND

There are three separate actions being coordinated in this proceeding. In the first action, Plaintiff Margalara Safi sued her employer Defendants Fogo de Chao Churrascaria (San Jose), LLC; Fogo de Chao, Inc. ("FDC"); and Fogo de Chao Churrascaria (California), LLC (collectively, "Defendants"), for various wage and hour violations. Her complaint asserts causes of action for: (1) failure to provide meal periods; (2) failure to authorize and permit rest periods; (3) failure to pay minimum wages; (4) failure to pay overtime wages; (5) failure to pay all wages due to discharged and quitting employees; (6) failure to maintain required records; (7) failure to furnish accurate itemized wage statements; (8) failure to indemnify employees for necessary expenditures incurred in discharge of duties; (9) unfair and unlawful business practices; and (10) penalties under PAGA.

In the second case, Plaintiff Sam Moussa filed a similar action asserting claims against Defendant Fogo de Chao Churrascaria (California), LLC for: (1) underpayment of hourly wages; (2) underpayment of overtime wages; (3) failure to reimburse necessary expenditures; (4) failure to provide meal periods; (5) failure to authorize and permit rest periods; (6) failure to furnish accurate itemized wage statements; (7) unfair and unlawful business practices; and (8) penalties under PAGA.

In the third case, Plaintiff Faraz Yousefian ("Plaintiff Yousefian") filed an action against
Fogo de Chao Churrascaria California, LLC, Fogo de Chao Churrascaria (Los Angeles), LLC and FDC asserting a single cause of action under PAGA.

Defendant Fogo de Chao, Inc. is Brazilian steakhouse restaurant chain that has operated nine restaurants in California during the class period. Defendants Fogo de Chao Churrascaria (California), LLC, Fogo de Chao Churrascaria (San Jose), LLC, and Fogo de Chao Churrascaria (Los Angeles) are wholly-owned subsidiaries of FDC that operate individual restaurants in California.

Plaintiff Safi was employed by FDC and Fogo de Chao Churrascaria (San Jose), LLC as a non-exempt server from approximately February 2016 to December 2016. Plaintiff Moussa was employed by FDC and Fogo de Chao Churrascaria (California), LLC as a non-

[1] "Plaintiffs" are Margalara Safi, Sam Moussa, and Faraz Yousefian.

[2] "Defendants" are Fogo de Chao Churrascaria (San Jose), LLC; Fogo de Chao, Inc. ("FDC"); and Fogo de Chao Churrascaria (California), LLC.

exempt server from approximately January 2016 to August 2018 at Defendants' Beverly Hills location.

II. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

A. Legal Standard

As explained by the California Supreme Court,

> The certification question 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 (*Sav-on Drug Stores*).)

California Code of Civil Procedure section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …." As interpreted by the California Supreme Court, section 382 requires: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, supra,* 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) The court must examine all the evidence submitted in support of and in opposition to the motion "in light of the plaintiffs' theory of recovery." (*Department of Fish and Game v. Superior Court (Fish and Game)* (2011) 197 Cal.App.4th 1323, 1349.) The evidence is considered "together": there is no burden-shifting as in other contexts. (*Ibid.*)

B. Discussion

Plaintiffs seek certification of the following class:

> All persons who worked for defendants Fogo de Chao, Inc., Fogo de Chao Churrascaria (California), LLC, Fogo de Chao Churrascaria (San Jose), LLC, and Fogo de Chao Churrascaria (Los Angeles), LLC (collectively, "Defendants") as non-exempt employees in the State of California at any time from October 24, 2013 through the date of the order granting class certification ("class period").

Alternatively, Plaintiffs seek certification of the following subclasses:

> <u>Meal Break Subclass</u>

All persons who worked for Defendants as non-exempt employees in the State of California during the class period who worked a shift over five hours for which Defendants' time records do not reflect a compliant meal break.

Rest Period Subclass

All persons who worked for Defendants as non-exempt employees in the State of California during the class period who worked one or more shifts over 3.5 hours.

Uniform Maintenance Subclass

All persons who worked for Defendants as non-exempt employees in the State of California during the class period who maintained, ironed, and/or dry cleaned their work uniforms and were not fully compensated for the time and expense to do so.

Wage Statement Subclass

All members of the Meal Period Subclass, Rest Period Subclass, and Uniform Maintenance Subclass who received at least one wage statement at any time from October 24, 2016 through the present.

Waiting Time Subclass

All members of the Meal Period Subclass, Rest Period Subclass, and Uniform Maintenance Subclass who were discharged from their employment by Defendants or quit their employment with Defendants at any time from October 24, 2014 through the present.

1. *Preceding Motion for Class Certification*

In September 2023, Plaintiffs unsuccessfully moved to certify the same class and subclasses that they seek to certify here, as well as additional subclasses based on off-the-clock work and non-reimbursed business expenses. In its order dated October 2, 2023, the Court found that Plaintiffs had satisfied their burden with respect to the ascertainability requirement as to the class and all subclasses, but denied the motion based on a lack of commonality after expressing its concerns that "variations in ownership and control over the individual restaurants [putative class and subclass members worked at] suggest that individual concerns may arise that will render class treatment inappropriate." (Oct. 2 Order at 8:17-19.) The Court asked Plaintiffs to consider, before submitting a renewed motion for class certification, "whether defining subclasses based on the location of class members' employment may be an appropriate method of managing some of the individual issues that may arise due to the variation in practices at the various restaurant locations." (*Id*. at 9:4-7.) Plaintiffs have not altered the nature of the class and subclasses (beyond eliminating two of them) they seek to certify with the instant motion, instead relying on additional evidence to establish the requisite showing.

2. *Numerous and Ascertainable Class*

"The trial court must determine whether the class is ascertainable by examining (1) the class definition, (2) the size of the class and (3) the means of identifying class members." (*Miller v. Woods* (1983) 148 Ca1.App.3d 862, 873.) A class is ascertainable "when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980 (*Noel*).) A class definition satisfying these requirements

> puts members of the class on notice that their rights may be adjudicated in the proceeding, so they must decide whether to intervene, opt out, or do nothing and live with the consequences. This kind of class definition also advances due process by supplying a concrete basis for determining who will and will not be bound by (or benefit from) any judgment.

(*Noel, supra,* 7 Cal.5th at p. 980, citation omitted.)

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." (*Noel, supra,* 7 Cal.5th at p. 984.) Still, it has long been held that "[c]lass members are 'ascertainable' where they may be readily identified … by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932, disapproved of on another ground by *Noel, supra,* 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 975-976 ["The defined class of all HD Package subscribers is precise, with objective characteristics and transactional parameters, and can be determined by DIRECTV's own account records. No more is needed."].)

As they did in the preceding motion for certification, Plaintiffs indicate that there are more than 3,000 current and former employees that are putative class members, and establish that these individuals are readily ascertainable through Defendants' employment and time records. Defendants do not challenge either of the foregoing and therefore the Court finds that Plaintiffs have satisfied their burden with respect to the ascertainability requirement as to the class and all subclasses.

3. *Community of Interest*

a. Predominant Questions of Law or Fact

For the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (*Hicks*).) The court must also give due weight to any evidence of a conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 215.) The ultimate question is 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. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104–1105 (*Lockheed Martin*).) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if

the members must individually prove their damages." (*Hicks, supra,* 89 Cal.App.4th at p. 916.)

> Plaintiffs' burden on moving for class certification . . . is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues predominate. As we previously have explained, this means each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment; and the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants.

(*Lockheed, supra,* 29 Cal.4th at 1108, internal citations and quotations omitted.)

Scope

In its order denying Plaintiffs' prior certification motion, the Court declined to certify the proposed class based on its concerns that the variations in ownership and control over the individual restaurants suggested that individual concerns might arise that would render class treatment inappropriate. As Plaintiffs have not altered the class definition or subclasses that they seek certification of, the Court still has the same concerns regarding class treatment- discussed in detail below- and therefore will again DENY Plaintiffs' motion.

Meal and Rest Break Subclasses

In their prior motion for class certification, Plaintiffs argued that their meal and rest break claims presented common legal and factual questions, including: (l) whether Defendants failed to provide employees compliant meal breaks; (2) whether Defendants' prospective meal break waivers are unlawful; and (3) whether Defendants had a common practice of failing to provide employees 10-minute rest breaks. They further asserted that, despite the restaurants' facially lawful policies, they had a practice of depriving employees of meal and rest periods and requiring employees to receive manager approval to take their breaks, resulting in breaks being taken outside the required time period. Finally, Plaintiffs insisted that Defendants' meal waivers, which at some point allowed employees to sign away their rights to a meal break from the time they began their employment prospectively, were unlawful. They indicated that they intended to prove liability via a survey to be conducted after certification.

Defendants, however, submitted evidence suggesting that there was "significant variation in the meal and rest period practices at the various restaurant locations over time" (Oct. 2nd Order at 9:22-23), including that some employees were provided the option to sign meal period waivers, and supervisors enforced meal and rest break policies in different ways. They also provided evidence that their time keeping systems automatically paid a meal period premium in cases of noncompliant meal breaks when no waiver had been signed. Defendants demonstrated that they would need to make numerous individual inquiries into the practices at the particular restaurants where the affected employees worked, the availability of someone to cover the employee's breaks, and the reasons why an employee did not take a compliant break period.

The Court ultimately concluded that it would not be "impossible" to certify the meal and rest break subclass but declined to do so based on its determination that Plaintiffs had not sufficiently demonstrated that "the individual issues raised with respect to [the attendant violations could] be effectively managed on a class action trial." (Oct. 2nd Order at 11: 9-11.)

In the instant motion, Plaintiffs again insist that their meal and rest break claims present common questions. Citing to the report prepared by Teresa Fulimeni[3] ("Fulimeni Report") regarding the expected instances of alleged violations per pay period based on a sampling of class members, Plaintiff explains that expert analysis of time records reveals that 38.5% of all shifts over five hours had a non-compliant meal break, including over one-third of all shifts over five hours that did not have a recorded meal break. (Plaintiffs' Evidence, Ex. 2 (Fulimeni Report) at 4.) Plaintiffs continue that time records establish that the foregoing failure to provide compliant meal breaks was common across Defendants' California locations, and list the percentages of non-compliance with respect to each specific location. These records, Plaintiffs assert, are sufficient to create a rebuttable presumption of liability under *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58 (*Donohue*). In *Donohue*, the California Supreme Court recognized a rebuttable presumption of liability with respect to meal break claims when, on their face, the employer's "time records show missed, shortened, or delayed meal periods with no indication" that premium pay was provided. (*Donohue*, 11 Cal.5th at 77.) The presumption goes to the question of liability (see *Estrada v. Royalty Carpet Mills, Inc.* (2022) 76 Cal.App.5th 685, 724) and, if it applies, the burden shifts to the defendant to counter and establish that the plaintiffs were provided with compliant meal periods but chose to work instead through representative testimony, surveys, statistical analysis and other types of evidence available to render manageable determinations of the extent of liability (*Donohue*, 11 Cal.5th at 78). It therefore follows that the burden is on the defendant to show that individual issues predominate.

Defendants insist that they can rebut the *Donohue* presumption, citing to their timekeeping system and its inclusion of an automatic meal period premium, which pays an employee a meal premium whenever time records showed a non-compliant meal period that was not mutually waived. (Defendants' Evidence, Ex. 2, ¶ 22; Ex. 4 at 188:15-189:20, 205:7-206:2.) They continue that these records reflect a total of 53.8% of employees who worked during the class period as having received at least one meal period premium payment, and insist that this fact alone rebuts the presumption afforded to Plaintiffs. Defendants further assert that they can rebut the presumption with evidence that they had a system to track meal period violations, *including* through employee attestations, as well as evidence that meal periods *were* provided. Finally, Defendants argue that no common unlawful meal period practice exists, and Plaintiffs' theory that Defendants' meal period waivers are unenforceable raises as many individual inquiries as their other theories.

As the Court touched on in its October 2nd order denying class certification, it need not determine at this stage of the proceedings whether Defendants have actually rebutted the *Donohue* presumption afforded to Plaintiffs because that is a merits issue. Rather, it must determine whether Defendants ability to rebut this presumption and Plaintiffs' ability to counter that rebuttal can be established by common proof.

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[3] In the preceding motion for certification, Plaintiffs submitted a report prepared by Ms. Fulemini; this report is submitted again in support of the instant motion with various updates.

To that end, the court has considered the following question: how is Plaintiffs' current showing with regard to the issue of whether common issues will predominate different than that made in connection with their preceding motion? They offer the same arguments in support of their motion, as do Defendants in their opposition. The only difference is the inclusion of additional deposition testimony from four Fogo managers (who worked at just six of the thirteen locations they seek to certify a class), the declarations of two new putative class members, updates to the Fulemini Report (which still does not, as noted previously, take into account that an employee may have entered into a meal period waiver), and the revised declarations of three other putative class members. Considering that the evidentiary showing on the preceding motion already involved well over a hundred employee declarations on both sides, this new evidence does not, on its face, appear to be particularly impactful, i.e., sufficient to nullify the reasons the Court found warranted denial of Plaintiffs' first motion for class certification.

The Court is still faced with evidence demonstrating that there was significant variation in the meal (and rest) period practices at the various restaurant locations over time, including with respect to waivers. As it explained in the October 2nd Order:

> For example, with respect to the meal period waivers, before 2019, employees were provided the option to sign a waiver at the beginning of their employment which would allow them to prospectively waive meal periods. After 2019, when the restaurants shifted to the Aloha time management system, employees were given the option to waive their meal periods each day. None of the time keeping systems used in the restaurants allowed employees to record the reason why they did not take a meal period when working a shift of an eligible length.
>
> Further, Defendants have provided evidence that their time keeping systems automatically paid a meal period premium in cases of noncompliant meal breaks when no waiver had been signed. Plaintiffs assert that supervisors controlled when and if employees were able to take their meal and rest breaks but Defendants contend that there was significant variability in how restaurant-level supervisors enforced their policies.

(Oct. 2 Order at 9:23-10:7.)

The foregoing remains the case here, and the Court does not find persuasive Plaintiffs' contention that Fogo's written meal period waivers are unlawful is amendable to common proof. Labor Code section 512 permits an employee to waive a meal period with the mutual consent of their employer if certain conditions are met, but whether employees *individually* rescinded the prospective waivers executed pursuant to this section prior to 2019, which they were permitted to do by providing at least one day's notice in writing (see Defendants' Evidence, Exhibit 198), is not subject to common proof. Moreover, even if the Court concluded that the prospective waiver agreements executed by employees were unlawful and thus rescinded, this still does not eliminate the possibility that the employee did *not* agree with Fogo on the particular day in which no meal break was recorded to waive their meal period if the conditions provided for a waiver under Labor Code section 512 existed. In other words, an individual analysis would *still* be required in order to determine if there was a violation and thus liability on the part of Defendants for failing to permit the employee to take a meal break.

Plaintiffs also still fail to propose a reasonable plan to manage Fogo's defense that it provided employees with meal periods but they elected not to take them. As noted above, Ms. Fulemini's updated report still does not take into account meal break waivers. Plaintiffs have stated their intention to utilize statistical evidence to establish liability on the meal (and rest) break claim, but as the Court explained in the October 2nd Order, "any class action trial plan, including those involving statistical methods of proof, must allow the defendant to litigate its affirmative defenses. If a defense depends upon questions individual to each class member, the statistical model must be designed to accommodate these case-specific deviations. If statistical methods are ultimately incompatible with the nature of the plaintiffs' claims or the defendant's defenses, resort to statistical proof may not be appropriate." (October 2 Order at 11:2-7, quoting *Duran v. U.S. National Bank Assn.* (2014) 59 Cal.4th 1, 40.) Here, Plaintiffs offers no methodology with respect to the meal break waivers, and insist that they need not to because they have decided to challenge the legality of the waivers (see above). But as noted above, even if the waiver is deemed unlawful and thus rescinded, individual inquiries will *still* be necessary to determine liability, and Plaintiffs submit no methodology or approach to manage such inquiries. As such, the Court finds no reason to depart from its previous denial of Plaintiffs' request to certify the meal break subclass.

Turning to the proposed rest break subclass, Plaintiffs submit evidence which they maintain establishes that Defendants had a common practice of failing to provide breaks (or not *enough* of them based on hours worked), with Defendants requiring employees themselves to seek permission to take such breaks, supervisors regularly not permitting employees to take them and instructing employees to skip or delay rest breaks when the restaurants were busy. (See Plaintiffs' Mtn. at 20, fn. 3.) They continue that Defendants did not pay any rest break premiums during the class period, and note that Defendants' timekeeping system does not even have a paycode to make such payments. Plaintiffs suggest that Defendants' own declarants affirm the absence of a practice which provided employees with their rest breaks, explaining that ninety-three claim they "voluntarily" chose not to take them, with an additional 12 silent as to their ability to take them. Certification, Plaintiffs urge, is appropriate because declarations on *both* sides are consistent that rest breaks were not regularly provided.

In opposition, Defendants counter that individual issues predominate over the rest period subclass, with there being no way for Plaintiffs to demonstrate that Fogo consistently applied a practice to deprive employees of rest breaks.

Have Plaintiffs demonstrated the existence of a uniform policy or practice on Defendants' part that deprived them of the rest breaks to which they were entitled? Critically, Plaintiffs' theory of common proof with respect to rest break violations (and indeed, *any* purported violations) "must be more than wishful thinking; it must have a foundation in the evidence." (*Payton v. CSI Electrical Contractors, Inc.* (2018) 27 Cal.App.5th 832, 842.) Specifically, they must "present *substantial* evidence proving both the existence of the defendant's uniform policy or practice and the alleged illegal effects of that policy or practice could be accomplished efficiently and manageably within a class setting." (*Cruz v. Sun World Internat., LLC* (2015) 243 Cal.App.4th 367, 384.) Here, Plaintiffs have not offered such evidence, and there are several barriers to making such a showing. These include the following: that Fogo's rest break policies are facially lawful (see Plaintiffs' Evidence, Exs. 30, 31, 32 and 33 [noting that while "scheduling of breaks and meal periods on any given day may need to be accomplished on a flexible basis . . . manager[s are] responsible for scheduling your meal breaks and rest breaks . . . in compliance with applicable laws"]); there are no records

which establish the absence of rest periods because California law does not require employers to track them (see Cal. Code Regs., tit. 8, § 11090(7)(3)) ["authorized rest periods need not be recorded"]); the testimony cited by Plaintiffs does *not* establish a consistently applied practice to *deprive* employees of rest breaks, but instead suggests Fogo had a practice of scheduling breaks and deciding *when* employees could take their breaks, rather than allowing the employee to decide; and while Plaintiffs insist that the "declarations on both sides are consistent on the point that rest breaks were not regularly provided," a review of these declarations does not support such an assertion. (See Defendants' Evidence, Ex. 201, Columns L-M.) The evidence submitted by Defendants also still suggests, as the Court noted previously, *significant* variation in how different restaurants managed rest breaks. All told, the foregoing establish that individual questions will predominate with respect to the rest break claim.

Finally, even assuming, for the sake of argument, that Plaintiffs established that Defendants had a policy or practice that deprived them of rest breaks to which they were entitled, their theory is still subject to the same individualized waiver defense that the meal break claim is and as with that claim, Plaintiffs fail to present manageable plan. Consequently, the Court will not certify the rest period subclass.

Uniform Maintenance Subclass

In their preceding motion to certify, Plaintiffs asserted that employees were required by Fogo's policies to maintain their uniform based on care instructions provided in the restaurants' uniform distribution form. But the Court noted in its order that only certain positions required uniforms to be dry cleaned, not all uniforms required ironing, and the uniform care instructions did not specify the frequency of dry cleaning, ironing, or washing, merely stating that the items were to be maintained "as necessary," thereby delegating the determination of the frequency of maintenance to the employees. The Court observed that there appeared to be "significant differences among the putative subclass members in what they did to comply with this 'as necessary' requirement" (Oct. 2 Order at 12:27-28), as well as "various individual reasons why an employee may have paid more or traveled more for dry cleaning than what would have been covered by the allowance [Fogo] provided" (Oct. 2 Order at 13:1-3) such that individual issues relating to how frequently an employee dry cleaned or ironed their uniforms "appear[ed] to predominate" (*id*. at 13:4). Plaintiffs insisted that such variations spoke to damages and *not* liability, but because it is undisputed that Defendants paid employees the equivalent of one hour of work time per week to engage in uniform maintenance, the Court held this was not accurate because the question of liability depended on whether the employees' time and expense in maintaining their uniforms *actually exceeded* the amount of the stipend provided. Such an individual query could not be avoided because Plaintiffs cited to no policy or practice which suggested any regularity in the frequency or expense or dry cleaning or ironing.

In the instant motion, Plaintiffs essentially make the same evidentiary showing that they did in the prior certification motion. They acknowledge the Court's finding that individual issues relating to the frequency of dry cleaning or ironing predominate, but again insist that any variations in employees' laundering practices, including whether employees ironed and/or dry cleaned their uniforms, the amount of time spent ironing, and the cost of dry cleaning, are *damages* issues which do not preclude certification. While courts have indeed held as a general matter that such variations "go to the question of damages –because they speak to the

extent, rather than type, of expenses incurred- and do not overwhelm the central issue of whether there was a failure to reimburse in violation of [the] Labor Code" (*Ochoa v. McDonald's Corp.* (N.D. Cal. 2016) 2016 U.S. Dist. LEXIS 88323, *24), the Court must reject this argument for the same reason that it previously did. Namely, and as set forth in the preceding paragraph, because it is undisputed that Defendants paid employees the equivalent of one hour of work time per week for uniform maintenance, the question of liability depends on whether the employees' time and expense in maintaining their uniforms *actually exceeded* the amount of the stipend provided, "a necessarily individual question as Plaintiff points to no policy or practice suggesting any regularity in the frequency or expense of dry cleaning or ironing." (Oct. 3 Order at 13:17-18, citing *Solis v. Am. Airlines, Inc.* (C.D. Cal. 2022) 2022 U.S. Dist. LEXIS 172166, *21 [class certification as to uniform claim inappropriate where, as here, "the inquiry speaks to the *type*, rather than extent, of expenses incurred-whether dry cleaning was required"].)

Defendants note conflicting testimony amongst both Plaintiffs and their own witnesses on this issue, with: some testifying that they dry-cleaned their uniform only, but with varying regularity; some testifying they just ironed; some stating they dry-cleaned and ironed; some testifying they did not dry clean *or* iron their clothes; and some switching their testimony on this topic entirely. (See Defendants' Opp. at 27-28.) The Court agrees with Defendants that these variances are what demonstrates that Plaintiffs' reliance on *Ochoa, supra,* and other, similar decisions,[4] is misplaced. In those cases, the expense reimbursement subclass was certified because the defendant employers were found to have a *common* policy or practice which required all class members to incur an expense but no policy or practice to reimburse them. Consequently, liability could be determined *without* further inquiry. That is not the case here, where liability must be determined based on the individual practices of each employee. Therefore, the Court again finds that the question of whether Fogo sufficiently reimbursed employees for uniform maintenance cannot be resolved on a class-wide basis because individual questions as to liability will predominate. Thus, it will not certify the uniform maintenance subclass.

Derivative Claims

Plaintiffs' wage statement and waiting time claims are derivative of the other claims discussed above. Thus, their suitability for class treatment depends on the suitability of the underlying claims, and as those classes cannot be certified for the reasons discussed above, the proposed wage statement and waiting time subclasses also cannot be certified.

III. CONCLUSION

Plaintiffs' motion for certification is DENIED.

The Court will prepare the order.

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[4] See *Brown v. Abercrombie & Fitch Co.* (C.D. Cal. 2015) 2015 U.S. Dist. LEXIS 176214, *9; *Sinohui v. CEC Entertainment, Inc.* (C.D. Cal. 2016) 2016 U.S. Dist. LEXIS 192363, *34-37, and *Santillan v. Verizon Connect, Inc.*, (S.D. Cal. 2022) 2022 U.S. Dist. LEXIS 182405.

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: *James Guiffre v. Bi-Rite Restaurant Supply Co., Inc.*
Case Nos.: 22CV402169

This is a putative class and representative action under the Private Attorneys General Act ("PAGA") by Plaintiff James Guiffre for civil penalties based on Defendant Bi-Rite Restaurant Supply Co., Inc.'s ("Defendant" or "Bi-Rite") alleged failure to pay all minimum and overtime wages owed and failure to provide paid rest breaks, among other Labor Code violations.

Before the Court are (1) Plaintiff's motion for leave to amend and (2) Defendant's motion to compel Plaintiff to arbitrate his individual PAGA claim and stay the representative PAGA claim pending the outcome of the arbitration. Both motions are opposed. As discussed below, the Court GRANTS IN PART and DENIES IN PART the motion for leave to amend and GRANTS the motion to compel arbitration and issue a stay.

I. BACKGROUND

Plaintiff was employed as a sales representative for Defendant, who provides food delivery services, from April 1, 2018 to October 1, 2021. On August 19, 2022, after having submitted a notice to the State Labor and Workforce Development Agency (the "LWDA") for alleged violations of the Labor Code by Defendant, Plaintiff initiated the instant action with the filing of a class action complaint (the "Complaint") asserting the following causes of action: (1) failure to pay all wages due; (2) failure to pay overtime wages; (3) failure to provide rest periods; (4) failure to provide accurate itemized wage statements; (5) failure to pay accrued vacation on termination; and (6) violation of Business & Professions Code § 17200.

In November 2022, the parties met and conferred regarding a potential motion to compel arbitration based on agreements executed by Plaintiff during his employment and discussed informal resolution of the case. The parties agreed to attend mediation and that Defendant would not waive its right to compel arbitration by participating in it. The parties were unable to resolve this action through two mediation sessions in 2023, and subsequent to the sessions, Plaintiff (1) agreed that he would proceed to arbitration for his individual claims and (2) expressed his intention to file a first amended complaint asserting only claims under PAGA. Plaintiff agreed that he had executed an agreement to arbitrate that barred his class action wage and hour claims and required arbitration of any prospective individual PAGA claim. The parties disagreed as to whether the representative PAGA claim should be stayed pending arbitration of Plaintiff's individual claims. The instant motions followed.

II. MOTION FOR LEAVE TO AMEND

Plaintiff seeks leave to file the First Amended Complaint ("FAC"), which dismisses all class action allegations without prejudice and converts this action to a representative action under PAGA. The FAC also seeks PAGA penalties for violations of Labor Code sections 201-204, 226, 226.2, 226.7, 227.3, 510, 558, 1194, 1197, and 1197.1 and Business & Professions Code section 17200 (the "UCL") for which Plaintiff sent his notice to LWDA on August 18, 2022 (the "2022 Notice") *and* PAGA penalties for violations of Labor Code sections 515, 1174, 1194 and 2802 for which Plaintiff sent an amendment to the foregoing notice on July 20,

2023 (the "2023 Amended Notice"). Defendant opposes Plaintiff adding a PAGA claim based on factual allegations alleged for the first time in the 2023 Notice, arguing that such a claim is time-barred.

A. Legal Standard

Section 473, subdivision (a)(1) of the Code of Civil Procedure states in pertinent part: "[t]he court may ... , in its discretion after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars ...." (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760 (*Atkinson*).) In considering a motion for leave to amend, "courts are bound to apply a policy of great liberality in permitting amendments … at any stage of the proceedings, up to and including trial." (*Id.* at p. 761.) "[I]t is a rare case" in which a court will be justified in denying a party leave to amend his pleadings. (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.)

However, the policy of liberality in permitting amendments should be applied only where no prejudice is shown to the adverse party. (*Atkinson, supra,* 109 Cal.App.4th at p. 761.) Where an amendment would require substantial delay in the trial date and substantial additional discovery; would change not only the specific facts and causes of action pled, but the tenor and complexity of the complaint as a whole; and where no reason for the delay in seeking leave to amend is given, refusal of leave to amend is not an abuse of discretion. (See *Magpali v. Farmers Group* (1996) 48 Cal.App.4th 471, 486–488 (*Magpali*) [affirming denial of request to amend made during trial].)

A party requesting leave to amend must include a copy of the proposed amended pleading with their noticed motion, as well as a supporting declaration which sets forth: (1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) the reasons why the request for amendment was not made earlier. (Cal. Rules of Court, rule 3.1324 (a) and (b).)

B. Discussion

Defendant does not oppose the conversion of the instant action from a class action to a representative action under PAGA based on the facts submitted in the 2022 Notice to the LWDA, but *does* oppose the addition of PAGA claims predicated on facts presented in the 2023 Amended Notice, arguing that such claims are time-barred. Plaintiff contrarily insists that these claims are timely under the relation back doctrine and further, are timely because the applicable statute of limitations does not bar a PAGA claim as long as the Plaintiff suffered at least one Labor Code violation during his employment.

Ordinarily, the court will not consider the validity of a proposed amended pleading in deciding whether to grant leave to amend, as grounds for a demurrer or motion to strike are premature. (See *Kittredge Sports Co. v. Superior Court* (2003) 109 Cal.App.4th 739, 760.) However, the court has the discretion to deny leave to amend, particularly where the proposed pleading is deficient as a matter of law and the defect could not be cured by further appropriate amendment. (*California Cas. Gen. Ins. Co. v. Superior Court* (1985) 173 Cal.App.3d 274, 281.) This includes circumstances in which the proposed amendments could be subject to demurrer as being barred by the statute of limitations. (*Yee v. Mobilehome Park Rental Review Bd.* (1998) 62 Cal.App.4th 1409, 1429.) Because some of the amendments proposed in the

instant motion implicate the statute of limitations, the Court will consider the validity of these amendments.

In the 2022 Notice to submitted to the LWDA, Plaintiff accused Defendant of violating Labor Code sections 201-204, 226, 226.2, 226.7, 227.3, 510, 558, 1194, 1197, and 1197.1, the UCL and PAGA by failing to pay all minimum and overtime wages owed, failing to provide paid rest breaks, failing to pay vacation wages and failing to provide accurate itemized wage statements. In the 2023 Amended Notice, Plaintiff asserted that Defendant additionally violated Labor Code sections 510, 515, 1174, 1194 and 2802 by misclassifying him and similarly aggrieved employees as exempt, by failing to maintain accurate payroll records, and by failing to reimburse them for business expenses they incurred.

Defendants submits that claims based on the 2023 Amended Notice are time-barred based on the one-year statute of limitations for PAGA claims. (See *Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 839 (*Brown*) ["The statute of limitations for PAGA claims is one year"].) As Defendant maintains, before initiating an action under PAGA, a plaintiff must comply with the statute's administrative exhaustion requirements by providing the employer and the LWDA with notice of the alleged Labor Code violations that are the basis of the penalties. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 981.) If the LWDA does not respond to the notice "within 65 calendar days … the aggrieved employee may commence a civil action …." (*Id*.) Consequently, a plaintiff has, at most, one year and 65 days to file a PAGA claim against an employer. (See *Brown,* at p. 839.)

As alleged in the proposed FAC, Plaintiff's employment ended on October 1, 2021, and thus he had one year and 65 days after that to timely pursue PAGA claims for violations occurring during his employment, i.e., until December 5, 2022. The original Complaint was timely filed on August 19, 2022. However, Plaintiff did not seek leave to add a PAGA claim based on allegations contained in the 2023 Amended Notice until November 2023. Such claims are therefore time-barred, at least on their face.

Relying on *Johnson v. Maxim Healthcare Servs., Inc.* (2021) 66 Cal.App.5th 924 (*Johnson*), Plaintiff argues that even if his claims are time-barred, he can still represent other aggrieved employees. In *Johnson*, an employee filed suit against her employer under PAGA and the trial court sustained the employer's demurrer, finding that the employee's individual claim was time-barred and thus she could not pursue a representative PAGA claim. The Court of Appeal reversed, holding that the employee was an aggrieved employee with standing to pursue her PAGA claim as she alleged that she was employed by the employer and personally suffered at least one Labor Code violation on which the PAGA claim was based. For the court, the fact that the plaintiff's individual claim might be time-barred did *not* nullify the alleged Labor Code violations she experienced nor strip her of her standing to pursue remedies under PAGA. Plaintiff insists that the same applies here and thus the claims sought to be added to the FAC are timely.

Defendant insists that *Johnson* is distinguishable because in that case the plaintiff was an employee when she submitted notice to the LWDA and filed suit, and thus continued to experience the alleged Labor Code violations at issue (specifically, that the employer's nonsolicitation, nondisclosure and noncompetition agreement violated Labor Code section 432.5) so it was no surprise that she was held to be an aggrieved employee within the statute of limitations. Here, in contrast, Defendant argues, Plaintiff was not a current employee at the

time of the 2023 Amended Notice, and the only Labor Code violations that could be timely asserted based on that notice occurred well after the end of his employment.

The Court does not find Defendant's efforts to distinguish *Johnson* to be persuasive. The *Johnson* court's determination that a plaintiff whose own claims are time-barred does not lose standing to pursue remedies under PAGA was informed by the California Supreme Court's reasoning in *Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73 (*Kim*), where the court held that an employee who settles and dismisses individual Labor Code claims does not lose standing to pursue a PAGA claim. The Supreme Court emphasized that the plain language of PAGA has two requirements for standing: the plaintiff "must be an aggrieved employee, that is, someone 'who was employed by the alleged violator' and 'against whom one or more of the alleged violations was committed.'" (*Kim*, at pp. 83-84.) The court concluded that the employee satisfied those requirements because he was employed by the alleged violator and personally suffered at least one Labor Code violation on which the PAGA claim was based. (*Id*., at 82, 84.) The court rejected the contention that a plaintiff loses standing by settling his individual claims because the "Legislature defined PAGA standing in terms of violations, not injury," and the employee became "aggrieved" when Labor Code violations were committed against him, a fact that was not nullified by settlement. (*Id*. at pp. 88.) Finally, the court observed that "[n]othing in the legislative history [of PAGA] suggests the Legislature intended to make PAGA standing dependent on the existence of an unredressed injury, or the maintenance of a separate, unresolved claim." (*Id*. at pp. 90-91.)

The court's conclusions in *Kim* (and *Johnson*) regarding standing did not hinge on the employment status of the plaintiff at the time the claims were made. Instead, the focus was on whether the plaintiff was "aggrieved" by virtue of Labor Code violations having been committed against him while he was employed by the defendant employer. Here, Plaintiff has alleged that he personally suffered the violations alleged in the 2023 Amended Notice; thus he became an "aggrieved employee" under PAGA at that time, a fact that is not nullified by *when* he filed suit or if he was still employed at that time. That said, even if Plaintiff has the requisite standing, he must still establish that the claims disclosed in the 2023 Amended Notice are timely in order for them to be viable.

To this end, Plaintiff insists that the new claims asserted in the proposed FAC based on the 2023 Amended Notice are timely because they relate back to the original Complaint. Under the relation back doctrine, an amended complaint is deemed to have been filed at the time of the earlier complaint if the amended complaint "(1) rest[s] on the same general set of facts, (2) involve[s] the same injury, and (3) refer[s] to the same instrumentality …." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 409.) Here, the question is whether any of the new claims, i.e., violations of Labor Code sections 510, 515, 1174, 1194 and 2802 based on the alleged misclassification of Plaintiff (and others) as exempt, failure to keep accurate payroll records and failure to reimburse business expenses relate back to the timely pleaded claims for violations of Labor Code sections 201-204, 226, 226.2, 226.7, 227.3, 510, 558, 1194, 1197, and 1197.1 and the UCL based on Defendant's purported failure to: pay all minimum and overtime wages owed; provide paid rest breaks; pay vacation wages; and provide accurate itemized wage statements.

Defendant maintains that the new claims do not relate back because they do rest on the same general set of facts or address the same injuries alleged in the Complaint. Unpaid wages and unreimbursed business expenses are, Defendant insists, fundamentally different injuries, as

are its alleged misclassification of Plaintiff as an "exempt" employee (and resulting failure to pay the correct wages and penalties) and purported failure to maintain proper payroll records based on inaccurate meal period punches. The Court agrees. While all of the new claims are predicated on Labor Code violations that purportedly occurred during Plaintiff's (and other aggrieved employees') employment with Defendant, the do *not* involve the same injuries. When evaluating whether an amended pleading alleges facts that are sufficiently similar to those alleged in the original complaint, "the critical inquiry is whether the defendant had adequate notice of the claim based on the original pleading." (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLC* (2011) 195 Cal.App.4th 265, 277.) Here, as asserted by Defendant, there is no mention in the original Complaint that it misclassified Plaintiff as exempt, much less that it misclassified him in *any* way, nor is there any mention of inaccurate payroll records and a failure to reimburse business expenses incurred by employees. As such, Defendant had no notice that Plaintiff would be making such claims in the proposed FAC and the Court finds that they do *not* relate back to the original Complaint.

Accordingly, to the extent that Plaintiff seeks leave to amend to add claims based on his 2023 Amended Notice, his motion is DENIED. His motion is GRANTED with respect to the remaining proposed amendments.

III. MOTION TO COMPEL ARBITRATION

Defendant moves to compel arbitration of Plaintiff's individual PAGA claim pursuant to an arbitration agreement executed by Plaintiff on December 19, 2019, that replaced an earlier arbitration agreement executed by him as part of the onboarding process in April 2018. As stated above, Defendant requests that the Court stay the representative PAGA claim pending resolution of the individual arbitration, and Plaintiff opposes this request.

A. Legal Standard

In ruling on a motion to compel arbitration, the Court must inquire as to (1) whether there is a valid agreement to arbitrate, and (2) if so, whether the scope of the agreement covers the claims alleged. (See *Howsan v. Dean Witter Reynolds* (2002) 537 U.S. 79, 84.) "Under both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate. [Citations.] The threshold question requires a response because if such an agreement exists, then the court is statutorily required to order the matter to arbitration." (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13, 19 (*Fleming*), internal quotation marks omitted.) The agreement at issue expressly provides that it is governed by the Federal Arbitration Act.

"The FAA [Federal Arbitration Act], which includes both procedural and substantive provisions, governs [arbitration] agreements involving interstate commerce." (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 840.) However, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid*.) Here, the Agreement expressly provides that "the [FAA] and federal common law applicable to arbitration shall govern [its] interpretation and enforcement," and thus federal procedural and substantive law apply. (See *Rodriguez v. American Technologies, Inc*. (2006) 136 Cal.App.4th 1110, 1122 ["[t]he phrase 'pursuant to

the FAA' is broad and unconditional," and unambiguously adopts both the procedural and substantive aspects of the FAA].)

Under the FAA, the Court must grant a motion to compel arbitration if any suit is brought upon "any issue referable to arbitration under an agreement for such arbitration" (9 U.S.C. § 3), subject to "such grounds as exist at law or in equity for the revocation of any contract…" (9 U.S.C. § 2). The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal, supra*, 14 Cal.4th at p. 413.)

"In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

> But the FAA's policy favoring arbitration … is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. Or in another formulation: The policy is to make arbitration agreements as enforceable as other contracts, but not more so. Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind.

(*Morgan v. Sundance, Inc.* (2022) 596 U.S. 411, internal citations and quotation marks omitted.)

B. Discussion

1. *Existence and Scope of Agreement to Arbitrate*

To establish that Plaintiff consented to arbitrate his individual PAGA claim, Defendant submits the declaration of Nathan Barulich ("Barulich Decl."), Defendant's Chief Operating Officer since April 2019, who explains that prior to the beginning of his employment with Defendant on April 2, 2018, Plaintiff was presented with a copy of Defendant's Alternative Dispute Resolution Program, which he acknowledged and executed with his signature. (See Barulich Decl., ¶ 6, Exhibit A.) Mr. Barulich continues that in December 2019, at his direction, Defendant began to implement a new Mutual Dispute Resolution Agreement (the "Arbitration Agreement") applicable to all employees. (*Id*., ¶ 7.) The Arbitration Agreement- which was electronically signed by Mr. Barulich- was sent to Plaintiff via Defendant's corporate DocuSign platform and he electronically signed and returned the agreement through that platform on December 19, 2019. (*Id*., ¶ 8.) A copy of the signed agreement was immediately stored in Plaintiff's personnel file and is attached to Mr. Barulich's declaration. (*Id*., ¶ 8, Exhibit B.)

As relevant here, the Arbitration Agreement provides, in pertinent part, that:

> Where resolution [of work-related problems] cannot be achieved through [BiRite]'s internal resources, the undersigned employee … and [BiRite] agree to use the dispute resolution procedures in this agreement, including mediation and arbitration, instead of a trial in court before a judgment or jury.

(Arbitration Agreement, § 1.)

> Other than as provided in this Agreement, to the extent possible under federal law, Employee and [BiRite] agree that any controversy, dispute, or claim that could otherwise be raised in court ("Covered Claim") that the Company has against Employee or the Employee has against the Company … shall be settled *exclusively* by either mediation or binding arbitration, rather than in court. It is the parties' intent that all claims between them covered by this Agreement are to be resolved through mediation, and if mediation is not successful then through binding arbitration to the fullest extent permitted by federal law (and state law that is not preempted by federal law), not an administrative proceeding or court….
>
> Covered Claims include, but are not limited to, claims for wages and other compensation, breach of contract, misappropriation of trade secrets or unfair competition, violation of public policy, wrongful termination; tort claims; claims for unlawful retaliation, discrimination and/or harassment (unless otherwise excluded under applicable state law to the extent not preempted by the Federal Arbitration Act); and claims for violation of any federal, state, or other government law, statute, regulation, or ordinance ….

(Arbitration Agreement, § 2, emphasis added.)

> Except where prohibited by federal law, covered claims must be brought on an individual basis only, and mediation and/or arbitration on an individual basis is the exclusive remedy. Neither party may submit a multi-plaintiff, class, collective, or representative action for resolution under this Agreement, and no mediator or arbitrator has authority to proceed with mediation or arbitration on such a basis. Any disputes concerning the validity of this multi-plaintiff, class, collective, and representative action waiver will be decided by a court of competent jurisdiction, not by the arbitrator. In the event a court determines that this waiver is unenforceable with respect to any claim or portion of a claim, this waiver shall not apply to that claim or portion of the claim, which may then only proceed in court as the exclusive forum.

(Arbitration Agreement, § 3.)

Given the language of the foregoing sections, it is clear that Plaintiff agreed to arbitrate all employment-related claims on an individualized basis, including his individual PAGA claims, and is barred from pursuing a class action. Pursuant to the U.S. Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 661, if an agreement to arbitrate is covered by the FAA, as the Arbitration Agreement is, its provision requiring arbitration of a

PAGA plaintiff's individual claims *must* be enforced. Thus, as Plaintiff himself has acknowledged, he must arbitrate his individual PAGA claim.

2. *Stay of Representative PAGA Action*

As indicated above, the parties disagree as to whether the Court should stay the representative PAGA claim pending resolution of arbitration of Plaintiff's individual PAGA claim. Because a PAGA plaintiff who is compelled to arbitrate his or her individual PAGA claims maintains standing to assert the remaining non-individual PAGA (i.e., representative) claims in court, a "the trial court may exercise its discretion to stay the non-individual claims pending the outcome of the arbitration pursuant to section 1281.4 of the Code of Civil Procedure." (*Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, 1123 (*Adolph*).) Defendant persuasively argues that a stay is the most appropriate action here given its intention to challenge Mr. Guiffre's standing to pursue claims under PAGA as an "aggrieved employee." It maintains that he does not so qualify because he was properly classified as an *exempt* employee, while Mr. Guiffre alleges to the contrary. In *Adolph*, the court spoke approvingly of the approach urged by Defendant here. That is, where there is a dispute over whether the plaintiff qualifies as an "aggrieved employee" under PAGA, a court can exercise its discretion and issue a stay pending the outcome of the arbitration. Following the arbitration, "[if] the arbitrator determines that" the plaintiff "is an aggrieved employee in the process of adjudicating his individual PAGA claim, that determination, if confirmed and reduced to a final judgment [], would be binding on the court, and [the plaintiff] would continue to have standing to litigate his non-individual claims." (*Adolph, supra*, at pp. 1123-1124.) However, "if the arbitrator determines that [the plaintiff] is not an aggrieved employee," the court "would give effect to that finding, and [the plaintiff] could no longer prosecute his non-individual claims due to lack of standing." (*Id*. at p. 1124.)

As was the case with the defendant in *Adolph* who opposed the issuance of a stay pending completion of arbitration of an individual PAGA claim, Plaintiff offers no convincing argument why proceeding in the aforementioned manner would be improper or unwarranted. He insists that a stay of the *arbitration* is appropriate under Code of Civil Procedure section 1281.2, subdivision (d), because the parties' arbitration agreement "is subject to the procedures of the California Arbitration Act" (see Opp. at 5:11-28), but he previously conceded that the Arbitration Agreement is governed by the FAA. His argument is directed at the original arbitration agreement executed by him in 2018, but that agreement does not control here as it was superseded by the Arbitration Agreement. His reliance on *Gavriiloglou v. Prime Healthcare Mgmt.* (2022) 83 Cal.App.5th 595 and two *trial* court decisions also do not compel a contrary conclusion. Other courts have criticized *Gavriiloglou's* finding that the doctrine of issue preclusion applies differently when considering the effect of an adjudication regarding a plaintiff's individual Labor Code claim on that plaintiff's ability to establish PAGA standing as entirely unsupported by "case law or logic" (*Rocha v. U-Haul Co. of Cal.* (2023) 88 Cal.App.5th 65, 80), and unpublished trial court decisions, of course, cannot be "cited or relied on by a court or party in any other action" absent exceptions that do not apply here. (Cal. Rules of Court, Rule 8.1115(a).) It is also notable, as Defendant points out, that Plaintiff has not cited any relevant post-*Adolph* authority which supports *not* issuing a stay and allowing the representative PAGA action to proceed even where there is a dispute over the named Plaintiff's standing to pursue such an action.

[1]

In sum, the Court agrees that the best course of action is to stay this case pending resolution of arbitration of Plaintiff's individual PAGA claim. Accordingly, Defendant's motion to compel arbitration and for a stay is GRANTED.

IV. CONCLUSION

Plaintiff's motion for leave to amend is DENIED as to the proposed amendments involving claims asserted in the 2023 Amended Notice and otherwise GRANTED.

Defendant's motion to compel arbitration is GRANTED. Plaintiff's representative PAGA action is stayed pending resolution of arbitration of his individual PAGA claim.

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.

[1] The Court agrees with Defendant that Plaintiff's reliance on *Kim v. Reynolds* (2020) 9 Cal.5th 73 for the proposition that even if Plaintiff fails to prevail on his individual PAGA claim he still has standing to pursue a representative PAGA action is misplaced. In *Kim*, the court concluded that a plaintiff does not lose standing under PAGA as an aggrieved employee "if they settle and dismiss their individual claims for Labor Code violations," but did not address or involve the process of a court following an arbitrator's conclusion that a plaintiff is not an aggrieved employee under PAGA. It is *Adolph*, not *Kim*, that is instructive in this regard.

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Calendar Line 3
(Tentative Ruling also applies to Calendar Line 4)

Case Name: *Ruiz v. Condon-Johnson & Associates, Inc.*
Case No.: 22CV402514

Presently before the Court in these actions are motions to be relieved as counsel filed by Bibiyan Law Group, P.C. (Bibiyan), which represents Plaintiff Joseph Ruiz. According to Bibiyan, Plaintiff has passed away and despite diligent efforts, Bibiyan was unable to locate Ruiz's next of kin. Under these circumstances, the Court finds that Bibiyan has shown sufficient reasons for their request.

In response, Defendant requests that the Court exercise its inherent authority to dismiss these actions. Although the Court recognizes that "[o]n motion after the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest" (Code Civ. Proc., § 377.31), the Court has not received such a motion or any indication that another individual intends to continue with this action, despite the fact that the motion to be relieved as counsel was served on February 26, 2024. Therefore, this request is well-taken.

Accordingly, the motions to be relieved as counsel for Ruiz are GRANTED and these actions are DISMISSED WITHOUT PREJUDICE. Bibiyan is ordered to submit an amended proposed order which removes the reference to the Case Management Conference on April 4, 2024.

The Court will prepare the dismissal orders.

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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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Case Name: *Attila Csupo, et al. v. Alphabet, Inc.*
Case No.: 19CV352557

This is a putative class action for conversion and quantum meruit, alleging that defendant Alphabet, Inc.'s ("Google") Android operating system and mobile phone applications passively transfer data using class members' cellular data allowances without their consent.

Before the Court is Plaintiffs' motion to compel production of discovery. Defendant Google opposes. For the reasons discussed below, the Court DENIES the motion.

As a preliminary matter, Google filed a motion to seal some of its papers file in opposition to Plaintiffs' motion to compel. The parties represent that they are meeting and conferring regarding issues related to Google's motion to seal. The parties have stipulated, and the court has ordered that Google shall file its motion to seal Plaintiff's moving papers by June 13, 2024 and Plaintiff may oppose Google's motion to seal its opposition papers and its motion to seal Plaintiff's papers by June 27, 2024. Therefore, Google's motion to seal shall go off calendar without prejudice to be heard in October as contemplated by the parties' stipulation.

I. BACKGROUND

In their Fourth Amended Complaint ("4AC"), Plaintiffs allege that Google owns and programs the Android operating system, the most popular mobile platform in the world. (4AC, ¶ 17.) Android works on a variety of mobile devices, including smartphones and tablets. (*Ibid.*) Many of the most popular mobile device manufacturers sell devices preinstalled with the Android operating system and a suite of Google's mobile apps. (*Id.*, ¶ 22.)

Plaintiffs are California residents who purchased Android mobile devices that they use with monthly cellular data plans from different carriers. (4AC, ¶¶ 8-10.) They purchased devices that were preloaded with Google's Android operating system as well as apps and widgets. (*Id.*, ¶ 23.) Cellular data plan customers pay the carrier each month for cellular data allowances. (*Id.*, ¶ 26.) Even under "unlimited" data plans, users are typically subject to quotas that can affect their connection speeds. (*Ibid.*)

Plaintiffs allege that they have property interests in their cellular data allowances. (4AC, ¶ 27.) Users can grant others access to their data allowances and sell unused data allowances to others. (*Id.*, ¶ 28.) Under some circumstances, mobile devices users impliedly consent to the use of their cellular data allowances, such as by engaging with applications that require internet access while connect only by their cellular plan. (*Id.*, ¶ 29.) Plaintiffs allege that Google has misappropriated their cellular data allowances through passive transfers, that is, data transfers occurring in the background and not as the result of Plaintiffs' direct engagement with Google products. (*Id.*, ¶ 31.)

Google could program Android to allow users to enable passive transfers only when they are on Wi-Fi connections, but Google has instead chosen to take advantage of Plaintiffs' cellular data allowances. (4AC, ¶ 40.) Google's policies do not disclose that it accesses cellular data allowance for passive transfers, nor do its agreements obtain users' consent for

such transfers. (*Id.*, ¶ 32-37.) Nevertheless, Google designed its operating system and apps to extract large volumes of information using Plaintiffs' own cellular data allowances, and the information transmitted through this practice supports Google's product development and lucrative advertising business. (*Id.*, ¶¶ 7, 38.)

Based on these allegations, Plaintiffs assert in the operative 4AC claims for: (1) conversion; and (2) quantum meruit. Among other things, Plaintiffs seek the following relief: (1) the fair market value of the cellular data allowances converted by Google; (2) the reasonable value of the cellular data allowances used by Google to provide information that benefited Google; and (3) injunctive relief directing Google to stop using cellular data allowances purchased by consumers without their consent. (4AC, ¶ 74.)

On October 26, 2023, the court (Hon. Kulkarni) granted Plaintiffs' motion for class certification. ("Class Certification Order.") The court found that "the types of data transfers focused on by Plaintiffs affect all or virtually all Android users because they are triggered by the same software present on all or virtually all Android devices … and [w]hether putative class members experienced these transfers to the same degree is not dispositive." (Class Certification Order, p. 12, lns. 6-11.) "The transfers that are at issue here are Clearcut transfers, CheckIn transfers, and NLP/GLS uploads." (*Id.*, p. 12, lns. 12-13.) In granting Plaintiffs' motion for class certification, the court referred to these three kinds of transfers as the "exemplar data transfers." (*Id.* at p. 13, lns. 15, 12, 25.)

At the November 2, 2023 case management conference ("CMC"), the court ordered each counsel to submit a brief regarding the scope of remaining discovery. At the November 16 CMC, the parties and court discussed various issues arising from the order granting class certification, and the court ordered briefing of these issues. The parties filed their briefs on December 1.

On December 11, 2023, the court (Hon. Kulkarni) made several rulings, including the following: "Plaintiffs are entitled to seek discovery from Google as to passive data transfers that were not part of the 'exemplar' set that was discussed in the [Class Certification] Order." (December 11, 2023 Order, p. 1, lns. 26-27.) On February 8, 2024, the court (Hon. Kulkarni) ruled on a case schedule, including setting the following discovery deadlines: April 1, 2024 deadline for substantial completion of document production and deadline for data production; and April 19, 2024 deadline for substantial completion of fact discovery. (February 8, 2024 Order, Ex. A.)

On March 8, 2024, the parties participated in an informal discovery conference ("IDC"). On March 27, Plaintiffs filed the motion now before the court, a motion to compel production of discovery.

II. MOTION TO COMPEL

This dispute requires the court to address Google's compliance with the December 11 Order allowing discovery of transfers outside of the "exemplar" set relied upon for class certification. More specifically, the parties are at an impasse on two overarching issues with respect to Plaintiffs' post-certification requests for production of documents and data: (1) whether Plaintiffs are entitled to all documents and data associated with the named Plaintiffs; and (2) whether Google is required to produce responsive documents and data without

removing information identifying specific users—in other words—without redaction or hashing. (See Plaintiffs' Motion to Compel Production of Discovery ("Motion"), p. 5, ln. 5; see also Google's Opposition to Motion to Compel ("Opposition"), p. 4, lns. 8-9 and 23-24.)

A. Legal Standard

A party propounding a request for production may move for an order compelling a further response if it deems that a statement of compliance is incomplete, a representation of inability to comply is inadequate, or an objection is without merit. (Code Civ. Proc., § 2031.310, subd. (a).) The motion must set forth "specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Proc., § 2031.310, subd. (b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) Good cause is established simply by a fact-specific showing of relevance. (*Id.* at 98.) If good cause is shown, the burden shifts to the responding party to justify any objections. (*Ibid*.)

"The statutory scheme vests trial courts with 'wide discretion' to allow or prohibit discovery. [Citation.]" (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 540 (*Williams*).) Trial courts issuing discovery orders "should do so with the prodiscovery policies of the statutory scheme firmly in mind." (*Ibid.*) The applicable discovery statutes "must be construed liberally in favor of disclosure unless the request is clearly improper by virtue of well-established causes for denial." (*Id.*, p. 541 [quoting and citing *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 378].)

B. Discussion

After the court granted Plaintiffs' motion for class certification on October 26, 2023, Plaintiffs initiated "Phase 2" of fact discovery by issuing their second set of RFPs on November 22, seeking further production regarding the "exemplar" network transfers that were the subject of class certification. (Motion, p. 5, lns. 11-14.) After the court's December 11 ruling that Plaintiffs could seek discovery as to passive transfers that were not part of the "exemplar" set, Plaintiffs issued their third set of RFPs on December 15. (*Id.*, p. 5, lns. 14-18.)

The parties were unable to reach an agreement as to three issues addressed at the March 8, 2024 IDC, one being whether Google will produce source code and associated materials. (Motion, p. 5, lns. 1-5, fn. 1.) Google has since agreed to make its source code available for a reasonable review. (*Ibid.*) Therefore, the parties' briefing for the instant motion focuses on the following two issues: (1) the production of the named-Plaintiffs' data; and (2) the hashing and redaction of data.

1. Production of Named Plaintiffs' Data

Plaintiffs' motion does not refer to specific RFPs or detail how Google's responses to specific RFPs falls short. Plaintiffs acknowledge that Google produced 742 documents in response to its second and third sets of RFPs, but Plaintiffs contend this is too little, too late. (Motion, pp. 5, ln. 20 – 6, ln. 4.) Google highlights RFP 17 as a "clear example of discovery gone too far." (Opposition, p. 11, ln. 3.) Plaintiffs' RFP Set 3, No. 17, requests production of the following:

17. All Documents and data in Your possession associated with any of the named Plaintiffs in this case or their devices.

(Declaration of Marc A. Wallenstein in Support of Plaintiffs' Motion to Compel Production of Discovery ("Wallenstein Dec."), ¶ 5, Ex. D, p. 5.)

Plaintiffs identify six arguments in support of their position that the named Plaintiffs' data is relevant and discoverable. (Motion, pp. 6-9.) First, Plaintiffs say the named Plaintiffs' data is necessary to identify additional types of actionable transfers, as allowed under the court's December 11, 2023 order. Second, Plaintiffs say their data is necessary to facilitate efficient expert examination of source code. Third, Plaintiffs say their individual data is relevant to their individual claims. Fourth, Plaintiffs say the named Plaintiffs' data is critical for rebutting Google's consent defense. Fifth, Plaintiffs say the named Plaintiffs' data will allow the jury to see what network transfer occurred in light of the specific settings that each named Plaintiff selected. Sixth, Plaintiffs say the named Plaintiffs' user data is relevant because it will contain the logs that the named Plaintiffs' devices sent to Google. Plaintiffs further assert that a court has previously ordered Google to produce named plaintiffs' data, citing *Brown v. Google LLC* (N.D. Cal. 2022) No. 4:20-cv-03664. (*Id.*, p. 14, lns. 8-24.)

Plaintiffs have also filed a Supplemental Statement of Facts ("Supplemental Statement"). According to Plaintiffs, the email attached to this supplemental filing counters any undue burden argument by Google because it demonstrates that Google has the ability to routinely grant permissions to search databases within an hour. (Supplemental Statement, p. 2, lns. 20-22.) This is not new argument by Plaintiffs and Google is aware of this email because it recently provided it to Plaintiffs. Therefore, the court has considered Plaintiffs' Supplemental Statement despite the date it was filed.

In opposition, Google contends that RFP 17 is massively overbroad and seeks irrelevant information. (Opposition, pp. 11-13.) Google argues Plaintiffs' demands violate established standard for the production of data in litigation. (*Id.*, pp. 11, ln. 25 – 12, ln. 5, citing *Sedona Conference Database Principles Addressing the Preservation and Production of Databases and Database Information in Civil Ltg.* (2014) 15 Sedona Conf. J. 171, 176 ["Absent a specific showing of need, a requesting party is entitled only to database fields that contain relevant information, and give context to such information, and not to the entire database in which the information resides or the underlying database application or database engine"].)

Google directs the court's attention to the federal magistrate's decision in the case of *In re Google RTB* (N.D. Cal.) Case No. 21-cv-02155-YGR.[6] (Opposition, p. 12, lns. 6-18.) There, the court "considered and rejected an approach to discovery that requires Google to produce all information it collects about the named plaintiffs…." (See Wallenstein Dec., ¶ 13, Ex. L ("RTB Order"), p. 4, lns. 4-6.) The magistrate found that "Plaintiffs have not shown that wholesale production of all data fields … is relevant or proportional to the needs of this case." (RTB Order, p. 4, lns. 8-10.) However, the court also found that "Google must produce documents sufficient to show for each named plaintiff the 'verticals' data fields it shared with RTB participants during the class period." (*Id.*, p. 5, lns. 7-9.)

[6] "RTB" refers to Google's digital ad auction system called Google Real-Time Bidding (RTB).

Google further argues that Plaintiffs' demand would pose an intolerable burden. (Opposition, pp. 13-14.) Google has produced evidence in its declarations in support of the opposition, filed under seal, regarding the undertaking that would be required to produce the data. In an effort to protect the information Google believes is sensitive, the court will not refer to it explicitly. (*Id.*, p. 13, lns. 15-17, 22; see also Declaration of Ben Kornacki in Support of Google LLC's Opposition to Plaintiffs' Motion to Compel, ¶¶ 2, 8; Declaration of Patrick Quaid in Support of Google LLC's Opposition to Plaintiffs' Motion to Compel, ¶ 9; Declaration of Shireesh Agrawal in Support of Google LLC's Opposition to Plaintiffs' Motion to Compel, ¶ 9.)

Here, the court agrees with Google that Plaintiffs' requests for production, such as RFP 17, are overbroad and do not appear reasonably related to a legitimate discovery need. As Google points out, it is Plaintiffs' burden, as the party moving to compel discovery, to "set forth specific facts showing good cause justifying the discovery sought by the demand." (Code Civ. Proc., § 2031.310, subd. (b)(1).) Further, "[a]lthough the scope of discovery is broad, it is not limitless … the burden rests upon the party seeking the discovery to provide *evidence* from which the court may determine" if the matter requested "either is itself admissible in evidence or appears reasonable calculated to lead to the discovery of admissible evidence." (*Calcor Space Facility v. Superior Court* (1997) 53 Cal.App.4th 216, 223-224 (*Calcor*).)

In this case, Plaintiffs' motion does not reference the scope of any specific RFPs. Further, the arguments Plaintiffs offer in support are insufficiently specific to justify a request as expansive as RFP 17. (See *Calcor*, *supra*¸53 Cal.App.4th at p. 224 ["There is an absence of specific facts relating to each category of materials sought to be produced; the justifications offered for the production are mere generalities."].) Given the nature of Plaintiffs' claims, the court would expect their inspection demands to be reasonably related to Google's use of Plaintiffs' cellular data allowances. Like the plaintiffs referenced in the RTB Order cited by both parties, the Plaintiffs here have not shown that all documents and data associated with any of the named Plaintiffs, or their devices, is relevant or proportional to the needs of the case.

While the court may be persuaded that Google's documents and data relating to the named Plaintiffs is discoverable in some measure, Plaintiffs have not defined a reasonable scope for their demands. Plaintiff's motion will be denied on that basis.

2. Hashing or Redaction of Data

While the determination of the preceding section is dispositive of the specific discovery request at issue for this motion, the court provides the following comments to guide the parties for future discussions on this topic.

The parties dispute whether Google should be required to produce responses without data fields identifying the users. Google argues in favor of using "hashing," which it describes as "replacing each user ID in a data set with a substitute." (Opposition, p. 14, ln. 23.) Plaintiffs point out that there is already a protective order in place. (Motion, p. 14, ln. 14, referencing court's March 11, 2021 Stipulated Protective Order for Litigation Involving Patents, Highly Sensitive Confidential Information and/or Trade Secrets.) Plaintiffs further argue that courts in similar contexts have declined to use "hashing" because of the utility of using the requested information as it is typically stored and to prevent additional discovery

disputes. (Motion, p. 14, lns. 5-11, quoting and citing *U.S. EEOC v. Dolgencorp, LLC* (N.D. Ill., May 5, 2015) No. 13-cv-04307, 2015 U.S. LEXIS 58994, 2015 WL 2148394.)

In opposition, Google asserts that the protective order is no guarantee against a data breach or misuse. (Opposition, p. 17, lns. 4-6, fn. 15.) Google further emphasizes that hashing data is a standard practice that is required by government entities in various contexts and is even used when access is limited to researchers. (*Id.*, pp. 15, lns. 5-17, 17, lns. 1-3.) According to Google, the hashing of data has no downside and that the dispute over including user IDs in the data is premature. (*Id.*, p. 16, lns. 17-26.)

Here, the court is not persuaded by Google's arguments. While Google asserts that hashing is a standard practice required in some contexts, it presents no authority that hashing is required in the context of this litigation, or that it represents a standard practice in similar litigation contexts. As Plaintiffs contend, identifying the named Plaintiffs' documents and data could be particularly probative of their damages claim. (Motion, pp. 15, ln. 20 – 16, ln. 1.) Further, Google presents no authority for its apparent position that the protective order does not sufficiently protect disclosure of the information in question. Thus, the production of data without removal of user IDs, whether by hashing or redaction, could be appropriate in this case with respect to a reasonably tailored and supported demand.

III. CONCLUSION

Plaintiffs' motion to compel is DENIED.

Google's motion to seal shall go off calendar without prejudice.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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