SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PLAINTIFFS individually and on behalf of all others similarly situated, Plaintiffs, vs. SOUTHERN CALIFORNIA GAS COMPANY, a California Corporation and SEMPRA ENERGY, a California Corporation, Defendants.	**Case No.:** **CLASS ACTION** **PLAINTIFFS' MOTION TO SET ASIDE SETTLEMENT**

Plaintiffs, on behalf of themselves, individually, and all others similarly situated, hereby move that this Honorable Court enter an Order setting aside the "settlement" entered into by Southern California Gas Company and Sempra Energy (hereinafter jointly "Defendants")[1] and some members of the proposed class in this action. Plaintiffs respectfully request that the Court find that the "Southern California Gas Company Individual Settlement Program," hereinafter the "Settlement," is in violation of Labor Code § 206.5 and California Rule of Court 3.769. Plaintiffs additionally request that the Court direct Defendants to cease communicating with putative class members regarding the pending litigation.

This Motion is based on the Memorandum of Points and Authorities set forth below, the First Amended Complaint on file in this matter, the Declarations of Donald Kick, Alberto Alvarez, Leonel Uribe and Kristen Marquis Fritz, filed herewith, and Defendants' Opposition to Plaintiffs' Application for a Temporary Restraining Order Prohibiting Settlement Communications with Members of an Uncertified Class, hereinafter "TRO Opp.," previously filed with the Court.

[1] Subsequent to this settlement offer, Sempra Energy was dismissed as a defendant in this action. However, since the settlement documents themselves refer to both entities, Plaintiffs will continue to use the pleural term "Defendants" throughout this Motion as Sempra Energy remains a Releasee of the settlement, despite its dismissal from this action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This matter is a proposed class action brought against Defendants on behalf of all current and former non-exempt Field Operations employees challenging Defendants' policy and practice of (1) failing to provide their non-exempt employees with the meal and rest periods to which they are entitled by law and (2) requiring their non-exempt employees to work off-the-clock and without pay during the Class Period. *See,* First Amended Complaint ("Complaint") at ¶1. In the normal course of discovery, Plaintiffs sought the identity and contact information for members of the putative class. In response, Defendants raised certain objections and refused to provide responsive information.[2] Defendants thereafter took full advantage of their sole control over this critical contact information. On or before June 14, 2011, Defendants used a unilaterally retained and controlled third-party "Administrator" to send highly misleading "settlement offers," broad releases and fully-negotiable checks, to approximately 850 putative class members who hold the title of either Construction Technician ("CT") or Lead Construction Technician ("LCT"). *See, e.g.,* Decl. of Donald Kick, "Kick Decl.," at ¶¶ 3-4, filed herewith. The documents provided insufficient, one-sided, coercive and outright false information, as discussed below. *Id.*

Immediately upon learning of these efforts by Defendants to enter into individual settlements with putative class members, Plaintiffs filed an *ex parte* Application For Order To Show Cause And Temporary Restraining Order, which was heard on June 20, 2011. Defendants appeared and opposed the Application. ("TRO Opp."). The Court heard argument and thereafter denied the *ex parte* Application. *See,* Transcript of Proceedings, the original of which is attached as Ex. A to the Declaration of Kristen Marquis Fritz, "Fritz Decl.," filed herewith. The merits of Plaintiffs' objections to the settlement were not addressed at that time, as the Court only denied the *ex parte* request seeking an immediate ruling. *Id.*

Apparently not satisfied with the response to their settlement offer, Defendants directed their self-selected and controlled "Administrator" to send a postcard "update" on or about June

[2] The parties have since met and conferred and agreed on a compromise regarding production of a sample of contact information. As of the date of filing this Motion, however, Plaintiffs have still not been provided with the contact information for any class members.

29, 2011 making yet further misleading statements and providing "an additional reason to accept," to wit: asserting that if there is a settlement in this lawsuit in the next 12 months that "is worth more than your settlement, we will make up the difference." *See, e.g.*, Kick Decl. at ¶ 6. The postcard then urged the recipients to accept the offer and indicated that, if they had questions, they could call a toll free "hotline." *Id.*

Less than one month later, in a further attempt to increase acceptance, the Administrator sent out another round of postcards. One version of the postcard was sent to putative class members who had rejected the settlement offer and asserted that as a result of discussions with the union representing class members, the company had "clarified and improved" its offer. *See, e.g.*, Kick Decl. at ¶ 7. Specifically, the postcard stated that employees would not be giving up any union contract rights or any claims not in the lawsuit. *Id.*[3] Another postcard was mailed to those who had neither cashed nor returned the checks. This mailing threatened to stop payment on the checks, and provided even more inaccurate and misleading statements (including, but not limited to, inferring that checks would expire, even though the check "stale dates" were still months away, and stating that class certification should be ruled upon soon, despite the fact that the hearing on that motion was not scheduled until December 13, 2011), and urging employees to "quickly cash your check." *See, e.g.*, Ex. F to Fritz Decl.

II. PLAINTIFFS HAVE STANDING TO CHALLENGE THE SETTLEMENT

Standing derives from the principle that "[e]very action must be prosecuted in the name of the real party in interest." Code Civ. Proc. § 367. "A party lacks standing if it does not have an actual and substantial interest in, or would not be benefited or harmed by, the ultimate

[3] In response, Plaintiffs' counsel sent letters to Defendants' counsel requesting that they "agree that the terms of the release negotiated as part of that settlement agreement will supersede the release that was obtained by an individual's acceptance of Defendants' 'offer' and will thereafter set the terms of release as to those individuals who accepted Defendants' offer under the 'Southern California Gas Company Individual Settlement Program.'" *See*, Ex. B, to Fritz Decl. The response received stated only that Defendants "remain open to mediation; this issue, like all issues, will be on the table." *See*, Ex. C, to Fritz Decl. In an attempt to further understand Defendants' "offer" to putative class members, Plaintiff's counsel asked Defendants' counsel the following: "Can you confirm that it is your position that the release obtained through your "settlement offer" does not release any claims not contained in the above lawsuit, as we understand the company represented to counsel for Local 132 of the Utility Workers Union of America?" *See*, Ex. D, to Fritz Decl. In response, Defendants' gave a non-answer, stating only that "[t]he language contained in the release in the individual settlement program materials which you have speaks for itself. The release is tailored to claims arising from or related to the claims alleged in the complaint." Ex. E, to Fritz Decl. As set out below, the Release *is* broader than the claims in the complaint.

outcome of an action." *City of Santa Monica v. Stewart*, 126 Cal.App.4th 43, 59 (2005) (citations omitted). Here, Plaintiffs have an actual and substantial interest not only in the action itself, but in the validity of the settlements that Defendants have entered into with putative class members. Indeed, the grossly false information contained in Defendants' settlement offers may result in prejudicing the class members against both the suit and Plaintiffs' counsel, as well as coercing them into releasing the valid claims in this lawsuit (and potentially even broader claims) without fair notice, adequate compensation, and reasonable information. Further, the claims under B & P Code §17200, *et seq.*, and PAGA, (Labor Code § 2698, *et seq*.,) provide Plaintiffs with standing to act in a representative capacity on behalf of absent class members.

III. THE SETTLEMENT IS IMPROPER AND MUST BE SET ASIDE

Plaintiffs' Counsel are well aware of the Appellate Court decision in *Chindarah v. Pick Up Stix, Inc.*, 171 Cal.App.4th 796 (2009). While that decision does permit individual settlement offers to be made to class members, it does so in very limited circumstances and under a factual scenario far different from the outright misleading method utilized by Defendants here. That opinion will be discussed, and distinguished, *ante*.

A. The "Settlement" Offered By Defendants Is Grossly Inadequate

The gross unfairness of this proposed settlement is easily exposed by examining the potential value of just some of the claims alleged in this action. All class members, and specifically the CTs and LCTs to whom the "settlement" offers have been made, assert three primary claims and several derivative claims. First, Plaintiffs claim that Defendants do not provide meal and rest breaks, as required by Labor Code section 226.7. By way of example, CTs and LCTs are not permitted to leave their jobsites/trucks for meal and rest breaks, are otherwise limited in what they can and cannot do and where they can and cannot go on those breaks, and must be ready, at all times, to respond to emergency calls, even during breaks. *See, e.g.,* Complaint at ¶3. Second, Plaintiffs have alleged an off-the-clock claim based upon the time it takes class members, including CTs and LCTs, to put on mandatory coveralls and other protective gear, and to otherwise perform certain duties before the start of, and after the end of, their paid shifts. *See, e.g.*, Complaint at ¶5. Third, since the wages for time spent working off

the clock and the missed meal and rest breaks are not reported on bi-weekly pay statements, class members, including CTs and LCTs, are entitled to the premium wages set forth in Labor Code section 226. *See, e.g.,* Complaint at ¶¶79, 80.

Even a conservative analysis of the value of these claims alone results in potential recovery far above that which was offered. The total potential value of the claims in this action, for an individual employed during even 4 years of what is now almost a 5 year class period would be significant.[4] For example, assuming only 8 minutes per day for the off-the-clock claim and 46 weeks worked per year, the off the clock claim for a class member earning the average CT and LCT rate of $30 per hour would total $5,520 plus interest (paid at overtime rate because CTs and LCTs already work 8 hours per day and 40 hours per week). If the same class member missed only one meal and only one rest break per week for four years, that claim would be worth approximately $11,040, plus interest. Since the unpaid off the clock and meal/rest penalty wages would not have been reported on pay stubs, that could easily result in a maximum Labor Code 226 penalty of $4,000.00 per person. Thus, for claims very conservatively calculated to be worth over $20,000, Defendants have unilaterally and deceptively offered sums in the range of $40 to $1,000.[5] *See,* Fritz Decl. at ¶ 16.

Defendants' settlement offer program is a clear example of how California public policy can be circumvented by employers, unless their actions are subject to judicial review and control. Here, after having allegedly violated California's wage laws, and facing a lawsuit as a result, Defendants sought to effectuate an end-run around the court system. The employees who the Supreme Court spoke so clearly of in *Gentry* v. *Superior Court*, 42 Cal 4th 443(2007), are being subjected to the worst abuse possible – coerced settlement of their claims, while a class action was pending, without any oversight to protect them.

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[4] During the Class Period, CTs made between $24.19 and $30.97 per hour and LCTs made between $30.10 and $38.53 per hour. *See,* Pay Grade Tables from 2005 and 2009 Collective Bargaining Agreements, attached respectively as Exhibits L and M to Fritz Decl. Thus, the average hourly wage as between CTs and LCTs during the Class Period is approximately $30 per hour.

[5] Under Plaintiffs' theory, all class members, including CTs and LCTs, are **never** provided the opportunity to take proper meal or rest breaks. If this theory prevails , at a minimum class members would be entitled to at least one missed meal break penalty, and one rest break penalty per day, raising this potential average claim to over $64,000 per person.

B. Defendants' Unilateral Conduct Violates California Rule Of Court 3.769

As an important preliminary matter, it must be noted that the Appellate Court in *Chindarah* did not address the argument set forth in this section, to the effect that Defendants'conduct violates California Rule of Court 3.769. As such, the Court of Appeals' opinion in that case does not dispose of the present issue. As discussed in the following sections of this brief, the *Chindarah* decision is also inapposite for several additional reasons.

California Rule of Court 3.769 states in pertinent part:

> (a) A settlement or compromise of an entire class action, or a cause of action in a class action, or as to a party, requires the approval of the court after hearing.
> (c) Any party to a settlement agreement may serve and file a written notice of motion for preliminary approval of the settlement. The settlement agreement and proposed notice to class members must be filed with the motion, and the proposed order must be lodged with the motion. (Emphasis added).

Permitting the procedure employed herein by Defendants to stand invites the very type of mischief this Rule of Court was promulgated to prevent. Defendants, acting unilaterally, should not be permitted to do what the parties, acting jointly, would be prohibited from doing. Just as parties reaching a mutually-agreed settlement are required to present the same for approval to the Trial Court, a defendant wishing to make unilateral, but essentially class-wide offers, to the putative class members should be required to do so by way of a proper motion. The Trial Court would then have the opportunity to perform its due diligence analysis of the proposal, permit plaintiffs' counsel to communicate with class members and comment upon the same, and to consider whether additional discovery is necessary prior to dissemination of the offer, to determine if the offer is indeed reasonable under the circumstances.

To prevent a violation of this public policy, which is intended to protect putative class members such as Defendants' employees from unknowingly or unintentionally waiving their rights, Rule 3.769 mandates compliance with its provisions any time an attempt is made to settle claims raised in a proposed or certified class action. To do otherwise would permit a defendant, acting unilaterally and without any oversight by a court or involvement of plaintiffs' counsel, to do what it unquestionably could not do in the case of true arms-length negotiations in connection with the settlement of a proposed class action.

This is particularly problematic in the context of wage and hour litigation due to the unequal bargaining powers of employer and employee. *See, Gentry,* 42 Cal.4th 443. Defendants' action in presenting an employer-driven (and clearly employer-beneficial) settlement proposal, without any court oversight or input by proposed class counsel, should not be countenanced. Indeed, it is necessary to level the playing field as much as possible. *Id.* at 472 ("The lack of material information about the disadvantageous terms of the arbitration agreement, combined with the likelihood that employees felt at least some pressure not to opt out of the arbitration agreement, leads to the conclusion that the present agreement was, at the very least, not entirely free from procedural unconscionability.") In *Kleiner vs. First National Bank of Atlanta,* the Court sanctioned defendant for urging potential class members to exclude themselves from the class (essentially what Defendants are doing here), holding that:

> A unilateral communications scheme, moreover, is rife with potential for coercion. "[I]f the class and the class opponent are involved in an ongoing business relationship, communications from the class opponent to the class may be coercive." This litigation is illustrative. The class consisted of Bank borrowers, many of whom were dependent on the Bank for future financing. Bank customers affected by the litigation included "those who anticipated seeking a note 'rollover,' new loans, extension of lines of credit, or any type of discretionary financial indulgence from their loan officers, and who did not have convenient access to other credit sources." … the high number of exclusion requests was witness to the inherent coercion of the Bank's machinations.751 F .2d 1193, 1201 (11th Cir. 1985) (internal citations omitted).

Indeed,

> in the final analysis it is the court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation. 'The court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement.' 'The courts are supposed to be the guardians of the class.'

Kullar v. *Foot Locker Retail, Inc.*, 168 Ca1.App.4th 116, 129 (2008) (internal citations omitted).

If this independent level of scrutiny by the trial court is required for a mutually agreed upon settlement, then certainly at a minimum, that same level of review, coupled with plaintiffs' counsels' right to comment upon the terms and provide advice to settling putative class

members, is required in connection with an attempt by a defendant to unilaterally settle with absent class members. Here, there can be no basis for a "presumption" of fairness that arises from arms-length negotiations. To the contrary, any presumption would be to the unfairness of this "settlement," which should not be permitted to proceed.

C. Defendants' Actions Are Improper

A defendant may make a non-coercive and non-misleading offer of settlement to putative class members; a defendant may not, however, coerce and mislead unrepresented class members into settling their legitimate claims for pennies on the dollar. *Rich & Whillock, Inc. v. Ashton Development, Inc.*, 157 Cal.App.3d 1154, 1158 (1984) ("there is an increasing recognition of the law's role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power and a greater willingness to not enforce agreements which were entered into under coercive circumstances.") Here, Defendants have claimed that their conduct in making this offer of settlement to putative class members is appropriate under the Court of Appeals' opinion in *Chindarah*. *See,* TRO Opp. It most certainly is not.

Chindarah was a misclassification case, not a claim involving non-compliant meal and rest breaks. 171 Cal.App.4th 796. Specifically, the Court's decision in *Chindarah* was based on the conclusion that an employee may release his claim to past overtime wages as part of a settlement of a bona fide dispute over those wages. *Id.* at 803. Importantly, the Court of Appeal acknowledged, however, that a compromise of such a bona fide dispute is binding only if it is made after the wages concededly due have been unconditionally paid. *Id.* at 800, 801, *citing Reid v. Overland Machined Products*, 55 Cal.2d 203 (1961), and *Sullivan v. Del Conte Masonry Co.*, 238 Cal.App.2d 630 (1965).

The Court also cited to the case of *Reynov v. ADP Claims Services Group, Inc.*, No. C06-2056CW, 2007 WL 5307977 (N.D.Cal. Apr. 30, 2007) for the principle that "wages are not 'due' if there is a good faith dispute as to whether they are owed. Because [employer's] defense that [plaintiff] was an exempt employee under California law would, if successful, preclude any recovery for [plaintiff], a bona fide dispute exists and the overtime pay cannot be considered 'concededly due.'" 171 Cal.App.4th at 802. *Reynov* is, however, distinguishable. There, the

Court noted two important facts: (1) the employer unconditionally paid plaintiff "all outstanding wages owed to him" and (2) plaintiff "accepted substantial compensation to settle a bona fide dispute." 2007 WL 5307977 at *3.

The same certainly cannot be said here, where Defendants have most definitely NOT paid putative class members all outstanding wages they are owed, and the paltry sum offered in settlement is anything but substantial. Defendants here attempt to mislead class members into waiving substantial claims without any disclosure of either the actual amount of money due the putative class members as a result of several Labor Code violations or, at a minimum, a disclosure of the potential recovery in this case. Instead, Defendants offer pennies on the dollar, hoping that a combination of both ignorance of the legal claims asserted and/or the actual sums due (something almost no class member could independently calculate) will result in the employer obtaining a windfall settlement at the expense of its employees. The *Reynov* Court noted that the purpose behind Labor Code § 206.5 was to prevent "unscrupulous employers" from precisely such situations, where payments provide them with a complete release of claims which are indisputably owed, but for far less than the indisputably owed amount. *Id.* This is indeed what Defendants are trying to do here.

Here, Plaintiffs assert claims which include unpaid off-the clock work time, missed meal and rest breaks, as well as claims under Labor Code section 226. These claims raise complex legal and factual arguments, both sides of which are not presented by Defendants' settlement offer.[6] Indeed, Defendants' settlement offer does not address many of these issues at all. *See, e.g.*, Ex. 1 to Kick Decl. In addition, as discussed above, the amounts offered were not even close to the amount that is likely owed. Also, the release in *Chindarah* was limited as to time and scope. In that case, the class period was a fixed period and the release covered only those claims that had been asserted in the underlying lawsuit. *Id.* Here, the "Claims Released" in the settlement program include claims broader than those alleged in this action, as discussed below.

[6] Plaintiffs estimate that the proposed class herein includes over 3,000 individuals. Based upon Defendants' representation, it appears that the settlement offer was made to 647 individuals. *See, e.g.*, Ex. 2 to Kick Decl. These individuals were all employed as "Construction Technicians" and "Lead Construction Technicians." *See,* Ex. 1 to Kick Decl. Defendants have no doubt chosen to attempt to "settle" with this sub-group of the proposed class because Defendants' Labor Code violations are the most egregious as to these employees.

Finally, it is important to note that the settlement in *Chindarah* was made with the putative class members after the parties had attended mediation (although unsuccessful). 171 Cal.App.4th at 798. Here, to the contrary, this action is in its infancy and no mediation has been held with a neutral mediator who would provide both sides with an unbiased analysis of their respective positions. No substantive offer of settlement was made to Plaintiffs' Counsel for consideration *before* directly offering the paltry sums directly to putative class members.

D. The Settlement Offer Is Misleading And Coercive

i. The Initial Misleading Communication

The most glaring reason why the settlement offer is misleading and coercive is the manner in which it is presented. The communication is presented in the form of what would appear to be a court-ordered Notice, is depicted as being from the "Southern California Gas Company Individual Settlement Program Administrator" and refers to the "Southern California Gas Company Individual Settlement Program" (as if this was a court ordered and endorsed notice and case resolution). The unsolicited mailing includes a fully-negotiable check, completed W-2 and 1099-MISC forms, and states in bold "IMPORTANT TAX RETURN DOCUMENTS ENCLOSED." However, contrary to this incredibly deceptive presentation, the purported "settlement" is no settlement at all. It was not negotiated with any party to this action, any attorney (or other representative) representing the employees, nor was it approved by the Court. It is nothing more than Defendants' self-serving offer to settle for pennies on the dollar.[7]

Defendants' intent to mislead is apparent. Since Defendants possessed the contact information for all recipients, there is no good reason why Defendants, themselves, did not send the settlement offer. Rather, in an effort to mislead recipients to believe that the settlement was somehow sanctioned by this Court, Defendants retained and controlled Rust Consulting as the "administrator" of a fictitious "settlement program."[8]

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[7] It is also disturbing that Defendants state that they are offering to settle so that they "can get on with [their] normal business without the distraction of major litigation." Indeed, that is precisely what the present litigation is seeking to prevent – Defendants continuing their "normal business" practices of violating the Labor Code by failing to provide non-exempt employees with proper meal and rest periods and requiring them to work of-the-clock.

[8] This is even more troublesome because the costs of such "administration" were taken out of the putative class members' shares of the $500,000 Defendants offered to pay. *See, e.g.*, Ex. 1 to Kick Decl. The offer advised that putative class members would bear the cost of the "administrator" chosen by Defendants, and yet did not

The communication is clearly calculated to mislead and misinform recipients. Even the "hotline" that was established to supposedly answer questions provides that a Southern California Gas Company representative – as opposed to the representative of a truly independent administrator - will return messages. Kick Decl. at ¶ 5. This is unmistakable evidence of coercion. Employees are told on the one hand that their participation is voluntary and that their managers/supervisors will not know whether or not they accepted the offer (except for those "who have a legitimate need to know," whatever that means), *id.* at Ex. 1, and, on the other hand, they will have to ask a "company representative" questions about the settlement offer. *Id.* at ¶ 5.

Defendants' intent is to make sure that class members receiving the offer of settlement are unable to properly evaluate whether the sum being offered to them is a fair, reasonable and adequate amount for the claims that are being released. Indeed, although the documents state that "You should accept only if you think what we are offering is a fair compromise of any claims you might have…," Kick Decl. at Ex. 1, there is no information provided to them to enable them to weigh the options. The gross settlement amount (as well as the individual amounts offered to putative class members) is grossly inadequate in light of the claims alleged. Without knowing certain specific information about the putative class members employment history and the details of Defendants' ongoing violation of law, it is impossible even for the moving party herein to estimate the exact value of the claims that class members are releasing by accepting this employer imposed "settlement."

Tellingly, no information is provided as to how the gross $500,000 "settlement amount" was arrived at or how it compares to Defendants' alleged and potential liability.[9] As an example, the "penalty" is pursuant to Labor Code § 226 for failure to provide employees with an accurate wage statement is a maximum of $4,000 for each employee working for Defendants more than 42 weeks (20 bi-weekly pay periods at $100 for the first pay period and $200 for each one

provide anyone to represent their interests in the settlement process or to evaluate whether such costs are reasonable.

[9] Defendants asserted in discovery responses (and Plaintiffs have no available information on which to evaluate this statement) that there are 598 current and 49 former employees who would fall within the sub-group they have unilaterally defined for purposes of this "settlement." Using the very conservative example found earlier in this brief, if all CTs and LCTs had the average overall claim of more than $20,000 for just some of their claims, the potential value to this group of employees would exceed $12.5 million.

thereafter). Recipients of this "offer" from Defendants would have no way to know that they may be entitled to $4,000 in penalties alone (setting aside the potential value of the other claims asserted in this lawsuit and the additional rights released by accepting the settlement offer) and thus would be misled to accepting Defendants' offer without full and complete knowledge.

Further, Defendants have unilaterally decided that the "settlement" will represent 50% wages and 50% penalties. What the penalties are, and how they are calculated, remains undisclosed. As a further example of the outrageous nature of this settlement, Defendants take the amount attributable to their *employer* payroll taxes out of each individual's share of the settlement. *See, e.g.,* Ex. 1 to Kick Decl. This is truly shocking.

Finally, the amount offered to settle the claims of these putative class members is particularly egregious in light of the breadth of the release and Defendants' admission in the documents that it could face "meaningful liability" in this case. *Id.*

Defendants also make several expressly misleading statements and blanket misrepresentations in the "settlement" documents. First, the documents make untrue representations about what the lawsuit claims, as well as the nature of Plaintiffs' attorneys' contentions. For example, the documents state that "Plaintiffs' attorneys contend that the obligation to "provide" meal and rest periods means that an employer must "ensure" that all employees take their 30 minute off-duty meal period within five hours of the start of work." *Id.* However, the Complaint does not present the claims in that manner, and is much more nuanced and comprehensive. In fact, the gravamen of the allegations in Plaintiffs' Complaint is that Defendants do not relieve class members of all of their duties so that they can take the meal and rest breaks that they are entitled to by law.[10] Concerning this issue, the document sent by Defendant refers to *Brinker Restaurant Corp. v. Superior Court,* 165 Cal.App.4th 25(2008), currently pending review before the California Supreme Court. However, the outcome of that case, regardless of the ruling, will have no impact on the present matter as the issue in *Brinker* is

[10] For example, Plaintiffs allege that "Defendants' policies, procedures and practices mandate that members of the Class stay on the job site and/or in their trucks during their meal and rest breaks and that they be available and ready at all times during those breaks to respond to emergencies. As a result, Plaintiffs and members of the Class are not relieved of all duties during their meal and rest periods as is required by law." Complaint at ¶¶ 3, 4, 23, 25.

whether the employer had an affirmative duty to ensure breaks were taken.[11] The present action, to the contrary, focuses on whether class members were relieved of all duties during meal and rest breaks. If they were not relieved of all duties, they were not provided rest and meal breaks.

Second, the documents provide legal advice (e.g., "Effective January 1, 2011, gas and electric utilities employees who are covered by a collective bargaining agreement became exempt from the requirement that they begin a meal period within five hours of starting work.") –and incorrect legal advice at that –but are signed by someone who is not an attorney. Additionally, the simple fact that Defendants are making any representations in the offer as to Plaintiffs' Counsels' position suggests that Plaintiffs' Counsel was consulted and/or participated in the preparation of the document and/or the settlement, which is not the case.

Third, the documents are further misleading for what they do not say. For example, they do not advise putative class members that there actually is no settlement in the true sense of the word, but, rather, they represent a misleading "offer" to employees. Also, the manner in which the settlement is presented and the language used makes it appear that Plaintiffs' Counsel or the Union were involved in the negotiation or presentation of the settlement (and not disclosing that neither were consulted). While, the documents repeatedly refer employees to contact Plaintiffs' Counsel or the Union to discuss the settlement, neither counsel nor the Union had any knowledge of this maneuver by Defendant until after the offer had been made.[12]

As stated previously, the correspondence from the Administrator (i.e. the Defendants) to the putative class members contained a "hotline" telephone number. However, callers to that number received a recorded message requesting information and advising that "a Southern California Gas Company representative" would return the call. *See,* Kick Decl. at ¶ 5. Indeed, there was no way to obtain information about the settlement anonymously or to contact the

[11] Indeed, contrary to Defendants' assertions in its TRO Opp. at p. 8, "all aspects of meal-period law" are not up in the air pending the ruling in *Brinker*.

[12] Defendants did not provide either Plaintiffs' Counsel or the Unions that represent these employees with advance notice of the so-called "settlement." Plaintiffs' Counsel became aware of it only after receiving calls from employees. Indeed, Defendants claim that there could be no coercion or abuse because the putative class members are "a union-represented workforce." TRO Opp. at pp. 8-9. This statement is just fantastical in light of the fact that Defendants did not advise the Unions that represented the putative class members of their intention to try to settle these claims (in violation of not only the employees' rights, but contractor bargaining rights as well).

Administrator directly. Rather, calls were designed to be returned by a company representative. Thus, Defendants not only discouraged putative class members from asking questions but, in fact, reduced the likelihood that they would be able to obtain answers at all, let alone non-coercive answers from an independent third-party administrator. Few CTs or LCTs would want to speak with their employer directly to determine if the employer's offer was fair.

In response to Plaintiffs' Application for a TRO, Defendants claimed that the settlement offer was non-coercive and informative because the claims rely on factual assertions within the personal knowledge of the recipient regarding, for example, "whether they were free to take compliant meal periods." TRO Opp. at p. 2. However, nowhere does Defendants' "offer" explain what a compliant meal period is under the law of this State so as to enable putative class members to evaluate whether they had received such meal breaks. Further, Defendants represented to the Court that "the overwhelming majority of putative class members acknowledge that they are free to dress at home, which would render the dressing time noncompensable," TRO Opp. at p. 8, but the settlement offer itself indicates only that of a "voluntary survey of randomly-chosen Gas Company construction technicians and lead construction technicians who work at six different bases. Almost all of those interviewed said that they…were free to take coveralls home if they so desired." (emphasis added). Many issues are triggered by this statement, and not addressed by Defendants, including who conducted this so-called survey, how it was designed, who drafted the questions, how it was "controlled" for bias or fear of retaliation for non-employer favored answers, whether it was anonymous, etc.

Moreover, the supposed "conclusion" of the so-called survey directly contradicts the express language of the Collective Bargaining Agreements applicable to the putative class members, which state that employees "will be regularly supplied with coveralls and, unless they go directly from home to a field job, will not take them home at night." *See*, Section 4.5(B) of 2005 and 2009 Agreements, excerpts attached as Exs. G and H to Fritz Decl., and emphasis added. Indeed, until recently, the stated company policy permitted wearing Company coveralls and uniforms "only in the performance of Company work or Company-approved activities" and not "to and from work" (as is allowed for two-piece uniforms). *See*, Employee Conduct and

Responsibilities, Revised June 2007, at p. B11, and Employee Conduct and Responsibilities Revised May 2009, at p. 9, attached to Fritz Decl. as Exs. I and J, respectively (emphasis added).[13] Thus, Defendants' self-serving - and false - statements in the settlement offer could not provide recipients with accurate and complete information about this, or any other, issue.

Defendants also assert that accurate information was made available because the settlement offer included the Complaint and a portion of the status conference report, with an invitation to contact Plaintiffs' counsel for more information. TRO Opp. at p. 8. This is a shocking attempt at confusing and misleading putative class members. These individuals are not attorneys and therefore may not have understood the claims (let alone their value) in the status conference report, the Complaint, or the facts and legal claims alleged therein. Further, it is not enough to "invite" them to call Plaintiffs' counsel. Putative class members may be reluctant to do so for various reasons, or may believe that they will incur fees if they contact an attorney. Plaintiffs' counsel in this matter had no opportunity to inform putative class members that they could consult with counsel without incurring a fee. Moreover, Defendants' conduct in objecting to the production of the entire class list without unnecessary and time-consuming procedures, and then contacting putative class members concurrently to carry out its "settlement program" in an attempt to undermine that same class, is beyond the pale of reason.

As is thus clear, and despite Defendants' assertions, the settlement offer was, in fact, misleading. Indeed, numerous putative class members did not understand the relationship of the settlement to this pending action or any available legal rights. *See, e.g.*, Decl. of Alberto Alvarez at ¶¶ 3, 5, filed herewith ("When I looked at the check and the other papers that came with it, I thought the payment was a follow-up to an earlier settlement that the Gas Company had paid out, so I cashed the check. I did not know or understand that the check represented a totally new settlement….I spoke with approximately 4-5 other fellow employees and we all were concerned that we may have misunderstood the "settlement" and signed away our rights.").

[13] Earlier this year, this policy was changed to state that "Employees may take uniforms and coveralls home if required to report to work with a uniform or coveralls." *See*, Employee Conduct and Responsibilities, Revised February, 2011, at p. 9, attached to Fritz Decl. as Ex. K.

ii. Further Misleading Communications

The subsequent information provided by Defendants (in the form of various postcards) was additionally misleading and further coercive. The first postcard, sent just two weeks after the settlement offer, attempted to convince putative class members that most of their peers had accepted the offer, stating that there had been "260 acceptances (93% of responses)." Kick Decl. at Ex. 2 (emphasis added). In fact, as of that date, only 260 acceptances had been received out of the total of 647, - amounting to 40% of the employees who had then received the offer. Clearly, Defendants carefully referred to the percentage of persons who had accepted out of those who had responded, rather than the percentage of persons who had accepted out of the total mailing, attempting to make those who had not accepted feel like they were "missing out" on something. This is yet another form of blatant misleading conduct, and is again beyond reason.

In addition, the postcard stated that "[o]n June 20 the lawyers who sued us asked the court to block the settlement program. They lost." *Id.* Defendants did not explain that the Court's ruling was limited to simply denying an *ex parte* Application for a Temporary Restraining Order (nor what that actually meant). Indeed, this statement led some to believe that the case itself had been dismissed. *See, e.g.,* Decl. of Leonel Uribe, filed herewith ("I received a postcard from the Settlement Administrator that said that the lawyers who sued the Gas Company had gone to court and lost.…I understood that statement to mean that the class action case was over and that I would not be able to recover anything from it. Figuring that in that case I had nothing else to lose, I then cashed the check."). Clearly, only legally sophisticated individuals could understand this distinction, and Defendants' phraseology was clearly intended to mislead the recipients, their own employees, into believing that the case had been lost. [14]

The first follow up postcard also attempted to coerce putative class members by offering to "make up the difference" if a settlement was reached in this case within 12 months. Kick Decl. at Ex. 2. Defendants did not disclose that *they* were in control of whether settlement would occur within that time *or* that by cashing the check employees would give up rights not covered

[14] This type of sly miscommunication is precisely why Courts control notices of settlements sent to class members.

by this lawsuit for which they could not later be reimbursed.

The second round of postcards, sent just 5 weeks after the settlement offer, was even more misleading and coercive. Indeed, putative class members who were still considering the settlement offer were threatened that the payments would be stopped. *See, e.g.*, Fritz Decl. at Ex. F. They were pressured into quickly cashing the checks despite the fact that the check stale dates were still months away (the checks were initially dated June 14, 2011 and stated that they were void after 120 days). *Id.* Further, despite the fact that the Court will not likely rule on class certification until early next year, Defendants threatened that it would be ruled upon "soon" and that, if Defendant prevailed, postcard recipients would not be part of the lawsuit. *Id.* As if that was not enough, Defendants tried to coerce these individuals to cash their checks by stating that "60% of the settlement money we have offered has been accepted; over half of your fellow employees have accepted our offer." *Id.* In simple terms, they called upon the hold-outs not to let this opportunity go by, even though this action was indeed proceeding forward.

Yet another postcard that was sent to putative class members who had already rejected the settlement was similarly coercive and misleading. Kick Decl. at Ex. 3. The postcard states that the company has been discussing the settlement offer with the union, trying to provide some kind of "validation" for the offer. Thus, despite disclosing that the union is neither supporting nor opposing an individual's acceptance of the offer, Defendants attempted to infer that the union supported the settlement offer itself. *Id.* In addition, putative class members receiving this postcard were told that the offer has been "clarified and improved," but similarly do not explain the limitations on the revised offer. *Id.* Further, these individuals were told that "60% of the settlement money we offered has been accepted by fellow employees," in yet a further effort to persuade them to change their minds. *Id.* It did not provide information as to how many employees had accepted the offer or the value of the settlement offered to those individuals.

In sum, the settlement documents as well as the follow-up correspondence with putative class members are shockingly misleading and coercive, and cannot be permitted to stand.

E. The Releases Are Overbroad And Invalid

A release is defined as "the relinquishment, concession, or giving up of a right, claim, or

privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced." *Commercial Insurance Co. v. Copeland*, 248 Cal.App.2d 561, 565, (1967), *citing* Black's Law Dictionary (4th ed.). To qualify as an effective release, the document must "be clear and explicit, free of ambiguity or obscurity, and tell the prospective releasor he or she is releasing the other from liability." *Conservatorship of Link*, 158 Cal.App.3d 138, 143 (1984). Here, the "Claims Released," by the "settlement offer" include

> any known or unknown claims under California law that Employee presently may have for unpaid wages, restitution, interest, liquidated damages, and/or penalties (including but not limited to penalties for failure to pay wages, underpayment of wages, late payment of wages, failure to provide accurate itemized statements or to keep records, and penalties under the Private Attorneys General Act of 2004), arising from or related to missed, late, short, interrupted and on-duty meal periods and rest periods, and to unrecorded (off-the-clock) work time, including but not limited to changing into and/or out of protective clothing, gear or uniforms, for the period December 14, 2006 to the date Employee cashes/deposits the special payment. (Emphasis added).

Indeed, although the settlement offer documents indicated that the settlement regards the present lawsuit, the "Claims Released" by the acceptance of the settlement offer are much broader than the claims in this lawsuit. [15] Tellingly, when directly challenged to do so, Counsel for Defendants was unwilling to expressly affirm that the settlement offer does not release any claims not contained in the present action. *See,* Fritz Decl. at Ex. E.

The "offer" thus attempts to undermine the legal process and usurp the authority of this Court, to serve only Defendants' interests. Further, the settlement documents Defendants sent to putative class members here provide for a release even if one is not signed: "If you cash the check, as a matter of law, you will have accepted our settlement offer and released your claims, even if you do not sign and return the release form." (Emphasis added) The Release language – the breadth of which clearly requires a law degree to be understood – is repeated, almost

[15] The First Amended Complaint seeks relief for Defendants': failure to pay wages earned and due, failure to pay proper amounts for overtime compensation in violation of California Labor Code § 1194, (hereinafter, "Labor Code"), and the orders and standards promulgated by the California Division of Labor Standards Enforcement and the California Industrial Welfare Commission; having discouraged or deprived Plaintiffs and members of the Class of meal and rest breaks and failure to pay for missed breaks pursuant to Labor Code §§ 200, 226.7, 512, and 12 California Code of Regulations § 11040; failure to pay compensation at time of termination in violation of Labor Code §§ 201-203; and failure to furnish Plaintiffs and members of the Class accurate, itemized wage statements required by Labor Code § 226 upon payment of wages. *Id.* at ¶8. The Complaint also seeks recovery under California Business & Professions Code §17200, *et seq.*, and the Private Attorneys General Act of 2004 (PAGA), Labor Code § 2698, *et seq*. The "Class Period" is December 14, 2006 through the date of judgment. *Id.* at ¶7.

verbatim, on the back of the check. This too is improper.

In addition, putative class members were not given any opportunity to negotiate the consideration they were willing to accept in exchange for giving up their rights (the release itself does not only cover wages, but also "restitution, interest, liquidated damages, and/or penalties"). *See, Nordstrom Com'n Cases,* 186 Cal.App.4th 576 (Cal.App. 4 Dist., 2010). Further, the inclusion of a release of penalties under the Private Attorneys General Act of 2004, "PAGA," is improper. Statutory rights enacted to serve a public purpose are unwaivable. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 100-101 (2000), *citing* California Civil Code, section 3513 ("Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement"). Under the PAGA, an employee has a statutory right to bring a private attorney general action on behalf of aggrieved current and former employees against the employer for violations of state labor laws. This statute undoubtedly serves a public purpose.[16] The inclusion of the PAGA claims in the release requires employees to forfeit their rights to civil penalties under the Act, and their right to bring representative actions on behalf of their aggrieved former and present colleagues. This fact also renders the Releases invalid.

Thus, the Settlement must also be set aside because the Releases are overbroad, were obtained in violation of putative class members' rights, and are also invalid, as set forth below.

F. Defendants' Conduct Violates Labor Code § 206.5

Labor Code § 206.5 provides: "[a]n employer shall not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made. A release required or executed in violation of the provisions of this section shall be null and void as between the employer and the employee." Thus, it is illegal for an employer to seek to exonerate itself from wrongdoing by requiring the signing of documents that effectively release the employer from liability.

The sending of a fully-negotiable check and an incredibly overbroad release, along with

[16] In enacting the PAGA, the California Legislature explicitly stated its intention to empower employees to use private attorneys general actions to provide ancillary protection against labor code violations.

one-sided and misleading settlement documents – as Defendants have done – does just that. In addition, Defendants render legal advice to class members and make various misrepresentations in the documents, as set forth above. This demonstrates a patent violation of Section 206.5.

This, however, does not dispose of the issue. Section 206.5 is to be read in light of Labor Code § 206. *See, e.g., Watkins v. Wachovia Corp.*, 172 CalApp.4th 1576, 1586-1587 (Cal.App. 2 Dist., 2009). Section 206(a) provides: "[i]n case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due …." (Emphasis added.) Only when a "bona fide dispute" exists as to the amount of wages due under this section, can the dispute be voluntarily settled with a release and a payment. *Watkins*, 172 Cal.App.4th at 1587. Employees may release claims for disputed wages and may negotiate the consideration they are willing to accept in exchange, *Nordstrom Com'n Cases*, *supra*, but, certainly, in a legally complex matter such as this, a Court must determine whether a bona fide dispute existed before determining whether a release is valid.

Here, Defendants have failed to make any representation or showing in the documents presented to CTs and LCTs that would establish that there was a legitimate dispute concerning wages due. Rather, Defendants simply include all potential claims in this action, as well as some unasserted claims, in the litany of claims being resolved by the settlement Release, without any explanation offered as to why this is appropriate. Indeed, the employees who received the settlement offer and signed the Release were likely unaware that they even had wages and penalties due to them, let alone whether any particular wage or penalty was or was not disputed under the law. In fact, to further confuse putative class members, the settlement documents advise employees to cash the check (and accept the Release), even if they do not believe that they experienced the same problems set forth in the lawsuit. *See*, Ex. 1 to Kick Decl. Therefore, it is clear that these putative class members did not have a bona fide dispute over wages due and, as such, Defendants attempts to secure a release in that regard is in violation of section 206.5.

G. The Releases Violate Civil Code § 1542

The Releases are also invalid because they provide for a release by employees of both known and unknown claims. As such, they violate Civil Code § 1542, which provides that "[a]

general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor." Further, Defendants have not advised putative class members that they are waiving all such claims by simply signing the Release and/or cashing the check. Importantly, it is unlikely that a court would approve a release under section 1542 on a class-wide basis because whether the individual releasors intended to discharge each and every claim they might have against a defendant would have to be examined on an individual basis. *See, e.g., Leaf v. City of San Mateo,* 104 Cal.App.3d 398, 411 (1980), *overruled on other grounds by, Trope v. Katz,* 11 Cal.4th 274 (1995). Thus, for this further reason, the Releases are invalid.

IV. DEFENDANTS' IMPROPER COMMUNICATIONS MUST BE STOPPED

In addition to setting aside the settlement, Defendants must be prevented from further discussing settlement with class members directly. Here, Defendants' attempts to coerce employees to release their claims in this lawsuit (and beyond) without full and accurate information concerning the claims, and the effect of the Releases, is an abuse of Defendants' general right to investigate the case against them. The prejudice to Plaintiffs by permitting Defendants' continued, unfettered access to putative class members, while Plaintiffs lack the same opportunity, is well recognized and manifest here. *See, e.g., Atari, Inc. v. Superior Court,* 166 Cal.App.3d 867, 873 (1985) (identifying inherent prejudice to the party denied the ability to communicate with putative class members while the other party was free to do so). Defendants must be ordered to cease all further communications with putative class members regarding this litigation, except to investigate the claims against them and only by utilizing proper mechanisms.

V. CONCLUSION

Plaintiffs respectfully request that the Court set aside the "Southern California Gas Company Individual Settlement Program." Plaintiffs also request that the Court direct Defendants to cease all improper communications with putative class members regarding the pending litigation.

[SIGNATURES]