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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JULIA BERNSTEIN, LISA MARIE SMITH, and ESTHER GARCIA, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

VIRGIN AMERICA INC.; ALASKA AIRLINES, INC.; and Does 1-10, inclusive,

Defendants.

Case No. 4:15-cv-02277-JST

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO AMEND THE JUDGMENT

Date: July 28, 2022
Time: 2:00 p.m.
Courtroom: 6, 2nd Floor
Judge: Hon. Jon S. Tigar

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I. INTRODUCTION

The Ninth Circuit remanded this lawsuit to this Court for "further proceedings consistent with [its July 20, 2021 order and amended] opinion." *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1145 (9th Cir. 2021). In that opinion, the Ninth Circuit affirmed this Court's "summary judgment to Plaintiffs [Julia Bernstein, Esther Garcia, and Lisa Marie Smith (collectively, "Plaintiffs")] on their claims for overtime (§ 510); for violation of meal and rest break requirements (§§ 226.7, 512); for wage statement deficiencies (§ 226); and for waiting time penalties (§§ 201 and 202)," but reversed this Court's "summary judgment to Plaintiffs on their claims for minimum wage (§1182.12); for payment for each hour worked (§ 204); and for heightened penalties for subsequent violations under PAGA." *Id.*

Plaintiffs' Motion to Amend the Judgment ("Motion") pays lip service to the twin legal concepts of the law of the case and the rule of mandate that govern this case on remand. In fact, however, Plaintiffs ask this Court to outright ignore the Ninth Circuit's opinion, revisit previously adjudicated arguments, consider new legal arguments, and apply heightened, unwarranted penalties. The Court should reject Plaintiffs' improper requests.

First, the Ninth Circuit's decision forecloses Plaintiffs' request for civil penalties under the California Labor Code Private Attorneys General Act ("PAGA") for the California Labor Code section 204 claims based on their minimum wage claim. The Ninth Circuit held that Virgin's credit-based, flight attendant compensation system fully complied with California law, and it thus, reversed this Court's decision in Plaintiffs' favor on both their minimum wage claim and claim "for payment for each hour worked (***§ 204***)." *Bernstein*, 3 F.4th at 1145 (emphasis added). Plaintiffs petitioned for rehearing or rehearing en banc on that very aspect of the Ninth Circuit's decision, specifically challenging the panel's rejection of their section 204 claim. *See* Request for Judicial Notice ("RJN"), Exh. A (Plaintiffs' Petition) at 22. The Ninth Circuit denied rehearing. Nonetheless, Plaintiffs now ask this Court to award them ***$14,092,200*** in civil penalties *for their section 204 claim*. Plaintiffs' request for penalties is flatly inconsistent with the Ninth Circuit's decision and should be denied.

Second, if this Court (improperly) entertains Plaintiffs' civil penalties demand for their

section 204 claim anyway, it should reject Plaintiffs' attempts to raise new legal arguments to inflate the penalties. As Plaintiffs admit, they "initially calculated the [section 204] penalty according to the initial and subsequent rate." Pl. Mot. at 12. Yet now, in response to the Ninth Circuit's decision limiting them to the initial violation rate, Plaintiffs change course and argue, for the first time, that they are "entitled to apply the alternative formulation" under Section 2699(f). *See Id.* Plaintiffs have waived their right to raise such new, alternative arguments not previously presented to this Court. Further, Plaintiffs' request for heightened penalties conflicts with the Ninth Circuit's explicit holding that because "Virgin was not notified by the Labor Commissioner or any court that it was subject to the California Labor Code until the district court partially granted Plaintiffs' motion for summary judgment.... [W]e reverse the district court's holding that Virgin is subject to heightened penalties for any labor code violation that occurred prior to that point." *Id.* at 1145-46.

Third, this Court previously rejected Plaintiffs' request for prejudgment interest on their meal period and rest break claims. Plaintiffs cannot relitigate that request now. When they previously sought prejudgment interest, "Plaintiffs rel[ied] *solely* on Labor Code section 218.6," which this Court held "plainly does not authorize prejudgment interest for these claims." ECF No. 365 at 10, n. 10 (emphasis added). This Court correctly observed that Plaintiffs had not raised "whether prejudgment interest on these claims is available under Civil Code section 3287(a) or (b)." *Id.* Because this Court already held prejudgment interest is not recoverable on these claims, the Court should not consider Plaintiffs' new argument.

Fourth, if the Court accepts Plaintiffs' invitation to revisit its prior decisions, Defendants respectfully request that this Court find that Defendants believed in good faith that they were not violating California Labor Code sections 203 and 226 because they believed: (a) sections 203 and 226 did not apply to Plaintiffs because they principally worked outside of California; (b) sections 203 and 226's application to Plaintiffs were preempted by the dormant Commerce Clause; (c) no wages were due to class members who separated from employment; and (d) Virgin's wage statements accurately reported Plaintiffs' earnings, listing their credit hours for each payment type, along with the corresponding rates of pay. As multiple courts in this district

have held, that good faith belief precludes liability for damages under sections 203 and 226.

Fifth, this Court should exercise its discretion to further reduce any PAGA penalties beyond the 25% reduction it applied in 2019 based on the Ninth Circuit decision. The "most important factor" this Court identified in limiting the reduction to 25% was that Plaintiffs were "deprived of compensation for hours worked and statutorily mandated breaks, suffering over $45 million in damages (including interest)." ECF. No. 365 at 13. The Ninth Circuit has now held that Defendants did ***not*** deprive Plaintiffs of wages due on unpaid hours, reducing Plaintiffs' damages by more than $40 million and significantly diminishing the "most important factor" distinguishing this case from those applying larger PAGA penalty reductions. Further, because the PAGA penalties Plaintiffs seek far exceed the total damages for the same claims, such an award would clearly be unjust, oppressive, and confiscatory. *See*. Cal. Lab. Code §2699(e)(2). Finally, the legal developments since this Court's prior decision only further highlight the enormous uncertainty surrounding Plaintiffs' claims and Defendants' potential liability. For these reasons, any PAGA penalties should be reduced by 75%.

Sixth, Plaintiffs' improperly inflated their waiting time penalties calculation by failing to exclude Waiting Time Penalties Subclass members whose purported damages stemmed from Plaintiffs' minimum wage claim. Under California Labor Code section 203, waiting time penalties are available only when "an employer willfully fails to pay…any wages of an employee" at the time of their separation from employment. Because the Ninth Circuit dismissed Plaintiffs' claims for minimum wage and for payment for each hour worked, only those Subclass members who were owed overtime wages at the time of their separation are eligible for waiting time penalties. Accordingly, waiting time penalties should not be awarded to Subclass members who were not owed overtime wages.

For the foregoing reasons and as set forth further below, the Court should deny Plaintiffs' Motion and amend the judgment consistent with the correct legal standards and equity.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On March 18, 2015, Plaintiff Julia Bernstein filed a Class Action Complaint in California Superior Court against Virgin on behalf of all "flight personnel," alleging that Virgin violated

multiple provisions of the California Labor Code and the California Industrial Welfare Commission Wage Order 9-2001. ECF No. 1. On February 22, 2018, the Court granted Plaintiffs leave to file a Second Amended Complaint, adding Alaska Air Group, Inc. as a defendant in the capacity of an alleged successor-in-interest to Virgin, before the parties stipulated and agreed that Plaintiffs would file a Third Amended Complaint substituting Alaska for Alaska Air Group, Inc. as the alleged successor-in-interest to Virgin. ECF Nos. 275, 297.

On July 9, 2018, the Court granted in part and denied in part Plaintiffs' motion for summary judgment. ECF No. 317. The Court granted Plaintiffs' motion as to Plaintiffs' claims that Virgin is liable for: (1) failing to pay for all hours worked in a duty period "because Virgin's formula does not separately compensate flight attendants for duty time that is not block time or deadheading time"; (2) failing to pay overtime wages; (3) failing to provide legally compliant meal periods and rest breaks within California;[1] (4) failing to provide legally compliant wage statements because the wage statements "do not show the effective hourly rate of pay for each hour of duty or the actual numbers of hours worked";[2] (5) failing to pay the Waiting Time Penalty subclass for all hours worked; (6) failing to comply with the Unfair Competition Law; and (7) penalties under PAGA, including for failure to "provide timely payments pursuant to California Labor Code Section 204." *See generally* ECF No. 317. With respect to the calculation of PAGA penalties, the Court also held that because Plaintiffs had notified "Virgin of the factual and legal bases for the Labor Code violations on September 25, 2015 and September 26, 2015," "the subsequent violation rate can be used after September 26, 2015." *Id.* at 15-16.

On January 16, 2019, the Court granted in part and denied in part Plaintiffs' motion for summary judgment on damages. ECF No. 365.[3] Of relevance here, the Court denied Plaintiffs'

[1] *See also* ECF No. 121 at 33.
[2] *See also Id.* at 31 (holding that "[g]ood faith is not a defense to a wage statement violation under § 226").
[3] In doing so, the Court disregarded several arguments Defendants raised in opposition, on the grounds that "Virgin could have raised [them] previously, but did not," stating that "[w]here a party 'has a full and fair opportunity to ventilate its views with respect to an issue' at summary judgment, yet does not raise it, the Ninth Circuit deems the argument abandoned on appeal. *Id.* at 5-6 (*citing BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 826 (9th Cir. 2000)); *see also Id.* at 9 (rejecting Virgin's objections to the scope of the waiting time penalties "[b]ecause Virgin also had numerous prior opportunities to raise these liability arguments").

motion for judgment awarding prejudgment interest on their meal and rest break claims under California Labor Code section 218.6, because the California Supreme Court's decision in *Kirby v. Immoos Fire Protection, Inc.*, 53 Cal. 4th 1244, 1255 (2012), "forecloses Plaintiffs' argument." *Id.* at 9. In so ruling, the Court explained that "[b]ecause Plaintiffs rely *solely* on Labor Code section 218.6, *see* ECF No. 355 at 19-20, the Court does not consider whether prejudgment interest on these claims is available under Civil Code section 3287(a) or (b)." *Id.* at 10, n. 10 (emphasis added). Further, the Court exercised its discretion to reduce the PAGA penalties to 25% of the calculated amount stating, *inter alia*:

- "Virgin stresses that $33.3 million in PAGA penalties would be confiscatory relative to $45 million in damages. The Court considers this factor. The weight of this factor is lessened, however, given that Virgin has not presented any evidence that the full penalty would be excessive in relation to its ability to pay" (*Id.* at 14 (internal citations omitted));
- "[P]rior law was unsettled regarding the extraterritorial applicability of California's wage-and-hour laws in this context. Although the relevant authorities clearly support the outcome in this case, no court had previously resolved the issues. Similarly, Virgin's preemptions arguments were not 'unreasonable or frivolous'" (*Id.* (internal citations omitted)); and
- "But whether Virgin's noncompliance was the result of good faith is relevant to the Court's penalty analysis….Conversely, where the law is unclear, awarding the maximum penalties may be excessively punitive and their deterrence function weakened."

Id. at 14-15 (internal citations omitted).

On February 4, 2019, the Court issued its order of judgment "against Defendants Virgin America Inc. and Alaska Airlines, Inc. and for Plaintiffs, all Class members, all California Resident Subclass members, and all Waiting Time Penalties Subclass members on the following claims in the following sums" set forth in the order. *See* ECF No. 367.

The following month, Defendants timely filed a Notice of Appeal to the Ninth Circuit,

arguing that: (1) the dormant Commerce Clause barred application of the Labor Code to interstate airline workers; (2) federal law preempted California's meal and rest break rules; (3) the California Labor Code did not apply to interstate airline workers who, like Plaintiffs, worked principally outside of California; (4) Virgin's credit-based compensation system did not violate California law with respect to minimum wage or failure to pay wages timely under section 204; and (5) Defendants were not subject to heightened penalties under PAGA for "subsequent violations." ECF No. 370.[4]

On February 23, 2021, the Ninth Circuit issue an initial decision on Defendants' appeal. *Bernstein v. Virgin America, Inc.*, 990 F.3d 1157 (9th Cir. 2021). In relevant part here, the Ninth Circuit reversed this Court's grant of summary judgment to Plaintiffs on their claims for minimum wage under California Labor Code section 1182.12(a) and for payment for all hours worked under California Labor Code section 204, finding that "[t]he fact that pay is not specifically attached to each hour of work does not mean that Virgin violated California law." *Id.* at 1166. The Ninth Circuit also reversed this Court's determination that Virgin was subject to heightened penalties for subsequent violations under PAGA, holding that "'a good faith dispute'

[4] During the pendency of Defendants' appeal, on June 29, 2020, the California Supreme Court created the legal test that controls whether and when section 226 applies to airline employees like Plaintiffs. *Ward v. United Airlines, Inc.*, 9 Cal. 5th 732 (2020). After initially noting that the "[a]pplication of section 226 logically depends on whether the employee's principal place of work is in California," the California Supreme Court held that:

> For interstate transportation workers…,we conclude that this principle [(*i.e.*, "that the Legislature intended for section 226 to apply to workers whose work is not performed predominantly in any one state, provided that California is the state that has most significant relationship to the work")] will be satisfied if the work performs some work here and is based in California, meaning that California serves as the physical location where the worker presents himself of herself to begin work….Applied to section 226, it means that workers are covered if they perform the majority of their work in California; but if they do not perform the majority of their work in any one state, they will be covered if they are based for work purposes in California.

Id. at 755-56. In doing so, the California Supreme Court rejected the "multifactor test" adopted by this Court. *Id.* at 757.

That same day, in *Oman v. Delta Air Lines, Inc.*, 9 Cal. 5th 762, 789 (2020), the California Supreme Court extended the *Ward* Test to the application of section 204, and also held that Delta's credit-based compensation system (which is near-identical to Virgin's) was lawful because it compensated flight attendants for all hours worked at a level at or above the minimum wage, even if particular components of the system failed to attribute a specific payment amount to every compensable hour.

that an employer is required to comply with a particular law 'will preclude imposition' of heightened penalties." *Id.* at 1172-73 (internal citation omitted). "Until the employer has been notified that it is violating a Labor Code provision (whether or not the [Labor] Commissioner or court chooses to impose penalties), the employer cannot be presumed to be aware that its continuing underpayment of employees is a 'violation' subject to penalties." *Id.* at 1173 (internal citation omitted). Because Virgin had not been notified that it was subject to the California Labor Code until this Court's decision in July 2018 – *i.e.*, after Virgin ceased operations – the Ninth Circuit held Virgin could not be subject to "heightened penalties for any labor code violation that occurred prior to that point." *Id.*

Both parties filed petitions for panel rehearing and rehearing *en banc*. Plaintiffs argued, in part, that "the panel mistakenly failed to affirm one of Plaintiffs' claims" with respect to section 204, claiming that they were "entitled to affirmance of the district court's judgment in their favor" because "the California Supreme Court rejected [Defendants'] argument [that section 204 did not apply to Plaintiffs] in *Oman*, holding that Section 204 applies 'to pay periods during which an employee predominantly works inside California,'" and "the panel found, for purposes of Labor Code § 226, that Plaintiffs, the Class and Subclass, work 'predominantly in California.'" *See* RJN, Exh. A at 22.

On July 20, 2021, the Ninth Circuit issued an amended order noting that "the panel unanimously voted to deny the petitions for panel rehearing," the "full court was notified of the petitions for rehearing en banc, and no judge requested a vote." *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1133 (9th Cir. 2021). In this final order, the Ninth Circuit again "reverse[d] the district court's summary judgment to Plaintiffs on their claims for minimum wage (§ 1182.12) [and] for payment for each hour worked (§ 204)" and held that Defendants were not "subject to heightened penalties for subsequent violations under PAGA." *Id.* at 1144-45.[5] The Ninth Circuit

[5] The Ninth Circuit also upheld this Court's determination that California's meal period and rest break laws are not preempted by field, conflict or express preemption pursuant to the Federal Aviation Act or Airline Deregulation Act ("ADA"). *Id.* at 1138-41. Defendants filed a petition for writ of certiorari to the United States Supreme Court on the issue of whether the ADA expressly preempts California's meal and rest break laws as having a significant impact on airline prices, routes, and services. Supreme Court of the United States Case No. 21-260. At its November 12, 2021 conference, the United States Supreme Court invited the Solicitor General to

therefore remanded the case to this Court "for further proceedings consistent with this opinion." *Id.* at 1145.

III. LEGAL ARGUMENT

A. The Court Should Deny Plaintiffs' Demand For $14 Million In PAGA Penalties For The Section 204 Claim That The Ninth Circuit Reversed On Appeal.

Despite Plaintiffs' demand that this Court "implement the remand directions of the Ninth Circuit in light of the rule of mandate and the law of the case," they inexplicably ask this Court to award more than $14 million in penalties on a claim the Ninth Circuit expressly rejected. This Court should refuse that request.

The Ninth Circuit reversed this Court's prior order granting "summary judgment to Plaintiffs on their claims for . . . payment for each hour worked (§ 204)," and remanded "for further proceedings consistent with this opinion." *Id.* Through their petition for panel rehearing and rehearing *en banc*, Plaintiffs asked the Ninth Circuit to overturn that determination – *i.e.*, to reinstate their section 204 claim and affirm this Court's prior decision. The Ninth Circuit rejected that request. Nonetheless, Plaintiffs now ask this Court to ignore the Ninth Circuit's decision and award them in excess of $14 million in PAGA penalties for that claim.

That request flatly conflicts with the "[t]win legal concepts" of the rule of mandate and law of the case, which, as Plaintiffs acknowledge, require this Court "to act on the mandate of an appellate court, without variance or examination, only execution" and preclude it "from reconsidering an issue decided previously by the same court or by a higher court in the same case." Motion at 5 (internal citations omitted). Those principles foreclose Plaintiffs' request for penalties under section 204.

Even if the Court were to revisit Plaintiffs' section 204 claim, Plaintiffs' demand for $14,092,200 in PAGA penalties should be rejected for the following reasons. *See* ECF No. 447-2 at 44.

First, Plaintiffs insist that they be awarded heightened penalties of $200 per pay period

file a brief in this case expressing the views of the United States. *See* ECF No. 436. At the time of this filing, the United States Supreme Court has not yet decided whether to grant certiorari.

based on Plaintiffs' allegation that "Virgin's failure to pay timely wages, like its failure to provide accurate wage statements, was knowing and intentional." Pl. Mot. at 17. But the Ninth Circuit already rejected the application of these heightened penalties and Plaintiffs' proffered justification for them because there was a good faith dispute over liability. *See Bernstein*, 3 F.4th at 1144.

Second, Plaintiffs waived the argument that penalties of $200 per pay period apply to their claim for failure to pay timely wages under Labor Code section 210's alternate formulation because they did not raise that argument in their prior summary judgment motions or at any other pint during this case. *See* Pl. Mot. at 17 (admitting that "Plaintiffs initially calculated the penalty according to the initial and subsequent rate"). As this Court previously held, "[w]here a party 'has a full and fair opportunity to ventilate its views with respect to an issue at summary judgment, yet does not raise it," that argument has been abandoned. *See* ECF No. 365 at 4-5; *see also id.* at 8-9 (declining to consider Defendants' arguments regarding the Waiting Time Penalties Subclass and waiting time penalties calculation because the Court held Virgin could have raised them previously). This Court should now hold Plaintiffs to the same legal standard under which they previously benefited at Defendants' expense and decline to consider Plaintiffs' untimely, new argument for heightened penalties. *See Novato Fire Prot. Dist. v. United States*, 181 F.3d 1135, 1142 n.6 (9th Cir. 1999) (holding that district court did not abuse its discretion in declining to consider new argument on motion for reconsideration).

No PAGA penalties may be awarded based on the Ninth Circuit's ruling on Plaintiffs' section 204 claim. But even if recovery on that claim were available, the maximum possible PAGA penalty would be $7,046,100 (based on the $100 initial violate rate), subject to at least the 25% reduction this Court previously applied. *See* Declaration of Valentin Estevez ("Estevez Decl."), ¶ 7.

B. Consistent With The Court's Prior Holding, Plaintiffs Are Not Entitled To Prejudgment Interest On Their Meal And Rest Break Claims.

This Court previously held that Plaintiffs were not entitled to prejudgment interest on their meal period and rest break claims under California Labor Code section 218.6 – the *sole* mechanism through which they sought such recovery. *See supra* at 2. That issue is settled and

should not (and cannot) be revisited here. Pl. Mot. at 5 ("The law of the case doctrine 'generally precludes a court from reconsidering an issue decided previously by the same court or by a higher court in the same case.'" (quoting *Fallstead*, 2017 WL 3575968, at *4, and *Stacy*, 825 F.3d at 567-68)).

Even aside from the law of the case, however, Plaintiffs' second attempt to recover prejudgment interest fails. In a footnote buried in their motion, Plaintiffs now argue they are entitled to prejudgment interest based on the California Supreme Court's recent decision in *Naranjo v. Spectrum Security Services, Inc.*, No. S258966, 2022 WL 1613499, at 415 (Cal. May 23, 2022), which Plaintiffs cite without analysis. Pl. Mot. at 9, n. 6. As an initial matter, that argument has not been properly raised and should be ignored. *Cheever v. Huawai Device USA, Inc.*, 2019 WL 8883942, at *3 (N.D. Cal. Dec. 4, 2019) (Tigar, J.) ("Arguments raised only in footnotes, or only on reply, are generally deemed waived and need not be considered." (quotation omitted)). But in any event, *Naranjo* actually confirms this Court's prior holding that Labor Code section 218.6 does not apply prejudgment interest to meal and rest break claims. *See* 2022 WL 1613499, at *15. And while *Naranjo* awarded prejudgment interest, it did so on grounds that Plaintiffs here never raised – Civil Code section 3287. *See Naranjo v. Spectrum Sec. Servs., Inc.*, 40 Cal. App. 5th 444, 476, 253 (2019) ("Civil Code section 3287 establishes a default interest rate of seven percent for litigants 'entitled to recover damages certain, or capable of being made certain,' calculated from the day that the right to recover the damages vests.") *aff'd in part by Naranjo*, 2022 WL 1613499, at **14-15 (affirming Court of Appeal decision and expanding reasoning to include default interest rate of seven percent established by state Constitution). Here, this Court declined to "consider whether prejudgment interest on [Plaintiffs' meal and rest break] claims is available under Civil Code section 3287(a) or (b)" "[b]ecause Plaintiffs rel[ied] *solely* on Labor Code section 218.6, *see* ECF No. 355 at 19-20." ECF No. 365 at 10, n. 10 (emphasis added).

The Court should therefore not reconsider its denial of Plaintiffs' request for prejudgment interest, particularly given Plaintiffs' inadequate briefing and failure to raise this argument in any

prior motion. *See supra* at 4-5.[6]

C. Plaintiffs' Request For Wage Statement Penalties And Waiting Time Penalties Should Be Denied Because A Good Faith Dispute Existed.

If the Court entertains Plaintiffs' requests to reconsider its prior decisions (which it should not), Defendants respectfully request that the Court also reconsider Defendants' good faith defense to Plaintiffs' wage time penalties and wage statement claims. Such reconsideration is particularly warranted in light of the Ninth Circuit's decision in this case, as well as recent decisions from other cases in the Ninth Circuit applying the good faith defense to wage-and-hour claims involving airlines and their inflight crew members.

As Defendants previously raised with this Court, in order to recover waiting time penalties, Plaintiffs must demonstrate that Defendants "willfully" failed to pay Plaintiffs and the Class wages upon their separation from employment. ECF No. 352 at 16-17; Cal. Lab. Code § 203(a). Defendants should not be liable for waiting time penalties when a "good faith dispute" exists over the payment of past wages. *See* Cal. Code Regs. tit 8, § 13520. A "good faith dispute" occurs when "an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee." *Id.* Whether the defense ultimately is successful is inconsequential. *Id.* Where the law governing wage payments is unclear, such that the employer's understanding of the legal requirements, even if mistaken, was undisputedly in good faith, a failure to pay earlier is not "willful." *See, e.g., Amaral v. Cintas Corp.*, 163 Cal. App. 4th 1157, 1201-03 (2008) (no "willful" violation where employer's position raised "complicated issues of first impression").

Here, this Court repeatedly recognized that "prior law was unsettled regarding the extraterritorial applicability of California's wage-and-hour laws in this context." ECF No. 365 at 14 (*citing* ECF No. 104 at 11-18; ECF No. 121 at 14). The Court also considered the laws' lack of clarity and "whether Virgin's noncompliance was the result of good faith" in reducing

[6] To the extent the Court finds that the *Naranjo* decision warrants reconsideration of the Court's prior decision or consideration of Plaintiffs' new argument, any prejudgment interest awarded should only begin as of the date *Naranjo* was decided, May 23, 2022. Under that approach, the prejudgment interest on Plaintiffs' meal period and rest break claims for the period May 23, 2022 to July 28, 2022 would be $2,448.12 and $5,279.03, respectively. *See* Estevez Decl., ¶ 8.

Plaintiffs' request for PAGA penalties, but nonetheless declined to address Defendants' good faith dispute to liability for waiting time penalties "[b]ecause Virgin could have raised this defense earlier but did not do so." ECF No. 365 at 9, 14-15. But in contrast to the new arguments that Plaintiffs raise now for the first time, Defendants consistently argued their good faith defense to liability throughout this case. *See, e.g.*, ECF Nos. 60 at 34; 97 at 34, 352 at 16-17. And Defendants' good faith belief that no waiting time penalties were owed to Plaintiffs was only buttressed by the Ninth Circuit's decision finding that Plaintiffs were paid for all hours worked. Accordingly, a good faith dispute clearly existed in this case, barring Plaintiffs' waiting time penalties claim.

Defendants' good faith defense also precludes liability on Plaintiffs' wage statement claim. An overwhelming majority of courts in California, ***including at least ten judges in this district***, agree that "[t]he good faith defense to the willfulness element of [section 226] is clearly established under California law." *Aguilar v. Zep Inc.*, No. 13-CV-00563-WHO, 2014 WL 4245988, at *19 (N.D. Cal. Aug. 27, 2014) (*citing Pedroza v. PetSmart, Inc.*, No. ED CV 11-298 GHK DTB, 2012 WL 9506073, at *4 (C.D. Cal. June 14, 2012 (internal citations omitted)); s*ee also Ornelas v. Tapestry, Inc.*, No. 18-cv-06453-WHA, 2021 WL 2778538, at *7 (N.D. Cal. July 2, 2021) (Alsup, J.); *Nicolas v. Uber Technologies, Inc.*, No. 19-cv-08228-PJH, at *11 (N.D. Cal. May 20, 2021) (Hamilton, J.); *Chavez v. Converse, Inc.*, No. 15-cv-03746-NC, 2020 WL 1233919, at *1 (N.D. Cal. Mar. 13, 2020) (Cousins, Magis. J.); *Magadia v. Wal-Mart Assocs., Inc.*, 384 F. Supp. 3d 1058, 1082 (N.D. Cal. 2019) (Koh, J.); *Arroyo v. Int'l Paper Co.*, No. 17-CV-06211-BL, 2020 WL 887771, at *11 (N.D. Cal. Feb. 24, 2020) (Freeman, J.); *Utne v. Home Depot U.S.A., Inc.*, No. 16-CV-01854-RS, 2019 WL 3037514, at *5 (N.D. Cal. July 11, 2019) (Seeborg, J.); *Oman v. Delta Air Lines, Inc.*, 230 F. Supp. 3d 986, 994 (N.D. Cal. 2017) (Orrick, J.); *Villalpando v. Exel Direct Inc.*, No. 12-cv-04137-JCS, 2015 WL 5179486, at *37 (N.D. Cal. Sept. 3, 2015) (Spero, J.); *Woods v. Vector Mktg. Corp.*, No. C-14-0264 EMC, 2015 WL 2453202, at *2 (N.D. Cal. May 22, 2015) (Chen, J.); *but see Vidrio v. United Airlines, Inc.*, No. 15-cv-07985-PSG-MRW, 2022 WL 1599918, at *14 (C.D. Cal. May 6, 2022).

Recently, two more Judges in this district considered the question of whether an airline's

wage statements reflecting a credit-based compensation system knowingly and intentionally violated section 226: *Wilson v. SkyWest Airlines, Inc.*, No. 19-CV-01491-VC, 2021 WL 2913656, at *2 (N.D. Cal. July 12, 2021), and *Booher v. JetBlue Airways Corporation* No. 15-CV-01203-JSW, ECF No. 85 (slip op), at *6 (N.D. Cal. Nov. 10, 2021), attached as Exh. B to RJN. In each case, the Court held that it did not. In *Wilson*, Judge Chhabria held that SkyWest had a good faith belief that it was not violating California law at the time it issued its wage statements "based on numerous decisions that the dormant Commerce Clause precluded applying California labor laws (including section 226) to interstate airline workers. 2021 WL 2913656, at *3 (internal citations omitted). Similarly, in *Booher*, Judge White held "that when JetBlue issued the wage statements at issue in this case, it had a good faith belief 'based on ample case law that was only very recently overturned, that California law did not apply to Plaintiffs because they did not principally work in California. Indeed, the Court previously found that Section 226 did not apply to wage statements.'" *Booher*, RJN, Exh B. at 7.

Those decisions recognize that the California Supreme Court has linked the "knowing and intentional" and "willful" standards within the California Labor Code, construing "willfull" failure to pay wages under sections 203 and 216 to mean that the employer has "knowingly and intentionally" failed to pay wages and thus that a good faith dispute defense is available. *See, e.g.*, *Magadia*, 384 F. Supp. 3d at 1081-82; *Woods v. Vector Marketing Corp.*, 2015 WL 2453202, at *4 N.D. Cal. May 22, 2015) ("The similarity between 'knowingly and intentionally' under Section 226 and 'willfully' under Section 203 with respect to their incorporation of a good faith dispute defense is consistent with the Labor Code generally. . . . The California Supreme Court has linked the two standards."). "Knowing and intentional" are "scienter requirements." *See Dalton v. Lee Publications, Inc.*, No. 08CV1072 BTM NLS, 2011 WL 1045107, at *5 (S.D. Cal. Mar. 22, 2011). Accordingly, "adopting an interpretation that would essentially read out any scienter requirements from 'knowing and intentional'" – as this Court and the *Vidrio* court did – "would create tension with the commonly-understood legal meanings of these words." *Magadia*, 384 F. Supp. 3d at 1083. Indeed, such an approach improperly transforms section 226 into a strict liability statute with no scienter requirement. *See id.* at 1083.

In contrast to the new arguments that Plaintiffs raise now for the first time, Defendants consistently argued their good faith defense to liability throughout this case. *See, e.g.*, ECF Nos. 60 at 34; 97 at 34. Defendants had multiple reasons to believe in good faith that Virgin was not violating sections 203 or 226.

First, Defendants believed sections 203 and 226 did not apply to Plaintiffs because "California law does not apply to the hours worked by Plaintiffs as Plaintiffs principally worked outside of California." ECF No. 97 at 11, 20-22. Defendants' interpretation was eminently reasonable, as multiple district courts drew the same conclusion. *See, e.g.*, *Oman v. Delta Air Lines, Inc.*, 230 F. Supp. 3d 986, 991 (N.D. Cal. 2017) (holding that sections 204 and 226 do not apply to plaintiffs "because the undisputed facts show that the named plaintiffs only worked a *de minimis* amount of time in California"); *Booher v. JetBlue Airways Corp.*, No. 15-CV-01203-JSW, 2017 WL 6343470, at *6-7 (N.D. Cal. Dec. 12, 2017); *Ward v. United Airlines, Inc.*, No. C 15-02309 WHA, 2016 WL 3906077, at *6 (N.D. Cal. July 18, 2016); *Vidrio v. United Airlines, Inc.*, No. CV15-7985 PSG (MRWX), 2017 WL 1034200, at *6 (C.D. Cal. Mar. 15, 2017). Second, Defendants believed that federal law preempted Plaintiffs' sections 203 and 226 claim, including because "the Dormant Commerce Clause precludes the application of the California Labor Code to Plaintiffs" (ECF No. 97 at 22-25) – a belief buttressed by the District Court's decision in *Ward*. 2016 WL 3906077, at *5 (holding that the dormant Commerce Clause preempted pilots' section 226 claim). Third, Defendants believed that no wages were due to the Waiting Time Penalties Subclass members, because Defendants believed they had paid all wages due. Fourth, Defendants believed that, even if section 226 applied to Plaintiffs, "Virgin's wage statements make it abundantly clear that it is complying with Section 226 in good faith by providing all of the requisite information in a manner that mirrors its compensation system" (ECF No. 97 at 34-35), a credit-based compensation system that the California Supreme Court and Ninth Circuit have now confirmed fully complies with California law. *See Bernstein*, 3 F.4th at 1136-37.

As this Court acknowledged, Defendants did not misinterpret established law or rely on some dubious legal theory. And as the Ninth Circuit recognized when partially reversing this

Court's summary judgment orders, there was a good faith dispute whether Defendants were required to comply with section 226. *Id.* at 1144. Accordingly, Defendants should not be subject to statutory *penalties* when a good faith dispute existed as to sections 203 and 226's applicability.

D. The Court Should Exercise Its Discretion Again And Further Reduce the Amount Of PAGA Penalties.

This Court previously applied a 25% reduction to the total PAGA penalties Plaintiffs sought because it agreed with Defendants that the $33.3 million in penalties would have been unjust and confiscatory relative to the $45 million in damages and that legal uncertainty regarding Defendants' liability in this case warranted a reduction because the "prior law was unsettled." ECF No 365 at 14. The Ninth Circuit's subsequent decision only supports that analysis and warrants significant further reduction to Plaintiffs' estimated PAGA penalties.

As an initial matter, Plaintiffs' argument that the Ninth Circuit's determination that California law does not allow for *heightened* PAGA penalties against Defendants eliminates the basis for any discretionary *reduction* of the penalties makes no sense. Pl. Mot. at 18. Plaintiffs offer no legal authority (nor could they) for the novel argument, and the suggestion that a party that succeeds in reducing its liability on appeal should be penalized with higher penalties simply cannot be right.

Nonetheless, as this Court previously decided, a reduction in the PAGA penalties is clearly warranted here. Defendants previously argued that the PAGA penalties should be completely or significantly reduced because this case presented multiple issues of first impression (including threshold questions regarding the applicability of California law and the calculation of damages that ultimately required the California Supreme Court and Ninth Circuit's analysis), and the maximum penalty Plaintiffs sought would have resulted in an award that was unjust, arbitrary, oppressive, and confiscatory. *See* ECF No. 352 at 16-19. The subsequent decisions in both this and other airline cases in this Circuit have confirmed the complexity of the legal questions at issue and underscored that further reductions are appropriate.

In rendering the prior decision, this Court recognized these complexities, but was unwilling to exercise its discretion in a manner similar to other courts that reduced PAGA

penalties by up to 94%. *See id.* at 18-19. The Court found these cases to be "wholly inapposite," but only did so after determining that the "*most important* factor distinguishing this case is injury." *Id.* at 13 ("Unlike in Virgin's cases, Plaintiffs have been deprived of compensation for hours worked and statutorily mandated breaks, suffering over $45 million in damages (including interest)") (emphasis added). But as the Ninth Circuit has since held, Plaintiffs were not deprived of compensation for all hours worked and, as a result, experienced purported damages of $13.3 million rather than $45 million. *Berntsein*, 3 F.4th at 1136-37 (holding that Virgin's compensation system, like the "virtually identical compensation scheme" that the California Supreme Court held to be lawful in *Oman*, did not violate California law). That decision not only significantly reduced the "injury" Plaintiffs suffered, but also the "main driver" distinguishing this case from those Defendants cited. *See* ECF No. 352 at 16-19. While Plaintiffs are still eligible for damages for unpaid wages following the Ninth Circuit's decision, their non-wage claims now account for approximately 40% of the potential damages, including an unjust and confiscatory $6,679,700 in PAGA penalties. Therefore, a significantly greater reduction in PAGA penalties is warranted now that the Ninth Circuit's recent decision eliminated most of the legal injuries that were the "most important factor" by which the Court distinguished this case from those Defendants cited.

The Court also previously agreed with Defendants' argument that $33.3 million in PAGA penalties would be potentially confiscatory relative to just $45 million in damages. ECF No. 365 at 14. Plaintiffs' expert David Breshears now claims that the combined total for all PAGA penalties amounts to $23,416,100, as compared to approximately $18.5 million in total damages, including prejudgment interest, for Plaintiffs' remaining non-PAGA claims. Pl. Mot. at 44. Awarding PAGA penalties that far exceed the total damages would clearly be unjust, oppressive, and confiscatory. *See* Cal. Lab. Code § 2699(e)(2). Even when properly dismissing Plaintiffs' claim for $14,092,200 in section 204 PAGA penalties, the remaining amount of $9,323,900 is still unjustified, particularly given that a significant majority of the remaining penalties ($6,679,700) are for a technical wage statement violation that did not cause any injury to Plaintiffs. *See, e.g., Fleming v. Covidien Inc.*, 2011 WL 7563047, at *2 (C.D. Cal. Aug. 12,

2011) (applying 82% reduction); *Aguirre v. Genesis Logistics*, 2013 WL 10936036, at *9 (C.D. Cal. July 3, 2013) (applying 72% reduction).

This Court also agreed that the legal uncertainty regarding Defendants' potential liability in this case required a reduction in total PAGA penalties. ECF No 365 at 14. The Court presumably reduced the weight of this factor based on its belief in January 2019 that "the relevant authorities clearly support the outcome in this case." *Id.* In the three years since that order, however, multiple airline cases touching on similar unsettled legal issues have made their way through the Ninth Circuit and California Supreme Court further changing the legal landscape and the applicable analysis to determining liability. *See, e.g., Ward v. United Airlines, Inc.*, 9 Cal. 5th 732 (2020); *Oman v. Delta Air Lines, Inc.*, 9 Cal. 5th 762 (2020). More significantly, the Ninth Circuit reversed this Court's order granting summary judgment for Plaintiffs on several issues, including finding that Virgin's credit-based compensation system fully complies with California law thereby eliminating more than half of the potential damages and penalties here. *Bernstein*, F.4th at 1137. And even where the Ninth Circuit disagreed with Defendants' arguments, such as with respect to the proposed job situs test, it similarly rejected this Court's analysis of the same claims, such as the "multifactor test." *Ward*, 9 Cal. 5th at 757-58 (rejecting multifactor test after noting that this Court adopted it based on an erroneous reading of *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (2011)). These legal developments prove that there was greater uncertainty regarding Defendants' liability than this Court previously recognized. Given that the question of "whether Virgin's noncompliance was the result of good faith is… relevant to the Court's penalty analysis," (*Bernstein*, 3 F. 4th at 1144 (citing *Amaral*, 163 Cal. App. 4th at 1157)), those legal developments justify a greater reduction of the total PAGA penalties far beyond the 25% previously granted. *See* ECF No. 354 at 15 (noting that "when the law is unclear, awarding the maximum penalties may be excessively punitive and their deterrence function weakened.").

Because all the factors the Court previously considered to determine the appropriate reduction in PAGA penalties now much more strongly favor Defendants, the Court should exercise its discretion to reduce total PAGA penalties by 75%.

E. Waiting Time Penalties Should Not Be Awarded To Waiting Time Penalties Subclass Members Who Are Not Owed Overtime Wages

"Under California law, '[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…but the wages shall not continue for more than 30 days.'" ECF No. 317 at 11 (*citing* Cal. Lab. Code § 203). Here, Plaintiffs "contend[ed] that Virgin willfully failed to pay the Waiting Time Penalty Subclass members for all hours worked and for overtime." *See id.* (*citing* ECF No. 225 at 26). Because this "Court had already found that Virgin failed to pay class members for all hours worked and for overtime," the Court granted Plaintiffs' summary judgment motion with respect to their section 203 claim. Accordingly, Plaintiffs calculated and requested waiting time penalties on behalf of every class member who separated from employment at any time since March 18, 2012, including Waiting Time Penalties Subclass members who Plaintiffs' expert identified as not having unpaid overtime wages at the time of their separation. *See generally* ECF Nos. 343, 343-2.

In light of the Ninth Circuit's reversal of Plaintiffs' claims for minimum wage and for payment for each hour worked (*Bernstein*, 3 F.4th at 1144-45), only those Waiting Time Penalties Subclass members who were owed overtime wages at the time of their separation should be eligible for waiting time penalties – an employee can only be owed waiting time penalties if they were actually waiting on wages to be paid. Nonetheless, Plaintiffs' expert did not adjust his waiting time penalties calculation in any way and Plaintiffs insist on being awarded the full amount originally sought, including for those Waiting Time Penalties Subclass members with no unpaid overtime wages. As Plaintiffs' contention must now be that "Virgin willfully failed to pay the Waiting Time Penalty Subclass members…for overtime" (*see* ECF No. 317 at 11), when properly limited to individuals with unpaid overtime wages, the requested waiting time penalties should be $2,014,738.35. *See* Estevez Decl., ¶ 6.[7]

[7] To the extent the Court permits Plaintiffs to argue that waiting time penalties are also available to those Waiting Time Penalties Subclass members who only have meal period and/or rest break damages (*i.e.*, they were not owed overtime upon their separation from employment) pursuant to the decision in *Naranjo*, 2022 WL 1613499, Plaintiffs' expert calculated those Subclass members' waiting time penalties as $234,732.23. *See* Estevez Decl., ¶ 6.

F. The Potential Wages Due, Interest, Penalties And PAGA Penalties Should Not Exceed $27,492,196 And Should Be Reduced Further Pursuant To Defendants' Arguments Above.

Based on the foregoing, Defendants state that, pursuant to the Ninth Circuit's decision, the following amounts may be awarded on Plaintiffs' claims subject to Defendants' arguments herein and appropriate reductions:

Wages Due

- ***Wages Due On Unpaid Hours:*** $0 (claim reversed by the Ninth Circuit).
- ***Overtime***: $6,324,592

Meal Period and Rest Break Premiums

- ***Meal Period Premiums***: $190,525
- ***Rest Break Premiums***: $410,841

Interest[8]

- ***Wages Due On Unpaid Hours:*** $0 (claim reversed by the Ninth Circuit).
- ***Overtime***: $4,829,000
- ***Meal Periods***: $0
- ***Rest Breaks***: $0

Penalties (subject to Defendants' good faith defenses (*see supra* at 11-15))

- ***Waiting Time Penalties:*** $2,014,738.35
- ***Wage Statements***: $4,398,600

PAGA Penalties (prior to appropriate reductions)

- ***Minimum Wage:*** $0 (claim reversed by the Ninth Circuit).
- ***Overtime***: $2,011,200
- ***Meal Periods***: $212,000
- ***Rest Breaks***: $421,000
- ***Wage Statements***: $6,679,700

[8] As stated above, should the Court entertain Plaintiffs' new argument that they are entitled to prejudgment interest on their meal period and rest break claims, such interest should be limited to the period following the May 23, 2022 decision in *Naranjo*, which results in interest of $2,344.50 (Meal Periods) and $5,279.03 (Rest Breaks). *See* Estevez Decl., ¶ 8.

- ***Timely Wages* (Section 204):** $0 (claim reversed by Ninth Circuit)
- **Total PAGA Penalties**: $9,323,900

IV. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion to Amend the Judgment in part, grant only those damages and penalties permitted for Plaintiffs' remaining claims following the Ninth Circuit's decision, and reduce Plaintiffs' request for PAGA penalties by 75%.

Dated: June 16, 2022

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