SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 18b
Honorable Shella Deen, Presiding
Thomas Duarte, Courtroom Clerk
191 North First Street, San Jose, CA 95113

DATE: October 10, 2024 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E

****Please specify the issue to be contested when calling the Court and Counsel****

LAW AND MOTION TENTATIVE RULINGS

FOR APPEARANCES: Department 18 is fully open for in-person hearings. The Court strongly prefers **in-person** appearances for all contested law and motion matters. For all other hearings, the Court strongly prefers either **in-person or video** appearances. If you must appear virtually, you must use video. Audio-only appearances are permitted, but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 18:
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

SCHEDULING MOTION HEARINGS: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion before you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

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https://www.scscourt.org/general_info/court_reporters.shtml

RECORDING IS PROHIBITED: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

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LAW AND MOTION TENTATIVE RULINGS

LINE 1	22CV408173	Mircea Dragomir et al vs Ryan Lotz	**Motion to Set Aside Default/Judgment and Order to Show Cause (Attorney Chappars)** Defendant Ryan Lotz's motion to set aside the judgment entered in this action and recall the writ of possession, pursuant to Code Civ. Proc., §473, subdivision (b), on the grounds that the judgment was entered due to his surprise, inadvertence, and excusable neglect. Newly retained defense counsel submitted a declaration in support of this motion with no language or exhibits attached. An answer was purportedly attached to be filed if this motion was granted. However, an answer was already filed on May 2, 2023. A judgment was entered in this case on April 10, 2024, following an unopposed summary judgment motion. Based on Defendant's declaration and the record itself, Defendant, although apparently represented by counsel at the time (Attorney Charles A. Wagner), key matters were left unopposed and without responses, including no service of discovery responses, no opposition to the resulting motion to compel, no compliance with a discovery order, and no opposition to a motion for summary judgment, which resulted in a judgment in Plaintiff's favor. Good cause appearing, the Court finds a plausible showing of mistake, inadvertence, and excusable neglect and GRANTS the motion. The judgment that was entered on April 10, 2024 is VACATED and the case is REINSTATED. Defendant has requested to file an answer, but that has already been filed. Defendant shall fully comply with the discovery order within 20 days of service of the order on this motion. The writ that issued is hereby recalled and extinguished. The Court SETS this matter for a case management conference on January 21, 2024 at 10 a.m. in Department 18b. Good cause appearing, the OSC against Attorney Chappars is VACATED. Moving party to prepare a formal order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 2	20CV373332	Benito Hernandez et al vs Robert Bortolotto et al	**Motion for Summary Judgment/Adjudication** Scroll down to LINE 2 for Tentative Ruling
LINE 3	22CV406851	Nurretin Beser vs Mateon Therapeutics, Inc. et al	**Motion for Summary Judgment/ Adjudication** Scroll down to LINE 3 for Tentative Ruling

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LAW AND MOTION TENTATIVE RULINGS

LINE 4	23CV415868	Maxie Smith vs Harry Mehta	**Motion for Sanctions (Request for Production of Documents)** Defendant Harry Mehta's motion for evidence, issue and/or terminating sanctions against Plaintiff Maxie Smith for her failure to respond to a document request, disobeying a court order to provide responses to the document request and pay sanctions and a new request for monetary sanctions of $963. Defendant's discovery was propounded on September 11, 2023. Plaintiff did not respond to the discovery and an order compelling further responses was filed on May 22, 2024, ordering that further responses were to be served within 20 days of the service of the order (by July 2, 2024) and sanctions of $480 to be paid by the same date. In the written order, Plaintiff was referred to a self-help website for information about civil litigation, including the mechanics of a lawsuit and discovery. Despite acknowledging the existence of the order, Plaintiff has not complied with it. Plaintiff did not file any opposition to this sanctions motion. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) After reviewing the record and the briefing, good cause appearing, the Court declines to issue terminating sanctions, but issues evidentiary and monetary sanctions as follows: Plaintiff shall be precluded from proffering evidence at trial to support her claims using information that she failed to provide in the document request, despite a court order to do so. Sanctions of $963 are awarded to Defendant to be paid by Plaintiff within 10 days of the service of the order on this motion. The previous awarded sanctions of $480 shall also be paid at the same time. (Code Civ. Proc., §§2023.010 and 2023.030.) Defendant to prepare formal order that includes the issues that are ordered precluded.

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LAW AND MOTION TENTATIVE RULINGS

LINE 5	23CV415868	Maxie Smith vs Harry Mehta	Motion for Sanctions (Form Interrogatories) Defendant Harry Mehta's motion for evidence, issue and/or terminating sanctions against Plaintiff Maxie Smith for her failure to respond to form interrogatories, disobeying a court order to provide responses to those interrogatories and pay sanctions and a new request for monetary sanctions of $774. Defendant's form interrogatories were propounded on September 11, 2023. Plaintiff did not respond to the form interrogatories and an order compelling further responses was filed on May 22, 2024, ordering that further responses were to be served within 20 days of the service of the order (by July 2, 2024) and sanctions of $480 to be paid by the same date. In the written order, Plaintiff was referred to a self-help website for information about civil litigation, including the mechanics of a lawsuit and discovery. Despite acknowledging the existence of the order, Plaintiff has not complied with it. Plaintiff did not file any opposition to this sanctions motion. A failure to oppose a motion may be deemed a consent to the granting of the motion. CRC Rule 8.54c. Failure to oppose a motion leads to the presumption that Plaintiff has no meritorious arguments. (See *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal. App. 3d 481, 489.) After reviewing the record and the briefing, good cause appearing, the Court declines to issue terminating sanctions, but issues evidentiary and monetary sanctions as follows: Plaintiff shall be precluded from proffering evidence at trial to support her claims using information that she failed to provide in response to form interrogatories 6.0. 7.0. 8.0. 9.0, 12.0 and 14.0, despite a court order to do so. Sanctions of $774 are awarded to Defendant to be paid by Plaintiff within 10 days of the service of the order on this motion. (Code Civ. Proc., §§2023.010 and 2023.030.) Defendant to prepare formal order that includes the issues that are ordered precluded.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	24CV434290	Manuel Panilag vs Armando Contreras et al	**Motion to Compel (Request for Production of Documents)** Plaintiff Manuel M. Panilag's motion to compel Defendants Armando Contreras and New Chance, LLC to (1) provide responses and responsive documents to his Requests for Production of Documents, Set One, (2) for an order deeming all objections waived by Defendants, and (3) an award of $4,935 in monetary sanctions. Defendants have not responded to Plaintiff's document request. Even if the Court accepts that the discovery was not served by personal service on May 2, 2024 – though Defendants have failed to provide any competent evidence to refute this -- the discovery was electronically served on Defendants' counsel on June 13, 2024, and Defendants' counsel unequivocally acknowledged receipt thereof on July 2, 2024, by email. Despite this service and receipt, Defendants have *still* not served responses or responsive documents, as such all objections have been waived, including that of privilege. Good cause appearing, the Motion is GRANTED. Defendants shall serve verified, code-compliant responses, without objections, and responsive documents by October 21, 2024. (Code Civ. Proc., §§2031.300(b) and 2031.300(a)). Sanctions in the amount of $3,560 are awarded to Plaintiff, to be paid by Defendants by October 21, 2024. Moving party to prepare formal order.
LINE 7	22CV403364	Jane Doe vs DOES 1 THROUGH 50, Inclusive et al	**Motion for Leave to File Cross-Complaint** Withdrawn by moving party, therefore motion is OFF CALENDAR.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	23CV416318	Francine McMahon vs Donna Brown et al	**Motion for Leave to File First Amended Complaint** Plaintiff filed this motion on February 1, 2024, and refiled it on February 2, 2024. The motion is brought pursuant to Code of Civil Procedure §§ 472, 473 (a)(1) and §578, and California Rule of Court 3.1324, to add a new cause of action for legal malpractice against Defendants James M. Barrett, Esq., and Elizabeth Du Par, Esq. The motion was opposed by the Barrett defendants. Defendants Elizabeth Du Par and Du Par Law did not oppose the motion. The motion was set for hearing on March 14, 2024, and after various continuations, on July 23, 2024, the motion was set for hearing on October 10, 2024. The Barrett defendants in their July 10, 2024 Case Management Conference Statement stated that "Plaintiff has a motion to amend that he stipulated to take OFF CALENDAR because the case settled at mediation". It is unclear to the Court if the case has settled or if this motion remains on calendar. Parties to appear.

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Calendar Line 2
Case Name: *Benito Hernandez, et al. v. McKim Corporation, et al.*
Case No.: 20CV373332

Before the Court is the motion for summary judgment or, alternatively, summary adjudication, against plaintiffs Benito Hernandez and Monica Hernandez. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background.

Plaintiffs Benito Hernandez, Monica Hernandez, and Esteban Gabriel Hernandez (collectively, "Plaintiffs") are construction workers who worked for defendant McKim Corporation ("McKim"). (Complaint, ¶6.) Defendant McKim performs on site construction and repair, specifically in the concrete and asphalt paving industry. (Complaint, ¶¶7 and 14.) Defendants Robert Anthony Bortolotto ("Bortolotto") and Santino Ricardo Orozco ("Orozco") are managers, corporate officers, and/or responsible individuals for purposes of licensing with the California State License Board ("CSLB"). (Complaint, ¶8.) Defendant Ricardo Ramirez is the owner of defendant McKim. (Complaint, ¶10.) Defendants Bortolotto, Orozco, Ricardo Ramirez, and Maria Ramirez are responsible for implementing and carrying out the unlawful labor, employment, and payroll policies and overseeing the day to day activities of the corporation. (Complaint, ¶¶8 – 10 and 16.)

Plaintiffs worked as laborers, operating engineers, and teamsters for defendants on multiple public works construction projects subject to the payment of prevailing wages. (Complaint, ¶15.)

Plaintiff Benito Hernandez was typically paid 32 hours a week despite routinely working 45 – 55 hours per week, five to six days per week. (Complaint, ¶17.) In summer when there was a push to finish school construction in a tight construction schedule, plaintiff Benito Hernandez could work seven days a week and over 55 hours a week. (*Id.*)

Plaintiff Monica Hernandez was never put on payroll and made substantially less than any recognizable prevailing wage to primarily drive a semitruck on both public work and private construction. (Complaint, ¶18.) Plaintiff Monica Hernandez would be paid by the hour without payroll deductions and without payment of overtime or prevailing wages when due and owing. (*Id.*)

Plaintiff Esteban Gabriel Hernandez was never put on payroll and made substantially less than any recognizable prevailing wage as a laborer in the summers and at times on weekends on both public work and private construction. (Complaint, ¶19.) Plaintiff Esteban Gabriel Hernandez would be paid by the hour without payroll deductions and without payment of overtime or prevailing wages when due and owing. (*Id.*)

Plaintiffs were not paid the correct prevailing wage for the work they discharged. (Complaint, ¶20.) The fringe benefits owed as part of various prevailing wage obligations were not properly funded to a third party fringe benefit trust fund based on prevailing wage laws of California. (*Id.*) The only fringe benefits funded were 32 hours for plaintiff Benito Hernandez. (*Id.*)

Defendants' failure to timely pay overtime wages in excess of eight (8) hours per day or forty (40) hours per week, or wages for all hours worked, was willful, intentional, and deliberate. (Complaint, ¶23.)

During their employment with defendants, only plaintiff Benito Hernandez received wage statements and those statements did not list all hours worked. (Complaint, ¶24.) The other plaintiffs did not receive any wage statements. (*Id.*)

At the end of their employment with defendants, Plaintiffs were not paid all wages in a timely manner and more than 30 days have passed since their separation from employment. (Complaint, ¶25.)

On November 10, 2020, Plaintiffs filed a complaint against defendants McKim, Bortolotto, Orozco, Maria Ramirez, and Ricardo Ramirez asserting causes of action for:

(1) Violation of California Labor Code sections 218.5, 1194, 1194.2, 1771, 1774

(2) Violation of California Labor Code section 226 – Failure to Provide an Itemized Wage Statement (against all defendants except Bartolotto)

(3) Violation of California Labor Code section 203 – Waiting Time Penalties

(4) Failure to Pay Minimum Wages, California Labor Code sections 1194 et seq.

(5) Failure to Pay Overtime Compensation (Labor Code sections 510 and 1194)

(6) Unfair Business Practices (Business and Professions Code sections 17200 et seq.)

On March 5, 2021, defendants McKim, Bortolotto, Orozco, Maria Ramirez, and Ricardo Ramirez jointly filed an answer to the Plaintiffs' complaint.

On May 11, 2023, Plaintiffs filed an amendment to the complaint substituting McKim Inc. for Doe defendant 1 and substituting S and R Materials Handling LLC ("SRMH") for Doe defendant 2.

On June 26, 2023, defendant SRMH filed an answer to Plaintiffs' complaint.

On February 8, 2024, defendants McKim, Bortolotto, Orozco, Maria Ramirez, and Ricardo Ramirez ("Moving Defendants") filed a motion for summary judgment/ adjudication of the complaint against plaintiffs Benito Hernandez and Monica Hernandez.

A May 16, 2024 minute order reflects the court (Hon. Manoukian) denied Moving Defendants' motion for summary judgment/ adjudication.

To facilitate further mediation between the parties and pursuant to their stipulation, the court (Hon. Pennypacker) issued an order on June 13, 2024 continuing hearing on the aforementioned motion for summary judgment/ adjudication to September 12, 2024 as Judge Manoukian's ruling "did not reach the merits of a discrete legal issue of preemption under Federal law of Plaintiff BENITO HERNANDEZ'S claims because of issues with the filing of a declaration and the attached exhibits." As the parties desire a ruling on the Preemption issue to guide the parties' settlement positions, Judge Pennypacker's order allowed [Moving] Defendants to refile a corrected declaration and exhibits, Plaintiffs "to file a supplemental opposition memorandum, of no more than [seven] pages, with new legal authority or new arguments two weeks before the hearing," and Moving Defendants "to file a supplemental reply memorandum, of no more than [seven] pages, which addresses any arguments made by Plaintiffs."

On July 2, 2024, Moving Defendants filed corrected declarations in support of their motion for summary judgment/ adjudication.

On August 28, 2024, Plaintiffs filed a supplemental opposition.

On September 12, 2024, the court continued hearing on the Moving Defendants' motion for summary judgment/ adjudication to allow for further supplemental briefing.

Moving Defendants' filed further supplemental briefing on September 18, 2024.

Plaintiffs filed a second supplemental opposition brief on September 25, 2024.

II. MOVING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF THE COMPLAINT AGAINST PLAINTIFF BENITO HERNANDEZ IS GRANTED.

Moving Defendants argue initially that all of the claims asserted by plaintiff Benito Hernandez in the complaint fail because he failed to exhaust the mandatory grievance procedure under a collective bargaining agreement ("CBA"). Moving Defendants rely on *Soremekun v. Thrifty Payless, Inc.* (9th Cir. 2007) 509 F.3d 978, 985-986 (*Soremekun*), where the court wrote:

> Prior to bringing suit, an employee seeking to vindicate personal rights under a collective bargaining agreement must first attempt to exhaust any mandatory or exclusive grievance procedures provided in the agreement. See *United Paperworkers Int'l. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) ("The courts have jurisdiction to enforce collective bargaining contracts; but where the contract provides grievance and arbitration procedures, those procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute"); *Del Costello*, *supra*, 462 U.S. at 163 ("Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement. Subject to very limited judicial review, he will be bound by the result according to the finality provisions of the agreement" (citations omitted)). [Footnote.] Thus, in the ordinary case, an employee's failure to exhaust contractually mandated procedures precludes judicial relief for breach of the collective bargaining agreement and related claims.

Moving Defendants proffer the following facts to support this argument: The CBAs in effect during Benito Hernandez's employment by McKim Corporation included specific grievance procedures applicable to the employment claims of Benito Hernandez.[1] The

[1] See Separate Statement Supporting Motion for Summary Judgment or, Alternatively, for Summary Adjudication ("Moving Defendants' SS"), Fact No. 10.

grievance procedures set forth in the CBAs to which Benito Hernandez was bound include the requirement that written notice of a grievance be provided to the employer and/or the union within ten days of the event triggering the grievance.[2] Benito Hernandez failed to provide such 10-day notice in regard to any of the claims made in this lawsuit.[3]

In his tentative ruling, Judge Manoukian found the underlying evidence in support of these factual assertions deficient because the declaration was incomplete. For that reason, Judge Manoukian determined Moving Defendants had not met their initial burden "of showing that a cause of action has no merit if the [Moving Defendants have] shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., §437c, subd. (p)(2).)

Moving Defendants have now corrected the evidentiary defects.

In opposition, Plaintiffs characterize Moving Defendants' argument as one of federal preemption and argue preemption does not apply here because it does not require interpretation of the CBA. Plaintiffs rely principally on *Melendez v. San Francisco Baseball Associates LLC* (2019) 7 Cal.5th 1, 5-8 (*Melenedez*) where the Court,

> conclude[d] that, although the agreement between the union and the Giants may be relevant to this lawsuit and may need to be consulted to resolve it, the parties' dispute turns on an interpretation of state law—namely, the meaning of "discharge" under Labor Code section 201—rather than an interpretation of the agreement itself. Because no party has identified any provision of the agreement whose meaning is uncertain and that must be interpreted to resolve plaintiffs' claim, this lawsuit is not preempted and state courts may decide it on the merits.
>
> …
>
> Section 301(a) of the Labor Management Relations Act, 1947 (29 U.S.C. § 185(a)) (hereafter section 301(a)) provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such

[2] See Moving Defendants' SS, Fact No. 11.
[3] See Moving Defendants' SS, Fact No. 12.

labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (See *Lingle v. Norge Division of Magic Chef, Inc.* (1988) 486 U.S. 399, 403 [100 L. Ed. 2d 410, 108 S. Ct. 1877] (*Lingle*).) "Courts typically refer to the statutory provisions at issue as 'section 301(a)' rather than by citation to the United States Code." (*Knutsson v. KTLA, LLC* (2014) 228 Cal.App.4th 1118, 1126 [176 Cal. Rptr. 3d 376].)

"In a series of opinions, the Supreme Court concluded that § 301's jurisdictional grant required the 'complete preemption' of state law claims brought to enforce collective bargaining agreements." (*Balcorta v. Twentieth Century-Fox Film Corp.* (9th Cir. 2000) 208 F.3d 1102, 1107 (*Balcorta*).) The main policies behind this preemption rule are to "ensure nationwide uniformity with respect to the interpretation of collective bargaining agreements and preserve arbitration as the primary means of resolving disputes over the meaning of collective bargaining agreements." (*Sciborski v. Pacific Bell Directory* (2012) 205 Cal.App.4th 1152, 1163 [140 Cal. Rptr. 3d 808] (*Sciborski*), citing *Lingle*, *supra*, 486 U.S. at p. 404, *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 211, 219 [85 L. Ed. 2d 206, 105 S. Ct. 1904] (*Allis-Chalmers*).)

Now, in supplemental opposition, Plaintiffs rely upon *Zavala v. Scott Brothers Dairy, Inc.* (2006) 143 Cal.App.4th 585 (*Zavala*) to support their assertion that statutory claims of workers cannot be waived by the collective bargaining process. Plaintiffs again miss the mark. As Plaintiffs themselves acknowledge, in *Zavala*, "the Union had already grieved the very same rest period issue on behalf of all of its members, including plaintiffs." (*Zavala*, *supra*, 143 Cal.App.4th at p. 589.) Thus, *Zavala* does not even address the Moving Defendants' argument that an employee seeking to vindicate personal rights under a collective bargaining agreement must first attempt to exhaust any mandatory or exclusive grievance procedures provided in the agreement.

Plaintiffs' reliance on *Zavala* aside, the court need not look further than *Soremekun* itself to reach the conclusion that not all of Plaintiff's claims are barred simply because plaintiff failed to follow the grievance procedure set forth in the CBA. As the *Soremekun* court observed and treated various claims differently, there are claims which are subject to the CBA's grievance procedure and there are other claims such as claims based upon statutorily conferred rights such as Labor Code sections 202 and 203.

> These sections create "nonnegotiable state-law rights . . . independent of any right established by contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985); see CAL. LAB. CODE § 219 (no provision in the article, including sections 202 and 203, "can in any way be contravened or set aside by a private agreement, whether written, oral, or implied"); *id.*, § 222 ("It shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either willfully or unlawfully or with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon").
>
> If a state law cannot be waived or modified by private contract, and if the rights it creates can be enforced without resort to the particular terms, express or implied, of the labor contract, the LMRA does not preempt a claim for violation of the law. *Miller v. AT&T Network Systems*, 850 F.2d 543, 545-46 (9th Cir. 1988). Stated otherwise, section 301 of the LMRA does not "grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. . . ." *Allis-Chalmers*, *supra*, 471 U.S. at 212; see also *Hayden v. Reickerd*, 957 F.2d 1506, 1509 (9th Cir. 1992).

(*Soremekun*, *supra*, 509 F.3d at p. 990.)

Initially, this court opined, in reading *Soremekun* that since plaintiff Benito Hernandez's claims (or a significant portion of them) are premised on state Labor Code violations, they cannot be waived or modified by the CBA and, particularly, the specific grievance procedures.

In their supplemental brief, Moving Defendants revisit *Soremekun* acknowledged "at least one claim was *not* preempted. Nevertheless, the court determined that even unpreempted claims were subject to the parties' agreements regarding submission of grievance."[4] In re-reading *Soremekun*, it would appear Moving Defendants are correct.

> The undisputed evidence shows that the grievance procedures set forth in the CBAs were not followed, and that Rite Aid did not receive contractual notice of Soremekun's wage claims as required. See *Hagin v. Pacific Gas & Elec. Co.*, 152 Cal. App. 2d 93, 96-98, 312 P.2d 356 (1957) (holding that a discharged employee could not recover board and lodging expenses under Labor Code §§ 202 and 203 because he failed to submit a grievance as required by the collective bargaining agreement and establish that the monies were due); cf. *Lim v. Prudential Insurance Co. of America*, 36 Fed.Appx. 267, 271 (9th Cir. May 17, 2002) (Unpub. Disp.) (holding, in a case where an employee sued for wrongful termination in violation of public policy, and asserted that her employer discharged her to avoid paying earned commissions, that "[b]ecause Lim's claim is based on a violation of a fundamental state statutory policy that is independent of the CBA and because her claim is not based on a breach of the CBA, the district court erred in dismissing that claim on the ground that Lim failed to exhaust the CBA's grievance procedure," but noting that "the court hearing Lim's claim may be required to refer to the collective bargaining agreement in order to confirm that termination did indeed deprive Lim of earned commissions"). Like the plaintiff in *Hagin*, Soremekun cannot show that the bereavement leave pay and overtime wages he seeks to recover were "due" when he resigned in 2003 because he failed to submit grievances regarding those claims as required by the CBAs.

(*Soremekun*, *supra*, 509 F.3d at pp. 992-993.)

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[4] See page 4, lines 5 – 7, of Moving Defendants' Second Supplemental Reply Memorandum of Points and Authorities in Support of Motion for Summary Judgment.

Moving Defendants referenced various California decisions to support this conclusion at the last hearing and also cites to them again in their supplemental brief.

> It is well established that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust the internal remedies before resorting to the courts in the absence of facts excusing such exhaustion. (*Cone v. Union Oil Co.*, 129 Cal.App.2d 558, 563-564 [277 P.2d 464]; *Terrell v. Local Lodge 758 etc. Machinists*, 141 Cal.App.2d 17, 21-22 [296 P.2d 100]; *Hagin v. Pacific Gas & Elec. Co.*, 152 Cal.App.2d 93, 96 [312 P.2d 356]; *Stroman v. Atchison, T. & S. F. Ry. Co.*, 161 Cal.App.2d 151, 166 [326 P.2d 155]; *Thornton v. Victor Meat Co.*, 260 Cal.App.2d 452, 467 [67 Cal.Rptr. 887]; *Gutierrez v. Gaffers and Sattler Corp.*, 4 Cal.App.3d 731, 735 [84 Cal.Rptr. 571]; *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42*, 4 Cal.3d 888, 894-895 [95 Cal.Rptr. 53, 484 P.2d 1397].)
>
> As explained in *Cone v. Union Oil Co.*, *supra*, at page 564, "[this] rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts [citation], is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. [Citation.] The use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer relations. [Citation.] Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies."

> We of course understand plaintiff's desire to remedy the breach of what he claims was a private doctor-patient relationship, the loss of his job, and the injury to his reputation which results from the employer's position as to the reason for his discharge. But the subject matter of the dispute is such that the collective bargaining agreement provided a method of resolving it. Plaintiff should have followed through with those procedures. "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. . . . [It] would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement." (*Republic Steel v. Maddox*, 379 U.S. 650, 653 [13 L.Ed.2d 580, 583, 85 S.Ct. 614][5].)

(*Johnson v. Hydraulic Research & Mfg. Co.* (1977) 70 Cal.App.3d 675, 679-680.)

Plaintiffs seemingly take issue with the age of the decisions relied upon by Moving Defendants and contend they should give way to the more recent decisions of *Barrentine v. Arkansas-Best Freight System, Inc.* (1981) 450 U.S. 728 (*Barrentine*) and *Zavala*, discussed above, which Plaintiffs contend stand for the proposition that a collective bargaining agreement cannot waive statutory rights. On that point, the court does not disagree. However, as discussed above, this court does not find *Zavala* (or *Barrentine*) to be particularly persuasive as neither address the exhaustion argument raised by Moving Defendants here.

The court does not view the exhaustion requirement to operate, as Plaintiffs argue, a waiver or an abrogation of their statutory rights but rather as a contractually agreed upon prerequisite to enforcement of those statutory rights.

Accordingly, upon further review, reflection, and consideration of the authorities cited by the parties, Moving Defendants' motion for summary judgment of the complaint against plaintiff Benito Hernandez is GRANTED.

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[5] *Republic Steel* is also cited in *Soremekun*. See *Soremekun*, *supra*, 509 F.3d at p. 986, fn. 35.

This court's review of Moving Defendants' motion for summary judgment/ adjudication is limited to the "Preemption issue." Thus, this court otherwise adopts the ruling issued by Judge Manoukian on or about May 16, 2024 with regard to Moving Defendants' motion for summary judgment/ adjudication.

The Court will prepare a formal order.

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Calendar Line 3
Case Name: *Nurettin Burcak Beser v. Mateon Therapeutics, Inc., et al.*
Case No.: 22CV406851

Before the Court is plaintiff Nurettin Burcak Beser's motion for summary adjudication. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling as follows.

I. Background.

Plaintiff Nurettin Burcak Beser ("Plaintiff") was employed by defendant PointR Data, Inc. ("PointR") when defendants Mateon Therapeutics, Inc. ("Mateon") and Oncotelic Therapeutics Inc. ("Oncotelic") purchased PointR. (First Amended Complaint ("FAC"), ¶22.) Defendants hired Plaintiff pursuant to the terms of a written employment agreement ("Agreement") to work as an engineer with the title of Senior Vice President/ Chief Technology Officer of Artificial Intelligence, on or about November 15, 2019. (FAC, ¶¶23 and 26[6].) Plaintiff worked remotely in California on defendant Mateon's artificial intelligence team. (*Id.*)

Defendants Vuong Trieu ("Trieu"), Amit Shah ("Shah"), and Saran Saund ("Saund") were officers, directors, and/or managing agents of defendants Mateon, Oncotelic, and PointR. (FAC, ¶24.)

Throughout his employment, Plaintiff was a salaried employee. (FAC, ¶25.) The Agreement set the terms of Plaintiff's employment, including his compensation and benefits and termination provisions. (FAC, ¶26.) Plaintiff's annual salary was to be $230,000 per year, payable every pay period. (*Id.*) Plaintiff was entitled to a 30% bonus every year. (*Id.*) In the event Plaintiff was terminated without cause, defendants agreed to pay Plaintiff any unpaid salary, a lump sum cash payment equivalent to one year's salary, accrued paid time off, health insurance benefits for one year, and other benefits. (*Id.*)

In addition to any unpaid salary and accrued paid time off, Plaintiff was also entitled to a lump sum cash payment equal to one year's salary, health insurance benefits for one year and other benefits if Plaintiff quit for "Good Reason", defined as "(a) any decrease in

[6] A copy of the Agreement is purportedly attached to the FAC as Exhibit A, but the FAC filed with the court does not include a copy of the Agreement.

compensation, (b) material diminution in title or responsibilities, or (c) requirement to relocate more than 50 miles." (FAC, ¶27.)

Plaintiff performed under the employment agreement. (FAC, ¶28.) Plaintiff met all objectives set by Defendants and regularly worked in excess of forty hours per week. (*Id.*) Plaintiff took no actions that would trigger the Agreement's for-cause termination provisions. (*Id.*)

Defendants did not pay Plaintiff for all work performed in October, November, and December 2021. (FAC, ¶29.) On or about November 15, 2021, defendants informed employees that they were being "furloughed" pending a prospective round of start-up funding. (*Id.*) Defendants repeatedly asked Plaintiff to perform work during the "furlough" and Plaintiff continued to work and perform his duties under the Agreement. (*Id.*)

Although Plaintiff received his full salary for the month of January 2022, he only received half his salary for work performed in February 2022. (FAC, ¶30.) Defendants failed to pay Plaintiff his full and complete promised salary thereby decreasing his compensation. (*Id.*) Plaintiff sent multiple requests for the compensation he was owed. (FAC, ¶31.) On or about February 8, 2022, Plaintiff gave defendants thirty days to remedy their failure to compensate Plaintiff, but defendants did not cure their breach of the Agreement. (*Id.*) On or about March 14, 2022, [Plaintiff] resigned with Good Reason. (FAC, ¶32.)

Defendants did not pay Plaintiff any salary for work performed in October 2021, November 2021, December 2021, and March 2022. (FAC, ¶33.) Defendants only paid one-half Plaintiff's salary for work performed in February 2022. (*Id.*) Despite demand for payment, defendants failed and refused to pay Plaintiff $76,644 in unpaid salary. (*Id.*) Defendants did not pay Plaintiff the 30% bonus he earned despite completing all roles and objectives communicated to him. (FAC, ¶34.) Defendants failed and refused to pay Plaintiff the $69,000 bonuses in 2020 and 2021. (*Id.*) Defendants failed and refused to pay Plaintiff for accrued and unused paid time off. (FAC, ¶35.) Defendants did not pay Plaintiff the severance pay (one year salary, continued health insurance, and other benefits) due to him under the Agreement in the event of Plaintiff's resignation for Good Reason. (FAC, ¶36.)

From October 1, 2021 to December 31, 2022, Plaintiff did not receive a guaranteed salary for each work week. (FAC, ¶37.)

On November 2, 2022, Plaintiff filed a complaint against defendants Mateon, PointR, Oncotelic, Trieu, and Shah asserting causes of action for:

(1) Failure to Pay Minimum Wage including Liquidated Damages

(2) Failure to Pay Wages on Termination, Cal. Labor Code §§201 and 203

(3) Failure to Provide Accurate Itemized Wage Statements, Cal. Labor Code §§226 and 1174

(4) Violation of Cal. Labor Code §558

(5) Unfair Business Practices under the Unfair Competition Law, Cal. Business and Professions Code §§ 17200 et seq.

(6) Breach of Contract

On January 27, 2023, defendants filed an answer to Plaintiff's complaint.

On June 5, 2024, Plaintiff filed the operative FAC which added defendant Saund, but otherwise continues to assert the same six causes of action asserted in Plaintiff's original complaint.

On July 10, 2024, defendants filed an answer to Plaintiff's FAC.

On July 18, 2024, Plaintiff filed the motion now before the court, a motion for summary adjudication. The notice of motion identifies 19 separate issues for which Plaintiff seeks summary adjudication.[7]

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[7] At the outset, the court will note that Plaintiff is seeking adjudication of some issues which are not the proper subject of summary adjudication. "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." (Code Civ. Proc., §437c, subd. (f)(1).) By way of example, Plaintiff's notice of motion seeks summary adjudication that, "[Plaintiff] Beser Resigned for Good Reason." This is not an issue subject to summary adjudication, except pursuant to a stipulation and court order. "Notwithstanding subdivision (f), a party may move for summary adjudication of a legal issue or a claim for damages other than punitive damages that does not completely dispose of a cause of action, affirmative defense, or issue of duty pursuant to this subdivision." (Code Civ. Proc., §437c, subd. (t).) However, a motion for summary adjudication pursuant to subdivision (t) must be pursuant to joint stipulation and order of the court (see Code Civ. Proc., §437c, subd. (t)(1)-(2)), which did not occur here. Rather than look to the issues identified in Plaintiff's notice of motion, the court will address the issues as framed by Plaintiff's memorandum of points and authorities.

II. PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION IS DENIED.

A. PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF THE SIXTH CAUSE OF ACTION [BREACH OF CONTRACT] AGAINST DEFENDANT ONCOTELIC IS DENIED.

"If an employer fails to pay wages in the amount, time, or manner required by contract or by statute, the employee … may seek judicial relief by filing an ordinary civil action against the employer for breach of contract and/or for the wages prescribed by statute. (Lab. Code, §§ 218, 1194.)" (*Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 350.)

Plaintiff has done so here by filing a civil action against his employer for breach of contract which is the sixth cause of action of Plaintiff's operative FAC. Although the sixth cause of action is directed against all defendants, Plaintiff (as the court understands in reading Plaintiff's argument [see footnote 2]) initially moves for summary adjudication of his sixth cause of action for breach of contract against defendant Oncotelic.

"A party may move for summary judgment in an action or proceeding if it is contended … that there is no defense to the action or proceeding." (Code Civ. Proc., §437c, subd. (a)(1).) "A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action." (Code Civ. Proc., § 437c, subd. (p)(1).) As Plaintiff acknowledges, "the elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

In support of his motion for summary adjudication, Plaintiff proffers a copy of his employment agreement [Agreement] with defendant Mateon, executed by defendant Mateon's CEO, defendant Trieu.[8] In response to discovery requests, defendant Oncotelic admitted that defendants Mateon and Oncotelic are the same entity and that defendant Oncotelic assumed

[8] See ¶5 and Exh. A to the Declaration of Plaintiff Nurettin Burcak Beser in Support of Motion for Summary Adjudication ("Declaration Beser"). See also Plaintiff Nurettin Burcak Beser's Separate Statement of Undisputed Facts in Support of Motion for Summary Adjudication ("Plaintiff's SSUF"), Issue No. 2, Fact Nos. 3 – 5.

any contractual obligations that defendant Mateon owed to Plaintiff.[9] Plaintiff also submits evidence that he performed his obligations under the Agreement.[10] Plaintiff thereafter proffers evidence that defendant Oncotelic breached the Agreement by failing to pay Plaintiff's salary in full.[11] Further, defendant Oncotelic breached section 6.4 of the Agreement which provides that "in the event of a Termination with Good Reason," then "Mateon shall provide to Executive" (i) unpaid salary and accrued unpaid PTO; (ii) a lump sum cash payment equal to a year's salary; (iii) the Executive retains all existing rights to stock options and rights; and (iv) all insurance benefits or COBRA coverage for a year after termination as Plaintiff has not received any of the benefits due under section 6.4 of the Agreement.[12] Plaintiff calculates his damages, "[e]xclusive of stock rights and insurance benefits"[13], amount to $474,319.35.[14]

As already noted above, Plaintiff's motion is fundamentally flawed in that it seeks adjudication of issues which are not the proper subject of summary adjudication. Now having read and reviewed Plaintiff's argument, it is clear to the court that Plaintiff is attempting to obtain partial summary adjudication even with respect to this sixth cause of action for breach of contract.[15] Plaintiff's calculation of damages for breach of contract is, admittedly, "[e]xclusive of stock rights and insurance benefits." By excluding a portion of the damages, summary adjudication is not available here as it would not completely dispose of Plaintiff's breach of contract cause of action. Again, "[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." (Code Civ. Proc., §437c, subd. (f)(1).) "The purpose of the enactment of Code of Civil Procedure section 437c, subdivision (f) was to stop the practice of

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[9] See Plaintiff's SSUF, Issue No. 1, Fact Nos. 1 – 2.
[10] See Plaintiff's SSUF, Issue No. 3, Fact Nos. 7 – 46.
[11] See Plaintiff's SSUF, Issue No. 4, Fact Nos. 47 – 52.
[12] See Plaintiff's SSUF, Issue No. 7, Fact Nos. 65 – 66.
[13] See page 11, line 20 of Plaintiff Nurettin Burcak Beser's Memorandum of Points and Authorities in Support of Motion for Summary Adjudication ("Plaintiff's MPA").
[14] See Plaintiff's SSUF, Issue No. 8, Fact Nos. 68 – 81.
[15] As set forth in Plaintiff's FAC, "Defendants, and each of them, breached the employment agreement by failing to pay earned wages, reducing Plaintiff's compensation, diminishing Plaintiff's job responsibilities, failing to cure Defendants' breaches after receiving 30-days' notice of breach, ***failing to accelerate Plaintiff's stock*** and pay severance after Plaintiff resigned with Good Reason … Plaintiff is entitled to compensation for … ***health insurance benefits and other benefits*** in an amount to be determined at trial." (FAC, ¶¶83 and 86; emphasis added.)

piecemeal adjudication of facts that did not completely dispose of a substantive area." (*Catalano v. Superior Court* (2000) 82 Cal.App.4th 91, 97.)

> Because issues of the calculation of damages apparently remain to be determined, it is not appropriate to grant summary judgment for appellant at this time. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1996) P 10:40.1, p. 10-17 [summary judgment or adjudication improper where amount of damages raises factual issue].) The correct procedure below would have been a motion to bifurcate the issue of liability, which the parties could have tried upon the undisputed facts. (Code Civ. Proc., § 598.) A decision on the issue of liability against the party on whom liability is sought to be imposed does not result in a judgment until the issue of damages is resolved.

(*Dept. of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1097.)

Similarly here, since the calculation of other contract damages remains, Plaintiff's motion for summary adjudication of the sixth cause of action for breach of contract is DENIED.

B. **PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION – THAT EACH DEFENDANT IS JOINTLY AND SEVERALLY LIABLE TO PLAINTIFF FOR $474,319.35 IN UNPAID WAGES UNDER CA LABOR CODE §202 – IS DENIED.**

"Labor Code sections 201 through 202 call for the payment of wages upon termination or resignation of employees working in various fields. Labor Code section 203 provides penalties for employers who fail to pay 'any wages of an employee' in violation of those sections." (*On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, 1086.)

Since Plaintiff alleges he resigned his employment (as opposed to being terminated), Plaintiff's second cause of action alleges a violation of Labor Code section 202 (although the cause of action's title and the caption reference Labor Code section 201) which, as Plaintiff alleges, provides, "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter." (FAC, ¶54.) "Plaintiff is entitled to recover 'waiting time' penalties … pursuant to Labor Code section 203." (FAC, ¶59.)

However, rather than moving for summary adjudication of his second cause of action, Plaintiff muddies the water by requesting summary adjudication of various issues. Presumably in the context of this second cause of action, Plaintiff seeks a determination that each of the defendants (Mateon, Oncotelic, PointR, Trieu, and Shah) is an employer liable for Plaintiff's unpaid wages.[16] Plaintiff also seeks an adjudication that defendants failed to pay Plaintiff his wages upon his [resignation][17], thereby entitling Plaintiff to waiting time penalties.

Independently, these are not issues which are properly subject to a motion for summary adjudication. Even if liberally construed by this court to be issues directed at Plaintiff's second cause of action, the court finds Plaintiff has not met its initial burden to "prove each element of the cause of action entitling the party to judgment on the cause of action." (Code Civ. Proc., §437c, subd. (p)(1).) This is because, as framed by the FAC, Plaintiff's second cause of action alleges both failure to pay wages upon resignation (Lab. Code, §202) and seeks waiting time penalties (Lab. Code, §203). To obtain summary adjudication of the second cause of action, Plaintiff must completely dispose of the cause of action.

On the waiting time penalty, Labor Code section 203 states:

> If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 201.6, 201.8, 201.9, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

Plaintiff himself recognizes waiting time penalties are only allowed if Plaintiff establishes that "an employer willfully fails to pay" wages due upon resignation.

> The statute … contemplates that the penalty shall be enforced against an employer who is at fault. It must be shown that he owes the debt and refuses to pay it. He is not denied any legal defense to the validity of the claim.' [¶]

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[16] See page 2, lines 18 – 23 (item nos. 10 -14), of the Notice of Plaintiff Nurettin Burcak Beser's Motion for Summary Adjudication ("Plaintiff's Notice"). See also page 12, line 1 to page 14, line 24 of Plaintiff's MPA.
[17] See page 2, line 25 (item no. 16), of the Plaintiff's Notice. See also page 18, line 18 to page 19, line 18 of Plaintiff's MPA.

> However, to be at fault within the meaning of the statute, the employer's refusal to pay need not be based on a deliberate evil purpose to defraud [employees] of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act which was required to be done." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7 [177 Cal. Rptr. 803], fn. omitted.) Similarly, in *Davis v. Morris* (1940) 37 Cal.App.2d 269, 274 [99 P.2d 345] (*Davis*), the court explained, "'In civil cases the word "willful" as ordinarily used in courts of law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.'"

(*Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891.)

Plaintiff proffers evidence that defendant Mateon did not pay all wages due on [Plaintiff's] last day of work and defendant Mateon did not remedy its failure to compensate [Plaintiff] for work performed.[18] However, neither of these facts address the intentionality or willfulness of defendant Mateon's conduct. Moreover, insofar as Plaintiff claims defendants Oncotelic, PointR, Trieu, and Shah are also Plaintiff's employers, Plaintiff has not offered any evidence with regard to their intentional failure or refusal to pay Plaintiff his wages upon his resignation.

Furthermore, defendants proffer evidence in opposition disputing whether Plaintiff was entitled to receipt of annual bonuses for 2020 and 2021.[19] Specifically, defendants proffer evidence that distribution of bonuses was left to the discretion of defendant Oncotelic's board of directors who decided, based on the financial status of the company, that no employees or executives (including Plaintiff) would receive bonuses for 2020 and 2021. This presents a

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[18] See Plaintiff's SSUF, Issue No. 16, Fact Nos. 116 – 117.
[19] See Defendants' Proposed Additional Facts, Fact No. 7.

triable issue of material fact with regard to the amount of wages Plaintiff claims he is entitled to.

As Plaintiff has not met his initial burden and there being a triable issue of material fact even if Plaintiff had met his initial burden, Plaintiff's motion for summary adjudication [whether directed at the second cause of action of Plaintiff's FAC or otherwise] is DENIED.

C. **PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION – THAT DEFENDANTS FAILED TO PAY PLAINTIFF MINIMUM WAGE – IS DENIED.**

Plaintiff apparently pleads in the alternative under his first cause of action that if he is not entitled to receive his full salary, he is at least entitled to recover minimum wage for the period "[b]etween October 2021 and the end of December 2021, [when] Plaintiff worked hours for which he recovered no compensation." (FAC, ¶¶41 and 46.)

> Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

(Lab. Code, §1194, subd. (a).)

In opposition, defendants assert Plaintiff was placed on a company-wide furlough for October 16 – 31, 2021 and November 16 – 30, 2021[20], thereby creating a triable issue of material fact with regard to whether Plaintiff is entitled to any compensation for those time periods. However, the evidence that defendants cite to is paragraph 20 of defendant Trieu's declaration. In looking at paragraph 20 of defendant Trieu's declaration, defendant Trieu does not make any statement concerning furlough. Nevertheless, defendant Trieu does state that "Beser did not work at least 40 hours per week in October 2021."[21] This evidence has the same effect in that it creates a triable issue of material fact with regard to whether Plaintiff was entitled to receive minimum wage for October 2021.

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[20] See page 3, lines 3 – 6 of Defendants' Opposition to Plaintiff Nurettin Burcak Beser's Motion for Summary Adjudication.

[21] See ¶19 to the Declaration of Vuong Trieu.

Accordingly, Plaintiff's motion for summary adjudication [whether directed at the first cause of action of Plaintiff's FAC or otherwise] is DENIED.

D. **PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION – THAT DEFENDANTS TRIEU, SHAH, AND POINTR ARE LIABLE FOR VIOLATIONS OF LABOR CODE §§1194 AND 203 – IS DENIED.**

As a final argument, Plaintiff seeks summary adjudication that defendants Trieu, Shah, and PointR are separately liable for violations of Labor Code sections 1194 [minimum wage] and 203 [waiting time penalties] pursuant to Labor Code section 558.1 which states, in relevant part:

> (a) Any employer ***or other person acting on behalf of an employer***, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.
>
> (b) For purposes of this section, the term "other person acting on behalf of an employer" is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term "managing agent" has the same meaning as in subdivision (b) of Section 3294 of the Civil Code.

(Emphasis added.)

However, in light of the rulings above, Plaintiff either has not met his initial burden or a triable issue of material fact exist with regard to defendants' underlying liability for violations of Labor Code sections 203 and 1194. Thus, it follows that Plaintiff is not entitled to summary adjudication by relying upon Labor Code section 558.1. To the extent Plaintiff is seeking an adjudication or determination that defendants Trieu, Shah, and PointR are "other person[s] acting on behalf of an employer" pursuant to Labor Code section 558.1, this is not a proper subject of summary adjudication.

Accordingly, Plaintiff's motion for summary adjudication against defendants Trieu, Shah, and PointR [whether directed at any particular cause of action of Plaintiff's FAC or otherwise] is DENIED

The Court will prepare the formal order.

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