UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 17-2274-DOC (DFMx) Date: August 7, 2018

Title: MITCHELL V. CORELOGIC, INC. ET AL.

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Deborah Lewman	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS [49]

Before the Court is Defendant Corelogic Valuation Solutions, Inc.'s ("Corelogic" or "Defendant") Motion to Dismiss and/or Strike ("Motion") (Dkt. 49) portions of Plaintiffs Jason Summers and Harriett Mitchell's (collectively, "Plaintiffs") Second Amended Complaint ("SAC") (Dkt. 43). The Court finds this matter appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. Having reviewed the moving papers and considered the parties' arguments, the Court GRANTS IN PART and DENIES IN PART Defendant's Motion.

I. Background

A. Facts

The following facts are drawn from Plaintiffs' Second Amended Complaint.

Plaintiff Harriett Mitchell, Plaintiff Jason Summers, and the putative class and collective action members allege they are or were employed by Defendants Corelogic,

Inc., Corelogic Solutions, LLC, and Corelogic Valuation Solutions, Inc. (collectively, "Defendants") under the following titles: "appraiser," "valuation solutions appraiser," "staff appraiser," "residential appraiser," and other similar positions (collectively, "appraisers"). SAC ¶ 1.

Plaintiff Harriett Mitchell resides in Los Angeles County, California and worked for Defendants as an appraiser from on or around October 1, 2015, to April 5, 2018. *Id.* ¶ 10. Representative Plaintiff Jason Summers resides in Kern County, California, and worked for Corelogic as an appraiser from on or around October 1, 2015, to on or around July 15, 2017. *Id.* ¶ 11.

Defendant Corelogic, Inc. is a Delaware Corporation whose principal "executive business office" is in Irvine, California. *Id.* ¶ 12. Defendant Corelogic Solutions, LLC is registered in California with a principal business office in Irvine, California and, Plaintiffs allege, is a subsidiary of Corelogic, Inc. *Id.* ¶ 13. Defendant Corelogic Valuation Solutions, Inc. is registered in California with a principal business office in Irvine, California, and is the entity named on appraisers' wage statements. *Id.* ¶ 14.

Plaintiffs are or were hourly wage employees, paid biweekly, and received additional non-discretionary incentive payment each month if they met a threshold billing requirement. [1] *Id.* ¶ 2.

Plaintiffs allege that Defendants "assign[ed] appraisers detailed production orders with vendor specifications, guidelines, and deadlines by which appraisers [were] to complete the orders." *Id.* ¶ 20. Further, Defendants had deadlines by which appraisers needed to submit reports and meet performance standards. *Id.* ¶ 23. Plaintiffs allege that if an appraiser failed to meet Defendants' deadlines or standards, the appraiser could face discipline such as verbal warnings, write-ups, reduction in high-value assignments, and/or termination. *Id.*

In addition, Defendants monitored appraisers' "turnaround times" and performance using a "performance rating system." *Id.* ¶ 24. Based on that system, Defendants assigned each appraiser a performance rating. *Id.*

According to Plaintiffs, appraisals are time sensitive and require a variety of tasks to complete, the timing of which can vary depending on weather conditions, customer schedules, code compliance, broker availability, cancellations, specification changes from

[1] Some of the unnamed Plaintiffs may be current employees, but because the named Plaintiffs are former employees, the Court will use past tense for the purposes of this order.

vendors, and other factors outside of appraisers' control. *Id.* ¶ 21. Appraisers working for Defendants could have as many as three on-site inspections a day, each of which can take one-and-a-half to four hours depending on the size of the property. *Id.* ¶ 22. In addition, appraisers draft and finalize appraisal reports from previous inspections, and research properties for inspection. *Id.*

Plaintiffs allege that they, and others similarly situated, regularly worked more than forty hours per week and eight hours per day due to "tight production deadlines, high quality standards, customer scheduling constraints, demanding workloads, and fear of discipline." *Id.* ¶ 25. Additionally, Defendants do not impose a company policy or practice that requires a day off, so appraisers often work six or seven days per week. *Id.* ¶ 26. Plaintiffs further allege that they, and others similarly situated, were routinely unable to take legally required meal and rest breaks. *Id*. ¶ 27.

In terms of pay, appraisers employed by Defendants receive non-discretionary incentive pay if they meet a threshold billing requirement, and overtime pay based on time and a half of the appraisers' hourly rate. *Id*. ¶¶ 28–29. Defendants paid appraisers' hourly wage on a bi-weekly basis, and paid appraisers' incentive payment on a monthly basis, based upon work completed in the month prior to payment. *Id.* ¶¶ 28–30. At the end of each month, Defendants also, separately from the incentive payment, pay appraisers a "co-efficient of their overtime" ("Co-Efficient OT"). *Id.*

Defendants call the incentive payment that they pay on a monthly basist a "production bonus." *Id.* ¶ 33. In calculating the incentive compensation, Defendants use billings to measure productivity, but, according to Plaintiffs, billings do not increase with every hour an appraiser works. *Id*. Defendants' formula for the incentive pay also includes an "Efficiency Tier" that measures billings per hour by dividing total eligible billings by total hours (including overtime hours). *Id*. ¶ 34.

In total, Defendants calculated an appraiser's incentive pay using the "total incentive" formula:

Total Incentive = Eligible Billings x Incentive Tier x OnTime Modifier. *Id.* ¶ 36.

To be eligible for the incentive payment, appraisers' needed to meet a minimum monthly billing threshold initially set at $7,500 and reduced by $350 for "Non-Production Day[s]" ("NPDs") within the production period. *Id*. ¶ 37. NPDs are full-day time-off periods including paid time off, company holidays, and other approved leave,

which reduce the minimum billings threshold that appraisers have to meet for the relative period. *Id.*

Thus, the formula for calculating the Elligible Billings factor that goes into the Total Incentive formula is: Eligible Billings = Total billings – (7,500 – (NPDs x 350)). *Id.*

Next, Defendants determine an appraiser's Efficiency Tier ("ET") to find the relative Incentive Tier, which is another factor used to determine the incentive pay; as shown in the Total Incentive formula above. *Id.* ¶ 38. The Efficiency Tier is calculated as: ET = (Appraiser Billings) / (Total Hours worked including overtime). *Id.* ¶ 39. Plaintiffs allege that number (ET) is then used to find the Incentive Tier Percentage from the chart pictured below. *Id.* ¶ 40.

Efficiency Tier

Staff Appraiser Billings Tier

Tier	Staff Appraiser Billings	Efficiency <$70	Efficiency $70-$99.99	Efficiency $100-$129.99	Efficiency >$130
1	Below Threshold (<$7,500)	0%	0%	0%	0%
2	$7,500 - $10,499	15%	17%	19%	20%
3	$10,500 - $16,999	28%	36%	39%	40%
4	$17,000 - $24,999	29%	38.5%	43%	43.5%
5	> $25,000	31%	39%	44%	44.5%

Plaintiffs allege that the ET will decrease in proportion to an increase in overtime hours reported because overtime is included in the denominator of the ET formula while the numerator (billings) does not necessarily increase, and that when the ET decreases, the Incentive Tier (percentage from the chart above) also decreases, effectively decreasing the Total Incentive Payment. *Id.* ¶ 46. Thus, Plaintiffs assert that under Defendants' formula, incentive pay can go down the more overtime an appraiser works. *Id.*

Finally, Defendants calculate an appraiser's "On-Time/ Service Level Agreement Modifier" (On-time/ SLA Modifier") by determining the percentage of time (On-Time Percentage) that an appraiser delivers an appraisal on or before Defendants' deadlines based upon the assigned production order. *Id.* ¶ 42. Plaintiffs allege that Defendants apply

the On-Time Percentage to its On-Time/SLA Percentage table pictured below to determine if a "modifier" will be applied to the appraiser's gross incentive pay. *Id.* ¶¶ 42–43. While Plaintiffs do not explain fully the modifier, based on the example provided, the modifier is the "wrapper" percentage determined from the table below, and then added to 100%, and used as a factor in the total incentive formula (Eligible Billings x Incentive Tier x OnTime Modifier). *Id.* ¶¶ 36–47.

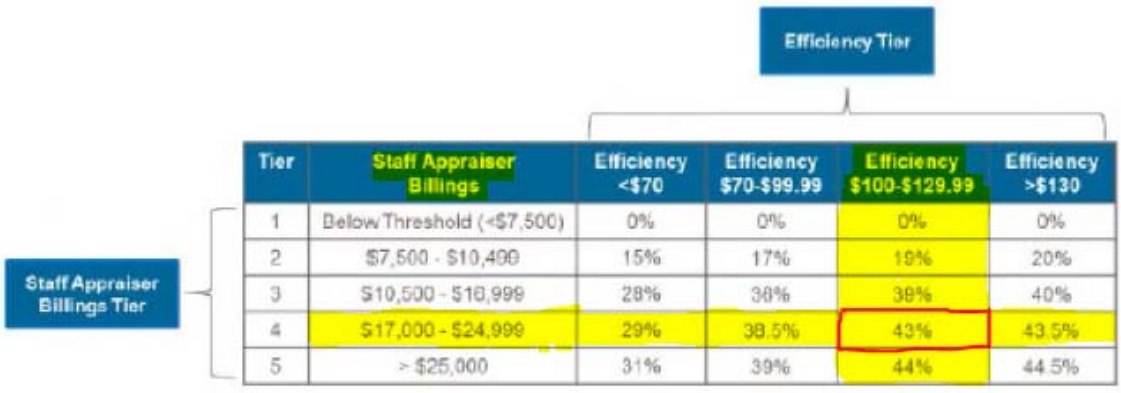
On-Time/SLA %	Wrapper
<90%	0%
90%-97.99%	1%
98%+	2.5%

Plaintiffs provide the following example to illustrate the alleged formulas. If an appraiser had $20,000 in total billings, 2 NPDs, and worked 160 regular hours and 40 overtime hours, the equation would be as follows:

Eligible Billings = $20,000 – ($7500 – (2 x $350)) = $13,200

ET = $20,000/ (160 + 40 hrs) = $100/hr

Incentive Tier = 43% (determined from chart below using staff appraiser billings of $20,000 and Efficiency of $100/hr)



Tier	Staff Appraiser Billings	Efficiency <$70	Efficiency $70-$99.99	Efficiency $100-$129.99	Efficiency >$130
1	Below Threshold (<$7,500)	0%	0%	0%	0%
2	$7,500 - $10,499	15%	17%	19%	20%
3	$10,500 - $16,999	28%	36%	38%	40%
4	$17,000 - $24,999	29%	38.5%	43%	43.5%
5	> $25,000	31%	39%	44%	44.5%

On Time/ SLA: 102.5%

Total Incentive = $13,200 x 43% x 102.5% = $5,817.90

Then, if 40 more overtime hours were added, the ET would become: $ 20,000/ (160+ 80) = $83.33/hr, making the Incentive Tier 38.5% (in the chart billings Tier 4 and ET $70–99.99). Then, the total incentive would decrease to $ 5,209.05 based on the following calculation:

Total Incentive = $13,200 x 38.5% x 102.5% = $5, 209.05

Id. ¶¶ 36–47. The total incentive payment is then used to calculate appraisers' regular rate of pay, which is not a separate payment but is a theoretical hourly rate inclusive of all eligible earnings for a period that is used to calculate the overtime premium due. *Id.* ¶¶ 36–48. Plaintiffs allege that Defendants' incentive pay formulas reduce appraisers' incentive pay when they report overtime, and thus reduces total earnings for the purpose of calculating appraisers' regular rate, which is used for calculating the overtime premium on the incentive payment. *Id.* ¶ 48. Thus, Plaintiffs allege that Defendants have an incentive to impose overtime on their employees because overtime reduces Defendants' cost of wages by decreasing the regular rate, which decreases the overtime premium paid to appraisers. *Id.*

Next, Plaintiffs allege that the Co-Efficient OT—the overtime premium due solely on the incentive pay—that Defendants pay appraisers at the end of each month fails to fully include appraisers' incentive payment in its calculation of the regular rate. *Id.* ¶ 49.

Defendants' Co-Efficient Overtime formula is:

Co-Efficient Overtime = (Total Incentive/ Total Hours Worked) x 50% x Overtime Hours

Id. ¶ 51. The Co-Efficient Overtime appears to be the overtime premium that Defendants pay on top of the incentive payment. *Id.* ¶ 50. Plaintiffs allege that the denominator (Total Hours Worked) of the above formula includes overtime hours, which decreases the Co-Efficient OT in weeks where appraisers report overtime and reduces the appraisers' regular rate. *Id.* ¶ 52.

Plaintiffs allege that they and others similarly situated routinely under-reported overtime hours to avoid the adverse effects based on Defendants' compensation formulas. *Id.* ¶ 53. Plaintiffs allege that, instead, they worked on their "own time" to get work done on time. *Id*. Plaintiff Mitchell alleges that she has spoken with other appraisers and previous supervisors and understands that under-reporting is common among appraisers working for Defendants, and that Defendants knew of the practice. *Id*. ¶ 53.

Plaintiffs allege that to meet Defendants' deadlines, avoid discipline, accommodate the customers' schedules, and generate sufficient billings to meet the threshold for earning incentive pay, appraisers had to work in excess of forty hours per week, eight hours a day, six to seven days per week, and skip legally required meal and rest breaks. *Id.* ¶ 54.

In addition, Plaintiffs allege that appraisers' wage statements do not have a standardized section to show premiums paid for missed meal or rest periods. *Id.* ¶ 55. Furthermore, appraisers did not have a way to record missed rest breaks, and Defendants did not pay premiums for the days appraisers did not have meal or rest breaks. *Id.*

Next, Plaintiffs allege that neither the bi-weekly wage statements nor incentive payment wage statements stated appraisers' regular rate of pay, which Plaintiffs allege should be greater than the hourly rate reflected on appraisers' wage statements because, according to Plaintiffs, the regular rate should include the full incentive payment in addition to the bi-weekly wages for the purposes of calculating overtime. *Id.* ¶ 56.

Plaintiffs further allege that the incentive wage statements that Defendants issue are deficient because the statements do not include the period's start or end date, total number of hours for the performance period related to the incentive payment, or the overtime hours used to calculate the Co-Efficient Overtime on the incentive payment. *Id.* ¶¶ 57–60. As a result, according to Plaintiffs, appraisers could not ascertain which hours or days related to their incentive pay and/or Co-Efficient Overtime Payment using wage statements alone, nor could they understand how the incentive payment and/or Co-Efficient Overtime payments were calculated using the wage statements alone. *Id.* ¶¶ 60–61. Plaintiffs further allege that appraisers could not ascertain their "accurate regular rate of pay for each pay period" using just their wage statements, and accordingly could not determine if they were being paid correctly. *Id.* ¶ 62.

B. Procedural History

On December 29, 2017, Plaintiff Mitchell initiated a law suit against Defendants. *See* Compl. (Dkt. 1). On April 27, 2018, Plaintiffs filed the operative Complaint, their Second Amended Complaint ("SAC") against Defendants, claiming:

(1) Failure to Pay Overtime Compensation, in violation of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*;

(2) Failure to Pay Overtime Compensation, in violation of California Labor Code §§ 510, 1194, and IWC Wage Order(s);

(3) Failure to Provide Itemized Wage Statements, in violation of California Labor Code § 226;

(4) Failure to Provide and/or Authorize Meal and Rest Periods or Pay Meal or Rest Period Premium Wages, in violation of California Labor Code §§ 512 and 226.7, and IWC Wage Order(s);

(5) Unlawful and/or Unfair Business Practices, in violation of California's Unfair Competition Law ("UCL"), Business & Professions Code § 17200 *et seq.*;

(6) Waiting Time Penalties, pursuant to California Labor Code §§ 201–204;

(7) Civil Penalties, pursuant to Private Attorneys General Act, California Labor Code § 2698 *et seq.*; and

(8) Wage Recovery pursuant to California Labor Code § 558.

SAC ¶¶ 85–139.

On May 11, 2018, Defendant Corelogic filed the instant Motion to Dismiss and Strike Plaintiffs' first through third, and fifth through eighth claims, for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). On May 29, 2018, Plaintiffs filed their Opposition ("Opp'n") (Dkt. 52). Defendant filed its Reply on June 4, 2018 ("Reply") (Dkt. 53).

II. Legal Standard

A. Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts which, if true, would entitle the complainant to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire &*

Marine Ins. Co., 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

When a motion to dismiss is granted, the court must decide whether to grant leave to amend. The Ninth Circuit has a liberal policy favoring amendments and, thus, leave to amend should be freely granted. *See, e.g.*, *DeSoto v. Yellow Freight System, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a court need not grant leave to amend when permitting a plaintiff to amend would be an exercise in futility. *See, e.g.*, *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

B. Motion to Strike

Under Rule 12(f), a court may "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f)(2). "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . ." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). "'Immaterial' matter is that which has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994) (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382, at 706–07 (1990)). "'Impertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.*

III. Discussion

Defendant moves to dismiss Plaintiffs' first through third, and fifth through eighth claims for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). *See* Mot. at 1–2. Specifically, Defendant argues that: (1) Plaintiffs' claims for failure to pay overtime fail because efficiency is a lawful factor in the Incentive Pay calculation, (2) Plaintiffs' claims for failure to pay overtime fail because total hours may lawfully be a divisor in calculation of incentive pay and the overtime premium on incentive pay, (3) Plaintiffs' claims for failure to provide itemized wage statements, violation of the UCL, waiting time penalties, and Private Attorney General Act ("PAGA") claims each fail as derivative of the overtime claims, (4) the limitations period for Plaintiffs' claim for underpaid wages is improper and should be stricken, and (5) Plaintiffs do not have standing to seek injunctive relief and all references

to such should be stricken. *See generally* Mot. The Court will address each argument in turn.

A. Failure to Pay Overtime Claims

Plaintiffs claim that Defendants failed to pay overtime compensation in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and in violation of California Labor Code §§ 510, 1194, and the Industrial Welfare Commission's ("IWC") Wage Orders.[2] SAC ¶¶ 85–97. Plaintiffs allege that pursuant to IWC Wage Order No. 4 ("Wage Order") (8 C.C.R. § 11040) and California Labor Code § 510, and, federally, the FLSA, 29 U.S.C. § 207(a), Defendants were required to pay employees at least one and one-half times the regular rate of pay for overtime work performed. *Id.* ¶¶ 85, 95, 96. Further, Plaintiffs claim that non-discretionary incentive pay cannot be designed to decrease in proportion to an increase in overtime hours because 29 C.F.R. § 778 prohibits lowering the hourly rate during overtime hours. *Id.* ¶ 88. Plaintiffs allege that Defendants failed to pay Plaintiffs appropriate overtime compensation because the compensation scheme diminished incentive pay when overtime was worked, which induced appraisers to under-report their overtime hours. *Id.* ¶ 89. Plaintiffs argue that the incentive pay may be unlawful because it does not increase with every hour worked (due to the efficiency factor). Opp'n at 16. Finally, Plaintiffs argue that the manner in which Defendants included incentive pay in the regular rate, using total hours worked as a divisor, was unlawful both under federal and California state law. Opp'n. at 12–13.

Defendant Corelogic argues that using efficiency, which is what can cause the decrease in pay when overtime is worked, as a factor in the calculation for incentive pay and subsequent regular rate calculations is lawful, and that therefore any claim based upon an unlawful use of efficiency in incentive pay and regular rate calculations must fail. Mot. at 10. Defendant Corelogic further argues that it properly included incentive payments in the regular rate of pay calculation by lawfully using total hours worked as the divisor, and, as a result, Plaintiffs' claim that the "total hours worked" divisor violates federal and state labor laws, must also fail. *Id*. at 11. The Court will first address the issue of the efficiency factor causing underreporting of overtime, and will then turn to whether use of a total hours divisor in both the efficiency factor and the overtime premium calculation causes Defendants to improperly undercompensate for overtime hours worked in violation of state and federal law.

[2] The IWC is a state agency that issues wage orders specifying minimum requirements with respect to wages, hours, and working conditions. *Mediola v. CPS Sec. Sols., Inc.*, 60 Cal. 4th 833, 838–39 (2015).

1. Use of Efficiency Factor that Causes Underreporting

First, Defendant Corelogic argues that federal and California law expressly permit efficiency, which is billings relative to hours worked, to be used as a factor in calculating incentive compensation plans. Mot. at 10. In response, Plaintiffs argue that Defendants' plan, and in particular its use of an efficiency factor, is unlawful because it induces appraisers to under-report their overtime hours. Opp'n at 9.

The Fair Labor Standards Act of 1938 ("FLSA") was created to eliminate those "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). While efficiency is expressly permissible as a factor in calculating a non-discretionary bonus, an employer knowingly allowing employees to underreport—and therefore go uncompensated for—overtime, is impermissible. *See Haber v. Americana Corp.*, 378 F.2d 854, 856 (9th Cir. 1967) (finding an efficiency bonus that was non-discretionary was not overtime compensation and should have been included in the regular rate); 29 C.F.R. § 778.211(c) ("Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently . . . are regarded as part of the regular rate of pay."); 29 C.F.R. § 785.13 ("[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them.").

While efficiency factors are thus seemingly permissible, Plaintiffs argues that "the courts must scrutinize the legality of mechanisms employers use to create and encourage off-the-clock work," seemingly suggesting that if a mechanism causes illegal underreporting, then the mechanism itself—in this case, an efficiency factor—may be unlawful. Opp'n at 8. However, while Defendants cannot "suffer" underreporting of overtime without paying for the work being done, Plaintiffs do not cite any statute or case indicating that the Court "must" look at the plan or mechanism that leads to employees underreporting their hours. 29 C.F.R. § 785.13; *see generally* Compl. ¶¶ 88–90; Opp'n at 7–11. Instead, both California and federal law, and precedent, indicate that a claim for off-the-clock liability is predicated upon the following: "(1) [plaintiffs] performed work for which [they] did not receive compensation; (2) that defendants knew or should have known that plaintiff[s] did so; but that (3) the defendants stood idly by." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (internal citation and quotation marks omitted) (discussing California Wage Order No. 14–80 and 29 C.F.R. § 785.11 (1998)). Thus, the standard focuses on a defendant's knowledge that plaintiffs are performing work for which they are not being compensated—it does not focus on the cause of the underpayment or underreporting, and thus does not change the fact that an

efficiency factor may be used as part of a non-discretionary bonus plan. *See id.*; 29 C.F.R. § 778.211(c).

However, Plaintiffs also allege that as a result of the efficiency factor, they, and other employees, routinely under-reported their hours with their supervisors' full knowledge, and were not paid for unreported overtime. SAC ¶¶ 25–27, 53, 89, 96. To the extent that Plaintiffs allege that Defendants knew or had reason to know of employees underreporting their overtime hours, Plaintiffs plausibly plead their claim for failure to pay overtime wages. Specifically, the pleadings plausibly establish that the efficiency factor in Defendants' incentive pay formula incentivized and caused appraisers to underreport their overtime hours, and, Plaintiffs allege, Defendants were aware of the practice. *See Jimenez v. Allstate Ins. Co.*, 765 F.3d at 1165.

Accordingly, the Court DENIES Defendant's Motion to the extent that Plaintiffs' overtime claims are based on off-the-clock liability for underreporting of overtime resulting from the efficiency factor. However, the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' overtime claims to the extent they are premised on the argument that Defendants' use of an efficiency factor itself is unlawful simply because it induces underreporting of overtime.

2. Total Hours Divisor

Next, Plaintiffs argue that Defendants failed to pay appropriate overtime wages because of the use of a total hours worked divisor in Defendants' computation scheme for both the incentive pay and the overtime premium due on the incentive pay. SAC ¶¶ 48–52, 88–89. First, Plaintiffs allege that the inclusion of a total hours divisor (within the efficiency factor) in Defendant's non-discretionary incentive pay scheme causes the incentive pay to decrease in proportion to an increase in the number of overtime hours worked, and that this is illegal because "a pay practice that lowers the hourly rate during statutory overtime hours or weeks when statutory overtime is worked is expressly prohibited" under the FLSA. Opp'n at 11 (citing 29 C.F.R. § 778). In addition, Plaintiffs claim that the use of a total hours divisor, including overtime hours, in the formula used to calculate the overtime premium means that the overtime premium is unlawfully reduced in the weeks that Appraisers work more overtime, which reduces the regular rate and thus both undercompensates Plaintiffs for overtime worked and incentivizes Defendants to impose overtime. *Id.* ¶ 52. In support of their argument, Plaintiffs allege that because the incentive pay scheme dilutes appraisers' incentive pay when they work overtime, the scheme cannot use the production bonus formula (which includes a total hours divisor) to calculate the overtime premium due on the bonus. *Id.* Specifically,

Plaintiffs claim that Defendants' incentive payment is not a production bonus, and is therefore subject to a different computation scheme than those used for production bonuses when calculating the overtime premium, because the incentive pay scheme does not guarantee that all extra hours worked will result in additional compensation.[3] SAC ¶ 50.[4]

In response, Defendant Corelogic argues that the FLSA uses a total hours worked divisor for all non-discretionary bonuses and does not make a distinction for production bonuses that "[do] not guarantee that all extra hours an appraiser works will result in additional compensation." Mot. at 12 (citing SAC ¶ 50). Defendant further argues that as a production bonus, the incentive pay is different from the flat-sum bonus in *Alvarado v. Dart Container Corp. of California*, which required that only non-overtime hours be considered in determining the regular rate of pay. Mot. at 11–12. In addition, Defendant points out that 29 C.F.R. § 778.209 specifies that where a bonus payment is considered part of the employee's regular rate, the amount is added to the employee's other earnings and divided by total hours worked. Mot. at 12. Defendant further contends that its computation scheme is also lawful under California law because the California Division of Labor Standards Enforcement ("DLSE") Manual § 49.2.1.2 states that employers may compute the regular rate by dividing the total earnings for the week, including overtime earnings, by the total hours worked during the week, including overtime hours. *Id*. at 13. The Court will first provide an overview of the California and federal law overtime requirements, and will then turn to addressing whether Defendants unlawfully under calculated overtime pay in violation of California or federal law by using the total hours divisor in computation of the incentive pay and calculation of the regular rate, as well as a total hours divisor in computation of the overtime premium due on the incentive pay.

First, under California law, IWC Wage Order No. 4 and California Labor Code § 510 require an employer to pay overtime premiums for hours worked in excess of eight in a given workday, forty in a given workweek, or on the seventh day worked in a single workweek at the rate of no less than one and one-half times the regular rate of pay for an employee. *See* 8 C.C.R. § 11040. In addition, the DLSE manual and several California cases provide guidance about incorporating bonuses and calculating overtime pay under California law. The DLSE manual states that, "if the bonus is a flat sum . . . the regular bonus rate is determined by dividing the bonus by the maximum legal regular hours

[3] A production bonus is distinguished from a flat sum bonus in that a production bonus is earned through the efforts of an employee. DLSE Manual, § 49.2.4.2, 49-9; *Alvarado v. Dart Container Corp. of California*, 4 Cal. 5th 542, 560 (2018).

[4] Plaintiffs do not indicate why the definition of a Production Bonus should include a requirement that extra hours worked results in additional compensation due.

worked during the period to which the bonus applies."[5] DLSE Manual, § 49.2.4.2. This calculation does not include overtime hours because "the bonus is not designed to be an incentive for increased production for each hour of work." *Alvarado*, 4 Cal. 5th at 560 (citing DLSE Manual, § 49.2.4.2). This view disallowing a total hours divisor so as not to reduce an employee's regular rate supports California's policy discouraging employers from imposing overtime, and construing labor laws in favor of worker protection. *Id*. at 561; *Skyline Homes, Inc. v. Department of Industrial Relations,* 165 Cal. App. 3d 239, 254 (1985); *Mendoza v. Nordstrom, Inc.*, 2 Cal. 5th 1074, 1087 (2017). In addition, the California Supreme Court in *Alvarado* expressly relied upon the California Court of Appeals' reasoning with regard to calculating overtime pay in *Skyline Homes*, in which an employer was found to be unlawfully calculating overtime pay by dividing employees' fixed weekly salary by the total hours worked in the week, not just non-overtime hours. *Alvarado*, 4 Cal. 5th at 564. Because the fixed weekly salary was based on a forty hour work-week, dividing by total hours of work unlawfully reduced employees' hourly rate for overtime. *Id*. In calculation of the regular rate for the purpose of calculating the overtime premium, California state law differs slightly from federal labor laws under the FLSA because California law is slightly more favorable for employees. *Compare Alvarado v. Dart Container Corp. of California*, 4 Cal. 5th 542, 560 (2018) (explaining that under California law an overtime premium is due when an employee works over eight hours in a workday); *with* 29 U.S.C. § 201 (explaining that an overtime premium is due when an employee works more than forty hours in a workweek).

Meanwhile, federally, the FLSA was enacted in 1938 to protect workers from "substandard wages and oppressive working hours." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147 (2012) (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc.*¸450 U.S. 728, 739 (1981)). The FLSA requires "employers to compensate employees for hours in excess of 40 per week at a rate of 1.5 times the employees' regular wages." *Id.* To calculate the regular rate, we "look not to contract nomenclature but to all payments, wages, piece work rates, bonuses, or things of value that form part of the normal weekly income of the employee." *Walling v. Alaska Pac. Consol. Min. Co.,* 152 F.2d 812, 815 (9th Cir. 1945). Bonuses not statutorily excluded from the regular rate must be totaled with other earnings to determine the regular rate for the purposes of overtime pay. 29 C.F.R. § 778.208. For example, if an hourly employee earns $12 per hour, and works 46 hours, then they have earned 46 hours at $12 per hour and an additional overtime premium of half the hourly rate ($6) multiplied by the amount of

[5] In a recent case, the California Supreme Court followed DLSE manual § 49.2.4.2 as an interpretive regulation, even though it was void as an underground regulation, because § 49.2.4.2 interpreted California Labor Code § 510, which still governs as good law. *Alvarado*, 4 Cal. 5th at 560. Thus, DLSE § 49.2.4.2 is persuasive and may be followed in its interpretation of California Labor codes.

overtime hours (6 hours) thus earning a total of $588. C.F.R. § 778.110. Now if the worker earned a production bonus of $46 for the week, noticeably not a flat rate sum, it would need to be included in a calculation of the worker's regular rate for the purpose of calculating the overtime premium. *Id.* So, the total of 46 hours at $12 per hour yields $552 as the base pay for the week, and the additional $46 bonus makes a base total for the week of $598, divided by 46 total hours would yield a regular rate of $13 per hour. Now that the regular rate is determined, the rate of $13 is multiplied by 46 total hours, with an overtime premium added of 6 hours at half of $13 ($6.50) per hour for a grand total of $637 for the week. *Id.*

However, when bonus payments are deferred over a period of time longer than a workweek, the bonus must be apportioned back over the workweeks of the period it can be said to have been earned so that the employee receives additional compensation for the overtime worked during that period. 29 C.F.R. § 778.209. The additional payment must "equal one-half the hourly rate allocable to the bonus for that week, multiplied by the number of statutory overtime hours worked during the week." *Id.* However, if it is impossible to allocate the bonus among workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted such as assuming equal amounts of the bonus for each week of the period to which the bonus relates. *Id.* In doing so, it may be equitable to "divide the total bonus by the number of hours worked by the employee during the period for which it is paid. The additional compensation due for overtime workweeks in the period may then be computed by multiplying the total number of statutory overtime hours worked in each such workweek during the period by one-half this hourly increase." *Id.*

Here, Defendants pay appraisers an hourly rate on a bi-weekly basis. SAC ¶ 2. If appraisers report overtime, then they receive time-and-a-half on that statutory overtime. *Id.* ¶ 29. Additionally, if appraisers meet a certain billing threshold they are eligible for an incentive bonus calculated based upon efficiency and timeliness. *Id.* ¶¶ 35–56. Then this bonus is included in calculating the appraisers' regular rate for the purpose of calculating the overtime premium required for the period to which the bonus relates. *Id.* However, the bi-weekly pay periods and incentive pay periods do not always align. *Id.* ¶ 32.

First, Plaintiffs assert that the incentive payment's inclusion of a total hours worked denominator is unlawful under the FLSA because the divisor allegedly reduces the regular rate for statutory overtime hours in proportion to an increase in overtime hours worked. *Id.* ¶¶ 46–47. As an initial matter, Plaintiffs' claim that inclusion of the total hours divisor in the efficiency factor of Defendants' incentive payment unlawfully reduces the regular rate is faulty logic in that the incentive payment bonus is earned, and

then added to employees' compensation to determine the regular rate. SAC ¶ 48; *see also* 29 C.F.R. § 778.209; DLSE Manual § 49.2.4.2. The bonus cannot be negative and thus can only increase the regular rate. *Id.* As a result, when Plaintiffs claim that the efficiency factor "reduces the regular rate," it is not clear what the regular rate is supposedly being reduced from. Plaintiffs seem to be arguing that without the efficiency factor, the incentive payment would be higher and thus the regular rate would be higher. SAC ¶ 48. Plaintiffs likely make such an argument regarding an unlawful reduction of the regular rate based on an analogy to a fixed sum bonus, which has a different effect on compensation and is subject to a different legal standard of calculation. *Alvarado* 4 Cal. 5th at 560 (citing DLSE Manual § 49.2.4.2, 49-9). The fixed sum bonus scheme is a guaranteed lump sum based upon some criteria being met that an employer has set out. *Alvarado* 4 Cal. 5th at 560 (citing DLSE Manual § 49.2.4.2, 49-9). The non-discretionary fixed sum bonus is included as part of an employee's regular salary, and is earned in regular hours. *Id.* Since it is not earned during overtime it cannot be reduced by overtime hours. *Id.* However, here, Defendants provide a production bonus based upon an employee's positive effort. Unlike unlawfully reducing a fixed sum bonus based on overtime and thereby reducing the regular rate, here the bonus is not fixed and is instead earned and calculated based on efficiency. Therefore, the regular rate cannot be "reduced" unlawfully by the inclusion of the production bonus, because the bonus is calculated and then added to employees other wages in order to determine a regular rate, and the bonus lawfully uses efficiency as a factor. *Id.* In sum, the regular rate can only increase by the addition of a bonus, and the bonus is calculated lawfully.

Nevertheless, Plaintiffs argue that designing non-discretionary incentive pay to decrease in proportion to an increase in the number of overtime hours is impermissible under the FLSA, because it supposedly "lowers the hourly rate during statutory overtime hours or weeks when statutory overtime is worked," and Plaintiffs cite 29 C.F.R. § 778 to support this claim.[6] Opp'n at 11. However, Plaintiffs do not specify which of § 778's numerous subparts and subdivisions supposedly prohibits such incentive pay schemes.

[6] Notably, the reason the incentive pay decreases in proportion to the number of overtime hours worked is because of the inclusion of the efficiency factor. As discussed above, efficiency may lawfully be used as a factor upon which to base a bonus, and efficiency is itself a comparison of production (here, billings) with cost (here, time) and thus requires dividing by total hours worked. 29 C.F.R. § 778.211(c); *Efficiency*, Merriam-Webster Dictionary (2018), https://www.merriam-webster.com/dictionary/efficiency?utm_campaign=sd&utm _medium=serp&utm. As a result, there is a seemingly lawful reason for including the total hours worked denominator— the incentive bonus incentivizes efficient work, and the hours it took to produce the billings are a lawful measure of efficiency. 29 C.F.R. § 778.211(c). The structure and theory behind an incentive bonus for efficient work is to encourage employees to get their work done in fewer hours. Thus, considering the incentive pay scheme in isolation, it seems that total hours are properly included in Defendants' calculation of the incentive bonus.

See Opp'n at 11. Plaintiffs also rely on *Brunozzi*, pointing to its holding that a compensation device which "diminishes an employee's bonus by a factor of their overtime" violates the FLSA. Opp'n at 11–12; *Brunozzi v. Cable Communications, Inc.*, 851 F.3d 990, 997 (9th Cir. 2017). Defendant responds that the case is "inapposite" because it involved piece-rate workers whose overtime premiums were deducted from their bonuses prior to calculation of their regular rate. Reply at 4.

In *Brunozzi*, the Ninth Circuit held that the "diminishing bonus device in [defendant's] pay plan causes it to miscalculate . . . the regular hourly rate during weeks when [the plaintiffs] work overtime . . . ." *Brunozzi*, 851 F.3d at 997. In that case, a cable company's technicians often worked in excess of forty hours per workweek. *Id.* at 993. The technicians eared a piece-rate wage at a fixed rate for each piece of work completed, as well as a production bonus of 1/6 of the piece rate total for the week according to the employment contract. *Id.* at 996. The employer then calculated the overtime premium due on that bonus by dividing it by the total hours worked in the related work period, including overtime hours, and then dividing by 2 and multiplying by the overtime hours. *Id.* The Ninth circuit determined that this calculation violated the FLSA because the diminishing bonus device in weeks overtime was worked caused the employer to miscalculate the technicians' regular rate and underpay them. *Id.* at 997. However, the Court in *Brunozzi* found that the "production bonus," in the case of the technicians, was not a true bonus as defined by the Department of Labor because according to the technicians' employment contracts, they would receive this production bonus of 1/6 of their piece rate total as part of their normal weekly income. *Id.* (citing 29 C.F.R. § 778.502(a) and explaining that a bonus is a sum paid in addition to total wages usually because of extra effort of one kind or another). Because the Ninth Circuit determined that the "bonus" in *Brunozzi* was not a true bonus, and was not earned during overtime hours, in that case it was unlawful to include overtime hours as a divisor. *Id.* This case is easily distinguished from *Brunozzi* because here the incentive bonus is a true "bonus," as it is a reward for meeting a production threshold—$7,500 in billings—and rewards and incentivizes timely work. SAC ¶¶ 34–44. Unlike in *Brunozzi*, in which the bonus was not earned during overtime hours, here, the bonus is earned during overtime hours and as such is truly a production bonus earned based on effort. *Id.*; *Brunozzi*, 851 F.3d at 997. Accordingly, Plaintiffs have not cited any authority establishing that Defendants' use of a total hours divisor in their incentive payment scheme is impermissible, or that it caused Defendants to violate state or federal overtime laws.

Next, Defendant Corelogic argues that the total hours worked divisor is also rightfully used to calculate the Coefficient Overtime Premium due on the incentive bonus. Mot. at 12–13; Compl. ¶ 51 (Co-Efficient Overtime = (Total Incentive/ Total

Hours Worked) x 50% x Overtime Hours). Plaintiffs allege that the total incentive pay should be divided only by the regular hours worked in the related period to determine the overtime premium due on their bonus. SAC ¶¶ 51–52.

Under California state law, the DLSE Manual § 49.2.4 states that:

> when a bonus is based on a percentage of production or some formula other than a flat amount and can be computed . . . [and] was earned during straight time as well as overtime hours, the overtime "premium" on the bonus is half-time or full-time (for double time hours) on the regular bonus rate. The regular bonus rate is found by dividing the bonus by the *total hours* worked during the period to which the bonus applies. The total hours worked for this purpose will be all hours, including overtime hours.

DLSE Manual § 49.2.4 (referencing California Labor Code § 204). Here, Defendants provide a production bonus, which is given based upon positive effort by the employee, and the overtime premium based due on the production bonus is calculated using the hours in which the bonus was earned. *See* DLSE Opinion Letter 1994 ("Any overtime on bonus wages is calculated based on the period during which the bonus is earned."). Thus, under California state labor laws, Defendants may and should calculate the overtime premium due on the production bonus by dividing the total bonus by the total hours attributable to earning the bonus, and then dividing that number in half to get the rate that should be multiplied by overtime hours worked in the period. *See id.* As Plaintiffs allege in their SAC, Defendants calculate the "Coefficient Overtime Premium" doing just that, and as a result, Plaintiffs have failed to state a claim for failure to pay overtime wages under California law as it relates to any improper calculation of the overtime premium by Defendants. *See* SAC ¶ 51.

Federally, to calculate the overtime premium on a bonus, employers may "divide the total bonus by the number of hours worked by the employee during the period for which it is paid." 29 C.F.R. § 778.209. For the same reasons as set out under California labor law, Defendants here have used the proper calculation to determine the overtime premium due on employees' incentive payment bonus. Defendants take the total incentive payment, divide by the total hours attributable to the bonus, then divide that number in half to get the rate which is multiplied by the total overtime hours. SAC ¶ 51. Consequently, Defendants divide the total bonus by the number of hours worked by the employee, to determine the extra 50% of that rate that is due as an overtime premium on the bonus. Therefore, Defendants, under federal law, lawfully include the incentive

bonus, and divide by the total hours worked divisor, in their calculation of employees' regular rate for the purposes of calculating the overtime premium due. *See* 29 C.F.R. § 778.209. Thus, Plaintiffs fail to state a federal claim for failure to pay overtime wages to the extent that their claim is based upon improper calculations by Defendants.

For the foregoing reasons, the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' first and second claims for failure to pay overtime compensation under the FLSA and California Labor Code to the extent that the claims are based on alleged improper calculation of overtime payments as a result of the total hours divisors used by Defendants. Nevertheless, Plaintiffs' first and second claims survive to the extent that they rely upon allegations of off-the-clock liability for underreporting of overtime.

B. Failure to Provide Itemized Wage Statements Claim

Next, Defendant argues that because Plaintiffs fail to state a claim for failure to pay overtime based on Defendants' calculations, Plaintiffs' claim for failure to provide itemized wage statements also fails as a derivative claim. Mot. at 14. Plaintiffs do not respond to Defendant's argument that Plaintiffs' claim for failure to provide itemized wage statements also fails, but the Court will nonetheless address the arguments. *See generally* Opp'n.

Under California Labor Code § 226(a), an employer must provide employees with an itemized wage statement including: "(1) gross wages earned, (2) total hours worked by the employee . . . (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid . . . and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee," either at the time of each payment of wages or semimonthly. Cal. Lab. Code § 226(a). An employee is deemed to have suffered injury for the purposes of § 226(a) if an employer failed to provide accurate and complete information as required by one or more items included as (1)–(9) of § 226(a), and if the employee cannot "promptly and easily determine from the wage statement alone . . . [t]he amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a). *Id.* § 226(e).

In the SAC, Plaintiffs allege that Defendants knowingly and intentionally failed to provide timely, accurate, itemized wage statements including gross and net wages earned based on the total hours that appraisers worked, the date of the period for which appraisers were paid their incentive pay, and all applicable hourly rates with the

corresponding number of hours worked at each rate. SAC ¶ 100. Although Defendants allege that Plaintiffs base this claim upon their claim that Defendants miscalculate Plaintiffs' overtime wages, Plaintiffs do not allege this in their operative Complaint. *See* Mot. at 1;. SAC ¶ 100. Rather, Plaintiffs allege that Defendants have failed to provide statutorily required information under § 226(a) subdivisions (1), (5), (6), and (9). SAC ¶ 100. Therefore, Plaintiffs properly plead a claim for failure to provide itemized wage statements.

Accordingly, the Court DENIES Defendant's Motion as to Plaintiffs' third claim for failure to provide itemized wage statements.

C. Unfair Competition Claim

Next, Defendant Corelogic argues that Plaintiffs' fifth claim for unfair competition in violation of California's Unfair Competition Law ("UCL"), California Business and Professions Code § 17200, must fail because it is derivative of Plaintiffs' claims based upon Defendants' use of efficiency in the incentive compensation plan, and total hours worked in the divisor of the regular rate compensation, which Defendant Corelogic argues should fail. Mot. at 14. Plaintiffs claim that the previously alleged conduct, namely Defendants' failure to pay overtime wages, constitutes unlawful business actions and practices in violation of the UCL. SAC ¶¶ 108–110; *see also* Cal. Bus. & Profs. Code § 17200.

The UCL prohibits unfair competition, which includes any "unlawful, unfair, or fraudulent business act or practice" that causes the person[s] asserting a claim to have "suffered injury in fact" and "lost money or property." Cal. Bus. & Prof. Code §§ 17200, 17204. "Unlawful," "unfair," and "fraudulent" are recognized as three separate and distinct theories of liability under the UCL. *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 885 (1999); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). "Unlawful" has been defined as "an act or practice, committed pursuant to business activity that is at the same time forbidden by law." *Bernardino v. Planned Parenthood Fed. Of Am.*, 115 Cal. App. 4th 322, 351 (2004). Thus, under an "unlawful" theory of liability, the UCL incorporates other state laws, and violations of those laws are independently actionable. *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1107 n.1 (9th Cir. 2013) (noting that by prohibiting unlawful business practices, the UCL "'borrows' violations from other laws by making them independently actionable as unfair competitive practices" (internal quotations omitted)); *Chabner v. United Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000).

Here, Plaintiffs allege that Defendants violated the UCL because they failed to pay overtime wages based upon their wrongful calculations, and because Defendants knowingly suffered or permitted Plaintiffs and putative class members to work overtime that went unreported and unpaid in violation of the FLSA, California Labor Code §§ 510 and 1194, and IWC Wage orders. SAC ¶¶ 53, 90, 98. Because Plaintiffs fail to state a claim for failure to pay overtime to the extent the claim is based upon Defendants' alleged miscalculation of the overtime premium, the claim also cannot support an unlawful theory of UCL liability to the extent it is based on Defendants' alleged miscalculations. However, Defendants have not moved to dismiss Plaintiffs' claim based upon unreported overtime hours. Reply at 2–3 ("[P]laintiffs devote the majority of their opposition to discussing allegations of off-the-clock work. Those allegations are not at issue in this motion . . . ."). Plaintiffs allege that they and putative class members routinely under-reported their overtime hours and that Defendants knew of this practice, and allowed it to continue in violation of the FLSA, California Labor Code §§ 510 and 1194, and IWC Wage orders. SAC ¶ 53. Plaintiffs allege injury to themselves and putative class members in the form of unpaid wages. *Id.* ¶ 110. As a result, Plaintiffs plausibly allege a claim for violation of the UCL under an unlawful theory of liability.

Accordingly, the Court DENIES Defendant's Motion as to Plaintiffs' fifth claim for violation of the UCL.

D. Waiting Time Penalties

Defendant Corelogic argues that Plaintiffs' claim for waiting time penalties must fail as derivative of Plaintiffs' claim for failure to pay overtime wages, which Defendant believes should be dismissed. Mot. at 14. Plaintiffs do not respond to this argument. *See generally* Opp'n. Plaintiffs' operative Complaint alleges that Plaintiffs and California class members who ceased employment with Defendants are entitled to unpaid compensation which has not been received more than 72 hours after cessation of employment in violation of California Labor Code §§ 201–203. SAC ¶ 113. Plaintiff Mitchell alleges that her employment with Defendants ended on or around April 5, 2018, and Representative Plaintiff Summers alleges that his employment with Defendants ended on or around July 15, 2017. SAC ¶¶ 10–11.

Under California Labor Code § 202(a), "[i]f 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 . . . ." Cal. Lab. Code § 202(a). Under California Labor Code § 203(a), "[i]f an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as

a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced." Cal. Lab. Code § 203(a). "Willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due." Cal. Code Regs. Tit. 8 § 13520. In other words, "willful" means something that "was done or omitted intentionally . . . that the person knows that he is doing and intends to do what he is doing." *York v. Starbucks Corp.*, No. CV 08–07919 GAF (PJWx), 2009 WL 8617536, at *5 (C.D. Cal. Dec. 3, 2009) (quoting *Davis v. Morris*, 37 Cal. App. 2d 269, 274 (1940)) (brackets omitted), *motion for reconsideration granted on other grounds York v. Starbucks Corp.*, No. CV 08–07919 GAF (PJWx), 2011 WL 4597489 (C.D. Cal. Aug. 5, 2011). "Courts have found that an allegation of deliberately implementing a policy 'of not paying owed wages' is sufficient to satisfy the willful requirement of § 203." *Varsam v. Lab. Corp. of Am.*, 120 F. Supp. 3d 1173, 1179 (S.D. Cal. 2015) (finding that plaintiff had plausibly alleged willful failure to timely pay wages upon termination by alleging facts of a regular practice by defendant of requiring plaintiff and class members to work off-the-clock during meal periods, rest periods, and after scheduled shifts).

To evaluate the sufficiency of Plaintiffs' factual allegations regarding Plaintiffs' claim for failure to pay timely wages after "cessation of employment," the Court must evaluate whether Plaintiffs sufficiently allege that Defendants owed Plaintiffs wages at the time that Plaintiffs ceased working for Defendants. Plaintiffs broadly allege that Defendants failed to pay them and other class members' wages owed for meal and rest break premiums, unpaid overtime, and unpaid minimum wages. SAC ¶¶ 111–117. Plaintiffs claim that Defendants failed to pay overtime wages in violation of the FLSA, California Labor Code §§ 510 and 1194, and IWC Wage Orders because Defendants induced Plaintiffs and class members to under-report overtime hours and work off-the-clock. SAC ¶ 53. Further, Plaintiffs allege that Defendants had knowledge of these unreported overtime hours, yet did not pay the wages owed for them. *Id.* Because Plaintiffs allege that Defendants systematically, knowingly permitted employees to work unpaid overtime, Plaintiffs also plausibly allege the willfulness requirement of § 203(a).

Next, the Court must assess whether Plaintiffs plausibly allege cessation of employment and failure to pay wages owed to them within the statutory 72 hour period. Here, Plaintiffs allege the dates that their employment ended (April 5, 2018 and July 15, 2017 respectively), and broadly allege that class members are similarly situated. SAC ¶¶ 10–11, 111–117. Plaintiffs further allege that they have not received compensation for earned and unpaid wages, more than 72 hours after the cessation of their employment. *Id.* ¶¶ 113–114. Because Plaintiffs plausibly allege meal and rest break violations, and

unpaid overtime wages, and plausibly allege that Defendants willfully failed to pay this unpaid compensation more than 72 hours after the cessation of their employment, Plaintiffs have plausibly stated a claim for failure to pay wages due upon discharge and waiting time penalties pursuant to § 203(a) in violation of § 202.

Plaintiffs also allege that Defendants fail to pay timely wages in accordance with California Labor Code § 204. SAC ¶ 115. Defendant Corelogic also moves to dismiss this claim as derivative of Plaintiffs' claim for failure to pay overtime wages in violation of the FLSA, California Labor Code §§ 510 and 1194, and IWC Wage Orders. Mot. at 14. Plaintiffs do not respond to Defendant's argument that this claim should be dismissed. *See generally* Opp'n.

California Labor Code § 204 provides that:

> all wages, other than [those excluded], earned by any person in any employment are due and payable twice during each calendar month . . . Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and 26th day of the month during which the labor was performed, and labor performed between the 16th and last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. . . .[A]ll wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period.

Cal. Lab. Code § 204 (a)–(b). However, it is not clear that § 204 creates a private right of action. In fact, a number of district courts have held that § 204 does not create a private right of action, and one discussed the issue without fully reaching whether a private right had been established. *See Johnson v. Hewlett-Packard Co.*, 809 F. Supp. 2d 1114, 1136 (N.D. Cal. 2011) *aff'd*, 546 F. App'x 613 (9th Cir. 2013) (finding no private right of action under section 204 or 210); *Jeske v. Maxim Healthcare Services, Inc.*, Case No. 11-1838LJOJLT, 2012 WL 78242, at *38 (E.D. Cal. Jan. 10, 2012); *Villalpando v. Exel Direct Inc.*, No. 12-cv-04137, 2014 U.S. Dist. LEXIS 42622, at *59 (N.D. Cal. 2014); *see also Huy Nguyen v. Wells Fargo Bank, N.A.*, No. 15-cv-05239, 2016 U.S. Dist. LEXIS 131710, at *31 (N.D. Cal. 2016) (finding that § 204 does not create a private right of action but can be asserted by way of PAGA and UCL claims); *Salcido v. Evolution Fresh, Inc.*, No. 14-cv-09233, 2016 U.S. DIST. LEXIS 1375, at *21–22 (C.D. Cal. 2016) (finding that a plaintiff had not established its amount in controversy because it likely

was not entitled to penalties under § 210 for its § 204 claim). The *Johnson* court held that § 204 does not create a private right of action because: (1) § 204 "requires the payment of wages in a timely manner; it does not provide a right to wages," and (2) California Labor Code § 210 provides for payment of a civil penalty for § 204 violations, so there is no clear legislative intent for a private right on top of the civil penalties that may be sought by the Labor Commissioner alone. *Johnson*, 809 F. Supp. 2d at 1136. The *Villalpando* court agreed with the *Johnson* court's reasoning that § 204 deals with the "timing of wage payments [and] does not appear to give rise to a claim for unpaid wages such that § 218 would indicate a clear legislative intent to create a private right of action under § 204."[7] *Villalpando*, 2014 U.S. Dist. LEXIS 42622, at *63.

Here, Defendant Corelogic does not raise the issue of whether § 204 creates a private right of action, but Plaintiffs assert § 204 in addition to their § 202 and § 203 claims, and this is not quite right. SAC ¶¶ 11–117; *see generally* Mot. Plaintiffs plausibly allege claims for failure to pay overtime wages, which support Plaintiffs' claims for failure to timely pay wages after cessation of employment. *See* Cal. Lab. Code §§ 202, 203. However, unpaid wage claims, which do carry a private right of action, are distinct from the California Labor Code section explaining the statutorily required timing of wage payments. *See* Cal. Lab. Code §§ 202, 203(a), 210, 218. Thus, it seems Plaintiffs' claims for failure to timely pay under Labor Code § 204 cannot be asserted as a private right of action that entitles Plaintiffs to remedy. *See* Cal. Lab. Code § 204.

For the foregoing reasons, the Court DENIES Defendant's Motion to the extent that it seeks to dismiss Plaintiffs' sixth claim for failure to pay wages due upon discharge and waiting time penalties under California Labor Code §§ 202, 203(a). However, the Court DISMISSES WITHOUT PREJUDICE Plaintiffs' sixth claim to the extent that it is brought under Labor Code § 204.

E. PAGA Claims

Defendant Corelogic next argues that all of Plaintiffs' PAGA claims should be dismissed as derivative of Plaintiffs' claim for failure to pay overtime wages, which Defendant believes should fail for the reasons previously discussed. Mot. at 2. However, Defendant does not move to dismiss any of Plaintiffs' claims that relate to meal and rest break violations, nor Plaintiffs' failure to report overtime claims. *See* Reply at 2–3. Some of Plaintiffs' PAGA claims are derivative of these alleged meal and rest break violations,

[7] California Labor Code § 218 states, "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under this article."

and failure to pay overtime due to underreporting. Compl. ¶¶ 118–134. Because the Court has not found that Plaintiffs failed to state a claim for claims one through six, Plaintiffs' PAGA claims are not derivative of failed claims and therefore survive Defendant's Motion to Dismiss.

However, Defendant additionally argues that Plaintiffs' claim for alleged underpaid wages under California Labor Code § 558 is governed by PAGA and as such is subject to a one- year statute of limitations period, because the remedy for § 558 is a civil penalty despite the penalty being in the form of "wages." Mot. at 14. Accordingly, Defendant argues that all references to an improper three year limitations period for this claim should be stricken. *Id.*

"The California Code of Civil Procedure ("CCP") provides for a one-year statute of limitations for an action upon a statute for a penalty or forfeiture, but provides for a three-year statute of limitations for an action upon a liability created by statute, other than a penalty or forfeiture." *Yadira v. Fernandez*, 2011 U.S. Dist. LEXIS 4101266, at *10; *see* Cal. Civ. Proc. Code §§ 338(a), 340(a). The purpose of a statute of limitations is to "protect defendants from the stale claims of dilatory plaintiffs." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 385 (1999) (internal citations and quotation marks omitted). The statute of limitations also has the related purpose of "stimulat[ing] plaintiffs to assert fresh claims against defendants in a diligent fashion." *Id.* If a statute of limitations affixes a definite period of time, "it operates conclusively across the board, and not flexibly on a case-by-case basis." *Id.*

"To enhance the enforcement of the labor laws, the Legislature enacted PAGA in 2003." *Home Depot U.S.A., Inc. v. Superior Court*, 191 Cal. App. 4th 210, 216 (2010). California Labor Code § 2699(a) of the Private Attorneys General Act "permits aggrieved employees to recover civil penalties that previously could be collected only by [the Labor and Workforce Development Agency]. In addition, to address violations for which no such penalty had been established, subdivision (f) of the statute created 'a default penalty and a private right of action' for aggrieved employees." *Id.* California Labor Code § 558, the code section at issue in the present Motion, describes violations of wage laws and the authorized civil penalties that result from such violations. California Labor Code § 558 states:

> (a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as

> follows: (1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages. (3) Wages recovered pursuant to this section shall be paid to the affected employee . . . (c) The civil penalties provided for in this section are in addition to any other civil or criminal penalty provided by law.

Cal. Lab. Code § 558.

While the California Supreme Court has not directly stated which statute of limitations should apply to § 558, the Court has noted the statutory language and nature of § 558 such that California Appeals Courts and trial courts have interpreted which statute of limitations should apply. The California Supreme Court analyzed § 588 in *Reynolds*, noting that recovery under § 558 is a penalty, which makes it recoverable under PAGA. *Reynolds*, 36 Cal. 4th 1075, 1094 (2005) ("[T]he Legislature has provided that aggrieved employees may under certain circumstances maintain civil actions to recover such penalties."). Several California Appellate Courts follow *Reynolds*' treatment of § 558 recovery as a penalty because the language of § 558 states that "[a]ny employer . . . who violates . . . a section of this chapter . . . shall be subject to a *civil penalty* as follows . . . ." Cal. Lab. Code § 558 (a) (emphasis added); *Thurman v. Bayshore Transit Mgmt, Inc.*, 203 Cal. App. 4th 1112, 1146–48 (2012) (agreeing with the *Yadira* court's treatment of § 558 recovery as a penalty, as per California Supreme Court dicta in *Reynolds*, and finding § 558 subject to a one year statute of limitations); *Yadira*, 2011 WL 4101266, at *3 (finding that PAGA only allows aggrieved individuals to recover civil penalties for violation of the underlying Labor Code provisions, and § 558's recovery is described as a penalty by the statute and by the California Supreme Court in *Reynolds* so a § 558 claims is subject to a one-year statute of limitations); *Jones v. Gregory*, 137 Cal. App. 4th 798, 809 (2006) (finding the recovery of underpaid wages under § 558 to be part of the civil penalty the statute provided for); *Bradstreet v. Wong*, 161 Cal. App. 4th 1440, 1441(2008) (noting that "pursuant to section 558, subdivision (a), a person "acting on behalf of an employer" could be subject to penalties equal to the amount of unpaid wages").

Plaintiffs respond to Defendant's argument that a one year statute of limitation is proper, arguing instead that a three year limitations period is correct because recovery

under California Labor Code § 558 is in the form of wages plus an additional penalty. Opp'n at 19. Plaintiffs' claims under California Labor Code § 558 are for (1) civil penalties on unpaid overtime premiums under Labor Code § 510, penalties for each subsequent violation, and an amount sufficient to recover underpaid wages, (2) civil penalties for underpaid employees based upon missed meal break violations under Labor Code § 512, subsequent violations, and an amount sufficient to recover unpaid wages, and (3) civil penalties for underpaid employees induced to work more than six days in seven in violation of California Labor Code § 552, and subsequent violations. Compl. ¶¶ 123–125. Plaintiffs contend that Defendant incorrectly relies upon *Yadira v. Fernandez* and *Thurman v. Bayshore Transit Mgmt.* in support of a one year statute of limitations because both cases rely upon *Reynolds v. Bement*, which is no longer good law. Opp'n at 18; *Yadira v. Fernandez*, 2011 WL 4101266, at *3 (N.D. Cal. 2011); *Thurman v. Bayshore Transit Mgmt.*, 203 Cal. App. 4th 1112, 1148 (2012); *Reynolds*, 36 Cal. 4th 1075 (2005). Plaintiffs argue that *Reynolds* only dealt with the PAGA statute of limitations as dicta, and that its holding was later abrogated in 2010 by *Martinez v. Combs*. Opp'n at 18; *Martinez v. Combs*, 49 Cal. 4th 35, 62 (2010). Plaintiffs argue that instead of *Reynolds*, the Court should look to *Murphy v. Kenneth Cole Productions, Inc.*, which found a three year statute of limitation under California Code of Civil Procedure § 338 as applied to meal and rest period premium claims under Labor Code § 226.7 because "the amount of payment under statute was linked to an employee's rightful rate of compensation, rather than a prescribed fixed amount," and was therefore treated as wages rather than a penalty. Opp'n at 19; *see also Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1114 (2007). Plaintiffs argue that because their § 558 claim is the "value of the workers' underpaid wages plus penalties," the claim should not be governed by a one year statute of limitations. *Id.* Finally, Plaintiffs argue that, in the alternative, the Court should simply not resolve the dispute at this stage. *Id.* However, the Court will address whether a one-year or three year statute of limitations should apply such that Defendant's Motion to Strike an improper limitations period should be granted.

Plaintiffs argue that *Reynolds* is not good law, and need not be followed because *Reynolds* only discussed § 558 recovery as dicta. Opp'n at 18–19. While Plaintiffs argue that *Reynolds* was abrogated by *Martinez*, in fact, *Martinez* abrogates *Reynolds* on other grounds that do not affect *Reynolds*' discussion of § 558 recovery. *Id.*; 49 Cal. 4th at 63. Specifically, the California Supreme Court in *Martinez* discussed the definition of an employment relationship, and how it was defined in *Reynolds*, but did not discuss whether recovery under § 558 was a penalty subject to a one-year statute of limitations. *Id.* Thus, the California Supreme Court's treatment of recovery under § 558 as a penalty in *Reynolds* is persuasive, despite Plaintiff's argument that the finding was dicta and need

not be followed. *Hubbard v. Superior Court*, 66 Cal. App. 4th 1163, 1169 (1997); *California Amplifier, Inc. v. RLI Ins. Co.*, 94 Cal. App. 4th 102, 114 (2001) ("[L]egal pronouncements by the Supreme Court are highly probative and, generally speaking, should be followed even if dictum."). Therefore, the PAGA penalties Plaintiffs seek under California Labor Code § 558 will be treated as a penalty based upon the statute's language, California Supreme Court dicta, and California Appellate treatment of the § 558 recovery. Consequently, the claim, as a civil penalty, is subject to a one year statute of limitations. *See* Cal. Civ. Proc. Code §§ 338(a), 340(a).

Because a one year statute of limitations applies, Defendant asks the Court to strike all references to a three-year statute of limitations. "[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . ." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). Under Rule 12(f), a court may "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f)(2). "'Impertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question." Fed. R. Civ. P. 12(f)(2); *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994) (quoting 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1382, at 706–07 (1990)). Here, the correct statute of limitations is one year for claims under California Labor Code § 558. *See Reynolds*, 36 Cal. 4th 1075. Therefore, any reference to a statute of limitations period of three years is impertinent since it does not pertain to a claim under California Labor Code § 558. Granting Defendant's 12(f) motion to strike all references to a three year limitations period avoids the expenditure of time and money in litigating the spurious issue of which limitations period is applicable. *See Sidney-Vinstein*, 697 F.2d at 885.

Accordingly, the Court STRIKES all references to an improper limitations period for Plaintiffs' claims under California Labor Code § 558.

F. Standing to Assert Injunctive Relief for Any Claim

Finally, Defendant Corelogic argues that Plaintiffs lack standing to assert injunctive relief against Defendants on any claim because Plaintiffs are former, not current, employees. Mot. at 13–14. Defendant Corelogic, accordingly, moves to strike Plaintiffs' request for injunctive relief from the SAC. *Id.* at 14. Plaintiffs respond that they are "standing in the shoes of the Labor and Workforce Development Agency ("LWDA")" and therefore may bring representative claims seeking injunctive and declaratory relief under PAGA. Opp'n at 20. Plaintiffs additionally request that should

the Motion be granted, they be given leave to amend to add a current employee "from the 50+ opt-ins." *Id.* Defendant replies that Plaintiffs' reliance on PAGA is "misplaced" because PAGA provides for the recovery of civil penalties only, not declaratory or injunctive relief. Reply at 10. Defendant further argues that the Court's power to act is limited by Article III's standing requirements, and as former employees Plaintiffs do not face immediate threat of irreparable injury and therefore lack Article III standing to seek injunctive relief against their former employer. *Id.* at 10–11.

A state statute cannot alter the constitutional standing requirements of federal courts, even if for good public policy reasons. *See Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1022 (9th Cir. 2004) (quoting *Lee v. Am. Nat'l Ins. Co.*, 260 F.3d 997, 1001–02 (9th Cir. 2001)) ("Even if Cal. Bus. & Prof. Code § 17204 permits a plaintiff to pursue injunctive relief in California state courts as a private attorney general even though he or she currently suffers no individualized injury as a result of a defendant's conduct, 'a plaintiff whose cause of action [under § 17204] is perfectly viable in state court under state law may nonetheless be foreclosed from litigating the same cause of action in federal court, if he cannot demonstrate the requisite injury' to establish Article III standing.") To establish Article III standing "[in] the context of injunctive relief, the plaintiff must demonstrate a real or immediate threat of an irreparable injury." *Clark v. City of Lakewood*, 259 F.3d 996, 1007 (9th Cir. 2001) (quoting *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1100 (9th Cir. 2000)); *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (2003) (noting that prospective injunctive relief "is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again . . . .").

Thus, a plaintiff "who cannot reasonably be expected to benefit from prospective relief ordered against the defendant has no claim for an injunction," and in the employment context, courts have repeatedly applied this principle to hold that plaintiffs lack standing to enjoin their former employer's unlawful employment practices. *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 864 (9th Cir. 2017); *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 364–65 (2011) (concluding that plaintiffs whose employment ended after an action was filed had no claim for injunctive relief against their former employer concerning its employment practices); *Walsh v. Nevada Dep't of Human Res.*, 471 F.3d 1033, 1036–37 (9th Cir. 2006) (concluding that a plaintiff requesting an injunction requiring her former employer to adopt and enforce lawful policies "lacked standing to sue for injunctive relief from which she would not likely benefit"); *Hangarter*, 373 F.3d at 1021–22 (9th Cir. 2004) (reversing grant of injunctive relief on a

UCL claim because plaintiff was no longer threatened by irreparable injury). As the Ninth Circuit explained in *Bayer*:

> A former employee currently seeking to be reinstated or rehired may have standing to seek injunctive relief against a former employer. But a former employee has no claim for injunctive relief addressing the employment practices of a former employer absent a reasonably certain basis for concluding he or she has some personal need for prospective relief.

Bayer, 861 F.3d at 865 (citations omitted).

Plaintiffs argue that they may stand in the shoes of the Labor and Workforce Development Agency as former employees to seek declaratory and injunctive relief under PAGA. Opp'n at 20. Plaintiffs cite to *Arias v. Superior Court*, 46 Cal. 4th 969, 980–981, 985 (2009), to support their claim that they may seek injunctive relief under PAGA. *Id.* However, the California Supreme Court in *Arias* discusses whether or not the requirements of class certification apply to a plaintiff's UCL and PAGA claims. *Arias*, 46 Cal. 4th at 980–981, 985. The Court noted the representative nature of an employee's PAGA claim for civil penalties, but does not address or discuss a plaintiff's standing to seek injunctive relief as a former employee, and as such the case does not inform this issue. *Id.*; Opp'n at 20. Plaintiffs similarly rely upon *Huff v. Securitas Security Services USA, Inc.*, which also discusses a plaintiff's ability to bring representative claims on behalf of other employees under PAGA yet does not discuss standing to seek injunctive relief beyond the civil penalties recovered under PAGA. Opp'n at 20; *Huff v. Securitas Security Services USA, Inc.*, 23 Cal. App. 5th 745, 753–61, (Cal. App. May 23, 2018).

Plaintiffs argue that if they are given leave to amend, they will add a current employee class representative, which would moot the issue of whether they have standing to seek injunctive relief. Opp'n at 20; *Perry-Roman v. AIG Ret. Servs.*, No. 09-02287, 2009 U.S. Dist. LEXIS 138476, at *5 (C.D. Cal. June 10, 2009) (noting that adding a current employee as a class representative moots the issue of standing with regard to seeking injunctive relief).

While Plaintiffs themselves do not have standing to seek injunctive relief against their former employer, some courts have held that in a class action injunctive relief may be sought where putative class members remain employed by Defendant employers. *See Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1189 (9th Cir. 2007) (finding that only current employees have standing to seek injunctive relief); *Walsh v. Nev. Dep't of Human Res.*,

471 F.3d 1033, 1036–37 (9th Cir. 2006) (finding that only current employees have standing to seek injunctive relief); *Perry-Roman v. AIG Ret. Servs.*, 2009 U.S. Dist. LEXIS 138476, at *5–8 (C.D. Cal. June 10, 2009) (explaining that "Ninth Circuit precedent confirms that in the class action context, where putative class members remain employed by the defendant employers, injunctive relief may still be sought" even where class representatives are no longer employed by defendant); *Johnson v. GMRI, Inc.*, 2007 U.S. Dist. LEXIS 66058 (E.D. Cal. Aug. 27, 2007) ("Defendants offer no definitive authority that plaintiffs are unable to rely on unnamed putative class members for standing. At this point, striking plaintiffs' injunctive relief claim would be premature."). In *Johnson*, the plaintiffs pointed out, and the Court agreed, that "current employees often fear retaliation and therefore may be unlikely to bring suit," while former employees as class representatives "are not susceptible to the same fears as current employees" but are familiar with the company's employment practices. *Id.* at 9–12. In both *Perry-Roman* and *Johnson,* the Court found that former employees were adequate representatives to seek injunctive relief for a class that included current employees of a defendant employer. *Perry-Roman,* 2009 U.S. Dist. LEXIS 138476, at *5–8; *Johnson* 2007 U.S. Dist. LEXIS 66058, at *7–13.

Here, Plaintiffs state that the Proposed Collective and California Class is made up of "all persons who are or have been employed by Defendants." SAC ¶¶ 1, 2, 4, 5. Since members of the putative class seem to be current employees, the class likely meets Article III standing requirements and it seems that striking Plaintiffs' claim for injunctive relief at this stage would be premature and rob potential class members of a remedy. In any case, Plaintiffs argue they can amend to add an additional class representative who is a current employee, thereby mooting the issue. Opp'n at 20. The Court finds this appropriate.

Accordingly, the Court DENIES Defendant's Motion to Strike all Injunctive and Declaratory Relief claims and GRANTS Plaintiffs leave to amend to add another class representative who is a current employee.

IV. Disposition

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Defendant's Motion.

The Court DISMISSES WITHOUT PREJUDICE Plaintiffs' first and second claims for failure to pay overtime to the extent that the claims are premised upon use of efficiency in calculating incentive pay and use of total hours as a divisor for incentive pay

and overtime calculations. The Court also DISMISSES WITHOUT PREJUDICE Plaintiffs' sixth claim for waiting time penalties to the extent that claim relies upon California Labor Code § 204.

In addition, the Court STRIKES all references to an improper limitations period of three years for Plaintiff's PAGA claim under California Labor Code § 558.

Plaintiffs may file an amended complaint, if desired, on or before **August 20, 2018.**

The Clerk shall serve this minute order on the parties.