

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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LIONEL HARPER and DANIEL  
SINCLAIR, individually and on  
behalf of all others similarly  
situated and all aggrieved  
employees,

Plaintiffs,

v.

CHARTER COMMUNICATIONS, LLC,

Defendant.

No. 2:19-cv-00902 WBS DMC

ORDER RE: DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT OR, IN  
THE ALTERNATIVE, SUMMARY  
ADJUDICATION

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Plaintiffs Lionel Harper ("Harper") and Daniel Sinclair  
("Sinclair") brought this putative class action against defendant  
Charter Communications, LLC ("Charter") alleging various  
violations of the California Labor and Business and Professions  
Code. (See First Am. Compl. ("FAC") (Docket No. 45).) Charter  
now moves for summary judgment on all claims or, in the

1 alternative, summary adjudication. (See Def.'s Mot. for Summ. J.  
2 ("Mot. for Summ. J.") (Docket No. 93-1).)

3 I. Factual and Procedural Background

4 Plaintiffs were employed by Charter as small/medium  
5 sized business Account Executives ("AEs") at Charter's Redding,  
6 California location. (Def.'s Statement of Undisputed Facts  
7 ("Def.'s SUF") Nos. 1-2 (Docket No. 93-2).) Harper worked for  
8 Charter from September 18, 2017 to March 12, 2018, and Sinclair  
9 worked for Charter from January 5, 2015 to April 4, 2017. (Id.  
10 Nos. 1,2, 31, 33.)

11 Charter is a broadband connectivity company and cable  
12 operator serving business and residential customers under the  
13 Spectrum brand, among others. (Decl. of Andrea Benner ("Benner  
14 Decl.") ¶ 3 (Docket No. 94).) Charter utilizes AEs to sell its  
15 phone, internet, and television services directly to small- and  
16 medium-sized businesses in an assigned geographic area. (Def.'s  
17 SUF No. 4.) Charter classifies its AEs as "exempt" employees.  
18 (Pls.' Statement of Disputed Facts ("Pls.' SDF") No. 1 (Docket  
19 No. 98-2).) On a typical day when plaintiffs were employed by  
20 Charter, Charter expected AEs to participate in a daily sales  
21 call with their regional sales manager, prepare sales proposals,  
22 cold-call potential customers, set up appointments with  
23 prospective customers and meet them in person, monitor existing  
24 sales, go "door-to-door knocking," and enter data related to  
25 completed sales into one of several online portals, among other  
26 tasks. (Benner Decl. ¶¶ 12-13, Ex. A; Def.'s SUF Nos. 4-6;  
27 Declaration of Zachary Shine ("Shine Decl."), Ex. B, Sinclair  
28 Deposition ("Sinclair Dep.") 142:14-19 (Docket No. 95-3); Ex. A,

1 Harper Deposition ("Harper Dep.") 126:5-127:5 (Docket No. 95-1).)  
2 AEs were also expected to interface with other departments,  
3 including departments that were responsible for installing  
4 equipment at the customer's business or for performing  
5 construction on the customer's property (e.g., to install phone  
6 lines or cables if the property did not already have them), and  
7 to be customers' first point of contact for the services sold up  
8 until installation had been completed. (See Shine Decl., Ex. C,  
9 Benner Deposition ("Benner Dep.") 85:21-87:2; 97:14-98:19.)

10 As salespersons, Charter AEs were eligible to earn  
11 commissions based on how many sales they made each month.  
12 (Def.'s SUF No. 16.) The parties dispute whether Charter ever  
13 provided plaintiffs with a copy of Charter's commission plan or  
14 conveyed its terms to the plaintiffs. (See Pls.' Response to  
15 Def.'s SUF ("Pls." RSUF") Nos. 12-16.)

16 During his employment with Charter, Sinclair had two  
17 managers: Wade Smith and Andrea Benner. (Sinclair Dep. 47:24-  
18 51:6.) Benner was Harper's manager throughout his entire  
19 employment. (Harper Dep. 79:18-80:23.) Since Benner was located  
20 in Medford, Oregon, she did not directly supervise either  
21 Sinclair or Harper's day-to-day activities. (Id.; Sinclair Dep.  
22 47:24-51:6.) Throughout Sinclair and Harper's employment,  
23 Charter required all AEs to meet or exceed certain monthly sales  
24 goals. (Def.'s SUF No. 9.) Both Sinclair and Harper received  
25 "corrective action reports" indicating that they were failing to  
26 meet Charter's expectations related to the AE position during  
27 their employment. (Def.'s SUF Nos. 9-10.) Beginning on August  
28 4, 2016, Sinclair took a leave of absence. (Benner Decl. ¶ 31.)

1 Charter terminated Sinclair on April 4, 2017. (Id.) On  
2 approximately February 3, 2018, Harper took medical leave. (Id.  
3 at ¶ 34.) He remained on leave through his termination on March  
4 12, 2018. (Id.)

5 On September 14, 2018, Harper filed a written notice  
6 with the California Labor and Workforce Development Agency  
7 ("LWDA"), alleging that Charter had committed violations of the  
8 California Labor Code. (See Decl. of Jamin Soderstrom  
9 ("Soderstrom Decl.") ¶ 22 (Docket No. 98-5).) Believing he was  
10 subject to an arbitration agreement with Charter, Harper then  
11 filed a demand for arbitration with JAMS on November 19, 2018.  
12 (Id. at ¶ 23.) The arbitrator subsequently issued a final award  
13 determining that none of Harper's claims were arbitrable. (See  
14 id. ¶ 24.) Harper then filed a complaint alleging the same  
15 violations of the California Labor Code against Charter in Shasta  
16 County Superior Court, on behalf of himself and all similarly  
17 situated individuals. (See Docket No. 1-1.) Charter removed the  
18 case to this court on May 17, 2019. (See Docket No. 1.) On  
19 December 13, 2019, Harper amended his complaint, adding Sinclair  
20 as a named plaintiff pursuant to Rule 15(c). (See FAC.)

21 Plaintiffs allege that Charter erroneously categorized  
22 them as exempt employees because Charter mistakenly categorized  
23 them as "outside salespersons." (FAC ¶ 9.) Plaintiffs claim  
24 that, as a result of this misclassification, Charter failed to  
25 pay them minimum wage in violation of California Labor Code §§  
26 1182.12, 1194, 1197, and 1194.4 (First Claim), failed to pay  
27 overtime wages in violation of California Labor Code §§ 510 and  
28 1197 (Second Claim), failed to provide meal periods or provide

1 premium wages in lieu thereof in violation of California Labor  
2 Code §§ 512 and 226.7 (Third Claim), and failed to provide rest  
3 breaks or pay premium wages in lieu thereof in violation of  
4 California Labor Code § 226.7 (Fourth Claim). (See generally  
5 FAC.) Plaintiffs further claim that Charter unlawfully  
6 calculated, deducted, and failed to pay commission wages under  
7 California Labor Code §§ 204, 221, 223, 224, and 2751 (Fifth  
8 Claim), failed to provide accurate wage statements in violation  
9 of California Labor Code § 226 (Sixth Claim), failed to pay all  
10 wages owed upon termination in violation of California Labor Code  
11 § 203 (Seventh Claim), failed to provide timely and complete  
12 copies of employment records in violation of California Labor  
13 Code §§ 226, 432, and 1198.5 (Eighth Claim), violated  
14 California's Unfair Competition Law ("UCL") under California  
15 Business and Professions Code § 17200 (Ninth Claim), and violated  
16 the California Private Attorney General Act ("PAGA"), Cal. Labor  
17 Code § 2698, et seq. (Tenth Claim).

## 18 II. Legal Standard

19 Summary judgment is proper "if the movant shows that  
20 there is no genuine dispute as to any material fact and the  
21 movant is entitled to judgment as a matter of law." Fed. R. Civ.  
22 P. 56(a). A material fact is one that could affect the outcome  
23 of the suit, and a genuine issue is one that could permit a  
24 reasonable jury to enter a verdict in the non-moving party's  
25 favor. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986).

26 The party moving for summary judgment bears the initial  
27 burden of establishing the absence of a genuine issue of material  
28 fact and can satisfy this burden by presenting evidence that

1 negates an essential element of the non-moving party's case.

2 Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

3 Alternatively, the movant can demonstrate that the non-moving  
4 party cannot provide evidence to support an essential element  
5 upon which it will bear the burden of proof at trial. Id. Where  
6 "the case turns on a mixed question of fact and law and the only  
7 disputes relate to the legal significance of undisputed facts,  
8 the controversy collapses into a question of law suitable to  
9 disposition on summary judgment." Thrifty Oil Co. v. Bank of Am.

10 Nat'l Tr. & Sav. Ass'n, 322 F.3d 1039, 1046 (9th Cir. 2003).

11 "Where the record taken as a whole could not lead a rational  
12 trier of fact to find for the non-moving party, there is no  
13 genuine issue for trial." Matsuhita Elec. Indus. Co. v. Zenith  
14 Radio Corp., 475 U.S. 574, 587 (1986). Any inferences drawn from  
15 the underlying facts must, however, be viewed in the light most  
16 favorable to the party opposing the motion.<sup>1</sup> See id.

17 <sup>1</sup> Charter makes several evidentiary objections to the  
18 Declaration of Jamin S. Soderstrom and its attachments, the  
19 declaration of Lionel Harper, and the declaration of Daniel  
20 Sinclair on the grounds that the statements by Mr. Soderstrom,  
21 Harper, and Sinclair, as well as their attached exhibits, lack  
22 foundation, are hearsay, are speculative, or are irrelevant.  
23 (See Docket No. 103-1.) Plaintiffs similarly object to portions  
24 of the Declaration of Andrea Benner and its attachments. (See  
25 Docket No. 98-27.) The Ninth Circuit has long held that "to  
26 survive summary judgment, a party does not necessarily have to  
27 produce evidence in a form that would be admissible at trial, as  
28 long as the party satisfies the requirements of Federal Rule of  
Civil Procedure 56." Fraser v. Goodale, 342 F.3d 1032, 1036-37  
(9th Cir. 2003.) Moreover, "[a]s a practical matter, the court  
finds this entire exercise of considering evidentiary objections  
on a motion for summary judgment to be futile and  
counterproductive." Burch v. Regents of University of  
California, 433 F.Supp.2d 1110, 1122 (E.D. Cal. 2006) (Shubb,  
J.). Accordingly, if Charter or plaintiffs wish to raise these  
evidentiary objections, they may do so at trial.

1     III. Discussion

2             A.     Claims for Failure to Pay Minimum Wage, Failure to Pay  
3                     Overtime, Failure to Provide Meal Periods, and Failure  
4                     to Provide Rest Periods

5             Charter first argues that plaintiffs' First (Minimum  
6     Wage), Second (Overtime), Third (Meal Periods), and Fourth (Rest  
7     Periods) claims fail as a matter of law because California's wage  
8     and hour laws, including minimum wage and overtime pay  
9     requirements, as well as meal and rest period requirements, do  
10    not apply to "outside salespersons." (See Mot. for Summ. J. at  
11    11-18.) Charter also argues that Sinclair's First through Fourth  
12    claims are time-barred because he last worked for Charter more  
13    than three years before he filed suit. The court will address  
14    Charter's statute-of-limitations argument before turning to the  
15    merits of its argument that Harper and Sinclair were properly  
16    classified as "outside salespersons."

17             1.     Statute of Limitations

18             The applicable limitations period for claims for  
19     damages under the California Labor Code is three years. See Cal.  
20     Code Civ. P. § 338. Charter argues that Sinclair's claims are  
21     time-barred because the last day Sinclair actually performed work  
22     for Charter was July 16, 2016, but Sinclair did not file suit  
23     until December 13, 2019. (See Mot. for Summ. J. at 21.)

24             Plaintiffs argue that, because Sinclair was among the  
25     putative class members referenced in Harper's original complaint,  
26     and Sinclair was added as a party plaintiff pursuant to Rule  
27     15(c) when plaintiffs filed the First Amended Complaint on  
28     December 13, 2019, Sinclair's claims relate back to Harper's  
   original pleading. See In re Syntex Corp. Sec. Litig., 95 F.3d

1 922, 935-36 (9th Cir. 1996).

2 "An amendment adding a party plaintiff [under Rule  
3 15(c)] relates back to the date of the original pleading only  
4 when: (1) the original complaint gave the defendant adequate  
5 notice of the claims of the newly proposed plaintiff; (2) the  
6 relation back does not unfairly prejudice the defendant; and (3)  
7 there is an identity of interests between the original and newly  
8 proposed plaintiff." Id. "In deciding whether an amendment  
9 relates back to the original claim, notice to the opposing party  
10 of the existence and involvement of the new plaintiff is the  
11 critical element." Avila v. INS, 731 F.2d 616, 620 (9th Cir.  
12 1984). Whether the defendant had adequate notice of the newly  
13 proposed plaintiff's claims often turns on "whether the original  
14 complaint clearly stated that the plaintiff sought to represent  
15 others." Allen v. Similasan Corp., 96 F. Supp. 3d 1063, 1069  
16 (S.D. Cal. 2015) (citations omitted).

17 The court finds that Harper's complaint gave defendant  
18 adequate notice of Sinclair's claims because it sought to pursue  
19 class claims. While an individual complaint may not provide  
20 adequate notice that the plaintiff seeks claims on behalf of a  
21 class, see, e.g., Corns v. Laborers Int'l Union of N. Am., No.  
22 09-cv-4403 YGR, 2014 WL 1319363, at \*5 (N.D. Cal. Mar. 31, 2014),  
23 courts have uniformly found that a class action complaint  
24 provides defendants adequate notice of other class members'  
25 claims, see, e.g., Lith v. Iheartmedia + Entm't, No. 1:16-cv-066  
26 LJO SKO, 2016 WL 4000356, at \*6 (E.D. Cal. July 25, 2016). Here,  
27 Harper's complaint unequivocally sought to bring a class action.  
28 (See Docket No. 1-1 (commencing action with "Class and PAGA

1 Action Complaint").) Defendant even acknowledged in its notice  
2 of removal that the putative class included 1083 account  
3 executives employed by defendant beginning in November 2014, of  
4 which Sinclair was one. (See Docket No. 1 at 11.)

5 The court also finds that an identity of interests  
6 exists between Sinclair and Harper. For there to be the required  
7 identity of interests, Harper and Sinclair must be "similarly  
8 situated." Immigrant Assistance Project of L.A. Cty. Fed'n of  
9 Labor (AFL-CIO) v. INS, 306 F.3d 842, 858 (9th Cir. 2002).

10 Plaintiffs are "similarly situated" when "[t]he circumstances  
11 giving rise to the[ir] claims remain[ ] the same [under the  
12 amended complaint] as under the original complaint. Raynor Bros.  
13 v. Am. Cyanimid Co., 695 F.2d 382, 384 (9th Cir. 1982). Here,  
14 Sinclair and Harper held the same position at Charter, had some  
15 of the same supervisors and colleagues, and were subject to the  
16 same allegedly unlawful policies and practices. These policies  
17 and procedures give rise to the same allegations of violations of  
18 the California Labor Code, California's UCL, and PAGA in both the  
19 original and operative complaints. (Compare Compl. (Docket No.  
20 1-1) with FAC (Docket No. 45).) Because the court finds an  
21 identity of interests between Harper and Sinclair, the relation  
22 back of Sinclair's claims will not prejudice Charter. Raynor  
23 Bros. v. Am. Cyanimid Co., 695 F.2d 382, 384 (9th Cir. 1982)

24 (holding when new and former plaintiffs "have sufficient identity of  
25 interests, relation back of the amendment is not prejudicial to the  
26 defendant"); Besig v. Dolphin Boating & Swimming Club, 683 F.2d  
27 1271, 1278 (9th Cir. 1982) (holding where the relief sought remains  
28 the same "the defendant is not prejudiced because his response to

1 the action requires no revision"); Immigrant Assistance, 305 F.3d at  
2 858 ("The addition of new plaintiffs who are similarly situated to  
3 the original plaintiffs therefore did not cause the INS any  
4 prejudice in the present case."). Sinclair's claims as alleged in  
5 the operative complaint therefore relate back to Harper's original  
6 complaint, which was filed on May 3, 2019.

7 Plaintiffs further argue that the court should apply  
8 principles of equitable tolling to suspend the running of any  
9 applicable statutes of limitations after November 19, 2018. (See  
10 Pls.' Opp'n at 39-46.) They base their argument on a series of  
11 events that began over a year before Harper filed his original  
12 complaint in Shasta County Superior Court. On April 19, 2018,  
13 approximately one month after Harper was terminated by Charter,  
14 Harper contacted JAMS, the company listed in an arbitration  
15 agreement Charter had signed with Harper, to request non-binding  
16 mediation. (Harper Decl. ¶ 22.)

17 Charter refused to participate in mediation with Harper  
18 in May 2018. (Id.) On July 3, 2018, Charter's counsel sent  
19 plaintiffs' counsel a letter attaching a copy of the arbitration  
20 agreement Harper had signed, which required arbitration with JAMS.  
21 (See Soderstrom Decl. ¶ 19, Ex. 19.) Charter asked Harper to comply  
22 with his contractual obligations to arbitrate, and stated that it  
23 would move to compel arbitration if Harper elected to file a  
24 complaint in court. (See id.) Harper subsequently filed a notice  
25 of Charter's alleged violations of the California Labor Code with  
26 the California LWDA, then filed an arbitration demand with JAMS on  
27 November 19, 2018, in compliance with his arbitration agreement with  
28 JAMS. (See id. at ¶¶ 22-23.) Because the arbitration agreement

1 included a mutual delegation option, Harper's arbitration demand  
2 asked the arbitrator to address several threshold issues before  
3 reaching the merits of the claim. (See id.) Harper's arbitration  
4 demand stated that Harper intended to file the same claims on an  
5 individual, class, and representative PAGA basis in court to the  
6 extent the arbitrator determined some or all of the claims were not  
7 arbitrable. (See id.)

8 The arbitrator issued a final award on April 25, 2019,  
9 dismissing the arbitration on the grounds that the entire  
10 arbitration agreement was null and void and that none of Harper's  
11 claims was arbitrable. (See id. at ¶ 24.) Harper filed his  
12 complaint shortly thereafter, on May 3, 2019. (See id.)

13 Plaintiffs argue that equitable tolling is automatic  
14 "where exhaustion of an administrative remedy is mandatory prior to  
15 filing suit." McDonald v. Antelope Valley Cmty. Coll. Dist., 45  
16 Cal. 4th 88, 101 (Cal. 2008). The parties dispute whether Harper  
17 was required to pursue arbitration before filing suit. (See Mot.  
18 for Summ. J. at 34; Pls.' Opp'n at 40.) However, the court need not  
19 address the question of whether Harper was required to arbitrate his  
20 claims because equitable tolling may still apply "regardless of  
21 whether the exhaustion of one remedy is a prerequisite to the  
22 pursuit of another." Elkins v. Derby, 12 Cal. 3d 410, 414 (Cal.  
23 1974). Equitable tolling applies in such situations when three  
24 elements are present: (1) timely notice, (2) lack of prejudice to  
25 the defendant, and (3) reasonable and good faith conduct by the  
26 plaintiff. See Saint Francis Mem'l Hosp. v. State Dep't of Pub.  
27 Health, 9 Cal. 5th 710, 724 (2020); Elkins, 12 Cal. 3d at 414.

28 Here, Charter had notice of Harper's allegations and

1 claims, and of his intent to pursue them on behalf of other  
2 employees in California and the Sate, as early as September 14,  
3 2018, when Harper filed and mailed the PAGA notice, and certainly by  
4 the time Harper filed his demand for arbitration, in which he  
5 indicated his intent to pursue his claims in court should the  
6 arbitrator determine that some or all of his claims were not  
7 arbitrable. (See Soderstrom Decl. ¶¶ 22-23.)

8 Under the second element, courts' "core focus" is  
9 "whether application of equitable tolling would prevent the  
10 defendant from defending a claim on the merits." Saint Francis, 9  
11 Cal. 5th at 728 (citing Addison v. California, 21 Cal. 3d 313, 318  
12 (Cal. 1978)). Given that Harper's claims in his demand for  
13 arbitration were the same as his claims filed in court, and that  
14 Harper indicated his intention to pursue his claims on behalf of a  
15 class, the court does not "see how tolling [the] statute of  
16 limitations would undermine the [defendant's] ability to defend the  
17 propriety of the same penalty in superior court." Id. Indeed, by  
18 May 17, 2019, just two weeks after Harper filed his claims in court,  
19 Charter had already identified 1,083 putative class members and  
20 aggrieved employees who had been employed by Charter in California  
21 since November 19, 2014. (See Docket No.1, at 11.)

22 Finally, the court finds here that Harper acted  
23 reasonably and in good faith. See Saint Francis, 9 Cal. 5th at 724.  
24 Harper filed his PAGA notice on September 14, 2018, just ten days  
25 after receiving his wage statements and some of his personnel  
26 records from Charter. (See Soderstrom Decl. ¶ 21.) Harper filed  
27 his arbitration demand two months later, and filed his suit in  
28 Shasta Superior Court shortly after the arbitrator issued a final

1 award. (See id. at ¶¶ 23-24.) These actions were each “objectively  
2 reasonable under the circumstances” and “subjectively in good faith”  
3 as Harper believed himself to be bound to an arbitration agreement  
4 with Charter that required arbitration with JAMS and did not  
5 unreasonably delay. See Saint Francis, 9 Cal. 5th at 724.

6 The court therefore finds that equitable tolling of the  
7 statute of limitations applicable to the claims in Charter’s  
8 original complaint to November 19, 2018 (the date on which Harper  
9 filed his arbitration demand with JAMS) is appropriate. See id.  
10 Because Sinclair’s claims relate back to the claims contained in  
11 Harper’s original complaint, the applicable date for determining  
12 whether Sinclair complied with the statute of limitations is  
13 November 19, 2018.

14 Accordingly, because the applicable statute of  
15 limitations for claims for damages under the Labor Code is three  
16 years, and Sinclair was still working for Charter on November 19,  
17 2015, the court will not grant summary judgment against Sinclair on  
18 his First through Fourth claims for damages on the grounds that his  
19 claims were not timely filed. As Sinclair acknowledges, however,  
20 he is time-barred from seeking penalties under his first four  
21 claims, as the last day he worked for Charter was April 4, 2017, and  
22 statutory penalties are subject to a one-year limitations period.  
23 See Cal. Code Civ. P. § 340; (Pls.’ Opp’n at 46). The court will  
24 therefore grant Charter’s request for summary adjudication as to  
25 Sinclair’s First, Second, Third, and Fourth Claims for statutory  
26 penalties.

## 27 2. Outside Salesperson Exemption

28 Under California law, outside salespersons are exempt

1 from overtime, minimum wage, meal period, and rest period  
2 requirements. California Labor Code § 1171 sets forth that "the  
3 provisions of [the Labor Code's Chapter on Wages, Hours, and  
4 Working Conditions] shall apply to and include men, women and  
5 minors employed in any occupation, trade, or industry, whether  
6 compensation is measured by time, piece, or otherwise, but shall  
7 not include any individual employed as an outside salesman . . .  
8 ." Cal. Lab. Code § 1171 (emphasis added). Under California  
9 regulations, an "outside salesperson" is defined as "any person,  
10 18 years of age or over, who customarily and regularly works more  
11 than half the working time away from the employer's place of  
12 business selling tangible or intangible items or obtaining orders  
13 or contracts for products, services or use of facilities." Cal.  
14 Code Regs. tit. 8, § 11070.

15           Whether someone is an outside salesperson under the  
16 California labor laws is a mixed question of law and fact,  
17 although it often "turns on a detailed, fact-specific  
18 determination." Ramirez v. Yosemite Water Co., 20 Cal. 4th 785,  
19 790 (Cal. 1999). "[T]he assertion of an exemption from the  
20 overtime laws is considered to be an affirmative defense, and  
21 therefore the employer bears the burden of proving the employee's  
22 exemption." Id. (citations omitted).

23           According to the California Supreme Court, the  
24 determination of whether an employee is an "outside salesperson"  
25 entails a "quantitative approach, looking to the actual hours  
26 spent on sales activity to determine if an employee is primarily  
27 a salesperson." Id. at 801. This determination is guided by  
28 practical inquiries into the actual nature of the requirements of

1 the employee's job. See id. Courts may not rely solely on  
2 either "the number of hours that the employer, according to its  
3 job description or its estimate, claims the employee should be  
4 working in sales," or "the actual average hours the employee  
5 spent on sales activity." Id. at 802 (emphasis added). As the  
6 California Supreme Court has explained:

7       On the one hand, if hours worked on sales  
8       were determined through an employer's job  
9       description, then the employer could make an  
10      employee exempt from overtime laws solely by  
11      fashioning an idealized job description that  
12      had little basis in reality. On the other  
13      hand, an employee who is supposed to be  
14      engaged in sales activities during most of  
15      his working hours and falls below the 50  
16      percent mark due to his own substandard  
17      performance should not thereby be able to  
18      evade a valid exemption. A trial court, in  
19      determining whether the employee is an  
20      outside salesperson, must steer clear of  
21      these two pitfalls by inquiring into the  
22      realistic requirements of the job. In so  
23      doing, the court should consider, first and  
24      foremost, how the employee actually spends  
25      his or her time. But the trial court should  
26      also consider whether the employee's  
27      practice diverges from the employer's  
28      realistic expectations, whether there was  
29      any concrete expression of employer  
30      displeasure over an employee's substandard  
31      performance, and whether these expressions  
32      were themselves realistic given the actual  
33      overall requirements of the job.

34 Id.

35       "[O]nly time 'away from the employer's place of  
36      business' that is spent on sales activity, i.e., 'selling  
37      tangible or intangible items or obtaining orders or contracts for  
38      products, services or use of facilities,' counts towards the 50%  
39      mark needed to establish the [outside salesperson] exemption."  
40 Spallino v. Charter Comms. Inc., No. ED CV 17-0982-DOC (SPx),  
41 2018 WL 6011541, at \*8 (C.D. Cal. June 5, 2018) (quoting 8 Cal.

1 Code Regs. § 11070). Activities performed inside the office do  
2 not count toward the exemption even if they are direct sales or  
3 sales-related activities. See Duran v. United States Bank Nat'l  
4 Assn., 59 Cal. 4th 1, 26 (Cal. 2014) ("Unlike the corresponding  
5 federal provision, California's wage order definition 'takes a  
6 purely quantitative approach' and focuses exclusively on whether  
7 the employee spends more than half of the workday engaged in  
8 sales activities outside the office." (emphasis added) (quoting  
9 Ramirez, 20 Cal. 4th at 797)). California law also does not  
10 treat activities that are "incidental" to sales activities as  
11 exempt, even if they are performed outside the office. Ramirez,  
12 20 Cal. 4th at 796-801.

13 Here, no party appears to contend that Harper or  
14 Sinclair actually spent more than 50% of their time away from the  
15 employer's place of business engaged in sales activities. (See  
16 Def.'s SUF Nos. 10-11; Pls.' SDF Nos. SDF Nos. 19-22.) Rather,  
17 Charter argues that plaintiffs were appropriately classified as  
18 outside salespersons because, during their employment, Charter  
19 expected AEs to "customarily and regularly" spend at least 50% of  
20 their time in the field conducting sales activities. (Mot. for  
21 Summ. J. at 3; Def.'s SUF No. 4.) If plaintiffs were spending  
22 less than 50% of their time outside the office participating in  
23 sales activities, Charter contends, they were not meeting the  
24 realistic requirements of their jobs. Ramirez, 20 Cal. 4th at  
25 802.

26 Charter points to several "corrective action reports"  
27 that were issued to plaintiffs as evidence that they were not  
28 living up to Charter's expectations for how much time AEs should

1 be spending outside the office. (See Benner Decl., Ex. I-N.)  
2 However, these corrective action reports were issued based on  
3 plaintiffs' failure to meet rolling average sales targets,  
4 without regard to the amount of time plaintiffs' spent outside  
5 the office. (See id.) While some of the directives contained in  
6 these reports instructed plaintiffs to focus on activities that  
7 would result in their spending more time outside the office, such  
8 as following more leads or knocking on more doors, other  
9 directives instructed plaintiffs to focus on activities that had  
10 to be done in the office, such as sending their manager their  
11 daily call form. (See id.) None of the corrective action  
12 reports expressly state that plaintiffs were failing to live up  
13 to expectations because they were spending too much time in the  
14 office. (See id.)

15 Charter also emphasizes that it advertises the AE  
16 position as one that will "keep you on the go" and "working door-  
17 to-door." (Benner Decl. ¶ 5.) According to training materials  
18 provided to new AEs in December 2016, on a "typical day," Charter  
19 expects AEs to be outside the office from 10:00 a.m. to 3:00  
20 p.m., or five hours out of the day. (See Benner Decl., Ex. A,  
21 ("December 2016 AE Training Materials") at 41.) Plaintiffs'  
22 former manager similarly testified that "account executives  
23 should spend most of their time in the field." (Benner Dep.  
24 92:1-8, 103:1-11.)

25 But the training materials Charter cites do not  
26 actually specify that Charter expects AEs to be out of the office  
27 more than half the day; while the schedule on a "typical day"  
28 will have AEs out of the office between 10:00 a.m. and 3 p.m.,

1 the schedule does not specify how long a AE's typical day will  
2 last besides saying it will go from "approximately 8:00 a.m." to  
3 "around 5 p.m." (See December 2016 AE Training Materials at 41.)  
4 In fact, both Sinclair and Harper testified that they regularly  
5 were required to work past 5 p.m. and that, contrary to the  
6 training materials emphasized by Charter, they were advised that  
7 the best sales results would be achieved if they were out in the  
8 field selling from 11:00 a.m. to 2:00 or 3:00 p.m., which would  
9 only result in 3-4 hours being spent out of the office selling.  
10 (See Harper Dep. 146:1-25, 163:1-164:11; Sinclair Dep. 97:5-15,  
11 100:25-101:19.) Other training materials produced by Charter  
12 reinforce plaintiffs' testimony, providing testimonials from "the  
13 best" AEs and samples schedules that suggest AEs need not spend  
14 more than 50% of their time outside the office. (See Soderstrom  
15 Decl., Exs. 10, 11.)

16 By contrast, another job description produced by  
17 Charter for "Direct Sales Reps" reveals that Charter expressly  
18 stated that it expected those employees to spend 80% of their  
19 time outside the office. (See Soderstrom Decl., Ex. 21.)  
20 Neither of Charter's "Standards of Performance" for the AE  
21 position in December 2015 or August 2017 indicated that Charter  
22 expected AEs to spend any particular amount of time outside the  
23 office--rather, the expectation simply appears to have been that  
24 AEs would complete a certain number of sales each month. (See  
25 Benner Decl., Ex. H; Benner Dep. 37:1-18; Soderstrom Decl., Ex.  
26 8.) Plaintiffs have also submitted declarations in which they  
27 explain that, contrary to the testimony of their former manager,  
28 Benner, no person at Charter, or any document they ever saw at

1 Charter, expected or required them to spend more than 50% of  
2 their work hours outside the office selling Charter's services.  
3 (See Harper Decl. ¶¶ 6, 10; Sinclair Decl. ¶¶ 6, 10.)

4 Viewing the evidence in the light most favorable to the  
5 non-moving parties, the court finds that genuine issues of  
6 material fact exist as to whether Charter actually expected its  
7 AEs to spend more than 50% of their time outside the office,  
8 engaged in sales or sales-related activities, at the time of  
9 plaintiffs' employment. See Celotex, 477 U.S. at 322-23.

10 Furthermore, even if Charter did have such an  
11 expectation, a genuine issue of fact would exist as to whether  
12 such an expectation was reasonable in light of the duties  
13 plaintiffs were expected to complete as part of their roles as  
14 AEs. See Ramirez, 20 Cal. 4th at 802 (directing that while  
15 courts should "consider, first and foremost, how the employee  
16 actually spends his or her time," they "should also consider  
17 whether the employee's practice diverges from the employer's  
18 realistic expectations, whether there was any concrete expression  
19 of employer displeasure over an employee's substandard  
20 performance, and whether these expressions were themselves  
21 realistic given the actual overall requirements of the job"  
22 (emphasis added)). The evidence shows that many of the tasks  
23 inherent to plaintiffs' job required them to be in the office.  
24 AEs were required to attend a daily sales call at the start of  
25 each day that prevented them from going out into the field.  
26 (Harper Dep. 149:9-17; Sinclair Dep. 98:25-99:14; Benner Dep.  
27 106:20-110:11.) This call typically lasted between 15 minutes  
28 and an hour, depending on how long the manager let the meeting

1 run. (See id.)

2 AEs were also required to spend significant amounts of  
3 time "scrubbing" a list of businesses provided to them by Charter  
4 to target each month (known as the "leads list"). (Harper Dep.  
5 102:5-104:15; Sinclair Dep. 277:20-278:15.) The scrubbing  
6 process required AEs to go through the leads list and determine  
7 which businesses were not viable targets, because they had  
8 closed, already had Charter service, or were listed at an address  
9 that was actually just a vacant lot or building. (See id.)  
10 Sinclair and Harper both testified that this process required  
11 them to work at their desk, because much of it involved  
12 researching businesses online, searching Google Maps, looking  
13 through Charter databases, or conferring with other AEs. (Id.)

14 Once AEs had verified that a business listed on the  
15 leads list was a valid lead, they had to research the business to  
16 determine how many clients it serviced, as well as what phone,  
17 internet, or telephone service the business already had, to  
18 create a sales proposal tailored to the specific business' needs.  
19 (Harper Dep. 117:14-119:16; Sinclair Dep. 133:2-134:9.) Harper  
20 and Sinclair testified that this process also largely required  
21 them to be at their desk, and estimated that it could take  
22 anywhere from 30 minutes to 3 hours, depending on how complex of  
23 a proposal needed to be prepared. (See id.)

24 After closing a deal with a client, AEs would have to  
25 return to the office to input the order into an online portal.  
26 (Harper Dep. 126:5-127:5; Sinclair Dep. 142:14-19.) Harper  
27 estimated that the input process would take 30 minutes to an  
28 hour. (See id.) The evidence shows that AEs were then expected

1 to be involved with an account up until service had been  
2 completely installed at the client's business. (Harper Dep.  
3 127:16-131:13; Sinclair Dep. 275:5-7; Benner Dep. 91:11-100:13.)  
4 While other departments were in charge of the actual installation  
5 and any construction that had to occur at the customer's business  
6 and/or property (e.g., installing cable or phone lines), AEs were  
7 expected to be the first point of contact would have to consult  
8 with these other departments to troubleshoot issues and would be  
9 expected to field calls from customers who viewed them as a point  
10 of contact for Charter. (Id.)

11 According to Harper, AEs would frequently have to work  
12 out logistical issues with customers regarding work that other  
13 departments were tasked with doing, like scheduling installs or  
14 required construction, all of which would be done from the  
15 office. (Id.; Benner Dep. 91:11-100:13 (explaining that AEs were  
16 expected to be the "main point of contact" with post-sale  
17 customers during the installation process and "remain available  
18 to the customer throughout the installation process").)  
19 Sinclair also testified that up until the day after an install  
20 was completed, AEs were expected to field calls from clients  
21 experiencing issues and investigate what their issue was so that  
22 the AE could refer the issue to the proper Charter department.  
23 (Sinclair Dep. 144:1-145:6.) Based on these tasks, Sinclair and  
24 Harper testified that they spent 70% and approximately 60-65% of  
25 their time at their desks, respectively. (Sinclair Dep. 47:10-  
26 16; Harper Dep. 235:19-254:12.)

27 Ultimately, the determination of whether Harper and  
28 Sinclair can appropriately be classified as "outside

1 salespersons" who are exempt from California wage and hour laws  
2 is a fact-intensive question. See Ramirez, 20 Cal. 4th at 790.  
3 Given the conflicting testimonial and documentary evidence as to  
4 Charter's expectations regarding how many hours plaintiffs should  
5 have spent outside the office, plaintiffs' testimony regarding  
6 the demands of their job and why they spent a majority of their  
7 time at the office, and viewing the facts in the light most  
8 favorable to plaintiffs as the non-moving parties, a reasonable  
9 juror could find that plaintiffs did not qualify as "outside  
10 salespersons." See Spallino, 2018 WL 6011541, at \*9 (denying  
11 summary judgment as to plaintiff's wage and hour claims because  
12 there was a disputed issue of fact as to whether Time Warner  
13 Cable Account Executive was an "outside salesperson"); T.W. Elec.  
14 Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 631  
15 (9th Cir. 1987) ("If the nonmoving party produces direct evidence  
16 of a material fact, the court may not assess the credibility of  
17 this evidence nor weigh against it any conflicting evidence  
18 presented by the moving party.").

19 Accordingly, there is a disputed issue of material fact  
20 underlying whether plaintiffs were protected by California's  
21 minimum wage, overtime pay, meal period, and rest period  
22 requirements. The court will therefore deny Charter's motion for  
23 summary judgment as to plaintiffs' First through Fourth Claims  
24 (except for Sinclair's First through Fourth Claims for penalties,  
25 as discussed above).<sup>2</sup>

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26 <sup>2</sup> Plaintiffs present an alternative argument that, even  
27 if the court were to find that Charter had properly classified  
28 AEs as outside salespersons after they had completed their  
initial training, the court should consider AEs' training weeks

1           B.    Commission-Based Claims

2           Plaintiffs' Fifth Claim alleges that Charter unlawfully  
3   calculated, deducted, and paid commission wages in violation of  
4   California Labor Code §§ 2751(b), 204, 221, 223, and 224. (See  
5   FAC ¶¶ 42-48.) As a threshold matter, Charter again argues that  
6   Sinclair's commission-based claims are time-barred based on the  
7   Labor Code's three-year statute of limitations. (See Mot. for  
8   Summ. J. at 25.) For the reasons discussed above, the court  
9   finds this argument to be without merit.

10          Charter also raises several substantive arguments as to  
11   why summary adjudication is appropriate as to each alleged  
12   statutory violation in the operative complaint. The court will  
13   address each of Charter's arguments in turn:

14               1.   California Labor Code § 2751(b)

15          California Labor Code § 2751(b) states that, where an  
16   employee is paid commissions, "the employer shall give a signed  
17   copy of the [commission plan] to every employee who is a party  
18   thereto and shall obtain a signed receipt for the contract from  
19   each employee." Cal. Labor Code § 2751(b). Charter argues that  
20   plaintiffs' claim fails as a matter of law because § 2751(b) no  
21   longer provides a private right of action. (See Mot. for Summ.  
22   J. at 22.) "Prior to January 2012, California Labor Code § 2752  
23   provided that '[a]ny employer who does not employ an employee

24   \_\_\_\_\_

25   separately and find that, at the least, Charter had misclassified  
26   plaintiffs during training. (See Pls.' Opp'n at 12-15.) Because  
27   the court finds that genuine issues of material fact exist as to  
28   whether AEs were properly classified as outside salespersons  
  throughout their entire employment, it need not consider  
  plaintiffs' training weeks separately from their non-training  
  weeks.

1 pursuant to a written contract as required by Section 2751 shall  
2 be liable to the employee in a civil action for triple damages.'" Swafford v. Int'l Bus. Machines Corp., 383 F. Supp. 3d 916, 934  
3 (N.D. Cal. 2019). But "[w]hen the California Legislature amended  
4 Section 2751 in 2011, it repealed Section 2752." Beard v. Int'l  
5 Bus. Machines Corp., No. C 18-06783 WHA, 2019 WL 1516692 (N.D.  
6 Cal. Apr. 7, 2019) (citing Stats. 2011, ch. 556, § 3). Other  
7 district courts interpreting § 2751(b) have concluded that the  
8 California's repeal of § 2752 removed any private right of action  
9 under the statute. See id.; Swafford, 383 F. Supp. 3d at 934.  
10 This court agrees with those courts, and finds that plaintiffs  
11 have no private right of action under § 2751. The court will  
12 therefore grant Charter's motion for summary adjudication as to  
13 plaintiffs' claim that Charter violated Labor Code § 2751(b).  
14

15           However, while § 2751 does not provide plaintiffs with  
16 a private right of action, the court will still assess whether a  
17 genuine dispute of material fact exists, as a violation of  
18 § 2751(b) may still form the basis of Harper's PAGA claim and  
19 serve as a predicate violation for plaintiffs' claims under the  
20 UCL, as discussed below. See Beard v. Int'l Bus. Machines Corp.,  
21 No. C 18-06783 WHA, 2020 WL 1812171, at \*9-10 (N.D. Cal. Apr. 9,  
22 2020) (denying employer summary judgment on UCL claim predicated  
23 on violation of Section 2751); Keenan v. Cox Commc'ns Cal., LLC,  
24 No. 18-cv-129-MMA (LL), 2019 WL 3288939, at \*9 (S.D. Cal. July  
25 22, 2019) (stating that monetary relief for violations of § 2751  
26 is only available in the form of civil penalties under PAGA)  
27 (overruled on other grounds).

28           Charter argues that it complied with § 2751(b) by

1 providing plaintiffs with their commission plans through an  
2 online portal known as "Synygy" and by requiring them to check a  
3 box acknowledging receipt shortly after they were hired. (See  
4 Mot. for Summ. J. at 23.) In support of its argument, Charter  
5 presents documents related to a Synygy training course that it  
6 asserts plaintiffs took upon being hired by Charter, as well as  
7 statements contained in Benner's declaration. (See Benner Decl.  
8 ¶¶ 17, 20-23, Ex. G.) Both Benner's declaration and the Synygy  
9 training documents state that, in the course of the training, new  
10 AEs were required to review their commission plan and check a box  
11 acknowledging that they had read and understood it, and that they  
12 agreed to comply with its terms. (See id.) According to Benner,  
13 the only way new AEs could "clear" the acknowledgment page and  
14 gain access to compensation information in the Synygy portal was  
15 to click the acknowledge button. (See id.) Benner also states  
16 that another Charter employee has searched Synygy's  
17 acknowledgement data and found that Harper electronically  
18 acknowledged receipt of his commission plan on September 29,  
19 2017, at 2:36 p.m. (See id.)

20 Plaintiffs dispute that they ever completed the Synygy  
21 training described in the training documents and by Benner. (See  
22 Harper Decl. ¶ 19; Sinclair Decl. ¶ 17; Soderstrom Decl., Ex.  
23 15.) Neither plaintiff recognized the Synygy training guide when  
24 it was presented to them, and a transcript of the training titles  
25 Harper completed during his training does not mention any  
26 training related to the Synygy portal. (See id.) Neither  
27 plaintiff recognized the commission plans Charter asserts they  
28 reviewed and signed, either. (Sinclair Dep. 75:9-76:17; Harper

1 Dep. 84:9-86:16.) Both Harper and Sinclair testified that they  
2 were never presented with copies of the commission plans;  
3 instead, the only knowledge they had of Charter's commission  
4 plans came from conversations they had with others in the office  
5 or, in Sinclair's case, from a one-page summary provided to him  
6 by a Charter employee. (Sinclair Dep. 77:9-78:5; Harper Dep.  
7 86:21-87:22.)

8 The only evidence that either plaintiff signed or  
9 acknowledged receipt of their commission plans comes from  
10 Benner's statement that AEs had to acknowledge receipt  
11 electronically before they could access the Synegy portal to view  
12 their compensation information, and her statement that Charter is  
13 in possession of data showing Harper electronically acknowledged  
14 receipt of his commission plan. (See Benner Decl. ¶¶ 17, 20-23.)  
15 However, both plaintiffs state in their declarations that there  
16 were multiple ways AEs could view and keep track of their  
17 commissions besides logging into Synegy, including other online  
18 portals, via email from their managers, phone discussions, sales  
19 meetings, and on their wage statements. (See Pls.' SDF 28;  
20 Harper Decl. ¶ 15; Sinclair Decl. ¶ 13.) And Charter has not  
21 produced the data showing electronic acknowledgement to which  
22 Benner refers, or any commission plans signed by either  
23 plaintiff. (See (See Pls.' SDF 30-34; Soderstrom Decl. ¶ 4;  
24 Benner Decl., Ex. F.) In other words, there is no documentary  
25 evidence the court can rely on that conclusively shows that  
26 plaintiffs knowingly agreed to Charter's commission plan,  
27 acknowledged receipt of the plan, or were provided with a signed  
28 copy of the plan, and the testimony and declarations of the

1 parties are in direct conflict. The court therefore finds that a  
 2 genuine issue of material fact exists as to whether Charter  
 3 failed to provide plaintiffs with signed copies of their  
 4 commission plans or failed to obtain a signed receipt from each  
 5 plaintiff in violation of § 2751. See Celotex, 477 U.S. at 322-  
 6 23.

### 7 3. California Labor Code § 204

8 Plaintiffs claim that Charter violated California Labor  
 9 Code § 204 by adopting an unlawful monthly commission pay period  
 10 and paying earned commissions late. (See FAC ¶¶ 46; Pls.' Opp'n  
 11 at 25.) Section 204 states in pertinent part:

12 All wages . . . earned by any person in any  
 13 employment are due and payable twice during  
 14 each calendar month, on days designated in  
 15 advance by the employer as the regular  
 16 paydays. Labor performed between the 1st  
 17 and 15th days, inclusive, of any calendar  
 18 month shall be paid for between the 16th and  
 the 26th day of the month during which the  
 labor was performed, and labor performed  
 between the 16th and the last day,  
 inclusive, of any calendar month, shall be  
 paid for between the 1st and 10th day of the  
 following month.

19 Cal. Labor Code § 204(a). "In other words, all earned wages,  
 20 including commissions, must be paid no less frequently than  
 21 semimonthly." Peabody v. Time Warner Cable, Inc., 59 Cal. 4th  
 22 662, 668 (Cal. 2014) (emphasis in original).

23 Charter argues that summary judgment is appropriate  
 24 because its commission plan complies with § 204. (See Mot. for  
 25 Summ. J. at 24.) According to Charter, AEs earn commissions on a  
 26 monthly basis, once they have met several criteria set out in  
 27 Charter's commission plan. (See Benner Decl. ¶¶ 17, 19, Exs. D,  
 28

1 F.) Charter contends that numerous courts and the California  
2 Department of Labor Standards Enforcement ("DLSE")--the  
3 California agency empowered to enforce California's labor laws,  
4 including wage orders--have recognized that "[c]ommission programs  
5 which calculate the amount owed once a month (or less often) are  
6 common." DLSE Opn. Letter No 2202.12.09-2 (2002); see also  
7 Chavez v. Time Warner Cable, LLC, 728 F. App'x 645, 648 (9th Cir.  
8 2018) ("such agreements are permitted under California law and do  
9 not offend § 204").

10 Plaintiff argues that Charter improperly conflates the  
11 determination of when a commission is earned with the  
12 determination of when an earned commission is required to be  
13 paid. "A commission is 'earned' when the employee has perfected  
14 the right to payment; that is, when all of the legal conditions  
15 precedent have been met. Such conditions precedent are a matter  
16 of contract between the employer and employee, subject to various  
17 limitations imposed by common law or statute." Koehl v. Verio,  
18 Inc., 142 Cal. App. 4th 1313, 1335, (1st Dist. 2006) (quoting  
19 DLSE Opn. Letter No. 1999.01.09, p.2). While the DLSE and  
20 numerous courts interpreting § 204 have concluded that a  
21 commission plan that determines how much an employee has earned  
22 in commission once per month does not violate § 204, see Peabody,  
23 59 Cal. 4th at 668, once the determination that an employee has  
24 earned commissions has been made, that employee must be paid  
25 during the next pay period. See id.

26 Plaintiffs contend that, while they "earned" their  
27 commissions at the conclusion of each "commission month," which  
28 began on the 22nd of each month and ended on the 21st of the next

1 month, the evidence shows that Charter did not pay plaintiffs  
2 until the second semimonthly pay period after the 22nd. (See  
3 Pls.' SDF 23-26; Benner Decl. ¶¶ 17, 19, Exs. D, F, Q, R; Benner  
4 Dep. at 39:11-24.)

5 Charter argues that its payments were nonetheless  
6 timely. Although the commission month ended on the 21st of each  
7 calendar month, Charter states that AEs did not "earn"  
8 commissions until Charter had reviewed and verified any sales  
9 pursuant to the terms of its commission plan. (See Benner Decl.,  
10 Ex. D at CHA/HAR 145, Ex. F at CHA/HAR 2468); Chavez v. Time  
11 Warner Cable Co. LLC, No. CV 12-05291-RGK (RZx), 2013 WL  
12 12080302, at \*4 (C.D. Cal. Feb. 20, 2013) (holding that employer  
13 had complied with § 204 by paying commissions on a monthly basis  
14 after taking a reasonable period of time to verify sales  
15 resulting in payment) (reversed on other grounds).

16 Charter does not provide any evidence in support of its  
17 assertion that it conducted additional verification of  
18 plaintiffs' sales after the 21st of each month, or that this  
19 verification process lasted until the next calendar month such  
20 that payment during the second semimonthly pay period would be  
21 timely. Moreover, because a genuine dispute of material fact  
22 exists as to whether plaintiffs knowingly agreed to the terms of  
23 Charter's commission plan, the court cannot conclude as a matter  
24 of law that Sinclair and Harper only "earned" their commissions  
25 upon the completion of the conditions laid out in the commission  
26 plans provided by Charter. See Koehl, 142 Cal. App. 4th at 1335  
27 ("A commission is 'earned' when the employee has perfected the  
28 right to payment; that is, when all of the legal conditions

precedent have been met. Such conditions precedent are a matter of contract between the employer and employee . . . .").

For similar reasons, the court cannot conclude, as Charter argues, that Harper's commission-based claims must fail because he never "earned" any commissions throughout the duration of his employment with Charter under the terms of his commission plan. Charter contends that Harper never completed the requisite number of monthly sales set out in the commission plan to "earn" any commissions. But undisputed evidence shows that Harper was paid \$420 in commissions on January 19, 2018. (See Benner Decl., Ex. Q at CHA/HAR 57.)

The court will therefore deny Charter's motion for summary judgment as to plaintiffs' claim for violations of § 204.

4. California Labor Code §§ 221, 223, 224

Plaintiffs claim that Charter violated California Labor Code §§ 221, 223, and 224 by "unlawfully deducting, reducing, clawing back, or otherwise reconciling commissions owed to plaintiffs." (FAC ¶ 47.)

a. Sections 221 and 224

California Labor Code §§ 221 and 224 protect employees against unlawful deductions of their earned wages. Under § 221, "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee." Section 224 authorizes certain deductions that an employee "expressly authorize[s] in writing," but forbids deductions that amount to a "rebate or deduction from the standard wage . . . pursuant to wage agreement or statute."

"[A]n employee's 'wages' or 'earnings' [under § 221]

1 are the amount the employer has offered or promised to pay, or  
2 has paid pursuant to such an offer or promise, as compensation  
3 for that employee's labor." Kemp v. Int'l Bus. Machs. Corp., No.  
4 3:09-cv-03683, 2010 WL 4698490, at \*5 (N.D. Cal. Nov. 4, 2010)  
5 (quoting Prachasaisoradej v. Ralphs Grocery Co., 42 Cal. 4th 217,  
6 228 (Cal. 2007)). Commissions can qualify as wages under  
7 California Labor Code § 221, but as the court noted in Kemp, "the  
8 right of a salesperson or any other person to a commission  
9 depends on the terms of the contract for compensation." Id.  
10 (citations omitted); see also Swafford, 383 F. Supp. 3d at 934.  
11 Accordingly, a California Labor Code § 221 claim requires "some  
12 showing that [the plaintiff] is contractually entitled to the  
13 commissions he claims to have been denied." Swafford, 383 F.  
14 Supp. 3d at 934.

15 Here, the parties dispute the number of earned  
16 commissions to which Harper was entitled in December 2017, and  
17 whether Charter fully paid him pursuant to the terms of his  
18 commission plan. (See Pls.' Opp'n at 27; Def.'s Reply at 30.)  
19 Harper presents evidence of emails he sent to his manager in  
20 January 2018 indicating that Charter had not provided him with  
21 commissions for nine installs he completed in December. (See  
22 Harper Decl., Ex. 2.) Charter argues that Harper was not  
23 entitled to any commissions in December, because he failed to  
24 sell the threshold level of fifteen "Primary Service Units"  
25 ("PSUs") required under the terms of his commission plan to  
26 "earn" commissions. (See Benner Decl., Ex. D.) Further, Charter  
27 argues that, even if Harper had been entitled to commissions for  
28 December, he only completed seven PSUs, for which he was fully

1 paid in January 2018. (See Benner Decl., Ex. Q at CHA-HAR 57  
2 (showing Harper was paid \$420 in commissions, at a rate of \$60  
3 per PSU x 7 PSUs.)

4 Because the court has found that a disputed issue of  
5 material fact exists as to whether Harper knowingly agreed to the  
6 terms of the commission plan to which Charter refers, the court  
7 cannot rule as a matter of law that Harper failed to "earn" any  
8 commissions in December 2017 because he did not sell fifteen  
9 PSUs. See Kemp, 2010 WL 4698490, at \*5 ("the right of a  
10 salesperson or any other person to a commission depends on the  
11 terms of the contract for compensation"). While Harper contends  
12 that he earned and was entitled to commissions for nine installs  
13 he completed in December, Charter argues that it properly paid  
14 him only for seven. There is therefore a disputed issue of  
15 material fact as to whether Charter unlawfully failed to pay  
16 Harper commission wages it had promised to pay pursuant to the  
17 agreement. See id.

18 Sinclair argues that Charter failed to pay him a  
19 commission for multiple sales he worked on that were ultimately  
20 transferred to a national sales AE before they were finalized.  
21 (See Sinclair Decl. ¶ 19; Sinclair Dep. 224:3-21.) Charter  
22 counters that, under the terms of Sinclair's commission plan, a  
23 service had to be installed before a commission on that sale  
24 could be "earned." (See Def.'s Reply at 31; Benner Decl., Ex.  
25 F.) Since Sinclair did not perform every step of the sales  
26 before they were completed, Charter contends that Sinclair did  
27 not "earn" the commissions to which he believes he is entitled.  
28 (See id.)

1 Again, a disputed issue of fact exists as to whether  
2 Sinclair knowingly agreed to the terms of the commission plan to  
3 which Charter refers. The court therefore cannot rule as a  
4 matter of law that Sinclair did not earn commissions for the  
5 sales at issue based on the terms of the commission plan which  
6 Charter argues applied at the time. Because the parties disagree  
7 as to whether Sinclair was entitled to commissions for sales in  
8 which he performed some, but not all, of the requisite work, the  
9 court concludes that a disputed issue of material fact exists as  
10 to whether Sinclair "earned" commission wages for those sales,  
11 and, therefore, whether Charter failed to pay Sinclair commission  
12 wages it had promised him as part of the commission plan. See  
13 Kemp,, No. 2010 WL 4698490, at \*5. The court will therefore deny  
14 Charter's motion for summary judgment as to plaintiffs' Fifth  
15 Claim for violations of California Labor Code §§ 221 and 224.

16 b. Section 223

17 "Section 223 prohibits the secret payment of a lower  
18 wage while purporting to pay the wage required by statute or  
19 contract." Johnson v. Hewlett-Packard Co., 809 F. Supp. 2d 1114,  
20 1136 (N.D. Cal. 2011).

21 The text of section 223 does not support the existence  
22 of a private right of action because it does not set forth an  
23 entitlement to a wage or provide a penalty. See id.; Calop  
24 Business Systems, Inc. v. City of Los Angeles, 984 F. Supp. 981,  
25 1015 (C.D. Cal. 2013). The court will therefore grant summary  
26 judgment in favor of Charter as to plaintiffs' Fifth Claim for  
27 violation of California Labor Code § 223.

28 However, while § 223 does not provide plaintiffs with a

1 private right of action, the court will still assess whether a  
2 genuine dispute of material fact exists, as a violation of § 223  
3 (like a violation of § 2751(b)) may still form the basis of  
4 Harper's PAGA claim and serve as a predicate violation for  
5 plaintiffs' claims under the UCL discussed below.

6 As described above, both Harper and Sinclair have  
7 provided evidence sufficient evidence to create a disputed issue  
8 of material fact as to whether Charter paid them a lower  
9 commission wage than that to which they were entitled as part of  
10 their commission plans, while purporting to pay them the proper  
11 wage. See Johnson, 809 F. Supp. 2d at 1136. A genuine of fact  
12 therefore exists as to whether Charter violated the terms of  
13 California Labor Code § 223.

14 C. Plaintiffs' Wage Statement Claims

15 California Labor Code § 226 requires that employers  
16 furnish their employees with accurate itemized statements in  
17 writing, showing gross wages earned, total hours worked, all  
18 deductions, net wages earned, all applicable hourly rates and the  
19 corresponding number of hours worked at each hourly rate, and the  
20 inclusive dates of all pay periods. Cal. Labor Code § 226(a).  
21 "An employee suffering injury as a result of a knowing and  
22 intentional failure by an employer to comply with subdivision (a)  
23 is entitled to recover the greater of all actual damages or  
24 [statutory penalties] and is entitled to an award of costs and  
25 reasonable attorney's fees." Id. § 226(e)(1). Plaintiffs allege  
26 a number of violations of § 226 in their complaint, some of which  
27 are derivative of their misclassification-based claims and their  
28 commission-based claims, and some of which are independent. (See

1 FAC §§ 49-54.)

2 1. Whether Plaintiffs' Derivative Wage Statement  
3 Claims Must Fail

4 Charter first argues that plaintiffs' derivative wage  
5 statement claims must fail because the minimum wage, overtime,  
6 and meal and rest period claims from which they derive also fail.  
7 However, as discussed above, the court has found that genuine  
8 disputes of material fact remain as to plaintiffs' minimum wage,  
9 overtime, and meal and rest period claims. Summary judgment in  
10 favor of Charter is therefore not warranted solely on this  
11 ground.

12 2. Whether the Statute of Limitations Bars  
13 Plaintiffs' Claims

14 Charter further argues that plaintiffs' wage statement  
15 claims are time-barred. Section 226 "has two applicable statutes  
16 of limitations--one year for penalties, and three years for  
17 damages." Sarkisov v. StoneMor Partners, L.P., No. C 13-04834  
18 WHA, 2014 WL 1340762, at \*2 (N.D. Cal. 2014). Charter contends  
19 that, because Harper last worked for Charter in January 2018 and  
20 Sinclair last worked for Charter in July 2016, but Harper did not  
21 file his complaint until May 3, 2019, and Sinclair did not join  
22 the suit via the FAC until December 13, 2019, plaintiffs did not  
23 successfully assert their claims within the one-year limitations  
24 period for penalties, and to the extent that Sinclair has made  
25 out a claim for damages under the statute, he did not timely file  
26 within the three-year limitations period. (See Mot. for Summ. J.  
27 at 26; Docket Nos. 1, 45.)

28 As discussed above, in Section III.A.1., the relevant

1 date for determining whether plaintiffs timely filed their claims  
2 is November 19, 2018. Since that date is less than a year from  
3 Harper's last day, and less than three years from Sinclair's last  
4 day, Charter's argument that Harper's wage statement claim for  
5 penalties or Sinclair's claim for damages is time-barred fails.  
6 However, the court will grant summary judgment in favor of  
7 Charter as to Sinclair's claim for penalties.

8 3. Whether Plaintiffs' Claims Fail to Establish an  
9 Actual Injury or a Knowing and Intentional  
10 Violation

11 Next, Charter contends that plaintiffs' claim under  
12 § 226 fails as a matter of law because plaintiffs "cannot offer  
13 admissible evidence of actual damages." (See Mot. for Summ. J.  
14 at 27.) Charter also argues in its reply that plaintiffs' claim  
15 fails because plaintiffs cannot show that their injury occurred  
16 as a result of a "knowing and intentional" violation of § 226(e),  
17 as required under the statute, because Charter had a "good faith  
18 belief" that their wage statements were in compliance given their  
19 belief that plaintiffs were properly classified as outside  
20 salespersons. (See Def.'s Reply at 16.)

21 However, an employer's showing that it acted under a  
22 good-faith belief that its employees were outside salespersons  
23 when issuing their wage statements is not sufficient to require  
24 that the employees' § 226(e) claim must fail as a matter of law.  
25 See Novoa v. Charter Commc'ns, LLC, 100 F. Supp. 3d 1013, 1028  
26 (E.D. Cal. 2015) (Ishii, J.) ("no court has granted summary  
27 judgment to an employer, finding that it acted in good faith when  
28 it violated Section 226(a); such a determination is generally a  
question for the factfinder to resolve at trial" (collecting

1 cases) (internal quotation marks omitted)); Garnett v. ADT LLC,  
2 139 F. Supp. 3d 1121, 1133 (E.D. Cal. 2015) (Shubb, J.) ("To the  
3 extent that some district courts have found that an employer can  
4 lack the necessary knowledge and intent if it had a good faith  
5 belief that its employee was exempt from section 226, this court  
6 disagrees."). An employee may establish § 226's "knowing and  
7 intentional" requirement by showing that his employer knowingly  
8 omitted information from his wage statements--he need not show  
9 that the employer knew that it was violating § 226's statutory  
10 requirements. See Novoa, 100 F. Supp. 3d at 1028. A disputed  
11 issue of fact therefore remains as to whether Charter knowingly  
12 omitted information from plaintiffs' wage statements in violation  
13 of § 226.

14 Plaintiffs have also submitted sufficient evidence that  
15 they suffered a cognizable "injury" sufficient to show actual  
16 damages. Courts have recognized that lost wages are a form of  
17 "all actual damages" recoverable under § 226(e)(1) because  
18 "[f]ailure to provide complete and accurate itemized paystubs  
19 could have made the alleged under-reporting of wages more  
20 difficult to detect and confront." Sarkisov, 2014 WL 1340762, at  
21 \*2; Arredondo v. Delano Farms Co, 301 F.R.D. 493, 547 (E.D. Cal.  
22 2014) (Seng, J.). Here, plaintiffs seek lost minimum, overtime,  
23 premium, and commission wages, and assert that Charter's failure  
24 to accurately itemize their total hours worked, their regular and  
25 overtime hours worked, the premium wages they were owed for meal  
26 periods and rest breaks not provided and the proper hourly rate  
27 for such premium wages, the commission wages they were owed, and  
28 the pay period for which they should have been paid made it more

difficult for plaintiffs to determine from their wage statements the amount they should have been paid each pay period. (See FAC ¶ 54, Prayer for Relief ¶¶ C-D; Harper Decl. ¶ 16; Sinclair Decl. ¶ 14.); Tennison v. Hub Grp. Trucking, Inc., No. LA CV20-05076 JAK (SPx), 2020 WL 7714702, at \*11 (C.D. Cal. Dec. 28, 2020) (“While there must be some injury in order to recover damages [under Section 226(e)], a very modest showing will suffice.”). A genuine dispute of material fact therefore exists as to whether plaintiffs suffered a cognizable injury sufficient to recover actual damages under § 226.

4. Whether Charter’s Wage Statements Complied with § 226

Finally, Charter argues that summary judgment of plaintiffs’ wage statement claim is appropriate because Charter’s wage statements complied with the requirements of § 226. In the FAC, plaintiffs allege that Charter’s wage statements were deficient in the following ways:

(a) prior to 2018, wage statements did not include the inclusive dates of the relevant pay period and only included the end date; (b) prior to 2018, commission wages were included on a wage statement that was separate from the regular wage statement and the commission wages were not attributed to and paid for the pay periods in which they were earned; (c) prior to 2017 Charter did not accurately keep track of and include on wage statements the total hours worked by Outside Salesperson Class members; (d) wage statements never reflected any premium wages being paid to Plaintiffs and Outside Salesperson Class members for meal periods or rest breaks that were not provided or that were late, shortened, missed, or on-duty, both during training weeks and after training weeks; and (e) Plaintiffs’ final several wage statements failed to accurately record the time worked, wages due, and

1 inclusive dates of the applicable pay  
2 periods, and failed to pay any waiting time  
penalties.

3 (FAC ¶ 52.)

4 Charter contests each of these allegations. Charter  
5 first asserts that all of plaintiffs' wage statements--with the  
6 exception of Sinclair's wage statements from 2015--included the  
7 inclusive dates of the relevant pay period. (See Mot. for Summ.  
8 J. at 27.) Charter argues that Sinclair's 2015 wage statements,  
9 though admittedly violative, cannot form the basis of a valid  
10 § 226 claim because wage statement claims are governed by a one-  
11 year statute of limitations, and Sinclair did not file the FAC  
12 until December 2019.

13 However, plaintiffs have produced evidence showing that  
14 the "Pay Begin Date" and "Pay End Date" on several of Harper's  
15 wage statements were not accurate with respect to the applicable  
16 22nd-to-21st "commission month" for earning commissions. (See  
17 Benner Decl., Ex. Q, at CHA/HAR 52 (listing begin date as  
18 10/20/17 and end date as 11/02/17), CHA/HAR 54 (listing begin  
19 date as November 17, 2017 and end date as 11/30/17), CHA/HAR 57  
20 (listing begin date as 12/15/17 and end date as 12/21/17).) As  
21 for Sinclair's claim, the court finds that it is not barred as to  
22 violations that occurred on or after November 19, 2015, given  
23 that Sinclair is seeking actual damages and thus the three-year  
24 statute of limitations applies, and plaintiffs have submitted  
25 evidence showing that Sinclair's December 31, 2016 wage statement  
26 is missing a "Period Beginning" date. (See Benner Decl., Ex. R,  
27 at CHA/HAR 404.) The court therefore finds that genuine disputes  
28

1 of material fact exist as to plaintiffs' claim for wage statement  
2 violations based on Charter's failure to provide inclusive dates  
3 of the relevant pay period.

4 Charter next argues that it is "not aware of any  
5 requirement that commission payments be included on the same wage  
6 statement as Plaintiffs' biweekly wages." (See Mot. for Summ. J.  
7 at 27.) Labor Code § 226(e) requires employers to furnish  
8 employees with accurate and complete information required by the  
9 statute so that employees may "promptly and easily determine from  
10 the wage statement alone . . . [t]he amount of the gross wages or  
11 net wages paid to the employee during the pay period." Cal.  
12 Labor Code §§ 226(e)(1), (e)(2)(b)(i).

13 Both plaintiffs state in their declarations that they  
14 were not able to promptly and easily determine from their wage  
15 statements the total gross and net wages they were paid for a pay  
16 period that included payment of both salary and commission wages.  
17 (See Harper Decl. ¶ 16; Sinclair Decl. ¶ 14.) That is  
18 understandable given that the beginning and end dates listed on  
19 Charter's commission wage statements do not correspond with  
20 Charter's 22nd-to-22st "commission month," and that the  
21 commission statements list two different pay periods, one of  
22 which does not correspond with the pay period listed on the  
23 salary statement. (See Benner Decl., Ex. Q, at CHA/HAR 51-52  
24 (listing "Begin Dates" of 10/20/17 and 11/03/17, and "End Dates"  
25 of 11/02/17 and 11/16/17), CHA/HAR 53-54 (listing "Begin Dates"  
26 of 11/17/17 and 12/01/17, and "End Dates" of 11/30/17 and  
27 12/14/17), CHA/HAR 56-57 (listing "Begin Dates" of 12/15/17,  
28 12/29/17 and 1/10/18, and "End Dates" of 12/21/17, 1/10/18, and

1 1/11/18).) There is therefore a genuine dispute of material fact  
2 as to whether Charter's practice of splitting wages between two  
3 wage statements that covered the same pay period violated § 226.

4 Finally, Charter argues that plaintiffs' claims fail to  
5 the extent they are based on allegations that, prior to 2017,  
6 Charter's wage statements did not include total hours worked.

7 (See Mot. for Summ. J. at 27-28.) The court agrees that, because  
8 Charter did not hire Harper until September 2017, this claim  
9 fails as to Harper to the extent it is based on allegations  
10 regarding wage statements prior to 2017. (See Harper Dep. 62:19-  
11 63:9, 78:16-79:1). However, Harper has alleged other violations  
12 of § 226 (see FAC ¶ 52) for which the court has found that  
13 genuine disputes of material fact exist. For instance, as  
14 discussed above, Harper has presented evidence sufficient to  
15 create an issue of material fact that Charter's wage statements  
16 did not include accurate "Pay Begin" or "Pay End" dates, and that  
17 Charter's practice of splitting his wage statements into separate  
18 statements for salary and commission prevented him from promptly  
19 and easily determining how much he had earned during a specific  
20 pay period from the statement alone. The court will therefore  
21 not grant summary adjudication as to Harper's Sixth Claim for  
22 violations of § 226.

23 The court disagrees with Charter's argument that this  
24 claim also fails as to Sinclair. Charter contends that,  
25 effective January 1, 2017, the California Legislature clarified  
26 that employers were not required to show hours worked for exempt  
27 positions, including outside salespersons, when it amended § 226  
28 by adding subsection (j). Notwithstanding the fact that Charter

1 fails to provide any authority indicating the California  
2 Legislature intended subsection (j) to apply retroactively, the  
3 text of subsection (j) indicates that it only applies when the  
4 employee is exempt from the payment of minimum wage and overtime  
5 under the "exemption for outside salesperson provided in any  
6 applicable order of the Industrial Welfare Commission." Cal.  
7 Labor Code § 226(j)(2)(B). Because a genuine dispute of material  
8 fact exists as to whether Sinclair was properly classified as an  
9 outside salesperson, the court finds that a genuine dispute of  
10 material fact exists as to whether Charter's wage statements  
11 violated § 226 by failing to include total hours worked prior to  
12 2017.

13 The court will therefore deny summary judgment as to  
14 Harper's Sixth Claim, and grant summary judgment in favor of  
15 Charter as to Sinclair's Sixth Claim for penalties.

16 D. Plaintiffs' Waiting Time Penalty Claims

17 Plaintiffs' seventh claim alleges that they are  
18 entitled to waiting time penalties under California Labor Code  
19 § 203. (FAC ¶¶ 55-58.) Under Labor Code § 203, if "an employer  
20 willfully fails to pay, without abatement or reduction, in  
21 accordance with Section[] 201 . . . any wages of an employee who  
22 is discharged or who quits, the wages of the employee shall  
23 continue as a penalty from the due date thereof at the same rate  
24 until paid or until an action therefor is commenced," up to 30  
25 days. Cal. Labor Code § 203(a). Plaintiffs allege that they  
26 were owed premium wages pursuant to Labor Code § 226.7 because  
27 Charter failed to provide them with compliant meal and rest  
28 breaks, and that they were owed commission wages because Charter

1 failed to correctly pay all commission wages that were earned and  
2 payable. (FAC ¶ 57.) Because Charter did not pay these wages to  
3 plaintiffs upon their termination, plaintiffs argue they are  
4 entitled to waiting time penalties under Labor Code § 203. (See  
5 id.)

6 The parties agree that plaintiffs' waiting time  
7 penalties claim is entirely derivative of their  
8 misclassification-based and commission-based wage claims. (See  
9 Mot. for Summ. J. at 28; Pls.' Opp'n at 31.) Because the court  
10 has found that genuine issues of material fact exist as to  
11 plaintiffs' underlying misclassification-based and commission-  
12 based wage claims, the court will not grant summary judgment in  
13 favor of Charter solely on this ground. (See Mot. for Summ. J.  
14 at 28.)

15 Charter further argues that meal and rest period claims  
16 cannot form the basis of a waiting time penalties claim because  
17 Labor Code § 226.7 meal and rest break premiums do not constitute  
18 "wages earned" for the purposes of Labor Code § 203. (See Mot.  
19 for Summ. J. at 28.) Under California law, an employer that  
20 fails to provide an employee with a legally compliant meal or  
21 rest period is required to pay the employee "one additional hour  
22 of pay at the employee's regular rate of compensation for each  
23 workday that the meal or rest...period is not provided." Cal.  
24 Labor Code § 226.7(c). The question of whether these ordered  
25 payments constitute wages or penalties for the purposes of a  
26 waiting time penalties claim has divided district courts in  
27 California. See Finder v. Leprino Foods Co., No. 1:13-cv-2059  
28 AWI BAM, 2015 WL 1137151, at \*5 (E.D. Cal. Mar. 12, 2015)

1 (acknowledging “[t]here is no clear answer” from conflicting  
2 decisions of the district courts of California).

3 This division among courts stems from two seemingly  
4 contradictory decisions by the California Supreme Court: Murphy  
5 v. Kenneth Cole Productions, 40 Cal. 4th 1094 (Cal. 2007), and  
6 Kirby v. Immoos Fire Protection, Inc., 53 Cal. 4th 1244, 1257  
7 (Cal. 2012). In Murphy, the court considered the nature of  
8 § 226.7 payments for purposes of determining the applicable  
9 limitations period for a claim under the statute. Murphy, 40  
10 Cal. 4th at 1110. After examining the language, legislative  
11 history, and purpose of § 226.7, Murphy concluded that “the  
12 ‘additional hour of pay’ is a premium wage intended to compensate  
13 employees, not a penalty.” Id. at 1114. Kirby, by contrast,  
14 held that, for purposes of awarding attorneys’ fees for the  
15 nonpayment of wages, “a section 226.7 claim is not an action  
16 brought for nonpayment of wages; it is an action brought for non-  
17 provision of meal or rest breaks.” Kirby, 53 Cal. 4th at 1257.

18 The Kirby court explained that its decision was “not at  
19 odds with our decision in Murphy.” See id. Instead, the court  
20 explained, Murphy determined that the remedy for a § 226.7  
21 violation is a wage, while Kirby determined that the legal  
22 violation triggering that remedy is the failure to provide a meal  
23 or rest period, not the nonpayment of wages. See id. Because  
24 Kirby was concerned with characterizing the nature of the § 226.7  
25 claim itself, whereas Murphy focused on the nature and  
26 characterization of the relief for that claim, the court held in  
27 Finder that that Murphy was the more directly relevant precedent  
28 and, therefore, that failure to pay premium wages under § 226.7

1 may form the basis for a waiting time penalties claim. See  
2 Finder, 2015 WL 1137151, at \*8.

3 Charter contends that a recent California Court of  
4 Appeals decision, Naranjo v. Spectrum Security Servs., Inc., 40  
5 Cal. App. 5th 444, 474 (2d Dist. 2019), should take precedence  
6 over the interpretation of § 226.7 offered in Finder. (See Mot.  
7 for Summ. J. at 29; Def.'s Reply ("Reply") at 20 (Docket No.  
8 103).) There, the court expressly held that premiums under  
9 § 226.7 are not wages for the employee's labor, work, or service,  
10 but rather a penalty for the employer's recalcitrance. See  
11 Naranjo, 40 Cal. App. 5th at 473. "Read this way, an employer's  
12 failure, however willful, to pay section 226.7 statutory remedies  
13 does not trigger section 203's derivative penalty provisions for  
14 untimely wage payments." Id. at 473-74.

15 However, as Judge Ishii recently pointed out in Bates  
16 v. Leprino Foods Co., No. 2:20-cv-00700 AWI BAM, 2020 WL 6392562  
17 (E.D. Cal. Nov. 2, 2020), the California Supreme Court is  
18 currently reviewing Naranjo and, thus, Naranjo "has no binding or  
19 precedential effect, and may be cited for potentially persuasive  
20 value only." Bates, 2020 WL 6392562, at \*5 (quoting Cal. R. Ct.  
21 8.1115(e)(1)). In light of Naranjo's non-precedential effect,  
22 the court in Bates found no reason to deviate from Finder and  
23 held that § 226.7 premiums are wages for the purposes of a  
24 waiting time penalties claim under § 203.

25 This court agrees with Judge Ishii's analyses in Finder  
26 and Bates that, under California Supreme Court precedent, § 226.7  
27 premiums are wages for purposes of §203 waiting time penalties  
28 claims. Because the only contrary California precedent, Naranjo,

1 lacks precedential value, the court will deny summary judgment as  
2 to plaintiffs' Seventh Claim for waiting time penalties based on  
3 Charter's failure to pay \$ 226.7 premiums.

4 E. Plaintiffs' Untimely Production of Employment Records  
5 Claims

6 Plaintiffs' Eighth Claim alleges that Charter failed to  
7 timely produce copies of their "personnel file[s], including all  
8 wage statements, instruments [they] signed or acknowledged  
9 concerning [their] employment, and other records concerning  
10 [their] obtaining and holding of employment . . . ." (FAC ¶¶ 61,  
11 63.) Plaintiffs rely on three California Labor Code provisions.  
12 First, § 226(b) gives current and former employees a right to  
13 inspect or copy their employment records, and permits an employer  
14 to take "reasonable steps" to ensure the identity of a current or  
15 former employee. Cal. Labor Code §§ 226(b). Section 226(c)  
16 requires that the employer comply with a § 226(b) request as soon  
17 as practicable, but no later than 21 calendar days from the date  
18 of the request. Id. at § 226(c).

19 Second, § 1198.5 provides that "[e]very current and  
20 former employee . . . has the right to inspect and receive a copy  
21 of the personnel records that the employer maintains relating to  
22 the employee's performance or to any grievance concerning the  
23 employee." Cal. Labor Code § 1198.5. The employer must make the  
24 contents of the personnel records available for inspection at a  
25 reasonable time, but no later than 30 days from the request. Id.  
26 Section 1198.5 also permits an employer to take "reasonable  
27 steps" to verify the identity of a current or former employee or  
28 his or her authorized representative. Id. at § 1198.5(e).

1 Finally, under § 432, "[i]f an employee ... signs any instrument  
2 relating to the obtaining or holding of employment, he shall be  
3 given a copy of the instrument upon request." See Cal. Labor  
4 Code § 432.

5 On June 5, 2018, plaintiffs' counsel prepared and sent  
6 a letter via email to Charter's in-house counsel requesting  
7 Harper's wage statements, personnel file records, and other  
8 employment records. (See Soderstrom Decl. ¶ 19.) Plaintiffs'  
9 counsel attached an authorization for the release of employment  
10 records signed by Harper using "DocuSign." (See id.; Harper  
11 Decl. ¶ 23.) On July 3, 2018, counsel for Charter sent an email  
12 and letter to plaintiffs' counsel advising him that it was  
13 Charter's position that his request for Harper's wage statements  
14 under § 226(b) was not valid, and that Harper would have to make  
15 the request himself before Charter would produce the records.  
16 (See Shine Decl. ¶ 7, Ex. F.) After further discussion between  
17 plaintiffs' and Charter's counsel, on July 18, 2018, Charter's  
18 counsel agreed to produce the documents requested by plaintiffs'  
19 counsel within a week. (See id. at ¶ 8.)

20 However, on July 23, 2018, Charter's in-house counsel  
21 received an email directly from Harper, who stated that he did  
22 not currently have representation. (See id. at ¶ 9.) The next  
23 day, counsel for Charter reached out to plaintiffs' counsel to  
24 confirm that he was indeed representing Harper. (See id.)  
25 Plaintiffs' counsel sent Charter's counsel a redacted version of  
26 his attorney-client agreement with Harper two weeks later, on  
27 August 13, 2018, and Harper emailed Charter's counsel directly on  
28 August 29, 2018 to confirm representation. (See id. at ¶ 10-11.)

1 Six days later, on September 4, 2018, Charter provided  
2 plaintiffs' counsel with copies of his wage statements and  
3 documents from his personnel file. (See id. at ¶ 11; Soderstrom  
4 Decl. ¶ 21.) Plaintiffs' counsel asserts that this production  
5 was deficient under § 1198.5 because it omitted certain documents  
6 related to Harper's employment, including corrective action  
7 reports. (See Soderstrom Decl. ¶ 21.)

8 Plaintiffs' counsel prepared and sent a similar letter  
9 requesting that Charter produce Sinclair's wage statements,  
10 personnel file records, and other employment records on October  
11 2, 2019. (See Soderstrom Decl. ¶ 25.) Charter produced copies  
12 of Sinclair's wage statements and personnel file records on  
13 October 17, 2019. (See id. at ¶ 26.) Plaintiffs' counsel also  
14 asserts that Charter's production as to Sinclair was deficient  
15 under § 1198.5 because it omitted numerous wage statements and  
16 corrective action reports. (See id.)

17 To begin with, the court agrees with Charter that  
18 summary adjudication as to § 432 is appropriate. "While  
19 §§ 226(c) and 1198.5 expressly include 'former employees,' the  
20 plain language of § 432 limits applicability to 'employees or  
21 applicant[s],' omitting any reference to former employees."  
22 Harris v. Best Buy Stores, L.P., No. 15-cv-00657-HSG, 2016 WL  
23 4073327, at \*10 (N.D. Cal. Aug. 1, 2016) (quoting Cal. Labor  
24 Codes §§ 226(c), 432, 1198.5); see also Arizona Elec. Power Co-  
25 op., Inc. v. United States, 816 F.2d 1366, 1375 (9th Cir. 1987)  
26 ("When Congress includes a specific term in one section of a  
27 statute but omits it in another section of the same Act, it  
28 should not be implied where it is excluded."); Briggs v. Eden

1 Council for Hope & Opportunity, 19 Cal. 4th 1106, 1117 (1999)  
2 ("Where different words or phrases are used in the same  
3 connection in different parts of a statute, it is presumed the  
4 Legislature intended a different meaning."). Because plaintiffs  
5 do not dispute that their requests for records were made after  
6 they were no longer employees, § 432 cannot apply here.

7 With respect to § 1198.5, the court declines to  
8 interpret the term "personnel records" in the narrow fashion  
9 urged by Charter. Plaintiffs argue that, in response to their  
10 requests, Charter failed to include corrective action reports,  
11 letters related to their termination, and commission plan  
12 documents and receipts in its production. Without citing to any  
13 authority, Charter argues that "personnel records" are "not so  
14 expansively defined in § 1198.5 or case law." To the contrary,  
15 the case law indicates that § 1198.5 "intends a broad definition  
16 of 'personnel file' to preclude employers from assigning  
17 documents to files having some other name, and then refusing  
18 access to the documents on the ground that they are not contained  
19 in the 'personnel file.'" Wellpoint Health Networks, Inc. v.  
20 Superior Court, 59 Cal. App. 4th 110, 124 (2d Dist. 1997).  
21 Common sense also dictates that at least some of the documents  
22 omitted by Charter, such as corrective action reports, fall  
23 within the plain text of the statute, as they are "personnel  
24 records . . . relating to the employee's performance or to any  
25 grievance concerning the employee." Cal. Labor Code § 1198.5.  
26 The court will therefore deny Charter's motion for summary  
27 adjudication of plaintiffs' claim under § 1198.5.

28 Finally, as to § 226(b), the court again declines to

1 adopt the narrow interpretation of the statute put forward by  
2 Charter. Charter argues that § 226(b) only authorizes current or  
3 former employees--and not their representatives--to inspect or  
4 receive a copy of their own wage statements. Because plaintiffs'  
5 counsel sent Charter a request for plaintiffs' wage statements  
6 under § 226 (not plaintiffs themselves), Charter argues that  
7 plaintiffs' claim under § 226 fails as a matter of law.

8 Charter points out that, in contrast to § 1198.5, § 226  
9 does not explicitly state that an employee's representative may  
10 submit a request to inspect records. Compare Cal. Labor Code  
11 § 1198.5 ("Upon a written request from a current or former  
12 employee, or his or her representative, the employer shall also  
13 provide a copy of the personnel records.") with Cal. Labor Code  
14 § 226(b) ("An employer . . . shall afford current and former  
15 employees the right to inspect or receive a copy of records  
16 pertaining to their employment, upon reasonable request to the  
17 employer."). However, Charter does not cite to a single case  
18 where a court has held that a request made by a current or former  
19 employee's representative is insufficient as a matter of law  
20 under § 226(b). Section 226(b)'s only requirement pertaining to  
21 the employee's request is that it be "reasonable." The court  
22 finds that, here, a genuine issue of material fact exists as to  
23 whether plaintiffs' requests to inspect and receive copies of  
24 their wage statements pursuant to § 226(b) were reasonable, given  
25 that they were signed by counsel and accompanied by an executed  
26 authorization signed by plaintiffs electronically. (See Shine  
27 Decl., Ex. E.)

28 The court also finds that genuine issue of material

1 fact exists as to whether the timing of Charter's production of  
2 Harper's wage statements fully satisfied § 226(b). The evidence  
3 shows that Charter did not produce Harper's wage statements for  
4 91 days after receiving Harper's request. (See Soderstrom Decl.  
5 ¶¶ 18-21, Ex. 18.) While Charter contends that this delay  
6 occurred as a result of "reasonable steps" taken by Charter to  
7 verify Harper's identity and whether he was represented by  
8 counsel, Charter did not initiate any efforts to verify Harper's  
9 identity or that of his counsel until after the 21-day deadline  
10 set out in § 226 had already passed. (See id.); Cal. Labor Code  
11 § 226(c). A reasonable jury could therefore find that Charter's  
12 response was not timely and that the steps that it took to verify  
13 Harper's identity and whether he was represented by counsel were  
14 not reasonable under the statute.

15 As to Sinclair's claim under § 226, plaintiffs have  
16 submitted evidence showing Charter's production of Sinclair's  
17 wage statements was incomplete and omitted at least 17 wage  
18 statements. (See Soderstrom Decl. ¶¶ 25-26; Benner Decl., Ex.  
19 R.) There is therefore a genuine dispute of material fact as to  
20 whether Charter fully satisfied its obligations to Sinclair under  
21 § 226(a). See Harris, 2016 WL 4073327, at \*11 (denying summary  
22 judgment because there was a factual dispute over whether  
23 employer had "fully satisfied" its § 226 obligations).

24 The court will therefore deny Charter's motion for  
25 summary judgment as to plaintiffs' Eighth Claim for violations of  
26 California Labor Code §§ 226 and 1198.5. The court will,  
27 however, grant summary adjudication in favor of Charter as to  
28 plaintiffs' claim for violation of California Labor Code § 432.

1 F. Plaintiffs' Claims under the UCL

2 Plaintiffs' Ninth Claim alleges that Charter has  
3 committed acts of unfair competition, as defined by the  
4 California Business and Professions Code § 17200, by violating  
5 various provisions of the California Labor Code. (FAC ¶¶ 65-73.)  
6 Charter's only argument in support of summary judgment is that  
7 plaintiffs' UCL claim is derivative of their First through Fifth  
8 Claims. (See Mot. for Summ. J. at 32; Pls.' Opp'n at 37.)  
9 Because the court has found that a genuine dispute of material  
10 fact exists as to plaintiff's underlying California Labor Code  
11 claims, the court will not grant Charter's motion for summary  
12 adjudication as to plaintiffs' UCL claim. See Cortez v.  
13 Purolator Air Filtration Prods., 23 Cal. 4th 163, 178-79 (Cal.  
14 2000) (holding unpaid wages are recoverable as restitution under  
15 the UCL).

16 G. Harper's PAGA Claim

17 PAGA authorizes employees to recover civil penalties  
18 for violations of the California Labor Code "as the proxy or  
19 agent of the state's labor law enforcement agencies." Kim v.  
20 Reins Int'l Cal., Inc., 9 Cal. 5th 73, 82 (Cal. 2020) (emphasis  
21 and citations omitted). Only an "aggrieved employee," or a  
22 person "who was employed by the alleged violator and against whom  
23 one or more of the alleged violations was committed" may serve as  
24 the state's representative in a PAGA action. Id. (quoting Cal.  
25 Labor Code § 2699(c)).

26 Only Harper has brought claims under PAGA. (See FAC  
27 ¶¶ 74-75.) Charter first argues that summary judgment as to  
28 Harper's PAGA claim is appropriate because Harper cannot show

1 that Charter committed violations of any underlying substantive  
2 provisions of the California Labor Code. However, because the  
3 court has found that disputed issues of material fact exist as to  
4 Harper's claims under other substantive provisions of the  
5 California Labor Code, as discussed above, a disputed issue of  
6 material fact also exists as to whether Harper is an aggrieved  
7 employee under PAGA.

8 Charter next argues that Harper's PAGA claim is time-  
9 barred. A plaintiff must file a PAGA action within one year of  
10 the alleged underlying Labor Code violation. Cal. Code Civ. P.  
11 § 340(a); Esparza v. Safeway, Inc., 36 Cal. App. 5th 42, 59 (2d  
12 Dist. 2019). The statute of limitations for the filing of the  
13 PAGA lawsuit is tolled for the sixty-five day notice period.  
14 Thus, as a practical matter, the statute of limitations for the  
15 filing of the LWDA letter is one year, and the statute of  
16 limitations for the filing of the PAGA lawsuit is one year and  
17 sixty five days (or 430 days total). Bush v. Vaco Tech. Servs.,  
18 LLC, 2018 WL 2047807 at \*13 (N.D. Cal. May 2, 2018). The statute  
19 of limitations begins to run when a cause of action accrues,  
20 meaning when the cause of action is complete with all of its  
21 elements. Esparza, 36 Cal. App. 5th at 59.

22 Charter contends that, because Harper was on an unpaid  
23 leave of absence from February 3, 2018 through the end of his  
24 employment, Harper last performed work for Charter on January 30,  
25 2018. (See Benner Decl. ¶¶ 34-36, Exs. O-Q.) Thus, in order to  
26 file a timely PAGA action based on an alleged minimum wage,  
27 overtime, meal period, rest period, or wage statement violation,  
28 Harper would have had to file his complaint no later than April

1 5, 2019 (430 days after January 30, 2018). (See Mot. for Summ.  
2 J. at 33.) Because Harper filed his complaint on May 3, 2019,  
3 Charter argues that Harper failed to timely file his PAGA claim  
4 within the applicable statute of limitations and, as a result,  
5 the court should dismiss his PAGA claim. (See id.)

6 However, as discussed above, in Section III.A.1, the  
7 statute of limitations governing the claims in Harper's original  
8 complaint--including his PAGA claim--may be equitably tolled to  
9 November 19, 2018. Charter's argument that Harper failed to  
10 comply with the statute of limitations is therefore without  
11 merit.

12 Accordingly, the court will deny Charter's motion for  
13 summary judgment as to Harper's PAGA claim.

14 IT IS THEREFORE ORDERED that defendant's motion for  
15 summary judgment or, in the alternative, summary adjudication  
16 (Docket No. 93-1) be, and the same thereby is, DENIED as to  
17 Sinclair's First, Second, Third,, Fourth, and Sixth Claims for  
18 damages, Harper's First, Second, Third, Fourth, Sixth, and Tenth  
19 Claims, as well as Plaintiffs' Fifth Claim for violations of Cal.  
20 Labor Code § 204, 221, and 224, Seventh Claim, and Eighth Claim  
21 for violations of §§ 1198.5 and 226.

22 IT IS FURTHER ORDERED that defendant's motion for  
23 summary judgment or, in the alternative, summary adjudication  
24 (Docket No. 93-1) be, and the same hereby is, GRANTED as to  
25 Sinclair's First, Second, Third, Fourth, and Sixth Claims for  
26 statutory penalties, as well as Plaintiffs' Fifth Claim for  
27 violations of Cal. Labor Code §§ 2751(b) and 223, and Eighth  
28 Claim for violations of Cal. Labor Code § 432.

1 Dated: February 12, 2021

  
WILLIAM B. SHUBB  
UNITED STATES DISTRICT JUDGE