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10
11 **UNITED STATES DISTRICT COURT**
12
13 **CENTRAL DISTRICT OF CALIFORNIA**
14 **WESTERN DIVISION**

15 JUAN PEREZ, on behalf of himself and
those similarly situated,

16 Plaintiffs,

17 v.

18 ALTA-DENA CERTIFIED DAIRY,
19 LLC, a Delaware Limited Liability
Company; and DOES 1 through 10,
20 inclusive,

21 Defendants.

Case No. CV 13-04335 R (FFMx)

CLASS ACTION

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANT
ALTA-DENA CERTIFIED DAIRY,
LLC'S MOTION TO DISMISS
PLAINTIFF'S COMPLAINT
PURSUANT TO FED. R. CIV. P.
12(b)(6) OR TO STRIKE
PURSUANT TO FED. R. CIV. P.
12(f)**

Date: August 5, 2013

Time: 10:00 AM

Place: Courtroom of the
Hon. Manuel L. Real,
Courtroom 8 – Spring St.

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Defendant Alta-Dena Certified Dairy, LLC (“Alta-Dena”) respectfully submits the following memorandum of points and authorities in support of its Rule 12(b)(6) motion to dismiss, or in the alternative 12(f) motion to strike, Plaintiff’s Complaint.

I. INTRODUCTION

Plaintiff brought this case after unsuccessfully trying to substitute himself as a named plaintiff in a prior case pending against Alta-Dena for missed meal and rest breaks and other related claims arising under California law. That case, *de la Cueva v. Alta-Dena Certified Dairy, LLC*, Case No. CV 12-01804 GHK (CWx) (“*de la Cueva* Action”), also is pending in this Court, before Chief Judge King—who recently denied class certification. *See id.* May 19, 2013 Order (Dkt. 61). Shortly thereafter, Plaintiff filed this case against Alta-Dena asserting similar claims on behalf of himself and a putative class of drivers. Alta-Dena asserts two grounds for dismissing Plaintiff’s claims with prejudice.

First, Plaintiff’s entire complaint should be dismissed on the basis that it contains nothing more than threadbare allegations that fail to pass muster under *Twombly*. Notably absent are specific factual allegations plausibly giving rise to claims that Alta-Dena failed to provide Plaintiffs (or putative class members) with any required meal or rest breaks. In fact, the only factual matter contained anywhere in the Complaint consists of four paragraphs—all of which are alleged on information and belief:

- Paragraph 7 stating that “Alta Dena failed to authorize and/or permit Mr. Perez (and similarly situated drivers) with legally compliant meal and/or rest break(s), which further resulted in other California Labor Code violations - all of which Mr. Perez suffered to his detriment.”
- Paragraph 14 generically describing Alta-Dena’s alleged policies and practices regarding meal and rest breaks.

- 1 • Paragraph 15 generically describing Alta-Dena’s alleged practice of
2 automatically deducting 30 minutes of pay from drivers for taking
3 their unpaid meal break, which is unquestionably lawful. *See Porch v.*
4 *Masterfoods, USA*, 685 F. Supp. 2d 1058, 1074 (C.D. Cal. 2008), *aff’d*,
5 364 F. App’x 365 (9th Cir. 2010) (granting summary judgment for
6 employer because auto-deduct policy and requiring employees to take
7 a lunch is lawful under California law).
- 8 • Paragraph 16 alleging that Alta-Dena was aware of the alleged
9 violations.

10 The remainder of the Complaint consists entirely of naked legal assertions and
11 recitals of the statutory elements for each cause of action.

12 In recent years, the Supreme Court has made clear that, to survive a motion
13 to dismiss, a complaint must plead “more than an undadorned, the-defendant-
14 unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.
15 Ct. 1937, 173 L.Ed.2d 868 (2009). A complaint that includes only “labels and
16 conclusions” or “a formulaic recitation of the elements of a cause of action will not
17 do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d
18 929 (2007). In *Twombly*, the Supreme Court held that absent sufficiently specific
19 factual allegations showing that, taken as true, class members were plausibly
20 entitled to the relief sought, boilerplate recitations of the elements of a cause of
21 actions and bare conclusions of class-wide harm were insufficient to survive a
22 motion to dismiss. *Twombly*, 550 U.S. at 557. In *Iqbal*, the Supreme Court held
23 that the plaintiff’s allegations were little more than naked assertions and formulaic
24 recitations of the law and, thus, did not plead sufficient facts to make the claim for
25 relief plausible on its face. *Iqbal*, 129 S.Ct. at 1951.

26 Yet Plaintiff’s Complaint does precisely what *Twombly* and *Iqbal* preclude—
27 it relies on naked legal assertions of the “defendant-unlawfully-harmed-me”
28 variety. For example, Plaintiffs’ claim for missed meal breaks consists of such

1 conclusory allegations as: “From at least 2004 to December 31, 2010, Defendant
2 failed to comply with California Labor Code §§ 226.7 and 512 because it did not
3 authorize or permit its drivers two rest periods during a work-day and/or a duty-free
4 meal period after five hours of work, if at all. Nor did Defendant authorize or
5 permit its drivers a second duty-free meal period after 10 and/or 12 hours of work,
6 if at all.” (Compl. ¶ 21) Similarly, Plaintiff’s claim that Alta-Dena failed to
7 comply with California’s various record-keeping requirements is based on the
8 conclusory assertion that Alta-Dena did not “provide the putative class members
9 with a pay stub that accurately reflected those wages due, the hours worked, the
10 applicable pay rates, or any deductions that were being made.” *Id.* ¶ 41.

11 Courts in this district regularly dismiss wage and hour cases, like this one,
12 which contain such perfunctory, non-specific allegations. *See, e.g., Jimenez v.*
13 *Allstate Ins. Co.*, No. 10-8486 AHM (FFMx), 2011 WL 61611, at *2 (C.D. Cal.
14 Jan. 7, 2011) (dismissing claim that the defendant “failed to pay meal and rest
15 benefits owed . . . and provided non-compliant wage statements” where the
16 complaint’s allegations were “devoid of factual content and consist of conclusory
17 statements and recitations of statutory language”); Order Granting Def.’s Mot. to
18 Dismiss, ECF No. 21 at p. 2-4, *Esquivel v. Performance Food Grp.*, No. 11-cv-
19 07284-JHN-PJWx (C.D. Cal. Nov. 14, 2011) (dismissing meal break claims
20 because “Plaintiffs’ bare, conclusory allegations that Defendant did not provide
21 them with off-duty meal breaks or missed meal break pay are not sufficient to state
22 a claim”). *Cf. Rojas v. Brinderson Constructors, Inc.*, 567 F. Supp. 2d 1205, 1209
23 (C.D. Cal. 2008) (dismissing claim that “Defendants were also aware [co-
24 defendant’s] workers were not taking second meal periods after working 10 and 12
25 hours in a day” because “Plaintiffs nowhere allege facts . . . to demonstrate that the
26 . . . Defendants knew about the alleged [meal period] violations”). The same result
27 of dismissal ordered in these cited cases is also warranted here.

1 Second, Plaintiff's claims for civil and statutory penalties pursuant to Cal.
 2 Labor Code sections 210, 225.5, 226(e), 226.3, 226.4, and 558 and the Labor Code
 3 Private Attorneys General Act of 2004 ("PAGA") are subject to a one-year statute
 4 of limitations and therefore are time-barred and should be dismissed with prejudice.
 5 Plaintiff alleges that the policies and practices underlying these claims continued
 6 "from at least 2005 to **December 31, 2010.**" (Compl. ¶¶ 14-15) Plaintiff further
 7 alleges that he "is informed and believes that Defendant moved drivers to a
 8 different related company on or about January 1, 2011, and that it no longer
 9 employs drivers." (*Id.* ¶ 14 n. 1) **Plaintiff filed his Complaint on May 15, 2013,**
 10 ***more than a year after the statute of limitations expired.*** Thus, these claims are
 11 time-barred and should be dismissed in their entirety.

12 **II. PROCEDURAL AND FACTUAL HISTORY**

13 **A. Procedural Background**

14 On May 15, 2013, Juan Perez ("Plaintiff") commenced this action in the
 15 Superior Court of the State of California for the County of Los Angeles, entitled
 16 *Juan Perez v. Alta Dena Certified Dairy, LLC*, as Case Number BC509036. On
 17 June 17, 2013, Alta-Dena timely removed the action to this Court on the basis of
 18 diversity and pursuant to the Class Action Fairness Act of 2005 ("CAFA"). Alta-
 19 Dena also filed a Notice of Related Case, notifying the Court that the instant case is
 20 related to several other cases pending or previously pending before the Court. On
 21 June 19, 2013, the case was transferred to the Honorable Manuel L. Real pursuant
 22 to General Order 08-05.

23 Before filing this action, Plaintiff (through the same counsel here) sought to
 24 participate in another putative class action involving similar claims against Alta-
 25 Dena. That action, the *de la Cueva* Action, was brought by the same attorneys here
 26 for the Plaintiff on behalf of Miguel de la Cueva, another former driver of Alta-
 27
 28

1 Dena, and sought to assert similar claims to those asserted here.¹ Shortly after the
 2 Court denied Mr. de la Cueva's motion for class certification, *see id.* Dkt. 61 (May
 3 19, 2013 Order), Plaintiff filed the instant case.

4 **B. Summary of the Complaint**

5 Plaintiff Juan Perez alleges that he was employed by Alta-Dena as a truck
 6 driver since 2005. (Compl. ¶ 7) Plaintiff brings claims on behalf of himself and a
 7 putative class of "[a]ll persons who were employed by Defendant as a 'Driver' for
 8 as long as the statutory period will allow (the 'putative class')." (*Id.* ¶ 8)

9 Plaintiff alleges that Alta-Dena "had a uniform policy and practice" that
 10 "failed to authorize and/or permit Mr. Perez (and other similarly situated drivers)
 11 with legally compliant meal and/or rest breaks, which further resulted in other
 12 California Labor Code violations[.]" (*Id.* ¶¶ 7, 14) Plaintiff alleges that he "is
 13 informed and believes these policies and/or practices continued from at least 2005
 14 to December 31, 2010, . . . [and] applied to all of Defendant's drivers in Southern
 15 California." (*Id.* ¶ 14) Plaintiff also alleges that "beginning in at least 2005 to at
 16 least December 31, 2010, Defendant instituted a practice of automatically deducting
 17 30 minutes of work time and, thus, 30 minutes of pay each day from each driver
 18 regardless of whether or not the driver actually took a duty free meal period if the
 19 driver worked beyond his minimum shift of eight or ten hours." (*Id.* ¶ 15)

20 Plaintiff brings claims on behalf of himself and the putative class for (1)
 21 failure to provide rest periods and meal periods, in violation of Cal. Labor Code §§
 22 226.7 and 512; (2) failure to pay statutory minimum wage, straight time, and
 23 overtime and "off-the-clock work", in violation of Cal. Labor Code §§ 510, 511,
 24 1182.12, and 1194, and the applicable IWC Order; (3) failure to pay all wages
 25 earned, in violation of Cal. Labor Code §§ 201-204; (4) "clawing back" earned

26 ¹ See *de la Cueva* Action, Dkt May 9, 2013 Order (No 61) at 4 ("Without citing any
 27 authorities, Plaintiff requests that we substitute Juan Perez as the class
 28 representative in the event we find Plaintiff inadequate. We decline to do so under
 the facts of this case.")

1 wages or making unauthorized deductions from employees' compensation, in
 2 violation of Cal. Labor Code §§ 221-224; (5) failure to provide accurate itemized
 3 wage statements, in violation of Cal. Labor Code § 226; and (6) unfair business
 4 practices, in violation of Cal. Bus. & Prof. Code §§ 17200, et seq. (*Id.* ¶¶ 20-52)

5 In addition, Plaintiff brings wage and hour claims on behalf of himself and
 6 the putative class under the Labor Code Private Attorneys General Act of 2004
 7 ("PAGA"), Cal. Labor Code §§ 2698-2699, seeking to recover various civil
 8 penalties. (Compl. ¶¶ 22, 27, 32-34, and 43)

9 In his Complaint, Plaintiff fails to allege basic information plausibly giving
 10 rise to such claims, including, for example:

- 11 • Plaintiff's job duties;
- 12 • Plaintiff's work schedule;
- 13 • The locations or facilities where Plaintiff worked;
- 14 • Plaintiff's practices regarding meal and rest periods;
- 15 • The reason why Plaintiff allegedly was denied meal and rest
- 16 periods and when (e.g., date and location) such denials occurred;
- 17 • Whether the alleged denial of meal or rest periods was due to a
- 18 written policy, the decisions of a supervisor, an unwritten
- 19 corporate practice, or anything else; and
- 20 • The facts concerning any such alleged corporate policy,
- 21 practice, or supervisory decision to deny meal or rest periods.

22 Notwithstanding his sparse allegations, Plaintiff prays for relief in the form
 23 of general damages, compensatory damages, special damages, punitive damages,
 24 statutory and civil penalties, pre- and post-judgment interest, attorneys' fees and
 25 costs of suit, and equitable relief. (Compl. Prayer For Relief ¶¶ 1-9)

26 **III. LEGAL STANDARD**

27 A party may move to dismiss a complaint pursuant to Federal Rule of Civil
 28 Procedure 12(b)(6) for failure to state a claim upon which relief may be granted if
 the complaint lacks either (1) a cognizable legal theory or (2) sufficient facts to
 support a cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d
 696, 699 (9th Cir. 1990) (citing Fed. R. Civ. P. 12(b)(6)). To survive a motion to

1 dismiss under Rule 12(b)(6), a complaint must include “enough facts to state a
2 claim for relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. This
3 standard is met only when the plaintiff has pleaded “a statement of circumstances
4 occurrences, and events in support of the claim presented.” *Id.* at 556 n.3 (quoting
5 Wright & Miller, Fed. Practice & Proc. § 1202 (3d ed. 2004)). “A claim has
6 facial plausibility when the plaintiff pleads factual content that allows the court to
7 draw the reasonable inference that the defendant is liable for the misconduct
8 alleged.” *Iqbal*, 556 U.S. at 661. “Threadbare recitals of the elements of a cause of
9 action, supported by mere conclusory statements, do not suffice.” *Id.* at 663. In
10 deciding a motion to dismiss, the Court must distinguish between factual
11 allegations and legal assertions. The Court “is not required to accept legal
12 conclusions cast in the form of factual allegations if those conclusions cannot
13 reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18
14 F.3d 752, 754-55 (9th Cir. 1994).

15 A motion to dismiss based on the statute of limitations is properly granted
16 where “the assertions of the complaint, read with the required liberality, would not
17 permit the plaintiff to prove that the statute was tolled.” *Vernon v. Heckler*, 811
18 F.2d 1274, 1278 (9th Cir. 1987). A plaintiff seeking to rely on tolling as a defense
19 to the statute of limitations “must have included the allegation in their pleadings[.]”
20 *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 991 (9th Cir. 2006)
21 (granting summary judgment on statute of limitations grounds where Plaintiff failed
22 to allege basis for tolling in complaint and noting that “federal courts have
23 repeatedly held that plaintiffs seeking to toll the statute of limitations on various
24 grounds must have included the allegation in their pleadings; this rule applies even
25 where the tolling argument is raised in opposition to summary judgment.”)

26 The Ninth Circuit recently clarified that a motion challenging the plaintiff’s
27 right to recover certain relief at the pleading stage is properly brought as a Rule
28 12(b)(6) motion and not as a motion to strike under Rule 12(f). *Whittlestone v.*

1 *Handi-Craft Co.*, 618 F.3d 970, 974 (9th Cir. 2010) (holding motion under Rule
 2 12(f) to strike claim for damages from complaint “was really an attempt to have
 3 certain portions of [the] complaint dismissed,” an action “better suited for a Rule
 4 12(b)(6) motion”). Several district courts have dismissed requests for relief on such
 5 a motion. *See, e.g., Hill v. Opus Corp.*, 841 F. Supp. 2d 1070, 1082 (C.D. Cal.
 6 2011) (granting motion to dismiss state law claims seeking compensation under
 7 ERISA-covered plans as being separable from claims seeking compensation under
 8 non-covered plans); *Thomas v. Home Depot USA Inc.*, 527 F. Supp. 2d 1003, 1007
 9 (N.D. Cal. 2007) (granting motion to dismiss employee’s claim for civil penalties
 10 under PAGA as time-barred); No. 3:10–CV–980–AC, 2012 WL 707100, at *10-11
 11 (D. Or. Mar. 1, 2012) (dismissing rather than striking plaintiff’s request for punitive
 12 damages for being insufficiently pled). However, to the extent this Court disagrees
 13 that dismissal is appropriate, Alta-Dena alternatively requests that Plaintiff’s claims
 14 for penalties under Cal. Labor Code §§ 210, 225.5, 226(e), 226.3, 226.4, and 558 in
 15 paragraphs 22, 26, 32, 37, 42 and 43, and claims under PAGA in paragraphs 18, 22,
 16 27, 32, 33 and 43, be stricken under Civil Rule 12(f) as irrelevant to the present
 17 litigation.

18 **IV. PLAINTIFF’S COMPLAINT FAILS TO ALLEGE FACTS THAT**
 19 **PLAUSIBLY GIVE RISE TO THE CLAIMS.**

20 Plaintiff’s Complaint must be dismissed in its entirety because it fails to
 21 plead “enough facts to state a claim for relief that is plausible on its face.”
 22 *Twombly*, 550 U.S. at 570. Each claim must be dismissed because it fails to plead
 23 any facts that would plausibly give rise to the claims asserted. Pleadings like the
 24 FAC are precisely what the Supreme Court cautioned against in warning that
 25 “[t]hreadbare recitals of the elements of a cause of action, supported by mere
 26 conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 663.

1 **A. Plaintiff's Meal and Rest Break Claims Fail.**

2 Plaintiff's First Cause of Action for missed meal and rest breaks is based on
3 California Labor Code section 226.7(b), which states:

4 If an employer fails to provide an employee a meal period or rest
5 period in accordance with an applicable order of the Industrial
6 Welfare Commission, the employer shall pay the employee . . . one
7 additional hour of pay at the employee's regular rate of compensation
for each work day that the meal or rest period is not provided.

8 The California Supreme Court recently has clarified that "[t]he employer satisfies
9 this obligation if it relieves its employees of all duty, relinquishes control over their
10 activities and permits them a reasonable opportunity to take an uninterrupted 30-
11 minute break, and does not impede or discourage them from doing so. What will
12 suffice may vary from industry to industry" *Brinker Restaurant Corp. v.*
13 *Super. Ct.*, 53 Cal. 4th 1004, 1040, 139 Cal.Rptr.3d 315 (Cal. 2012). "On the other
14 hand, the employer is not obligated to police meal breaks and ensure no work
15 thereafter is performed." *Id.*

16 Plaintiff makes the conclusory assertion that "Defendant had a uniform
17 policy and practice of restricting all drivers' [sic.] during their alleged meal period
18 to remain within a one-mile (or half mile) radius of their designated routes. Thus,
19 Defendant did not allow Plaintiff or any putative class member duty free meal
20 period(s) as required by the California Labor Code and the applicable Industrial
21 Welfare Commission Wage Orders." (Compl. ¶ 14) Plaintiff does not say whether
22 this alleged policy and practice was written or unwritten, formal or informal, or by
23 whom or how often it was enforced; whether or how often Plaintiff and other
24 drivers complied with the alleged policy and practice; and how often the alleged
25 policy and practice resulted in a driver not receiving a duty-free meal period.
26 Moreover, this policy as alleged relates solely to the *location* of the truck, not the
27 driver. Plaintiff fails to allege what, if anything, prevented Plaintiff or other drivers
28 from leaving their vehicles to take their eligible meal periods or why taking a full

1 period one-half mile away from their truck somehow constitutes a violation of the
2 California Labor Code.

3 Plaintiff alleges that “Defendant’s written meal and rest break policy failed to
4 explain that Plaintiff and putative class members were entitled to meal and/or rest
5 breaks at a specific time. Instead, Defendant’s policy was that supervisors would
6 schedule such breaks, but they never did. And Defendant’s policy further included
7 that meal and rest breaks could be combined, thereby also failing to comply with
8 meal and rest break timing requirements.” (Compl. ¶ 14) Again, Plaintiff fails to
9 allege any facts as to whether and how often this alleged policy resulted in an actual
10 violation of the law, or the reasons for that alleged violation.

11 Plaintiff also alleges that “Plaintiff is further informed and believes that
12 Defendant had a corporate policy and/or practice that did not permit ‘drivers’ (such
13 as Plaintiff) from taking a meal and/or rest break until a shipment was completed
14 (*i.e.*, driver from Defendant’s place of business to another local California delivery
15 destination). . . . This meant that Plaintiff, and other drivers, often went six (6)
16 hours if not longer without a meal and/or rest break.” (*Id.*) Plaintiff does not allege
17 or explain the specifics of this policy, including whether it was written or unwritten,
18 formal or informal, how and by whom it was enforced, or whether and how often it
19 was observed by Plaintiff and other drivers.

20 Plaintiff alleges that Alta-Dena hid the law from drivers (which is of course
21 impossible) because Alta-Dena did not “inform Plaintiff or the putative class
22 members that they were entitled to a second meal break if they worked over 10
23 and/or 12 hours in a day (which Plaintiff often did).” (*Id.*) Plaintiff does not allege
24 any facts as to how often he or other drivers missed second meal breaks for which
25 they were eligible, or the facts and circumstances surrounding those events. In any
26 event, in California, as elsewhere, “[e]veryone is presumed to know the law.”
27 *Robertson v. Dodson*, 54 Cal. App. 2d 661, 129 P.2d 726, 728 (Cal. Ct. App. 1942).

1 These conclusory allegations do not give rise to meal and rest break claims
 2 on behalf of Plaintiff or the putative class. For example, based on the above
 3 allegation, Alta-Dena has no notice of the factual basis for Plaintiff's—much less
 4 any other driver's—claim. Plaintiff's Complaint fails to answer the most
 5 fundamental factual pleading questions: When was Plaintiff denied meal periods
 6 and rest breaks? Which of the above scenarios forms the basis for his missed meal
 7 period and rest break claims? What were the facts or circumstances when he was
 8 supposedly required to take an "on-duty" meal period, or denied a meal period
 9 altogether? What actions did Alta-Dena take that "impede[d] or discourage[d]" him
 10 from taking his meal period as is required under *Brinker*?

11 Several of Plaintiff's allegations are pled "on information and belief," which,
 12 absent further factual support, are patently insufficient to meet the *Iqbal* and
 13 *Twombly* standard. See, e.g., *Solis v. City of Fresno*, No. 11-CV-00053 AWI GSA,
 14 2012 WL 868681, at *8 (E.D. Cal. March 13, 2012) ("In the post-*Twombly* and
 15 *Iqbal* era, pleading on information and belief, without more, is insufficient to
 16 survive a motion to dismiss for failure to state a claim.").

17 Courts in this district have dismissed meal break claims pled with
 18 substantially more specificity than Plaintiffs' threadbare allegations here. For
 19 example, Judge Nguyen recently dismissed meal break claims raised on behalf of a
 20 putative class of delivery drivers for failing to include sufficient factual specificity.
 21 Order Granting Def.'s Mot. to Dismiss, ECF No. 21 at 2-4, *Esquivel v.*
 22 *Performance Food Grp.*, No. 11-cv-07284-JHN-PJWx (C.D. Cal. Nov. 14, 2011)
 23 (attached to the Declaration of Steven Sklaver ("Sklaver Decl.") as Exh. 1). In
 24 *Esquivel*, the plaintiffs alleged the following in support of their missed meal break
 25 claim:

- 26 • "Defendants employed a routine policy or practice of creating
 27 delivery routes that exerted significant time pressure on its
 28 drivers . . . [which] impeded Plaintiffs and the other Class

1 members from taking 30-minute, off-duty meal breaks in a
2 timely fashion.”

- 3 • Plaintiffs were working “12 to 15 hours per day” and were
4 “pressure[d] to deliver by the ‘lunch-time rush,’” which
5 “prevented them from taking timely meal breaks”
- 6 • Plaintiffs “were paid on the basis of a piece rate system that
7 included . . . specific amounts allotted to the miles completed
8 by drivers,” which “discouraged or prevented them from taking
9 meal breaks”

10 *Id.* at 2-3 (internal quotation marks and citations omitted). The Court concluded
11 that the above assertions were simply “broad and conclusory allegations” that
12 “fail[ed] to plead a plausible claim.” *Id.* at 3. In support of this holding, the Court
13 noted that (1) “Plaintiffs fail to allege why they could not have taken their 30-
14 minute meal breaks at some point along their routes”; (2) “Plaintiffs do not allege
15 the start and end times of their work day” and are silent as to “why Plaintiffs could
16 not take meal breaks before or after the ‘lunch-time rush’”; and (3) Plaintiffs do not
17 allege how the “piece rate system” of pay “discouraged or prevented them from
18 taking meal breaks” *Id.* at 3-4.

19 Plaintiff’s allegations are strikingly similar to the claims that were dismissed
20 in *Esquivel*. Numerous courts within the Ninth Circuit have dismissed wage and
21 hour cases like this one that rest on threadbare recitations of the elements of a cause
22 of action, rather than on factual allegations. *Jeske v. Maxim Healthcare Servs.,*
23 *Inc.*, No. 11-1838 LJO JLT, 2012 WL 78242, at *5 (E.D. Cal. Jan. 10, 2012)
24 (dismissing meal period claim that “merely alludes to ‘numerous days worked’
25 without meal periods” and the claim “lacks facts to demonstrate that [defendant]
26 denied [plaintiff] meal breaks”); *Jimenez*, 2011 WL 61611, at *2 (dismissing claim
27 that defendant “failed to pay meal and rest benefits owed” where the complaint was
28 “devoid of factual content and consist[s] of conclusory statements and recitations of
statutory language”); *Weigle v. FedEx Ground Package Sys., Inc.*, No. 06-CV-

1 1330 JLS (POR), 2010 WL 4723673, at *4 (S.D. Cal. Nov. 15, 2010) (dismissing
 2 claim that “[d]efendant required Plaintiffs to work . . . without being given a 30-
 3 minute meal period for shifts of at least five hours” as “non-specific allegations
 4 [that] do not suffice to survive a motion to dismiss under *Twombly* and *Iqbal*)
 5 (internal quotation marks and citation omitted); *Schneider v. Space Sys./Loral, Inc.*,
 6 No. 11-02489-JF, 2011 WL 4344232, at *2 (N.D. Cal. Sept. 15, 2011) (dismissing
 7 complaint that alleged plaintiff “worked without being given paid 10-minute rest
 8 periods as required by law and without being given a 30-minute meal period”)
 9 (internal quotation marks, citation, and alteration omitted) (citing similar cases).
 10 The Court should do likewise here.

11 **B. Plaintiff’s “Clawed-Back” Wages and Minimum Wage and**
 12 **Overtime Claims Fail.**

13 Plaintiff alleges as his Fourth Cause of Action that Alta-Dena violated Cal.
 14 Labor Code §§ 221-224 “by automatically deducting 30 minutes of pay each day
 15 from each employee if they worked more than their minimum shift.” (Compl. ¶ 36)
 16 Plaintiff alleges that these deductions were made regardless of whether the
 17 employee actually took their eligible meal period. In his Second Cause of Action,
 18 Plaintiff alleges that as a result of these deductions, Alta-Dena also violated the
 19 minimum wage and overtime laws. (Compl. ¶23) These claims are therefore
 20 necessarily premised on the underlying claim that Plaintiff and other drivers were
 21 denied earned meal periods, thus making the alleged deductions improper. As
 22 discussed above, the underlying meal period claim is devoid of necessary facts and
 23 thus these claims fail for the same reasons.

24 **C. Plaintiff’s “Waiting-Time” Claim Fails.**

25 For his Third Cause of Action, Plaintiff alleges that Alta-Dena failed to pay
 26 him and other drivers the meal and rest break premium pay they were owed upon
 27 termination, as well as other compensation resulting from the alleged missed meal
 28 periods (*i.e.*, the 30 minutes allegedly deducted and overtime allegedly owed).

(Compl. ¶¶ 30-31) Again, these claims are necessarily based on the underlying claims for violations of the meal and rest break laws—which fail to meet the standard articulated in *Twombly* and *Iqbal*—and should be dismissed for the same reasons. Also, Plaintiff fails to allege facts supporting any other driver’s termination.

D. Plaintiffs’ Record-Keeping Claims Fail.

In his Fifth Cause of Action, Plaintiff states that as a result of allegedly failing to provide premium pay for missed meals and rest breaks and allegedly improperly deducting time from drivers’ pay records, Alta-Dena failed to provide accurate itemized wage statements as required by section 226. (Compl. 41) Plaintiff alleges that “Defendant also listed the incorrect entity that employed Plaintiff and the putative class members on the paystub,” but offers no facts in support of that allegation. (*Id.*) This claim is based on nothing more than “formulaic recitation[s] of the elements of a cause of action” *Twombly*, 550 U.S. at 555.

Yet again, Courts within the Ninth Circuit have dismissed record-keeping claims that, like this one, are based on conclusory legal assertions without any specific factual allegations to support them. *Jeske*, 2012 WL 78242, at *15 (faulting the “conclusory nature of the inaccurate records claims” where “[t]he claims merely point to [legal] requirements and claim they were not satisfied with nothing more”); *Rhoades v. Progressive Cas. Ins. Co.*, No. 10-cv-0763-GEB-KJN, 2011 WL 397657, at *3 (Feb. 3, 2011) (“Plaintiffs’ wage statement claim offers nothing more than a formulaic recitation of the elements of a cause of action.”) (internal quotation marks and citation omitted); *see also, e.g., Jimenez*, 2011 WL 61611, at *2 (dismissing conclusory record-keeping claim); *Kemp v. Int’l Bus. Machines Corp.*, No. 09-4683 MHP, 2010 WL 4698490, at *3 (N.D. Cal. Nov. 8, 2010) (holding that the plaintiff’s bare allegation that defendant failed to comply

1 with record-keeping requirements “does not demonstrate beyond a highly
 2 speculative level that [defendant] may actually be engaged in unlawful record-
 3 keeping practices”); *Harding*, 2009 WL 2575898, at *3 (holding allegations that
 4 defendant failed to “provide accurate Itemized Wage Statements” were “conclusory
 5 allegations as defined by *Twombly*, and will be assigned no weight”) (internal
 6 quotation marks and citation omitted).

7 **E. There Are No Facts Alleged to Support Plaintiffs’ UCL Claim.**

8 Plaintiff’s Sixth Cause of Action purports to state a claim under California’s
 9 UCL, Cal. Bus. & Prof. Code § 17200 *et seq.* based on the preceding claims.
 10 (Compl. ¶¶ 45-52) Plaintiff fails to state a claim for relief on the underlying
 11 violations; therefore, the UCL claim must also be dismissed. *See Brisos v. Wells*
 12 *Fargo Bank*, 737 F. Supp. 2d 1018, 1033 (N.D. Cal. 2010) (“Because Plaintiff has
 13 failed to state claims for any underlying violation of state or federal law, he cannot
 14 proceed on his unfair competition law claims under § 17200.”).

15 **F. There Are No Facts Alleged to Support Plaintiff’s PAGA Claim.**

16 Plaintiff’s PAGA claim incorporates the above deficient allegations, and
 17 nothing more. (Compl. ¶¶ 18, 22, 27, 32-33, and 43) For that reason, the PAGA
 18 claim is also subject to dismissal. *See Brisos*, 737 F. Supp. 2d at 1033.

19 **V. PLAINTIFF’S PENALTY CLAIMS ALSO ARE TIME-BARRED.**

20 All of Plaintiff’s claims should be dismissed in their entirety, as discussed
 21 above. Plaintiff’s claims for penalties under the Labor Code and PAGA should be
 22 dismissed on the separate ground that they are time-barred.

23 Plaintiff seeks statutory and civil penalties on behalf of himself and the
 24 putative class under various sections of the California Labor Code.² *See* Compl. ¶

25
 26 ² Alta-Dena moves to dismiss on statute of limitations grounds all of Plaintiff’s
 27 claims for statutory and civil penalties except for his claims under California Labor
 28 Code section 203—asserted in Plaintiff’s First and Third Causes of Action—
 because section 203 provides that “[s]uit may be filed for these penalties at any
 time before the expiration of the statute of limitations on an action for the wages

22 (First Cause of Action for Failure to Provide Meal And/Or Rest Breaks: seeking “recovery of unpaid wages, interest, and attorneys’ fees, and costs, in addition to penalties under California Labor Code §§ 203, 210, 218.6, 226, 226.3, 558, 1194(a), and/or 2699 because Defendants did not pay Plaintiff and putative class members accurately in a timely manner for the rest periods and/or meal periods they were deprived of during their employment and/or upon their discharge”); ¶ 26 (Second Cause of Action for Failure to Pay Minimum Wage And/Or Overtime: seeking “civil penalties for Defendant’s above described violations of the California Labor Code, including 25% of all amounts unlawfully withheld by Defendants pursuant to California Labor Code § 225.5”); ¶ 32 (Third Cause of Action for Failure to Pay Wages Upon Termination of Employment: “Pursuant to California Labor Code §§ 210 and 2699, Plaintiff and the putative class members seek civil penalties”); ¶ 37 (Fourth Cause of Action for Clawed-Back Wages: seeking “civil penalties for Defendant’s above described violations of the California Labor Code, including 25% of all amounts unlawfully withheld by Defendants pursuant to California Labor Code § 225.5”); ¶¶ 42-43 (Fifth Cause of Action for Failure to Provide Accurate and Itemized Pay Statements: seeking “statutory penalties . . . under California Labor Code § 226(e)” and “civil penalties pursuant to California Labor Code § 226.4”³).

Plaintiff also seeks at least three types of penalties under PAGA. First, Plaintiff seeks to recover penalties that the LWDA could collect pursuant to Labor Code § 210(a). (Compl. ¶ 32) Second, Plaintiff seeks to recover penalties that the LWDA could collect pursuant to Labor Code § 226.3 (Compl. ¶ 43). Third, Plaintiff seeks to recover statutory penalties under PAGA’s separate penalty

(... cont’d)
 from which the penalties arise [*i.e.*, three years].” Cal. Labor Code § 203(b). However, Alta-Dena does move to dismiss Plaintiff’s PAGA claim insofar as it is predicated on Labor Code section 203, for reasons discussed in Part V.B.2.

³ Section 226.4 does not provide for a civil penalty but rather authorizes the Labor Commissioner to issue citations for violations of section 226(a).

1 provision, Cal. Labor Code § 2699(f), for alleged violations of California's meal
2 break laws (Compl. ¶ 22).

3 The statute of limitations for penalty claims is one year, and because Plaintiff
4 filed this action in 2013 and asserts no claims for any conduct occurring after
5 December 31, 2010 (Compl. ¶¶ 14-15) and alleges that Alta-Dena employed no
6 drivers after January 1, 2011 (*id.* ¶ 14 n.1), all of these penalty claims are time-
7 barred. Cal. Code Civ. P. § 340.

8 **A. Plaintiff's Penalty Claims on Behalf of Himself and the Putative**
9 **Class Are Time-Barred**

10 Plaintiff seeks to recover civil and statutory penalties pursuant to Labor Code
11 sections 210, 225.5, 226(e), 226.3, 226.4, and 558 on behalf of himself and the
12 putative class. These penalty claims are time-barred by a one-year statute of
13 limitations on actions for penalties. Cal. Code Civ. P. § 340(a); *see also, e.g.,*
14 *Nguyen v. Baxter Healthcare Corp.*, No. 10-cv-01436-CJC (SSx), 2011 WL
15 6018284, at *9 (C.D. Cal. Nov. 28, 2011) (dismissing claim for section 226(e)
16 penalties as time-barred under one-year statute of limitations). In his Complaint,
17 Plaintiff alleges that the conduct underlying his claims continued "until December
18 31, 2010" and that Alta-Dena did not employ Plaintiff or any other drivers after
19 January 2, 2011. (Compl. ¶¶ 14-15 & n. 1) Plaintiff did not file his complaint until
20 May 15, 2013, more than 2 years later. Thus, these claims are time-barred.

21 To the extent Plaintiff purports to seek actual damages stemming from Alta-
22 Dena's alleged failure to provide accurate itemized wage statements, that claim
23 must be dismissed because Plaintiff fails to allege he suffered any actual injury.
24 "The injury requirement cannot be met simply by showing that one of the nine
25 itemized requirements under Section 226(a) is absent from the wage statement." *Id.*
26 at *8. The Complaint is totally devoid of any allegation that Plaintiff was injured
27 (let alone suffered actual damages) as a result of receiving inaccurate itemized
28 wage statements, and any claim for statutory penalties is clearly time-barred. *Id.* a

*9 (“[B]ecause the Court finds there is no evidence of injury suffered as a result of the purported missing information in her wage statements, Section 340 applies to limit her wage statement claim to wage statements provided . . . a year before she filed her complaint.”).

Therefore, Plaintiff’s claims for penalties on behalf of himself and the putative class under Cal. Labor Code sections 210, 225.5, 226(e), 226.3, 226.4, and 558 are time-barred and must be dismissed with prejudice.

B. Plaintiff’s PAGA claims must be dismissed in their entirety.

1. Plaintiff’s penalty claims under section 2699(a) are time-barred.

PAGA provides that any Labor Code provision that “provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency [“LWDA”] . . . may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees” Cal. Labor Code § 2699(a) (bracketed alteration added).

Plaintiff seeks to collect, pursuant to PAGA, the statutory penalties that the LWDA would be entitled to collect for Alta-Dena’s alleged failure to:

- Provide meal and rest periods, *see* Cal. Labor Code § 558 (providing “a civil penalty” for the failure to comply with section 512’s meal and rest break requirements);
- Pay all wages due semi-monthly, *see* Cal. Labor Code § 210 (providing a “civil penalty” for the “fail[ure] to pay the wages of each employee”);
- Furnish accurate itemized wage statements, *see* Cal. Labor Code §§226(a), 226(e), 226.3 (providing an additional “civil penalty” for the failure to provide accurate itemized wage statements).

For the reasons discussed above, each of these claims for statutory penalties is time-barred under a one-year statute of limitations. *See, e.g., Yanira v. Fernandez*, No.

1 C-08-05721 RMW, 2011 WL 4101266, at *2-3 (N.D. Cal. Sept. 8, 2011) (finding
2 PAGA claims for penalties under Labor Code section 558 subject to one-year
3 statute of limitations); *Singer v. Becton, Dickinson & Co.*, No. 08-cv-821 IEG
4 (BLM), 2008 WL 2899825, at * (S.D. Cal. July 25, 2008) (holding claims for
5 penalties pursuant to Labor code sections 210, 226.3, 558, and PAGA are subject to
6 a one-year statute of limitations). As such, those claims must be dismissed.

7 2. Plaintiff's penalty claims under section 2699(f) are time-barred.

8 Plaintiff's PAGA claim for statutory penalties under section 2699(f) is
9 subject to the one-year statute of limitations on actions upon a statute for penalty or
10 forfeiture. A Plaintiff cannot use section 2699(a) to collect premium wages or
11 penalties authorized by an underlying Labor Code section that permits employees,
12 but not the LWDA, such recovery. Cal. Labor Code § 2699(a) (authorizing an
13 "aggrieved employee" to bring an action "on behalf of himself or herself and other
14 current or former employees" to enforce "any provision of this code that provides
15 for a civil penalty to be assessed and collected by the Labor and Workforce
16 Development Agency") (emphasis added); *De Simas v. Big Lots Stores, Inc.*, No.
17 06-6614 SI, 2007 WL 686638, at *5 (N.D. Cal. March 2, 2007) (holding Plaintiff
18 was not an "aggrieved employee" for PAGA purposes where the underlying Labor
19 Code section "does not give the [LWDA] authority to bring suit").

20 Instead, where the LWDA is not authorized to collect a statutory penalty,
21 PAGA may also permit an aggrieved employee to recover a separate statutory
22 penalty for "all provisions of this [Labor] code except those for which a civil
23 penalty is specifically provided," amounting to "one hundred dollars (\$100) for
24 each aggrieved employee per pay period for the initial violation and two hundred
25 dollars (\$200) for each aggrieved employee per pay period for each subsequent
26 violation." Cal. Labor Code § 2699(f)(1)-(2). Plaintiff seeks to collect such PAGA
27 penalties for the following alleged Labor Code violations, none of which permits
28 the LWDA to collect penalties directly;

- 1 • Failing to provide one hour of premium pay for each employee
2 who was deprived a meal or rest period, Cal. Labor Code §
3 226.7;
- 4 • Failing to pay all wages due semi-monthly, Cal. Labor Code §§
5 201, 204;
- 6 • Failing to pay all wages due upon termination, Cal. Labor Code
7 §§ 202, 203.

8 *See McKenzie v. Fed. Exp. Corp.*, 765 F. Supp. 2d 1222, 1231-32 (C.D. Cal. 2011)
9 (“Section 2699.3 plainly provides that a civil action to recover penalties under
10 Section 2699(f) requires a violation of one of the provisions listed under Section
11 2699.5.”); *see also* Cal. Labor Code § 2699.5 (listing Labor code sections 201-204
12 and 226.7).

13 Regardless of the statute of limitations applicable to the underlying Labor
14 Code violations at issue, Plaintiff’s PAGA claim for statutory penalties under
15 section 2699(f) is nonetheless subject to the one-year statute of limitations on
16 actions upon a statute for penalty or forfeiture. *See, e.g., Thomas v. Home Depot*
17 *USA, Inc.*, 527 F. Supp. 2d 1003, 1007 (N.D. Cal. 2007) (holding that “[d]espite the
18 three-year statute of limitations that applies to some of the Labor Code violations . .
19 . a PAGA claim is, by definition, a claim for civil penalties” and thus “the one-year
20 statute of limitations provided in CCP § 340(a)” applies) (internal citations
21 omitted). *Cf. De Simas v. Big Lots Stores, Inc.*, No. 06-6614 SI, 2007 WL 686638,
22 at *5 (N.D. Cal. March 2, 2007). Thus, all of Plaintiff’s claims for penalties under
23 PAGA are time-barred under a one-year statute of limitations, regardless of whether
24 the statute of limitations on the underlying Labor Code violation may be longer.

25 Plaintiff cannot continue to represent the State of California and all injured
26 parties in an action for civil penalties under PAGA given that his individual claims
27 are time-barred. *Thomas*, 527 F. Supp. 2d at 1009 (holding that Plaintiff whose
28

individual claims are time-barred “cannot go forward in a representative capacity with his PAGA claims after the one-year statute of limitations under CCP § 340(a) has run”).

Because each of Plaintiff’s claims for penalties under PAGA is time-barred, Plaintiff’s PAGA claim must be dismissed in its entirety.

VI. CONCLUSION

For the foregoing reasons, Alta-Dena respectfully requests that the Court grant its motion to dismiss all the claims in Plaintiff’s Complaint with prejudice on the ground that Plaintiff fails to plead facts sufficient to support the claims. In the alternative, Alta-Dena requests that the Court grant its motion to dismiss on statute of limitations grounds (1) Plaintiff’s claims under California Labor Code sections 210, 225.5, 226(e), 226.3, 226.4, and 558, and (2) Plaintiff’s claims under PAGA in their entirety and with prejudice.

Dated: June 24, 2013

MARC M. SELTZER
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AMANDA BONN
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By 
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Alta-Dena Certified Dairy, LLC

PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1901 Avenue of the Stars, Suite 950, Los Angeles, California 90067-6029.

On June 24, 2013, I served the foregoing document(s) described as follows:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANT ALTA-DENA CERTIFIED DAIRY, LLC'S MOTION TO DISMISS
PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6) OR TO
STRIKE PURSUANT TO FED. R. CIV. P. 12(f)**

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Timothy B. McCaffrey, Jr.

Natasha Chesler

THE LAW OFFICES OF TIMOTHY B. MCCAFFREY, JR.

11377 West Olympic Boulevard, Suite 500

Los Angeles, California 90064-1683

Tel: (310) 882-6407; Fax: (310) 882-6359

Email: tmccaffrey@tbmlaw.net; nchesler@tbmlaw.net

____BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

X____BY ELECTRONIC MAIL: I caused said document(s) to be served via the Court's CM/ECF system.

Executed on June 24, 2013, at Los Angeles, California.

X____(Federal) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

M.F. Williams

(Type or Print Name)

(Signature)