SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2310

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department19@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

Court Reporters are not provided. Please consult our Court's website, www.scscourt.org, for the rules, policies, and required forms for appointment by stipulation of privately-retained court reporters.

- **Parties can appear either in person or remotely.** All remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.
- If any party wants a Court Reporter, the appropriate form must be submitted. The Reporter can appear in person or remotely.
- Members of the public who wish to observe can do so through Microsoft Teams (using the link discussed above) or in person. Please make sure to turn your camera off and mute yourself if you are observing the proceedings remotely.
- As a reminder, state and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while in the courtroom and while on Microsoft Teams.

LAW AND MOTION TENTATIVE RULINGS
DATE: APRIL 24, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV384527	O'Brien, et al. v. Cerida Investment Corp., et al. (PAGA) [Lead Case; Consolidated with 21CV384529 (Class Action)]	See Line 1 for tentative ruling.
LINE 2	23CV418329	Sha v. Loandepot.com, LLC (Class Action/PAGA)	See Line 2 for tentative ruling.
LINE 3	23CV423638	Nguyen v. Naftoon, Inc. (Class Action/PAGA)	See Line 3 for tentative ruling.
LINE 4	22CV402965	Legarde v. Spectra360, Inc. (PAGA)	See Line 4 for tentative ruling.
LINE 5	20CV371934	Manalo v. San Jose, LLC, et al. (Class Action)	See Line 5 for tentative ruling.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2310

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department19@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

Court Reporters are not provided. Please consult our Court's website, www.scscourt.org, for the rules, policies, and required forms for appointment by stipulation of privately-retained court reporters.

- **Parties can appear either in person or remotely.** All remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.
- If any party wants a Court Reporter, the appropriate form must be submitted. The Reporter can appear in person or remotely.
- Members of the public who wish to observe can do so through Microsoft Teams (using the link discussed above) or in person. Please make sure to turn your camera off and mute yourself if you are observing the proceedings remotely.
- As a reminder, state and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while in the courtroom and while on Microsoft Teams.

LAW AND MOTION TENTATIVE RULINGS

LINE 6	23CV420252	SJSC Properties, LLC v. WSP USA, Inc., et al.	Unopposed application for admission *pro hac vice* is GRANTED. No appearance necessary. Counsel to submit proposed order to court.
LINE 7	23CV424785	Sagemcom Broadband SAS v. DIVX, LLC, et al.	See Line 7 for tentative ruling.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: O'Brien, et al. v. Cerida Investment Corp., et al. (PAGA) [Lead Case; Consolidated with 21CV384529 (Class Action)]
Case No.: 21CV384527

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on April 24, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This consolidated action is comprised of two cases: (1) Kathleen O'Brien v. Cerida Investment Corp., et al. (Santa Clara County Superior Court, Case No. 21CV384527) ("First Action"); (2) Kathleen O'Brien v. Cerida Investment Corp., et al. (Santa Clara County Superior Court, Case No. 21CV384529) ("Second Action").

The Representative Action Complaint filed in the First Action on July 20, 2021, sets forth a single cause of action for Violation of the Private Attorneys General Act (Labor Code §§ 2698 et seq.).

The Class Action Complaint filed in the Second Action on July 20, 2021, sets forth the following causes of action: (1) Violation of Bus. & Prof. Code §§ 17200 et seq. (Unfair Business Practices); (2) Violation of Labor Code §§ 1194, 1197, 1197.1 (Failure to Pay Minimum Wages); (3) Violation of Labor Code § 510 (Failure to Pay Overtime Wages); (4) Violation of Labor Code §§ 226.7, 512 and Applicable IWC Wage Order (Meal Period Violations); (5) Violation of Labor Code §§ 226.7, 512 and Applicable IWC Wage Order (Rest Period Violations); (6) Violation of Labor Code § 2802 (Failure to Reimburse Expenses); (7) Violation of Labor Code § 226 (Failure to Provide Accurate Itemized Wage Statements); and (8) Violation of Labor Code §§ 201, 202, 203 (Failure to Provide Wages When Due).

On October 21, 2022, the court entered a Joint Stipulation and Order to Consolidate Cases for Settlement Approval and for Leave to File an Amended Complaint for Settlement Purposes. In addition to consolidating the First and Second Actions, this order also granted leave to incorporate the claims of Aurora Galvan and Cara Lish and to add them as named plaintiffs and class representatives. Galvan and Lish had previously set forth related claims in

the following matters: Aurora Galvan v. Cerida Investment Corp. (Los Angeles County Superior Court, Case No. 21 STCV30165); Cara Lish v. Cerida Investment Corp. (Sacramento County Superior Court, Case No. 34-2022-00315822-CU-OE-GDS); and Cara Lish v. Cerida Investment Corp. (Sacramento County Superior Court, Case No. 34-2022-00315177-CU-OE-GDS).

On October 25, 2022, plaintiffs Kathleen O'Brien, Aurora Galvan, and Cara Lish (collectively, "Plaintiffs") filed a First Amended Class Action Complaint, setting forth causes of action for: (1) Violation of Bus. & Prof. Code §§ 17200 et seq. (Unlawful Business Practices); (2) Violation of Labor Code §§ 1194, 1197, 1197.1 (Failure to Pay Minimum Wages); (3) Violation of Labor Code § 510 (Failure to Pay Overtime Compensation); (4) Violation of Labor Code §§ 226.7, 512 and Applicable IWC Wage Order (Failure to Provide Required Meal Periods); (5) Violation of Labor Code §§ 226.7, 512 and Applicable IWC Wage Order (Failure to Provide Required Rest Periods); (6) Violation of Labor Code § 2802 (Failure to Reimburse Employees for Required Expenses); (7) Violation of Labor Code § 226 (Failure to Provide Accurate Itemized Statements); (8) Violation of Labor Code §§ 201, 202, 203 (Failure to Pay Wages When Due); and (9) Violation of the Private Attorneys General Act (Labor Code §§ 2698 et seq.). The Lish and Galvan actions were dismissed. (See Memorandum in Support of Motion, p. 5, lns. 10-11.)

The parties have reached a settlement.

Plaintiffs now move for preliminary approval of the settlement. The motion is unopposed.

II. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (Wershba), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (Dunk).)

In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as "the strength of plaintiffs' case, the risk,

expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

(*Wershba*, supra, 91 Cal.App.4th at pp. 244-245, citing *Dunk*, supra, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (Officers).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (Wershba, supra, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (Ibid., quoting *Dunk*, supra, 48 Cal.App.4th at p. 1801 and Officers, supra, 688 F.2d at p. 625, internal quotation marks omitted.)

The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba*, supra, 91 Cal.App.4th at p. 245, citing *Dunk*, supra, 48 Cal.App.4th at p. 1802.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76-77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (Id. at p. 77.)

III. DISCUSSION

A. Provisions of the Settlement

The proposed settlement provides that this consolidated action has been settled on behalf of the following class:

all individuals who are or previously were employed by Cerida in California and classified as hourly, non-exempt employees at any time during the Class Period, including those Cerida employees who provided services in California that Cerida had contracted with Deloitte to provide to a third party.

(Declaration of Haig B. Kazandjian in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Kazandjian Dec."), Ex. 1 ("Settlement Agreement"), ¶ 1.5.) The "Class Period" is defined as the period of time from July 20, 2017, through February 28, 2022. (Settlement Agreement, ¶ 1.13.) The class includes a subset of Aggrieved Employees, who are defined as "all individuals who are or previously were employed by Cerida in California and classified as hourly, non-exempt employees at any time during the PAGA Period including those Cerida employees who provided services in California that Cerida had contracted with Deloitte to provide to a third party." (Settlement Agreement, ¶ 1.4.) The "PAGA Period" is defined as the period of time from March 18, 2020, through February 28, 2022. (Settlement Agreement, ¶ 1.33.) As defined in the Settlement Agreement, "Defendants" means Cerida Investment Corporation ("Cerida") and Deloitte Consulting LLP ("Deloitte"). ("Settlement Agreement"), ¶ 1.17.)

Plaintiffs' counsel also submitted the following declarations: Declaration of Kyle Nordrehaug in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement; and Declaration of James R. Hawkins in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement.

According to the terms of the settlement, Cerida will pay a non-reversionary, gross settlement amount of $938,611.69. (Settlement Agreement, ¶¶ 1.22, 3.1.) The gross settlement amount includes attorney fees of $312,870.56 (1/3 of the gross settlement amount), litigation costs not to exceed $35,000, service awards to the class representatives totaling

$25,000, settlement administration costs not to exceed $20,000, and a PAGA allocation of $20,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to the Aggrieved Employees). (Settlement Agreement, ¶¶ 1.3, 1.7, 1.15, 1.22, 1.24, 1.27, 1.32, 3.2.)

The net settlement amount will be distributed to the class members on a pro rata basis based on the number of workweeks worked during the Class Period. (Settlement Agreement, ¶¶ 1.23, 1.28, 3.2.) Similarly, Aggrieved Employees will receive a pro rata share of the 25 percent portion of the PAGA payment allocated to them based on the number of workweeks worked during the PAGA period. (Settlement Agreement, ¶¶ 1.24, 1.33, 3.2.) Each class member is expected to receive approximately $663.81. (Kazandjian Dec., ¶¶ 16, 38.)

Checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be distributed to the California Controller's Unclaimed Property Fund. (Settlement Agreement, ¶¶ 5.2-5.4.)

The parties' proposal to send funds from uncashed checks to the Controller of the State of California does not comply with Code of Civil Procedure section 384, which mandates that unclaimed or abandoned class member funds be given to "nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent." The parties are directed to identify a new cy pres recipient in compliance with Code of Civil Procedure section 384 prior to the continued hearing date.

In exchange for the settlement, class members agree to release Defendants, and related persons and entities, from "all class claims pled or which could have been pled based on the factual allegations contained in the Operative Complaint which occurred during the Class Period." (Settlement Agreement, ¶¶ 1.38, 1.40, 6.2.) Aggrieved Employees agree to release Defendants, and related persons and entities, from "all PAGA claims pled or which could have been pled based on the factual allegations contained in the Operative Complaint and PAGA Notices sent by Plaintiffs that occurred during the PAGA period as to the

Aggrieved Employees." (Settlement Agreement, ¶¶ 1.39, 1.40, 6.3.) Plaintiffs also agree to release Defendants, and related persons and entities, from all claims that were, or reasonably could have been, alleged based on the facts contained in the operative complaint and all PAGA claims that were, or reasonably could have been, alleged based on facts contained in the operative complaint and Plaintiffs' PAGA notice. (Settlement Agreement, ¶¶ 1.40, 6.1.)

B. Fairness of the Settlement

Plaintiffs state that the settlement was reached through discovery, analysis, and mediation with Jeffrey Krivis, Esq. (Kazandjian Dec., ¶¶ 11-12, 27-28.) In anticipation of mediation, Plaintiffs' counsel conducted informal discovery, which included a random sampling of putative class members' time and pay records, employee handbooks, relevant wage and hour policies, information regarding the total amount of putative class members, the total workweeks worked by the putative class members, the total workweeks worked by the putative class members, the numbers, and the average rate of pay for the putative class members. (Id. at ¶¶ 11, 22.) From the information provided, Plaintiffs determined that there were approximately 792 class members who worked 14,596 workweeks. (Id. at ¶¶ 15, 23.) Plaintiffs estimate that Defendants' maximum total exposure for all claims is approximately $3,454,109.80. (Id. at ¶¶ 28, 29.) Plaintiff provides a detailed breakdown of this amount by claim. (Ibid.)

The proposed settlement represents approximately 27.2 percent of the maximum potential value of Plaintiffs' claims. Thus, the proposed settlement amount is within general range of percentage recoveries that California courts have found to be reasonable. (See Cavazos v. Salas Concrete, Inc. (E.D.Ca|. Feb. 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist.LEXIS 30201, at *41-42 [citing cases listing range of 5 to 25-35 percent of the maximum potential exposure].) Defendants maintain that no violations occurred and that its policies are valid. (Kazandjian Dec., ¶ 10.) The PAGA allocation of $20,000 is just over 2% of the gross settlement, putting it at the lower end but still within the reasonable range, especially considering that the estimated total potential value of the PAGA claims is based on stacking the several violations alleged. (Id. at ¶¶ 13, 29.)

Overall, the court finds the settlement is fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

C. Incentive Award, Fees, and Costs

Plaintiffs request service awards as follows: $10,000 to Kathleen O'Brien; $10,000 to Aurora Galvan; and $5,000 to Cara Lish. (Kazandjian Dec., ¶¶ 13, 21; Settlement Agreement, ¶ 3.2.)

The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks, brackets, ellipses, and citations omitted.)

Plaintiff O'Brien submits a declaration detailing her participation in the action. Specifically, O'Brien declares that she spent approximately 30-40 hours in connection with this litigation, including discussing the case with class counsel, providing documents to class counsel, answering questions from class counsel, reviewing documents, and discussing the settlement with class counsel. (Declaration of Kathleen O'Brien in Support of Motion for Preliminary Approval of Class Settlement, ¶¶ 6, 11-12.)

Plaintiff Galvan submits a declaration detailing her participation in the action. Specifically, Galvan declares that she spent approximately 25 hours in connection with this litigation, including discussing the case with class counsel, providing documents to class counsel, answering questions from class counsel, reviewing documents, and discussing the

settlement with class counsel. (Declaration of Aurora Galvan in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, ¶¶ 2, 4-6.)

Plaintiff Lish submits a declaration detailing her participation in the action. Specifically, Lish declares that she provided significant assistance in connection with this litigation, including by providing factual background, speaking with potential class members, discussing the case with class counsel, providing documents to class counsel, participating in phone calls to discuss litigation and settlement strategy, reviewing documents, and discussing the settlement with class counsel. (Declaration of Plaintiff Cara Lish in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, ¶ 6.) However, Lish does not state the number of hours she worked on the case. Accordingly, the court requests that class counsel provide, prior to the continued hearing date on this matter, a supplemental declaration from plaintiff Lish indicating the number of hours she spent working on the case.

Plaintiffs undertook risk by putting their names on these consolidated cases because doing so might impact their future employment. (*See Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].)

However, the amounts requested by Plaintiffs are more than the court typically awards for the amounts of time they spent in connection with this action. The court will decide the approved incentive awards after plaintiff Lish submits her supplemental declaration indicating the estimated time she spent on this litigation.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel will seek attorney fees of $312,870.56, which is one third of the gross settlement amount. Plaintiffs have entered into a joint prosecution agreement in this case which calls for a split of Class Counsels' Fee award as follows: 47.5% to Haig B. Kazandjian Lawyers, APC; 47.5% to Blumenthal Nordrehaug Bhowmik De Blouw LLP; and 5% to James Hawkins APLC, and Plaintiffs have consented to the agreement in writing. Plaintiffs' counsel shall submit lodestar

information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. Plaintiffs' counsel shall also submit evidence of actual costs incurred as well as evidence of any settlement administration costs.

D. Conditional Certification of Class

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." As interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class; and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc. v. Superior Court*, supra, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

As explained by the California Supreme Court,

The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. A trial court ruling on a certification motion determines whether the issues which may be jointly tried, when compared with those requiring

separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.

(*Sav-On Drug Stores, Inc. v. Superior Court*, supra, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiffs state there are approximately 792 class members that can be ascertained from Defendants' records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue is apparent regarding the typicality or adequacy of Plaintiffs as class representatives. In sum, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

The content of a class notice is subject to court approval. "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court." (Cal. Rules of Court, rule 3.769(f).)

The notice generally complies with the requirements for class notice. (Settlement Agreement, Ex. A.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion.

However, the second paragraph on page 2 of the class notice is misleading as it states that class members "have two basic options under the Settlement": (1) "Do Nothing"; and (2) "Opt-Out of the Class Settlement." This portion of the class notice must be modified to reflect that class members have a third option—they may object to the settlement.

Next, page 3, Section 8 on page 10, and Section 9 on page 11 of the class notice must be amended to include the following language regarding the final approval hearing:

> Class members may appear at the final approval hearing in person or remotely using the Microsoft Teams link for Department 19 (Afternoon Session). Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members who wish to appear remotely are

encouraged to contact class counsel at least three days before the hearing if possible, so that potential technology or audibility issues can be avoided or minimized.

The amended notice shall be provided to the court for approval prior to the continued hearing date.

IV. CONCLUSION

Accordingly, the motion for preliminary approval of the class action settlement is CONTINUED to June 26, 2024 at 1:30 p.m. in Department 19. Plaintiffs shall file supplemental declarations no later than June 10, identifying a new cy pres recipient, indicating the estimated time plaintiff Lish spent on this litigation, and including an amended class notice. No additional filings are permitted.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

- oo0oo -

Calendar Line 2

Case Name: Sha v. Loandepot.com, LLC (Class Action/PAGA)
Case No.: 23CV418329

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on April 24, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This putative class and representative action arises out various alleged wage and hour violations. The operative First Amended Class and Representative Action Complaint ("FAC"), filed on September 28, 2023, alleges causes of action for: (1) Failure to Reimburse Expenses Pursuant to Labor Code § 2802; (2) Violation of Business & Professions Code § 16600 and Labor Code § 432.5; (3) Violation of Business & Professions Code § 17200; (4) Penalties Pursuant to Labor Code §§ 2699, et seq. ("PAGA").

Now before the court is defendant loanDepot.com, LLC's ("Defendant") motion to compel arbitration of plaintiff Betty Sha's ("Plaintiff") individual claims, dismiss Plaintiff's class claims, and stay Plaintiff's representative PAGA claim pending resolution of Plaintiff's individual arbitration. Plaintiff opposes the motion.

II. REQUESTS FOR JUDICIAL NOTICE

A. Plaintiff's Request

In connection with her opposition, Plaintiff asks the court to take judicial notice of the Declaration of Grant Folsom in Support of Defendant Viking River Cruises, Inc.'s Motion to Compel Arbitration and to Stay Proceedings ("Folsom Declaration") filed in the case of *Angie Moriana v. Viking River Cruises, Inc.* (Los Angeles County Superior Court, Case No. BC687325) on January 8, 2019.

The Folsom Declaration is a proper subject of judicial notice as it is a court record relevant to arguments raised in connection with the pending motion. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *People v. Woodell* (1998) 17 Cal.4th 448, 455 (*Woodell*) [Evid. Code, § 452, subd. (d) permits the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth

of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

Accordingly, Plaintiff's request for judicial notice is GRANTED.

B. Defendant's Request

In connection with its reply, Defendant asks the court to take judicial notice of: (1) the Folsom Declaration; and (2) the Respondents' Brief filed in the case of *Mario Barrera, et al. v. Apple American Group LLC, et al.* (Court of Appeal of the State of California, First Appellate District, Division Two, Case No. A165445) on March 2, 2023.

The items are proper subjects of judicial notice as they are court records relevant ot arguments raised in connection with the pending motion. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *Woodell, supra,* 17 Cal.4th at p. 455 [Evid. Code, § 452, subd. (d) permits the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

Accordingly, Defendant's request for judicial notice is GRANTED.

III. LEGAL STANDARD

"The FAA [Federal Arbitration Act], which includes both procedural and substantive provisions, governs [arbitration] agreements involving interstate commerce." (*Avila v. Southern California Specialty Care, Inc*. (2018) 20 Cal.App.5th 835, 840.) Here, there is no dispute that the FAA applies, as the arbitration agreement expressly provides. (See *Davis v. Shiekh Shoes, LLC* (2022) 84 Cal.App.5th 956, 963 [the FAA applies if it is so stated in the agreement since arbitration is a matter of contract].) However, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid*.)

The California Arbitration Act provides that a court must grant a petition to compel arbitration "if it determines that an agreement to arbitrate … exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement," among other exceptions. (Code Civ. Proc., § 1281.2.)

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co*. (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp*. (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of the evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal, supra,* 14 Cal.4th at p. 413.) "In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

IV. DISCUSSION

Defendant moves to compel Plaintiff to pursue her individual claims in arbitration and asks the court to dismiss Plaintiff's class claims and stay her representative PAGA claim. Defendant asserts that Plaintiff electronically signed a Mutual Arbitration Agreement on January 20, 2022, which included an agreement to arbitrate all claims between Plaintiff and LD Holdings Group, LLC (and its subsidiaries, which includes Defendant). (Declaration of Michael Wartenberg in Support of Defendant loanDepot.com, LLC's Motion to Compel Arbitration, Dismiss Plaintiff's Class Claims, and Stay Proceedings Pending Completion of Arbitration ("Wartenberg Dec."), ¶¶ 15-23 & Exs. B-D.) Defendant contends that the Mutual Arbitration Agreement covers the claims in this action because it provides that covered claims include "wage and hour claims including but not limited to claims of … reimbursement, penalties, benefits; violation of any federal, state or other government … statute, ordinance, or regulation, including but not limited to … the California Labor Code, the California Civil Code, the California Business and Professions Code, the California Wage Orders, and/or the California Private Attorneys General Act …." (Wartenberg Dec., Ex. B, § 3.) Defendant argues that Plaintiff agreed to individually arbitrate the claims at issue and waived her class

claims because the Mutual Arbitration Agreement states that the parties "may file claims against the other only in their individual capacities, and may not file claims as a plaintiff and/or participate as a class member in any pending or future class and/or collective action against the other …." (Wartenberg Dec., Ex. B, § 6.) Defendant notes that the Mutual Arbitration Agreement also contains a representative action waiver providing that representative claims are waived "except to the extent this provision is unenforceable under the applicable law" (Wartenberg Dec., Ex. B, § 7), as well as a severability provision (Wartenberg Dec., Ex. B, § 8). Finally, Defendant asserts that Plaintiff's representative PAGA claim must be stayed pursuant to section 7 of the Mutual Arbitration Agreement.

In opposition, Plaintiff does not dispute that she signed the Mutual Arbitration Agreement, that the Mutual Arbitration Agreement constitutes a binding agreement to arbitrate, that the scope of the Mutual Arbitration Agreement generally covers the claims alleged in her FAC, or that the Mutual Arbitration Agreement includes a class action waiver. Instead, Plaintiff argues that her PAGA claim, both individual and representative, must proceed in court and should not be stayed. Plaintiff contends that the PAGA claim must proceed in court because the Mutual Arbitration Agreement provides that the arbitrator's authority only extends to disputes between Plaintiff, as an individual, and Defendant and has no preclusive effect as to issues or claims in any dispute with anyone who is not a named party to the arbitration. (Wartenberg Dec., Ex. B, § 5.) Plaintiff also argues that if the representative action waiver is stricken from the Mutual Arbitration Agreement, his individual PAGA claim cannot be arbitrated.

A. Existence of Agreement to Arbitrate

> The burden of persuasion is always on the moving party to prove the existence of an arbitration agreement with the opposing party by a preponderance of the evidence: "Because the existence of the agreement is a statutory prerequisite to granting the [motion or] petition, the [party seeking arbitration] bears the burden of proving its existence by a preponderance of the evidence." [Citation.]
>
> However, the burden of production may shift in a three-step process.
>
> First, the moving party bears the burden of producing "prima facie evidence of a written agreement to arbitrate the controversy." [Citation.] The moving party "can meet its initial burden by attaching to the [motion or] petition a copy of the arbitration agreement purporting to bear the [opposing party's] signature." [Citation.] Alternatively, the moving party can meet its burden by setting forth the agreement's provisions in the motion. [Citation.] For this step, "it is not necessary to follow the normal procedures of document authentication." [Citation.] If the moving party meets its initial prima facie burden and the

> opposing party does not dispute the existence of the arbitration agreement, then nothing more is required for the moving party to meet its burden of persuasion.

(*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 164-166 (*Gamboa*); *Iyere v. Wise Auto Group* (2023) 87 Cal.App.5th 747, 755 (*Iyere*).)

> If the movant bears its initial burden, the burden shifts to the party opposing arbitration to identify a factual dispute as to the agreement's existence—in this instance, by disputing the authenticity of their signatures. To bear this burden, the arbitration opponent must offer admissible evidence creating a factual dispute as to the authenticity of their signatures. The opponent need not prove that his or her purported signature is not authentic, but must submit sufficient evidence to create a factual dispute and shift the burden back to the arbitration proponent, who retains the ultimate burden of proving, by a preponderance of the evidence, the authenticity of the signature. [Citation.]

(*Iyere, supra,* 87 Cal.App.5th at p. 755.)

"If the opposing party meets its burden of producing evidence, then in the third step, the moving party must establish with admissible evidence a valid arbitration agreement between the parties. The burden of proving the agreement by a preponderance of the evidence remains with the moving party. [Citation.]" (*Gamboa, supra,* 72 Cal.App.5th at pp. 165-166.)

With its moving papers, Defendant submitted a copy of the Mutual Arbitration Agreement, which contains an agreement to arbitrate and is purportedly signed by Plaintiff. This is sufficient for Defendant to meet its initial burden to show the existence of an agreement to arbitrate. (See *Gamboa, supra,* 72 Cal.App.5th 158, 165; see also *Iyere, supra,* 87 Cal.App.5th at p. 755.) In opposition, Plaintiff does not present any evidence contesting the authenticity of her electronic signature on the Mutual Arbitration Agreement. Thus, the record evidence is sufficient to establish that Plaintiff generally agreed to arbitrate her claims.

Moreover, the individual wage and hour claims alleged in the FAC fall within the scope of the Mutual Arbitration Agreement. As Defendant persuasively argues, the Mutual Arbitration Agreement expressly covers "all past, present, future claims between [Plaintiff] and [Defendant]…." (Wartenberg Dec., Ex. B, § 3.) Mutual Arbitration Agreement specifies further that covered claims include "wage and hour claims including but not limited to claims of … reimbursement, penalties, benefits; violation of any federal, state or other government … statute, ordinance, or regulation, including but not limited to … the California Labor Code, the California Civil Code, the California Business and Professions Code, the California Wage Orders, and/or the California Private Attorneys General Act …." (Wartenberg Dec., Ex. B,

§ 3.) Thus, all of Plaintiff's individual claims, including Plaintiff's individual PAGA claim, are subject to arbitration under the terms of the Mutual Arbitration Agreement.

B. Class Claims

Next, as Defendant persuasively argues, Plaintiff's class claims must be dismissed because the Mutual Arbitration Agreement contains an enforceable class action waiver as it expressly provides that the parties may only file claims in their individual capacities and may not file or participate in class or collective actions. (Wartenberg Dec., Ex. B, § 6.)

C. Representative PAGA Claim

As Plaintiff points out, the Mutual Arbitration Agreement contains a waiver Plaintiff's right to bring representative PAGA claims (i.e., PAGA claims on behalf of other aggrieved employees) that is unenforceable under California law. (Wartenberg Dec., Ex. B, § 7 ["The Parties agree that each may file claims against the other only in their individual capacities, and may not file claims as a plaintiff and/or participate as a representative in any pending or future representative action against the other, except to the extent this provision is unenforceable under the applicable law …"]; see *Nickson v. Shemran, Inc*. (2023) 90 Cal.App.5th 121, 130 ["Here, the Agreement purports to waive Nickson's right "to make any claims … in a private attorney general capacity." That waiver is unenforceable as a matter of state law. [Citation.]"].) Thus, the court must address whether the waiver of the representative PAGA claims can be severed from the agreement. (See *ibid.*)

"[W]hether to sever is within the trial court's discretion." (*Navas v. Fresh Venture Foods, LLC* (2022) 85 Cal.App.5th 626, 636–637.)

> " 'In deciding whether to sever terms rather than to preclude enforcement of the provision altogether, the overarching inquiry is whether the interests of justice would be furthered by severance; the strong preference is to sever unless the agreement is "permeated" by unconscionability.' [Citation.] [¶] An agreement to arbitrate is considered 'permeated' by unconscionability where it contains more than one unconscionable provision. [Citation.] 'Such multiple defects indicate a systematic effort to impose arbitration on [the nondrafting party] not simply as an alternative to litigation, but as an inferior forum that works to the [drafting party's] advantage.' [Citation.] An arbitration agreement is also deemed 'permeated' by unconscionability if 'there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement.' [Citation.] If 'the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms,' the court must void the entire agreement." (*Magno v. The College Network, Inc.* (2016) 1 Cal.App.5th 277, 292.)

(*De Leon v. Pinnacle Property Management Services, LLC* (2021) 72 Cal.App.5th 476, 492–493.)

Here, the Mutual Arbitration Agreement contains a severability provision, which provides that "[i]f any provision of this Agreement is determined to be illegal or unenforceable, such determination shall not affect the balance of this Agreement, which shall remain in full force and effect, and such invalid provision shall be deemed severable." (Wartenberg Dec., Ex. B, § 8.) Furthermore, the arbitration clause plainly has a lawful purpose consistent with both the FAA and California's public policy. (See, e.g., *Graham v. Scissor-Tail, Inc*. (1981) 28 Cal.3d 807, 821, 831 [recognizing there is a "strong public policy of this state in favor of resolving disputes by arbitration" and remanding for enforcement of arbitration agreement after voiding unconscionable provision providing for biased arbitrator].) Voiding the clause as it pertains to the entire PAGA claim would have the effect of depriving Defendant of its right to contract for bilateral arbitration based on the mandatory joinder rule of *Iskanian* that *Viking River* declared preempted. Moreover, the PAGA waiver is of the type which the court routinely construes under *Viking River Cruises, supra,* 142 S.Ct. at p. 1924. Given the United States Supreme Court's clear direction in *Viking River* that courts should interpret these provisions to require arbitration of individual PAGA claims where the agreement at issue permits, the court is unwilling to find it should not do so here, and to instead find that this partially enforceable provision tips the entire agreement into unenforceable, "permeated by unconscionability" territory. Thus, the court finds that severance furthers the interests of justice here and Defendant is entitled to enforce the arbitration agreement consistent with *Viking River*.

Notably, the Mutual Arbitration Agreement provides that "any representative claims that are found not subject to arbitration under the law shall be resolved in court, and are stayed pending the outcome of the arbitration." (Wartenberg Dec., Ex. B, § 7.) A stay of the representative PAGA claim is also consistent with *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104 (*Adolph*). (See *Adolph, supra*, 14 Cal.5th at p. 1123 [when a court has ordered a matter to arbitration, the court has discretion pursuant to section 1281.4 of the Code of Civil Procedure to stay the remaining claims pending the outcome of the arbitration].)

Plaintiff argues that, as a practical matter, the court should not stay the representative PAGA claim because the Mutual Arbitration Agreement provides that the arbitrator's authority only extends to disputes between Plaintiff, as an individual, and Defendant and has no preclusive effect as to issues or claims in any dispute with anyone who is not a named party to the arbitration. (Wartenberg Dec., Ex. B, § 5.)

However, if the arbitrator determines that Plaintiff, as an individual, did not suffer any of the alleged wage and violations (i.e., determines that Plaintiff is not an aggrieved employee) and the court confirms that determination and reduces it to a final judgment, then Plaintiff, as an individual, would lack standing to prosecute her representative PAGA claim. (See *Adolph, supra*, 14 Cal.5th at p. 1124, citing *Rocha v. U-Haul Co. of California* (2023) 88 Cal.App.5th 65, 76–82 [the reviewing court concluded the arbitrator's finding that the plaintiffs did not suffer a section 1102.5 violation as alleged in the operative complaint precluded them from qualifying as "aggrieved employees" based on that same alleged violation].) Consequently, allowing the arbitration to proceed first promotes judicial economy and efficiency.

For these reasons, a stay of the representative PAGA claim is warranted.

D. Conclusion

Accordingly, Defendant's motion to compel arbitration is GRANTED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

- oo0oo -

Calendar Line 3

Case Name: Nguyen v. Naftoon, Inc. (Class Action/PAGA)
Case No.: 23CV423638

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on April 24, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

II. INTRODUCTION

This is a putative class and representative action arising out of various alleged wage and hour violations. On September 25, 2023, plaintiff Bryan Nguyen ("Plaintiff") filed a Class Action Complaint ("Complaint") against defendant Naftoon, Inc. ("Defendant"), which alleged causes of action for: (1) Failure to Pay Minimum Wages [Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197]; (2) Failure to Pay Overtime Compensation [Cal. Lab. Code §§ 1194 and 1198]; (3) Failure to Provide Meal Periods [Cal. Lab. Code §§ 226.7 and 512]; (4) Failure to Authorize and Permit Rest Breaks [Cal. Lab. Code § 226.7]; (5) Failure to Indemnify Necessary Business Expenses [Cal. Lab. Code § 2802]; (6) Failure to Timely Pay Final Wages at Termination [Cal. Lab. Code §§ 201-203]; (7) Failure to Provide Accurate Itemized Wage Statements [Cal. Lab. Code § 226]; and (8) Unfair Business Practices [Cal. Bus. & Prof. Code §§ 17200, et seq.].

On November 20, 2023, Defendant filed the instant Petition to Compel Arbitration, Dismiss Class Claims, and Dismiss or Stay Proceedings ("Petition").

On December 5, 2023, Plaintiff filed an opposition to the Petition.

On December 7, 2023, Plaintiff filed a First Amended Class Action and Representative Complaint ("FAC"), which sets forth the following causes of action: (1) Failure to Pay Minimum Wages [Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197]; (2) Failure to Pay Overtime Compensation [Cal. Lab. Code §§ 1194 and 1198]; (3) Failure to Provide Meal Periods [Cal. Lab. Code §§ 226.7 and 512]; (4) Failure to Authorize and Permit Rest Breaks [Cal. Lab. Code § 226.7]; (5) Failure to Indemnify Necessary Business Expenses [Cal. Lab. Code § 2802]; (6) Failure to Timely Pay Final Wages at Termination [Cal. Lab. Code §§ 201-203]; (7) Failure to Provide Accurate Itemized Wage Statements [Cal. Lab. Code § 226];

(8) Unfair Business Practices [Cal. Bus. & Prof. Code §§ 17200, et seq.]; and (9) Civil Penalties Under PAGA [Cal. Lab. Code §§ 2699, et seq.].

On April 17, 2024, Defendant filed a reply in support of its Petition.

Now before the court is the Petition.

II. DISCUSSION

As a threshold matter, the court has determined that further briefing from the parties is necessary before it can rule on the instant Petition.

First, after the filing of the Petition, Plaintiff filed a FAC which adds a PAGA claim. The parties' briefing does not adequately address what, if any, effect the filing of the FAC has on the Petition or what action the court should take with respect to the newly added PAGA claim. The court would like the parties to address: (1) what effect, if any, the filing of the FAC has on the Petition (e.g., does the filing of the FAC render the Petition moot); (2) what relief, if any, does the Petition seek with respect to the PAGA claim (e.g., is the scope of the notice of Petition broad enough to encompass any relief sought with respect to the PAGA claim); and (3) what action(s) should the court take with respect to the PAGA claim.

Second, the parties purport to quote portions of the applicable arbitration agreement in their papers. (See e.g., Petition to Compel Arbitration, Dismiss Class Claims, and Dismiss or Stay Proceedings, pp. 2:17-7:28; Memorandum of Points and Authorities in Support of Petition to Compel Arbitration, Dismiss Class Claims, and Dismiss or Stay Proceedings, pp. 3:3-14, 5:10-16; Plaintiff's Memorandum of Points and Authorities in Response to Defendant's Petition to Compel Arbitration, Dismiss Class Claims, and Dismiss or Stay Proceedings, p. 15:7-9.) However, many of the quotations discussed in the parties' papers differ from the terms that are actually set forth in the signed copy of the arbitration agreement attached to the Petition as Exhibit A. In particular, the court draws the parties' attention to sections 4, 9, and 15 of the arbitration agreement attached as Exhibit A to the Petition. The court would like the parties to address: (1) why the terms of the arbitration agreement as quoted in their papers differ, in some respects, from the terms set forth in the signed copy of the arbitration agreement attached to the Petition as Exhibit A; (2) whether the terms as they appear the arbitration agreement attached to the Petition as Exhibit A are accurate and controlling here; and (3) what

is the proper interpretation and effect of the terms as set forth in the arbitration agreement attached to the Petition as Exhibit A.

Accordingly, the Petition is CONTINUED to May 15, 2024, at 1:30 p.m. in Department 19. The parties shall file supplemental briefs addressing the issues identified by the court no later than May 3, 2024. The supplemental briefs shall not exceed five pages in length. No additional filings are permitted.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

- oo0oo -

Calendar Line 4

Case Name: Legarde v. Spectra360, Inc. (PAGA)
Case No.: 22CV402965

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on April 24, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

III. INTRODUCTION

On September 12, 2022, plaintiff Jeremy Legarde ("Plaintiff") filed a Representative Action Complaint against defendant SPECTRA360, Inc. dba Raso Solutions ("Defendant"), which set forth a single cause of action for Penalties Pursuant to Labor Code § 2699, et seq. for violations of Labor Code §§ 201, 202, 203, 226(a), 226.7, and 2802.

Defendant moved to compel arbitration of Plaintiff's individual PAGA claim and dismiss Plaintiff's representative PAGA claim. Plaintiff opposed the motion.

On May 18, 2023, the court denied Defendant's motion to compel arbitration. Defendant appealed the court's order.

Subsequently, the parties reached a settlement of the PAGA claim.

Defendant asked the Sixth District Court of Appeal to stay the appeal to allow for approval of settlement in the trial court. The appellate court granted Defendant's request on November 7, 2023.

Now before the court is Plaintiff's motion for approval of the PAGA settlement. The motion is unopposed.

IV. LEGAL STANDARD

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380.) 75 percent of any penalties recovered go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining 25 percent for the employees. (*Ibid.*) PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id.* at p. 383.) A judgment in a PAGA action binds all those,

including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

A superior court must review and approve any PAGA settlement. (Lab. Code, § 2699, subd. (l)(2).) The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) The proposed settlement must be submitted to the LWDA at the same time it is submitted to the court. (*Ibid*.)

> As discussed by one court:
> PAGA does not establish a clear standard for evaluating PAGA settlements.
> …
> Accordingly, certain courts have been willing to approve PAGA settlements only if (1) the statutory requirements set forth by PAGA have been satisfied, and (2) the settlement agreement is fair, reasonable, and adequate in view of PAGA's public policy goals.

(*Patel v. Nike Retail Services, Inc.* (N.D. Cal. 2019) 2019 WL 2029061 at *2.)

As part of this analysis, these courts have evaluated proposed PAGA settlements under the relevant factors from *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. (*Patel v. Nike Retail Services, Inc.*, *supra*, 2019 WL 2029061 at *2.) "Of the *Hanlon* factors, the following are relevant to evaluating [a] PAGA settlement: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel. (*Ibid*.)

"[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *13.) The settlement must be reasonable in light of the potential verdict value. (See *O'Connor v. Uber Technologies, Inc*. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim

succeeds at trial. (See *Viceral v. Mistras Group, Inc*. (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

V. DISCUSSION

The proposed settlement has been made with regard to the following aggrieved employees: "all employees who are employed or have been employed as an hourly employee by [Defendant] in the State of California who worked one or more pay periods since July 8, 2021 and continuing to the present." (Declaration of Liane Katzenstein Ly in Support of Motion for Approval of Representative Action Settlement ("Ly Dec."), Ex. 1 ("Settlement Agreement"), ¶ 1.4.) The PAGA Period is defined as the period of time from July 8 , 2021 to September 18, 2023. (Settlement Agreement, ¶ 1.19.)

Pursuant to the terms of the settlement, Defendant will pay a non-reversionary, maximum settlement amount of $95,000. (Settlement Agreement, ¶¶ 1.10, 3.1.) This amount includes attorney fees of not more than $31,666.66 (1/3 of the maximum settlement amount), litigation costs not to exceed $8,500, an enhancement award up to $5,000 for Plaintiff, and settlement administration costs not to exceed $3,000). (Settlement Agreement, ¶¶ 1.3, 1.11, 1.14, 1.15, 1.17, 1.22, 3.2.) Of the remaining net settlement amount, 75 percent will be paid to the LWDA and 25 percent will be distributed to aggrieved employees based on the pro rata number of pay periods worked by each aggrieved employee during the Representative Period. (Settlement Agreement, ¶¶ 1.11, 1.14, 1.15, 1.22.)

Funds from checks that are not cashed within 180 days from the date of mailing will be sent to the California Controller's Unclaimed Property Fund. (Settlement Agreement, ¶ 4.4.)

In exchange for the settlement, the aggrieved employees agree to release Defendant, and related persons and entities, from "all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice." (Settlement Agreement, ¶¶ 1.25, 1.26, 5.)

Plaintiff also advises the court that the parties entered into a separate, confidential settlement of Plaintiff's individual claims.

Plaintiff contends the PAGA settlement is fair, reasonable, and adequate. Plaintiff indicates that the settlement resolves PAGA claims on behalf of 53 aggrieved employees who

collectively worked 1,139 pay periods during the PAGA Period. (Ly Dec., ¶ 15.) Prior to mediation, Plaintiff's counsel obtained a sampling of time and payroll data from Defendant as well as Plaintiff's personnel records. (*Id.* at ¶ 14.) The parties participated in a full-day mediation with Alan Berkowitz, Esq. on September 18, 2023, and reached a settlement. (*Id.* at ¶ 16.) Plaintiff estimates that Defendant's maximum potential exposure for the PAGA claim is $113,9000. Notably, Plaintiff's counsel does not provide a declaration supporting this calculation. Additionally, Plaintiff's counsel does not provide a breakdown of the maximum potential exposure based on the underlying Labor Code violations or an estimate of the average individual settlement payment to be received by aggrieved employees. Plaintiff's counsel generally explains that the value of the PAGA claim was discounted due to the strength of Defendant's defenses on the merits and the risk that the court would exercise its discretion to significantly reduce any PAGA penalties available. (Ly Dec., ¶¶ 24-46.) The settlement is approximately 83 percent of the maximum potential value of the PAGA claim.

The court has concerns regarding the fairness of the settlement. First, as noted above, the aggrieved employees covered by the proposed settlement encompasses all employees of Defendant who were employed in California and worked one or more pay periods "since July 8, 2021 and continuing to the present." However, the PAGA Period is defined as the time period from July 8, 2021 to September 18, 2023. Thus, the definition of Aggrieved Employees and the definition of the PAGA Period have different end dates. It is unclear to the court why the end dates of the relevant time period are not the same. Prior to the continued hearing, the parties shall meet and confer regarding this discrepancy and Plaintiff shall file a supplemental declaration addressing this issue and whether any amendments have been made to the settlement agreement to address the issue.

Second, Plaintiff states that he has entered into a confidential individual settlement agreement. Although Plaintiffs only need court approval for the PAGA settlement, not for an individual settlement, information regarding the terms of any individual settlement will help the court determine whether the PAGA settlement is fair in the context of the overall settlement of the claims in the case. The court notes that the operative complaint does not allege any individual claim on Plaintiff's behalf, other than the PAGA claim. It is unclear to the court

what individual claims are being resolved by the separate settlement agreement. Furthermore, it is unclear whether Plaintiff's counsel received payment for attorney fees and costs in connection with the individual settlement and whether any such payment was for work also performed in connection with the PAGA action. Therefore, prior to the continued hearing, Plaintiff shall provide the individual settlement to the court for an *in camera* review.

Third, Plaintiff does not submit a declaration from his counsel setting forth the details regarding his calculations of Defendant's maximum potential liability. It is unclear how Plaintiff determined the number of violations that occurred for each underlying Labor Code violation. Prior to the continued hearing, Plaintiff's counsel shall file a supplemental declaration providing a breakdown of the maximum potential exposure based on the underlying Labor Code violations as well as an estimate of the average individual settlement payment to be received by aggrieved employees.

As part of the settlement, Plaintiff seeks an enhancement award in the amount of $5,000. Although service awards are common in class actions, there is less authority regarding the propriety of service awards in PAGA cases. Nevertheless, a PAGA case is a representative action like a class action and it has been recognized that an individual's willingness to act as a private attorney general may merit a service award. (See *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 959.) Plaintiff has submitted a declaration generally detailing his participation in the action. However, Plaintiff does not provide an estimate of the time spent in connection with this action. Prior to the continued hearing, Plaintiff shall file a declaration specifically estimating the time he spent in connection with the PAGA action. The court will make a determination as to the service award at that time.

Plaintiff's counsel seeks attorney fees of $31,666.66 (1/3 of the maximum settlement amount). Plaintiff's counsel states that the total combined lodestar is $32,482.50 (based on 46.9 hours of work). However, a portion of that amount is based on anticipated hours of work that has not yet been performed. The evidence demonstrating that the actual total combined lodestar is $28,907.50 (based on 41.9 hours of work). (Ly Dec., ¶¶ 60-62, 64-79.) This results in a multiplier of 1.1. The court finds that the fees requested are generally reasonable as a percentage of the total recovery.

However, the court wants to determine whether counsel has already received any payment for this work in connection with Plaintiff's individual settlement. Consequently, prior to the continued hearing, Plaintiff's counsel shall submit a supplemental declaration addressing whether payment was received for attorney fees in connection with Plaintiff's individual settlement and whether any such payment covered any fees incurred in connection with the PAGA action.

Plaintiff's counsel also requests litigation costs in the total amount of $6,723.01. (Ly Dec., ¶¶ 20, 83-88.) However, some of this amount includes anticipated costs which are not recoverable. Plaintiff's counsel only presents evidence of incurred costs in the amount of $6,465.26. (Ly Dec., ¶¶ 20, 83-88.) Additionally, it is unclear whether Plaintiffs' counsel received any payment for these costs in connection with Plaintiff's individual settlement. As Plaintiff is to provide a copy of the individual settlement to the court prior to the continued hearing, the court will wait until the continued hearing to address the reasonableness of the litigation costs.

Plaintiff also asks for settlement administration costs in the amount of $3,000. Plaintiff provides a declaration from the settlement administrator demonstrating that costs associated with settlement administration do not exceed $3,500. (Declaration of Sean Hartranft of Apex Class Action Administrators Regarding Settlement Administration, ¶ 7.) Consequently, the court approves settlement administration costs in the lesser amount of $3,000.

Accordingly, the motion for approval of PAGA settlement is CONTINUED to June 26, 2024, at 1:30 p.m. in Department 19. Plaintiff shall file supplemental declarations with the additional information requested by the court no later than June 10, 2024. No additional filings are permitted.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

- oo0oo -

Calendar Line 5

Case Name: Manalo v. San Jose, LLC, et al. (Class Action)
Case No.: 20CV371934

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on April 24, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VI. INTRODUCTION

This putative class and representative action arises out of alleged wage and hour violations. Plaintiff Joanne Manalo ("Plaintiff") seeks to recover premiums for missed meal and rest periods, unpaid overtime, and related statutory penalties on behalf of all non-exempt registered nurses working at Regional Medical Center from October 22, 2019, to the present. The Class Action Complaint for Damages ("Complaint"), filed on October 23, 2020, sets forth causes of action for: (1) Failure to Provide Meal Periods or Compensation in Lieu Thereof [Cal. Lab. Code §§ 512, 226.7 and Wage Order 5-2001]; (2) Failure to Provide Rest Periods or Compensation in Lieu Thereof [Cal. Lab. Code §§ 512, 226.7 and Wage Order 5-2001]; (3) Failure to Pay Overtime Wages [Cal. Lab. Code §§ 1194, 1198, 510, 515(d) and Wage Order 5-2001]; (4) Failure to Pay for All Hours Worked [Cal. Lab. Code §§ 200, 201, 202, 204, and Wage Order 5-2001]; (5) Failure to Provide Accurate Itemized Wage Statements [Cal. Lab. Code §§ 226(a) & (e) and Wage Order 5-2001]; and (6) Civil Penalties for Violation of Private Attorneys General Act of 2004 [Cal. Lab. Code §§ 2698 et seq.].

On March 22, 2021, defendants San Jose, LLC and San Jose Healthcare System, L.P. dba Regional Medical Center of San Jose (collectively, "Defendants"), erroneously sued as Regional Medical Center of San Jose, filed a joint Answer to the Complaint.

Now before the court is Plaintiff's motion for leave to file a first amended complaint ("FAC"). Defendants oppose the motion.

II. REQUEST FOR JUDICIAL NOTICE

In connection with her moving papers, Plaintiff asks the court to take judicial notice of: (1) the class action complaint filed in *Efleda Agaceta v. HCA Healthcare, Inc., et al.* (Santa Clara County Superior Court, Case No. 23CV415667) ("*Agaceta* Action") on May 15, 2023;

and (2) a Joint Initial Case Management Conference Statement filed in the *Agaceta* Action on September 12, 2023.

The items are proper subjects of judicial notice as they are court records relevant to arguments raised in the pending motion. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *People v. Woodell* (1998) 17 Cal.4th 448, 455 [Evid. Code, § 452, subd. (d) permits the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

Accordingly, Plaintiff's request for judicial notice is GRANTED.

III. LEGAL STANDARD

> The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code.

(Code Civ. Proc., § 473, subd. (a)(1).)

> While a motion to permit an amendment to a pleading to be filed is one addressed to the discretion of the court, the exercise of this discretion must be sound and reasonable and not arbitrary or capricious. And it is a rare case in which a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case. If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion.

(*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530, internal citations and quotation marks omitted.)

IV. DISCUSSION

Plaintiff seeks leave to amend the Complaint. Plaintiffs asserts that the proposed FAC makes the following changes to her operative pleading: (1) adds a seventh cause of action for Failure to Pay All Wages Due Upon Separation (i.e., a derivative claim for waiting time penalties under Labor Code section 203; (2) deletes references to defendant Regional Medical Center of San Jose (as this defendant was erroneously named); (3) corrects certain alleged facts to reflect findings made in formal discovery; and (4) makes non-substantive clerical corrections. (Declaration of Alexei Kuchinsky in Support of Plaintiff's Motion for Leave to File First Amended Complaint, ¶ 3 & Exs. 1 & 2.) Plaintiff argues Defendants will not be prejudiced by the amendments because the proposed FAC is based on the same set of operative facts. Plaintiff contends that the gravamen of her pleading is still that Defendants' uniform practice of failing to maintain adequate staffing levels resulted in the inability of nurses to take off-duty 30-minute meal period and 10-minute rest breaks and compelled nurses to work off-the-clock to fulfill all assignments during their shifts. Plaintiff also notes that she could not bring a claim for waiting time penalties prior to March 14, 2021, because she did not resign from her employment until that date. Plaintiff contends that thereafter and until May 2022, there was uncertainty as to whether such a claim was proper given that appellate courts had not resolved the legal question of whether unpaid premiums for missed meal and rest periods constituted "wages" for purposes of claim waiting time penalties. Plaintiff further notes that the case was stayed from June to September 2023, while the parties pursued mediation.

In opposition, Defendants not assert that they will suffer any prejudice due to the proposed amendments and the addition of the new seventh cause of action. Rather, Defendants argue that the court should enter an order stating that the seventh cause of action for waiting time penalties does not relate back to the filing of the Complaint and the relevant statute of limitations period must be calculated from the filing date of the proposed FAC. This argument goes to the merits of the claim, and Defendants' purported statute of limitations defense, and is not a reason to deny leave to amend. While a trial court may deny leave to amend when the amended pleading would be barred by the statute of limitations (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1124), Defendants do not argue that the seventh cause of action is time-barred in its entirety. Defendants' argument regarding the statute of

limitations and relation-back doctrine is more appropriately raised, and addressed, in connection with a motion challenging the legal sufficiency of the amended pleading (e.g., on demurrer).

Furthermore, while it is undisputed that Plaintiff delayed in filing her motion for leave to amend, the case is still in an early stage of litigation. Class certification discovery is ongoing and no trial date has been set. Moreover, courts are bound to apply a policy of great liberality in permitting amendments to the complaint at any stage of the proceedings. (See *Atkinson v. Elk Corp*. (2003) 109 Cal.App.4th 739, 761.) Therefore, the amendment should be allowed.

Accordingly, Plaintiff's motion for leave to file the proposed FAC is GRANTED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

- oo0oo -

Calendar Line 6

Case Name: SJSC Properties, LLC v. WSP USA, Inc., et al.
Case No.: 23CV420252

Unopposed application for admission *pro hac vice* is GRANTED. No appearance necessary. Counsel to submit proposed order to court.

- oo0oo -

Calendar Line 7

Case Name: Sagemcom Broadband SAS v. DIVX, LLC, et al.
Case No.: 23CV424785

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on April 24, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VII. INTRODUCTION

This action arises out of contracts entered into between plaintiff Sagemcom Broadband SAS ("Plaintiff") and DivX, LLC ("Old DivX"). Plaintiff alleges that in 2007, it entered into a contract with Old DivX to license Old DivX's codec software. (Complaint, ¶ 1.) In 2013, Plaintiff and Old DivX allegedly amended the contract so Plaintiff could purchase a perpetual license to the Old DivX decoder software. (*Id.* at ¶ 2.) Plaintiff subsequently paid the perpetual license fee. (*Ibid.*) Plaintiff alleges that it continued using, and reporting its use of, the perpetually licensed Old DivX software for the next eight years without any issues or disputes. (Complaint, ¶ 4.)

Old DivX eventually sold its assets to a new entity also called DivxX, LLC ("New DivX"). (Complaint, ¶ 4.) On June 30, 2022, New DivX sent Plaintiff a letter asserting that it was a party to the license agreement and demanding an audit of Plaintiff's records based on an audit provision in the license agreement. (*Id.* at ¶ 5.) New DivX also represented that the audit would be conducted by an independent certified public accounting firm. (*Ibid.*) New DivX engaged KPMG, LLP ("KPMG") to conduct the audit. (*Id.* at ¶ 6.) In its introductory letter to Plaintiff, KPMG represented that it would be conducting an audit of Plaintiff. (*Ibid.*)

However, it was later revealed that New DivX's and KPMG's (collectively, "Defendants") representations were false as KPMG was not engaged to serve as an independent auditor, but instead was engaged to conduct a license review as an advisor to New DivX. (Complaint, ¶ 6.) Plaintiff alleges that it relied on Defendants' false representations that an audit was being conducted under the surviving audit term of the license agreement by an independent certified public accounting firm and Plaintiff was induced to participate and

share confidential information about its business and products that it would not have otherwise agreed to share. (*Id.* at ¶¶ 5-7.)

Additionally, KPMG prepared and sent "preliminary findings" to New DivX, over Plaintiff's objections and in violation of a non-disclosure agreement, that were inconsistent with the terms of the license agreement and contained confidential information about Plaintiff's product components. (Complaint, ¶¶ 8-10.) KPMG also prepared a second set of "preliminary findings" that were based on erroneous findings regarding the license agreement, Plaintiff's quarterly reports, and Plaintiff's product components and functionality. (*Id.* at ¶ 12.)

Plaintiff seeks judicial declarations that: (1) the license agreement expired on June 30, 2014, except as to the perpetual license; and (2) Plaintiff does not owe any unpaid royalties or other compensation to New DivX. (Complaint, ¶ 17.) Plaintiff further seeks an injunction ordering: (1) Defendants to return or permanently destroy all information obtained from or through Plaintiff; (2) KPMG to retract its "preliminary findings" or any reports created in connection with its review of Plaintiff; and (3) New DivX to refrain from relying on information obtained from Plaintiff in this action or in any other proceeding. (Complaint, ¶ 17.)

Based on the foregoing allegations, the Complaint filed on October 16, 2023, sets forth causes of action for: (1) Declaratory Judgment; (2) Fraud; (3) Unfair Competition; (4) Breach of Contract; (5) Breach of Contract; (6) Breach of Implied Covenant of Good Faith and Fair Dealing; and (7) Breach of Implied Covenant of Good Faith and Fair Dealing.

Plaintiff moved to seal portions of the Complaint and portions of certain exhibits attached thereto. New DivX filed a joinder to the motion to seal.

On March 13, 2024, the court continued the matters to April 24, 2024, to allow the parties to submit supplemental declarations in support of their requests for sealing.

On April 10 and 11, 2024, the parties filed additional papers in support of their requests for sealing.

II. LEGAL STANDARD

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access

to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).) Pleadings, in particular, should be open to public inspection "as a general rule," although they may be filed under seal in appropriate circumstances. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 104, fn. 35.)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3 (*Providian*).) "[A] binding contractual agreement not to disclose" may suffice. (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 107.) In addition, confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285–1286 (*Universal*).)

Where some material within a document warrants sealing, but other material does not, the document should be edited or redacted if possible, to accommodate both the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*Providian, supra*, 96 Cal.App.4th at p. 309.)

III. DISCUSSION

In its moving papers, Plaintiff sought to seal portions of the Complaint, and portions of Exhibits J-M, O-Q, S, T, V, and W to the Complaint, which discuss KPMG's "preliminary findings." Plaintiff asserte that the "preliminary findings," and the information that Plaintiff provided to KPMG, contain highly sensitive and non-public information about Plaintiff's products and operations. Specifically, Plaintiff stated that the "preliminary findings" include information about Plaintiff's product shipments and purported product and component

functionality. Plaintiff asserted that it does not release its shipped products information publicly in the regular course of business. Plaintiff stated that "[a]dditional supporting information describing the commercial sensitivity of the redacted information is available at the request of the [c]ourt." Plaintiff also contended that sealing of information regarding the "preliminary findings" is warranted because the "preliminary findings" are purportedly inaccurate.

To support its request for sealing, Plaintiff submitted a declaration from its counsel Kourtney Mueller Merrill ("Merill"). Merrill declared that Plaintiff provided commercially sensitive and non-public information to KPMG, including "information regarding [Plaintiff] product shipments and purported product and component functionality." (Declaration of Kourtney Mueller Merrill in Support of Motion to File Complaint Under Seal, ¶ 4.) Merrill further declared that Plaintiff "has a strong interest in maintaining the confidentiality of this information, particularly as it relates to its suppliers, customers, competitors, who would obtain an unfair advantage should they have access to this information." (*Id.* at ¶ 5.)

In addition to information regarding KPMG's "preliminary findings," Plaintiff sought to seal Exhibits C-F to the Complaint, in their entirety, as well as references to those exhibits. Exhibits C-F are the license agreement, and amendments thereto, between Plaintiff and Old DivX. Plaintiff stated that it does not believe that all of the terms and conditions of the license agreement satisfy the requirements for sealing, but it is obligated under the terms of the license agreement to keep the documents confidential. Plaintiff stated that it cannot disclose the documents without giving the other party prior notice and an opportunity to request a protective order or other appropriate remedy. Plaintiff asked the court to conditionally seal the quotations from and discussions of the parties' agreements pending New DivX's appearance in this case and an opportunity to address the confidentiality of the documents.

In its joinder, New DivX asked the court to seal Exhibits C-F to the Complaint, in their entirety. New DivX asserted that there is good cause to seal the license agreement, and the amendments thereto, because they contain confidential business information, the public disclosure of which would pose competitive harm to New DivX. Specifically, New DivX contended that its pricing strategies are insider knowledge that would give licensees and other

competitors a competitive advantage over New DivX. Notably, New DivX expressly stated that it does not seek to seal references to, and quotations from, the license agreements and amendments that are set forth in the body of the Complaint. Rather, New DivX only sought to seal the exhibits themselves.

To support its request for sealing, New DivX submitted a declaration from its counsel, TJ Fox ("Fox"). Fox declared that Exhibits C-F to the Complaint contain confidentiality provisions requiring the parties to maintain the agreements in confidence and New DivX considers the agreements to contain sensitive and confidential business information reflecting its licensing strategies and practices. (Declaration of TJ Fox in Support of DIVX, LLC's Notice of Joinder to Sagemcom Broadband SAS's Motion to File Complaint Under Seal, ¶ 6.) Fox further declared that New DivX believes it is probable that it will suffer prejudice and competitive harm if the agreements are publicly disclosed because its licensees and competitors can use this information over New DivX "by understanding pricing terms with [Plaintiff] as a licensee." (*Id.* at ¶ 7.) Notably, Fox's declaration was signed under penalty of perjury, but did not identify the place where it was executed or recite that it was executed "under the laws of the State of California."

In its March 13, 2024 minute order, the court determined that the parties had not adequately justified the request for sealing. The court stated that the evidence presented by Plaintiff demonstrated that information regarding Plaintiff's product shipments and product and component functionality is confidential business information that should be sealed; however, much of the material redacted by Plaintiff does not discuss Plaintiff's product shipments and/or product and component functionality. The court asked Plaintiff to submit a supplemental declaration setting forth in greater detail the factual basis for Plaintiff's claim that all of the information redacted in the Complaint and the subject exhibits constitutes confidential business information warranting sealing or, alternatively, amend its request for sealing so that it is narrowly tailored to information regarding Plaintiff's product shipments and product and component functionality.

The court also noted that New DivX did not present any admissible evidence supporting its request for sealing because Fox's declaration failed to identify the place where it

was executed or recite that it was executed "under the laws of the State of California." (See *Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 941 ["Although not mentioned in the SLAPP Act, the Code of Civil Procedure also allows a court to consider, in lieu of an affidavit, certain written declarations. To qualify as an alternative to an affidavit, a declaration must be signed and recite that the person making it certifies it to be true under penalty of perjury. The document must reflect the date and place of execution, if signed in California, or recite that it is executed 'under the laws of the State of California.' [Citations.]"].). The court further stated that even if Fox's declaration was admissible, at best it demonstrated that information regarding pricing terms with Plaintiff is confidential business information that should be sealed; however, New DivX's request for sealing was not narrowly tailored to pricing terms, but seeks to seal the agreement, and amendments thereto, as a whole. The court asked New DivX to submit a supplemental, admissible declaration setting forth in greater detail the factual basis for New DivX's claim that the entirety of Exhibits C-F to the Complaint constitutes confidential business information warranting sealing or, alternatively, amend its request for sealing so that it is narrowly tailored to information regarding the price terms in the agreements with Plaintiff.

Plaintiff has now submitted an amended request for sealing, which narrows the request for sealing to information regarding confidential volumes of Plaintiff products shipped, KPMG royalty assessments that can be used to derive the volumes of shipped products, the amount paid for the perpetual license, non-public technical information about Plaintiff's product components, non-public information about Plaintiff business negotiations, and personally identifying information of Plaintiff employees (e.g., email addresses and phone numbers).

To support its amended request for sealing, Plaintiff submits a supplemental declaration from its counsel, which provides adequate information regarding the confidential information at issue, the steps taken by Plaintiff to keep said information confidential, and the potential harm of public disclosure of the information. (Declaration of Kourtney Mueller Merrill in Support of Amended Motion to File Complaint Under Seal, ¶¶ 3-7.)

Additionally, New DivX has now submitted an amended joinder to Plaintiff's motion, which narrows the request for sealing to information regarding the price terms in the agreements with Plaintiff.

To support its amended request for sealing, New DivX submits a supplemental declaration from its counsel, which provides adequate information regarding the confidential information at issue, the steps taken by New DivX to keep said information confidential, and the potential harm of public disclosure of the information. (Amended Declaration of TJ Fox in Support of DivX, LLC's Amended Notice of Joinder to Sagecom Broadband SAS's Motion to File Complaint Under Seal, ¶¶ 2-8.)

The amended briefing and supplemental declarations filed by the parties adequately address the court's concerns regarding sealing. Information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party. (*Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1286.) Thus, as a general matter, the subject materials appear to be subject to sealing. Moreover, the sealing requests are narrowly tailored as they only seek to seal references to the confidential information disclosed in the documents.

Accordingly, the amended motion to seal and amended joinder are GRANTED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

- oo0oo -

Calendar Line 8

Case Name:
Case No.:

- oo0oo -

Calendar Line 9

Case Name:
Case No.:

- oo0oo -

Calendar Line 10

Case Name:
Case No.:

- oo0oo -

Calendar Line 11

Case Name:
Case No.:

- oo0oo -

Calendar Line 12

Case Name:
Case No.:

- oo0oo -

Calendar Line 13

Case Name:
Case No.:

- oo0oo -