SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, 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.)

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LAW AND MOTION TENTATIVE RULINGS
DATE: MARCH 6, 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	23CV412292	Spalinger v. El Camino Hospital (Class Action)	See Line 1 for tentative ruling.
LINE 2	20CV361771	Geierman v. Grocery Delivery E-Services USA, Inc., et al. (Class Action)	See Line 2 for tentative ruling.
LINE 3	23CV422616	Anderson v. Topgolf Payroll Services, LLC, et al. (PAGA)	See Line 3 for tentative ruling.
LINE 4	21CV391681	Jennings v. Knighted Ventures, LLC (Class Action)	Hearing date vacated per counsel, without prejudice.
LINE 5	18CV335538	Evans v. Dolgen California, LLC (Class Action/PAGA)	Rescheduled to March 20, 2024 at 1:30 p.m.
LINE 6	21CV386659	Rodriguez v. Excite Credit Union (Class Action)	Unopposed motion for admission *pro hac vice* is GRANTED. No appearance necessary. Court will sign proposed order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Spalinger v. El Camino Hospital (Class Action)
Case No.: 23CV412292

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 6, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This putative class action arises out defendant's El Camino Hospital's ("Defendant") alleged sharing of class members' sensitive and confidential protected health information and personally identifiable information with Meta Platforms, Inc., without class members' knowledge or consent. The Complaint, filed by plaintiff Indigo Spalinger ("Plaintiff") on February 28, 2023, sets forth the following causes of action: (1) Violation of the California Invasion of Privacy Act, Cal. Penal Code § 631; (2) Violation of the California Confidentiality of Medical Information Act, Cal. Civ. Code § 56.10; and (3) Invasion of Privacy Under California's Constitution.

On May 12, 2023, Defendant removed the action to the United States District Court, Northern District of California, pursuant to the federal officer removal statute, 28 United States Code Section 1442, which permits the removal of a civil action against federal officers and "any person acting under that officer" relating to "any act under color of such office."

Subsequently, Plaintiff filed a motion to remand. Defendant opposed the motion.

On August 21, 2023, the district court granted Plaintiff's motion to remand.

On September 20, 2023, Defendant appealed the order granting Plaintiff's motion to remand.

Thereafter, Defendant apparently moved to stay the appeal and the Ninth Circuit stayed the appeal on December 13, 2023.

Now before the court is Defendant's motion to stay the action pending its appeal of the order granting Plaintiff's motion to remand. Plaintiff opposes the motion to stay.

II. REQUEST FOR JUDICIAL NOTICE

A. Defendant's Request

In connection with its moving papers, Defendant asks the court to take judicial notice of: (1) a minute order filed in *Angela Heard v. Torrance Memorial Medical Center* (Los Angeles County Superior Court, Case No. 22STCV36178) (the "*Heard* Action") on June 8, 2023; (2) Defendant's Notice of Removal filed in *Indigo Spalinger v. El Camino Hospital* (United States District Court, Northern District of California, Case No. 5:23-cv-02350-VC) (the "Federal Action") on May 12, 2023; (3) Defendant's Opposition to Plaintiff's Motion to Remand filed in the Federal Action on June 26, 2023; (4) the order Granting Motion to Remand filed in the Federal Action on August 21, 2023; (5) the Order Granting Defendant's Motion for Further Stay of Enforcement of the Court's October 20, 2021 Order to Remand filed in *Maude Fox, et al. v. Cerritos Vista Healthcare Center LLC* (United States District Court, Central District of California, Case No. 2:21-cv-06418-DSF(SKx)) on January 7, 2022; (6) the Order Recalling Court's Transmittal of the June 1, 2021 Order to Remand (Dkt. No. 31) And Staying Enforcement For 30 Days filed in *Harry Forman, et al. v. C.R.C.H., Inc., et al.* (United States District Court, Central District of California, Case No. 2:21-cv-02845 SB (JEMx)) on June 11, 2021; (7) the Order on Motion to Stay filed in *Harry Forman, et al. v. C.R.C.H., Inc., et al.* (United States District Court, Central District of California, Case No. 2:21-cv-02845 SB (JEMx)) on July 26, 2021; (8) an Order filed in *Estate of Joseph Maglioli, et al. v. Andover Subacute Rehabilitation Center I, et al.* (United States District Court, District of New Jersey, Case No. 21-2114(KM)(JBC)) on June 18, 2021; (9) the docket for *In re Silverado Senior Living, Inc.* (United States District Court, Central District of California, Case No. 2:21-cv-00070); (10) the docket for the Federal Action; and (11) the docket for Defendant' appeal of the order granting remand in the Federal Action.

Item Nos. 2-11 are generally proper subjects of judicial notice as they are court records that relevant to issues raised in connection with the pending motion to stay. (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."].)

Item No. 1—an unpublished California trial court order—is not a proper subject of judicial notice. Unpublished California opinions "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Ct., rule 8.1115(a); *County of San Bernardino v. Cohen* (2015) 242 Cal.App.4th 803, 816 (*Cohen*) [noting that trial court cases are not citeable]; see also *Schachter v. Citigroup, Inc*. (2005) 126 Cal.App.4th 726, 738 (*Schachter*) [trial court ruling has no precedential value]; *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 448, fn. 4 (*Drummond*) ["in the absence of some additional showing—such as the conditions for claim or issue preclusion—the actions of other judges are simply irrelevant"].) Here, Defendant cites to the unpublished order entered in the *Heard* Action as persuasive authority in support of its motion for stay. This is improper. The court admonishes Defendant not to cite unpublished California trial court orders in the future.

Accordingly, the request for judicial notice is DENIED as to Item No. 1 and GRANTED as to Item Nos 2-11.

B. Plaintiff's Request

In connection with her opposition, Plaintiff asks the court to take judicial notice of: (1) the Order Denying Defendant's Motion to Stay Action Pending Appeal filed in *Michelle Valladolid v. Memorial Health Services* (Los Angeles County Superior Court, Case No. 23STCV05059) (the "*Valladolid* Action") on May 3, 2023; (2) the Notice of Withdrawal of Defendants' Motions for Stay of Proceedings Pending Appeals filed in *John Doe v. Cedars-Sinai Health System, et al.* (Los Angeles County Superior Court, Case No. 22STCV41085) (the "*Cedars-Sinai* Action") on November 17, 2023.

Item No. 1—an unpublished California trial court order—is not a proper subject of judicial notice. Unpublished California opinions "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Ct., rule 8.1115(a); *Cohen, supra*, 242 Cal.App.4th at p. 816 [noting that trial court cases are not citeable]; see also *Schachter, supra,* 126 Cal.App.4th at p. 738 [trial court ruling has no precedential value]; *Drummond, supra,* 176 Cal.App.4th at p. 448, fn. 4 ["in the absence of some additional showing—such as the

conditions for claim or issue preclusion—the actions of other judges are simply irrelevant"].) Here, Plaintiff cites to the unpublished order entered in the *Valladolid* Action as persuasive authority in support of her opposition to the motion for stay. This is improper. The court admonishes Plaintiff not to cite unpublished California trial court orders in the future.

Similarly, Item No 2 is not a proper subject of judicial notice. Plaintiff cites to the notice of withdrawal entered in the *Cedars-Sinai* Action to show that "after the court issued its decision in *Valladolid*, the same defense counsel as those involved in this case withdrew another motion to stay pending in the Los Angeles Superior Court that, again, was based on an almost identical procedural history as that here." The fact that defense counsel in an unrelated case withdrew a motion for stay, and the purported reasons for the withdrawal, is irrelevant to the to the material issues before the court. (See *Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People ex rel. Lockyer v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2 [the court may properly take judicial notice of court records if those records are deemed to be necessary and relevant to the disposition of the motion].)

Accordingly, the request for judicial notice is DENIED.

III. LEGAL STANDARD

The court has the inherent authority to control the litigation before it to avoid conflicting rulings and unnecessary waste of parties' and judicial resources. (Code Civ. Proc., § 128(a)(2), (8).) The authority includes the power "to stay an action when appropriate." (*Jordache Enters., Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 758.) " '[A] court ordinarily has inherent power, in its discretion, to stay proceedings when such a stay will accommodate the ends of justice.' " (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 141 (*OTO*).)

IV. DISCUSSION

Defendant asks the court to stay this case pending resolution of its appeal of the order granting Plaintiff's motion for remand in the Federal Action pursuant to its inherent power to control the proceedings before it. Defendant argues that if proceedings continue in this court during the pendency of its appeal and it eventually prevails in the Ninth Circuit Court of Appeals, the fruits of reversal will be lost. Defendant contend it would suffer cost,

inconvenience, and potentially conflicting rules and discovery standards if parallel litigation was permitted. Defendant assets that this action is entirely embraced and affected by the appeal, and a stay would preserve the status quo.

In opposition, Plaintiff asserts that a stay is not warranted because the request for a stay is a delay tactic predicated on Defendant's unmeritorious appeal. Plaintiff also contends that Defendant's motion fails because Defendant does not identify a hardship it would suffer if a stay is denied and Defendant's right to appeal is not impeded by litigation in state court.

As an initial matter, the parties spend a substantial portion of their briefs arguing the merits of Defendant's appeal. However, they do not cite any California authority demonstrating that it is proper for the court to consider the merits of Defendant's appeal when ruling on Defendant's request for a stay. Rather, the applicable legal standard instructs the court to consider whether "such a stay will accommodate the ends of justice.' " (*OTO, supra,* 8 Cal.5th at p. 141.) Thus, the court does not address the parties' contentions regarding the merits of Defendant's appeal.

Upon review of the parties' papers and evidence, the court concludes that a stay of this action would not accommodate the ends of justice. First, Plaintiff has shown that it is possible damage may result from granting the stay. Defendant seeks to stay the instant action during the pendency of its appeal in the Federal Action. Defendant does not estimate how long the appeal is expected to take. Additionally, Defendant does not address the fact that it recently requested, and the Ninth Circuit granted, its request for a stay of the appeal. A stay of indefinite duration could result in significant delay in addressing the merits of Plaintiff's claims and is prejudicial to Plaintiff.

Second, Defendant has not shown a clear hardship from denial of the stay. The issue on appeal in the Ninth Circuit is whether Plaintiff's claims against Defendant should proceed in state or federal court. Any prejudice resulting from Defendant being required to proceed in a forum that it contends is improper is limited. Defendant asserts that it may be subject to potentially inconsistent standards and rulings regarding the sufficiency of the pleadings and the scope of permissible discovery. Although Defendant points to differences between the federal and state pleading standards, Defendant does not identify any particular issue with the

sufficiency of the Complaint or explain how the issue presented in the operative pleading in this case might be resolved differently under federal law. Defendant also highlights differences between the federal and state discovery standards. But Defendant does not show that those differences are likely to impact discovery in this case. For example, Defendant does not establish that discovery is, or will be, sought regarding privileged or work product information. In sum, the risks identified by Defendant are speculative at best.

Defendant also observes that federal district courts routinely grant stays of orders remanding actions removed to federal court pursuant to the federal officer statute. But Defendant did not seek a stay of the order granting remand in the Federal Action. Moreover, in such cases, a party seeking a stay of the remand order must establish that it is likely to succeed on the merits. (*Martin v. Serrano Post Acute LLC* (C.D.Cal. Nov. 18, 2020, No. CV 20-5937 DSF (SKx)) 2020 U.S.Dist.LEXIS 263591, at *2-5.) Defendant has not made that showing here.

On balance, the court finds that allowing litigation to proceed in this court pending the appeal in the Ninth Circuit will not significantly prejudice Defendant. No significant hardship to Defendant is shown and there do not appear to be significant benefits to a stay. Furthermore, a stay of indefinite duration will delay resolution of Plaintiff's claims and result in prejudice to Plaintiff.

Accordingly, the motion to stay this action is DENIED.

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

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Calendar Line 2

Case Name: Geierman v. Grocery Delivery E-Services USA, Inc., et al. (Class Action)
Case No.: 20CV361771

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 6, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

II. INTRODUCTION

This is a class and representative action arising out of alleged violations of the Fair Credit Reporting Act ("FCRA") and the Labor Code. Plaintiff Jennifer Geierman ("Plaintiff") filed the operative First Amended Complaint ("FAC") against defendants Grocery Delivery E-Services USA, Inc. and Insperity Business Services, L.P. on March 18, 2020. The FAC sets forth the following causes of action: (1) Violation of 15 U.S.C. §§ 1681b(b)(2)(A) (FCRA); (2) Violation of 15 U.S.C. §§ 1681d(a)(1) and 1681g(c) (FCRA); (3) Failure to Provide Meal Periods (Lab. Code §§ 204, 223, 226.7, 512 and 1198); (4) Failure to Provide Rest Periods (Lab. Code §§ 204, 223, 226.7 and 1198); (5) Failure to Pay Hourly Wages (Lab. Code §§ 223, 510, 1194, 1194.2, 1197, 1997.1 and 1198); (6) Failure to Indemnify (Lab. Code § 2802); (7) Failure to Provide Accurate Written Wage Statements (Lab. Code § 226(a)); (8) Failure to Timely Pay All Final Wages (Lab. Code §§ 201, 202 and 203); (9) Unfair Competition (Bus. & Prof. Code §§ 17200 et seq.); and (10) Civil Penalties (Lab. Code §§ 2698 et seq.).

Plaintiff advised the court that the parties had reached a settlement and she moved for an order preliminarily approving the settlement. The motion was unopposed.

On December 21, 2022, the court (Hon. Patricia M. Lucas) denied the motion for preliminary approval of settlement without prejudice. The court explained that the proposed settlement agreement suffered from numerous deficiencies which prevented approval at that time. The court indicated that when there was a new agreement correcting the noted deficiencies, another motion for preliminary approval could be made.

Now before the court is Plaintiff's motion for preliminary approval of an amended settlement agreement. The motion is unopposed.

III. 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.)

IV. DISCUSSION

A. Provisions of the Settlement

The Amended Joint Stipulation of Class Action Settlement and Release ("Amended Settlement Agreement") is entered into between Plaintiff, on behalf of herself and all others

similarly situated, and "Defendants Grocery Delivery E-Services USA, Inc. and Insperity PEO Services, L.P.," who are defined collectively as "Defendants" in the Settlement Agreement. (Declaration of Shaun Setareh in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class ("Setareh Dec."), ¶ 12 & Ex. 1 ("Amended Settlement Agreement"), pp. 3:1-5 & 4:4-9, & ¶ VI.1.43.) The parties represent that Insperity PEO Services, L.P. was erroneously sued as Insperity Business Services, L.P. in the FAC.

The Settlement Agreement provides that the case has been settled on behalf of the following class:

> (1) any individual who applied for employment with Defendant Grocery Delivery E-Service USA, Inc. and had a background check performed in connection with their employment during the FCRA Class Period ("FCRA Class") or (2) any individual who worked for Defendant Grocery Delivery E-Service USA, Inc. in California as a Brand Ambassador during the Hourly Employee Class Period ("Brand Ambassador Class") or (3) non-exempt hourly employees who worked [for] Defendant Grocery Delivery E-Service USA, Inc. in California and who signed arbitration agreements during the Hourly Employee Class Period ("Hourly Employee Class").

(Amended Settlement Agreement, ¶ VI.1.7.) The "FCRA Class Period" means January 13, 2015 through October 29, 2020. (Amended Settlement Agreement, ¶ VI.1.11.) The "Hourly Employee Class Period" means January 13, 2016 through the date of preliminary approval. (Amended Settlement Agreement, ¶ VI.1.12.)

The class also includes a subset of "Aggrieved Employees" who are defined as "any person who was employed by Defendant Grocery Delivery E-Service USA from January 13, 2019 through the Preliminary Approval Date (the 'PAGA Period'), and shall specifically include any hourly-paid or non-exempt employees who worked for Defendant Grocery Delivery E-Service USA in California during this period, including Aggrieved Employees who have not previously release[d] PAGA claims in the settlement of *Avila Davis v. Grocery E-Services USA Inc., et al.,* Case No. C18-02253, filed on November 6, 2018 in the Superior Court of California, County of Contra Costa, which is estimated to be 1,013 individuals through November 8, 2021." (Amended Settlement Agreement, ¶ VI.1.2.)

According to the terms of Settlement Agreement, Grocery Delivery E-Services USA, Inc. and Insperity PEO Services, L.P will pay a non-revisionary gross settlement amount of

$945,391.45. (Amended Settlement Agreement, ¶¶ VI.1.1.9, VI.1.19, VI.2.1.1, VI.2.1.4.) The gross settlement amount includes attorney fees up to $315,130.48 (1/3 of the gross settlement amount), litigation costs of up to $20,000, PAGA penalties in the amount of $10,000 (75 percent of which will be distributed to the LWDA and 25 percent of which will be distributed to Aggrieved Employees), settlement administration costs not to exceed $40,000, and a service award to Plaintiff of $7,500. (Amended Settlement Agreement, ¶¶ VI.1.1.9, VI.1.1.19, VI.1.1.34, VI.2.1.1, VI.2.1.4.)

The net settlement will be allocated as follows: 70 percent to the FCRA Class; 20 percent to the Brand Ambassador Class; and 10 percent to the Hourly Employee Class. (Amended Settlement Agreement, ¶ VI.1.1.20.)

The Amended Settlement Agreement states that checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be sent to the Alliance for Children's Rights. (Amended Settlement Agreement, ¶ VI.3.2.8.) However, the Amended Settlement Agreement also states that checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be sent to Legal Aid at Work. (Amended Settlement Agreement, ¶ VI.2.1.9.) Thus, as currently drafted, the Amended Settlement Agreement does not clearly identify the *cy pres* recipient.

Prior to the continued hearing date, the parties shall amend the Amended Settlement Agreement to correct this discrepancy and Plaintiff's counsel shall file a supplemental declaration addressing this issue.

In exchange for the settlement, class members agree to release Grocery Delivery E-Services USA, Inc. and Insperity PEO Services, L.P, and related entities and persons, from:

> claims that reasonably arise out of the same set of operative facts plead in the Complaint and First Amended Complaint in the Action, or that were reasonably related to the allegations in the Complaint and First Amended Complaint in the Action with respect to the alleged violations of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 et seq. that accrued during the FCRA Class Period; wage and hour claims that were brought in this Action, including but not limited to allegations that Defendants misclassified hourly non-exempt employees as exempt, failed to provide employees with lawful meal periods, failed to provide employees with lawful rest periods, failed to pay premium wages when non-exempt employees were not provided with lawful meal and/or rest periods, failed to pay minimum and/or overtime wages, failed to reimburse employees for all necessary business expenses in violation of the Labor Code, including but not limited to sections, 201, 202, 204, 223, 226.7, 510, 512, 1194, 1194.2, 1197, 1197.1, 1198, 2802 and Business and Professions Code section 17200 et seq.; for derivative claims for inaccurate wage statements and waiting time penalties under Labor Code sections 203 and 226, that accrued during the Hourly Employee Class Period, and civil penalties under the Labor Code

> Private Attorneys General Act (Labor Code section §§ 2698 et seq.), that accrued during the applicable Period.

(Amended Settlement Agreement, ¶¶ VI.1.5, VI.1.40.)

B. Fairness of the Settlement

Plaintiff asserts that the settlement is fair, reasonable, and adequate, given the strength of Plaintiff's claims, the inherent risks of litigation, and the costs of pursuing litigation. Plaintiff states that the parties engaged in informal discovery, which included the disclosure of the relevant FCRA forms, sample arbitration agreements, applicable employee handbooks and policies, Plaintiff's personal file, Plaintiff's payroll records, a sampling of class members time records, and information regarding the size of each class and the number of weeks worked by the Brand Ambassador and Hourly Employee classes. (Setareh Dec., ¶ 6.) Plaintiff then hired an expert to analysis this data with respect to potential damages and penalties. Subsequently, the parties attended mediation with Steven J. Rottman, Esq. and later settled the matter. (*Id.* at ¶ 7.) Plaintiff estimates that Defendants faced a maximum potential liability of $5,570,747 for all claims. (*Id.* at ¶ 8.) Plaintiff provides a detailed breakdown of this amount by claim. (*Ibid.*) Plaintiff estimates that the net recovery is $552,760.97 with an average estimated individual settlement payment to each FCRA Class Member of $39.08, to each Brand Ambassador Class Member of $678.23, and to each Hourly Employee Class Member of $46.14.

The settlement represents approximately 16.9 percent of the maximum potential value of Plaintiff's claims. The proposed settlement amount is within the 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].)

Upon review, the court concludes that the Amended Settlement Agreement corrects the deficiencies noted in the court's prior order. Additionally, the court finds that the settlement is fair. It provides for a significant recovery and eliminates the risk and expense of continued litigation.

C. Incentive Award, Fees, and Costs

> Plaintiff requests a service award in the amount of $7,500.
> 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.)

Prior to the final approval hearing, the class representative shall file a declaration specifically detailing her participation in the action and an estimate of time spent. The court will make a determination at that time.

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.) Plaintiff's counsel will seek attorney fees of $315,130.48 (1/3 of the gross settlement amount). Plaintiff's 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. Plaintiff's counsel shall also submit evidence of actual costs incurred.

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.)

Here, Plaintiff states that the FCRA Class is made up of 9,901 individuals, the Brand Ambassador Class is made up of 163 individuals, and the Hourly Employee Class is made up of 1,198 individuals. Plaintiff asserts that the class members 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 has been raised regarding the typicality or adequacy of Plaintiff as class representative. In sum, the court finds that the proposed classes 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. (Setareh Dec., Ex. 2.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion.

However, Section 11 of the class notice does not accurately reflect the language of the release of claims. The parties must modify the notice so it reflects the actual language of the release.

Additionally, Section 12 of the notice states that "[t]o object, you must send a letter …." This portion of the notice must be amended that class members may object in writing to the settlement.

Finally, Section 17 of the class notice must be modified to include the following language regarding the final fairness 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.

Prior to the continued hearing date, the parties shall provide the amended notice to the court for its approval.

IV. CONCLUSION

Accordingly, the motion for preliminary approval of the amended settlement is CONTINUED to April 24, 2024, at 1:30 p.m. in Department 19. Plaintiff shall file a supplemental declaration with the additional information requested by the court no later than April 10, 2024. No additional filings are permitted.

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

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Calendar Line 3

Case Name: Anderson v. Topgolf Payroll Services, LLC, et al. (PAGA)
Case No.: 23CV422616

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 6, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

V. INTRODUCTION

On September 18, 2023, plaintiff Jose Anderson ("Plaintiff") filed a Complaint against defendants Topgolf Payroll Services, LLC ("Topgolf Payroll"), Topgolf International, Inc. ("Topgolf International"), and Topgolf USA El Segundo ("Topgolf El Segundo") (collectively, "Defendants"), which sets forth a single cause of action for Violation of the California Labor Code Private Attorneys General Act of 2004 (Cal. Lab. Code §§ 2698, et seq.). Plaintiff alleges that he was employed by Defendants and Defendants engaged in a systematic pattern of wage and hour violations by failing to pay all wages (including minimum wages and overtime wages), issuing wages through payment cards with fees required to obtain cash, failing to provide lawful meal periods or compensation in lieu thereof, failing to authorize or permit lawful rest breaks or provide compensation in lieu thereof, failing to reimburse necessary business expenses, failing to provide accurate itemized wage statements, and failing to pay all wages due upon separation of employment. (Complaint, ¶¶ 3, 4, 10, 18, 19, 22-28, 33, 34.)

Now before the court is Defendants' demurrer to the Complaint or, in the alternative, motion to strike portions of the Complaint. Plaintiff opposes the matter.

II. REQUEST FOR JUDICIAL NOTICE

In connection with their moving papers, Defendants ask the court to take judicial notice of: (1) the Class Action Complaint filed in *Bob B. Benyamin v. Topgolf Payroll Services, Inc., et al.* (Placer County Superior Court, Case No. S-CV-0049735); (2) the Order Granting In Part and Denying In Part Defendants' Motion to Dismiss filed in *Bob B. Benyamin v. Topgolf Payroll Services, Inc., et al.* (United States District Court, Eastern District of California, Case No. 2:23-cv-00303-JAM-DB); (3) the Second Amended Class Action Complaint filed in *Bob B. Benyamin v. Topgolf Payroll Services, Inc., et al.* (United States District Court, Eastern

District of California, Case No. 2:23-cv-00303-JAM-DB) on July 6, 2023; (4) the Complaint for Violation of the California Labor Code Private Attorneys General Act of 2004 (Cal. Lab. Code §§ 2698, et seq.) filed in *Bob Benyamin v. Topgolf Payroll Services, LLC, et al.* (Placer County Superior Court, Case No. S-CV-0050128) on March 20, 2023; and (5) a tentative ruling on Defendant's Demurrer or, in the Alternative, Motion to Stay, and Motion to Strike in *Bob Benyamin v. Topgolf Payroll Services, LLC, et al.* (Placer County Superior Court, Case No. S-CV-0050128) set for hearing on August 10, 2023. Plaintiff objects to the request for judicial notice of Item No. 5.

Item Nos. 1-4 are generally proper subjects of judicial notice as they are court records that relevant to issues raised in connection with the pending demurrer. (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."].)

Item No. 5—an unpublished tentative ruling from a California trial court—is not a proper subject of judicial notice. First, the tentative ruling is not an endorsed-filed record of the court. Consequently, it is not subject to judicial notice under Evidence Code section 452, subdivision (d). Second, Defendants offer the tentative ruling for the purpose of showing that a stay of this action is warranted. However, the trial court's statements in the tentative ruling are not being, especially since the court has inherent power to reconsider any interim order. (See *Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156.) Third, even assuming for the sake of argument that the trial court adopted its tentative ruling, it is well-established that unpublished California opinions "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Ct., rule 8.1115(a); *County of San Bernardino v. Cohen* (2015) 242 Cal.App.4th 803, 816 [noting that trial court cases are not citeable]; see also *Schachter v. Citigroup, Inc.* (2005) 126 Cal.App.4th 726, 738 [trial court ruling has no precedential value]; *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 448, fn. 4 ["in the absence of some

additional showing—such as the conditions for claim or issue preclusion—the actions of other judges are simply irrelevant"].) Here, Defendants cite to the unpublished ruling as persuasive authority in support of its demurrer. This is improper. The court admonishes Defendants not to cite unpublished California trial court orders in the future.

Accordingly, the request for judicial notice is DENIED as to Item No. 5 and GRANTED as to Item Nos 1-4.

III. DEMURRER

A. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, " '[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice' [citation]." (*Hilltop Properties, Inc. v. State* (1965) 233 Cal.App.2d 349, 353; see Code Civ. Proc., § 430.30, subd. (a).) " 'It is not the ordinary function of a demurrer to test the truth of the … allegations [in the challenged pleading] or the accuracy with which [the plaintiff] describes the defendant's conduct. … .' [Citation.] Thus, … 'the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]' [Citations.]" (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958.)

B. Discussion

Defendants initially demur to the Complaint on the ground of failure to allege sufficient facts to constitute a cause of action. (See Code Civ. Proc., § 430.10, subd. (e).) Defendants assert that the Complaint fails to state a claim because Plaintiff does not provide any factual, non-conclusory allegations identifying his employer.

The complaint in a civil action serves the purposes of framing the issues and notifying the defendant of the basis on which recovery is sought. (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 211-212.) "In fulfilling this function, the complaint should set forth the ultimate facts constituting the cause of action, not the evidence by which plaintiff proposes to prove those facts." (*Id*. at p. 212.) A complaint is sufficient "if it alleges ultimate rather than evidentiary facts." (*Doe v. City of Los Angeles* (2007) 42 Cal.4th

531, 550; *Foster v. Sexton* (2021) 61 Cal.App.5th 998, 1019 (*Foster*).) Although evidentiary facts are sufficient to state a claim, California appellate courts routinely hold that alleged conclusions of law are not. (E.g., *Shaw v. City of Los Angeles Unified School Dist.* (2023) 95 Cal.App.5th 740, 753.) The distinction between conclusions of law and ultimate facts is not, however, always entirely clear. (*Foster, supra*, 61 Cal.App.5th at pp. 1027-1028.) " ' "[C]ourts have permitted allegations which obviously included conclusions of law and have termed them 'ultimate facts' or 'conclusions of fact.' " [Citations.] What is important is that the complaint as a whole contain sufficient facts to apprise the defendant of the basis upon which the plaintiff is seeking relief. [Citations.]' " (*Doheny Park Terrace Homeowners Assn., Inc. v. Truck Ins. Exchange* (2005) 132 Cal.App.4th 1076, 1099.) As a general matter, " '[t]here is no need to require specificity in the pleadings because "modern discovery procedures necessarily affect the amount of detail that should be required in a pleading." [Citation.]' " (*Ibid*.)

Case law demonstrates that general allegations concerning employment constitute "ultimate facts." (See *May v. Farrell* (1928) 94 Cal.App. 703, 706-708 [allegations that a tortfeasor is an employee of the defendant and committed the tort within the course or scope of employment are ultimate facts]; see also *Shields v. Oxnard Harbor Dist*. (1941) 46 Cal.App.2d 477, 481-482, 485-486 [holding that a complaint's averment that the driver of a vehicle was " 'employed by' " defendant-governmental agency and was acting " 'within the course and scope of his employment' " at the time of the collision was "a sufficient allegation that [the driver] at the time of the accident was the servant" of the defendant-governmental agency and "acting within the course and scope of his employment"]; *Garton v. Title Ins. & Trust Co.* (1980) 106 Cal.App.3d 365, 371-372, 375-377 [indicating that a complaint alleging that "the defendants were the agents and employees of each other and were acting in the course and scope of their agency, employment and authority" had sufficiently pled that one of the defendants "was acting as an agent or employee" of another defendant].)

Additionally, B.E. Witkin's treatise on California law observes that "allegations concerning 'employment' and 'scope of employment' " constitute "ultimate facts." (See 4 Witkin, Cal. Procedure (6th ed. 2021) Pleading, § 401 [boldface & capitalization omitted]; 5

Witkin, Cal. Procedure (6th ed. 2021) Pleading, at § 918 ["The courts have approved a general statement to the effect that the wrongdoer was the agent or employee of the defendant principal, and 'was acting in the scope of his employment.' "]; see also *Taylor v. Bell* (1971) 21 Cal.App.3d 1002, 1007 [describing Witkin as "the leading text writer on California law"].)

Here, Plaintiff expressly alleges that he was employed by all of the Defendants.[1] (Complaint, ¶¶ 10 ["Plaintiff … worked for Defendants in California during the relevant time periods"], 18 ["Defendants employed Plaintiff and other California residents as non-exempt employees at Defendants' California business location(s)"].) These allegations of employment are sufficient for pleading purposes.

Next, Defendants demur to the Complaint on the ground of "[t]here is another action pending between the same parties on the same cause of action" (Code Civ. Proc., § 430.10, subd. (c)), arguing that this action and the PAGA complaint filed in *Bob Benyamin v. Topgolf Payroll Services, LLC, et al.* (Placer County Superior Court, Case No. S-CV-0050128) (the "*Benyamin* PAGA Action") concern the same parties and claims. Defendants also argue that the doctrine of exclusive concurrent jurisdiction applies here because there is overlap between the claims alleged in the two actions, there is a danger of inconsistent rulings, and a stay would conserve judicial resources and expenses. Defendants cite to, and rely heavily, on *Shaw v. Superior Court* (2022) 78 Cal.App.5th 245 (*Shaw*) to support their position.

A party may demur on the ground "[t]here is another action pending between the same parties on the same cause of action." (Code Civ. Proc., § 430.10, subd. (c).) A demurrer on this ground is also known as a plea in abatement. (*County of Santa Clara v. Escobar* (2016) 244 Cal.App.4th 555, 564.) "To 'abate' a right of action is to suspend its prosecution due to some impediment that, without defeating the underlying cause of action, prevents the present maintenance of [the] suit." (*Ibid.*, italics omitted.) Thus, a demurrer on this particular statutory ground is a request to suspend or stay a lawsuit based on the pendency of another lawsuit. (*Ibid.*; see *Childs v. Eltinge* (1973) 29 Cal.App.3d 843, 855–856; see also *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681-682 ["if the first suit is still pending when the second is

[1] It is readily apparent that the reference to a single "Defendant" in paragraph 19 of the Complaint is a typographical error.

filed, the defendant in the second suit may plead that fact in abatement (Code Civ. Proc., § 430.10, subd. (c)"].)

"A plea in abatement pursuant to [California Code of Civil Procedure] section 430.10, subdivision (c), may be made by demurrer or answer when there is another action pending between the same parties on the same cause of action." (*Plant Insulation Co. v. Fibreboard Corp*. (1990) 224 Cal.App.3d 781, 787 (*Plant*) [emphasis in original].) The plea in abatement requires "absolute identity of parties, causes of action or remedies sought in the initial and subsequent actions." (*Id.* at p. 788.) Regarding "absolute identity" of causes of action, "the rule is that such a plea may be maintained only where a judgment in the first action would be a complete bar to the second action." (*Id*. at pp. 787-788.) Issue preclusion or collateral estoppel is not enough; identical causes of action must be involved in both suits, so that a judgment in the first action would be res judicata on the claim in the other action. (See *Bush v. Superior Court* (1992) 10 Cal.App.4th 1374, 1384.)

Related to the statutory plea in abatement is the rule of exclusive concurrent jurisdiction, which "has been interpreted and applied more expansively, and therefore may apply where the narrow grounds required for a statutory plea of abatement do not exist." (*Plant , supra*, 224 Cal.App.3d at p. 788.) "Unlike the statutory plea of abatement, the rule of exclusive concurrent jurisdiction does not require absolute identity of parties, causes of action or remedies." (*Ibid.*) "If the court exercising original jurisdiction has the power to bring before it all the necessary parties … [and] to litigate all the issues and grant all the relief to which any of the parties might be entitled under the pleadings," the court should stay the second action pending resolution of the first. (*Ibid.*) Nevertheless, while complete identity between the parties and remedies sought is not required, "the issues in the two proceedings must be substantially the same and the individual suits must have the potential to result in conflicting judgments" for the rule to apply. (*County of Siskiyou v. Superior Court (Environmental Law Foundation)* (2013) 217 Cal.App.4th 83, 91.)

Under either doctrine, "[a]n order of abatement issues as a matter of right[,] not as a matter of discretion[,] where the conditions for its issuance exist." (*Lawyers Title Ins. Corp. v. Superior Court (Harrigfeld)* (1984) 151 Cal.App.3d 455, 460.)

Here, Plaintiff persuasively argues that there is not absolute identity of parties between the two actions. Topgolf El Segundo is a defendant in this action, but is not a defendant in the *Benyamin* PAGA Action. Similarly, Topgolf USA Roseville, LLC is a defendant in the *Benyamin* PAGA Action, but is not a defendant in this action. Because the parties in the two actions are not identical, Defendants are not entitled to a statutory plea in abatement.

Furthermore, although the the rule of exclusive concurrent jurisdiction does not require absolute identity of parties, the court exercising original jurisdiction must have the power to bring before it all the necessary parties. (*Plant , supra*, 224 Cal.App.3d at p. 788.) As Plaintiff persuasively argues, Defendants have not demonstrated that the Placer County Superior Court has the power to bring Topgolf El Segundo before it.

Lastly, Defendants argue that the court has inherent authority to stay this action under Code of Civil Procedure 410.30. However, that statute merely sets forth the possible grounds for demurrer. Defendants cite no legal authority, and the court is aware of none, providing that a demurrer is the proper procedural vehicle to request a stay of proceedings based on the court's inherent power to control the actions before it. Notably, Defendants did not file a noticed motion for a stay under Code of Civil Procedure section 128 or any other statute addressing the court's inherent authority to stay proceedings. Therefore, the request for a stay pursuant to the court's inherent authority is not well-taken.

Even if Defendants' request was properly before the court, the court would decline to enter a stay for the reasons already discussed. Additionally, tools other than a stay may be used to manage parallel PAGA actions in their early stages, including formal or informal coordination. The court expects that such tools may be effectively utilized here.

Accordingly, the demurrer is OVERRULED.

IV. MOTION TO STRIKE

A. Legal Standard

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the

challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion to strike, the court reads the pleading as a whole, all parts in their context, and assuming the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63 citing *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.)

B. Discussion

Defendants move to strike Plaintiff's PAGA claim to the extent it is predicated on violations of Labor Code section 204 and 226.3. Defendants contend Plaintiff has failed to plead sufficient facts showing a violation of either statute.

In opposition, Plaintiff asserts that a failure to state facts sufficient to constitute a cause of action is grounds for a general demurrer, not for a motion to strike. Plaintiff also argue that the court cannot grant the relief requested on demurrer because a demurrer does not lie to a portion of a cause of action.

Although an objection that a complaint as a whole fails to state facts sufficient to constitute a cause of action may not be a ground for a motion to strike, but for a general demurrer (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 529), it is well-established that a motion to strike case may be be used to challenge a portion of a cause of action where the complaint failed to state facts constituting a claim (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683.)

Here, Plaintiff does not otherwise dispute the merits of Defendants' arguments regarding the PAGA claim to the extent it is predicated on violations of Labor Code section 204 and 226.3. Consequently, Plaintiff implicitly concedes that Defendants substantive arguments are well-taken.

Accordingly, the alternative motion to strike is GRANTED with 30 days' leave to amend.

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

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Calendar Line 4

Case Name:
Case No.:

- oo0oo -

Calendar Line 5

Case Name:
Case No.:

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Calendar Line 6

Case Name: Rodriguez v. Excite Credit Union (Class Action)
Case No.: 21CV386659

Unopposed motion for admission *pro hac vice* is GRANTED. No appearance necessary. Court will sign proposed order.

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Calendar Line 7

Case Name:
Case No.:

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Calendar Line 8

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Case No.:

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Calendar Line 9

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