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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULIA BERNSTEIN, et al.,

Plaintiffs,

v.

VIRGIN AMERICA, INC., et al.,

Defendants.

Case No. 15-CV-02277-JST

CLASS ACTION

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO AMEND THE JUDGMENT

Hearing Date: August 18, 2022
Hearing Time: 2:00 p.m.
Courtroom: 6 (Oakland)

The Honorable Jon S. Tigar

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I. INTRODUCTION

Virgin's opposition smacks of desperation. Having failed in its yearslong battle to convince the Courts that it has no obligation whatsoever to comply with California wage laws, it now attempts to chip away at the multimillion-dollar judgment affirmed by the Ninth Circuit. Its efforts fail.

Virgin concedes that the Ninth Circuit Opinion requires judgment to be entered on Plaintiffs' overtime and meal and rest break claims and the corresponding PAGA penalties at the amounts calculated by Plaintiffs' expert. But it then raises numerous arguments that have no teeth.[1]

First, in what can only be described as an ostrich-like attempt to ignore the actual claims in this case, Virgin argues that the Ninth Circuit reversed this Court's holding that Virgin violated Labor Code § 204's timely pay requirements. In fact, Plaintiffs asserted two separate claims based on § 204. Liability for their Third Cause of Action, which relates to Plaintiffs' minimum wage claim, was reversed. Liability for their Ninth Cause of Action for PAGA penalties, which included penalties for Virgin's admitted failure to pay Plaintiffs and the Class in a timely fashion, was affirmed. Further, because the Ninth Circuit remanded for recalculation of the PAGA penalties, and § 204 requires penalties of $200 per violation where the violation was, as here, knowing and intentional, the $200 per violation is the applicable rate.

Second, Virgin has offered no evidence or persuasive argument that the PAGA penalties are "unjust, arbitrary and oppressive, or confiscatory," as it must do to warrant any reduction. Indeed, the Ninth Circuit has already reduced the penalties, and what remains is Virgin's confirmed liability for serially and unlawfully withholding the wages of over 2,000 flight attendants.

Third, Virgin's attempt to resurrect a faulty "good faith" defense to Plaintiffs' wage statement and waiting time penalties claims fails. The Ninth Circuit affirmed these claims; the mandate does not permit reconsideration of them. Further, Virgin did not argue the defense to

[1] Virgin does make one argument that is admittedly correct, as discussed below.

the Ninth Circuit, and also waived it in this Court long ago. Virgin's attempt to rewrite the record and claim this defense was appropriately raised cannot succeed. In addition, this Court correctly found that Virgin intentionally and knowingly violated Plaintiffs' rights to accurate wage statements and waiting time penalties.

Plaintiffs' motion to amend the judgment must be granted. In addition, just today, the U.S. Supreme Court denied Virgin's petition for certiorari. See U.S. S. Ct. Case No. 21-260, entry for June 30, 2022. Accordingly, the amended judgment can be entered as to all claims.

II. ARGUMENT

A. The Ninth Circuit Affirmed Plaintiffs' PAGA Claims and Remanded for Recalculation of the Penalties.

1. The Ninth Circuit Affirmed Plaintiffs' PAGA Claim Based Upon Virgin's Violation of Labor Code § 204.

Defendants make the cursory, but remarkable, claim that the Ninth Circuit reversed Plaintiffs' PAGA claim under Labor Code § 204 for failing to pay wages timely. Not even a tortured reading of the Opinion can lead to that conclusion. Defendants intentionally conflate the distinct provisions of Labor Code § 204 that Plaintiffs invoked when prosecuting this action. Section 204 appears in two ***separate causes of action*** in Plaintiffs' operative Complaint. Dkt. 298. One of those causes of action was reversed; the other was affirmed and remanded for recalculation of the amount owed. *Bernstein v. Virgin Am., Inc.*, 3 F.4th 1127, 1137, 1144-45 (9th Cir. 2021).

Plaintiffs' **Third Cause of Action** alleges that Virgin violated § 204 by requiring Plaintiffs to work off-the-clock and thus failing to pay Plaintiffs for all hours worked. Dkt. 298 at pp. 14-15. This claim goes hand in hand with Plaintiffs' "minimum wage" claim, *i.e.*, that Virgin violated California law by not paying Plaintiffs for all duty hours worked. *Id.* at pp. 11-12. *See* Lab. Code § 204 ("all wages…earned [by an employee] are due and payable" by the employer). The Ninth Circuit reversed this Court's judgment on these claims, finding that, under the intervening case of *Oman v. Delta Air Lines, Inc.*, 9 Cal.5th 762 (2020), Virgin paid Plaintiffs "for all hours worked." *Bernstein*, 3 F.4th at 1137. Specifically, the Ninth Circuit opined that

the Virgin's pay scheme was "virtually identical" to that in *Oman* and was lawful for the same reasons: "the scheme, taken as a whole, does not promise any particular compensation for any particular hour of work; instead, it offers a guaranteed level of compensation for each duty period and each rotation." *Id.*, quoting *Oman*, 9 Cal.5th at 786. Accordingly, the Ninth Circuit "reverse[d] the district court's summary judgment to Plaintiffs on their claims for minimum wage and payment for all hours worked." *Bernstein*, 3 F.4th at 1137; *see also* at 1145 ("We reverse the district court's summary judgment to Plaintiffs on their claims for minimum wage (§ 1182.12) [and] for payment for each hour worked (§ 204)").

In contrast, Plaintiffs' **Ninth Cause of Action** alleges that Virgin is liable for civil penalties under PAGA for several Labor Code violations, including "[f]ailing to comply with Labor Code section 204 by failing to pay wages in a timely manner, i.e., between the 16th and the 26th day of the month for labor performed between the 1st and 15th days of the month, and between the 1st and 10th day of the following month for labor performed between the 16th and the last day of the month." Dkt. 225 at pp. 20-21; Labor Code § 204(a). Apart from claiming that it was broadly exempt from California wage laws, Virgin ***never mounted a defense to this claim.*** Plaintiffs, in their first summary judgment motion, put forth evidence that Virgin violated the timely pay requirement of § 204 "because each flight attendant's month-end check is not paid until after the 26th of each month and their following check is not paid until after the 10th of that following month." Dkt. 225 at p. 18.[2] That is, whether or not Virgin was properly paying Plaintiffs, it was always paying them late, in violation of § 204. Plaintiffs argued that Virgin was therefore liable for civil penalties pursuant to PAGA. *Id.* at pp. 27-28. Virgin did not dispute the evidence or oppose this argument at all in its opposition brief. Dkt. 267. This Court found: "Plaintiffs provide evidence that Virgin does not provide timely payments pursuant to California Labor Code Section 204. Virgin does not dispute this evidence. Accordingly, Plaintiffs' motion for summary judgment on this claim is granted." Dkt. 317 at p. 12. Virgin also did not oppose

[2] All of Virgin's documents confirm that Virgin always paid its flight attendants late and thus not in compliance with § 204. *See, e.g.,* Dkt. 232-26; 232-27; 232-28; 232-07 at p. 858; 232-09 at pp. 957-58; 232-10 at pp. 1033-34.

this argument when Plaintiffs filed their second motion for summary judgment as to the amount of the judgment. Dkt. 352.

Further, Virgin did not appeal this Court's determination that Virgin was liable for civil penalties under PAGA for its failure to pay timely as required by § 204. Ninth Cir. Dkt. 024. On appeal, the only attack Virgin made specific to Plaintiffs' PAGA claim was "whether the district court correctly held that Virgin was subject to heightened penalties for subsequent violations under PAGA." *Bernstein*, 3 F.4th at 1144. The Ninth Circuit found that the subsequent rate applied only after this Court's determination of a violation and, accordingly, reversed this Court's judgment "for heightened penalties for subsequent violations under PAGA," and remanded for recalculation of the PAGA penalties. *Id.* at 1145. Thus, Virgin's argument that the Ninth Circuit reversed Plaintiffs' PAGA claim based on § 204 is without merit.

Defendants make much of the fact that Plaintiffs petitioned the Ninth Circuit for rehearing. Plaintiffs did so primarily to correct the Ninth Circuit panel's fundamental error that Virgin compensated its flight attendants for all hours worked, based upon Virgin's misrepresentation that its pay scheme was the same as that in *Oman.* The fact that Plaintiffs also sought to head off at the pass Virgin's specious argument regarding § 204, by seeking confirmation that the Ninth Circuit's decision cannot be read in the manner that Virgin now urges, can hardly be treated as a concession of any kind by Plaintiffs.

The untimely nature of Virgin's pay of wages is entirely distinct from whether Virgin properly paid its flight attendants for all hours worked. Virgin's systematic violation of § 204's timely pay requirement was neither challenged nor overturned on appeal. Virgin's argument that the Ninth Circuit reversed this claim is both inaccurate and unpersuasive.

2. The Ninth Circuit Remanded for Recalculation of the PAGA Penalties that Flow from Each of Virgin's Labor Code Violations and Plaintiffs' Recalculation of the Penalties Owed under § 204 Are Directly within This Court's Mandate.

Virgin's arguments that Plaintiffs are not entitled to apply the $200 per violation rate to the PAGA penalties for violations of Labor Code § 204 are similarly infirm. *First*, Virgin's

argument that Plaintiffs "waived" the right to seek penalties of $200 per pay period under § 210's alternate formulation fundamentally misunderstands the nature of the rule of mandate. The Ninth Circuit's opinion explicitly remanded to this Court for recalculation of the PAGA penalties, after concluding that PAGA's provisions that call for a higher rate for any "subsequent violation" apply only after a determination by a government agency or court. *Bernstein*, 3 F.4th at 1144. Thus, this Court has been directed to recalculate the PAGA penalties.

Second, Virgin misconstrues the applicable penalty provisions. The civil penalties for violations of § 204 are set forth in Labor Code § 210, which contains *alternative* formulas. Either the initial/subsequent rates of $100/$200 apply to each violation, or, if the violation is "willful or intentional," the rate of $200 for each violation, plus 25 percent of the amount unlawfully withheld, applies. Lab. Code § 210. Virgin contends that the Ninth Circuit disallowed any "heightened" penalties, so the $200 per violation cannot apply. But that is a convenient misreading of the Opinion, which construed "subsequent violation," not "heightened" penalties. *Bernstein*, 3 F.4th at 1144.

Third, the alternative formulation of $200 for each violation applies here because Virgin's failure to pay timely wages, like its failure to provide accurate wage statements, was knowing and intentional. *See,* Dkt. 121 p. 31; Dkt. 317 at p. 11-12. Plaintiffs presented evidence that Virgin systematically paid its flight attendants beyond the time limits proscribed in § 204. Virgin never disputed that evidence. *Id.*; Dkt. 225 p. 19; *supra*, n. 1.

By using the prescribed $200 per violation rate, the total amount in civil penalties owed, *excluding* the additional 25 percent of wages unlawfully withheld, is $14,092,200. 2022 Breshears Report, ¶ 20, Ex. B, B-1, B-2. If the Court were nevertheless to determine that only the "initial" rate applies to this claim, the total amount of civil penalties owed, as conceded by Virgin, is $7,046,100. Dkt. 454-01, Estevez Decl. ¶ 7.

3. Virgin Has Failed to Establish Any Basis for this Court's Discretionary Reduction of the PAGA Penalties.

Virgin also clings to its arguments – already rejected by this Court – that the Court should reduce the PAGA penalties by a whopping 75%. But Virgin has failed to demonstrate that it is

entitled to any reduction, let alone such an extreme reduction, of the PAGA penalties, because it has not and cannot demonstrate that the penalties, based on the facts and circumstances of this case, are "unjust, arbitrary and oppressive, or confiscatory." Lab. Code § 2699(e)(2).

First, Virgin misunderstands Plaintiffs' argument that the reasons for the Court's previous 25% reduction have now been obviated by the Ninth Circuit's decision. To the extent that this Court had found a reduction was appropriate due to the uncertain nature of Plaintiffs' unpaid wages claim, the Ninth Circuit found in *Virgin's* favor on that issue, thus eliminating the PAGA penalties associated with that claim altogether. To the extent that Virgin continues to assert any "good faith" confusion about the application of California law to a California employer employing California employees, this is also addressed by the Ninth Circuit – any such argument only goes to whether a "subsequent" violation rate applies. *Bernstein,* 3 F.4th at 1144. Because the Ninth Circuit Opinion forecloses the use of the "subsequent violation" rate here, the PAGA penalties are *already* effectively reduced on that basis.

Virgin leans heavily on its oft-repeated incantation that it should get a break because the law has been unclear. But remember the undisputed facts: Virgin has always been a California employer that took over $10 million in California tax dollars in exchange for committing to employ a California-based workforce. Dkt. 121, p.1; Dkt. 225, pp.11-12. And Virgin concedes it never even attempted to apply with California law with respect to its flight attendants. *See, e.g.,* Dkt. 97, p. 34; 317, p. 12, 14; 101-30, p. 10. Further, Virgin has already gotten its break by the significant reduction of penalties by the Ninth Circuit: no penalties for any unpaid hours, and reduced penalties on certain claims, even when Virgin serially violated the law. Virgin insists that recent developments contradict this Court's earlier statement that "the relevant authorities clearly support the outcome in this case," (Dkt. 365 at 14), but that is untrue. What Virgin conveniently ignores is that its (and other airlines') wholesale attack on the application of California law has failed. The Ninth Circuit resoundingly *affirmed* this Court's conclusions that federal law does not prohibit the application of California wage law here, rejected Virgin's "job situs" test, and affirmed liability on all but one of Plaintiffs' claims. *See, generally, Bernstein*, 3 F.4th 1127. Moreover, at no time during this multi-year litigation did Virgin attempt to remedy

any violations or comply in any way with California law, unlike other cases in which courts found a reduction appropriate. *See, e.g., Thurman v. Bayshore Transit Mgmt., Inc*., 203 Cal. App. 4th 1112, 1136 (2012) (noting that "defendants took their obligations under Wage Order No. 9 seriously and attempted to comply with the law"); *Fleming v. Covidien Inc*., 2011 WL 7563047, at *2 (C.D. Cal. Aug. 12, 2011) (considering "prompt steps to correct violations once notified").

Second, Virgin attempts to dismiss the real injury it caused to the approximately 2,000 flight attendants it has been depriving of wages since it opened its doors for business in California in 2007. Virgin acknowledges that this Court, in awarding PAGA penalties in this case, noted that the "most important factor" that distinguishes this case from every case Virgin has used to prop up its flimsy argument for a reduction in penalties is the injury to Plaintiffs and the Class.[3] But then Virgin suggests that violations of more than $13 million in wage loss does not constitute "injury" warranting complete PAGA penalties. Far from the "technical" violations Virgin contends it engaged in, however, flight attendants in this case testified to the very real harm they have suffered, from never being paid overtime to being completely unable to determine how they were paid. *See, e.g.*, Dkt. 258-09 through 285-23.

Third, Virgin mischaracterizes this Court's earlier analysis, stating that the Court "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." Dkt. 451 at p. 21. In fact, the Court said only that "it considers this factor," and that 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." Dkt. 365 at p. 14. Virgin does not even attempt to show an inability to pay. And given that PAGA is a stand-alone statute that is regularly prosecuted *without* any parallel claims to recover for wage loss, whether a penalty is confiscatory *relative to wage loss*, is not an appropriate inquiry. *Cf. Carrington v. Starbucks Corp.,* 30 Cal.

[3] Virgin cites no new case law in support of this argument. The two cases it cites are the same this Court explained were "wholly inapposite" the last time Virgin advanced this meritless argument. *See* Dkt. 451 at pp. 16-17 and Dkt. 365 at p. 13.

App. 5th 504, 529 (2018) (affirming reduction in penalties as "confiscatory" where there was evidence of defendant's "good faith attempts to comply" with the law and of the violations being "minimal").

PAGA is a public prosecution statute. It exists to assist the State with the enforcement of California wage laws and is broadly intended to compel California employers to follow California law. *See Huff v. Securitas Sec. Servs. USA, Inc*., 23 Cal. App. 5th 745, 752-53 (2018), citing *Iskanian v. CLS Transp. L.A., LLC*, 59 Cal. 4th 348, 379 (2014). Accordingly, PAGA penalties "are mandatory, not discretionary," *Amaral v. Cintas Corp. No. 2,* 163 Cal. App. 4th 1157, 1213 (2008), and a Court may award a lesser amount than the maximum penalty if –and only if—to do otherwise would result in an award that is either "unjust, arbitrary, and oppressive or confiscatory." Lab. Code § 2699(e)(2).

Virgin admits that it chose not to comply with California law, even long after this case was filed, which has resulted in substantial and significant wage losses to Plaintiffs and the Class. Virgin has, therefore, willfully failed to comply with even the most basic California wage protections. Virgin offers no evidence that the PAGA penalties at issue here would be unjust, arbitrary, and oppressive or confiscatory. Any reduction in the PAGA penalties is neither warranted nor appropriate.

B. Virgin Cannot Avoid Liability for the Wage Statement and Waiting Time Penalties Claims that the Ninth Circuit Affirmed on Appeal.

Ignoring both the rule of mandate and the law of the case, Virgin insists that if this Court "entertains Plaintiffs' requests to reconsider its prior decisions," the Court should also reconsider Virgin's "good faith dispute" defense to Plaintiffs' claims for waiting time penalties (§ 203) and wage statement violations (§ 226).

This sauce for the goose, sauce for the gander argument is not well taken. *First*, Virgin glosses over a critical – and dispositive – distinction. Plaintiffs' request is limited to *exactly* what this Court has been directed to do by the Ninth Circuit, i.e., to recalculate the PAGA penalties. The Ninth Circuit affirmed Plaintiffs' § 203 and § 226 claims. *Bernstein*, 3 F.4th at

1145. This Court is bound by that holding. *See Stacy v. Colvin*, 825 F.3d 563, 567 (9th Cir. 2016); *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012); *United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir. 2000); *Ryan v. Editions Ltd. West, Inc*., 786 F3d 754, 766 (9th Cir. 2015); *Fallstead v. Colvin*, No. 16-CV-00829-JST, 2017 WL 3579568, at *4 (N.D. Cal. May 26, 2017).

Second, and equally dispositive, Virgin waived its good faith defense by failing to raise it on appeal. Ninth Cir. Dkt. 024; *see Bernstein*, 3 F.4th 1127. Virgin is thus foreclosed from arguing this affirmative defense now. *See Slice v. Acton*, 2012 WL 1900567, *1 (D. Mont. May 24, 2012) (quoting *Munoz v. County of Imperial*, 667 F.3d 811, 817 (9th Cir. 1982) (internal quotations and citations omitted) ("Generally in our circuit, a party waives a new contention that could have been but was not raised on a prior appeal"); *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996) ("A party cannot use the accident of a remand to raise ... an issue that he could just as well have raised in the first appeal because the remand did not affect it").

Third, Virgin waived its good faith defense in *this* Court long ago. Virgin's statement that it "consistently argued" a good faith defense "throughout this case" (Dkt. 451, at 14) is categorically untrue. Even if this Court could revisit what the Ninth Circuit has explicitly affirmed, Virgin has waived any reconsideration of that argument here. *See, e.g.*, *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1491 n.1 (2019) (argument waived where defendant failed to raise it in opposition brief); *Pac. Dawn LLC v. Pritzker*, 831 F.3d 1166, 1178 n.7 (9th Cir. 2016) ("plaintiffs did not raise that argument to the district court in their ... opposition to the defendants' motion for summary judgment, so the argument was waived"); *Azpeitia v. Tesoro Ref. & Mktg. Co. LLC*, No. 17-CV-00123-JST, 2017 WL 3115168, at *10 (N.D. Cal. July 21, 2017) ("failure to respond in an opposition brief to an argument ... constitutes waiver or abandonment") (citation omitted).

With respect to Plaintiffs' § 203 claim, Virgin did not raise a good faith defense when it moved for summary judgment, or when it opposed Plaintiffs' motion for summary judgment on liability. Dkt. 97; Dkt. 267. Virgin first sought to invoke this *liability*-based affirmative defense to Plaintiffs' § 203 claim in opposition to Plaintiffs' motion for summary judgment on damages.

Dkt. 352 at 22-23. The Court rightly rejected that belated and half-hearted gambit:

> Virgin next raises for the first time a defense to liability for waiting time penalties. Even where an employer willfully fails to pay wages, "a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203." Cal. Code Regs. tit. 8, § 13520. Because Virgin could have raised this defense earlier but did not do so, the Court does not address it further.

ECF No. 365, at 8-9.

With respect to Plaintiffs' § 226 claim, as Virgin acknowledges, this Court *already* concluded that Virgin was not entitled to a good faith defense. *See Bernstein v. Virgin Am., Inc.*, 227 F. Supp. 3d 1049, 1076 (N.D. Cal. 2017) (holding that "[g]ood faith is not a defense to a wage statement violation under § 226"). That decision is law of the case that Virgin did not challenge on appeal. Virgin can hardly be heard to complain now. *See Slice v. Acton*, 2012 WL 1900567, *1.

Virgin's invocation of other "recent" trial court decisions finding a good faith defense does not assist it. Those cases do not express an intervening change in the law such that this Court could revisit its prior rulings. *See United States v. Van Alstyne,* 584 F.3d 803, 813 (9th Cir. 2009) (intervening change in controlling law is an exception to law of the case); *In re Molasky,* 843 F.3d 1179, 1185 n. 5 (9th Cir. 2016) ("an intervening change in controlling authority" is an exception to the mandate rule). To the contrary, as Virgin acknowledges, many courts, including this Court in this action, recognized there is no good faith defense to wage statement claims. Dkt. 451, p. 17. The correctness of this conclusion is confirmed by a simple review of the statutory language. Section 226 provides penalties for an employer's "knowing and intentional" failure to provide the information required in wage statements. It also explicitly states that "a 'knowing and intentional failure' does not include an isolated and unintentional payroll error due to a clerical or inadvertent mistake [and] the factfinder may consider as a relevant factor whether the employer, prior to an alleged violation, has adopted and is in compliance with a set of policies, procedures, and practices that fully comply with this section." Lab. Code § 226(e)(3). Good faith appears nowhere in the statute.

Many other well-reasoned cases are in accord. *See Vidrio v. United Airlines, Inc.*, No.

CV157985PSGMRWX, 2022 WL 1599918, at *14 (C.D. Cal. May 6, 2022) (collecting cases rejecting "good faith dispute" defense to § 226 claims and holding "that Defendant may not raise a good faith defense to Plaintiffs' second cause of action under § 226(e)" because "to establish the knowledge element of their second cause of action under § 226(e), Plaintiffs must show that Defendant 'knew that its wage statements did not contain' information required by § 226(a) but not that it 'knew that this conduct ... was unlawful'"); *Garnett v. ADT LLC*, 139 F. Supp. 3d 1121, 1133–34 (E.D. Cal. 2015) (employer's violation of § 226 is "not knowing and intentional if it was 'an isolated and unintentional payroll error due to a clerical or inadvertent mistake,'" and an employer's "good faith belief" that it is exempt from § 226 cannot defeat a finding of a knowing and intentional violation because "ignorance of the law" can never form the basis for such a defense); *see also Troester v. Starbucks Corp.,* 387 F. Supp. 3d 1019, 1030–31 (C.D. Cal. 2019) (the "good faith dispute" defense does not apply to wage statement claims" under § 226); *Derum v. Saks & Co.*, 95 F. Supp. 3d 1221, 1228 (S.D. Cal. 2015) (citation omitted) ("Whether the employer knew it was violating § 226(a) is irrelevant" as "ignorance of the law does not excuse a violation of § 226."); *Novoa v. Charter Commc'ns, LLC*, 100 F. Supp. 3d 1013, 1027–29 (E.D. Cal. 2015) ("[A] mistake of law—even when made in good faith—does not prevent Defendant's conduct from knowingly and intentionally failing to comply with [§ 226(a)]"); *Furry v. East Bay Publ'g, LLC*, 30 Cal. App. 5th 1072, 1085 (2018) (concluding that an employer's good faith belief "is not a viable defense" to a § 226(e) claim); *Kao v. Holiday*, 12 Cal. App. 5th 947, 962 (2017) (explaining that liability is established under § 226(e) even if a defendant "believed, in good faith, that" § 226(a) did not apply because "[s]uch a belief amounts to a mistake of law that is not excused under the statute mandating itemized wage statements").

Undaunted, Virgin insists that a good faith defense to § 226 is available because courts have "linked" willfulness (as required for § 203 claims) to the "knowing and intentional" requirement of § 226.[4] Even if true, that argument cannot assist Virgin here because this Court

[4] The cases upon which Virgin relies are distinguishable and unpersuasive. All decisions were either context specific with respect to the underlying facts of the case or assumed the existence of a good faith defense to § 226 without significant analysis. *See Amaral*, 163 Cal. App. 4th at

found Virgin's § 226 violation to be knowing and intentional. In denying Virgin summary judgment on this issue, the Court found: "Virgin concedes that its wage statements do not show" the hourly rate or the number of hours worked, and that "its compensation system prevents full compliance," but "it nonetheless is 'complying with Section 226 in good faith.'….Good faith is not a defense to a wage statement violation under § 226. *Garnett*, 139 F.Supp.3d at 1133–34. Moreover, the fact that Virgin's wage statement deficiencies are part of a centralized policy that fails to comply with § 226 suggests that the violation is knowing and intentional. *Id*. *Bernstein*

1202 (reviewing findings of trial court and determining whether defenses were either "not unreasonable or frivolous" based upon evidentiary record); *Aguilar v. Zep Inc.*, No. 13-CV-00563-WHO, 2014 WL 4245988 (N.D. Cal. Aug. 27, 2014) (denying summary judgment and assuming the applicability of a "good faith dispute" defense applicable with respect to both § 203 and § 226 claims without any independent analysis); *Pedroza v. PetSmart, Inc.*, No. ED CV 11-298 GHK DTB, 2012 WL 9506073, at *4 (C.D. Cal. June 14, 2012)(addressing both claims at summary judgment and failing to analytically distinguish between Labor Code sections); *Ornelas v. Tapestry, Inc.*, No. 18-cv-06453-WHA, 2021 WL 2778538, at *7 (N.D. Cal. July 2, 2021)(addressing good-faith dispute defense on summary judgment and full record); *Chavez v. Converse*, Inc., No. 15-cv-03746-NC, 2020 WL 1233919 *3 (N.D. Cal. Mar. 13, 2020)(on full record deciding that good-faith defense could be asserted based on previous law in existence at time of alleged violations); *Magadia v. Wal-Mart Assocs., Inc.*, 384 F. Supp. 3d 1058, 1082 (N.D. Cal. 2019), *rev'd on other grounds*, 999 F.3d 668 (9th Cir. 2021)(following other cases to permit assertion of a good-faith defense on full evidentiary record); *Arroyo v. Int'l Paper Co.*, No. 17-CV-06211-BL, 2020 WL 887771 * 13 (N.D. Cal. Feb. 24, 2020)(based on full factual record determining whether employer actually had a good-faith belief that its wage statements were compliant with California law); *Utne v. Home Depot U.S.A., Inc.*, No. 16-CV-01854-RS, 2019 WL 3037514 * 5-7 (N.D. Cal. July 11, 2019)(addressing defense on full record); *Oman v. Delta Air Lines, Inc.*, 230 F. Supp. 3d 986, 992-94 (N.D. Cal. 2017)(finding that § 226 could not apply to employees given *de minimis* contacts with California and specifically citing this case as distinguishable and effectively warranting a different result); *Villalpando v. Exel Direct Inc.*, No. 12-cv-04137-JCS, 2015 WL 5179486 * 36-37 (N.D. Cal. Sept. 3, 2015)(addressing issues on full record); *Woods v. Vector Mktg. Corp.*, No. C-14-0264 EMC, 2015 WL 2453202 * 4 (N.D. Cal. May 22, 2015)(summary judgment addressed on full record); *Wilson v. SkyWest Airlines, Inc.*, 2021 WL 2913656 (N.D. Cal. July 12, 2021)(summary judgment denied because the nature of wage statement reporting better served section 226's purpose and established a basis for good-faith); *Booher v. JetBlue Airways Corporation*, No. 15-CV-01203-JSW, ECF No. 85 (slip op), at *6 (N.D. Cal. Nov. 10, 2021)(good-faith dispute defense, to the extent applicable, to be addressed on full record); *Dalton v. Lee Publications, Inc.*, No. 08CV1072 BTM NLS, 2011 WL 1045107 * 5 (S.D. Cal. Mar. 22, 2011)(addressing issues on full record); *Booher v. JetBlue Airways Corp.*, No. 15-CV-01203-JSW, 2017 WL 6343470 * 7 (N.D. Cal. Dec. 12, 2017)(decision predicated on good-faith belief arising from fact that employees did not work primarily in California); *Ward v. United Airlines, Inc.*, No. C 15-02309 WHA, 2016 WL 3906077 (N.D. Cal. July 19, 2016), *rev'd* 986 F.3d 1234 (9th Cir. 2021)(basing entire decision on extraterritorial analysis untethered to good faith dispute defense).

v. Virgin Am., Inc., 227 F. Supp. 3d 1049, 1076 (N.D. Cal. 2017).

Then, in later granting Plaintiffs' summary judgment on this claim, the Court stated:

> Virgin concedes that its wage statements do not show the effective hourly rate of pay for each hour of duty or the actual number of hours worked. ECF No. 121 at 31. Plaintiffs have also provided evidence that Virgin knew that its wage statements did not show the actual number of hours worked. ECF No. 225-3 at 18-20. Virgin does not dispute this evidence or offer competing evidence. Therefore, Plaintiffs are entitled to summary judgment on this claim.

ECF 317, p.11. The Court thus found that Virgin knowingly and intentionally violated § 226. Virgin put no contrary evidence in the record, and did not appeal that ruling.

Similarly, Virgin conceded it did not pay its flight attendants in compliance with § 203 and argued only that it was exempt from California law. But, even if "exemption" can be considered a basis for asserting a good faith defense, the undisputed facts here—a California employer who received millions of state dollars to base its operations here and then paid its California-based workforce in ways that knowingly flouted the requirements of the California Labor Code—hardly suggest good faith.[5] The facts and concessions in the record defeat any good faith defense, even if such a defense were properly before the Court. *See Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314, 325-26 (2005) (evidence that employer "was aware" it was underpaying its employees supported finding of willfulness despite ambiguity in the law); *see* Cal. Code Regs. tit. 8, § 13520 ("Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a 'good faith dispute"). Virgin's belated claim of good faith cannot now save it from liability.[6]

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[5] The Ninth Circuit did not consider the potential for countervailing evidence to "good faith" in its analysis on heightened penalties under PAGA. Instead, it reversed the Court's holding that Virgin is subject to heightened penalties based only on the fact that "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." *Bernstein*, 3 F.4th at 1144.

[6] Virgin also fails to acknowledge that that its attempt to obtain reconsideration of its good faith defense – despite its obvious and repeated waiver of it – would necessarily require full blown merits discovery on how and why Virgin could have reasonably believed it was complying with California law, including whether it acted with reckless disregard of its legal obligations, and any legal advice it obtained at the time its violations began. *See, e.g., Takacs v. A.G. Edwards &*

C. Defendants Are Correct with Respect to Prejudgment Interest on Plaintiffs' Meal and Rest Breaks Claims.

In their motion, Plaintiffs asked the Court to recalculate the prejudgment interest Virgin owes and include prejudgment interest on Plaintiffs' meal and rest break claims on the basis of the California Supreme Court's intervening case of *Naranjo v. Spectrum Sec. Servs., Inc.*, 13 Cal. 5th 93, 509 P.3d 956 (2022). Upon consideration of Virgin's arguments in opposition, Plaintiffs withdraw this request as Virgin is correct in its argument.

D. Plaintiffs Are Entitled to Waiting Time Penalties for Overtime and Missed Meal and Rest Periods.

The Ninth Circuit "affirm[ed] the district court's summary judgment to Plaintiffs on their waiting time penalties claim." *Bernstein*, 3 F.4th at 1144. Virgin argues, however, that the amount of waiting time penalties must be recalculated to exclude Plaintiffs' unpaid wages claim and meal and rest period claims. Virgin failed to raise these arguments on appeal, so they are not properly within the mandate and before this Court. *See Fallstead*, 2017 WL 3579568, at *4

Nevertheless, Plaintiffs agree that recalculation of the waiting time penalties to exclude any penalties based upon unpaid hours is warranted based upon the Ninth Circuit's reasoning (even if not squarely within the rule of mandate), and Plaintiffs accept Virgin's expert calculation of these penalties, which is $ 2,014,738.35. Dkt. 454-01, Estevez Decl. ¶ 6.

Without any argument or reasoning whatsoever, however, Virgin also argues that the amount of waiting time penalties must be recalculated to also exclude Plaintiffs' missed premiums for Virgin's meal and rest period violations. There is no basis for such a reduction, and Virgin has never previously asserted one. Further, the intervening California Supreme Court

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Sons, Inc., 444 F. Supp. 2d 1100, 1126-27 (S.D. Cal. 2006) (denying summary judgment and holding that plaintiff had established a triable issue of fact regarding whether defendant acted in good faith when it misclassified its workers); *Goro v. Flowers Foods, Inc.*, No. 17-CV-02580-JLS-JLB, 2019 WL 6252499, at *17 (S.D. Cal. Nov. 22, 2019) (acknowledging that counsel may have evidence pertinent to "good faith dispute defense" and noting that, if defendants choose to "choose to argue the subjective intent component of a[]… good faith defense without including the advice of counsel, Defendants can assume that risk"). *Cf. Consumer Fin. Prot. Bureau v. Glob. Fin. Support, Inc.*, No. 15-cv-2440-GPC-AHG, 2021 U.S. Dist. LEXIS 58188, at *7 (S.D. Cal. Mar. 25, 2021) (rejecting challenge to default judgment as "grossly untimely" and "manifestly unjust" because it would "upend almost two-years' worth of [p]laintiff's prosecution over the case").

decision in *Naranjo* expressly holds that missed meal and rest period premiums are properly a basis for waiting time penalties under Labor Code § 203. *Naranjo,* 509 P.3d at 975 ("Missed-break premium pay is indeed wages subject to the Labor Code's timely payment and reporting requirements, and it can support section 203[.]").

Accordingly, Plaintiffs are entitled to waiting time penalties for missed break premiums. Plaintiffs accept Virgin's expert calculation of these penalties, which is "an additional $234,732.23." Dkt. 454-01, Estevez Decl. ¶ 6.[7]

III. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion.

Dated: June 30, 2022

Respectfully submitted,

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[7] Plaintiffs submit a revised proposed order concurrently with this brief.

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