

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

McElroy v. Vitalant

McElroy · No. 25-cv-02996-RS · Decided December 11, 2025

SUMMARY

The United States District Court for the Northern District of California partially grants and partially denies Vitalant’s motion to dismiss Kim McElroy’s Second Amended Complaint and denies the motion to strike class allegations. The court holds that McElroy plausibly pleads a representative PAGA claim based on alleged failure to pay wages in cash on demand under California Labor Code section 212(a), while dismissing other claims with varying opportunities to amend. The court dismisses the unfair competition claim without leave to amend based on inadequate equitable remedies and lack of standing for prospective injunctive relief.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	Richard Seeborg, Chief United States District Judge
JURISDICTION	United States District Court for the Northern District of California
DECIDED	December 11, 2025
DOCKET	25-cv-02996-RS
DISPOSITION	other
PROCEDURAL POSTURE	Defendant moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss the Second Amended Complaint and under Rule 12(f) to strike class action allegations. The court had previously granted judgment on the pleadings against the First Amended Complaint with leave to amend.
STANDARD OF REVIEW	On a Rule 12(b)(6) motion, the court accepts well-pleaded allegations as true and asks whether the complaint states a claim for relief that is plausible on its face. Conclusory statements and formulaic recitations are insufficient. On a Rule 12(f) motion, allegations are construed liberally in the plaintiff's favor, and striking is disfavored unless the material clearly has no possible bearing on the litigation.
PRECEDENTIAL VALUE	persuasive

TOPICS

wage and hour motions to dismiss class actions standing civil procedure

PRACTICE AREAS

employment law civil procedure wage and hour class actions remedies

QUESTIONS PRESENTED

1. Whether the Second Amended Complaint plausibly alleged meal- and rest-break violations based on COVID-related preshift tasks.
2. Whether the complaint plausibly alleged minimum-wage and overtime violations under the pleading standard applied in *Landers v. Quality Communication, Inc.*
3. Whether the unamended claims for waiting time, vacation wages, and business-expense indemnification should be dismissed without further leave to amend.
4. Whether California Labor Code section 212(a) provides a private right of action for an individual or class claim.
5. Whether McElroy plausibly alleged a PAGA claim based on an alleged violation of section 212(a).
6. Whether the derivative wage-statement, final-pay, and PAGA claims could proceed to the extent their predicate claims were amendable.
7. Whether the unfair-competition claim could proceed despite the availability of legal remedies and McElroy's status as a former employee.
8. Whether the class allegations should be stricken at the pleading stage under Rule 12(f).

HOLDINGS

1. The Second Amended Complaint did not plausibly allege meal- or rest-break violations because it failed to identify a specific instance of denial, the frequency of the alleged violations, or the person who required the preshift COVID-related work or prevented a timely break.
2. The Second Amended Complaint failed to plausibly allege that McElroy worked more than 40 hours in a particular workweek or otherwise earned less than the legally required wage because of uncompensated COVID-related tasks.
3. The claims for waiting time to be assigned work, vacation wages, and business-expense indemnification were dismissed without leave to amend because McElroy did not amend them after being given an opportunity to substantiate the alleged unlawful policies.
4. California Labor Code section 212(a) does not provide a private right of action for an individual or class damages claim.
5. McElroy plausibly alleged a representative PAGA claim based on Vitalant's alleged violation of section 212(a), because she alleged that the pay card charged a fee to access wages and section 225.5 provides a civil penalty for violating section 212.

6. The wage-statement, timely-final-pay, and PAGA claims were dismissed with leave to amend to the extent they depended on claims that remained amendable, but were dismissed without leave to amend to the extent they depended on claims dismissed without leave to amend.
7. The unfair-competition claim was dismissed without leave to amend because McElroy had an adequate remedy at law for restitution and, as a former employee, lacked standing to seek prospective injunctive relief based on future workplace violations.
8. The motion to strike the class allegations was denied because, although the allegations were thin, it was not absolutely clear at the pleading stage that no circumstances could support class treatment.

KEY QUOTATIONS

“The amendments to the complaint push only one substantive claim across the line of plausibility: her claim for failure to pay all wages due in cash on demand (claim nine).” (at 1)

“Under Landers, she must aver facts that make plausible that she worked more than forty hours in a particular workweek.” (at 6)

“Therefore, McElroy can maintain a PAGA action premised on a well-pleaded violation of section 212(a).” (at 7)

“At this stage, it is not absolutely clear that the class device cannot succeed.” (at 13)

FACTUAL BACKGROUND

Kim McElroy was a former employee of Vitalant, a nonprofit blood donation organization. She alleged that Vitalant required employees to perform COVID-related preshift tasks, including symptom screening, temperature checks, questionnaires, hotline calls, and vaccinations, without adequately compensating them or providing legally required meal and rest breaks. She also alleged that Vitalant paid employees through pay cards that charged fees to access wages. McElroy asserted individual, class, and PAGA claims based on California wage-and-hour statutes and sought damages and equitable relief.

PROCEDURAL HISTORY

McElroy filed an employment-related putative class action in California state court against her former employer, Vitalant, asserting eleven California wage-and-hour and related claims. Vitalant removed under the Class Action Fairness Act, and the court previously granted judgment on the pleadings with leave to amend. After McElroy filed her Second Amended Complaint, Vitalant moved to dismiss and to strike the class allegations. The court granted the motion to dismiss in part, denied it in part, and denied the motion to strike; it permitted amendment of specified claims within 21 days.

DISPOSITION

other

CASES CITED

- Astiana v. Ben & Jerry's Homemade, Inc., 2011 WL 211796, at *14 (N.D. Cal. May 26, 2011)
- Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)
- Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009)
- Chavez, 683 F.3d at 1108
- Tietsworth v. Sears, 720 F. Supp. 2d 1123, 1145-46 (N.D. Cal. 2010)
- Ambriz v. Coca Cola Co., 2013 WL 5947010, at *3-*4 (N.D. Cal. Nov. 5, 2013)
- Perez v. DNC Parks & Resorts at Asilomar, Inc., 2022 WL 411422, at *5 (E.D. Cal. Feb. 10, 2022)
- Perez v. Island Hospital Management III, LLC, 2019 WL 3064113, at *3 (C.D. Cal. Feb. 8, 2019)
- Landers v. Quality Communication, Inc., 771 F.3d 638, 639-45 (9th Cir. 2014)
- Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407 (2010)
- Saunders v. Ameriprise Fin. Servs., Inc., 2019 WL 4344296, at *5 (C.D. Cal. Mar. 19, 2019)
- Vikco Ins. Servs., Inc. v. Ohio Indem. Co., 70 Cal. App. 4th 55, 62 (1999)
- Gunawan v. Howroyd-Wright Emp. Agency, 997 F. Supp. 2d 1058, 1068 (C.D. Cal. 2014)
- Sonner v. Premier Nutrition Corp., 971 F.3d 834, 837 (9th Cir. 2020)
- Mort v. United States, 86 F.3d 890, 892 (9th Cir. 1996)
- Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992)
- Ellis v. Costco Wholesale Corp., 657 F.3d 970, 988 (9th Cir. 2011)
- Hill v. Pacific Maritime Association, 2025 WL 1282628, at *5 (N.D. Cal. May 2, 2025)
- Gutzalenko v. City of Richmond, 723 F. Supp. 3d 748, 755 (N.D. Cal. 2024)
- In re Nexus 69 Prod. Liab. Litig., 296 F. Supp. 3d 888, 960-64 (N.D. Cal. 2018)

OPINION

McElroy

PER CURIAM.

1 2 3 4 5 6

7 UNITED STATES DISTRICT COURT

8 NORTHERN DISTRICT OF CALIFORNIA

9

KIM J. MCELROY,

10 Case No. 25-cv-02996-RS Plaintiff, 11

v. ORDER GRANTING IN PART AND

12 DENYING IN PART DEFENDANT'S

VITALANT, MOTION TO DISMISS SECOND

13 AMENDED COMPLAINT AND

Defendant. DENYING DEFENDANT'S MOTION

14 TO STRIKE

15 16 Kim McElroy, on behalf of herself and a putative class of similarly situated individuals, 17
sued Vitalant, her former employer, for eleven violations of the California Labor Code and the 18

California Business and Professions Code. Vitalant’s motion for judgment on the pleadings was 19 granted, with leave to amend, because McElroy’s First Amended Complaint (FAC) failed to allege 20 facts sufficient to make any of the asserted violations plausible. Vitalant now moves to dismiss 21 McElroy’s Second Amended Complaint (SAC) under Rule 12(b)(6) and to strike the class action 22 averments under Rule 12(f). 23 The amendments to the complaint push only one substantive claim across the line of 24 plausibility: her claim for failure to pay all wages due in cash on demand (claim nine). That claim 25 can only be prosecuted as a representative action under the California Private Attorneys General 26 Act (PAGA) because the substantive statute, California Labor Code § 212(a), does not provide a 27 private right of action. McElroy’s other substantive claims remain deficiently pleaded. Therefore, 1 failure to pay all wages due in cash, but it is otherwise granted. McElroy is given leave to amend 2 her dismissed claims, save the three she chose not to amend in the SAC—those for failure to pay 3 for time spent waiting to be assigned work (claim four), failure to pay vacation wages (claim five), 4 and failure to indemnify for business expenses (claim eight)—and her claim for unfair competition 5 (claim ten), which cannot be maintained under principles of equity and standing. 6 Vitalant’s motion to strike is denied. Though the class action averments are extremely thin, 7 the Ninth Circuit has admonished that Rule 12(f) should not be used to dismiss portions of a 8 complaint. Rather, a defendant’s argument that the requirements of Rule 23 are not satisfied is best 9 ventilated through the class certification process. See *Astiana v. Ben & Jerry’s Homemade, Inc.*, 10 2011 WL 211796, at *14 (N.D. Cal. May 26, 2011).

11 I. BACKGROUND

12 Kim McElroy is a former employee of Vitalant, a nonprofit blood donation organization. 13 On behalf of herself and others similarly situated, McElroy sued Vitalant in California state court, 14 asserting eleven causes of action under various California wage and hour laws. See Dkt. 1, Ex. E 15 (FAC). After answering McElroy’s amended complaint, Vitalant removed the case to federal 16 district court under the Class Action Fairness Act, 28 U.S.C. § 1453. See Dkt. 1. 17 Vitalant moved for judgment on the pleadings or, in the alternative, to strike the class 18 action averments. See Dkt. 19. The former motion was granted because McElroy failed plausibly 19 to aver that Vitalant committed any legal violations. See Dkt. 25. Specifically, McElroy’s meal 20 and rest break claims (claims one and two) were dismissed because the FAC was “devoid of any 21 detail that would make plausible her claim that Vitalant systematically denied her and the putative 22 class members meal and rest breaks.” *Id.*, at 3. McElroy did not identify any specific instance in 23 which a meal or rest break was denied, how often it happened, or who prevented her from taking a 24 break. See *id.* 25 McElroy’s claims for failure to pay minimum and overtime wages (claim three) suffered 26 from similar defects. Her FAC did not adequately aver that the off-the-clock work she was 27 allegedly asked to perform caused her to work more than 40 hours in a week because it omitted 1 “any detail regarding the extra work—such as how often it was required and how long it took.” 2 *Id.*, at 4; see *id.* (determining that the minimum wage claim could not

proceed because the 3 complaint “fails to provide any detail about when or for how long [McElroy] was required to 4 perform [the uncompensated] tasks”). 5 McElroy also brought four claims premised on the existence of an illegal policy: failure to 6 pay for time spent waiting to be assigned work (claim four), failure to pay vacation wages (claim 7 five), failure to indemnify for business expenses (claim eight), and failure to pay wages due in 8 cash on demand (claim nine). Claims four, five, and eight fell short because McElroy merely 9 averred the existence of the illegal policy without offering specific facts that substantiated the 10 policy’s existence. See Dkt. 25, at 5 (“It may be, as McElroy argues, that she need only allege that 11 Vitalant had an illegal policy that she was subject to, but she nonetheless needs to substantiate that 12 allegation with specific facts that make the existence of that policy and its application to her 13 plausible instead of just possible.”). Claim nine was insufficiently pleaded because, while 14 McElroy averred that Vitalant paid its employees with pay cards that were usable only for a fee, 15 she did not aver that she was ever denied the opportunity to access her wages without charge. See 16 *id.*, at 6. 17 Finally, McElroy asserted four claims that were derivative of her substantive wage and 18 hour claims: failure to provide accurate written wage statements (claim six), failure to pay all final 19 wages in a timely manner (claim seven), unfair competition (claim ten), and a representative claim 20 under the Private Attorney Generals Act, Lab. Code §§ 2698, *et. seq.* (claim eleven). Those claims 21 all failed because the predicate claims failed. McElroy’s motion to strike was denied as moot. 22 McElroy was given 21 days to file a SAC addressing these deficiencies. She did so on 23 October 23, 2025—three days after the deadline. See Dkt. 26. Vitalant promptly moved to dismiss

24 for failure to state a claim, arguing that McElroy’s SAC failed to cure the problems that doomed 25 her original submission. Dkt. 27 (Mot.); Fed. R. Civ. P. 12(b)(6). It again moved to strike the class 26 averments in the alternative. 27

1 II. LEGAL STANDARD

2 To survive a motion to dismiss under Rule 12(b)(6), the complaint must allege sufficient 3 facts which, if accepted as true, “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. 4 v. Twombly*, 550 U.S. 544, 570 (2007). Conclusory statements or formulaic recitations of the 5 elements of a claim are not sufficient. See *Chavez*, 683 F.3d at 1108. Rather, “[a] claim has facial 6 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable 7 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 8 678 (2009). Assessing facial plausibility is a context-sensitive task that requires judicial 9 experience and common sense. *Id.* at 679. 10 Under Rule 12(f), “any redundant, immaterial, impertinent, or scandalous matter” may be 11 stricken from a complaint. “As with motions to dismiss, when ruling on a motion to strike, the 12 Court takes the plaintiff’s allegations as true and must liberally construe the complaint in the light 13 most favorable to the plaintiff.” *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1145–46 (N.D. Cal. 14 2010).

15 III. DISCUSSION

16 A. Timeliness 17 Vitalant first argues that its motion should be granted because McElroy filed her SAC 18 three days late. It characterizes McElroy as having “flouted the Court’s order” and undermined the 19 expeditious resolution of this case. See Mot., at 1. It also contends that it enjoys a presumption of 20 prejudice from McElroy’s tardy submission and that this presumption has not been rebutted 21 because McElroy has not offered any excuse for why the amended complaint came late. See *id.* 22 Court-imposed deadlines are important. Litigants and lawyers that wish to maximize their 23 chances of success are admonished to comply with them. However, this relatively minor 24 transgression does not warrant dismissal. Despite its assertion to the contrary, Vitalant does not 25 seem to have been prejudiced by McElroy’s failure to comply with the deadline. It filed a motion 26 to dismiss two weeks after the SAC came in, and as will become apparent below, that motion was 27 well-crafted and persuasive. Moreover, McElroy’s SAC is substantially the same as her FAC. That 1 is to McElroy’s detriment on the merits of Vitalant’s motion, but it means that Vitalant was well- 2 equipped to deal with the complaint whenever it was filed. 3 B. Motion to Dismiss 4 i. Claims One and Two: Failure to Provide Meal and Rest Periods 5 McElroy avers that Vitalant violated California law by requiring her and the putative class 6 members to work more than five hours per day without providing a 30-minute meal period and to 7 work more than four hours without permitting a ten-minute rest period. See Cal. Lab. Code 8 §§ 226.7, 512(a). In her FAC, McElroy averred that Vitalant had a “common policy and practice” 9 of denying her and the putative class members breaks “due to understaffing, heavy workloads, and 10 uncompensated pre-shift duties,” which included Covid-19 testing and vaccinations and required 11 communications with superiors. See FAC ¶¶ 20, 24. 12 Judgment on the pleadings was granted as to these claims because the FAC was devoid of 13 any detail to substantiate the averments—it did not “identify a single, specific instance in which 14 she was denied a meal or rest break, nor [did it] detail how often she was denied the breaks, or 15 what she was required to do during the time she should have been given off.” Dkt. 25, at 3. To 16 remedy that failing, McElroy has added the following averment to her SAC: 17 Moreover, Plaintiff was required to self-screen for COVID-related symptoms prior to clocking into work, this included taking her own temperature, complete a 18 detailed questionnaire, and, if necessary, call Defendant’s COVID Hotline for further instructions. 19 20 SAC ¶¶ 47, 61 (meal and rest break claims, respectively). This is not enough. At best this 21 added “detail” identifies what McElroy “was required to do during the time she should have been 22 given off.” Dkt. 25, at 3. Her theory is now clear: Her COVID-related obligations started the clock 23 on her workday earlier, so she earned breaks earlier than she otherwise would have. It does not, 24 however, push the averments across the line of plausibility. They do not—as the order granting 25 Vitalant’s motion for judgement on the pleadings required—(1) identify a single, specific instance 26 in which this “work” was required, (2) say how often it was required, or (3) say who required it. 27 Without those details, McElroy’s assertion that Vitalant is liable for a violation of California wage 1 and hour law remains too speculative to proceed. 2 McElroy relies on several non-binding district court decisions, but none

establish that she 3 met the pleading burden. In *Ambriz v. Coca Cola Co.*, the district court permitted meal and rest 4 break claims to proceed where the plaintiff merely alleged that the defendant denied him meal and 5 rest breaks and had a policy of doing the same to the putative class members. 2013 WL 5947010, 6 at *3 (N.D. Cal. Nov. 5, 2013). That was enough, the district court explained, because there was 7 no way to “allege the non-existence of something . . . with any greater specificity than [the 8 plaintiff did] [t]here.” *Id.*, at *4. Where the allegation is that an employer failed to provide any 9 breaks to its employees, perhaps that is right. McElroy’s theory, by contrast, is amenable to much 10 greater specificity. She could have explained how long those COVID-related tasks took, when she 11 performed them, and when she was given a break. Indeed, at present, McElroy’s SAC is missing 12 the core of a meal and rest break claim: an averment that someone prevented her from taking a 13 break. She avers, in essence, that she started her day earlier because of the COVID-related tasks 14 and that this “caused” her to take breaks after she had worked five hours in a day, but how exactly 15 it did so is left unexplained. 16 McElroy also points to *Perez v. DNC Parks & Resorts at Asilomar, Inc.*, 2022 WL 411422, 17 at *5 (E.D. Cal. Feb. 10, 2022), but that case merely proves the deficiency of her claims. There, 18 the plaintiffs’ original meal and rest break claims were dismissed because they “failed to identify 19 any specific instance(s) where they were deprived of meal or rest breaks.” *Id.* The plaintiffs 20 amended their complaint by “provid[ing] specific instances in which rest breaks were not fully 21 taken” and at least “five instances when [one plaintiff] was not provided a meal break at all.” *Id.* 22 The detail in these new averments was sufficiently granular to make the asserted legal violation 23 plausible. For example, one plaintiff averred that he “took a 26[-]minute meal break for a shift 24 over seven hours and did not take full rest breaks due to walking between work stations and rest 25 break areas.” *Id.* Another identified the specific dates on which he was denied meal breaks. See *id.* 26 McElroy provides nothing remotely comparable. 27 McElroy’s reliance on *Perez v. Island Hospital Management III, LLC*, 2019 WL 3064113, 1 at *3 (C.D. Cal. Feb. 8, 2019), is similarly misplaced. While it is true that that plaintiff, like 2 McElroy, pointed to “understaffing” and a “heavy workload” as the cause of the missed breaks, he 3 provided much more detail about how and when those causes manifested in legal violations. See 4 *id.* The plaintiff averred “that understaffing prevented him from taking a rest break ‘approximately 5 once a week’ and that the meal breaks he took were interrupted by hotel guests ‘frequently’ or 6 ‘approximately three to four times week.’” *Id.* Though the plaintiff did not give a precise date, the 7 frequency with which he alleged this occurred made it clear that the violations were basically 8 continuous. Here, by contrast, McElroy seems to say there were discrete instances of her being 9 required to conduct COVID-related tasks. If that is true, she should be able to say specifically 10 when those instances occurred. If that is not true, she should—like the plaintiff in *Island Hospital 11 Management*—be able to say with what frequency she was denied timely breaks. McElroy is given 12 one more chance to satisfy her pleading burden on these claims. 13 ii. Claim Three: Failure to Pay Hourly and Overtime Wages 14 McElroy avers that Vitalant did not pay her for the time spent completing

her COVID- 15 related tasks, which resulted in her being denied hourly wages and overtime wages.¹ Judgment on 16 the pleadings was granted on this claim because McElroy failed to meet her pleading burden under 17 the Ninth Circuit’s decision in *Landers v. Quality Communication, Inc.*, 771 F.3d 638 (9th Cir. 18 2014).² Namely, she did not adequately aver “that she worked more than forty hours in a given 19 20 1 Though the SAC is somewhat unclear on this point, McElroy does not appear to aver that Vitalant directly violated the law by not paying her for the time spent performing these COVID- 21 related tasks. Indeed, that claim would sound more in breach of contract. Her theory appears to be that the COVID-related tasks increased her total hours worked to a point where her effective wage 22 (the total paid divided by hours worked) fell below the legal minimum wage. See SAC ¶ 81 (“This uncompensated time caused Plaintiff and the Hourly Employee Class members to work in excess 23 of eight (8), ten (10), and twelve (12) hours a day and/or forty (40) hours a week, entitling [them] to minimum and overtime wages.”). 24 2 McElroy offers a passing argument that *Landers* does not apply because it involved the federal 25 Fair Labor Standards Act, not the California wage and hour laws. See 771 F.3d at 639. That distinction is unimportant. The Ninth Circuit derived the pleading standard from Federal Rule of 26 Civil Procedure 8 and Supreme Court gloss on that Rule. See *id.* at 640. Therefore, this standard applies in federal court even though the underlying cause of action comes from state law. See 27 *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010). 1 workweek without being compensated for the overtime hours worked during that workweek.” *Id.* 2 at 644–45. To remedy that failure, McElroy added the following allegation to the SAC: 3 As an example, Plaintiff was required to undergo mandatory vaccinations on 10/10/22. Plaintiff worked in excess of 40 hours [per] week for the pay period 4 beginning on 10/9/2022 and ending on 10/22/2022. As such, the uncompensated off-the-clock work, discussed above, including the mandatory vaccinations, all 5 result in not only unpaid minimum wages, but unpaid overtime wages as well. 6 SAC ¶ 82. McElroy continues to misunderstand her burden under *Landers*, and consequently, her 7 averments continue to fall short. Under *Landers*, she must aver facts that make plausible that she 8 worked more than forty hours in a particular workweek. See *Landers*, 771 F.3d at 645 (“A plaintiff 9 may establish a plausible claim by estimating the length of her average workweek during the 10 applicable period and the average rate at which she was paid, the amount of overtime wages she 11 believes she is owed, or any other facts that will permit the court to find plausibility.”). As the 12 Ninth Circuit there explained, more specific facts move the complaint close to the plausibility 13 threshold. See *id.* 14 All McElroy has provided is one date and one allegedly off-the-clock task. There is no way 15 to know whether that task caused her to work more than forty hours in a week without more. For 16 example, how many hours did she work excluding the COVID vaccination? How long did the 17 vaccination take? What was her hourly wage during that period? Correspondingly, what was her 18 effective hourly wage assuming she was entitled to be paid for the time spent getting vaccinated? 19 The SAC has no answers. 20 Perhaps recognizing the thinness of her averments, McElroy argues that *Landers* does not 21

require her to identify a particular instance in which she was denied minimum or overtime wages. 22 In her view, it requires only that she plead facts that give rise to a plausible inference that such an 23 instance occurred. See *Saunders v. Ameriprise Fin. Servs., Inc.*, 2019 WL 4344296, at *5 (C.D. 24 Cal. Mar. 19, 2019). To be sure, the scope of a wage-and-hour plaintiff’s pleading burden after 25 *Landers* has been the subject of considerable debate among district courts. There is no need to 26 wade into that debate here, though, because McElroy has not even pleaded facts that give rise to a 27 plausible inference that she was denied minimum or overtime wages in a particular week. It is 1 possible that the time she spent getting vaccinated pushed the hours she worked during the week 2 including October 10, 2022, above forty—but it is not plausible. If McElroy otherwise worked 3 less than forty hours and the time spent getting vaccinated was not significant, it is also possible 4 that she did not work more than forty hours that week. Without any detail about her work schedule 5 or wages, there is simply no way to tell if she is entitled to relief on the facts averred. McElroy is 6 given one final chance to amend her complaint to fix this deficiency. 7 iii. Unamended Claims 8 McElroy brings claims for failure to pay for time spent waiting to be assigned work (claim 9 four), failure to pay vacation wages (claim five), and failure to indemnify for business expenses 10 (claim eight). Judgment on the pleadings was granted as to those claims because McElroy merely 11 averred that Vitalant maintained illegal policies to which she was subjected; she did not plead 12 facts that substantiated the existence of those policies. Her failure to plead sufficient facts, the 13 order explained, appeared to stem from a “misunderstanding of her pleading burden.” Dkt. 25, at 14 5. 15 That misunderstanding persists. McElroy made no changes to these claims. Instead, she 16 appears to argue that they were adequately plead all along. Indeed—at least as to the failure to 17 indemnify claim—she claims to be “unsure what additional facts can be added at this point.” Dkt. 18 29, at 11. 19 The answer to this confusion, of course, can be found in the order granting Vitalant’s 20 motion for judgment on the pleadings. That order explained that “McElroy fail[ed] to identify a 21 single instance in which she incurred [business] expenses at Vitalant’s direction.” Dkt. 25, at 6. 22 Providing specific instances in which someone at Vitalant either told McElroy to use her personal 23 cell phone for work duties or instructed her to buy additional supplies with her own money would 24 have substantiated the general allegation that Vitalant had such a policy. Without it, McElroy’s 25 averments remain fatally deficient. Because McElroy chose not to avail herself of the prior 26 opportunity to amend these claims, they are dismissed without leave to amend. 27 1 iv. Claim Nine: Failure to Pay All Wages in Cash on Demand 2 McElroy brings a claim under California Labor Code § 212(a) for failure to pay all wages 3 in cash on demand. Specifically, she avers she and other Vitalant employees were paid with “pay 4 cards” that they could not use for free. Vitalant’s motion for judgment on the pleadings was 5 granted on this claim because McElroy did not aver “that she was ever denied the opportunity to 6 access her wages for free.” Dkt. 25, at 6 (emphasis in original). Her SAC now includes one line 7 addressing that deficiency: “Specifically, Plaintiff was charged a fee for using this company- 8 issued pay card to access her wages owed.”

SAC ¶ 38. 9 This amendment aside, Vitalant argues that section 212(a) does not contain a private right 10 of action. Section 212(a) provides that “[n]o person, or agent or officer thereof, shall issue in 11 payment of wages due, or to become due, or as an advance on wages to be earned: Any order, 12 check, draft, note, memorandum, or other acknowledgement of indebtedness, unless it is 13 negotiable and payable in cash, on demand, without discount . . .” In California, “[a]doption of a 14 regulatory statute does not automatically create a private right to sue for damages resulting from 15 violations of the statute. Such a private right of action exists only if the language of the statute or 16 its legislative history clearly indicates the Legislature intended to create such a right to sue for 17 damages.” *Vikco Ins. Servs., Inc. v. Ohio Indem. Co.*, 70 Cal.App.4th 55, 62 (1999). As other 18 courts have recognized, section 212(a) merely proscribes conduct, it does not “clearly indicate[]” 19 that the legislature intended to create a right to bring a lawsuit. See *Gunawan v. Howroyd-Wright 20 Emp. Agency*, 997 F. Supp. 2d 1058, 1068 (C.D. Cal. 2014). Therefore, McElroy’s individual 21 failure to pay claim is dismissed without leave to amend. 22 However, McElroy also seeks to prosecute a representative PAGA action for Vitalant’s 23 alleged violation of section 212(a). See FAC ¶ 143. Under PAGA, “any provision of [the Labor 24 Code] that provides for a civil penalty to be assessed and collected by the Labor and Workforce 25 Development Agency . . . may, as an alternative, be recovered by an aggrieved employee on 26 behalf of himself or herself and current or former employees.” Cal. Lab. Code § 2699(a). Section 27 225.5 of the Labor Code provides that “every person who unlawfully withholds wages due any 1 employee in violation of Section 212 . . . shall be subject to a civil penalty.” That civil penalty is 2 “recovered by the Labor Commissioner” and “paid into a fund within the Labor and Workforce 3 Development Agency.” Id. § 225.5. Therefore, McElroy can maintain a PAGA action premised on 4 a well-pleaded violation of section 212(a). 5 That PAGA claim can proceed because, though close, McElroy’s claim now adequately 6 avers a violation of section 212(a). As noted, the order granting Vitalant’s motion for judgment on 7 the pleadings faulted McElroy for failing to aver that she was charged a fee for using her pay card. 8 She has now done just that. Vitalant points out that an employer does not violate section 212(a) if 9 it provides at least one opportunity per pay period to use a pay card for free, and it argues that the 10 SAC is deficient because McElroy did not specifically aver that Vitalant denied her one such 11 opportunity. However, that is precisely what the SAC can be interpreted to say. McElroy avers 12 that the pay cards “were useable for a fee and did not have a provision for use and payment in 13 California at no cost to the employee.” SAC ¶ 38. If the pay card literally would not work without 14 a fee, it is unclear how McElroy could have been afforded even the single opportunity to use it for 15 free that California law guarantees her. 16 To be sure, this averment could—and perhaps should—have more detail. McElroy could 17 have averred the frequency with which she was paid with a pay card, how much the alleged fee 18 was, and where she tried to use it only to be asked to pay for a fee. However, as opposed to other 19 claims in this case, the failure to provide those details does not introduce the possibility that 20 Vitalant acted legally. Section 212(a) is very straightforward—an employer must provide an 21

employee one chance per pay period to access her wages for free. McElroy's averment is that Vitalant did not do that, so it can proceed as a PAGA claim. 23 v. Derivative Claims 24 As previously explained, McElroy brings three claims that she concedes depend on well- 25 pleaded substantive wage and hour claims: (1) failure to provide accurate written wage statements 26 (claim six), (2) failure to pay timely all final wages (claim seven), and (3) "unfair competition" 27 (claim ten). Claims six and seven depend on the substantive failure to pay minimum and overtime 1 wages claim (claim three). That is because, as explained in the prior order on the motion for 2 judgment on the pleadings, there is no failure to itemize minimum and overtime wages that the 3 employer was never obligated to pay. Similarly, there can be no liability for late payment of 4 minimum and overtime wages that the employer never owed. Because claim three may still be 5 revived in a third amended complaint and claims six and seven rise and fall with claim three, 6 claims six and seven are also dismissed with leave to amend. 7 However, McElroy's unfair competition claim cannot be revived. Horizontal choice-of-law 8 principles require that federal courts exercising subject-matter jurisdiction over state law claims 9 apply federal common law to determine the availability of equitable remedies. See *Sonner v. 10 Premier Nutrition Corp.*, 971 F.3d 834, 837 (9th Cir. 2020). In her unfair competition claim, 11 McElroy seeks "the issuance of temporary, preliminary and permanent injunctive relief enjoining 12 [Vitalant] . . . from further violations of the Labor Code and applicable Wage Orders" as well as 13 "declaratory relief and restitution of all monies rightfully belonging to [the putative class 14 members] that [Vitalant] did not pay them or otherwise retained by means of its unlawful and 15 unfair business practices." SAC ¶¶ 137, 139. The parties agree that those are classical equitable 16 remedies. 17 McElroy cannot seek either remedy. As to the latter, she has not shown that she lacks an 18 adequate remedy at law, a prerequisite of securing equitable relief in federal court. See *Mort v. 19 United States*, 86 F.3d 890, 892 (9th Cir. 1996) ("It is a basic doctrine of equity jurisprudence that 20 courts of equity should not act ... when the moving party has an adequate remedy at law . . . 21 " (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992))). McElroy's request 22 for equitable restitution is completely duplicative of her request for damages in the substantive 23 wage and hour claims on which the unfair competition claim depends—both simply ask for the 24 money lost. In her papers, McElroy hardly even attempts to explain what relief restitution would 25 provide that damages would not. 26 McElroy focuses, instead, on explaining why injunctive relief would give the putative class 27 something that damages cannot. Namely, she says that injunctive relief is necessary because many 1 of the putative class members are current employees of Vitalant, and damages cannot ameliorate 2 the future violations Vitalant may commit. That may be so, but McElroy has no standing to ask for 3 that relief because she is not a current employee of Vitalant. Said otherwise, McElroy will not be 4 injured by Vitalant's future unlawfulness, and thus she cannot maintain a prospective claim 5 consistent with Article III of the Constitution. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 988 6 (9th Cir. 2011) (explaining, in a workplace discrimination suit, that "only current employees have 7 standing to seek injunctive relief"). There

is no conceivable way these defects could be remedied, 8 so McElroy's unfair competition claim is dismissed without leave to amend. 9 McElroy's final claim is for civil penalties under PAGA. As explained, only McElroy's 10 claim for failure to pay all wages in cash on demand (claim nine) was sufficiently pleaded, and 11 that claim can only be maintained as a PAGA action. To the extent McElroy can revive any of her 12 substantive wage and hour claims in a third amended complaint, she can reallege entitlement to 13 prosecute them as a PAGA claim as well. Therefore, the PAGA claim is dismissed without leave 14 to amend insofar as it relates to underlying claims dismissed without leave to amend (claims four, 15 five, eight, nine as an individual or class claim, and ten), and it is dismissed with leave to amend 16 insofar as it relates to underlying claims dismissed with leave to amend (claims one, two, three, 17 six, and seven). 18 C. Motion to Strike 19 Vitalant moves to strike McElroy's class action averments. Because not every claim has 20 been dismissed under Rule 12(b)(6), this motion is no longer moot. Vitalant argues that the class 21 action averments should be stricken because they are merely boilerplate recitations of Rule 23's 22 requirements devoid of any facts that make the maintenance of a class action plausible. As to 23 numerosity, McElroy avers that she "is informed and believes, and thereupon alleges that the 24 actual number [of potential class members] exceeds the minimum required for numerosity under 25 California law." SAC ¶ 14. As to commonality and predominance, she identifies at least twelve 26 common questions, all of which are some version of whether Vitalant maintained a policy and 27 practice that violates California law. Id. ¶ 15. As to typicality, she says that her claims "are typical 1 of the other class members' claims." Id. ¶ 16. Finally, as to adequacy, she says that she "is an 2 adequate class representative and has no interests that are adverse to, or otherwise conflict with, 3 the interests of absent class members and is dedicating to prosecuting this action vigorously on 4 their behalf. Id. ¶ 17. 5 Vitalant's critique of the class action averments have merit. However, "[m]otions to strike 6 are generally disfavored' and 'should only be granted if the matter sought to be stricken clearly 7 has no possible bearing on the subject matter of the litigation.'" Hill v. Pacific Maritime 8 Association, 2025 WL 1282628, at *5 (N.D. Cal. May 2, 2025) (quoting Gutzalenko v. City of 9 Richmond, 723 F. Supp. 3d 748, 755 (N.D. Cal. 2024)). Consequently, "courts in this District do 10 not generally consider motions to strike class allegations at the pleadings stage," id., and those that 11 do grant the motion only if it is "convinced that any questions of law are clear and not in dispute[] 12 and that under no set of circumstances could the [class action device] succeed." In re Nexus 69 13 Prod. Liab. Litig., 296 F. Supp. 3d 888, 960–64 (N.D. Cal. 2018). 14 At this stage, it is not absolutely clear that the class device cannot succeed. Discovery may 15 well reveal facts that demonstrate the requirements of Rule 23 can be satisfied. If no such facts 16 emerge, Vitalant may renew these arguments in an opposition to class certification.

17 IV. CONCLUSION

18 For the foregoing reasons, Vitalant's motion to dismiss is granted in part and denied in 19 part. The motion is denied only as to the claim for failure to pay wages in cash on demand (claim 20

nine) insofar as McElroy intends to prosecute that claim via PAGA. The claims for failure to provide meal and rest breaks (claims one and two) and for failure to pay overtime and minimum wages (claim three) are dismissed with leave to amend. The claims for failure to pay reporting time (claim four), for failure to pay vacation time (claim five), for failure to indemnify for business expenses (claim eight), for failure to pay wages in cash on demand insofar as it is asserted on an individual or class basis (claim nine), and for unfair competition (claim ten) are dismissed without leave to amend. The other derivative claims (claims six, seven, and eleven) can be revived to the extent they depend on claims for which McElroy is given leave to amend. Finally, Vitalant's motion to strike is denied. Any final amended complaint must be filed within 21 days of the date of this order. 4 || ITISSO ORDERED. 5 6 Dated: December 11, 2025 7
RICHARD SEEBORG
8 Chief United States District Judge 9 10 11 a 12 15 16 it 4 18 19 20 21 22 23 24 25 26 27
98 ORDER GRANTING MOTION TO DISMISS
CASE No. 25-cv-02996-RS