

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 7, Honorable Charles F. Adams Presiding

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

To contest a tentative ruling, you must call (408) 808-6856 before 4:00 P.M. and leave a voicemail message containing the information described below.

PLEASE NOTE: Sending an email to the department or Complex Coordinator will no longer suffice to constitute notice to the Court of the need for a hearing regarding a tentative ruling.

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

DATE: OCTOBER 10, 2024

TIME: 1:30 P.M.

**PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE [RULE OF COURT 3.1312](#))**

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV395280	Granato, et al. v. Apple Inc. (Class Action)	See Line 1 for tentative ruling.
LINE 2	23CV424954	Hall v. Cepheid, et al. (Class Action/PAGA)	See Line 2 for tentative ruling.
LINE 3	20CV372622	Temujin Labs Inc. v. Abittan, et al.	See Line 3 for tentative ruling.
LINE 4	23CV415833	Trace3, LLC v. Sycomp, A Technology Company, Inc., et al.	See Line 4 for tentative ruling.

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 7, Honorable Charles F. Adams Presiding

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

To contest a tentative ruling, you must call (408) 808-6856 before 4:00 P.M. and leave a voicemail message containing the information described below.

PLEASE NOTE: Sending an email to the department or Complex Coordinator will no longer suffice to constitute notice to the Court of the need for a hearing regarding a tentative ruling.

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

LINE 5	21CV378464	Cativo v. ATMHS, LLC, et al.	<u>Order of Examination:</u> a proof of service does not appear on the Court's docket. Counsel for Plaintiff must appear to address service and/or select a new examination date.
LINE 6	23CV415833	Trace3, LLC v. Sycomp, A Technology Company, Inc., et al.	See Line 4 for tentative ruling.
LINE 7	23CV415833	Trace3, LLC v. Sycomp, A Technology Company, Inc., et al.	
LINE 8			
LINE 9			
LINE 10			

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 7, Honorable Charles F. Adams Presiding

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

To contest a tentative ruling, you must call (408) 808-6856 before 4:00 P.M. and leave a voicemail message containing the information described below.

PLEASE NOTE: Sending an email to the department or Complex Coordinator will no longer suffice to constitute notice to the Court of the need for a hearing regarding a tentative ruling.

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

LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Jesse Granato et al. v. Apple, Inc.*

Case No.: 22CV395280

This is a putative class action against defendant Apple, Inc. (“Apple”) based on its alleged deliberate efforts to frustrate the ability of its customers to obtain repairs of Apple products purchased by them from entities other than Apple.

I. BACKGROUND

A. Factual

According to the allegations of the operative first amended complaint (“FAC”), the named plaintiffs, Jesse Granato (“Granato”) and Janice Zarad (“Zarad”) (collectively, “Plaintiffs”), at various dates between January 2021 and April 2021, contacted Apple and/or visited its stores due to issues with the iPhones that they had purchased, including broken screens. None of these issues were covered by the One-Year Limited Warranty that came with the phones, and Plaintiffs had to pay Apple to make repairs. (FAC, ¶¶ 77-81.)

Plaintiffs allege that under “normal circumstances,” Apple customers with devices such as an iPhone that have cracked screens or other minor issues could prolong the lives of their electronic devices by repairing them, including by utilizing independent small businesses that will make repairs at an affordable price. (FAC, ¶ 14.) However, to accelerate the pace at which customers need to replace their Apple devices, Apple deliberately frustrates its customers’ efforts to either repair their devices themselves or utilize a repair shop of their choosing by imposing restrictions how products may be repaired. (*Id.* at ¶ 15.) Apple’s practices to accomplish the foregoing include: threatening customers with loss of warranty coverage; withholding parts, tools and repair manuals; placing “booby traps” and other repair impediments in its devices; refusing to service devices that have been previously repaired; and disparaging independent repair shops and aftermarket replacement parts. (*Ibid.*)

The one-year limited warranty (the “Limited Warranty”) that Apple typically provides with each of its new devices contains a number of exclusions, but requires that customers obtain *all* repairs—even those not covered by the warranty—from Apple or an Apple Authorized Service provider. (FAC, ¶¶ 2, 15, 30-36.) If a customer repairs their own device or pays an independent repair shop to do so, Apple terminates their warranty coverage, and Apple expressly advises customers of as much. (*Id.* at ¶¶ 31-32.)

Apple historically refuses to sell parts to independent repair shops and has made certain repairs impossible without access to hardware or software tools that are only available to Apple Stores and authorized repair shops. (FAC, ¶¶ 23-24.) Apple has failed to adequately explain its refusal to not make parts or manuals available, and its claims in August 2019 that it would begin providing genuine parts, tools and repair guides to independent repair shops through its Independent Repair Program have proven illusory. (*Id.* at ¶ 24.) The prices charged by Apple to these shops are excessive and it places pre-conditions on the shops that are designed to “dissuade participation and render independent repair shops uncompetitive.” (*Id.* at ¶¶ 25-27.) These conditions include, but are not limited to: allowing Apple to make unannounced inspections and audits at any time, including for up to five years after a shop has left the Independent Repair Program; requiring shops to share customer information at Apple’s request; and imposing penalties for shops that fail the aforementioned audits. (*Id.* at ¶ 27.)

The “booby traps” utilized by Apple to impede the ability of independent repair shops to make repairs include both physical (e.g., proprietary screws requiring special tools to remove) and software-based (e.g., the intentional disabling of certain features when unauthorized repairs are detected to have been made) impediments. (FAC, ¶¶ 16-22.)

Apple warns customers that it is unsafe for anyone other than Apple or an Apple Authorized Service Provider (“AASP”) to make repairs to its products but was unable to provide the FTC with any facts tying physical injuries to repairs performed by independent repair shops when it investigated Apple’s contention. (FAC, ¶¶ 41-43.) Apple provides training videos for AASPs to train their technicians “to undermine third party companies and talk customers into buying more expensive first party repairs.” (*Id.* at ¶ 44.)

As a result of the foregoing practices, customers pay Apple higher prices for repairs, buy more brand-new Apple products in lieu of paying Apple for expensive repairs, forego repairs, and purchase extended warranties to avoid paying high prices in the event their devices need to be repaired. (FAC, ¶¶ 48, 52-55.) Additionally, these restrictions, which have been condemned by the FTC and Apple’s own shareholders, deprive customers of timely, local repairs, harm the environment (by increasing the amount of e-waste) and harm small businesses and lower-income communities. (*Id.* at ¶¶ 57-76.)

B. Procedure

Based on the foregoing allegations, Plaintiffs (including two additional plaintiffs no longer involved in this action) initiated this action with the filing of the operative Complaint on March 11, 2022, asserting the following causes of action: (1) unlawful and unfair business practices (violation of Bus. & Prof. Code, § 17200, et seq. (the “UCL”)); (2) violation of the Magnuson-Moss Warranty Act (“MMWA”) (15 U.S.C. §§ 2301, et seq.); (3) violation of the Consumer Legal Remedies Act (Civ. Code §§ 1750, et seq.); and (4) unjust enrichment.

On January 29, 2024, this Court (Hon. Kulkarni) sustained Apple’s demurrer to the first through fourth causes of action with 30 days’ leave to amend. On February 28, 2024, Plaintiffs Granato and Zarad filed their FAC, asserting two causes of action for: (1) violation of the Magnuson-Moss Warranty Act (“MMWA”) (15 U.S.C. §§ 2301, et seq.); and (2) violation of the Consumer Legal Remedies Act (Civ. Code §§ 1750, et seq.).

On March 29, 2024, Apple filed a demurrer to each cause of action. Plaintiffs oppose the motion and Apple has filed a reply.

II. REQUESTS FOR JUDICIAL NOTICE

In support of their opposition, Plaintiffs request the Court take judicial notice of the following: (1) FTC Report dated May 2021 concerning repair restrictions (Exhibit A); (2) FTC Policy Statement dated July 2021 concerning repair restrictions (Exhibit B); (3) President Joe Biden’s Executive Order titled “Executive Order on Promoting Competition in the American Economy,” dated July 9, 2021 (Exhibit C); (4) California Senate Bill No. 244 (Exhibit D); (5) FTC Administrative Complaint dated October 2022 against Harley-Davidson Motor Company Group, LLC (Exhibit E); (6) FTC Compliance Warnings dated April 2018 concerning tying under the MMWA (Exhibit F); (7) FTC Decision and Order dated October 2015 concerning matter of BMW of North America, LLC (Exhibit G); (8) FTC Decision and Order dated August 2022 concerning MWE Investments, LLC (Exhibit H); (9) FTC Agreement dated 2015 concerning a consent order with BMW of North America, LLC (Exhibit I); and (10) FTC

Agreement dated 2015 concerning a consent order with Harley-Davidson Motor Company Group, LLC (Exhibit J).

The Court may properly take judicial notice of Exhibits C and D as “[t]he decisional, constitutional, and public statutory law this state and of the United States” (Evid. Code, § 451, subd. (a)) and “[o]fficial acts of the legislative, executive, and judicial departments of the United States” (Evid. Code, § 452, subd. (c)), respectively. However, it may only take judicial notice of the *existence* of FTC documents, and not the truth of their contents. (See *Gerawan Farming, Inc. v. Agr. Labor Relations Bd.*, (2018) 23 Cal.App.5th 1129, 1155, fn. 35 [declining to take judicial notice of the “truth of any findings or assertions” in public agency records].) As the Court does not see how the *existence* of these documents is relevant to the disposition of the demurrer, it declines to take judicial notice of the remaining exhibits. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 (*Gbur*) [“judicial notice, since it is a substitute for proof . . . , is always confined to those matters which are relevant to the issue at hand”].)

Accordingly, Plaintiffs’ request for judicial notice is GRANTED IN PART. The request is GRANTED as to Exhibits C and D and is otherwise DENIED.

In support of its reply, Apple requests judicial notice of: (1) transcript of the January 11, 2024 hearing on Apple’s prior demurrer (Exhibit 1); and (2) Apple’s reply brief in support of its motion to dismiss revised consolidated amended class action complaint filed on August 25, 2008 in the separate matter of In re Apple & ATTM Antitrust Litigation (No. C 07-5152 JW (N.D. Cal.)) (Exhibit 2).

The Court does not find these materials helpful to addressing the demurrer, and therefore not relevant its disposition. (*Gbur*, *supra*, 93 Cal.App.3d at p. 301.) Moreover, the Court declines to consider new evidence in reply. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 [“This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points.”].)

As such, Apple’s request for judicial notice is DENIED.

III. DEMURRER

A. Legal Standard

In ruling on a demurrer, a court treats it “as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.” (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214.) Courts may also consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

B. Discussion

Apple demurs to the first and second causes of action on the ground they fail to state facts sufficient to constitute a cause of action pursuant to Code of Civil Procedure section 430.10, subdivision (e).

1. Second Cause of Action: Magnuson-Moss Warranty Act (“MMWA”)

In the second cause of action, Plaintiffs allege that by conditioning warranty coverage under the Limited Warranty on customers exclusively using Apple or AASPs, even for repairs that are not free and not covered by the Apple warranty, Apple has violated the MMWA’s prohibition of illegal tying arrangements contained in 15 U.S.C. Section 2302 (“Section 2302”), subdivision (c). (FAC, ¶ 101.)

In support of the demurrer to the second cause of action, Apple argues: (1) Apple provides warranty repairs to customers free of charge, placing its conduct beyond the scope of 15 U.S.C. 2302, subd. (c); (2) Plaintiff fails to allege the existence of an improper tying arrangement between Apple warranty coverage and the use of Apple or Apple Authorized Service Provider repair services; and (3) Plaintiffs do not allege they suffered any cognizable harm caused by the alleged misconduct.

The MMWA governs warranties for consumer products distributed in interstate commerce and “requires disclosures in connection with written warranties[] [and] regulates the substantive content of warranties,” among other provisions. (*Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1331.) It does not substitute federal law for state law of consumer product warranties, but rather supplements it, except in specific instances in which it expressly proscribes a regulating rule. (*Ibid.*, citing *Walsh Ford Motor Co.* (D.C. Cir. 1986) 807 F.2d 1000, 1012-1014.) Section 2302 of the MMWA sets forth the rules governing the content of the warranties to which it applies, and subdivision (c) of this section provides, in pertinent part, that:

No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer’s using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name . . .

(15 U.S.C. § 2302, subd. (c).)

The foregoing describes what are referred to as “tying arrangements.” Apple contends that Plaintiffs have not stated a MMWA anti-tying claim because its warranties do not require them to obtain Apple repairs. As Apple notes, and this Court previously explained, while the MMWA generally prohibits tying arrangements, it does not do so in circumstances in which the “article or service is provided *without charge* to the consumer.” (16 C.F.R. § 700.10, subd. (a) [emphasis added].) The MMWA permits warrantors such as Apple to limit free repairs to those done by the warrantor, i.e., Apple or AASPs. A review of the provisions of the Limited Warranty relied on in the FAC demonstrate that the only circumstances where Apple requires a repair be performed by Apple or an AASP is when the repair is within the warranty and provided free of charge, which is precisely what is permitted by the MMWA and FTC regulations.

In opposition, Plaintiffs argue that the Limited Warranty is expressly conditioned on following the warranty terms and user manual guidelines, and they assert that the FAC cites three provisions of the Limited Warranty that either command customers not to use independent repair services or direct them to Apple for their repairs. (Opposition, p. 16.) As in

their prior opposition, Plaintiffs cite the same “anti-repair” provision of the Limited Warranty, which states:

Important: Do not open the Apple Product. Opening the Apple Product may cause damage that is not covered by this Warranty. Only Apple or an AASP should perform service on this Apple Product.

(FAC, Ex. A [Limited Warranty at p. 6].)

Plaintiffs contend that the language of this provision goes far beyond informing customers that third-party damage is excluded from the warranty. Instead, Plaintiffs argue, “it admonishes the customer.” (Opposition, p. 17.) This argument is not persuasive. As the Court previously acknowledged, this language appears in a section of the warranty describing a customer’s responsibilities before, during, and after in-warranty service, and not the section containing warranty exclusions. The Court explained that, when read in full, this provision is merely a warning that if customers or an independent repair provider damage the device while opening it, that damage may not be covered by the warranty. The language in this provision is consistent with the warranty exclusion that Apple does not cover damage caused by service performed by anyone other than Apple or an AASP. Again, that exclusion is permitted under FTC regulations. (See 16 C.F.R. § 700.10, subd. (c).)

Plaintiffs next assert that because Apple’s User Guide states that “[i]f iPhone is damaged or malfunctions, contact Apple or an [AASP],” and that the battery should be replaced by Apple or an authorized service provider. (Opposition, p. 17, citing FAC, ¶¶ 31, 34.) Plaintiffs’ reliance on the user guide also does not state a claim for a violation of the MMWA. As Apple notes in reply, providing safety warnings in the user guide does not mean that the Limited Warranty is conditioned on obtaining Apple or AASP repairs. (Reply, p. 9.) Finally, Plaintiffs contend that use of the word “should” in the above provision communicates an obligation or requirement. (Opposition, p. 17.) The Court already explained that Apple’s use of the word “should” cannot reasonably be interpreted as “shall” and further, California courts often hold that “‘should’ does not convey imperative obligation, no more compulsion than ‘ought.’ . . . In plain effect, ‘should’ is ‘a recommendation, not . . . a mandate.’” (*Marin Assn. of Public Employees v. Marin County Employees’ Retirement Assn.* (2016) 2 Cal.App.5th 674, 699, citing *Lashley v. Koerber* (1945) 26 Cal.2d 83, 90; *Cuevas v. Superior Court* (1976) 58 Cal.App.3d 406, 409 [“The word ‘should’ is used in a regular, persuasive sense, as a recommendation, not as a mandate.”].) Apple concedes that the iPhone user guide encourages customers to contact Apple for proper functionality and to avoid damage or injury, but that in no way establishes a *policy* requiring customers to repair their devices through Apple. (Demurrer, p. 14.) The provisions in the Limited Warranty do not instruct customers to *only* use Apple or AASPs to repair their devices, nor do they prohibit customers from opening their devices, obtaining repairs from independent providers, or suggest that warranty coverage will be terminated if they do so.

The Court next turns to Apple’s argument that Plaintiffs’ new allegations that Granato was told by an Apple employee that if he went elsewhere to repair his iPhone he would lose coverage under the warranty (FAC, ¶ 78) and that Zarad “understood that she had to have her iPhone repaired by Apple” based on conversation with an Apple employee (FAC, ¶ 81) are vague and still fail to state a claim. (Demurrer, p. 15.)¹ As to Zarad, the Court previously noted

¹ The Court again notes that a majority of Plaintiffs’ allegations are anecdotal or non-personal examples that are insufficient to support a claim to survive a demurrer.

that she cannot allege that Apple threatened to void her warranty if she did not purchase repair services from Apple or an AASP because her warranty had already expired by the time she purchased a screen repair from Apple.

As to Granato, Apple contends that being told by a single employee that he would lose warranty coverage if he went elsewhere for a repair does not establish a company-wide practice; it would not have voided the warranty; and it would be directly at odds with the express language of the warranty, which also provides that no Apple employee is authorized to make any modifications to the warranty. (See FAC, Ex. A, p. 5.) Here, the Limited Warranty specifically states that Apple employees are not authorized to modify the warranty. Furthermore, a single employee telling Granato that he would lose warranty coverage does not also indicate that the employee was authorized to void the warranty. Lastly, as the Court previously explained, Plaintiffs still do not allege that they personally purchased or repaired dozens of Apple devices, aside from their iPhones, that they purport to put at issue in the FAC.

In conclusion, Plaintiffs' "anti-repair" allegations find no support in the Limited Warranty when read as a whole. The Court therefore finds that Plaintiffs have failed to state a claim for violation of the MMWA, and the Court SUSTAINS Apple's demurrer to the second cause of action without leave to amend. (See *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 890 (*Cantu*) [leave to amend may be denied where "it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a claim"].)

2. First Cause of Action: Unlawful and Unfair Business Practices

In Plaintiffs' first cause of action, they allege that Apple violates California's Unfair Competition Law ("UCL") by having practices that are designed to deliberately frustrate its customers' efforts to repair their own devices, either themselves or through an independent repair shop. Plaintiffs allege that Apple's practices are unlawful because they violate the MMWA and the Federal Trade Commission Act ("FTC Act"); and are unlawful within the meaning of that statutory scheme because (1) the gravity of harm to Plaintiffs and the proposed Class far outweigh any legitimate utility of the practices, (2) they are immoral, unethical, oppressive, unscrupulous or substantially injurious to Plaintiffs and the proposed Class, and (3) undermine or violate the stated public policies underlying the MMWA and the FTC Act. (FAC, ¶¶ 95-96.)

To this cause of action, Apple asserts that: (1) the claim is barred by California's safe harbor doctrine; (2) Plaintiffs fail to allege any unlawful or unfair conduct by Apple; and (3) Plaintiffs fail to plead a loss of money or property caused by the alleged misconduct.

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

As set forth above, Plaintiffs base the "unlawful" component of their UCL claim on violations of the MMWA and Section 5 of the FTC Act. (FAC, ¶ 95.) In support of their argument in opposition, Plaintiffs assert that if the Court finds Plaintiffs' have pled a violation

of either the MMWA or the FTC Act, then Plaintiffs also state a claim for violation of the UCL's unlawful prong. (Opposition, p. 14.) As explained in detail above, Plaintiffs have not stated a claim for violations of either the MMWA or the FTC Act. Thus, they do not state a claim for violation of the UCL's unlawful prong.

The Court next turns to whether Plaintiffs have sufficiently pled that Apple's alleged practices constitute "unfair" practices within the meaning of the UCL. This Court previously explained that there is a split in authority with regard to the proper test for determining whether a business practice is unfair under the statute and the California Courts of Appeal have adopted three different tests to do so, including: (1) the balancing test; (2) the tethering test; and (3) the FTC test. (See, e.g., *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 380, fn. 9.)

a. Balancing Test

Under the balancing test, "an unfair business practice occurs when that practice offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 719 [internal quotations omitted].) "In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." (*Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263, 285 [internal citations and quotations omitted].)

Plaintiffs assert that the FAC alleges, in significant detail, several practices by Apple that meet the balancing test. (Opposition, p. 8, citing FAC, ¶¶ 13-45.) In particular, they refer to the following practices as being "immoral, unethical, and unscrupulous": (1) telling consumers they will void their warranty if they go outside of Apple for repairs; (2) placing booby traps in iPhones so they malfunction; (3) withholding genuine replacement parts unless independent shops agree to unreasonable terms; and (4) inflated prices due to the alleged business practices. (*Ibid.*) Plaintiffs contend that the Court's prior January 2024 Order, primarily focused only on one alleged unfair practice: warranty tying arrangements and that now the FAC alleges in significantly more detail, inflated prices, and more detail about their own experiences.

The Court is not persuaded. First, the January 2024 Order addressed inflated repair prices, device replacement, environmental harm, and lack of access to timely repairs, ultimately deciding that Plaintiffs' allegations were based on a mischaracterization of Apple's hardware warranties and practices. The Court further concluded that speculative allegations of harm to consumers were insufficient to establish an unfair practice under the balancing test. (January 2024 Order, p. 16, citing *Marsh v. Anesthesia Servs. Med. Grp., Inc.* (2011) 200 Cal.App.4th 480, 502 ["Nor do Appellant's alternative tort theories provide an underlying body of law to plead unfair 'practices' in this context, where they affected her specifically."].) As alleged now, the pleading still contains only anecdotal allegations or conclusory statements. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 808 ["'conclusory allegations will not withstand demurrer'"].) Further, the Court does not find Plaintiffs' assertion that they now allege individual harms meritorious. First, the allegations that nearby repair shops charge less than Apple are insufficient given that there are no allegations either Zarad or Granato attempted to repair their phones elsewhere. Further, Zarad's warranty could not have been voided by any Apple practice because the warranty period had already expired when she attempted to repair her phone at Apple. (See FAC, ¶¶ 80-82.) As for the allegations pertaining to Granato, who went to Apple to get his screen repaired, he was told that the screen *was not*

covered by the warranty. (FAC, ¶ 78.) Further, as noted above, Apple employee's had no authority to change the terms of the Limited Warranty. (See FAC, Ex A, p. 5.) Finally, the Court is still not persuaded that Plaintiffs allege factual allegations that the anti-repair practices provide more harm than utility to consumers.

b. The Tethering Test

With regard to the tethering test, if a claim that an act or practice violates certain statutes fails, the derivative "tethered" UCL unfair prong claim will also fail. (See e.g., *In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, 1419; *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1185, citing *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 182 ["When a statutory claim fails, a derivative UCL claim also fails."].) As the Court noted in its prior order, Plaintiffs attempt to rely on public policies tied to specific statutes and thus, their derivative UCL claim rises and falls with their underlying statutory claims.

c. The FTC Test

Under the FTC test, there are three factors that define unfairness under section 5 of the FTC Act: "(1) The consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." (*Camacho v. Automobile Club of Southern California* (2006) 142 Cal.App.4th 1394, 1403.) The Court finds that Plaintiffs still fail to satisfy the FTC test. Here, there are no allegations that either Plaintiff experienced "substantial injury" in the form of inflated prices. Rather, Zarad paid \$199 to have her phone screen fixed and Granato paid \$129 to fix his phone. Plaintiffs likewise do not address the countervailing benefits such as avoiding the numerous injuries listed in the User Guide. (See FAC, Ex. B, p. 1.) Finally, given the language of the Limited Warranty, as discussed above, Plaintiffs could have taken their phones to other repair shops where they could have paid less for their repairs. (See FAC, ¶¶ 25, 50.)

The foregoing leads the Court directly to Apple's remaining argument that Plaintiffs have not pleaded facts establishing that they personally suffered damages as a result of Apple's practices. In order to establish standing to pursue a UCL claim, a plaintiff must plead facts which demonstrate that they suffered a loss of money or property *as a result* of the alleged practice constituting unfair competition. (Bus. & Prof., § 17204; *Bower v. AT&T Mobility, LLC*, (2011) 196 Cal.App.4th 1545, 1554.) As the Court concluded above, Plaintiffs fail to plead facts linking their iPhone screen repairs or the price they paid for any of those repairs, i.e., their claimed damages, to any of Apple's "unfair" repair practices. Again, Plaintiffs do not contend that Apple threatened to void their warranties if they had their screens repaired by a non-Apple repair provider or if they did not purchase repair services from Apple or one of its AASPs (and Ms. Zarad cannot allege as much given that her warranty had already expired by the time she purchase a screen repair from Apple) or third parties could have made repairs for less² and Apple prevented them from obtaining such repairs. They also do not contend that "booby traps" in their iPhone screens foiled independent or self-service repairs or that they

² While Plaintiffs now allege that other repair shops charged less for repairs than Apple, there are no allegations that Plaintiffs attempted to go to these repair shops and were then prevented from doing so by Apple.

sought, but could not obtain, Apple parts, tools, and repair manuals to repair their screens themselves.

Given that Plaintiffs have not established a UCL claim, they cannot seek injunctive relief for unfair business practices.

Accordingly, the Court SUSTAINS Apple's demurrer to the first cause of action without leave to amend. (See *Cantu, supra*, 4 Cal.App.4th at p. 890.)

IV. CONCLUSION

The demurrer is SUSTAINED in its entirety WITHOUT LEAVE TO AMEND.

The Court will prepare the final 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.sccscourt.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 2

Case Name: *Daryl Hall et. al v. Cepheid et. al*

Case No.: 23CV424954

Plaintiff Daryl Hall, on behalf of himself and all other similarly situated current and former employees (collectively, “Class Members”) filed this action against defendants Cepheid Inc., Vitor Rocha, and Deborah Gonyea (collectively, “Defendants”) based on Cepheid’s failure to pay employee wages based on time actually worked. Cepheid now demurs to the seventh and eighth causes of action in the first amended complaint (“FAC”). In the alternative, Cepheid moves to strike portions of the FAC.

I. BACKGROUND

According to the allegations of the FAC, Cepheid has implemented a uniform time clock rounding policy and practice that results in Class Members “being denied minimum wages and overtime compensation for all hours worked.” (FAC, ¶ 9.) Cepheid allegedly rounds each clock-in and clock-out to a pre-determined interval, resulting in systemic underpayment of employee wages over time and in the aggregate at both Class Members’ straight time and overtime rates. (*Ibid.*) Cepheid also allegedly failed to pay the correct regular rate of pay for calculating the overtime rate, failed to authorize and/or permit non-exempt employees to take bona fide meal and rest breaks, failed to pay employees for all time worked, failed to compensate non-exempt employees in lieu of meal and rest periods, and failed to use the correct regular rate of pay for missed meal and rest breaks. (*Id.* at ¶¶ 10-14.)

Hall filed his original complaint on October 26, 2023. Hall filed the FAC on March 15, 2024, alleging class action causes of action for: (1) failure to pay minimum wages; (2) failure to pay overtime wages; (3) failure to provide meals or premium pay in lieu thereof; (4) failure to provide rest periods or premium pay in lieu thereof; (5) failure to reimburse necessary business expenses; (6) failure to provide and maintain accurate records; (7) failure to pay wages when due; (8) PAGA penalties; and (9) violation of California’s Unfair Competition Law.

On April 15, 2024, Cepheid filed a demurrer to the seventh and eighth causes of action in the complaint. In the alternative, Cepheid also filed a motion to strike portions of the FAC. Plaintiffs filed oppositions to both the demurrer and motion to strike on September 10, 2024. Cepheid filed a reply on September 26, 2024.

II. DEMURRER AND MOTION TO STRIKE

A. General Legal Standards

i. Demurrer

As relevant to this case, “[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds: . . . [t]he pleading does not state facts sufficient to constitute a cause of action.” (Code Civ. Proc., § 430.10, subd. (e).) A demurrer may be brought by “[t]he party against whom a complaint [] has been filed” to object to the legal

sufficiency of the pleading as a whole, or to any “cause of action” stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court in ruling on a demurrer treats it “as admitting all properly pleaded material facts, but not contentions, deductions or conclusions of fact or law.” (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) “A demurrer tests only the legal sufficiency of the pleading. [Citation.] It ‘admits the truth of all material factual allegations in the complaint . . . ; the question of plaintiff’s ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.’ [Citation.]” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn’s, LLC* (2006) 39 Cal.4th 223, 227.)

ii. Motion to Strike

Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading, or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter that the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a); see also *City and County of San Francisco v. Strahlendorf* (1992) 7 Cal.App.4th 1911, 1913.) A motion to strike should not be a procedural “line item veto” for the civil defendant. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683.)

In ruling on a motion to strike, the court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (See *Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63, citing *Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) The court’s decision to strike pursuant to section 436 is discretionary. (See Code Civ. Proc., § 436 [“The court may . . . strike”]; see also *Colden v. Broadway State Bank* (1936) 11 Cal.App.2d 428, 429 [motion to strike is addressed to the sound discretion of the court].)

B. Discussion

i. Seventh Cause of Action: Failure to Pay Wages When Due

Cepheid demurs to the seventh cause of action on the grounds Hall cannot bring a cause of action for penalties under Labor Code sections 203 and 201 if Hall does not allege Cepheid terminated Hall’s employment. (See, e.g., Memorandum of Points and Authorities in Support of Demurrer (“MPA”), pp. 2:12-5:2.) According to Cepheid, Labor Code sections 201 and 202 provide for separate causes of action regarding the timing of final payment of wages to employees. (*Id.* at p. 2:17-18.) Cepheid contends that Labor Code section 201 applies to employees who have been involuntarily terminated, whereas Labor Code section 202 applies to employees who have voluntarily resigned. (*Id.* at p. 2:21-27.) Cepheid argues that the court must dismiss Hall’s seventh cause of action under Labor Code section 201 because Hall involuntarily resigned from his position at Cepheid. (*Id.* at p. 4:17-27.)

The court notes at the outset that a demurrer cannot lie to only a portion of a cause of action. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682.) Cepheid addresses this by contending that (1) Labor Code sections 201 and 202 are separate causes of action, regardless of the labels Hall has used in the complaint; (2) in complex cases, courts have broad powers to fashion suitable methods to manage the litigation; and (3) regardless, Cepheid moves in the alternative to strike from the complaint Hall's Labor Code section 201 claim. (MPA, p. 1, fn. 1.) Hall does not address this point in Hall's opposition brief. Nevertheless, the court does not find Cepheid's first argument persuasive. Cepheid cites *De Monbrun v. Sheet Metal Workers Int'l Assoc.* (1956) 140 Cal.App.2d 546, 553 (*De Monbrun*) for the proposition that a "cause of action is the right to secure redress for violation of an obligation owing to the claimant. . . . [T]he action therefore springs from the obligation, and hence 'cause of action' is simply the 'obligation.'" (*Id.* at p. 1, fn. 1.) According to the court in *De Monbrun*, this "test of identity of causes of action applies in the field of res judicata as well as other areas, such as introduction of a new cause of action after running of the applicable statute of limitations." (*De Monbrun, supra*, 140 Cal.App.2d at p. 553.) The *De Monbrun* court does not use this language in a discussion regarding whether a party may demur to only a portion of a cause of action, and therefore the court does not find this case persuasive on this point, especially since the prohibition on utilizing a demurrer to challenge only a portion of a cause of action is longstanding and well-settled.

In any event, Cepheid also moves to strike Hall's Labor Code section 201 claim from the seventh cause of action. Under Code of Civil Procedure section 436, a court may strike out any irrelevant, false, or improper matter inserted into any pleading, or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436.) The court will therefore analyze the parties' arguments under a motion to strike.

Hall responds to Cepheid that causes of action under Labor Code sections 201 and 202 may be brought together "because class treatment is appropriate, and the harm suffered 'is essentially the same'" where an employer has failed to pay wages. (Plaintiffs' Opposition to Defendant's Demurer and Motion to Strike ("Opposition"), p. 2:11-12.) Cepheid's motion "avoids the majority position" of courts permitting a cause of action to join the two Labor Code sections, and Cepheid's position "would effectively punish workers who were fired by denying them the ability to participate in the same underlying claims for untimely wages." (*Id.* at pp. 2:25-3:4.) According to Hall, "Defendant's argument is incompatible with the legislative intent of [sections] 201 and 202." (*Id.* at p. 3:4-7.) Hall contends that in "Defendant's view, because Plaintiff quit his job, he should only be allowed to represent the half of the class members who also quit" and "not those who were fired because the timing requirements for final payments differ for these types of employees under Labor Code [sections] 201, 202." (*Id.* at pp. 1:27-2:3.)

Labor Code section 201 states that if "an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." (Lab. Code, § 201, subd. (a).) Labor Code section 202 states that if "an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting." (Lab. Code, § 202, subd. (a).) Labor Code section 203 states that if "an employer willfully fails to pay, without abatement or reduction, in accordance with

Sections 201, 201.3, 201.5, 201.6, 201.8, 201.9, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced.” (Lab. Code, § 203, subd. (a).)

In support of their respective arguments, both Cepheid and Hall direct the court to federal law interpreting the California Labor Code.¹ (MPA, p. 3:5-18; Opposition, p. 2:9-24.) Although the court is not bound by federal district court decisions, (see *Sanchez v. Bezos* (2022) 80 Cal.App.5th 750, 769), it can look to “analytically sound” reasoning in federal opinions as persuasive. (*Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432, fn. 6.) Courts in the Ninth Circuit appear split as to whether an individual plaintiff, on behalf of a class, can bring an action under both sections 201 and 202 if they have not been fired but instead have resigned. (Compare *Hall v. Western Ref. Retail, LLC* (C.D. Cal., Sept. 19, 2019, No. 5:19-cv-00855-VAP-SKx) 2019 LEXIS 227289, *6-7 (*Hall*) [“The Court finds that Plaintiff’s § 201 claim is sufficiently aligned with absent members asserting a § 202 claim. Under § 201, an employer must pay an employee it discharged all wages earned and unpaid within seventy-two hours of discharge. [Citation.] If an employee quits (as opposed to being involuntarily discharged), the employer also owes that employee all unearned wages within seventy-two hours of the employee’s departure. [Citation.] Regardless of the nature of the separation, the employer is liable under § 203 if it does not pay the employee all unearned wages within the seventy-two hour period after separation from employment.”] with *Segal v. Aquent LLC* (S.D. Cal., Sept. 24, 2018, No. 18cv346-LAB (JLB)) 2018 LEXIS 164610, *15-16 [“Plaintiff was terminated from her employment, so Defendants argue she may not bring a claim under § 202 on behalf of quitting employees. . . . While she may be able to allege a violation of § 202 as part of her PAGA claim—she does not currently—she has no standing to sue under that statute individually or on behalf of the putative class.”].) It does not appear the Ninth Circuit Court of Appeals has addressed the issue.

Neither party cites California law dealing with this specific issue, and it does not appear California courts have addressed the issue. “In general, a named plaintiff [in California] must have standing to prosecute an action.” (*CashCall, Inc. v. Superior Court* (2008) 159 Cal.App.4th 273, 286 (*CashCall*), citing Code Civ. Proc., § 367.) “In a class action, then, the trial court initially must address whether the named plaintiffs have standing under Article III to assert their individual claims . . .” (MPA, pp. 4:27-5:2, quoting *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 319.) “ ‘It is elementary that the named plaintiff in a class action must be a member of the class he purports to represent.’ ” (*First American Title Ins. Co. v. Superior Court* (2007) 146 Cal.App.4th 1564, 1573, quoting *Trotsky v. Los Angeles Fed. Sav. & Loan Assn.* (1975) 48 Cal. App. 3d 134, 146.) Here, Hall alleges that he worked for Cepheid as “a

¹ The court acknowledges the notice of new authority, and a supporting request for judicial notice, filed by Cepheid on October 1, 2024. (See Notice of New Authority Regarding Cepheid’s Demurrer and Motion to Strike; Cepheid’s Request for Judicial Notice, p. 1:6-10.) Cepheid requests the court judicially notice one exhibit in support of Cepheid’s notice of new authority. (Cepheid’s Request for Judicial Notice (“RJN”), p. 1:6-10.) Exhibit A is a decision in *Everardo Garza, Jr. v. Winco Holdings, Inc.* (E.D. Cal. Sept. 30, 2024, No. 1:20-cv-01354-TLN-SCR), (RJN, Ex. A.) Cepheid cites Evidence Code section 452, subdivisions (c) and (h) in support of Cepheid’s request. (*Id.* at p. 1:11-16.) The court GRANTS judicial notice of Exhibit A pursuant to Evidence Code section 452, subdivisions (c) and (h).

non-exempt employee from approximately 2021 to 2023” and that he “left [Cepheid’s] employ during the Class Period.” (Complaint, Ex. ¶¶ 1, 69.) Hall alleges the “discriminatory conduct and hostile work environment [was] so severe and pervasive that it resulted in Mr. Hall’s constructive termination.” (*Id.* at ¶ 94.) As such, Hall alleges he resigned from his employment at Cepheid. Labor Code section 201 applies when “an employer discharges an employee . . .” (Lab. Code, §201, subd. (a).) Thus, it appears that Hall could not personally sustain a cause of action under Labor Code section 201, at least under the current allegations. The court therefore finds that Hall, based on the FAC, cannot represent a putative class under both Labor Code sections 201 and 202 given they apply to different types of employment termination.²

The court GRANTS Cepheid’s motion to strike portions of the seventh cause of action that refer to Labor Code section 201 with 20 days’ leave to amend.

a. Eighth Cause of Action: Private Attorneys General Act Penalties

Cepheid demurs to Hall’s Private Attorneys General Act (“PAGA”) cause of action on the grounds that Hall filed this action without waiting the requisite period after providing notice of this action to the Labor and Workforce Development Agency (“LWDA”). (MPA, p. 5:5-6.) According to Cepheid, Hall filed the complaint the “same day he submitted his notice to the LWDA, completely disregarding the 65-day waiting period” required by California Labor Code section 2699.3, subdivision (a)(2)(A). (*Id.* at p. 8:12-13, citing Lab. Code, § 2699, subd. (a)(2)(A).) Cepheid argues that the LWDA “was given no opportunity to investigate the matter before Plaintiff filed suit, nor was Cepheid given the opportunity to cure any alleged violations.” (*Id.* at p. 8:13-15.)

Labor Code section 2699.3, subdivision (a)(1) requires an aggrieved employee or representative to give written notice to the LWDA and the employer of the specific provisions of the code alleged to have been violated, including the facts and theories to support the alleged violation. (See Lab. Code, § 2699.3, subd. (a)(1).) Thereafter, the LWDA “shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 60 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is provided within 65 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action pursuant to Section 2699.” (Lab. Code, § 2699.3, subd. (a)(2)(A).) Labor Code section 2699.3, subdivision (a)(2)(C) states that “[n]otwithstanding any other provision of law, a plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under this part at any time within 60 days of the time periods specified in this part.” (Lab. Code, § 2699.3, subd. (a)(2)(C).)

Here, Hall alleges that on “October 26, 2023, [Hall] electronically filed a notice of claims of claims with the LWDA and sent a copy to Defendant by certified mail. Plaintiff has not received notice from the LWDA that it was exercising jurisdiction over the allegations set

² Hall briefly argues that because he alleges “he was constructively terminated” his experience was “typical of both employees who were terminated and those who were resigned.” (Opposition, p. 3:11-13.) Hall does not explain this argument further and provides no legal support.

forth in the notice. As of 65 days from date of electronic filing, all requirements for administrative exhaustion for bringing these PAGA claims will have been met.” (FAC, ¶ 83.)

Hall argues in his opposition brief that “[m]ultiple courts have found that bringing claims at the same time as giving notice to the LWDA does not provide grounds to dismiss the cause of action provided the LWDA takes no action within the statutory period—which is the case here.” (Opposition, p. 3:25-27.) According to Hall, “[t]here is no dispute that Plaintiff filed a notice with the LWDA that complied with the notice requirements under PAGA by notifying the LWDA of the statutory violations that Defendant is alleged to have committed. Nor is there a dispute that the LWDA did not take any further action to pursue those alleged violations within the 65-day period. As found by numerous District Courts, that is the end of the inquiry, and the PAGA claims survive.” (*Id.* at 4:21-25.)

Hall cites primarily federal law in support of Hall’s position. (See Opposition, pp. 3:25-4:20.) Hall correctly notes that lower federal courts within the Ninth Circuit have found that a plaintiff’s “failure to complete the 65 day exhaustion waiting period before filing Plaintiff’s PAGA claim does not bar adjudicating Plaintiff’s PAGA claim because exhaustion has subsequently occurred.” (*Magadia v. Wal-Mart Assocs.* (2018) 319 F.Supp.3d 1180, 1189.) In *Magadia*, the court “excused [plaintiff’s] failure to exhaust his administrative remedies before bringing [] suit” because the plaintiff “provided notice to Wal-Mart and the LWDA on October 4, 2016,” “Plaintiff was therefore permitted to file this action 65 days after providing notice on October 4, 2016” on “December 8, 2016,” plaintiff filed “the instant lawsuit on December 2, 2016,” and “LWDA has never provided Plaintiff with notice that the agency intends to investigate.” (*Id.* at pp. 1188-1189.)

Cepheid cites *Esparza v. Safeway* (2019) 36 Cal.App.5th 42 (*Esparza*). Cepheid relies on *Esparza* to argue that because “the notice requirement is part of PAGA, the statute’s overall remedial purpose does not allow courts to frustrate the Legislature’s choice to make it a condition precedent to suit.” (MPA, p. 7:9-11, quoting *Esparza, supra*, 36 Cal.App.5th at p. 61.) According to Cepheid, the purpose of PAGA “is not to promote private enforcement without regard to the LWDA. On the contrary, our Supreme Court has stated that PAGA’s ‘sole purpose is to vindicate [the LWDA’s] interest in enforcing the Labor Code.’” (*Id.* at p. 7:16-18, quoting *Esparza, supra*, 36 Cal.App.5th at p. 61.) Here, Cepheid argues that the LWDA “was given no opportunity to investigate the matter before Plaintiff filed suit, nor was Cepheid given the opportunity to cure any alleged violations,” and “these actions clearly frustrate the legislature’s choice in making such a waiting period a ‘condition precedent to suit.’” (*Id.* at p. 8:12-17.)

Cepheid attempts to distinguish *Magadia* and other federal cases cited by Hall by arguing these opinions ignore *Esparza*’s directive that courts cannot disregard PAGA’s mandate that the exhaustion requirements are a condition precedent to filing suit, these federal opinions are non-binding on this court, and the issue of exhaustion was raised “after a significant period had passed.” (MPA, pp. 8:18-9:7.) According to Cepheid, “where the issue of administrative exhaustion has been raised at the motion to dismiss stage and where LWDA letters are filed the same day as the complaints themselves, federal courts have granted motions to dismiss.” (*Id.* at p. 9:8-14, citing *Stagner v. Luxottica Retail North America, Inc.* (N.D. Cal. Aug. 22, 2011, Nos. C 11-02889 CW, C 11-03168 CW) 2011 LEXIS 93733, *18 (*Stagner*) [granting defendant’s motion to dismiss a PAGA claim where the plaintiff brought her PAGA

complaint the same day, despite the plaintiff's argument that " 'the passage of time has already mooted' the issue".)

The court agrees with Cepheid that Hall did not comply with the requisite procedural requirements. Labor Code section 2699.3, subdivision (a)(1) "requires the employee to give written notice of the alleged Labor Code violation to both the employer and the [LWDA], and the notice must describe facts and theories supporting the violation. [Citation.]" (*Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 835 (*Brown*).) Then, " '[i]f the agency notifies the employee and the employer that it does not intend to investigate . . . , or if the agency fails to respond within [65] days, the employee may then bring a civil action against the employer.' [Citation.]" (*Ibid.*) "If the plaintiff has an action pending, the plaintiff 'may as a matter of right amend an existing complaint to add a cause of action arising under [PAGA]' within 60 days. [Citation.]" (*Ibid.*) "Because the notice requirement is part of PAGA, the statute's overall remedial purpose does not allow courts to frustrate the Legislature's choice to make it a condition precedent to suit. [Citation.]" (*Esparza, supra*, 36 Cal.App.5th at p. 61.) Here, Hall did not comply with the Legislature's choice to make notice to the LWDA "a condition precedent to suit," nor did Hall follow the procedures discussed in Labor Code section 2699.3 by seeking to amend his complaint within 60 days to properly assert a PAGA cause of action.

The court can, however, permit Hall to amend his complaint to allege compliance with Labor Code section 2699.3. Under *Brown*, this would not violate the statute of limitations. In *Brown*, the Court of Appeal stated that the relation back doctrine could not "be used to frustrate the intent of the Legislature to require compliance with administrative procedures as a condition to filing an action. [Citation.]" (*Brown, supra*, 28 Cal.App.5th at pp. 841.) However, the facts and holdings in *Brown* suggest that Plaintiff's PAGA claim is not barred by the statute of limitations due to her filing of her initial complaint before the 65-day period had run and her failure to amend within the 60-day period provided for in Labor Code section 2699.3, subdivision (a)(2)(C).

In *Brown*, on October 12, 2009, the plaintiff filed with the LWDA a notice of alleged Labor Code violations, including alleged violations of Labor Code section 226. (*Id.* at p. 830.) Two days later, plaintiff filed a class action and PAGA representative action against defendants, alleging Labor Code violations that included Labor Code section 226. (*Ibid.*) On November 30, 2009, plaintiff filed a first amended complaint adding an allegation that she had satisfied the administrative prerequisites required by Labor Code section 2699.3, subdivision (a). (*Ibid.*) On September 21, 2012, plaintiff moved to file a second amended complaint including the PAGA claims for violations under Labor Code section 226, along with adding new PAGA claims. (*Id.* at p. 831.) On March 24, 2016, plaintiff sent two letters to the LWDA (and defendants) alleging in more detail violations of the Labor Code in response to a motion for judgment on the pleadings filed by defendants in January 2016, wherein defendants argued the notice sent by plaintiffs to the LWDA in 2009 was inadequate as to the new allegations in the second amended complaint. (*Id.* at p. 832.) On March 25, 2016, plaintiff filed a third amended complaint, and defendants filed a demurrer, arguing the notices sent in 2016 were "too late and the PAGA claims were time-barred." (*Id.* at p. 833.) The court concluded that the original notice sent to the LWDA that included alleged violations of Labor Code section 226 "was adequate as to the alleged violations of [Labor Code section 226]" made in later amended complaints. (*Id.* at pp. 841-842.) The court otherwise remanded to the trial court the

decision as to whether newly alleged violations in the later amended complaints sufficiently related to the adequately noticed allegations. (*Ibid.*)

Here, Hall filed the complaint and the LWDA notice at the same time. In the initial complaint Hall alleged “[o]n October 26, 2023, Plaintiff electronically filed a notice of claims with the LWDA and sent a copy to Defendant by certified mail. Plaintiff has not received notice from the LWDA that it was exercising jurisdiction over the allegations set forth in the notice. As of 65 days from date of electronic filing, all requirements for administrative exhaustion for bringing these PAGA claims will have been met.” (Complaint, ¶ 81.) Similarly, in the FAC Hall alleges “[o]n October 26, 2023, Plaintiff electronically filed a notice of claims with the LWDA and sent a copy to Defendant by certified mail. Plaintiff has not received notice from the LWDA that it was exercising jurisdiction over the allegations set forth in the notice. As of 65 days from date of electronic filing, all requirements for administrative exhaustion for bringing these PAGA claims *will have been met.*” (FAC, ¶ 83, emphasis added.) The statute of limitations for PAGA claims is one year, in addition to 65 days of tolling. (See Lab. Code, § 2699.3, subd. (a)(2)(A); Code Civ. Proc., § 340, subd. (a).) Here, “[c]omplainant alleges that on or about January 23, 2023, respondent took the following adverse actions . . . complainant was discriminated against . . . and as a result of the discrimination was terminated . . .” (FAC, Ex. B, p. 1:23-25.) As such, Hall had until January 23, 2023, plus 65 days of tolling, to amend the FAC to allege compliance with PAGA. Nevertheless, the court finds that permitting Hall to amend the FAC to properly allege compliance with Labor Code section 2699.3 as to the PAGA allegations included in the complaint and noticed to the LWDA comports with the holding of *Brown*, as Hall alleged he has sent notice to the LWDA and Cepheid, the LWDA seemingly did not act, and the notice Hall sent to the LWDA and complaint discuss the PAGA allegations at issue. (See FAC, ¶ 83; Opp. p. 6:11-13.)³

For the reasons stated above, the court SUSTAINS Cepheid’s demurrer as to the eighth cause of action with 20 days’ leave to amend to allege proper compliance with the requirements of Labor Code section 2699.3.

III. Conclusion

The court GRANTS Cepheid’s motion to strike portions of the seventh cause of action that refer to Labor Code section 201 with 20 days’ leave to amend. The court SUSTAINS Cepheid’s demurrer as to the eighth cause of action with 20 days’ leave to amend. In light of this conclusion, Cepheid’s demurrer to the seventh cause of action is moot.

³ *Esparza*, on which Cepheid relies, is distinguishable in that the court found that plaintiff brought an untimely PAGA claim because the plaintiff asserted a PAGA cause of action for the first time in an amended complaint filed well after the statute of limitations on plaintiff’s PAGA claim had expired. (*Esparza*, *supra*, 36 Cal.App.5th at pp. 60-65.) In *Esparza*, appellants served the LWDA with a notice letter over a year after the statute of limitations had run and, seven months after sending this notice letter, filed a second amended complaint adding, for the first time, a PAGA cause of action. (*Id.* at p. 48.)

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.sccscourt.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: *Temujin Labs, Inc., et al. v. Abittan, et al.*

Case Number: 20CV372622 (related case: 21CV375422)

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

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

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

Cross-Complainants moved for terminating sanctions against Ms. Chao and Mr. Ding. Specifically, Cross-Complainants requested a Court order striking Ms. Chao and Mr. Ding’s complaint and answer to the Cross-Complaint, entering a default judgment against Ms. Chao and Mr. Ding, and setting a prove up hearing, based on their willful violation of Court orders. A prove-up hearing was conducted by the Court on January 8, 2024, and default judgments were subsequently entered in favor of Mr. Abittan and Messrs. Lu and Fisch on their Cross-Complaints against Ms. Chao and Mr. Ding.

Now before the Court is Messrs. Fisch and Lu’s motion for leave to file a first amended cross-complaint (“FACC”). Their motion, which was filed on September 13, 2024, seeks to plead the following: 1) an additional Cross-Defendant, Temujin Cayman; 2) additional Racketeer Influenced and Corrupt Organizations (“RICO”) claims against proposed Cross-Defendant Temujin Cayman and existing Cross-Defendant Temujin DE; and 3) additional allegations showing that Ms. Chao and Mr. Ding control Temujin, and are alter egos of Temujin. The motion is unopposed. Messrs. Fisch and Lu filed a reply on October 2, 2024, explaining that the motion is unopposed because Temujin does not object to the amendment. As discussed below, the motion is GRANTED.

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

I. Motion for Leave to File FACC

Messrs. Fisch and Lu move for leave to file a proposed FACC against Temujin (filed in docket number 20CV372622) that asserts causes of action for:

- (1) Fraudulent Inducement;
- (2) Fraud;
- (3) Breach of Contract;
- (4) Breach of the Implied Covenant of Good Faith and Fair Dealing;
- (5) Defamation;
- (6) Tortious Interference with Prospective Economic Advantage;
- (7) RICO Violation (18 U.S.C. § 1962, subd. (c)); and
- (8) Conspiracy to Commit RICO Violation (18 U.S.C. § 1962, subd. (d).)

A. Legal Standard

Motions for leave to amend are directed to the discretion of the court. “The court *may*, in *furtherance of justice*, and *on any terms as may be proper*, allow a party to amend any pleading . . .” (Code Civ. Proc. § 473(a)(1), italics added.) The law generally favors amendments on the basis that cases should include all disputed matters between parties and be decided on their merits. As a general rule, courts liberally allow amendments. (See *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 939.) Indeed, “[i]f the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion.” (*Morgan v. Super. Ct.* (1959) 172 Cal.App.2d 527, 530 (*Morgan*).) The court does not abuse its discretion by denying leave to amend where the facts stated do not constitute a cause of action. (See *IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 654.)

A motion to amend filed before trial must (1) include a copy of the proposed amended pleading, (2) state what allegations in the previous pleading are proposed to be deleted, and (3) state what allegations are proposed to be added to the previous pleading. (Cal. Rules of Court, rule 3.1324(a).) The motion must also include a separate declaration that explains “(1) The effect of the amendment; (2) Why the 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.” (Cal. Rules of Court, rule 3.1324(b).)

B. Analysis

As noted above, Messrs. Fisch and Lu seek leave to file an FACC that will include additional: 1) factual details, 2) Cross-Defendants, and 3) RICO claims against Temujin. Specifically, Cross-Complainants seek to include “factual allegations showing that [Temujin Parties] control Temujin, conspired with Temujin, and are alter egos of Temujin,” and to make

additions to Cross-Complainants' prayer for relief based on the newly proposed causes of action (See Defendants' and Cross-Complainants' Memorandum of Points and Authorities in Support of Motion for Leave to File Their FACC ("Amend Mot.,")) pp. 4:18-23-5:14-20.).

Messrs. Fisch and Lu contend that their motion should be granted for the following reasons: 1) Cross-Complainants "have obtained further information" regarding Temujin subsequent to filing their cross-complaint, 2) they have acted with due diligence, 2) discovery is still proceeding, 3) the trial date is still not set, 4) the proposed FACC include additional allegations and causes of action that are "similar to the other allegations against Cross-Defendants, including those brought by Abittan"; and 4) any prejudice to Cross-Defendants is minimal, at most. (Amend Mot., pp. 1:4-7; 2:7-16; 6:11-15.) Notably, Cross-Complainants point out that Cross-Defendant Abittan has already alleged RICO claims against Temujin. (Amend Mot., p. 6:13-15.) As a result, Cross-Complainants contend Temujin cannot claim "unfair surprise" by Messrs. Fisch and Lu in amending their complaint. (*Ibid.*) Finally, in light of the reasons outlined above, Cross-Complainants argue that this motion has not been filed under "rare circumstances" that would justify a denial, and Cross-Defendants are aware of the "factual underpinnings" of the new allegations. (Amend Mot., p. 7:4-10.)

Here, Messrs. Fisch and Lu have provided a proposed FACC, a redlined copy showing the changes to be made, and a declaration outlining why the amendments are "necessary and proper," among other things. (Cal. Rules of Court, rule 3.1324(b).) The motion is also unopposed. Notably, the parties are engaged in discovery and no trial date has been set. Accordingly, the Court finds that no prejudice will result because Temujin does not object to the amendment.

In the absence of any clear prejudice to Temujin, and in light of the strong judicial policy favoring amendment such that denial is *rarely* justified, the Court GRANTS Messrs. Fisch and Lu's motion for leave to amend. (*Morgan, supra*, 172 Cal.App.2d at p. 530 ["[I]t is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion"].)

II. CONCLUSION

Cross-Complainants' motion for leave to file the FACC is GRANTED.

This Court will prepare the final 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.sccscourt.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 (including Calendar Lines 6 & 7)

Case Name: *Trace3, LLC v. Sycomp, A Technology Company, Inc., et al.*

Case Number: 23CV415833

This is a trade secret misappropriation action brought pursuant to the California Uniform Trade Secrets Act. Plaintiff Trace3, LLC (“Trace 3”) seeks statutory damages and injunctions against corporate Defendant Sycomp a Technology Company, Inc. (“Sycomp”) and individual Defendants Timothy Cordell, Geoffrey Peterson, Devin Tomcik, and John Barnes (collectively, the “Individual Defendants”). Trace3 alleges that the Individual Defendants, all of whom are former Trace3 employees, joined Sycomp, a competitor, after abusing and exploiting their privileged access to Trace3’s computer networks and devices to misappropriate Trace3’s trade secret and confidential information to the benefit of Sycomp.

Trace3 filed the operative second amended complaint (“SAC”) on March 1, 2024, asserting the following causes of action: (1) violation of the California Uniform Trade Secrets Act (“CUTSA” or the “Act”); (2) breach of contract (against the Individual Defendants); (3) breach of implied covenant of good faith and fair dealing (against the Individual Defendants); (4) violation of Comprehensive Computer Data Access and Fraud Act (Penal Code § 504); (5) breach of fiduciary duty; (6) violation of Business & Professions Code § 17200; (7) intentional interference with contract; (8) intentional interference with prospective economic advantage; (9) negligent interference with prospective economic opportunity; (10) taking/receiving stolen property in violation of Penal Code § 496. However, on August 26, 2024, the court filed its order sustaining Sycomp’s demurrer to the fourth, fifth, sixth, seventh, eighth, ninth and tenth causes of action without leave to amend; sustaining without leave to amend the Individual Defendants’ demurrer to the third, fourth, fifth, sixth, seventh, eighth, ninth and tenth causes of action; and sustaining without leave to amend the Individual Defendants’ demurrer to the second cause of action as to Mr. Barnes only.

Currently before the Court are (1) Sycomp’s motion to compel further responses, (2) Trace3’s motion to compel further responses, and (3) Trace 3’s eighth and eleventh motions to seal. All motions are opposed.

I. DISCOVERY MOTIONS

A. Legal Background

i. Motion to Compel Further Responses to Interrogatories

A responding party must provide non-evasive answers to interrogatories that are “as complete and straightforward...to the extent possible,” and, if after a reasonable and good faith effort to obtain the information they still cannot respond fully to an interrogatory, the responding party must so state in its response. (Code Civ. Proc., § 2030.220.)¹ If the responding party provides incomplete or evasive answers, or objections without merit, the propounding party’s remedy is to seek a court order compelling a further response to the interrogatories. (§ 2030.300.)

¹ All further undesignated statutory references are to the Code of Civil Procedure.

ii. Motion to Compel Further Responses to Requests for Admission

Section 2033.220 provides, “(a) Each answer in a response to requests for admission shall be as complete and straightforward as the information reasonably available to the responding party permits. [¶] (b) Each answer shall: [¶] (1) Admit so much of the matter involved in the request as is true, either as expressed in the request itself or as reasonably and clearly qualified by the responding party. [¶] (2) Deny so much of the matter involved in the request as is untrue. [¶] (3) Specify so much of the matter involved in the request as to the truth of which the responding party lacks sufficient information or knowledge. [¶] (c) If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for admission, that party shall state in the answer that a reasonable inquiry concerning the matter in the particular request has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter.”

Section 2033.290, subdivision (a) provides, “On receipt of a response to requests for admissions, the party requesting admissions may move for an order compelling a further response if that party deems that either or both of the following apply: [¶] (1) An answer to a particular request is evasive or incomplete. [¶] (2) An objection to a particular request is without merit or too general.”

iii. Motion to Compel Further Responses to Requests for Production

A responding party 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. (§ 2031.210.) Additionally, section 2031.230 requires that a representation of an inability to comply with the particular demand for inspection must also “affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with the demand.” If a party demanding a response to an inspection demand deems: (1) a statement of compliance with the demand is incomplete; (2) a representation of inability to comply is inadequate, incomplete, or evasive; or (3) an objection in the response is without merit or too general, that party may move for an order compelling further response to the demand. (§ 2031.310, subd. (a).)

In general, a motion for an order compelling further responses to requests for production of documents “shall set forth specific facts showing good cause justifying the discovery sought by the inspection demand.” (§ 2031.310, subd. (b)(1).) In order to establish good cause, the burden is on the moving party to show relevance to the subject matter and specific facts justifying the discovery. (See *Glenfed Develop. Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117.) Once a showing of good cause is made, the burden shifts to the opposing party to justify his or her objections. (See *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.)

B. Sycomp’s Motion to Compel Further Responses

Sycomp moves to compel Trace3 to provide further responses, without objection, to (1) its special and form interrogatories, set two, in its entirety; (2) requests for admission Nos. 36, 39, and 42 in its second set of requests for admission; and (3) its special and form interrogatories and requests for admission, set three, in its entirety. It also moves to compel

production of documents it alleges Trace3 has improperly withheld in violation of the court's January 30, 2024 order granting in part Sycomp's motion to compel expedited discovery.

i. Failure to Request an Informal Discovery Conference

Trace3 argues that Sycomp filed this motion in a rushed manner without requesting an informal discovery conference ("IDC"). Sycomp contends that the issues raised in this motion are similar to those that have already been addressed at the parties' March 29, 2024 IDC. Sycomp provides an email in which its counsel informed the court's Complex Litigation Coordinator that Sycomp would like to expand the scope of the March 29, 2024 IDC to include "Sycomp's Special Interrogatories, Requests for Admission, and Form Interrogatories, Set Two, and Special Interrogatories, Set Three." (See Declaration of Jeanette Barzelay in Support of Sycomp's Motion to Compel, Ex. 6.) Because the parties attended an IDC involving many of the discovery requests currently at issue in Sycomp's second set of discovery requests and because Trace3 does not explain how a further IDC would be fruitful, the court will not require an additional IDC as to Sycomp's second set of discovery requests. However, as will be discussed further below, the court finds that an IDC is warranted as to the third set of discovery requests and the privilege issues raised in connection with the 22 emails Sycomp alleges should have been produced pursuant to the court's January 30, 2024 order.

ii. Sycomp's Second Set of Requests for Admission and Interrogatories

Sycomp seeks further responses to its requests for admission ("RFAs") 36, 39, and 42 and its form interrogatory ("FI") 17.1 as it relates to RFAs 36 through 45.

RFAs 36, 39, and 42 request that Trace3 admit that the information contained in certain "hash values" is not Trace3's personal property. In Trace3's initial responses to all three RFAs, Trace3 asserted that it is an entity and not a person and, therefore, it cannot own personal property. It also indicated that it lacked sufficient information to admit or deny the RFAs because the hash values identified by Sycomp were contained in multiple files and, therefore, Trace3 could not determine which iteration of the hash values the RFAs referred to without further information. On that basis, it denied each RFA. In its supplemental responses, Trace3 argued that the phrase "personal property" was vague and ambiguous due to the fact that Trace3 is a company and it would interpret the phrase to refer to "Trace3's property". It still denied each RFA.

Sycomp argues that Trace3 has "rewritten" the RFAs by interpreting the RFAs to speak to Trace3's "property" rather than its "personal property". It states that, during meet and confer, it clarified that personal property meant any property other than real property. It argues that, in denying the RFAs at issue, Trace3 must be interpreting its "property" to mean anything it possesses rather than something it owns. Sycomp contends it is requesting an admission as to whether Trace3 owns the content such that it is not public or owned by someone else and that Trace3 cannot seriously maintain that it owns content that is marked as confidential information belonging to another entity.

Trace3 argues that it is the information contained in the hash values that is confidential information. It explains that the hash values correspond to data embedded or incorporated into various files, including emails, client documents, and Trace3 system files.

The court agrees with Trace3 that the meaning of personal property in this context is ambiguous.

Notably, Sycomp did not explain in meet and confer that the meaning of personal property included the right to possess the property such that it is not public or did not belong to others. Further, the explanation, provided in meet and confer, that personal property is any property other than real property does not provide sufficient clarification as it simply recognizes the indisputable distinction that the information contained in the hash values would not be real property.

The court notes that some of Sycomp's other RFAs already asked Trace3 to admit that information contained in certain hash values were not its confidential information or trade secrets, suggesting that Sycomp had already asked about items Trace3 asserted were secret or exclusive. Trace3 explains that, while the individual components of an item it contends to be a protected trade secrets may themselves be available elsewhere, the compilation of the whole may still qualify as a trade secret. (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 47 ["even if some or all of the elements of Altavion's design were in the public domain and thus unprotectable, the combination was a protectable trade secret if it was secret and had independent economic value"].) In this context, it was not clear that the RFAs regarding whether the information contained in certain hash values were Trace3's personal property were targeted at discovering whether Trace3 contended that the information was its exclusive property.

Additionally, in this context, Trace3's argument that it is not clear what iteration of the information contained in the hash values is also well taken. Sycomp contends that the hash values necessarily identify the same content regardless of where the content is located. But, if that content is located within a document or other item that Trace3 alleges is a protected trade secret, it was reasonable for Trace3 to deny the RFAs at issue even if the specific information itself is a logo or file belonging to another company.

The motion is DENIED to the extent it seeks further responses to RFAs 36, 39, and 42.

Sycomp also seeks further response to its FI 17.1 as it relates to RFAs 36 through 45. Sycomp notes that, in addition to RFAs 36, 39, and 42, Trace3 also denied RFAs 37, 38, 40, 41, and 43 through 45. The motion must be denied to the extent it seeks further responses to FI 17.1 as it relates to RFAs 36 through 45. Sycomp's separate statement fails to comply with Rules of Court, rule 3.1345(c)(5), which provides, "If the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth[.]" Here, Sycomp has not set forth the text of RFAs 37, 38, 40, 41, and 43 through 45. It also has not set forth Trace3's responses to those same RFAs themselves, although it has provided the text of FI 17.1 as it relates to those RFAs. Further, Sycomp has not provided the text of these RFAs or responses in other documents filed with the instant motion. Without this information, the court cannot evaluate Trace3's responses to FI 17.1 as they relate to those RFAs.

The motion is DENIED to the extent it seeks further responses to FI 17.1 as it relates to RFAs 37, 38, 40, 41, and 43 through 45.

As to FI 17.1 as it relates to RFAs 36, 39, and 42, the court has the text of the RFAs and responses. Sycomp takes issue with Trace3's responses to subpart (b) of FI 17.1, which asks for all facts on which the response to the RFA at issue is based. Trace3's initial responses to these RFAs indicated that it was unclear which iteration of the information contained in the hash values were referring to due to the number of files in which those hash values appeared.

Sycomp contends these responses are evasive and incomplete. It argues that Trace3 contends that the information at issue is its property but it states no facts in support of that contention. In light of the court's conclusion that RFAs 36, 39, and 42 are ambiguous as to the definition of personal property, the court finds that an additional response to FI 17.1 as it relates to those RFAs is not warranted.

The motion is DENIED to the extent it seeks further responses to FI 17.1 as it relates to RFAs 36, 39, and 42.

Sycomp further contends that Trace3 must provide further responses to special interrogatories ("SIs") 29 through 40, served in set two of its discovery requests. It asserts that these SIs ask if Trace3 contends that a company logo², .woff file, or file for the WHOOP Battery Pack, and any information contained in 210 hash value matches are Trace3's personal property, confidential information, or trade secret information.

SIs 29, 32, 35, and 38 suffer from the same issue identified above as to the definition of personal property. Trace3 objected on the ground that the definition of personal property was vague and ambiguous. Again, the court finds the phrase "personal property" to be ambiguous as it relates to the information contained in the hash values. Accordingly, the motion is DENIED to the extent it seeks further responses to SIs 29, 32, 35, and 38.

SIs 30, 33, 36, and 39 seek information regarding whether Trace3 contends that the logo, WHOOPs Battery Pack file, any .woff file, and any information contained in 210 hash value matches are Trace3's confidential information. SIs 31, 34, 37, and 40 seek information regarding whether Trace3 contends that the logo, WHOOPs Battery Pack file, any .woff file, and any information contained in 210 hash value matches are Trace3's trade secret.

In its response to SI 30, for example, Trace3 explained that it did not consider the company logo by itself to be its confidential information but that the company logo was present in documents identified in its Appendix A³ are confidential or trade secret material and that the logo appears on certain of those documents. It objected based on attorney-client privilege and work product privilege because it seeks "all facts" in support of the contention that the company logo is Trace3's confidential information. It also objected that the "request [was] overbroad, unduly burdensome, and vague in that it seeks information regarding 'any' [identified third-party company] logo without identifying any particular record or logo

² The specific company, which is not a party to this case, is identified in the parties' papers but the name of the company is redacted.

³ Appendix A is a spreadsheet that includes the file name, hash value, and folder path of documents Trace3 alleges were wrongfully taken by the Individual Defendants before they left Trace3.

appearance, within any time frame, or otherwise limiting the request to the subject matter of this action.”

Sycomp contends that this response was incomplete and evasive in that it did not state all facts on which the response was based and that its objections are without merit. Trace3 does not attempt to justify its undue burden objections. Accordingly, they are waived. (See *Coy v. Super. Ct.* (1962) 58 Cal.2d 210, 220-221 [the burden is on the responding party to justify any objection].) With respect to its vagueness and overbreadth objections, it asserts that the requests are vague and overbroad because the requests are not tailored to this case. The court finds the vagueness and overbreadth objections to be without merit. The attorney-client and work product privilege objections are preserved. (See *Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1129 [“the court may not overrule a privilege objection unless it receives sufficient information to decide whether the objection has merit”].)

As to SIs 30 and 31, which relate to the company logo, the court finds that the responses are inappropriate. The request is asking about the company logo itself, not items or compilations that contain the company logo. Thus, if Trace3 does not claim that the logo is its confidential or trade secret information, as it states in the response, it should simply state that it does not assert that *the logo itself* is its confidential or trade secret information. Accordingly, the motion is GRANTED as to SIs 30 and 31. Trace3 is ordered to provide further responses to SIs 30 and 31 within 30 days of the date of the court’s order.

Trace3’s responses regarding the .woff files fare no better. Trace3 states that in response to SIs 33 and 34 that it does not contend that information contained in any .woff files are its confidential or trade secret information but that Appendix A list .woff files associated with its confidential and trade secret information. Again, SIs 33 and 34 are referring to the .woff files themselves. Accordingly, the motion is GRANTED as to SIs 33 and 34. Trace3’s privilege objections are preserved.

With respect to the SIs involving the WHOOP battery updater (SIs 36 and 37), Trace3 objected on the ground that “WHOOP battery updater” is not defined and that the interrogatory improperly included a hyperlink to a website explaining how to use a product, in violation of section 2030.060, subdivision (d), which states that “[e]ach interrogatory shall be full and complete in and of itself.” This argument, which Trace3 defends in its responsive separate statement is well taken. Accordingly, the motion is DENIED as to SIs 36 and 37.

SIs 39 and 40 asks that, if Trace3 contends that “any information in any of the files associated with the 210 unique MD5 hash values listed in Exhibit A” attached to the SIs is its confidential or trade secret information, it provide all facts in support of that contention. Trace3 designated part of its response as to both SIs 39 and 40 confidential. Without directly referring to the confidential material, the court understand the thrust of Trace’s response to be that information associated with the hash values are portions of files or emails that it contends are confidential or entitled to trade secret protections because they relate to work done for a former customer. The court finds that Trace3 has adequately stated facts supporting its position that some of the files are confidential or trade secret information. To the extent Sycomp argues that Trace3 must identify the files that are confidential or otherwise protected, the court rejects that argument as SIs 39 and 40 do not call for that information. The motion is DENIED as to SIs 39 and 40.

iii. Sycomp's Third Set of Interrogatories and Requests for Admission

Sycomp also seeks further responses to SI 41, RFAs 46 through 48 and FI 17.1 as it relates to RFAs 46 through 48, as propounded in its third set of discovery responses. Sycomp argues that these discovery requests seek information from Trace3 in support of its claims of spoliation.

SI 41, the only discovery response from the third set of discovery requests that Sycomp mentioned in its IDC brief filed March 27, 2024, states, "IDENTIFY all TRACE3 DOCUMENTS – excluding duplicate copies – that YOU contend are no longer in YOUR possession, custody, or control." "TRACE3 DOCUMENTS" is defined as documents, files, or records that Trace3 identifies as confidential or trade secret information and that Trace3 contends were provided to Sycomp by certain named individuals.

Trace3 objected on the ground that SI 41 is overbroad as worded because it could refer to any document that Trace3 lost access to at any time and for any reason. This objection is well-taken. Although the definition of "TRACE3 DOCUMENTS" is limited, the interrogatory does not limit the requests to documents that Trace3 no longer has access to as a result of the spoliation conduct *alleged in this case*. The motion is DENIED with respect to SI 41.

Sycomp also requests further responses as to RFA 46 through 48. These RFAs request that Trace3 admit that it inspected devices returned to it by certain former employees after their departure (RFA 46), that that examination revealed that no information was transmitted to Sycomp by those former employees from those devices (RFA 47), and that examination of those devices did not reveal that data from those devices was used by Sycomp.

Sycomp did not submit these issues to an IDC. Although it did mention to the Complex Litigation Coordinator that it wanted to add the issue of the adequacy of Trace3's responses to set three of its discovery requests, its March 27, 2024 IDC brief only mentioned SI 41. Accordingly, the court finds the motion premature to the extent it relates to RFAs 46 through 48 and FI 17.1 as it relates to those RFAs. The court orders Sycomp and Trace3 to attend an IDC. Thereafter, should the issues not be resolved, Sycomp may renew its motion to compel relating to RFAs 46 through 48 and FI 17.1 (as it relates to those RFAs).

iv. The Court's January 30, 2024 Order

Sycomp contends that the court (Hon. Sunil Kulkarni), in its January 30, 2024 order granted Sycomp's motion to compel further responses to some of its special interrogatories, set one, and form interrogatory 17.1 It asserts that Trace3 was required to provide nonprivileged, responsive documents by April 1, 2024. However, it maintains that Trace3 failed to disclose 22 emails on the subject of Sycomp's alleged "raiding" of Trace3's employees that Trace3 disclosed on a March 29, 2024 supplemental privilege log. It argues that these emails are not subject to the attorney-client privilege because Trace3 relied on only the attorney work product privilege in withholding these same emails in the Arizona action involving the two parties.⁴ It

⁴ Sycomp contends that the parties agreed that discovery served in the Arizona action has been deemed served in the instant case. It argues that Trace3 served a privilege log in the Arizona action on September 18, 2023 and that Trace3 agreed that this privilege log was deemed served in this action. It maintains that that privilege log listed these same emails and

asserts that, by failing to claim the privilege in the Arizona action, it has waived the attorney client privilege pursuant to Evidence Code section 912, subdivision (a), which provides that “failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege” can be seen as waiver of the privilege.

Trace3 asserts that, since the motion was filed, it has produced more narrowly redacted copies of 16 of the 22 email strings at issue and, thus, the majority of the motion as it relates to the January 30, 2024 order is moot. With respect to the remaining strings, it contends that these discuss its litigation strategy and, in one case, its implementation of a legal hold, and that they are core work product and protected by the attorney client privilege. Trace3 also contends that the court (Hon. Kulkarni) filed a supplemental order on February 1, 2024 allowing it to withhold documents it would have otherwise produced in response to the court’s January 30, 2024 order on the basis of privilege. It argues that it complied with that order by producing a privilege log listing the emails. Trace3 provides some example emails as Exhibits 5 and 6 to the Declaration of Nicole S. Phillips in Support of Trace3’s Opposition.⁵

In reply, Sycomp maintains that the motion is not moot because Trace3 produced only redacted copies of the 16 email chains and it did not defend its redactions.

As the parties’ acknowledge, the court’s Complex Civil Guidelines provides that no discovery motion may be filed until the parties have met with the court for an IDC. Notably, Sycomp’s IDC brief, filed March 27, 2024, only mentioned one email it contended was not privileged and should have been produced in response to the court’s January 30, 2024 order. Trace3’s IDC brief, also filed March 27, 2024, did not mention the privilege issue with the 22 emails at all. The parties’ briefing on this motion makes clear that the issues surrounding Trace3’s privilege invocations are complex and require more focused attention.

Sycomp’s motion is denied as premature to the extent it seeks disclosure of the 22 emails. The court orders Sycomp and Trace3 to attend an IDC. Thereafter, should the issues not be resolved, Sycomp may renew its motion to compel relating to the 22 emails at issue.

In the meantime, Sycomp and Trace3 are ordered to continue to meet and confer regarding the privilege issues related to the 22 emails. Trace3 is ordered to provide a supplemental privilege log, within 30 days of the court’s order, that identifies which specific communications within the email chains are subject to the attorney client or work product privileges, identifies the attorney(s) involved in those specific communications, and the entity, entities, or individuals represented by the attorney(s) at the time the communications were made.

asserted only the work product privilege and not the attorney-client privilege. (See Sycomp’s Memorandum of Points and Authorities in Support of Motion to Compel, pp. 9:3-10:13.) The Arizona action has since been dismissed.

⁵ Notably, it is not clear from the example email chains that there is at least one attorney involved in the communications. Trace3 explains that it only included “the to/from/cc on the top email on the chain in its privilege log” but the emails that include attorneys are further down in the chain. (Opposition to Sycomp’s Motion to Compel at p. 10:6-7.)

v. The Parties' Requests for Sanctions

Sycomp requests sanctions pursuant to sections 2023.030, subdivision (a), 2030.290, subdivision (c), and 2033.290, subdivision (d) in the amount of \$32,157. It asserts that Trace3 violated the Court's January 30 order, and lacks justification in failing to provide complete and straightforward responses.

Trace3 also requests sanctions in the amount of \$24,352.50 under sections 2023.010, subdivision (i), 2023.020, and 2023.050, subdivision (a)(3). It maintains that Sycomp filed the motion prematurely without requesting an IDC or adequately meeting and conferring.

As both parties have had some success as it relates to this motion, the court finds that sanctions are not warranted as to either party. Both parties' requests for sanctions are DENIED.

vi. Conclusion

Sycomp's motion is DENIED as to RFAs 36, 39, and 42. The motion is DENIED to the extent it as to FI 17.1 as it relates to RFAs 36 through 45. The motion is DENIED as to SIs 29, 32, and 35 through 41.

Sycomp's motion is GRANTED as to SIs 30, 31, 33, and 34. Trace3 is ordered to provide further responses to SIs 30, 31, 33, and 34 within 30 days of the date of the court's order.

Sycomp's motion is DENIED WITHOUT PREJUDICE as premature to the extent it seeks further responses to RFAs 46 through 48 and FI 17.1 as it relates to those RFAs and as it relates to disclosure of the 22 emails Sycomp contends Trace3 should have produced in connection with the court's January 30, 2024 order. The court orders the Sycomp and Trace3 to contact the Complex Litigation Coordinator to schedule an IDC with respect to these issues. In the meantime, the parties are ordered to continue to meet and confer and Trace3 is ordered to provide a supplemental privilege log as to the 22 emails as discussed above.

Both parties' requests for sanctions are DENIED.

V. Trace3's Motion to Compel Further Responses

Trace3 seeks further responses to its requests for production ("RFPs") 58 through 89 and its SIs 29 through 47, which were contained in sets three through five of its discovery requests. The court will find that the parties have not adequately met and conferred as to the issues raised in this motion. Notably, the discovery requests remaining at issue still number approximately 50. Both Sycomp and Trace3 fault the other for their inadequate meet and confer efforts. Thus, the motion is DENIED as premature. Below, the court will provide some guidance as to its current stance on the issues raised in the motion and order the parties to further meet and confer and then schedule an additional IDC as to the issues raised in this motion.⁶ The court orders both parties to make sincere, good faith efforts to narrow the issues

⁶ The court acknowledges that the parties attended an IDC on March 29, 2024 at which these issues were raised. The court ultimately ordered the parties to meet and confer. However, since that IDC, the court sustained Sycomp's demurrer as to many of the causes of action in its second

before seeking a ruling from the court. Thereafter, should the issues not be resolved, Trace3 may renew its motion to compel relating to these issues.

Before discussing the requests at issue, the court will discuss certain issues relevant to some, if not all, of the outstanding requests.

A. General Issues

In response to the discovery requests at issue, Sycomp contended that Trace3's section 2019.210 disclosure identifying its trade secrets was insufficient. The court finds that Trace3 has shown that the court previously found the disclosure sufficient and that challenges to the section 2019.210 should not be made in the form of an opposition to a motion to compel. In an order filed February 1, 2024, the court (Hon. Kulkarni) stated "the Court already has ruled that Trace3's amended trade secret disclosure satisfied Code of Civil Procedure section 2019.210, thus permitting discovery. (See 8/15/23 Order.)" (February 1, 2024 Order Concerning Two Discovery-Related Motions, p. 5:6-7.) The court also ruled, "If the Individual Defendants wish to challenge the most recent disclosure, they should not do so sub silentio through its opposition to Trace3's discovery motion." (*Id.* at p. 5:10-12.) As Sycomp correctly, points out, the August 15, 2023 order did confirm that Trace3 had made an additional disclosure. But, the court's February 1, 2024 order confirmed that the court did, in fact, find that the disclosure was sufficient to permit discovery. Notably, Sycomp does not explain in what way the section 2019.210 disclosure was insufficient. Further, Sycomp states that it did not withhold any information based on that objection and merely asserted it to preserve the issue. Sycomp provides no reason for the court to deviate from its prior rulings in the context of this motion.

Additionally, Sycomp has asserted that the discovery at issue is irrelevant because it has shown that it does not possess any of Trace3's trade secrets in the context of its motion for summary adjudication. Without speaking to the merits of the motion for summary adjudication, the court rejects this argument. The motion for summary adjudication has not yet been heard and discovery should not be limited to the hash value analysis Sycomp has conducted at this time as Trace3 expresses concerns with the limitations of the hash value analysis.⁷ The court is not inclined to find that the analysis Sycomp has previously conducted renders Trace3's requests at issue irrelevant. As Trace3 notes, "[A] party is entitled to seek discovery on its theory of the facts and the law, and is not limited in discovery by the opponent's theory." (*Big City Dynasty v. FP Holdings, L.P.* (D.Nev. 2020) 336 F.R.D. 507, 511.) For discovery purposes, information is "relevant to the subject matter" if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement thereof. (*Gonzalez v. Super. Ct.* (1995) 33 Cal.App.4th 1539, 1546.)

amended complaint without leave to amend. The court further notes that its guidance is based on the record as it stands at this time.

⁷ The court notes that Sycomp attempts to shoehorn the complex issues raised in its summary adjudication motion into its opposition to this discovery motion. At one point in its opposition, it directs the court to the entirety of its motion for summary adjudication in support of its argument. The court is not inclined to consider the entirety of the evidence submitted in support of the motion for summary adjudication in determining whether the items requested in this discovery motion are relevant.

Finally, in the motion itself, Trace3 asserted that it was entitled to seek discovery on its Penal Code claims (causes of action four and eight) but, as Sycomp points out, the court sustained a demurrer as to these claims on the ground that they were preempted by the California Uniform Trade Secrets Act (Civ. Code §§ 3426-3426.11) without leave to amend. In reply, Trace3 does not respond to this argument. Accordingly, it appears that it has withdrawn this argument.

B. The Seven Categories of Requests at Issue

Trace3 groups the requests at issue into seven categories:

1. File name search of Sycomp devices and systems for documents containing Trace3's trade secrets and confidential information as well as hash value analysis of Trace3's confidential information (RFPs 58-60, SI 29)
2. Provide the images of former Trace3 employees' Sycomp devices for forensic examination (RFP 61)
3. A SharePoint staging ground for which archived screenshots produced by Sycomp in this litigation show designated files and folders moved to Sycomp, and use dates for the site dating back to at least April 2023 (SIs 44-47, RFPs 82-89)
4. How Sycomp learned of opportunities and prepared quotes for customers for which it had never before provided RnR services days after Trace3 employees who stole hundreds of thousands of Trace3 files started working at Sycomp (SIs 35-37, 41)
5. Sycomp's relationship with customers Trace3 alleges it stole from Trace3 using Trace3 data (SI 3, 42-43; RFPs 69-74, 80-81)
6. Former Trace3 employee Cordell's work while employed by Trace3 with former Trace3 employee Barnes who had already moved to and was acting on behalf of Sycomp (SI 34; RFPs 64, 67, 76)
7. Trace3 former employees' use of Sycomp devices and email, including all instances of accessing Trace3 files from their Sycomp devices (SIs 30-32, 38-40; RFPs 62-63, 65-66, 68, 75-79)

1. Category 1

RFPs 58, 59, and 60 request all documents in Sycomp's possession, custody, or control that match any of the hash values for any document identified as confidential on Appendix A (RFP 58), that match any of the file names for any document identified in Trade Secret Category Nos. 1-4 on Appendix A (RFP 59), or that match any of the file names for any document identified as confidential on Appendix A (RFP 60). SI 29 asks Sycomp to identify any documents in its possession that match any of the hash values for any document identified as confidential on Appendix A.

Sycomp maintains that these requests are duplicative and irrelevant. It relies on section 2031.310, subdivision (g), which provides, in pertinent part, The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists: . . . (2) The discovery sought is unreasonably cumulative or duplicative. . . . (4) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues." The court

notes that Sycomp has produced a table at the end of its responsive separate statement comparing the discovery previously requested to the requests currently at issue. Although Trace3 urges the court not to consider the table, the court orders Trace3 to consider whether it can reduce the number of discovery requests at issue.

Trace3 contends that hash values are poor identifiers because the addition of a period or similar minimal change would cause the hash values for that information to be different and thus, the searches already conducted by Sycomp are insufficient. It asserts that, if one of its former employees had, for example, copied and pasted the information, it might result in a different hash value being assigned to the same information. Sycomp counters that it used search terms such as “T3”, “Trace3”, or the names of relevant customers. Because the trade secret data is tied to the relevant customer, it asserts that its searches would have revealed the relevant trade secret information even if copying and pasting had occurred. It contends that its searches revealed no trade secret information. As discussed above, the court has rejected the idea that the purported lack of evidence that Sycomp possesses Trace3 trade secret material renders the requests at issue irrelevant.

2. Category 2

RFP 61 requests that Sycomp produce a forensic examination of any and all Sycomp electronic devices used by former Trace3 employees.

Sycomp asserts that certain former Trace3 employees have already had their devices forensically imaged, including Cordell, Peterson, and Tomcik, as well as a former defendant, Lilian Elias. Trace3 contends that Sycomp only searched Tomcik’s device for the purposes of its motion for summary judgment and that it should not have to take Sycomp’s word as to results of that search. It also contends that it has reason to believe that Cordell used a Sycomp device to access and delete Trace3’s documents after receiving cease and desist and preservation letters. It contends that forensic examination is necessary to determine whether a USB device, which Tomcik admitted destroying, was inserted into the former employees’ devices.

It appears to the court a full forensic examination of the devices of all 11 former employees’ devices on these grounds may not be necessary. The court questions whether there is a need for examination of all former employees’ devices and, if Trace3 is solely concerned with the possibility that the destroyed USB device was inserted into one of the Sycomp devices, whether the burden of the forensic examinations requested can be limited to searches that would produce evidence of insertion of that USB device.

3. Category 3

The third category of requests (SIs 44-47, RFPs 82-89) relate to a Sharepoint site Trace3 contends Sycomp set up in April 2023 with folders for several Trace3 customers for whom Sycomp had never done RnR work in the US previously.

Sycomp objected to these requests on the grounds that the requests were overbroad, irrelevant, burdensome, harassing, and duplicative of prior requests. Although Sycomp contends that these requests are duplicative, it does not explain how they are duplicative. It

points the court to no other discovery requests seeking the same or similar information. Thus, the court would be inclined to overrule the duplicative objection.

Sycomp contends that it has already produced some 500 documents related to the Sharepoint site. It also contends that its searches would have revealed whether any trade secrets were present in the Sharepoint site. Trace3 counters that the 500 documents already produced were cherry picked by Sycomp and that Sycomp did not produce information such as the file/folder structure, file history, user dates, which Trace3 contends are directly relevant to its claims that Sycomp used this site as a landing page for the Individual Defendants to store Trace3's stolen information. The court would be inclined to find this information relevant.

4. Categories 4 and 5

The requests in category 4 (SIs 35-37, 41) seek information regarding how Sycomp learned of opportunities and prepared quotes for new customers days after Trace3 employees who allegedly stole hundreds of thousands of Trace3 files started working at Sycomp. The requests in category 5 seek information regarding Sycomp's relationship with customers Trace3 alleges it stole from Trace3 using Trace3 data (SI 3, 42-43; RFPs 69-74, 80-81).

Sycomp argues that, to the extent the requests seek discovery regarding allegedly confidential material that does not rise to the level of a trade secret, Trace3's claims are preempted under the California Uniform Trade Secrets Act. The court found in response to Sycomp's demurrer that all Trace3's non-trade secret causes of action are preempted. However, Trace3 contends that this information is relevant to its trade secret claim and its breach of contract claim asserted against the Individual Defendants. Trace3 has not sufficiently explained the relevance of the confidential information, as opposed to trade secret information, to the trade secret and breach of contract claims. The court wonders whether the discovery requests in these categories can be limited such that they are more narrowly tailored to the trade secret and breach of contract claims.

5. Category 6

The requests in category 6, concern Cordell's work while employed by Trace3 with former Barnes who had already moved to and Trace3 alleges was acting on behalf of Sycomp (SI 34; RFPs 64, 67, 76). Trace3 maintains that this information is sought to show evidence of Cordell and Barnes's conspiracy to misappropriate Trace3 data. Sycomp asserts that there is no good cause for these requests because Trace3 has not identified a trade secret that was misused by Cordell and Barnes. Because the court sustained Sycomp's demurrer without leave to amend after the instant discovery motion was filed, Trace3, Trace3's theory of how the alleged conspiracy between Cordell and Barnes to misappropriate Trace3's data appears to be inadequately fleshed out.

6. Category 7

In category 7, Trace3 seeks information regarding its former employees' use of Sycomp devices and email, including all instances of accessing Trace3 files from their Sycomp devices (SIs 30-32, 38-40; RFPs 62-63, 65-66, 68, 75-79). With respect to these requests, Sycomp contends that "[t]he salient issue is not when and how they gained access to their Sycomp devices and systems, but whether there is any evidence that any alleged Trace3 trade secrets

exist on those systems.” (Opposition at p. 16:17-19.) Trace3 argues that is entitled to evidence regarding when its former employees gained access to the Sycomp devices because they could have had access to Trace3 trade secrets and Sycomp devices at the same time, which would have made it easier for them to use Trace3 trade secrets for Sycomp’s benefit. In the context of those arguments, the court is inclined to find the requested information relevant. Not only would this information potentially show the former employees had the opportunity to use Trace3’s trade secrets improperly but could also potentially assist in narrowing the timeframe for any searches of the former employees’ Sycomp devices or discovery requests related to those devices.

C. Trace3’s Request for Sanctions

Trace3 requests sanctions in the amount of \$29,997. Because the motion has been denied, the request for sanctions is also DENIED. Sycomp does not make a request for sanctions in connection with this motion.

D. Conclusion

Trace3’s motion to compel is DENIED WITHOUT PREJUDICE as premature. The parties are ordered to meet and confer sincerely and in good faith and then schedule an IDC as to the issues raised in the motion. Trace3’s request for sanctions is DENIED.

II. MOTIONS TO SEAL

A. Legal Background

“Unless confidentiality is required by law, court records are presumed to be open.” (Rules of Court, rule 2.550(c).) “A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties.” (Rules of Court, rule 2.551(a).) The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest. (Rules of Court, rule 2.550(d).)

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

Further, where some material within a document warrants sealing but other material does not, the document should be edited or redacted if possible, to accommodate the moving party’s overriding interest and the strong presumption in favor of public access. (See Rules of Court, rule 2.550(e)(1)(B); see also *In re Providian Credit Card Cases*, *supra*, 96 Cal.App.4th

at p. 309.) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*In re Providian Credit Card Cases*, *supra*, 96 Cal.App.4th at p. 309.)

Protection of alleged trade secrets and confidential information are overriding interests that can support a sealing request. (See *McGuan v. Endovascular Technologies, Inc.* (2010) 182 Cal.App.4th 974, 988; *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1281.) Civil Code section 3426.5 provides that “a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include ... sealing the records of the action ...” “ ‘Trade secret’ means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” (Civ. Code, § 3426.1, subd. (d), formatting altered.)

B. Trace3’s Eighth Motion and Eleventh Motions to Seal

Trace3 has filed an Eight and Eleventh motion to seal portions of documents filed in connection with Sycomp’s Motion for Summary Adjudication, filed March 27, 2024 and Trace3’s Ex Parte Application to Continue Hearing and Briefing Schedule on Sycomp’s Motion for Summary Adjudication and to Adjust The Case Schedule. Sycomp filed a single opposition to both motions to seal and Trace3 filed a single reply. Accordingly, the court will discuss the motions together.

In its Eighth Motion to Seal, Trace3 moves for an order sealing portions of documents filed in support of Sycomp’s Defendant’s Motion for Summary Adjudication, filed March 27, 2024, including specified portions of (1) Defendant’s Memorandum of Points and Authorities in Support of Sycomp’s Motion for Summary Adjudication; (2) Defendant’s Separate Statement of Undisputed Material Facts in Support of Sycomp’s Motion for Summary Adjudication; (3) Declaration of James D. Vaughn; (4) Declaration of James D. Vaughn, Exhibits C, F, and G; (5) Declaration of Brian Bartel; Declaration of Jeanette Barzelay; (6) Declaration of Jeanette Barzelay, Exhibits 14, 17, 18, 19, 20, 25, 26, 27, 28, and 29; (7) Declaration of Jeanette Barzelay, Exhibit 34 (Declaration of Rajiv Dharnidharka); and (8) Declaration of Jeanette Barzelay, Exhibit 34 (Declaration of Rajiv Dharnidharka, Exhibits 5, 6, and 7).⁸

In its Eleventh Motion to Seal, Trace3 seeks to seal Exhibits 7, 8, and 9 to the Declaration of Jeanette Barzelay in Opposition to Trace3’s Ex Parte Application to Continue Hearing and Briefing Schedule on Sycomp’s Motion for Summary Adjudication and to Adjust The Case Schedule. It asserts that Exhibit 7 is a deposition transcript of Sycomp’s Chief Operations Officer Neal Callahan, which has been designated confidential; Exhibit 8 is an email that contains confidential customer and vendor names and customer opportunities and has been designated highly confidential by Sycomp; and Exhibit 9 is Trace3’s notice of deposition for Sycomp’s person most knowledgeable, which also contains confidential customer and vendor names and customer opportunities and has been designated confidential.

⁸ Trace3 includes a chart specifying the exact portions of the documents to be sealed in its Memorandum of Points and Authorities in support of the motion at pages 11 through 13.

Trace3 contends that the portions of these documents they seek to seal “contain trade secret and/or competitively sensitive business information which would harm Plaintiff’s business interests if disclosed” and that the redacted portions of the documents contain “descriptions of Trace3 customer and vendor names, and non-public purchase and sales information and locations that has been marked as subject to the Parties’ Stipulated Protective Order and related to Trace3’s operations.” (Declaration of Nicole S. Phyllis in Support of Trace3 LLC’s Motion to File Under Seal, ¶¶ 9-10.) It also argues that the documents identify or refer to non-public customer opportunities, and other non-public, proprietary, and trade secret information.

Sycomp opposes both motions, contending that the court has already found that some of the information does not warrant sealing and that Trace3 itself has published some of the allegedly confidential material. Specifically, it asserts that Exhibit 14 to the Declaration of Jeanette Barzelay in support of Sycomp’s Motion for Summary Adjudication is Appendix A attached to Trace3’s operative August 7, 2023 Second Amended Trade Secret Identification Pursuant to Code of Civil Procedure § 2019.210. It asserts that the court (Hon. Kulkarni) has already denied Trace3’s prior request to seal Appendix A in its order filed November 7, 2023 concerning Trace3’s third motion to seal. The court notes that Trace3 is not currently seeking to seal the entirety of Exhibit 14; instead it seeks to redact specific portions of that document that include customer and vendor names and purchase and sale order numbers and locations. The court’s November 7, 2023 order makes clear that the motion sought to seal the entirety of what the parties then referred to as the TS/CI List. It specifically stated, “The Court concludes that Trace3, which bears the burden of proof for sealing, has not shown why every single entry on the TS/CI List should be sealed. And since Trace3 didn’t try to justify the sealing of specific entries, the Court DENIES Trace3’s motion to seal.” (November 7, 2023 Order Concerning: (1) Trace3’s Third Motion to Seal; and (2) Trace3’s Motion to Uphold Confidentiality Designations, p. 4:6-8.) Accordingly, the court finds that Trace3 is not precluded from seeking the narrow redactions it currently seeks.

Sycomp also objects to the sealing of the Exhibits F and G to Declaration of James D. Vaughn filed in connection with Sycomp’s motion for summary adjudication because the exhibits list file names that are largely innocuous and reflect non-trade secret material and therefore, Trace3 has not justified the sealing of these items. But, as with Appendix A, Trace3 seeks to redact only portions of Exhibits F and G to remove customer and vendor names. Accordingly, Sycomp’s argument that other, non-confidential files would be sealed is without merit.

Sycomp also reiterates its arguments made previously in connection with other motions to seal, that Trace3 cannot seek to seal its customers’ and vendors’ names because it routinely publishes the names of its customers and vendors. However, as explained in a prior order of the court, the court has already previously sealed some of Trace3’s customer and vendor names in this action and Sycomp has provided no reason for it to depart from this ruling here. (See August 7, 2023 Order Concerning: A) Plaintiff’s Motion to Modify TRO and Request for Expedited Discovery; B) Plaintiff’s Motion to Seal; and C) Plaintiff’s Motion to Compel Sycomp’s Discover Responses/Deposition, p. 2:24-3:1; January 30, 2024 Order Concerning: Two Motions to Seal by Trace3; and (2) Sycomp’s Motion to Compel Further Responses to Expedited Discovery, pp.17:15-18:17.) Trace3 also seeks to seal purchase and sales order

numbers, pricing, and technical information. It asserts that this information is “competition sensitive” and that it has taken measures to prevent disclosure of this information.

The court finds that the proposed redactions and sealings are minimal and narrowly tailored to protect Trace3’s confidential information.

Trace3’s Eighth and Eleventh Motions to Seal are GRANTED.

III. CONCLUSION

A. Sycomp’s Motion to Compel

Sycomp’s motion is DENIED as to RFAs 36, 39, and 42. The motion is DENIED to the extent it as to FI 17.1 as it relates to RFAs 36 through 45. The motion is DENIED as to SIs 29, 32, and 35 through 41.

Sycomp’s motion is GRANTED as to SIs 30, 31, 33, and 34. Trace3 is ordered to provide further responses to SIs 30, 31, 33, and 34 within 30 days of the date of the court’s order.

Sycomp’s motion is DENIED WITHOUT PREJUDICE as premature to the extent it seeks further responses to RFAs 46 through 48 and FI 17.1 as it relates to those RFAs and as it relates to disclosure of the 22 emails Sycomp contends Trace3 should have produced in connection with the court’s January 30, 2024 order. The court orders Sycomp and Trace3 to schedule an IDC with respect to these issues. In the meantime, the parties are ordered to continue to meet and confer and Trace3 is ordered to provide a supplemental privilege log as to the 22 emails as discussed above.

Both parties’ requests for sanctions are DENIED.

B. Trace3’s Motion to Compel

Trace3’s motion to compel is DENIED WITHOUT PREJUDICE as premature. The parties are ordered to meet and confer sincerely and in good faith and then schedule an IDC as to the issues raised in the motion. Trace3’s request for sanctions is DENIED.

C. Trace3’s Eighth and Eleventh Motions to Seal

Trace3’s Eighth and Eleventh Motions to Seal are 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.scsccourt.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:

Case No.:

- 00000 -

Calendar Line 6

Case Name:

Case No.:

- oo0oo -

Calendar Line 7

Case Name:

Case No.:

- oo0oo -

Calendar Line 8

Case Name:

Case No.:

- 00000 -

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 -