SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

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

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

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LAW AND MOTION TENTATIVE RULINGS
DATE: MARCH 27, 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	20CV375153	Boyer v. Lucile Salter Packard Childrens Hospital at Stanford (Class Action/PAGA)	See Line 1 for tentative ruling.
LINE 2	22CV400827	Tio v. Transdev Alternative Services, Inc. (Class Action) (Lead Case; Consolidated with 22CV400828)	Motion withdrawn by moving party per Notice filed March 13.
LINE 3	23CV412066	Frazer v. The Save Mart Companies, LLC (Class Action)	See Line 3 for tentative ruling.
LINE 4	19CV359055	Kaga FEI Co., Ltd. v. Cypress Semiconductor Corp.	See Line 4 for tentative ruling.
LINE 5	19CV359055	Kaga FEI Co., Ltd. v. Cypress Semiconductor Corp.	See Line 4 for tentative ruling.
LINE 6	19CV360648	Dancy v. Walmart Inc., et al. [Included in Walmart Wage and Hour Cases, JCCP5136, Santa Clara]	Unopposed application for admission *pro hac vice* is GRANTED. Court will sign proposed order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7	19CV355879	Guzik Technical Enterprises v. Keysight Technologies, Inc.	See Line 7 for tentative ruling.
LINE 8	22CV403427	Bravo v. Michels Pacific Energy, Inc. (Class Action/PAGA)	See Line 8 for tentative ruling.
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Boyer v. Lucile Salter Packard Childrens Hospital at Stanford (Class Action/PAGA)
Case No.: 20CV375153

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 27, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a putative class and Private Attorneys General Act ("PAGA") action arising out various alleged wage and hour violations. The operative First Amended Complaint ("FAC"), filed on November 4, 2021, sets forth the following causes of action: (1) Failure to Reimburse Business Expenses (Labor Code § 2802); (2) UCL Violations (Cal. Bus. & Prof. Code §§ 17200-17204); and (3) PAGA Penalties (Labor Code § 2698 et seq.).

The parties have reached a settlement. Plaintiff Valerie Boyer ("Plaintiff") moved for preliminary approval of the settlement.

On August 30, 2023, the court continued the motion for preliminary approval of settlement to September 27, 2023. The court asked the parties to clarify how funds from uncashed settlement checks should be distributed as the settlement agreement contained inconsistent provisions. The court also requested a copy of Plaintiff's LWDA PAGA letter so it could determine whether the letter was consistent with the FAC. The court otherwise found the settlement fair for purposes of preliminary approval. The court also approved the request for an incentive award in the amount of $10,000, and certified the class for settlement purposes. Finally, the court requested the parties submit an amended class notice adding certain language regarding the final approval hearing.

On September 8, 2023, Plaintiff's counsel filed a supplemental declaration, which included a copy of Plaintiff's LWDA PAGA letter, the Amended Joint Stipulation of Class Action and PAGA Settlement ("Amended Settlement Agreement"), and the amended Notice of Class Action and PAGA Settlement ("Amended Class Notice").

On September 28, 2023, the court granted the motion for preliminary approval of settlement.[1] The court determined that the supplemental declaration from Plaintiff's counsel adequately addresses its concerns regarding the settlement. Specifically, the Amended Settlement Agreement clarified that funds associated with uncashed checks will be re-distributed pro rata to participating class members who cashed their settlement checks. (Supplemental Declaration of Craig J. Ackermann in Support of Plaintiff's Motion […], ¶¶ 5-6 & Ex. B, ¶¶ III.G.6 & III.J.13.) The Amended Settlement Agreement also reflected the updated settlement administration costs in the amount of $18,000. (*Ibid.*) Plaintiff's counsel further included a copy of Plaintiff's LWDA PAGA letter, which was consistent with the FAC. (*Id.* at ¶ 4 & Ex. A.) Finally, the amended class notice contained the changes requested by the court. (*Id.* at ¶¶ 8-9 & Ex. F.)

Now before the court is the motion by Plaintiff for final approval of the settlement. The motion is unopposed.

II. LEGAL STANDARD

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

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

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

[1] The court entered a formal order memorializing its ruling on October 6, 2023.

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

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

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

III. DISCUSSION

> The case has been settled on behalf of the following class:
> Plaintiff and all other individuals in California who are or were employed by Defendant and who entered into Temporary Remote Work Agreements with Defendant during the Class Period [from March 13, 2020 through March 12, 2021]. __

The class is "co-extensive" with PAGA Aggrieved Employees, who are defined as "Plaintiff and all other individuals in California who are or were employed by Defendant and who entered into Temporary Remote Work Agreements with Defendant during the Class Period [from March 13, 2020 through March 12, 2021]."

As discussed in connection with preliminary approval, Defendants will pay a gross, non-reversionary amount of $300,000. The gross settlement payment includes attorney fees not to exceed $105,000 (35 percent of the gross settlement amount), litigation costs up to $24,000, an incentive award up to $10,000 for the class representative, reasonable costs of settlement administration up to $18,000, and a PAGA Payment of $10,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be available for PAGA Aggrieved Employees). Any amounts not approved or not actually spent for attorney fees,

litigations costs, and settlement administration costs shall be added to the Net Settlement Amount.

The Net Settlement Amount will be distributed pro rata to Participating Class Members "based on the Months the individual Participating Class Members worked for Defendant during the Class Period, excluding any month for which a Class Member already received a home internet reimbursement," and to PAGA Members "based on the months the individual PAGA Aggrieved Employees worked for Defendant during the PAGA Period."

Funds associated with uncashed checks will be re-distributed pro rata to participating class members who cashed their settlement checks.

In exchange for the settlement, Participating Class Members who do not opt out will release "[a]ny and all claims, obligations, demands, rights, causes of action, and liabilities against Defendant during the Class Period, under PAGA and/or Labor Code Section 2802 that have been asserted or that could have been asserted in Plaintiff's LWDA PAGA letter, and Plaintiff's Complaint and Amended Complaint, based on the facts, claims and/or allegations therein[.]" "The Parties acknowledge that Released Claims includes any claims for penalties under PAGA resulting from any LWDA investigation." Plaintiff also agrees to a general release of claims.

On November 6, 2023, the settlement administrator mailed notice packets to 1,265 class members. (Declaration of Bryn Bridley Re: Notice and Settlement Administration ("Bridley Dec."), ¶¶ 4-6.) Ultimately, 168 notice packets were deemed undeliverable. (*Id*. at ¶¶ 8-9.) As of January 5, 2024, there were five requests for exclusion from: Tuan Duong; MaryEllen Brady; Jenny Rojas Gil; Sonia Martinez; and Nina Schuppler. (*Id*. at ¶ 10.) There were no objections. (*Id*. at ¶ 11.)

The highest individual settlement share to be paid is approximately $117.56 and the average individual settlement share to be paid is approximately $107.86. (Bridley Dec., ¶ 12.) The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiff requests an incentive award of $10,000. The court approved the incentive award in connection with preliminary approval of the settlement and continues to do so for purposes of final approval.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel seek attorney fees in the amount of $105,000 (35 percent of the gross settlement amount). Plaintiff's counsel provide evidence demonstrating a total combined lodestar of $301,416.71 (representing 436.95 hours of work). (Declaration of Amir Seyedfarshi in Support of Plaintiff's Motion for Final Approval of Class Action Settlement and Attorneys' Fees and Costs ("Seyedfarshi Dec."), ¶¶ 19-21 & Ex. A; Declaration of Craig J. Ackermann in Support of Plaintiff's Motion for Final Approval of Class Action Settlement and Attorneys' Fees and Costs ("Ackermann Dec."), ¶¶ 14-15 & Ex. A.) This results in a negative multiplier.

Here, the percentage of the common fund sought by counsel is marginally higher than the 33.33 percent typically awarded in wage and hour cases, at 35 percent. The lodestar is significantly above the requested fee award, and the court will award the requested fees. The court does note that the lodestar appears to be somewhat inflated and excessive as six attorneys, and ten additional staff members, worked on this matter, and the majority of hours were billed by senior counsel at high hourly rates (e.g., 128.75 hours billed at $919 per hour, 83.72 hours billed at $764 per hour, and 103.85 hours billed at $733 per hour). Consequently, although the court approves attorney fees in the amount of $105,000 as that amount is described in the settlement terms, and appears to be per agreement of the parties, the court has noted its skepticism with the amount of the lodestar set forth.

Plaintiff's counsel also requests $23,471.64 in litigation costs. However, the evidence submitted by Plaintiff's counsel shows that they have only incurred costs in the amount of $23,186.64. (Seyedfarshi Dec., ¶¶ 22-23 & Ex. B; Ackermann Dec., ¶¶ 19-20 & Ex. B.) The incurred costs appear to be reasonable and are approved in the amount of $23,186.64. The administrative costs in the amount of $18,000 are also approved. (Bridley Dec., ¶ 16.)

Accordingly, the motion for final approval of the settlement is GRANTED as modified by the court.

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

The court will set a compliance hearing for November 20, 2024, at 2:30 p.m. in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein, the number and value of any uncashed checks, amounts remitted to Defendants, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

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Calendar Line 2

Case Name: Tio v. Transdev Alternative Services, Inc. (Class Action) (Lead Case; Consolidated with 22CV400828)
Case No.: 22CV400827

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Calendar Line 3

Case Name: Frazer v. The Save Mart Companies, LLC (Class Action)
Case No.: 23CV412066

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 27, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

On March 8, 2023, plaintiff Matthew Frazer ("Plaintiff") filed a Class Action Complaint ("Complaint") against defendant The Save Mart Companies, LLC ("Defendant"), which sets forth the following causes of action: (1) Violations of Unfair Competition Law (Cal. Bus & Prof. Code §§ 17200, et seq.) ("UCL"); and (2) Violations of California Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750, et seq.) ("CLRA"). In the Complaint, Plaintiff alleges Defendant unlawfully charged him 20 cents for recycled grocery bags when he used his WICs Electronic Benefit Transfer card ("EBT") or voucher to purchase groceries, in violation of California Public Resources Code section 42283, subdivision (d). (Complaint, ¶¶ 1-5, 7, 14-18.)

On March 20, 2023, the court entered an Order Deeming Case Complex and Staying Discovery and Responsive Pleading Deadline.

On February 23, 2024, the court entered an Order Re: Stipulation For Briefing Schedule regarding briefing on Defendant's demurrer to the Complaint.

Now before the court is Defendant's demurrer to the first and second causes of action of the Complaint on the ground of failure to allege sufficient facts to state a cause of action. (See Code Civ. Proc., § 430.10, subd. (e).) Plaintiff opposes the demurrer.

II. REQUEST FOR JUDICIAL NOTICE

In connection with its moving papers, Defendant asks the court to take judicial notice of: (1) the Complaint; (2) California Public Resources Code section 42287; and (3) the City of San Jose Ordinance No. 29314. In connection with its reply, Defendant asks the court to take judicial notice of: (1) an August 29, 2014 California Committee Report for the 2013 California Senate Bill No. 270, California 2013-2014 Regular Session ("Committee Report"); and (2) the

Supplemental Declaration of William F. Murphy in Support of Motion for Preliminary Approval of Class Action Settlement and Provisional Certification of Settlement Class ("Murphy Declaration") filed in the case of *Brian Womack v. Safeway, Inc.* (Alameda County Superior Court, Case No. RG17878467) on March 7, 2019. Defendant's request for judicial notice is unopposed.

First, the Complaint is a proper subject of judicial notice as it is a court record relevant to the pending motion. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records].)

Second, California Public Resources Code section 42287 and the City of San Jose Ordinance No. 29314 are proper subjects of judicial notice as regulations/legislative enactments issued under the authority of a public entity and official acts of the legislative, executive, or judicial department of a state. (Evid. Code, § 452, subds. (b) [permitting judicial notice of regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States] & (c) [permitting judicial notice of official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States]; see *Curcini v. County of Alameda* (2008) 264 Cal.App.4th 629, 647, fn. 13 [taking judicial notice of county administrative code and salary ordinance.)

Third, the Committee Report is a proper subject of judicial notice as it is indicative of the intent of the Legislature as a whole. (Evid. Code, § 452, subd. (c); *Los Angeles County Metropolitan Transportation Authority v. Superior Court* (2004) 123 Cal.App.4th 261, 269-270 [reviewing reports by the Senate Rules Committee and the Assembly and Senate Judiciary Committees as well as arguments in favor of the bill before the Assembly Subcommittee on the Administration of Justice]; *see Metropolitan Water Dist. of Southern California v. Imperial Irr. Dist*. (2000) 80 Cal.App.4th 1403, 1425–1426 [a court may take judicial notice of legislative materials indicative of the intent of the Legislature as a whole, such as legislative committee reports and analyses, and testimony or argument to either a house of the Legislature or one of its committees, including statements pertaining to the bill's purpose].)

Fourth, although the Murphy Declaration is a court record and its existence is a proper subject of judicial notice, the truth of hearsay statements made by in a declaration filed in an

unrelated case may not be judicially noticed by the court. (See *People v. Woodell* (1998) 17 Cal.4th 448, 455 [Evid. Code, § 452, subd. (d) permits the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

Accordingly, Defendant's request for judicial notice is GRANTED IN PART and DENIED IN PART. The request is GRANTED as to the Complaint, Public Resources Code section 42287, City of San Jose Ordinance No. 29314, the Committee Report, and the existence of the Murphy Declaration. The request is DENIED as to truth of the contents of the Murphy Declaration.

III. LEGAL STANDARD

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

IV. DISCUSSION

Defendant demurs to the first and second causes of action of the Complaint on the ground of failure to allege sufficient facts to constitute a cause of action, arguing that Public Resources Code section 42283, subdivision (d) is inapplicable because Public Resources Code section 42287, subdivision (c)(1) allows Defendant to follow local ordinances that existed prior to the enactment of the state-wide law. Defendant asserts that Public Resources Code section

42287, subdivision (c)(1) permits retailers to charge for grocery bags based on local ordinances adopted prior to September 1, 2014. Defendant highlights statements in the Committee Report considering Senate Bill 270, which included both Public Resources Code section 42283 and section 42287, that "[t]his bill does not pre-empt existing ordinances; however, it does provide uniformity moving forward by pre-empting local ordinances adopted after September 1, 2014." Defendant further points out that the store which is the subject of this dispute is allegedly located in San Jose. Defendant contends that Ordinance No. 29314 was adopted by the San Jose City Council on October 8, 2013, and states that retailers have the discretion to charge Supplemental Nutrition Assistance Program ("SNAP") customers for grocery bags. Defendant concludes that Ordinance No. 29314 was grandfathered in through Public Resources Code section 42287, subdivision (c)(1) and, therefore, its alleged conduct did not violate Public Resources Code section 42283, subdivision (d).

In opposition, Plaintiff argues that Public Resources Code section 42287, subdivision (c)(1) does not apply here because Public Resources Code section 42283, subdivision (d) states that retailers are required to provide grocery bags for free at the point of sale to customers that receive assistance under SNAP and the Supplemental Food Program for Women, Infants and Children ("WIC") "[n]otwithstanding any other law."

> California courts have set forth rules for construing the meaning of a statute. Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, court must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. [Citations.]

(*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737; see also *Jackpot Harvesting Co., Inc. v. Superior Court* (2018) 26 Cal.App.5th 125, 140 (*Jackpot*).)

> California courts follow an approach to determine legislative intent that involves up to three steps. The first step is our examination of the actual language of the statute. We do so because the statutory language is generally the most reliable indicator of legislative intent. In this first step, we scrutinize words themselves, giving them their usual and ordinary meanings and construing them in context. And we will apply common sense to the language at hand and interpret the statute to make it workable and reasonable. In doing so, if we find the statutory language to be clear, its plain meaning should be

> followed. Thus, if there is no ambiguity, we presume the Legislature meant what it said, and the plain meaning of the language governs.

(*Jackpot, supra,* 26 Cal.App.5th at pp. 140-141, internal quotation marks and citations omitted.)

> If we determine the statutory language is unclear, we will proceed to the second step and review the legislative history. In doing so, we examine the legislative history and statutory context of the act under scrutiny. Under these circumstances, we select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.

(*Jackpot, supra,* 26 Cal.App.5th at p. 141, internal quotation marks and citations omitted.)

Upon review of the plain language of the statutes and the legislative history, the court is not persuaded that Defendant's alleged conduct was lawful.

Section 42283 is located in Article 3 Single-Use Carryout Bags, Chapter 5.3 Single-Use Carryout Bags, Part 3 State Programs, Division 30 Waste Management of the Public Resources Code. The statute provides that:

> (a) Except as provided in subdivision (e), on and after July 1, 2015, a store, as defined in paragraph (1) or (2) of subdivision (g) of Section 42280, shall not provide a single-use carryout bag to a customer at the point of sale.
>
> (b)
>
> > (1) On and after July 1, 2015, a store, as defined in paragraph (1) or (2) of subdivision (g) of Section 42280, shall not sell or distribute a reusable grocery bag at the point of sale except as provided in this subdivision.
> >
> > (2) On and after July 1, 2015, a store, as defined in paragraph (1) or (2) of subdivision (g) of Section 42280, may make available for purchase at the point of sale a reusable grocery bag that meets the requirements of Section 42281.
> >
> > (3) On and after July 1, 2015, a store, as defined in paragraph (1) or (2) of subdivision (g) of Section 42280, that makes reusable grocery bags available for purchase pursuant to paragraph (2) shall not sell the reusable grocery bag for less than ten cents ($0.10) in order to ensure that the cost of providing a reusable grocery bag is not subsidized by a customer who does not require that bag.
>
> (c)
>
> > (1) On and after July 1, 2015, a store, as defined in paragraph (1) or (2) of subdivision (g) of Section 42280, shall not sell or distribute a recycled paper bag except as provided in this subdivision.
> >
> > (2) A store, as defined in paragraph (1) or (2) of subdivision (g) of Section 42280, may make available for purchase a recycled paper bag. On and after July 1, 2015, the store shall not sell a recycled paper bag for less than ten cents ($0.10) in order to ensure that the cost of providing a recycled paper bag is not subsidized by a consumer who does not require that bag.

(d) *Notwithstanding any other law, on and after July 1, 2015, a store, as defined in paragraph (1) or (2) of subdivision (g) of Section 42280, that makes reusable grocery bags or recycled paper bags available for purchase at the point of sale shall provide a reusable grocery bag or a recycled paper bag at no cost at the point of sale to a customer using a payment card or voucher issued by the California Special Supplemental Food Program for Women, Infants, and Children pursuant to Article 2 (commencing with Section 123275) of Chapter 1 of Part 2 of Division 106 of the Health and Safety Code or an electronic benefit transfer card issued pursuant to Section 10072 of the Welfare and Institutions Code*.

(Pub. Res. Code, § 42283, italics added.)

Thus, Public Resources Code section 42283, subdivision (d) generally provides that, notwithstanding any other law, on and after July 1, 2015, a store shall provide a reusuable grocery bag or recycled paper bag to a SNAP or WIC customer at no cost.

Section 42287 is located in Article 5 Preemption, Chapter 5.3 Single-Use Carryout Bags, Part 3 State Programs, Division 30 Waste Management of the Public Resources Code. The statute provides that:

(a) *Except as provided in subdivision (c), this chapter is a matter of statewide interest and concern and is applicable uniformly throughout the state.* Accordingly, this chapter occupies the whole field of regulation of reusable grocery bags, single-use carryout bags, and recycled paper bags, as defined in this chapter, provided by a store, as defined in this chapter.

(b) On and after January 1, 2015, a city, county, or other local public agency shall not enforce, or otherwise implement, an ordinance, resolution, regulation, or rule, or any amendment thereto, adopted on or after September 1, 2014, relating to reusable grocery bags, single-use carryout bags, or recycled paper bags, against a store, as defined in this chapter, unless expressly authorized by this chapter.

(c)

(1) *A city, county, or other local public agency that has adopted, before September 1, 2014, an ordinance, resolution, regulation, or rule relating to reusable grocery bags, single-use carryout bags, or recycled paper bags may continue to enforce and implement that ordinance, resolution, regulation, or rule that was in effect before that date*. Any amendments to that ordinance, resolution, regulation, or rule on or after January 1, 2015, shall be subject to subdivision (b), except the city, county, or other local public agency may adopt or amend an ordinance, resolution, regulation, or rule to increase the amount that a store shall charge with regard to a recycled paper bag, compostable bag, or reusable grocery bag to no less than the amount specified in Section 42283.

(2) A city, county, or other local public agency not covered by paragraph (1) that, before September 1, 2014, has passed a first reading of an ordinance or resolution expressing the intent to restrict single-use carryout bags and, before January 1, 2015, adopts an ordinance to restrict single-use carryout bags, may continue to enforce and implement the ordinance that was in effect before January 1, 2015.

(Pub. Res. Code, § 42287, italics added.)

By its plain language Public Resources Code section 42287, subdivision (c)(1) limits the effect of Chapter 5.3. Specifically, it provides that Chapter 5.3 does not preempt local ordinances relating to reusable grocery bags, single-use carryout bags, or recycled paper bags adopted before September 1, 2014. Any such local ordinance may continue to be enforced and implemented.

Additionally, the legislative history reveals that Chapter 5.3 was intended to only "preempt[ ] local ordinances adopted on or after September 1, 2014, relating to reusable grocery bags, single-use carryout bags, or recycled bags." The Committee Report states:

> Eighty-seven cities and counties throughout California have adopted ordinances banning plastic bags, including […] San Jose […]. Many of these local governments also require stores to charge a fee for a paper carryout bag, and a few have banned both single-use plastic and paper carryout bags. This bill does not pre-empt existing ordinances; however, it does provide uniformity moving forward by pre-empting any local ordinance adopted after September 1, 2014.

(Committee Report, p. 5.) Thus, the legislative history also reflects the legislature's intent to grandfather in local ordinances adopted prior to September 1, 2014.

Furthermore, the legislative history specifically mentions the ordinance at issue here—Ordinance No. 29314—which was adopted by the San Jose City Council on October 8, 2013. Section B of Ordinance No. 29314 states that "[o]n or before December 31, 2013, a Retail Establishment may make available for sale to a Customer a Recycled Paper Bag for a minimum charge of ten cents." Section D of Ordinance No. 29314 further states that "[a] Retail Establishment may provide a Customer participating in [WIC] and a Customer participating in [SNAP] with one or more Recycled Paper Bags at no cost through December 31, 2013." Thus, Ordinance No. 29314 is not preempted, and may be enforced, to the extent that it provides that: (1) stores may sell customers recycled paper bags for at least 10 cents through December 31, 2013; and (2) stores may provide SNAP and WIC customers with a recycled paper bag at no cost through December 31, 2013.

Here, Defendant's alleged conduct did not occur on or before December 31, 2013. Rather, Defendant allegedly charged Plaintiff for recycled papers bags in October 2022 and March 2023. (Complaint, ¶¶ 2, 7, 16.) By its express terms, Ordinance No. 29314 only governs the sale and/or provision of paper bags to SNAP and WIC customers through December 31, 2013. Because Defendant's alleged conduct occurred after this time period,

Defendant has not established that its conduct is permissible under Ordinance No. 29314 or the applicable Public Resource Code provisions.

Accordingly, the demurrer to the first and second causes of action of the Complaint on the ground of failure to allege sufficient facts to state a cause of action is OVERRULED.

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

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Calendar Lines 4 – 5

Case Name: Kaga FEI Co., Ltd. v. Cypress Semiconductor Corp.
Case No.: 19CV359055

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 27, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

II. INTRODUCTION

This action arises from alleged breaches of the Distributor Agreement by which plaintiff and cross-defendant Kaga FEI Co.[2] ("KFEI") and defendant and cross-complainant Cypress Semiconductor Corporation ("Cypress") agreed that KFEI would serve as a nonexclusive distributor of Cypress products to Japanese companies and their affiliates.

On November 25, 2019, KFEI filed a complaint against Cypress, alleging claims for: (1) Breach of Contract; and (2) Breach of the Covenant of Good Faith and Fair Dealing.

On September 10, 2021, KFEI filed a First Amended Complaint against Cypress, which set forth the following causes of action: (1) Breach of Contract; and (2) Breach of the Covenant of Good Faith and Fair Dealing.

On May 23, 2022, Cypress filed a Cross-Complaint against KFEI and cross-defendant Fujitsu Semiconductor Limited ("FSL"), alleging causes of action for: (1) Breach of Written Contract; (2) Breach of Covenant of Good Faith and Fair Dealing; and (3) Intentional Interference with Contract.

On November 23, 2022, Cypress filed a First Amended Cross-Complaint against KFEI and FSL, which set forth the following causes of action: (1) Breach of Written Contract; (2) Breach of Covenant of Good Faith and Fair Dealing (KFEI); (3) Breach of Covenant of Good Faith and Fair Dealing (FSL); (4) Intentional Interference with Contract; (5) Implied and Equitable Indemnity; and (6) Violation of California UCL (Cal. Bus. Code § 17200 et seq.).

On May 12, 2023, KFEI filed the operative Second Amended Complaint ("SAC") against Cypress, alleging causes of action for: (1) Breach of Distributor Agreement; (2) Breach of Covenant of Good Faith and Fair Dealing; (3) Breach of September 5, 2017 Settlement

[2] On March 9, 2021, plaintiff notified the court that it changed its corporate name from Fujitsu Electronics Inc. to Kaga FEI Co., Ltd.

Agreement; (4) Breach of October 28, 2016 Letter Agreement; (5) Fraudulent Inducement/Intentional Misrepresentation; (6) False Promise; (7) Intentional Interference with Contractual Relations; and (8) Intentional Interference with Prospective Economic Relations.

On October 31, 2023, the court entered an Order Re: Motions to Seal; Demurrer, which sustained Cypress's demurrer to the third and fourth causes of action of the SAC, without leave to amend, and overruled the demurrer to the fifth through eighth causes of action of the SAC.

On November 21, 2023, Cypress filed the operative Second Amended Cross-Complaint ("SAXC") against KFEI, which sets forth causes of action for: (1) Breach of Distributor Agreement; (2) Fraudulent Concealment; (3) Civil Conspiracy; (4) Breach of Covenant of Good Faith and Fair Dealing; (5) Declaratory Judgment (Section 15.2.1, 15.2.4, and 16.7 of the Distributor Agreement); (6) Declaratory Judgment (Section 15.3.5 of the Distributor Agreement); (7) Cal. Bus. Code § 17200 (Unfair Business Act and Practices); and (8) Intentional Interference with Prospective Economic Relations.

Currently before the court are: (1) Cypress's motion to seal portions of the SAXC; (2) KFEI's motion to seal portions of its demurrer; (3) Cypress's motion to seal portions of its opposition to the demurrer; (4) KFEI's motion to seal portions of its reply in support of its demurrer; and (5) KFEI's demurrer to the SAXC. The motions to seal are unopposed. Cypress opposes the demurrer.

II. MOTIONS TO SEAL

A. LEGAL STANDARD

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).) Pleadings, in particular, should be open to public inspection "as a general rule," although they may be filed under seal in appropriate circumstances. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 104, fn. 35.)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3 (*Providian*).) "[A] binding contractual agreement not to disclose" may suffice. (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 107.) In addition, confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285-1286 (*Universal*).)

Where some material within a document warrants sealing, but other material does not, the document should be edited or redacted if possible, to accommodate both the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*Providian, supra*, 96 Cal.App.4th at p. 309.)

B. CYPRESS'S MOTION TO SEAL PORTIONS OF THE SAXC

Cypress seeks to seal portions of the SAXC. The material at issue relates to the confidential terms of the parties' business relationship, the parties' confidential business strategies, customer information, and pricing margins. (Declaration of Elspeth V. Hansen in Support of Cypress Semiconductor Corporation's Motion to Seal Portions of Cypress Semiconductor Corporation's Second Amended Cross-Complaint, ¶¶ 3-7.) This information is not publicly available, and its disclosure could harm the parties' positions when entering into future agreements or negotiations. (*Ibid*.) Additionally, the parties' Distributor Agreement provides that the parties will not disclose any such non-public business information. Notably, the court previously sealed similar information in the SAC. The proposed redactions in Cypress's SAXC are narrowly tailored to this information.

The court therefore finds that Cypress has established an overriding interest that justifies sealing these limited portions of its SAXC, and the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra*, 110 Cal.App.4th at pp. 1283 [a contractual obligation not

to disclose can constitute an overriding interest which warrants sealing] & 1286 [information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party].)

Accordingly, the motion to seal portions of Cypress's SAXC is GRANTED.

C. KFEI'S MOTION TO SEAL PORTIONS OF ITS DEMURRER

KFEI seeks to seal portions of its demurrer to the SAXC as well as portions of the exhibits attached to its request for judicial notice. The material at issue relates to the confidential terms of KFEI's business relationship with Cypress, KFEI's confidential business strategies, KFEI's customer lists, and KFEI's product prices. (Declaration of Benjamin P. Smith in Support of Plaintiff and Cross-Defendant Kaga FEI Co., Ltd.'s Motion to Seal, ¶¶ 2-6.) This information is not publicly available, and its disclosure could harm the parties' positions when entering into future agreements or negotiations. (*Ibid.*) Additionally, the parties' Distributor Agreement provides that the parties will not disclose any such non-public business information. (*Ibid.*) The proposed redactions in the demurrer are narrowly tailored to this information.

The court therefore finds that KFEI has established an overriding interest that justifies sealing these limited portions of its demurrer, and the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra,* 110 Cal.App.4th at pp. 1283 [a contractual obligation not to disclose can constitute an overriding interest which warrants sealing] & 1286 [information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party].)

Accordingly, the motion to seal portions of KFEI's demurrer is GRANTED.

D. CYPRESS'S MOTION TO SEAL PORTIONS OF ITS OPPOSITION

Cypress seeks to seal portions of its opposition to KFEI's demurrer to the SAXC. The material at issue relates to the confidential terms of the parties' business relationship, the

parties' confidential business strategies, and customer information. (Declaration of Elspeth V. Hansen in Support of Cypress Semiconductor Corporation's Motion to Seal Portions of [Its] Opposition to Plaintiff and Cross-Defendant Kaga FEI Co., Ltd.'s Demurrer, ¶¶ 2-7.) This information is not publicly available, and its disclosure could harm the parties' positions when entering into future agreements or negotiations. (*Ibid.*) Additionally, the parties' Distributor Agreement provides that the parties will not disclose any such non-public business information. The proposed redactions in Cypress's opposition are narrowly tailored to this information.

The court therefore finds that Cypress has established an overriding interest that justifies sealing these limited portions of its opposition, and the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra,* 110 Cal.App.4th at pp. 1283 [a contractual obligation not to disclose can constitute an overriding interest which warrants sealing] & 1286 [information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party].)

Accordingly, the motion to seal portions of Cypress's opposition is GRANTED.

E. KFEI'S MOTION TO SEAL PORTIONS OF ITS REPLY

KFEI seeks to seal portions of its reply in support of its demurrer to the SAXC. The material at issue relates to the confidential terms of KFEI's business relationship with Cypress and KFEI's customer lists. (Declaration of Benjamin P. Smith in Support of Plaintiff and Cross-Defendant Kaga FEI Co., Ltd.'s Motion to Seal, ¶¶ 2-6.) This information is not publicly available, and its disclosure could harm the parties' positions when entering into future agreements or negotiations. (*Ibid.*) Additionally, the parties' Distributor Agreement provides that the parties will not disclose any such non-public business information. (*Ibid.*) The proposed redactions in the reply are narrowly tailored to this information.

The court therefore finds that KFEI has established an overriding interest that justifies sealing these limited portions of its reply, and the other factors set forth in rule 2.550 are

satisfied. (See *Universal, supra,* 110 Cal.App.4th at pp. 1283 [a contractual obligation not to disclose can constitute an overriding interest which warrants sealing] & 1286 [information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party].)

Accordingly, the motion to seal portions of KFEI's reply is GRANTED.

III. DEMURRER

KFEI demurs to the second, third, and fifth through eighth causes of action of the SAXC on the ground of failure to state facts sufficient to constitute a cause of action. (See Code Civ. Proc., § 430.10, subd. (e).) KFEI also demurs to the third cause of action on the additional grounds of lack of jurisdiction of the subject of the cause of action alleged in the pleading and defect or misjoinder of parties. (See Code Civ. Proc., § 430.10, subds. (a) &. (d).)

A. REQUEST FOR JUDICIAL NOTICE

In connection with its moving papers, KFEI asks the court to take judicial notice of: (1) Amendment No. 1 to the parties' Distributor Agreement; (2) a press release titled "Kaga Electronics acquires 70% shares in Fujitsu Electronics from Fujitsu Semiconductor" dated September 10, 2018; (3) an excerpt from the Fujitsu Group Integrated Report 2015; (4) an excerpt from the Fujitsu Group Integrated Report, Financial Section 2015; (5) a Notice of Breach of Cypress Distributor Agreement dated February 25, 2019; (6) a Notice of Termination of Cypress Distributor Agreement dated April 10, 2019; (7) a letter from Philip J. Wang dated August 16, 2019; and (8) an Order Granting Petition to Compel Arbitration filed in the case on *Fujitsu Semiconductor Limited v. Cypress Semiconductor Corporation* (United States District Court, Northern District of California, Case No. 22-mc-80313-VKD, ECF) on June 5, 2023.

Cypress opposes the request for judicial notice, arguing that KFEI seeks to obtain judicial notice not simply of the existence of the subject documents but of the truth of their contents.

The court may properly take judicial notice of the existence of Item No. 1 under Evidence Code section 452, subdivision (h) because Cypress references Amendment No. 1 to the parties' Distributor Agreement throughout the SAXC. (See Evid. Code, § 452, subd. (h); see also *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9 (*StorMedia*) [indicating that a document referenced in a pleading under review is judicially noticeable]; *Salvaty v. Falcon Cable TV* (1985) 165 Cal.App.3d 798, 800, fn. 1 (*Salvaty*); *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285, fn. 3 (*Ingram*) [taking judicial notice of a letter and media release that formed the basis of the allegations in the complaint], overruled in part on other grounds in *Leon v. County of Riverside* (2023) 14 Cal.5th 910, 930-931.) The court does not take judicial notice of any particular interpretation of the document's meaning. (See *Herrera v. Deutsche Bank National Trust Co*. (2011) 196 Cal.App.4th 1366, 1375 (*Herrera*) ["When judicial notice is taken of a document, … the truthfulness and proper interpretation of the document are disputable."].)

Similarly, the court may properly take judicial notice of the existence of Item No. 2 under Evidence Code section 452, subdivision (h) because Cypress references the September 10, 2018 press release in the SAXC. (See Evid. Code, § 452, subd. (h); see also *StorMedia, supra,* 20 Cal.4th at p. 457, fn. 9 [indicating that a document referenced in a pleading under review is judicially noticeable]; *Salvaty, supra,* 165 Cal.App.3d at p. 800, fn. 1; *Ingram, supra,* 74 Cal.App.4th at p. 1285, fn. 3 [taking judicial notice of a letter and media release that formed the basis of the allegations in the complaint].) The court does not take judicial notice of the truthfulness of the contents of the press release or any particular interpretation of the document's meaning. (See *Herrera, supra,* 196 Cal.App.4th at p. 1375 ["When judicial notice is taken of a document, … the truthfulness and proper interpretation of the document are disputable."].)

Next, KFEI seeks judicial notice of Item Nos. 3 and 4—annual reports made by FSL regarding its corporate plans—to show that FSL publicly discussed, and therefore knew, its own plans to divest itself of its semiconductor business as of 2015. Although Cypress opposes the request for judicial notice of these items, the mere existence of the subject reports is not reasonably subject to dispute. The existence of the reports is not reasonably subject to dispute

and is capable of ready determination, particularly since Cypress does not question with specificity the authenticity or completeness of the reports which are posted on FSL's web site. (See *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 753 [taking judicial notice of public records posted on the FDIC website].) Notably, the court does not take judicial notice of the truthfulness of the contents of the reports or any particular interpretation of the documents' meaning. (See *Herrera, supra,* 196 Cal.App.4th at p. 1375 ["When judicial notice is taken of a document, … the truthfulness and proper interpretation of the document are disputable."].)

Item Nos. 5 through 7 are proper subjects of judicial notice under Evidence Code section 452, subdivision (h) because Cypress references the February 25, 2019 Notice of Breach, the April 10, 2019 Notice of Termination, and the August 16, 2019 letter in the SAXC. (See Evid. Code, § 452, subd. (h); see also *StorMedia, supra,* 20 Cal.4th at p. 457, fn. 9 [indicating that a document referenced in a pleading under review is judicially noticeable]; *Salvaty, supra,* 165 Cal.App.3d at p. 800, fn. 1; *Ingram, supra,* 74 Cal.App.4th at p. 1285, fn. 3 [taking judicial notice of a letter and media release that formed the basis of the allegations in the complaint].) The court does not take judicial notice of the truthfulness of the contents of the documents or any particular interpretation of the documents' meaning. (See *Herrera, supra,* 196 Cal.App.4th at p. 1375 ["When judicial notice is taken of a document, … the truthfulness and proper interpretation of the document are disputable."].)

Finally, the court may properly take judicial notice of the existence of, and the truth of the results reached in, Item No. 8 because the Order Granting Petition to Compel Arbitration is a court record that is generally relevant to the issues raised on demurrer. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *People v. Woodell* (1998) 17 Cal.4th 448, 455 [Evid. Code, § 452, subd. (d) permits the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

Accordingly, KFEI's request for judicial notice is GRANTED.

B. LEGAL STANDARD

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

C. SECOND CAUSE OF ACTION

KFEI argues that the second cause of action for fraudulent concealment fails to state a claim because it is not alleged with particularity, it did not have a legal duty to disclose a possible future sale, statements about a possible future sale constitute non-actionable opinions, and Cypress cannot have reasonably relied on KFEI's alleged failure to disclose a possible future sale.

In opposition, Cypress persuasively asserts that the majority of KFEI's arguments are misplaced because the second cause of action is not based on KFEI's alleged failure to disclose the fact that a future sale was a possibility, but on KFEI's alleged failure to disclose that it was actively pursuing the sale of FEI (i.e., actively pursuing new ownership). (SAXC, ¶¶ 26, 30-31, 80.) Because the majority of KFEI's arguments do not address the actual allegations that form the basis of the claim, KFEI has not shown that the second cause of action fails to state a claim.

Furthermore, KFEI's assertion that Cypress failed to plead the claim with particularity fails to take into account the differences between a fraud claim based on affirmative misrepresentations and a fraud claim based on concealment or nondisclosure. Though the

particularity requirement generally mandates that a plaintiff plead facts establishing the aforementioned items, it is much more difficult to apply this rule in a case of non-disclosure because, as one court explained, "[h]ow does one show 'how' and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?" (*Alfaro v. Community Housing Imp. System & Planning Ass'n., Inc.* (2009) 171 Cal.App.4th 1356, 1384.) One of the purposes of the specificity requirement is to provide "notice to the defendant, to furnish the defendant with certain definite charged which can be intelligently met." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216, internal quotations omitted.) But, when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy, even under strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party …." (*Id*. at p. 217.) Such is the circumstance here, when KFEI is alleged to possess exclusive and superior knowledge regarding the fact that it was actively pursuing the sale of FEI. In this vein, the court agrees with Cypress that it has alleged the elements of this claim with the requisite specificity.

Accordingly, the demurrer to the second cause of action is OVERRULED.

D. THIRD CAUSE OF ACTION

KFEI argues that the third cause of action for civil conspiracy fails to state a claim because conspiracy is not a cause of action, the underlying fraud claim fails, the claim is not alleged with particularity, and Cypress does not allege facts showing KFEI's knowledge and agreement to FSL's plan to sell its shares of FEI while Amendment No. 1 was being negotiated. KFEI also asserts that the claim should be dismissed because it seeks to impose liability on a party—FSL—who has not and cannot be joined.

In opposition, Cypress asserts that it has properly plead a standalone claim for conspiracy because the underlying cause of action for fraudulent concealment is viable. Cypress further contends that it has adequately alleged facts in support of the elements of its claim. Finally, Cypress asserts that it does not seek to hold FSL liable for the alleged conspiracy and FSL is not an indispensable party.

As an initial matter, Defendant is correct that conspiracy is generally not a standalone cause of action. Rather, it is "a legal doctrine that imposes liability on persons who, although not actually committing the tort themselves, share with the immediate tortfeasors a common plan or design in its perpetuation. By participation in a civil conspiracy, a co-conspirator effectively adopts as his or her own the torts of other co-conspirators within the ambit of the conspiracy. In this way, a co-conspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511, internal citations omitted.) Nevertheless, for the reasons set forth above, the underlying tort of fraudulent concealment survives the instant demurrer. Consequently, the court can evaluate the sufficiency of the conspiracy "cause of action" to determine whether Cypress has adequately pleaded conspiracy as a basis for vicarious liability.

The elements of a civil conspiracy are: (1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting. (*Mosier v. Southern Cal. Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, 1048.) General allegations of agreement have been held sufficient and the conspiracy averment has even been held unnecessary, providing the unlawful acts or civil wrongs are otherwise sufficiently alleged. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47.) Given the existence of the underlying tort pleaded in the SAXC and Cypress's allegations that the KFEI and FSL conspired to defraud it, KFEI's argument regarding particularity is unpersuasive and does not provide a basis upon which to sustain the demurrer to the third cause of action.

Finally, Cypress persuasively argues that FSL is not an indispensable party as it is well-established that it is unnecessary for all joint tortfeasors to be named as defendants in a single lawsuit. (See *Countrywide Home Loans, Inc. v. Superior Court* (1999) 69 Cal.App.4th 785, 794 [the borrowers' allegedly participation with defendants in the fraudulent scheme put the borrowers beyond the reach of section 389 because "[j]oint tortfeasors are not necessary to afford complete relief"].)

Accordingly, the demurrer to the third cause of action is OVERRULED.

E. FIFTH AND SIXTH CAUSES OF ACTION

KFEI argues that the court should dismiss the fifth and sixth causes of action for declaratory relief because the declaratory relief sought is irrelevant and unnecessary. KFEI contends that declaratory relief operates prospectively and here only past wrongs are involved.

KFEI's argument is well-taken. "[D]eclaratory relief operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventive justice, to declare rights rather than execute them." (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403.) Hence, where there is an accrued cause of action for an actual breach of contract or other wrongful act, declaratory relief may be denied. (5 Witkin, California Procedure (4th ed. 1997) Pleading, § 823, p. 279; Code Civ. Proc., § 1061 ["The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."].)

Here, there are no facts are alleged that would render necessary or proper a declaration with respect to the future conduct of the parties. Cypress's claims for declaratory relief allege that: (1) "[a]n actual controversy between Cypress and FEI" has arisen "as to whether FEI's acquisition by Kaga entitled Cypress to immediately terminated the contract pursuant to Sections 15.2.1, 15.2.4, and 16.7 of the Distributor Agreement"; and (2) "[t]here is an actual controversy between Cypress and FEI as to whether FEI is entitled to damages for loss of business following termination of the Distributor Agreement." (SAXC, ¶¶ 106 & 111.) Thus, the claims, as pleaded, merely seeks to redress past wrongs. Cypress does not allege any facts indicating that declaratory relief will regulate future conduct by the parties, the parties' relationship is ongoing, or there is any possibility of a continued relationship between the parties. (See *Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 367-68, 371-72, and 374-75 [a demurrer may properly be sustained when a claim for declaratory relief seeks only redress of past wrongs and there are no allegations suggesting declaratory relief will regulate future conduct by the parties].) Therefore, Cypress fails to allege sufficient facts to state a claim for declaratory relief.

Accordingly, the demurrer to the fifth and sixth cause of action is SUSTAINED without leave to amend.

F. SEVENTH CAUSE OF ACTION

KFEI argues that the seventh cause of action for violation of the UCL fails to state a claim because KFEI is not a competitor or consumer entitled to protection under the UCL. KFEI also asserts that Cypress has no available remedy because it does not seek injunctive relief and it cannot allege an entitlement to restitution; rather, it seeks to recover damages in the form of lost profits.

Here, KFEI's second argument is well-taken. "While the scope of conduct covered by the UCL is broad, its remedies are limited." (*Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1144 (*Korea*).) Because a "UCL action is equitable in nature[,] damages cannot be recovered." (*Ibid*.) Instead, "[p]revailing plaintiffs are generally limited to injunctive relief and restitution." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co*. (1999) 20 Cal.4th 163, 179.) Under the UCL, injunctive relief is appropriate only when there is a threat of continuing misconduct (i.e., some threat of future misconduct). (*Madrid v. Perot Systems Corp*. (2005) 130 Cal.App.4th 440, 463 (*Madrid*).) In addition, the California Supreme Court has defined restitution under the UCL as the "return [of] money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property …." (*Korea, supra*, 29 Cal.4th at pp. 1144-45.) "The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." (*Id.* at p. 1149.) When a cause of action seeks only remedies that are not recoverable under the UCL, the cause of action fails to state a claim under the unfair competition law. (*Id*. at p. 1166; *Madrid, supra,* 130 Cal.App.4th at p. 467.)

As KFEI points out, Cypress does not seek any injunctive relief in connection with the seventh cause of action. Furthermore, although Cypress alleges in a conclusory fashion that it is entitled to restitution (SAXC, ¶ 124), Cypress expressly alleges that KFEI's wrongful conduct "caused it to suffer monetary losses in the form of, among other things, lost profits from selling products to FEI at uncompetitive prices, rather than at the competitive prices that

would have been paid had the products been sold to end users by other distributors" (SAXC, ¶ 120). Lost profits or business opportunity is a measure of damages, not restitution. (See *Korea, supra,* 29 Cal.4th at pp. 1150-1151 ["The nonrestitutionary disgorgement remedy sought by plaintiff closely resembles a claim for damages, something that is not permitted under the UCL. As one court has noted: 'Compensation for a lost business opportunity is a measure of damages and not restitution to the alleged victims.' "].) Because Cypress does not plead any other facts showing that it actually seeks restitution (as opposed to damages), the seventh cause of action fails to state a claim.

Accordingly, the demurrer to the seventh cause of action is SUSTAINED with 10 days' leave to amend.

G. EIGHTH CAUSE OF ACTION

KFEI argues that the eighth cause of action for intentional interference with prospective economic relations fails to state a claim because KFEI was not a stranger to Cypress's relationships with end users.

This argument is well-taken. The elements for the tort of intentional interference with prospective economic advantage "are usually stated as follows: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." (*Korea, supra,* 29 Cal.4th at p. 1153.) The tort of interference with prospective economic advantage cannot be prosecuted against a party to the relationship from which the plaintiff's anticipated economic advantage would arise. (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 262 (*Kasparian*).)

Here, Cypress alleges that it "has and/or had economic relationships with end users who purchased its semiconductor chips from FEI prior to the termination of the Cypress-FEI

relationship in October 2019," and "FEI engaged in wrongful conduct in interfering with Cypress's relationships with end users of Cypress products." (SAXC, ¶¶ 126-128.) These allegations demonstrate that KFEI was a party to the end users' relationship with Cypress (as the end users purchased chips from KFEI) and KFEI cannot be liable for interference with its own economic relations. (See Kasparian, supra, 38 Cal.App.4th at p. 265.)

Accordingly, the demurrer to the eighth cause of action is SUSTAINED without leave to amend.

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

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Calendar Line 5

Case Name:
Case No.:

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Calendar Line 6

Case Name:
Case No.:

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Calendar Line 7

Case Name: Guzik Technical Enterprises v. Keysight Technologies, Inc.
Case No.: 19CV355879

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 27, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

III. INTRODUCTION

This case arises out of defendant Keysight Technologies' ("Defendant") alleged tortious scheme to defraud and steal valuable business opportunities from plaintiff Guzik Technical Enterprises ("Plaintiff"). Plaintiff's original Complaint, filed on September 30, 2019, set forth the following causes of action: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Intentional Misrepresentation; (4) Promise Without Intent to Perform; (5) Fraudulent Omission; (6) Breach of Fiduciary Duty; (7) Quasi-Contract Based on Unjust Enrichment; (8) Violation of California Bus. & Prof. Code § 17200; (9) Intentional Interference with Prospective Economic Advantage; (10) Trade Secret Misappropriation – Cal Civ. Code, § 3426, et seq.; (11) Violation of the Cartwright Act – Cal. Bus. & Prof. Code, § 16700, et seq.; and (12) Promissory Estoppel.

On August 3, 2020, Plaintiff served Defendant with its original Trade Secret Disclosure, which identified nine trade secrets.

Defendant demurred to the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, and twelfth causes of action on the grounds that they did not state facts sufficient to constitute a cause of action. On September 24, 2020, the court overruled the demurrer as to the first cause of action and sustained the demurrer with leave to amend as to all other causes of action.

The First Amended Complaint ("FAC"), filed on October 14, 2020, set forth the following causes of action: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Fraud – Intentional Misrepresentation; (4) Fraud – Promise Without Intent to Perform; (5) Breach of Fiduciary Duty; (6) Fraud – Fraudulent Omission; (7) Trade Secret Misappropriation – Cal Civ. Code, § 3426, et seq.; (8) Violation of the

Cartwright Act – Cal. Bus. & Prof. Code, § 16700, et seq.; (9) Promissory Estoppel; (10) Violation of California Bus. & Prof. Code, § 17200, et seq.; (11) Intentional Interference with Prospective Economic Advantage; and (12) Quasi-Contract Based on Unjust Enrichment.

On January 31, 2021, Plaintiff served Defendant with its First Amended Trade Secret Disclosure, which identified eighth trade secrets (some of which have numerous sub-parts).

Defendant demurred to the first, second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, and twelfth causes of action in the FAC on the grounds that they did not state facts sufficient to constitute a cause of action. On February 19, 2021, the court overruled the demurrer as to the first, second, third, fourth, fifth, sixth, ninth, tenth, and twelfth causes of action, and sustained the demurrer with leave to amend as to the eighth, and eleventh causes of action.

The Second Amended Complaint ("SAC"), filed on March 11, 2021, set forth the following causes of action: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Fraud – Intentional Misrepresentation; (4) Fraud – Promise Without Intent to Perform; (5) Breach of Fiduciary Duty; (6) Fraud – Fraudulent Omission; (7) Trade Secret Misappropriation – Cal Civ. Code, § 3426, et seq.; (8) Violation of the Cartwright Act – Cal. Bus. & Prof. Code, § 16700, et seq.; (9) Promissory Estoppel; (10) Violation of California Bus. & Prof. Code, § 17200, et seq.; (11) Intentional Interference with Prospective Economic Advantage; and (12) Quasi-Contract Based on Unjust Enrichment.

On June 17, 2021, the court entered the Order Re: Statement of Decision Granting Guzik Technical Enterprises' Motion to Compel Trade Secret Discovery, overruling Defendant's objections to Plaintiff's First Amended Trade Secret Disclosure.

Defendant demurred to the eighth and eleventh causes of action in the SAC on the grounds that they did not state facts sufficient to constitute a cause of action. On June 24, 2021, the court overruled the demurrer as to the eighth cause of action and sustained the demurrer without leave to amend as to the eleventh cause of action.

On June 13, 2023, the court entered the Stipulation and Order Regarding Amended Pleadings, granting the parties leave to amend their pleadings.

On June 14, 2023, Plaintiff filed the operative Third Amended Complaint ("TAC"), which sets forth the following causes of action: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Fraud – Intentional Misrepresentation; (4) Fraud – Promise Without Intent to Perform; (5) Breach of Fiduciary Duty; (6) Fraud – Fraudulent Omission; (7) Trade Secret Misappropriation – Cal Civ. Code, § 3426, et seq.; (8) Violation of the Cartwright Act – Cal. Bus. & Prof. Code, § 16700, et seq.; (9) Promissory Estoppel; (10) Violation of California Bus. & Prof. Code, § 17200, et seq.; (11) Intentional Interference with Prospective Economic Advantage; and (12) Quasi-Contract Based on Unjust Enrichment.

On June 15, 2023, Plaintiff served Defendant with a Second Amended Trade Secret Disclosure, which purported to add three new trade secrets (Nos. 9-11) and twelve exhibits (Nos. 28-40).

The parties participated in an Informal Discovery Conference on July 17, 2023, in an attempt to resolve their disagreement regarding whether Plaintiff can unilaterally amend the First Amended Trade Secret Disclosure. The parties were unable to resolve their dispute.

On October 10, 2023, the court granted Plaintiff's motion for an order granting Plaintiff leave to amend its trade secret disclosure so that the Second Amended Trade Secret Disclosure can become operative.

On December 21, 2023, Plaintiff dismissed the seventh cause of action of the TAC with prejudice.

On March 5, 2024, the court entered an Order Re: Motion for Summary Adjudication; Motions to Seal.

On March 7, 2024, Plaintiff filed a notice of settlement of the entire case.

On March 21, 2024, Plaintiff filed a Request for Dismissal of the entire action with prejudice. The dismissal was entered later that day.

Now before the court is the motion by Defendant to seal certain exhibits filed in support of Plaintiff's opposition to Defendant's motion for summary adjudication. Plaintiff opposes the motion.

IV. LEGAL STANDARD

"Unless confidentiality is required by law, court records are presumed to be open." (Cal. Rules of Court, rule 2.550(c).) "A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties." (Cal. Rules of Court, rule 2.551(a).) The court may order that a record be filed under seal only if it expressly finds facts that establish:

1. There exists an overriding interest that overcomes the right of public access to the record;
2. The overriding interest supports sealing the record;
3. A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
4. The proposed sealing is narrowly tailored; and
5. No less restrictive means exist to achieve the overriding interest.

(Cal. Rules of Court, rule 2.550(d).)

A party moving to seal a record must file a memorandum and a declaration containing facts sufficient to justify the sealing. (Cal. Rules of Court, rule 2.551(b)(1).) A declaration supporting a motion to seal should be specific, not conclusory, as to the facts supporting the overriding interest. If the court finds that the supporting declarations are conclusory or otherwise unpersuasive, it may conclude that the moving party has failed to demonstrate an overriding interest that overcomes the right of public access. (See *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 305.)

Further, where some material within a document warrants sealing but other material does not, the document should be edited or redacted if possible, to accommodate the moving party's overriding interest and the strong presumption in favor of public access. (See Cal. Rules of Court, rule 2.550(e)(1)(B); see also *In re Providian Credit Card Cases*, *supra*, 96 Cal.App.4th at p. 309.) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*In re Providian Credit Card Cases*, *supra*, 96 Cal.App.4th at p. 309.)

III. DISCUSSION

Defendant moves to seal Exhibit Nos. 55, 61, 73, 76, 78, 84, 85, 92, 93, 95, 96, 98, 101, 103, 107, 109, and 112 filed in support of Plaintiff's opposition to Defendant's motion for summary adjudication. Defendant asserts that sealing is warranted because the information sought to be sealed contains Defendant's confidential and competitively sensitive business information. For example, Defendant asserts that many of the exhibits discuss confidential information about its actual or potential customers. Defendant contends that disclosure of its confidential information would be likely to harm its competitive standing by providing its competitors with sensitive business information.

In support of its motion, Defendant provides a declaration from its counsel. (Declaration of Nancy Trethewey in Support of Defendant Keysight Technologies, Inc.'s Motion to Seal Exhibits Lodged in Support of Plaintiff Guzik Technical Enterprises' Opposition to Keysight's Motion for Summary Adjudication, ¶¶ 3-10.)

In opposition, Plaintiff argues that Defendant's request for sealing is overbroad because it seeks to seal entire exhibits when only some of the information contained in the exhibits is confidential. For example, Plaintiff notes that Defendant seeks to seal Exhibit No. 109 on the basis that it includes confidential information regarding Defendant's actual or potential customers. Plaintiff asserts that only two of the six emails in Exhibit No. 109 even briefly refer to Defendant's customers and such references could be easily redacted without sealing the entire email chain. Plaintiff further points out that summaries of Exhibit No. 109 appear elsewhere in the public record. Plaintiff argues that Defendant's request to seal Exhibit Nos. 55, 61, 73, 76, 78, 85, 92, 93, 95, 101, 103, and 107 suffers from similar defects because those exhibits contain information that is not confidential and the purportedly confidential information in those exhibits can be easily redacted. Notably, Plaintiff does not object to the court sealing Exhibit Nos. 84, 96, 98, and 112 in their entirety. Plaintiff contends that Defendant should be given leave to file a new motion to seal that is narrowly tailored and redacts only the confidential information at issue.

In connection with its reply, Defendant submits redacted versions of Exhibit Nos. 55, 61, 73, 76, 78, 85, 92, 93, 95, 101, 103, 107, and 109, which address Plaintiff's concerns by redacting the confidential information therein.

Information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party. (*Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1286 (*Universal*).) Thus, as a general matter, the confidential information regarding Defendant's actual or potential customers, Defendant's business strategies and business plans, Defendant's competitors, Defendant's suppliers, Defendant's financial information, and Defendant's technical information in the subject exhibits appears to be subject to sealing. Moreover, the sealing request (as amended by Defendant's reply) is narrowly tailored as it only seeks to seal explicit references to the confidential and private information disclosed in the documents.

Accordingly, the motion to seal is GRANTED as follows: Exhibits Nos. 84, 96, 98, and 112 are to be sealed in their entirety; and the redacted portions of Exhibit Nos. 55, 61, 73, 76, 78, 85, 92, 93, 95, 101, 103, 107, and 109 are to be sealed.

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

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Calendar Line 8

Case Name: Bravo v. Michels Pacific Energy, Inc. (Class Action/PAGA)
Case No.: 22CV403427

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on March 27, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

V. INTRODUCTION

This is a class and representative action arising out of alleged wage and hour violations. The operative First Amended Class and PAGA Action Complaint ("FAC"), filed on November 28, 2022, sets forth the following causes of action: (1) Violation of Cal. Labor Code §§ 510 and 1198 (Unpaid Overtime); (2) Violation of Cal. Labor Code §§ 226.7 and 512(a) (Unpaid Meal Period Premiums); (3) Violation of Cal. Labor Code § 226.7 (Unpaid Rest Period Premiums); (4) Violation of Cal. Labor Code §§ 1194, 1197 and 1197.1 (Unpaid Minimum Wages); (5) Violation of Cal. Labor Code §§ 201, 202 and 203 (Final Wages Not Timely Paid); (6) Violation of Cal. Labor Code § 226(a) (Failure to Provide Accurate Wage Statements); (7) Violation of Cal. Labor Code §§ 2800 and 2802 (Failure to Reimburse Necessary Business Expenses); (8) Violation of Cal. Business & Professions Code §§ 17200, et seq.; and (9) Violation of Cal. Labor Code §§ 2699, et seq. (Private Attorneys General Act).

The parties have reached a settlement. Plaintiff Michael Bravo ("Plaintiff") moved for preliminary approval of the settlement. The motion was unopposed.

On February 28, 2024, the court continued the motion for preliminary approval of settlement to March 27, 2024. In its tentative ruling, the court directed Plaintiff to file a supplemental declaration identifying a new *cy pres* recipient, addressing the court's concerns regarding the scope of the definitions for the class and PAGA Employees, and including an amended class notice.

On March 15, 2024, Plaintiff filed a supplemental declaration from his counsel in support of the motion for preliminary approval of settlement.

VI. LEGAL STANDARD

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

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

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

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

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

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

VII. DISCUSSION

A. Provisions of the Settlement

This case has been settled on behalf of the following class:

> [A]ll current and former hourly-paid and/or non-exempt non-union employees and union employees covered under the National Pipe Line Agreements

> employed by Defendant [Michels Pacific Energy, Inc. ("Defendant")] in the State of California at any time during the Class Period.

(Declaration of Jonathan M. Genish in Support of Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement ("Genish Dec."), Ex. 2 ("Settlement Agreement"), ¶ 6(a).) The National Pipe Line Agreements means the collective bargaining agreements ("CBAs") that cover Defendant's employees who are members of the International Union of Operating Engineers ("IUOE"), the International Brotherhood of Teamsters ("IBT"), and the Laborers' International Union of North America ("LIUNA"). (Settlement Agreement, ¶ 6(u).) The Class Period is defined as the period from September 26, 2018 through October 11, 2023. (Settlement Agreement, ¶ 6(f).)

The settlement also includes a subset of PAGA Employees, who are defined as "all current and former hourly-paid and/or non-exempt non-union and union employees covered under the National Pipe Line Agreements employed by Defendant in the State of California at any time during the PAGA Period." (Settlement Agreement, ¶ 6(y).) The PAGA Period means the period from September 22, 2021 through October 11, 2023. (Settlement Agreement, ¶ 6(aa).)

According to the terms of settlement, Defendant will pay a maximum, non-reversionary settlement amount of $1,750,000. (Settlement Agreement, ¶¶ 6(p).) The gross settlement amount includes attorney fees up to $583,333.33 (1/3 of the gross settlement amount), litigation costs not to exceed $13,000, a PAGA allocation of $200,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to PAGA Employees), an enhancement award up to $10,000, and settlement administration costs not to exceed $8,500. (Settlement Agreement, ¶¶ 6(a), 6(l), 6(p), 6(t), 6(v), 6(x), 6(z), 6(ll), 9-12.) The net settlement amount will be distributed to participating class members pro rata basis. (Settlement Agreement, ¶¶ 6(s), 6(v), 14.)

The settlement agreement originally provided that checks that remain uncashed 180 days from the date the checks are dated will be void and the funds from those checks will be distributed to the State of California Unclaimed Property Fund. (Settlement Agreement, ¶ 34.) The parties have now executed Amendment No. 1 to the Settlement Agreement, which

designates California Rural Legal Assistance, Inc. as the *cy pres* recipient. (Supplemental Declaration of Jonathan M. Genish in Support of Plaintiff's Motion for Preliminary Approval of Class Action and PAGA Settlement ("Supp. Genish Dec."), ¶ 5 & Ex. 2.) The court approves the new *cy pres.*

In exchange for the settlement, the class members agree to release Defendant, and related entities and persons, from any and all claims which were alleged or which could have been alleged based on the factual allegations in the FAC arising during the Class Period. (Settlement Agreement, ¶¶ 6(ff), 6(hh), 35.) PAGA Employees agree to release Defendant, and related entities and persons, from any and all claims for civil penalties under PAGA arising from any of the factual allegations in Plaintiff's PAGA letter arising during the PAGA Period. (Settlement Agreement, ¶¶ 6(gg), 6(hh), 36.) In addition, Plaintiff agrees to a comprehensive general release. (Settlement Agreement, ¶ 37.)

B. Fairness of the Settlement

Plaintiff states that the settlement was reached through discovery, analysis, and mediation with Louis Marlin, Esq. (Genish Dec., ¶¶ 11-12, 22-25.) In anticipation of mediation, Plaintiff's counsel conducted informal discovery, which included a random sampling of putative class members' time and pay records, employee handbooks, CBAs, relevant wage and hour policies, information regarding the total number of putative class members, the total workweeks worked by the putative class members, the numbers of current versus former employees, the dates of employment of the putative class members, and the average rate of pay for the putative class members. (Genish Dec., ¶¶ 11, 23.) From the information provided, Plaintiff determined that there were approximately 273 class members who worked 12,515 workweeks from September 26, 2018 through May 31, 2023. (*Id.* at ¶¶ 16, 26.) Plaintiff estimates that Defendant's maximum potential liability for the claims is approximately $7,946,500. (*Id.* at ¶¶ 27-39.) Plaintiff provides a breakdown of this amount by claim. (*Ibid.*) Plaintiff discounted the value of the claims given Defendant's defenses, the possibility that the court could substantially reduce any PAGA penalties, and the risks and costs associated with class certification. (*Ibid.*) The gross settlement amount represents approximately 22 percent of the potential maximum recovery. The proposed settlement

amount is within the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D.Ca|. Feb. 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist.LEXIS 30201, at *41-42 [citing cases listing range of 5 to 25-35 percent of the maximum potential exposure].)

Additionally, the supplemental declaration from Plaintiff's counsel adequately addresses the court's concerns regarding the scope of the definitions of the class and PAGA Employees. Plaintiff's counsel explains that the class and PAGA Employees encompass two groups of employees: (1) all current and former hourly-paid and/or non-exempt non-union employees employed by Defendant in California at any time during the Class Period or PAGA Period, respectively; and (2) all current and former hourly-paid and/or non-exempt union employees covered under the National Pipe Line Agreements employed by Defendant in California at any time during the Class Period or PAGA Period, respectively. (Supp. Genish Dec., ¶¶ 7-10.)

Thus, the court finds the terms of the settlement to be fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

C. Incentive Award, Fees, and Costs

Plaintiff requests an enhancement awards in the amount of $10,000 for the class representative.

> The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks, brackets, ellipses, and citations omitted.)

Plaintiff filed a declaration generally describing his participation in the lawsuit. Plaintiff declares that he spent approximately 25 to 30 hours in connection with this action, including discussing the case with class counsel, searching for and providing documents to

class counsel, answering questions from class counsel, providing information regarding Defendant's policies and practices, and reviewing settlement documents. (Declaration of Plaintiff Michael Bravo in Support of Motion for Preliminary Approval of Class Action and PAGA Settlement, ¶¶ 4-9.)

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

However, the court continues to find the sought-after amount excessive. The requested amount of $10,000 is more than the court typically awards for the amount of time Plaintiff spent in connection with this action. Therefore, the court approves an enhancement award in the total amount of $2,500.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co*. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel will seek attorney fees up to $583,333.33 (1/3 of the gross settlement amount) and litigation costs not to exceed $13,000. Plaintiff's counsel shall submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. Plaintiff's counsel shall also submit evidence of actual costs incurred as well as evidence of any settlement administration costs.

D. Conditional Certification of Class

Plaintiff requests that the class be conditionally certified for purposes of the settlement. Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." As interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class;

and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).)

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, supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

> As explained by the California Supreme Court,
> The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. A trial court ruling on a certification motion determines whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.

(*Sav-On, supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiff states that there are approximately 306 class members that can be determined from a review of Defendant's records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

The content of a class notice is subject to court approval. "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court." (Cal. Rules of Court, rule 3.769(f).)

The parties have now submitted an amended class notice containing the changes requested by the court. (Supp. Genish Dec., Ex. 2, Ex. A.) The notice generally complies with the requirements for class notice. It provides basic information about the settlement, including

the settlement terms, and procedures to object or request exclusion. Accordingly, the amended class notice is approved.

VIII. CONCLUSION

The motion for preliminary approval of the class and representative action settlement is GRANTED. The final fairness hearing is set for September 25, 2024, at 1:30 p.m. in Department 19.

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

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