SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

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

To contest a tentative ruling, you must:

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

In the voicemail message, please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested.

PLEASE NOTE:

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

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

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- Members of the public who wish to observe can do so through Microsoft Teams (using the link discussed above) or in person. Please make sure to turn your camera off and mute yourself if you are observing the proceedings remotely.
- As a reminder, state and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while in the courtroom and while on Microsoft Teams.

DATE: OCTOBER 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	23CV424597	Cowley v. Apple, Inc.	See Line 1 for tentative ruling.
LINE 2	22CV402960	Magbag v. Spartronics Irvine, LLC, et al. (Class Action/PAGA)	See Line 2 for tentative ruling.
LINE 3	23CV426828	Berryhill v. Big Al's V, Inc. (Class Action)	See Line 3 for tentative ruling.

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LINE 4	21CV386962	Loera v. Cellco Partnership (Class Action) (Lead Case; CONSOL with 21CV386960)	See Line 4 for tentative ruling.
LINE 5	20CV372622	Temujin Labs Inc. v. Abittan, et al.	See Line 5 for tentative ruling.
LINE 6	21CV375422	Temujin Labs Inc. v. Fu	
LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *William Cowley v. Apple, Inc.*
Case No.: 23CV424597

This is a consumer action in which Plaintiff William Cowley alleges that Defendant Apple, Inc. ("Apple" or "Defendant") wrongfully terminated his Apple ID account without justification, thereby violating the California Consumers Legal Remedies Act ("CLRA"), among other claims.

Before the Court is Apple's demurrer to the operative First Amended Complaint ("FAC"), which is opposed by Plaintiff. As discussed below, the Court SUSTAINS the demurrer WITH 20 DAYS' LEAVE TO AMEND.

I. BACKGROUND

According to the allegations of the FAC, Apple designs, manufactures, and markets smartphones, personal computers, tablets, watches, and accessories, and sells, or otherwise makes available, related Content for use on said devices. (FAC, ¶ 1.) In order to obtain Content, iCloud storage or make in-app purchases, consumers must create and use an Apple ID, which requires them to register a valid method of payment for any purchases made through Apple with the ID. (*Id.*, ¶ 2.)

Mr. Cowley obtained an Apple ID and purchased (and/or licensed) Apps and Content from Apple and made in-app purchases through the use of that ID via an Apple device, including, at various times an iPhone, iPad, Mac, Apple Watch, and/or Apple TV. (FAC, ¶ 6.) Mr. Cowley also subscribed to Apple's iCloud, making monthly payments to Apple to store, maintain, and back up his Content in Apple's iCloud storage platform. (*Id.*, ¶ 7.)

On October 25, 2021, Mr. Cowley attempted to complete a transaction on VeVe, a digital collectable marketplace App where users can purchase, trade, and sell digital collectables, some of which are known as a non-fungible tokens or NFTs. (FAC, ¶¶ 27, 29.) Mr. Cowley had used the VeVe app on numerous occasions previously, making purchases using his credit/debit card through the Apple App Store which was tied to his Apple ID. (*Id.*, ¶ 28.) However, on this day, when Mr. Cowley attempted to complete a transaction, he received a notification from Apple on his iPhone that the transaction could not be completed. (*Id.*, ¶ 29.) When he contacted Apple to inquire why, he was informed that his Apple ID account was disabled, and he could no longer access his account or Content. (*Id.*, ¶ 30.) Mr. Cowley received no further communication or notice from Apple that his Apple ID account was terminated. (*Id.*, ¶ 31.)

In accordance with his contractual rights and obligations in Apple's *Terms and Conditions*, Mr. Cowley immediately contacted Apple to obtain more information regarding why his account was disabled. (FAC, ¶ 32.) He reviewed each transaction with Apple representatives to confirm their legitimacy, as well as verified all credit and debit cards on file. (*Id.*, ¶ 33.) Despite this, Apple representatives informed Mr. Cowley that his account was terminated and that Apple had no ability to reverse the termination or provide him access to the apps, Content and/or services affiliated with the Apple ID. (*Id.*, ¶ 34.) He was advised that his account was disabled for "security concerns," but Apple never articulated what led to such

concerns and prevented Mr. Cowley from exercising his contractual right to maintain the security of his Apple ID account that Apple allegedly uncovered. (*Id*., ¶ 36.) Had Apple allowed him to do so, Apple would not have terminated his Apple ID account. (*Id*.)

Apple told Mr. Cowley that because his account was already terminated, nothing could be done to reactivate it, and that his only option was to create a new Apple ID and repurchase and somehow re-create his Apps, Content, and Services. (FAC, ¶ 38.) Mr. Cowley did so, but Apple quickly terminated Mr. Cowley's second account and incorrectly flagged his credit/debit card numbers as being invalid. (*Id*., ¶ 39.) Apple, in bad faith, refused to allow Mr. Cowley to address whatever Apple's alleged security concerns were. Rather, Apple terminated his Apple ID two times and deprived him of access to his Content and diminished the value of his Apple devices. (*Id*., ¶ 40.) Upon the termination of Mr. Cowley's first Apple ID, he lost access to all of his Content that he had acquired and maintained on his Apple ID since 2007, some of which were highly sentimental items and memories that cannot be recovered. (*Id*., ¶ 41.) He also lost access to documents he used regularly as part of his employment that he maintained on the iCloud platform; this left him unable to perform his job, resulting in harm to him and his career. (*Id*., ¶ 43.)

At Apple's direction, Mr. Cowley created a *third* Apple ID. (FAC, ¶ 44.) Through persistent efforts that required significant time and effort, Mr. Cowley was able to obtain the return of minimal documents/information saved to iCloud, but he has permanently lost most of his Apps, Content, and Services due to Apple's wrongful conduct and policies. (*Id*.) As a result of Apple's actions, Mr. Cowley was also forced to order all new debit and credit cards because Apple improperly flagged his cards within the Apple ecosystem and he could not create a third Apple ID, make purchases, and/or use his accounts without different payment methods. (*Id*., ¶ 45.)

Mr. Cowley alleges that Apple's termination of his Apple ID is "unconscionable, void, and unenforceable under Civil Code §§ 1670.5, 1671(b); constitutes an unlawful, unfair, and deceptive practice under the UCL; violates the CLRA, including without limitation Civil Code §§ 1770(a)(14), (16), and (19); and demonstrates bad faith." (FAC, ¶ 49.)

Based on the foregoing, Plaintiff initiated this action in October 2023, and filed the operative FAC on January 16, 2024, asserting the following causes of action: (1) violations of the CLRA (Civil Code § 1750); (2) violations of Business & Professions Code § 17200 ("UCL") (unfair business practice); (3) violations of the UCL (unlawful business practice); (4) violations of the UCL (fraudulent business practice); (5) breach of contract; and (6) breach of the implied covenant of good faith and fair dealing.

II. DEMURRER

Apple demurs to the FAC and each of the claims asserted therein on the ground of failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

A. Legal Standard

In ruling on a demurrer, a court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal.*

Emergency Management Agency (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff" s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) The court may also consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

B. Discussion

1. *Breach of Contract (5th Cause of Action)*

In the fifth cause of action, Plaintiff alleges that Apple breached its *Media Terms and Conditions* (the "Media Terms") by prohibiting him from exercising his contractual right to maintain the security of his Apple ID account when Defendant was confronted with an alleged security concern regarding it. (FAC, ¶ 113.) Apple's breach resulted in the termination of Mr. Cowley's Apple ID account and the loss of all of his Apps, Content, and services that he would need a valid Apple ID to access, including the Content he paid to store on the iCloud. (*Id.*, ¶ 114.) Apple maintains that Plaintiff's breach of contract claim is deficient for two reasons: (1) Plaintiff fails to sufficiently plead all of the necessary elements of the claim, and (2) the claims is barred by the Media Terms' Liability Limitation provision.

In order to state a claim for breach of contract, a plaintiff must allege the following elements: (1) the existence of a contract; (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's breach; and (4) damages to the plaintiff as a result of the breach. (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239.) Apple asserts that Plaintiff fails to adequately plead his own performance or facts which show that Apple breached the Media Terms.

The Court agrees that Plaintiff has not pleaded facts which establish that Apple breached the Media Terms. As a matter of simple logic, " '[i]n order for [a breach of contract] action to be based on an instrument in writing, the writing must express the obligation sued upon.' " (*Miron v. Herbalife Internat., Inc.* (9th Cir. 2001) 11 Fed. App'x 927, 929.) Here, Plaintiff does not cite to an express provision of the Media Terms that Apple allegedly breached; instead, the sole breach asserted is based on a statement in the Media Terms stating that "[y]our account is valuable, and you are responsible for maintaining its confidentiality and security." (FAC, Ex. A at p. 2.) But if this provision imposes any obligation on one of the parties, it is on *Plaintiff*—not Apple. Consequently, there is no express contractual basis for any of obligations that Apple is alleged by Plaintiff to have breached, including "inform[ing] the account owner" of any suspected security issues and "permit[ing] them . . . to contest" or "resolve the alleged security issue." (*Id.* ¶ 10.) Without additional allegations and further explanation, it appears that Plaintiff has created alleged contractual obligations out of whole cloth. In short, Apple's supposed interference with Plaintiff's ability to secure his account does not amount to a breach because Apple did not fail to do something it promised or was required to do under the contract.

Moreover, the Media Terms establish that Apple's termination of his Apple ID was *expressly* permitted under its provisions. (See FAC, Ex. A at p. 11 [stating that Apple may terminate a user's Apple ID and preclude access to Services and Content if it suspects or

determines that a user has failed to comply with the Media Terms]; *id*. at p. 13 ["Apple may monitor your use of the Services and Content to ensure that you are following these Usage Rules.".) Apple also reserved the right to suspend or discontinue the Services or Content at *any time* without notice:

> If you fail, or Apple suspects that you have failed, to comply with any of the provisions of this Agreement, Apple may, without notice to you: (i) terminate this Agreement and/or your Apple ID, and you will remain liable for all amounts due under your Apple ID up to and including the date of termination; and/or (ii) terminate your license to the software; and/or (iii) preclude your access to the Services.
>
> Apple further reserves the right to modify, *suspend, or discontinue the Services (or any part or Content thereof) at any time* with or without notice to you, and *Apple will not be liable to you or to any third party should it exercise such rights*.

(FAC at p. 11.)

Furthermore, the Media Terms say nothing about granting users the *sole* right to self-monitor accounts to protect against security risks; these rights are instead *expressly* granted to Apple. (See FAC, Ex. A at pp. 4-5, 13 ["Apple may monitor your use of the Services and Content to ensure that you are following these Usage Rules."); *id*. at p. 13 ["You hereby grant Apple the right to take steps Apple believes are reasonably necessary or appropriate to enforce and/or verify compliance with any part of this Agreement."].) Thus, Plaintiff's failure to adequately plead the element of breach renders his claim defective.

The Court is not persuaded, however, that Plaintiff failed to adequately plead his own performance. (See, FAC, ¶ 112 ["Plaintiff performed under this contract when he created and maintained an Apple ID, purchased Content and Services through Apple, abided by the Terms and Conditions, and contacted Defendant when Defendant terminated his Apple ID account in an attempt to exercise his contractual right to maintain the security of his Apple ID account."].) The cases Apple cites for the proposition that Plaintiff must plead his performance with specificity are distinguishable in that they involve specific conditions precedent on the part of the plaintiff, whereas the instant action does not appear to involve similar conditions. (See, e.g., *Careau v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390-1390 (*Careau*).) Thus, the Court will not sustain the demurrer to the breach of contract claim on this basis.

Turning lastly to Apple's remaining argument concerning the Media Terms' Liability Limitation provision, this portion of the Media Terms provides that the user agrees to:

> To indemnify and hold Apple . . . harmless with respect to any claims arising *out of your breach of this Agreement, your use of the Services, or any action taken by Apple as part of its investigation of a suspected violation of this Agreement or as a result of its finding or a decision that a violation of this Agreement has occurred*. You agree that you shall not sue or recover any damages from Apple . . . as a result of its decision to remove or refuse to

> process any information or content . . . *to suspend or terminate your access to the Services*[.]

(FAC, Ex. A at pp. 11-12.)

Plaintiff further agreed that "use of, or inability to use, or activity in connection with the services is at your sole risk," and Apple shall not be liable for damages "arising from your use of any of the Services." *Id*. at p. 11.) If the foregoing provisions are enforceable, Plaintiff may have affirmatively waived his right to bring claims for damages in connection with his use of the Services.

As Apple explains, limitation of liability clauses are enforceable "unless they are unconscionable, that is, the improper result of unequal bargaining power or contrary to public policy." (*Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.* (2012) 209 Cal.App.4th 1118, 1126.) "Under California law, a contractual clause is unenforceable if it is *both* procedurally and substantively unconscionable. Procedural unconscionability focuses on oppression or surprise due to unequal bargaining power, while substantive unconscionability focuses on overly-harsh or one-sided terms." (*Antonelli v. Finish Line, Inc.* (N.D. Cal. 2012) 2012 U.S. Dist. LEXIS 19787, *6-7 [internal citations and quotations omitted].) In his opposition, Plaintiff maintains that the Media Terms' Liability Limitation provision is unconscionable because it is a contract of adhesion that lacks even the most basic fairness. The Court disagrees.

First, Plaintiff has not actually alleged in the FAC that the Media Terms are unconscionable, e.g. facts which establish that it is a contract of adhesion or that certain terms are substantively unconscionable; he has merely asserted as much in his opposing papers. Second, courts which have considered allegations of substantive unconscionability with respect to the same terms and conditions have *rejected* them as without merit. (See, e.g., *Price v. Apple, Inc.* (N.D. Cal. 2023) 2023 U.S. Dist. LEXIS 53341, *9-*14 (*Price II*); *Price v. Apple, Inc.* (N.D. Cal. 2022) 2022 U.S. Dist. 64201, *8-*11 (*Price I*); *Rutter v. Apple, Inc.* (N.D. Cal. 2022) 2022 U.S. Dist. LEXIS 82549, *19-*20.) In the absence of allegations of unconscionability, the Court concludes, at least for the purposes of this demurrer based on the allegations presently asserted, that the Media Terms' Liability Limitation provision operates to bar Plaintiff from asserting a claim for breach of the Media Terms.

In accordance with the foregoing, Apple's demurrer to the fifth cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

2. *Breach of the Implied Covenant of Good Faith and Fair Dealing (6th Cause of Action)*

In the sixth cause of action, Plaintiff alleges that Apple breached its implied contractual obligation to exercise good faith and fair dealing in its implementation of the Media Terms "when it deprived [him] of the contractual right to maintain the security of his Apple ID account when it was confronted with an alleged security concern and then terminated said account for the same alleged security concern." (FAC, ¶ 125.) It further breached this implied duty, he continues, when it "recommended [he] create a new Apple ID without disclosing the security concern so that Plaintiff could maintain his Apple ID security in the future and avoid a

repeated unilateral termination." (*Id*.) Apple maintains that this claim fails for the following reasons: (1) it was expressly permitted to terminate Plaintiff's account under the Media Terms; (2) the Media Terms do not grant Plaintiff the right to maintain the security of his account when Apple is confronted with an alleged security concern and it is not required to articulate a reason for terminating and Apple ID account; and (3) the claim is duplicative of the breach of contract cause of action. All of these arguments are well taken.

As a general matter, every contract imposes upon the parties to it a duty of good faith and fair dealing. (*Storek & Storek, Inc. v Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44, 55.) The covenant exists "to prevent one contracting party from unfairly frustrating the other party's right to receive benefits of the agreements actually made." (*Guz v. Betchel National, Inc.* (2000) 24 Cal.4th 317, 349 (*Guz*).) Thus, the covenant "cannot be endowed with an existence independent of its contractual underpinnings. It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Id*., internal citations and quotations omitted.) Consequently, because the Media Terms do not contain an express term to the effect that Plaintiff has the "right to maintain the security of his Apple ID account when it was confronted with an alleged security concern" (FAC, ¶ 125), Plaintiff cannot state a claim for breach of the implied covenant.

Plaintiff's opposition makes clear that this claim is based on Apple's purported breach of particular "express terms" of the Media Terms, namely the same terms that underlay the preceding contract claim. (See Opp. at p. 15 [explaining that the claim is supposedly based on Apple's interference with the "express terms [that] afford Cowley the right to secure his account and contact Apple to address concerns".].) Thus, as pled, this claim is duplicative of that cause of action and critically, "where breach of an actual contract term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." (*Guz, supra,* at 327.) Such a duplicative claim is subject to demurrer. (See *Careau, supra*, 222 Cal.App.3d at p. 1401.)

Finally, as described above, Apple was expressly authorized under the Media Terms to terminate Plaintiff's Apple ID account under the circumstances alleged. Where "termination of the [contract] . . . [is] expressly permitted . . . such conduct can *never* violate an implied covenant of good faith and fair dealing." (*Carma Devs. (Cal.), Inc. v. Marathon Dev. California, Inc*. (1992) 2 Cal.4th 342, 376 [emphasis added]; see also *Bevis v. Terrace View Partners, LP* (2019) 33 Cal.App.5th 230, 256 ["[T]he implied covenant of good faith and fair dealing may not be 'read to prohibit a party from doing that which is expressly permitted by an agreement.'"] [citation omitted].) Thus, it seems that no claim for breach of the implied covenant can be predicated on Apple doing something that it was expressly permitted to do, i.e., terminate Plaintiff's Apple ID.

For the foregoing reasons, Apple's demurrer to the sixth cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

3. *Violation of the CLRA (1st Cause of Action)*

Plaintiff's first cause of action is predicated on allegations that Apple violated the CLRA by "representing that a transaction confers or involves rights, remedies, or obligations

that it does not have or involve, or that are prohibited by law, as identified herein. Namely, Defendant represented in its Terms and Conditions that Cowley is "responsible for maintaining [his account's] confidentiality and security." (FAC, ¶ 60.) "However, when Defendant suspected that a security issue had arisen with Cowley's accounts, it terminated his accounts and prohibited him from maintaining the security of his accounts by unilaterally resolving the alleged security issues." (*Id*.) Plaintiff further alleges that Apple violated the CLRA by "misrepresent[ing] that purchasing goods and services using an Apple ID would be secure and safe" and "fail[ing] to disclose that it cancels Apple IDs when it is confronted with an alleged security concern without notice and without regard to the damage doing so inflicts on its consumers." (*Id*., at ¶ 61.)

The CLRA targets a class of "unfair methods of competition and unfair or deceptive acts or practices" enumerated in Civil Code section 1770. (Civ. Code, § 1770, subd. (a).) "Any consumer who suffers any damage as a result of the use or employment by any person of" this unlawful conduct may bring an action for damages, restitution of property, and injunctive relief. (Civ. Code, § 1780, subd. (a).) The consumer may also bring a class action on behalf of "other consumers similarly situated." (Civ. Code, § 1781, subd. (a).) Apple contends that Plaintiff fails to state a claim for violation of the CLRA because (1) the FAC fails to allege any sale or lease of "goods" or "services" under the CLRA, (2) the FAC does not plausibly allege a representation that was false or likely to deceive a reasonable consumer, or Plaintiff's reliance thereon and (3) the claim is barred by the Media Terms Liability Limitation provision. The Court agrees with Apple.

As Apple explains, the CLRA only applies to "transactions intended to result or which result in the sale or lease of goods or services to a consumer." (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal. App. 4th 29, 39-40 (*Alborzian*).) Here, Plaintiff fails to plead the sale or lease of any applicable "goods" or "services." The CLRA defines "goods" as "tangible chattels bought or leased for use primarily for personal, family, or household purposes," and it defines "services" as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." (*Id.*) Plaintiff's only reference to a purported good or service is the software and Content on his devices (see FAC, ¶¶ 27, 61-62, 77), but as Apple argues, these items are not "tangible chattels" or "services furnished in connection with the sale or repair of goods." (*Alborzian,* 235 Cal.App.4th at 40.) Courts that have considered this issue have regularly concluded that software is neither a good nor service under the CLRA. (See, e.g., *Rojas-Lozano v. Google, Inc.* (N.D. Cal. 2016) 159 F.Supp.3d 1101, 1116; *Wofford v. Apple Inc*. (S.D. Cal. 2011) 2011 U.S. Dist. LEXIS 129852, *6-*7.)

The case primarily relied on by Plaintiff in his opposition to demonstrate to the contrary, *Doe v. Roblox Corp.* (N.D. Cal. 2022) 602 F.Supp.3d 1243, 1263-1264) (*Roblox*) does not compel a different conclusion. The holding of *Roblox* is narrow, with the case providing that monetary purchases that are part and parcel to a user's intended engagement with a digital service qualify as "services" under the CLRA. Here, use of the Apple ID is "separate and apart" from the *specific* purchase of a good or service covered by the CLRA, e.g., a third party app like VeVe. There are notably no allegations that the Apple ID must be purchased or requires purchase of another product (or a sale) for registration. Thus, the transaction that purportedly resulted in the termination of Plaintiff's Apple ID account is removed from any "service" offered by Defendant. The failure to allege any sale or lease of "goods" or "services" under the CLRA is fatal to Plaintiff's claim.

Turning to Plaintiff's second argument (assuming he adequately alleged any sale or lease of goods or services), in his opposition, he asserts five alleged misrepresentations/nondisclosures that form the basis of his claim (see Opp. at p. 8):

- Apple failed to disclose that its termination of a user's Apple ID can result in the loss of access to the user's electronically stored property;
- Apple guaranteed Plaintiff that it would safely and "permanently" provide access to his electronically stored property so long as Plaintiff complied with the Media Terms;
- Apple never disclosed that a security concern could result in termination of Plaintiff's Apple account;
- Apple misrepresented that Plaintiff was "buying" content through his Apple account that Apple could not thereafter prevent him from accessing and using; and
- Apple told Plaintiff that "it was his responsibility to maintain the security of his Apple ID account, and if he did, Apple would not terminate his account."

None of the listed items support a claim for violation of the CLRA. First, the Media Terms expressly advise that termination of a user's Apple ID can result in the loss of access to the user's electronically stored property. (FAC, Ex. A at p. 11.) Second, the assertion that Apple would "permanently" provide Plaintiff access to his electronically stored property so long as he complied with the Media Terms is contrary to the aforementioned, express termination rights. (*Id*. at pp. 1-6.) Third, the Media Terms unambiguously state that Apple is authorized to terminate the agreement where a user "fail[s], or Apple suspects that [the user] [has] failed" to comply with the Media Terms, and further provide that Apple may "modify, suspend, or discontinue the Services (or any part or Content thereof) at any time with or without notice" to the consumer. (*Id*. at p. 11.) Fourth, Apple did not misrepresent that Plaintiff was "buying" content through his Apple account that it could not thereafter prevent him from accessing and using that content because, again, the Media Terms expressly provide Apple "the right to modify, suspend, or discontinue the Services (or any part or Content thereof)." (*Id*.) Fifth, while the Media Terms confirm that Plaintiff had an obligation to maintain the security of his Apple ID account, that obligation does not override Apple's express right to terminate his account in the face of suspected noncompliance with the Media Terms.

Finally, Plaintiff's interpretation of the statement advising consumers to be a "gatekeeper" over the security of their Apple ID" as meaning that Apple had relinquished to consumers all rights and obligations concerning security is not a reasonable one because such an interpretation is belied by the plain language of the Media Terms, particular the termination provision. (See *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473 ["Any contract must be construed as a whole, with the various individual provisions interpreted together so as to give effect to all, if reasonably possible or practicable . . . . Courts must interpret contractual language in a manner which gives force and effect to every provision, and not in a way which renders some clauses nugatory, inoperative or meaningless"].) Consequently, as the true issue raised in this context is a legal one of contract interpretation, the Court rejects Plaintiff's contention that a different issue—materiality—precludes the Court from reaching this conclusion on demurrer in the absence of conflicting evidence attaching disparate plausible meanings to the relevant provisions. (See *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 ["It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence"].) In any event, materiality can be decided on demurrer under certain circumstances,

though the Court need not do so here. (See, e.g., *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1262 [holding that a court can determine the factual misrepresentation is so obviously unimportant that the jury could not reasonably find that a reasonable person would have been influenced by it].)

Given the foregoing, Apple's demurrer to the CLRA claim on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

4. *Violation of the UCL (2nd, 3rd and 4th Causes of Action)*

With these claims, Plaintiff alleges that Apple's actions constitute unfair (2nd), unlawful (3rd) and fraudulent (4th) acts or practices under the UCL. Apple urges that its demurrer to these claims should be sustained because its actions do not so qualify and further, as Plaintiff accepted the Media Terms, which give Apple the right to terminate a user's Apple ID account if it suspects a user has failed to comply with any of the provisions contained therein, Plaintiff cannot state a UCL claim. The Court agrees.

The UCL prohibits "unfair competition," which is broadly defined to include any unlawful, unfair, or fraudulent act or practice. (Bus. & Prof. Code, § 17200.) "Because the UCL is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. An act can be alleged to violate any or all of the three prongs of the UCL—unlawful, unfair, or fraudulent." (*Berryman v. Merit Prop. Mgm't, Inc.* (2007) 152 Cal.App.4th 1544, 1554.) The UCL "borrows" violations of other laws and treats them as unlawful practices independently actionable under the act. (*Gafcon, Inc. v. Ponsor & Assocs.* (2002) 98 Cal.App.4th 1388, 1425, fn. 15.)

Given the Court's conclusion that no claim for violation of the CLRA has been stated by Plaintiff, it follows that his UCL claim alleging "unlawful" acts or practices based on the CLRA also fails. Further, no UCL claim under the "fraudulent" prong has been pleaded because, as explained above, the FAC does not plausibly allege any representation that was either false or likely to deceive. As the standard for determining whether a defendant misrepresented the characteristics, uses, or benefits of goods and services under the CLRA is the same as that for assessing fraudulent conduct under the UCL (see, e.g., *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1382), and Plaintiff's CLRA claim fails, it follows that his UCL claim predicated on "fraudulent" acts or practices also fails.

Turning to the remaining prong based on "unfair" conduct, in consumer (as opposed to competitor) UCL actions such as the one at bar, a split of authority exists with regard to the proper test for determining whether a business practice is unfair under the statute, with the California Courts of Appeal adopting three different tests for determining unfairness in the consumer context. (See, e.g., *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 380, fn. 9.) These tests consist of the following:

- An act or practice is unfair "if the consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided." (*Daughtery v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 700, 710.)

- "'[A]n "unfair" business practice occurs when that practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 719, internal citations omitted.)
- An unfair business practice means "'the public policy which is a predicate to the action must be "tethered" to specific constitutional, statutory or regulatory provisions.'" (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940 (*Scripps*).)

The Court is not persuaded that a claim based on this prong has been stated under *any* of the foregoing tests. Plaintiff has not pleaded any facts which demonstrate that the alleged harm to consumers (he concludes, without describing any supporting facts, that the purpose of Apple's actions "was to profit from its immoral scheme to sell the same products to the same consumers multiple times" (see FAC, ¶¶ 70, 78)), outweighed the benefit and utility to Apple of maintaining the security of its platform, including by retaining the right to terminate accounts experiencing security issues or engaging in fraud or other abuse.[1] This is particularly true where, as here, Plaintiff pleads that Apple terminated his Apple ID account *after identifying a security concern*. (FAC, ¶ 36.) Nor has Plaintiff stated an established public policy that is offended by Apple's actions, much less one that is "tethered" to specific constitutional, statutory or regulatory provisions.'" (See *Scripps*, *supra*, 108 Cal.App.4th at p. 940.)

All told, Plaintiff fails to state a claim for violation of the UCL under any of the three prongs. Consequently, Apple's demurrer to the second, third and fourth causes of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

III. CONCLUSION

Apple's demurrer to the FAC and the claims asserted therein on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

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

[1] In *Price II*, the Court held that the plaintiff could not state claims against Apple for alleged violations of the UCL (or other alleged torts and statutory claims) because, among other things, the plaintiff admitted that he accepted the Media Terms which granted Apple termination rights. It also rejected a UCL claim under the "unfair" prong due to Plaintiff's failure to compare the harm to consumers from the complained of practices against the utility of Apple's conduct. (See *Price II*, *supra*, 2022 U.S. Dist. LEXIS 64201 at *13-15.)

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 2

Case Name: *Dean J. Magbag v. Spartronics Irvine, LLC, et al.*
Case No.: 22CV402960

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff Dean J. Magbag alleges that defendants Spartronics Irvine, LLC and Spartronics Milpitas, Inc. and Epiqore (collectively, "Defendants") committed various wage and hour violations. Before the Court is Plaintiff's motion for preliminary approval of settlement, which is unopposed. As discussed below, the Court GRANTS the motion.

I. BACKGROUND

According to the allegations of the First Amended Class Action Complaint ("FAC"), Plaintiff was formerly employed by Defendants as a non-exempt, hourly paid employee. He alleges that Plaintiffs failed to: pay all wages due (including minimum and overtime wages); provide lawful meal periods or compensation in lieu thereof; authorize or permit lawful rest breaks or provide compensation in lieu thereof; reimburse necessary business-related costs; provide accurate itemized wage statements; timely pay wages during employment; and pay all wages due upon separation of employment. (FAC, ¶ 4.)

Plaintiff initiated this action on September 9, 2022, and filed the operative FAC on January 17, 2023, asserting the following causes of action: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to permit rest breaks; (5) failure to reimburse business expenses; (6) failure to provide itemized wage statements; (7) failure to timely pay wages during employment; (8) failure to pay all wages due upon separation of employment; (9) violation of Business & Professions Code § 17200; and (10) PAGA penalties.

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

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the

> risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(*Wershba, supra,* 91 Cal.App.4th at pp. 244–245, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of relevant factors, depending on the circumstances of each case. (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.) The trial court also must independently confirm that "the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra*, 168 Cal.App.4th at p. 129.) Of course, before performing its analysis the trial court must be "provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Id.* at pp. 130, 133.)

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 2022 U.S. LEXIS 2940.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76–77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum

even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

III. SETTLEMENT PROCESS

Subsequent to the initiation of this action, the parties engaged in informal discovery and agreed to attend a private mediation session. In preparation for the mediation, Defendants agreed to produce, and did produce, Plaintiff's and Class Members' payroll records and time punch data and employee handbook containing the written policies. Formal discovery was paused during this time.

On July 19, 2024, the parties engaged in a mediation session with Michael J. Loeb, a respected mediator, and reached a settlement. After a full day of negotiating, the parties agreed to a settlement amount and executed a memorandum of understanding. Over the next several months, the parties negotiated the terms of the settlement, which is now before the Court for approval.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement amount is $482,500. Attorney's fees of up to $160,833.33 (or one-third of the gross settlement), litigation costs of up to $25,000 and administration costs not to exceed $8,250 will be paid from the gross settlement. $25,000 will be allocated to PAGA penalties, 75% of which ($18,750) will be paid to the LWDA, with the remaining 25% ($6,250) distributed, on a pro rata basis, to "Aggrieved Employees," who are defined "all California citizens who performed work at Spartronics Irvine, LLC and Spartronics Milpitas, Inc. whether hired by Spartronics Irvine, LLC, Spartronics Milpitas, Inc. or Epiqore as a non-exempt employee in the State of California at any time during [September 9, 2021 to July 19, 2023]." Plaintiff will seek an incentive award of $7,500.

The net settlement will be allocated, on a pro rata basis, to "Class Members," who are defined as "all California citizens who performed work at Spartronics Irvine, LLC and Spartronics Milpitas, Inc. whether hired by Spartronics Irvine, LLC, Spartronics Milpitas, Inc. or Epiqore as a non-exempt employee in the State of California at any time during [September 9, 2028 through July 19, 2023]." Class members will not be required to submit a claim to receive payment. For tax purposes, settlement payments will be allocated 10% to wages and 90% to interest and penalties. Defendants are responsible for employer-side payroll taxes. Funds associated with checks uncashed after 180 days will be transmitted to the Controller of the State of California to be held in trust for such class members pursuant to California unclaimed property law.

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

> [A]ll claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint and ascertained in the course of the Action. Except as set forth in Section 6.3 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period.

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

> [A]ll claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint, and the PAGA Notice and ascertained in the course of the Action.

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

V. FAIRNESS OF SETTLEMENT

Based on the available data, Plaintiff's counsel prepared an exposure analysis and determined the maximum value of Plaintiff's claims to be as follows: $1,977,367 (meal period claim); $3,000,000 (rest period claim); $682,331 (failure to reimburse necessary business expenses); $1 million plus (waiting time penalties and wage statement violations); and $9,496,600 (PAGA penalties). Plaintiff's counsel than heavily discounted the foregoing amounts to reach a realistic recovery amount for each claim; factors compelling such reduction included: the risk of class certification being denied; Defendants' arguments on the merits (include the voluntary nature of rest periods, their maintenance of compliant meal period practices and the ability of employees to waive their meal periods, their lack of willful violations); the likelihood that PAGA penalties would be drastically reduced by the Court in its discretion; and the risk of not prevailing at trial or on appeal.

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

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

VI. PROPOSED SETTLEMENT CLASS

Plaintiff requests that the following settlement class be provisionally certified:

> [A]ll California citizens who performed work at Spartronics Irvine, LLC and Spartronics Milpitas, Inc. whether hired by Spartronics Irvine, LLC, Spartronics Milpitas, Inc. or Epiqore as a non-exempt employee in the State of California at any time during [September 9, 2018 through July 19, 2023].

A. Legal Standard for Certifying a Class for Settlement Purposes

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …."

Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332 (*Sav-On Drug Stores*).) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

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

B. Ascertainable Class

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

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

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

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." (*Noel, supra,* 7 Cal.5th at p. 984.) Still, it has long been held that "[c]lass members are 'ascertainable' where they may be readily identified … by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932,

disapproved of on another ground by *Noel, supra,* 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 975-976 ["The defined class of all HD Package subscribers is precise, with objective characteristics and transactional parameters, and can be determined by DIRECTV's own account records. No more is needed."].)

Here, the estimated 235 class members are readily identifiable based on Defendants' records, and the settlement class is appropriately defined based on objective characteristics. The Court finds that the settlement class is numerous, ascertainable, and appropriately defined.

C. Community of Interest

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact, (2) class representatives with claims or defenses typical of the class, and (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, supra,* 34 Cal.4th at pp. 326, 332.)

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

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

As for the second factor,

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

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

Like other members of the class, Plaintiff was employed by Defendants as a non-exempt, hourly-paid employee and alleges that he experienced the violations at issue. The

anticipated defenses are not unique to Plaintiff, and there is no indication that Plaintiff's interests are otherwise in conflict with those of the class.

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

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

D. Substantial Benefits of Class Certification

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

Here, there are an estimated 235 Class Members. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

VII. NOTICE

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

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement (except for the PAGA component) or object. The gross settlement amount and estimated deductions are provided, and Class Members are

informed of their qualifying workweeks as reflected in Defendants' records and are instructed how to dispute this information. Class members are given 60 days to request exclusion from the class or submit a written objection to the settlement.

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

> Although class members may appear in person, the judge overseeing this case encourages remote appearances. (As of August 15, 2022, the Court's remote platform is Microsoft Teams.) Class members who wish to appear remotely should contact class counsel at least three days before the hearing if possible. Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members may appear remotely using the Microsoft Teams link for Department 7 (Afternoon Session) or by calling the toll free conference call number for Department 7.

Turning to the notice procedure, as articulated above, the parties have selected Phoenix Class Action Administration Solutions as the settlement administrator. The administrator will mail the notice packet within 29 days of preliminary approval of the settlement, after updating Class Members' addresses using the National Change of Address Database. Any returned notices will be re-mailed to any forwarding address provided or a better address located through a skip trace or other search. Class Members who receive a re-mailed notice will have an additional 14 days to respond. These notice procedures are appropriate and are approved.

VIII. CONCLUSION

Plaintiff's motion for preliminary approval is GRANTED.

The final approval hearing shall take place on **April 24, 2025** at 1:30 in Dept. 7. The following class is preliminarily certified for settlement purposes:

> [A]ll California citizens who performed work at Spartronics Irvine, LLC and Spartronics Milpitas, Inc. whether hired by Spartronics Irvine, LLC, Spartronics Milpitas, Inc. or Epiqore as a non-exempt employee in the State of California at any time during [September 9, 2018 through July 19, 2023].

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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Calendar Line 3

Case Name: *Josiah Berryhill v. Big Al's V, Inc.*
Case No.: 23CV426828

This is a putative class action. Plaintiff Josiah Berryhill alleges that Defendant Big Al's V, Inc. committed various wage and hour violations. Before the Court is Plaintiff's motion for preliminary approval of settlement, which is unopposed. As discussed below, the Court GRANTS the motion.

I. BACKGROUND

According to the allegations of the operative Class Action Complaint ("Complaint"), Plaintiff was employed by Defendant as an hourly-paid, non-exempt employee from August 2019 to June 2022. (Complaint, ¶ 7.) Plaintiff alleges that Defendant failed to: pay all wages owed (including minimum, straight time and overtime wages); provide meal periods or compensation in lieu thereof; provide rest periods or compensation in lieu thereof; timely pay final wages at termination; provide accurate, itemized wage statements; reimburse necessary business expenditures; and produce requested employment records.

On December 1, 2023, Plaintiff filed the Complaint asserting the following causes of action: (1) failure to pay minimum and straight time waged; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) failure to authorize and permit rest periods; (5) failure to timely pay final wages at termination; (6) failure to provide accurate itemized wage statements; (7) failure to indemnify employees for expenditures; (8) failure to produce requested employment records; and (9) unfair business practices.[1]

Plaintiff now seeks an order: preliminarily approving the proposed Class Action and PAGA Settlement Agreement; provisionally certifying the proposed class for settlement purposes only; appointing Plaintiff as class representative; appointing John G. Yslas, Jeffrey C. Bils, Aram Boyadjian and Andrew Sandoval of Wilshire Law Firm, PLC as class counsel; appointing ILYM Group, Inc. ("ILYM") as the Settlement Administrator and authorizing ILYM to send notice of the Settlement to class members; and setting a final approval hearing date.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234–235

[1] On July 17, 2023, Plaintiff filed the representative action entitled *Berryhill v. Big's Al's V, Inc.*, Case No. 23CV418950, in this Court. That action, which is currently being heard in another department (Hon. Zayner), asserts a single cause of action under the Private Attorneys General Act ("PAGA"). The instant motion has only been filed in the case at bench.

(*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

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

(*Wershba, supra,* 91 Cal.App.4th at pp. 244–245, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of relevant factors, depending on the circumstances of each case. (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.) The trial court also must independently confirm that "the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra,* 168 Cal.App.4th at p. 129.) Of course, before performing its analysis the trial court must be "provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Id.* at pp. 130, 133.)

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 2022 U.S. LEXIS 2940.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76–77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the

statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

III. SETTLEMENT PROCESS

Following the initiation of this action, the parties engaged in informal discovery, with Defendant producing time data and payroll records for hourly paid, non-exempt employees from December 23, 2019 through December 11, 2023 (extrapolated to December 1, 2019 to April 9, 2024), a list of estimated number of employees during the class and PAGA period, wage and hour policy and practice documents, and all documents concerning Mr. Berryhill. Plaintiff's counsel investigated the applicable law regarding Plaintiff's claims as well as the defenses asserted in this action and, after reviewing the materials provided by Defendant, was able to prepare a damages analysis regarding Defendant's potential exposure and Plaintiff's odds of recovery.

On April 9, 2024, the parties participated in private mediation with mediator Steve Cerversis, an experienced class action mediator. After extensive negotiations the parties, who came into the mediation prepared to litigate their positions through trial and appeal, reached the settlement that is now before the Court.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement is $325,000. Attorney's fees of up $108,333.33 (35% of the gross settlement), litigation costs of up to $15,145, and administration costs not to exceed $8,850 will be paid from the gross settlement. $20,000 will be allocated to PAGA penalties, 75% of which ($5,000) will be paid to the LWDA, with the remaining 25% ($5,000) dispensed to "Aggrieved Employees," who are defined as individuals "employed by Defendant in California and classified as an hourly-paid or non-exempt employee who worked for Defendant during [may 17, 2022 to June 8, 2024]." Plaintiff will also seek a service award of $7,500.

The net settlement will be allocated to "Class Members," who are defined as all persons employed by Defendant in California and classified as an hourly-paid or non-exempt employee who worked for Defendant during [December 1, 2019 to June 8, 2024]," on a pro rata basis based on the number of weeks worked during the class period. Class members will not be required to submit a claim to receive their payment. For tax purposes, settlement payments will be allocated 20% to wages and 80% to penalties and interest. The employer-side payroll taxes on the portion allocated to wages will be paid by Defendants separate from, and in addition to, the gross settlement amount, 100% of the payment to PAGA Employees will be allocated to penalties. Funds associated with checks uncashed after 180 days will be transmitted to Controller of the State of California to be held in trust for such class members pursuant to California unclaimed property law.

In exchange for settlement, class members who do not opt out will release:

> All Participating Class Members, on behalf of themselves and their respective former and present representatives, agents, attorneys, heirs, administrators, successors and assigns, release Released Parties from all claims that were alleged, or reasonably could have been alleged, based on the Class Period facts stated in the Operative Complaint including all claims, charges, complaints, liens, demands, causes of action, obligations, damages and liabilities, known or suspected, that each Participating Class Member had, now has, or may hereafter claim to have against the Released Parties, and that were asserted in the Action, or that arise from or could have been asserted based on any of the facts, circumstances, transactions, events, occurrences, acts, disclosures, statements, omissions or failures to act alleged in the Action that have arisen during the Class Period ("the Released Claims"). The Released Claims specifically include, but are not limited to, any claimed violations of Labor Code §§ 201-204, 226, 226.7, 512, 1194, 1194.2, 1197, 1198, and 2802; and Business & Professions Code § 17200, et. seq. Except as set forth in Section 5.3 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation or claims based on facts occurring outside the Class Period.

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

> [A]ll claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaints, and the PAGA Notice and ascertained in the course of the Action.

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

V. FAIRNESS OF SETTLEMENT

Based on the available data provided by Defendants, including class member timekeeping and payroll records, as well as class member demographics (i.e., the number of class members, workweeks, and average total compensation of the class), and with the assistance of a statistics expert, Plaintiff's counsel estimated Defendants' maximum exposure for each claim to be as follows: $231,188.67 (failure to pay for all hours worked); $193,801.16 (meal period claim); $611,360.13 (rest period claim); $0[2] (failure to reimburse necessary business expenses); $1,244,152.80 (waiting time penalties); $287.950 (inaccurate wage statements); $1,135,800 (PAGA penalties). Plaintiff's counsel than estimated Defendants' *realistic* exposure for Plaintiffs' claims (which total $389,062.31) to be: $46,237.73 (failure to pay for all hours worked); $38,760.23 (meal period claim); $122,272.03 (rest period claim);

[2] Plaintiff's counsel considered these amounts to be too attenuated and *de minimis* for inclusion.

$266,790.23 (statutory and civil penalties). Plaintiff's counsel arrived at the foregoing amounts by offsetting Defendants' maximum exposure by, among other things: the risk of class certification being denied; Defendants' arguments on the merits (include the voluntary nature of rest periods); the likelihood that PAGA penalties would be reduced by the Court in its discretion; and the risk of not prevailing at trial or on appeal. The gross settlement amount of $325,000 represents 83.5% of the realistic maximum recovery calculated by Plaintiff's counsel.

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

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

VI. PROPOSED SETTLEMENT CLASS

Plaintiff requests that the following settlement class be provisionally certified:

> [A]ll persons employed by Defendant in California and classified as an hourly-paid or non-exempt employee who worked for Defendant during [December 1, 2019 to June 8, 2024].

E. Legal Standard for Certifying a Class for Settlement Purposes

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …."

Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332 (*Sav-On Drug Stores*).) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

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

F. Ascertainable Class

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

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

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

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

Here, the estimated 426 Class members are readily identifiable based on Defendant's records, and the settlement class is appropriately defined based on objective characteristics. The Court finds that the settlement class is numerous, ascertainable, and appropriately defined.

G. Community of Interest

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact, (2) class representatives with claims or defenses typical of the class, and (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, supra,* 34 Cal.4th at pp. 326, 332.)

For the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home*

Corp. (2001) 89 Cal.App.4th 908, 916 (*Hicks*).) The court must also examine evidence of any conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 215.) The ultimate question is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be good for the judicial process and to the litigants. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104–1105 (*Lockheed Martin*).) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks*, *supra,* 89 Cal.App.4th at p. 916.)

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

As for the second factor,

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

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

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

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

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

H. Substantial Benefits of Class Certification

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

Here, there are an estimated 426 class members. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

VII. NOTICE

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

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement (except for the PAGA component) or object. The gross settlement amount and estimated deductions are provided, and Class Members are informed of their qualifying workweeks as reflected in Defendant's records and are instructed how to dispute this information. Class members are given 60 days to request exclusion from the class or submit a written objection to the settlement.

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

> Although class members may appear in person, the judge overseeing this case encourages remote appearances. (As of August 15, 2022, the Court's remote platform is Microsoft Teams.) Class members who wish to appear remotely should contact class counsel at least three days before the hearing if possible. Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members may appear remotely using the Microsoft Teams link for Department 7 (Afternoon Session) or by calling the toll free conference call number for Department 7.

Turning to the notice procedure, as articulated above, the parties have selected ILYM as the settlement administrator. The administrator will mail the notice packet within 29 days of preliminary approval of the settlement, after updating Class Members' addresses using the National Change of Address Database. Any returned notices will be re-mailed to any forwarding address provided or a better address located through a skip trace or other search. Class Members who receive a re-mailed notice will have an additional 14 days to respond. These notice procedures are appropriate and are approved.

VIII. CONCLUSION

Plaintiff's motion for preliminary approval is GRANTED.

The final approval hearing shall take place on **April 24, 2025** at 1:30 in Dept. 7. The following class is preliminarily certified for settlement purposes:

> [A]ll persons employed by Defendant in California and classified as an hourly-paid or non-exempt employee who worked for Defendant during [December 1, 2019 to June 8, 2024].

The Court will prepare the order.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

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Calendar Line 4

Case Name: *Loera, et al. v. Cellco Partnership*
Case Nos.: 21CV386962 (consolidated with 21CV386960)

This is a consolidated putative class action and representative action under the Private Attorneys General Act ("PAGA"). Plaintiffs John Loera and Manuel Nieto (collectively, "Plaintiffs") allege that Defendant Cellco Partnership d/b/a Verizon Wireless ("Defendant" or "Verizon") failed to pay overtime and minimum wages, failed to provide meal and rest periods or pay associated premiums, and failed to provide code-complaint wage statements, among other Labor Code violations.

Before the Court is Plaintiffs' motions for final approval of settlement and fees, which is unopposed. As discussed below, the Court GRANTS the motion.

I. BACKGROUND

According to the allegations of the operative Third Amended Consolidated Complaint ("TAC"), Plaintiffs were both formerly employed by Defendant as hourly-paid, non-exempt employees, with Mr. Loera employed from November 2010 to March 2020 and Mr. Nieto employed from November 2010 to April 2019. (TAC, ¶¶ 27-28.) Plaintiffs allege that Defendant failed to pay them all regular and overtime wages earned, failed to provide them the meal and rest periods to which they were entitled, and failed to pay them statutorily mandated premiums for the missed rest and meal periods. (Id., ¶¶ 36-42.) Plaintiffs further allege that Defendant failed to provide suitable seating for members of the class and aggrieved employees who could have performed their duties while seated. (Id., ¶ 47.) Defendant also did not provide employees with all wages due to them upon the termination of their employment.

On January 20, 2021, Mr. Nieto filed a PAGA representative action in Santa Cruz County Superior Court seeking civil penalties for numerous violations of the Labor Code. Mr. Loera filed a class action complaint against Defendant in this Court on September 22, 2021, alleging essentially the same wage and hour claims as those set forth in Mr. Nieto's PAGA action. That same day, Mr. Loera also filed a separate PAGA action against Defendant.

In August 2022, counsel for Mr. Nieto and counsel for Mr. Loera began working together. On March 15, 2023, Mr. Loera received the Court's permission to amend his class complaint to add Mr. Nieto as a plaintiff and class representative. In an order dated November 30, 2023 and pursuant to a stipulation between the parties, the Court consolidated the actions initiated by Mr. Loera and granted Plaintiffs leave to file the TAC. The TAC was ultimately filed on December 5, 2023 and asserts the following causes of action: (1) unpaid overtime; (2) unpaid meal period premiums; (3) unpaid rest period premiums; (4) unpaid minimum wages; (5) final wages not timely paid; (6) wages not timely paid during employment; (7) non-compliant wage statements; (8) failure to keep requisite payroll records; (9) unreimbursed business expenses; (10) violation of Business & Professions Code § 17200; and (11) civil penalties under PAGA.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

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

(*Wershba, supra,* 91 Cal.App.4th at pp. 244–245, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of relevant factors, depending on the circumstances of each case. (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.) The trial court also must independently confirm that "the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra,* 168 Cal.App.4th at p. 129.) Of course, before performing its analysis the trial court must be "provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Id.* at pp. 130, 133.)

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 2022 U.S. LEXIS 2940.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76–77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

III. SETTLEMENT CLASS

For settlement purposes only, Plaintiffs request the following Class be certified:

> All individuals who were employed by Verizon as a nonexempt retail employee and performed work in California at any time during the period beginning on March 27, 2017, and ending on May 15, 2023.

Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …."

Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 332 (*Sav-On Drug Stores*).) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

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

since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

At preliminary approval, the Court provisionally certified the above-described class, determining that Plaintiffs had demonstrated by a preponderance of the evidence (1) an ascertainable class, (2) a well-defined community of interest among the class members and (3) that a class action provides substantial benefits to both litigants and the Court. Consequently, the Court will certify the class for settlement purposes as requested.

IV. TERMS AND ADMINISTATION OF SETTLEMENT

The non-reversionary gross settlement amount is $3,500,000. Attorney fees of up to one-third of the gross settlement ($1,166,666.66), litigation costs up to $50,000, and administration expenses not to exceed $32,000 will be paid from the gross settlement. $280,000 will be allocated to PAGA penalties, 75% of which ($210,000) will be paid to the LWDA, with the remaining 25% ($70,000) paid to "PAGA Group Members," who are defined as "all individuals who were employed by Verizon as a nonexempt retail employee and performed work in California at any time during the period beginning on May 26, 2019 and ending on May 15, 2023." Plaintiffs also each seek an enhancement award of $10,000.

The net settlement will be allocated to class members- defined as "[a]ll individuals who were employed by Verizon as a nonexempt retail employee and performed work in California at any time during the period beginning on March 27, 2017 and ending on May 15, 2023"- on a pro rata basis based on the number of weeks worked during the class period. For tax purposes, settlement payments will be allocated 40% to wages and 60% to interest and penalties. The employer side payroll taxes will be paid by Defendant separately from the gross settlement amount. 100% of the PAGA payment to PAGA Group Members will be allocated to penalties. Funds associated with checks uncashed after 180 days will be transmitted to Legal Aid at Work as the *cy pres* recipient.

In exchange for settlement, class members who do not opt out will release:

> [A]ny and all claims, rights, demands, liabilities, and causes of action of any kind, whether known or unknown, arising from the alleged violation of any provision of common law, California law, and/or federal law which was or could be raised based on the same operative facts or theories asserted in any of Plaintiffs' complaints, amended complaints or in the letters to the Labor and Workforce Development Agency, including but not limited to claims for off-the-clock work, unpaid wages, unpaid overtime wages, failure to pay all wages earned every pay period, failure to pay all compensation at the regular rate of pay or the correct regular rate of pay, failure to provide meal periods or rest periods, unpaid premium wages for meal periods or rest periods, untimely payment of wages, inaccurate wage statements, recordkeeping violations, failure to timely pay all wages owed upon termination, unfair competition, reimbursement of business expenses, unlawful deductions from wages, reporting time pay violations, failure to provide wage notices, violation of suitable seating requirements, claims under California Labor Code sections 201, 202, 203, 204, 223, 226, 226.3, 226.7, 510, 512, 551, 552, 558, 1174, 1182.12, 1194, 1197, 1197.1, 1198, 2800, 2802, 2804, 2810.5, California Code of Regulations, Title 8 Section 11000 et seq., the applicable Industrial Welfare Commission (IWC) Wage Orders, Business &

> Professions Code §§ 17200–17208, the Fair Labor Standards Act, or any related damages, penalties, restitution, disgorgement, interest or attorneys' fees, that arose during the Class Period.

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

> Any and all claims under PAGA which were or could be raised based on the same operative facts or theories asserted in any of Plaintiffs' complaints, amended complaints or in the letters to the Labor and Workforce Development Agency, and that arose during the PAGA Period, including claims for PAGA penalties under Labor Code sections 2698-2699.5 for violations of California Labor Code sections 201, 202, 203, 204, 223, 226, 226.3, 226.7, 510, 512, 551, 552, 558, 1174, 1182.12, 1194, 1197, 1197.1, 1198, 2800, 2802, 2804, 2810.5, including based on assertions of off-the-clock work, unpaid wages, unpaid overtime wages, failure to pay all wages earned every pay period, failure to pay all compensation at the regular rate of pay or the correct regular rate of pay, failure to provide meal breaks or rest periods, unpaid premium wages for meal periods or rest periods, untimely payment of wages, inaccurate wage statements, recordkeeping violations, failure to timely pay all wages owed upon termination, reporting time pay violations, failure to provide wage notices, reimbursement of business expenses, unlawful deductions from wages, and violation of suitable seating requirements.

As determined in the Court's order preliminarily approving the parties' settlement agreement, the foregoing releases are both appropriately tailored to the allegations at issue. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.)

The notice period has now been completed. According to the declaration of case manager Kevin Lee with settlement administrator Phoenix Settlement Administrators ("Phoenix") submitted in support of the instant motions, on April 16, May 21, and June 11, 2024, Phoenix received from Defendant's counsel several class data files containing the names, social security numbers, last known mailing addresses, and the total number of relevant workweeks worked for each of the 4,342 settlement class members. Phoenix processed the addresses it had against the National Change of Address database to confirm and update this information and then mailed the notice packet to Class members on July 12, 2024 via first class mail. As of the date of Mr. Lee's declaration, September 30, 2024, 31 notices have been returned to Phoenix as undeliverable, none of which included a forwarding address. Phoenix attempted to locate a current mailing address for the returned packets using a skip trace and located 31 updated addresses, to which the notice was promptly re-mailed. At present, zero notices are considered undeliverable.

The deadline to submit a request for exclusion, a challenge to the amount of work weeks listed, or an objection to the settlement was September 10, 2024. As of the date of Mr. Lee's declaration, Phoenix has received four workweek disputes,[1] two requests for exclusion and no objections. Consequently, there are 4,340 participating settlement class members. Based on this number, Class members will receive an average estimated payment of $449.63, with the estimated highest paying being $1,954.21 and the lowest $0.71.

[1] According to Mr. Lee's declaration, these disputes have been resolved.

At preliminary approval, the Court found that the proposed settlement provides a fair and reasonable compromise to Plaintiffs' claims, and that the PAGA settlement is genuine, meaningful, and fair to those affected. It finds no reason to depart from these findings now, especially considering that there are no objections. Therefore, the Court finds that the settlement is fair and reasonable for the purposes of final approval.

V. ATTORNEYS' FEES, COSTS AND INCENTIVE AWARDS

As set forth above, Plaintiffs' counsel seeks a fee award of $1,166,666.66, or one-third of the gross settlement amount, which is not an uncommon contingency fee allocation in a wage and hour class action. Plaintiffs also provide a lodestar figure of $1,331,065, which is based on 1,754.70 hours of work at billing rates of $575 to $900, resulting in a *negative* multiplier of 0.87. This is far less than the range of multipliers that courts typically approve. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 488, 503–504 (*Laffitte*) [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13]; *Wershba, supra,* 91 Cal.App.4th at p. 255 ["[m]ultipliers can range from 2 to 4 or even higher"]; *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051, fn. 6 [stating that multipliers ranging from one to four are typical in common fund cases and citing the court's own survey of large settlements finding "a range of 0.6–19.6, with most (20 of 24, or 83%) from 1.0–4.0 and a bare majority (13 of 24, or 54%) in the 1.5–3.0 range"].)

"While the percentage method has been generally approved in common fund cases, courts have sought to ensure the percentage fee is reasonable by refining the choice of a percentage or by checking the percentage result against a lodestar- multiplier calculation." (*Laffitte, supra*, 1 Cal.5th 480, 494-495.) Applying this latter approach,

> [T]he percentage-based fee will typically be larger than the lodestar based fee. Assuming that one expects rough parity between the results of the percentage method and the lodestar method, the difference between the two computed fees will be attributable solely to a multiplier that has yet to be applied. Stated another way, the ratio of the percentage-based fee to the lodestar-based fee implies a multiplier, and that implied multiplier can be evaluated for reasonableness. If the implied multiplier is reasonable, then the cross-check confirms the reasonableness of the percentage-based fee; if the implied multiplier is unreasonable, the court should revisit its assumptions.

(*Laffitte, supra*, 1 Cal.5th at p. 496, quoting Walker & Horwich, *The Ethical Imperative of a Lodestar Cross-check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases* (2005) 18 Geo. J. Legal Ethics 1453, 1463.) As described by the California Supreme Court, "[i]f the multiplier calculated by means of a lodestar crosscheck is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Laffitte, supra,* 1 Cal.5th at 505.)

Here, as the multiplier sought by Plaintiffs' counsel is negative, far less than the range of modifiers typically approved by courts and is supported by the percentage cross-check, the Court finds counsel's requested fee award is reasonable.

Plaintiffs' counsel also seeks $46,710.46 in litigation costs, which is less than the maximum amount ($50,500) permitted under the settlement agreement. Based on the information contained in the declaration of Plaintiffs' counsel, this amount is reasonable and is therefore approved. The $31,950 in administrative costs are also approved.

Finally, Plaintiffs request incentive awards of $10,000 each. To support this request, Plaintiffs submit the declaration of their counsel which describes their efforts in this action. The Courts finds that they are entitled to an incentive award and the amounts requested are reasonable and are therefore approved.

VI. CONCLUSION

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiffs' motions for final approval and for fees and costs are GRANTED. The following class is certified for settlement purposes only:

> All individuals who were employed by Verizon as a nonexempt retail employee and performed work in California at any time during the period beginning on March 27, 2017, and ending on May 15, 2023.

Judgment will be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff and the members of the class will take from their TAC only the relief set forth in the settlement agreement and this order and judgment. Pursuant to Rule 3.769(h) of the California Rules of Court, the Court will retain jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **June 19, 2025 at 2:30 P.M.** in Department 7. 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 pursuant to Code of Civil Procedure section 384, subdivision (b); the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely

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 Lines 5 (including Calendar Line 6)

Case Name: *Temujin Labs, Inc., et al. v. Abittan, et al.*
Case No.: 20CV372622

Case Name: *Temujin Labs, Inc. v. Franklin Fu*
Case No.: 21CV375422

These actions arise from the business dealings of: (1) Temujin Labs Inc., a Delaware corporation ("Temujin"); (2) a related Cayman Islands corporation; and (3) Temujin's co-founders, who go by the aliases of Lily Chao and Damien Ding.[1] The aforementioned business dealings involve the development of Temujin as a financial technology company operating under the name "Findora."

In Case No. 20CV372622 ("*Abittan*"), Temujin alleges that Defendants and Cross-Complainants Ariel Abittan, Benjamin Fisch, and Charles Lu conspired to: (a) assert a false claim of ownership of its business; (b) misappropriate its trade secrets; (c) usurp and interfere with control over its assets, such as social media accounts; and (d) interfere with its relationships with investors and business partners. Mr. Abittan, a former business partner of Ms. Chao and Mr. Ding, filed a cross-complaint alleging, among other things, that Ms. Chao and Mr. Ding stole from and defamed him. Mr. Fisch and Mr. Lu filed a separate cross-complaint, asserting that Ms. Chao and Mr. Ding misrepresented a host of important facts about their business and activities to induce Mr. Fisch and Mr. Lu to work for Temujin.

In Case No. 21CV375422 ("*Fu*"), Temujin alleges that its former consultant, Defendant and Cross-Complainant Franklin Fu, demanded additional under-the-table payments for himself and secret payments to certain investors rather than performing his duties in good faith. In a cross-complaint, Mr. Fu alleges that Ms. Chao and Mr. Ding repeatedly lied to him about a range of subjects, including Temujin's technology and even their own identities.

The Court imposed terminating sanctions on Ms. Chao and Mr. Ding for concealing their identities after several rounds of discovery motion practice. Temujin, Ms. Chao and Mr. Ding were also subjected to issue and evidentiary sanctions for discovery misconduct arising from noncompliance with Court orders. A prove-up hearing was conducted by the Court on January 8, 2024, with default judgments subsequently entered in favor of Mr. Abittan and Messrs. Lu and Fisch on their Cross-Complaints against Ms. Chao and Mr. Ding.

Now before the Court are the following motions: (1) Mr. Lu's motion to compel responses to enforcement interrogatories as to Lily Chao; (2) Mr. Fisch's motion to compel responses to enforcement interrogatories as to Damien Ding; (3) Mr. Fisch's motion to compel responses to enforcement interrogatories as to Ms. Chao; (4) Mr. Fu's motion to compel responses to enforcement interrogatories as to Ms. Chao; and (5) Mr. Fu's motion to compel responses to enforcement interrogatories as to Mr. Ding. The foregoing motions are all unopposed. As discussed below, the Court GRANTS the motions. The related requests for monetary sanctions are GRANTED IN PART.

[1] The Temujin entities, a related entity called Discreet Labs Ltd., Ms. Chao, and Mr. Ding are referred to collectively herein as the "Temujin Parties."

I. MESSRS. LU AND FISCH'S MOTIONS TO COMPEL

A. Discussion

On March 8, 2024, Messrs. Lu and Fisch served enforcement interrogatories on Mr. Ding and Ms. Chao. No responses have been received.

Under Code of Civil Procedure section 708.020, subdivision (a), a judgment creditor "may propound written interrogatories to the judgment debtor, in the manner provided in Chapter 13 (commencing with Section 2030.010) of Title 4 of Part 4, requesting information to aid in enforcement of the money judgment. The judgment debtor shall answer the interrogatories in the manner and within the time provided by Chapter 13 (commencing with Section 2030.010) of Title 4 of Part 4." Such interrogatories "may be enforced, to the extent practicable, in the same manner as interrogatories in a civil action." (Code Civ. Proc., § 708.020, subd. (c).)

To this end, "[i]f a party to whom interrogatories are directed fails to serve a timely response, the party propounding the interrogatories may move for an order compelling response to the interrogatories." (Code Civ. Proc., § 2030.290, subd. (b).) "The party to whom the interrogatories are directed waives … any objection to the interrogatories, including one based on privilege or on the protection for work product." (Code Civ. Proc., § 2030.290, subd. (a).) Likewise, "[i]f a party to whom a demand for inspection, copying, testing, or sampling is directed fails to serve a timely response to it, the party making the demand may move for an order compelling response to the demand." (Code Civ. Proc., § 2031.300, subd. (b).) "The party to whom the demand for inspection, copying, testing, or sampling is directed waives any objection to the demand, including one based on privilege or on the protection for work product." (Code Civ. Proc., § 2031.300, subd. (a).)

All that must be shown in the moving papers is that a set of interrogatories was properly served on the opposing party, that the time to respond has expired, and that no response of any kind has been served. (See *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905-906.) Here, Messrs. Lu and Fisch have demonstrated the foregoing. (See Declarations of John Durrant filed in Support of Messrs. Lu and Fisch's Motions to Compel Responses to Enforcement Interrogatories, ¶¶ 2-5.) As Mr. Ding and Ms. Chao do not oppose the instant motions, the Court GRANTS them.

B. Requests for Sanctions

In connection with each motion, Messrs. Lu and Fisch requests that the Court impose monetary sanctions against Mr. Ding and Ms. Chao.

"The court shall impose a monetary sanction … against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code Civ. Proc., § 2030.290, subd. (c).)

Here, the imposition of sanctions is warranted given Mr. Ding and Ms. Chao's failure to respond to the interrogatories and the instant motions. In support of these motions, Messrs.

Lu and Fisch's counsel submits declarations stating that the following amounts of time were spent on the motions: Lu motion (0.6 hours by Denise McGinn and 0.5 hours by John Durrant); Fisch motion re: Ms. Chao (1.3 hours by Ms. McGinn and 2 hours by Mr. Durrant); Fisch motion re: Mr. Ding (0.7 hours by Ms. McGinn and .5 hours by Mr. Durrant). Ms. McGinn bills at a rate of $425 per hour and Mr. Durrant at a rate of $725 per hour. The declarations also state the time anticipated to be spent on reply papers, but none have been filed. The Court finds that the foregoing rates and hours spent preparing the motions are reasonable. Accordingly, the Court GRANTS the requests for sanctions in the following amounts: $617.50 (Mr. Lu's motion re: Ms. Chao); $2,002.50 (Mr. Fisch's motion re: Ms. Chao); and $660 (Mr. Fisch's motion re: Mr. Ding).

II. MR. FU'S MOTIONS TO COMPEL

On March 8, 2024, Mr. Fu served enforcement interrogatories on Mr. Ding and Ms. Chao. No responses have been received. As Mr. Fu has demonstrated that these interrogatories were properly served on Mr. Ding and Ms. Chao, that the time to respond has expired, and that no response of any kind has been served, his motions are GRANTED.

The declarations of Mr. Fu's counsel submitted in support of these motions state that Ms. McGinn spent 0.7 hours of time on the motion regarding Ms. Chao and 0.4 hours on the motion concerning Mr. Ding, with Mr. Durrant spending 0.5 hours on each motion, at the same rates as those described above in connection with the motions relating to Messrs. Lu and Fisch. The Court will not award sanctions for anticipated time, and thus GRANTS the requests for sanctions in the following amounts: $532.50 (motion re: Mr. Ding); and $660 (motion re: Ms. Chao).

III. CONCLUSION

Messrs. Lu and Fisch's motions to compel are GRANTED. Their requests for sanctions are GRANTED IN PART consistent with the foregoing discussion.

Mr. Fu's motions to compel are GRANTED. His requests for sanctions are GRANTED IN PART consistent with the foregoing discussion.

Any discovery responses compelled pursuant to this order must be served no later than 30 days from the date the order is filed.

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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