SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Sunil R. Kulkarni Presiding

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

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department1@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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

- **Parties can appear either in person or remotely.** All remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.
- If any party wants a Court Reporter, the appropriate form must be submitted. The Reporter can appear in person or remotely.
- Members of the public who wish to observe can do so through Microsoft Teams (using the link discussed above) or in person. Please make sure to turn your camera off and mute yourself if you are observing the proceedings remotely.
- As a reminder, state and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while in the courtroom and while on Microsoft Teams.

LAW AND MOTION TENTATIVE RULINGS
DATE: SEPTEMBER 14, 2023 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV349850	Cacananta v. Samaritan, LLC	See tentative ruling. The Court will prepare the final order.
LINE 2	22CV409220	Calvillo v. Wraplify LLC (Class Action/PAGA)	See tentative ruling. The Court will prepare the final order. As stated in the tentative ruling, the parties are ordered to appear.
LINE 3	22CV399097	Yotopoulos v. Mach49, LLC, et al.	See tentative ruling. The Court will prepare the final order.
LINE 4	21CV386639	Davis v. Mandarich Law Group, LLP, et al.	See tentative ruling. The Court will prepare the final order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Sunil R. Kulkarni Presiding

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

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department1@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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

- **Parties can appear either in person or remotely.** All remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.
- If any party wants a Court Reporter, the appropriate form must be submitted. The Reporter can appear in person or remotely.
- Members of the public who wish to observe can do so through Microsoft Teams (using the link discussed above) or in person. Please make sure to turn your camera off and mute yourself if you are observing the proceedings remotely.
- As a reminder, state and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while in the courtroom and while on Microsoft Teams.

LAW AND MOTION TENTATIVE RULINGS

LINE 5	18CV336217	Prado v. Dart Container Corporation of California (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 6			
LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

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

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

I. BACKGROUND

A. Related Case

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

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

B. Initial Complaint in this Action

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

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

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

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

II. MOTION FOR CLASS CERTIFICATION

A. Legal Standard

As explained by the California Supreme Court,

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

(*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, internal quotation marks, ellipses, and citations omitted (*Sav-on Drug Stores*).)

California Code of Civil Procedure section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court …." As interpreted by the California Supreme Court, section 382 requires: (1) an ascertainable class and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.) The court must examine all the evidence submitted in support of and in opposition to the motion "in light of the plaintiffs' theory of recovery." (*Department of Fish and Game v. Superior Court (Fish and Game)* (2011) 197 Cal.App.4th 1323, 1349.) The evidence is considered "together": there is no burden-shifting as in other contexts. (*Ibid.*)

B. Requests for Judicial Notice

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

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

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

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

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

C. Effect of the *Richert* Decision

In the introductory section of its opposition, Defendant suggests that when the Court's decision in *Richert* becomes final, Plaintiff will be bound by the principles of res judicata and collateral estoppel in this action, which it characterizes as "largely duplicative" of *Richert*. It continues that the Court decision in *Richert* makes clear that Plaintiff's theory of liability is untenable because the use of the term "Productv" on the paystubs provided to proposed class members is not confusing and thus complies with Section 226. Neither of these assertions compel the denial of Plaintiff's motion.

First, the Court's decision in *Richert* is not final for the purposes of res judicata/collateral estoppel and thus its potential preclusive effect on the action at bar, assuming the Court could consider it on a motion for class certification, is not ripe.

Second, as for whether Plaintiff has asserted a viable theory of liability, the Court believes this is a question that reaches the *merits* of Plaintiff's claims that cannot appropriately be considered at this juncture. As the Court acknowledged previously, while courts generally will not consider the merits of a claim on a motion for class certification because the certification question is essentially a procedural one, "[w]hen evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1023-1024 (*Brinker*).) However, "[s]uch inquiries are *closely* circumscribed" (*id*. at 1024), and "resolution of disputes over the merits of a case generally must be postponed until *after* class certification has been decided, with the court assuming for the purposes of the certification motion that any claims have merit" (*id*. at 2023, emphasis in original).

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

Brinker's progeny are in accord on this issue. (See, e.g., *Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 232-234 [concluding that lawfulness of employer's policy requiring employees to sign on-duty meal break agreement could be determined on classwide basis and explaining "[a]s *Brinker* instructs, we do not determine at this stage whether [the defendant]'s policy of requiring on-duty meal breaks violates the law. Instead, the question we address is whether [the defendant]'s legal liability under the theory advanced by Plaintiffs can be determined by facts common to all class members …."]; *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726-727 [reversing trial court's order denying certification based on the acceptance of employer's position that applicable labor law did not require it to adopt policy as alleged by plaintiff because "[employer's] assertion that it was not required to [to do so] goes to the merits of the parties' dispute. The question of certification, however, is 'essentially a procedural one that does not ask whether an action is legally or factually meritorious. Indeed, *Brinker* emphasized that, whenever possible, courts should 'determine class certification independent of threshold questions disposing of the merits.'"]; *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1150, 1154 [concluding that employer's lengthy argument on the merits (i.e., that the law did not require it to provide a written meal or rest break policy) did not alter analysis of whether the plaintiffs' *theory* of liability was amendable to class treatment: "[First, the] plaintiffs' allegations concern the absence of any policy, not merely a written policy. Moreover, as *Brinker* instructs, a court should not address the merits of a claim in examining a class certification motion unless necessary. It is not necessary for this court to address whether a written meal and/or rest break policy is legally required."].) Thus, the only for consideration for the Court with regard to Plaintiff's theory of liability on this motion is whether it is amendable to class treatment, and *not* its viability. Accordingly, the Court will not address Defendant's contention that the wage statements at issue complied with Section 226.

D. Numerous and Ascertainable Class

A class is ascertainable "when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible

when that identification becomes necessary." (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980 (*Noel*).) A class definition satisfying these requirements

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

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

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

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

E. Community of Interest

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, supra,* 34 Cal.4th at p. 326.) Samaritan contends, as it did in opposition to the prior motion for class certification, that none of these factors are satisfied here.[1]

1. *Predominant Questions of Law or Fact*

For the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (*Hicks*).) The court must also give due weight to any

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

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

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

But as Plaintiff correctly responds, Section 226's injury requirement is minimal and analyzed under an objective, reasonable person standard, which does not require an individualized showing harm. (See Lab. Code, § 226, subd. (e) [an employee suffers injury if he or she cannot "promptly and easily determine" the total hours worked during a pay period, meaning "a reasonable person would [not] be able to readily ascertain the information without reference to other documents or information"]; *Lubin v. Wackenhut Corporation* (2016) 5 Cal.App.5th 926, 959–960 [trial court erred in declining to certify a wage statement class due to the injury requirement].) And as the Court explained previously, while the employee declarations that Defendant submit may bear on the merits of the ultimate issue of whether a reasonable person could understand the subject wage statements, this does not transform the issue into an individualized one.[2]

Finally, Samaritan again insists that the issue of whether any wage statement violations were "knowing and intentional" on its part raises individual issues. The Court sees no reason to depart from its prior rejection of this argument and conclusion that Defendant's wage statements appear to have been issued pursuant to general policies or decisions that impacted the class members in the same manner, and Defendant's intent in adopting those policies or decisions can be determined on a classwide basis.

---

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

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

2. *Adequacy and Typicality*

"Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The fact that a class representative does not personally incur all of the damages suffered by each different class member does not necessarily preclude the representative from providing adequate representation to the class. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238, disapproved of on another ground by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.) Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status. (*Ibid.*)

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

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

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

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

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

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

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

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

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

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

The foregoing establishes that Mr. Whitehouse's claims are typical of the class that he seeks to certify and the Court rejects Defendant's narrow characterization of those claims as being based solely on the theory that proposed class members would add the shift differential and "Productv" line together, rather than, as broadly alleged in the FAC, that when an employee was paid shift differential wages, the hours displayed did not equal the total hours worked. In short, because Mr. Whitehouse claims to have been confused by the pay stubs in

the same manner as entirety of the class, his interests align with it and the element of typicality is met.

The Court also rejects Defendant's assertion that Plaintiff's receipt of two disciplinary warnings[3] renders him an inadequate class representative as there is no showing that there is any nexus between these warnings and Mr. Whitehouse's credibility and ability to adequately to serve in this role. Further, Defendant's insistence that Plaintiff is biased against it as a result of the foregoing is purely speculative and not supported by any evidence. Plaintiff also submits evidence that he is sufficiently informed of the claims in this action, has agreed to abide by all necessary duties of a class representative, and is currently able and willing to perform them and assist counsel in the litigation. (Declaration of Jason Whitehouse, ¶¶ 4, 5.) He further proffers evidence that his counsel are experienced and well-qualified to serve as class counsel in this action. All told, the Court finds that Mr. Whitehouse and his counsel will fairly and adequately represent the class.

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

III. CONCLUSION

Plaintiff's motion for class certification is GRANTED.

The Court will prepare the order.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

- oo0oo -

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

Calendar Line 2

Case Name: *Calvillo v. Wraplify LLC*
Case No.: 22CV409220

This is a putative class and representative action under the Private Attorneys General Act ("PAGA") alleging wage and hour violations by defendant Wraplify LLC ("Wraplify"). Plaintiff Liliana Calvillo alleges that Wraplify failed to provide code-compliant meal and rest breaks, failed to reimburse expenses and committed other wage and hour violations.

Before the Court is Wraplify's motion for an order (1) compelling Plaintiff to arbitrate her individual claims; (2) dismissing her class claims; and (3) staying the action pending completion of the individual arbitration. Plaintiff nominally opposes the motion, insisting that it is moot because she dismissed her class claims and added a representative PAGA claim after Wraplify filed the instant motion.

BACKGROUND

A. Factual

Wraplify is a delivery service based in Milpitas that makes local-only deliveries in California for its clients. According to the allegations of the operative First Amended Complaint, Plaintiff was employed by Wraplify from August 28, 2022 to November 1, 2022 as an office assistant. She alleges that Wraplify failed to pay for all hours worked (including minimum wages, straight time wages, and overtime wages), failed to provide meal and rest periods, failed to pay all earned waged twice per month, failed to maintain accurate records of hours worked and meal periods, failed to furnish accurate wage statements, failed to indemnify for necessary expenses, and failed to produce requested employment records.

B. Procedural

Plaintiff initiated this action on December 28, 2022 with the filing of a class action complaint asserting nine causes of action for violations of the Labor Code and California Unfair Competition Law. In June 2023, Wraplify filed the instant motion to compel arbitration of Plaintiff's individual claims, dismiss the class causes of action, and stay the proceedings pending completion of arbitration of Plaintiff's individual claims.

Approximately a month later, the California Supreme Court issued its decision in *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104 (*Adolph*), holding that where a plaintiff has brought a PAGA action comprising of individual and non-individual claims, an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees. Where there has been a determination that the Plaintiff's individual claims are subject to arbitration, courts are instructed to stay the non-individual PAGA claims pending the outcome of that arbitration.

As a consequence of the holding in *Adolph*, Plaintiff's counsel reached out to opposing counsel and suggested that Plaintiff would potentially be interested in dismissing the class claims and moving forward on a representative PAGA-basis only. After Plaintiff's counsel did

not hear back from opposing counsel regarding the issue by the requested deadline of August 15, 2023, Plaintiff filed the FAC that day removing all class claims and adding a representative PAGA cause of action. The following day, Plaintiff's counsel reached out to opposing counsel and asked if they would withdraw the motion to compel arbitration given the FAC. Plaintiff's counsel did not hear back by the August 17, 2023 opposition deadline and the motion to compel arbitration remains on calendar. Consequently, Plaintiff filed an opposition to the motion.

MOTION TO COMPEL ARBITRATION

Wraplify moves to compel arbitration based on an agreement Plaintiff executed on October 14, 2022 upon being hired entitled "Mutual Agreement to Individually Arbitrate Disputes" (the "Agreement").

A. Mootness

As an initial matter, Plaintiff insists that because she has dismissed her class claims, Wraplify's motion to compel is now moot. The Court disagrees because a class action *cannot* be dismissed without court approval. (Cal. Rules of Court, rule 3.770(a).) "Requests for dismissal must be accompanied by a declaration setting forth the facts on which the party relies. The declaration must clearly state whether consideration, direct or indirect, is being given for the dismissal and must describe the consideration in detail." (*Ibid*) "If the court has not ruled on class certification, or if notice of the pendency of the action has not been provided to class members in a case in which such notice was required, notice of the proposed dismissal may be given in the manner and to those class members specified by the court, or the action may be dismissed without notice to the class members if the court finds that the dismissal will not prejudice them." (Cal. Rules of Court, rule 3.770(c).)

Here, because she filed the FAC absent the class claims without court approval, Plaintiff did not effectively dismiss those claims from this action by filing an amended pleading. However, despite Plaintiff's failure to comply with Rule 3.770, in the interests of judicial economy, the Court grants the approval contemplated by the rule- it is clear that Plaintiff and her counsel received no compensation for the dismissal, and the dismissal of the class claims did not adversely affect the putative class. Thus, the class claims are DISMISSEDfrom this action and the operative pleading is the FAC. Despite this, the Court still believes Wraplify's motion is not moot to the extent Plaintiff asserts individual PAGA claims.[4]

[4] It is not entirely clear to the Court whether Plaintiff is suggesting that she is *only* asserting a PAGA claim in her representative capacity and not on an individual basis, and it is also not clear whether this is possible under PAGA, as the statute provides that an action under PAGA may be brought "by an aggrieved employee on behalf of himself or herself *and* other current or former employees …." (Lab. Code, § 2699, subd. (a).) On the other hand, courts have permitted an employee whose individual claim is time-barred to pursue a representative claim under PAGA (see *Johnson v. Maxim Healthcare Services, Inc.* (2021) 66 Cal.App.5th 924), which supports her ability to only assert a representative claim. There appears to be some confusion between the parties (e.g., Wraplify discusses Plaintiff's "individual" PAGA claim in its reply). In the FAC, Plaintiff pleads that she is not seeking underlying general and/or special damages for Labor Code violations, but "simply penalties as permitted by [PAGA], declaratory

B. Legal Standards

"The FAA [Federal Arbitration Act], which includes both procedural and substantive provisions, governs [arbitration] agreements involving interstate commerce." (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 840.) However, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid*.) Here, the Agreement expressly provides that "the [FAA] and federal common law applicable to arbitration shall govern [its] interpretation and enforcement," and thus federal procedural and substantive law apply. (See *Rodriguez v. American Technologies, Inc*. (2006) 136 Cal.App.4th 1110, 1122 ["[t]he phrase 'pursuant to the FAA' is broad and unconditional," and unambiguously adopts both the procedural and substantive aspects of the FAA].)

Under the FAA, the Court must grant a motion to compel arbitration if any suit is brought upon "any issue referable to arbitration under an agreement for such arbitration" (9 U.S.C. § 3), subject to "such grounds as exist at law or in equity for the revocation of any contract…" (9 U.S.C. § 2). The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal, supra,* 14 Cal.4th at p. 413.)

"In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

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

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

C. Existence and Scope of Agreement to Arbitrate

---

relief, and injunctive relief for all Aggrieved Employees as permitted by the PAGA." (FAC, ¶ 4.) This appears to indicate that there is no individual PAGA claim. The parties are ordered to appear at the September 14 hearing to discuss this issue.

To establish that Plaintiff consented to the Agreement, Wraplify submits the declaration of Ankit Bhatnagar, the owner of Wraplify, who explains that after she was hired, she executed the Agreement through October 14, 2022 as part of the "onboarding" process. According to Mr. Bhatnagar, the process is executed electronically, with the Agreement presented to the individual user/prospective employee after he or she taps the line that says "Arbitration Agreement Start >." Once the potential new employee scrolls through the whole agreement, he or she can tap the box to the left of "I Agree and Accept" and then "Continue." Directly above the "I Agree and Accept" button, the Agreement states:

> **Employee Acknowledgment.** I understand by clicking on the "I Agree and Accept" Button below that I agree to the terms of, and agree to be bound by, this Agreement. I further agree that acknowledge that my acceptance of or continuing employment with the Company provides further evidence of my agreement to accept and be bound by the terms of this Agreement. I understand this Agreement will remain in effect after my employment ends and that nothing in this Agreement modifies the at-will nature of my employment.

If the employee taps "I Agree and Accept" and "Continue," Mr. Bhatnagar explains, their profile will display a green checkmark next to the words "Arbitration Agreement" indicating the individual has electronically accepted the Agreement. No one other than the employee is able to access the employee's account and accept the Agreement- the employee must do that themselves.

The Agreement states that Plaintiff and Wraplify "agree that any covered claim … shall be submitted to individual binding arbitration." (Bhatnagar Decl., Exhibit 1 at p. 1.) "Covered Claims" are defined as "all past, current, and future grievances, disputes, claims, issues, or causes of action … under applicable federal, state or local laws, arising out of or relating to" Plaintiff's "application, hiring, hours worked, services provided, and/or employment with [Wraplify] or the termination thereof," including "issues regarding benefits, bonuses, [and] wages." It expressly provides:

> The Employee and the Company each specifically acknowledges and agrees that all claims involving minimum wages, overtime, unpaid wages, expense reimbursement, wage statements, and claims involving meal and rest breaks shall be subject to arbitration under this Agreement. (*Id*.)

As one Court of Appeal summarized,

> [T]he moving party bears the burden of producing "prima facie evidence of a written agreement to arbitrate the controversy." (*Rosenthal, supra*, 14 Cal.4th at p. 413.) The moving party "can meet its initial burden by attaching to the [motion or] petition a copy of the arbitration agreement purporting to bear the [opposing party's] signature." (*Bannister v. Marinidence Opco, LLC* (2021) 64 Cal.App.5th 541, 543–544 [279 Cal. Rptr. 3d 112] (*Bannister*).) Alternatively, the moving party can meet its burden by setting forth the agreement's provisions in the motion. (*Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 219 [105 Cal. Rptr. 2d 597] (*Condee*); see also Cal. Rules of Court, rule 3.1330 ["The provisions must be stated verbatim or a copy must be physically or electronically attached to the petition and incorporated by

> reference."].) For this step, "it is not necessary to follow the normal procedures of document authentication." (*Condee*, at p. 218.) If the moving party meets its initial prima facie burden and the opposing party does not dispute the existence of the arbitration agreement, then nothing more is required for the moving party to meet its burden of persuasion.

(*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 165–166.)

Here, Wraplify submits a "signed" submits a copy of the on-line record showing Plaintiff's acceptance of the Agreement, and she does not dispute having done so. Thus, Wraplify has established the existence of the Agreement. As for the Agreement's scope, given its express language, it is clear that any individual claim by Plaintiff under PAGA is subject to the Arbitration Agreement as it falls directly within the definition of "Covered Claims" set forth therein. Thus, the Court will grant Wraplify's motion and stay the representative PAGA claim (if one exists), pending completion of arbitration of Plaintiff's individual PAGA claim.

CONCLUSION

Assuming Plaintiff has brought both individual and representative PAGA claims, Wraplify's motion to compel arbitration is GRANTED and this action is STAYED pending completion of arbitration of Plaintiff's individual PAGA claim. Plaintiff's class action claims are dismissed.

Because it is unclear whether Plaintiff is asserting an individual or representative PAGA claim (or both), the parties are ordered to appear at the September 14 hearing to discuss this issue.

*****

LAW AND MOTION HEARING PROCEDURES

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

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

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

- oo0oo -

Calendar Line 3

Case Name: *Jason Yotopoulos v. Mach49, LLC, et al.*
Case No.: 22CV399097

This is a corporate control case arising out of the acquisition of defendant Mach49, LLC ("Mach49") by defendant Next Fifteen Communications Corporation ("Next15"). Plaintiff Jason Yotopoulos, formerly employed by Mach49, alleges that other members of the company diverted substantially all of the sales proceeds to themselves and away from him through a series of impermissible self-dealing transactions.

Before the Court is Mr. Yotopoulos' motion to compel further responses to various requests for production of documents propounded on Mach49 and Next 15. As discussed below, the motion is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

A. Factual

According to the allegations of the operative First Amended Complaint ("FAC"), Mach49 is a startup company founded by Mr. Yotopoulos and defendants Linda Yates, Russell Lampert, and Brad Sharek (collectively referred to as the "Founder Defendants"). In 2014, the Founder Defendants and Plaintiff entered into the Mach49 Operating Agreement (the "Operating Agreement"). When Ms. Yates became CEO of Mach49, Plaintiff negotiated for veto rights over any proposed sale of Mach49, any proposed issuance of additional Mach49 stock, and any proposed amendment to the Operating Agreement. The Operating Agreement incorporated Plaintiff's and the Founder Defendants' ownership interests in the 10,000,000 shares of stock issued by the company. Because both Ms. Yates and Mr. Yotopoulos owned more than 25% of the shares, they could each veto actions that required a supermajority (defined as 75% of shares or more), including any proposed sale of Mach49, any proposed issuance of additional Mach49 stock, and any proposed amendment of the Operating Agreement.

In 2018, defendants Clement Wang and David Charpie became members of Mach49. (Messrs. Wang, Charpie, Lambert, Sharek and Ms. Yates will be referred to collectively as the "Member Defendants"). Also in 2018, Mach49 began talks with Next15 regarding the latter's acquisition of the former. Next15's CEO, defendant Tim Dyson, is a friend of Ms. Yates and her husband, defendant Paul Holland.

In September 2019, Ms. Yates removed Plaintiff as an officer in Mach49. On January 21, 2020, defendant Deborah Ludewig, outside counsel for Mach49, organized defendant Harker Holding, LLC ("Harker"), a wholly-owned subsidiary of Mach49, of which Mr. Lampert was the sole member on the board of directors. Around May 28, 2020, the Mach49 board of directors met without Plaintiff and issued 1,000,000 additional shares of Mach49 stock to Messrs. Wang, Charpie, Sharek and Lampert. This had the effect of diluting Plaintiff's ownership interest in the company and removing his veto power.

Thereafter, the Member Defendants restructured Mach49 such that it became a subsidiary of Harker, and then Mach49 shareholders exchanged their Mach49 shares for Harker shares. Harker than sold all shares of Mach49 to Next15. In August 2020, the Member Defendants voted to approve the transaction.

Plaintiff alleges that the issuance of the aforementioned additional stock and the acquisition by Next15 breached the Mach49 Operating Agreement and the series of transactions executed by the Member Defendants to sell Mach49 to Next15 was purely self-interested and designed to circumvent Plaintiff's rights. Plaintiff maintains that only 2% of the price was allocated to initial payments and the remaining 98% was allocated to earnouts to be paid between 2024 and 2026 that he was excluded from. He alleges that he has received only $780,234 for his 33% stake in a company worth over $300 million.

B. Procedural

On May 27, 2022, Mr. Yotopoulos filed the initial complaint asserting nine causes of action. Subsequently, separate demurrers were filed by (1) Harker, Messrs. Lampert, Sharek, Charpie, Wang, Holland and Mses. Ludewig and Yates; and (2) Mach49, Next15 and Mr. Dyson. After the demurrers were sustained in part and overruled in part, Plaintiff filed the operative FAC on April 3, 2023, asserting the following causes of action: (1) breach of contract (against Mach49 and Member Defendants); (2) tortious interference with contractual relations (against Messrs. Holland and Dyson, Ms. Ludewig, Harker and Next15); (3) breach of fiduciary duty (against Member Defendants as members of Mach49); (5) breach of fiduciary duties (against Member Defendants as members of Harker); (5) aiding and abetting breach of fiduciary duty (against Messrs. Holland and Dyson, Ms. Ludewig and Next15); (6) breach of covenant of good faith and fair dealing (against Member Defendants); (7) unjust enrichment (against Messrs. Holland and Dyson, Ms. Ludewig, Harker and Next15); and (8) equitable accounting (against Member Defendants, Mach49 and Harker).

II. MOTION TO COMPEL

Plaintiff moves for an order compelling further responses to First Sets of Request for Production ("RPD") propounded on Mach 49 and Next15 as follows:

- Mach49 provide written responses to RPD Nos. 2, 3-18, 22, 29, 33 and 37 consistent with the parties' agreements reached during meet and confer and produce all corresponding documents;
- Mach49 provide complete, code-compliant responses to RPD Nos. 19, 20, 21, 24-28, 30, 31, 34-36 and 38 without objection and produce all responsive documents;
- Next15 provide written responses to RPD Nos. 1-7, 10 and 11 consistent with the parties' agreement reached during meet and confer and produce all corresponding documents; and
- Next15 provide complete, code-compliant responses to RPD Nos. 8, 9 and 12-20 without objection and produce all responsive documents.

A. Discovery Dispute

Plaintiff propounded his first set of RPDs on Mach49 and Next15 in August 2022. After a seven month discovery stay, and an additional one month extension granted by

Plaintiff, the defendants served their responses on April 3, 2023. The parties engaged in initial meet and confer regarding responses during a call on April 17, 2023, after the parties had already exchanged various written communications. Virtually no progress was made during the initial call and the parties agreed to confer further.

After a further call on April 24, the parties reached agreement on many of the requests but had two primary disputes remaining: (1) the defendants were unable to agree on production of documents responsive to RPD Nos. 34-36 to Mach49 and RPD Nos. 16-18 to Next15 relating to consideration paid for Next15's acquisition of Mach49, the agreement to cap earnout payments from the acquisition, or the "Strategic Alliance" that apparently resulted in the earnout cap and (2) the parties disagreed on the timeframe for the document production. The parties continued to exchange written meet and confer communications and an IDC was set for May 26, 2023.

During the IDC, the Court suggested that the defendants produce documents through the filing date of the case, May 27, 2022, and produce documents relating to the acquisition earnouts thereafter, including a summary of the earnout payments and substantive documents reflecting the calculations and any projections. As to the "Strategic Alliance" documents, the Court initially discussed a production of "high level" documents such as presentations, and later discussed financial documents reflecting payments resulting from this transaction. The parties were directed to confer further and submit a Joint Report by June 16.

On May 31, 2023, Plaintiff largely accepted the Court's proposal, agreeing to production through May 27, 2022 and the ongoing production of earnout documents. His caveat was that the defendants also produce documents that specifically refer to him through the date of their responses on April 3, 2023. He also agreed to accept "high-level" documents relating to the five-year "Strategic Alliance." Defendants did not initially respond, but after further follow-up, rejected Plaintiff's proposal.

B. Legal Standard

A propounding party may move for an order compelling a further response to document production request if the party deems the responding party's objections as too general or lacking merit, or its substantive responses as not code-compliant. (Code Civ. Proc., § 2031.310, subd. (a)(1)-(3).) The motion must be accompanied by a meet and confer declaration and the propounding party must make a threshold showing of good cause for the discovery sought. (Code Civ. Proc., § 2031.310, subd. (b)(1)-(2).) Once the propounding party establishes good cause for the discovery, the burden shifts to the responding party to justify any objections or responses. (*Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.)

To satisfy the burden of demonstrating good cause for the discovery sought, the moving party must make a "fact-specific showing or relevance." (*Glenfeld Development Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117.) Discovery is allowed for any matters not privileged that are either relevant to the subject matter involved in the action or reasonably calculated to lead to the discovery of admissible evidence. (Code Civ. Proc., § 2017.010.) Information is relevant to the subject matter if it might reasonably assist a party in evaluating its case, preparing for trial, or facilitating settlement. (*Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1546.) "Admissibility is *not* the test and information, unless privileged, is discoverable if it might reasonably *lead* to admissible evidence." (*Ibid.*, original italics.)

Courts liberally construe the relevance standard, and any doubts as to whether a request seeks information within the scope of discovery are generally resolved in favor of discovery. (*Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785, 790.)

C. Discussion

1. *Mach49 RPD Nos. 34-36 & Next15 RPD Nos. 16-18*

These requests seek documents and communications relating to: any compensation paid to any defendant because of the transaction that resulted in Next15's acquisition of Mach49 (including any cash, equity, warrant, option, bonus, earnout, etc.) (Mach49 No. 34 & Next15 Nos. 16); Next15 capping the total earnout payments paid by Next15 to $300,000,000 (Mach49 No. 35 & Next15 No. 17); and Mach49 and Next15's strategic five-year plan to grow their value to more than $400,000,000 (Mach49 No. 36 & Next15 No. 18).

Plaintiff establishes that good exists for the production of documents relating to the proceeds from the acquisition transaction because he contends that the Member Defendants breached their fiduciary duties, and Next15 aided and abetted this breach, by allocating 98% to post-closing earnouts from which they excluded him. As Plaintiff's alleged primary damages are his *pro rata* share of the earnouts, documents pertaining to the amount of proceeds, the percentage allocations, the purported basis for allocating 98% to earnouts and the reasons for the earnout cap of $300 million are relevant to ascertaining why defendants chose to allocate the sale proceeds in the manner they did, whether the allocation was reasonable and appropriate, why they decided to cap the earnout, and the extent of Plaintiff's damages.

A party responding to an inspection demand must respond separately to each item in the demand by stating one of the following: (1) an agreement to comply; (2) a representation of inability to comply; or (3) objections. (See Code Civ. Proc., § 2031.210, subd. (a).) Here, Mach49 responded by objecting to these requests as "overly broad and unduly burdensome," and as seeking materials outside of its possession, custody or control. It also objected to RPD No. 34 to the extent it seeks information protected by attorney-client privilege, the attorney work product doctrine, or other "other applicable privilege or protection that would render such information non-discoverable." It concluded its response to RPD No. 34 by stating that subject to the foregoing objections, it was willing to meet and confer to narrow the scope of the requests. No such qualification was offered in the responses to Nos. 35 and 36.

In their opposition, the defendants explain that in May 22, 2023, they offered to produce documents responsive to Mach49 RPD Nos. 34-35 and Next15 RPD Nos. 16-17 through May 27, 2022, and subsequently agreed on June 9, 2023 to produce, every six months, a schedule showing completed or projected earnout payments, and documents sufficient to confirm this data. They do not deviate from these apparent agreements in their memorandum, and thus do not attempt to justify any of the objections asserted in response to these particular requests. Consequently, these objections are overruled, and the defendants are ordered to provide code-complaint further responses and produce all responsive documents, without qualification.

Defendants maintain that Plaintiff's request for "Strategic Alliance" documents, Mach49 RPD No. 36/Next15 No. 18) should be denied in its entirety because the requested items are not relevant and the scope of the request is unduly burdensome and overbroad.

Defendants explain that the materials are not relevant because the Strategic Alliance project was signed in February 2022, well after the acquisition, and Mach49's post-acquisition performance is simply not relevant to whether it was correctly valued in the acquisition. The Court disagrees because, as Plaintiff contends, these materials are relevant to the defendants' defense that the post-acquisition growth of Mach49 justified the earnout allocation and decision to cap the earnout at a particular amount. The earnout cap relates directly to Plaintiff's claimed damages and this information also relates to the defendants' contention that substantially all of the value of Mach49 was generated *post*-acquisition, which is contrary to Plaintiff's position. Consequently, the Court further concludes that the requests are not overbroad.

Defendants also fail to substantiate their objection that responding to the requests for "Strategic Alliance" documents is unduly burdensome. It is not enough to just generally make the assertion that this is the case; a party objecting on this basis must make a *particularized* showing of facts demonstrating hardship, including *evidence* showing the quantum of work required to respond. (See *West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 417-418.) No such particularized evidentiary showing has been made here, with approximations of costs offered without any breakdown of how these approximations were reached (e.g., $500,000 to review and produce documents in response to this request) and therefore this objection is overruled. Nevertheless, Plaintiff appears to suggest that he would accept documents returned by the keyword search "strategic alliance," which effectively is a limitation on the request as it seeks all documents *related to* the "Strategic Alliance." In the interests of compromise, the defendants are ordered to provide code-complaint verified further responses to the subject requests, without objection, and produce all documents responsive to the keyword search "strategic alliance" for Mach49 No. 36/Next15 No. 18.

2. *Mach49 RPD Nos. 19-21, 24-28, 30-31 and 38 & Next15 RPD Nos. 8, 9 and 12-20*

These requests seek the following:

- Mach49 No. 19: documents relating to Mach49's reverse merger with Harker.
- Mach49 Nos. 20 and 21: documents related to Next15's acquisition of Mach49 generally and between Mach49 and Mr. Dyson.
- Mach49 No. 24: all communications between Mach49 and Plaintiff.
- Mach49 25 and 26 & Next15 No. 13: all communications between Mach49 and Next15, and Next15 and Mr. Dyson, regarding the decision to remove Plaintiff as a Mach49 employee, officer or director.
- Mach49 No. 27: all documents and communications relating to Mach49's issuance of any Phantom Shares, non-voting stock, or non-voting units.
- Mach49 No. 28 & Next15 No. 14: all communications and documents relating to any statement from Plaintiff that he would sue to protect his rights under the Operating Agreement, including any offer by the defendants to settle.
- Mach49 Nos. 30 and 31: all documents and communications related to any issuance of equity from Mach49 to any Founder or New Member.
- Mach49 No. 38 & Next15 No. 20: all documents and communications related to the allegations contained in paragraphs 60, 74-76, 81-86 of the initial complaint.
- Next15 Nos. 8 and 9: all minutes (include drafts) from all of Next15's Board of Director's meetings relating to Mach49.

- Next15 No. 15: all documents or communications relating to any bids or offers (including the possibility of any future bids or offers) to acquire or merge with Mach49.
- Next15 No. 19: all documents and communications regarding any independent appraisals of Mach49's fair market value, including but not limited to any 409A valuation.

The defendants objected to each of the foregoing requests on the grounds of overbreadth and undue burden and to the extent each request documents that are (1) outside their possession, custody and control; (2) publicly available; or (3) obtainable from other sources that are more convenient. They then responded that, subject to these objections, they were willing to meet and confer to narrow the scope of the requests.

Plaintiff establishes the existence of good cause for these items because they pertain directly to the allegations and theories of liability he asserts in his FAC, i.e., the alleged defective acquisition of Mach49 by Next15, actions by the Member Defendants to shift value in Mach49 away from Plaintiff and to overcome his contractual veto, Mach49's reverse merger with Harker as a step in the acquisition process, Next15's knowledge of the relevant provisions of the Operating Agreement and its acts of assistance to the Member Defendants in accomplishing the foregoing. Thus, the burden shifts to the defendants to justify their objections to the requests.

With regard to Mach49 RPD No. 24, Mach49 asserts that the Court should deny Plaintiff's motion with respect to this request in its entirety because it would be unduly burdensome to require it to produce such communications, including from Plaintiff's six years of employment with the company, as it would have to review more than 22,000 emails at a cost of approximately $250,000. It maintains that Plaintiff previously withdrew this request and thus believes its inclusion in this motion was in error. In his reply, Plaintiff states that he offered to withdraw this request as part of a larger compromise that was never reached but affirms his willingness to withdraw this request now, provided that he is not prejudiced from serving similar, perhaps narrower requests in the future. Given that the parties are for all intents and purposes in agreement with respect to this request, the Court will deny the motion to compel a further response to Mach49 RPD No. 24 without prejudice.

As for the remaining requests, the defendants maintain that Plaintiff's request for a production timeframe for these RPDs from the acquisition to the present is unduly burdensome because it would involve significant costs. Applying the same search terms applied to pre-acquisition documents, the defendants maintain, returned approximately 30,000 hits from between May 27, 2022 and May 3, 2023 alone, and reviewing and producing these documents would involve an estimated 150 hours of work by counsel and involve approximately $200,000 in costs. Plaintiff responds that the defendants' claim of burden is exaggerated, with defendants failing to expressly articulate how a 150-hour document review project would cost $200,000 to complete. They continue that the numbers of documents cited by the defendants are modest given the size of this case.

During the May 26 IDC, the Court proposed a production timeframe through the date of the filing of this action, May 27, 2022. The Court believes that this is a reasonable timeframe for responsive documents for the subject requests given the nature of what they seek, which is different than the requests discussed in the preceding section of this order which seek documents pertaining to post-acquisition compensation that is ongoing. Consequently, the

defendants are ordered to provide code-compliant, verified further responses to these requests, without objection, and produce all responsive documents through May 27, 2022.

3. *Mach49 RPD Nos. 2-18, 22, 23, 29, 33 & Next15 RPD Nos. 1-7, 10 and 11*

According to Plaintiff, the defendants have failed to amend their responses to these requests to conform to the parties' agreement. The defendants do not address this assertion in their opposition, and the Court will accept this as an implied concession that it is accurate. Consequently, they are ordered to provide code-compliant, verified further responses to these requests, without objection, and produce all responsive documents subject to the parties' agreement.

III. CONCLUSION

Plaintiff's motion to compel further responses to First Sets of RPDs propounded on Mach49 and Next15 is GRANTED IN PART and DENIED IN PART. The motion is DENIED as to Mach49 RPD No. 24 and otherwise GRANTED, subject to the qualifications articulated above. Within 60 days of this order, Mach49 and Next15 are ordered to provide code-compliant, verified further responses and responsive documents to the requests at issue.

The Court will prepare the order.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

- oo0oo -

Calendar Line 4

Case Name: *Marla Marie Davis v. Mandarich Law Group, LLP, et al.*
Case No.: 21CV386639

Plaintiff brought this putative class action against Defendants Mandarich Law Group, LLP and two attorneys, Ryan Earl Vos and Elizabeth Grace Sutlian-Mardikian, alleging that Defendants routinely bring collection actions against consumers using improper declarations under Code of Civil Procedure section 98, in violation of the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(3) (the "FDCPA"). In an order filed on February 7, 2022, the Court granted Defendants' special motion to strike the Complaint pursuant to Code of Civil Procedure section 425.16 (the "anti-SLAPP statute" or "Section 425.16") and Plaintiff appealed. The Court's order was affirmed on appeal.

Defendants now move for attorney fees and costs incurred on the appeal pursuant to the anti-SLAPP statute. The motion is unopposed. For the reasons discussed below, the Court GRANTS the motion.

I. MOTION FOR ATTORNEYS' FEES AND COSTS ON APPEAL

A. Legal Standard

The anti-SLAPP statute provides that "a prevailing defendant on a special motion to strike shall be entitled to recover that defendant's attorney's fees and costs." (Code Civ. Proc. § 425.16, subd. (c)(1).) The fee-shifting provision was intended "to discourage ["SLAPP" lawsuits] by imposing the litigation costs on the party seeking to 'chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' (*Id*., subd. (a).)" (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131 (*Ketchum*).) It "also encourages private representation in SLAPP cases, including situations when a SLAPP defendant is unable to afford fees or the lack of potential monetary damages precludes a standard contingency fee arrangement." (*Ibid.*) Accordingly, the statutory fees provision of Section 425.16 is "broadly construed so as to effectuate the legislative purpose of reimbursing the prevailing defendant for expenses incurred in extricating [himself or itself] form a baseless lawsuit." (*Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 446, 448.) "The reasonableness of attorneys' fees is within the discretion of the trial court, to be determined from consideration of such factors as the nature of the litigation, the complexity of the issues, the experience and expertise of counsel and the amount of time involved." (*Id*. at 448.)

A statute authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise. (*Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927-929.) Because the fee provision of the anti-SLAPP statute does not preclude recovery of appellate attorney fees by a prevailing defendant-respondent, such damages are recoverable. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1500.) As the Court's order granting Defendants' anti-SLAPP motion was affirmed on appeal, Defendants are the prevailing party and thus entitled to recover their related attorney fees and costs. Defendants are additionally entitled to recover fees incurred in preparing the instant motion. (See *Ketchum, supra,* 24 Cal.4th at 1141 ["'[A]bsent circumstances rendering the

award unjust, fees recoverable … ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim.'"].)

B.

C. Discussion

Defendants requests that the Court award $23,995.19 in fees and costs associated with the appeal and the instant motion, as well as the fees and costs for any reply brief and, if necessary, appearing for oral argument at the hearing.

"[B]y its terms, Code of Civil Procedure section 425.16 permits the use of the so-called lodestar adjustment method under our long-standing precedents, beginning with *Serrano v. Priest* (1977) 20 Cal. 3d 25 … (hereafter *Serrano III*)." (*Ketchum, supra,* 24 Cal.4th at p. 1131.) Applying that method,

> [t]he lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative "multiplier" to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.

(*Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal.App.4th 819, 833, internal citations and quotation marks omitted; see also *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.)

The party seeking attorney fees bears the burden of establishing its entitlement thereto and documenting the hours its attorneys appropriately expended on the matter and their hourly rates. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1020 ("*ComputerXpress*"); *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 784 ("*City of Colton*").) The court may require the moving party to produce records establishing a proper basis for determining how much time was spent on particular claims, and may reduce compensation based on a failure to maintain appropriate time records. (*ComputerXpress, supra,* 93 Cal.App.4th at p. 1020; *City of Colton, supra,* 206 Cal.App.4th at p. 784.)

While Plaintiff's appeal of the Court's order granting Defendants' anti-SLAPP motion was pending, the Court granted Defendants' request for attorney fees and costs incurred on the motion. In granting this request, the Court concluded that the hourly rates of $385 billed by attorneys June D. Coleman and Nicole M. Strickler and $305 billed by attorney Katherine M. Olson were reasonable. Accordingly to Defendants, after the foregoing motion, Ms. Strickler and Ms. Olson's hourly rates were increased to $400 and $365 per hour, respectively, and they maintain that these rates are similarly reasonable and well within the market rate. The Court also declined to award a multiplier, opting to award Defendants their actual defense costs.

"[A] trial court has discretion to award an hourly rate under the lodestar method that exceeds the rate that was actually incurred or paid"; however, it also has "wide discretion to consider the prevailing party's fee agreement in awarding attorney fees." (*Pasternack v. McCullough* (2021) 65 Cal.App.5th 1050, 1058.) Here, the Court exercises its discretion, as it previously did, to award the rates actually paid by Defendants. The Court does not find these

rates to be unreasonable considering the nature of the issues addressed on appeal, the hourly rates awarded to opposing counsel in similar matters, and the hourly rates charged throughout the California legal community. It again declines to award a multiplier.

Accordingly to Defendants, their counsel billed 54.91 hours, totaling $18,825 in defending Plaintiff's appeal, and 11.3 hours in preparation of the instant motion and memorandum of costs totaling $4,233.50, for a final total of $23,060.00 in fees. They continue that they also incurred $846.50 in costs to the appellate court and $88.69 in costs to file this motion and the accompanying cost memorandum. The Court concludes that the time billed by Defendants' counsel is reasonable and supported by the declarations submitted by them in connection with this motion.

For the reasons discussed above, the Court will award Defendants the following fees:

Description	**Biller**	**Rate**	**Hours**	**Total**
Defense of Appeal	June D. Coleman	$385	1.6	$616
	Nicole M. Strickler	$385	5.2	$2,002
		$400	13.61	$5,444
	Katherine M. Olson	$305	29	$8,845
		$325	2.2	$715
		$365	3.3	$1,204.50
TOTAL			54.91	$18,826.50
Memorandum of Costs	Nicole M. Strickler	$400	.2	$80
	Katherine M. Olson	$365	1.2	$438
TOTAL			1.4	$518
Fee Motion	June D. Coleman	$385	2.3	$885
	Nicole M. Strickler	$400	1.6	$640
	Katherine M. Olson	$365	6	$2,190
TOTAL			9.9	$3,715
GRAND TOTAL				**$23,060**

The Court will also award the $846.50 in costs to the appellate court and $88.69 in costs to file this motion and the accompanying memorandum totaling $935.19 in costs for a total award of $23,995.10.

II. CONCLUSION

The Court GRANTS Defendants' motion for attorney fees and costs in the amount of $23,995.10.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

- oo0oo -

Calendar Line 5

Case Name: *Prado v. Dart Container Corp. of California, et al.*
Case No.: 18CV336217

This is a putative class and Private Attorney General Act ("PAGA") action on behalf of employees of defendant Dart Container Corporation of California ("Dart"). Plaintiff alleges wage and hour violations, as well as failure to provide compliant disclosure forms for background checks in violation of the Fair Credit Reporting Act ("FCRA").

Before the Court is Plaintiff's motion for leave to file a Third Amended Complaint ("TAC"). Dart opposes the motion. For the reasons discussed below, the Court DENIES Plaintiff's motion.

I. BACKGROUND

A. Factual

According to the operative complaint, Dart is a Michigan corporation with its principal place of business in Michigan, but does business in California. (Second Amended Class and Representative Action Complaint ('SAC"), ¶¶ 7, 9.) When Plaintiff applied for employment with Defendant on October 14, 2013, he was required to fill out a disclosure and authorization form for a background investigation. (*Id*., ¶¶ 21, 26.) But the disclosures provided contained extraneous and superfluous language in violation of federal and state laws, and were impermissibly incorporated into an employment application. (*Id*., ¶¶ 22-27.)

Plaintiff further alleges that he and other putative class members worked off the clock before and/or after their scheduled shifts. (SAC, ¶¶ 28-34.) They did not receive required meal and rest periods or premium pay for missed breaks. (*Id*., ¶¶ 35-40.) Their overtime was incorrectly calculated because the pay rate it was based on did not include non-discretionary bonuses and/or shift differential pay. (*Id*., ¶¶ 41-42.) And as a result of these other violations, Dart failed to provide accurate wage statements. (*Id*., ¶¶ 43-47.)

Based on these allegations, Plaintiff brings a first cause of action on behalf of the putative FRCA Class for failure to provide proper disclosure in violation of the FCRA. He also brings a second cause of action under PAGA arising from the alleged wage and hour violations.

B. Procedural

Plaintiff initiated this action on October 12, 2018 and in April 2023, moved to certify the FRCA Class. The Court denied the motion based on its conclusion that the Plaintiff lacked standing to pursue his FRCA claim under the Fifth Appellate District's recent decision in *Limon v. Circle K Stores, Inc.* (2022) 84 Cal.App.5th 671 (*Limon*). In his reply on the motion for certification, Plaintiff urged that he could "easily and readily amend" the SAC to correct the standing issue. The Court responded that "[w]hile the 'eas[e]' and propriety of [the] change in course [was] not obvious to [it]," it denied Plaintiff's motion without prejudice to: (1) a future motion for leave to amend the SAC, whether to add allegations concerning Plaintiff's

standing or to add a new class representative who does have standing; and/or (2) a future motion to certify a class supported by evidence that the proposed representative has standing.

Plaintiff now moves to file the TAC in order to allege additional facts sufficient to confer standing to pursue his FCRA claim pursuant to *Limon*.

II. MOTION FOR LEAVE TO FILE TAC

A. Legal Standard

Section 473, subdivision (a)(1) of the Code of Civil Procedure states in pertinent part: "[t]he court may …, in its discretion after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceedings in other particulars …." (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760.) In considering a motion for leave to amend, "courts are bound to apply a policy of great liberality in permitting amendments … at any stage of the proceedings, up to and including trial." (*Id*. at 761.) "[I]t is a rate case" in which a court will be justified in denying a party leave to amend his pleadings. (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.)

However, a policy of liberality in permitting amendments should be applied only where no unfair prejudice is shown to the adverse party. (*Atkinson, supra,* 109 Cal.App.4th at 761.) Where an amendment would require substantial delay in the trial date and substantial additional discovery; would not change not only the specific facts and causes of action pled, but the tenor and complexity of the complaint as a whole; and where no reason for the delay in seeking leave to amend is given, refusal of leave to amend is not an abuse of discretion. (See *Magpali v. Farmers Group* (1996) 48 Cal.App.4th 471, 486-488 [affirming denial of request to amend made during trial].)

In addition, "leave to amend should *not* be granted where, in all probability, amendment would be futile." (See *Foroudi v. The Aerospace Corp.* (2020) 57 Cal.App.5th 992, 1000, internal quotation omitted, italics in original.)

B. Discussion

As an initial matter, Dart maintains that Plaintiff's motion should be denied because it fails to comply with Rule 3.1324(b) of the California Rules of Court, which provides that a motion for leave to amend must be accompanied by a supporting declaration that specifies: (1) the effect of the amendment; (2) why amendment is necessary and proper (3) when the facts giving rise to the amended allegations were discovered; and (4) the reasons why the request for amendment was not made earlier. Dart explains that the supporting memorandum filed by Plaintiff's counsel fails to describe the effect of amendment, why the amendment is necessary and proper, when the facts giving rise to the amended allegations were discovered, and why the request was not made earlier.

Indeed, the subject declaration only addresses Plaintiff's counsel's efforts to get opposing counsel to stipulate to the filing of the proposed TAC and contains *none* of the information listed in Rule 3.1324(b). Consequently, Plaintiff's motion is procedurally defective and must be denied on this basis.

Even if the Court was inclined to overlook this procedural defect, however, it would still deny Plaintiff's motion as it agrees with Dart that Plaintiff's proposed amendment is both untimely and suffers from inexcusable delay.

As the Court explained in its order denying Plaintiff's motion for class certification, the FCRA mandates that an employer disclose to an applicant, clearly and conspicuously in writing, that it may obtain the applicant's consumer report for employment purposes, and articulate the means by which the applicant might prevent the prospective employer from doing so- i.e., withholding authorization. (*Limon v. Circle K. Stores, Inc.,* 84 Cal.App.5th at 689.) If the employer fails to do so, the applicant may maintain a private right of action against it for damages caused by the violation. *Limon* recently held that "under California law, … an informational injury that causes no adverse effect is insufficient to confer standing upon a private litigant to sue under the FCRA." (*Limon,* 84 Cal.App.5th at 707.) While Plaintiff stated in his declaration filed in support of the motion for certification that he did not know "whether Dart would actually perform a background check" and was never informed that it had "actually" done so, because he (1) offered no evidence that he did not know or was confused about whether Dart could obtain a background report and whether he could withhold authorization for it doing so, and (2) also offered no evidence of injury to his "protected interest in ensuring fair and accurate credit (or background) reporting" (*Limon,* 84 Cal.App.5th at 705), the Court concluded that the record suggested that Plaintiff lacked standing to pursue his FCRA claim.

In the proposed TAC, to address the issue of FCRA standing, Plaintiff alleges that "[a]s a result of the inclusion of this extraneous and superfluous language in the disclosures, Plaintiff was confused and would not have otherwise authorized Defendants to obtain a background check on him had be understood it." (Proposed TAC, ¶ 28.) Dart asserts that Plaintiff has been aware since at least October 2020 of his lack of standing and thus has had ample opportunity prior to this point in time to plead the additional facts he now seeks to add. Permitting Plaintiff to amend now, Dart continues, would not only award his dilatory conduct, but would require both parties to conduct additional discovery and investigation almost *five years* after the initial complaint was filed.

Dart also notes that it made Plaintiff aware of its concerns in October 2020 that because he twice affirmatively authorized the company to procure his background check, it was not credible that he was not aware of the fact the Dart actually procured it. Lastly, Dart asserts that while Plaintiff places the blame for his delay in filing his amended complaint on the *Limon* decision (decided on October 25, 2022), the case law on which his amended complaint is based has existed since at least 2016, with the U.S. Supreme Court having articulated what is necessary to pursue a claim for violation of the FCRA's disclosure requirement- the plaintiff having suffered a concrete injury. (See *Spokeo, Inc. v. Robins* (2016) 135 S. Ct. 1540.) Dart continues that since at least 2017, courts have found that in order to establish standing for this type of FCRA claim, the plaintiff must prove both (1) that the inclusion of extraneous language confused him; and (2) he would not have signed a sufficiently clear FCRA form. (*Syed v. M-I, LLC* (9th Cir. 2017) 853 F.3d 492, 499.)

Unwarranted delay in presenting a proposed amendment may, by itself, be a valid reason for denying leave. (See, e.g.. *Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926.) Given Plaintiff's failure to provide a compliant supporting memorandum, the Court is provided with no explanation for his delay in seeking leave to amend to ensure that he adequately

pleaded his standing to assert a claim under the FCRA. Even if the Court takes the charitable view that the standard for pleading standing to pursue such a claim was not clear until the *Limon* decision, Plaintiff not seeking leave to amend until now is unreasonable, especially given that the parties have been litigating this case for nearly five years.

The Court therefore declines to grant Plaintiff leave to amend to file the TAC.

III. CONCLUSION

Plaintiff's motion for leave to file a TAC is DENIED.

The Court will prepare the order.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

- oo0oo -

Calendar Line 6

Case Name:
Case No.:

- oo0oo -

Calendar Line 7

Case Name:
Case No.:

- oo0oo -

Calendar Line 8

Case Name:
Case No.:

- oo0oo -

Calendar Line 9

Case Name:
Case No.:

- oo0oo -

Calendar Line 10

Case Name:
Case No.:

- oo0oo -

Calendar Line 11

Case Name:
Case No.:

- oo0oo -

Calendar Line 12

Case Name:
Case No.:

- oo0oo -

Calendar Line 13

Case Name:
Case No.:

- oo0oo -