SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Sunil R. Kulkarni Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2110

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LAW AND MOTION TENTATIVE RULINGS
DATE: OCTOBER 5, 2023 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	22CV399353	Ocanas v. Catholic Charities of Santa Clara County (Class Action)	RESCHEDULED to November 9, 2023 at 1:30pm.
LINE 2	20CV374328	JLA Advisors, LLC v. Rajagopalan, et al.	See tentative ruling. The Court will prepare the final order.
LINE 3	23CV411833	Padilla v. Cortec Precision Sheetmetal Inc. (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 4	23CV411829	Ruiz v. Condon-Johnson & Associates, Inc. (PAGA)	See tentative ruling. The Court will prepare the final order.
LINE 5	23CV410212	Card v. Security Industry Specialists, Inc. (PAGA)	See tentative ruling. The Court will prepare the final order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	22CV405652	Card v. Security Industry Specialists, Inc. (Class Action)	See line 5.
LINE 7	19CV349850	Cacananta v. Samaritan, LLC	See tentative ruling. The Court will prepare the final order. The Court notes that this tentative ruling is slightly different than its previous tentative ruling on this motion, which was provided on 9/14/23.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name:
Case No.:

- oo0oo -

Calendar Line 2

Case Name: *JLA Advisors, LLC v. Rajagopalan, et al.*
Case No.: 20CV374328

These cross-actions arise from Plaintiff/Cross-Defendant JLA Advisors, LLC's ("JLA") engagement by ASIP Holdings, LLC ("ASIP") and its subsidiary Q Networks to analyze and implement business opportunities in the secure 5G mobile network field. JLA alleges that it hired Defendant/Cross-Defendant/Cross-Complainant Nara Rajagopalan and his company, Defendant/Cross-Defendant/Cross-Complainant Bay Views LLC ("Bay Views"), to consult on the project. According to JLA, Mr. Rajagopalan breached the agreements governing his work, interfered with JLA's relationship with ASIP and Q Networks, and wrongfully claimed ownership of intellectual property developed in connection with the project.

In a cross-complaint ("Amended Cross-Complaint" or "ACC"), Mr. Rajagopalan (along with Bay Views and Defendant/Cross-Defendant/Cross-Complainant Lianghwa Jou) alleges that he never signed the draft consulting agreement and was not paid for much of his work. Moreover, he claims that he disclosed his other work for Q Networks- on his own time- on technology outside the scope of the JLA project to Cross-Complainant/Cross-Defendant John Trobough, who is JLA's managing member as well as "Co-Chief Executive Officer" of Q Networks and managing member of ASIP. Mr. Rajagopalan alleges that he was promised equity in Q Networks for this work, but Mr. Trobough interfered. Finally, Ms. Rajagopalan alleges that Mr. Trobough defamed him to Q Networks and ASIP.

Before the Court is JLA and Mr. Trobough's (collectively, "Cross-Defendants") motion for summary adjudication in their favor and against Mr. Rajagopalan, Bay View and Mr. Jou's (collectively, "Cross-Complainants") on the second, third, fourth, sixth[1] and eighth causes of action in their ACC. Based on the reasons discussed below, the Court GRANTS IN PART and DENIES IN PART Cross-Defendants' motion. The Court GRANTS the motion as to the second, third and fourth causes of action, and as to the eighth cause of action with respect to Bay Views only. The Court DENIES the motion as to the eighth cause of action with respect to the remaining Cross-Complainants.

I. BACKGROUND

A. Factual

According to the allegations of the ACC, in February 2019, Mr. Trobough contacted Mr. Rajagopalan, a long-time acquaintance, and asked him whether he would be interested in providing consulting services for JLA on a project that it was performing for Q Networks to design and operate a secure 5G network and data infrastructure for the U.S. and allied governments. (ACC, ¶¶ 11-12.) Aware at the time that Mr. Rajagopalan did not have specialized expertise in the area, Mr. Trobough informed him that he had hired another consultant, Peter Atwal, to address any 5G issues related to the Q Networks product. (*Id*., ¶

[1] On September 21, 2023, Cross-Complainants dismissed the sixth cause of action from the ACC without prejudice. Accordingly, Cross-Defendants' motion is MOOT with respect to this claim.

13.) Mr. Rajagopalan stated that he did not have sufficient time to develop a strategy on his own, but that another developer, Mr. Jou, could assist him. (*Id*., ¶ 14.)

In May 2019, Mr. Trobough sent Mr. Rajagopalan an incomplete draft of a Consulting Agreement ("Draft Agreement") with several material terms missing. (ACC, ¶ 15.) After finding certain terms unacceptable, Mr. Rajagopalan did not sign the Draft Agreement, but believed that he and Mr. Trobough would eventually work out and finalize the terms. (*Ibid*.) However, this never happened. (*Ibid*.)

Despite never finalizing an oral or written consulting agreement, Mr. Rajagopalan and Mr. Jou, through Bay Views, began providing consulting services for JLA in June 2019. (ACC, ¶ 16.) Bay Views issued its first related invoice in June 2019, and thereafter billed JLA approximately monthly until July 2020. (*Id*., ¶ 17.) JLA made regular and timely payments on most invoices until April 2020, when the parties' relationship deteriorated. (*Id*., ¶ 18.) At the time it stopped payment, JLA owed an outstanding balance to Bay Views of $170,000. (*Id*., ¶¶ 19-20, Exhibits B-E.)

On November 20, 2019, Mr. Rajagopalan informed Mr. Trobough that he and Mr. Jou had developed technology relating to the core network- referred to as a Virtual Private Mobile Network ("VPMN") - that was outside the scope of services he had been asked to provide on the Q Networks project. (ACC, ¶¶ 21-22.) Both men understood that Mr. Rajagopalan had developed VPMN on his own and that it was outside the scope of consulting work that Mr. Trobough had asked him to perform. (*Id*., ¶ 23.) Because the VPMN strategy was so different, Mr. Rajagopalan urged Mr. Trobough to have Q Networks pivot to it. (*Id*., ¶ 25.) Mr. Trobough did not commit to approaching Q Networks with the proposal, but encouraged Mr. Rajagopalan to present it to others at JLA, and then two other principals of Q Network (as well as its parent company ASIP): Rob Spaulding and Ben Doramus. (*Id*., ¶ 26.) Messrs. Spaulding and Doramus initially were not interested in pivoting to VPMN, but grew more open to the idea upon signing a Non-Disclosure Agreement with Bay Views. (ACC, ¶ 27.)

As a result of Q Networks' growing interest and at the direct request of Mr. Trobough, Mr. Rajagopalan worked on integrating various features of his proprietary VPMN technology into the Q Road Map being developed for Q Networks. (ACC, ¶ 28.) He did so after receiving assurances from Mr. Trobough and others at Q Networks, including Messrs. Spaulding and Doramus, that he would be compensated- both monetarily and in the form of equity in Q Networks. (*Ibid*.) To this end, between mid-January through late-April 2020, Mr. Rajagopalan had various conversations with Messrs. Spaulding and Doramus in which both assured him that Q Networks, through ASIP, would submit to him an offer that would provide him company shares in exchange for the VPMN. (*Id*., ¶ 29.) On April 26, 2020, Mr. Doramus told Mr. Rajagopalan that they would finalize his equity participation after Q Networks converted from an LLC to a corporation in the next several weeks. (*Id*., ¶ 30.)

However, on August 9, 2020, Mr. Spaulding informed Mr. Rajagopalan that Mr. Trobough had told him not to move forward with any deal with Mr. Rajagopalan because he (Mr. Trobough) "had [him] handled." (ACC, ¶ 31.) Approximately a week later, Mr. Rajagopalan had a call with Messrs. Spaulding and Doramus wherein they repeated the foregoing message. (*Id*., ¶ 32.) According to Messrs. Spaulding and Doramus, Mr. Trobough told them that Mr. Rajagopalan should not be trusted, did not own the rights to VPMN, and was simply a "shakedown artist" who was trying to extort money out of them. (*Id*., ¶ 33.)

These statements were knowingly false and injurious to Mr. Rajagopalan. (*Ibid*.) As a direct result of Mr. Trobough's actions and interference, Q Networks and ASIP did not move forward with purchasing the VPMN technology from Bay Views. (*Id*., ¶ 34.)

Mr. Rajagopalan additionally alleges, on information and belief, that Mr. Trobough was "Co-Chief Executive Officer" of Q Networks and a managing member of ASIP, who usurped Q Network's opportunity to negotiate directly with Mr. Rajagopalan for the company's use of the proprietary VPMN technology for his own personal benefit and for the benefit of JLA. (ACC, ¶ 37.)

B. Procedural

Cross-Complainants initiated this action in June 2021, and filed the operative ACC on May 2, 2023, asserting the following causes of action: (1) services rendered/quantum meruit (by Bay Views against JLA); (2) defamation per quod (by Mr. Rajagopalan against Mr. Trobough); (3) defamation per se (by Mr. Rajagopalan against Mr. Trobough); (4) intentional interference with prospective economic relations (by Cross-Complainants against Mr. Trobough); (5) declaratory relief (by Cross-Complainants against Cross-Defendants); (6) conversion (by Cross-Complainants against Cross-Defendants); (7) fraud (by Cross-Complainants against Cross-Defendants); (8) breach of non-disclosure agreements (by Cross-Complainants against Cross-Defendants). As stated above, Cross-Complainants have recently dismissed their sixth claim.

II. MOTION FOR SUMMARY ADJUDICATION

A. Legal Standard

"A defendant seeking summary judgment [or adjudication] must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co*. (2002) 98 Cal.App.4th 66, 72; see also Code Civ. Proc., § 437c, subd. (p)(2).)

This standard provides for a shifting burden of production; that is, the burden to make a prima facie showing of evidence sufficient to support the position of the party in question. (See *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850–851 (*Aguilar*).) The burden of persuasion remains with the moving party and is shaped by the ultimate burden of proof at trial. (*Ibid.*) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) The opposing party must produce substantial responsive evidence that would support such a finding; evidence that gives rise to no more than speculation is insufficient. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162–163.)

The traditional method for a defendant to meet its burden on summary judgment is by "negat[ing] a necessary element of the plaintiff's case" or establishing a defense with its own evidence. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) The defendant may also demonstrate that an essential element of plaintiff's claim cannot be established by "present[ing] evidence that the plaintiff does not possess, and cannot reasonably obtain, needed

evidence-as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar, supra,* 25 Cal.4th at p. 855.)

On summary judgment, "the moving party's declarations must be strictly construed and the opposing party's declaration liberally construed." (*Hepp v. Lockheed-California Co*. (1978) 86 Cal.App.3d 714, 717 (*Hepp*); see also *Johnson v. American Standard, Inc*. (2008) 43 Cal.4th 56, 64 [the evidence is viewed in the light most favorable to the opposing plaintiff; the court must "liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor"].) Summary judgment may not be granted by the court based on inferences reasonably deducible from the papers submitted, if such inferences are contradicted by others which raise a triable issue of fact. (*Hepp, supra,* 86 Cal.App.3d at pp. 717–718.)

B. Discussion

1. *Second Cause of Action: Defamation Per Quod and Third Cause of Action: Defamation Per Se*

In the second and third causes of action, Mr. Rajagopalan alleges that in August 2020, Mr. Trobough made false statements to Messrs. Spaulding and Doramus "that [he] should not be trusted because he did not own the rights to VPMN, and that [he] was a 'shakedown artist' who was trying to extort money out of them." (ACC, ¶¶ 46, 55.) Mr. Trobough maintains that he is entitled to summary adjudication of the these claims for the following reasons: (1) no admissible evidence exists that the statements were made, i.e., published; (2) the statements are subject to the common interest privilege; and (3) there is no evidence of resulting damages.[2]

a. Defamation and Slander

"The tort of defamation involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) "Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the 'public' at large; communication to a single individual is sufficient." (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645.) A defamatory statement that is oral in nature constitutes slander. (Civ. Code, § 46.) Slanderous statements which injure one with respect to his office, profession, trade or business are deemed slander per se. (*Hanley v. Lund* (1963) 218 Cal.App.2d 633.) "The term 'per se' when used in describing the effect of allegedly slanderous words means that

[2] A defendant moving for summary judgment is only required to negate the plaintiff's theories of liability as alleged in the complaint. (See *Hutton v. Fidelity Nat'l Titlr Co.* (2013) 213 Cal.App.4th 486, 493.) Here, the only defamatory statements alleged to have been made by Mr. Trobough about Mr. Rajagopolan are (in August 2020) that the latter was a "shakedown artist" who was trying extort money out of Messrs. Spaulding and Doramus. In the course of their opposition, Cross-Complainants refer to other purportedly defamatory or disparaging statements made by Mr. Trobough about Mr. Rajagopolan, but none of these are alleged in the ACC. As such, they are not actionable and Cross-Defendants have no obligation to address them.

the utterance of such words is actionable without proof of special damages. [Citations.]" (*Correia v. Santos* (1961) 191 Cal.App.2d 844, 851.)

Defamation per quod, as distinguished from defamation per se, refers to statements that are not libelous or slanderous on their face and require "explanatory matter" to establish the defamatory meaning thereof. (*Walker v. Kiousis* (2001) 93 Cal.App.4th 1432, 1441-1442; see also *Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 382; Civ. Code, § 45a.)

b. Publication

Mr. Trobough first argues that he is entitled to summary adjudication on the second and third causes of action because Mr. Rajagopalan cannot establish, with admissible evidence, that he made any defamatory statements in the first place.

As a general matter, in order to be actionable, the matter alleged to be defamatory must be "published," i.e., communicated by the defendant to some third person who understands its defamatory meaning and application to the plaintiff. (*Ringler Associates v. Maryland Cas. Co.* (2000) 80 Cal.App.4th 1165, 1179; *Matson v. Dvorak* (1995) 40 Cal.App.4th 539.) Here, as alleged in the ACC, Mr. Trobough's defamatory statements were communicated to Messrs. Spaulding and Doramus, who then, in turn, advised Mr. Rajagopalan of as much. (ACC, ¶¶ 33, 46.) In order to establish the foregoing, Mr. Rajagopalan must submit the testimony or declarations of Messrs. Spaulding or Doramus, the individuals who directly heard the purported slander. If Mr. Rajagopalan relies on his own declaration recounting what Messrs. Spaulding and Doramus told him that Mr. Trobough said, he has, as Mr. Trobough maintains, a potential evidentiary problem- hearsay. Hearsay is "an out-of-court statement offered for the truth of the matter asserted and is generally inadmissible." (*People v. Flinner* (2020) 10 Cal.5th 686, 735; Evid. Code, § 1200.) Such a declaration or testimony by Mr. Rajagopalan would contain two levels of out-of-court statements- Messrs. Spaulding and Doramus' as to what Mr. Trobough said to them, and Mr. Rajagopalan's regarding what Messrs. Spaulding and Doramus' communication to him of what Mr. Trobough has said. While Mr. Trobough's alleged comments would *not* qualify as hearsay in this context because they are not being offered for their truth (i.e., to establish that Mr. Trobough is a "shakedown artist" involved in attempted extortion), Messrs. Spaulding and Doramus' statements describing those comments and identifying Mr. Trobough as the speaker *are* being offered for their truth and thus qualify as hearsay. (See, e.g., *Sanchez v. Bezos* (2022) 80 Cal.App.5th 750, 765-766.)

But how does the foregoing intersect with Cross-Defendants' initial burden on this motion? Where, as here, a party moving for summary judgment endeavors to meet their initial burden by demonstrating that the opposing party cannot establish an essential element of their claim because they lack the evidence necessary to do so, the moving party must support their motion with discovery admissions or other admissible evidence following extensive discovery showing that the plaintiff "does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at 854-855.) Critically, it is not enough for the moving defendant to show merely that a plaintiff currently "has no evidence" on a key element of his claim; the moving defendant must *also* produce *evidence* showing that the plaintiff cannot reasonably obtain the evidence necessary to support the claim. (See *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 891; *Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 808.)

In making the argument that Mr. Rajagopalan does not possess admissible evidence that the allegedly defamatory statements were made, Mr. Trobough wrongfully characterizes the out-of-court statements alleged in the ACC as double hearsay. In fact, as explained above, the *only* statements that are hearsay are Messrs. Spaulding and Doramus' statements to Mr. Rajagopalan about what Mr. Trobough said to them. To avoid this hearsay problem, Mr. Rajagopalan could presumably rely on the direct testimony of Messrs. Spaulding and Doramus in this regard. Accordingly, if it is Mr. Trobough's contention that Mr. Rajagopalan does not possess admissible evidence necessary to establish the element of publication, he must submit *evidence* that Mr. Rajagopalan does not have or *cannot reasonably* obtain their testimony. But he does not do so here, instead merely asserting, without citation to anything other than the ACC (see Cross-Defendants' Separate Statement of Undisputed Material Facts ("UMF") No. 1), that no such evidence exists. He also states that "no one has testified or *will* testify" they heard him make the alleged defamatory statements to Messrs. Spaulding and Doramus, but he submits no actual *evidence* which establishes this either.

Consequently, having failed to demonstrate that Mr. Rajagopalan does not possess, and cannot reasonably obtain, admissible evidence of publication, Mr. Trobough has not met his initial burden with respect to the second and third causes of action and is not entitled to summary adjudication of these claims on this basis.

c. Common Interest Privilege

Next, Mr. Trobough maintains that he is entitled to summary adjudication on the defamation claims because the allegedly defamatory statements, even if made, would be privileged as a matter of law under the common interest privilege.

Civil Code section 47 ("Section 47"), subdivision (c), "extends a conditional privilege against defamatory statements made without malice on subjects of mutual interest." (*Noel v. River Hills Wilson, Inc.* (2003) 113 Cal.App.4th 1363, 1368.) "[I]f malice is shown, the privilege is not merely overcome; it never arises in the first instance." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723, fn. 7.) "It is *the occasion* giving rise to the publication that is conditionally privileged, i.e., under specified conditions the occasion gives rise to a privilege. If the privilege arises, it is a complete defense." (*Ibid*., emphasis in original.) "Insofar as the common-interest privilege is concerned, malice is not inferred from the communication itself." (*Noel, supra*, 113 Cal.App.4th at 1370, citing Civ. Code, § 48.) "The malice necessary to defeat a qualified privilege [e.g., the common interest privilege] is 'actual malice,' which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights.'" (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413 [internal citations and quotations omitted].)

"The privilege is recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest. The interest must be something other than mere general or idle curiosity, such as where the parties to the communication share a contractual, business or similar relationship or the defendant is protecting his pecuniary interest. Rather, it is restricted to proprietary or narrow private interests." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118-1119 [internal citations and quotations omitted].) "One authority explains the statutory interest as follows: (1)

the 'interest' applies to a defendant who is protecting his own pecuniary or proprietary interest. (2) The required 'relation' between the parties to the communication is a contractual, business or similar relationship … . (3) The 'request' referred to must have been in the course of a business or professional relationship." (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 914 [internal citations and quotations omitted].) "The defendant has the initial burden of showing the allegedly defamatory statement was made on a privileged occasion, whereupon the burden shifts to the plaintiff to show the defendant made the statement with malice. The existence of the privilege is ordinarily a question of law for the court." (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 108 [internal citations and quotations omitted].)

Mr. Trobough insists that the common interest privilege applies to the statements at issue because at the time they were allegedly made by him in August 2020, he was the co-CEO of Q Networks and one of its managers as a California limited liability company, while Messrs. Doramus and Spaulding were also managers of Q Networks, and Mr. Spaulding was co-CEO. (UMF No. 2.) Further, he continues, Mr. Doramus was the manager of ASIP (which wholly-owns Q Networks), and he and Messrs. Doramus and Spaulding were all members of ASIP Holdings, the 100% owner of ASIP. (*Ibid*.) As he had pecuniary interests in the foregoing companies, Mr. Trobough explains, if Mr. Rajagopolan and Mr. Jou given equity in Q Networks or ASIP Holdings, those interests would necessarily be effected. (See Declaration of John Trobough in Support of Motion for Summary Adjudication ("Trobough Decl."), ¶ 4.) Moreover, he explains, under ASIP Holdings and Q Networks' operating agreements, his vote was necessary in order to approve Mr. Rajagopolan or Mr. Jou's obtaining any such interest as unanimity was required amongst voting members for such actions. (Trobough Decl., ¶¶ 5-6.) Thus, he concludes, in communicating about Mr. Rajagopalan's trustworthiness and motives to his business associates, his statements were clearly made in the common interest and are privileged.

Based on the evidence submitted, Mr. Trobough has demonstrated that the statements made to Messrs. Spaulding and Doramus in August 2020 were made on a privileged occasion because: Messrs. Trobough, Spaulding and Doramus shared a business relationship (Q Networks and ASIP Holdings) and Mr. Trobough's statements to them about Mr. Rajagopalan and his character, a man they were considering entering into a long-term professional relationship with, were reasonably calculated to protect that relationship and its attendant interests.

In the opposition, Mr. Rajagopalan argues that a triable issue exists as to whether Mr. Trobough and Q Networks/ASIP had common interests at the time the subject statements were made. That is, it is his contention that Messrs. Trobough, Spalding and Doramus' interests did not actually align in August 2020 because Mr. Trobough was looking to usurp the opportunity to obtain control over the VPMN technology from Q Networks/ASIP to himself and JLA. But none of the evidence cited by Cross-Complainants establishes as much. For example, Cross-Complainants cites communications from Mr. Trobough to Messrs. Spaulding and Doramus wherein he continues to malign Mr. Rajagopolan and express dismay at them for working with him, as well as a communication from Mr. Spaulding to Mr. Doramus dated May 27, 2020 expressing a desire to separate JLA from Q Networks and hire Mr. Rajagopalan and Mr. Jou. (See Declaration of Marissa Nebenzahl Sinha in Support of Opposition to Motion for Summary Judgment ("Sinha Decl."), Exhibits D and E.) But the fact that Messrs. Trobough, Spaulding and Doramus disagree over Mr. Rajagopolan does not mean that they did not share a common interest in protecting their interests in Q Networks and ASIP Holdings. The requirement that a

common interest exist between parties for the privilege to apply does not mean that they must be in *agreement* as to what they are talking about in connection with furthering or protecting that interest. By way of an example, the common interest privilege has been determined to apply to statements by management and coworkers to other coworkers explaining why an employer disciplined an employee. (See *Deaile v. General Telephone Co. of California* (1974) 40 Cal.App.3d 841, 846.) One can imagine that these situations often involve circumstances in which the individuals to whom the purportedly defamatory statements were made might not be in agreement as to whether the discipline applied by their employer to a coworker was appropriate or warranted at all, but that does not mean that the parties involved in the conversation do not share a common interest such that the privilege is deemed to apply to encourage overall candor in their communications.[3]

Cross-Complainants otherwise fail to demonstrate that Messrs. Trobough, Spaulding and Doramus did not share a common interest and that the statements made about Mr. Rajagopalan were not made in connection with that interest. Consequently, as Mr. Trobough has established that the statements were made on a privileged occasion, the burden shifts to Cross-Complainants to show that Mr. Trobough made the statements with malice, i.e., that he was "motivated by hatred or ill will towards the plaintiff *or* … lacked reasonably grounds for belief in the truth of the publication and therefore acted in reckless disregard of [Mr. Rajagopalan's] rights." (*Sanborn, supra,* 18 Cal.3d at 413 [internal citations and quotations omitted].)

To reiterate, "[i]nsofar as the common-interest privilege is concerned, malice is not inferred from the communication itself." (*Noel, supra*, 113 Cal.App.4th at 1370, citing Civ. Code, § 48.) Without citing any specific evidence, Cross-Complainants assert in their opposition that "there are triable issues of fact as to whether [Mr. Trobough's statements about Mr. Rajagopolan) were motivated by spite, as opposed to innocent communications …." (Opp. at 12:1-3.) But without evidence, no showing of malice has been made. Consequently, the Court finds that the statements at issue are subject to the common interest privilege and thus not actionable. Therefore, Cross-Defendants' request for summary adjudication of the second and third causes of action must be GRANTED, and the Court need not address the merits of Cross-Defendants' remaining argument concerning a lack of resulting damages.[4]

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[3] In concluding that the common interest privilege was implicated by the facts before it, the Court in *Deaile* explained:

> Clearly, an employer is privileged in pursuing its own economic interests and that of its employees to ascertain whether an employee has breached his responsibilities of employment and if so, to communicate, in good faith, that fact to others within its employ so that (1) appropriate action may be taken against the employee; (2) the danger of such breaches occurring in the future may be minimized; and (3) present employees may not develop misconceptions that affect their employment with respect to certain conduct that was undertaken in the past.

(*Deaile* at 849.)

[4] Although upon a cursory review, the Court does not believe Cross-Defendants have met their initial burden in this regard. As explained above, a defendant moving for summary judgment on the ground that the plaintiff cannot establish an essential element of their claim because they

2. *Fourth Cause of Action: Intentional Interference with Prospective Economic Advantage*

In the fourth cause of action, Cross-Complainants allege that Mr. Trobough knew of the prospective economic relationship between them and Q Networks and ASIP and engaged in acts of defamation or breaches of his fiduciary duties to those companies in order to disrupt that relationship, and did in fact do so. (ACC, ¶¶ 62-67.) Mr. Trobough argues that he is entitled to summary adjudication of this claim for the following reasons: (1) he could not have interfered with the prospective relationship as a matter of law because he was not a stranger to it; (2) he did not engage in acts which were independently wrongful; and (3) there are no damages as Cross-Complainants had the full opportunity to negotiate with Messrs. Spaulding and Doramus.

a. Intentional Interference with Prospective Economic Advantage Generally

The elements of a claim of interference with prospective economic advantage are: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153, internal citation omitted.) A plaintiff asserting such a claim must plead and prove not only that the defendant interfered with the prospective economic relationship, but also "that the defendant's interference was wrongful by some measure beyond the fact of the interference itself." (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393.) "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard" (*Edwards v. Arthur Anderson LLP* (2008) 44 Cal.4th 937, 944), and not merely the product of an improper, but lawful, purpose or motive (*Korea Supply, supra*, 29 Cal.4th at 1159, fn. 11.)

b. Mr. Trobough's Relationship to the Prospective Economic Relationship

Mr. Trobough first insists that he is entitled to judgment on this claim because he is not a stranger to the prospective economic relationship at issue.

According to some authority, the tort of intentional interference with prospective economic advantage is subject to a critical limitation: it can *only* be asserted against a stranger to the economic relationship at issue. (See *Kasparian v. County of Los Angeles* (1995) 38

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lack the evidence necessary to do so must support their motion with discovery admissions or other admissible evidence following extensive discovery showing that the plaintiff "does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at 854-855.) Here, Cross-Defendants' cite no such discovery admissions or other admissible evidence demonstrating that Mr. Rajagopalan "does not possess, and cannot reasonably obtain, needed evidence" of his damages.

Cal.App.4th 242.) Historically, this limitation was recognized only with respect to the tort of intentional interference with an *existing* contractual relationship, which is a "species" of the tort of intentional interference with prospective economic advantage. (*Id*. at 260.) However, in *Kasparian*,[5] *supra*, which Mr. Trobough relies on his making this argument, the limitation was extended to the latter, with the court concluding that the rationale behind barring prosecution of a claim for intentional interference with contractual relationship where the "interfering" party is not a stranger to the subject relationship applied with equal force where there was no established contract but merely a prospective one. The court explained that "[i]f a party has no liability in tort for refusing to perform an existing contract, no matter what reason, he or she certainly should not have to bear a burden in tort for refusing *to enter into* a contract where he or she has no obligation to do so."[6] (*Kasparian*, at 266.)

Given the facts of this case, it is clear that Mr. Trobough was not a stranger to the prospective economic relationship between Cross-Complainants and Q Networks/ASIP. As explained above, Mr. Trobough was the co-CEO of Q Networks and one of its managers as a California limited liability company, as well as a member and manager of ASIP, and his agreement was necessary for either company to enter into a business relationship with Cross-Complainants. (UMF Nos. 14-16.) Because Mr. Trobough was not a stranger to this relationship, it appears, at least at first blush, that he cannot be liable for interfering with it as matter of law.

Notably, in their opposition Cross-Complainants do not dispute that Mr. Trobough maintained his stated positions with Q Networks and ASIP. Instead, they endeavor to defeat Mr. Trobough's request for summary adjudication by arguing that he is not automatically immune from liability as an officer of Q Networks from interfering with the company's contractual obligations. In support of this contention, Cross-Complainants rely primarily on *Woods v. Fox Broadcasting Sub., Inc.* (2005) 129 Cal.App.4th 344 and *Collins v. Vikter Manor, Inc.* (1957) 47 Cal.2d 875.

In *Woods*, the court held that a major shareholder in a corporation could be held liable for interfering with a contract between the corporation and the plaintiff. The *Woods* court distinguished cases such as *Applied Equipment, supra*, 7 Cal.4th 503 (which was heavily cited by *Kasparian*) and the cases it cited, explaining that in those cases the defendant "was either a contracting party or its *agent* who could not be liable for interference rather than "noncontracting parties who had some general economic interest or other stake in the contract." (*Woods*, 129 Cal.App.4th at 352, 353.) It then concluded that *Applied Equipment's* definition of "stranger" was dicta at best and opined: "[W]e find it highly unlikely that *Applied Equipment* intended to hold, or should be construed as holding, that persons or entities with an ownership interest in a corporation are automatically immune from liability for interfering with

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[5] In *Kasparian*, a plaintiff, a limited partner of a partnership, sued the general partnership, two of the individual partners, two of the individual partners, and a Los Angeles County supervisor for interfering in settlement negotiations in which the plaintiff hoped the general partnership would buy out his interest. The appellate court concluded that the partnership could not be held liable as a matter of law, and included the individual partner defendants in its holding.

[6] The remedy for refusing to perform an existing contract was a claim for breach of contract, but no claim in *tort*. (See *Kasparian*, *supra*, 38 Cal.App.4th at 265, citing *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 517-518.)

their corporation's contractual obligations." (*Id*. at 353.) In reaching its final disposition, the court rejected the holding of *Kasparian*.

In *Collins*, a valid cause of action for interference with a contract was held to be stated against defendants who were officers, directors, and beneficial owners of the contracting company, though such parties could still avoid liability by establishing that their conduct was privileged, particularly by demonstrating that their acts of interference were in the best interests of the corporation. (*Collins*, 47 Cal.2d at 883.) Whether the conduct was privileged was a defense whose resolution turned on factual issues. (*Ibid*.)

Cross-Complainants urge this Court to follow *Woods* (and *Collins*) and its rejection of *Kasparian* and find that their interference claim is not barred as a matter of law simply because Mr. Trobough was not a stranger to the prospective economic relationship at issue.

Ultimately, the Court finds the rationale of *Woods* and a subsequent case that relied on *Woods*, *Asahi Kasei Pharma Corp. v. Actelion Ltd*. (2013) 222 Cal.App.4th 945, more persuasive than *Kasparian* and agrees that Mr. Trobough's positions in Q Networks and ASIP do not bar prosecution of an intentional interference claim against him. As *Woods* explained, neither *Applied Equipment* "nor any of the authorities it relied upon when discussing the liability of third parties arose from factual settings like" the ones at present, "where a powerful shareholder [or officer/member] allegedly interferes in a contract between the corporation [or LLC] whose shares it owns and some other person or entity." (*Woods*, 129 Cal.App.4th at 353.) Given this, per *Woods*, *Applied Equipment* had no reason to consider and discuss cases such as *Collins, supra*, which held that "the owners or officers or a business entity could be held liable for interfering with that entity's contracts, subject to the defense of certain privileges." (*Ibid*.) This fact, "combined with the absence of any analysis on the issue by the *Kasparian* court," supports this Court declining to follow *Kasparian* "to the extent it might hold that some of the individual owners of a business entity are automatically deemed to be exempt from contract interference liability because of their economic interest in the entity means they are not strangers to any of the entity's contractual obligations." (*Woods*, at 354.)

Asahi Kasei is in accord with this approach. In that case, a licensor entered into a licensing and development agreement for one of its pharmaceutical products and the licensee discontinued its work on the products upon being acquired by a company who made directly competing products. The licensor sued the licensee for intentional interference with contract. The trial court refused the defendant's proposed instruction that that they were not liable for any interference occurring after the acquisition and the appellate court held that the jury was properly instructed because corporate owners and executives were not immune from liability for interfering with a subsidiary's contractual obligations as a matter of law merely because they had an economic interest; rather, they could assert a qualified privilege as a defense. The court rejected *Kasparian*, as the *Woods* court did, to the extent it implicitly held that "the owners of a business entity are automatically deemed to be exempt from interference liability because their economic interests mean they are not 'strangers,'" and explained that it agreed with *Woods* that the *Kasparian* court's "absence of analysis limits the persuasiveness of its holding." (*Asahi Kasei*, 222 Cal.App.4th at 965, citing *Woods* at 354.) This Court agrees.

In his reply, Mr. Trobough maintains that Cross-Complainants "have the law wrong" because his argument in support of adjudication of this claim is not one of "immunity." But *Woods* and *Asahi Kasei* both stand for the proposition that the owners of a business entity are

not automatically exempt from interference liability because their economic interests mean they are not "strangers" to the subject contract or proposed economic relationship. Mr. Trobough has argued that he is entitled to summary judgment on this claim based on the opposite stance. Even if the word "immunity" is not the most apt for what is at issue here, Cross-Complainants' argument is still directly on point and persuasive. Consequently, the Court agrees with Cross-Complainants that this claim is not barred as a matter of law given Mr. Trobough's positions with Q Networks and ASIP and therefore will not grant summary adjudication on this basis.

c. Independently Wrongful Conduct by Mr. Trobough

Mr. Trobough next insists that he is entitled to summary adjudication of the fourth cause of action because he did not engage in any act which was wrongful apart from the alleged interference itself.

As set forth above, Cross-Complainants' interference claim is predicated on two independently wrongful torts purportedly committed by Mr. Trobough: defamation and breach of fiduciary duty. Given this Court's ruling on Mr. Trobough' motion with respect to the second and third causes of action (see above), the Court agrees that his allegedly defamatory conduct cannot serve as an independently wrongful act to support this claim. As for his purported breach of fiduciary duty, Mr. Trobough argues that the alleged breach- his purported usurpation of Q Networks' opportunity to negotiate directly with Mr. Rajagopalan for use of the VPMN technology (ACC, ¶¶ 36-37)- does not constitute an independently wrongful act for the following reasons: (1) Cross-Complainants have no evidence that Mr. Trobough usurped this opportunity; (2) even if there was such a usurpation by Mr. Trobough, his conduct is privileged as a good-faith assertion of a legally protected interest; (3) there was no usurpation because it was always contemplated that JLA would be folded into Q Networks upon completion of the project.

Despite the language used, Mr. Trobough's first argument is not truly one of the inability Cross-Complainants to establish an element of their claim because they lack the evidence to do so. This is because in connection with his argument, Mr. Trobough submits evidence that there was no usurpation of Q Networks' opportunity to negotiate with Mr. Rajagopalan (i.e., a breach of fiduciary duty) because he (and Mr. Jou) did *in fact* negotiate directly with Messrs. Spaulding and Doramus from July 2020 through December 2020, with the three or four of them having approximately 15-20 discussions that included the issue of ownership and use of the VPMN, culminating in the parties' ultimately being unable to reach a deal. (UMF No. 18.) Mr. Rajagopalan himself testified directly at his deposition that he rejected an equity offer from Q Networks of 10% of Mr. Spaulding's equity for himself and Mr. Jou because he believed it to be a "very poor deal." (See Cross-Defendants' Compendium of Evidence, Exhibit B at 275:5-16.) Thus, with his first argument, Mr. Trobough is actually attempting to negate a necessary element of Cross-Complainants' claim, and the Court believes with the evidence submitted that he has done so. This evidence completely counters the allegation that Mr. Trobough usurped any opportunity by Q Networks to negotiate with Cross-Complainants over the use and ownership of the VPMN technology and thus Mr. Trobough meets his initial burden on his request for adjudication of the fourth cause of action by establishing that there was no breach of fiduciary duty by him.

In their opposition, Cross-Complainants fail to rebut Mr. Trobough's showing in this regard, i.e., demonstrate that Q Networks' opportunity to negotiate with Cross-Complainants was usurped by him, and therefore fail to establish the existence of a triable issue of material fact. As such, the Court need not evaluate the merits of Mr. Trobough's remaining arguments, and given the absence of any independently wrongful conduct by Mr. Trobough, he is entitled to summary adjudication of the fourth cause of action in his favor. Accordingly, Mr. Trobough's request for summary adjudication of the fourth cause of action is GRANTED.

3. *Eighth Cause of Action: Breach of Non-Disclosure Agreements*

In the final cause of action at issue, Cross-Complainants allege that Mr. Rajagopalan and Bay Views entered into a non-disclosure agreement ("NDA") with JLA (the "JLA NDA") and that Mr. Rajagopalan also entered into an NDA with Q Networks (the "Q Networks NDA") which Mr. Jou and Bay Views were beneficiaries of. (ACC, ¶¶ 88-89.) The VPMV technology at issue was the subject of these NDAs. (*Id*., ¶ 90.) Cross-Defendants allegedly breached these agreements by "engaging in the conduct complained of [in the ACC]." The Court presumes the foregoing is a reference to the allegation that JLA and Mr. Trobough published the VPMN in one or more patent applications. (*Id*., ¶ 71.) Cross-Defendants maintain that summary adjudication of this claim in their favor is warranted because: (1) JLA and Mr. Trobough are not parties to the Q Networks NDA and therefore could not breach it; (2) Cross-Complainants voluntarily disclosed the VPMN to Q Networks and other third parties; (3) Messrs. Rajagopalan and Mr. Jou sustained no damages; and (4) Bay Views has no interest in the VPMN technology and thus could not be harmed by any alleged breach of the NDAs.

This a breach of contract claim. In order to meet their initial burden, Cross-Complainants must establish each of the following elements: (1) existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damages to plaintiff as a result of the breach. (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239.)

a. The Q Networks NDA

Cross-Defendants first assert that they cannot be liable for breach of the Q Networks NDA because they were not parties to it. This argument is well-taken. As JLA was not a party to the Q Networks NDA, there was no contract between it and Mr. Rajagopalan in that regard and it cannot serve as the basis for liability against the company. As for Mr. Trobough, while he may have had the obligation to maintain the confidentiality of certain materials disclosed to Q Networks pursuant to the NDA as a "representative" of the company (see Sinha Decl., ¶ L, Exhibit L at p. 2 [describing the obligation of the "Receiving Party" and "Each Receiving Party Representative" to keep confidential information confidential]), he was not a signatory and therefore not a party to it. (See *Andrews Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 585, fn. 5 [stating that generally the absence of a signature on a written agreement means there is no breach of contract claim against the non-signatory.) Arguably, any failure to maintain confidentiality as required by the NDA based on Mr. Trobough's conduct would create a claim for breach against *Q Networks* and not Mr. Trobough in his individual capacity.

Cross-Complainants only response to this is to state that JLA and Mr. Trobough are "part" of Q Networks and cannot "have their cake and eat it too" by both arguing that the latter

is part of Q Networks such that no claim for contractual interference can be stated against him and that no breach of the NDA can be stated against him because he is not a party. But these are two entirely different claims with completely distinct elements and consequently there is no inconsistency in the positions taken by Cross-Defendants with respect to each. Ultimately, because JLA and Mr. Trobough are not parties to the Q Networks NDA, they cannot be liable for any alleged breach of it.

b. The JLA NDA

Turning to the JLA NDA, Cross-Defendants argue that Messrs. Rajagopalan and Jou voluntarily disclosed the VPMN technology to third parties such as Q Networks, thereby removing any confidentiality protection that might have once attached. (UMF No. 27.) Cross-Defendants submit evidence that in November 2019, Mr. Jou wrote up material for VPMN to be included in the Q Networks patent application and at one point in the resulting email chain, Mr. Rajagopolan copied a patent attorney, Josh Dobrowitzky, who worked for Q Networks' patent strategist StrongForce. (Trobough Decl., ¶ 9.) According to Mr. Trobough, neither Mr. Dobrowitzky nor StrongForce were retained by him or JLA at any time, but rather by Q Networks and ASIP, and he did not direct Messrs. Rajagopalan and Jou to provide information about the VPMN to them. (*Ibid*.) He continues that Messrs. Rajagopolan and Jou, from November 2019 through May 2020, participated in incorporating VPMN concepts into Q Networks' products and responses to numerous government requests for proposals. (*Id*. at ¶ 10.) Mr. Rajagopalan acknowledged incorporating VPMN concepts into documents provided to the government at his deposition. (Cross-Defendants' Compendium of Evidence, Exhibit A at 59:4-18.) Cross-Defendants also maintain that confidential VPMN information was disclosed to third party T-Mobile.

The foregoing, however, does not establish that the VPMN-related information lost its confidential character and the attendant obligation for it to remain protected from disclosure. The JLA NDA articulates the circumstances under which the obligation to keep information confidential by the party receiving it does not apply (see Sinha Decl., ¶ 13, Exhibit K at § 3), and Cross-Defendants' fail to demonstrate that the aforementioned actions fall within any of these specified circumstances. With respect to T-Mobile specifically, while Mr. Rajagopalan testified that he discussed the concept with them, the testimony cited by Cross-Defendants does not establish that these discussions included the disclosure of information deemed confidential under the JLA NDA. Thus, the Court concludes that Cross-Defendants have not met their initial burden based on this argument.

Cross-Defendants next argue that Cross-Complainants suffered no damages as a result of any alleged disclosure, but similar to how this argument was presented by them in connection with the defamation claim (see fn. 4, *supra*), Cross-Defendants fail to submit evidence which demonstrates Cross-Complainants "do[] not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at 854-855.) They cite no discovery admissions or other admissible evidence demonstrating that Mr. Rajagopalan "does not possess, and cannot reasonably obtain, needed evidence" of his damages. Consequently, Cross-Defendants have not met their initial burden on this basis.

Lastly, as for Bay Views, it is not a party to the JLA NDA and as Cross-Defendants submit, Mr. Rajagopolan testified that that the company has no ownership, title or interest in the VPMN technology. (Cross-Defendants' Compendium of Evidence, Exhibit B at 350:4-13,

23-25.) As such, it is not entitled to maintain a claim for breach and could not be damaged by any disclosure given its lack of ownership or interest in the confidential information. Thus, Cross-Defendants are entitled to summary adjudication of the eighth cause of action as to Bay Views. They are not, however, with respect to Messrs. Rajagopolan and Jou. Therefore, Cross-Defendants' request for summary adjudication of the eighth cause of action is GRANTED with respect to Bay Views and DENIED as to the remaining Cross-Complainants.

III. CONCLUSION

Cross-Defendants' motion for summary adjudication is GRANTED IN PART and DENIED IN PART. The motion is GRANTED as to the second, third and fourth causes of action, and as to the eighth cause of action with respect to Bay Views only. The motion is DENIED as to the eighth cause of action with respect to the remaining Cross-Complainants.

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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Calendar Line 3

Case Name: *Padilla v. Cortec Precision Sheetmetal, Inc.*
Case No.: 23CV411833

This is a putative class action and Private Attorneys General Act ("PAGA") action on behalf of the employees of defendant Cortec Precision Sheetmetal, Inc. ("Cortec"). Plaintiff Jorge Padilla alleges that Cortec failed to provide employees with off-duty meal periods and, as a result, failed to provide accurate wage statements and pay employees all their premiums upon separation of employment.

Before the Court is Cortec's motion to stay this action pending resolution of the following related cases: (1) *Ramon Ponce, et al. v. Cortec Precision Sheet Metal, Inc.,* Santa Clara County Superior Court, Case No. 21CV378025 (the "*Ponce* Action"); and (2) *Maria Sanchez v. Cortec Precision Sheet Metal, Inc.,* Santa Clara County Superior Court, Case No. 21CV380908 (the "*Sanchez* Action"). Based on the reasons discussed below, the Court GRANTS Cortec's motion.

IV. BACKGROUND

Plaintiff initiated the instant action on August 28, 2023, asserting claims for: (1) violation of Labor Code §§ 201-203, 226.6 and 512; (2) violation of Labor Code § 226(a); (3) violation of Business & Professions Code § 17200, et seq.; and (4) violation of Labor Code § 2698, et seq.

The proposed class and subclass in this action are defined as follows:

a. All current and former non-exempt employees who worked one shift longer than 5 hours for Defendant in California at any time from March 6, 2019, through the present (the "Class");
b. All current and former non-exempt employees who worked one shift longer than 10 hours for Defendant in California at any time from March 6, 2019, through the present (the 'Second Meal Period Sub-Class").

V. MOTION TO STAY ACTION

A. Legal Standard

"Trial courts generally have the inherent power to stay proceedings in the interests of justice and to promote judicial efficiency." (*Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489.) The trial court's inherent power to exercise reasonable control over all proceedings connected with the litigation before it "rests upon and is limited by the exercise of sound judicial discretion." (*Bailey v. Fosca Oil Co.* (1963) 216 Cal.App.3d 813, 818.) "Granting a stay in a case where the issues in two actions are substantially identical is a matter addressed to the sound discretion of the trial court." (*Thompson v. Continental Ins. Co.* (1967) 66 Cal.2d 738, 746.)

"In exercising its discretion the court should consider the importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly

conflicts with the courts of other jurisdictions. It should also consider whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have already advanced." (*Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal.App.4th 800, 804 [internal citation and quotations omitted].)

B. Related Cases

1. The *Ponce* Action

On March 11, 2021, Plaintiff Ramon Ponce initiated a class action lawsuit against Cortec which asserted ten causes of action for various Labor Code violations, including Labor Code sections 201 and 202 (failure to timely pay all wages owed upon termination), 226.7 and 512(a) (failure to provide proper meal breaks and rest period premiums), 226(a) (failure to provide accurate wage statements), 1194, 1197 and 1197.1 (failure to pay minimum wages), 510 and 1198 (failure to pay overtime wages), 204 (failure to timely pay wages during employment), 1174(d) (failure to keep required payroll records), 2800 and 2802 (failure to reimburse business expenses) and violation of Business & Professions Code § 17200. Mr. Ponce additionally sought waiting time penalties under Labor Code § 203. Mr. Ponce amended his complaint on May 17, 2021 to add a PAGA claim based on same violations asserted in his initial pleading.

The proposed class in this action is defined as:

> All current and former hourly-paid or non-exempt employees who worked for any of the Defendants within the State of California at any time during the period from March 11, 2017 to final judgment and who reside in California.

This action is set for mediation on October 23, 2023.

2. The *Sanchez* Action

Plaintiff Maria Sanchez filed a related action seven weeks after the *Ponce* Action on April 29, 2021, asserting the same causes of action. On November 24, 2021, Ms. Sanchez filed a First Amended Complaint to add a PAGA cause of action based on the same violations asserted in her initial pleading.

The proposed class in this action is defined as:

> All persons who worked for Defendants as non-exempt, hourly paid employees in California, within four years prior to the filing of the initial complaint until the date of trial.

This action set for mediation on October 23, 2023.

C. Discussion

At the outset, the Court notes that California and federal authorities have held that "separate but similar actions by different employees against the same employer" are generally

permissible under the PAGA statutory scheme.[7] (*Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 866 [where one representative plaintiff had already filed a PAGA action, subsequent agreements to arbitrate PAGA claims executed by other employees were unenforceable as against those employees], citing *Tan v. GrubHub, Inc.* (N.D. Cal. 2016) 171 F.Supp.3d 998, 1012-1013.) Federal courts have accordingly denied requests to stay parallel PAGA actions based on the federal "first-to-file" rule, which is similar to California's rule of exclusive concurrent jurisdiction. (See *Tan v. GrubHub, Inc., supra,* 171 F.Supp.3d at pp. 1012-1016 [noting that defendants cited no case holding that "two PAGA representatives cannot pursue the same PAGA claims at the same time" and "declin[ing] to be the first [court] to so hold"].)

However, in *Shaw v. Superior Court* (2022) 78 Cal.App.5th 245, the appellate court held that the trial court did not err in staying a representative suit under PAGA which arose from the *same facts and theories* as another pending PAGA action in a different superior court because the language of the Act did not demonstrate unequivocal legislative intent to abrogate the common law doctrine of exclusive concurrent jurisdiction,[8] nor did application of the exclusive concurrent jurisdiction rule vitiate the purposes for which PAGA was enacted. Because proceeding with resolution of the case would duplicate court efforts, waste resources, and potentially produce divergent results, the appellate court explained, the trial court reasonably concluded that policy considerations supported application of the exclusive concurrent jurisdiction, i.e., the staying of the later-filed PAGA action.

With the foregoing in mind, the Court turns to the arguments submitted by the parties. In asserting that the instant action should be stayed pending resolution of the *Ponce* and *Sanchez* Actions, Cortec makes the following arguments: (1) the alleged violations in all three actions are identical and completely overlap, and to litigate duplicative actions is a waste of judicial resources and would raise the specter of conflicting determinations; and (2) without a stay, Cortec will continue to be overburdened with fees, costs and time to defend nearly three identical lawsuits, including litigating against six different plaintiff's counsel in discovery,

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[7]This is in contrast to the other major *qui tam* statute in California, the False Claims Act. (See Gov't Code § 12652(c)(10); *Canela v. Costco Wholesale Corporation* (N.D. Cal., May 23, 2018, No. 13-CV-03598-BLF) 2018 WL 2331877, at *7; *Gonzalez v. Corecivic of Tennessee, LLC* (E.D. Cal., Aug. 1, 2018, No. 16-CV-01891-DAD-JLT) 2018 WL 3689564, at *4 [contrasting PAGA with federal False Claims Act].)

[8] Under this judge-made doctrine, when two or more courts have subject matter jurisdiction over a dispute, the court that first asserts jurisdiction assumes it to the exclusion of others. (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1175.) "The rule is based upon the public policies of avoiding conflicts that might arise between courts if they were free to make contradictory decisions or awards relating to the same controversy, and preventing vexatious litigation and multiplicity of suits," and is "enforced not so much to protect the rights of parties as to protect the rights of Courts of co-ordinate jurisdiction to avoid conflict of jurisdiction, confusion and delay in the administration of justice." (*Id.* at pp. 786-787, internal citations and quotations omitted.) Still, where the rule applies, "[a]n order of abatement issues as a matter of right not as a matter of discretion …." (*Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 786, internal citations and quotation omitted.) Still, where the rule applies, "[a]n order of abatement issues as a matter of right not as a matter of discretion …." (*Ibid.*)

motion practice and at trial, and producing substantially similar records and information it already produced in the first two actions.

In his opposition, Plaintiff, who insists that the case should not be stayed, if at all, unless and until a settlement is reached, maintains that Cortec is only seeking a stay in order to negotiate first with opposing counsel in the *Ponce* and *Sanchez* Actions at mediation and obtain a low settlement at his exclusion- i.e., a reverse auction.[9] Plaintiff insists that this intention is clear based on opposing counsel's refusal to permit his counsel to attend the mediation session set for October 23rd. Plaintiff continues that in the event the Court is inclined to grant Defendant's motion, the Court should not stay his representative action under PAGA because there is no authority for doing so.

Upon consideration of the arguments made by the parties, the Court believes that policy considerations support the issuance of a stay of the instant action in the vein of *Shaw*. First, given that the instant action is nearly identical to the *Ponce* and *Sanchez* actions (e.g., the same facts and theories of liability), there is no doubt that permitting it to be pursued simultaneous to those lawsuits "would duplicate court efforts, waste resources, and potentially produce divergent results." (*Shaw, supra,* 78 Cal.App.5th at 262.) Not to mention the potential waste of party resources with Defendant facing the prospect of duplicating its own efforts in responding to discovery, engaging in motion practice, and preparing for trial. Issuing a stay so as to prevent any of the foregoing in certainly "in the interests of justice and … promote[s] judicial efficiency." (*Freiberg v. City of Mission Viejo, supra,* 33 Cal.App.4th 1484, 1489.)

Second, with regard to Plaintiff's allegation that Cortec is conducting a reverse auction by excluding the presence of his counsel at the mediation in the *Ponce* and *Sanchez* Actions, not only is this allegation unsupported and entirely speculative at this juncture, but the possibility of a reverse auction is, as the court in *Shaw* explained, "inherent whenever the LWDA authorizes (or declines to authorize) multiple plaintiffs to sue." (*Shaw,* 78 Cal.App.5th at 263.) Nevertheless, the Court is not aware of any authority which provides that such a risk warrants denial of a stay request in circumstances such as the ones in the case at bench.

Further, to the extent that Plaintiff is concerned about the ability of plaintiffs' counsel in the *Ponce* and *Sanchez* Actions to adequately represent the interests of the aggrieved employees, there are sufficient safeguards in place. Settlements in class actions and PAGA actions both require court review and approval to determine if they are fair and reasonable and, in the case of the latter, that the plaintiff has adequately represented the state's (and thus the public's) interests. (See *Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 244-245 [articulating factors to be considered in granting approval of settlement in class actions]; *Moniz*

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[9] One court defined a "reverse auction" thusly:

> A reverse auction is said to occur when "the defendant in a series of class actions picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant." [Citation.] It has an odor of mendacity about it.

(*Uribe v. Crown Building Maintenance Co.* (2021) 70 Cal.App.5th 986, 990, fn. 2, quoting *Negrete v. Allianz Life Ins. Co. of North America* (9th Cir. 2008) 523 F.3d 1091, 1099.)

v. Adecco USA, Inc. (2021) 72 Cal.App.5th 56, 76-77 [discussing requirement, pursuant to Labor Code section 2699, subdivision (l)(2), for court to review and approve settlement of any action filed under PAGA].) Moreover, in the event that Plaintiff takes issue with the sufficiency of any settlement reached in the *Ponce* and *Sanchez* Actions, he retains the ability to object to them. (See *Shaw*, *supra*, 78 Cal.App.5th at 263 [explaining that although there is no express statute governing objections by plaintiffs pursuing other PAGA representative actions, they can do so through various mechanisms- e.g., motion to vacate or set aside approved settlement]; Cal. Rules of Court, rule 3.769 [setting forth procedures for settlement of class action, including objections by class members].) Plaintiff otherwise fails to demonstrate that he would suffer any hardship or inequity if his action was stayed pending resolution of the *Ponce* and *Sanchez* Actions.

Turning to Plaintiff's contention that the Court cannot stay the representative PAGA portion of this action, the Court is not persuaded that this is the case. Plaintiff insists that based on the decisions issued in *Tan v. Grubhub, Inc., supra*, 171 F.Supp.3d 998, and *Julian v, Glenair, Inc., supra*, 17 Cal.App.5th 853, which cited *Tan* with approval, a concurrent PAGA action is permissible and must be allowed to continue despite similarities to an earlier-filed action. While the *Shaw* court rejected *Tan* and *Julian* as instructive with regards to whether the exclusive concurrent jurisdiction rule could apply where concurrent PAGA lawsuits have been filed, and this rule is not implicated here, the Court believes that the reasoning behind this rejection is relevant with regards to answering the question of whether a concurrent PAGA action can be stayed based on the Court's inherent power to issue such an order.

After examining the legislative purpose of PAGA and concluding that it contained no clear intent to abrogate common law doctrine, *Shaw* rejected *Julian* because it did not address whether PAGA's purpose would be impaired through application of the exclusive concurrent jurisdiction rule, i.e., the staying of a PAGA action, where concurrent PAGA lawsuits have been filed and the latter-filed suit is nearly identical to the earlier action. (*Shaw,* 78 Cal.App.5th at 261.) As for *Tan*, in that case the defendant filed a motion to dismiss a PAGA claim for failure to state a claim, arguing that an earlier-filed PAGA action in state court alleged the same claims for the same employees. The court denied the motion due to PAGA being "silent with respect to whether an employee may bring a PAGA action when another private plaintiff brings suit against the employer in a representative capacity." (*Id*. at 261-262.) *Shaw* explained that the central inquiry in *Tam* was distinct from the one before it because in *Tam*, the motion to dismiss "posed the question of whether the plaintiff failed to state a claim for want of statutory authorization to file," whereas it was tasked with determining whether PAGA abrogated the common law rule of exclusive concurrent jurisdiction. (*Id*. at 262.) It did not, the court continued, and neither *Julian* nor *Tan* compelled a different conclusion.

Prior to its rejection of these cases, when it concluded that PAGA contained no clear intent to abrogate common law doctrine, the *Shaw* court explained that "[r]ecognizing a court's power to stay a subsequent PAGA representative suit that is wholly subsumed by a prior PAGA representative suit- i.e., where the second suit alleges the same Labor Code violations based on the same facts and theories as the prior suit- does not eliminate the code enforcement mechanism provided by PAGA: the first suit proceeds, thus fulfilling PAGA's purpose." (*Shaw*, 78 Cal.App.5th at 260.) The court continued, "[w]hile the Legislature sought to maximize code enforcement and deter future violations, [the court does] *not discern an intent in PAGA to waste judicial resources, encourage multiplicity of duplicative suits, and prohibit courts from staying suits that might otherwise lead to inconsistent results*." (*Ibid*., italics

added.) Given this conclusion, the Court believes that it may properly stay this action in its *entirety* and that it is in the interests of justice and promoting judicial efficiency to do so. Accordingly, Cortec's motion to stay this action is GRANTED.

VI. CONCLUSION

Cortec's motion to stay this action in its entirety pending resolution of the *Ponce* and *Sanchez* Actions is GRANTED.

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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Calendar Line 4

Case Name: *Ruiz v. Condon-Johnson & Associates, Inc.*
Case No.: 23CV411829

This is a representative action under the Private Attorneys General Act ("PAGA" of the "Act") alleging that Defendant Condon-Johnson & Associates failed to pay minimum and overtime wages and to properly calculate the pay rates used to pay overtime, failed to provide meal and rest breaks, and committed various other wage and hour violations.

Before the Court is Defendant's motion to compel arbitration, which is opposed by Plaintiff Joseph Ruiz. For the reasons discussed below, the Court GRANTS Defendant's motion.

VII. BACKGROUND

A. Factual

As alleged in the operative complaint, Defendant is a construction contractor who employed Plaintiff in May 2022 as a non-exempt employee with responsibilities for machine maintenance, mechanical repairs, drilling and handling heavy machinery. (Complaint, ¶¶ 26.)

Plaintiff alleges that Defendant failed to pay him and other non-exempt employees minimum and overtime wages, as well as provide them with meal and rest breaks and full wages due upon termination. (Complaint, ¶¶ 10-13, 17.) Employees were also allegedly not provided itemized wage statements that accurately reflected their gross wages. (*Id.*, ¶ 14.) Defendant purportedly failed to pay employees the full amount of their wages in a timely fashion and failed to reimburse them for costs incurred for laundering mandatory work uniforms and buying tools necessary to perform their work. (*Id.*, ¶ 18.) Plaintiff further alleges that Defendant did not provide employees with compensation on their final rate of pay for unused vested paid vacation as required by Labor Code section 227.3. (*Id.*, ¶ 17.)

Based on the foregoing allegations, Mr. Ruiz filed the Complaint on May 6, 2023, asserting a single claim under PAGA seeking penalties based on the aforementioned violations of the Labor Code by Defendant. Mr. Ruiz seeks penalties under Labor Code sections 210, 226.3, 558, 1174.5, 1197.1 and 2699.)

B. Related Action

On August 26, 2022, Mr. Ruiz filed a putative wage and hour class action against Defendant- *Ruiz v. Condon-Johnson & Associates*, Case No. 22CV402514 (the "Class Action")- based on the same violations of the Labor Code alleged in the instant action. Plaintiff asserts ten causes of action on behalf of himself and putative class members for: (1) failure to pay overtime wages; (2) failure to pay minimum wages; (3) failure to provide meal periods; (4) failure to provide rest periods; (5) failure to pay all wages due upon termination; (6) failure to provide accurate wage statements; (7) failure to pay timely wages during

employment; (8) failure to indemnify; (9) violation of Labor Code section 227.3; and (10) violation of the Unfair Competition Law, Business and Professions Code section 17200.[10]

In June 2023, Defendant moved to compel Plaintiff's claims to arbitration based on the Grievance Procedure section of the collective bargaining agreement ("CBA") between union members like Mr. Ruiz and Defendant (hereafter, the "Master Agreement"). Plaintiff conceded that most of his claims must be arbitrated under the Master Agreement, but insisted that his Section 226.7 claim did not because the agreement did not specifically refer to it. The Court rejected Plaintiff's argument, finding that the Master Agreement's reference to "[a]ll claims arising under … the California Labor Code" imposed a clear and unmistakable allocation of *all* Labor Code claims, *including* Section 227.3, to arbitration. Accordingly, Defendant's motion to compel Plaintiff's class action claims to arbitration was granted, with all further proceedings in the action stayed pending resolution of the arbitration. (See June 26, 2023 Order Concerning Defendant's Petition to Compel Arbitration.)

VIII. MOTION TO COMPEL ARBITRATION

Defendant moves to compel arbitration based on the Master Agreement, arguing that it provides for mandatory grievance and arbitration procedures and explicitly bars Plaintiff's PAGA action.

A. Legal Standards

"The FAA [Federal Arbitration Act], which includes both procedural and substantive provisions, governs [arbitration] agreements involving interstate commerce." (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 840.) However, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid*.)

Under the FAA, the Court must grant a motion to compel arbitration if any suit is brought "upon any issue referable to arbitration under an agreement in writing for such arbitration" (9 U.S.C. § 3), subject to "such grounds as exist at law or in equity for the revocation of any contract[.]" (9 U.S.C. § 2.) Under California arbitration law, i.e., the California Arbitration Act ("CAA"), a court must grant a petition to compel arbitration "if it determines that an agreement to arbitrate … exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement," among other exceptions. (Code Civ. Proc., § 1281.2.) The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal*, *supra, 1*4 Cal.4th at 413.)

"In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy

[10] All subsequent statutory references refer to the Labor Code unless otherwise specified.

favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

> But the FAA's policy favoring arbitration … is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. Or in another formulation: The policy is to make arbitration agreements as enforceable as other contracts, but not more so. Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind.

(*Morgan v. Sundance, Inc*. (2022) ___U.S.___ [142 S.Ct. 1708, 1713], internal citations and quotation marks omitted.)

Defendant maintains that the FAA applies because it is engaged in interstate commerce. Plaintiff does not dispute this in his opposition, whereas when opposing Defendant's motion to compel arbitration in the Class Action he maintained that California law applied. The Court explained in its order granting the motion that because both the FAA and CAA required Defendant to establish the existence of a valid agreement covering the parties' dispute and the parties did not identify any outcome-determinative differences between the FAA and the CAA, the Court assumed that the Master Agreement is subject to the FAA, but that California procedural law applies. It makes this same assumption here.

Thus, in order to succeed on this motion, Defendant must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute at issue is covered by it. (See *Cruise v. Kroger Co.*, *supra*, 233 Cal.App.4th 390, 396.) If it does so, the burden shifts to Plaintiff to prove a ground for denial of the motion.[11] (*Rosenthal, supra, 1*4 Cal.4th at p. 413.)

B. Discussion

Neither party disputes the existence of the Master Agreement, a CBA, nor the fact that it contains an arbitration provision. What *is* disputed is whether Plaintiff's PAGA claim comes within the scope of the arbitration provision of the agreement. As a general matter, arbitration provisions in CBAs are enforceable with respect to claims made by a union member. (*14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 260; *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 180.) Whether a CBA creates a duty for the parties to arbitrate a particular grievance is a legal issue to be decided by the Court. (*AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 649.) The parties' positions on this question can be summarized thusly: Defendant maintains that the exemption to PAGA for construction industry employees' whose performance is governed by a valid CBA applies, whereas Plaintiff argues that it does not. This exception is provided by Section 2699.6.

1. *Section 2699.6*

[11] Plaintiff's evidentiary objections are OVERRULED. These objections are immaterial to the disposition of Defendant's motion.

As a general rule, "an employee's right to bring a PAGA action is unwaivable." (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 383 [overruled in part in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___ [142 S.Ct. 1906].) Consequently, employment agreements that purport to waive an employee's right to assert a civil action under PAGA are unenforceable. (See *Julian v. Glenair, Inc.* (2017) 17 Cal.App.5th 853, 869-871.) However, in 2018, the Legislature carved out an exception to the foregoing rule by enacting a PAGA statute, Section 2699.6, that applies to the construction industry where certain requirements are met. (*Oswald v. Murray Plumbing & Heating Corp.* (2022) 82 Cal.App.5th 938, 942, fn. 2; Lab. Code, § 2699.6, subd. (b).) The Court must determine if Section 2699.6 applies to the Master Agreement.

Section 2699.6 provides, as relevant here, as follows:

> (a) [PAGA] shall not apply to an employee in the construction industry with respect to work performed under a valid collective bargaining agreement in effect any time before January 1, 2025, that expressly provides for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime hours worked, and for the employee to receive a regularly hourly pay rate of not less than 30 percent more than the state minimum wage rate, and the agreement does all of the following:
>
> (1) Prohibits all of the violations of this code that would be redressable pursuant to this part, and provides for a grievance and binding arbitration procedure to redress those violations.
>
> (2) Expressly waives the requirements of this part in clear and unambiguous terms.
>
> (3) Authorizes the arbitrator to award any and all remedies otherwise available under this code, provided that nothing in this section authorizes the award of penalties under this part that would be payable to the Labor and Workforce Development Agency ["LWDA"].

2. *Requirements of Section 2699.6 as Applied to the Masters Agreement*

Accordingly, in order to establish that Mr. Ruiz cannot assert a representative action under PAGA, Defendant must demonstrate that the Master Agreement: (1) expressly provides for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime hours worked, and for the employee to receive a regularly hourly pay rate of not less than 30 percent more than the state minimum wage rate; (2) prohibits all violations of the Labor Code that would be redressable under PAGA and provides for a grievance and binding arbitration procedure to redress those violations; (3) expressly waives the requirements of PAGA in "clear and unambiguous terms"; and (4) authorizes the arbitrator to award any remedies available under PAGA, except for those that would be payable to the LWDA. Upon review, the Master Agreement appears to meet each of the foregoing requirements.

First, Mr. Ruiz worked for Defendant in construction under the Masters Agreement and received a wage of $34.75 per hour, which is nearly 250 percent more than the state minimum wage of $14.00, and was entitled to premium overtime wages. (See Declaration of Keith Bizzack in Support of Motion to Compel Arbitration, Exhibit 7; Exhibit 1 (Master Agreement), §§ 18-20A at pp. 23-27, 38-45.) The first paragraph of Section 2699.6, subdivision (a), is therefore satisfied.

Next, the Master Agreement satisfies the remaining requirements of subdivision (a) of Section 2699.6 on its face, providing that:

> The [Master] Agreement prohibits any and all violations of the sections of the California Labor Code that are redressable pursuant to the Labor Code Private Attorneys General Act of 2004 ("PAGA"). Such claims shall be resolved exclusively through binding arbitration before an impartial arbitrator and shall not be brought in a court of law or before any administrative agency such as the California Labor Commissioner. This agreement *expressly waives the requirements of PAGA* and authorizes the arbitrator to award any and all remedies otherwise available under the California Labor Code, *except* the award of penalties under PAGA that would be payable to the Labor Workforce development Agency.

(Master Agreement, § 9, p. 17, emphasis added.)

This portion of the Master Agreement tracks, nearly exactly, the language contained in subdivision (a)(1)(2) and (3) of Section 2699.6. Thus, the agreement not only encompasses *any* and *all* of the Labor Code violations that are redressable under PAGA- and all of the violations listed in Plaintiff's Complaint are expressly identified as actionable under PAGA by Section 2699.5- but it also, in "clear and unambiguous terms," expressly waives the requirements of the Act, *and* authorizes the arbitrator to award any remedies available under PAGA, except for those that would be payable to the LWDA.[12]

Therefore, the Master Agreement meets all of the requirements of the construction industry employee exemption to PAGA. Nevertheless, Plaintiff insists that Section 2699.6, subdivision (a) ("Section 2699.6(a)"), does not apply to his PAGA representative action.

3. *Plaintiff's Arguments*

In asserting that the Master Agreement does not comport with the requirements of Section 2699.6, subdivision (a), Plaintiff submits the following arguments: (1) the Master Agreement does not prohibit *all* violations of PAGA that would be redressable under the Act; (2) the Master Agreement does not provide for a grievance and binding arbitration procedure to redress *all* of those violations, particularly Section 227.3.[13] Plaintiff additionally asserts that

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[12] The Court notes that the MOU to the Master Agreement dated January 15, 2021, which modified Subsection 20 of Section 9 (Grievance Procedure), also tracks the language set forth in subdivision (a) of Section 2699.6.

[13] Once an employer makes vacation pay a term of employment, Section 227.3 entitles terminated employees to immediate payment for "any vested vacation time" unless a CBA "otherwise provide[s]." (Lab. Code, § 227.3.)

even if the Court compels arbitration of his individual claim, he should be permitted to proceed with his representative claim. None of these arguments are persuasive.

Plaintiff first explains that because the "Grievance Procedure" in the Master Agreement only provides for 10-day statute of limitations, and the statute of limitations under PAGA is, in contrast, one-year, it fails to provide "adequate" redress for the representative claims which an aggrieved employee might bring. There are several problems with this argument. First, Section 2699.6(a) places no qualification on the type of grievance and binding arbitration procedure that must be provided by the CBA at issue, much less that it be "adequate." Second, while Plaintiff maintains that permitting Defendant to "slash" PAGA's one-year statute of limitations to a mere 10 days would "impede the effective prosecution of representative PAGA actions [and] undermine the Legislature's objective" (Opp. at p. 4:24-26, quoting *Williams v. Superior Court* (2017) 3 Cal.5th 531, 548), the Legislature not only did not set forth any minimum standards for the grievance and arbitration procedures it refers to in subdivision (a),[14] but it was the unique and beneficial aspects of union grievance and arbitration that led to its decision to exempt union construction companies like Defendant in the first place.

In *Oswald v. Murray Plumbing & Heating Corp.*, *supra*, the court, after concluding that the CBA before it met the requirements of Section 2699.6(a), considered whether enforcing the agreement satisfied the purpose of the exemption. *Without even examining the specific grievance and arbitration procedures in the CBA at issue*, the court held that it *did* after examining the Legislative purpose of Section 2669.6 and noting that it was "intended to commit PAGA claims arising in the building and construction industry to the grievance and arbitration machinery of a [CBA] maintained by employers and [a] union in that industry so long as the CBA expressly provides for … key provisions such as grievance and binding arbitration procedure." (*Oswald*, 82 Cal.App.5th at 946, quoting Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 1654 (2017-2018 Reg. Sess.) as amended Aug. 24, 2018, p. 2.) The Legislature made a pointed decision to defer to the grievance and arbitration procedures collectively bargained for by unionized construction workers when it came to PAGA claims, regardless of what they are, and if the Court were to pass judgment on the "sufficiency" of these procedures as set forth in the Master Agreement, it would be directly overriding the Legislature's intent. Further, as the *Oswalt* court observed, while individuals like Plaintiff, as a union member, "enjoy[] the benefits of the union's bargaining power," they are "also subject to the burdens imposed by [a] CBA, which limit [their] remedy for Labor Code violations to an arbitral forum." (*Oswalt*, 82 Cal.App.5th at 944.) That Plaintiff may have less time to seek redress for various Labor Code violations under the procedures provided by Master Agreement than those under PAGA does not render the construction industry exemption inapplicable, and Plaintiff notably has offered no authority which provides as much.

Next, Plaintiff repeats a version an argument previously rejected by the Court in its order on Defendant's motion to compel arbitration in the Class Action, namely, that because Section 227.3 is not specifically mentioned in the Master Agreement, and the agreement does not specifically provide that vacation pay claims are subject to the Grievance Procedure, the agreement does not comport with all of the requirements of Section 2699.6(a), particularly those contained in subsection (1) ("Prohibits all of the violations of this code that would be

[14] Notably, the Legislature elected to refer to "*a* grievance and arbitration procedure." In utilizing this phrasing, the Legislature indicated its deference to any such procedures as agreed upon by construction industry employees working under a valid CBA.

redressable pursuant to this part, and provides for a grievance and binding arbitration procedure to redress those violations"). The Court determined that the Master Agreement's use of a general reference to the Labor Code demonstrated the parties' intention for the arbitration provision of the Master Agreement to cover as many claims as possible. Plaintiff does challenge this determination, but maintains that because the Grievance Procedure does not mention vacation pay, if the Court were to conclude that Master Service agreement bars a representative action under PAGA, what recourse does a union employee have to seek redress for his employer's failure to comply with Section 227.3? The answer, he insists, is nothing. As such, he continues, the Master Agreement fails to provide for a grievance and binding arbitration procedure to redress *all* violations of the Labor Code that would be redressable under PAGA, and the Section 2699.6 exemption does not apply.

The Court disagrees. It does not believe that the Master Agreement (or the Grievance Procedure contained therein) needs to specifically identify Section 227.3 or unused vested paid vacation days in order for these items to be redressable through the arbitration procedures provided by the agreement. The Master Agreement very clear states that "*all* claims and claims for associated penalties arising under … the California Labor Code … will be resolved through the procedures set forth in this Section 9 [Grievance Procedure] ...." (Master Agreement at p. 17.) This necessarily includes a claim for violation of Section 227.3. The Grievance Procedure, in turn, provides for binding arbitration should the grievance not be settled to the union's satisfaction through the initial settlement dispute procedures provided. Thus, to the Court, it is clear that union members such as Plaintiff *do* have recourse through the grievance and binding arbitration procedures set forth in the Master Agreement for an employer's failure to comply with Section 227.3. Consequently, Plaintiff's assertion that the Master Agreement fails to provide for a grievance and binding arbitration procedure to redress *all* violations of the Labor Code that would be redressable under PAGA is without merit.

Plaintiff's remaining argument that he should be permitted to proceed with the representative portion of this action is wholly unpersuasive. Plaintiff maintains that the California Supreme Court's recent decision in *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104 compels such a result. But *Adolph*, in which the Supreme Court held that where a plaintiff has brought a PAGA action comprising of individual and non-individual claims, an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees, did not consider situations such as the circumstances at bar, where the exemption to PAGA provided by Section 2699.6 is implicated because of the existence of a CBA that meets certain requirements. As such, its holding is inapplicable because wherein *Adolph* the arbitration clause at issue purported to prohibit arbitration of non-individual PAGA claims, here in contrast the Master Agreement provides that the forum for Plaintiff to bring *any* PAGA claims *is* arbitration, not court. Plaintiff and the aggrieved employees collectively bargained for such a result, and the Court must defer to it as intended by the Legislature.

In accordance with the foregoing, Defendant's motion to compel arbitration is GRANTED.

IX. CONCLUSION

Defendant's motion to compel arbitration is GRANTED.

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 No.: 22CV405652

Case Name: *Jason Card v. Security Industry Specialists, Inc.*
Case No.: 23CV410212

INTRODUCTION

The case in docket 22CV405652 is a putative wage and hour class action. Defendant Security Industry Specialists, Inc. ("SIS") is a private security contractor providing security personnel services to third party clients. Plaintiff Jason Card asserts that he was employed by SIS and assigned to work as a security guard at Apple, Inc. During Plaintiff's employment, SIS As a result of these alleged violations, the Complaint includes causes of action for: (1) failure to pay minimum wage for all hours worked; (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 timely pay wages during employment; (7) failure to provide accurate, itemized wage statements; (8) failure to pay all wages due upon separation of employment; (9) violation of Business and Professions Code section 17200, et seq.

Plaintiff has filed a separate lawsuit alleging only a Private Attorney General Act violation (Labor Code section 2698, et seq.) in docket 23CV410212.

Now before the Court are motions by SIS to compel arbitration of all of Plaintiff's claims filed in each docket. Plaintiff has opposed the motions and SIS has filed replies. As explained below, the Court GRANTS SIS's motion in both dockets.

DISCUSSION

SIS moves to compel arbitration of all class claims and the individual portion of Plaintiff's PAGA claim under the Federal Arbitration Act ("FAA"), to dismiss Plaintiff's class claims without prejudice or stay them, and to stay the representative portion of Plaintiff's PAGA claim.

I. SIS's Request for Judicial Notice

SIS requests that this Court take judicial notice of Apple Inc.'s Form 10-K filed with the Securities and Exchange Commission ("SEC") for the fiscal year ended September 24, 2022 under Evidence Code section 452, subdivision (h). It appears that Defendant makes this request for the purposes of showing that Apple is involved in activities affecting interstate commerce. Plaintiff does not oppose the request. Accordingly, the Court will take judicial notice of form 10-K. (*StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 456, fn. 9 [granting unopposed request for judicial notice of SEC filing].) But, the Court notes that "[w]hen judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable." (*Ibid*.) Here, although Plaintiff does not oppose the request for judicial notice and certainly does not dispute that Apple is involved in worldwide activities, the Court notes that Plaintiff disputes that his particular work at Apple involved interstate commerce.

II. Legal Standard

SIS asserts that the FAA applies to the arbitration agreements at issue but Plaintiff does not agree. The Court will lay out the applicable standards under both federal and state law because, as discussed below, the outcome of the motion is the same, for the most part, regardless of which standard is employed.

In ruling on a petition to compel arbitration, the Court must inquire as to (1) whether there is a valid agreement to arbitrate, and (2) if so, whether the scope of the agreement covers the claims alleged. (See *Howsan v. Dean Witter Reynolds* (2002) 537 U.S. 79, 84.) "Under both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate. [Citations.] The threshold question requires a response because if such an agreement exists, then the court is statutorily required to order the matter to arbitration." (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13, 19 (*Fleming*), internal quotation marks omitted.)[15]

Under California law, "[a] written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.) "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement." (Code Civ. Proc., § 1281.2, subds. (a), (b).) "This initial issue also reflects the very plain principle that you cannot compel individuals or entities to arbitrate a dispute when they did not agree to do so." (*Fleming*, *supra*, 88 Cal.App.5th at p. 19.)

"Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement--either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation (see [Code Civ. Proc., § 1281.2, subds. (a), (b))--that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense. [Citation.] (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) If the proponent of arbitration has shown the existence of an arbitration provision governing the claims at issue by a preponderance of the evidence, the burden then shifts to the resisting party to prove a ground for denial. (*Ibid*.)

"Federal law is wholly congruent with these principles. As the United States Supreme Court observed two decades ago: 'Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," [citation] we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the

[15] Although Defendant does not argue that it is petitioning the Court to compel arbitration under the Federal Arbitration Act ("FAA"), the Court discusses federal law because the arbitration agreement itself provides that the FAA applies.

agreement.' (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 294 [].) 'For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' (*United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 582.)" (*Fleming, supra,* 88 Cal.App.5th at pp. 19-20.) "The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).) "If no agreement to arbitrate was formed, then there is no basis upon which to compel arbitration." (*Ahlstrom v. DHI Mortgage Co., L.P.* (9th Cir. 2021) 21 F.4th 631, 635.)

Under the FAA, the Court must grant a motion to compel arbitration if any suit is brought upon "any issue referable to arbitration under an agreement for such arbitration" (9 U.S.C. § 3), subject to "such grounds as exist at law or in equity for the revocation of any contract…" (9 U.S.C. § 2). "The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability." (*Pinnacle, supra,* 55 Cal.4th at p. 236.)

"In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle, supra*, 55 Cal.4th at p. 236.)

III. Merits of the Motion

A. Existence of an Agreement to Arbitrate

The first step in ruling on a petition to compel arbitration is to determine whether an arbitration agreement exists. Plaintiff appears to assert that he did not sign an arbitration agreement. But, this is contradicted by Plaintiff's other arguments regarding procedural unconscionability. In any event, SIS has shown the existence of a signed agreement to arbitrate.

Here, SIS has provided the declaration of its Director of Human Resources, in which the declarant states that newly hired employees are provided with a unique link to onboarding documents and assigned a password that only the employee can change. (Declaration of Julia Prybyla in Support of Defendant Security Industry Specialists' Motion to Compel Arbitration and Dismiss Civil Proceedings, ("Prybyla Decl.") ¶ 9(a).) That link and password are used to sign the onboarding documents after the employees has verified his or her personal identifying information. (Prybyla Decl. ¶ 9(b), 9(c)(ii).) Plaintiff worked for SIS at two separate times and signed the arbitration agreement electronically using the above process both times. On August 12, 2012, Plaintiff signed the agreement and, on August 27, 2012, SIS's agent countersigned. (Prybyla Decl. ¶ 11.) Plaintiff signed again on June 29, 2020 and SIS's agent signed on July 8, 2020. (Prybyla Decl. ¶ 12.)

Both the 2012 and the 2020 agreements provide

> IN CONSIDERATION AND AS A MATERIAL CONDITION OF THE EMPLOYMENT AND CONTINUATION OF EMPLOYMENT OF THE

EMPLOYEE AS OF THE DATE THIS EMPLOYMENT DISPUTE ARBITRATION PROCEDURE BECOMES EFFECTIVE, THE EMPLOYEE AND THE EMPLOYER (as defined in Section 1.3 below) (each a 'Party' or 'Employee' and 'Employer,' and collectively the 'Parties') AGREE TO SUBMIT FOR RESOLUTION PURSUANT TO THIS EMPLOYMENT DISPUTE ARBITRATION PROCEDURE ANY DISPUTE (as defined in Section 1.2 below)[.]

Plaintiff asserts that he was forced to arbitrate without knowing more about what that entailed and, therefore, no valid agreement was formed. He maintains that this case is similar to *Nelson v. Cyprus Bagdad Copper Corporation* (9th Cir. 1997) 119 F.3d 756, 762 (*Nelson*) and *Prudential Insurance Co. of America v. Justine Lai* (9th Cir. 1997) 42 F.3d 1299, 1305 (*Lai*), in which the Ninth Circuit Court of Appeals held that the protections of certain civil rights laws were not waived in favor of arbitration by the fact that the plaintiffs had signed forms containing arbitration agreements. Each Court held that a waiver of these rights must be knowing. Even assuming these cases remain good law and that the knowing waiver standard applies to the claims at issue here, these cases are easily distinguishable. (See *Zoller v. GCA Advisors, LLC* (9th Cir. 2021) 993 F.3d 1198, 1203.) Here, Plaintiff signed the arbitration agreement itself, not some other document containing and concealing the arbitration agreement and the terms of the arbitration agreement in this case clearly and expressly encompass all employment related disputes, thereby making it clear that Plaintiff was waiving the right to judicial determination of his employment related claims. (See *id*. at p. 1204 [distinguishing *Nelson* and *Lai* on these and other grounds].)

The Court finds that Plaintiff signed an agreement to arbitrate the claims raised in the instant case.

B. Unconscionability

Plaintiff contends that the arbitration agreements are unenforceable because they are unconscionable. "A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree and the contract contains terms that are unreasonably favorable to the other party. [Citation.]" (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125 (*OTO*).) Unconscionability has both procedural and substantive elements. (*Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*); *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1539 (*Jones*).) Both must appear for a court to invalidate a contract or one of its individual terms, (*Armendariz, supra,* 24 Cal.4th at p. 114; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174 (*Mercuro*)), but they need not be present in the same degree: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa" (*Armendariz, supra*, 24 Cal.4th at p. 114.)

i. Procedural Unconscionability

Procedural unconscionability focuses on the elements of oppression and surprise. (*Armendariz, supra*, 24 Cal.4th at p. 114.) "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice," while "[s]urprise involves the extent to which the terms of the bargain are hidden in a prolix printed

form drafted by a party is a superior bargaining position." (*Davis v. TWC Dealer Group, Inc.* (2019) 41 Cal.App.5th 662, 671 (*Davis*), internal citation and quotation marks omitted.)

Here, Plaintiff argues that the agreement is procedurally unconscionable because it was offered on a take it or leave it basis as a mandatory condition of employment.

> An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power on a take-it-or-leave-it basis. [Citations.] Arbitration contracts imposed as a condition of employment are typically adhesive [citations], and the agreement here is no exception. The pertinent question, then, is whether circumstances of the contract's formation created such oppression or surprise that closer scrutiny of its overall fairness is required. [Citations.] Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. [Citations.]

(*OTO, supra*, 8 Cal.5th at p. 126, internal quotation marks omitted.)

Plaintiff has provided his own declaration, in which he states

> Although I do not recall the exact paperwork I viewed and signed, I was informed I had to electronically sign and agree to all of the documents to have the job, and so I did. And in fact, SIS waited for me to sign the paperwork before I could begin my employment. There was not 'Action-Optional' column which might indicate that I could have chosen not to accept or electronically sign a document. No one from SIS told me that I did not have to electronically sign the alleged arbitration agreement attached as Exhibit 1,[16] or that I had the option to not sign or accept any of my onboarding documents. Similarly, nothing on their electronic system indicated that I did not have to electronically sign the arbitration agreement, or that I had the option to not sign or accept any of my onboarding documents in order to complete them.

(Declaration of Jason Card in Support of Plaintiff's Opposition to Defendant Security Industry Specialists, Inc.'s Motion to Compel Arbitration ("Card Decl."), ¶ 2.)

The arbitration agreement and paperwork signed contemporaneously with the agreement generally support the view that agreeing to be bound by the arbitration agreement was a mandatory condition of employment. Both versions of the agreement contains the following clause: "IN CONSIDERATION AND AS A MATERIAL CONDITION OF THE EMPLOYMENT AND CONTINUATION OF EMPLOYMENT OF THE EMPLOYEE" the employee and employer agree to arbitrate their disputes.

Additionally, each version of the agreement contains a page with the header "AGREEMENT ON ALTERNATIVE DISPUTE RESOLUTION" which includes the

[16] There is nothing attached to the declaration. However, Plaintiff does not appear to challenge the versions of the agreements provided by SIS.

following sentence, "However, I understand that I will not be offered employment, or my employment will not be continued, if this Agreement is not signed and returned by me within ten (10) business days of its receipt." These provisions clearly express that Plaintiff would not be allowed to commence or continue employment with SIS if he refused to sign the arbitration agreement.

SIS argues that the agreements are not procedurally unconscionable because they allow the employee to opt out of the agreement. (See *Gentry v. Superior Court* (2007) 42 Cal.4th 443, 470 (*Gentry*) ["freedom to choose whether or not to enter a contract of adhesion is a factor weighing against a finding of procedural unconscionability"], abrogated on another ground as stated in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal. 4th 348 (*Iskanian*).) Section 4.1 of the 2012 and 2020 versions of the agreement each provide, "A new Employee is bound by this Employment Dispute Arbitration Procedure as of the date of its receipt by that Employee, unless that Employee notifies the Employer, in writing, within ten (10) business days of such receipt, that he/ she elects to opt out of this Employment Dispute Arbitration Procedure."

It has been held that "an opt-out provision does not insulate an arbitration agreement from a finding of procedural unconscionability[.]" (*Swain v. LaserAway Medical Group, Inc.* (2020) 57 Cal.App.5th 59, 69.) Here, the Court finds that a low amount of procedural unconscionability remains despite the ability to opt out because the opt-out provision is unclear as to whether an employee who chose to opt out could remain employed by SIS and the portions of the agreement indicating that it is a mandatory condition of employment strongly suggest otherwise.

ii. Substantive Unconscionability

Plaintiff contends that the arbitration agreements are substantively unconscionable because (1) the arbitration requirement applies only to claims that would be brought by an employee, (2) Plaintiff's assent to the agreement was obtained by economic duress, (3) it required him to waive class and PAGA representative actions, and (4) it puts him at a higher risk of having to pay costs and fees than he would face in court.

Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create "overly harsh" or "one-sided results" (*Armendariz, supra*, 24 Cal.4th at p. 114, internal citation and quotations omitted), that is, whether they reallocate risks in an objectively unreasonable or unexpected manner, (*Jones, supra*, 112 Cal.App.4th at p. 1539). "In assessing substantive unconscionability, the paramount consideration is mutuality." (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 241, internal citation and quotation marks omitted.) Arbitration agreements are substantively unconscionable where they lack a "modicum of bilaterality," "without at least some reasonable justification for such one-sidedness based on 'business realities.' " (*Armendariz, supra*, 24 Cal.4th at p. 117.)

"Substantive unconscionability examines the fairness of a contract's terms. This analysis ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided. All of these formulations point to the central idea that the unconscionability doctrine is concerned not with a simple old-fashioned bad bargain, but with

terms that are unreasonably favorable to the more powerful party." (*OTO, supra*, 8 Cal.5th at pp. 129-130, internal citation and quotations omitted.)

Plaintiff asserts that the agreements require arbitration of claims that would usually be brought by an employee while excluding from arbitration those claims that would typically be brought by an employer. Specifically, Plaintiff points to a portion of the agreements that states, "I understand that any employment-related dispute that I may have with my Employer, including, but not limited to, any dispute concerning my application for employment and my employment and its termination if I am hired, must be resolved exclusively through the Company's Employment Dispute Arbitration Procedure."

"Although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope, . . . doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself. " (*Armendariz, supra*, 24 Cal.4th at p. 118.)

Plaintiff relies on *Mercuro, supra*, 96 Cal.App.4th at pp. 175-176 in which the Court of Appeal reasoned

> The arbitration agreement specifically covers claims for breach of express or implied contracts or covenants, tort claims, claims of discrimination based on race, sex, age or disability, and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation or public policy. Thus the agreement compels arbitration of the claims employees are most likely to bring against [employer] Countrywide. On the other hand, the agreement specifically excludes 'claims for injunctive and/or other equitable relief for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information . . . .' Thus the agreement exempts from arbitration the claims Countrywide is most likely to bring against its employees.

The arbitration agreements in this case are not similar to that in *Mercuro*. Section 1.1 of the agreements provides that all disputes are subject to arbitration and section 1.2 provides that the term "dispute" includes claims of the employer against the employee. Section 1.2 of the agreement also provides that certain types of disagreement are excluded from the term "dispute" but these exclusions are not limited to claims brought by employers. That section excludes from the term "dispute" "statutory claims for worker's compensation or unemployment insurance, other claims that are expressly excluded by statute, and claims that are expressly required to be arbitrated under a different procedure pursuant to the terms of an employee benefit plan or the rules of a national securities exchange (e.g., NASD; NYSE)." Here, the claims that are excluded from arbitration are not the type that would only be raised by an employer and both the employer and the employee are bound by the arbitration agreements. Accordingly, the Court finds that the agreement is not substantively unconscionable on this basis.

Plaintiff also contends that he signed the arbitration agreements under economic duress. He declares that he needed the income to maintain his livelihood and obligations to his wife and child. (Card Decl., ¶ 4.) He states that, in 2020, he had a three year old child and "prior to

and during" his employment with SIS, he had credit card debt. (*Ibid.*) But, as SIS correctly points out, Plaintiff has not shown that he could not obtain employment elsewhere.

As stated in *CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644, on which Plaintiff relies,

> The doctrine of 'economic duress' can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. [Citation.] The party subjected to the coercive act, and having no reasonable alternative, can then plead 'economic duress' to avoid the contract.

But, "[w]hen a party pleads economic duress, that party must have had no 'reasonable alternative' to the action it now seeks to avoid . . . If a reasonable alternative was available, and there hence was no compelling necessity to submit to the coercive demands, economic duress cannot be established." (*Ibid*.)

Here, Plaintiff has made no attempt to show that no reasonable alternative was available. In fact, he states that he applied with SIS because he believed it would be a good fit in addition to the fact that he needed a job to support himself. (Card Decl., ¶ 4.) On this record, the Court cannot find economic duress as many, if not most, job seekers look for work in order to make their livelihoods and this fact, by itself, cannot support a finding of economic duress or it would be present in nearly every employment contract.

Plaintiff further asserts that the arbitration agreements are substantively unconscionable because they contain waivers of his right to file class action and PAGA lawsuits. Plaintiff specifically objects to a portion of section 2.7 of the arbitration agreements stating

> Employer and the individual Employee will not assert class action or representative action claims against the other in arbitration or otherwise; and Employer and the individual Employee shall only submit their own, individual claims in arbitration and will not seek to represent the interests of any other person, or to have their interests represented by a class representative.

Plaintiff also complains that section 2.7 of the agreements states that he cannot be a part of any claims or actions involving anyone other than himself.

SIS counters that class action waivers are routinely enforced by the California courts and that the PAGA waiver argument is irrelevant to the instant action and PAGA waiver in this case is not a blanket waiver prohibited by relevant case law. To the extent Plaintiff is asserting that a class action waiver is substantively unconscionable, that argument must be rejected. (See *Iskanian, supra*, 59 Cal.4th at pp. 364, 366 [*Gentry* rule "whereby a class waiver would be invalid if it meant a de facto waiver of rights and if the arbitration agreement failed to provide suitable alternative means for vindicating employee rights" preempted by FAA"]; *Evenskaas v. California Transit, Inc.* (2022) 81 Cal.App.5th 285, 298 [*Gentry* rule preempted by FAA]; *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___ [213 L. Ed. 2d 179, 142 S.Ct. at p. 1918] (*Viking River*) ["'a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so'"].)

With respect to the PAGA waiver, SIS's initial argument appears to be that the PAGA waiver has no bearing on this case because Plaintiff does not assert a PAGA claim in docket 22CV405652. In *Najarro v. Superior Court* (2021) 70 Cal.App.5th 871, 882, the Court of Appeal found a PAGA waiver rendered an arbitration agreement unconscionable despite the fact that no PAGA claim had been raised. It held that the fact that no PAGA claim was asserted was "irrelevant." (*Ibid.*) Accordingly, and because Plaintiff raises a PAGA claim against SIS in docket 23CV410212, the Court will reach the merits of Plaintiff's argument that the arbitration agreements are unconscionable because they contain a PAGA waiver.

In *Davis*, the court explained that

> [T]he presence of provisions that: (1) 'the arbitrator will hear only … individual claims and does not have the authority to fashion a proceeding as a class or collective action …', and (2) 'the Company has the right to defeat any attempt by [the Davises] to file or join other employees in a class, collective or joint action or arbitration … .' Such broad language could be read to preclude Labor Code Private Attorneys General Act (PAGA; Lab. Code, § 2698 et seq.) representative actions, a violation of public policy.

(*Davis, supra*, 41 Cal.App.5th at p. 675.) The *Davis* court based its holding on *Iskanian, supra,* 59 Cal.4th at p. 360, in which the California Supreme Court held that "an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy."

The United States Supreme Court recently partially overruled *Iskanian* in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___ [213 L. Ed. 2d 179, 142 S.Ct. 1906] (*Viking River*). As explained in *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, 1117,

> In *Iskanian,* we held that a predispute categorical waiver of the right to bring a PAGA action is unenforceable (*Iskanian, supra,* 59 Cal.4th at pp. 382-383) — a rule that *Viking River* left undisturbed (see *Viking River, supra,* 596 U.S. at p. ___ [142 S.Ct. at pp. 1922–1923, 1924–1925] [the FAA does not preempt this rule]).

Thus, the prohibition against categorical predispute PAGA waivers remains good law. In *Viking River,* the United States Supreme Court stated: "The agreement between Viking and Moriana purported to waive 'representative' PAGA claims. Under *Iskanian,* this provision was invalid if construed as a wholesale waiver of PAGA claims. And under our holding, that aspect of *Iskanian* is not preempted by the FAA, so the agreement remains invalid insofar as it is interpreted in that manner." (*Viking River, supra,* 596 U.S. at p. ___ [142 S.Ct. at pp. 1924-1925].)

SIS argues that the PAGA waiver in this case is not the type of wholesale PAGA waiver invalidated in other cases because it does not prevent PAGA claims entirely. It asserts that what is prohibited by the agreements is only the representative portion of the PAGA claim.

In *Martinez-Gonzalez v. Elkhorn Packing Co., LLC* (N.D.Cal. 2022) 635 F. Supp. 3d 883, 898, on which SIS relies, the plaintiff contended that the following provision of an arbitration agreement was an improper "wholesale" waiver of the right to bring a PAGA

action: "To the extent permitted by law, the Company and I agree to waive any right to file any class or representative claims addressing wages or other terms or conditions of employment in any forum." The Court held that the provision was not a wholesale waiver because it only required the plaintiff to waive representative claims.

The Court reasoned

> In *Viking River*, the Supreme Court explained that claims under PAGA can be said to be 'representative' claims in two different ways: first, a PAGA claim is always representative, even when pertaining only to allegations of misconduct suffered by an individual, because a PAGA plaintiff always represents the State of California. *Id*. at 1916. Second, some PAGA actions may be 'representative' in the sense that they can address violations suffered by a number of employees beyond just the plaintiff. *Id.* In recognizing this distinction in the 'representative' nature of PAGA, the Supreme Court held that, notwithstanding the plaintiff's inherent role as a representative of the state, PAGA claims can be split into 'individual' claims and non-individual 'representative' claims, thereby reversing the rule from the California Supreme Court in *Iskanian v. CLS Transportation* holding that PAGA claims are indivisible and may not proceed as separate individual and representative actions. *Id.* at 1924 ('We hold that the FAA preempts the rule of Iskanian insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate.'). The Supreme Court held that an arbitration agreement which compels individual claims to arbitration is enforceable as to the individual portion of a PAGA claim. *Id.* at 1924-25 ('The agreement between Viking and Moriana purported to waive "representative" PAGA claims . . . But the severability clause in the agreement provides that if the waiver provision is invalid in some respect, any "portion" of the waiver that remains valid must still be "enforced in arbitration." Based on this clause, Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim.').

(*Martinez-Gonzalez v. Elkhorn Packing Co., LLC*, *supra*, 635 F. Supp. 3d at p. 898.) Thus, SIS asserts that the fact that only an individual PAGA claim must proceed to arbitration undercuts the idea that the waiver is a prohibited "wholesale waiver."

But, as *Martinez-Gonzalez* acknowledges, the representative portion of the PAGA claim (representative in the sense of addressing violations suffered by other employees) may not be waived under *Iskanian* as left intact by *Viking River*. (See *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, 1118.) Thus, the agreement, which prevents either party from asserting "representative action claims against the other in arbitration or otherwise" is substantively unconscionable to the extent it would prevent Plaintiff from bringing a PAGA representative action.

Finally, Plaintiff argues that the arbitration agreements put him at a higher risk of having to pay fees and costs than he would face in court. He contends that under many wage and hour laws, a prevailing defendant is not entitled to fees as a prevailing party. Further, he asserts that the provision for fees in Code of Civil Procedure section 128.5 and for sanctions in

the Civil Discovery Act, and Civil Code section 1671 all would not apply to the arbitration contemplated in the agreements.

Plaintiff challenges section 20.2 of the agreements, which states, "The Arbitrator may award either Party its reasonable attorneys' fees and costs, including reasonable expenses associated with production of witnesses or proof, upon a finding that the other Party (a) engaged in unreasonable delay, (b) failed to cooperate in discovery, or (c) failed to comply with requirements of confidentiality."

" '[A]n arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees.' (*Armendariz, supra*, 24 Cal.4th at p. 103.) Further, an arbitration agreement 'cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.' (*Id.* at pp. 110-111; accord, *Patterson v. Superior Court* (2021) 70 Cal.App.5th 473, 488 [].)" (*Mills v. Facility Solutions Group, Inc.* (2022) 84 Cal.App.5th 1035, 1055.)

SIS asserts that the applicable standards governing attorney fees and costs in the arbitration agreements are the same as those governing the sanctions statutes Plaintiff cites. But, SIS cites to no authority for this proposition and the language in the arbitration agreement does not exactly track the language in the statutes. The Court finds that enforcing section 20.2 of the agreements may cause Plaintiff to pay fees and costs that he would not have to pay in court. Accordingly, it finds that section 20.2 is substantively unconscionable. However, as discussed below, it is easily severed.

C. Severability

As discussed above, the Court has found certain provisions of the arbitration agreements unconscionable. SIS contends that these provisions can be severed pursuant to the arbitration agreements' severability provision, section 25.2, which states

> Should any provision of this Employment Dispute Arbitration Procedure be held invalid, illegal or unenforceable, it shall be deemed to be modified so that its purpose can lawfully be effectuated and the balance of this Employment Dispute Arbitration Procedure shall remain in full force and effect. The provisions of this Employment Dispute Arbitration Procedure shall be deemed severable and the invalidity or enforceability of any provision shall not affect the validity or enforceability of the other provisions hereof.

Plaintiff maintains that the unconscionable portions of the agreements are not severable due to the sheer volume of such provisions. The Court finds that the two unconscionable provisions are severable.

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

> " 'In deciding whether to sever terms rather than to preclude enforcement of the provision altogether, the overarching inquiry is whether the interests of justice would be furthered by severance; the strong preference is to sever unless the

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

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

While *De Leon* and other authorities state that an agreement is "permeated by unconscionability" where it contains "more than one unconscionable provision," this is not a hard and fast rule. (See *Lange v. Monster Energy Co.* (2020) 46 Cal.App.5th 436, 454 ["[t]hat an agreement can be considered permeated by unconscionability if it contains more than one unlawful provision does not compel the conclusion that it must be so"]; see also *Murrey v. Superior Court* (2023) 87 Cal.App.5th 1223, 1255 ["[t]here is no magic number of unconscionable provisions"].)

The Court finds that section 20.2 of the arbitration agreements must be severed. The Court further finds that the portions of section 2.7 of the arbitration agreements referring to "representative actions" must also be severed. These provisions are ordered severed and may not be enforced. With the offending portions of the agreement severed, the Court finds an enforceable agreement to arbitrate.

D. Application of the FAA and Labor Code section 229

Plaintiff contends that SIS has failed to show that the FAA is applicable to the agreements at issue. Specifically, he asserts that, although Apple may be a company engaged in interstate commerce, his employment, which is the subject of the arbitration agreement does not involve interstate commerce. Plaintiff also asserts that he may bring his claims in the superior court regardless of the existence of an agreement to arbitrate under Labor Code section 229, which provides, "[a]ctions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate." But, as SIS correctly points out both the United States Supreme Court and at least one California Court of Appeal have concluded that Labor Code section 229 is preempted by the FAA. (See *Perry v. Thomas* (1987) 482 U.S. 483, 491; *Nixon v. AmeriHome Mortgage Co., LLC* (2021) 67 Cal.App.5th 934, 947.) Where the FAA does not apply, the Court of Appeal has held that Labor Code section 229 is not preempted. (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 687.)

"A party seeking to enforce an arbitration agreement has the burden of showing FAA preemption." (*Lane v. Francis Capital Management LLC*, supra, 224 Cal.App.4th at p. 687.) SIS points out that the arbitration agreements state that any dispute proceeding according to its terms "is deemed to be an arbitration proceeding subject to the Federal Arbitration Act, 9 U.S.C. §§1-16, if applicable, to the exclusion of any state law inconsistent therewith or, if the FAA is not applicable, to the law of the state of venue." Thus, the agreements are expressly governed by the FAA.

Plaintiff asserts that the statement in the agreements that the FAA governs is not dispositive, Ms. Prybyla's declaration establishes that the Agreement involved interstate commerce.

> The FAA applies to any contract evidencing a transaction involving commerce that contains an arbitration provision. [Citations.] [T]he phrase involving commerce in the FAA is the functional equivalent of the term affecting commerce, which is a term of art that ordinarily signals the broadest permissible exercise of Congress's commerce clause power. [Citations.] . . .
> Applying these principles, the United States Supreme Court has identified three categories of activity that Congress may regulate under the commerce power: (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce and persons or things in interstate commerce, and (3) those activities having a substantial relation to interstate commerce. [Citations.]

(*Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 238, citations and quotation marks omitted.)

Here, SIS maintains offices in multiple states and provides security personnel both inside and outside of California. (Prybyla Decl., ¶ 2.) SIS conducts business with Apple in locations in many states and even in Brazil. (Prybyla Decl., ¶ 3.) SIS employees at Apple retail locations, such as Plaintiff, assist with monitoring merchandise shipments and controlling property movement. (Prybyla Decl., ¶ 5.) Thus, SIS has shown that the agreements explicitly provide that they are governed by the FAA and that the agreements involve interstate commerce. The FAA governs and Labor Code section 229 is preempted.

E. Dismissal of the Class Claims

Plaintiff does not appear to dispute that the class claims should be dismissed if the motion is granted. Multiple appellate courts have held that arbitration provisions with language analogous to the operative language here do not permit class arbitration, and a trial court should dismiss such claims and compel individual arbitration upon motion by the defendant. (See *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, disapproved of on another ground by *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233; *Nelsen v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115.) Accordingly, the Court will dismiss the class claims.

F. The PAGA Claim

SIS requests that the Court order the individual portion of Plaintiff's PAGA claim to arbitration and stay the representative portion of the PAGA claim. Pursuant to *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, the Court will grant this request.

CONCLUSION

The motion to compel arbitration is GRANTED. Plaintiff's class claims are ordered dismissed, and the parties are ordered to arbitration of Plaintiff's individual claims in docket 22CV405652. In docket 23CV410212, the parties are ordered to arbitration of the individual portion of the PAGA claim. The representative portion of the PAGA claim and all proceedings are ordered STAYED pending arbitration.

***

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 7

Case Name: *Lovely Cacananta v. Samaritan, LLC*
Case No.: 19CV349850

This is a putative class and Private Attorneys General Act ("PAGA") action alleging wage statement violations against Defendant Samaritan, LLC. Before the Court is Plaintiff's motion for class certification, which Defendant opposes. As discussed below, the Court GRANTS the motion.

X. BACKGROUND

A. Related Case

In August 2017, another Samaritan employee, Jennifer Richert, filed a similar action related to her wage statements, *Richert v. Samaritan, LLC* (Super. Ct. Santa Clara County, No. 17CV314186) (*Richert*). Ms. Richert is represented by the same counsel who represent Plaintiff here. She alleges that, during pay periods when she received overtime wages, her wage statements failed to identify the accurate total hours worked as required by the Labor Code. Based on these allegations, she brings (1) a putative class claim for violation of Labor Code section 226 ("Section 226") and (2) a claim for PAGA penalties.

In June 2020, the Court (Judge Walsh) certified the *Richert* class of "[a]ll current and former California non-exempt employees, who were paid overtime wages by [Samaritan], at any time between August 8, 2016 to the present." The matter proceeded to a bench trial on liability, which was held on August 1 and 2, 2022. On August 28, 2023, the Court issued a Final Statement of Decision Following Phase 1 of Trial finding against Ms. Richert and in favor of Defendant on liability on her Section 226, subdivision (a)(2) and (9) claims, both directly for her class action claim and as a predicate for liability under PAGA. And on September 15, the Court issued a final judgment in *Richert*.

B. Initial Complaint in this Action

The initial complaint ("Complaint") in this action was filed on July 1, 2019 with Lovely Cacananta as the named plaintiff. Ms. Cacananta alleged that she had worked for Defendant as an hourly, non-exempt employee since May 2018 and during that time, she and other employees were not provided with legally compliant wage statements. Specifically, when shift differential wages were paid, the wage statements failed to accurately identify the total hours worked by the employee during the pay period. (*Ibid.*) In this situation, the hours displayed on the wage statements did not equal the actual total hours worked during the pay period. (*Ibid.*) Like the plaintiff in *Richert*, Ms. Cacananta brought (1) a putative class claim for violation of Section 226 and (2) a claim for PAGA penalties.

In November 2022, Ms. Cacananta moved to certify the following class:

> all current and former California non-exempt employees of Defendant Samaritan, LLC who were paid shift differential wages at any time between July 1, 2018, through the present.

After holding oral argument, the Court denied Ms. Cacananta's motion after determining that her testimony in another case established that her claims were not typical of those advanced in the Complaint. Plaintiff later moved for, and was granted, leave to amend the Complaint to add Justin Whitehouse as a named plaintiff. Mr. Whitehouse now moves for certification of the same class.

XI. MOTION FOR CLASS CERTIFICATION

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. Requests for Judicial Notice

Both parties submit requests for judicial notice in connection with their papers.

First, Plaintiff requests that the Court take judicial notice of the Division of Labor Standards Enforcement ("DLSE") opinion letter No. 2002.05.17 (May 17, 2002) (Exhibit 1). This request is a proper subject of judicial notice pursuant to Evidence Code section 452, subdivisions (c) and (h) and is therefore GRANTED. (See also *Morgan v. United Retail Inc.* (2010) 186 Cal.App.4th 1136, 1147 [considering DLSE exemplar wage statement; "[a]lthough

not binding on a court, the DLSE's construction of a statute, whether embodied in a formal rule or a less formal representation, is entitled to consideration and respect"].)

In connection with its opposition, Defendant requests that the Court take judicial notice of the following: various materials from *Richert*, including the First Amended Complaint (Exhibit 1), the Court's ruling on Defendant's Renewed Motion for Summary Judgment (Exhibit 2), the Court's April 17, 2023 "Proposed/Tentative Statement of Decision Following Phase I Court Trial" (Exhibit 5) and Ms. Richert's Motion for Class Certification (Exhibit 7); plaintiff's paystub in *General Atomics v. Superior Court* (2021) 64 Cal.App.5th 987 (Exhibit 3); the DLSE exemplar wage statement (Exhibit 4); and the Court's November 4, 2022 ruling in this action on Plaintiff's prior Motion for Class Certification (Exhibit 6). Defendant also submits a supplemental request for the Court to take judicial notice of the Final Statement of Decision Following Phase 1 of Trial issued by this Court in *Richert*.

Because Defendant is relying on the *Richert* items to address the substantive merits of Plaintiff's claim, which the Court does not believe it can properly do on this motion, the Court concludes that these items are not relevant to the disposition of the motion and therefore declines to take judicial notice of them. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [stating that judicial notice is limited to relevant matters].) For the same reason it will not take judicial notice of the paystub in *General Atomics v. Superior Court* (2021) 64 Cal.App.5th 987. The Court will, however, take judicial notice of its ruling on Plaintiff's prior motion for certification in this action and the DLSE exemplar wage statement. Thus, Defendant's request for judicial notice is GRANTED as to Exhibits 4 and 5 and otherwise DENIED.

C. Effect of the *Richert* Decision

In the introductory section of its opposition, Defendant suggests that when the Court's decision in *Richert* becomes final, Plaintiff will be bound by the principles of res judicata and collateral estoppel in this action, which it characterizes as "largely duplicative" of *Richert*. It continues that the Court decision in *Richert* makes clear that Plaintiff's theory of liability is untenable because the use of the term "Productv" on the paystubs provided to proposed class members is not confusing and thus complies with Section 226.

The Court now has issued a final judgment in *Richert*. However, the parties have not fully briefed the issue/claim preclusion impacts of *Richert*. And if the plaintiff in *Richert* files an appeal, the *Richert* judgment will not be "final" for issue and claim preclusion purposes. "[A] judgment that is on appeal is not final for purposes of applying the doctrines of claim and issue preclusion." (*Boblitt v. Boblitt* (2010) 190 Cal.App.4th 603, 606.) The Court asks the parties to come to the October 5, 2023 hearing to discuss these issues.

Second, as for whether Plaintiff has asserted a viable theory of liability, the Court believes this is a question that reaches the *merits* of Plaintiff's claims that cannot appropriately be considered at this juncture. As the Court acknowledged previously, while courts generally will not consider the merits of a claim on a motion for class certification because the certification question is essentially a procedural one, "[w]hen evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023-1024 (*Brinker*).) However, "[s]uch inquiries are *closely* circumscribed" (*id*. at 1024), and "resolution of disputes over the merits of a case generally must be postponed until *after* class

certification has been decided, with the court assuming for the purposes of the certification motion that any claims have merit" (*id*. at 2023, emphasis in original).

Here, the certifiability of the proposed class- all current and former California non-exempt employees of Defendant Samaritan, LLC who were paid shift differential wages at any time between July 1, 2018, through the present- is *not* dependent on resolution of the threshold legal dispute between the parties of whether the wage statements issued to these individuals violated Section 226. It would be entirely premature for the Court to resolve this dispute now, and doing so could, as the Supreme Court cautioned in *Brinker*, "place[] defendant in jeopardy of multiple class actions, with one after another dismissed until one trial court concludes there *is* some basis for liability and in that case approves class certification." (*Brinker*, 53 Cal.4th at 1034.) It is in fact "far better from a fairness perspective to determine class certification independent of threshold questions disposing of the merits, and thus permit defendants who prevail on those merits, equally with those who lose on the merits, to obtain the preclusive benefits of such victories against an *entire class* and not just a named plaintiff." (*Ibid*., citing *Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1078, 1069.)

Brinker's progeny are in accord on this issue. (See, e.g., *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 232-234 [concluding that lawfulness of employer's policy requiring employees to sign on-duty meal break agreement could be determined on classwide basis and explaining "[a]s *Brinker* instructs, we do not determine at this stage whether [the defendant]'s policy of requiring on-duty meal breaks violates the law. Instead, the question we address is whether [the defendant]'s legal liability under the theory advanced by Plaintiffs can be determined by facts common to all class members …."]; *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726-727 [reversing trial court's order denying certification based on the acceptance of employer's position that applicable labor law did not require it to adopt policy as alleged by plaintiff because "[employer's] assertion that it was not required to [to do so] goes to the merits of the parties' dispute. The question of certification, however, is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious. Indeed, *Brinker* emphasized that, whenever possible, courts should 'determine class certification independent of threshold questions disposing of the merits.'"]; *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1150, 1154 [concluding that employer's lengthy argument on the merits (i.e., that the law did not require it to provide a written meal or rest break policy) did not alter analysis of whether the plaintiffs' *theory* of liability was amendable to class treatment: "[First, the] plaintiffs' allegations concern the absence of any policy, not merely a written policy. Moreover, as *Brinker* instructs, a court should not address the merits of a claim in examining a class certification motion unless necessary. It is not necessary for this court to address whether a written meal and/or rest break policy is legally required."].)

Thus, the only for consideration for the Court with regard to Plaintiff's theory of liability on this motion is whether it is amendable to class treatment, and *not* its viability. Accordingly, the Court will not address Defendant's contention that the wage statements at issue complied with Section 226.

D. 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, as the Court concluded in its order on Plaintiff's prior motion for class certification, members of the class are easily identifiable from Defendant's records. The proposed class is comprised of 2,814 individuals and is appropriately defined based on objective characteristics. Thus, the Court again finds that the class is numerous and ascertainable.

E. 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.) Samaritan contends, as it did in opposition to the prior motion for class certification, that none of these factors are satisfied here.[17]

1. *Predominant Questions of Law or Fact*

[17] Defendant additionally suggests that class action for the claims asserted here is not superior and would require mini-trials and could have been pursued by Ms. Richert in that action. The Court does not find these assertions compelling because one, Defendant offers no authority for the proposition that a class action is not superior because the claims asserted therein could have been asserted in another action (i.e., *Richert*) and two, for the reasons discussed below, the Court believes that common questions predominate. Class treatment remains superior to adjudicate the wage claims of 2,814 proposed class members.

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.)

In its order on the previous motion for consideration, the Court observed that putative class members received substantially identical wage statements, and liability can be determined based on facts common to all class members. (*Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1307 [holding with respect to a Section 226 claim that "[a] common legal issue predominates the claim, and it makes no sense to resolve it in a piecemeal fashion"]; see also *Wilson v. The La Jolla Group* (2021) 61 Cal.App.5th 897, 920 [Section 226 "establishes a uniform standard of liability" generally amenable to class treatment].) This observation still holds true now. Defendant insists that this element of class certification is not met because Plaintiff has not submitted evidence of class-wide injury and in fact, the evidence (including the testimony of Ms. Richert) establishes that numerous employees who were paid shift differentials fully understood the total hours reported on their pay stubs and have never suffered any injury of any kind due to information contained in or not contained in their pay stubs. Thus, Samaritan argues, individualized inquiries are necessary to address the issue of injury.

But as Plaintiff correctly responds, Section 226's injury requirement is minimal and analyzed under an objective, reasonable person standard, which does not require an individualized showing harm. (See Lab. Code, § 226, subd. (e) [an employee suffers injury if he or she cannot "promptly and easily determine" the total hours worked during a pay period, meaning "a reasonable person would [not] be able to readily ascertain the information without reference to other documents or information"]; *Lubin v. Wackenhut Corporation* (2016) 5 Cal.App.5th 926, 959–960 [trial court erred in declining to certify a wage statement class due to the injury requirement].) And as the Court explained previously, while the employee declarations that Defendant submit may bear on the merits of the ultimate issue of whether a reasonable person could understand the subject wage statements, this does not transform the issue into an individualized one.[18]

Finally, Samaritan again insists that the issue of whether any wage statement violations were "knowing and intentional" on its part raises individual issues. The Court sees no reason

[18] As in the preceding motion for certification, Plaintiff objects to the twenty-four employee declarations submitted by Defendant in support of its opposition. And again, while the Court notes these objections, it need not resolve them as the declarations ultimately have no bearing on its ruling on this motion. Defendant also objects to a portion of Mr. Whitehouse's declaration; this declaration is overruled.

to depart from its prior rejection of this argument and conclusion that Defendant's wage statements appear to have been issued pursuant to general policies or decisions that impacted the class members in the same manner, and Defendant's intent in adopting those policies or decisions can be determined on a classwide basis.

In sum, Plaintiff's wage statement theory is straightforward and does not raise individualized issues. Common issues predominate to this claim.

2. *Adequacy and Typicality*

"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 fact that a class representative does not personally incur all of the damages suffered by each different class member does not necessarily preclude the representative from providing adequate representation to the class. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238, disapproved of on another ground by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.) Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status. (*Ibid.*)

"Although the questions whether a plaintiff has claims typical of the class and will be able to adequately represent the class members are related, they are not synonymous." (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375 (*Martinez*).) "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." (*Ibid.*, quoting *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.)

While the Court found in its order on the prior motion for certification that Plaintiff had sufficiently demonstrated adequacy of representation, Ms. Cacananta was nevertheless determined by the Court to be an inadequate class representative because she did not possess claims that were typical of the proposed class. The Court based this conclusion on Ms. Cacananta having testified consistently in the *Richert* action that she understood her pay stubs: specifically, that the "productv" line on her pay stub reflected her total hours worked, including any overtime hours, and she was able to compare her own personal records of the hours she worked to her wage statements to make sure the wage statements were accurate.

Here, Defendant maintains that Mr. Whitehouse is neither adequate nor typical of the proposed class because: he testified that he did not understand what shift differentials are and did not know whether he was supposed to add or subtract shift differentials; and he does not possess the credibility, honesty and integrity of a fiduciary required to be an adequate class representative as evidenced by his having received multiple disciplinary warnings during his employment that caused bias and resentment toward Samaritan. As Plaintiff's theory of this case is that proposed class members would add the shift differential and "Productv" line together, Defendant explains, Mr. Whitehouse's ignorance about his paystub demonstrates a lack of familiarity with the issue presented by his counsel and demonstrates that he is not typical of the class he seeks to represent. Defendant adds that as of March 2023, it has reformatted its wage statements in several ways, including no longer using the term "Productv. Nonetheless it explains, Mr. Whitehouse seeks to represent an overbroad proposed class of

individuals of which his is not representative because the proposed class includes individuals who would have only received the updated wage state. These arguments are unavailing.

Again, Ms. Cacananta was rejected as an adequate representative because a clear showing was made, based on her own testimony, that she understood her wage statements. The testimony of Mr. Whitehouse reflects his having an entirely different experience: he expressly testified that he did not understand and was confused when trying to decipher his pay stubs. Specifically, he testified that he did not know if "Productv" is the "total amount of hours that [he's] worked" or the "total amount of hours that [he's] getting paid for. (See Deposition of Justin Whitehouse ("Whitehouse Depo.") at 97:21-98:11; see also at 32:3-33, 44:7-16, 95:17-96:1, 111:18-112:17 (Attached as Exhibit A to Reply Declaration of Kristen M. Agnew).) He further testified that he lacked an understanding that "Productv" hours encompassed shift differential hours:

> Q: When you say you're not sure how to read it, what specifically do you mean?
> A: I don't know- I don't know if the Shift 2 or the Shift 3 is included in the hours. I- I mean, I'm not sure what it's necessarily there for. I- I don't know how really to express what I'm trying to say. So …
> Q: When you say "included in the hours," what hours are you referring to?
> A: I guess it would be the productivity hours.

(Whitehouse Depo. at 148:5-15.)

Mr. Whitehouse also testified that he does not understand the relationship between shift differential hours and "Productv" hours:

> Q: And then it says, "As a result, when applicable hours are added up in each wage statement, it does not correlate to the actual correct number of total hours that I worked in that pay period." So would you actually add hours up on your wage statement?
> A: Yeah.
> Q: Okay. Why?
> A: To see if I was getting – to see if I was getting paid for the same hours that I was – that I worked.

(Whitehouse Depo. at 150:7-13.)

Mr. Whitehouse further testified that: many of his co-workers shared in his confusion and "did not know how to read [their] paystubs" (Whitehouse Depo. at 38:19-39:9, 48:12-49:6); his direct supervisor informed him that "Productv" hours are "the amount of hours that you worked before 80 hours" (Whitehouse Depo. at 96:11-18, 103:18-22); and he remained confused about whether "Productv" hours encompassed shift differential hours even after speaking with human resources, his director and the union (Whitehouse Depo. at 119:6-120:17, 126:20-127:13, 128:1-16, 148:16-149:2).

The foregoing establishes that Mr. Whitehouse's claims are typical of the class that he seeks to certify and the Court rejects Defendant's narrow characterization of those claims as being based solely on the theory that proposed class members would add the shift differential and "Productv" line together, rather than, as broadly alleged in the FAC, that when an

employee was paid shift differential wages, the hours displayed did not equal the total hours worked. In short, because Mr. Whitehouse claims to have been confused by the pay stubs in the same manner as entirety of the class, his interests align with it and the element of typicality is met.

The Court also rejects Defendant's assertion that Plaintiff's receipt of two disciplinary warnings[19] renders him an inadequate class representative as there is no showing that there is any nexus between these warnings and Mr. Whitehouse's credibility and ability to adequately to serve in this role. Further, Defendant's insistence that Plaintiff is biased against it as a result of the foregoing is purely speculative and not supported by any evidence. Plaintiff also submits evidence that he is sufficiently informed of the claims in this action, has agreed to abide by all necessary duties of a class representative, and is currently able and willing to perform them and assist counsel in the litigation. (Declaration of Jason Whitehouse, ¶¶ 4, 5.) He further proffers evidence that his counsel are experienced and well-qualified to serve as class counsel in this action. All told, the Court finds that Mr. Whitehouse and his counsel will fairly and adequately represent the class.

In sum, Plaintiff has demonstrated that the elements for class certification are met. Thus, the motion must be granted.

XII. CONCLUSION

Plaintiff's motion for class certification tentatively is GRANTED. However, the Court asks the parties to appear at the October 5 hearing to discuss: a) whether a stay of this case pending a possible appeal in *Richert* is appropriate; and b) whether supplemental briefing on the issue/claim preclusion aspects of *Richert* is needed.

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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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

[19] These arise from purported complaints that Mr. Whitehouse "did not help the patient line cook."

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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Case Name:
Case No.:

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