SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Theodore C. Zayner Presiding

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

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

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

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

LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV356777	Mejia v. J.A. Momaney Services, Inc. (Class Action)	See Line 1 for tentative ruling.
LINE 2	21CV386961	Ruiz v. Lion Foods LLC (Class Action/PAGA)	See Line 2 for tentative ruling.
LINE 3	20CV365260	Sheppard v. Staffmark Investment LLC (Class Action/PAGA)	See Line 3 for tentative ruling.
LINE 4	19CV356142	SJSC Properties, LLC v. Suffolk Construction Company, Inc., et al.	See Line 4 for tentative ruling.
LINE 5	21CV392238	City of San Jose v. County of Santa Clara	See Line 5 for tentative ruling.
LINE 6	21CV392238	City of San Jose v. County of Santa Clara	See Line 5 for tentative ruling.
LINE 7	21CV392238	City of San Jose v. County of Santa Clara	See Line 5 for tentative ruling.
LINE 8			
LINE 9			
LINE 10			
LINE 11			

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LAW AND MOTION TENTATIVE RULINGS

LINE 12			
LINE 13			

Calendar Line 1

Case Name: Mejia v. J.A. Momaney Services, Inc. (Class Action)
Case No.: 19CV356777

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

I. INTRODUCTION

This putative class and representative action by plaintiffs Carlos Adalberto Mejia ("Mejia") and Chris Alderson ("Alderson") (collectively, "Plaintiffs") arises out of various alleged wage and hour violations. The operative Second Amended Complaint ("SAC"), filed on January 27, 2022, sets forth the following causes of action: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Overtime Wages; (3) Failure to Provide Meal Periods; (4) Failure to Permit Rest Breaks; (5) Failure to Provide Accurate Itemized Wage Statements; (6) Failure to Pay All Wages Due Upon Separation of Employment; (7) Violation of Business and Professions Code §§ 17200, et seq.; and (8) Enforcement of Labor Code § 2698 et seq.

The parties reached a settlement. Plaintiffs moved for preliminary approval of the settlement.

On May 31, 2023, the court continued the motion for preliminary approval of settlement to June 28, 2023. In its minute order, the court noted that the PAGA release was overbroad and ordered the parties to meet and confer regarding the scope of the release. Next, the court directed Plaintiffs to designate a new *cy pres* recipient in compliance with Code of Civil Procedure section 384. The court further informed the parties that the settlement agreement must be modified to provide for two separate calculations and payments: one for payments related to the settlement of the class claims; and one for payments related to the settlement of the PAGA claim. Lastly, the court asked the parties to make several changes to the class notice.

On June 16 and 21, 2023, Plaintiffs' counsel filed a supplemental declarations and briefs with the court.

On July 6, 2023, the court entered an order granting the motion for preliminary approval.

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

II. LEGAL STANDARD

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

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

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

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

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

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

III. DISCUSSION

> The case has been settled on behalf of the following class:
> [A]ll non-exempt employees employed by [defendants J.A. Momaney Services, Inc. and Jeffrey A. Momaney (collectively, "Defendants")] in California at any time during the Class Period, excluding family members of Jeffrey Momaney.

The Class Period is defined as the time period of October 16, 2015, through the date of preliminary approval of the settlement. The settlement also includes a subset of PAGA Group Members, who are defined as all class members employed by Defendants at any time during the PAGA Period. The PAGA Period is defined as the time period of October 16, 2018, through the date of preliminary approval of the settlement.

As discussed in connection with preliminary approval, Defendants will pay a maximum, non-reversionary settlement amount of $720,000. The gross settlement amount includes attorney fees up to $288,000 (40 percent of the gross settlement amount), litigation costs not to exceed $55,000, a PAGA allocation of $20,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be allocated to the net settlement fund and distributed to PAGA Group Members), a total incentive award up to $45,000 for the class representatives ($30,000 for Mejia and $15,000 for Alderson), and settlement administration costs up to $9,500. The net settlement amount will be distributed to participating class members pro rata basis; however, the payments to class members who previously received individual settlements will be reduce by the amount of the settlement already paid, with the exception that no class member shall receive less than $1.00. Checks that remain uncashed 180 days from the date the checks are dated will be void and the funds from those checks will be distributed to Mothers Against Drunk Driving as the *cy pres* recipient.

On August 7, 2023, the settlement administrator mailed notice packets to 310 class members. (Declaration of Yami Burns in Support of Motion for Final Approval of Class Action Settlement ("Burns Dec."), ¶ 5.) Ultimately, 13 notice packets were deemed undeliverable. (*Id.* at ¶ 6.) As of November 15, 2023, there were no objections and no requests for exclusion. (*Id.* at ¶¶ 7-8.)

The highest individual settlement share to be paid is approximately $8,005.62, the lowest individual settlement share to be paid is approximately $19.91, and the average

individual settlement share to be paid is approximately $1,113.89. (Burns Dec., ¶ 12.) The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiffs request a total incentive award up to $45,000 for the class representatives ($30,000 for Mejia and $15,000 for Alderson). Plaintiffs submitted declarations in support of the request, detailing their participation in the action. Mejia declares that he spent approximately 200 hours in connection with this lawsuit, including searching for documents, discussing the case with class counsel, preparing for and attending three separate depositions, providing declarations in support of motions, being available during mediation, providing responses to written discovery, reviewing documents, and discussing settlement with class counsel. (Declaration of Carlos Mejia in Support of Motion for Final Approval of Class Action Settlement, ¶¶ 4-9, 14.) Alderson declares that he spent approximately 100 hours in connection with this lawsuit, including searching for documents, discussing the case with class counsel, preparing for and attending his deposition, providing responses to written discovery, providing declarations in support of motions, locating witnesses, and reviewing settlement documents. (Declaration of Chris Alderson in Support of Motion for Final Approval of Class Action Settlement, ¶¶ 13-15.)

Moreover, Plaintiffs undertook risk by putting their names on the case because it might impact their future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].). Therefore, the requested incentive award in the total amount of $45,000 is reasonable and approved.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co*. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel seek attorney fees in the amount of $252,000 (35 percent of the gross settlement amount). Plaintiffs' counsel provide evidence demonstrating a lodestar of $981,515. (Declaration of Jessica L. Campbell in Support of Plaintiffs' Motion for Final Approval of Class Action

Settlement ("Campbell Dec."), ¶¶ 44-67.) This results in a negative multiplier. The court finds the attorney fees are reasonable as a percentage of the common fund and are approved.

Plaintiffs' counsel also requests litigation costs in the amount of $48,195.02, and provides evidence of incurred costs in that amount. (Campbell Dec., ¶ 68 & Ex. 3.) Consequently, the litigation costs are reasonable and approved. The settlement administration costs of $9,500 are also approved. (Burns Dec., ¶ 15.)

Accordingly, the motion for final approval of class action settlement is GRANTED.

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

The court will set a compliance hearing for September 18, 2024, at 2:30 p.m. in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein, the number and value of any uncashed checks, amounts remitted to Defendants, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

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Calendar Line 2

Case Name: Ruiz v. Lion Foods LLC (Class Action/PAGA)
Case No.: 21CV386961

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

IV. INTRODUCTION

This is a putative class and representative action arising out of various alleged wage and hour violations. The operative First Amended Class and Representative Action Complaint ("FAC"), filed on November 29, 2021, sets forth causes of action for: (1) Failure to Pay All Wages; (2) Failure to Provide Meal Periods or Compensation in Lieu Thereof; (3) Failure to Permit Rest Periods or Provide Compensation in Lieu Thereof; (4) Knowing and Intentional Failure to Provide Accurate Itemized Wage Statements; (5) Waiting Time Penalties; (6) Failure to Reimburse Business Expenses; (7) Violations of Unfair Competition Law; and (8) Violation of the Private Attorneys General Act of 2004.

The parties reached a settlement. Plaintiff Edy Ruiz ("Plaintiff") moved for preliminary approval of the settlement.

On July 12, 2023, the court granted the motion for preliminary approval of the settlement, subject to approval of the amended class notice.

On July 21, 2023, Plaintiff submitted an amended class notice to the court. The court approved the amended class notice on July 28, 2023.

On August 28, 2023, the court entered an Amended and Second Amended Order Granting Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement.

Plaintiff now moves for final approval of the settlement. The motion is unopposed.

V. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v.*

Apple Computer, Inc. (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

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

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

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

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

VI. DISCUSSION

> The case has been settled on behalf of the following class:
> [A]ll persons currently or formerly employed as non-exempt employees in California by Defendant [Lion Foods LLC ('Defendant')] at any time during the Class Period.

The Class Period is defined as June 2, 2018 through the preliminary approval date of the settlement. The class also contains a subset of Aggrieved Employees that are defined as "all persons currently or formerly employed as non-exempt employees in California by Defendant

at any time during the PAGA Period." The PAGA Period is defined as September 21, 2020 through the preliminary approval date of the settlement.

As discussed in connection with preliminary approval, Defendant will pay a gross, non-reversionary amount of $190,000. The gross settlement payment includes attorney fees of $63,333.33 (1/3 of the gross settlement amount), litigation costs not to exceed $20,000, an enhancement award for the class representative up to $5,000, settlement administration costs up to $8,500, and a PAGA allocation of $3,800 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to Aggrieved Employees).

The net settlement amount will be distributed to the class members on a pro rata basis based on the number of workweeks worked during the Class Period. Similarly, Aggrieved Employees will receive a pro rata share of the 25 percent portion of the PAGA payment allocated to Aggrieved Employees based on the number of workweeks worked during the PAGA Period.

The settlement agreement provides that checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be distributed to the California State Controller Office's Unclaimed Property Division. In its July 12, 2023 minute order granting preliminary approval, the court explained that the parties' proposal to send funds from uncashed checks to the California State Controller does not comply with Code of Civil Procedure section 384, which mandates that unclaimed or abandoned class member funds be given to "nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent." The court directed Plaintiff to provide a new *cy pres* in compliance with Code of Civil Procedure section 384 prior to the final approval hearing. Plaintiff has not done so.

Counsel for the parties are ordered to appear at the final fairness hearing to identify a new *cy pres* recipient in compliance with Code of Civil Procedure section 384.

In exchange for the settlement, class members agree to release Defendant, and related persons and entities, from all claims or causes of action that accrued during the Class Period

that were alleged or which could have been alleged based on the factual allegations in the FAC. Aggrieved Employees agree to release Defendant, and related persons and entities, from all claims or causes of action that accrued during the PAGA Period that were alleged or which could have been alleged based on the exhausted claims and factual allegations in Plaintiff's notices to the LWDA and the FAC.

On September 15, 2023, the settlement administrator mailed notice packets to 293 class members. (Declaration of Kevin Lee in Support of Plaintiff's Motion for Final Approval of Class Action and PAGA Settlement ("Lee Dec."), ¶ 5.) Ultimately, 22 notice packets were deemed undeliverable. (*Id.* at ¶ 7.) As of December 21, 2023, there were no objections and no requests for exclusion. (*Id.* at ¶¶ 8-9.)

The highest individual settlement share to be paid is approximately $896.94 , the lowest individual settlement share to be paid is approximately $6.55, and the average individual settlement share to be paid is approximately $305.01. (Lee Dec., ¶ 14.) The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiff requests an incentive award up to $5,000 for the class representative. Plaintiff submitted a declaration in support of the request, detailing his participation in the action. Plaintiff declares that he spent approximately 60 hours in connection with this lawsuit, including searching for and providing information and documents to class counsel, discussing the case with class counsel, identified and conferred with other class members, preparing for and being available for mediation, and reviewing the settlement agreement. (Declaration of Edy Ruiz in Support of Plaintiff's Motion for Final Approval of Class Action and PAGA Settlement, ¶¶ 7-9.)

Moreover, Plaintiff undertook risk by putting his name on the case because it might impact his future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].) Therefore, the requested incentive award in the total amount of $5,000 is reasonable and approved.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co*. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel seek attorney fees in the amount of $63,333.33 (1/3 of the gross settlement fund). Plaintiff's counsel provide evidence demonstrating a lodestar of $161,335. (Declaration of Daniel J. Hyun in Support of Plaintiff's Motion for Final Approval of Class Action and PAGA Settlement ("Hyun Dec."), ¶¶ 47-48 & Ex. 5; Declaration of Jose R. Garay in Support of Plaintiff's Motion for Final Approval of Class Action and PAGA Settlement ("Garay Dec."), ¶ 7 & Ex. 1.) This results in a negative multiplier. The court finds the attorney fees are reasonable as a percentage of the common fund and are approved.

Plaintiffs' counsel also requests litigation costs in the amount of $13,416.38, and provides evidence of incurred costs in that amount. (Hyun Dec., ¶ 48 & Ex. 6; Garay Dec., ¶ 7 & Ex. 2.) Consequently, the litigation costs are reasonable and approved. The settlement administration costs of $8,500 are also approved. (Lee Dec., ¶ 17.)

Accordingly, the motion for final approval of settlement is GRANTED subject to the appearance of counsel at the final fairness hearing to identify a new *cy pres* recipient in compliance with Code of Civil Procedure section 384.

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

The court will set a compliance hearing for September 18, 2024, at 2:30 p.m. in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein, the number and value of any uncashed checks, amounts remitted to Defendant, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

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Calendar Line 3

Case Name: Sheppard v. Staffmark Investment LLC (Class Action/PAGA)
Case No.: 20CV365260

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

VII. INTRODUCTION

This is a class and representative action arising out of alleged wage and hour violations. The operative Second Amended Complaint ("SAC"), filed on January 11, 2023, sets forth the following causes of action: (1) Failure to Provide Meal Periods; (2) Failure to Permit Rest Breaks; (3) Failure to Provide Accurate Itemized Wage Statements; (4) Failure to Pay All Wages Due Upon Separation of Employment; (5) Violation of Business and Professions Code §§ 17200, et seq. ("UCL"); (6) Failure to Reimburse Business Expenses; and (7) Enforcement of Labor Code § 2698 et seq. ("PAGA").

The parties reached a settlement. Plaintiff Tracee Sheppard ("Plaintiff") moved for preliminary approval of the settlement.

On May 10, 2023, the court continued the motion for preliminary approval of settlement to July 12, 2023. In its minute order, the court directed Plaintiff to identify a new *cy pres* recipient in compliance with Code of Civil Procedure section 384, ordered the parties to meet and confer regarding the scope of the PAGA release, and to modify the settlement agreement to provide for two separate payments and calculations (one for PAGA claims and one for class claims). The court otherwise found the settlement fair. The court also requested the parties make several changes to the class notice.

On June 28, 2023, Plaintiff filed a supplemental brief and supplemental declarations in support of her motion.

On July 28, 2023, the court granted preliminary approval of the settlement and approved the amended class notice.

Plaintiff now moves for final approval of the settlement. The motion is unopposed.

VIII. LEGAL STANDARD

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

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

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

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

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

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

IX. DISCUSSION

> The case has been settled on behalf of the following class:
> [A]ll current and former non-exempt employees who are or were employed by [defendant Staffmark Investments LLC ("Staffmark")] and placed on temporary work assignment with [defendant UPS Mail Innovations, Inc. ("UPSMI")] in California at any time during the Class Period.

The Class Period is defined as the time period on March 19, 2019 through June 2, 2022. The settlement also includes PAGA Group Members, who are defined as all class members. The PAGA Period is the same as the Class Period.

As discussed in connection with preliminary approval, Staffmark and UPSMI (collectively, "Defendants") will pay a maximum, non-reversionary settlement amount of $2,400,000. The gross settlement amount includes attorney fees up to $800,000 (1/3 of the gross settlement amount), litigation costs not to exceed $20,000, a PAGA allocation of $50,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be allocated to PAGA Group Members), an incentive award up to $10,000 for the class representative, and settlement administration costs not to exceed $35,000. The net settlement amount will be distributed to participating class members pro rata basis. Checks that remain uncashed 180 days from the date the checks are dated will be void and the funds from those checks will be distributed to Bay Area Legal Aid.

On August 2, 2023, the settlement administrator mailed notice packets to 5,493 class members. (Declaration of Kevin Lee Regarding Notice and Settlement Administration ("Lee Dec."), ¶¶ 3-5.) During the response period, one individual requested to be added to the class. (*Id.* at ¶ 6.) Notice was mailed to this additional individual such that notice was sent to a total of 5,494 class members. (*Ibid.*) The settlement administrator declares that "sixty-five (65) Notice Packets remain undeliverable, specifically sixty-six (66) are undeliverable since an updated address could not be obtained via skip trace, while fifty-eight (58) are undeliverable since they were returned by the Post Office after a second mailing." (*Id.* at ¶ 8.) As of November 6, 2023, there were no objections and no requests for exclusion. (*Id.* at ¶¶ 9-10.)

The highest individual settlement share to be paid is approximately $4,067.81, the lowest individual settlement share to be paid is approximately $22.60, and the average individual settlement share to be paid is approximately $271.61. (Lee Dec., ¶ 15.)

The court has concerns regarding the adequacy of the notice. As an initial matter, it is unclear when the one additional class member who asked to be added to the class was mailed a notice packet. Consequently, the court cannot determine when the response period deadline elapsed for this individual. Next, the settlement administrator's declaration does not clearly

state how many notice packets were ultimately undeliverable. Additionally, Plaintiff previously advised the court in connection with the motion for preliminary approval of settlement that there were approximately 5,500 class members. However, notice packets were only mailed to 5,494 class members. Plaintiff does not explain this discrepancy. It is unclear whether there are only 5,494 class members or whether notice was not provided to the additional 6 class members. In light of the foregoing, a brief continuance of this matter is warranted. Plaintiff is directed to provide a supplemental declaration clarifying when the one additional class was mailed a notice packet, how many notice packets were ultimately undeliverable, and why notice packets were only mailed 5,494 class members.

Plaintiff requests an incentive award up to $10,000 for the class representative. Plaintiff submitted a declaration in support of the request, detailing her participation in the action. Plaintiff declares that she spent approximately 50 hours in connection with this lawsuit, including searching for and providing documents to class counsel, discussing the case with class counsel, identifying potential witnesses, reviewing discovery, participating in settlement discussions, and reviewing settlement documents. (Declaration of Tracee Sheppard in Support of Motion for Final Approval of Class Action Settlement, ¶ 7.)

Moreover, Plaintiff undertook risk by putting her name on the case because it might impact his future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].)

However, the requested service award in the amount of $10,000 is excessive. Each class member will receive approximately $271.61. Consequently, the sought-after service award would amount to more than 36 times the estimated average payout. Additionally, the amount requested is higher than the court typically awards for the amount of Plaintiff time spent in connection with this action. In light of the foregoing, the court finds that a service award in the amount of $5,000 is reasonable and it approves the award in that lesser amount.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co*. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel

seek attorney fees in the amount of $800,000 (1/3 of the gross settlement amount). Plaintiff's counsel provide evidence demonstrating a lodestar of $413,370. (Declaration of Fawn F. Bekam in Support of Motion for Final Approval of Class Action Settlement ("Bekam Dec."), ¶¶ 18-19.) This results in a multiplier of 1.94. The court finds the attorney fees are reasonable as a percentage of the common fund and are approved.

Plaintiff's counsel also requests litigation costs in the amount of $12,793.33, and provides evidence of incurred costs in that amount. (Bekam Dec., ¶ 20 & Ex. 1.) Consequently, the litigation costs are reasonable and approved. The settlement administration costs of $35,000 are also approved. (Lee Dec., ¶ 18.)

Accordingly, the motion for final approval of the class and representative action settlement is CONTINUED to February 21, 2024, at 1:30 p.m. in Department 19. Plaintiff shall file a supplemental declaration with the additional information requested by the court no later than February 7, 2024. No additional filings are permitted.

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

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Calendar Line 4

Case Name: SJSC Properties, LLC v. Suffolk Construction Company, Inc., et al.
Case No.: 19CV356142

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

X. INTRODUCTION

This is a construction defect action. According to the allegations of the operative First Amended Complaint ("FAC"), filed on February 5, 2020, plaintiff SJSC Properties, LLC ("SJSC") is in the process of building a modern, multifamily residential apartment complex and mixed-use project comprised of two 28-story towers and a below grade parking garage (the "Project"). (FAC, ¶ 2.) As a result of groundwater intrusion and flood events, SJSC was forced to halt and/or delay construction of the SJSC Towers Project and incur substantial groundwater flood related mitigation, remediation, and restoration/repair costs. (*Id*. at ¶¶ 3, 5, 42, & 51-53.) Based on the foregoing allegations, the FAC sets forth the following causes of action: (1) Breach of Contract (against defendant Langan Engineering and Environmental Services ("Langan")); (2) Breach of Contract (against defendant Suffolk Construction Company, Inc. ("Suffolk")); (3) Professional Negligence (against Suffolk, Langan, and defendant Drill Tech Drilling & Shoring, Inc. ("Drill Tech")); (4) Negligence (against Suffolk and Drill Tech); (5) Breach of Third-Party Beneficiary Contract (against Drill Tech); and (6) Breach of Warranty (against Suffolk and Drill Tech).

Suffolk filed a Cross-Complaint on March 16, 2020. The Cross-Complaint sets forth the following causes of action: (1) Breach of Contract (against SJSC); (2) Breach of Contract (against Drill Tech); (3) Express Contractual Indemnity (against Drill Tech); (4) Equitable Indemnity (against Drill Tech); (5) Negligence (against Drill Tech); (6) Breach of Express Warranty (against Drill Tech); (7) Breach of Implied Warranty (against Drill Tech); (8) Contribution (against Drill Tech); and (9) Declaratory Relief (against Drill Tech).

On July 8, 2022, Drill Tech filed a Cross-Complaint against Suffolk, Langan, and cross-defendant Avar Construction, Inc. ("Avar"), alleging the following causes of action:

(1) Negligent Misrepresentation (against SJSC, Suffolk, and Langan); (2) Breach of Contract (against Suffolk); (3) Non-Payment (against Suffolk); (4) Prompt Payment Penalties (against Suffolk); (5) Breach of Third-Party Beneficiary Contract (against Suffolk and Avar); (6) Negligent Interference with Prospective Economic Relations (against Avar); (7) Negligence (against Suffolk and Avar); (8) Foreclosure of Mechanics' Lien (against SJSC); (9) Stop Payment (against SJSC); (10) Implied Indemnity (against Suffolk, Langan, and Avar); (11) Equitable Indemnity (against SJSC, Suffolk, Langan, and Avar); (12) Concealment (against SJSC and Langan); (13) Contribution (against SJSC, Suffolk, Langan, and Avar); and (14) Declaratory Relief (against SJSC, Suffolk, Langan, and Avar).

On August 31, 2022, Avar filed a Cross-Complaint against TOES 1 through 50, which set forth causes of action for: (1) Comparative Indemnity; and (2) Implied Indemnity.

On August 28, 2023, the court entered a Stipulation and Order Re Trial and Pretrial Dates, which set trial for April 1, 2024. The court later continued the trial date to April 2, 2024.

On December 19, 2023, Avar filed an ex parte application for leave to amend its Cross-Complaint to substitute Drill Tech as TOE 3. Drill Tech opposed the ex parte application.

On December 20, 2023, the court entered an Order Denying Avar Construction Inc.'s Application for Leave to File Second Toe Amendment to Cross-Complaint Pending Hearing, which set the matter for hearing on January 24, 2024.

Now before the court is Avar's application for leave to amend its Cross-Complaint to substitute Drill Tech as TOE 3 pursuant to Code of Civil Procedure section 473. Drill Tech opposes the application.

II. LEGAL STANDARD

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

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

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

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

If ignorant of any defendant's name, a plaintiff may designate the defendant by any name in a pleading. (Code Civ. Proc., § 474.) The plaintiff must be genuinely ignorant of the defendant's identity at the time of filing the complaint. (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 177.) Once the defendant's true name is discovered, the pleading must be amended accordingly. (Code Civ. Proc., § 474.)

However, the policy of liberality in permitting amendments should be applied only where no prejudice is shown to the adverse party. (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761.) And leave to amend should not be granted where the proposed amendment would be futile. (See *Foroudi v. The Aerospace Corp*. (2020) 57 Cal.App.5th 992, 1000.)

III. DISCUSSION

Here, Drill Tech has shown that it will suffer prejudice so as to warrant denying Avar leave to file the proposed amendment. The court has already continued the trial date multiple times and the current trial date of April 2, 2024, is approximately two months away. Under the terms of the Stipulation and Order Re Trial and Pretrial Dates entered on August 28, 2023, the deadlines for document exchange, written discovery, fact witness depositions, expert witness designation, and supplemental expert witness designation have passed. Thus, Drill Tech is currently precluded from conducting any discovery regarding the factual allegations that Avar purports to have newly discovered regarding its indemnity claims. As Drill Tech persuasively argues, this places it in the untenable position of not knowing prior to trial the specific factual

basis for Avar's indemnity claims. Additionally, Drill Tech will be unable to designate any additional expert witness to address those claims.

Accordingly, Avar's application for leave to amend its Cross-Complaint to substitute Drill Tech as TOE 3 is DENIED.

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

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Calendar Lines 5 – 7

Case Name: City of San Jose v. County of Santa Clara
Case No.: 21CV392238

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

XI. INTRODUCTION

This action arises out of the District Attorney for the County of Santa Clara's ("District Attorney") requests for police officer personnel records from the City of San Jose ("City") in connection with the District Attorney's investigation and prosecution of police misconduct. On December 10, 2021, the City filed a Verified Complaint for Declaratory Relief ("Complaint") seeking a judicial determination as to the scope of the District Attorney's access to police officer records under Penal Code section 832.7, subdivision (a). (Complaint, ¶¶ 8, 41, & 44.) Specifically, the City asked for determinations as to whether it may disclose police officer personnel records to the District Attorney under the exception set forth in Penal Code section 832.7, subdivision (a) in the following circumstances: records of an officer under investigation, beyond the records of the specific incident under investigation; records of an officer whose off-duty conduct is under investigation, beyond the records of the specific incident under investigation; and records of an officer who is a witness to conduct of another officer under investigation. (*Id.* at Prayer for Relief.)

On October 13, 2022, the court entered a Stipulation and Order Granting Real Parties' In Interest's Motions for Joinder and/or Intervention.

On October 31, 2022, San Jose Police Officers' Association ("SJPOA"), Matthew Rodriguez ("Rodriguez"), Tyler Moran ("Moran"), and George Brown ("Brown") filed a Joint Complaint in Intervention.

On November 28, 2022, SJPOA, Rodriguez, and Brown (collectively, "Intervenors") filed the operative First Amended Joint Complaint in Intervention ("FACI") seeking declaratory and injunctive relief against the City and the District Attorney. In addition to the requests for judicial determinations made by the City, Intervenors request judicial

determinations as to whether: the District Attorney must file a *Pitchess* motion to obtain records of officer who have been charged with crimes; individual officer training records constitute personnel records within the meaning of Penal Code section 832.8; and the City may provide copies of officer personnel records to the District Attorney. (FACI, ¶ 3.)

Now before the court are: (1) the motion by the District Attorney for summary judgment of the Complaint and FACI; (2) the motion by the City for summary judgment of the Complaint and FACI; and (3) the motion by SJPOA for summary adjudication of the first cause of action of the FACI. All three motions are opposed. Specifically, the City and SJPOA oppose the District Attorney's motion for summary judgment, the District Attorney and SJPOA oppose the City's motion for summary judgment, and the District Attorney and the City oppose SJPOA's motion for summary adjudication.[1]

II. LEGAL STANDARD

The pleadings limit the issues presented for summary judgment or adjudication and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73.)

A motion for summary judgment must dispose of the entire action. (Code Civ. Proc., § 437c, subd. (a); *All Towing Services LLC v. City of Oran*ge (2013) 220 Cal.App.4th 946, 954 (*All Towing*) ["Summary judgment is proper only if it disposes of the entire lawsuit."].) "Summary judgment is properly granted when no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. [Citation.] Once the defendant has met that burden, the burden shifts to the plaintiff 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party

[1] Rodriguez and Brown did not file oppositions to any of the motions.

opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Madden v. Summit View, In*c. (2008) 165 Cal.App.4th 1267, 1272 (*Madde*n).)

"Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. ([Code Civ. Proc.,] § 437c, subd. (f).) … Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.' " (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

For purposes of establishing their respective burdens, the parties involved in a motion for summary judgment or adjudication must present admissible evidence. (*Saporta v. Barbagelata* (1963) 220 Cal.App.2d 463, 468.) Additionally, in ruling on the motion, a court cannot weigh said evidence or deny the motion on the ground that any particular evidence lacks credibility. (See *Melorich Builders v. Superior Court* (1984) 160 Cal.App.3d 931, 935; see also *Lerner v. Superior Court* (1977) 70 Cal.App.3d 656, 660.) As summary judgment or adjudication "is a drastic remedy eliminating trial," the court must liberally construe evidence in support of the party opposing the motion and resolve all doubts concerning the evidence in favor of that party. (See *Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389; see also *Hepp v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 717-718.)

III. DISTRICT ATTORNEY'S MOTION FOR SUMMARY JUDGMENT

A. Request for Judicial Notice

The District Attorney asks the court to take judicial notice of: the legislative history for Penal Code section 832.7, subdivision (a) (specifically, the legislative history for Senate Bill 1436 (1977-1978 Reg. Sess.), Senate Bill 1027 (1987-1988 Reg. Sess.), Assembly Bill 1106 (2003-2004 Reg. Sess.), Senate Bill 2 (2021-2022 Reg. Sess.), and Senate Bill 16 (2021-2022 Reg. Sess.)); the criminal complaints filed against Rodriguez and Brown; the Complaint; and the FACI. The request for judicial notice is unopposed.

First, the legislative history for Penal Code section 832.7, subdivision (a) is a proper subject of judicial notice under Evidence Code section 452, subdivisions (a) and (c). (See *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 171, overruled in part ["In considering the history of the statutes at issue, we grant the requests of the parties and amici curiae to take

judicial notice of legislative history documents […].”]; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1041, fn. 4 [“Petitioner requests that this court take judicial notice of the legislative history of Senate Bill No. 1436 (1977-1978 Reg. Sess.) […]. We grant the request. (§§ 452, subds. (a), (c), 459.)”].)

Second, the criminal complaints filed against Rodriguez and Brown, the Complaint, and the FACI are proper subjects of judicial notice under Evidence Code section 452, subdivision (d) as they are court records relevant to issue raised by the pending motion. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *People v. Woodell* (1998) 17 Cal.4th 448, 455 [Evid. Code, § 452, subd. (d) permits the trial court to “take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact.”].)

Accordingly, the District Attorney’s request for judicial notice is GRANTED.

B. Discussion

The parties generally agree that the following material facts are undisputed: On September 29, 2020, the District Attorney filed criminal charges against Rodriguez for assault under color of authority, based on an incident that occurred on or around July 22, 2020. (Separate Statement of Undisputed Material Facts in Support of District Attorney for the County of Santa Clara’s Motion for Summary Judgment, Undisputed Material Fact (“UMF”) No. 1.) At the time of the incident, Rodriguez was employed by the San Jose Police Department (“SJPD”) as a police officer. (UMF No. 2.) In connection with the charges, the District Attorney requested Rodriguez’s personnel file from the City. (UMF No. 3.)

On October 27, 2021, the District Attorney filed criminal charges against Brown for assault under color of authority, together with battery and child endangerment, based on an incident that occurred on July 24, 2021. (UMF No. 4.) At the time of the incident, Brown was employed by the SJPD as a police officer. (UMF No. 5.) In connection with the charges, the District Attorney requested Brown’s personnel file from the City. (UMF No. 6.)

The District Attorney also requested personnel records for Moran, the second officer present with Rodriguez during the alleged assault and a witness to the July 22, 2020 incident. (UMF No. 7.) At the time of the incident, Moran was employed by the SJPD as a police officer. (UMF No. 8.) The District Attorney subsequently withdrew the records request relating to Moran. (UMF No. 9.)

In its letters regarding Rodriguez, Brown, and Moran, the District Attorney sought a copy of the "personnel records" of each officer as defined in Penal Code section 832.8. (UMF No. 10.)

The SJPD provided the District Attorney with its criminal investigation materials for the July 22, 2020 incident involving Rodriguez. (UMF No. 11.) Other than those materials, the City has not provided any records in response to the District Attorney's request regarding Rodriguez. (UMF No. 12.) The City did not provide any records in response to the District Attorney's initial request under Penal Code section 832.7, subdivision (a) for personnel records regarding Brown (UMF No. 13); however, the District Attorney later obtained copies of the SJPD investigative files related to the July 24, 2021 incident involving Brown. The City did not provide any records in response to the request regarding Moran prior to that request being withdrawn. (UMF No. 14.)

In the criminal proceeding against Rodriguez, the District Attorney issued a subpoena seeking information regarding Rodriguez's training. (UMF No. 15.) The criminal court granted release of Rodriguez's training records to the District Attorney. (UMF No. 16.) In the criminal proceeding against Brown, the District Attorney issued a subpoena seeking information regarding Brown's training. (UMF No. 17.) The criminal court granted release of Brown's training records to the District Attorney. (UMF No. 18.)

Based on the foregoing undisputed material facts, the District Attorney initially argues that it is entitled to access confidential police personnel records without filing a *Pitchess* motion during the pre-filing investigation and prosecution of police misconduct under the exception set forth in Penal Code section 832.7, subdivision (a). The District Attorney asserts that this includes records of witness officers and records beyond the specific incident under investigation. Next, the District Attorney argues that where it is entitled to records under the

exception set forth in Penal Code section 832.7, subdivision (a), it can be provided with copies of those records. Finally, the District Attorney argues that records regarding police officers' training courses are not confidential personnel records under Penal Code section 832.8 and those records are available pursuant to a subpoena.

In opposition, the City does not dispute the majority of the District Attorney's motion. With respect to the first issue, the City does not challenge the District Attorney's motion to the extent it asserts that the District Attorney is generally entitled to access confidential police personnel records without filing a *Pitchess* motion during the pre-filing investigation and prosecution of police misconduct under the exception set forth in Penal Code section 832.7, subdivision (a), including records beyond the specific incident under investigation. The City only contends that the District Attorney is not entitled to access personnel records of witness officers under *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696 (*Johnson*). With respect to the second issue, the City agrees with the District Attorney that records of officer training are generally not the type of personnel records Penal Code section 832.7 is intended to keep confidential. However, the City asserts that such records would constitute confidential personnel records if an officer underwent training as a remedial measure as part of a performance assessment or discipline. Regarding the third and final issue, the City agrees that it may properly provide copies of personnel records to the District Attorney where the District Attorney is entitled to disclosure of the records under the exception set forth in Penal Code section 832.7, subdivision (a).

Like the City, the SJPOA only disputes the first issue to the extent the District Attorney seeks disclosure of personnel records of witness officers. Regarding the second issue, the SJPOA asserts that, in a vacuum, it is impossible to determine if an officer's training records are protected; training records should be deemed presumptively confidential; and any determination that such records are not protected should be made on a case-by-case basis. With respect to the third issue, SJPOA contends that the District Attorney can only access and review personnel records that it is entitled to under the exception set forth in Penal Code section 832.7, subdivision (a).

1. Scope of Disclosure of Personnel Records In Connection with Investigation and Prosecution of Police Misconduct

Penal Code section 832.7, subdivision (a) provides:

> Except as provided in subdivision (b), the personnel records of peace officers and custodial officers and records maintained by a state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code. *This section does not apply to investigations or proceedings concerning the conduct of peace officers* or custodial officers, or an agency or department that employs those officers, *conducted by* a grand jury, *a district attorney's office*, the Attorney General's office, or the Commission on Peace Officer Standards and Training.

(Italics added.)

Under the plain and commonsense meaning of the statute, the confidentiality provisions in Penal Code section 832.7, subdivision (a) prohibiting disclosure of police officer records do not apply to investigations or proceedings concerning the conduct of police officers conducted by a district attorney's office. (See *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 [We first examine the statutory language, giving it a plain and commonsense meaning. […] If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend."].)

"This exception indicates that the Legislature considered the range of situations in which prosecutorial need justifies direct access to peace officer personnel records, and it decided that those situations should be limited to 'investigations or proceedings concerning the conduct of peace officers or custodial officers' "—i.e., when "[a] police officer" is "the target of an investigation." (*Johnson, supra*, 61 Cal.4th at pp. 713-714.)

Courts that have applied the exception in Penal Code section 832.7, subdivision (a) have held that district attorneys who are conducting investigations or, or who are prosecuting, police officers for misconduct are entitled to disclosure of the police personnel records that are otherwise deemed confidential by the statute. (*Towner v. County of Ventura* (2021) 63 Cal.App.5th 761, 773-774; *Fagan v. Superior Court* (2003) 111 Cal.App.4th 607, 618-619 (*Fagan*); *People v. Superior Court*

(Gremminger) (1997) 58 Cal.App.4th 397, 405 (*Gremminger*); *People v. Gwillim* (1990) 223 Cal. App. 3d 1254, 1269-1270.)

As applied, the exception in Penal Code section 832.7, subdivision (a) permits disclosure of the personnel records requested in this case to the District Attorney. The undisputed material facts demonstrate that the District Attorney's requests for the personnel records of Rodriguez, Brown, and Moran were made in connection with pending criminal proceeding against Rodriguez and Brown for their alleged assaults of civilians under color of authority (among other charges). (UMF Nos. 1, 3, 4, 6, & 7.) Moreover, Rodriguez, Brown, and Moran were all employed as police officers at the time of the incidents in question. (See *Fagan, supra,* 111 Cal.App.4th at p. 615 ["It is undisputed that petitioners were employed as police officers at the time of the incident in question. … Although they were off-duty, petitioners were nonetheless police officers" and the district attorney was accordingly entitled to their personnel records]; see also *Gremminger, supra,* 58 Cal.App.4th at p. 406 ["[t]he key" for the exception to apply "is whether the police officer was employed as a police officer at the time of the conduct which is being investigated. If so, then the exemption applies …"].)

Notably, there is no language in the statute indicating that the District Attorney's access to personnel records should be limited to records of the specific incident under investigation. The exception set forth in Penal Code section 832.7, subdivision (a) does not differentiate the excepted records by category or subject matter—rather, it states that the confidentiality provision simply does not apply to personnel records, as a whole, when the records are sought in connection with investigations or proceedings concerning the conduct of police officers. Furthermore, the parties have not identified, and the court is not aware of, any case differentiating between or limiting the categories of confidential personnel records to be provided.

Similarly, there is no language in the statute precluding the disclosure of the personnel records of a witness officer. The exception set forth in Penal Code section 832.7, subdivision (a) sets forth the circumstances under which the District Attorney is entitled to disclosure of otherwise confidential police personnel record—i.e., during an

investigation or proceeding regarding officer misconduct. As long as the records are sought in connection with that investigation or proceeding, they fall within the exception. The statute does not restrict which officers' records the District Attorney may access.

The City and the SJPOA contend that *Johnson* prevents the District Attorney from accessing personnel files for witness officers under the exception set forth in Penal Code section 832.7, subdivision (a). However, the City and the SJPOA misconstrue *Johnson*. As the District Attorney persuasively argues, the underlying criminal action in *Johnson* was the prosecution of a civilian defendant, not an investigation or proceeding concerning the conduct of police officers. (*Johnson, supra*, 61 Cal.4th at p. 706 ["The underlying criminal action charged real party in interest Daryl Lee Johnson (hereafter defendant) with domestic violence crimes. Two San Francisco police officers are potentially important witnesses in the case."].) In that context, the court held that "the prosecution does not have unfettered access to confidential personnel records of police officers who are potential witnesses in criminal cases. Rather, it must follow the same procedures that apply to criminal defendants, i.e., make a *Pitchess* motion, in order to seek information in those records." (*Id.* at p. 705.) The court explained that the exception set forth in Penal Code section 832.7, subdivision (a) did not apply because "[c]hecking for *Brady* material" was not an investigation concerning the conduct of police officers and "[a] police officer does not become the target of an investigation merely by being a witness in a criminal case." (*Id.* at pp. 713-714.) Thus, *Johnson* simply holds that the investigation at issue must be of police misconduct before the exception will permit the disclosure of personnel records.

Here, it is undisputed that the District Attorney is investigating and prosecuting Rodriguez for police misconduct and sought Moran's personnel records in connection with that investigation. Because a police officer is the target of the investigation, the exception set forth in Penal Code section 832.7, subdivision (a) applies.

2. Copies of Personnel Records

Contrary to SJPOA's argument otherwise, the District Attorney is not barred from receiving copies of the personnel records at issue in this case. As explained above, the plain language of Penal Code section 832.7, subdivision (a) provides that the confidentiality provisions prohibiting disclosure of police officer records do not apply to investigations or proceedings by a district attorney's office concerning the conduct of police officers. Nothing in the statute limits the District Attorney's right to disclosure of the personnel records to a mere opportunity to access and review the records. The object of the *Pitchess* procedures is to obtain confidential police records in discovery. The statute itself contemplates that disclosure of personnel records will entail the provision of copies as the statute regulates the costs of copies of personnel records subject to disclosure when a district attorney's *Pitchess* motion is successful. (See Pen. Code, § 832.7, subd. (b)(10).) SJPOA cites no authority for its argument that the exemption from the *Pitchess* procedures somehow imposes additional access and review restrictions for personnel records.

3. Training Records

> Penal Code section 832.8 provides:
> As used in Section 832.7, the following words or phrases have the following meanings:
>
> > (a) "Personnel records" means any file maintained under that individual's name by his or her employing agency and containing records relating to any of the following:
> >
> > > (1) Personal data, including marital status, family members, educational and employment history, home addresses, or similar information.
> > >
> > > (2) Medical history.
> > >
> > > (3) Election of employee benefits.
> > >
> > > (4) Employee advancement, appraisal, or discipline.
> > >
> > > (5) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties.
> > >
> > > (6) Any other information the disclosure of which would constitute an unwarranted invasion of personal privacy.

"[P]eace officer personnel records include only the types of information enumerated in section 832.8." (*Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 293-294.)

The City and the SJPOA suggest that some training records could potentially fall within subsection (a)(4) of Penal Code section 832.8, which covers records relating to employee advancement, appraisal, or discipline. However, under that subsection, "only the records generated in connection" with that advancement, appraisal, or discipline "would come within the statutory definition of personnel records." (*Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 71.) The subsection should not be read so broadly as to include every record that might be considered for purposes of an officer's advancement, appraisal, or discipline, for such a broad reading of the statute would sweep virtually all law enforcement records into the protected category of personnel records. (*Id.* at pp. 71-72.) The City and the SJPOA speculate that training records might be confidential if an officer underwent training as a remedial measure as part of a performance assessment or discipline. But in that situation, only the records of the assessment or discipline itself would be protected, not the records of the training course itself. (See *City of Fresno v. Superior Court* (1988) 205 Cal.App.3d 1459, 1466 [stating that training materials did not fall within the subject matter of a *Pitchess* motion, i.e., police officer personnel records].)

4. Conclusion

Accordingly, the District Attorney's motion for summary judgment of the Complaint and FACI is GRANTED.

IV. CITY'S MOTION FOR SUMMARY JUDGMENT

The City's motion for summary judgment of the Complaint and FACI, and the oppositions thereto filed by the District Attorney and the SJPOA, raise the same three issues discussed at length in connection with the District Attorney's motion for summary judgment.

For the reasons explained above, the City's motion for summary judgment is DENIED as to the City's proposed limitation on the scope of the records available under the exception

set forth in Penal Code section 832.7, subdivision (a), and GRANTED as to the availability of copies and training records.

V. SJPOA'S MOTION FOR SUMMARY ADJUDICATION

The SJPOA's motion for summary adjudication, and the oppositions thereto filed by the District Attorney and the City, raise the same three issues discussed at length in connection with the District Attorney's motion for summary judgment.

For the reasons explained above, SJPOA's motion for summary adjudication is DENIED.

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

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