SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2170

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department7@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV395032	Nejat v. MTN Inc. Environmental Services, et al. (Class Action/PAGA)	See Line 1 for tentative ruling.
LINE 2	23CV425685	Plancarte v. Moreno & Associates, Inc. (Class Action)	See Line 2 for tentative ruling.
LINE 3	22CV407249	Treespring Investments, LP v. Rautner, et al.	See Line 3 for tentative ruling.
LINE 4	20CV369179	Hone Capital LLC, et al. v. Wu, et al. (Lead Case; Consolidated With 20CV369308)	On the court's own motion, this matter is continued to June 27, 2024, at 1:30 p.m.
LINE 5	20CV369179	Hone Capital LLC, et al. v. Wu, et al. (Lead Case; Consolidated With 20CV369308)	On the court's own motion, this matter is continued to June 27, 2024, at 1:30 p.m.
LINE 6	22CV399410	Rodriguez v. Balderas, et al. (Class Action)	See Line 6 for tentative ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Alexander Nejat v. MTN Inc. Environment Services, et al.*
Case No.: 22CV395032

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff Alexander Nejat alleges that Defendants MTN Inc. Environment Services and MES Inc. Mountain Environmental (collectively, "Defendants"), a construction company specializing in waterproofing and mitigation, failed to pay overtime and minimum wages, failed to provide compliant meal and rest periods or pay associated premiums, and failed to provide code-complaint wage statements, among other Labor Code violations.

Now before the Court is Plaintiff's motion for final approval of settlement, which is unopposed. As discussed below, the Court GRANTS Plaintiff's motion.

I. BACKGROUND

Plaintiff was employed as a general laborer by Defendants, a non-exempt, hourly position, from December 28, 2018 through March 9, 2021. He initiated this action with the filing of the operative complaint on March 7, 2022, asserting the following causes of action: (1) failure to pay minimum and overtime wages; (2) failure to provide meal periods or compensation in lieu thereof; (3) failure to provide rest periods or compensation on lieu thereof; (4) failure to provide accurate wage statements; (5) failure to pay wages upon ending employment; (6) violation of unfair competition law; and (7) violation of PAGA.

Plaintiff now weeks an order: finally certifying the settlement Class; finally appointing Alexander Nejat Orantes as Class representative for purposes of settlement; finally appointing Mehrdad Bokhour of Bokhour Law Group, P.C. and Jake Finkel of The Finkel Firm as Class counsel for purposes of settlement; finding the notice was properly provided in accordance with the Court's order granting preliminary approval; finally approving the settlement; binding participating Class Members to the terms of settlement, including the release specified therein; and retaining jurisdiction to enforce the settlement agreement.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

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

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

> and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

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

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

B. PAGA

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

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

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

III. SETTLEMENT CLASS

For settlement purposes only, Plaintiff requests the following class be certified:

> [A]ll current and former non-exempt employees who worked for any Defendant within the State of California at any time during the period of time between March 7, 2018 and August 11, 2023.

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

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

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

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

IV. TERMS AND ADMINISTATION OF SETTLEMENT

The non-reversionary gross settlement is $206,500. Attorney fees of up to $68,833.33 (one-third of the gross settlement), litigation costs and expenses of up to $15,000, and $5,000 in administrative costs will be paid from the gross settlement. $5,000 will be allocated to PAGA penalties, 75% of which ($3,750) will be paid to the LWDA, with the remaining $1,250 distributed to "Aggrieved Employees." Mr. Nejat will seek a service award of $7,500.

The net settlement, approximately $106,916.67, will be allocated to class members on a pro rata basis based on the number of weeks each member worked during the class period. The remaining 25% of the PAGA settlement amount will be distributed to aggrieved employees in the same manner except it will be based on the number of weeks worked during the PAGA period of August 13, 2020 through August 11, 2023. The average payment (including PAGA payments) will be approximately $1,233.18, and the highest payment is estimated to be $7,827.23. Class members will not be required to submit a claim to receive their payment. For tax purposes, settlement payments will be allocated 25% to wages, and 75% as interest and civil penalties from which no taxes will be withheld. Funds associated with the checks uncashed after 180 days will be donated to the State Bar of California- Justice Gap Fund.

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

> [A]ll claims, actions or causes of action alleged or that reasonably could have been alleged against [Defendants] arising out of the facts, circumstances and primary rights at issue in the operative Complaint and any amendments thereto during the Class Period, including all claims for: 1) failure to pay all minimum and overtime wages; 2) meal period violations; 3) rest period variations; 4) wage statement violations; 5) failure to timely pay wages during employment and upon separation of employment; and 6) Unfair Competition Law violations.

The PAGA release is similar, but in addition to the Complaint refers to claims arising out of the "facts, circumstances, and primary rights" at issue in the LWDA notices. Consistent with the statute, aggrieved employees will not be able to opt out of the PAGA portion of the settlement.

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

The notice period has now been completed. According to the declaration of a case manager with administrator CPT Group, Inc. ("CPT"), Laura Singh, submitted in support of the instant motion and dated April 22, 2024, CPT received data file from counsel containing the names and identifying information (including last known mailing address) for each class member and subsequently processed these items against the National Change of Address data base to confirm or update the relevant information. On January 3, 2024, Notice Packets were mailed via first class mail to the Class Members identified in the list received by CPT. As of the date of Ms. Singh's declaration, twelve Notice Packets have been returned to CPT, none of which included a forwarding address. CPT performed a skip trace on these returned packets and obtained nine updated addresses, which packets were promptly re-mailed. At present, three notices are undeliverable where no new addresses could be located. CPT has not received any requests for exclusion or objections to the settlement.

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

V. MOTION FOR ATTORNEYS FEES, COSTS AND INCENTIVE AWARD

As articulated above, Plaintiff's counsel seeks a fee award of $68,333.33, or one-third of the gross settlement, which is not an uncommon contingency fee allocation in a wage and hour class action. This award is facially reasonable under the "common fund" doctrine, which allows a party recovering a fund for the benefit of others to recover attorney fees from the fund itself. Plaintiff also provides a lodestar figure of $69,400, based on 108.5 hours at billing rates of $625 to $650 per hour, resulting in a negative multiplier.

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

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

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

Here, as the multiplier sought by Plaintiff's counsel is negative and the amount of fees requested is supported by the percentage cross-check, the Court finds the requested fee award is reasonable.

Plaintiff's counsel also seeks $15,000 in litigation costs, which is below the amount of costs ($16,360.05) actually incurred, and appears reasonable. The $5,000 in administrative costs are also approved.

Finally, Plaintiff requests a service award of $7,500.[1] To support his request, his counsel submits a declaration describing his efforts in the case. The Court finds that the class representative is entitled to such payment and that the amount requested is reasonable.

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[1] In his motion, Plaintiff refers to both $10,000 and $7,500 as service award amounts being sought by him. The Court believes the reference to $10,000 is a typographical error as the parties' settlement agreement limits the recoverable service award to $7,500 and this is the amount discussed in the Court's order granting preliminary approval.

VI. CONCLUSION

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

Plaintiff's motion for final approval is GRANTED. The following class is certified for settlement purposes only:

> [A]ll current and former non-exempt employees who worked for any Defendant within the State of California at any time during the period of time between March 7, 2018 and August 11, 2023.

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

The Court sets a compliance hearing for **February 13, 2025 at 2:30 P.M.** in Department 7. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted pursuant to Code of Civil Procedure section 384, subdivision (b); the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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

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Calendar Line 2

Case Name: *Maria Teresa Trovo Plancarte v. Moreno & Associates, Inc.*
Case Nos.: 23CV425685

This is a putative class action. Plaintiff Maria Teresa Trovo Plancarte alleges that Defendant Moreno & Associates, Inc. ("Defendant"), which provides building maintenance services, committed various Labor Code violations. Before the Court is Defendant's motion to compel arbitration and for a stay, which is opposed. As discussed below, the Court GRANTS Defendant's motion.

I. BACKGROUND

According to the allegations of the operative complaint ("Complaint"), Plaintiff was employed by Defendant as a janitor, an hourly-paid, non-exempt position, from approximately March 2023 through June 2023. (Complaint, ¶ 17.) She alleges that Defendant committed various Labor Code violations, including: requiring Plaintiff and the class members to work off-the-clock without compensation; failing to properly pay minimum wages, straight time/regular rate wages, and overtime wages for all hours worked; failing to provide all meal and rest breaks to which they were entitled and failing to pay meal and rest break premiums when due; failing to timely pay wages during employment and upon termination of employment; failing to provide accurate wage statements; failing to reimburse necessary business-related expenses; and failing to adhere to other related protections afforded by the California Labor Code and the applicable Industrial Welfare Commission Wage Order. (*Id*., ¶ 18.)

Based on the foregoing, Plaintiff initiated this action with the filing of the Complaint on November 9, 2023, asserting the following causes of action: (1) unpaid minimum wages; (2) unpaid overtime; (3) unpaid meal premiums; (4) unpaid rest period premiums; (5) wages not timely paid during employment; (6) failure to provide accurate wage statements; (7) untimely final wages; (8) failure to reimburse necessary business expenses; and (9) violation of Business & Professions Code § 17200, et seq.

On January 5, 2024, Plaintiff filed a separate action under the Private Attorneys General Act ("PAGA") against Defendant based on the same alleged Labor Code violations.[1]

II. MOTION TO COMPEL ARBITRATION AND FOR STAY

Defendant moves to compel arbitration of Plaintiff's claims based on an agreement she purportedly executed on August 7, 2023 entitled "Agreement to Arbitrate Employment Disputes" (the "Agreement") which is attached to the Declaration of Ernesto Moreno.[2]

[1] This action, Case No. 24CV428768, is also captioned *Plancarte v. Moreno & Associates, Inc.* A motion to compel arbitration and stay is set to be heard in this action on June 4, 2024 in Department 3.

[2] Defendant's request for judicial notice of JAMS Employment Arbitration Rules and Procedures is GRANTED. (Evid. Code, § 452, subd. (h); see *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal.4th 1125, 1132, fn. 5.)

Plaintiff opposes this motion, urging that she never consented to the Agreement, the Agreement is unconscionable and Plaintiff's representative PAGA claim can proceed without this action being stayed.

A. Legal Standards

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

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

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

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

(*Morgan v. Sundance, Inc*. (2022) 596 U.S. 411 (*Morgan*), internal citations and quotation marks omitted.)

B. Existence and Scope of Agreement to Arbitrate

In order to establish that Plaintiff consented to the Agreement, Defendant provides a declaration by its CEO, Ernesto Moreno, who explains that in 2023, Defendant adopted a policy of requiring employees to resolve disputes through binding arbitration. (Declaration of

Ernesto Moreno in Support of Motion to Compel Arbitration ("Moreno Decl."), ¶ 4.) He states that Plaintiff executed a Spanish version of the Agreement, the language with which she is most comfortable, on August 7, 2023, and attaches a purported copy of the signed Agreement as Exhibit D to his declaration.

Plaintiff counters that she was "made" to sign various documents during her employment and does not recall the document attached as Exhibit D to the Moreno Declaration, nor recognize the handwriting contained therein as her own.

1. *Legal Standard*

As one Court of Appeal summarized,

> [T]he moving party bears the burden of producing "prima facie evidence of a written agreement to arbitrate the controversy." (*Rosenthal, supra*, 14 Cal.4th at p. 413.) The moving party "can meet its initial burden by attaching to the [motion or] petition a copy of the arbitration agreement purporting to bear the [opposing party's] signature." (*Bannister v. Marinidence Opco, LLC* (2021) 64 Cal.App.5th 541, 543–544 [279 Cal. Rptr. 3d 112] (*Bannister*).) Alternatively, the moving party can meet its burden by setting forth the agreement's provisions in the motion. (*Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 219 [105 Cal. Rptr. 2d 597] (*Condee*); see also Cal. Rules of Court, rule 3.1330 ["The provisions must be stated verbatim or a copy must be physically or electronically attached to the petition and incorporated by reference."].) For this step, "it is not necessary to follow the normal procedures of document authentication." (*Condee*, at p. 218.) If the moving party meets its initial prima facie burden and the opposing party does not dispute the existence of the arbitration agreement, then nothing more is required for the moving party to meet its burden of persuasion.
>
> If the moving party meets its initial prima facie burden and the opposing party disputes the agreement, then in the second step, the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement. (See *Condee, supra*, 88 Cal.App.4th at p. 219.) The opposing party can do this in several ways. For example, the opposing party may testify under oath or declare under penalty of perjury that the party never saw or does not remember seeing the agreement, or that the party never signed or does not remember signing the agreement. [Citations.]
>
> If the opposing party meets its burden of producing evidence, then in the third step, the moving party must establish with admissible evidence a valid arbitration agreement between the parties. The burden of proving the agreement by a preponderance of the evidence remains with the moving party. (*Rosenthal, supra*, 14 Cal.4th at p. 413.)

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

By producing a copy of what it represents was the Agreement signed by Plaintiff, Defendant has met its initial burden on this motion by submitting prima facie evidence of a written

agreement to arbitrate the claims asserted in this action. The burden therefore shifts to Plaintiff to produce evidence to challenge its authenticity.

2. *Plaintiff's Burden*

To this end, Plaintiff submits her own declaration stating that she does not recall the Agreement nor having ever reviewed it. She explains that when she signs documents, her typical signature reads as "Ma. Teresa P," and attaches a copy of a document she signed at Defendant's request which she describes as including a "sample of her signature." She continues that when she initials documents, she uses the initials "M.T.P.," and is in the habit of photographing documents that she signs so that she can "reference them later during [her] employment." Plaintiff explains that she reviewed the document attached as Exhibit D to the Moreno Declaration, which includes "Maria T. Plancarte" handwritten at the top of the first page, the initials "T.P." at the bottom of the second page, and "Maria P" at the signature of the third page, and does not recognize any of the handwriting in Exhibit D as her own. She also states that she does not recognize the other signature in Exhibit D, which appears to read "Sandra Cervantes L," and finally, that she possess a photo of an unsigned agreement called "Acuerdo de Arbitrajede Conflictos Laborales" which appears to be similar to the document depicted in Exhibit D but contains no handwriting.

Under *Gamboa, supra*, the foregoing would appear to be sufficient to place the burden back on Defendant to prove that Plaintiff consented to the Agreement with admissible evidence. *Iyere v. Wise Auto Group* (2023) 87 Cal.App.5th 747 (*Iyere*) recently disagreed with *Gamboa* when it comes to handwritten signatures, reasoning that, unlike with electronic signatures, "[i]f a party confronted with his or her handwritten signature on an arbitration agreement is unable to allege that the signature is inauthentic or forged, the fact that that person does not recall signing the agreement neither creates a factual dispute as to the signature's authenticity nor affords an independent basis to find that a contract was not formed." (*Id.* at p. 758.) Here, Plaintiff does not directly allege that the signature and initials contained in Exhibit D to the Moreno Declaration are inauthentic or forged, but she clearly implies as much given her description of how she normally writes her signature and her provision to the Court of examples of such writings. The Court believes that the showing made by Plaintiff is sufficient under *Gamboa* and *Iyere* to create a factual dispute as to whether she actually executed the Agreement attached to the Moreno Declaration as Exhibit D and thus whether an agreement to arbitrate actually exists between the parties. Consequently, the burden shifts back to Defendant to "establish with admissible evidence a valid arbitration agreement between the parties." (*Gamboa, supra*, 72 Cal.App.5th at 166.)

3. *Defendant's Burden*

In connection with its reply, Defendant submits the Declaration of Sandra Cervantes, its Director of Human Resources, who explains that during the summer of 2023, when Defendant adopted a policy of requiring employees to resolve disputes through binding arbitration, she sent an electronic copy of the Agreement to all employees via Docusign, and further directed all supervisors to provide hard copies of the Agreement to each employee in the language with which they were most comfortable. She continues that because the signatures of some employees are "illegible or difficult to read," she asked them to print or sign their names clearly on the Agreement if they did not use Docusign.

According to Ms. Cervantes, Plaintiff brought an unsigned copy of the Agreement to her in her office on August 7, 2023. While there, Ms. Cervantes states that she witnessed Plaintiff sign the Agreement and hand it back to her, and a copy of this signed Agreement is attached to her declaration as Exhibit A. She continues that during her employment with Defendant, Plaintiff signed numerous documents but did not "consistently sign her name in the same manner on all documents," frequently signing in cursive as "Ma Teresa P." but also signing documents by printing "Maria Plancarte." Attached as Exhibit B to Ms. Cervantes' declaration are other documents Plaintiff purportedly signed during her employment by printing her name as she is alleged to have done on the Agreement. Ms. Cervantes lastly states that she received a text from Plaintiff on August 8, 2024, in Spanish, requesting that she send her "a photo of the form you gave me please," which she understood to be referring to the Agreement signed the previous day given that she had not recently given her any other forms. A copy of this message is attached to Ms. Cervantes' declaration as Exhibit C.

Ms. Cervantes' declaration successfully rebuts Plaintiff's showing by establishing, with admissible evidence, that she signed the Agreement. While Plaintiff implies that the signatures/initials contained on this document were not written by her, she notably does not expressly *deny* having signed the Agreement. Given this fact, and Ms. Cervantes' testimony that she actually witnessed Plaintiff signing the Agreement, the Court finds that Defendant has established, by a preponderance of the evidence, that an agreement to arbitrate, i.e., the Agreement, was created and exists between Plaintiff and Defendant. It is also clear that the claims asserted in this action come within the scope of the Agreement, which mandates that Plaintiff arbitrate "all claims and disputes" not listed in the section of the Agreement entitled "Claims that will be resolved outside arbitration."[3] Accordingly, the burden shifts to Plaintiff to establish a ground for denial of Defendant's motion. (See *Rosenthal, supra*, 14 Cal.4th at 413.)

C. Unconscionability

In opposition, Plaintiff maintains that the Agreement is unconscionable. Unconscionability has both procedural and substantive elements. (*Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*); *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1539 (*Jones*).) Both must appear for a court to invalidate a contract or one of its individual terms (*Armendariz, supra*, 24 Cal.4th at p. 114; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174), but they need not be present in the same degree: "the more substantively oppressive the contract term, the less evidence of procedural

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[3] This section provides that:

> Notwithstanding any other provision of this Agreement, claims for workers' compensation benefits, claims for unemployment insurance benefits, claims for penalties pursuant to the Private Attorneys General Act of 2004 that are based on alleged violations not affecting the Employee personally ("Representative PAGA Claims"), claims pending in any state or federal court at the time the Employee signs this Agreement, and other claims not subject to arbitration by law, are not subject to this Agreement and shall not be resolved through binding arbitration.

(See Moreno Decl., Exhibit D at § 2.)

unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa" (*Armendariz, supra,* 24 Cal.4th at p. 114).

1. *Procedural Unconscionability*

Procedural unconscionability focuses on the elements of oppression and surprise. (*Armendariz, supra*, 24 Cal.4th at p. 114.) "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice," while "[s]urprise involves the extent to which the terms of the bargain are hidden in a prolix printed form drafted by a party is a superior bargaining position." (*Davis v. TWC Dealer Group, Inc*. (2019) 41 Cal.App.5th 662, 671, internal citation and quotation marks omitted.) Here, Plaintiff insists that the Agreement is procedurally unconscionable because it is a take-it-or-leave it contract of adhesion and further, the applicable arbitration rules are not included, except in incorporation by reference.

Analyzing procedural unconscionability "begins with an inquiry into whether the contract is one of adhesion" (*Armendariz*, 24 Cal.4th at 113) i.e., one that is "standardized, generally on a preprinted form, and offered by the party with superior bargaining power 'on a take-it-or-leave-it basis'" (*OTO, LLC v. Kho* (2019) 8 Cal.5th 111, 126.) Arbitration agreements imposed as a condition of employment are typically deemed to be adhesive and the pertinent situation in such a circumstance is "whether circumstances of the contract's formation created such oppression or surprise that closer scrutiny of its overall fairness is required." (*Id*.) "Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 247.) Circumstances relevant to establishing oppression include: the amount of time the party is given to consider the agreement; the amount and type of pressure exerted on them to sign; the length of the proposed contract and the length and complexity of the challenged provision; the education and experience of the party; and whether the party's review of the agreement was aided by an attorney. (*Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* (2015) 232 Cal.App.4th 1332, 1348.) In pre-hiring settings, such as the one at bar, courts must be "particularly attuned" to the danger of oppression and overreaching. (*Armendariz, supra,* at 115.)

Here, while Plaintiff makes the aforementioned claims regarding procedural unconscionability, she offers no *evidence* of the same, as is her burden. (See *Sanchez v. Valencia Holding Co., LLC, supra* 61 Cal.4th at 911.) Merely asserting in the body of her opposition that the Agreement is procedurally unconscionable does not make it so. As for Plaintiff's second argument concerning procedural unconscionability, she offers no authority which provides that the failure to set forth the entirety of the rules applicable to the subject arbitration in the body of the Agreement- here, the JAMS Employment Arbitration Rules and Procedures- makes it qualify as such and further, the Court does find merit in Defendant's assertion that the inclusion of those rules in their entirety, which span 12 pages in length, would create the very length and complexity that Plaintiff suggests would be unconscionable.

Given the foregoing, the Court finds that Plaintiff has failed to establish that the Agreement is procedurally unconscionable. Because both procedural *and* substantive unconscionability must be present in order for the Court to invalidate the Agreement (see

Armendariz, supra, 24 Cal.4th at p. 114; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174), the Court concludes that it is enforceable.

2. *Substantive Unconscionability*

Given its conclusion that the Agreement is not procedurally unconscionable, the Court need not evaluate the merits of Plaintiff's assertions regarding substantive unconscionability. However, even if it did, the Court finds that Plaintiff has not established the presence of such unconscionability.

Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create "overly harsh" or "one-sided results" (*Armendariz, supra*, 24 Cal.4th at p. 114, internal citation and quotations omitted), that is, whether they reallocate risks in an objectively unreasonable or unexpected manner (*Jones, supra*, 112 Cal.App.4th at p. 1539). "In assessing substantive unconscionability, the paramount consideration is mutuality." (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 241 (*Pinela*), internal citation and quotation marks omitted.) Arbitration agreements are substantively unconscionable where they lack a "modicum of bilaterality," "without at least some reasonable justification for such one-sidedness based on 'business realities.' " (*Armendariz, supra*, 24 Cal.4th at p. 117.)

Here, Plaintiff insists that the Agreement is substantively unconscionable because (1) it prevents an employee from seeking monetary relief through any potential administrative or governmental agency, (2) the PAGA language is inconsistent with current law and affects "alleged violations affecting the Employee personally" in contravention of cases such as *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104 (*Adolph*) and *Balderas v. Fresh Start Harvesting, Inc.* (2024) 101 Cal.App.5th 533 and (3) the language that "Moreno and the Employee also waive any right they might otherwise hold to appeal any decision issued by the arbitrator, except as otherwise noted or permitted by law" has a chilling effect on any employee seeking review and is unnecessary. None of these contentions are persuasive.

First, Plaintiff is not prohibited from filing a complaint with the appropriate government or administrative agencies; she is merely prohibited from pursuing a double recovery and *Armendariz*, which Plaintiff relies on in support of her argument, does not hold that a plaintiff must be permitted to pursue monetary recovery in an administrative proceedings. Rather, it states only that an arbitration agreement should not bar an employee from filing a complaint with a government agency. The Agreement does not do so.

Second, in contrast to Plaintiff's argument, the Agreement's provisions regarding PAGA are in accord with current law, which permits an employee to pursue a PAGA claim in a *representative* capacity for the benefit of other employee but also permits an employer to require an employee to arbitrate their *individual* PAGA claim. (See *Adolph, supra*.) This is precisely what the Agreement does.

Finally, Section 12 of the Agreement permits the parties to present appeals "as otherwise noted or permitted by law," so it does not preclude an appeal when grounds for an appeal from a binding arbitration award exist pursuant to applicable law.

As part of the Agreement, Plaintiff agreed *not* to pursue class action claims. As such, the Court will stay this action pending the conclusion of the arbitration. Plaintiff's reliance on *Adolph* for the proposition that she may pursue claims under PAGA on behalf of other employees even if she must resolve her individual claims in arbitration has no place in this action given that this case does not involve any PAGA claims. Therefore, as there exists an enforceable agreement between Plaintiff and Defendant requiring her to arbitrate the claims asserted in this action, Defendant's motion to compel arbitration and for a stay is GRANTED.

III. CONCLUSION

Defendant's motion to compel arbitration and stay this action is GRANTED. This action is stayed pending resolution of the arbitration.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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

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Calendar Line 3

Case Name: *Treespring Investments, LP v. Rautner, et al.*
Case No.: 22CV407249

Plaintiff Treespring Investment, LP ("Treespring") brings the instant action for concealment and breach of fiduciary duty, among other things, arising out of a business dispute between itself and defendants James Rautner ("Rautner") and Dennis Pollutro ("Pollutro") (collectively, "Defendants").

Currently before the Court is Defendants' demurrer to the Complaint, which is opposed by Treespring. As discussed below, the Court SUSTAINS the demurrer as to the first, fifth and sixth causes of action WITH 20 DAYS' LEAVE TO AMEND. The Court OVERRULES the demurrer as to the Complaint and remaining claims asserted therein.

I. BACKGROUND

In 2014, Messrs. Rautner and Pollutro co-founded SDSE Networks, LLC ("SDSE") and were its sole owners and managing partners. SDSE is in the business of securing electronic communications and data, and represents that it primarily serves the U.S. government. (Complaint, ¶¶ 11-12.)

In 2018, Messrs. Rautner and Pollutro formed and incorporated another company: Eclipz.io ("Eclipz"). (Complaint, ¶ 11.) Eclipz is a technology company whose software secures data in transit by creating secure data transport connection enclaves, without the need for expensive hardware and software, and serves customers in a number of industries. (*Ibid*.) Mr. Rautner became Eclipz's Chief Financial Officer and Chief Operating Officer, while Mr. Pollutro became its Chief Technology Officer. (*Id.*, ¶ 3.)

On February 27, 2018, Eclipz and SDSE entered into an Exclusive Software License Agreement (the "Exclusive License"), which was amended on June 24, 2019, and was signed by Mr. Rautner for SDSE. (Complaint, ¶ 13.) Under this agreement, SDSE granted to Eclipz "perpetual and irrevocable" and "exclusive (even as to SDSE), worldwide, fully-paid-up, royalty-free, non- transferable, sub-licenseable. . . right and license under all of SDSE's Intellectual Property Rights, now existing or hereafter arising, to (a) use, copy and create derivative works of the Software (including any and all Updates thereto). . ." (*Ibid*.) The Exclusive License obligated SDSE to provide a copy of the software to Eclipz "in a form or medium reasonably requested by Eclipz." (*Ibid.*) The software at issue is the Eclipz 1.0, also known as the Scout 2.0 platform, and is defined by the Exclusive License to include the software in source code form. (*Ibid*.)

On December 11, 2028, SDSE and Eclipz entered into a Consulting Agreement pursuant to which certain work done by SDSE for Eclipz would be the property of Eclipz, and upon completion of this work, SDSE was obligated to provide all deliverables (including source code). (Complaint, ¶ 14.) The agreement was made retroactive to apply to any work done by SDSE for Eclipz prior to its execution and permitted Eclipz to withhold payment of an invoice in the event of a dispute without the withholding constituting a breach of its terms. (*Ibid*.)

In September 2019, Defendants solicited Treespring's investment in Eclipz. (Complaint, ¶ 17.) At that time, Defendants allegedly concealed that: they planned to take Eclipz's technology for use by SDSE; they had no intention of turning over the source code/other source materials pertaining to Eclipz's technology; they were using Eclipz as a vehicle to obtain Treespring's investment for the benefit and growth of SDSE; they were approving unsubstantiated invoices for payments to SDSE, which were not being disclosed in Eclipz's financial statements; as officers of Eclipz, they had not obtained a copy of the Eclipz 1.0 platform, or any updates, in source code format; and SDSE did not create or own the core technology at the heart of the Scout 2.0 platform, and only had a non-exclusive license from a third-party for the core technology, in contrast to the provisions contains in the Exclusive License and Consulting Agreement. (*Ibid*.)

On September 18, 2019, Treespring entered into a Series A Preferred Stock Purchase Agreement (the "SAPS Agreement") pursuant to which it purchased shares in Eclipz for a total purchase price of $2.8 million. (Complaint, ¶ 19.) The Agreement included a warranty that Eclipz had ownership and possession of all intellectual property rights necessary to the conduct of its business. (*Ibid*.) Treespring subsequently continued to invest in Eclipz; to date, it has invested over $6.6 million in the company. (*Ibid*.)

Unbeknownst to Treespring, SDSE worked on Eclipz's technology, at the expense of Eclipz, and using Treespring's invested funds, without providing Eclipz with any actual possession of the source code or source materials behind its software. (Complaint, ¶ 20.) Defendants allegedly abused their dual roles as fiduciaries to Eclipz and its shareholders to their advantage, and under their control, and using Treespring's investment, Eclipz paid SDSE over $4 million for software, work product, and engineering services related to cyber security software that is either fully, exclusively licensed to, or owned by Eclipz, but which Eclipz never received and for which SDSE is now claiming ownership. (*Ibid*.)

Defendants suggested that SDSE and Eclipz negotiate a merger between the two companies, but talks broke down due to Defendants' excessive demands. (Complaint, ¶ 21.) On September 19, 2021, Eclipz demanded that SDSE provide Eclipz with possession of its source code and other source materials pursuant to the terms of the Exclusive License and Consulting Agreement, and also informed SDSE that it was suspending payment for disputed invoices. (*Ibid*.) SDSE, however, managed by Defendants, declined. (*Ibid*.) Two weeks later, Defendants resigned from their positions as directors and officers of Eclipz. (*Ibid*.) Shortly thereafter, SDSE terminated its engineering support, leaving Eclipz unable to service existing customers or provide proof-of-concepts to potential customers. (*Ibid*.) Another demand for the source code and source materials made by Eclipz on October 15, 2021 went unheeded by SDSE. (*Id*., ¶ 23.) Defendants have used their wrongful possession of Eclipz's intellectual property as leverage for their own personal gain. (*Id*. at ¶ 21.)

On November 15, 2021, Eclipz filed an action against SDSE for breach of the Exclusive License and Consulting Agreements, among other things, in San Mateo County Superior Court (the "San Mateo Action"). (Complaint, ¶ 24.) In this action, Eclipz sought and obtained a TRO compelling SDSE to fulfill its obligations under the subject agreements. (*Ibid*.) Defendants refused to comply with the Court's order, and instead directed SDSE to file an appeal challenging the issuance of the TRO on February 24, 2022, as well as a motion to dissolve it. (*Id.*, ¶¶ 26-28.) Treespring alleges that without court intervention, Defendants' scheme is set to allow them to "steal millions of investor funds to use for the benefit of their

own company, based on their fraudulent misconduct and their blatant violations of their fiduciary obligations to Eclipz's shareholders, leaving [it] with no real investment and millions in losses." (Complaint, ¶ 29.)

Based on the foregoing allegations, Treespring filed the Complaint on November 23, 2022, asserting the following causes of action: (1) fraud-concealment; (2) violation of Corporations Code §§ 25400(d), 25401, 25504 and 25504.1; (3) breach of fiduciary duty; (4) constructive fraud (Civil Code § 1573); (5) intentional interference with contractual relations; and (6) intentional interference with prospective economic advantage.

II. DEMURRER

A. Defendants' Request for Judicial Notice

In connection with their demurrer, Defendants request that the Court take judicial notice of the following items, which is opposed in part by Treespring: (1) the unredacted version of the Complaint filed on June 5, 2023[1] (Exhibit 1); (2) the unredacted Declaration of Marwa Elzankaly in Support of Motion to Seal Portions of the Complaint and the Motion Itself, and Exhibits A-E thereto, filed June 5, 2023 (Exhibit 2); and (3) the Declaration of Ryan Maas in Support of Plaintiff's Opposition to Defendants' Special Motion to Strike, Request for Sanctions, and Exhibits thereto, filed on June 8, 2023 (Exhibit 3). Treespring objects to this request, arguing that (1) they are not relevant to the instant motion and (2) the truth of the facts asserted in the declarations and the exhibits attached thereto are not proper subjects of judicial notice.

The basis for Defendants' request is subdivision (d) of Evidence Code section 452, which permits a court to take judicial notice of court records. Generally, judicial notice of court records is limited to matters that are *indisputably* true; this usually means notice is limited to the orders and judgments in a court filed, as distinguished from the *contents* of documents filed therein. (See *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 113.) Notice of the latter is generally not permitted because such documents constitute inadmissible hearsay. (See *Day v. Sharp* (1975)50 Cal.App.3d 904, 914.) However, as Defendants note, a court may take judicial notice of a party's admissions or concessions in cases where the admission "cannot reasonably be controverted," such as in answer to interrogatories or requests for admission, or in affidavits or declarations filed on a party's behalf. (*Arce v. Kasier Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 488; see also *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604-605 ["The court will take judicial notice of records such as admissions, answers to interrogatories, affidavits, and the like, when considering a demurrer, only where they contain statements of the plaintiff or his agent which are inconsistent with the allegations of the pleading before the court."].) Given the foregoing, the Court takes judicial notice of the existence of all of these items and, to the extent that any of them contain anything that qualifies as a party admission, the truth of those admissions.

Subject to the foregoing qualifications, Defendants' request for judicial notice is GRANTED.

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[1] The initial version of the Complaint was redacted and filed conditionally under seal on November 23, 2023. The Court later denied the related motion to seal.

B. Legal Standard

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, "[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732, internal citations and quotations omitted; see also Code Civ. Proc., § 430.30, subd. (a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. … Thus, … the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal citations and quotations omitted.)

In ruling on a demurrer, the allegations of the complaint must be liberally construed, with a view to substantial justice between the parties. (*Glennen v. Allergan, Inc.* (2016) 247 Cal.App.4th 1, 6.) Nevertheless, while "[a] demurrer admits all facts properly pleaded, [it does] not [admit] contentions, deductions or conclusions of law or fact." (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.)

C. Discussion

Defendants demur to the Complaint and each of the six causes of action asserted therein on the ground of failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) Defendants assert that its demurrer should be sustained in its entirety for the following reasons: (1) each claim impermissibly seeks to recover damages that are derivative of harm to Eclipz, which Treespring lacks standing to bring; (2) each claim fails to plead fraud with the requisite particularity; (3) the claims are premised on alleged omissions that Treespring was expressly informed of in the SAPS Agreement; (4) the first, third and fourth causes of action fail because Defendants did not owe potential investors a fiduciary duty merely by virtue of their roles as Eclipz executives; and (5) each claim suffers from additional pleading deficiencies.

1. *Nature of Claims and Treespring's Standing*

Defendants first contend that Treespring's allegations make clear that it is seeking to recover for harm that is derivative to Eclipz and it lacks standing to assert such claims. In support of this contention, Defendants cite a variety of cases, many of which involve claims for damages against corporate management on a theory of their alleged misconduct causing a dimunition in stock value, including *Schrage v. Schrage* (2021) 69 Cal.App.5th 126 (*Schrage*), and insists that the gravamen of this action, which is the primary consideration in determining whether the nature of the harm at issue is derivative or not, is corporate mismanagement. As such, Defendants insist, this case is derivative in nature and cannot be brought by Treespring in its capacity as an individual shareholder. In opposition, Treespring insists that the cases cited are distinguishable because this case does not involve a diminution in value and its claims are direct because they are predicted on Defendants fraudulently inducing it to invest millions of dollars in Eclipz.

As a general matter, an action is derivative if "the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets." (*Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106.) In contrast, "[i]f the injury is one to the plaintiff as a stockholder and to him individually, and not to the corporation, as where the action is based on a contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, it is an individual action …." (*Schrage, supra,* at 150, quoting Sutter *v. General Petroleum Corp.* (1946) 28 Cal.2d 525, 530.)

It is true, as Treespring maintains, that the instant action cannot properly be characterized only as one asserting claims based on mismanagement which resulted in the dimunition of stock value. Rather, this case is primarily predicated on fraudulent inducement, i.e., the purportedly wrongful actions of Defendants to induce Treespring to invest heavily in Eclipz in the first instance. Several authorities cited by Treespring in its opposition, including *Harmsen v. Smith* (9th Cir. 1982) 693 F.2d 932 (*Harmsen*), have concluded that such a claimed injury is properly characterized as "[a] separate individual damage[]" for which a shareholder may seek redress through an individual, direct action.

In *Harmsen*, the plaintiffs, minority shareholders, filed suit under federal law against a controlling shareholder/officer for engaging in fraudulent activities. The plaintiffs additionally filed state law claims for fraud and conspiracy to defraud, and the defendants argued that these claims were, under California law, derivative claims which could not have been brought on the plaintiffs' own behalf but only on behalf of the corporation. The appellate court affirmed the trial court's holding that the duty alleged to have been violated was a duty to the shareholders separate from the duty owed to the corporation and that the claimed injury was to the shareholders as *individuals*. It reasoned that the district court did not err in its application of California law to the question of the standing of the shareholders to bring the state law claims because they "were allegedly damaged in that they were induced to buy and hold stock which was worthless and which they would have known would have been was worthless had they been aware of the defendants' misdeeds" and thus their injuries were "greater than the mere diminution of the value of their stock, for which only the corporation or a shareholder acting derivatively may normally seek recovery." (*Harmsen*, 693 F.2d at 941.)

In *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, another instructive case cited by Treespring, the plaintiff, a shareholder in a company acquired in a merger transaction, sued the defendant law firm that represented the acquiring company for fraud based on nondisclosure of material facts. The law firm contended that the plaintiff had no standing to sue it for fraud because his claims were derivative in nature due to the gravamen of those claims being the diminution in value of the stock acquired. Such circumstances, the law firm insisted, were a "classic" example of a derivative claim because the harm to the plaintiff was the same harm suffered by every other shareholder of the acquired company. The appellate court held that the law firm's position was wrong because by alleging that the firm deceived him into a stock purchase he otherwise would not have done had certain disclosures been made to him, he was not seeking "to recover on behalf of the corporation for injury done to [it]" by the law firm, with the gravamen of his claim instead being "injury to [himself] …." (*Vega*, 121 Cal.App.4th at 297.)

The Court believes that the instant action is similar to the foregoing because Treespring alleges that by reason of fraudulent nondisclosures committed by Defendants, it was induced to do something that it would not otherwise have done, i.e., invest Eclipz. As soon as Treespring took steps in reliance on Defendants' conduct, the tort was completed except as to the injury suffered, which was to Treespring as a stockholder and to it individually. (See *Sutter, supra,* 28 Cal.3d at 5310-531.) Even if it is the case that Defendants' conduct with respect to Eclipz also resulted in injury to that company as a whole, the "dual nature of the injury does not necessarily preclude an action by the stockholder [Treespring] as an individual." (*Id*. at 531.)

Further, even assuming for the sake of argument, as Defendants assert in their reply, that some of Treespring's claims are *also* predicated on their alleged post-investment conduct such that this action does fall within the line of cases such as *Schrage* where the claimed injury is the result of mismanagement/misconduct by the corporation's officers/majority shareholders, a demurrer does not lie to part of a cause of action. (See *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682.) Given the foregoing, the Court will not sustain the demurrer on this basis.

2. *Adequacy of Fraud Allegations*

Next, Defendants contend that Treespring's fraud-based claims are not sufficiently stated because they are not pleaded with the requisite particularity, including pleadings facts establishing the time, place and contents of each purported act or omission and how they were made.

By making this argument, Defendants are conflating what is required to plead *different* types of fraud. It is generally true, as Defendants contend, that "[i]n California, fraud must be pled specifically; general and conclusory allegations do not suffice. Thus, the policy of liberal of liberal construction of the pleadings … will not ordinarily be invoked to sustain a pleading defective in any material respect. This particularity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered." (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993 [internal citations and quotations omitted].) But as clarified in *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1384, the foregoing statement of the rule "reveals that it is intended to apply to affirmative misrepresentations." It cannot be directly applied to fraud based on nondisclosure because "[h]ow does one show 'how' and 'by what means' something didn't happen, or 'when' it never happened, or 'where' it never happened?" (*Ibid*.) Thus, where a claim rests on allegations of fraudulent omissions, the particularity requirement "is somewhat relaxed because a plaintiff cannot plead either the specific time of [an] omission or the place, as he is not alleging an act, but a failure to act." (*Asghari v. Volkswagen Grp. of Am., Inc.* (C.D. Cal. 2013) 42 F.Supp.3d 1306, 1325 [citations omitted].)

Given Defendants' invocation of the incorrect pleading standard, the Court will not sustain the demurrer on the grounds that Treespring failed to allege where and when the allegedly fraudulent conduct occurred. Further, in contrast to what is argued by Defendants, Treespring has sufficiently pleaded why certain omissions were misleading at the time they incurred, including the fact that SDSE failed to disclose that it "did not create or own the core technology at the heart of the SCOUT 2.0 platform, and only had a non-exclusive license from a third party for the core technology," (Complaint, ¶ 17(f)), information that was material given

the import of Eclipz's rights to its intellectual property as reflected in the SAPS Agreement (*id*. at 19).

3. *Effect of the SAPS Agreement*

Defendants next assert that their demurrer should be sustained because each of Treespring's claims are predicated, at least in part, on its allegation that SDSE did not provide Eclipz with source code, but neither the License Agreement nor Consulting Agreement actually grant Eclipz an unqualified right or title to SDESE's source code, trade secrets, or other proprietary information. The SAPS Agreement, Defendants continue, explicitly disclosed to Treespring that the Licensing Agreement between SDSE and Eclipz permitted SDSE to provide the software in source code *or* object code. (See Request for Judicial Notice, Exhibit 3 at § 1.7, Exhibit 3 (E) and Exhibit C at §§ 2.7-2.12.) Thus, they insist, there was no material omission.

The Court need not evaluate the merits of Defendants' argument because, as stated above, a demurrer does not lie to part of a cause of action (see *PH II, Inc., supra*, 33 Cal.App.4th at 1682), and none of Treespring's claims are predicated solely on omissions pertaining to the provision of source code to Eclipz by SDSE. Thus, the Court cannot sustain the demurrer on this basis.

4. *Defendants' Fiduciary Duty to Potential Investors*

Defendants next maintain that their demurrer to Treespring's first, third and fourth causes of action must be sustained because they did not owe potential investors a fiduciary duty merely because they were executives of Eclipz. Such duties, Defendants insist, are only owed once a potential investor becomes an actual shareholder.

Defendants' first cause of action for fraud is based on their alleged failure to disclose and/or conceal material facts. The elements of such a claim are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248, internal citation and quotations omitted.) There are four circumstances in which nondisclosure of concealment may constitute actual fraud, i.e., in which the defendant was under a legal duty to disclose material facts. These include: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336.) Thus, there may be a duty to disclose even where a fiduciary relationship does *not* exist and consequently even assuming, for the sake of argument, that no such relationship has been alleged here, that by itself does not establish that the first cause of action has not been adequately pleaded.

The third cause of action is for breach of fiduciary duty; in contrast to the first cause of action, a fiduciary realtionship is undoubtedly required in order to state such a claim. (See *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.) However, once again, the Court need not evaluate the merits of Defendants' substantive argument (here, concerning whether a fiduciary duty is owed to potential investors) because, as Defendants themselves acknowledge in their supporting memorandum, Treespring's claims, including the third for breach of fiduciary duty, are predicated on conduct that occurred both before *and* after Treespring invested in Eclipz. (See Memo. at 11: 1-4.) Thus, even if the Court were to credit Defendants' assertion that their pre-investment conduct does not give rise to a breach of fiduciary duty cause of action because the requisite fiduciary relationship did not yet exist, the same cannot be said as to Defendants' alleged post-investment conduct because fiduciary duties are owed to shareholders by the corporation's officers/directors. (See *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108-110.) As a demurrer does not lie to only part of a cause of action, the Court cannot sustain the demurrer to the third cause of action on this basis. This reasoning applies with equal force to the fourth cause of action for constructive fraud because while such a claim also requires the existence of a fiduciary or confidential relationship (see *Assilzadeh v. Cal. Fed. Bank* (2000) 82 Cal.App.4th 399, 415), because the claim is predicated on both pre and post-investment conduct, a demurrer does not lie on this basis.

5. *Remaining Arguments*

a. Fraudulent Concealment

Defendants maintain that this claim fails because Treespring has not pleaded facts establishing that they owed the company a duty to disclose. The Court agrees. While Treespring insists in its opposition that such a duty was owed by Defendants because they had exclusive knowledge of material facts concerning Eclipz, it has not *expressly* pleaded as much. Treespring *does* allege that Defendants "were in a superior position with unique knowledge of material facts concealed" (Complaint, ¶ 33), but does not clearly plead that this knowledge gave rise to a duty to disclose. Therefore, the demurrer to the first cause of action on the ground of failure to state facts sufficient to constitute a cause of action is sustained.

b. Corporations Code Claims

Treespring alleges that Defendants' actions violated Corporations Code sections 25400, subdivision (d), 25401, 25504 and 25504.1.[2] Defendants argue that their demurrer to these claims should be sustained because (1) as Treespring continues to hold Eclipz stock, its only potential remedy is rescission, and in order to obtain rescission, it must name Eclipz as a defendant, which it has not done, (2) Defendants were not the "actual sellers" under the SAPS Agreement- Eclipz was- and thus cannot be held liable for an alleged primary violation of securities law and (3) Treespring fails to plead sufficient facts to establish secondary liability under Corporations Code sections 25504 ("control person" liability) or 25504.1 ("aider/abettor" liability), i.e., that Defendants materially assisted those who were in privity with Treespring, the stock purchaser.

Corporations Code section 25401 provides that:

[2] All subsequent statutory references are to the Corporations Code, unless otherwise stated.

> It is unlawful for any person to offer or sell a security in this state, or to buy or offer to buy a security in this state, by means of any written or oral communication that includes an untrue statement or a material fact or omits to state a material fact necessary to make the statements made, in the light of the circumstances under which the statements were made, not misleading.

Corporations Code section 25501 establishes civil liability for violations of the foregoing section, and this liability is "sometimes referred to as primary or direct because it applies to a person who is directly or primarily responsible for violating section 25401 as a consequence of selling or buying securities by means of misrepresentations or omissions of material fact." (*AREI II Cases* (2013) 216 Cal.App.4th 1004, 1013.) It provides that a person who violates section 25401 is liable for rescission or damages "to the person who purchases a security from him or sells a security to him."

Finally, Corporations Code sections 25504 and 25504.1 provide for secondary liability for violations of Section 25401. The former provides that:

> Every person who directly or indirectly controls a person liable under Section 25501 or 25503, every partner in a firm so liable, every principal executive officer or director of a corporation so liable, every person occupying a similar status or performing similar functions, every employee of a person so liable who materially aids in the act or transaction constituting the violation, and every broker-dealer or agent who materially aids in the act or transaction constituting the violation, are also liable jointly and severally with and to the same extent as such person, unless the other person who is so liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist.

The latter provides:

> Any person who materially assists in any violation of Section 25110, 25120, 25130, 25133, or 25401 . . . with intent to deceive or defraud, is jointly and severally liable with any other person liable under this chapter for such violation.

Defendants' first argument concerning rescission as the only remedy currently available to Treespring can readily be disposed of as such an argument was expressly rejected by the court in *Moss v. Kroner* (2011) 197 Cal.App.4th 860, 877 (*Moss*), which concluded that holding to the contrary would mean "the victims who are most severely damaged by misrepresentations or omissions about a security—those whose holdings are valueless and untransferable—possess fewer remedies than those who suffer less severe injury and have a security that can be transferred."

Moss also compels rejection of Defendants' remaining arguments, as the court determined that controlling persons of a corporation could be held liable for money damages under Section 25504, *without* a strict showing of privity. In rejecting a prior California appellate decision that relied on similar federal authority in holding that rescission is the only remedy available under Section 25501 because the plaintiff still owns the security and no remedy is available against those who otherwise could be held secondarily liable under

Sections 25505 and 25504.1 because rescission is not available against one who is not a party to the contract,[3] the court explained:

> Federal and state laws regarding the potentially liable participants are … not substantially identical [citation] and we do not believe that the strict privity that federal law requires in the course of restricting liability to the primary liability of a securities seller reasonably can be imported to interpret California's statutory scheme, in which the Legislature has deliberately created secondary joint and several liability by means of statutes such as sections 25504 and 25504.1.

(*Moss*, 197 Cal.App.4th at 877.)

Thus, under *Moss*, "for secondary actors [like Defendants,] strict privity is not required to state a cause of action for violation of section 25401 by means of sections 25504 and 25504.1." (*Id*. at 879.) Because this Court finds *Moss* instructive, it believes that Treespring has adequately pleaded a claim against Defendants for the provisions of the Corporations Code at issue and therefore will not sustain Defendants' demurrer to the second cause of action.

c. Breach of Fiduciary Duty

Defendants insist that this claim is "barred to the extent it is premised" on them appealing the "erroneous" TRO in the San Mateo Action because they were no longer serving on Eclipz's Board when the order was issued, and such an act is not actionable because it is privileged litigation activity. However, as the Court previously held in denying Defendants' special motion to strike, Treespring's claims are predicated on conduct that *preceded* the San Mateo Action, and any references to it are merely for added context. Consequently, the Court will not sustain the demurrer on this basis.

d. Constructive Fraud

Defendants next argue that the fourth cause of action for constructive fraud fails because Treespring fails to plead that Defendants acted on Treespring's behalf for purposes of the SAPS Agreement, i.e., that they were Treespring's agents at the time the company was considering investing in Eclipz.

"Constructive fraud is a unique species fraud applicable only to a fiduciary or confidential relationship. As a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud." (*Assilzadeh v. Cal. Fed. Bank, supra,* 82 Cal.App.4th at 415.) The elements of a claim for constructive fraud are: (1) a fiduciary or confidential relationship; (2) an act, omission, or concealment involving a breach

[3] This decision is *Viterbi v. Wasserman* (2011) 191 Cal.App.4th 927, which is relied on by Defendants. This case and *Moss* represent a split of authority on whether direct privity is required for recovery of monetary damages under Section 25505. This Court finds that *Moss* represents a better reasoned approach and is thus instructive. (See *Moss,* at 876-879.)

of that duty; 3) reliance; and (4) damages. (*Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1249-50.)

Thus, Treespring need not plead that Defendants were its agent, rather, they need only allege the existence of a fiduciary or confidential relationship existed between the parties. Thus, the Court will not sustain the demurrer on this basis.

e. Intentional Interference with Contractual Relations

Defendants contend that no claim for intentional interference with contractual relations has been stated because, as Treespring incorporates its fiduciary duty and concealment claims as the necessary intentional acts required to plead this tort and these claims fail for the reasons state above, it follows that this cause of action fails. Defendants further assert that their demurrer to this claim should be sustained because the tort requires them to plead that they prevented performance of Treespring's contract with Eclipz.

The elements of a claim for intentional interference with contractual relations are "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 (PG&E).)

In the Complaint, Treespring pleads in the most general of terms that Defendants' actions "prevented performance of, made more complicated and expensive the performance of, and/or frustrated the entire value of, the agreements at issue." (Complaint, ¶ 61.) This is insufficient to state a claim for intentional interference with contractual relations because Treespring has not specifically articulated *how* the SAPS Agreement (the only specific agreement identified between itself and a third party, Eclipz) was actually disrupted and/or breached by Defendants' alleged conduct. Accordingly, Defendants' demurrer to the fifth cause of action on the ground of failure to state facts sufficient to constitute a cause of action is sustained.

f. Intentional Interference with Prospective Economic Advantage

Finally, Defendants argue that Treespring's remaining claim for intentional interference with prospective economic advantage fails because (1) Treespring fails to plead facts establishing that the relationship between Treespring and Eclipz was actually disrupted by Defendants' actions and (2) the alleged predicate wrongful acts (breach of fiduciary duty and concealment) are not actionable for the reasons discussed above and thus the necessary independently wrongful conduct on the part of Defendants has not been pleaded.

The elements of a claim for intentional interference with prospective economic advantage are (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) In order to state this claim, a plaintiff must allege "the

defendant's conduct was wrongful by some measure beyond the fact of the interference itself." (*Id*. at 1159 citing *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392–393, internal citations and quotation marks omitted.) "An act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Ibid*.)

This action suffers from the same defect as the preceding claim, namely, that Treespring has not articulated *how* its economic relationship with Eclipz was actually disrupted by Defendants' alleged conduct. Accordingly, Defendants' demurrer to the sixth cause of action is sustained.

III. CONCLUSION

Defendants' demurrer to the Complaint on the ground of failure to state facts sufficient to constitute a cause of action is OVERRULED. Defendants' demurrer is SUSTAINED as to the first, fifth and sixth causes of action WITH 20 DAYS' LEAVE TO AMEND. The demurrer is OVERRULED as to the remaining claims.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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

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Calendar Line 6

Case Name: *Anali R. Rodriguez v. Shannon Lane Balderas*
Case No.: 22CV399410

The unopposed motion to be relieved as counsel for Plaintiff is GRANTED. The Court will sign the proposed order.

In addition, the Court observes counsel's statement that Plaintiff has not responded to communications since November, 2023. Accordingly, the Court will issue an order to Plaintiff requiring her to show cause why this action should not be dismissed without prejudice: (1) because she is unable to represent a putative class or group of aggrieved employees as a self-represented litigant (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 12 ["In the class action context, the Court has an obligation to closely scrutinize the qualifications of counsel to assure that assure that all interest, including those of as yet named plaintiffs are adequately represented. [Citations.] This is because in certifying a class action, the Court confers on absent persons the status of litigants and 'creates an attorney-client relationship between those persons and a lawyer or group of lawyers.' "]; *McShane v. United States* (9th Cir. 1966) 366 F.2d 286, 288 [self-represented litigant "has no authority to appear as an attorney for others than himself"]; *Simon v. Hartford Life* (9th Cir. 2008) 546 F.3d 661, 665 ["courts have routinely adhered to the general rule prohibiting pro se plaintiffs from pursuing claims on behalf of others in a representative capacity"]); and (2) for failure to prosecute pursuant to Code of Civil Procedure sections 583.410 and 583.420, subdivision (a)(2).

Since this action was filed on June 23, 2022, the Court intends to schedule the hearing on the Order to Show Cause for July 18, 2024, at 1:30 p.m.

The Case Management Conference scheduled for May 30, 2024, is VACATED.

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