BRYAN SCHWARTZ LAW, P.C.
Bryan Schwartz (SBN 209903)
bryan@bryanschwartzlaw.com
Jane Beasley Mackie (SBN 288380)
jane@bryanschwartzlaw.com
180 Grand Avenue, Suite 1380
Oakland, California 94612
Tel. (510) 444-9300 | Fax (510) 444-9301

CALIFORNIA CIVIL RIGHTS LAW GROUP
Lawrence Organ (SBN 175503)
larry@civilrightsca.com
Marqui Hood (SBN 214718)
marqui@civilrightsca.com
Cimone Nunley (SBN 326915)
cimone@civilrightsca.com
332 San Anselmo Avenue
San Anselmo, CA 94960
Tel. (415) 453-4740
Fax (415) 785-7352

Attorneys for Representative Plaintiffs Sharonda Taylor and Zenobia Milligan

(Additional counsel listed on next page)

ELECTRONICALLY FILED
Superior Court of California,
County of Alameda
05/21/2025 at 04:18:21 PM
By: Darmekia Oliver,
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

SHARONDA TAYLOR, TATIANNA SMITH, and ZENOBIA MILLIGAN, individually and on behalf of all others similarly situated,

Representative Plaintiffs,

vs.

TESLA, INC. doing business in California as TESLA MOTORS, INC.; and DOES 1 THROUGH 50, INCLUSIVE,

Defendants.

Case No.: 23CV028922

DECLARATION OF BRYAN J. SCHWARTZ IN SUPPORT OF REPRESENTATIVE PLAINTIFFS' UNOPPOSED MOTION FOR APPROVAL OF PRIVATE ATTORNEY GENERAL ACT SETTLEMENT AND MOTION FOR ATTORNEYS' FEES AND COSTS

Complaint Filed: March 7, 2023

NICHOLS KASTER, LLP
Matthew C. Helland (SBN 250451)
helland@nka.com
235 Montgomery St., Suite 810
San Francisco, CA 94104
Tel. (415) 277-7235 | Fax (415) 277-7238

Attorneys for Representative Plaintiffs Sharonda Taylor and Zenobia Milligan

I, Bryan Schwartz, declare as follows:

1. I am a member in good standing of the Bar of the State of California and Plaintiffs' counsel of record in this matter. I am over 18 years of age and make this declaration based upon my personal knowledge and could so testify if called to do so. I submit this declaration in support of Plaintiffs' Unopposed Motion for Approval of PAGA Settlement, and Plaintiffs' Unopposed Motion for Approval of Attorneys' Fees and Costs.

SETTLEMENT BACKGROUND

2. My firm, Bryan Schwartz Law, P.C., along with our co-counsel California Civil Rights Law Group and Nichols Kaster, LLP, represent Representative Plaintiffs (also referred to herein as "Plaintiffs") on a contingency basis. We also represent the plaintiffs and class members in *Vaughn v. Tesla*, Case No. RG17882082, which is also pending in this Department. *Vaughn* alleges race discrimination and harassment claims under the Fair Employment and Housing Act and does not involve any Labor Code issues.

3. This case sought PAGA penalties on behalf of individuals who sought their personnel records from Tesla. My firm spent significant time requesting personnel files on behalf of hundreds of workers and meeting and conferring regarding those requests. We then worked on multiple rounds of administrative exhaustion through the Labor Workforce Development Agency (LWDA) and spent dozens of hours getting the lawsuit researched and drafted correctly.

4. This case has been hotly litigated. Plaintiffs served 1,635 discovery requests, seeking admissions that each of the personnel file requests was made and not answered timely – crafting these discovery requests was time-consuming. Tesla filed an anti-SLAPP motion, which the court denied. Tesla appealed from that denial, which resulted in full appellate briefing and argument. Due to the potential consequences of that anti-SLAPP motion (*i.e.,* dismissal of the case and fee shifting), defeating the motion and prevailing on appeal required significant resources. We then expended a great deal of time pushing the case toward resolution, and that is why we have achieved a strong settlement for the State and the aggrieved workers. To get to mediation, we attempted a novel approach (in a PAGA case) of extending a Code of Civil Procedure § 998 offer, and extensive correspondence concerning penalty

calculations and settlement approaches. After our successful mediation with Peter Rukin, which resulted in three distinct mediators' proposals (for PAGA penalties, for injunctive relief, and then for attorneys' fees, in that order), the parties spent around six weeks developing a long-form agreement to memorialize the agreement we reached with the mediator, which required significant time on my part and others'.

5. Plaintiffs Taylor, Milligan, and Smith remained involved in the case throughout, including during the settlement negotiations, until Plaintiff Smith's rejection of the settlement. Plaintiffs Taylor and Milligan engaged actively in their duties as representative plaintiffs until today, as they have testified. Plaintiffs promptly responded to counsel's inquiries; reviewed pleadings and discovery; discussed the case strategy; and provided insights and feedback at every stage of the litigation, including through mediation and settlement.

6. Plaintiff Tatianna Smith attended the mediation via Zoom, along with myself and my co-counsel, Mr. Helland and Mr. Organ. After mediation, the parties negotiated and executed a long-form settlement agreement for approximately six weeks, which was fully executed by April 11, 2025, except for Plaintiff Tatianna Smith.

7. After Plaintiff Smith rejected the negotiated settlement, Plaintiffs' counsel moved to be relieved as her counsel and served the motion on Plaintiff Smith. On May 9, 2025, the Court granted Plaintiffs' counsel's motion and my office served the order granting the motion on Ms. Smith the same day by email and certified mail. We notified Plaintiff Smith, per the Court's order, that she would need to obtain new counsel by May 30, 2025, or the Court would entertain a Tesla motion to dismiss her from the action.

SETTLEMENT EVALUATION

8. Before mediation, my co-counsel and I evaluated our client's position, Tesla's defenses, and the risks of continued litigation. We understood that Tesla's main defense in this matter was that it was justified in failing to respond to Plaintiffs' requests because the requests were part of *Vaughn,* a separate class action. Even if not ultimately justified on this defense, Tesla has argued and we have considered that it says it withheld the files under the good-faith belief that it was entitled to do so under discovery orders in *Vaughn.* We have also weighed Tesla's argument that under section 1198.5(p),

which provides that "[a]n employer is not required to comply with more than 50 requests under this section to inspect and receive a copy of personnel records filed by a representative or representatives of employees in one calendar month," the company properly withheld the requested files, or at least had a good-faith belief that it was entitled to do so. We have also considered Tesla's argument that it had and has no obligation to produce any records to those who it considers non-employees, *i.e.,* those who worked at Tesla through staffing agencies. I believe each of these issues – plus the ever-present arbitration-related arguments – could have posed at least some risk to recovery for the LWDA and aggrieved workers.

9. Since the Court of Appeal did not adjudicate Tesla's defenses entirely on the merits, I believe considerable time and attorneys' fees would be incurred in continuing to litigate the defenses. Moreover, I considered courts' wide discretion in reducing PAGA penalties under Labor Code section 2699(e)(2):

> In any action by an aggrieved employee seeking recovery of a civil penalty . . . a court may award a lesser amount than the maximum civil penalty amount specified by this part if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.

In determining whether the penalty should be reduced, courts consider a number of factors, including whether the violation was minimal and whether the violation arose from a good-faith error. *See, e.g., Carrington v. Starbucks Corp.* (2018) 30 Cal.App.5th 504, 529.

10. One example that particularly concerned me was *Sanchez v. McDonald's* (L.A Superior Court, filed Jan. 24, 2013) BC499888, in which, after a full trial on the merits, the court awarded $774,442 of $41 million in PAGA penalties sought, representing 1.89% of the total. The Statement of Decision and a *Daily Journal* article about the case are attached as **Exhibit A**. I know the attorneys who litigated that case to be exceptional – including Michael Rubin, who has appeared in *Vaughn* – so it is sobering to see what can happen even when top attorneys prosecute PAGA claims.

11. I am not aware of any other pending cases that assert claims that will be extinguished, or adversely affected, by this case.

QUALIFICATIONS AND EXPERIENCE OF PLAINTIFFS' COUNSEL

12. I am one of California's most experienced employment lawyers in representing workers in wage-and-hour class, collective, and representative PAGA actions. Among the many cases in which my firm and I have been approved as class and/or representative counsel, and where my fees have been awarded based at least in part upon my claimed rates, in this court, elsewhere in California, and in federal courts court, are:

a. *Policarpio, et al. v. Quality Medical Imaging*, RG16835690 (Seligman, J.); *Cuenca v. Kaiser,* RG20065123 (Alameda Super. Ct.) (Kaus, J.); *De'Silva v. Independence Logistics*, RG 17855933 (Alameda Super. Ct.) (Smith, J.); *Dela Cruz, et al. v. Addison Lee, et al.*, RG19021433 (Alameda Super. Ct.) (Smith, J.); *Amenya, et al. v. Henry Industries*, RG15754205 (Alameda Super. Ct.) (Smith, J.); *Austin, et al. v. Cosco Fire Protection, Inc.*, RG16831960 (Alameda Super. Ct.) (Smith, J.); *Ford, et al. v. Axis Appraisal Management Solutions, et al.*, Civ. 1403236 (Marin Super. Ct.); *Azadi, et al. v. Carey Limousine, et al.*, Case No. CGC-12-527396 (S.F. Super. Ct.); *Moses, et al. v. Adecco*, Case No. 17CV311980 (Santa Clara Super. Ct.); *Call v. Shutterstock, Inc.*, SCV-262841 (Sonoma Super. Ct.); *Jenkins et al. v. Whitestone Grp.*, CGC-14-541930 (S.F. Super. Ct.); *Jenkins, et al. v. G4S Govt. Solutions*, JCCP No. 4545 (Los Angeles Super. Ct.); *Garcia, et al. v. Landmark Hospitality, et al.*, CGC-13-532871 (S.F. Super. Ct.); *Quiles, Turman, et al. v. Koji's Japan Inc., et al.*, Civ. No. 30-2010-00425532-CU-OE-CXC (Orange Super. Ct.); *Greene, et al. v. Shift Operations, et al.*, CGC 16-552307 (S.F. Super. Ct.); *Boyd, et al. v. Bank of Am. Corp.*, 300 F.R.D. 431, 444 (C.D. Cal. 2014); *Buckingham, et al. v. Bank of America*, 15-6344 (N.D. Cal.); *Mitchell, et al. v. CoreLogic,* 17-2274 (C.D. Cal.); *Rueda, et al. v. Idemia Identity & Security,* 18-3794 (N.D. Cal.); *Bakhtiar v. Information Resources, Inc.,* 17-04559 (N.D. Cal.); *Lee, et al. v. JPMorgan Chase, et al.*, 13-1511 (C.D. Cal.); *Duque, et al. v.*

Bank of America, 18-1298 (C.D. Cal.); *Roy v. MI Group*, 17-05800 (N.D. Cal.); *Yim, et al. v. Carey Limousine NY*, 14-5883 (E.D.N.Y.); *Alabsi v. Savoya,* 18-06510 (N.D. Cal.); *Adlao, et al., v. JPMorgan Chase, et al.*, 10-04508 (N.D. Cal.); *Johnson v. Quantum Learning Network*, 15-05013 (N.D. Cal.); *Marino v. CACafe, Inc.,* 16-6921 (N.D. Cal.); *Wright, et al. v. Adventures Rolling Cross Country*, *et al*., 12-982 (N.D. Cal.); *Pearson, et al. v. Samsonite Company Stores, Inc., et al.*, 09-1263 (N.D. Cal.); *Kairy, et al. v. Supershuttle, et al.*, 08-2993 (N.D. Cal.); *Martinez, et al., v. Incom Mechanical, et al.*, 11-01392 (N.D. Cal.). In my work for other firms, I was also approved as Class Counsel in others matters, including, *e.g.*, *Zinman v. Wal-Mart*, 09-02045 (N.D. Cal.); *Stanfield, et al. v. First NLC Financial Services, LLC*, 06-3892 (N.D. Cal.); *Rivera, et al. v. Solstice Capital Group*, 07-1852 (C.D. Cal.); *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 574 (C.D. Cal. 2008); and *Carter v. Anderson Merchandisers*, 2008 WL 4948489, *8 (C.D. Cal. Nov. 18, 2008). I was also approved as class counsel by this Court in a non-employment (consumer) matter: *Cordrey, et al. v Mills College,* 22CV011159 (Alameda Super. Ct.) (J. Markman).

b. I was approved as Class Counsel by the EEOC in *Meyer, et al. v. Blinken (Dept. of State),* EEOC No. 531-2015-00092X and *Saba, et al. v. Blinken (Dept. of State),* EEOC No. 530-2012-00389X, both actions affecting many federal workers.

13. After graduating Cornell University *magna cum laude*, I attended and graduated Berkeley Law. Thereafter, I served as law clerk to the late Hon. Franklin Van Antwerpen (formerly of the Eastern District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit).

14. I am the past Chair of the Labor & Employment Law Section of the State Bar of California (now called California Lawyers Association, with over 7,500 members), a past member of the Executive Board of the California Employment Lawyers Association ("CELA"), a member of the Board of Directors of Legal Aid at Work, and Board member and past President of the Foundation for Advocacy Inclusion and Resources (FAIR – a non-profit I helped establish, to increase diversity in the profession).

15. I appeared before the California Supreme Court as the author of the CELA and Consumer Attorneys of California brief in *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (2012) 53 Cal.4th 1004, and CELA's briefs in *Kirby v. Immoos Fire Protection* (2012) 53 Cal.4th 1244, and *Duran v. US Bank*, NA (2014) 59 Cal.4th 1172, and *ZB v.* Superior *Court (Lawson)* (2019) 8 Cal.5th 175, each a decision which affects millions of workers statewide.

16. I regularly speak about employment law topics in professional journals, on the radio, and at law schools, conferences and seminars, trainings for new lawyers, and in webinars, having done so on dozens of recent occasions. My articles are frequently published in *The Daily Journal*, the *California Labor and Employment Law Review*, *Plaintiff*, and other publications.

17. My senior associate Jane B. Mackie graduated from Columbia Law School in 2012. During law school she was a Harlan Stone Fiske Scholar each of her three years. After law school, she served as a judicial clerk to the Honorable Carlos T. Bea of the Ninth Circuit Court of Appeals for two and a half years. She then served the State of California as a Deputy Attorney General. Before she joined my firm in July 2022, Ms. Mackie was a Deputy District Attorney for four years. She worked extensively on this matter, including revising the pleadings and drafting filings and discovery.

18. Jennifer Reisch and Monali Sheth were Of Counsel with my firm, and graduated Berkeley Law in 2002 and 2005, respectively, and contributed to this case after having worked many years prosecuting workers' rights actions. Ms. Reisch was especially involved in the early strategy of the case, requesting the files and exhausting with the LWDA. Renato Flores, Dylan Colbert, and Francis Santos all began at my firm as Law Fellows, directly following law school, and also worked on this case – Mr. Flores subsequently became (and remains) an associate of the firm and now has several years experience on all facets of employment litigation. Ms. Colbert, in particular, was heavily involved in drafting the lawsuit.

ATTORNEY HOURLY RATES

19. My and my firm's regular billing rates have been routinely approved by courts issuing fee awards or as part of a lodestar cross-check—after evaluating counsel's qualifications and the relevant legal market—and these rates are paid by the firms' non-contingency clients.

20. Courts routinely award Bryan Schwartz Law P.C.'s current, customary, and regular billing rates, which increase $25/hour per year per timekeeper, and which are charged to hourly-paying clients. These are/have been as follows, along with the hours spent by each timekeeper on this matter (also reflected in **Exhibit B**) – hours which will only continue to increase as we prepare for and attend the hearing on settlement approval and fees and proceed through settlement administration:

Name	Title	Law School Graduation	2025 Rate	Hours Spent
Bryan Schwartz	Principal Attorney	2000	$975	133.7
Jennifer Reisch	Of Counsel	2002	$900	28
Monali Sheth	Of Counsel	2005	$850	12.3
Jane Mackie	Senior Associate	2012	$750	112
Renato Flores	Associate	2022	$400	5.9
Dylan Colbert	Law Fellow	2021	$325	57.3
Francis Santos	Law Fellow	2023	$350	.5
Paralegals/Legal Assistants/Law Clerks	-	N/A	$250	278.3

21. I am familiar with the hourly rates generally charged by litigators in Alameda County, the San Francisco Bay Area generally, and throughout California. More specifically, I am familiar with the hourly rates charged and the billing and work practices of employment lawyers with skills, qualifications and experience similar to those of Plaintiffs' counsel in this action. I gained familiarity with market rate ranges by tracking developments in the legal market and discussing attorneys' fees, billing and work practices from the plaintiffs' bar through my various legal community activities; by reviewing legal newspapers and surveys pertaining to market rates; by reviewing rates charged by firms that my firm has associated with or whom we have opposed; by setting billing rates for my own firm; and based on my years at other law firms as a plaintiffs'-side employment lawyer.

22. The fees and hourly rates sought by all attorneys and staff in this matter are within (or below) the San Francisco Bay Area community standards for someone of our respective levels of experience and skill. In addition, we are sometimes compensated with multipliers, as described below.

23. Numerous state and federal courts, including this one, have approved my customary and regular billing rates. For example, in 2023, a $925/hour rate was expressly approved for me in *McHaar v. FedEx Ground Package Systems, Inc.*, 20CV366270 (Santa Clara County Super. Court), with a lodestar multiplier. In 2021, a $900/hour rate was expressly approved for me in *Cuenca v. Kaiser Foundation Health Plan Inc.,* RG20065123 (Alameda County Super. Court) (Kaus, J.), with a lodestar multiplier. My regular, requested hourly rates (which increase $25/hour per year) have been approved dozens of times, expressly or as part of a lodestar cross-check, often with multipliers.

24. My firm billed $250 per hour for law clerk and paralegal time and $150 per hour for legal assistant time, both of which have also consistently been awarded. Paralegals in my office performed critical work in this matter. For example, Salma Sadat and Natalie Rudin (who both graduated top universities) formerly worked as paralegals with my office and assisted extensively on this matter performing paralegal duties. Among many other tasks, such as filing and service and formatting/preparation of court filings, Ms. Rudin coordinated communications with clients to request personnel files from Tesla, and Ms. Sadat conducted research regarding the complaint. The paralegal billing does not include any normal overhead charges for the office or any secretarial, administrative, or office managerial duties that they performed. Billing at the paralegal rate ($250/hour) includes only charges associated with litigation/mediation preparation and higher-level paralegal tasks.

COUNSELS' ACCRUED FEES AND COSTS

25. With co-counsel, my firm incurred extensive fees and costs in serving hundreds of personnel file requests, initiating and investigating this action and commencing discovery, in opposing Tesla's Motion to Strike and defeating its appeal of that motion's denial, in settlement and mediation-related efforts, and on the settlement and fee motion briefing. My firm has spent over 628 hours in this matter. This has resulted in about $307,360.00 in legal fees from my firm alone, to date, incurred with a risk of no recovery because of our contingency arrangement. Attached as **Exhibit C** is a chart detailing the hours billed by timekeepers at Bryan Schwartz Law, P.C. by category. The time includes:

- 21.2 hours related to the appeal;
- 48.5 hours related to mediation and settlement negotiation;

- 65 hours related to the complaint;
- 21.2 hours related to discovery;
- 91.8 hours related to motion practice;
- 25.9 hours related to strategy;
- 23.9 hours related to legal research;
- 150.5 hours related to requesting personnel files and meeting and conferring about them;
- 19.6 hours related to administrative exhaustion;
- 46.7 hours devoted to case management;
- 25 hours related to miscellaneous tasks including meet-and-confer efforts, communications with clients, and communications about the filing; and
- 20.3 hours of case-specific, non-overhead administrative time, which is billed at $175/hour.

My firm also spent 68.4 hours on activities related to this case that, in exercising billing discretion, we have not charged in calculating our lodestar.

26. The billing chart in **Exhibit C** reflects charges by myself, BSL associates, law fellows, and paralegals/law clerks. All of the billing calculated in **Exhibit C** was reasonably necessary to the successful prosecution of this litigation.

27. My firm's time spent on this matter was documented contemporaneously using the Clio software program, which was always tracked to the nearest one-tenth of one hour, thereby detailing every effort expended on behalf of Plaintiffs since 2021. This does not account for future work that will still be spent on this matter to see it through settlement approval and settlement administration.

28. We will provide the full, itemized billing of all counsel, *in camera,* should the Court request it.

29. When combined with the attorneys' fees incurred by California Civil Rights Law Group (about $54,660) and Nichols Kaster (about $226,774), the current lodestar of $588,794 exceeds the agreed-upon limit of fees and costs, $340,000, of which (as described below), $16,378.70 are

costs/administrator fees. After accounting for costs, the $323,621.30 available for fees represents a steep discount—a multiplier of 0.5496x our lodestar fees.

30. My firm has incurred costs of about $6,812.05 for various expenses such as court filings, mediation fees, legal research fees, mailing and postage fees, and payment of a consultant (third-party, class/representative action ethics expert) – the latter to ensure our proper, code/rule-compliant withdrawal from representation regarding Ms. Smith in a manner that would protect Plaintiffs. Charts detailing these expenses are attached as **Exhibit D.** These types of expenses are routinely incurred in other matters (other than as to the expert, since we rarely have a need to withdraw from representing a named plaintiff) and paid by clients directly and/or awarded by courts upon request. When combined with the costs incurred by co-counsel, the total costs amount to $11,378.70, which are added to the $5,000 required for the settlement administrator, Simpluris.

31. The $5,000 not-to-exceed fee charged by Simpluris is a very reasonable price for administration of this PAGA settlement involving 766 individuals, based upon my experience with settlement administration in dozens of other matters, and is less than the $7,500 quoted to me by another major settlement administration vendor for this project.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Oakland, California, on May 21, 2025.

/s/ Bryan Schwartz

By:____

Bryan J. Schwartz

EXHIBIT A

FILED
Superior Court of California
County of Los Angeles
JUL - 6 2017
Sherri R. Carter, Executive Officer/Clerk
By V. Jaime, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MARIA SANCHEZ, DAVID CRUZ, INES MENDEZ MERINO, and JONATHAN VALENTIN, as individuals, and on behalf of all others similarly situated, Plaintiffs, vs. MCDONALD'S RESTAURANTS OF CALIFORNIA, INC., a California corporation; MCDONALD'S OF CULVER1-SEPULVEDA, a business entity of unknown form, and DOES 1 through 100, inclusive Defendants.	CASE NO. BC499888 STATEMENT OF DECISION

Having concluded the bifurcated trial, and having received and considered the Plaintiffs' Objections, the Court now issues a Statement of Decision.[1]

[1] Plaintiffs submitted 78 separate questions that they request that the Court answer in this statement of decision. A number of these questions are not proper subject matters for the statement of decision. For example, questions 1-3 refer to facts that can be adduced by reference to the record. Questions 4 and 5 are argumentative and rhetorical. Questions 9, 10 and 33, inquire as to the preclusive effect of this decision on other yet-to-be adjudicated aspects of this complex case and are not properly addressed in this decision. The issues raised in the remaining questions – the

I. BACKGROUND

This action was brought as a class action against McDonald's on behalf of crew members at the 119 corporate-owned restaurants located in California ("McOpCo restaurants"). The operative Third Amended Complaint alleges, *inter alia*, a class action and representative action for a number of different violations of the California Labor Code arising from McOpCo's operation of its fast food restaurants in California.

In August 2016, the Court certified an overtime sub-class defined as "all Class Members who worked a shift that began on one calendar day and ended the next calendar day (an overnight shift) followed by a shift that began the same calendar day as the overnight shift ended, who were not paid all overtime for all time worked in excess of eight hours in a 24-hour period." The Court also certified derivative wage statement claims arising out of the same daily overtime sub-class claim.

To determine who the members of the certified class were, the parties went through the punch-in/punch out data to determine which class members fit within that description. Those are the class members who received notice and from which plaintiffs averred they would "be able to calculate damages." (Transcript of Proceedings, February 27, 2017 at

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intent required for the violations and penalties adjudicated, the selection of the workday for the purpose of computing underpaid or unpaid wages, the probative value of certain witness testimony, the adequacy of McDonald's wage statements, and the computation of penalties – are addressed in the Court's statement of decision. Plaintiffs' contention in their Objections to the Court's Proposed Statement of Decision, filed on July 5, 2017, that the Court is required to respond to each of their seventy eight questions in its statement of decision is simply incorrect. Under Code of Civil Procedure 632, a trial court is required to render a statement of decision addressing the factual and legal bases for its decision as to each of the principal controverted issues in the case. A statement of decision need not address all the legal and factual issues raised by the parties. Instead, it need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision. A trial court rendering a statement of decision under Section 632 is required to state only ultimate, rather than evidentiary facts, because findings of ultimate facts necessarily include findings on all intermediate evidentiary facts necessary to sustain them. *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124-1125 (citations omitted).

page 4, lines 7-13).

The Court granted plaintiffs' motion for summary adjudication on the overtime sub-class' issue of liability on Count Four – failure to pay overtime wages. In that ruling, the Court held that McDonald's method of calculating daily overtime violated Labor Code § 510(a), which requires employers to pay an overtime premium for "any work in excess of eight hours in one workday [defined as 'any consecutive 24-hour period commencing at the same time each calendar day]. See Labor Code Section 500(a).

The PAGA cause of action (Count Twelve) was limited to the daily overtime sub-class group of aggrieved employees for whom liability had been established. The Court earlier had found that an amalgam of individual and dissimilar uncertified claims -- other than the daily overtime sub-class and derivative wage statement claims -- would make a PAGA trial unmanageable. The PAGA count, therefore, was limited to the daily overtime claim that had been certified. As part of its pre-trial evidentiary rulings, the Court precluded testimony regarding plaintiffs' newly-minted penalty assessment for seventh day overtime payments because the introduction of an entirely new theory of liability on the eve of trial would violate due process and be unreasonably prejudicial to McDonalds.[2] The Court also held, by way of an *in limine* motion, that the limitations period on the plaintiffs' PAGA claim extended back to March 13, 2013.

The plaintiffs' PAGA penalty claims were bifurcated and tried to the Court. Trial

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[2] Although objected to by plaintiffs, the record establishes the facts upon which plaintiffs claimed a violation of Labor Code Section 510 have materially changed from those alleged in the third amended complaint, which was essentially an off-the-clock allegation. This is the allegation for which the plaintiffs obtained permission to sue under the PAGA scheme. On the eve of trial, a seven day premium computation emerged as part of the plaintiffs' overtime damage/penalty study. As both well beyond the scope of the authority provided to these plaintiffs by the State of California and as a fundamental violation of defendant's due process rights, the Court excluded that additional penalty assessment. That the defendant's expert quickly prepared a counter-study in response to this new damage claim does not affect the fact that plaintiffs' late-in-the-day addition of penalties/damages was fundamentally unfair and unauthorized.

began on May 23, 2017 and concluded on June 2, 2017. The Court issued a tentative decision on June 9, 2017. The Court issued a proposed statement of decision thereafter and now issues this Statement of Decision.

Three of the four named class action plaintiffs (Inez Mendez Merino, David Cruz and Jonathan Valentin) pursued PAGA claims at trial. Two of the aggrieved employee representatives were called by the plaintiffs, one was called by the defendant.

The Court reserved ruling on the defendant's motion for judgment, which McDonald's filed at the close of the plaintiffs' case, and declined to render any judgment until all evidence was presented. *See Watt v. Kantel* (1970) 13 Cal.App. 3d 249, 253.

OUTLINE OF ISSUES DECIDED AT TRIAL

As the plaintiffs' claims and theories of liability changed on the eve of trial,[3] the Court begins by setting forth the issues to be decided by the Court in this PAGA trial:

(1) What penalties are owed to the "overtime sub-class" and when should the work-day be established for purposes of that computation?

(2) Did McDonald's willfully fail to pay wages when due or fail to pay wages upon each overtime-subclass member's voluntary or involuntary termination? If so, should a penalty under Labor Code Section 2699 be imposed?

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[3] In a footnote in their trial brief, plaintiffs retreated from a number of their earlier claims and limited the relief sought in this PAGA penalty trial phase. Specifically, plaintiffs are not seeking waiting time penalties under Section 203 and penalties for inaccurate wage statements under Labor Code Section 226(e). Although these claims were included in the pretrial rulings on *in limine* motions, the plaintiffs elected to forego these statutory penalty claims (and their requirements of willfulness) during this phase of the case. Whether these statutory penalty claims will be tried in conjunction with the remaining jury issues remains to be determined at a later date, as does the preclusive effect, if any, of the rulings made in this PAGA trial. The Court, however, declines plaintiffs' request to leave PAGA penalties to be adjudicated at a later date.

(3) Is McDonald's liable for additional penalties under Labor Code Section 210? If so, what penalty is to be imposed?

(4) Did McDonald's intentionally fail to maintain records or provide wage statements as required under the Labor Code? If so, what penalty is to be imposed?

II. UNPAID OVERTIME AND THE DEFINITION OF WORKDAY FOR OVERTIME COMPUTATION

The defendant's failure to pay overtime, which provides for a civil penalty to be assessed and collected under Labor Code Section 558, may be recovered through a PAGA action. Labor Code Section 2699(a).

California Labor Code Section 558 provides as follows:

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

1. For any initial violation, fifty dollars for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover unpaid wages;*

2. For each subsequent violation, one hundred dollars for each underpaid employee for each pay period for which the employee was underpaid *in addition to an amount sufficient to recover unpaid wages.*

This section should be construed as providing a civil remedy that consists of *both* the $50 or $100 penalty amount and any unpaid wages, with the unpaid or underpaid wages going entirely to the affected employee or employees as an express exception to the general rule that civil penalties recovered in a PAGA action are distributed 75 percent to the Labor and Workforce Development Agency (LWDA) and 25 percent to the aggrieved employees. Thurman v. Bayshore Transit Mgmt., Inc. (2012) 203 Cal.App. 4th 1112, 1145.

A. Defining the Workday

Although McDonald's calculated overtime using a system other than a fixed 24-hour workday, the compelling and credible evidence adduced at trial supports the conclusion that McDonald's has a workday for its restaurants' operational activities. And, for purposes of computing unpaid overtime wages, that workday is the proxy that should be applied in this case.

As testified to by credible witnesses at trial, including Jessie Lopez and Kathy Froehlich, the evidence demonstrates that 4:00 a.m. is the start of a new service day at the 24-hour restaurants at issue in this case. This workday begins at the start of McDonald's operational workday and begins at approximately the same time as the employer's first shift "openers" arrive in the morning. [4] The current eRestaurant system used in McDonald's corporate-owned California restaurants has a fixed "labor start of day" at 4:00 a.m., which largely corresponds to the defendant's business day. (Exhibit 427) The openers for breakfast service arrive at 4 a.m. and begin the preliminary preparation for the

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[4] The Court sustained defendant's objection to certain Requests for Admissions. The "covered employee" term as used therein is irrelevant to any issue to be tried in this case. The Court limits these discovery requests and responses to members of the certified class, as these are the aggrieved employees. The time period is similarly limited. The term "covered restaurant" is limited to the California McOpCo restaurants at issue in this trial.

larger number of crewmembers that arrive closer to the beginning of the breakfast service rush. Closing shifts also generally wind down operations at the 4 a.m. hour. There are generally core groups of crewmembers who regularly work only those work shifts. As credibly testified to by Jessie Lopez, the composition of these shifts is predicated largely on the crewmembers' availability and/or requests for working those shifts. Crewmembers on these shifts generally stay on these shifts and become experienced in the different aspects of service and cleaning required on those particular shifts. The credible testimony establishes that it is rare for an employee to be scheduled to work an overnight shift followed by a day shift the next day.

The defendant's expert quantified the labor cycle in McDonald's restaurants. As shown in Exhibit 551, an analysis of the 20-store sample of McOpCo restaurants in California,[5] shift start times for relevant job categories cluster in the early morning hours. Few shifts start in the evening and even fewer shifts begin around midnight. The most common shift times start around the breakfast rush – 5 to 7 a.m. The "openers" for those breakfast shifts arrive at 4 a.m. as the stores "ramp up" for the morning rush.

That a certain level of management in California stores could modify the labor start of day in their back-office systems does not impair the use of the 4:00 a.m. proxy. Froehlich credibly and competently testified to the creation of certain aspects of McDonald's ISP program and its newer eRestaurant back office web-based system. The "in store processor" is a relatively old combination of hardware and software that McDonald's uses for back-office functions at their McOpCo restaurants. These systems were developed and installed in the 1980s and 1990s. Only recently has McDonald's begun to update certain of these functions using a web-based system called eRestaurant. Since the rollout of McDonald's new eHR and eLabor modules of its eRestaurant

[5] As credibly testified to by defendant's expert, most of these 20 stores were 24-hour restaurants.

computer system (completed by 2015), the "labor start of day" has been set to begin at 4:00 a.m. This is the workday that defendant McOpCo uses for a number of managerial tasks and this "workday" coincides with how the defendant actually operates its business.

Labor Code Section 500 affords the employer significant flexibility in the designation of a workweek and a workday. Moreover, a workday that begins at approximately the same time as an employer's first shift in the morning enables McOpCo to implement a "workday" for purposes of computing overtime in a way that is entirely consistent with its labor demand.[6]

By contrast, plaintiffs' 12:01 a.m. calendar day "workday" proxy bears little or no relationship with the realities of the defendant's operations. As shown in Exhibit 511, very, very few crewmembers begin their shifts at midnight. And, although there is a "default" calendar-day 12:01 to midnight workday that is used in administrative proceedings by the Division of Labor Standards Enforcement ("DLSE") when there is no workday established in the record, this Court is not mandated to use this proxy. *See Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 580.[7] Moreover, this case is not one where the record does not support the existence of a workday. Plaintiffs cite no authority to support the use of the 12:01 default proxy when, as here, there is a "workday" used and defined by the employer for purposes other than the computation of overtime.[8]

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[6] That using this workday as a proxy has the effect of reducing both the number of unpaid wages and the amount of penalties imposed – as compared to a 12:01 a.m. calendar-day proxy -- is not inconsistent with the policy of the labor laws. Rather, it reflects the fact that this proxy most closely aligns with the operational realities of McDonald's business. A proxy should not be selected solely because it inflates damages or penalties. Rather, an overtime "workday" should be selected that both reflects reality and allows the defendant to implement easily that "workday" for purposes of daily overtime on a going-forward basis.

[7] In *Kilby v. CVS Pharmacy, Inc.* (2016) 63 Cal.4th 1, 13, the Supreme Court reiterated that the DLSE's enforcement policies are not entitled to deference because they were not adopted in compliance with the Administrative Procedures Act. And, while courts *may* resort to these rules for guidance, they are not obligated to do so. *Id.*

[8] The Court affords no weight to the plaintiffs' selection of 9:00 p.m. as the "workday start" proxy to be used in this case. Although plaintiffs' expert testified that it was the most common shift starting time in the "class data set," that data set was limited to the identified class members who worked through midnight and thereafter worked a second

The Court declines to use such a proxy in this case.

B. Computation of Unpaid Overtime Wages and Interest

Using a 4:00 a.m. to 3:59 a.m. workday proxy, the computation of unpaid overtime liability should be an arithmetic process. Yet, despite what should be a routine application of overtime pay to eligible hours during the relevant period of time, the experts disagree as to the amount of unpaid overtime and the number of violations for which penalties can be imposed.

First, the experts appear to disagree on the correct starting point for the computation of unpaid overtime liability. Defendants calculate unpaid overtime owed back to January 2009; plaintiffs limit their analysis to the undescribed "PAGA period."

The Court agrees with the defendant's use of January 24, 2009 for the purpose of computing unpaid or underpaid overtime in this case. For purposes of Section 2699, "cure" means that the employer abates each violation alleged by any aggrieved employee, that the employer is in full compliance with the underlying statutes and any aggrieved

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shift on the next day. Plaintiffs' expert had no opinion regarding, whether based on a twenty-store sample of all shifts, this start time bore any resemblance to the work and shifts cycle during the *entire* workday at McOpCo stores.

Another problem with the use of a 9 p.m. workday is that it impermissibly includes shifts that do not include the criteria used for certifying the class (who are the aggrieved employees). *See Pac. Gas & Elec. Co. v. Zuckerman* (1987) 189 Cal.App. 3d 1113, 1135. And, while the labor laws should be construed to ensure enforcement, selecting a "workday" based principally on the fact that it maximizes penalties without being tied to the overtime violation asserted by the class/ PAGA aggrieved employee group is impermissible. Damages and penalties should relate to the allegations of wrongdoing. *See U.S. Fire. Ins. Co. v. Shepard, Mullin, Richter & Hampton* (2009) 171 Cal.App. 4th 1617, 1629.

Finally, plaintiffs' last-minute inclusion of a new "workday" proxy on which to calculate damages (prepared five days before trial began) violates due process and left the defendant with little time and fewer opportunities to rebut that claim. Breshears' August 18, 2015 expert report used a midnight workday scenario, as did his 2016 supplemental declaration in support of class certification. Although the Court allowed the defendant latitude in questioning the plaintiffs' expert on rebuttal as an attempt to cure the problem of late-disclosure, that questioning reflected the last-minute nature of defendant's preparation and the difficulties that counsel encountered in responding to plaintiffs' last-minute change in their damages analysis. As it is legally and procedurally defective, the 9:00 workday start proxy shall not be used in this case.

employee is made whole. Labor Code Section 2699(c). As the PAGA case is for the recovery of penalties under Section 558, the remedy expressly provided in that position includes "*an amount sufficient to recover unpaid wages.*" Given the remedial purposes of PAGA and the Labor Code, there is no value in postponing the computation of the full measure of "cure" in this case that would otherwise be due and owing to the entire overtime sub-class.

Second, the experts disagreed regarding how to adjust for or how to handle anomalies in the data set of time punches. David Breshears, plaintiffs' expert, excluded certain time records based on an "eight hour exclusion" rule that had the effect of eliminating data points from the analysis. Paul White, defendant's expert, accommodated those anomalies by restoring those shifts to the analysis using an extrapolation method. While admittedly having only a small magnitude of effect on Breshears' analysis, his decision to exclude shifts from his damage study made that study and his testimony generally unreliable.

Another problem with Breshears is his general approach of running the plaintiffs' counsel's scenarios through his model, with no regard to whether or how they affected his analysis or testimony. (See, e.g., Exh. 536). His lack of understanding as to whether the data would support the request or how it would affect the validity of his conclusions rendered him not credible.

The Court finds the testimony of Paul White credible and persuasive. His methodology of excluding and then correcting anomalies in the data is superior to the method used by Breshears as it considers and includes all the punch data. White's extrapolation method also considered payroll records as a cross-check. Was this simply a mistaken punch, or was this a short shift that needed to be accounted for? The care and diligence reflected in White's analysis entitles it to substantial weight.

According to White's credible testimony, the total amount of back pay overtime owed to members of the overtime sub-class since January 24, 2009 is $55,471. The Court selects the "non-net across weeks" alternative and the "extrapolated" option for the calculation of damages. The non-net option most closely captures the underpayment of daily overtime issue presented in this case.[9]

In addition, the Court adopts Paul White's computation of the back pay overtime simple interest of 10 percent starting on January 24, 2009 and continuing through June 1, 2017 as $18,701.

C. Overtime Penalties

Any employer who violates any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty. For any initial violation, the civil penalty is fifty dollars for each underpaid employee for each pay period for which the employee was underpaid (in addition to an amount sufficient to recover underpaid wages). For each subsequent violation, one hundred dollars for each underpaid employee for each pay period for which the employee was underpaid (in addition to an amount sufficient to recover underpaid wages).

As interpreted in *Amaral*, section 558(a)(2)'s "subsequent violation provision" does not apply unless a Court or the California Labor Commissioner notifies the employer that the practice at issue violates the Labor Code. *Amaral v. Cintas Corp.* (2008) 163 Cal.

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[9] Plaintiffs' criticism of Dr. White's non-net across weeks method in their Objections to the Proposed Statement of Decision is without merit. Plaintiffs confuse the construction of a model using a "but-for" world in which a daily overtime had been established using a 4 a.m. continuous 24-hour workday and then assessing the actual unpaid or underpaid overtime still owed by McDonald's with the use of impermissible offsets in actual work settings. Dr. White's model is entirely distinguishable from instances in which employers seek to use payments in excess of legal requirements to militate or offset a failure to pay a legal wage. Plaintiffs' reliance on Labor Code Section 221 and the cases relying on that provision in objecting to this damages analysis, therefore, is misplaced.

App. 4th 1157, 1209 (2008). Such a reading is consistent with the statutory language and structure of Section 558. *Id. See also Trang v. Turbine Engine Components Techs. Corp.*, 2012 U.S. Dist. LEXIS 179710 (C.D. Cal. 2012).

Plaintiffs have provided the Court with no evidence that, as required in *Amaral,* any Court or the Labor Commissioner has notified McDonald's that its overtime practice of allocating shift hours to the day on which the shift began is a violation of California Labor laws. Accordingly, the only penalties that can be imposed in this case are initial penalties under subsection (a)(1).

Plaintiffs argued in closing that the filing of this action or other actions against other McDonald's entities should be construed to be the equivalent of a notification by the Labor Commissioner. There are no cases cited by plaintiffs to support such a contention. Nor, if the filing of a complaint could be construed to constitute "notice," would the complaints filed in this case provide the basis upon which the current trial has proceeded. There is no mention of the claim of unpaid daily overtime based on the payroll date method used by McDonald's in the plaintiffs' complaints. In fact, to the degree that there are any specifics provided, they address "off the clock" non-payment of overtime. Plaintiffs' claim for subsequent penalties is unsupported by the evidence in this case.

Computing the initial penalties owed under Labor Code Section 558 (a) (1), the Court finds the computation of Paul White credible. (Exhibit 545). According to his computation, a $50 penalty applied to each violation would result in a penalty of $700,270.[10]

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[10] Although defendant objects that plaintiffs seek recovery of allegedly unpaid overtime under both Labor Code Section 510 and Section 558, the Court finds that the award of "unpaid wages" under Section 558 going back to January 24, 2009, operates to preclude a second award of the same back time pay under Section 510.

III. PAGA Penalties for Violation of Labor Code Sections 201 and 202

Plaintiffs also seek penalties under PAGA for McDonald's violations of Labor Code Sections 201 and 202.

At the very last minute (in a footnote in their trial brief), plaintiffs elected not to pursue waiting time statutory penalties under Section 203 in this bifurcated proceeding. Plaintiffs assert that without 203, Sections 201 and 202 can support a claim for PAGA civil penalties without the requirement under 203 that the non-payment be willful. See Labor Code § 2699(f)(2). By disaggregating a cohesive statutory scheme and asserting that the first two subparts do not have a statutory penalty (thereby allowing PAGA civil penalties), the plaintiffs ignore the plain language of Section 203, which states that penalties can be recovered if an employer *willfully* fails to pay in accordance with Sections 201 and 202.

The Court rejects plaintiffs' tortured reading of the statutory language of Labor Code Sections 201-203. *See Amaral*, 163 Cal. App. 4th at 1200-03 (affirming the trial court's refusal to 'impose penalties for violations of Labor Code Sections 201 and 202 because the court correctly concluded that the defendant's conduct was not willful). Thus, plaintiffs may not recover penalties under PAGA for Labor Code Section 201 and 202 unless they prove that McDonald's acted willfully and intentionally failed to pay overtime wages.[11]

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[11] Plaintiffs' effort to disaggregate comprehensive Labor Code statutory penalty schemes and to create double penalties for the same violation using PAGA is arguably impermissible. Imposition of both statutory and civil penalties for the same conduct is an impermissible double recovery. The plain language of PAGA establishes a penalty for all those provisions in this code "except those for which a civil penalty is specifically provided." The Labor Code already specifically provides a penalty for violations of Sections 201-203 and 206. Accepting plaintiffs' contention for the purposes of this decision, however, that a PAGA 201/202 claim can be asserted, it necessarily requires the same willfulness element as is required under the statutory penalty scheme. PAGA creates no greater substantive rights than those afforded under the Labor Code.

As defined in Title 8, California Code of Regulations, Section 13520, the term willful does not necessarily require anything blameworthy or with evil intent, but rather that McDonald's knew what they were doing, was a free agent and failed to perform a *required* act, i.e., payment of an overtime premium in certain instances. "The settled meaning of willful, as used in Section 203, is that an employer has intentionally failed or refused to perform an act *which was required to be done*." *Amaral*, 163 Cal.App. 4th at 1203 (emphasis added).

McDonald's intentionally set the parameters and programmed its internal timekeeping and payroll systems to track and pay crewmembers' overtime based on a method that this Court has found to have violated Labor Code Section 510(a). This act was not accidental nor was it unintended.

That McDonald's created these parameters and has not altered them throughout the relevant period, however, does not fully answer the question of whether McDonald's actions in this case establish willful non-payment of its overtime obligations. *See Jasper v. C.R. England,* 2009 WL 873360, at *6 (C.D. Cal. March 30, 2009) (characterizing requirement as willful non-compliance).

Plaintiffs failed to adduce any competent or credible evidence that McDonald's designed its payroll date method for keeping shifts on a single day in order to evade or reduce its overtime obligations.[12] Credible testimony clearly establishes that McDonald's paid crewmembers for overtime if they worked more than eight hours recorded on a

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[12] The Court gives no weight to the testimony of Jeannette Galvan. Although she testified that she had been "amicably" terminated by McDonald's, her demeanor and tone while testifying belied that claim. This witness obviously still holds significant animus towards McDonald's and believes that she was terminated for no cause. Given the grounds for which she was terminated, i.e., failure to follow McDonald's policies, her testimony regarding McOpCo's policies during the relevant period of time is not credible. Further, having left the company more than two years ago, her knowledge of McOpCo's current operating systems is limited. For that reason also, her testimony has little probative value.

particular payroll date. (Hoes Deposition at 82:20 – 83:3). As credibly testified to by Lopez, if crewmembers worked overtime they got paid.[13] (6/1/17 Tr. 27L11-16).

Nor, as discussed *infra*, have plaintiffs adduced any evidence that McDonald's was aware of the rare "daily overtime incurred from a second shift following a shift that crossed the day divide" underpayment of crewmembers until late in the prosecution of this case. The uncontroverted and competent testimony established that McDonald's believed that its payroll date overtime practice was fair and legally compliant.

Froehlich's credible testimony was that McDonald's thought that keeping shifts together was the fairest and legal way in which to track and compute overtime. She testified that McDonald's believed that keeping a shift intact across the day divide would insure that any overtime occurring within that overnight schedule was fully and adequately compensated. And, since those parameters were built into the ISP system, McDonald's back-office systems designers never received any objections to this form of time-keeping until this Court's ruling on summary judgment.[14] For these reasons, until that point in

[13] This fact distinguishes the overtime claim presented here from those presented in most Labor Code cases. For example, in an "off the clock" claim, no overtime is paid for hours worked in excess of eight hours. Or, in a misclassification case, employees doing non-exempt work do not receive overtime pay. In this case, overtime was paid but in an amount that was not computed using a continuous 24 hour "workday" as defined in the California Labor Code.

[14] There was no evidence adduced by plaintiffs that the persons responsible for the ISP system and its operation were aware of two different lawsuits filed by certain plaintiffs against a different McDonald's entity (as a joint employer) and certain of its franchisees. There was no evidence adduced that either action rendered a binding judgment against the McDonald's defendant in this case. More importantly, these pleadings did not specifically allege anything having to do with the overtime practices at issue in this trial. As was the case with this litigation, these initial complaints specifically alleged that McDonald's violated the overtime laws by engaging in "off the clock" practices.

The Court declined plaintiffs' request to take judicial notice of certain of these pleadings. Judicially noticing these unrelated cases would have resulted in the undue consumption of time on matters that are not relevant. Judicial notice provides solely for noticing the existence of a pleading, not its contents. Plaintiffs failed to proffer settlement agreements or other exhibits or testimony to show a binding judgment or other adjudication of the overtime practices being challenged here. Without such evidence, there is no basis upon which to make a reasonable inference that the mere existence of these lawsuits constituted constructive notice to McDonald's regarding the legality of its payroll date daily overtime practice.

time, McDonald's did not see a need to make any changes to the system.[15]

Plaintiffs adduced no competent circumstantial evidence to support a reasonable inference that McDonald's adopted its payroll date overtime policy to reduce or keep its labor costs low. That McDonald's monitors and attempts to control overtime expenses does not support an inference that McDonald's payroll date overtime method was done to evade overtime obligations. Rather, the defendant's attention to labor expenses as a variable cost of its operation is entirely expected and understandable. As these exhibits show, reducing avoidable overtime costs through careful scheduling of crewmembers enhanced store profit and worker productivity. That obvious proposition falls well short of allowing a reasonable inference that McDonald's engaged in its overtime practice with the intention of evading or avoiding overtime.

Further, the evidence at trial showing the entire circumstances surrounding the adoption of the payroll date overtime policy further supports the conclusion that McDonald's did not knowingly or willfully violate Sections 201 or 202.[16]

It matters, in making a finding of willful or intentional violations, whether the law was known or capable of being known at the time of the alleged violation – or at any time

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[15] In fact, only since this Court's ruling on plaintiffs' motion for summary judgment has McDonald's been in discussions with its eRestaurant vendor about how to adapt its current system to establish a consecutive 24-hour workday for purposes of computing overtime. Although inadmissible as a subsequent remedial measure, these actions rebut plaintiffs' characterization of defendant as an employer indifferent to its obligations under the California Labor Code.

[16] The Court did not rule on this issue in advance of trial. Rather, McDonald's sought to have its affirmative defense of objective good faith decided as a matter of law as part of an *in limine* motion, *i.e.*, to exclude evidence regarding the history or intent of McDonald's method of calculating daily overtime. The Court denied that *in limine* motion and, instead, ruled that the entire factual and legal landscape underlying McDonald's use of its existing overtime system needed to be considered at trial. The Court did not, as plaintiffs argue in their trial brief, reject McDonald's principal basis for asserting its good faith affirmative defense – "that the law requiring daily overtime to be calculated using a consistent 24-hour workday purportedly 'lacked clarity.'" (See May 9, 2017 Order at 12-13). Rather, the Court ruled that evidence regarding the facts and the law surrounding defendant's adoption and continued use of this overtime practice was relevant and needed to be considered by the Court.

thereafter. See Cal. Code of Regs. Title 8, Section 13530(a). That a defense turns out to be ultimately unsuccessful does not mean that the violation was willful.

The clear weight of the evidence presented in this case supports the defendant's claim that it did not intentionally fail to comply with California's overtime laws. The "[d]etermination of employer's overtime liability is one of the most complicated areas of wage and hour law." R. Simmons, Wage and Hour Manual for California Employers at 293.[17] And, there are significant differences in what is required under federal law and what California requires when it comes to daily overtime.

In fact, the violation presented here is so novel that only two federal district courts have ever had occasion to consider generally the effect of a day divide with regard to California daily overtime laws. In one case, *Jakosalem v. Air Serv. Corp.* 2014 U.S. Dist. LEXIS 173090 (N.D. Cal. 2014), the court considered the interplay of an employer's designation of a workday and an employee's entitlement to overtime. In another, *In re Walmart Stores, Inc. Wage and Hour Litig.*, 505 F. Supp. 2d 609 (N.D. Cal. 2007), a different district court concluded that the plaintiffs stated a claim for failure to pay overtime where employees worked a single shift in excess of the day divide set by the employer. Neither case considered the unique situation presented here, i.e., where the company had never designated any consecutive 24-hour period commencing at the same time each calendar day for purposes of computing daily overtime.

The technical nature of this claimed violation is underscored by the credible testimony that no crewmember or manager ever complained to McDonald's headquarters

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[17] Plaintiffs' continued objections to the rather unremarkable proposition that wage and hour overtime liability is complicated are inexplicable. See Plaintiffs' Objections to the PSOD at 38. To the extent that they believe that the author and his association with a management defense firm makes that proposition less true, that is groundless. And, as shown by the novelty and difficulty of this particular case, that is a conclusion that any party to this litigation could have reached without the benefit of a published treatise.

regarding its daily overtime practices before this litigation was filed. No employee has ever prevailed in a lawsuit – including this case which is still underway and yet to be fully adjudicated -- that successfully challenged the defendant's practice of allocating shift hours to the day on which the shift commenced. And, even in this lawsuit, the plaintiffs' theory of "overtime violations" has been a moving target. As late as 2014, plaintiffs' discovery responses focused on "off-the-clock" overtime theories of liability wholly unrelated to the "day divide" practices at issue in this trial. (See e.g. Exhibits 484, 486, 489, 490, 493, 499, 503, 505, 507, 511, 517, 518, and 520).

None of the class representatives testified that they initiated this action in order to perfect a claim for daily overtime based on having worked an overnight shift crossing midnight with another shift within the same 24-hour period. Collectively the class representatives could recall no more than a handful of occasions when they were, in fact, members of the certified class.[18] (See Exhibit 549). A comparative study of McDonald's existing overtime pay practices and a 4 a.m. workday overtime proxy showed that the vast majority of class members are owed less than fifteen dollars in unpaid overtime since 2009. (Exhibit 554). Only one class member was owed unpaid overtime of $26 or more. (Id.) And, importantly, a large number of class members would receive *less* overtime pay under a 4:00 a.m. workday than they would have earned under the payroll date method. (Trial Exhibit 553).

Until the Court's ruling on summary judgment in this case, the legal obligations imposed on McDonald's with regard to its daily overtime obligations for a certain number

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[18] The testimony of Jonathan Valentin was particularly problematic. Although a class representative, plaintiffs' counsel expressed on the eve of trial that they were "making efforts to get him here." Defendant's notice secured his appearance at trial. On direct examination by defendant, Mr. Valentin had little recall and was impeached by his previous verified discovery responses when questioned by defense counsel. Although he was much more forthcoming when questioned by plaintiffs' counsel, Valentin appeared to have little personal recall of the relevant events in this case. The Court finds his testimony entirely not credible.

of crewmembers whose shifts included both a shift that crosses the day divide and a second shift on the next calendar day were not established in the jurisprudence. No California appellate decision has construed Section 510(a) to find McDonald's overtime practices illegal. Although this Court has rejected McDonald's legal arguments in support of its overtime practices, these defenses were not unreasonable or frivolous. In fact, this litigation has (as in *Amaral*) "raised complicated issues of first impression."

For these reasons, the Court finds that plaintiffs have not established the element of willfulness as required under Sections 201 and 202.

IV. PENALTIES UNDER SECTION 210

In addition to any other applicable sanction, Labor Code Section 210 authorizes substantial penalties against employers who do not comply with the state wage payment rules.

In addition to, and entirely independent and apart from any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Section 201.3, 204, 204(b), 204.1, 204.2, 205, 205.5 and 1197.5, shall be subject to a civil penalty. For an initial violation that is not intentional, the penalty is $100 for each failure to pay each employee in accordance with the requirements of the applicable Labor Code. For a subsequent violation, or any willful or intentional violation, the penalty is $200 for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld. Penalties awarded under this provision are not awarded to employees; they are paid to the General Fund in the State Treasury.

As a predicate for recovery, plaintiffs must establish a qualifying Labor Code violation under the enumerated provisions. Plaintiffs are relying on Labor Code Section

204. (See Plaintiffs' Trial Brief at 32).

Labor Code Section 204 requires employers to pay all wages of non-exempt employees twice each calendar month on regular designated paydays. But, that provision does not regulate the manner in which the employer calculates hours worked, and it has no application when, as here, a plaintiff complains that the employer did not pay all wages due. Section 204 "does not provide for the payment of wages nor create any substantive right to wages." *See's Candy Shops. Inc. v. Superior Court* (2012) 210 Cal.App. 4th 889, 905. In fact, "the only right furthered by the section is the timely payment of wages." *Id.* (the "sole purpose of [section 204] is to require an employer of labor who comes within its terms to maintain two regular paydays each month, within the dates required in that section.") As the appellate court reasoned, "the question whether all wages have been paid is different from how an employer calculates the number of hours worked and thus what wages are owed. Section 204 does not address the measurement issue." *Id. See also Hadjavi v. CVS Pharmacy*, 2010 U.S. Dist. LEXIS 143762 (C.D. Cal. Sept. 22, 2010) (granting motion to dismiss because Section 204 "deals solely with the timing of wages and not whether these wages were paid.")

There has been not one scintilla of evidence adduced by plaintiffs to support a claim that McDonald's failed to maintain at least two paydays during each calendar month.[19] Accordingly, plaintiffs have not established a claim for PAGA penalties under Section 210.

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[19] Had liability for penalties been established, the Court would have considered whether any PAGA penalties for violations of Labor Code Section 204 had been released as part of a settlement of a separate PAGA action, *Mendez v. McDonald's Restaurants of California, Inc.* (Los Angeles County Sup. Ct. Case BC 531883). *See Villacres v. ABM Indus. Inc.* (2010) 189 Cal.App. 4th 562, 576-77.

V. MCDONALD'S RECORD KEEPING AND WAGE STATEMENT PRACTICES

Plaintiffs seek penalties for McDonald's paperwork under a number of different "paperwork provisions."

First, plaintiffs argue that McDonald's has knowingly failed to provide record keeping and wage statements under Labor Code Section 1174.5 because McDonald's maintains records outside of California.[20]

Throughout the class certification process, these record-keeping claims were considered solely as derivative claims to the plaintiffs' daily overtime claim. At no time did the plaintiffs argue (until they included it in an appendix to their reply memorandum to their *in limine* motions) that this cause of action was predicated on the theory that McDonald's kept its records outside of California.

Although new, this theory is unsupported by any competent evidence. The undisputed evidence is that McDonald's maintains its required records electronically and that these records are fully accessible in California. (Deposition of Joan Hoes at 69:13-70:22.) As such, McDonald's complies with the law. *See, e.g.*, DLSE Opinion Letter 1995.07.20 (proving that storage of records by electronic means meets the requirement of California law if the records are (1) retrievable in the State of California and (2) may be printed in an indelible format upon request of either the employee or the Division).

Plaintiffs' novel reading of a statutory provision intended to address the responsibility of employers for maintaining records as yet another statutory provision by which to stack additional penalties for McDonald's overtime wage violation is contrary to

[20] Plaintiffs also changed their record keeping claims in their trial brief. Plaintiffs are not seeking penalties under Labor Code Section 226(e).

the purpose of this provision. *See Craib v. Bulmash* (1989) 49 Cal.3d 475, 478 (statutes intended to require disclosure of a kind customarily kept in the ordinary course of business and are *separate* from means by which to enforce substantive wage and hour provisions).

Plaintiffs also seek penalties for violations of Section 226(a) and enhanced penalties under 226.3. Although Section 226 includes a statutory penalty section under subsection (e), the plaintiffs dropped their claims for relief under that section in their trial brief and are seeking PAGA penalties only for violations of Section 226(a). Whether this is permissible or whether the decisions rendered here will preclude further litigation of the same issues remains to be answered on another day. As with Section 201 and 202, plaintiffs' last minute pivot appears to have been a strategic attempt to avoid the language in subsection (e) that requires a knowing and intentional failure by the employer to comply with subsection (a) before a penalty is imposed.

Divorcing Section 226(a) from its penalty provision in subsection (e) defies principles of statutory construction and creates strict liability even though the express language of the penalty provisions of the wage statement laws require knowing or willful misconduct by the defendant in order for a statutory penalty to be imposed. PAGA's omnibus penalty provisions were not designed as "work arounds" for those Labor Code provisions with express penalty provisions that require knowing or willful misconduct.

Plaintiffs, as discussed earlier, have failed to meet their burden of showing willful or intentional non-payment or underpayment of overtime wages. Plaintiffs, therefore, also fail to adduce evidence that McDonald's knowingly or intentionally violated the derivative wage statement provisions of Section 226(a).[21] Accordingly, no PAGA penalties (if they

[21] Plaintiffs erroneously re-cast the court's holding as relying on a "good faith defense." See Plaintiffs' Objections to the PSOD at 35. This Court did not rely on a good faith defense in concluding that plaintiffs failed to meet their burden of showing a Section 226(a) violation.

can be said to exist at all) can be imposed for this 226(a) PAGA violation.[22]

Labor Code Section 226.3 imposes penalties when an employer fails to provide the employee with an accurate itemized wage summary, as described in Section 226(a). Section 226.3 contains a "scienter" provision. "In enforcing this section, the Labor Commissioner shall take into consideration whether the violation was inadvertent, and in his or her discretion, may decide not to penalize an employer for a first violation, and, in his or her discretion, may decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake. Under Section 226.3, the civil penalties are $250 per employee per violation in an initial citation and $1,000 per employer for each subsequent violation.

As discussed *supra*, McDonald's use of a non-compliant payroll date overtime system was not willful. The purpose of the wage statement requirement is to provide transparency as to the calculation of wages. *McKenzie v. Fed. Express Corp.*, 765 F. Supp.2d 1222, 1230 (C.D. Cal. 2011). To comply, a wage statement must accurately report the information necessary for an employee to verify that he or she is being properly paid in accordance with the law. *See Morgan v. United Retail, Inc.* 186 Cal.App. 4th 1136 (2010).

In this case, defendant's wage statements accurately report the information necessary for its crewmembers to verify that they were being paid overtime that they had worked. That the methodology used to compute that obligation (which ultimately resulted in an underpayment of less than $60,000 over 47 million hours of work) has been determined in a case of first impression to violate Section 510 does not establish the degree of deliberateness or intentionality required for enhanced penalties. *See Heritage*

[22] Again as with Section 204, as the Court finds no violation, it is not necessary to consider the preclusive effect of the judgment and release in *Mendez*. *See Villacres*, 189 Cal.App.4th at 569.

Residential Care, Inc. v. Division of Labor Standards Enforcement (2011) 192 Cal.App. 4th 75, 86 (the term "inadvertent, as used in Section 226.3, means unintentional, accidental or not deliberate.)

VI. PAGA PENALTIES

McDonald's requests that this Court use its discretion to reduce the penalties awarded under PAGA. McDonald's notes a number of problems with the penalties sought by plaintiffs, including (1) they reflect the incorrect workday, (2) they are unable to show McDonald's acted willfully, knowingly and intentionally, (3) plaintiffs improperly seek to stack penalties, (4) plaintiffs make a number of mistakes with respect to individual penalties, and (5) they fail to account for the *Mendez* settlement.

The Court declines the invitation to do so. The Court has computed penalties using a 4 a.m. workday commended by McDonald's as most closely approximating the true workday at the 24-hour restaurants. The Court has found that plaintiffs failed to establish willfulness or notice or "intentionality as required for Sections 201, 202, 210, 226(a) and 226.3. The Court has rejected plaintiffs' attempt to "stack" penalties under Section 1174.5 or Labor Code Section 510. Considering the facts and circumstances of this entire case, there is no basis for reducing the penalty amounts further. While the penalties significantly exceed the aggrieved employees' actual damages, the amount imposed in this case is not unjust, oppressive or confiscatory.

VII. CONCLUSION

Plaintiffs have established that they are entitled to back pay for overtime owed, using an extrapolated 4:00 a.m. workday on a non-net across weeks option, dating back to January 24, 2009 of $55,471.

Simple interest of 10 percent starting on January 24, 2009 and continuing through June 1, 2017 equals $18,701.

Plaintiffs have also established that they are entitled to overtime penalties under Section 558 of $700,270.

Because plaintiffs failed to prove that McDonald's violated the law knowingly, willfully and intentionally, they are not entitled to penalties under Labor Code Sections 201, 202, 226(a), 266.3 or 1174.5. Nor are they entitled to the willful enhancement under Labor Code Section 210.

Dated: July 6, 2017

HONORABLE ANN I. JONES
JUDGE OF THE SUPERIOR COURT

Articles from *Daily Journal* regarding *Sanchez v. McDonald's Rests. of Cal*

Monday, June 12, 2017
McDonald's able to substantially minimize its damages in overtime trial
By Matthew Blake

LOS ANGELES What was often a confusing bench trial regarding McDonald's Corp. and overtime allegations under the state's Private Attorneys General Act has a quite clear conclusion for now: McDonald's won.

Superior Court Judge Ann I. Jones issued a tentative decision Friday that the fast food Goliath must pay $774,442, mostly in PAGA penalties, plus overtime back pay and interest for eight years worth of McDonald's 119 corporate-run stores violating California's overtime pay policy. It was a fraction of the $41 million the plaintiffs sought. Sanchez et. al v. McDonald's et. al., BC499888 (L.A. Super. Ct., filed Jan. 24, 2013).

According to Jones' tentative ruling, the store failed to pay $55,471 in total overtime to thousands of overnight shift workers, who will now see that money, plus $18,701 in accumulated interest.

Per the PAGA statute, in which workers are deputized as private attorneys general to peruse labor code violations, 25 percent of that money will go to plaintiffs and their lawyers, while 75 percent is routed to the state's Labor and Workforce Development Agency.

Jones' tabulations should sound familiar to trial participants, as the bench officer completely incorporated the calculations of McDonald's expert accountant witness, Paul White.

"The court finds the testimony of Paul White credible and persuasive," Jones wrote.

The judge, meanwhile, skewered the testimony of plaintiffs' go-to accountant, David Breshears, as "not credible" and "generally unreliable." Breshears' estimates included a scenario in which plaintiffs would net about $41 million.

Michael Rubin, a partner and plaintiffs' lawyer for Altshuler Berzon LLP, said after the hearing that he would file an objection, and that an appellate court would ultimately decide the matter. He said Jones' standard for deciding whether McDonald's willfully violated labor law, and her method for calculating penalties were "contrary to the labor code."

The Jones Day team that represented McDonald's declined comment after the hearing, and an email sent to Chicago-based lead lawyers Michael J. Gray and Elizabeth M. McCree,, receive no response.

In a summary judgment ruling in April, Jones found McDonald's liable for not paying overtime to a certified class of overnight hourly wage earners who work a shift a day after their overnight shift begins. For example, a worker who started a shift at 10 p.m. June 9 and ended a shift at 6 a.m. June 10 would be credited as working eight hours on June 9 and no hours on June 10.

Under that timekeeping policy, McDonald's could have the worker, for example, work a 6 p.m. to 10 p.m. shift on June 10 and not pay them overtime.

Under California law, the 10 hours worked by that employee during June 10 would qualify them for time-and-a-half pay for the last two hours of work.

Jones' summary judgment was arguably a seminal victory for California plaintiffs' employment lawyers in its application of the increasingly used PAGA statute, and the ability to blame the deep-pocketed corporate parent, as opposed to individual McDonald's franchisee owners, for workplace violations.

Jones Day's defense in the seven-day bench trial may serve as an example of how to mitigate penalties under PAGA.

For example, Gray's hours-long cross-examination of Breshears, which at times came across as nit-picking the accountant's methodology, paid off.

"Breshears, plaintiffs' expert, excluded certain time records based on an 'eight hour exclusion' rule that had the effect of eliminating data points from the analysis," Jones wrote. "While admittedly having only a small magnitude of effect on Breshears' analysis, his decision to exclude shifts from his damage study made that study and his testimony generally unreliable."

Jones added that Breshears uncritically ran the scenarios of Rubin and plaintiffs' co-lead lawyer Joseph M. Sellers, of Cohen Milstein & Sellers PLLC, without thinking through how they impacted his testimony.

"His lack of understanding as to whether the data would support the request or how it would affect the validity of his conclusions rendered him not credible," the judge said.

Jones wholly agreed with McDonald's willfulness argument, endorsing the corporation's contention that until the Sanchez suit, no one had raised concerns about the overtime policy and that company brass believed, "keeping shifts together was the fairest and legal way in which to track and compute overtime."

In making her conclusion, the judge effectively knocked out several ancillary PAGA penalties, including fines for delayed payment, that would have greatly increased the damage amount.

Cheerful yet beleagured during the bench trial, Jones spent 2 minutes rendering her verdict Friday.

After her clerk distributed copies of the decision the judge had spent a week to prepare, Jones did not ask for oral arguments and refused to take questions from lawyers, before returning to her chambers.

matthew_blake@dailyjournal.com

Monday, June 5, 2017
McDonald's class action goes to the judge, with many questions
Defense lawyers say company didn't realize OT law violations
By Matthew Blake

LOS ANGELES — A unique bench trial about how much corporate-owned California McDonald's Corp. stores must pay in penalties for overtime violations ended Friday with plaintiffs' lawyers pushing the labor code's limits, McDonald's lawyer insisting that his client never meant to do wrong, and the judge continually interjecting to ask questions.

After closing arguments, Los Angeles County Superior Court Judge Ann I. Jones took under submission a Private Attorneys General Act case regarding what fines the fast food chain must pay for a longstanding policy that conflicts with California overtime law. Sanchez et. al. v. McDonald's et. al., BC49988 (L.A. Super. Ct., filed Jan. 24, 2013).

Jones set a hearing for Friday at which the judge might issue a ruling.

In a summary judgment ruling in April, Jones found McDonald's liable for not paying overtime to a certified class of overnight shift workers who work a full shift the day after their overnight shifts begin.

What has remained unclear in the seven-day trial is the analysis Jones should use to tabulate labor code penalties, with untold millions of dollars at stake for McDonald's.

Plaintiffs' lawyers Joseph M. Sellers of Cohen Milstein Sellers & Toll PLLC and Michael Rubin at Altshuler Berzon LLP "marched through" — in Jones' words — the possible penalties to levy.

Speaking in soothing tones and wearing his typical bow tie, Rubin, a veteran attorney of several novel employment disputes, laid out penalties for unpaid overtime, inaccurate wage statements, and penalties for delays in pay.

Under the 13-year-old PAGA statute, the representative group of thousands of McDonald's overnight workers are deputized as a private attorney general, and collect a $100 penalty for each initial violation against an employee, and $200 for each subsequent violation.

The state Labor and Workforce Development Agency is supposed to receive 75 percent of penalty proceeds, with plaintiffs, and their lawyers, netting 25 percent.

Rubin argued that Jones must steadfastly adhere to implementing these penalties. When the judge pressed Rubin for case law, the lawyer said, "Until recently, PAGA has mostly been an afterthought," and there is virtually no case law for calculating millions of dollars of penalties.

McDonald's lawyer Michael A. Gray, a Jones Day partner, fired back with a closing argument that stylistically was as animated as Rubin's was calm.

Gray lambasted plaintiffs for "incredibly creative" accounting methods and legal theories.

He rebuked Sellers and Rubin for their "tag team" closing argument that took nearly two hours, and slammed plaintiffs' accountant, David Breshears,as a "kind gentleman" who struggled to pass his Certified Public Accountant examination.

Substantively, Gray emphasized that McDonald's had no idea that its payroll methods conflicted with California law until the late innings of the case, after which plaintiffs — who had struck other wage-and-hour class claims — pressed their overnight worker overtime claim.

"The plaintiffs are not even invested in this case," Gray said, citing deposition testimony in which named plaintiffs acknowledged that they signed onto the lawsuit to allege other claims, including being made to work off the clock, and had little to no overtime claims.

The lawyer pointed out that some employees actually were paid more due to McDonald's policy, while thousands of members of the class were cheated out of less than $20.

Gray said that it was "simply against the spirit and language of the Private Attorneys General Act" to make McDonald's pay an, "eight-figure or nine-figure penalty" for a non-willful violation.

"Plaintiffs would like you to inflict pain on McDonald's," Gray said. "But the judge has discretion to make sure any penalties are fair and just."

In his rebuttal, Sellers countered that there is a "fundamental difference" in each side's interpretation of what "willfulness" means.

According to the lawyer, willfulness protects employers' against inadvertent violations, such as rounding a decimal point in a way that hurts workers, but not policies that repeatedly violate the law.

Sellers argued that he didn't have the burden of showing that the fast food giant deliberately flouted state law, and noted, besides, that the company had an "almost fetish level" interest in avoiding overtime.

Jones, who has acknowledged being at times confused by plaintiffs' legal theories and miffed by their late exhibit admissions, noted during Rubin's arguments, "I'm creating a lot of the slowness because I'm asking a lot of questions."

The judge's numerous clarifying questions have indicated little about to what extent she will punish McDonald's financially. At the end of the day, Jones said her "aspirational goal" was to issue a tentative ruling Friday, at which point parties will lodge objections.

The endpoint of a case that Jones has compared to a Francios Truffaut film is unclear, as, among other matters, plaintiffs have advocated for a subsequent jury trial regarding overtime claims of the certified class.

matthew_blake@dailyjournal.com

Friday, June 2, 2017
Judge expresses confusion, irritation in McDonald's class action
McDonald's overtime dispute has jurist irritated with lawyers
By Matthew Blake

LOS ANGELES — An epic bench trial against McDonald's Corp. has somewhat befuddled the judge, who announced Thursday that she is not totally sure what the case is about.

Asked by Joseph M. Sellers, lead lawyer for a plaintiff representative group of thousands of McDonald's overnight workers, what he should focus on in closing arguments Friday morning, Los Angeles County Superior Court Judge Ann I. Jones replied, "Tell me exactly what the issues are in the case," adding later, "I don't know." Sanchez et al. v. McDonald's Restaurants of California Inc. et al., BC49988 (L.A. Super. Ct., filed Jan. 24, 2013).

Jones compared plaintiffs' and defendant's cases, which each wrapped up Thursday, as "two ships passing in the night."

Of particular confusion to Jones is what damages methodology plaintiffs' counsel has proposed in calculating labor code penalties under the state's Private Attorneys General Act.

Not helping matters is a small forest's worth of late exhibit admissions. Jones, who has stayed largely cheerful throughout the two-week trial, chided lawyers at the end of the day for the flurry of late admissions, prompting a contrite Sellers to reply, "We do know better."

In a summary judgment last month, Jones found McDonald's liable for not paying overtime to a certified class of overnight workers who work a shift a day after their overnight shift begins. For example, a worker who started a shift at 10 p.m. on June 2 and ended a shift at 6 a.m. on June 3 would be credited as working eight hours on June 2 and no hours on June 3.

Under that timekeeping policy, McDonald's could have the worker, for example, work a 6 p.m. to 10 p.m. shift on June 3 and not pay them overtime. But under California law, the 10 hours worked by that employee during June 3 would qualify them for time-and-a-half pay for the last two hours of work.

McDonald's representatives have testified they were oblivious to how their store policy conflicted with state law, until Sanchez was filed.

What Jones must decide is how much to assess McDonald's in labor code penalties. The company has argued that its purported lack of willful violations should be a mitigating factor.

Michael J. Gray, a partner at Jones Day and the lead lawyer for the fast food chain, suggested McDonald's failure to pay overtime for some workers was a largely insignificant quirk of the company timekeeping policy.

Gray and plaintiffs' counsel again Thursday brought to the witness stand David M. Breshears, an accountant who analyzed approximately 11 million time-punches of McDonald's workers for the plaintiffs and then tabulated missing overtime payments, plus labor code penalties under PAGA.

Gray asked Breshears how many employees, out of a possible PAGA representative class of 8,998 people, were owed less than $20 in overtime by McDonald's. Calculator in hand, Breshears answered that a majority — 5,150 employees — were owed less than $20.

Breshears qualified this calculation by noting that 2,801 people in the group were owed no overtime.

Plaintiffs' lawyers countered at day's end with the testimony of Jeannette Galvan, who managed several McDonald's in the Fresno area until the company fired her.

Under direct examination from Kristin M. Garcia, an associate at Altshuler Berzon, Galvan said McDonald's managers had weekly "commitment to excellence meetings" and received numerous payroll reports that scrupulously discouraged overtime payments.

"You don't want to give overtime," Galvan said, repeatedly stating that the practice was "frowned upon."

Galvan also testified that the stores she managed started their workday at various early morning hours, a practice she said denied time-and-a-half overtime pay to some overnight workers.

Garcia's examination, though, was cut short by Jones, who warned it was bleeding into plaintiffs' closing time. Jones has repeatedly stressed she will hear no more after Friday, because of other judicial obligations.

After Friday, Jones will take the case under submission. She has tentatively said she will announce a ruling June 9.

matthew_blake@dailyjournal.com

Wednesday, May 31, 2017
McDonald's official testifies company didn't know state overtime law
Fast food giant did not know state overtime rules
By Matthew Blake

LOS ANGELES — A decision-maker for McDonald's Corp. employee timekeeping testified Tuesday that the company didn't consider how its workday conflicts with California overtime law, even after the fast food company's policy became subject to a lawsuit.

Kathryn Froehlich, senior project manager for McDonald's, told Joseph M. Sellers, a partner at Cohen Milstein Sellers & Toll PLLC and lead counsel for a plaintiff representative group of California overnight workers, that for 27 years the fast food company has configured timekeeping so that hours worked would be attributed to the day a shift began, and not when the work was performed. Sanchez et al. v. McDonald's Restaurants of California Inc. et al., BC49988 (L.A. County Super. Ct., filed Jan. 24, 2013).

Conversely, under California law, overtime calculations are based on the amount of work an employee completes during a 24-hour period, regardless of the day that work began, a contrast that leaves McDonald's liable for possibly hundreds of thousands of missing overtime payments.

"We believe what we were doing was right, and we did not look to make changes," Froehlich said, repeatedly referring to McDonald's timekeeping policy as "the right thing to do."

Froehlich's testimony about the company's awareness, and compliance with, California overtime law got to the heart of a high-stakes and novel, if technical, dispute.

Hours have been spent over what Los Angeles County Superior Court Judge Ann I. Jones deemed the "housekeeping" matters of how the Private Attorneys General Act bench trial should proceed, including whether Jones could grant an injunction of McDonald's timekeeping policy.

Jones appeared unlikely to let plaintiffs move for the injunction as it fell outside the purview of PAGA, in which workers are deemed deputized by the state attorney general to pursue labor code violations against their employer.

The cheerful yet somewhat beleagured judge at one point compared the case's complexity and lack of precedent to a Francois Truffaut movie.

In a summary judgment ruling last month, Jones found that McDonald's is liable for not paying overtime to some overnight shift workers who work a shift the day after their overnight shift begins.

For example, a PAGA representative member who started a shift at 10:00 p.m. on May 30 and ended the shift at 6 a.m. on May 31 would count as working eight hours on May 30 and no hours May 31.

Under that timekeeping policy, McDonald's could have the aforementioned class member, for example, work a 6 p.m. to 10 p.m. shift on May 31 and not pay them overtime. But the 10 hours worked by that employee during May 31 would qualify them for time-and-a-half pay for their last two hours of work under California law.

Froehlich, an information technology employee at McDonald's since 1991, testified that the company did not take into account that scenario when its labor scheduling practices were adopted, and that she is not aware of a "legal opinion" the company sought into the lawfulness of its overtime policy.

Echoing the opening statement of McDonald's lead lawyer Michael A. Gray, a partner at Jones Day, Froehlich said. "We never had any issues brought to our attention" about the company's overtime policy until the lawsuit.

Sellers pressed her on this point, getting Froehlich to acknowledge that even after the Sanchez complaint was filed, the company did not respond outside of defending the lawsuit. "There was nothing that happened on the operational side of affairs," Froehlich said.

Under the 13-year-old PAGA law, Jones has discretion, even after establishing liability, on how much in penalties she will assess against McDonald's.

One mitigating factor, Gray has argued, is that the company's violation of state labor law is mostly technical and does little harm to their modestly-paid, hourly workers.

Earlier in the day, plaintiff Ines Mendes testified that McDonald's had a "secret system" of compensation that Mendes, who cannot read English and the company's English language wage statement, could not understand.

Gray pressed the witness, getting Mendes to acknowledge that the plaintiff did not know the lawsuit contained an overnight worker overtime claim until recently. While still containing millions of dollars in possible liability for McDonald's, Sanchez has been whittled down from a much larger case with several alleged state labor code violations.

Jones has called for the case to wrap up by Friday, at which point she will take it under submission.

matthew_blake@dailyjournal.com

Tuesday, May 30, 2017
Harrowing questions, excruciating detail mark McDonald's overtime pay trial
By Matthew Blake

LOS ANGELES — A possibly critical courtroom showdown took place Friday in a Private Attorneys General Act labor penalties case against McDonald's Restaurants of California Inc. during a clash over an accountant's calculations.

For almost four hours, McDonald's lawyer Michael J. Gray grilled accountant David M. Breshears, hired by plaintiffs' lawyers to calculate PAGA penalties for overnight hourly workers who did not get overtime from McDonald's. Sanchez et al. v. McDonald's Restaurants of California Inc. et al., BC499988 (L.A. Super. Ct., filed Jan. 24, 2013).

Gray, a Jones Day partner in Chicago, asked Breshears, partner at Henning Morse LLP, a series of compound questions, apparently seeking to expose Breshears' calculations as at times arbitrary, redundant and tilted to beef up an upcoming payday for plaintiffs, their phalanx of lawyers, and the state of California.

For example, one calculation that assumed the Golden Arches workday begins at 9 p.m. tallied approximately $41 million in penalties and back pay.

But it was not clear whether Gray's exceedingly detailed questions — which dug for errors literally on the margins of Breshears' analysis of about 11 million employee timecard punches — gained traction with Los Angeles County Superior Court Judge Ann I. Jones.

"We're talking about hundreds of entries among millions and millions of entries," Breshears testified.

At one point, the judge echoed Breshears' assertion, that while Gray identified possible double counting in violations, the accountant had identified the misstep and testified that it accounted for less than 3 percent of the data. "I think he's quantified the error you identified," Jones told Gray.

Breshears' epic and, at times excruciating, bookkeeping testimony illustrated the magnitude of a novel trial that highlights two key trends in state employment law: the use of PAGA, and the liability of parent corporations for alleged violations by their subsidiaries.

Jones announced that the trial will conclude Friday, due to other matters on the judge's calendar, at which point she will take the matter under submission.

The judge must determine what McDonald's will pay under PAGA, in which plaintiffs — here, a group of about 13,000 McDonald's overnight workers — are deputized as private attorneys general as they collect 25 percent in any labor code penalties, with the state's Labor and Workforce Development Agency pocketing the rest.

Jones has already held McDonald's liable for a record-keeping policy that cheated some workers out of overtime, because the company configured electronic timekeeping so all hours worked would be attributed to the day a shift began, and not when work was performed.

Under PAGA, McDonald's must pay $200 for the first time they do not pay a worker overtime, and $250 for each subsequent violation. Additionally, the company must pay penalties for wage statements with missing or inaccurate information, and for time employees have spent waiting to collect their pay.

Jones has a great deal of leeway to assess what McDonald's may pay under PAGA. She may, for example, find some penalties gratuitous or penalize McDonald's less if she believes their record-keeping mistakes were accidental.

Gray suggested a few holes in Breshears' two years of work for plaintiffs' counsel at Cohen Milstein Sellers & Toll PLLC and Alsthuler Berzon LLP.Breshears answered Gray's questions, but maintained that the lawyer was identifying only small inconsistencies in the data.

Plaintiffs' lawyers sat largely silent during Gray's presentation, with lead attorney Joseph Sellers of Cohen Milstein Sellers & Toll asking his witness a few clarifying questions toward afternoon's end.

matthew_blake@dailyjournal.com

Thursday, May 25, 2017
Named plaintiff in McDonald's overtime suit says he wants his $6
Bookkeeper outlines $26M to $41M options in OT lawsuit
By Matthew Blake

LOS ANGELES - Questioning a veteran accountant and affable former burger flipper, lawyers representing thousands of McDonald's Restaurants of California Inc. nightshift workers made their case Wednesday that they should collect a super-sized amount of penalties for an alleged Golden Arches unlawful overtime policy.

Joseph M. Sellers of Cohen Milstein Sellers & Toll PLLC and Launa Adolph of Matern Law Group brought to the witness stand bookkeeper David M. Breshears, who sought to prove that McDonald's owed millions in unpaid overtime and attendant penalties. They also called David Cruz, a named plaintiff, who articulated why he valued his role in a somewhat novel legal dispute.

In a trial scheduled to go into next week, with Sellers calling additional plaintiffs then, Los Angeles County Superior Court Judge Ann I. Jones must determine how much McDonald's pays in penalties per the plaintiffs' Private Attorneys General Act claim.

Jones has already held McDonald's liable for a record-keeping policy that cheated some workers out of overtime, because the company configured electronic timekeeping so all hours worked would be attributed to the day a shift began, and not the day the work was performed.

But the judge has a good deal of leeway under the fluidly implemented PAGA law as to how much McDonald's must pay. For example, Jones could find that McDonald's violations were not willful and reduce her final tally, a conclusion for which defense lawyers Michael Gray and Cindi L. Ritchey of Jones Day have advocated.

An accountant at Henning Morse LLP, Breshears painstakingly gave various models in which Jones may calculate potential PAGA penalties.

Crawling through slides featuring charts with infinitesimal font sizes, the accountant showed his analysis of the 11 million timecard punches or 1.65 million employee shifts that he analyzed of McDonald's stores dating back to March 24, 2013.

With various competing models of when McDonald's workday started, Breshears' analysis produced some eye-popping calculations.

For example, if the workday were to start at 9 p.m., McDonald's would have to fork over $41 million in make-up payments and penalties for each PAGA violation. A midnight start of the day would mean $26 million toward the PAGA representative group.

But what exhibits and analyses Jones would ultimately rule upon is unclear. Sellers' deliberate, quiet questioning of his witness was occasionally interrupted by Gray's spurts of objections.

The defense lawyer seemed most irked by the fact that some exhibits were sent over to McDonald's counsel in the last 12 hours. Jones admitted the exhibits for now, though the judge asked several clarification questions and appeared willing to later strike the documents upon cross-examination.

Testifying in the morning, Cruz conceded defense lawyers' point that he rarely manned the overnight shift, and McDonald's may, in fact, owe him a grand total of $6.34 in unpaid overtime.

Cruz acknowledged he only learned after the lawsuit was filed that it contained an overtime claim, specifically regarding workers whose shift bleeds from one day into the next.

But the former restaurant worker, who spent much of his testimony warmly smiling, said that it was important for him to be part of the representative action.

"It's not just my case," Cruz testified. "This is for the rest of the McDonald's employees who did not get paid overtime."

"It could be $10. It could be $12. It could be $6," the witness added. "I still earned this money."

Ritchey, though, may have gained some traction in demonstrating that Cruz was not just ignorant of inside baseball corporate policy, but information made readily available to him. For example, Cruz said that overtime pay was not properly laid out on his wage statement. But Ritchey showed that the plaintiff was also unaware of the crew schedules that were noticeably posted at work.

Cruz will not have to appear again, but Gray is expected to have a heated, multiple-hour cross-examination of Breshears. That will happen Friday. The trial is dark Thursday.

matthew_blake@dailyjournal.com

Wednesday, May 24, 2017
McDonald's in the frying pan for overtime policy
Company lawyer claims no one griped about overtime policy
By Matthew Blake

LOS ANGELES — A novel bench trial started Tuesday with sharply conflicting opinions about McDonald's Restaurants of California Inc.'s corporate ethos, but it will likely take a turn into spreadsheets, painstaking explanations of calculations, and parsing of the state labor code.

Joseph M. Sellers, plaintiffs' lawyer for a class of thousands of California McDonald's overnight shift workers, told Los Angeles County Superior Court Judge Ann I. Jones in opening statements that since the early 1990s, when they developed payroll software, the fast food giant has systemically denied already low-paid hourly workers overtime through recordkeeping sleight of hand.

But McDonald's lawyer Aaron J. Gray countered that before a wave of joint employer lawsuits began fingering locally operated Golden Arches and their corporate parent for alleged violations, no one had ever complained about how the company calculates overtime.

Gray, a Chicago-based partner at Jones Day, declared, "There is not one stitch of evidence that McDonald's knew of the consequences," that their time sheet protocol ran afoul of California's overtime law. Sanchez et al. v. McDonald's Restaurants of California Inc. et al., BC49988 (Jan. 24, 2013, L.A. County Super. Ct.).

Waving his hand at two pieces of poster board that plaintiffs put up to show a timeline of McDonald's overtime policy, Gray said, "This is lovely and well-done. But it is absolutely irrelevant to what they know."

What McDonald's knows — or, more to the point, whether the company knew it was breaking California law — could be the crux of the case. In a trial expected to last until Friday, Jones must determine how much McDonald's pays in penalties per the plaintiffs' Private Attorneys General Act claim.

PAGA requires judges to levy $100 for each employee per period for each initial violation, and $200 for each subsequent violation — a tally that could put McDonald's tab in the eight figures.

But the still not fully understood 13-year-old law — which has resulted in very few PAGA-only bench trials — leaves Jones wiggle room.

The judge can reduce penalties that she deems unjust or arbitrary. Jones may also reduce the total if McDonald's can show its violations were not willful.

Under PAGA, the McDonald's named plaintiffs have deputized themselves as private attorneys general who seek to collect labor penalties, with 25 percent of any proceeds going to plaintiffs and 75 percent to the state's Labor and Workforce Development Agency.

According to the labor code, overtime calculations are based on the amount of work an hourly employee completes during any single 24-hour workday period. Any work beyond eight hours, per the statute, should result in time-and-a-half payment.

In a summary judgment order last month, Jones ruled that McDonald's violated the state overtime statute because the company configured electronic timekeeping so all hours worked would be attributed to the day a shift began, and not the day the work was performed.

For example, a class member who started a shift at 10 p.m. on Jan. 1 and ended the shift at 6 a.m. on Jan. 2 would be counted as working eight hours on Jan. 1, and zero hours on Jan. 2, because their work day started Jan. 1.

Under that timekeeping policy, McDonald's could have the aforementioned class member, for example, work a 6 p.m. to 10 p.m. shift on Jan. 2 and not pay them overtime.

That policy, Jones ruled, violated the labor code, because the class member worked 10 hours during a single 24-hour workday period — the Jan. 2 work period — and so should have been paid overtime for two of those hours.

Gray has argued that his company's transgressions are largely technical, and partly the result of starting their work day at the 4 a.m. breakfast shift, instead of midnight or another time.

According to Gray, McDonald's overtime violations have not amounted to much in lost dollars for employees. For example, Gray said, named plaintiff David Cruz lost a mere $6.34 due to company policy being at odds with state overtime law.

Sellers, a partner at Cohen Milstein Sellers & Toll PLLC in Washington, promised that plaintiffs' accountant David M. Breshears would testify Wednesday with spreadsheets and explanations of calculations precisely showing what McDonald's owes in overtime. He also said that he would produce Cruz as a witness to explain what this lawsuit means to McDonald's workers.

Plaintiffs are expected to wrap up their case by Thursday. Besides Sellers, McDonald's is represented by San Francisco lawyers Michael Rubin and Kristen Garcia of Altshuler Berzon LLP.

matthew_blake@dailyjournal.com

EXHIBIT B

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Name	Title	Law School Graduation	2025 Rate	Hours Spent
Bryan Schwartz	Principal Attorney	2000	$975	133.7
Jennifer Reisch	Of Counsel	2002	$900	28
Monali Sheth	Of Counsel	2005	$850	12.3
Jane Mackie	Senior Associate	2012	$750	112
Renato Flores	Associate	2022	$400	5.9
Dylan Colbert	Law Fellow	2021	$325	57.3
Francis Santos	Law Fellow	2023	$350	.5
Paralegals/Legal Assistants/Law Clerks	-	N/A	$250	278.3

EXHIBIT C

EXHIBIT C

Category	**Sum of Hours**	**Sum of Amount**
Administrative	20.3	$3,482.50
Administrative Exhaustion	19.6	$9,237.50
Appeal	21.2	$18,412.50
Mediation	48.5	$39,957.50
Case Management	46.7	$25,675.00
Complaint	65	$34,212.50
Discovery	21.2	$14,585.00
Miscellaneous (including various meet and confer efforts; communications with clients, and communications re filing efforts)	25	$11,135.00
Motion	91.8	$64,380.00
Strategy	25.9	$18,607.50
Legal Research	23.9	$15,690.00
Personnel File Requests and Meet/Confer re Same	150.5	$51,915.00
Not Billed	68.4	$0
Grand Total	628	$307,360.00

EXHIBIT D

EXHIBIT D

Category	**Sum of Amount**
Court Filing Fees	$1,974.45
Mediation Fee	$3,500.00
Mailing and Postage Fees	$107.60
Consultant Fees	$680.00
Legal Research	$550.00
Grand Total	$6,812.05

Expenses	Sum of Amount
Online research	**550**
Westlaw legal research re jury trial right in PAGA context.	50
Westlaw legal research re enhancements for PAGA representative plaintiffs.	50
Westlaw legal research re impact of objection on PAGA settlement and re enhancements in PAGA settlements.	50
Westlaw legal research re injunctive and declaratory relief under PAGA.	50
Westlaw legal research re moot for appeal argument	50
Westlaw legal research re PAGA penalty provisions.	50
Westlaw legal research re PAGA statute and seminal case precedent	50
Westlaw legal research re requests for admission, set one.	50
Westlaw legal research re requests for admission.	50
Westlaw legal research re value of 1198.5 and other claims.	50
Westlaw legal research to prepare for withdrawal motion hearing.	50
Postage	**107.6**
Certified mail fee re: re-mailing to representative plaintiff re: plaintiffs' 998 offer due to updated mailing address.	10.72
Certified mail postage for five 998 offers mailed to defense counsel at their five respective offices.	49.6

Drop off certified mail re order on hearing on motion to be relieved as counsel at U.S. Postal Office.	9.92
Postage for certified mail re: letter with plaintiffs' 998 offer to representative plaintiff.	10.72
Print and certified mail declaration in support of attorney's motion to be relieved as counsel.	10.72
Fee for sending PAGA letter copy to Labor & Workforce Development Agency via Certified Mail.	7.96
Fee for serving PAGA letter to Tesla Motors Inc. Registered Agent via Certified Mail.	7.96
Court fees	**1974.45**
Court and FirstLegal fees re: filing of case management statement for 1.15.25 conference.	21.45
Download fee re: Court's order on settlement approval.	1
Download fee re: case rescheduling orders from docket.	4
E-service re Filing Proof of Service of Summons and Acknowledgement of Receipt through First Legal.	3
Fee re: downloading order dismissing plaintiff.	2
Fee re: downloading remittur from Alameda County ePortal.	3
Filing civil case cover sheet via First Legal - rejected.	9.5
Filing fee for Opposition to Notice of Related Case via First Legal.	16.45
Filing fee for Peremptory Challenge to Judicial Officer and Proof of Service via First Legal.	16.45

Filing fee for plaintiffs' Motion to Be Relieved as Counsel.	83.85
Filing fee for proof of service re: plaintiffs' motion to be relieved as counsel.	21.45
Filing fee with FirstLegal re: joint case management statement.	20.45
Filing initial complaint and civil case cover sheet via First Legal - accepted.	1508.85
Filing of motion to dismiss plaintiff Shaka Green.	82.85
Filing Proof of Service of Summons and Acknowledgement of Receipt through First Legal.	16.45
Filing via First Legal Notice of Appearance and Proof of Service.	16.45
Filing via First Legal Opposition to Defendant's Motion to Strike.	16.45
First Legal filing fee for Joint Case Management Statement.	18.9
First Legal filing of case management statement and proof of service.	16.45
FirstLegal filing fee re: joint case management statement for 2024.12.11 case management conference.	20.45
LWDA - Filing PAGA letter.	75
Arbitrators/mediators	**3500**
Mediation Fee	3500
Consultant Fees	**680**
Ethical consulting services rendered.	680
Grand Total	**6812.05**