SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

JOHN DOE, DAVID GUDEMAN, and PAOLA CORREA on behalf of the State of California and aggrieved employees,

Plaintiffs,

v.

GOOGLE, INC., ALPHABET, INC., ADECCO USA, INC., ADECCO GROUP NORTH AMERICA, and ROES 1 through 10,

Defendants.

Case No. CGC-16-556034

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY ADJUDICATION

Plaintiffs' Motion for Partial Summary Adjudication came on regularly for hearing on December 16, 2021. Appearances are as stated in the record. The matter was reported. The Court issued a tentative ruling prior to oral argument. Having considered the arguments and written submissions of all parties and being fully advised, the Court grants in part and denies in part Plaintiffs' Motion for Partial Summary Adjudication.[1] Plaintiffs' Motion is granted as to the first and second causes of action because the At-Will Agreement and Exit Certificate contain a de facto noncompete provision in violation of Business and

[1] Plaintiffs' Requests for Judicial Notice are granted pursuant to Evidence Code § 452(c). (See Plaintiffs' RFJN; Plaintiffs' RFJN in Reply.)

Professions Code § 16600. Plaintiffs' Motion is denied as to the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, and fifteenth causes of action because Plaintiffs failed to meet their initial burden of demonstrating that the documents at issue are facially unlawful.

BACKGROUND

Plaintiffs John Doe, David Gudeman, and Paola Correa alleged that as a condition of employment, Google and Alphabet (together "Google") required current and former employees to comply with illegal confidentiality agreements, policies, and practices. (See Fifth Amended Complaint (Nov. 21, 2017) ("5AC") ¶ 5.) Adecco, a staffing firm that provides temporary workers to Google, also allegedly required compliance with illegal confidentiality agreements, policies, and practices. (*Id.* at ¶¶ 8–9.) Plaintiffs alleged that these agreements and policies illegally restricted employees' right to speak, work, and whistle blow. (See generally 5AC.)

Plaintiffs move for summary adjudication as to the first, second, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, and fifteenth causes of action in the Fifth Amended Complaint on the ground that Google's employment agreements and written policies are facially unlawful. (Motion, 2.) Plaintiffs place six agreements or policies at issue: (1) Data Classification Guidelines; (2) Employee Communications Policy; (3) Code of Conduct; (4) At-Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement; (5) Exit Certificate; and (6) "You Said What?!" training.[2] (Opening Brief, 2.)

LEGAL STANDARD

"A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of

[2] During oral argument, Plaintiffs clarified that a finding that any one of the challenged documents is unlawful would allow the Court to grant summary adjudication.

duty." (Code of Civ. Proc., § 437c(f)(1).) "A motion for summary adjudication may be made by itself . . . and shall proceed in all procedural respects as a motion for summary judgment." (Code of Civ. Proc., § 437c(f)(2).)

"First, and generally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) "[A] plaintiff bears the burden of persuasion that 'each element of' the 'cause of action' in question has been 'proved,' and hence that 'there is no defense' thereto. [Citation.]." (*Ibid.* [citations omitted]; Code of Civ. Proc., § 437c(p).)

"Second, and generally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar*, 25 Cal.4th at 850.) "A burden of production entails only the presentation of 'evidence.'" (*Ibid.*) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at 851.)

"Third, and generally, how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial." (*Ibid.*) "Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not-otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Ibid.*)

The pleadings delimit the scope of the issues and frame the outer measure of materiality in a summary judgment proceeding. (*Hutton v. Fidelity Nat'l Title Co.* (2013) 213 Cal.App.4th 486, 493.)

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DISCUSSION & ANALYSIS

I. Employee Disclosure of Wages and Working Conditions

A. Background Law

"No employer may do any of the following: (a) Require, as a condition of employment, that an employee refrain from disclosing the amount of his or her wages. (b) Require an employee to sign a waiver or other document that purports to deny the employee the right to disclose the amount of his or her wages. (c) Discharge, formally discipline, or otherwise discriminate against an employee who discloses the amount of his or her wages." (Lab. Code, § 232.) Wages include "all amounts for *labor* performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1371 [quoting Lab. Code, § 200(a)] [emphasis in original].)

"No employer may do any of the following: (a) Require, as a condition of employment that an employee refrain from disclosing information about the employer's working conditions . . . (d) This section is not intended to permit an employee to disclose proprietary information, trade secret information, or information that is otherwise subject to a legal privilege without the consent of his employer." (Lab. Code, § 232.5.)

"An employer shall not discharge, or in any manner discriminate or retaliate against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section. An employer shall not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under this section. Nothing in this section creates an obligation to disclose wages." (Lab. Code, § 1197.5(k)(1).)

B. Application

Plaintiffs raise two arguments regarding employee disclosure of wages and working conditions. First, Plaintiffs argue Google violates the Labor Code by classifying wages and working conditions as "Need-To-Know," which is the most restrictive classification of information at Google and equivalent to a trade secret. (Opening Brief, 4.) Second, Plaintiffs argue the Employee Communications Policy and Code of Conduct violate Labor Code § 232.5(a) by prohibiting protected speech. (*Id.* at 7.)

1. Wages and Working Conditions

Plaintiffs place Google's Data Classification Guidelines at issue. (See Sagafi Decl., Ex. A.) Google classifies information under three categories: (1) Need-To-Know, (2) Confidential, and (3) Public. (*Ibid.*) Need-To-Know information is defined as "information associated with serious legal, privacy or business concerns [which] . . . would cause a significant risk of harm if it were used or disclosed improperly." (*Ibid.*) "Need-To-Know information is shared only with authorized individuals for a specific purpose." (*Ibid.*) Information classified as Need-To-Know includes "Employee Data," which is all employee data unless otherwise classified; recruiting information, performance, compensation, and benefits information; employment records; Googlers' personal identifiable information; and sensitive personally identifiable information. (*Ibid.*) Employee Data is defined as "any information generated about a Googler or that Google obtains in the context of employment." (*Ibid.*)

First, the stated purpose of the Data Classification Guidelines is to "describe how data and information are classified at Google." (Sagafi Decl., Ex. A.) Plaintiffs' Motion is devoid of any evidence that the Data Classification Guidelines served as a condition of employment.[3] Accordingly, the Court cannot conclude as a matter of law that Google violated Labor Code § 232(a).

Second, the left header provides that the Data Classification Guidelines fall under Google's "Security Policies." (Sagafi Decl., Ex. A.) Plaintiffs do not present any evidence about how Google presented the Data Classification Guidelines to employees and whether Google required employees to sign or acknowledge receiving the document.[4] Therefore, the Court cannot determine as a matter of law that Google violated Labor Code § 232(b).

Third, although Plaintiffs argue that the Data Classification Guidelines prohibit an employee from disclosing wages and working conditions, the Data Classification Guidelines explicitly state that "Employee Data is any information generated about a Googler or that Google obtains in the context of

[3] Although Plaintiffs allege in the operative complaint that Plaintiff John Doe was "terminated from Google after being falsely accused of disclosing certain memes concerning Nest working conditions to the press," Plaintiffs did not submit any evidence to establish that the Data Classification Guidelines are a condition of employment or that Google terminated John Doe for violating the Data Classification Guidelines. (5AC ¶ 12.)

[4] During oral argument, Plaintiffs' counsel argued that Google did not provide any evidence to the contrary. However, whether Google presented evidence to the contrary is irrelevant to the inquiry here as Plaintiffs did not meet their initial burden of production.

employment." (Sagafi Decl., Ex. A.) Based on the definition of "Employee Data," Plaintiffs are unable to meet their initial burden because on the document's face, it is unclear whether the Data Classification Guidelines preclude employees from disclosing Google's employment data, an employee's own employment data, or both.

Therefore, Plaintiffs do not meet their burden on this ground.

2. Protected Speech

Plaintiffs challenge Google's Employee Communications Policy and Code of Conduct. (Opening Brief, 7; Sagafi Decl., Exs. B-C.) Plaintiffs submit seven versions of the Employee Communications Policy. (Sagafi Decl., Ex. B.) Plaintiffs argue the restrictions set forth in Google's Employee Communications Policy and Code of Conduct are overly broad because the policies prohibit any discussions of work conditions, and thus, violate Labor Code § 232.5(a). (Opening Brief, 8.)

Both the Employee Communications Policy and Code of Conduct require employees to comply with their respective terms as a condition of employment. The Employee Communications Policy states that "failing to follow these guidelines may have consequences for your employment with Google, up to and including termination." (Sagafi Decl., Exs. B-1-B-2, B-4-B-7.) The Code of Conduct provides that failure to comply with the Code of Conduct "can result in disciplinary action, including termination of employment." (*Id.* at Ex. C.)

Five of the seven versions of the Employee Communications Policy include a statement in the introductory section stating: "[n]othing in this or other Google policies is intended to limit employees' rights to discuss with other employees the terms, wages, and working conditions of their own employment, or to communicate with a government agency regarding violations of law, as warranted and as protected by applicable law." (Sagafi Decl., Exs. B-2, B-4-B-7.) Plaintiffs are unable to account for the initial disclaimer or cite any authorities holding that such a disclaimer is facially invalid. As a result, Plaintiffs cannot meet their initial burden as to five of the seven versions of the Employee Communications Policy.

Of the two remaining versions of the Employee Communications Policy, one is incomplete. (See Sagafi Decl., Ex. B-3.) As a result, the Court is unable to determine whether it contains an initial disclaimer in the introduction.[5]

The other remaining version of the Employee Communications Policy provides that employees must "not share any confidential or privileged information—from unannounced products to financial performance—with people outside the company." (Sagafi Decl., Ex. B-1.) "Confidential information includes internal reports, policies and procedures or other internal business-related confidential communications that have not been made public." (*Ibid.*) Similar to other versions of the Employee Communications Policy, the Code of Conduct is incorporated by reference. (*Ibid.*)

Section four of the Code of Conduct governs the preservation of confidential information, which includes "financial, product and user information." (Sagafi Decl., Ex. C, §§ 4(1), 4(4).) Confidential information cannot be disclosed "outside of Google without authorization." (*Ibid.*) The only reference to employment-related information is found in section five of the Code of Conduct, which provides that employees should only access employees' personal information "in line with local law and Google internal policies, and keep it secure according to those standards." (*Id.* at Ex. C, § V(6).)

Plaintiffs are unable to meet their burden based on the face of the Code of Conduct and the remaining version of the Employee Communications Policy, which make no substantive reference to employment-related information and do not define employment information that is considered confidential. Similarly, neither the Employee Communications Policy nor the Code of Conduct define confidential information. Therefore, an issue remains as to whether the Employee Communications Policy or Code of Conduct preclude employees from disclosing Google's employment data, an employee's own employment data, or both.

Accordingly, Plaintiffs' Motion is denied on this ground.

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[5] At the hearing, Plaintiffs' counsel acknowledged the incomplete version of the Employee Communications Policy. Plaintiffs' counsel represented that the document produced in discovery was incomplete.

II. Employee Mobility

A. Background Law

"Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extend void." (Bus. & Prof. Code, § 16600.) "Thus, unless a contractual restraint falls into one of section 16600's three statutory exceptions (§§ 16601 [sale of goodwill or interest in a business], 16602 [dissolution of a partnership], or 16602.5 [dissolution or sale of limited liability company]), it ostensibly is void." (*AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* (2018) 28 Cal.App.5th 923, 935.) "'[S]ection 16600 evinces a settled legislative policy in favor of open competition and employee mobility' . . . people have the right to pursue lawful employment and to engage in business and occupations of their choice." (*Quidel Corporation v. Superior Court of San Diego County* (2020) 57 Cal.App.5th 155, 165, quoting *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 946 [holding noncompete provisions in employment contracts are per se invalid in California].)

"No employer, or agent, manager, superintendent, or officer thereof, shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law." (Lab. Code, § 432.5.)

B. Application

Plaintiffs argue Google contractually limits employees' speech by indefinitely prohibiting employees from disclosing their professional experience, skills, and business knowledge with prospective employers using broad confidentiality provisions, which is a restraint on mobility in violation of Business and Professions Code § 16600. (Opening Brief, 9-11.) Specifically, Plaintiffs place the At-Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement ("At-Will Agreement") and Exit Certificate at issue. (Opening Brief, 11.)

1. At-Will Agreement and Exit Certificate

Google's At-Will Agreement provides that during and after employment, employees "will hold in the strictest confidence and take all reasonable precautions to prevent any unauthorized use or disclosure of Google Confidential Information." (Sagafi Decl., Ex. D, 1.) Confidential Information is defined as "any information in any form that relates to Google or Google's business and that is not generally

known." (*Ibid.*)[6] Employees cannot "use Google Confidential Information for any purpose other than for the benefit of Google in the scope of [an employee's] employment, or [] disclose Google Confidential Information to any third party without [] prior written authorization." (*Ibid.*) Moreover, "all Google Confidential Information that [an employee] use[s] or generate[s] in connection with [their] employment belongs to Google." (*Ibid.*)

The Exit Certificate states: "[b]y signing this note, you further agree that you have followed the terms of the Company's At Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement . . . [y]ou agree that in compliance with the Agreement, you will adhere to your obligations to the Company, including those contained in Section 2 (Confidential Information)." (Sagafi Decl., Ex. E.)

Plaintiffs rely on *Dowell*, where the Court of Appeal held that the noncompete and nonsolicitation clauses at issue were facially void under Business and Professions Code § 16600. (*Dowell v. Biosense Webster, Inc.* (2009) 179 Cal.App.4th 564, 575.) The *Dowell* court reasoned that the broad noncompete and nonsolicitation clauses prohibited the plaintiffs "from practicing their chosen profession" for eighteen months. (*Ibid.*) The *Dowell* court also noted that the Supreme Court of California "concluded that section 16600 'prohibits employee noncompetition agreements unless the agreement falls within a statutory exception.'" (*Id.* at 576 [quoting *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 942].)

However, *Dowell* is factually distinguishable. In *Dowell*, the plaintiffs signed an "Employee Secrecy, Non-Competition and Non-Solicitation Agreement," which provided that "for 18 months after termination of employment the employee would 'not render services, directly or indirectly, to any CONFLICTING ORGANIZATION' in which such services 'could enhance the use or marketability of a CONFLICTING PRODUCT by application of CONFIDENTIAL INFORMATION' to which the employee 'shall have had access' during employment." (*Dowell*, 179 Cal.App.4th at 567-68.) Whereas

[6] "Examples include Google's non-public information that relates to its actual or anticipated business, products or services, research, development, technical data, customers, customer lists, markets, software, hardware, finances, employee data and evaluation, trade secrets or know-how, [and] intellectual property rights." (Sagafi Decl., Ex. D, 1.)

here, neither the At-Will Agreement nor the Exit Certificate contain an explicit noncompete or nonsolicitation clause.

Plaintiffs also rely on *Brown* to support their argument that a confidentiality provision such as the one here can constitute an unlawful noncompete clause. (*Brown v. TGS Management Company, LLC* (2020) 57 Cal.App.5th 303.) In *Brown*, the plaintiff signed a "Confidentiality, Noncompetition, Assignment and Notice Agreement" which contained overly broad confidentiality provisions that prevented the plaintiff from working in his chosen profession. (*Id.* at 306.) The "confidentiality provisions set forth in detail the employee's duty to 'keep all Confidential Information in strictest confidence and trust' during and after employment.'" (*Id.* at 315.) Confidential Information was defined as "*all* information that is 'usable in' or that 'relates to' the securities industry." (*Ibid.*)

The *Brown* court found the arbitrator erred in declining to make a finding as to "the legality of the confidentiality provisions [when] the arbitrator is unable to 'foresee the nature of [the plaintiff's] conduct in the context of his anticipated future employment.'" (*Id.* at 316.) The court concluded that the details of the plaintiff's future employment were irrelevant to the inquiry as the plaintiff raised a facial challenge rather than an as applied challenge to the confidentiality provision. (*Id.* at 316-17.) The court subsequently held that the confidentiality provisions were facially unlawful under Business and Professions Code § 16600 because they operated "as a de facto noncompete provision" and effectively barred the plaintiff from working in his chosen profession indefinitely. (*Id.* at 317.)

Here, Plaintiffs burden shift because the face of the At-Will Agreement functions as a de facto noncompete provision in violation of Business and Professions Code § 16600. The language of Google's At-Will Agreement is analogous to the confidentiality provision in *Brown*. Although the confidentiality provision in *Brown* was broader than the one at issue here because it extended to the securities industry generally, Google's confidentiality provision extends to "any information in any form that relates to Google or Google's business and that is not generally known." (Compare *Brown*, 57 Cal.App.5th at 315 with Sagafi Decl., Ex. D, 1.) Additionally, Google restricts disclosure of Confidential Information to third parties without written authorization. (*Ibid.*) The same reasoning applies to the Exit Certificate as it incorporates the At-Will Agreement by reference.

In opposition, Google asserts Plaintiffs cannot establish that employees are prevented from attaining new employment. (Opposition, 15.) Google relies on the fact that the confidentiality provision does not explicitly state that employees are limited to using their own skills and cannot describe their skills and experience at Google when seeking new employment. (*Id.* at 16-17.) However, Business and Professions Code § 16600 does not require an explicit statement. In *Brown*, the court found that the broad confidentiality provision which defined confidential information as "*all* information that is 'usable in' or that 'relates to' the securities industry" violated Business and Professions Code §§ 16600 on its face and constituted a de facto noncompete clause without addressing whether the confidentiality provision needed to include an explicit statement about seeking new employment. (*Brown*, 57 Cal.App.5th at 315.) Google cites no authorities that state otherwise. (See *City of Oakland v. Hassey* (2008) 163 Cal.App.4th 1477 [affirming summary adjudication when conditional offer presented to police officer trainee was not a restraint on trade]; *Hamilton v. Juul Labs, Inc.* (N.D. Cal. Sept. 11, 2020) 2020 WL 5500377 [finding the plaintiff did not sufficiently plead that the non-solicitation clause at issue had a negative impact on her trade or business to be void].)

Therefore, Google is unable to raise a triable issue of material fact.

2. Exhaustion of Administrative Remedies and Statute of Limitations

Google contends Plaintiffs cannot maintain a legal challenge of the At-Will Agreement because Plaintiffs failed to exhaust their administrative remedies pursuant to Labor Code § 432.5. (Opposition Brief, 15.) Google notes that Plaintiffs provided unsigned copies of the At-Will Agreement, which two Plaintiffs signed in 2013 and 2014. (*Id.* at 18.) Google also asserts that Plaintiffs did not send an LWDA letter until May 2016, which was well past the one-year statute of limitations. (*Ibid.*)

"Before bringing a civil action for statutory penalties, an employee must comply with Labor Code section 2699.3." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 981.) The aggrieved employee or representative must provide written notice to the LWDA "of the specific provisions of [the Labor Code] alleged to have been violated, including the facts and theories to support the alleged violation." (Lab. Code, § 2699.3(a)(1)(A).)

PAGA actions are subject to a one-year statute of limitations. (Code of Civ. Proc., § 340(a); *Esparza v. Safeway, Inc.* (2019) 36 Cal.App.5th 42, 59.) An employee may pursue a PAGA action even if

the employee's individual claim is time-barred. (*Johnson v. Maxim Healthcare Services, Inc.* (2021) 66 Cal.App.5th 924, 929.) "PAGA standing does not depend on maintaining an individual Labor Code claim." (*Id.* at 930.)

Google challenges whether Plaintiffs exhausted their administrative remedies. However, on May 17, 2016, Plaintiffs submitted a letter to the LWDA. (5AC, Ex. 1.) Google does not challenge the substance of Plaintiffs' notice to the LWDA. A review of the LWDA notice demonstrates that Plaintiffs complied with Labor Code § 2699.3 prior to filing this action.

Google also intertwines a statute of limitations argument within their challenge to Plaintiffs' exhaustion of administrative remedies. The Court finds Google's statute of limitations argument unpersuasive in light of *Johnson.*

The plaintiff in *Johnson* signed a "Non-Solicitation, Non-Disclosure and Non-Competition Agreement" on September 7, 2016. (*Johnson v. Maxim Healthcare Services, Inc.* (2021) 66 Cal.App.5th 924, 927.) The plaintiff sent a notice to the LWDA on June 19, 2019 stating that she intended to bring a PAGA action because the agreement violated Labor Code section 432.5. (*Ibid.*) After receiving no response from the LWDA, on September 9, 2019, the plaintiff filed a PAGA action for violation of Labor Code section 432.5. (*Ibid.*) The trial court sustained the defendant's demurrer without leave to amend on the ground that the plaintiff's individual claim was time-barred, therefore, the plaintiff did not have standing to pursue a PAGA action. (*Ibid.*) The Court of Appeal reversed. (*Id.* at 932.) The court reasoned that it was undisputed the plaintiff was an aggrieved employee at one time. (*Id.* at 929-930; see also Lab. Code, § 2699(c).) The plaintiff alleged she is employed by the defendant and "personally suffered at least one Labor Code violation on which the PAGA claim is based." (*Id.* at 930-932.) The court concluded Plaintiff had standing to bring a PAGA action because "she alleged in the operative complaint that [the defendant] had violated section 432.5 during the applicable statute of limitations, subjecting the company to penalties under PAGA." (*Id.* at 932.)

This action is analogous to *Johnson.* Here, Google presented the At-Will Agreement to Plaintiffs Gudeman and Doe on October 8, 2013 and July 14, 2014, respectively. (5AC ¶¶ 52-53.) On May 17, 2016, Plaintiff Doe first notified the LWDA of his intent to pursue a PAGA action for violation of Business and Professions Code § 16600 and Labor Code § 432.5. (5AC, Ex. 1.) On June 14, 2016,

Plaintiff Doe supplemented his first notice to the LWDA. (*Ibid.*) On January 31, 2017, Plaintiff Gudeman notified the LWDA of his intent to pursue a PAGA action for the claims alleged and identified in Plaintiff Doe's notices to the LWDA. (*Ibid.*) Subsequently, Plaintiffs filed this action on December 20, 2016.

Plaintiffs allege Plaintiff John Doe continues to work for Google and "remains subject to the agreements, policies, and practices of Google at issue in this litigation." (5AC ¶ 17.) In contrast, Plaintiffs allege Google terminated Plaintiff David Gudeman in December 2016. (*Id.* at ¶ 19.) However, Plaintiffs allege Plaintiff David Gudeman "as a former employee, [] remains subject to Google's unlawful confidentiality agreement as well as its unlawful policies and practices." (*Ibid.*) As in *Johnson*, Plaintiffs allege either current or former employment with Google as well as experiencing a Labor Code violation that serves as a predicate for the PAGA claims. (See *Johnson*, 66 Cal.App.5th at 930-932.) Although Plaintiffs' individual claims may be time-barred, Plaintiffs maintain standing in this PAGA action.

Accordingly, Plaintiff's Motion is granted as to the first and second causes of action.

III. Whistleblowing

A. Background Law

"An employer, or any person acting on behalf of the employer, shall not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, or from providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." (Lab. Code, § 1102.5(a).)

"No employer, or agent, manager, superintendent, or officer thereof, shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law." (Lab. Code, § 432.5.)

"No person may take any action to impede an individual from communicating directly with [the Securities and Exchange] Commission staff about a possible securities law violation, including enforcing,

or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications." (17 C.F.R. § 240.21F-17.)[7]

B. Application

Plaintiffs assert Google violates Labor Code §§ 1102.5(a) and 432.5 as well as SEC Rule 21F-17 by prohibiting whistleblowing to anyone, including government agencies such as the Securities and Exchange Commission. (Opening Brief, 15-19.) Plaintiffs place the At-Will Agreement, Data Classification Guidelines, and "You Said What?!" training at issue.[8]

1. At-Will Agreement

The At-Will Agreement states that during and after employment, employees "will hold in the strictest confidence and take all reasonable precautions to prevent any unauthorized use or disclosure of Google Confidential Information." (Sagafi Decl., Ex. D, 1.) Additionally, employees cannot "use Google Confidential Information for any purpose other than for the benefit of Google in the scope of [an employee's] employment, or [] disclose Google Confidential Information to any third party without [] prior written authorization." (*Ibid.*) Moreover, "all Google Confidential Information that [an employee] use[s] or generate[s] in connection with [their] employment belongs to Google." (*Ibid.*) Confidential information is defined as "any information in any form that relates to Google or Google's business and that is not generally known." (*Ibid.*)

Although the "Confidential Information" section of the At-Will Agreement purports to restrict an employee from reporting legal violations, the At-Will Agreement incorporates the Code of Conduct by reference. (See Sagafi Decl., Ex. D, 2.) The Code of Conduct repeatedly refers employees to report violations or suspected violations to the "Ethics & Compliance Hotline," Human Resources, or a manager. (Sagafi Decl., Ex. C.)

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[7] 17 C.F.R. § 240.21F-17 is also referred to as SEC Rule 21F-17.

[8] At oral argument, Plaintiffs clarified that only the At-Will Agreement, Data Classification Guidelines, and "You Said What?!" training are at issue despite the opening brief placing the At-Will Agreement, Data Classification Guidelines, Privacy and Information Security Training, Data Security Policy, and "You Said What?!" training at issue. (See Opening Brief, 16.) Plaintiffs' counsel represented that the Privacy and Information Security Training as well as the Data Security Policy are merely illustrative of Google's alleged suppression.

Further, section thirteen of the At-Will Agreement states: "[f]or purposes of this Agreement, 'Protected Activity' means filing a charge or complaint, or otherwise disclosing relevant information to or communicating, cooperating, or participating with, any state, federal, or other governmental agency, including the Securities and Exchange Commission, the Equal Employment Opportunity Commission, and the National Labor Relations Board." (Sagafi Decl., Ex. D, § 13.) Plaintiffs do not reconcile or produce any evidence that section thirteen of the At-Will Agreement is facially unlawful.

Therefore, the Court finds the Plaintiffs do not meet their burden as to the At-Will Agreement.

2. Data Classification Guidelines

The Data Classification Guidelines' stated purpose is to "describe how data and information are classified at Google." (Sagafi Decl., Ex. A.) The Data Classification Guidelines are silent as to whistle blowing. The Data Classification Guidelines incorporate the Data Security Policy by reference, which is also silent as to whistle blowing. (*Id.*, Exs. A, G.) As the Data Classification Guidelines document is silent as to whistle blowing, an issue remains about whether failure to include a whistle blowing provision in the Data Classification Guidelines unlawfully prevents or impedes an employee from whistle blowing in violation of Labor Code §§ 1102.5(a) and 432.5 as well as SEC Rule 21F-17. Therefore, Plaintiffs do not meet their initial burden as to the Data Classification Guidelines.

Accordingly, Plaintiffs' Motion is denied on this ground.

3. "You Said What?!" Training

The "You Said What?!" training provides an overview of employee email communications at Google. (Sagafi Decl., Ex. H.) Plaintiffs place four slides from the training at issue. For the reasons that follow, the Court finds Plaintiffs did not meet their initial burden as to the facial challenge of the "You Said What?!" training.

First, a slide titled "Confidential Doesn't Include My Spouse or Partner, Right?" contains the statement "[d]on't share Google confidential information, including information about the status of products, deals or litigation, investigations, or other legal matters with anyone outside of Google. A-N-Y-O-N-E." (*Ibid.*) At first glance, this slide suggests that an employee cannot share confidential information with anyone outside Google. However, when read in context, this Slide instructs Google employees to not share confidential information such as a prospective employee's application with their

spouse, family, and friends as outlined in an activity following the slide. (*Ibid.*) Moreover, the slide specifically refers to employee disclosure of "the status of products, deals or litigation, investigations, or other legal matters." (*Ibid.*) Whistle blowing is not implicated this slide.

Second, a slide titled "Know Your Rights" provides an example of how to respond to law enforcement or a regulator seeking to interview or interrogate the employee. (*Ibid.*) Google employees are instructed to state, "I'd be more than happy to talk to you, but I'd like to have one of Google's lawyers present. If you'll give me your contact information, I'll relay it, so that someone can contact you to schedule this interview." (*Ibid.*) This slide does not prevent an employee from reporting a violation or suspected violation to a regulator or law enforcement. Rather, the context for this slide is how Google employees should respond when contacted by a regular or law enforcement, not vice versa.

Third, a slide titled "Think…Then Speak" instructs employees to "avoid communications that conclude, or appear to conclude, that Google or Googlers are acting 'illegally' or 'negligently,' have 'violated a law,' should or would be 'liable' for anything, or otherwise convey legal meaning." (*Ibid.*) The quoted text is from one of three sub-paragraphs on the slide. (*Ibid.*) The first sub-paragraph discusses how there can be unintended consequences of a Google employee's communications, especially when many people presume statements by a Google employee should be attributed to Google. (*Ibid.*) The second sub-paragraph discusses federal regulations and penalties for the release of material, non-public information that could be used for trading stock. (*Ibid.*) In light of the first and second sub-paragraphs, the context of the third sub-paragraph is to limit Google's liability from employee statements. Specifically, an employee using legalese or legal conclusions in their communications could raise red flags or subject Google to legal liability even if the statement was innocent or unintended. However, the face of the third sub-paragraph does not prevent an employee from whistle blowing.

Fourth, a slide for a training exercise provided that employees should omit the following from an internal email because it is non-privileged and speculates about Google's liability: "You know and I know that there are serious flaws in the technology. If we release this thing like this, Google's going to get sued left and right, the product liability damages will be off the chart, and you and I may even be held personally negligent." (*Ibid.*)

The introduction to the training exercise states that the fictional employee "became aware of safety concerns with the gStroller product and is worried that it is being pushed to market before it is ready. [He] intends to send the email on the right to his manager." (*Ibid.*) The example provided in the training exercise is the opposite of preventing Google employees from whistle blowing. Instead, the employee in the example sent an email to his manager after omitting the language and received a call from the Legal Department to discuss. (*Ibid.*) The implied goal of the training exercise was to demonstrate how including legalese could place Google at-risk. (*Ibid.*) In the example, the Legal Department was already involved in a case regarding the same technology. (*Ibid.*) However, the training did not suggest or imply that a Google employee could not report such concerns to a supervisor or someone with authority to investigate.

The four slides Plaintiffs place at issue do not, on their face, prevent an employee or explicitly instruct an employee to not engage in whistle blowing activities. Plaintiffs' reliance on *Hamilton*, an unpublished federal decision, is unpersuasive. In *Hamilton*, the plaintiffs alleged the following. Juul instructed employees to not communicate in a recorded manner, especially information regarding potential or actual illegal conduct or the dangers of Juul's products. (*Hamilton v. Juul Labs, Inc* (N.D. Cal. Jan. 27, 2021) 2021 WL 275485 at *7.) Juul held office drills to prepare for unannounced government inspections where employees would conceal incriminating evidence. (*Ibid.*) Juul instructed employees to not speak with government regulators "unless they had no choice." (*Ibid.*) If a Juul employee spoke to a government regulator, Juul trained the employee on how to conceal information. (*Ibid.*) Juul instructed employees to not speak to the press or third parties about Juul. (*Ibid.*) Juul retaliated against the plaintiffs for reporting violations. (*Ibid.*) The court found the plaintiffs stated a plausible claim that the Nondisclosure Agreement, Juul's policies, and Juul's practices violated Labor Code § 1102.5. (*Id.* at *8.) The court reasoned that the plaintiffs alleged a pattern and practice of Juul preventing employees from reporting to government agencies and retaliating against employees. (*Ibid.*)

Here, Google's alleged conduct does not rise to the level of Juul's conduct in *Hamilton*. Moreover, Google's "You Say What?!" training does not prevent Google employees from whistle blowing to a superior, law enforcement, or regulator. Plaintiffs do not submit any evidence to demonstrate otherwise.

Therefore, Plaintiffs' Motion is denied on this ground.

CONCLUSION AND ORDER

Accordingly, Plaintiffs' Motion is granted as to the first and second causes of action and denied as to the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, and fifteenth causes of action.

IT IS SO ORDERED.

Dated: January 12, 2022

Anne-Christine Massullo
Judge of the Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.251)

I, Ericka Larnauti, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On January 13, 2022, I electronically served the attached document via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: January 13, 2022

T. Michael Yuen, Clerk

By: _____
Ericka Larnauti, Deputy Clerk