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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

HEATHER BOONE and ROXANNE RIVERA, on behalf of themselves and all others similarly situated

Plaintiffs,

v.

AMAZON.COM SERVICES, LLC,

Defendant.

Case No. 1:21-cv-00241-DAD-BAM

NOTICE OF MOTION AND MOTION BY DEFENDANT AMAZON.COM SERVICES LLC TO DISMISS PURSUANT TO RULE 12(B)(1) AND 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES

Hearing:
Date: July 6, 2021
Time: 9:30 AM
Place: Courtroom 5
Judge: Judge Dale A. Drozd

NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE that on July 6, 2021, at 9:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom 5, 7th Floor, at 2500 Tulare Street Fresno, CA 93721-4516, before the Honorable Dale A. Drozd, Defendant Amazon.com Services LLC ("Amazon"), by and through its counsel of record, will and hereby does move the Court to enter an order dismissing Plaintiffs Heather Boone and Roxanne Rivera's first, second, third, fourth, fifth, and sixth causes of action for failure to state a claim under Rule 12(b)(6) and Plaintiffs' third claim under Rule 12(b)(1) for lack of subject-matter jurisdiction.

Amazon moves to dismiss all of Plaintiffs' causes of action for failure to state a claim under Rule 12(b)(6). Plaintiffs failed to plead facts sufficient to establish any plausible claims. First, Plaintiffs' claims in their first, second, and sixth causes of action that time spent waiting for and undergoing COVID-19 screenings is compensable under the Fair Labor Standards Act and California law fail as a matter of law; COVID-19 screenings do not satisfy either law's test for when an activity must be compensated. Plaintiffs' third cause of action alleging Amazon issued inaccurate wage statements fails for multiple reasons. Plaintiffs lack standing to bring this claim and it thus should be dismissed under Rule 12(b)(1). Moreover, the claim fails under Rule 12(b)(6) because it is entirely derivative of Plaintiffs' other insufficiently pled claims, is foreclosed under California law, and lacks sufficient allegations that any violation was willful. Plaintiffs' fourth cause of action seeking waiting time penalties also should be dismissed as derivative of Plaintiffs' other insufficiently pled claims and because Plaintiffs have failed to adequately allege that any violation of the California Labor Code was willful. Plaintiffs' fifth cause of action under California's Unfair Competition Law should also be dismissed because this cause of action is derivative of Plaintiffs' other claims and because Plaintiffs do not—and cannot—establish that they lack an adequate remedy at law that would justify the Court providing them with equitable relief.

This motion is made following the conference of counsel pursuant to the Court's standing order, which took place via telephone on May 27, 2021.

Dated: June 3, 2021

JASON C. SCHWARTZ
GIBSON, DUNN & CRUTCHER LLP

By: */s/ Jason C. Schwartz*

Attorney for Defendant Amazon.com Services LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit is a misguided attempt to hold Amazon.com Services LLC ("Amazon") liable for actions it took to keep its associates and the community-at-large safe during the COVID-19 pandemic in accordance with government-mandated requirements. Plaintiffs Heather Boone and Roxanne Rivera have sued on behalf of a sprawling putative California class and nationwide collective group, alleging that Amazon associates should have been paid for time they allegedly spent in pre-shift COVID-19 screenings, and asserting a bevy of derivative claims based on that core allegation. The Court should dismiss these meritless and insufficiently alleged claims.

First, Plaintiffs seek to recover under the Fair Labor Standards Act ("FLSA") for time spent in and waiting for COVID-19 screenings. But only time spent on *work* is compensable under the FLSA—i.e., activities controlled or required by the employer that primarily benefit the employer. COVID-19 screenings are not conducted primarily for Amazon's benefit, but rather are California-mandated health precautions designed to ensure the wellbeing and safety of all Amazon associates and the community-at-large, and thus do not constitute compensable work time. Even if the screenings primarily benefit Amazon, however, they are preliminary to the principal activities for which Amazon fulfillment center associates are employed and therefore are not compensable under the Portal-to-Portal Act. *See Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 35 (2014). It is also abundantly clear that the time associates spend waiting to be screened is not compensable, *see IBP, Inc. v. Alvarez*, 546 U.S. 21, 41–42 (2005), and Plaintiffs have failed to allege any facts demonstrating that the time employees spend being screened, when separated from the time allegedly spent *waiting* to be screened, is anything other than *de minimis*, *see Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). Plaintiffs' claims under California law for time spent waiting for and in COVID-19 screenings fail for similar reasons. Under the test for compensable time established in *Frlekin v. Apple Inc.*, 8 Cal. 5th 1038 (Cal. 2020), Amazon does not exercise the requisite level of control over its associates during the screenings to make that time constitute "hours worked."

Second, Plaintiffs' claim that they are due statutory penalties under California law for allegedly inaccurate wage statements also suffers from myriad deficiencies. The claim is entirely derivative of

Plaintiffs' other insufficiently pled claims. Moreover, Plaintiffs have failed to allege an injury-in-fact resulting from the allegedly inaccurate wage statements and thus lack Article III standing to pursue this claim. Plaintiffs also must show actual injury to state a claim under California Labor Code section 226 based on a failure to document wages they claim they were owed but not paid. *See Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1337 (2018) ("The purpose of section 226 is to *document* the *paid* wages to ensure the employee is fully informed regarding the calculation of those wages." (quotation marks omitted)). Even if the wage statements were legally deficient, relief would still be unavailable because Plaintiffs have provided no factual allegations from which the Court can infer that any error on the wage statements was the result of willful conduct on Amazon's part.

Third, Plaintiffs seek waiting time penalties under California law. But this claim, too, is derivative and should be dismissed in light of Plaintiffs' failure to adequately plead their other claims. Plaintiffs also offer only conclusory allegations about whether Amazon willfully denied them all wages due at the time they were discharged, a necessary prerequisite for recovery. And all of the disputed payments are clearly the subject of good faith disagreements, which bars assessment of penalties.

Finally, Plaintiffs seek equitable relief under California's Unfair Competition Law ("UCL"). But they fail to allege that the legal remedies available to them are inadequate, thereby dooming the prayer for equitable relief. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020). This claim also fails because it is derivative of the other claims.

For all of these reasons, the Court should dismiss Plaintiffs' First Amended Complaint ("FAC") in its entirety, with prejudice, because further amendment would be futile. *See, e.g.*, *Snowden v. Cty. of Valaveras*, 2019 WL 4829480, at *9 (E.D. Cal. Sept. 30, 2019) (Drozd, J.) (dismissing a FAC with prejudice where "amendment is futile").

II. BACKGROUND

A. Plaintiffs' Allegations and Causes of Action

Plaintiffs Heather Boone and Roxanne Rivera filed this action against Amazon on behalf of themselves, a putative California class, and a putative nationwide collective under the FLSA. Plaintiffs later amended their complaint to remove certain claims related to alleged security screening and the calculation of overtime rates of pay. The California class is defined as "[a]ll current and former hourly

paid employees of Amazon who underwent a COVID-19 screening during at least one week in the four-year period before the filing of this Complaint to the present." FAC ¶ 54 (the "California Class"). The FLSA collective is defined as "[a]ll current and former hourly paid employees of Amazon who underwent a COVID-19 screening during at least one week in the three-year period before the filing of this Complaint to the present." *Id.* ¶ 64 (the "FLSA Collective").[1] Plaintiff Boone alleges that she worked for Amazon from June 2018 through July 2020 and that her job duties included "gathering packages from the Amazon warehouse, scanning them, placing them in boxes, and labelling the items." *Id.* ¶ 24. Plaintiff Rivera alleges that she worked for Amazon from November 2018 to January 2019, and again from May 2020 to October 2020, and that her job duties included "gathering items and placing them in the right location in the warehouse." *Id.* ¶ 25.

Plaintiffs allege that Amazon has required its associates to be screened for symptoms of COVID-19 before they may clock-in for their shifts. *Id.* ¶ 27. They allege that Amazon has used two processes for COVID-19 screenings. Under one process, associates "approach a security booth," where they "swipe[] [their] employee badge[s]," and are asked a handful of questions; they then have their temperature taken by a body scanner, after which they may proceed to clock-in. *Id.* ¶¶ 28–29. Under the other process, associates allegedly "form a line," then "one by one" are asked a handful of questions while having their temperature taken manually by another associate; if there is a red flag, the associate is moved to another area and asked some additional questions. *Id.* ¶¶ 30–31. According to the FAC, "The amount of time it takes to undergo the COVID-19 examination is approximately 10 minutes to 15 minutes on average. This amount of time could be longer depending upon the number of other Amazon employees in line for the COVID-19 screening." *Id.* ¶ 32.

Plaintiffs assert six causes of action. Claims 1 through 4 allege violations of the California Labor Code on behalf of themselves and the California Class they purport to represent, including: (1) failure to pay all hours worked in violation of California Labor Code sections 204, 1194, 1194.2, 1197, 1197.1, and 1198 (FAC ¶¶ 83, 85); (2) failure to pay overtime in violation of Wage Order No.

[1] Plaintiffs' claims are all dependent on screening associates for COVID-19 upon entry to Amazon facilities "[f]ollowing the outbreak of the Coronavirus." FAC ¶ 22. Amazon notes that that class definitions are thus temporally overbroad, given the COVID-19 pandemic did not begin until 2020.

4-2001 and California Labor Code sections 510, 558, and 1194 (FAC ¶ 90); (3) failure to furnish wage statements in violation of California Labor Code section 226 (FAC ¶ 98); and (4) failure to pay all wages upon separation from employment in violation of California Labor Code sections 201, 202, 203, and 218 (FAC ¶ 104). Claim 5 seeks equitable relief under the UCL, Cal. Bus. & Prof. Code § 17200 *et seq.*, on behalf of Plaintiffs and the California Class. FAC ¶¶ 109–11. Finally, claim 6 alleges violations of the FLSA on behalf of Plaintiffs and the FLSA Collective they purport to represent for failure to pay overtime. *Id.* ¶ 116.

B. Public Health Measures to Stop the Spread of COVID-19

Central to Plaintiffs' claims are the measures Amazon has taken to help combat the spread of COVID-19—measures which have been extensively shaped and in many instances dictated by guidance and regulations issued by public health authorities. Under regulations promulgated by the California Division of Occupational Safety and Health ("Cal/OSHA") that took effect on December 1, 2020, all employers are required to "develop and implement a process for screening employees for and responding to employees with COVID-19 symptoms." Cal. Code Regs. tit. 8, § 3205(c)(2)(B). Before that, guidance issued jointly by both Cal/OSHA and the California Department of Public Health ("CDPH") as far back as July 2020 instructed businesses operating in nearly every industry to "provide temperature and/or symptom screenings for all workers at the beginning of their shift and any vendors, contractors, or other workers entering the establishment," or, as an alternative, to require workers to self-screen at home before leaving for the workplace. Amazon's Request for Judicial Notice ("RJN"), Ex. 1, CDPH and Cal/OSHA, *Industry guidance to reduce risk*. And starting in April 2020, the City of Fresno (where the facility Plaintiff Boone alleges she worked at is located), ordered all "Essential and Authorized Businesses" to establish a process for "screening employees and visitors, but not customers," in accordance with guidelines set by Fresno County. RJN, Ex. 2, *City of Fresno Emergency Order 2020-13*.

Cal/OSHA began citing employers for COVID-related violations—including for failures to implement proper screening procedures for employees—far before its COVID-specific regulation was promulgated. *See* RJN, Ex. 3, *Citations for COVID-19 Related Violations*; RJN, Ex. 4, *Cal/OSHA Issues Citations to Multiple Employers for COVID-19 Violations*. And since at least May 2020, the

Centers for Disease Control and Prevention ("CDC") has urged employers to consider implementing COVID-19 screening. *See* RJN, Ex. 5, *Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19).*

III. STANDARD OF REVIEW

In order to avoid dismissal under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Similarly, under Rule 12(b)(1), a defendant may "assert that[ ] the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Although a court assessing the sufficiency of a complaint must accept factual allegations as true, this rule is "inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. "[A] complaint that offers 'labels and conclusions, . . . a formulaic recitation of the elements of a cause of action[,]' or 'naked assertion[s]' devoid of 'further factual enhancement' will not suffice." *Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 641 (9th Cir. 2014) (quoting *Twombly*, 550 U.S. at 555, 557). Moreover, the factual allegations "must be enough to raise a right to relief above the speculative level," and they must do more than "create[] a suspicion of a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (internal quotation marks and citation omitted). Rather, a plaintiff must allege the "kind of factual allegations that 'nudg[e] their claims across the line from conceivable to plausible.'" *Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014) (quoting *Twombly*, 550 U.S. at 570). In conducting its analysis, a court must "draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. It acts as a gatekeeper to ensure that, based on the plaintiff's claims, "it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

These standards exist to ensure that a plaintiff "with a largely groundless claim" cannot simply "take up the time of a number of other people," by pursuing a suit without even the "reasonably founded hope that the [discovery] process will reveal relevant evidence." *Starr*, 652 F.3d at 1213 (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)). Concerns related to unnecessary expense and the waste of time and judicial resources are particularly relevant where, as here, Plaintiffs

purport to represent a large class alleging violations that span over a period of years. *See Twombly*, 550 U.S. at 559. It is only by "taking care to require allegations" to meet a plausibility standard that courts can adequately guard against these significant risks. *Id.*

IV. ARGUMENT

A. Time Spent in and Waiting for COVID Screenings Is Not Compensable (Claims 1, 2, & 6)

Plaintiffs allege that Amazon owes them pay under the FLSA and the California Labor Code for time spent in COVID-19 screenings before they clock in for work, as well as any time associates spend waiting in line for such screenings. Plaintiffs have failed to state a claim under Rule 12(b)(6) because they have not plausibly alleged that Amazon's COVID-19 screenings are compensable time under either federal or state law.

1. Time Spent in and Waiting for COVID-19 Screenings Is Not Compensable Under the FLSA

The Ninth Circuit applies "a three-step approach to determine when an activity was compensable within the definitions of the FLSA and the Portal[-]to-Portal Act." *Ceja-Corona v. CVS Pharmacy, Inc.*, 2013 WL 796649, at *4 (E.D. Cal. Mar. 4, 2013) (citing *Bamonte v. City of Mesa*, 598 F.3d 1217, 1224 (9th Cir. 2010)). "The three steps are (1) whether the activity constituted 'work,' (2) whether the activity was an 'integral and indispensable' duty, and (3) whether the activity was *de minimis*." *Id.*

Plaintiffs' claim that time spent waiting for and undergoing COVID-19 screening is compensable under the FLSA fails at each step. *First,* because Amazon associates do not undergo COVID-19 screening for the primary purpose of benefiting Amazon, the screenings are not "work" for which compensation may be owed under the FLSA. *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003). *Second*, even if COVID-19 screening is "work," it is "preliminary" to "the principal activity or activities which such employee is employed to perform," and thus non-compensable under the Portal-to-Portal Act. 29 U.S.C. § 254(a); *see Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 35 (2014). *Third*, any time spent waiting for COVID-19 screening is not compensable under the FLSA, *see* 29 C.F.R. § 790.7(g), and the FAC fails to allege that the time it takes Amazon associates to complete the actual COVID-19 screenings is anything more than *de minimis*, *see Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

a. COVID-19 Screenings Are Not "Work" Under the FLSA

The test for whether an activity constitutes "work," and therefore must be compensated, under the FLSA "contains two conjunctive components—activity that is *controlled or required by the employer*, *and* that is pursued necessarily and *primarily for the benefit of the employer*." *Bamonte v. City of Mesa*, 598 F.3d 1217, 1224–25 (9th Cir. 2010) (citations omitted). Both prongs must be met for an activity to be compensable work. *Id*. COVID-19 screenings do not satisfy this test because they are not conducted primarily for Amazon's benefit. The FAC's conclusory allegation to the contrary is not supported by facts that make the assertion plausible. *See* FAC ¶¶ 40–41. Rather, COVID-19 screenings are part of a nationwide public health initiative that transcends any particular interest Amazon may have; while they incidentally benefit Amazon, they also benefit its associates and, indeed, the community as a whole. The screenings are thus not compensable under the FLSA.

An activity is not primarily for the benefit of the employer under the FLSA where any benefit the employer receives is only incidental, or where the employer and its employees benefit more or less equally from the activity, including when the activity is related to employee health and safety. *See, e.g.*, *Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1163 (D.C. Cir. 1975) (employees' accompaniment of OSHA inspectors around employer's facility was not primarily for the employer's benefit despite "furthering industrial safety benefits"); *Wheat v. J.B. Hunt Transp., Inc.*, 2016 WL 1397673, at *4 (C.D. Cal. Apr. 5, 2016) (truck drivers' sleep apnea testing pursuant to federal requirements and employer's internal policies was not primarily for the benefit of the employer); *Gibbs v. City of N.Y.*, 87 F. Supp. 3d 482, 493–95 (S.D.N.Y. 2015) (counseling sessions that police officers with alcohol problems were required to complete were not compensable); *Makinen v. City of N.Y.*, 53 F. Supp. 3d 676, 698–99 (S.D.N.Y. 2014) (employer-mandated alcohol rehabilitation treatments were not primarily for the police department's benefit); *Loc. 1605 Amalgamated Transit Union, AFL-CIO v. Cent. Contra Costa Cty. Transit Auth.*, 73 F. Supp. 2d 1117, 1124 (N.D. Cal. 1999) (that the employer "received incidental benefits" from workers' collective bargaining activities and paid them for time spent in negotiations before a strike began does not mean that negotiating activities "after the strike were pursued primarily for [the employer's] benefit").

COVID-19 screenings first and foremost benefit Amazon associates by detecting whether they are ill and in need of medical attention, as well as by preventing associates from putting their colleagues at risk. While Plaintiffs are correct that a COVID-19 outbreak at an Amazon fulfillment center would be disruptive to business operations, *see* FAC ¶ 41–43, Amazon would by no means be the only, or even the primary, entity to suffer from such an incident; employees, and the general public, would as well. Steps to stop the spread of COVID-19—like the screenings Plaintiffs have based their claims on here—are designed to detect and prevent the society-wide spread of a contagious disease. While Amazon benefits from measures to reduce the spread of COVID-19, it does so in the same way all members of the public benefit from responsible precautions to slow the spread of the virus. *See* RJN, Ex. 6, *OSHA Guidance on Preparing Workplaces for COVID-19* ("To reduce the impact of COVID-19 outbreak conditions on businesses, workers, customers, and the public, it is important for all employers to plan now for COVID-19."). That is why federal, state, and local authorities directed *all* members of the public for over a year to do their part to mitigate the risk posed by the virus, whether that be by requiring individuals to wear masks when they are in public, requiring businesses to screen employees before they start work each day, or even requiring non-essential workers to stay at home. Because the pandemic threatens all members of the community, it has necessitated preventive action by everyone for everyone's benefit.

The fact that Amazon's COVID-19 screenings are conducted in accordance with regulations and guidelines issued by California state agencies and the CDC underscores that these screenings benefit Amazon associates and the public at large, and are not undertaken primarily for Amazon's benefit. As outlined above, the CDC issued guidance as early as May 2020, and California public health authorities issued guidance as early as July 2020, urging employers to screen their employees at work; California regulation now requires such screenings. *See supra* 4–5. Courts have held, in analogous circumstances, that government-mandated workplace screenings are not conducted primarily for the employer's benefit. In *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007), for example, the court determined that mandatory security screenings of construction workers at the Miami International Airport were not compensable time. The screenings at issue were required by the Federal Aviation Administration; the employer could not choose whether its employees were screened.

For that reason, the court concluded that the employer "did not primarily—or even particularly—benefit from the security regime." *Id*. at 1344. In other words, though the screenings were "necessary" for workers to access their jobsite, they were required by the government to achieve purposes that did not primarily benefit the employer. *Id.*

Similar reasoning applies here. Amazon is compelled—and previously was at the very least strongly encouraged—by state authorities to engage in COVID-19 screening of its associates to address broader public health concerns that transcend Amazon's business interests and advance the interests of workers and the public-at-large. As the CDPH and Cal/OSHA explained in guidance for logistics and warehousing facilities, the recommended measures were designed "to support a safe, clean environment for workers." RJN, Ex. 7, *CDPH & Cal/OSHA, COVID-19 Industry Guidance: Logistics & Warehousing Facilities*. Time spent waiting for and undergoing COVID-19 screening thus is not "work" under the FLSA.

b. COVID-19 Screening Is "Preliminary to" Associates' Principal Activities

COVID-19 screening also is not compensable for a separate reason: under the Portal-to-Portal Act, screening is "preliminary to" "the principal activity or activities" Amazon associates are "employed to perform." 29 U.S.C. § 254(a). The Supreme Court made clear in *Integrity Staffing Solutions, Inc. v. Busk* that, even if an activity is work-related, it is not compensable unless it is either a principal activity the employee is employed to perform or "integral and indispensable to" principal activities, meaning it is "an intrinsic element of those [principal] activities and one with which the employee cannot dispense if he is to perform those activities." 574 U.S. at 35. According to Plaintiffs' allegations, their principal work-related activities consisted of "gathering packages from the Amazon warehouse, scanning them, placing them in boxes, and labelling the items"; "gathering items from the shelves in the warehouses and putting the items in carts"; and "gathering items and placing them in the right location in the warehouse." FAC ¶¶ 24–25. Undergoing COVID-19 screening is not a principal activity for which they were employed. Plaintiffs' half-hearted, conclusory assertion that "the [COVID-19] screening was necessary to ensure that the Plaintiffs and Class Members" could safely "serve the customers of Amazon" (*id.* ¶ 41) does not demonstrate otherwise.

Amazon's COVID-19 screening is "preliminary" because it is not intrinsically tied to the primary activity for which the worker is employed and associates' jobs could be performed without the screening. *Busk*, 574 U.S. at 36 ("The integral and indispensable test is tied to the productive work that the employee is employed to perform."); *see also Steiner v. Mitchell*, 350 U.S. 247, 255 (1956). COVID-19 screening is not a function of, or dictated by the specific nature of, the job the worker is performing. In *Busk*, for example, the Court held that security screenings of workers who "retrieve products from warehouse shelves and package those products for shipment to Amazon customers" were preliminary because "[t]he screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment" and the company "could have eliminated the screenings altogether without impairing the employees' ability to complete their work." 574 U.S. at 35. The same is true of COVID-19 screenings.

The lack of a close nexus to "the productive work that the employee is *employed to perform*," *Busk*, 574 U.S. at 36, is further demonstrated by that fact that COVID-19 screenings are a general precaution required by the State of California for nearly all employers, and long recommended by the CDC for all employers, *see supra* at 4–5. As noted above, California guidelines on screening apply across nearly all industries and recommend that visitors to worksites be screened, too. Such generalized screening procedures are not tied to or dictated by the principal activities fulfillment center associates are employed perform. *See, e.g.*, *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593–94 (2d Cir. 2007) (time spent undergoing entry security screenings at a nuclear power plant was not compensable "because the security measures at entry are required (to one degree or another) for everyone entering the plant—regardless of what an employee does . . . —and including visitors"). The COVID-19 screenings alleged by Plaintiffs are plainly non-compensable "preliminary" activities.

Recent governmental guidance does not dictate otherwise. In FAQs published online, the Department of Labor's Wage and Hour Division ("WHD") stated that, for some employees, "undergoing a temperature check before they begin work must be paid because it is necessary for their jobs." RJN, Ex. 8, *COVID-19 and the Fair Labor Standards Act Questions and Answers*. WHD gave as an example a "nurse who performs direct patient care services at a hospital," explaining that such a worker may

have to be compensated because the screening is needed for her "to safely and effectively perform her job during the pandemic," and is therefore "integral and indispensable" to her work. *Id*.

This informal guidance is entirely consistent with the conclusion that time spent by Amazon associates undergoing COVID-19 screenings is not compensable. The work of a nurse caring for patients is health-oriented and involves the provision of care to patients, including patients suffering from COVID-19. In such circumstances, then, it may well be the case that COVID-19 screenings are integral and indispensable to nurses' principal work activities. Unlike with nurses, however, COVID-19 screenings for Amazon associates are in no way a function of or directly related to the particular job duties they perform. They are therefore not integral or indispensable to associates' principal activities. This distinction is consistent with recent caselaw, too. In *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020), for example, the Tenth Circuit concluded that security screenings underwent by detention guards employed at a prison were compensable, distinguishing *Busk*'s holding that security screenings are not compensable for warehouse workers. The Court reasoned that while "an employer's general desire to keep its employees safe has no clear or obvious connection to the particular activities those employees are employed to perform," the work of detention guards is security-oriented, the security screenings are thus directly "tied to" the work they perform, and time spent in those screening was therefore compensable. *Id*. at 1278.

In any event, the WHD FAQ is informal and does "not warrant *Chevron*-style deference." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000). Rather, the FAQ is "'entitled to respect' . . . , but only to the extent that [its] interpretation[] ha[s] the 'power to persuade.'" *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). That persuasive power may be demonstrated by "the thoroughness evident in [the document's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Skidmore*, 323 U.S. at 140. The FAQ's reasoning is "cursory" and "offer[s] no explanation for its conclusion" beyond providing the one example concerning nurses. *Xiao Lu Ma v. Sessions*, 907 F.3d 1191, 1196 (9th Cir. 2018).

Moreover, the standard WHD appears to rely upon is at least questionable. The FAQ suggests that an activity is "integral and indispensable" and thus compensable under the Portal-to-Portal Act if it is "necessary" for a worker to "safely and effectively perform her job." But that standard is drawn

from the *concurrence* in *Busk*. *See* 574 U.S. at 37–38; *Dinkel v. MedStar Health Inc.*, 99 F. Supp. 3d 37, 41–42 (D.D.C. 2015) (explaining that the "safely and effectively" "test is nowhere to be found in the Court's opinion itself"). And it is too open-ended. The Supreme Court has held that "the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity.'" *IBP, Inc. v. Alvarez*, 546 U.S. 21, 40 (2005). This is true even where the activity necessitated by the employee's job is safety related. *See Chagoya v. City of Chicago*, 992 F.3d 607, 623 (7th Cir. 2021) (holding that employer's "directive that its officers take the precautions necessary to ensure the safe and secure storage of the weapons and equipment" they use in their work was not "integral and indispensable" to their principal activities because it was "very far removed, both logically and practically, from the [employees'] principal activity"). In other words, contrary to what the FAQs may suggest, the fact that a given activity may be necessary to promote on-the-job safety is not dispositive regarding compensability. *See Dinkel*, 99 F. Supp. 3d at 41–43 (holding that healthcare workers' uniform maintenance activities undertaken to control the spread of infection were not compensable because it "would [not] be so unsafe as to be effectively impossible to carry out their jobs without their uniform maintenance activities," and because the activities did not have the "sort of intimate relationship with [the workers'] principal activities" needed to make an activity integral and indispensable). For all of these reasons, the FAQ holds limited persuasive value. *See, e.g.*, *Nature v. United States*, 250 F. Supp. 3d 634, 639 n.3 (E.D. Cal. 2017) (Drozd, J.) (declining to defer to National Park Service FAQs).

c. Time Spent in COVID-19 Screenings Is *De Minimis*.

Finally, even if COVID-19 screenings were integral and indispensable to Plaintiffs' principal work activities (which they are not), Plaintiffs have failed to allege that *the screenings themselves*—when considered apart from *the time spent waiting* to undergo screening—are more than "*de minimis*," meaning the "employee is required to give up a substantial measure of his time and effort" on the activity. *Anderson*, 328 U.S. at 692 (1946). By ignoring the distinction between waiting time and time spent undergoing screening, and offering no allegations regarding the amount of time spent actually undergoing screenings, the FAC provides no plausible basis to infer that Plaintiffs have a viable claim.

First, time spent waiting to be screened is decidedly not compensable under the FLSA. U.S. Department of Labor regulations make clear that time spent waiting in line to begin principal work activities is not compensable. *See* 29 C.F.R. § 790.7(g) (time spent "checking in and out and waiting in line to do so" are "preliminary" and "postliminary" activities). The Supreme Court also has recognized that time employees spend waiting to perform a task that itself may be intrinsic and indispensable to their principal work activities is not compensable because the waiting period is "two steps removed" from the principal activities. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 42 (2005). The Court reasoned that if such waiting time were compensable there would be "no limiting principle" to distinguish activities that are plainly non-compensable under the Portal-to-Portal Act, such as walking from a time clock to the worksite. *Id*. at 41. In consequence, even if COVID-19 screenings themselves were compensable, any time Amazon associates spend waiting to be screened would not be.

In order to state a claim, therefore, the FAC needed to allege facts sufficient to plausibly support the conclusion that time spent in COVID-19 screenings is more than *de minimis*. *See Ceja-Corona*, 2013 WL 796649, at *7 (granting motion to dismiss on *de minimis* grounds where "complaint is devoid of the necessary details"). "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours," it is not compensable under the FLSA. *Alvarez*, 339 F.3d at 903 (quoting *Anderson*, 328 U.S. at 692). In determining whether otherwise compensable time is *de minimis*, the Ninth Circuit considers three factors: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984). Although "[n]o rigid rule can be applied with mathematical certainty," "[m]ost courts have found daily periods of approximately 10 minutes de minimis even though otherwise compensable." *Id*. at 1062; *see Young v. Beard*, 2015 WL 1021278, at *11 (E.D. Cal. Mar. 9, 2015) ("Ten minutes often serves as a rule of thumb.").

The FAC gives no indication that COVID-19 screenings themselves take any appreciable amount of time. Indeed, the factual allegations indicate that the time spent in screenings was negligible. Plaintiffs allege that it takes "10 to 15 minutes on average"—inclusive of time spent waiting—to complete a COVID-19 screening, and that the time varies depending on how long the wait is. FAC ¶ 32. The screenings themselves are alleged to involve answering a small handful of simple questions and

having one's temperature taken. *Id.* ¶¶ 28–30. It is implausible that those activities took 10 to 15 minutes on average. And even assuming that the majority of this time was not spent waiting, which is implausible, it is clear "as a matter of logic" that the few minutes Plaintiffs spent in COVID-19 screenings is below the 10-minute threshold courts typically rely on to differentiate compensable time from *de minimis* time. *Alvarez*, 339 F.3d at 904. Further, the COVID-19 screenings are a short-term, emergency measure, meaning Plaintiffs' aggregate claims are not substantial enough to render the time spent in the screenings anything other than *de minimis*. *See Lindow*, 738 F.2d at 1063. The indeterminacy of exactly how long Plaintiffs spent in the COVID-19 screenings on any given day also points to the conclusion that the time should be treated as *de minimis*, as does the lack of any allegation suggesting it was practicable to record the time spent in just COVID-19 screening. *See Id*.

In sum, Plaintiffs' allegations conflate time spent in COVID-19 screening with time spent *waiting* to be screened. FAC ¶ 32. But waiting time is unquestionably not compensable even if COVID-19 screening time is. The FAC is therefore devoid of any allegations about the actual amount of work Plaintiffs engaged in without being compensated. What scant allegations Plaintiffs do make indicate that, whatever amount of time they spent in COVID-19 screenings, it was *de minimis*, and therefore not compensable.

* * *

For all of these reasons, time spent waiting for or undergoing COVID-19 screening is not compensable under the FLSA.

2. Time Spent in and Waiting for COVID-19 Screenings Is Not Compensable "Hours Worked" Under California Law

Time spent undergoing and waiting for COVID-19 screenings also is not compensable under California law. The California Supreme Court has held that only certain time spent on activities where the employee is under the *control* of the employer is compensable.[2] *See Frlekin v. Apple Inc.*, 48 Cal.

[2] Unlike the FLSA, which provides no definition of "work," California law defines what constitutes "hours worked" for purposes of its minimum wage and overtime requirements. As applicable here, California regulations define "hours worked" to mean "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." Cal. Code Regs. tit. 8, § 11070. Although in some ways related, the tests for what constitutes "work" under Federal and California law are different

(Cont'd on next page)

5th 1038, 1046 (2020). "The level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative." *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 587 (2000). "[A]t least with regard to cases involving *onsite* employer-controlled activities, the mandatory nature of an activity is not the only factor to consider . . . . [C]ourts may and should consider additional relevant factors—including, but not limited to, the location of the activity, the degree of the employer's control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures—when evaluating such employer-controlled conduct." *Frlekin*, 48 Cal. 5th at 1056. Here, applying these factors to the alleged facts shows that time Amazon associates spent in COVID-19 screenings is decidedly not compensable. COVID-19 screening is not primarily for Amazon's benefit, it is required by California regulations (and was strongly encouraged by both the state and federal governments before regulations were adopted), and it takes place before employees fully enter onto the work premises.

As explained above, COVID-19 screenings are not primarily for Amazon's benefit. *See supra* at 7–9. To reiterate, Amazon does not implement COVID-19 precautions to advance a particular business purpose or serve some other objective of unique interest to Amazon. Rather, like all businesses and individuals during the pandemic, Amazon has done its part to advance a nationwide public health initiative directed by government authorities and designed to produce benefits common to everyone. In fact, the company has adopted industry-leading COVID-19 safety measures well beyond the screening of associates. Simply put, the screening is not "imposed primarily for the benefit of the employer." *Madera Police Officers Ass'n v. City of Madera*, 36 Cal. 3d 403, 410 (1984).

That COVID-19 screening is required by California and before that was strongly encouraged by state authorities confirms that the screening is not primarily for the benefit of Amazon and that Amazon's control is minimal. *See supra* at 8–9. Amazon's COVID-19 screening is analogous to the facts of *Griffin v. Sachs Electric Co.*, 390 F. Supp. 3d 1070, 1089–90 (N.D. Cal. 2019). In *Griffin*,

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in significant respects. *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 590 (2000) ("While one of our lower courts has recognized the 'parallel' nature of the federal and state definitions of 'hours worked,' the [California Department of Labor Standards Enforcement] has underscored the substantial differences between the federal and state definitions in numerous advice letters."). Whether or not an activity is "controlled" by an employer for purposes of California law therefore says little about whether or not the activity counts as "work" under the FLSA.

employees had to travel along an access road after passing through a security gate to get to their worksite. While on the access road, employees were required to follow rules "fundamentally no different than limitations imposed on travel through other types of premises," many of which "originated" with "the State of California," not the employer. *Id.* at 1089. The court concluded that travel time on the access road was therefore not compensable under California law, because the requirements were "not atypical on an employer's premises" and were "safety-oriented in nature." *Id.* at 1089–90. That description fits COVID-19 screening to a tee. COVID-19 screening at Amazon facilities is safety-oriented and intended to comply with generally applicable government policy and is not "primarily directed" to benefiting the employer. *Madera*, 36 Cal. 3d at 409. As noted above, these screening procedures are required of many different types of businesses and public places. In fact, this Court has issued orders to prevent individuals with COVID symptoms from entering courthouses in the Eastern District of California. *See* RJN Ex. 9, *General Order No. 610, Restrictions on Visitors to Eastern District of California Courthouses*.

Amazon's minimal control over associates is confirmed by the fact that the alleged screenings occur before associates' shifts and before they fully enter the worksite. In *Morillion*, the court explained that time spent by employees commuting to the worksite is non-compensable where the employer does not restrict what employees can do in the moments leading up to their arrival and entry at the worksite. *See* 22 Cal. 4th at 586. Time spent being screened in a non-invasive fashion before actually entering the employer's premises is analogous. *See Griffin*, 390 F. Supp. 3d at 1089–90; *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 571 (C.D. Cal. 2008) ("[A] pre-shift security line requirement . . . may be more akin to time spent in an ordinary commute, where employees may choose to start earlier or later depending on their own judgment."). Amazon's control over associates is minimal as they pass through and wait for COVID-19 screening.

Plaintiffs' analogy to the California Supreme Court's decision in *Frlekin* is misplaced. *See* FAC ¶ 38. In *Frlekin*, the plaintiffs alleged that mandatory security screenings conducted by the employer as employees left for the day consisted of, among other things, intrusive bag checks under the close supervision of managers in order to detect theft. 8 Cal. 5th at 1056. Given those allegations, the court emphasized that "the employer-controlled activity primarily serve[d] the employer's interests"—

i.e., the "searches promote[d] [the employer's] interest in loss prevention." *Id.* at 1052–53. Amazon's COVID-19 screenings—designed to advance, and dictated by, public health objectives—are thus a far cry from exit screenings "to detect and deter theft." *Id*. at 1052.

Moreover, Amazon's COVID-19 screenings occur at the *beginning* of the workday before Amazon associates are permitted to enter the worksite, whereas in *Frlekin* workers were not permitted to *leave* the worksite until they had completed screening, which allegedly required employees to wait as long as 45 minutes before a screening occurred. 8 Cal. 5th at 1044. Because Amazon associates are not "confined to the premises until" the COVID-19 screening, they are subject to a lesser degree of control than the workers in *Frlekin*. *Id.* at 1051. As the court in *Frlekin* emphasized, the employees there were allegedly required to perform very specific tasks, "including opening their bags, unzipping internal compartments, removing their personal Apple technology devices and technology cards, and proving ownership of such items." *Id*. Nothing similar is alleged here. Rather, Plaintiffs allege that Amazon associates were required to answer a handful of short questions and have their temperature taken. FAC ¶¶ 28–31. These actions are entirely passive and exhibit much less control by the employer than the security screening in *Frlekin*.

Under California law, time spent on a work activity can also be compensable, even if the employer does not exercise control over the employee, if the employer has "suffered or permitted" the person to work. *See Morillion*, 22 Cal. 4th at 584. Under this standard, the relevant question is whether the employer was aware that the employee was engaged in work activities and failed to stop her from doing so. *Martinez v. Combs*, 49 Cal. 4th 35, 70 (2010). "The test lacks relevance where the primary issue is whether the plaintiff's activities constituted work in the first place." *Saini v. Motion Recruitment Partners, LLC*, 2017 WL 1536276, at *11 (C.D. Cal. Mar. 6, 2017). Since the central question raised by Plaintiffs' FAC is whether COVID-19 screening constitutes work at all, not whether Amazon was aware of the screenings, the "suffered or permitted" to work test does not apply.

Amazon is aware that an informal FAQ posted online in late July 2020 by the California Department of Industrial Relations ("DIR") asserts that "[e]mployers that require their workers to complete a medical check in order to begin a shift, even if it is recommended under public health orders, must compensate workers for that time worked." RJN, Ex. 10, *Safe Reopening FAQs for Workers and*

Employers. This guidance, however, is not legally binding. *See Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1029 n.11 (2012). At best, it is entitled to something approximating *Skidmore* deference. *See Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 14–15 (1998). Under that rubric, the DIR FAQ is entitled to little, if any, weight. Moreover, the DIR's analysis of this novel legal question is both cursory and erroneous; in fact, it is contrary to California Supreme Court precedent. Specifically, the FAQ reasons that because COVID-19 screening is required, employees are under the control of the employer. But the California Supreme Court has repeatedly held that the "fact that the employer requires the employees' activity" is not "determinative," *Morillion*, 22 Cal. 4th at 587, but merely "probative," *Frlekin*, 8 Cal. 5th at 1056. The Court should follow the decisions of the California Supreme Court, not the DIR's informal FAQ that misinterprets those decisions, and hold that COVID-19 screenings are not compensable time under California law.

B. Plaintiffs Have Failed to State a Claim for Unpaid Overtime (Claim 2)

Even leaving aside the fact that Plaintiffs' time spent in and waiting for COVID-19 screenings is not compensable under either the FLSA or California law, Plaintiffs fail to state a claim for unpaid overtime. Under *Landers*, "a plaintiff asserting a claim to overtime payments must allege that she worked more than forty hours *in a given workweek* without being compensated for the overtime hours worked during *that workweek*." 771 F.3d at 644–45 (emphases added). A complaint that lacks "sufficient detail about the length and frequency of [Plaintiffs'] unpaid work to support a reasonable inference that [they] worked more than forty hours in a given week" must be dismissed for failure to state a claim. *Id*. at 646 (quoting *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 201 (2d Cir. 2013)). This pleading standard applies to both Plaintiffs' FLSA and California claims. *See Tan v. GrubHub, Inc.*, 171 F. Supp. 3d 998, 1007 n.3 (N.D. Cal. 2016) ("[A]lthough *Landers* discussed overtime claims asserted under the FLSA, its reasoning applies to overtime claims asserted under the California Labor Code, as well.").

Plaintiffs have not met this standard. Even after amending their complaint, Plaintiffs still fail to allege the hours they worked and the overtime they claim they are owed with the level of specificity required by *Landers*. The FAC alleges that Plaintiff Boone normally worked ten-hour shifts four days a week, and that Plaintiff Rivera worked from "approximately 6 pm to 5 am" on "a rotation that was

four days straight followed by three days off." FAC ¶¶ 24–25. But Plaintiff Rivera does not allege a *single* "given workweek" when she believes she should have been paid overtime. And while Plaintiff Boone generally claims that she worked overtime "during the first and second weeks of May 2020" (*id.* ¶ 24), neither she nor Plaintiff Rivera alleges "the amount of overtime they believe they are owed." *Nicolas v. Uber*, 2021 WL 2016161, at *9 (N.D. Cal. May 20, 2021). Absent such allegations, Plaintiffs do not (and cannot) state any claim for overtime pay.

C. Plaintiffs' Wage Statement Claim is Derivative, They Lack Standing to Bring the Claim, and the FAC Fails to State the Essential Elements of the Claim (Claim 3)

Plaintiffs allege that Amazon "knowingly and intentionally failed to furnish and continues to fail to furnish Plaintiffs and each California Class Member with timely, itemized wage statements that accurately reflect—among other things—the total number of hours worked, hourly rates, and wages earned, as mandated by the California Labor Code § 226(a)." FAC ¶ 98. This claim should be dismissed for four independent reasons: (1) this claim is derivative of claims 1 and 2, neither of which are cognizable, rendering the wage statement claim also not cognizable; (2) Plaintiffs have failed to allege an injury-in-fact and thus lack Article III standing; (3) Plaintiffs have failed to state a valid claim entitling them to relief because all inaccuracies they allege in the wage statements Amazon issued to them are based on disputed payments, and they make no allegation of actual injuries they sustained; and (4) the FAC lacks any factual assertions to support Plaintiffs' claims that Amazon knowingly and intentionally failed to provide accurate wage statements, an essential element of a claim under section 226.

First, Plaintiffs' section 226 claim should be dismissed because it is derivative of claims 1 and 2, both of which have failed to state a claim. *See Tavares v. Cargill Inc.*, 2019 WL 2918061, at *7 (E.D. Cal. July 8, 2019) (Drozd, J.) (dismissing derivative wage statement claims where underlying claims failed); *see also Harris v. Best Buy Stores, L.P.*, 2018 WL 984220, at *9 (N.D. Cal. Feb. 20, 2018) (same).

Second, the FAC lacks sufficient allegations to show that Plaintiffs have Article III standing to bring a claim based on the supposed inaccuracies of their wage statements. The claim thus should be dismissed under Rule 12(b)(1). *See Kirchner v. First Advantage Background Servs. Corp.*, 2016 WL

6766944, at *1–*2 (E.D. Cal. Nov. 14, 2016). Alleging a violation of section 226, without more, does not demonstrate that Plaintiffs suffered a "concrete" and "real" injury-in-fact for purposes of Article III standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548–49 (2016). Rather, "in order to satisfy Article III's standing requirement, a plaintiff seeking damages for the violation of a statutory right must not only plausibly allege the violation but must also plausibly allege a 'concrete' injury causally connected to the violation." *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1172 (9th Cir. 2018). Here, Plaintiffs have not alleged a cognizable injury resulting from the purportedly inaccurate wage statements. *See* FAC ¶¶ 98–100. That warrants dismissal of the section 226 claim. *See Mays v. Wal-Mart Stores, Inc.*, 804 F. App'x 641, 643 (9th Cir. 2020) (dismissing claim for relief under section 226 because the complaint failed to "allege any real-world consequences flowing, or even potentially flowing, from the violation").

Third, a failure to display disputed wages on a wage statement does not entitle an employee to a presumption of injury under section 226. *See* Cal. Lab. Code § 226(e)(2). If the alleged inaccuracy underlying a claim under section 226 is based on disputed wages, an "individualized showing[] of actual harm" is needed for a claim to succeed. *Kazi v. PNC Bank, N.A.*, 2021 WL 965372, at *21 (N.D. Cal. Mar. 15, 2021); *see also Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1337 (2018) ("The purpose of section 226 is to *document* the *paid* wages to ensure the employee is fully informed regarding the calculation of those wages." (quotation marks omitted)). There is nothing in the FAC to suggest that the alleged section 226 violations are based on anything other than a failure to include the disputed payments in the wage statements. And the FAC makes no reference to any actual injury the supposed inaccuracies in the wage statement caused. Because Plaintiffs cannot rely on section 226's presumption of injury, they have thus failed to state all the essential elements of their claim.

Fourth, relief under section 226 is available only where the injury suffered is the "result of a knowing and intentional failure by an employer to comply" with the statute. Cal. Lab. Code § 226(e)(1). The FAC "offers nothing more than a single conclusory statement that Defendant ['knowingly and intentionally'] failed to provide accurate wage statements, without any facts to support the inference that Defendant was aware of the information required on a wage statement as it pertained to

Plaintiff[s] and the putative class, but intentionally chose to omit it." *Dawson v. Hitco Carbon Composites, Inc*, 2017 WL 7806358, at *6 (C.D. Cal. May 5, 2017); *see* FAC ¶ 98.

D. Plaintiffs' Claim for Waiting Time Penalties Is Foreclosed Because Plaintiffs Do Not and Cannot Allege Willfulness (Count 4)

Plaintiffs seek waiting time penalties under California Labor Code section 203, alleging that Amazon failed to pay them all wages they were owed at the time they were discharged in violation of sections 201 and 202. FAC ¶ 104. This claim fails for multiple reasons.

To begin, Plaintiffs' section 203 claim is derivative of their claims that they were owed gap and overtime pay. The gap and overtime pay claims fail; therefore, the derivative section 203 claim also fails. *See Krauss v. Wal-Mart, Inc.*, 2019 WL 6170770, at *3 (E.D. Cal. Nov. 20, 2019) ("Because Plaintiff's underlying causes of actions fail, this derivative claim [for waiting time penalties] fails as well.").

Moreover, Plaintiffs offer merely conclusory allegations that Amazon knowingly and willfully violated sections 201 and 202, *see, e.g.*, FAC ¶ 104, even though that is an essential element of a claim for waiting time penalties under section 203. Such allegations are insufficient to allege a viable section 203 claim. *See, e.g.*, *Johnson v. Winco Foods, LLC*, 2018 WL 6017012, at *16 (C.D. Cal. Apr. 2, 2018) ("Such a conclusory allegation merely parrots the statutory language without providing any details to suggest that Defendants intentionally failed to pay upon termination the wages allegedly owed to Plaintiff and other class members.").

At the very least, the claims brought in the FAC are plainly subject to good faith disagreement. Cal. Code Regs. tit. 8, § 13520 ("[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203."); *see also Diaz v. Grill Concepts Servs., Inc.*, 23 Cal. App. 5th 859, 868 (2018) ("an employer's failure to pay is not willful if that failure is due to . . . uncertainty in the law"); *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 8 (1981). Amazon is aware of no court decision anywhere in the country holding that time spent waiting for and undergoing COVID-19 screening is compensable under either the FLSA or California law. And, as explained above, the DIR's statement in an online FAQ that COVID-19 screening time is compensable is informal, non-binding, and legally erroneous. Nor is the legal question posed by application of wage and

hour laws to such screenings closely analogous to existing precedents. That is reason enough to conclude that any failure to pay wages owed for time spent in COVID-19 screenings was not willful, even assuming the Court ultimately rejects Amazon's argument that such screenings are not compensable. *See Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1202 (2008) (declining to find violation of section 203 willful where the disputed wage payments presented "complicated issues of first-impression").

E. Plaintiffs' Claim Under the UCL Should Be Dismissed as Derivative of Plaintiffs' Other Failed Claims and Because Plaintiffs Have Not Alleged that the Available Legal Remedies Are Inadequate (Claim 5)

Plaintiffs' UCL claim is entirely derivative of their other claims for relief. Because each of their other claims is defective and must be dismissed, their UCL claim also necessarily fails. *See, e.g.*, *Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136, 1147 (2011) ("Because the underlying causes of action fail, the derivative UCL . . . claim[ ] also fails.").

Plaintiffs also cannot pursue relief pursuant to the UCL because they expressly claim entitlement to numerous remedies at law and make no allegations that those remedies are inadequate. "[I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief." *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992). The Ninth Circuit recently explained that this principle requires district courts to dismiss claims for equitable relief under the UCL absent a showing by the plaintiff that she "lacks an adequate remedy at law." *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020); *see also Nationwide Biweekly Admin., Inc. v. Superior Court*, 9 Cal. 5th 279, 292 (2020) (holding that UCL claims "are equitable in nature"). Plaintiffs have not and cannot make that showing; thus, their UCL claim should be dismissed.

Further, while Plaintiffs also purport to seek "injunctive and preventive relief" as part of their UCL claim, *see* FAC ¶ 110, they allege that they are *former* employees, meaning they lack standing to obtain such prospective remedies, s*ee Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 988 (9th Cir. 2011) ("[O]nly current employees have standing to seek injunctive relief.").[3]

[3] Plaintiffs' FAC deleted the original Complaint's request for injunctive relief from the prayer, but the FAC's fifth claim continues to refer to "all other injunctive and preventive relief authorized by Business and Professions Code §§ 17202 and 17203."

V. CONCLUSION

Amazon respectfully requests that the Court dismiss the entirety of Plaintiffs' FAC.

Dated: June 3, 2021

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