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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA, OAKLAND**

RYAN HYAMS, and REGINE DUHON, individuals, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

CVS HEALTH CORPORATION, a Rhode Island Corporation, CVS PHARMACY, INC., a Rhode Island Corporation, GARFIELD BEACH CVS, LLC, a California Corporation, and CVS RX SERVICES, INC., a New York Corporation, DOES 1 through 25, inclusive,

Defendants

Case No. 4:18-cv-06278-HSG

**REPLY IN SUPPORT OF PLAINTIFF RYAN HYAMS' MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 56**

Action Filed: August 21, 2018
Removal Date: October 12, 2018
Trial Date: Not set

DATE: October 29, 2020
TIME: 2:00 pm
PLACE: Courtroom 2, 4th Floor
1301 Clay Street
Oakland, CA 94612

Plaintiffs Ryan Hyams "("Plaintiff") and Regine Duhon hereby submit their reply brief in support of Plaintiff Hyams' Motion for Partial Summary Judgment ("Motion") against Defendants CVS Health Corporation, CVS Pharmacy, Inc., Garfield Beach CVS, LLC, and CVS Rx Services, Inc. ("CVS").

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## I. INTRODUCTION

In its Opposition to the Motion, CVS concedes the material facts Plaintiff relies upon, and does not submit any admissible evidence to dispute them. In particular, CVS does not dispute that:

- Labor Code sections 850-852 have been part of the Labor Code since the 1930s;
- CVS had the capacity to comply with Labor Code sections 850-852 easily by utilizing functions already available in its proprietary scheduling software;
- CVS' timekeeping records show hours worked in excess of the limitations defined in Labor Code sections 850-852;
- CVS' scheduling records show that shifts were consistently scheduled in excess of Labor Code sections 850-852's limitations; and
- Until February 2020, **CVS never attempted to comply with Labor Code sections 850-852**.

Instead, CVS argues that Labor Code sections 850-852 do not actually apply to CVS, positing multiple unpersuasive arguments. The logic behind each theory falls apart upon closer examination of the facts and applicable law. Tellingly, even if one or more of CVS' arguments is credited, CVS is still liable, in some capacity, for violations of Labor Code sections 851-852, warranting partial summary judgment.

## II. LEGAL ARGUMENT

Because the dispute here rests on statutory interpretation, it is a legal question properly resolved on summary judgment. *See Helm v. State of Cal.*, 722 F.2d 507, 509 (9th Cir. 1983); *Burden v. SelectQuote Ins. Servs.*, 848 F.Supp.2d 1075, 1079 (N.D. Cal. 2012) (summary judgment appropriate if dispute rests on statutory interpretation). CVS' opposition arguments do not relieve CVS entirely of liability – at most, CVS disagree with the reach of Plaintiff's interpretation of Labor Code sections 850-852. Plaintiff asks the Court to reject each of CVS' unfounded arguments and enter summary judgment consistent with the scope of the plain meaning of the statutes set forth in the Motion.

### A. CVS' Proposed Interpretation of Labor Code Sections 850-852 Ignores the Plain Meaning of the Statutory Terms.

CVS' Opposition is riddled with statements that are unsupported by facts, legal authority, or legislative history. These unfounded conclusions cannot defeat the only logical interpretation of clear and unambiguous statutory language, as explicated in the Motion.

**1. Employers Are Not Excluded From Liability for Labor Code Section 850.**

CVS argues that Labor Code section 850 imposes liability only upon the *employees* who work beyond its hours of work limits, and not the employer. CVS cites no legal authority to support its novel theory that the Labor Code may hold liable the very workers for whom the protections are designed.[1] *See* Labor Code section 50.5 (a function of the Labor Code, "is to foster, promote, and develop the welfare of the wage earners of California, to improve their working conditions, and to advance their opportunities for profitable employment"). CVS' interpretation would lead to an absurd result, inconsistent with the Labor Code's purpose. *See Aponte v. Gomez*, 993 F.2d 705, 708 (9th Cir. 1993) ("It is a settled principle of statutory construction that a statute need not be given its literal meaning if doing so renders an absurd result which the legislature did not intend."). CVS has no problem applying Industrial Welfare Commission ("IWC") Wage Order 7 to employers, while ignoring that Labor Code section 850 uses the exact same statutory framework to define *employers*' obligations. *See, e.g.*, Labor Code § 1182.13; *Martinez v. Combs*, 49 Cal. 4th 35 (2010) (holding that the Wage Orders are intended to impose liability against employers who control the wages, hours and working conditions of the workers defined in them). Wage Order 7 states that "This order shall apply to *all persons employed* in the mercantile industry…," and, in the section limiting the hours of work, states: "Such employees shall not be employed more than…" This language mirrors Labor Code section 850's language that "[n]o person employed to sell at retail drugs and medicine …shall perform any work…for more than…" It should similarly be understood to apply to employers.

**2. Pharmacists Are Not "Excepted" From the Scope of the Statutes.**

Despite wording which any reasonable person would interpret as applying to pharmacists, CVS argues that the statutes do not apply to pharmacists. *See, e.g., Tormey v. Vons Companies, Inc.*, 2014 WL 4403107, at *8 (Aug. 27, 2014) (California appeals court states that Labor Code §§ 850-853 cover retail pharmacists). "The well-accepted rules of statutory construction caution us that 'statutory interpretations which would produce absurd results are to be avoided.'" *Arizona State Bd. For Charter Schools v. U.S. Dept. of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) (citing *Ma v. Ashcroft,* 361 F.3d 553,

[1] The only case CVS cites for this premise, *Ex parte Twing*, 188 Cal. 261 (1922), does not address a Labor Code provision, but nonetheless holds an employer liable for violating the criminal statute.

558 (9th Cir.2004)) ("When a natural reading of the statutes leads to a rational, common-sense result, an alteration of meaning is not only unnecessary, but also extrajudicial."). First, CVS contends that the mere existence of Business & Professions Code section 4000, *et seq.* ("B&P Code"), regulating unrelated aspects of the practice of pharmacy, preempts Labor Code sections 850-852. CVS does not cite any section of the B&P Code dealing with the same subject matter as Labor Code sections 850-852 or its hours of work limits. Without any actual overlap, preemption cannot occur.

CVS also interprets the language at the end of Labor Code sections 850 and 851, "except that any registered pharmacist may be so employed and may perform such work for the full period of time permitted by this section," to mean that pharmacists are "excepted" from the statutes. CVS can only reach this conclusion by ignoring the language "and may perform such work for the full period of time permitted by this section," that unambiguously expects pharmacists to work up to, but not more than, the full nine hours per day permitted. Pharmacists, who compound physician's prescriptions, undeniably fall within the statute's ambit. Any other construction would be absurd. And despite disputing Plaintiff's explanation for this language (that it addressed conflicts with laws that limited female pharmacists' work to 8 hours per day), CVS's cited case confirms this explanation. *See Bosley v. McLaughlin*, 236 U.S. 385, 392 (1915) (holding that whether female pharmacists may work for more than 8 hours in a day is a conflict for the legislature to decide). Combined with the legislative history cited in the Motion, Plaintiff's interpretation of this phrase is the only reasonable one.

**3. Front Store Employees Cannot Be Excluded From the Scope of the Statutes.**

Without referring to the statutory language or citing any legal authority or legislative history, CVS proposes that the phrase "employees who sell at retail drugs and medicines" may be interpreted as limited to certain employees, based on circumstances not referenced in the statute, such as when employees only perform pharmacy or counseling duties, or use discretion in dealing with drugs and medicines.[2] These proposals impermissibly ask the court to rewrite the statutes to add currently nonexistent statutory criteria. *See Planned Parenthood Arizona Inc. v. Betlach*, 727 F.3d 960, 970–971 (9th Cir. 2013) (a court is "not vested with the power to rewrite" a statute but must instead construe what is written); *Gonzalez v. United States Immigration and Customs Enforcement*, 2020 WL 5494324, at

[2] Plaintiff objects to, and asks the Court to strike, evidence in ECF 106-1 at 8:16-20; 15:4-6; 26:7-8; 31:23-25.

*17 (9th Cir., Sept. 11, 2020) ("We cannot, however, 'create[ ] out of thin air' statutory text that does not exist.") (citing *Hamama v. Adducci*, 912 F.3d 869, 879 (6th Cir. 2018); *Ariz. State Bd. for Charter Sch. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1007 (9th Cir. 2006) (" a court may not add or subtract statutory text")). As the United States Supreme Court recently instructed:

> But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

*Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1737 (2020). Applying this reasoning, the practical realities of the "modern pharmacy operations" have no bearing on the statute's application. While the legislature could have written the statute as CVS desires, or amended it at any point, it did not. Instead, it used the disjunctive "or," to differentiate between pharmacists who "compound physician's prescriptions" from those who merely sell at retail drugs and medicines. This choice, combined with the other unopposed arguments in the Motion, compels the conclusion that the legislature intended to include a broader scope of employees within the reach of the statutes.

The only case CVS cites, *Bosley v. McLaughlin*, 236 U.S. 385, 392 (1915), upholding limits on the hours female pharmacists worked in a day, refers only to "employees engaged in selling drugs;" it does not examine what employees are included. CVS understands the standard of review backwards, urging the court to ignore the plain words of the statute unless Plaintiff explains in detail what the legislature was thinking when it chose to define which employees to include in the ambit of the statutes. The law is that the plain meaning of the selected words can only be overcome by evidence showing that the meaning *contradicts* the statute's goal. *See Metro One Telecomms., Inc. v. C.I.R.,* 704 F.3d 1057, 1061 (9th Cir. 2012) (the statute's plain meaning controls unless "demonstrably at odds with the intentions of" the legislature). CVS has not challenged the statutory construction relied on in the Motion, nor has it identified any inconsistency between limiting the work hours of those engaged in the retail sale of drugs and medicines and the statutory purpose of protecting public health as well as the Labor Code's statutory purpose of "protection of the employee's interests." *Alvarado v. Dart Container Corp. of Cal.*, 4 Cal. 5th 542, 552 (2018). Nor has CVS disputed Plaintiff's evidence, including job descriptions and FRCP 30(b)(6) witness testimony, that all retail employees were "employed to sell at retail drugs and medicine." Seventy-six other CVS employees corroborate that

the purpose of their employment is to sell at retail drugs and medicines, including over-the-counter medicines. *See* Supplemental Declaration of Beth Gunn ("Gunn Dec."), ¶¶ 2-3, Exs. 32-111. They assist customers in finding over-the-counter medicines, ring up such sales, and handle inventory, which furthers public health objectives such as dealing with sick customers and removing expired products from the shelves. *Id.* The statutes reflect an understanding that a higher risk of affecting public health occurs any time that drugs or medicines are stocked and sold to the public. CVS has not offered any basis for assuming that the legislature intended anything other than to broadly limit the working hours of all employees so engaged, under any conditions, in furtherance of this goal.

**4. The "Rule of Lenity" Does Not Apply Here.**

Citing cases arising in the criminal context, CVS asks the Court to replace well-settled law construing the Labor Code broadly in favor of employees with the "law of lenity," a criminal law concept, requiring fair notice of potential criminal consequences. According to its historical case law, the rule of lenity is a last-ditch means of interpreting an ambiguous statute, after all other canons of statutory construction have failed, to impose the lesser of possible criminal penalties. *See Kasten v. Saint-Gobain Performance Plastics Corp*., 563 U.S. 1, 16 (2011) ("But after engaging in traditional methods of statutory interpretation, we cannot find that the statute remains sufficiently ambiguous to warrant application of the rule of lenity here."); *U.S. v. Nader*, 542 F.3d 713, 721 (9th Cir. 2008) (rejecting the rule of lenity where typical statutory construction supplied an answer, because "[t]he rule of lenity applies only where 'after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute.'") (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993)). This concept does not assist CVS here, where, as explained above and in the Motion, the canons of statutory construction can and do provide an answer about the proper scope of Labor Code sections 850-852. *See, e.g., Home Depot U.S.A., Inc. v. Superior Court*, 191 Cal. App. 4th 210, 224, (2010), as modified on denial of reh'g (Jan. 10, 2011) (rejecting rule of strict construction for penal statutes and broadly construing PAGA as a civil statute according to its purpose of protecting the public).

**B. <u>Labor Code Sections 850-852 Have Not Been Repealed or Superseded.</u>**

CVS contends that the establishment of the IWC Wage Orders supersede Labor Code sections 850-852. This is just plain wrong. The California Supreme Court has held that the Wage Orders **do not**

take priority over the Labor Code. *See Gerard v. Orange Coast Memorial Medical Center*, 6 Cal.5th 443, 448 (2018) (citing *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1026 (2012)) ("'To the extent a wage order and a statute overlap, we will seek to harmonize them, as we would with any two statutes.' But because the Legislature is the source of the IWC's authority, **a provision of the Labor Code will prevail over a wage order if there is a conflict.**") (emphasis added). Thus, if a conflict between the Wage Orders and the Labor Code arises that cannot be harmonized, the conflict must be resolved in favor of the Labor Code. Here, no such inherent conflict exists: Labor Code sections 850-852's limits do no conflict with requirements to pay overtime compensation for daily shifts longer than eight hours or alternative workweek options, especially since a common alternative workweek schedule includes working 80 hours in 9 days during two workweeks, which could be shifts of 8.9 hours per work day. (Gunn Dec., ¶¶ 5-6, Exs. 112-113 (referring to common alternative workweek examples of working 80 hours in nine days over two workweeks). Labor Code section 1186.5's option for alternative workweek schedules can be harmonized in the same way. Further, Labor Code section 1186.5 resolves any conflicts with its specific language allowing alternative workweek schedules "[n]otwithstanding any other provision of law," if mandatory rules are followed, including rules that limit the hours to be worked during the covered periods. *See* Labor Code §1186.5. CVS has not submitted any evidence that is has availed itself of any legal alternative workweek options, nor can it, as its discovery responses indicated that none exist. (Gunn Dec., ¶ 16, Exs. 116-117). CVS' hypothetical conflict between the two Labor Code provisions is not ripe for adjudication.

**C. <u>CVS' Attacks on Plaintiff's Expert's Methodology Are Merely Alternate Incorrect Interpretations of Labor Code Sections 850-852.</u>**

CVS' criticism of Plaintiff's expert's declaration are not really objections to Dr. Drogin's methodology, they are objections to Plaintiff's theory of the case and accompanying statutory construction. Such objections do not undermine Dr. Drogin's testimony, which was properly based on his expert analysis of CVS' own timekeeping and payroll data.[3] *See, e.g., Alberts v. Aurora Behavioral Health Care*, 241 Cal.App.4th 388, 412 (2015) (crediting expert analysis where it "was offered to show

[3] CVS also objected to Dr. Drogin including two separate pieces of information – number of shifts worked and number of pay periods in which a violation occurred – in two separate paragraphs of his declaration. This is not a methodological problem, and does not disqualify him as a data expert.

that the [employer's] timekeeping and payroll data confirmed plaintiffs' theory that classwide policies led to the denial of meal breaks for putative class members"). To present an alternative methodology, CVS must specifically identify the other evidence it will rely upon to do so, which CVS has not done.

Regardless, CVS' challenge to Dr. Drogin's methodology affects only the extent of damages; it does not erase all liability for CVS. As the Supplemental Declaration of Richard Drogin ("Supp. Drogin Dec.") clarifies, even if CVS' interpretation of the statutes is adopted, hundreds of employees are still aggrieved, for tens of thousands of PAGA penalties. (Supp. Drogin Dec., ¶¶ 5-7.) Dr. Drogin can ascertain the exact number of violations, affected pay periods and/or PAGA damages pursuant to any theory of liability or methodology arising from any statutory interpretation. (*Id.*)[4]

**1. CVS' Interpretation of the Phrases "Average" and "Per Day" Conflict with the Statutory Language and Purpose.**

CVS proposes that the term "on average" in Labor Code sections 850 and 851 means that violations occur only when averaging hours of work over some unspecified period of time, instead of per day, as the statute states. This construction is untenable because it seeks to insert a different denominator to calculate the "average" other than the one already provided in the statute – *i.e.*, other than the hours worked "per day." CVS asks this court to replace the "per day" statutory language with a randomly chosen period of time – seemingly the number of days worked in a pay period – as the denominator used to calculate an "average." The statutory language does not lend itself to this interpretation. Rather, the wording of Labor Code section 851.5 demonstrates that the legislature intended to place limitations on the number of daily hours worked by covered employees: It states "Except on Sundays and holidays, and except for a period of time for meals, not to exceed one hour in length, **the hours of work permitted *per day* by this chapter** shall be consecutive." Labor Code § 851.5 (emphasis added). The only reasonable interpretation of this language is that the legislature intended Labor Code sections 850-851 to limit the number of "hours of work permitted per day."

The language also provides insight into the legislature's thinking: It understood that the hours worked might be separated by a period of time for meal breaks, such that the two separate time periods

[4] CVS' objection to Dr. Drogin counting each pay period in which any sort of violation occurred as one PAGA violation should be overruled, as separating out violations could lead to double-counting.

would be added together to determine the hours of work permitted per day. This is exactly how Dr. Drogin performed his analysis. Further, the language reflects an expectation of a workweek to be 6 days, comprised of Monday to Saturday, with a day off on Sunday. Using this assumption, a limit of 108 work hours in a two-week period would cover 12 days, which works out to an "average" of nine hours per work day over the pay period. As such, the portion of the statute limiting the work hours to not more than 108 in a two-week period has the exact same effect as CVS' proposed formula for "averaging" work hours, and would render CVS' construction of the "per day" language superfluous. In light of the legislature's own words interpreting the provisions at issue, the court should avoid construing the statute to contain a superfluous provision. *See Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.").

Perhaps most important, CVS' interpretation would allow a result that is incompatible with the statutory purpose. According to CVS' theory, employees could regularly work shifts of 20 hours one day, and shifts of 4 hours on three other days, and still comply with the statute. Or this could occur twice in one two-week pay period. This result would not advance the goal of limiting the number of hours of work permitted per day, or of safeguarding the public health. Because CVS' interpretation is at odds with the commonsense statutory language and purpose, it should be rejected.

**2. CVS' Interpretation of the Phrase "Hours" of "Work" Conflicts with Another Portion of the Statute.**

CVS contends that the hours considered as work time should exclude rest periods. As set forth above, Labor Code section 851.5 does not contemplate calculating rest periods into the "consecutive" amount of time permitted to be worked per day, even though it specifically subtracts meal break time from the calculation of hours of work. If the legislature had intended to similarly exclude rest break time, it could have easily done so, but since it did not, no similar adjustment is authorized. CVS also faces a practical challenge in attempting to remove rest break time from the time calculated as hours of work: **It has no evidence of such alleged non-working rest break time.** As CVS' own data shows, CVS does not keep track of rest break time. (Supp. Drogin Dec., ¶ 8.) To defeat summary judgment on this issue, CVS must "identify with reasonable particularity the evidence that precludes summary

judgment" by "introduc[ing] some 'significant probative evidence'" to support its contentions. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996); *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Eisenberg v. Ins. Co. of North America*, 815 F.2d 1285, 1288 (9th Cir.1987)). Where, as here, no rest break records exist, CVS lacks the significant probative evidence needed to show that employees did not work during those hours. *See, e.g., Gomez v. J. Jacobo Farm Labor Contractor, Inc.*, 334 F.R.D. 234, 257 (E.D. Cal. 2019), modified on reconsideration 2020 WL 1911544 (E.D. Cal., Apr. 20, 2020) ("not recording a rest break may create a rebuttable presumption that the employee was not relieved of duty and that no rest break was provided") (citing *Brinker*, 53 Cal. 4th at 1053, 139 (Werdegar, J., concurring)).

**3. CVS' Interpretation of the Phrase "a Week" Ignores the Legislative Intent to More Narrowly Limit Hours of Work for Employees Selling at Retail Drugs and Medicine.**

Based on the holding in *Mendoza v. Nordstrom, Inc.,* 2 Cal. 5th 1074 (2017), CVS urges a statutory construction based on the interpretation of other provisions of the Labor Code, sections 551 and 552, to understand the phrase "a week" as a fixed period of time instead of a rolling 7-day period of time. In *Mendoza,* the court based its decision on its review of the statutory history and legislative purpose to impose hours of work restrictions generally applicable to all employees on a workweek basis, across all industries. It did not consider the special rules imposed here for those "employed to sell at retail drugs and medicines."[5] Nor did it consider the import of Labor Code section 851.5, which only applies to this particular chapter of the Labor Code. The language of Section 851.5 clarifies that the legislature was concerned with the "consecutive" amount of time worked by the employees covered by the provisions in the chapter. The dictionary defines "consecutive" as "following one after the other in order : SUCCESSIVE." [6] The legislature's use of this term indicates an intent to consider days of work on a consecutive rolling basis, as Dr. Drogin calculated. This is consistent with the dictionary definition of a "week" as "any of a series of 7-day cycles," and "any seven consecutive

[5] CVS also suggests that the *Mendoza* interpretation of Labor Code sections 551-552 to relieve employers of liability if employees choose to work in excess of the day of rest requirement can be incorporated into the analysis here. However, Section 852's different statutory language that "The employer shall apportion the periods of rest to be taken by an employee…" clearly places a more stringent onus on employers to plan and ensure the proper periods of rest, without exception.

[6] All dictionary definitions contained herein are accessed through the following formula at https://www.merriam-webster.com/dictionary/[word to be defined] (last accessed on September 21, 2020).

days," and an intent to strictly regulate the days of rest for these employees. As the Motion pointed out, only a few industries were selected to impose stringent hours of work limitations, which should weigh heavily in construing the statute to comport with its legislative goals.

But even if CVS' definition of "week" is utilized, aggrieved employees were still required to work in excess of the statutory limitations of Labor Code section 852. (Supp. Drogin Dec., ¶ 7.) CVS has not provided any evidence that its interpretation relieves it of liability; only that the amount of damages may be reduced. As Plaintiff noted in the Motion, damages adjustments must be made based on updated data and could be amended to account for a different interpretation.

**D. CVS Cannot Rely on an Unpled Affirmative Defense Based on Nonexistent Evidence of "Emergency" Circumstances.**

**1. CVS Has Not Provided Evidence to Pursue its Labor Code Section 854 Defense.**

Because CVS' arguments pertaining to Labor Code section 854 are presented to negate liability that would otherwise exist, they constitute an affirmative defense. *See Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*, 718 F.Supp.2d 1167, 1173–1174 (N.D. Cal. 2010) (citing *Roberge v. Hannah 1174 Marine Corp.*, 1997 WL 468330, at *3 (6th Cir.1997) (an affirmative defense under FRCP 8(c) is "a defense that does not negate the elements of the plaintiff's claim, but instead precludes liability even if all of the elements of the plaintiff's claim are proven")). As a practical matter, CVS has not asserted this affirmative defense, and no good cause permits it to do so at this late stage of the litigation. *See Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (finding no good cause to allow amendment five days before fact discovery closed). In fact, when a party seeking amendment "was not diligent, the inquiry should end." *Id.* CVS has not filed a motion to amend its answer to include this defense, and opted to forego the opportunity to amend its answer in March 2019. (ECF 1-4 at 290-298 (Answer); ECF 19 (stipulation deeming Answer the operative complaint)).

Critically, because it is an affirmative defense, CVS bears the burden of proof to show that Labor Code section 854 excuses the violation of sections 850-852. *See Barnes*, 718 F.Supp.2d at 1173–1174 (citing *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489, 492 n. 4 (9th Cir.1988)). Yet CVS has not pointed to any evidence that it can rely upon to support this defense, much less the significant probative evidence required to defeat summary judgment. CVS implies that there are records showing times when employees called in sick or when wildfires or pandemic created

emergency situations, but it has not disclosed such evidence either in its FRCP 26 disclosures or its discovery responses. (Gunn Dec., ¶¶ 7-15, Exs. 114-115) Offering such evidence now violates the rule of FRCP 37(c)(1) that "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), **the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial**, unless the failure was substantially justified or is harmless." FRCP 37(c)(1) (emphasis added). This section is meant to "give[] teeth to [FRCP 26's] disclosure requirements by forbidding the use…of any information required to be disclosed by Rule 26(a) that is not properly disclosed." *Yeti by Molly, Ltd. V. Deckers Outdoor Corp*., 259 F.3d 1101, 1106 (9th Cir. 2001). It is an "'automatic sanction to provide a strong inducement for disclosure of material.'" *Bonzani v. Shinseki*, 2014 WL 66529, at *3 (E.D. Cal. Jan. 8, 2014) (quoting *Yeti*, 259 F.3d at 1106).

Evidence pertaining to alleged "emergency" circumstances, if it exists, would have been in CVS' possession since the inception of this case, yet (as set forth above), at no point prior to filing its Opposition did CVS disclose that it intended to rely upon such information as part of its defense of this case. This failure to disclose was neither substantially justified nor harmless, as fact discovery closed without Plaintiff having the opportunity to explore the alleged evidence pertaining to this affirmative defense, including deposing a FRCP 30(b)(6) deponent on the topic. *See, e.g., Ollier v. Sweetwater Union High Sch. Dist.*, 267 F.R.D. 339, 343 (S.D. Cal. 2010) ("The decision about whom to depose is largely driven by defendants' disclosures."). As a result, CVS is not allowed to supply this undisclosed evidence in opposition to the Motion.[7] *See*, *e.g.*, *Firstsource Solutions USA, LLC v. Tulare Reg'l Med. Ctr.*, 2018 WL 2949853, at *7 (E.D. Cal. June 13, 2018) (declining to consider evidence in opposition to summary judgment motion, given failure to comply with discovery obligations); *Cmtys. Actively Living Indep. & Free, et al. v. City of Los Angeles*, 2011 WL 4595993, at *7 (C.D. Cal. Feb. 10, 2011) (striking declarations of undisclosed witnesses in support of summary judgment motion; "The Court will not permit the City to circumvent discovery rules where it could have easily complied with such rules and where it has failed to establish that the late disclosures were either substantially justified or harmless."); *Whatru Holding, LLC v. Angels*, 2015 WL 11112535, at *2 (C.D. Cal. Aug. 6, 2015)

[7] Plaintiff objects to, and asks the Court to strike, such evidence CVS submitted in contravention of FRCP 26 in ECF 106-1 at 5:3-9; 7:20-8:8; 17:23-18:15; 22:19-23:16; 25:23-26; 31:27-32:2.

(same); *Ovieda v. Sodexo Ops., LLC*, 2013 WL 12122413, at *6 (C.D. Cal. Oct. 9, 2013) (same); *Gerawan Farming, Inc. v. Prima Bella Produce, Inc.*, 2011 WL 3348056, at *8 (E.D. Cal. Aug. 2, 2011) (same; witnesses not disclosed until day before discovery cutoff).

**2. CVS' Interpretation of the Word "Emergency" Ignores Its Plain Meaning.**

Moreover, the type of evidence CVS wishes to develop would not satisfy Labor Code section 854, which exempts compliance with Labor Code sections 850-852 "in any case of emergency," and states that "[t]he word emergency shall be construed as being accident, death, sickness or epidemic." While this language clarifies the types of emergencies that will suffice, it does not negate the meaning of the word "emergency" as "an unforeseen combination of circumstances." The dictionary definitions of accident, death, and epidemic all reflect similar unforeseeable circumstances affecting the public health – "accident" is defined as "an unforeseen and unplanned event or circumstance," or "an unexpected happening causing loss or injury;" "disaster" is defined as "a sudden calamitous event bringing great damage, loss or destruction;" and "epidemic" is defined as "an outbreak of disease that spreads quickly and affects many individuals at the same time." CVS does not provide any evidence of legislative intent for this exception to apply for the purpose of selling drugs and medicines to maintain corporate profits as opposed to maintain public health during a time of emergency.

By clinging to the word "sickness" as if it can be read apart from the context of "emergency," and apply to any type of sickness, including non-emergency sickness causing business "emergencies" unrelated to public health, CVS is really referring to its staffing practices in relation to routine employee sick day absences. Because the Labor Code itself contemplates that employees might take sick leave in the amount of "one hour per every 30 hours worked," employers are on notice that such sick time exists and could be taken, rendering it not unforeseeable, and therefore not a public health "emergency" within the meaning of Labor Code section 854. Labor Code § 246. Further, given CVS' sophisticated scheduling processes, it could have hired sufficient staff to fill any such routine absences if it had been trying to comply with Labor Code sections 850-852, which it admitted it did not. It did not even utilize its scheduling program's ability to limit the maximum hours to be worked per shift.[8] CVS'

[8] *See* ECF 84 at 12:4-9; 12:20-13:9. CVS offers no evidence of its schedulers using Labor Code §§ 850-852 as a scheduling guide, and Plaintiff's evidence shows that they did not. (Gunn Dec., ¶4, Exs. 108-110).

ongoing failure to schedule shifts in compliance with Labor Code sections 850-852 was not a function of sickness, it was a function of creating the wrong shift lengths and not hiring enough employees to cover shifts when needed. As CVS' scheduling data shows, such shifts were routinely scheduled[9] – any of these shifts exceeding nine hours in length that required coverage would be the same length no matter who worked it. CVS cannot avoid liability with these paltry excuses.

**E. No Good Faith Reason Exists to Reduce the PAGA Penalties.**

The Motion sets forth the specific criteria a court should consider when determining whether to reduce the statutorily-prescribed amount of PAGA penalties. CVS' only basis for reducing penalties speciously argues that Plaintiff, and perhaps other employees, were complicit in working hours beyond those permitted by the Labor Code. CVS' desperate attempt to cast Plaintiff's innocuous joke into a basis for an "unclean hands" affirmative defense should be rejected, as no evidence supports it.[10] Regardless, neither Plaintiff nor any other employee may absolve CVS from its obligations to comply with the Labor Code. Despite noting how long Labor Code sections 850-852 have existed, CVS does not explain: (1) its longstanding noncompliance, including according to its own understanding of the statutes; (2) its failure to change its scheduling practices until nineteen months after it was notified of the statutory violations; (3) its different practices from its competitors and the advice of the California Chamber of Commerce. Obviously, CVS made no good faith compliance efforts. Instead, CVS waited for its noncompliance to be discovered rather than suffer any business slowdown or reduced profits inevitably resulting from compliance. This is exactly when a multi-billion-dollar company must pay the full PAGA penalties designed to deter such cavalier disregard of California's employment laws.

**F. No PAGA Manageability Concerns Exist.**

CVS incorrectly insists that Plaintiff must show that this PAGA action is manageable. As a threshold matter, manageability concerns for PAGA claims should not be entertained. *See, e.g., Tseng v. Nordstrom, Inc.,* 2016 WL 7403288, at *5 (C.D. Cal. Dec. 19, 2016) (declining to impose a

[9] CVS objected to Dr. Drogin's analysis of the scheduling data as not showing the amount of time actually worked, when it was proffered to show the number of shifts that were regularly scheduled in violation of Labor Code §§ 850-852, which Plaintiff's sample schedules also show. (Gunn Dec., ¶¶17-18, Exs. 118-119).

[10] CVS misconstrues Plaintiff's deposition testimony, involving a joke text exchange with a CVS scheduler about wanting a Porsche (which he never bought), to accuse him of consciously violating the Labor Code. To the contrary, Plaintiff testified that he did not think CVS would ask him to violate the law and that he often wanted to work less but felt he had to work the hours CVS asked of him. (Gunn Dec., ¶17, Ex. 118).

manageability requirement on PAGA claims in light of PAGA's purpose as a law enforcement action to benefit the public); *Rincon v. West Coast Tomato Growers, LLC*, 2016 WL 11620827, at *9 (S.D. Cal., July 11, 2016) (determining whether a PAGA claim is unmanageable is inconsistent with PAGA's purpose and statutory scheme); *Zackaria v. Wal–Mart Stores, Inc.*, 142 F.Supp.3d 949, 959 (C.D. Cal. 2015) (deeming PAGA actions unmanageable due to "individualized liability determinations" is inconsistent with PAGA's purpose, because it "would impose a barrier on such actions that the state law enforcement agency does not face when it litigates those cases itself."); *Plaisted v. Dress Barn, Inc.*, 2012 WL 4356158, at *2 (C.D. Cal. Sept. 20, 2012) (same; "every PAGA action in some way requires some individualized assessment regarding whether a Labor Code violation has occurred."); *Moua v. IBM Corp.*, 2012 WL 370570, at *3 (N.D. Cal., Jan. 31, 2012) ("The statute's plain purpose is to protect the public interest through a unique private enforcement process, not to allow a collection of individual plaintiffs to sue the same defendant in one consolidated action for the sake of convenience and efficiency."). But even if the manageability of adjudicating the Labor Code sections 850-852 claims is considered, the relevant facts and law quickly resolve the inquiry, since all that is required is interpreting statutes and analyzing centralized data contained in scheduling, timekeeping and payroll records. CVS' only objection is based solely on its improper attempt to introduce new evidence after fact discovery has closed, as explained above. Because such evidence cannot be considered, nor would individualized inquiries be required to examine it, CVS' manageability arguments must be rejected.

**G. CVS' Would-Be Settlement in Another Case Cannot Shield it from Liability.**

Although it has not filed a motion to stay the case, CVS suggests deferring ruling on the Motion so that it can rush through approval of a proposed settlement in the matter of *Chalian, et al. v. CVS Pharmacy, Inc., et al.,* (C.D. Cal. Case No. 2:16-cv-8979-AB-AGR) ("*Chalian*"), arguing that the Labor Code section 850-852 claims at issue in the Motion will be disposed of through that proceeding. This argument is spurious. First, the *Chalian* plaintiffs have represented that the scope of the release in that case was narrowly tailored to cover only claims that are not part of this case – namely, claims arising from off-the-clock work that caused shift lengths to exceed Labor Code sections 850-852's limits. [11]

[11] To the extent CVS understood differently, "the failure to reach a meeting of the minds on all material points prevent[ed] the formation of a contract" *Bustamante v. Intuit, Inc.*, 141 Cal.App.4th 199, 215 (2006).

(Gunn Dec., ¶¶ 19-21, Exs. 120-121). Such time would not be recorded, or appear in CVS' timekeeping records, and would not be considered violations here. Second, the *Chalian* court has not yet approved the settlement of the belatedly added PAGA claims. (*Id.* at ¶¶ 22-23). After expressing concerns about the scope of the release, the court deferred ruling on whether to include these claims in that settlement, and urged the parties to confer with Plaintiffs to find mutually acceptable language. *Id.* Third, the *Chalian* court's denial of Plaintiffs' motion to intervene, which was based on Plaintiff Hyams' sole status as a party deputized by the California Labor and Workforce Development Agency ("LWDA") to pursue the Labor Code 850-852 claims, has been appealed to the Ninth Circuit, and will take additional time to resolve. (*Id.* at ¶ 24). In a recent *amicus curiae* brief the LWDA filed in a Ninth Circuit appeal involving almost identical issues, the LWDA articulated its official position that only those who have followed the LWDA's administrative procedures, like Plaintiff Hyams, may settle PAGA claims, calling into question whether the claims at issue will be resolved as proposed. (*Id.*, Ex. 122). *See, e.g., O'Connor v. Uber Technologies, Inc.*, 201 F.Supp.3d 1110, 1131 (N.D. Cal. Aug. 18, 2016) (inviting and crediting the LWDA's evaluation when approving PAGA settlement).

Perhaps most compelling, CVS itself did not identify the *Chalian* settlement agreement as part of any defense in this case in either its FRCP 26 disclosures or in its responses to discovery. (Gunn Dec., ¶ 26). Thus, as explained above, CVS cannot rely on it as a defense in this case, either in response to this Motion or at trial. This is particularly true because CVS represented, in response to Plaintiffs' discovery requests, that, other than sporadic individual settlement agreements, no agreements that might affect the claims in this case existed, and did not provide the agreement until months later, after fact discovery closed. (*Id.*, Ex. 123). Allowing CVS to rely on such evidence at this late stage to prevent a dispositive motion on claims that Plaintiffs have been litigating for over two years, as the only representatives authorized by the LWDA to pursue such PAGA claims, would be not be in the best interests of the LWDA or the aggrieved employees.

DATED: September 24, 2020

GUNN COBLE LLP

By: /s/ Beth Gunn
Beth Gunn

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