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
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LAW AND MOTION TENTATIVE RULINGS
DATE: DECEMBER 14, 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	19CV354617	Berumen, et al. v. Allied Construction Management, Inc. et al. (Class Action/PAGA)	No papers have been filed for this final approval hearing. The Court orders the parties to appear (remotely or in person) to discuss.
LINE 2	22CV395973	Jane Doe 1, et al. v. Trustees of the California State University, et al. (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 3	20CV371579	The City of San Jose v. AT&T Corporation, et al.	See tentative ruling. The Court will prepare the final order.
LINE 4	19CV345534	Palomino v. Northrop Grumman Systems Corporation	See tentative ruling. The Court will prepare the final order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 5	19CV345045	VanCleave, et al. v. Abbott Laboratories (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 6	22CV399340	Jamie Komen Revocable Trust v. Page, et al. (Alphabet Inc.) [Shareholder Derivative]	Rescheduled to March 21, 2024 at 1:30 p.m.
LINE 7			
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: *Jane Doe, et al. v. Trustees of the California State University*
Case No.: 22CV395973

Before the Court is Defendant Trustees of the California State University's ("CSU" or "SJSU") demurrer to the Third Amended Complaint ("TAC") filed by Plaintiffs Jane Doe and Jane Roe and motion to strike portions contained therein, which are opposed by Plaintiffs. Defendant Scott Shaw joins both motions. As discussed below, the Court SUSTAINS the demurrer without leave to amend as to CSU, and as to Mr. Shaw, SUSTAINS it IN PART and OVERRULES it IN PART. The motion to strike is MOOT as to CSU and GRANTED as to Mr. Shaw.

I. BACKGROUND

A. Factual

According to the allegations in the SAC, for over fourteen years, Mr. Shaw, who was San Jose State University's ("SJSU") head athletic trainer, sexually abused countless female student athletes during allegedly sports-related massages by inappropriately and without consent touching them in their private areas. (TAC, ¶ 1.) Plaintiffs suffered lasting humiliation and trauma as a result of Mr. Shaw's actions and SJSU's attempts to silence complaints and persuade complainants into believing they were wrong to report the abuse in the first place. (*Ibid*.)

Between at least 2006 and 2008, SJSU received complaints and knew that Mr. Shaw inappropriately touched female athletes. (TAC, ¶ 2.) However, under the toxic climate at the time, SJSU athletics staff dismissed reports of abuse raised by athletes and dissuaded them from filing formal complaints or otherwise pursuing their claims for fear of further humiliation. (*Id*.)

Ms. Doe was a student-athlete at SJSU from 2004 until 2008; Ms. Roe also was a student-athlete there, but from 2004 to 2009. (TAC, ¶¶ 20, 22.) Mr. Shaw sexually harassed, abused, and molested both of them. (*Ibid*.)

In 2009, SJSU conducted an investigation, during which investigators with questionable ties to the athletics department mischaracterized and misrepresented witness testimony, minimized student-athlete's complaints of abuse, chose not to treat reporting student athletes as complainants, and ultimately issued a two-page report exonerating Mr. Shaw that was never shared with coaches, athletes, or the public. (TAC, ¶¶ 5, 56.)

Over the next decade, SJSU dismissed and ignored further complaints of Mr. Shaw's abuse. (TAC, ¶¶ 8, 58.) SJSU implemented an informal policy that prohibited Mr. Shaw from providing massages to female athletes, however, the policy was never enforced and it was not communicated to student-athletes, coaches, or staff of the athletic department. (*Ibid*.) Mr. Shaw was given free access to continue his sexual abuse and he was even promoted. (*Ibid*.) When SJSU employees raised concerns about his abuse, the administration retaliated against them with threats, poor evaluations, and termination. (*Id*., ¶ 9.) Documentation of abuse was

removed or destroyed from Title IX files, information was leaked directly to Mr. Shaw, and complaints were stifled under the specter of legal action by SJSU or Mr. Shaw. (*Ibid*.)

In 2020, in response to intense media scrutiny, SJSU convened an independent reinvestigation of the 2009 complaints and instructed Mr. Shaw to stop massaging female athletes during the investigation. (TAC, ¶¶ 20, 59.) Yet Mr. Shaw sought out and abused an athlete during the investigation of his conduct. (*Id*.) The new investigation contravened the 2009 investigation outcome and found that Mr. Shaw had sexually harassed female athletes. (*Id*.)

In 202l, the United States Department of Justice (the "DOJ") completed its own investigation and found that SJSU had committed numerous Title IX Violations through its conduct that had resulted in the abuse of student-athletes. (TAC, ¶¶ 11, 66.) The DOJ also found that SJSU engaged in retaliation against employees for raising concerns related to Mr. Shaw's abuse and that SJSU had perpetuated an environment within the Athletics Department under which the abuse continued. (*Id*.) The DOJ notes approximately 1,000 female students may have been subjected to Mr. Shaw's treatment over his time at SJSU. (*Id*.) (Plaintiffs bring this class action on behalf of these individuals. (*Id*.)

In late November 2021, SJSU sent a letter (the "Letter") to all student-athletes who had ever been treated by Mr. Shaw. (TAC, ¶ 14.) The Letter pertained to the 2009 investigation as well as the DOJ's investigation. (*Id*.) The Letter also requested responses from anyone who had been subjected to sexual misconduct by Mr. Shaw, and gave a November 2022 deadline for responses. (*Id*.)

B. Procedural

Based on the foregoing allegations, Plaintiffs filed their initial complaint in mid-March 2022 and their first amended complaint in July 2022. In February 2023, pursuant to a stipulation between the parties, Plaintiffs filed the Second Amended Complaint ("SAC"), which asserted claims for the following: (l) violation of Title IX (pre-assault and post-assault); (2) negligence, negligent supervision, negligent retention/hiring; negligent failure to warn, train, or educate; (3) intentional infliction of emotional distress; (4) violation of Bane Act; (5) gender violence; (6) sexual battery; and (7) sexual assault.[1]

In March 2023, CSU filed a demurrer to the SAC and motion to strike, both of which were joined by Mr. Shaw. On July 24, 2023, the Court issued its order on the motions, sustaining the demurrer in its entirety with leave to amend and deeming the motion to strike moot as a result.

Plaintiffs filed the TAC on August 15, 2023, asserting the same seven claims as the SAC. CSU again demurs to the TAC in its entirety on the ground of failure to state facts sufficient to constitute a cause of action and moves to strike various allegations contained therein. (Code Civ. Pro., §§ 430.10, subd. (e), 435 and 436.)

II. DEMURRER

[1] All claims are asserted against both defendants, except for the fifth which is asserted only against Mr. Shaw.

A. Request for Judicial Notice

CSU requests that the Court take judicial notice of selected legislative history of Code of Civil Procedure section 340.16, particularly a copy of the Assembly Policy Committee Analysis dated May 3, 2022. Documents constituting legislative history have long been recognized as proper subjects of judicial notice. (See Evid. Code, § 452, subd. (c); *Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 233, fn. 6.) Accordingly, CSU's request for judicial notice is GRANTED.

B. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, "[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732, internal citations and quotations omitted; see also Code Civ. Proc., § 430.30, subd. (a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. … Thus, … the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal citations and quotations omitted.)

In ruling on a demurrer, the allegations of the complaint must be liberally construed, with a view to substantial justice between the parties. (*Glennen v. Allergan, Inc.* (2016) 247 Cal.App.4th 1, 6.) Nevertheless, while "[a] demurrer admits all facts properly pleaded, [it does] not [admit] contentions, deductions or conclusions of law or fact." (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.)

C. Discussion

In its demurrer, CSU maintains, as it did in its preceding attack on the adequacy of the allegations of the SAC, that Plaintiffs' claims are all time-barred and fail due to a lack of sufficient facts.

1. *Statute of Limitations*

In its demurrer to the SAC, CSU asserted that all of Plaintiffs' claims were time-barred, an argument that the Court accepted, in part. It rejected CSU's argument that Plaintiffs' Title IX claim was time-barred given Plaintiffs' allegations that they did not have reason to know at the time they allegedly suffered sexually harassment and abuse by Mr. Shaw that the athletic training techniques he performed on them were sexually abusive, and did not discover the true nature of his conduct until November 29, 2021, when CSU sent the Letter to former CSU student-athletes, including Plaintiffs, advising of the same. Based on these allegations, the Court concluded that Plaintiffs' Title IX claim accrued when the Letter was sent, less than two years before they initiated the instant action.

However, the Court found persuasive CSU's contention that Plaintiffs' remaining state law claims *were* untimely as alleged because they accrued at the time of their occurrence,

delayed discovery did not apply and Plaintiffs failed to plead facts necessary to equitably estop CSU from invoking a statute of limitations defense.

In the instant motion, CSU contends that in the TAC, which they characterize as "minimally-altered," Plaintiffs have not cured the defects that rendered their state laws claims untimely, including by relying on a longer statute of limitations. CSU also again maintains, despite the Court's rejection of this argument in the order on the preceding demurrer, that Plaintiffs' Title IX claim is untimely.

a. Title IX Claim

Once again relying on *Doe v. University of Southern California* (C.D. Cal. 2019) 2019 U.S. Dist. LEXIS 170082, CSU asserts that Plaintiffs' Title IX claim accrued at the time they suffered their alleged injuries rather than, as the Court concluded previously, "when the plaintiff[s] kn[ew] or ha[d] reason to know of the school's policy of deliberate indifference that created a heightened risk of harassment." (Order at 7, citing *Karasek v. Regents of University of California* (N.D Cal. 2020) 500 F.Supp.3d 967, 978.) In its order on CSU's demurrer to the SAC, the Court found *Doe* distinguishable, reasoning that unlike in *Doe*, where the court found that the plaintiff was undoubtedly aware of her injury at the time of the examination, the "SAC allege[d] that Ms. Doe and Ms. Roe did not know or have reason to know that the athletic training techniques performed on them constituted sexual abuse." (Order at 6.) CSU states that it "respectfully disagrees" with the Court's analysis[2] and that the foregoing allegation, a similar one of which was rejected by the Court in *Doe* as "mere labels and conclusions," is a "pure legal conclusion that cannot withstand demurrer." The Court does not find CSU's assertion persuasive because it views an allegation by Plaintiffs regarding whether or not they possessed particular knowledge at a given point in time as a statement of *fact*.[3] Thus, it declines to depart from its prior conclusion that Plaintiffs' Title IX claim is timely as pleaded in the TAC.

b. State Law Claims

Turning to Plaintiffs' remaining state law claims, which were previously held to be untimely based on the Court's conclusion that they accrued at the time they occurred (with insufficient facts pleaded to support delayed discovery),[4] CSU asserts that Plaintiffs still fail to plead facts necessary to establish that it is "equitably estopped from asserting time limitations as a defense." (TAC, ¶ 18.)

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[2] The Court notes that neither side contested the tentative ruling on the demurrer to the SAC.

[3] The Court also rejects CSU's assertion that Plaintiffs cannot claim that they were both in apprehension of imminent harmful conduct by Mr. Shaw at time of the touching and also that they were unaware the conduct was harmful until 13 years later; the Court does not believe an individual being apprehensive of conduct they understand to be therapeutically necessary at the time it occurs is inconsistent with an allegation that they later understood that conduct to be wrongful and inappropriate.

[4] The Court sees no reason to depart from its prior conclusion that these claims accrued at the time they occurred, with the TAC again failing to set forth facts sufficient to show that a reasonable investigation at the time of the alleged assaults would not have revealed a basis for their claims.

As the Court explained in its order on the demurrer to the SAC, "[g]enerally, speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of the fact; and (4) he must rely upon the conduct to his injury." (*Honeywell v. Workers' Comp. Appeals Bd.* (2005) 35 Cal.4th 24, 37.) Critically, in order for the doctrine to apply, the plaintiff must be "*directly* prevented … from filing [a] suit on time" (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 385, emphasis added), with the defendant "engag[ing] in some sort of *purposeful* conduct or make a representation that leads that *particular* plaintiff not to take action against [it]" (*Ortega v. Pajaro Valley Unified Sch. Dist.* (1998) 64 Cal.App.4th 1023, 1056, emphasis added.)

Previously, the Court held that Plaintiffs failed to plead facts sufficient to implicate equitable estoppel, explaining that:

> [T]he SAC fails to allege sufficient facts to establish that CSU knew about Mr. Shaw's abuse as early as 2006 because it is unclear who the complaints were made to and who implemented the informal policy. Plaintiffs then allege CSU investigated Mr. Shaw in 2009 and incorrectly concluded that he had not violated university policy. (SAC, ¶ 56.) The DOJ report pertained to the students who came forward in the 2009 investigation. However, Ms. Doe had graduated by that time and it is unclear whether Ms. Roe was still attending SJSU at the time of the 2009 investigation. Moreover, Plaintiffs do not allege that they made any reports of their abuse. Nor do Plaintiffs allege CSU made any misrepresentations to them specifically. Therefore, it does not appear that equitable estoppel applies here, at least based on the current state of Plaintiff's operative complaint.

(Order at 8:22-9:3.)

CSU argues that the TAC still lacks facts sufficient to establish equitable estoppel because Plaintiffs still fail to plead facts showing that CSU knew about *their* claims in particular and engaged in any conduct or made representations to Plaintiffs that induced them not to pursue those purported claims. Indeed, there are still no allegations in the TAC that Plaintiffs reported their claims to CSU prior to filing their claims, nor that they were involved in the December 2009 investigation of Mr. Shaw's conduct. There are no allegations that CSU made any statements to them that prevented them from timely filing the state law claims. In their opposition, Plaintiffs point to allegations that various CSU employees' had general knowledge about alleged inappropriate conduct by Mr. Shaw (see TAC, ¶ 56), but this does not overcome their lack of allegations of CSU's knowledge of *their* particular claims based on Mr. Shaw's purported conduct. Thus, Plaintiffs still have not pleaded facts necessary to implicate equitable estoppel, and therefore the doctrine does not operate to rescue their state law claims, which are untimely.

c. Import of Code of Civil Procedure section 340.16

CSU next states that from the meet and confer process, it understands that Plaintiffs intend to rely on the statute of limitations provisions in subdivisions (b) and (e) of Code of Civil Procedure section 340.16 ("Section 340.16"). Subdivision (b) of this code section

provides that claims for the recovery of damages suffered as a result of sexual assault that occurred on or after January 1, 2009 and that "would have been barred solely because the applicable statute of limitations has or had expired . . . are hereby revived and may be commenced until December 31, 2026." Subdivision (e), in turn, provides that claims seeking damages suffered as a result of sexual assault that would otherwise be barred before January 1, 2023 solely because of the applicable statute of limitations are revived and can be filed until December 31, 2023 if the defendant entity or its employees "engaged in a cover up or attempted a cover up of a previous instance or allegations of sexual assault by an alleged perpetrator of such abuse."

As CSU maintains, subdivision (b) of Section 340.16 does not apply to Plaintiff Doe because she graduated from CSU in 2008. While Plaintiff Roe did not graduate until the spring of 2009, the Court agrees with CSU that this subdivision does not render her claims timely.

First, Section 340.16 has no application to Plaintiffs' Title IX claims, as the relevant statute of limitations for those claims is the two-year limitations period for personal injury claims provided by Code of Civil Procedure section 335.1. (See, e.g., *Blake v. Davis* (C.D. Cal. 2023) 2023 U.S. Dist. LEXIS 102141, *2, fn. 2.) Second, given that Plaintiffs' state law claims accrued at the time the alleged assaults by Mr. Shaw took place, and they did not file their government claims until March 2022 (TAC, ¶ 14), Plaintiff Roe fails to establish that she timely complied with the Government Claims Act (Gov. Code, § 810, et seq.) (the "Act").

"Under the Act, no person may sue a public entity or public employee for 'money or damages' unless a timely written claim has been presented to and denied by the public entity." (*County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1267.) In order to be timely, the claim generally must be presented to the particular entity within six months of accrual of the injury. (*A.M. v. Ventura Unified School Dist.* (2016) 3 Cal.App.5th 1252, 1257.) Absent an applicable exception, "failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing suit against that entity bars a plaintiff from filing a lawsuit against that entity." (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239.) This requirement, which is "not a statute of limitations" (see *Willis v. City of Carlsbad* (2020) 48 Cal.App.5th 1104, 1120-1121), is not obviated by subdivision (b) of Section 340.16, and the legislative history makes clear that the Legislature understood that it would not impact the claims presentation obligations for claims against public entities like CSU. (See CSU's Request for Judicial Notice, Exhibit A at 63 ["This bill does *not* eliminate the presentation requirement for claims against *either* the state, or local governmental entities."].) Thus, because Plaintiff Roe did not timely present her state claims, she is barred for pursuing them regardless of the limitations period provided by subdivision (b) of Section 340.16.

As for subdivision (e) it, like subdivision (b), has no bearing on Plaintiffs' failure to timely present their claims under the Act, and there are no specific facts pleaded which establish that CSU or its employees "engaged in a cover up or attempted to cover up a previous instance or allegations of sexual assault by an alleged perpetrator of such abuse" as the term "cover up" is defined by the statute. (See Code Civ. Proc., § 340.16, subd. (e)(4)(A) [defining "cover up" as "a concerted effort to hide evidence relating to a sexual assault that incentivizes individuals to remain silent or prevents information relating to a sexual assault from becoming public or being disclosed to the plaintiff, including, but not limited to, the use of nondisclosure agreements or confidentiality agreements."].)

Plaintiffs do not dispute CSU's contention that subdivisions (b) and (e) of Section 340.16 are inapplicable to it and thus impliedly concede the merits of this argument. However, they insist that subdivision (b) revives Plaintiff Roe's claim against *Mr. Shaw*. Mr. Shaw has joined in CSU's motion and supporting papers but has not provided any separate argument that addresses the merits of this contention as it pertains to claims against him, specifically. The failure to timely present the state law claims also is not a barrier to claims against Mr. Shaw in his individual capacity. While the Court is persuaded that Section 340.16 does not operate to revive Plaintiffs' untimely state law claims against CSU, the same cannot be said for Mr. Shaw.

Therefore, in accordance with the foregoing, CSU's demurrer to the state laws claims asserted against it (i.e., the second, third, fourth, sixth and seventh causes of action) on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND. The demurrer to these claims (and the fifth cause of action) as to Mr. Shaw is OVERRULED.

2. *Sufficiency of Allegations*

CSU again argues, as it did in its prior demurrer to this claim in the SAC, that Plaintiffs fail to state a claim under Title IX, whether based on pre-assault or post-assault conduct.

a. Pre-Assault Conduct

As the Court explained in its order on the demurrer to the SAC, a pre-assault Title IX claim based on sexual harassment/misconduct must allege "(1) a school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment that was known or obvious, (3) in a context subject to the school's control, and (4) as a result, the plaintiff suffered harassment that was so severe, pervasive, and objectively offensive that it can be said to have deprived the plaintiff of access to the education opportunities and benefits provided by the school." (*Karasek v. Regents of the Univ. of Cal.* (9th Cir. 2020) 956 F.3d 1093, 1112 (*Karasek 1*).) "A school need not have had actual knowledge of a specific instance of sexual misconduct or responded with deliberate indifference to that misconduct before damages liability may attach." (*Id*.) "Generally, informing low-level school employees of assaults is insufficient to establish deliberate indifference because those employees do not have the authority to alter official policy." (*Karasek II*, *supra*, 500 F.Supp.3d at p. 986.) Title IX requires that "an official who at minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf have actual knowledge of discrimination in the recipient's program." (*Oden v. N. Marianas College* (9th Cir. 2006) 440 F.3d 1085, 1089.)

The Court held that Plaintiffs failed to state a Title IX claim based on pre-assault conduct because there were no allegations that any complaints were made to any CSU staff member or employee who possessed the authority to alter official policy; at most, it explained, the SAC alleged that SJSU "implemented an informal policy after the complaint s [made about Mr. Shaw's conduct] but that policy was not enforced or communicated to coaches or staff." (Order at 10:6-8.) Absent such allegations, the Court concluded that Plaintiffs could not establish the deliberate indifference necessary to state their claim.

CSU argues that the TAC suffers from the same deficiencies. Plaintiffs concede this point with respect to Ms. Doe, but insist that a Title IX claim based on pre-assault conduct has been stated by Ms. Roe based on allegations that beginning in 2009, high-ranking individuals within the SJSU Athletics Department were on notice of reports of Mr. Shaw's inappropriate conduct, including the Senior Associate Athletics Director. (TAC, ¶ 56 ["By the beginning of 2009, the SJSU Athletic Department had become aware of reports that [Mr.] Shaw had inappropriately touched student athletes during sessions. High-ranking individuals within the administration were aware of these reports, including the Senior Associate Athletic Director."].) In making the argument that that she has adequately pleaded this claim, Plaintiff Roe cites the decision recently issued by the Ninth Circuit Court of Appeals in *Brown v. Arizona* (9th Cir. 2023) 82 F.4th 863, where the court reversed the district court's summary judgment in favor of the University of Arizona in an action brought under Title IX by a student. The reversal was based in part on the court's conclusion that the plaintiff had submitted sufficient evidence that would support a conclusion by a reasonable factfinder that University officials had actual knowledge or notice of other violent assaults by the student who victimized the plaintiff and that the Senior Associate Athletics Director to whom reports of such assaults were made was "an official who … ha[d] authority to address [the assaults] and to institute corrective measures." (*Brown, supra,* 82 F.4th at 880-881.) As she has similarly alleged that SJSU's Senior Associate Athletics Director, among other "high-ranking officials" were aware of reports that Mr. Shaw had inappropriately touched student athletes during sessions, Plaintiff Roe argues, she has stated a claim under Title IX for pre-assault conduct. The Court disagrees.

It must be emphasized that *Brown* involved a motion for summary judgment and thus was concerned with *evidence* and the not the adequacy of the pleadings. This distinction is critical because the Ninth Circuit did not make a broad holding that a Senior Associate Athletics Director necessarily is a category of official who has the authority to address alleged misconduct and institute corrective measures; instead, the court found that the *particular* official in the case before it, given the evidentiary record, had the authority to address the perpetrator's assaults and institute corrective measures. (*Brown*, 82 F.4th at 881 [explaining that the specified "chain of events" demonstrated that the Senior Associate Athletic Director had the "authority to address [the perpetrator]'s behavior and to institute corrective measures."].) Here, there are no allegations in the TAC which show that that the SJSU Senior Associate Athletic Director had the authority or ability to alter official CSU policy. As such, the Court finds persuasive CSU's contention that Plaintiff Roe has failed to state a claim under Title IX based on pre-assault conduct.

b. Post-Assault Conduct

The elements of a post-assault claim are "(1) the school exercised substantial control over both the harasser and the context in which the known harassment occurs, (2) plaintiff suffered sexual harassment . . . that is so severe and pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school, (3) the school had actual knowledge of the harassment, (4) the school acted with deliberate indifferent to the harassment, and (5) the school's deliberate indifference subjected plaintiff to harassment." (*Emily O v. Regents of the Univ. of Cal.* (2021) 2021 U.S. Dist. LEXIS 78082.)

In its order on CSU's prior demurrer, the Court also held that no Title IX claim based on CSU's post-assault conduct was stated because the SAC did not allege that either plaintiff reported Mr. Shaw's conduct to CSU, with allegations of reports from *others* regarding his conduct being made insufficient to plead a post-assault claim. The claim was additionally deemed defective because the SAC did not adequately plead that high-ranking CSU officials had actual knowledge of Mr. Shaw's alleged conduct towards Plaintiffs.

As with the pre-assault claim, CSU contends that the TAC has not corrected the deficiencies that compelled the Court to sustain the demurrer to the post-assault claim. The Court agrees, as there are still no allegations that either plaintiff reported Mr. Shaw's conduct to CSU, and Plaintiffs impliedly concede the merits of this argument by electing not to address it at all in their opposition.

Given the foregoing, CSU's (and Mr. Shaw's) demurrer to the first cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

III. MOTION TO STRIKE

A. Requests for Judicial Notice

Both parties make requests for judicial notice.

In connection with its motion, CSU requests the Court take judicial notice of the Complaint filed in this court in Case No. 22CV407998, *Jane Bo Doe v. Trustees of the California State University*, as well as two news articles pertaining to Mr. Shaw's alleged conduct and SJSU's purported knowledge of the same, one published on the website of USA Today on April 17, 2022 and the other on the website of the The Mercury News on November 19, 2021.

Plaintiff requests the Court take judicial notice of two items issued by the U.S. Department of Justice: (1) a press release issued on September 21, 2023, relating to its investigation into Defendants' misconduct that is the basis for Plaintiffs' claims; and (2) the resulting investigative report issued on September 21, 2023.

The Court is not persuaded that any of the foregoing materials are relevant to the disposition of the motion to strike. As such, both parties' requests for judicial notice are DENIED. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [stating that information subject to judicial notice must be relevant to the issue at hand].)

B. Legal Standard

Pursuant to Code of Civil Procedure section 436, a court may strike out "any irrelevant, false, or improper matter inserted in any pleading" or any portion of a pleading "not drawn or filed in conformity with the law[] …, a court rule, or an order of the court." (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from matters of which the court may take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.)

In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assuming the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53, 63, citing, *Clauson v. Super. Ct*. (1998) 67 Cal.App.4th 1253, 1255.)

C. Discussion

CSU moves to strike portions of the TAC, particularly Plaintiffs' class allegations (TAC, ¶¶ 39-44) and their claim for emotional distress damages under Title IX (TAC, ¶ 85). Given the Court's ruling on the demurrer, this motion is MOOT as to CSU.

As to Mr. Shaw, Plaintiffs concede that emotional distress damages are not available under Title IX and thus this portion of the TAC is stricken. The Court also agrees that the class allegations must be stricken because Plaintiffs will not be able to establish the necessary element of class action treatment that common questions of law or fact predominate. (See *Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 470 [stating required elements of class certification].) Courts have acknowledged the propriety of striking class allegations "where it is clear that there is no reasonable possibility that the plaintiffs could establish a community of interest among the potential class members and that individual issues predominate over common questions of law and fact." (*Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 53.) This includes in mass-tort cases involving claims of sexual abuse a public entity such as a school. (See, e.g., *Clausing v. S.F. Unified Sch. Dist.* (1990) 221 Cal.App.3d 1224, 1233.)

This case will undoubtedly involve many individualized inquiries and issues, including whether and how many times each individual experienced assault, when each individual experienced assault and/or had reason to know of their injuries, the circumstances of the alleged assaults, whether each individual reported assault, how the University reacted, whether that reaction was deliberately indifferent or unreasonable under the circumstances, whether the University was on actual notice of prior assaults, and the existence and extent of injury or damages suffered by each individual. Not to mention whether each student-athlete has a timely claim and whether the claims presentation requirement has been satisfied. (See, e.g., *See Jolly v. Eli Lilly & Co.* (1988) 44 Cal. 3d 1103, 1123[("[M]ass-tort actions for personal injury most often are not appropriate for class action certification" in part because "periods of limitation . . . may vary widely[.]"].) These issues will predominate and prevent class treatment. As such, the Court agrees that this case is "precisely the kind of mass-tort lawsuit which courts have found not amenable to class certification." (*Clausing*, 221 Cal.App.3d at 1234.)

While Plaintiffs are correct that some California courts have permitted class certification for sexual assault claims, all of the cases they cite for this proposition involved certification in the context of *settlement*, and not a contested motion for class certification. Certification in the settlement context is a much simpler analysis because issues like the community-of-interest requirement are not contested. (See *Glob. Minerals & Metals Corp. v. Superior Court* (2003) 113 Cal.App.4th 836, 859 [explaining that "a lesser standard of scrutiny is used for settlement cases" because "no trial is anticipated in a settlement class case, so the case management issues inherent in the ascertainable class determination need not be confronted."].) *Clausing, supra,* is significantly more instructive with regard to whether class allegations should be stricken in circumstances such as the one at bar and its approach and reasoning compels this Court to conclude that Plaintiffs' class allegations are improper.

Accordingly, the motion to strike is GRANTED with regard to Mr. Shaw.

IV. CONCLUSION

CSU's demurrer to TAC on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND and SUSTAINED WITHOUT LEAVE TO AMEND as to the first cause of action as to Mr. Shaw. The demurrer to the remaining claims as to Mr. Shaw is OVERRULED.

The motion to strike is MOOT as to CSU and GRANTED as to Mr. Shaw.

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 3

Case Name: *The City of San Jose, ex rel. Roger Schneider v. AT&T Corporation, et al.*
Case No.: 20CV371579

Plaintiff and Relator Roger Schneider ("Plaintiff") brings this action under California's False Claims Act against Defendants AT&T Corporation, Bandwidth Inc., Century Link Communications, LLC, Inteliquent Inc., Pacific Bell Telephone Company and Verizon Business Network Services Inc. (collectively, "Defendants") based on Defendants' alleged systematic under-collection and underpayment of Telephone Line Tax fees due to the City of San Jose (the "City") to fund its 911 emergency response telephone system.

Before the Court is Plaintiff's motion to vacate the Court's December 2, 2021 order dismissing this case without prejudice for failure to appear at a hearing on an Order to Show Cause, which is opposed by Defendants. As discussed below, the Court DENIES the motion.

I. BACKGROUND

Plaintiff initiated this action with the filing of the Complaint on September 9, 2020. As provided by Government Code section 12652, subdivision (c), the Complaint was filed under seal pending the City's determination of whether to intervene, and thus service was not immediately effectuated at that time. (See Gov. Code, § 12652, subd. (c)(2) ["No service shall be made on the defendant until after the complaint is unsealed."].) According to Plaintiff, the Complaint was filed with the current contact information for his counsel, who have offices in Emeryville, California. Plaintiff's counsel moved into their current offices in 2016 from offices in San Francisco.

On May 21, 2021, the City filed a motion to extend the seal. (See Gov. Code, § 12652, subd. (c)(5).) Plaintiff's counsel attended a case management conference ("CMC") on June 22, 2021, where the Court's minutes reflect that the Court would set another CMC for October 12, 2021. On September 7, 2021, the City filed its notice of non-intervention and served Plaintiff with the notice via email.

Plaintiff maintains that he was never served with notice of the October 12, 2021 CMC. As a result, his counsel failed to appear at the hearing, and the Court set an Order to Show Cause ("OSC") for the failure to appear for December 2, 2021, with the Clerk's office to provide notice. Plaintiff's counsel maintains he was not served notice of the OSC because it was sent to his former law firm address in San Francisco. He therefore did not appear at the hearing and the Court dismissed the action without prejudice.

II. MOTION TO VACATE DISMISSAL

Plaintiff moves to vacate the dismissal of his Complaint pursuant to Code of Civil Procedure section 473 ("Section 473"), subdivision (d), which provides in pertinent party that "[t]he court may … on motion of either party after notice to the other party, set aside any void judgment or order." Plaintiff characterizes the Court's December 2, 2021 order of dismissal as "void" because he did not, through his counsel, receive notice of it. He maintains, citing primarily to *Reid v. Balter* (1993) 14 Cal.App.4th 1186, among other decisions, that because he

did not receive notice that his case would be dismissed if he failed to appeal at the OSC hearing, the Court must vacate it.

In *Reid*, the plaintiffs, sellers of real property, sought damages and enforcement of a vendor's lien against the defendants, the buyers. When the plaintiffs failed to appear at a scheduled status conference, the trial court dismissed the case. Sixteen months later, the plaintiffs filed a motion to vacate the dismissal, which was granted, and they ultimately obtained judgment in their favor. The defendants challenged the propriety of the trial court's order vacating the order of dismissal but the appellate court affirmed, finding that the plaintiffs has not received notice that their case would be dismissed if they failed to appeal for the statute conference[5] and as a consequence, the dismissal was a "clear violation" of their due process rights and the order of dismissal was void.

Here, Plaintiff argues he similarly did not receive notice that his case would be dismissed and therefore the order of dismissal is void. While the Court's minutes for October 12, 2021 setting the OSC for December 2, 2021, advised that Plaintiff's failure to appear at that hearing "may result in dismissal of the case," Plaintiff's position is that he did not receive *any* notice, full stop, due to such notice being sent to his counsel's former law office address. Though he insists that the passage of time has no bearing on the due process requirements for a dismissal order because an order that violates due process is void from the moment of its issuance, he explains that his counsel was under the impression that because he had been served electronically with the filings of the City up to that time, he would also receive electronic notice if the Court had set future CMCs. He continues that his counsel did not check the docket until January 2023, at which time he discovered the case had been dismissed, because he was awaiting a ruling on a demurrer to a similar complaint he filed in San Francisco Superior Court. Should the Court grant this motion, Plaintiff states, he will amend his Complaint in this action to account for the aforementioned ruling.

In their opposition, Defendants dispute Plaintiff's contention that the dismissal order is void and argue that it is merely voidable. As such, they maintain, Plaintiff cannot rely on subdivision (d) of Section 473 to vacate the order and instead must rely on subdivision (b) of this code section, which places a time limit of six months on an application to "relieve a party of his or her legal representative from a … dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." This period of time has long since come and gone, Defendants explain, and thus the only way for Plaintiff to obtain the relief he seeks is under the doctrine of extrinsic mistake, which requires a showing of diligence that Plaintiff has not made.

In arguing that the order of dismissal is voidable rather than void, Defendants rely primarily on *Lee v. An* (2008) 168 Cal.App.4th 558. In that case, the plaintiffs, an attorney and his firm, sued the defendant based on allegations that she practiced law without a license and falsely conducted a law practice under the same name of the attorney's law firm. The plaintiffs received a form notice of a CMC hearing in four months' time, the contents of which: warned that a failure to appear could result in the imposition of sanctions, including dismissal of the case and the striking of the defendant's answer, and instructed plaintiffs to serve the notice on all parties and attorneys of record. The plaintiffs sent notice to the defendant of the CMC, but

[5] The case record established that the plaintiffs had only been advised that they might be subject to certain sanctions if they failed to appear, but dismissal was not listed as one of them.

it was not a copy of the court's notice and did not contain the same detailed warnings about the potential for sanctions for failure to appear. The defendant did not appear at the CMC and a further CMC was set, which the plaintiffs provided defendant notice of as ordered. However, the defendant did not appear at the further CMC either and as a consequence, the court struck her answer and entered her default. Three years later, the defendant moved to set aside the default and resulting default judgment, arguing that the court violated her due process rights in entering the foregoing because she did not receive notice of the CMC or that failing to appear at the hearing could result in terminating sanctions. For this reason, she maintained, the default was invalid, and the resulting default judgment void. Although the defendant's motion for relief was brought under subdivision (d) of Section 473, the court denied it because it was not brought within the sixth-month time limitation provided by section 473, subdivision (b), and she appealed.

On appeal, the court found that the default judgment was *voidable* rather than void, and thus not subject to being set aside beyond the six-month time limit of subdivision (b) of Section 473 because, while in issuing the foregoing judgment the trial court acted in excess of its jurisdiction or defined power by imposing sanctions against the defendant for failing to comply with the local rules (by not appearing at the CMC) without her having received prior notice of the same, it did *not* "lack fundamental authority over the subject matter, question presented, or party," circumstances which *would* render an order or judgment void. (*Lee*, 168 Cal.App.4th at 565.) When the court issued the terminating sanctions without adequate prior notice, it still had fundamental (i.e., personal) jurisdiction over the parties and the subject matter. The appellate court continued that even where statutory relief is unavailable, a trial court retains discretion to vacate a default on equitable relief, including extrinsic mistake. (*Id*. at 566.) But it concluded that the defendant was not entitled to such relief because she had not demonstrated that the requisite three elements were satisfied. (*Ibid*., citing *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 503 [explaining that in order to qualify for equitable relief on the basis of extrinsic mistake, the defaulted party must: demonstrate it has a meritorious case; articulate a satisfactory excuse for not presenting a defense to the original action; and demonstrate diligence in seeking to set aside the default once it was discovered.].)

Here, Defendants insist that this case is like *Lee* because the Court had "fundamental jurisdiction" over both Plaintiff and the subject matter at all relevant times and therefore dismissal was void rather than voidable. Defendants characterize *Reid, supra*, as "go[ing] against the weight of current authority" and argue that it is distinguishable because in that case the notice did not advise the plaintiff that dismissal was a possible sanction for failure to attend the CMC, whereas here the October 21, 2021 minute order and mailed notice specified that "failure to appear may result in dismissal."

The Court does not believe that the factual distinction highlighted by Defendants in *Reid* is particularly helpful to their position; if anything, it arguably harms it because the *Reid* defendant at least received notice of *when* the CMC it ultimately failed to appear at was going to take place. Here, in contrast, Plaintiff maintains that he had no notice of the hearing, period. On the other hand, the import of *Reid* is questionable to begin with given that there is no indication that the court in that case ever considered the difference between "void" and "voidable" orders in reaching its decision. The distinction between these terms is critical.

"A judgment is 'void' *only* when the court entering that judgment lack[ed] jurisdiction in a fundamental sense due to the entire absence of power to hear or determine the case

resulting from the absence of authority over the subject matter or the parties." (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660 (*American Contractors*), internal citations and quotations omitted, emphasis added.) While a court that "acts contrary to [its] authority" "to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites" has been said to "lack jurisdiction" (*American Contractors, supra*, at 661, internal citations and quotations omitted), such acts do not render the court's judgment void because "jurisdictional errors can [only] be of two types[:] A court can lack fundamental authority over the subject matter, question presented, or party, making its judgment *void*, or it can merely act in excess of its jurisdiction or defined power, rendering the judgment *voidable*" (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56).) "Only void judgments and orders may be set aside under Section 473, subdivision (d); voidable judgments and orders may not." (*People v. The North River Ins. Co.* (2020) 48 Cal.App.5th 226, 234.) Based on the foregoing authorities, the dismissal order cannot be deemed void because it is indisputable that the court had jurisdiction over Plaintiff and the subject matter of this action at the time of its issuance. The fact that the *Reid* court did not discuss the distinction between void and voidable orders is significant and compels the Court to decline to read it to stand for the proposition that an order entered at a hearing of which a party did not have notice is void, rather than voidable.

Further, as Defendants contend, the holding reached in *Reid* is contrary to the weight of authority. (See, e.g., *Johnson v. E-Z Ins. Brokerage, Inc.* (2009) 175 Cal.App.4th 86, 98 [judgment entered as the result of terminating sanction issued on ex parte basis was voidable, not void]; *Airs Aromatics, LLC v. CBL Data Recovery Technologies, Inc.* (2018) 23 Cal.App.5th 1013, 1022 [when a court merely acts in excess of jurisdiction, the judgment is only *voidable*, meaning the error is generally not subject to collateral attack"]; *Machado v. Myers* (2019) 39 Cal.App.5th 779, 797 [appellants not entitled to relief under Section 473, subdivision (d), from judgment inconsistent with the terms of a settlement agreement because court only acted in excess of its defined power, rendering the judgment voidable and not void].)

Given the clear, limited circumstances in which an order may be deemed void, and the absence of such circumstances here, the Court concludes that the October 21, 2021 dismissal order is merely voidable and thus Plaintiff is not entitled to relief under subdivision (d) of Section 473. Nor is he entitled to relief under subdivision (b) of this code section as the proscribed sixth-month application period has clearly run.

As Defendants explain, this Court retains the discretion to vacate the order on equitable grounds such as extrinsic mistake- "a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits." (*Lee, supra*, 168 Cal.App.4th at 566, internal citations omitted.) But not only does Plaintiff not invoke this doctrine in his papers, his actions do not support a showing of the necessary element of diligence. He maintains that his counsel did not discover the dismissal order until January 2023, but once discovering it, he did not move to vacate the dismissal for another *eight months*. Plaintiff makes reference to his counsel analyzing the impact of the ruling of a demurrer to a similar complaint in San Francisco Superior Court on this litigation during this time, but assuming this is the explanation for the delay, the Court does not see how it can support a showing of diligence. Even if Plaintiff believed the ruling would require him to make changes to the case at bench, his first order of business should have been to get the dismissal order vacated. Any possible amendment could have been dealt with subsequent to that because if there is no pending case, the viability of Plaintiff's Complaint is an issue that never comes to fruition.

In sum, the Court finds the October 21, 2021 order of dismissal is voidable and not void. In accordance with the foregoing analysis, Plaintiff's motion to set it aside is DENIED.

III. CONCLUSION

Plaintiff's motion to set aside the October 21, 2021 order of dismissal of this action without prejudice is DENIED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

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Calendar Line 4

Case Name: *Esteban Palomino v. Northrop Grumman Systems Corp., et al.*
Case No.: 19CV345534

This is a class and Private Attorneys General Act ("PAGA") action alleging wage statement violations against Defendant Northrop Grumman Systems Corporation ("Northrup" or "Defendant"). Following a two-day bench trial in January 2023, along with consideration of post-trial briefing and objections to a Proposed/Tentative Statement of Decision, the Court issued its Final Statement of Decision on November 2, 2023, finding that Northrup failed to provide wage statements that complied with Labor Code Section 226 ("Section 226") by (1) using two-separate wage-related documents to provide all legally-required information instead of one, (2) not listing the correct employer name and (3) not permitting a reasonable employee to use simple math to calculate total hours worked when overtime hours were listed on the pay statement. The Court awarded $1,199,800 in classwide damages and $3,160,950 in civil PAGA penalties based on Northrup's violation of subdivision (a)(8) of Section 226.

Before the Court is Plaintiff Esteban Palomino's motion for attorney fees and a service award. Northrup opposes the motion.[6] As discussed below, Plaintiff's motion for attorney's fees and a service award is GRANTED IN PART and DENIED IN PART. Plaintiff's counsel is entitled to a fee award in the amount of $1,691,558.10 , based on a multiplier of 1.5. Plaintiff's request for a service award is DENIED.

I. METHODS FOR CALCULATING FEE AWARDS IN CLASS/PAGA ACTIONS

A prevailing party is entitled to recover attorney fees authorized by law. (Code Civ. Proc., 1033.5, subd. (a)(10)(C).) A plaintiff who prevails on his or her claim for violation of Labor Code Section 226, subdivision (a), is entitled to reasonable attorney's fees. (Lab. Code, § 226, subd. (e)(1) ["An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is … entitled to an award of costs and reasonable attorney's fees."].) A plaintiff who prevails on his or her claim for violation of PAGA is also entitled attorney's fees. (Lab. Code, § 2699, subd. (g)(1) ["An employee who prevails in any [PAGA] action shall be entitled to an award of reasonable attorney's fees and costs."]; *Atempa v. Pedrazzani* (2018) 27 Cal.App.5th 809, 829 [explaining that "[b]ecause [the] statute provides that the prevailing employee 'shall be entitled' to recover attorney fees, '[such] an award is a matter of right.'"].)

The party seeking attorney fees bears the burden of establishing its entitlement thereto and documenting the hours its attorneys appropriately expended on the matter and their hourly rates. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1020; *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 784.)

"Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 254, overruled on another ground by *Hernandez v.*

[6] Northrup's request for judicial notice of the Complaint and Summary Judgment Order in Plaintiff's parallel individual lawsuit in this Court, Case No. 19CV348352, is GRANTED. (Evid. Code, § 452, subd. (d).)

Restoration Hardware, Inc. (2018) 4 Cal.5th 260.) The lodestar method, which is what is utilized by Plaintiff here, "is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative 'multiplier' to take into account a variety of other factors, including the quality of representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." (*Lealao b. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 25.) "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill in justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.)

II. THE ATTORNEY FEE AWARD

Mr. Palomino seeks a fee award of $3,155,800. He submits that his lodestar is $1,262,320, resulting in a multiplier of 2.5. According to Plaintiff, his counsel spent a total of 1,682 hours litigating this matter.[7] He maintains that the hours incurred and the hourly rates sought by his counsel are reasonable, and the 2.5 multiplier is justified given the particularities of this case.

In its opposition, Northrup asserts that Plaintiff's fee request should be denied "in its entirety" because of "excessive inflation." It argues that Plaintiff cannot recover fees billed after Northrup's motion for summary judgment was denied on January 11, 2021, and also challenges the reasonableness of Plaintiff's request, arguing that it includes and/or is comprised of numerous impermissible elements, including block billing, excessive and vague travel time, vague and non-descriptive billing entries, and excessive and unnecessary work. Finally, Northrup urges the Court to reject Plaintiff's requested multiplier.

A. Recoverability of Fees Incurred After Denial of Northrup's Motion for Summary Judgment

First, as stated above, Northrup insists that Plaintiff cannot recover attorney fees incurred subsequent to the denial of Northrup's motion for summary judgment in January 2021 (totaling $1,044,355) because Plaintiff could have resolved this motion years ago by filing a dispositive motion of his own. Such a motion, Northrup argues, would have obviated the need for further briefing, discovery, or trial preparation, and it had no control over the length of this case once its motion was denied. Plaintiff, Northrup insists, made a "conscious decision to drag out the litigation to drive up fees." (Northup Opp. at 8:26-27.) Citing various cases[8], Northup explains that courts have routinely held that it is not "reasonable" to award fees for

[7] This is broken down by Plaintiff as follows: Mr. Marder- 127.8 hours, Mr. Lee- 292.4 hours, Ms. Agnew- 610.3 hours and Mr. Rosenthal- 651.7 hours.

[8] See *Kraif v. Guez* (C.D. Cal. 2014) 2014 U.S. Dist. LEXIS 194640 (*Kraif*); *Sweet People Apparel, Inc. v. Saza Jeans, Inc.* (C.D. Cal. 2016) 2016 U.S. Dist. LEXIS 41537 (*Sweet People Apparel, Inc.*); *Huber v. Lawruk* (W.D. Pa. 2010) 2010 U.S. Dist. LEXIS 51367 (*Huber*); *Kota v. Abele Tractor & Equip. Co.* (N.D.N.Y. 1990) 1990 U.S. Dist. LEXIS 3638 (*Kota*); *In re Coyne Electrical Contractors, Inc.* (Bankr. S.D.N.Y. 1999) 231 B.R. 204 (*In re Coyne*).)

work that would have been entirely obviated by a dispositive motion. The Court does not find Northrup's argument persuasive.

First, as Plaintiff responds in his reply, defeating Northrup's MSJ does not necessarily mean that he would have been successful on his own summary judgment motion had he subsequently elected to file one. Notably, Defendant does not suggest that Plaintiff was certain to have won such a motion; if it was so convinced that that was the case it could have, as Plaintiff suggests, stipulated to liability and itself obviated the need for further work. But Defendant apparently believed that it still possessed a winning defense to Plaintiff's claims as it filed a writ with the California Court of Appeal immediately after the Court's ruling. Second, the Court relied on testimony at trial in order to reach is ruling in this case which was not part of the evidence of any point in the proceedings.

Third, the cases cited by Defendant are distinguishable. *Kraif* did not involve the Labor Code and was a situation in which the *defendant* was seeking fees, with the court electing to reduce the fee request because the second of two MSJs could have been filed with the first. No such circumstances are present here. In *Sweet People Apparel, Inc.*, a trademark infringement case, the district court declined to award attorney's fees because the claims at issue were not "groundless, unreasonable, frivolous, or pursued in bad faith"; this is a wholly different standard then here, where fees *must* be awarded to the prevailing party. In *Huber*, the attorney's fee award was reduced based on the fact that despite the losing party *conceding* its liability, the prevailing party continued to propound extensive discovery before filing its own MSJ. Northrup never made such a concession. In *Kota*, the court declined to award the defendant attorney's fees because it ruled that the plaintiff's claims were not frivolous, and opined that if the defendant believed the same, it should have filed an MSJ. Here, Plaintiff explains that it does not believe Northrup's defenses to be frivolous (and neither did Northrup given the filing of its writ) and this Court has made no such finding. Finally, *In re Coyne* did not involve a motion for attorney's fees, but rather the dismissal of bankruptcy proceedings due to the plaintiff's failure to prosecute his case, with the court noting that the plaintiff had admitted it had enough evidence to move for summary judgment at the start of the case but did not do so. No such admission by Plaintiff has been made here.

Thus, the Court rejects Northrup's contention that Plaintiff cannot, as a matter of law, recover attorney's fees incurred after its motion for summary judgment was denied.

B. Reasonableness of Hours Incurred

Next, Northrup challenges the reasonableness of the hours purportedly incurred by Plaintiff's counsel, arguing that it has failed to distinguish tasks performed by utilizing improper "block billing" that should be stricken in its entirety or reduced by 20% to 30%, claims travel time that is excessive and vague and therefore should likewise be excluded or reduced, submits vague and non-descriptive billing entries that should be excluded or discounted, and includes duplicative, excessive and unnecessary work, including that of counsel William Marder.

Here, Plaintiff insists, that the hours incurred by his counsel are reasonable given the length of time this case has been pending and actively litigated (four years). This active litigation includes the following "major events": opposing Northrup's motion for summary judgment; opposing Northrup's writ in the Court of Appeal; moving for class certification;

opposing Northrup's motion to strike aggrieved employees (and its subsequent motion for reconsideration); opposing numerous *ex parte* motions; preparing for trial; trying the case; preparing pre and post-trial briefing; and responding to Northrup's objections to the Court's ruling.

As Plaintiff states, an attorney fee award should ordinarily include compensation for all hours reasonably spent, so that the purpose behind statutory fee authorizations – i.e., to encourage attorneys to vindicate important rights affecting the public interest – are not frustrated or nullified altogether by diluted awards. (*Serrano v. Unruh (Serrano IV)* (1982) 32 Cal.3d 621, 624, 639.) Hours are reasonably spent if, at the time the work was performed, counsel's efforts were reasonable; whether, in hindsight, plaintiff's counsel could have spent fewer hours is irrelevant. (See *Wooldridge v. Marlene Industries Corp.* (6th Cir. 1990) 898 F.2d 1169, 1177.) Courts must "carefully review attorney documentation of hours expended; 'padding' in the form of inefficient or duplicative efforts is not subject to compensation. (*Ketchum, supra,* 24 Cal.4th at 1132.)

1. *Block Billing*

Turning to Northrup's first critique of Plaintiff's claimed hours, while it is correct that courts have routinely held that block-billing entries should be stricken entirely or substantially reduced, that is not exactly the manner of billing utilized by Plaintiff's counsel here. "Block billing" has been defined as the "time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." (*Mendez v. County of San Bernadino* (9th Cir. 2008) 540 F.3d 1109, 1128, fn. 2.) In the time and tasks charts provided in support of Plaintiff's motion, there are entries in which a total sum of hours worked is listed for a variety of tasks without a further breakdown for the specific amount of time spent on each task, but there are also days in which separate entries are made for separate blocks of time spent on this case which are comprised of different groupings of activities.

Thus, Plaintiff's counsel's time-keeping appears to fall short of the most severe form of block billing (i.e., the mere listing of total time spent on a case without any specificity regarding tasks performed) but does contain certain elements of it (i.e., the grouping of tasks). To be clear, block billing is not *per se* objectionable, though it does increase the risk that the trial court, in a reasonable exercise of discretion, will discount a fee request. (See *Jaramillo v. County of Orange* (2011) 200 Cal.App.4th 811, 830.)

Here, the description of work provided here by Plaintiff's counsel describes tasks that are related and likely to be done simultaneously. For example, in one entry, counsel lists in a particular block of time spent on this case "[r]eview[ing] correspondence from defense counsel re merits of class allegations; conduct legal research re cases cited in correspondence." (See Declaration of Kristen M. Agnew, Exhibit A, Entry of 8/9/2019.) And it is true that block billing is "particularly problematic in cases where there is a need to separate out work that qualifies for compensation … from work that does not." (Jaramillo, supra, 200 Cal.App.4th at 830.) That is not the situation here.

After weighing all of these considerations, the Court will reduce the amount by 10% based on block (or "block-ish") billing.

2. *Travel Time*

Northrup argues that Plaintiff's claimed travel time is excessive because he seeks to recover fees for *non-working* travel time, fails to show that these fees were necessary to the conduct of litigation and fails to separate out actual travel time from large block entries. Northrup also notes that its counsel handled all appearances by video, an option that was equally available to opposing counsel, and further explains that clients often refuse to pay for attorney travel time. (See Declaration of Jesse A. Cripps ("Cripps Decl.") in Support of Opposition to Motion for Attorney's Fees and Service Award, Exhibit C.) The Court is not persuaded by Northrup's arguments.

First, it is not the case that travel time is not routinely compensated. (See, e.g., *Allen v. City of Los Angeles* (C.D. Cal. 1995) 1995 U.S. Dist. LEXIS 13929.) This may well be the custom of Northrup's counsel's firm, but it is not necessarily the custom of all firms. Second, Plaintiff's counsel establishes that the only travel it performed was to prepare Plaintiff for his trial testimony, for the trial itself, and for the hearing on the post-trial briefing. The Court agrees that for these task, it was either necessary that class counsel appear in-person or, if not necessary, certainly justified. Finally, the Court does not view any of the hours listed for travel as excessive given the realities of commuting in the San Francisco Bay Area and surrounding areas. Consequently, the Court declines to make any reductions to or exclusions of the entries for travel time.

3. *Vague Entries*

Northrup identifies 38 entries by counsel amounting to $46,570 that it characterizes as "vague." (See Cripps Decl., Exhibit D.) Because it is difficult to determine whether the time spent on the tasks described in the entries is "reasonable," Defendant argues, the Court should reduce them by at least 40%. The Court agrees that these entries are vague such that some reduction in the fees requested is warranted. The Court reduces this amount by 20%, which means the amount of reduction is $9,314. (This reduction will happen first, and then the 10% across-the-board deduction discussed above.)

4. *Excessive and/or Unnecessary Work*

Finally, Northrup argues that Plaintiff's fee request is comprised of excessive, unnecessary or duplicative work. Northrup first takes aim at the $108,630 in fees for work purportedly performed by Plaintiff's counsel William Marder, stating that he never made any appearance in this action but rather was the primary counsel for Plaintiff's separate wrongful termination case. It insists that there is no proof that Mr. Marder did any work in this matter, which suggests that "this is a thinly veiled attempt to recoup fees for the parallel suit that he lost." Northrup's contentions are unavailing. Northrup offers nothing more than pure speculation in support of its contention that Mr. Marder has not performed work in this case, and the mere fact that he also represented Plaintiff in a separate action does not, by itself, defeat his representations under penalty of perjury to the contrary. Moreover, as Plaintiff responds, the fact that Mr. Marder did not argue this case does not render him ineligible to be compensated for the hours he spent working on it. His role as a secondary participant is reflected in the hours billed, which amount to less than 30 hours per year over the lifespan of the case. Thus, the Court sees nothing improper about the fees requested based on work performed in this case by Mr. Marder.

Next, Northrup accuses Plaintiff's counsel of submitting false entries, noting in particular Mr. Rosenthal's representation that he appeared at trial for 1.90 hours, when the minutes of trial reflect that the second day was only 11 minutes. The Court is not bothered by this entry, as appearance at trial can certainly include more than just the time spent once court has been called to order.

Northrup also insists that the hours listed by counsel for certain tasks, for example, reviewing various motions papers and responses to discovery, are excessive and inflated and as a result should be reduced by the Court. It continues that Plaintiff also included nearly 200 duplicative and/or excessive entries in his request amounting to $355,465 in fees, and cites as an example a day in December 2019 where two attorneys entered time for the same exact task. (See Cripps Decl., Exhibit E.) Finally, Defendant explains, all four of Plaintiff's attorneys billed a total of over 20 hours for tasks relating to the same brief, the opposition to its December 2019 motion to stay, which it characterizes as excessive and duplicative.

These assertions are not well taken. First, the fact that multiple attorneys were working on the same motion and/or task does not mean that the entries for that work reflect duplicative efforts, even where counsel are working collaboratively, they are entitled to be compensated for their work. Second, 4.5 hours to review a reply brief in support of a motion for summary judgment, particularly on claims involving arguably novel issues, does not strike the Court as unreasonable particularly where, as here, a new argument involving a comparison of the language of Section 226 to other unrelated statutes was made by Defendant and required investigation. The Court therefore declines to strike or reduce any of the hours claimed by Northrup to represent duplicative efforts.

C. Propriety of Multiplier

"There is no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation." (*Thayer v. Wells Fargo Bank* (2001) 92 Cal.App.4th 819, 834.) The California Supreme Court has instructed that, while the lodestar amount "is the basic fee for comparable legal services in the community; it may maybe adjusted by the court based on factors including … (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award." (*Ketchum, supra,* 24 Cal.4th at 1132.)

Plaintiff asserts that the 2.5 multiplier it requests is justified given the somewhat novel issue presented by this case, which required a high level of skill on the part of his counsel. It continues that it took this case on a purely contingent basis and bore the risk of a negative outcome after four years of effort. To merely compensate them based on lodestar, Plaintiff insists, could provide no incentive for counsel to take similar cases in the future. Finally, Plaintiff notes that this Court has in the past granted multipliers of over 2.5 to Plaintiffs' counsel for matters that settled.

In its opposition, Northrup counters that a 2.5 multiplier is not appropriate for several reasons. First, it states, the lodestar amount sought already takes into account the skill level and expertise of his counsel. Second, Defendant continues, while taking a case on a contingency fee basis may support an award of a multiplier, it does not necessarily compel it.

(Opp. at 17:24-25, citing *Save Our Uniquely Rural Cmty. Env't v. Cnty. of San Bernardino* (2015) 235 Cal. App. 4th 1179, 1188.) Third, Northrup insists that Plaintiff cannot reasonably and in good faith argue that this case is so complex as to necessitate a modifier; rather, it involved a limited question of law (statutory interpretation of Section 226, subdivision (a)) and fact. This, Northrup argues, was borne out by the brevity of trial due to a small universe of evidence which essentially involved the experiences of a single employee.

When all of the circumstances of this case are taken into account, the Court is not persuaded that a multiplier as high as 2.5 is warranted. While the case involved significant motion practice, and an arguably novel issue, it did not involve voluminous discovery or the accounting of the experiences of numerous class members, circumstances that likely would have made the case particularly more arduous to prosecute. And while the Court acknowledges having previously and recently approved a multiplier of over 2.5 in another PAGA action, the amount awarded in that case was supported by a cross-check of a percentage of the common fund, which is not the case here.

That said, the Court is mindful of the risk that Plaintiff's counsel took in taking this case on a contingency basis and consequently believes that a multiplier is warranted to incentivize legal practitioners to continue to take similar cases. Therefore, the Court finds that a multiplier of 1.5 is appropriate, resulting in a total fee award of $1,691,558.10 ($1,262,320 - $9,314 = $1,253,006. $1,253,006 x 90% = $1,127,705.40. $1,127,705.40 x 1.5 = $1,691,558.10).

III. SERVICE AWARD

Mr. Palomino also requests a service award in the amount of $50,000. Northrup challenges the propriety of such an award, arguing that it is only recoverable where a class action has been resolved via settlement. It continues that representations made by Mr. Palomino in his declaration are demonstrably false given his statements in the separate case he is pursuing against it in his individual capacity. Finally, Northrup asserts that such an award cannot be recovered because it was not pleaded in the complaint or otherwise disclosed as being sought prior to this point as an element of damages.

First, Northrup cites no authority, nor is the Court aware of any, which expressly prohibits the provision of a service award to a class representative outside of the resolution of a case by settlement. The case cited by Northrup in support of this proposition, *Dyer v. Wells Fargo Bank, N.A.* (N.D. Cal. 2014) 303 F.R.D. 326, 329, merely states that a named plaintiff is eligible for reasonable incentive payments upon approval of a class settlement. Second, when Plaintiff stated in his declaration that he filed suit in order to change company policy, it was not necessarily a lie given the fact that the wage statement format had changed because he never received the new format and thus was unaware that there had been a change at the time he filed suit.

However, the Court does find merit in Northrup's assertion that this award cannot be recovered because it was not pleaded in the Complaint or otherwise disclosed as being sought prior to this point in time. Because of this, no evidence or proof was put on at trial supporting Plaintiff's alleged entitlement to an award and Defendant was not provided with an opportunity to make any challenge to that purported entitlement. Plaintiff does not address this argument

in his reply, thereby impliedly conceding its merits. Thus, Plaintiff's request for an incentive award is denied.

IV. CONCLUSION

Plaintiff's motion for attorney's fees and a service award is GRANTED IN PART and DENIED IN PART. Plaintiff's counsel is entitled to a fee award in the amount of $1,691,558.10, based on a multiplier of 1.5. Plaintiff's request for a service award is DENIED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

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

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

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Calendar Line 5

Case Name: *VanCleave, et al. v. Abbott Laboratories, Inc.*
Case No.: 19CV345045

Plaintiffs Elizabeth J. VanCleave and Katharine Hassan bring this class action against Defendant Abbott Laboratories, Inc. ("Abbott" or "Defendant") for alleged deceptive and misleading business practices with respect to the labeling and advertising of its PediaSure products in California. Before the Court is Plaintiffs' motion regarding the trial deadline (Code of Civil Procedure section 583.340), which is opposed by Abbott. As discussed below, Plaintiffs' motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

According to the allegations of the operative First Amended Complaint ("FAC"), filed on October 9, 2020, Defendant is a health care company that manufactures, markets, and distributes pediatric nutrition shakes for consumption by children ages one to thirteen under its PediaSure brand. (*Id.* at ¶ 3.) By placing statements such as "Complete, Balanced Nutrition," "Balanced Nutrition to Help Fill Gaps," "Nutrition to Help Kids Grow," "Use as part of a healthy diet," and "Clinically Proven to Help Kids Grow" on the PediaSure labeling, Defendant represents to consumers that PediaSure is a healthy option that provides balanced nutrition. (*Id.* at ¶ 5.) Defendant's representations are false and misleading because the pediatric nutrition shakes are neither healthy nor balanced- they are highly processed, sugar sweetened beverages. (*Id.* at ¶ 8.)

On March 22, 2019, Plaintiffs initiated this action with the filing of the Complaint, asserting seven causes of action. After Defendant's demurrer to the Complaint was sustained in part and substantially overruled, Plaintiffs filed the FAC on October 30, 2020, asserting the following causes of action: (1) Violation of Commercial Code, § 2313, Breach of Express Warranty; (2) Violation of Commercial Code, § 2314, Breach of Implied Warranty of Merchantability; (3) Violations of the Consumers Legal Remedies Act, Civil Code § 1750, et seq.; (4) Violations of Business & Professions Code, § 17500, et seq.; (5) Violations of Business & Professions Code, § 17200, et seq., Unlawful, Unfair and Fraudulent Business Acts and Practices; and (6) Unjust Enrichment. Abbott again demurred and also moved to strike portions of the FAC. On May 17, 2021, the Court overruled the demurrer in its entirety and granted the motion to strike in part.

II. MOTION REGARDING TRIAL DEADLINE

With this motion, Plaintiffs seek an order making the following two findings:

1) That the following time periods are excluded from the computation of time within which the action must be brought to trial under the relevant statutory provisions and COVID-19 emergency tolling provisions:

    - 22 days between the date the parties agree the case must be brought to trial (September 22, 2024) and the October 14, 2024 trial date;

- 122 days during which the Court stayed all responsive pleadings and discovery and the additional 150 days the Court extended the discovery stay, for a total of 272 days; and
- 135 days during which Defendant's discovery conduct impeded Plaintiffs efforts to move the case to trial.

2) That the October 14, 2024 trial date is timely, and that a total of 429 days is excluded from the computation of time in which this case must be brought to trial during these periods of time.

A. Legal Standard

Code of Civil Procedure section 583.310 provides that "[a]n action shall be brought to trial within five years after the action is commenced against the defendant." The five-year period beings to run when the initial complaint is filed in the action. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 723.) "Cases not brought to trial within the five-year period are subject to dismissal; any such dismissal first requires a noticed motion either by a defendant or the court on its own motion." (*State ex rel. Sills v. Gharib-Danesh* (2023) 88 Cal.App.5th 824, citing Code Civ. Proc., § 583.360, subd. (a).)

The five-year rule is "mandatory" and is "not subject to extension, excuse, or exception except as expressly provided by statute." (Code Civ. Proc., § 583.360, subd. (b).) As relevant here, Code of Civil Procedure section 583.340 ("Section 583.340") provides that certain periods of time "shall be excluded" from the five-year periods, thereby tolling the running of the five-year periods, including that "[i]n computing the time within which an action must be brought to trial pursuant to this article, there shall be excluded the time during which … [¶] … [p]rosecution or trial of the action was stayed or enjoined" …. [or] …[¶] … [b]ringing the action to trial, for any other reason, was impossible, impracticable, or futile." (Code Civ. Proc., § 583.340, subds. (b) and (c).)

B. Discussion

1. *Chronology of Proceedings*

As articulated above, this action was initiated on March 22, 2019, and was marked "complex" by Plaintiffs. On March 26, 2019, the Court entered an order deeming the case "Complex," staying discovery "pending further order of [the] Court," prohibiting the parties from filing any responsive pleadings until a date for such filings was set at the first case management conference ("CMC"), and setting the initial CMC for July 26, 2019.

During the initial CMC, the Court approved of the parties' jointly proposed briefing schedule for Abbot's demurrer and alternative motion to strike. A joint case management statement submitted to the Court on November 27, 2019, reflected the parties having negotiated a schedule and procedures for discovery as well as a stipulated protective order and expert discovery order, both of which were submitted to the Court and entered on December 19, 2019. A hearing on Abbott's demurrer was held the following day and the resulting order was issued on December 25, 2023.

Plaintiffs served their first set of discovery requests on January 17, 2020. Abbott objected to the scope of the requests and the parties subsequently engaged in meet and confer discussions to resolve the issue. Abbott made its first document production in March 2020 and continued making rolling productions thereafter. Discovery continued into early 2020, and Plaintiffs requested an informal discovery conference ("IDC") in June 2021 regarding numerous discovery disputes. During the June 3, 2021 IDC, the Court directed Defendant to complete its document production by July 1, 2021. Abbott's discovery responses covered the four-year period from March 23, 2015 to March 22, 2019. Shortly after the foregoing deadline, Plaintiffs raised for the first time their view that Defendant's discovery responses should have instead covered March 23, 2015 to July 1, 2021. Following another IDC in September 2021, the parties agreed to further meet and confer and ultimately reached an agreement as to the scope of discovery in November 2021. Pursuant to that agreement, Abbott produced additional documents by March 5, 2022.

In May 2022, Plaintiffs deposed various Abbott employees and took its Person Most Knowledgeable depositions relating to class certification. Abbott deposed the named plaintiffs in June 2022. The parties served class certification expert reports in the months that followed and depositions of these experts took place from December 2022 to February 2023. Class certification motion practice spanned March 13, 2023 to July 26, 2023. In March 2023, Plaintiffs sent Abbott a proposed Second Amended Complaint ("SAC"); one of their alternative classes proposed in their motion for class certification was based on the proposed amendment. Abbott proposed to stay the remaining dates pertaining to the class certification motion pending resolution of whether Plaintiffs obtained leave to file the proposed SAC. Plaintiffs rejected the proposal because it would delay getting the case to trial within the five-year period. At the parties' March 30, 2023 CMC, they agreed to go forward with the briefing schedule currently set, and Plaintiffs withdrew their SAC.

On August 3, 2023, the Court held the hearing on the motion for class certification, during which the Plaintiffs expressed concerns that a second round of certification briefing would further delay the merits discovery needed to prepare for trial. The Court advised that the issue seemed premature but might be revisited at the next CMC; the August 31, 2023 CMC was rescheduled by the Court to October 12, 2023. On September 28, 2023, the Court issued an order denying Plaintiffs' motion for class certification based on their original proposed class, but allowed them to file another motion.

At the October 12, 2023 CMC, Plaintiffs requested that the Court open merits discovery; the Court was reluctant to do so and instructed the parties to meet and confer on the case schedule assuming class certification was granted. Plaintiffs also requested the Court set a date for trial to commence prior to the statutory deadline, and on October 18, 2023, the Court set a trial date of September 16, 2024.

Abbott stated its belief to Plaintiff that there were no impediments standing in the way of the parties being ready for trial by the September 22, 2024 deadline, based on its contention that merits discovery would only take a few months given the factual overlap between class and merits discovery. Consequently, the parties did not reach an agreement under Code of Civil Procedure section 583.330 to extend the time within which to bring the case to trial.

On November 1, 2023, the Court issued an order continuing the trial to October 14, 2024 "[d]ue to court congestion," and apologizing for the "inconvenience these changes may

cause for counsel and the parties." Abbott declined to stipulate that the new trial date would be timely under the rules. On November 2, 2023, Plaintiffs filed their renewed motion for class certification, which requested that the Court lift the stay on merits discovery as of the date of class certification and set a hearing regarding class notice at the earliest available date. This motion (along with motions to exclude various experts) is currently set to be heard on January 25, 2024.

2. *122 Days During Which the Court Stayed All Pleadings and Discovery and the Additional 150 Days the Court Extended the Discovery Stay for a Total of 272 Days*

It is clear from all relevant case law that Plaintiffs cannot rely on subdivision (b) of Section 583.340 to obtain a finding that the five-year period is tolled for 272 days based on pleadings and discovery stays issued by the Court. (See *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 721-722, 726, 730 [explaining that subdivision (b) of Section 583.340 "contemplates a bright-line, nondiscretionary rule that excludes from the time in which a plaintiff must bring a case to trial only that time during which *all* the proceedings in an action are stayed" and therefore partial stays imposed by the trial court, which halt "specific proceedings, such as a stay of discovery," are *not* to be excluded from the five-year period under Section 583.340, subdivision (b)]; *Warner Bros. Entertainment Inc. v. Superior Court* (2018) 29 Cal.App.5th 243, 258 [finding that an order that stays discovery and responsive pleadings does not operate to toll the five-year period under subdivision (b) of Section 583.340].) Thus, Plaintiffs can only obtain such a finding if these stays are shown to have made it "impossible, impracticable, or futile" to bring this action to trial under subdivision (c) of Section 583.340.

Under Section 583.340, subdivision (c), a court must determine what is impossible, impracticable, or futile "in light of all circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves." (*Moran v. Superior Court* (1983) 35 Cal.3d 229, 238.) "The critical factor in applying these exceptions to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case." (*Ibid*.) However, "[a] plaintiff's reasonable diligence alone does not preclude involuntary dismissal; it is simply one factor for assessing the existing exceptions of impossibility, impracticability, or futility." (*Bruns, supra*, 51 Cal.4th at 731, citing *Baccus v. Superior Court* (1989) 207 Cal.App.3d 1526, 1532-1533.) Further, "every period of time during which the plaintiff does not have it within his power to bring the case to trial is *not* to be excluded in making the computation. [Citation.]" (*Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court* (1990) 217 Cal.App.3d 464, 472, emphasis added.) Critically, "[t]ime consumed by the delay caused by ordinary incidents of proceedings, like disposition of a demurrer, amendment of pleadings, and the normal time of waiting for a place on the court's calendar are *not* within the contemplation of these exceptions." (*Baccus, supra*, at 1532.) "[I]mpracticability and futility involve a determination of *excessive* and *unreasonable* difficulty or expense, in light of circumstances of the particular case." (*Brunzell Constr. Co. v. Wagner* (1970) 2 Cal.3d 545, 554.)

The plaintiff bears the burden of proving that the circumstances warrant application of the Section 583.340, subdivision (c), exception (see *Perez v. Grajales* (2008) 169 Cal.App.4th 580, 590) and must set forth (1) the obstacles he or she faced due to causes beyond his or her control and (2) his or her exercise of reasonable diligence in overcoming them (see *Howard v.*

Thrifty Drug & Discount Stores (1995) 10 Cal.4th 424, 438; *Wilshire Bundy Corp. v. Auerbach* (1991) 228 Cal.App.3d 1280, 1287-1288.)

Here, the Court is not persuaded that the stays of discovery and responsive pleadings that totaled 272 days qualify, at least as they occurred in this action, as the type of circumstances contemplated by subdivision (c) of Section 583.340. As Abbott argues, the record establishes that even with these stays, the parties made substantial progress in moving the case to trial by meeting and conferring several times and: negotiating a responsive pleading schedule; stipulating to a protective order; negotiating an order relating to expert discovery; discussing scheduling of fact discovery and class certification briefing; collaborating on two case management statements; and fully briefing and arguing Abbott's demurrer and alternative motion to strike. (See *Warner Bros. Entertainment, Inc., supra*, 29 Cal.App.5th at 257 [observing that parties meeting and conferring, agreeing to exchange various documents and preparing and submitting a joint status report to the court during stay or responsive pleadings and discovery were "significant litigation activities."]) Further, such stays are not atypical in the initial stages of a complex matter, where the focus is often on case management issues that represent a "step that contributes significantly to the advancement of [the] … action to eventual resolution." (*Ibid*. [also stating that "[t]he stay of responsive pleadings and formal discovery during this time effectively facilitates the parties' focus on case management issues, including multiple issues concerning how discovery is to be conducted. Plainly, this is a step- an important step- in the action."].)

Similarly, in the period during which the Court kept the initial discovery stay in place (July 2019 to December 2019), the parties participated in further significant litigation activities by engaging in briefing to determine which claims and labeling statements would be allowed to proceed to discovery and, if necessary trial, and continued to meet and confer on the stipulated protective order, a stipulation between the parties regarding expert discovery, the bifurcation of class and merits issues and the preparation of a second joint case management statement.

Finally, even though the stays were out of Plaintiffs' control, a necessary condition to invoke subdivision (c) of Section 583.340, the Court is not persuaded that they made it impossible or impracticable to bring this case to trial given the important steps the parties' were able to take while they were in place. (See, e.g., *Gaines v. Fidelity National Title Ins. Co.* (62 Cal.4th 1081, 1102-1103 [holding that partial stay to allow parties to mediate did not render it impracticable to bring the case to trial where plaintiff made meaningful progress towards resolving the case during the trial].) Consequently, the Court finds that the five-year period was not tolled while the stays of discovery and responsive pleading were in place.

3. *135 Days During Which "Defendant's Discovery Conduct Impeded Plaintiffs' Efforts to Move the Case to Trial"*

The Court is also not persuaded that Abbott's conduct in connection with the discovery propounded by Plaintiffs during the period of October 21, 2021 to March 5, 2022, merits tolling the statutory deadline. None of the events and conduct described by Plaintiffs qualify as anything other than ordinary discovery disputes that are common to complex cases involving broad discovery, the scope of which is likely to be the subject of routine negotiation

and debate.[9] Notably, while at several points the disagreements between the parties necessitated participation in various IDCs, at no point did Plaintiffs find it necessary to engage in discovery motion practice based on Abbott's conduct. (See *Fidelity Nat'l Home Warranty Co. Cases* (2020) 46 Cal.App.5th 812, 856 [affirming trial court's rejection of plaintiffs' argument that it was impracticable to bring the case to trial due to defendant's alleged repeated "misuse of the discovery process" notwithstanding two successful motions to compel].)

The Court agrees with Abbott that it cannot be that a narrow statutory exception reserved for circumstances of "excessive and unreasonable difficulty" is satisfied every time there is a good-faith dispute regarding the scope of discovery. (*Bruns, supra,* 51 Cal.4th at 731.) The five-year period already accounts for ordinary delays such as good-faith discovery disputes. (See *Gaines, supra*, 62 Cal.4th at 1102.) Moreover, some of the delays are based on Plaintiffs' *own* conduct rather than Defendant's. For example, the bulk of Abbott's document production was made in 2020 and 2021, with the remaining production completed in early March 2022, but Plaintiffs did not initiate any depositions until May 2023. Otherwise, the Court is not persuaded that any of Abbott's actions represented circumstances of ""excessive and unreasonable difficulty."

Plaintiffs also fail to articulate how the supposed 4.5 month delay allegedly caused by Abbott's conduct made it impossible to bring the case to trial within the statutory deadline because, even crediting the entirety of that period, it would amount to just a small portion of the more than three-year discovery period in this action.

In sum, the Court finds that the five-year period was not tolled by Abbott's conduct in connection with discovery during the period of October 21, 2021 to March 5, 2022.

4. *22 Days Between the Date the Parties Agree the Case Must Be Brought to Trial (September 22, 2024) and the October 14, 2024 Trial Date*

Lastly, contrary to the preceding periods of time discussed above, the Court wholly agrees with Plaintiffs that the 22-day continuance of the trial date that it made sua sponte from September 16, 2024 to October 14, 2024 "[d]ue to court congestion" qualifies as the type of impossibility, impracticability and futility contemplated by subdivision (c) of Section 583.340. As Plaintiffs maintain, it has long been held that the foregoing subdivision includes the "aggregate time a case is continued because of courtroom unavailability." (*Chin v. Meier* (1991) 235 Cal.App.3d 1473, 1477; *Rose v. Scott* (1991) 233 Cal.App.3d 537, 542 ["Impossibility occurs when there is no courtroom available."]; *Lazella v. Lovelady* (1985) 171 Cal.App.3d 34, 40.) Courtroom unavailability is clearly an obstacle beyond Plaintiffs' control, and no level of diligence exercised by them will be able to overcome it. Thus, the Court concludes that the new trial date is timely under Section 583.310 based on the exclusion of these 22 days from the computation of time within which this case must be brought to trial.

[9] For this reason, Plaintiffs' reliance on *Westinghouse Elec. Corp. v. Superior Court* (1983) 143 Cal.App.3d 95, 105-106, where it was deemed appropriate to extend the five-year period because "substantial discovery remain[ed] to be completed at or near the end of the five-year period" and the record showed that the defendant's dilatoriness was to blame, is misplaced.

Given the foregoing, the Court finds that the October 14, 2024 trial date is timely given the tolling of the five-year period for 22 days due to courtroom unavailability. No other time is excluded from the five-year period.

III. CONCLUSION

Plaintiffs' motion is GRANTED PART and DENIED IN PART. The Court finds that the October 14, 2024 trial date is timely given the tolling of the five-year period for 22 days due to courtroom unavailability. No other time is excluded from the five-year period in which this case must be brought to trial.

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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