SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

Thomas Duarte, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2170

To contest a tentative ruling, you must:

1. Call (408) 808-6856 before 4:00 P.M. and leave a voicemail message containing the information described below, and
2. Notify the other side before 4:00 P.M. that you will appear at the hearing to content the tentative ruling.

In the voicemail message, 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 NOTE:

- If you fail to notify the court or opposing side as required by California Rule of Court, rule 3.1308(a)(1) and Civil Local Rule 8(E), the Court will not hear argument and the tentative ruling will be adopted even if all parties appear at the hearing.
- Sending an email to the department or to the Complex Clerk will no longer suffice to constitute notice to the Court of the need for a hearing regarding a tentative ruling.

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.
- 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.

DATE: OCTOBER 17, 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	21CV383231	Rickwalder, et al. v. Meta Platforms, Inc. (Class Action)	See Line 1 for tentative ruling.

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LINE 2	21CV386229	Estrada v. Monterey Mushrooms, Inc.	These cases are scheduled for a final approval hearing. However, the Court did not receive a motion or other papers associated with this hearing date. Counsel must appear to discuss this issue with the Court.
LINE 3	21CV391403	Gillogly v. Monterey Mushrooms, Inc.	
LINE 4	23CV417412	James v. Applied Materials, Inc. (Class Action/PAGA)	See Line 4 for tentative ruling.

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LINE 5	22CV399097	Yotopoulos v. Mach49, LLC, et al.	The unopposed motion to seal is GRANTED. The Court will sign the proposed order.
LINE 6	20CV369179	Hone Capital LLC, et al. v. Wu, et al. (Lead Case; Consolidated With 20CV369308)	See Line 6 for tentative ruling.
LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Joseph Rickwalder, et al. v. Meta Platforms, Inc.*
Case No.: 21CV383231

Plaintiffs Angel McDaniel, Jerome Gage and Craig Miller (collectively, "Plaintiffs") bring this putative class action against Meta Platforms, Inc.[1] ("Defendant" or "Meta"). Plaintiffs assert claims for invasion of privacy and for violations of the federal Wiretap Act, the California Invasion of Privacy Act ("CIPA"), and related common law claims arising from Meta's offering of "Business Tools" to partners like third-party Home Box Office Inc. ("HBO") and its associated tracking of user's activities online.

Before the Court is Plaintiffs' motion for class certification, as well as various motions to seal by both sides. The motion for class certification is opposed, the motions to seal are not.[2] As discussed below, the Court GRANTS the motions to seal and DENIES Plaintiffs' motion for class certification.

I. BACKGROUND

A. Factual

As alleged by Plaintiffs, Meta is the largest social media site on the planet, touting 2.9 billion monthly active users. (Third Amended Complaint ("TAC"), ¶ 6.) Its revenue model involves mining its platform and third-party websites for insights used to target and customize advertisements for businesses. (See *id.*, ¶¶ 9-11, 31-32.) Indeed, roughly 97 percent of Meta's $117 billion in 2021 revenue came from selling advertising. (*Id.*, ¶ 30.) According to Plaintiffs, Meta has a history of ubiquitously tracking its users' actions and communications, including sensitive and confidential communications, even while interacting with websites other than those maintained by Meta. (See *id.*, ¶¶ 11-21.) After its "Beacon" program—which did this transparently—was rejected by users, Meta moved its tracking "behind the scenes, where consumers do not notice it." (*Id.* ¶ 21.)

1. *Meta's Business Tools*

Meta's Business Tools "are bits of code that advertisers can integrate into their website, mobile applications, and servers, thereby enabling Meta to intercept and collect user activity on those platforms." (TAC, ¶ 33.) The Business Tools are automatically configured to capture certain data, like when a user visits a webpage, that webpage's Universal Resource Locator ("URL") and metadata, or when a user downloads a mobile application or makes a purchase. (*Id.*, ¶ 34.) Business Tools can also track other events, either those offered on a menu of "standard events" from which advertisers can choose (including what content a visitor views or purchases) or "custom events" created by advertisers using their own parameters. (*Ibid.*)

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[1] Meta was formerly known as Facebook, Inc. ("Facebook"). At times, the parties still refer to the company as such. The Court uses Meta and Facebook interchangeably in this order.

[2] The parties' motions to seal are GRANTED. (See Cal. Rule of Court, rule 2.550(d).)

One Business Tool is the Meta Tracking Pixel. (TAC, ¶ 35.) When a user accesses a website hosting the Meta Tracking Pixel, Meta's software script surreptitiously directs the user's browser to send a separate message to Meta's servers containing the original GET request sent to the host website, along with additional data that the Pixel is configured to collect. (*Ibid.*) Two sets of code are thus automatically run as part of the browser's attempt to load a website—the website's own code, and Meta's embedded code. (*Ibid.*) After collecting and intercepting this information, Meta processes it, analyzes it, and assimilates it into datasets like "Core Audiences" and "Custom Audiences." (*Id.*, ¶ 37.) Meta's other Business Tools, like "Meta SDK" for mobile applications and "Conversions API," function the same way. (See *id.*, ¶¶ 38-39.)

3. *How Business Tools Are Used in Connection with HBO Max*

HBO coordinates its HBO Max streaming service with Meta to target its advertisements and set up its Business Tools. (TAC, ¶¶ 40–43.) Because HBO is a top advertising spender, Meta's "Solutions Engineers team," embedded employees, and others work with HBO closely to provide strategic advice. (See *id.*, ¶¶ 43–44.) HBO Max uses Business Tools including both the Meta Tracking Pixel and Meta SDK. (*Id.*, ¶ 45.)

Plaintiff Angel McDaniel lives in Apple Valley, California, and subscribed to HBO Max from 2020 to the present, after creating a Meta account in 2007. (TAC, ¶ 23.) She has watched countless videos from HBO Max on her desktop, mobile devices, and television. (*Ibid.*) As described below, Meta tracked her actions and intercepted her communications with HBO Max, revealing the URL requested, form field information entered, and event data that identified what videos she requested and when. (*Ibid.*) The same is true for Plaintiffs Jerome Gage, who lives in Torrance, and Craig Miller, who lives in Oceanside. (*Id.*, ¶¶ 24-25.)

When an HBO subscriber watches a video, the Meta Tracking Pixel intercepts and collects information relating to two events, PageView and AuthenticatedTraffic (both of which constitute "content"). (TAC, ¶ 47.) PageView transmits the video's URL and AuthenticatedTraffic transmits the episode title, series name, season title, episode number, and page title. (*Id.*, ¶¶ 48–50.) HBO's Pixel also utilizes "Automatic Advanced Matching" to match HBO Max subscribers to their Meta profiles using other information from HBO's website like names and emails—which Meta intercepts and collects regardless of whether a user is logged into Meta or even has an account. (See *id.*, ¶¶ 53-58.) Two Pixels intercept communications from subscribers who use HBO's form fields to input identifying information, and Meta matches the identifiers against a subscriber's subsequent activity. (See *id.*, ¶¶ 56-58.) HBO's Pixel also registers each time a subscriber clicks a button related to the "profile page" and that button's text and transmits information from each Meta cookie in the subscriber's browser cache—even if a visitor has never created a Meta account. (See *id.*, ¶¶ 63–75.) Meta links identifiers associated with the cookies to event data, allowing Meta to know, among other things, which HBO Max videos a subscriber has watched. (*Id.*, ¶ 76.)

By compelling a visitor's browser to transmit the Advanced Matching parameters, cookies, and other browser identifiers—and by using its other Business Tools to compel disclosure of identifiers—alongside event data for videos, Meta intentionally intercepted electronic communications that subscribers sent and received while viewing videos on HBO

Max. (See TAC, ¶¶ 77-81.) And because they contained personally identifiable information, these communications were confidential. (*Ibid*.)

Through its use of Meta's Business Tools, HBO violates the Video Privacy Protection Act ("VPPA"), which prohibits " '[a] video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider.' 18 U.S.C. § 2710(b)(1)." (See TAC, ¶¶ 83-85.) Moreover, subscribers had a reasonable expectation that their communications with HBO were confidential. (See *id.*, ¶¶ 86-88.) Meta, too, "knows that it intercepted sensitive and unlawfully disclosed information that HBO had no legal right to transmit." (*Id.*, ¶ 91.)

4. *Meta's Alleged Failure to Receive User Consent*

According to Plaintiffs—and as discussed in more detail below—Meta never receives consent from users to intercept and collect electronic communications containing this sensitive and unlawfully disclosed information: in fact, it expressly warrants the opposite. (TAC, ¶ 92.) Plaintiffs cite Meta's Terms of Service, Cookies Policy, Data Policy, California Privacy Policy, and other representations that it will not receive unlawfully collected information from partners and will only collect sensitive "data with special protections" that users choose to provide. (See *Id.*, ¶¶ 92-106.)

And even for lawfully collected, non-sensitive information, "Meta still fails to receive informed consent from users because it obfuscates the volume, specificity, and type of data it collects." (TAC, ¶ 111.) For example, Meta offers an "Off-Meta activity" report that ostensibly shows a summary of activity that partners share with Meta, but in reality provides only a selective and misleading glance at the data Meta collects. (See *id.* ¶¶ 107-119.) Meta emphasizes to users that they can control and review the data Meta collects, but the tools it offers to do so are incomplete, inaccurate, and intentionally designed to deceive and confuse users. (See *id.* ¶¶ 120-123.)

5. *Plaintiff's Claims in This Action*

Plaintiffs allege that, both in connection with HBO Max and in general, Meta's interception and subsequent use of electronic communications violates the California Consumer Privacy Act ("CCPA") and a stipulated consent decree between Meta and the Federal Trade Commission ("FTC"). (See TAC, ¶¶ 125-142.) Meta also violates California Constitutional and common law protections from invasions of privacy and intrusion upon seclusion. (See *id.*, ¶¶ 143-145.)

Mr. Gage brings this action on behalf of a putative class of "all subscribers to HBO Max in the United States who have an account with [Meta]" (the "Class"). (TAC, ¶¶ 1, 147.) Plaintiffs assert the following causes of action (1) violation of the Wiretap Act, 18 U.S.C. § 2510, et seq.; (2) violation of CIPA, Cal. Penal Code § 631; (3) violation of CIPA, Cal. Penal Code § 632; (4) invasion of privacy; and (5) intrusion upon seclusion.

B. Procedural

Joseph Rickwalder initiated this action on June 18, 2021, asserting putative class claims for violation of CIPA based on his use of CNN's website. Meta demurred, and Plaintiffs filed a

First Amended Complaint adding Candace Carter as a plaintiff as well as a claim for violation of the Wiretap Act. On March 9, 2022, Plaintiffs filed the Second Amended Complaint ("SAC"), adding Ms. McDaniel as a plaintiff along with extensive allegations concerning HBO Max and several new causes of action.

Meanwhile, Ms. McDaniel filed a separate putative class action in the United States District Court for the Southern District of New York, asserting a VPPA claim directly against HBO based on HBO Max's use of Facebook's Business Tools. (*McDaniel v. Home Box Office, Inc.* (S.D.N.Y, No. 1:22-CV-01942), the "Federal Action".) HBO moved to compel arbitration.

In August 2022, Meta demurred to the SAC on multiple grounds and moved to stay this action in favor of the Federal Action. Plaintiffs opposed both motions, and brought a motion to sever Mr. Rickwalder and Ms. Carter's claims in the event the Court granted a stay of Ms. McDaniel's claims. In its order issued on September 15, 2022, the Court denied the motion to stay (which mooted the motion to sever), sustained the demurrer as to Mr. Rickwalder and Ms. Carter's claims with leave to amend, and sustained the demurrer as to the then-fourth cause of action in the SAC (for violation of the Comprehensive Computer Access and Fraud Act) as to Ms. McDaniel and overruled the demurrer as to her remaining claims.

On October 30, 2023, Plaintiffs filed the operative TAC, which no longer includes Mr. Rickwalder and Ms. Carter as plaintiffs but added Messrs. Gage and Miller in that capacity. Mr. Gage is the sole proposed class representative.

II. MOTION FOR CLASS CERTIFICATION

In this motion, Plaintiffs move to certify the following class and subclass:

1. All persons in the United States who, from June 19, 2021 to and through the date that class notice is disseminated, had the same email address associated with a subscription to hbomax.com and a Facebook account, and for whom there is associated Event Data in the ads_pixel_traffic table stored in Meta Platforms, Inc.'s Hive database showing their video-viewing behavior on hbomax.com.

2. All persons in the California who, from June 19, 2021 to and through the date that class notice is disseminated, had the same email address associated with a subscription to hbomax.com and a Facebook account, and for whom there is associated Event Data in the ads_pixel_traffic table stored in Meta Platforms, Inc.'s Hive database showing their video-viewing behavior on hbomax.com.

Meta opposes the motion, arguing that individual issues predominate for each of the causes of action alleged in the TAC and class certification is not a superior method of adjudication.

A. Legal Standard

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* (2004) 34 Cal.4th 319, 326, internal quotation marks, ellipses, and citations omitted (*Sav-on Drug Stores*).)

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, 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.) The court must examine all the evidence submitted in support of and in opposition to the motion "in light of the plaintiffs' theory of recovery." (*Department of Fish and Game v. Superior Court (Fish and Game)* (2011) 197 Cal.App.4th 1323, 1349.) The evidence is considered "together": there is no burden-shifting as in other contexts. (*Ibid.*)

B. Numerous and Ascertainable Class

A class is ascertainable "when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980 (*Noel*).) A class definition satisfying these requirements

> puts members of the class on notice that their rights may be adjudicated in the proceeding, so they must decide whether to intervene, opt out, or do nothing and live with the consequences. This kind of class definition also advances due process by supplying a concrete basis for determining who will and will not be bound by (or benefit from) any judgment.

(*Noel, supra,* 7 Cal.5th at p. 980, citation omitted.)

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." (*Noel, supra,* 7 Cal.5th at p. 984.) Still, it has long been held that "[c]lass members are 'ascertainable' where they may be readily identified … by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932, disapproved of on another ground by *Noel, supra,* 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 975-976 ["The defined class of all HD Package subscribers is precise, with objective characteristics and transactional parameters, and can be determined by DIRECTV's own account records. No more is needed."].)

Here, there does not appear to be any dispute that members of the putative class and subclass are numerous—potentially including millions of individuals—and are ascertainable because both are defined by objective, clear characteristics; namely, whether Meta has Event Data for them showing video-viewing behavior and whether they used the same email address for their Facebook and HBO accounts. Meta has confirmed that it is possible to identity putative class members as email addresses from HBO Max subscribers can be used to find Facebook accounts associated with the same email address, and, from there, those users' Facebook User IDs, separable IDs, hashed identifiers, and associated Event Data from Facebook can be located.

The Court therefore finds that the class and subclass are numerous and ascertainable.

C. Community of Interest

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*, *supra*, 34 Cal.4th at p. 326.)

1. *Predominant Questions of Law or Fact*

For the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (*Hicks*).) The court must also give due weight to any evidence of a conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 215.) The ultimate question is 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. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104–1105 (*Lockheed Martin*).) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks*, *supra*, 89 Cal.App.4th at p. 916.)

The community of interest requirement is the primary area of dispute with regards to Plaintiffs' request for class certification. Plaintiffs maintain that the elements of each their claims are susceptible to common proof while, as set forth above, Meta insists to the contrary.[3]

Plaintiffs assert two causes of action for violation of the CIPA, for violations of Penal Code sections 631 ("Section 631") and 632 ("Section 632"), as well as a single claim for violation of the federal Wiretap Act. Section 632, subdivision (a), prohibits intentional (i.e., "willful") and nonconsensual eavesdropping on confidential communications by means of an electric amplifying or recording device. As relevant here, Section 631, subdivision (a), imposes liability upon

[3] Plaintiffs are not seeking to certify their two common law privacy claims.

> Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained . . . .

(*In re Google Assistant Privacy Litig.* (N.D. Cal. 2020) 457 F.Supp.3d 797, 825.)

The Wiretap Act generally prohibits the interception of "wire, oral, or electronic communication[s]" through the use of "any electronic, mechanical, or other device." (18 U.S.C. § 2511(1).) The elements of Plaintiffs' claim for violation of this act are similar to those under CIPA Section 631, subdivision (a), because they focus on whether Meta either "[1] intentionally intercept[ed] [or] endeavor[ed] to intercept … any wire, oral, or electronic communication" or "[2] intentionally use[d], or endeavor[d] to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." (18 U.S.C. § 2511(1)(a), (d).)

Plaintiffs assert that the elements of these claims are susceptible to classwide proof because they focus on Meta's conduct common to the entire class and subclass, with the testimony of Meta's witnesses and the opinions of Plaintiffs' experts furnishing classwide evidence that Meta's Pixel and related software is "a machine, instrument, contrivance" or other "manner" of engaging in the conduct prescribed by Section 631, subdivision (a), or an "electronic amplifying or recording device" under Section 632. Plaintiffs continue that the question of whether Meta acted "willfully" and "eavesdrop[ped] or record[ed] [a] confidential communication" is also subject to common proof because it collected the video-watching data *en masse* and thus either collected it willfully for *all* class and subclass members or none.[4] Finally, Plaintiffs argue, the issue of whether class and subclass members consented to Meta's collection of the aforementioned data will be resolved the same way for all class and subclass members because it is a binary issue, i.e., Meta either disclosed its wiretapping or it did not. Anticipating Meta's challenge to this argument, Plaintiffs insist that even if there *are* individualized issues concerning consent, certification should not be denied on that basis because the predominance standard does not require *every* aspect of a case to be susceptible to classwide proof.

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[4] The elements of Plaintiffs' claim for violation of this act are similar to those under CIPA Section 631, subdivision (a), because they focus on whether Meta either "[1] intentionally intercept[ed] [or] endeavor[ed] to intercept … any wire, oral, or electronic communication" or "[2] intentionally use[d], or endeavor[d] to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." (18 U.S.C. § 2511(1)(a), (d).)

Meta responds that individualized issues predominate regarding several issues: (1) whether each alleged interception reflects a class or subclass member's *own* video-viewing behavior, as opposed to someone else who utilized their HBO Max subscription; (2) whether each member expressly or impliedly consented to Meta's receipt of their data; (3) whether a member is entitled to discretionary statutory damages; and (4) whether Meta's due process rights are impacted by the recovery of damages by putative class and subclass members.

As Meta explains in its opposition, the theory underlying Plaintiffs' Wiretap Act claim (and indeed all of their other claims) is that certain "sensitive" data pertaining to class and subclass members was sent by HBO to Meta without the consent of those individuals. Plaintiffs argue that this information, consisting of, at a minimum, first name, last name, email address and the subscriber's Facebook ID number, was "sensitive" because it was sent in violation of the VPPA. The VPPA prohibits video tape service providers from disclosing consumers' "personally identifiable information," which is defined to include "information which identifies a person as having requested or obtained specific video materials or services from a video tape service provider." (18 U.S.C. § 2710, subd. (a)(3).) In its order on Meta's demurrer to the SAC, the Court permitted Plaintiffs' claims to proceed to the extent they were based on "HBO's disclosure of personally identifiable information to Facebook in violation of the VPPA," which it concluded was "the only 'sensitive' information addressed by the [complaint]." (Demurrer Order at p. 26.)

Accordingly, as Meta maintains, while there is no direct VPPA claim in this case, in order to prove their wiretapping claims, each class and subclass member must show that Meta received data from HBO about them that constituted *their own* "personally identifiable information" that was sent in violation of the VPPA.[5] (See *Eichenberger v. ESPN, Inc.* (9th Cir. 2017) 876 F.3d 979, 983 [explaining that the VPPA "protects a consumer's substantive privacy interest in *his or her* video-viewing history"].) Indeed, the class and subclass Plaintiffs seek to certify emphasize this point as both include the phrase "their video-viewing behavior on hbomax.com." Thus, perhaps implicitly, Plaintiffs recognize that data reflecting the video-viewing behavior of someone other than the subscriber is not "personally identifiable information concerning [a] consumer" (18 U.S.C. § 2710(b)(1)) because it does not identify a subscriber "as having requested or obtained specific video materials or services." (*Id.* § 2710(a)(3); *In re Nickelodeon Consumer Privacy Litig.* (3d Cir. 2016) 827 F.3d 262, 284 ["Congress's purpose in passing the [VPPA] was quite narrow: to prevent disclosures of information that would, with little or no extra effort, permit an ordinary recipient to identify a particular person's video-watching habits"].) Instead, it reflect the video-viewing habits of someone else. A plaintiff cannot bring a wiretapping claim based on the alleged interpretation of data reflecting someone else's viewing habits because the Wiretap Act confers a cause of action to "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used" in violation of the statute. (18 U.S.C. § 2520, subd. (a).) CIPA is similar. In sum, there is no actionable claim if the data received by Meta reflects the video-viewing behavior of someone *other* than the plaintiff. The transfer of personal information pertaining to the plaintiff's family or friends who have accessed content on the plaintiff's HBO Max account is not actionable as to the plaintiff.

[5] As Meta notes, Plaintiffs also argue that "video-watching behavior" is "sensitive data" under California law, particularly Civil Code section 1799.3. (Plaintiffs' Mtn. at pp. 16-17.)

Meta submits that it is commonplace for video-service subscribers to share their passwords with others, with one recent report estimating that, of the 215 million people in the United States using streaming services, 25% are using someone else's account, with HBO Max being one of the two most affected platforms. (See Declaration of Elizabeth K. McCloskey in Support of Opposition to Motion for Class Certification ("McCloskey Decl."), Ex. 20 at p. 1.) Meta continues that the self-described behaviors of two of the three named plaintiffs, including the proposed class representatives, establishes the individualized nature of this issue, with Mr. Gage and Ms. McDaniel both admitting to sharing their HBO Max logins with friends and family and providing testimony demonstrating that data in the ads_pixel_traffic table do not necessarily reflect a subscriber's own video-viewing behavior. During his deposition, in addition to admitting that he provided his HBO login credentials to his aunt, brother, and sister, among others, Mr. Gage testified that he had never watched *The Gilded Age*, *The Alienist*, or *FBOY Island* (and could not recall watching other shows), even though the data in the ads_pixel_traffic associated with his Facebook account contained the title of those shows. (McCloskey Decl., Ex. 17 (Gage Deposition) at pp. 180:12-181:24, 187:6-13, 194:15-196:24, 256:9-14, 257:10-11, 257:18-23; *id*. Ex. 21.) Similarly, despite testifying that no one else "ever watched a video on HBO Max through [his] account," Mr. Miller denied having watched a show (*Tour de Pharmacy*) whose title is reflected in the ads_pixel_traffic data associated with his Facebook account. (*Id*. Ex. 16 at pp. 120:9–11, 133:13–14; id. Ex. 21.) And Ms. McDaniel admitted that she shared her HBO login credentials with more than ten other people, including several people outside her household. (*Id*. Ex. 19 at pp. 110:24–112:16.)

All told, Meta's evidence suggests that an individualized inquiry is necessary to determine whether the data from ads_pixel_traffic reflects a particular class or subclass member's *own* video-viewing behavior rather than the video-viewing behavior of a friend or family member who has accessed that individual's HBO account.

In their reply, Plaintiffs endeavor to address the foregoing by insisting that Meta "does not present evidence that a single piece of Event Data from HBO in its possession" reflects video-viewing by anyone other than class members themselves," and that Meta's argument is based on "speculation." (Reply at pp. 9-10.) They also insist that, if necessary, class members can confirm the accuracy of the Event Data matched to their account via a classwide notice procedure.

But Meta *has* presented such evidence in the form of testimony from the named plaintiffs admitting that numerous lines of data that Meta received from HBO and associated with their Facebook accounts showed the titles of movies they did not watch or admitting that they shared their HBO login credentials with numerous people. And notable, Plaintiffs submitted with their reply *new* declarations from the named plaintiffs recanting their deposition testimony and claiming that they *did* actually watch the videos they previously disclaimed. Mr. Gage now declares that he *did* watch *The Gilded Age*, *The Alienist*, *FBOY Island*, and various other shows after all. (See Reply Declaration of Timothy Fisher in Support of Motion for Class Certification ("Fisher Decl."), Ex. 36 (Sept. 11, 2024 Declaration of Jerome Gage).) This new declaration purports to substantively alter not only the testimony Plaintiff Gage gave at his deposition, but also the errata sheet Mr. Gage submitted *after* his deposition, where he had changed some of his answers to "I don't recall.". (See *id.* ¶¶ 4–5.) And Mr. Miller, with his recollection similarly refreshed, now declares that he did in fact watch *Tour de Pharmacy*. (See *id.* Ex. 37 (Sept. 10, 2024 Declaration of Craig Miller).)

The foregoing showing is problematic. First, it is improper to submit new evidence with a reply brief. (See, e.g., *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538) But second, as Meta insists, Plaintiffs' act of submitting declarations which contradict their previous sworn testimony in fact *supports* Meta's assertion that the question of whether its ads_pixel_traffic table actually reflects each class or subclass member's *own* video-viewing behavior is an individual issue that must examined individually. Further, the Court finds persuasive Meta's contention that the flip-flopping nature of the named plaintiffs' testimony undercuts Plaintiffs' assertion that the accuracy of Event Data can be confirmed by class and subclass members by a class-wide "notice process." Thus, Plaintiffs' effort to establish that the Event Data associated with each of their Facebook accounts reflects their own video-viewing behavior actually *strengthens* Meta's argument against class certification.

In their reply, Plaintiffs offer additional arguments for why Meta's assertion that the issue of whether each member's own video-viewing behavior is accurately reflected in the data provided by HBO to Meta is an individualized issue is incorrect. First, they argue that Meta's records accurately reflect the video-viewing behavior of each putative class and subclass member and they cannot disclaim such accuracy. But this argument is unavailing because, as Meta responds, it is *not* claiming that the Event Data it received and associates with a particular Facebook account is inaccurate; rather it is arguing that putative class members cannot rely solely on that data to establish their claims that Meta received data from HBO about television shows and movies *that a particular class member* viewed. The fact that an identified show or movie is matched to a particular Facebook account does not mean, therefore, that the account holder is the person who viewed it; it simply means that Meta had *some* basis for associating the data with that Facebook account. However, that person's HBO account may have been used by *someone else* to view a particular video. The Court agrees with Meta that this does not make the Event Data "inaccurate," it simply demonstrates that there are limits as to what that data shows.

Plaintiffs also assert that Meta can match every individual viewer to their actual Facebook account through the cookies in each viewer's device. (See Reply at pp. 10-11.) But not only do many people often use a single device—Mr. Gage and Ms. McDaniel both testified to as much—such that cookies cannot affirm *who* was actually utilizing the subject device when certain content is being accessed, but Meta also shows that matching does not always happen based on what device a person is using. It submits evidence that it matches Event Data to a Facebook account in many different ways, including, for example, by the email address associated with the HBO account being used, that do *not* depend on cookies on an individual users' device. (See McCloskey Decl., Ex. D (Deposition of Meta's Person Most Qualified) at pp. 109:21-110:21, 114:25-115:3, 123:8-19, 127:19-128:11.) Meta persuasively argues that Plaintiffs' simplistic "cookies" argument is unsustainable because, as it has demonstrated, password sharing can result in Event Data being matched to a class member's Facebook account *even if* someone else watched a show on their *own* device.

Ultimately, and most problematically, Plaintiffs have not identified a classwide method for litigating this key element of their claims, i.e., how a factfinder can determine, based on evidence *outside* of the ads_pixel_traffic table, whether that person's allegedly disclosed Event Data reflects her own viewing on that particular occasion. In the absence of such a methodology, the Court concludes that the central issue of whether each line of data associated with the class member's email address reflects that class member's own video-viewing behavior, rather than that of friends or family members, would require individualized analysis

and evidence that would predominate over other common issues otherwise susceptible to class-wide proof. This compels denial of Plaintiffs' request for certification of the class and subclass.[6]

III. CONCLUSION

The motions to seal are GRANTED.

Plaintiffs' motion for class certification is DENIED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. 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.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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[6] Given this conclusion, the Court need not address the remaining elements required for certification. Nevertheless, the Court notes that it agrees with Plaintiffs that the issues of consent, damages and whether each interception took place in California can be determined on a classwide basis by resort to common proof.

Calendar Line 2

Case Name:
Case No.:

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Calendar Line 3

Case Name:
Case No.:

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Calendar Line 4

Case Name: *Lary Martin James v. Applied Materials, Inc.*
Case No.: 23CV417412

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff Lary Martin James alleges that Defendant Applied Materials, Inc. ("Applied" or "Defendant") committed various wage and hour violations. Before the Court is Plaintiff's motion for preliminary approval of settlement, which is unopposed. As discussed below, the Court GRANTS the motion.

I. BACKGROUND

According to the allegations of the operative First Amended Class Action Complaint ("FAC"), Plaintiff was formerly employed by Applied in a non-exempt, hourly-paid position. Plaintiff alleges that Defendant failed to: pay all wages owed (including minimum and overtime); provide lawful meal periods or compensation in lieu thereof; permit lawful rest breaks or provide compensation in lieu thereof; reimburse necessary business-related costs; provide accurate itemized wage statements; timely pay wages during employment; and pay all wages due upon separation of employment.

Based on the foregoing, Plaintiff initiated this action in June 2023 and filed the operative FAC on August 21, 2023, asserting the following causes of action: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to permit rest breaks; (5) failure to reimburse business expenses; (6) failure to provide accurate itemized wage statement; (7) failure to pay timely wages during employment; (8) failure to pay all wages due upon separation of employment; (9) violation of Business & Professions Code § 17200; and (10) PAGA penalties.

Plaintiff now seeks an order: preliminarily approving the parties' class action settlement; certifying the Class for settlement purposes only; ordering the proposed Class Notice be sent to the settlement Class; appointing CPT Group as the settlement administrator; conditionally appointing Plaintiff as Class representative; appointing Aegis Law Firm, PC as Class counsel; and scheduling a final approval hearing.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

Generally, "questions whether a [class action] 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*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> 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, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of relevant factors, depending on the circumstances of each case. (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The trial 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.*, citation and internal quotation marks omitted.) The trial court also must independently confirm that "the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra*, 168 Cal.App.4th at p. 129.) Of course, before performing its analysis the trial court must be "provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Id.* at pp. 130, 133.)

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. 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.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 2022 U.S. LEXIS 2940.)

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; see also *Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F.Supp.3d 959, 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 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.)

III. SETTLEMENT PROCESS

After the initiation of this action, the parties engaged in informal discovery, through which Plaintiff obtained a significant number of documents and information, including Plaintiff's personnel file, timekeeping records and wages statements, Defendant's wage and hour policy documents, dates of employment and final hourly rates for the putative class, and a 20% sampling of time and pay records for the putative class.

On January 26, 2024, the parties engaged in private mediation with David Rotman, a respected mediator, and reached a settlement. The parties subsequently negotiated the terms of the related agreement, which was finalized on April 22, 2024 and is now before the Court for approval.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement amount is $2,500,000. Attorney's fees of up to $833,333.33 (or one-third of the gross settlement), litigation costs not to exceed $25,000 and administration costs of $15,500 will be paid from the gross settlement. $100,000 will be allocated to PAGA penalties, 75% of which ($75,000) will be paid to the LWDA, with the remaining 25% distributed, on a pro-rata basis, to "PAGA Group Members," who are defined as "all Class Members who worked for Applied in a nonexempt position in California at any time from June 13, 2022 through the date of which the Court grants preliminary approval of the Settlement." The "Class," in turn, is defined as "all current and former employees who were directly hired and worked for Applied in a non-exempt position in California at any time from December 17, 2018 through February 29, 2024."

The net settlement will be distributed to Class Members on a pro rata basis. For tax purposes, settlement payments will be allocated 33.33% to wages and 66.66% to penalties and interest. PAGA payments will be allocated 100% to penalties. Defendant is responsible for employer-side payroll taxes. Plaintiff will seek an incentive award of $10,000. Funds associated with checks uncashed after 180 days will be transmitted to the Controller of the State of California to be held in trust for such Class Members pursuant to California unclaimed property law.

In exchange for settlement, Class Members who do not opt out will release:

> [A]ny and all known and unknown claims against Applied and the other Released Parties that are asserted in the First Amended Complaint or arise out of or reasonably relate to the facts alleged in the First Amended Complaint that, during the Class Period, Applied failed to pay all minimum wages, paid sick leave, and overtime; provide meal and rest periods; pay meal and rest period premiums at the regular rate of pay; properly include shift differentials, bonuses, and other incentive compensation in the regular rate of pay for purposes of calculating overtime wages, paid sick leave, and meal and rest period premiums; maintain accurate records; furnish accurate itemized wage statements; reimburse necessary business expenses; timely pay all wages due during

> employment; and pay all wages due upon separation of employment (the "Released Class Claims"). The Released Class Claims, as defined above, include but are not limited to all such claims brought under California Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 246, 510, 512, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 2698 et seq., 2800, and 2802, California Business and Professions Code sections 17200- 17208, and the Industrial Welfare Commission Wage Order. The Released Class Claims, as defined above, include all such claims for wages, statutory penalties, civil penalties, or other relief under the California Labor Code, PAGA, any other related federal, state or municipal law, relief from unfair competition under California Business and Professions Code section 17200 et seq., attorneys' fees and costs, and interest.

PAGA Group Members, who consistent with the statute will not be able to opt out of the PAGA portion of the settlement, will release:

> [A]ny and all claims under PAGA for civil penalties against Applied and the other Released Parties that arise out of or reasonably relate to the allegations asserted in the First Amended Complaint and notice submitted by Plaintiff to the LWDA pursuant to PAGA that, during the PAGA Period, Applied failed to pay all wages due, including minimum wages, paid sick leave, and overtime; provide meal and rest periods; pay meal and rest period premiums at the regular rate of pay; properly include shift differentials, bonuses, and other incentive compensation in the regular rate of pay for purposes of calculating overtime wages, paid sick leave, and meal and rest period premiums; maintain accurate records; furnish accurate itemized wage statements; reimburse necessary business expenses; timely pay all wages due during employment; and pay all wages due upon separation of employment (the "Released PAGA Claims"). The Released PAGA Claims, as defined above, include but are not limited to all such PAGA claims brought under California Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 246, 510, 512, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 2698 et seq., 2800, and 2802, and the Industrial Welfare Commission Wage Order. All PAGA Group Members will release the Released PAGA Claims and receive a PAGA Group Payment, regardless of whether they elect not to participate in the Settlement.

The foregoing releases are appropriately tailored to the allegations at issue. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.)

V. FAIRNESS OF SETTLEMENT

Based on available data, Plaintiff's counsel and his expert calculated Applied's maximum exposure for each claim to be as follows: $125,000 (overtime claims); $532,000 (minimum wage claim); $470,000 (meal period claim); $2.1 million (rest break claim); $320,000 (reimbursement claim); $1.28 million (derivative waiting time and wage statement penalties); and $3,155,200 (PAGA penalties). Plaintiff's counsel and his expert than adjusted the foregoing, which total more than $3 million, to arrive at the following *realistic* exposure amounts for each claim for the purpose of settlement negotiations: $7,954 (overtime claim); $47,880 (minimum wage claim); $42,300 (meal period claim); $189,000 (rest break claim);

$28,800 (reimbursement claim); $42,386 (waiting time penalties); $73,622 (wage statement penalties); $100,000 (PAGA penalties). Plaintiff's counsel arrived at the aforementioned amounts by offsetting Defendant's maximum exposure by, among other things: the risk of class certification being denied (mostly due to the presence of individualized issues); Defendant's arguments on the merits, including that bonuses were discretionary, shift differential payments were excluded from the regular rate of pay, that it maintained lawful overtime and other relevant policies and Class Members executed meal break waivers; a lack of willfulness on Defendant's part with regard to various claimed violations; and the risk of not prevailing at trial or on appeal.

Considering the portion of the case's value attributable to uncertain penalties, claims that could be difficult to certify for class treatment, and the multiple, dependent contingencies that Plaintiff would have had to overcome to prevail on his claims, the settlement achieves a good result for the class. For purposes of preliminary approval, the Court finds that the settlement is fair and reasonable to the class, and the PAGA allocation is genuine, meaningful, and reasonable in light of the statute's purposes.

Of course, the Court retains an independent right and responsibility to review the requested attorney fees and award only so much as it determines to be reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127–128.) Counsel shall submit lodestar information prior to the final approval hearing in this matter so the Court can compare the lodestar information with the requested fees. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 504 [trial courts have discretion to double-check the reasonableness of a percentage fee through a lodestar calculation].)

VI. PROPOSED SETTLEMENT CLASS

Plaintiff requests that the following settlement class be provisionally certified:

> All current and former employees who were directly hired and worked for Applied in a non-exempt position in California at any time from December 17, 2018 through February 29, 2024.

A. Legal Standard for Certifying a Class for Settlement Purposes

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 …."

Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence: (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, 332 (*Sav-On Drug Stores*).) "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.)

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class determination need not be confronted, and the court's review is more lenient in this respect. (*Id.* at pp. 93–94.) But considerations designed to protect absentees by blocking unwarranted or overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

B. Ascertainable Class

A class is ascertainable "when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980 (*Noel*).) A class definition satisfying these requirements

> puts members of the class on notice that their rights may be adjudicated in the proceeding, so they must decide whether to intervene, opt out, or do nothing and live with the consequences. This kind of class definition also advances due process by supplying a concrete basis for determining who will and will not be bound by (or benefit from) any judgment.

(*Noel*, *supra,* 7 Cal.5th at p. 980, citation omitted.)

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." (*Noel*, *supra,* 7 Cal.5th at p. 984.) Still, it has long been held that "[c]lass members are 'ascertainable' where they may be readily identified … by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932, disapproved of on another ground by *Noel*, *supra,* 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 975-976 ["The defined class of all HD Package subscribers is precise, with objective characteristics and transactional parameters, and can be determined by DIRECTV's own account records. No more is needed."].)

Here, the estimated 988 class members are readily identifiable based on Defendant's records, and the settlement class is appropriately defined based on objective characteristics. The Court finds that the settlement class is numerous, ascertainable, and appropriately defined.

C. Community of Interest

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, supra,* 34 Cal.4th at pp. 326, 332.)

For the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (*Hicks*).) The court must also examine evidence of any conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 215.) The ultimate question is 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 good for the judicial process and to the litigants. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104–1105 (*Lockheed Martin*).) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks, supra,* 89 Cal.App.4th at p. 916.)

Here, common legal and factual issues predominate. Plaintiff's claims all arise from Defendant's wage and hour practices (and others) applied to the similarly-situated class members.

As for the second factor,

> The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's interests are antagonistic to or in conflict with the objectives of those she purports to represent that denial of class certification is appropriate. But even then, the court should determine if it would be feasible to divide the class into subclasses to eliminate the conflict and allow the class action to be maintained.

(*Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 99, internal citations, brackets, and quotation marks omitted.)

Like other members of the class, Plaintiff was employed by Defendant as a non-exempt, hourly-paid employee and alleges that he experienced the violations at issue. The anticipated defenses are not unique to Plaintiff, and there is no indication that Plaintiff's interests are otherwise in conflict with those of the class.

Finally, adequacy of representation "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The class representative does not necessarily have to incur all of the damages suffered by each different class member in order to provide adequate representation to the class. (*Wershba, supra,* 91 Cal.App.4th at p. 238.) "Differences in individual class members' proof of damages [are] not fatal to class certification. Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." (*Ibid.*, internal citations and quotation marks omitted.)

Plaintiff has the same interest in maintaining this action as any class member would have. Further, he has hired experienced counsel. Plaintiff has sufficiently demonstrated adequacy of representation.

D. Substantial Benefits of Class Certification

"[A] class action should not be certified unless substantial benefits accrue both to litigants and the courts. . . ." (*Basurco v. 21st Century Ins.* (2003) 108 Cal.App.4th 110, 120, internal quotation marks omitted.) The question is whether a class action would be superior to individual lawsuits. (*Ibid.)* "Thus, even if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action." (*Id*. at pp. 120–121, internal quotation marks omitted.)

Here, there are an estimated 988 Class Members. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

VII. NOTICE

The content of a class notice is subject to court approval. (Cal. Rules of Court, rule 3.769(f).) "The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (*Ibid.*) In determining the manner of the notice, the court must consider: "(1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do not receive notice; and (7) The res judicata effect on class members." (Cal. Rules of Court, rule 3.766(e).)

Here, the notice describes the lawsuit, explains the settlement, and instructs Class Members that they may opt out of the settlement (except for the PAGA component) or object. The gross settlement amount and estimated deductions are provided, and Class Members are informed of their qualifying workweeks as reflected in Defendant's records and are instructed how to dispute this information. Class Members are given 45 days to request exclusion from the class, submit a written objection to the settlement, or challenge the information used to calculate their share of the settlement.

The notice is generally adequate. Regarding appearances at the final fairness hearing, the notice shall be further modified to instruct class members as follows:

> Although class members may appear in person, the judge overseeing this case encourages remote appearances. (As of August 15, 2022, the Court's remote platform is Microsoft Teams.) Class members who wish to appear remotely should contact class counsel at least three days before the hearing if possible. 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 may appear remotely using the Microsoft Teams link for Department 7 (Afternoon Session) or by calling the toll free conference call number for Department 7.

Turning to the notice procedure, as articulated above, the parties have selected CPT Group as the settlement administrator. The administrator will mail the notice packet within 44 days of preliminary approval of the settlement, after updating Class Members' addresses using the National Change of Address Database. Any returned notices will be re-mailed to any forwarding address provided or a better address located through a skip trace or other search. Class Members who receive a re-mailed notice will have an additional 14 days to respond. These notice procedures are appropriate and are approved.

VIII. CONCLUSION

Plaintiff's motion for preliminary approval is GRANTED. The final approval hearing shall take place on **April 17, 2025** at 1:30 in Dept. 7. The following class is preliminarily certified for settlement purposes:

> All current and former employees who were directly hired and worked for Applied in a non-exempt position in California at any time from December 17, 2018 through February 29, 2024.

IX. CONCLUSION

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. 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.

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Calendar Line 5

Case Name:
Case No.:

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Calendar Line 6

Case Name: *Hone Capital LLC v. Wu, et al.*
Case Nos.: 20CV369179 (consolidated with Case No. 20CV369308)

This consolidated action arises from a series of business disputes among several parties. Plaintiff/Cross-Defendant Hone Capital LLC ("Hone Capital" or "Hone" or "Plaintiff"), a subsidiary of China Science & Merchants Investment Management Group Co, LTD ("CSC Group"), has sued several parties for fraud and breach of fiduciary duty, among other things. Hone Capital's claims arise from: (1) alleged embezzlement and double-dealings of Defendants/Cross-Complainants Veronica Wu and Purvi Gandhi, former employees of Hone Capital; and (2) supposed assistance in these wrongful actions by various outside parties hired by or doing business with Mses. Wu and Gandhi, either directly or through entities controlled by Mses. Wu and Gandhi. Mses. Wu and Gandhi have each filed cross-claims against Hone Capital for unpaid wages and profit sharing.

Before the Court is Ms. Gandhi's motion to compel CSC Group to provide further responses and production to her second set of production requests, which CSC Group opposes. As discussed below, the Court GRANTS the motion.

I. BACKGROUND

Ms. Gandhi filed the operative Third Amended Complaint ("TAC") on April 25, 2023. Per the allegations of the TAC, Ms. Gandhi was employed by CSC Group and Hone Capital for over four years, during which she and her colleague, Ms. Wu, managed various investments for CSC Group and its affiliates, including Hone. (See TAC, ¶¶ 1, 31-53.) Ms. Gandhi alleges that these investments have done quite well, resulting in substantial gains to CSC Group; the fair market value of CSC Group's portfolio is currently estimated to be over $400 million. (See *id*., ¶¶ 1, 13, 70.) Ms. Gandhi alleges that CSC Group and its affiliates agreed to compensate her management services with a portion of vested carried interest (i.e., profit share) but ultimately failed to do so. She now seeks to recover these monies- the current value of which is purportedly in excess of $15 million- and others through a variety of claims against CSC Group, including fraud, breach of contract, tortious interference with contract, common counts, failure to pay wages due, unjust enrichment, violation of Business and Professions Code section 17200 and declaratory relief.

II. MOTION TO COMPEL FURTHER RESPONSES AND PRODUCTION

Ms. Gandhi moves to compel further responses and production to Request for Production of Documents ("RPD"), Set Two, No. 18. This request seeks "DOCUMENTS sufficient to show the current value of any WU GANDHI INVESTMENT that YOU still hold."

A. Legal Standard

A party propounding a request for production may move for an order compelling a further response if it deems that a statement of compliance is incomplete, a representation of inability to comply is inadequate, or an objection is without merit. (Code Civ. Proc., § 2031.310, subd. (a).) The motion must set forth "specific facts showing good cause justifying

the discovery sought by the demand." (Code Civ. Proc., § 2031.310, subd. (b)(1); *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) Good cause is established simply by a fact-specific showing of relevance. (*Id.* at p. 98.) If good cause is shown, the burden shifts to the responding party to justify any objections. (*Ibid*.)

B. Discovery Dispute

On April 19, 2024, Ms. Gandhi served RPD, Set Two, which contained 46 requests, on CSC Group. CSC Group served its responses on May 28, 2024. As relevant here, CSC Group asserted a variety of objections to RPD No. 18, including those based on relevance, vagueness, overbreadth and undue burden. CSC Group also objected to the request "to the extent it seeks confidential and proprietary business information or trade secrets." Finally, CSC Group objected to the defined term "WU GANDHI INVESTMENT" used in Request No. 18 and requested to meet and confer regarding that term.

Counsel for the parties subsequently met and conferred to discuss RPD No. 18, with CSC Group asking Ms. Gandhi to provide a list of the investments at issue. Ms. Gandhi provided the requested list and CSC Group agreed to use it to define "GANDHI INVESTMENTS"—but only as to those "that have been exited," i.e., sold. CSC Group also agreed to extend the applicable time period for the request to the present. However, CSC Group later reversed course and refused to produce such documents, claiming that they are not relevant to Ms. Gandhi's damages. Ms. Gandhi's counsel was unable to alter CSC Group's position and consequently requested an informal discovery conference ("IDC") with the Court.

During the August 30, 2024 IDC, the Court expressed its belief that RPD No. 18 was, at a minimum, likely to lead to the discovery of admissible evidence. Counsel for CSC Group responded that it was willing to produce responsive documents, but that because the information was subject to confidentiality agreements with third parties, it needed a court order compelling it to produce the documents before it could do so. This motion followed.

C. Discussion

As a threshold matter, the Court finds that Ms. Gandhi has demonstrated good cause exists for the items sought by RPD No. 18. As Ms. Gandhi explains, the central theory of her case against CSC Group is her right to be fairly compensated for the services (primarily investment management) that she provided to it and its affiliates for more than four years. The defendants allegedly promised to compensate Ms. Gandhi with "carried interest" on the investments she managed, and while CSC Group has sold some of those investments, it purportedly continues to hold onto others. (TAC, ¶¶ 1, 38-45.) Documents concerning the value of the investments that have been sold and those that CSC Group still possesses are clearly relevant to the element of damages based on several different theories,[1] as well as to disproving Hone/CSC Group's allegations that that investments managed by Ms. Gandhi were "poorly managed and…not in the position to be profitable in any foreseeable future" and "that

[1] These include the following: the reasonable value of the services provided by Ms. Gandhi, i.e., the increase in value of investments she managed (quantum meruit claim); the increased value of the unsold investments as it constituted a benefit to defendants (unjust enrichment claim); and current value of the carried interest on all CSC Group Investments Ms. Gandhi managed (tort claims).

CSC Group lost money" on such investments. (See Sixth Amended Complaint, ¶ 27 & TAC, ¶ 73.) Recognizing the apparent relevance of the materials sought by the subject request, CSC Group does not challenge Ms. Gandhi's showing of good cause. Accordingly, the burden shifts to CSC Group to justify its objections.

To this end, the *only* objection that CSC Group seeks to substantiate is that pertaining to the allegedly confidential, proprietary or trade secret character of materials responsive to the request.[2] CSC Group explains that the request seeks confidential information that it is not permitted to disclose pursuant to confidentiality agreements with third parties, unless required by law or applicable court order. Moreover, it continues, Ms. Gandhi is now its direct competitor through her other investment companies, namely HC Investments, LLC and Minerva SFR LLC, and it "should not be forced to turn over confidential and proprietary information relating to its current investments, which reveal its investment strategy, to a direct competitor."

Neither of the foregoing arguments provide a basis upon which to deny Ms. Gandhi's motion.

To begin, even assuming, for the sake of argument, that the documents sought by RPD No. 18 *are* "confidential," they are nonetheless still discoverable. CSC Group cites authority suggesting that certain categories of confidential materials that do not qualify as trade secrets may not be discoverable. But at the same time, CSC Group does not cite any authority supporting its assertion that the basic valuation information sought by RPD No. 18 qualifies as "confidential and proprietary business information." Nor does CSC Group persuasively substantiate its contention that any of the information sought is subject to a contractual confidentiality restriction. Indeed, the alleged agreements were not provided for the Court's inspection but just quoted in part. Notably, no definition of the "Confidential Information" discussed in each agreement is provided by CSC Group. This omission is critical as without it, the Court cannot conclude that the information being sought is, in actuality, subject to the aforementioned agreements.

Critically, the Court entered a stipulated protective order in this action nearly three years ago on November 29, 2021, which governs the production of documents. Provided it has a legitimate basis to do so, CSC Group can designate documents as confidential when it produces them and, pursuant to the order, such documents "shall be used solely for the purpose of this case" and are subject to strict disclosure limitations. This order is sufficient to address CSC Group's fears concerning the dissemination of this information.

Furthermore, it is not apparent how disclosing to Ms. Gandhi the current value of the investments she previously managed will reveal its confidential "investment" strategy, particularly since Ms. Gandhi *already knows* what these investments are. CSC Group also provides no evidence to substantiate its claim that Ms. Gandhi is a "direct competitor;" in the absence of such evidence, the Court agrees with Ms. Gandhi that there appears to be no valid basis for CSC Group to declare materials responsive to RPD No. 18 as "attorney's eyes only" rather than merely "confidential."

[2] The other unsupported objections are OVERRULED.

In sum, the Court finds that good cause exists for the materials sought by RPD No. 18 and CSC Group's objections to this request are without merit. Consequently, Ms. Gandhi's motion to compel is GRANTED.

III. CONCLUSION

Ms. Gandhi's motion to compel is GRANTED. No later than 30 days from the date the order is filed, CSC Group serve a further response to RPD No. 18 and produce any corresponding responsive documents, consistent with the preceding discussion.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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