SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Sunil R. Kulkarni Presiding

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

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

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

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

LAW AND MOTION TENTATIVE RULINGS
DATE: JANUARY 11, 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	22CV396821	Zhou v. Cisco Systems, Inc. (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 2	21CV375255	Johnson v. SCK Ilara Investors, LLC (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 3	22CV399734	Boyer v. Serrano Electric Inc. (Class Action/PAGA)	See tentative ruling. The Court will prepare the final order.
LINE 4	20CV374355	Silvaco, Inc. v. Andersen, et al.	See tentative ruling. The Court will prepare the final order.
LINE 5	22CV395280	Granato, et al. v. Apple Inc. (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 6	17CV314286	U.S. Bank National Association et al vs Fareed Sepehry-Fard	See tentative ruling. The Court will prepare the final order.
LINE 7			
LINE 8			
LINE 9			

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Sunil R. Kulkarni Presiding

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

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

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

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

LAW AND MOTION TENTATIVE RULINGS

LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Anna Zhou v. Cisco Systems, Inc.*
Case No.: 22CV396821

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff Anna Zhou alleges that Defendant Cisco Systems, Inc. failed to provide employees with compliant meal and rest breaks, failed to pay minimum and overtime wages, issued noncompliant wage statements, and committed other wage and hour violations.

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

I. BACKGROUND

Plaintiff was employed by Defendant as an hourly, non-exempt employee. (First Amended Class Action Complaint ("FAC"), ¶¶ 8, 14.) According to Plaintiff, Defendant failed to pay employees for all hours worked and failed to provide them with meal periods and permit rest breaks. (*Id*., ¶ 15.) Employees worked for Defendant more than eight hours per day or 40 hours per week but Defendant failed to pay overtime wages or even pay employees for all hours worked. (*Id*., ¶ 16.) Defendant failed to provide accurate, itemized wage statements. (*Id*., ¶ 21.) Defendant also did not reimburse employees for required business expenses including use of personal cell phones for business purposes and purchase of face masks. (*Id*., ¶¶ 16, 19.)

Based on these allegations, Plaintiff asserts, in the operative First Amended Complaint, putative class claims for: (l) failure to pay minimum wages, in violation of Labor Code sections 204, 1194, 1194.2, and 1197; (2) failure to pay overtime wages, in violation of Labor Code sections 1194 and 1198; (3) failure to provide meal periods, in violation of Labor Code sections 226.7 and 512, subdivision (a); (4) failure to permit rest breaks, in violation of Labor Code section 226.7; (5) failure to reimburse employees for required expenses under Labor Code sections 2800 and 2802; (6) failure to timely provide final wages under Labor Code sections 201 through 203; (7) violation of Labor Code section 226 by failing to provide accurate itemized wage statements; (8) violation of Business and Professions Code section 17200, et seq.; and (9) a representative claim for PAGA penalties (Lab. Code, § 2698, et seq.).

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) ___U.S.___, 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:

> All current and former employees who worked for Cisco in a non-exempt position in California at any time from April 5, 2018 through February 15, 2023.

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

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

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

At preliminary approval, the Court provisionally certified the above-described class, determining that 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 amount is $1,925,000. Attorney fees of up to $641,666.67, or one-third of the gross settlement, whichever is greater, litigation costs of up to $25,000, and up to $35,000 in administration costs will be paid from the gross settlement. One-hundred thousand dollars of the gross settlement amount will be allocated to PAGA

penalties, 75% of which ($75,000) will be paid to the LWDA. The named Plaintiff seeks an incentive award $10,000.

The net settlement of approximately $1,140,333.33 will be allocated to 5,840 participating class members (reduced from the proposed settlement class of 5,852 accounting for opt-outs) based on the number of workweeks worked by each member in a position covered by the settlement from April 5, 2018 through August 11, 2023, the date preliminary approval of the settlement was granted by this Court. The PAGA payment will be allocated to 2,687 "aggrieved employees" (i.e., the "PAGA Group"), which is defined as "[a]ll Class Members who worked for Cisco in a non-exempt position in California at any time from March 29, 2021 through February 15, 2023," on a pro rata basis based on the number of workweeks worked from March 29, 2021 through August 11, 2023. For tax purposes, settlement payments will be allocated one-third to wages and two-thirds to penalties and interest. PAGA settlement payments will be allocated 100 percent to penalties. The employer's share of payroll taxes will be paid in addition to the gross settlement. Funds associated with checks uncashed after 180 days will be paid to the California Controller's Unclaimed Property Fund in the name of the class member, leaving no unpaid residue subject to the requirements of Code of Civil Procedure Section 384, subdivision (b).

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

> [A]ny and all known and unknown claims against Cisco and the Released Parties that are asserted in the First Amended Complaint or arise out of or reasonably relate to the facts alleged in the First Amended Complaint that, from April 5, 2018 through the date on which the Superior Court grants preliminary approval of the Settlement . . . (that) Cisco failed to pay all wages due, including minimum wages and overtime; provide meal and rest periods; pay meal and rest period premiums at the regular rate of pay; maintain accurate records; furnish accurate itemized wage statements; reimburse necessary business expenses; timely pay all wages due during employment; or pay all wages due to discharged and quitting employees.

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

> [A]ny and all claims under PAGA for civil penalties against Cisco and the other Released Parties that arise out of or reasonably relate to the allegations in the notice submitted by Plaintiff to the LWDA pursuant to PAGA that, from March 29, 2021 through the date on which the Superior Court grants preliminary approval of the Settlement . . . [that] Cisco failed to pay all wages due, including minimum wages and overtime; provide meal and rest periods; pay meal and rest period premiums at the regular rate of pay; maintain accurate records; furnish accurate itemized wage statements; reimburse for necessary business expenses; timely pay all wages due during employment; or pay all wages due to discharged and quitting employees[.]

Consistent with the statute, aggrieved employees will not be able to opt out of the PAGA portion of the settlement.

The notice period has now been completed. According to the declaration of a case manager with settlement administrator ILYM Group ("ILYM"), Nick Castro, submitted in support of the instant motion, on September 11, 2023, ILYM received from counsel for Cisco the names and identifying information (including last known mailing address) for each settlement class member and subsequently processed these items against the National Change of Address database to confirm and update the relevant information. On September 25, 2023, Notice Packets were mailed via first class mail to all 5,852 individuals contained in the list provided to ILYM. As of the date of Mr. Castro's declaration, December 13, 2023, 171 Notice Packets have been returned to ILYM as undeliverable, with none including a forwarding address. ILYM performed a skip trace on these returned packets, and obtained 122 updated addresses, to which a Notice Packet was promptly re-mailed. At present, 49 Notice Packets have been deemed undeliverable. ILYM has received 12 requests for exclusion and no objections. November 9, 2023, was the deadline for either of the foregoing. The administrator estimates that participating class members will receive an average gross payment of $191.11, with a maximum payment of $717.29 and a minimum payment of $5.12.

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

V. ATTORNEYS FEES, COSTS AND INCENTIVE AWARD

As articulated above, Plaintiff's counsel seeks a fee award of $641,666.67, 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 fun" 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 $199,742.50, based on 299.8 hours at billing rates of $375 to $725 per hour, resulting in a multiplier of 3.2. This is within the range of multipliers that courts typically approved. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 488, 503–504 (*Laffitte*) [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13]; *Wershba, supra,* 91 Cal.App.4th at p. 255 ["[m]ultipliers can range from 2 to 4 or even higher"]; *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1051, fn. 6 [stating that multipliers ranging from one to four are typical in common fund cases and citing the court's own survey of large settlements finding "a range of 0.6–19.6, with most (20 of 24, or 83%) from 1.0–4.0 and a bare majority (13 of 24, or 54%) in the 1.5–3.0 range"].)

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

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

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

Here, while the multiplier sought by Plaintiff's counsel is on the higher end of what California courts typically award, it is still well within the acceptable range and is supported by the percentage cross-check. As such, the Court finds counsel's requested fee award is reasonable.

Plaintiff's counsel also seeks $22,263.18 in litigation costs, which is below the $25,000 limit provided by the Settlement and appears reasonable. The $35,000 in administrative costs are also approved.

Finally, Plaintiff requests an incentive award of $10,000. To support her request, she submits a declaration describing her efforts on the case. The Court finds that the class representative is entitled to an enhancement award and the amount requested is reasonable.

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:

> All current and former employees who worked for Cisco in a non-exempt position in California at any time from April 5, 2018 through February 15, 2023.

Excluded from the class are the 12 individuals who submitted timely requests for exclusion.

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 **August 22, 2024 at 2:30 P.M.** in Department 1. 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.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

- oo0oo -

Calendar Line 2

Case Name: *Priscilla Johnson v. SCK Ilara Investors, LLC, et al.*
Case No.: 21CV375255

This is a putative class action on behalf of tenants of apartment buildings owned by Defendant SCK Ilara Investors, LLC ("SCK"), alleging that it and defendants Pinnacle California Corp dba Pinnacle Property Management Services California Corp. ("Pinnacle") and Bell Partners, Inc. ("Bell Partners") (collectively, "Defendants") illegally withheld portions of tenants' security deposits.

Before the Court is Plaintiff Priscilla Johnson's motion for class certification, which is opposed by Defendants. As discussed below, the Court GRANTS Plaintiff's motion.

I. BACKGROUND

A. Factual

As alleged in the operative class action complaint, in November 2019, Plaintiff rented a residential apartment in a building SCK owns in Milpitas (the "Premises") and paid a $995 security deposit. (Class Action Complaint, ¶¶ 2–3, 5, 18–20.) When she vacated her apartment on June 24, 2020, Defendants overcharged her security deposit and failed to show her invoices for repairs charged against it. (*Id.*, ¶ 20.) Plaintiff paid the overcharges under protest. (*Ibid.*)

Pursuant to Civil Code section 1950.5, a landlord must furnish a departing tenant with a copy of an itemized statement indicating the basis for, and the amount of, any security received and the disposition of the security, and shall return any remaining portion of the security to the tenant. (*Id.*, ¶ 8.) Plaintiff alleges that Defendants negligently or intentionally failed to return her and other tenants' security deposits as required by the statute, and failed to train staff concerning the statute's requirements. (*Id.*, ¶¶ 25–26.) Defendants' "violations include, but are not limited to: Defendants' impermissible deductions for routine cleaning expenses and normal wear and tear; Defendants' charging of unreasonable hourly rates for their work; Defendants[']' failure and refusal to provide adequate accounting of the use of the security deposits; and Defendants[']' failure and refusal to return all or any portion of the security deposits to the Class Representative and Class Members." (*Id.*, ¶ 32.)

B. Procedural

Based on the foregoing allegations, Plaintiff initiated the instant action on January 18, 2021 on behalf of a putative class of similarly situated individuals, "including all former tenants and occupants of real property owned, managed, or controlled by Defendants, which Class Members have been refused the lawful accounting of and return of their security deposits following their vacating their rental units." (Class Action Complaint, ¶ 23.) Plaintiff asserts claims for (1) violation of Civil Code section 1950.5, (2) negligent hiring/supervision of employees, and (3) unfair and unlawful business practices in violation of Business & Professions Code sections 17200 et seq. (the "UCL").

In July 2021, SCK demurred to each of foregoing causes of action based on arguments pertaining to the viability of Plaintiff's lawsuit as a class action, i.e., that Ms. Johnson failed to plead facts showing that class certification was appropriate.[1] The Court overruled the motion. Plaintiff now moves for an order: (1) certifying this action as a class action; (2) appointing Plaintiff as a class representative; (3) appointing Plaintiff's counsel as class counsel; and (4) ordering Defendants to disseminate notice to the class.

II. MOTION FOR CLASS CERTIFICATION

Plaintiff defines the class as follows: all former tenants at the Premises who paid security deposits and to whom Defendants did not return more than $125 of the security deposit within 21 days of the vacation of the apartment. Plaintiff asserts that given this class definition, there are two subclasses which consist of: (1) households who had various deductions against their security deposit and were not provided with any supporting documentation for those deductions; and (2) households who had various deductions against their security deposit for which there are purportedly repair records that justify said objections.

A. Legal Standard

As explained by the California Supreme Court,

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

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

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

The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976)

---

[1] While class certification is generally not decided at the pleading stage, a court may decide the propriety of class certification on the pleadings "if it concludes as a matter of law that, assuming the truth of the factual allegations in the complaint, there is no reasonable possibility that the requirements for class certification will be satisfied." (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 211.)

18 Cal.3d 381, 385.) The court must examine all the evidence submitted in support of and in opposition to the motion "in light of the plaintiffs' theory of recovery." (*Department of Fish and Game v. Superior Court (Fish and Game)* (2011) 197 Cal.App.4th 1323, 1349.) The evidence is considered "together": there is no burden-shifting as in other contexts. (*Ibid.*)

B. Numerous and Ascertainable Class

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

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

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

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

Here, members of the class are easily identified from Defendants' records. According to materials submitted by Plaintiff, there are 302 households with approximately 537 individuals who may be putative class members for the first subclass, and 136 households with approximately 257 individuals who may be putative class members for the second subclass. (See Declaration of Tony Ruch in Support of Motion for Class Certification ("Ruch Decl."), ¶¶ 9-16, 15-19.) Combined, this results in a total putative class of approximately 438 householders with approximately 794 individuals. The proposed class and subclasses are appropriately defined based on objective characteristic. The Court accordingly finds that the class is numerous and ascertainable, which Defendants do not dispute.

C. Community of Interest

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores*, *supra*, 34 Cal.4th at p. 326.) Defendants maintain that this requirement is not met because individual questions of law and fact for each putative class members "overwhelmingly" predominate over common issues.

1. *Predominant Questions of Law or Fact*

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

As articulated above, the thrust of Plaintiff's Complaint is that Defendants violated Civil Code section 1950.5 ("Section 1950.5") (and thus the UCL[2]) by applying improper charges to security deposits, failing to return all or any portion of those deposits, and failing to provide required documentation pertaining to the foregoing. Under Section 1950.5, a landlord is permitted to use a security deposit to repair "damages to the premises, *exclusive* of ordinary wear and tear, caused by the tenant" but may not use it to repair any conditions that preexisted the tenant's occupancy "or for the cumulative effects of ordinary wear and tear occurring during any one or more tenancies." (Civ. Code, § 1950.5, subds. (b)(2) and (e).) Within 21 days after the tenant has vacated the premises, the landlord must provide him with "a copy of an itemized statement indicating the basis for, and the amount of, any security received and the disposition of the security, and shall return any remaining portion of the security to the tenant." (Civ. Code, § 1950.5, subd. (g).)

A tenant may maintain an action for wrongful retention of a security deposit under Section 1950.5 for "statutory damages …, in addition to actual damages" (Civ. Code, § 1950.5, subd. (l)) and will succeed on such a claim where he establishes that (1) he paid a security deposit, (2) the security deposit was for a residential property; (3) the plaintiff used the property as a dwelling, and (4) the amounts deducted by the defendant were not reasonably necessary (Civ. Code, § 1950.5, subds. (a), (e) and (l).) The landlord has the burden of proof as to the reasonableness of the amounts claimed, and punitive damages may also be awarded if it is shown that the defendant made deductions in bad faith. (*Id*. at subd. (l).)

Here, Plaintiff contends that common issued of law and fact predominate because there is common proof that Defendants have (bad faith) policies of: applying improper charges to security deposits regardless of cleanliness or damage, and failing to provide required documentation to tenants within 21 days of move out. Plaintiff explains that Defendants' records demonstrate that they gave tenants materially identical move out statements which are used to justify security deposit deductions due to the documents being form security itemization statements, and thus the "answer" to the question of whether Defendants have unlawful bad faith policies that violate Section 1950.5 will be the same for the entire class.

---

[2] Plaintiff's UCL claim is predicated on Defendants' alleged violations of Section 1950.5. (Complaint, ¶ 46.)

The only elements of the claim that are in dispute, Plaintiff insists, are (1) whether the deductions were reasonably necessary and (2) whether the deductions were made in bad faith such that the class is entitled to punitive damages. Plaintiff relies on *Peviani v. Arbors at California Oaks Property Owner, LLC* (2021) 62 Cal.App.5th 874 (*Peviani*), which the Court also cited in its August 2021 order overruling Defendants' demurrer, in arguing that the element of commonality is satisfied.

In opposition, Defendants maintain that a community of interest is not present because individual questions of law and fact will predominate over common issues given that (1) security deposit deductions were made based on actual charges incurred for each member and differ depending on factors requiring individualized evidence and (2) Plaintiff fails to provide evidence of a failure to send the required itemized statements of deposit deductions, which will also require individual analysis for each class member. Defendants further maintain that *Peviani* is not controlling because its holding is "narrowly limited" and does not address all of the other elements of certification. The Court will begin its analysis of commonality by reviewing *Peviani*.

In *Peviani*, three tenants sued their landlord alleging a variety of claims including, as particularly relevant here, bad faith retention of security deposits and, based on that (among other things), violation of the UCL. The tenants moved for certification of two classes, with the first concerning false advertising and habitability issues, and the second focusing on the security deposit issues. With regard to the latter, the plaintiffs argued that common issues of law and fact predominated because there was common proof that the defendants had a policy of applying improper charges to security deposits regardless of cleanliness or damages and that they had a policy of failing to provide the required documents within 21 days of move-out. The defendants countered that individualized inquiries would be required of each class member in order to determine whether the deposit amounts retained for him or her were reasonable.

The trial court denied the plaintiffs' motion for class certification, and with respect to the security deposit class, did so based on its determination that individualized evidence would predominate and thus there was a lack of commonality and the class would be unmanageable. The court reached this determination after finding that the plaintiffs' evidence did not suggest that the defendants had a bad faith policy of retaining security deposits throughout the relevant time period.

The Court of Appeal reversed, based in part on its finding that the trial court erred by concluding that there was a lack of commonality amongst the security deposit class. In reaching this finding, the appellate court identified two flaws in the trial court's reasoning. First, it explained, the trial court focused on bad faith/punitive damages, rather than on the *reasonableness* of the security deposit deductions, which concerned liability, and damages could be dealt with apart from liability and "generally do not defeat certification." (*Peviani*, 62 Cal.App.5th at 900, quoting *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 30.) Commonality, it reiterated, hinges on a plaintiff's theory of liability, and *not* damages. (*Id*., citing *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 ["As a general rule if the defendant's liability can be determined by facts common to all members of a class, a class will be certified *even if the members must individually prove their damages*. [Citation.]".)

Second, it continued, the trial court incorrectly "discussed plaintiffs' evidence as though plaintiffs had to prove a likelihood of prevailing on their theory," when it actuality

"[t]he focus, at the class certification stage, should be on plaintiffs' *theory* of liability- *not* their likelihood of prevailing. [Citation.]" (*Peviani*, 62 Cal.App.5th at 900, emphasis added.) The court then concluded its finding of error in the trial court's ruling pertaining to a lack of commonality thusly:

> We fail to see why, in order to prove the reasonableness of their deductions, defendants would need to go through every deduction for every move-out. A detailed analysis such as that might be necessary for some claims of damages, but it would not be necessary for reasonableness. Reasonableness involves the decisionmaking process, the criteria, and the consistency of the decision maker …. If the criteria are reasonable and the criteria are consistently applied, then reasonableness is properly proved by common evidence. In sum, we conclude the trial court erred by concluding there is a lack of commonality.

(*Peviani, supra,* 62 Cal.App.5th at 902.)

Plaintiff insists that *Peviani* is controlling on the issue of commonality, while Defendants argue that the case is distinguishable because there the issue was the trial court's faulty reasoning concerning individualized proof of damages, whereas here they and class members must present individualized evidence to establish *liability* of each class member. The Court disagrees with Defendants characterization of the import of *Peviani* on this case.

Peviani clearly held that the issue of the reasonableness of deductions to security deposits, which is, along with bad faith, the only disputed element in this case,[3] one that *can* be established by common proof. Here, Plaintiff[4] submits that Defendants' own standard form documents and testimony will establish that they had a uniform policy and practice of retaining security deposits without providing any supporting documentation for those deductions. According to Ms. Johnson, SCK's personal most qualified ("PMQ") on these issues, Dana David, testified at her deposition that SCK uses form templates to centrally create rent ledgers, rental agreements, move out statements and other documents for tenants, and also uses centralized software to maintain tenant ledgers and other information. (See Ruch Decl., Exhibit 1.) The ledgers purportedly contain a full accounting of tenant charges, credits and payments, and thus include all security deposits collected by Defendants.

According to Ms. David's testimony, SCK has delegated the drafting of move out statements and providing them to tenants to the property management companies who manage the Premises; Bell maintained this role from July 2018 to March 2020, while Pinnacle assumed it in March 2020 and continues to manage the Premises at present. (Ruch Decl., ¶¶ 3-4.) Bell's PMQ, Kris Buker, testified that it too uses uniform and centralized ledgers, as well as standard-form templates, to centrally create rent ledgers, rental agreements, move out

---

[3] That is, Defendants do not appear to be taking issue with the other elements of a wrongful retention of security deposit claim, i.e., that plaintiff and class members paid them security deposits, that the deposits were used for residential property and that plaintiff and class members used the Premises as dwellings.

[4] Plaintiff provides her own declaration wherein she states that Defendants failed to provide her security deposit or any documentation justifying repairs made within 21 days of her vacating her unit. She states that charges for painting and carpet cleaning, among other things, were deducted from her security deposit, despite her former unit not requiring such repairs.

statements and other documents for tenants. (*Id.*, Exhibit 2.) Bell also similarly uses centralized software to maintain tenant ledgers, rental agreements, repair history, the pictures property managers related to repair and cleaning and other charges, tenant file and other information. The ledgers purportedly contain a full accounting of tenant charges, credits and payments, and thus include all security deposits collected by Defendants.

Bell purportedly has a policy that any cleaning and repair charges docked from the security deposit must be validated with invoices and pictures, but does *not* provide related documentation unless the tenant requests them. (Ruch Decl., Exhibit 2 at 55:21-56:5, 67:11-17.) Bell's PMQ also testified to a *lack* of documents supporting security deposit charges against tenants. (*Id*. at 36:20-37:7, 43:11-16, 44:1-5, 46:3-7, 47:21-48:1, 48:6-8, 56:20-22, 57:3-15, 58:10-59:2, 67:18-68:10, 68:20-69:3, 70:6-71:9, 72:20-73:9.)

Pinnacle's PMQ, Cindi Wang, testified that the company uses uniform and centralized ledgers, and standard-form documents for all of their tenants at the Premises. Specifically, Pinnacle uses form templates to centrally create rent ledgers, rental agreements, move out statements and other documents for tenants. (Ruch Decl., Exhibit 3.) As with SCK and Bell, it also uses centralized software to maintain tenant ledgers, rental agreements, move out statements and other information, with the ledgers containing a full accounting of tenant charges, fees, credits, and payments, and thus all security deposits collected by Defendants. (*Id*.) Pinnacle purportedly advises its third-party vendors and in-house employees to take pictures of the vacated apartments to justify the claimed conditions and also asserts that it has a policy to provide a receipt or invoice for deductions made to the security deposits.

Plaintiff submits various documentary evidence, and spreadsheets prepared by her counsel which purportedly summarize the voluminous documentary evidence, which she maintains will support her contention that Defendants (and their vendors) charge predetermined costs for repairs that bear no relationship to what is reasonably necessary. (See, e.g., Ruch Decl., Exhibits 8 and 9.) She continues that the Defendants' standard forms and testimony will also establish that they had a uniform policy and practice of retaining security deposits without actually providing any supporting documentation for those deductions to former tenants as required.

Defendants' response to the forgoing is, in part, to challenge the veracity of Plaintiff's contentions by submitting the declaration of Ms. Cindi Wang. But not only is Ms. Wang only an employee of Pinnacle and thus cannot speak to the actions taken (or not taken) by Bell or SCK, but as stated above, the focus in determining whether commonality exists is *not* on the ultimate merits of Plaintiff's case, but on whether liability can be determined based on common evidence. Given the holding of *Peviani*[5] and the materials submitted by Plaintiff, the Court concludes that the answer to this question is "yes." As explained in *Peviani*, Defendants can prove the reasonableness of their deposit deductions, which directly determines their liability on Plaintiff's 1950.5 and UCL claims, by common evidence, e.g., individual testimony, experts who review their records, or a combination of both. (See *Peviani, supra*, 62

[5] As stated above, Defendants challenge the import of *Peviani* because it did not address all of the elements of certification, including superiority. While it is true that *Peviani* did not address all of the elements of certification, as to the issue of reasonableness and thus commonality on a 1950.5 claim, it is *directly* on point and thus controlling.

Cal.App.5th at 900-901.) The Court therefore finds that common issues predominate as to Plaintiff's claims.

2. *Adequacy and Typicality*

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

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

a. Adequacy

Plaintiff maintains she is an adequate class representative because her interests in this action are completely aligned with class members given her allegations that Defendants intentionally failed to return both her and other tenants', i.e., class members, security deposits and made impermissible deductions from them. (Complaint, ¶¶ 25-26, 32.) Defendants counter that she is not an adequate representative because she does not provide evidence of any other injury to potential class members, and the security deposit deductions at issue are all based on the particular condition of each unit and the specific circumstances of each tenancy. Defendants' assertions are wholly unpersuasive.

Again, Plaintiff alleges that she suffered from the *same* violations of Section 1950.5 (and thus the UCL) as the putative class members, and thus there is no basis to conclude that her interests, i.e., to recover damages for these violations, are antagonistic to or in conflict with the objectives of this action for the class- to similarly recover damages for the security deposit violations. Whether Plaintiff is an adequate representative does not depend on any *evidentiary* showing as to the merits of the claims of other tenants, and the case cited by Defendants for this proposition, *Seagram v. Neways, Inc.*, *supra*, does not so hold. The issue in the portion of *Seagram* cited by Defendants was that the named plaintiffs were potential *defendants* in the proposed action and thus had an insurmountable conflict with class members such that they could not fairly and adequately represent the class. The lack of an evidentiary showing of the injuries suffered by other class members was not discussed as an element of establishing whether the named plaintiff was an adequate representative of the class. Defendants otherwise make no showing which demonstrates that Plaintiff maintains any sort of conflict with putative class members such that she cannot adequately represent their interests.

There is also no reason to conclude that Ms. Johnson's counsel, who submits a declaration describing his significant experience in class action lawsuits, is not qualified to litigate this action, and Defendants impliedly concede this point by electing not to address it. Given the foregoing, the Court finds that Plaintiff has sufficiently demonstrated adequacy of representation.

b. Typicality

With regard to typicality, Plaintiff alleges that she and the putative class members suffered from the *same* injuries as a result of the *same* course of conduct, namely, the loss of portions of their security deposits to which they were entitled based on Defendants' policy and practice of making uniform, unjustified and unreasonable deductions from those deposits and failing to provide supporting documentation of the same. Given these allegations, the test of typicality is clearly met, with no distinction between the causes of the harm purportedly suffered by Plaintiff and putative class members. (See *Martinez v. Joe's Crab Shack Holdings*, *supra,* 231 Cal.App.4th at 375.)

D. Superiority

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

Plaintiff asserts that a class action would be superior to individual lawsuits by the putative class members because: the claims of the putative class members are modest and thus it is unlikely that they would pursue such claims or be able to find counsel to represent them; putative class members do not have individual interest in personally controlling their cases and the compensation they seek can be determined from Defendants' records in the same way they would be in an individual action; a class action would avoid the risk of inconsistent verdicts; and it would be far more efficient for the Court to hear and decide the same questions by common evidence on a class-wide basis than hear potentially hundreds of identical individual lawsuits by each tenant.

In opposition, Defendants maintain that a class action is *not* superior because: they would have to establish the reasonableness of their deductions from the security deposits with respect to every member with individualized proof and thus each class members' claims stand and fall on their own; individual lawsuits would better serve the interests of each class member because each tenant is in a better position to prove their own case with evidence pertaining to the condition of his *specific* unit at the time he vacated it; class treatment provides no greater benefit to litigants than separate small claims actions would; and they would suffer substantial prejudice because they would be forced to incur the same expense of essentially litigating hundreds of claims despite no evidence of other class members being subject to Section 1950.5 violations.

On balance, the Court finds Plaintiff's contention that a class action involving alleged Section 1950.5 violations would be superior to potentially hundreds of individual lawsuits asserting the same more persuasive. Given the relatively modest amounts of money involved for each tenant (based on the materials submitted by Plaintiff, the security deposits at issue appear to range from approximately $600 to $1400, with the amounts of these deposits retained for repairs ranging from approximately $160 to $1500), this action is clearly one that can be described as providing "a method of obtaining redress" for "numerous parties [who have] suffer[ed] injury of insufficient size to warrant individual action." (See *Basurco, supra*, 108 Cal.App.4th at 120.) Contrary to what Defendants argue, and as clearly explained by the court in *Peviani*, with regard to defeating the Section 1950.5 and UCL claims, a class action will *not* require them to establish the reasonableness of their security deposit deductions with respect to *every* member. (See *Peviani, supra*, 62 Cal.App.5th at 902 ["We fail to see why, in order to prove the reasonableness of their deductions, defendants would need to go through every deduction for every move-out …."].) Instead of hundreds of small claims, a class action will make it possible, though the use of common evidence, to prove or disprove Plaintiff's claim that Defendants regularly engaged in practices that violate Section 1950.5 in a single lawsuit. This is clearly more efficient than litigating multitudes of individual actions, and provides a method of redress for a large number of individuals with modest claims, which is a central purpose of the class action device. Thus, the Court finds that Plaintiff has sufficiently demonstrated the element of superiority.

As all of the elements for class certification are met, the Court GRANTS Plaintiff's motion.

III. CONCLUSION

Plaintiff's motion for class certification is GRANTED. The following class and subclasses are certified:

> Class: All former tenants at the Premises who paid security deposits and to whom Defendants did not return more than $125 of the security deposit within 21 days of the vacation of the apartment,
>
> Subclass (1): All Class members at the Premises who had various deductions against their security deposits and were not provided any supporting documentation for those deductions.
>
> Subclass (2): All Class members who had various deductions against their security deposits for whom Defendants purport to possess repair records justifying those objections.

Given their superior position with regards to identifying class members, Defendants are ordered to assist in identifying those individuals and bear the expense of providing them notice.[6] (See *Hypertouch, Inc. v. Superior Court* (2005)128 Cal.App.4th 1527, 1551.)

[6] Plaintiff has a fee waiver in this action (see Ruch Decl., ¶ 24) and a relatively small stake, and thus ordering her to bear the cost of providing notice would impose a burden on her disproportionate to that stake.

The Court will prepare the order.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

- oo0oo -

Calendar Line 3

Case Name: *Tami Marie Boyer v. Serrano Electric Inc.*
Case No.: 22CV399734

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff Tami Marie Boyer alleges that Defendant Serrano Electric Inc. failed to pay overtime and minimum wages, failed to provide meal and rest periods or pay associated premiums, and failed to provide code-complaint wage statements, among other Labor Code violations.

Before the Court is Plaintiff's motion for preliminary approval of a settlement, which is unopposed. As discussed below, if satisfactory clarification is provided concerning whether the notice will be provided in languages other than English, the Court is inclined to GRANT the motion.

I. BACKGROUND

On November 17, 2022, Plaintiff filed a class action and PAGA complaint accusing Defendant of failing to: properly pay overtime wages, provide meal periods, authorize and permit rest breaks, properly pay meal and rest break premiums, pay minimum wages, pay timely pay wages during employment and upon termination, provide accurate wage statements, keep accurate payroll records and reimburse necessary business expenses. Plaintiff also alleged that Defendant's actions violated California Business and Professions Code § 17200.

In the operative complaint, Plaintiff asserts the following causes of action: (1) failure to pay minimum waged; (2) failure to pay overtime wages; (3) failure to provide meal breaks; (4) failure to permit rest breaks; (5) failure to reimburse business expenses; (6) failure to provide accurate itemized wage statements; (7) failure to pay wages timely during employment; (8) failure to pay all wages due upon separation of employment; (9) violation of Business & Professions Code § 17200; and (10) enforcement of Labor Code § 2698 et seq. ("PAGA").

Plaintiff now seeks an order: preliminarily approving the proposed Class Action and PAGA Settlement Agreement and Class Notice (the "Settlement"); conditionally certifying the proposed Class for settlement purposes only; appointing Plaintiff as class representative; appointing Aegis Law Firm as class counsel; appointing Rust Consulting, Inc. ("Rust") as the Settlement Administrator and authorizing Rust to send notice of the Settlement to Class Members; and setting a final approval hearing date.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234–235 (*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) ___U.S.___, 2022 U.S. LEXIS 2940.)

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

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

III. SETTLEMENT PROCESS

After initial meet and confer conversations subsequent to the filing of this action, the parties began to discuss engaging in informal mediation with an eye towards resolution of Plaintiff's claims through mediation. Through informal discovery, Defendant produced a significant amount of documents and information, including Plaintiff's personnel file, the employee handbook in effect during the Class Period, data pertaining to potential class members, a list of unique employee identification numbers of potential class members with their hire and applicable termination dates, meal period waivers allegedly signed by potential class members, and an approximate 25% sampling of class members' timekeeping and pay records. With this data, Plaintiff's counsel and their retained expert were able to perform a comprehensive damages analysis and estimate Defendant's potential liability.

On May 30, 2021, the parties participated in a mediation session with Jill Sperber, and while they did not reach a settlement at mediation, they accepted a mediator's proposal and executed a memorandum of understanding thereafter. The parties continued to negotiate over the next several months, and in August 2023 finalized the Settlement that is now before the Court.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement is $695,000. Attorney fees of up to one-third of the gross settlement (currently $231,666.67), litigation costs not to exceed $25,000, and an estimated $6,750 in administration costs will be paid from the gross settlement. $20,000 will be allocated to PAGA penalties, 75% of which ($15,000) will be paid to the LWDA. Plaintiff will seek an enhancement award of $10,000.

The net settlement will be allocated to class members on a pro rata basis based on the number of weeks worked during the class period. With a class size of approximately 186 individuals, class members will, on average, receive $2,150. Class members will not be required to submit a claim to receive their payment. For tax purposes, settlement payments will be allocated 33% to wages and 66.67% to penalties and interest. The employer-side payroll taxes on the portion allocated to wages will be paid by Defendant separately from, and in addition to, the gross settlement amount. 100% of the PAGA payment to "Aggrieved Employees" will be allocated to penalties. Funds associated with checks uncashed after 180 days will be transmitted to the State Controller Unclaimed Property Fund in the name of the class member for whom the funds are designated.

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

> [A]ll claims that were alleged, or reasonably could have been alleged, based on the facts alleged in the Operative Complaint, which arose during the Class

> Period. Except as set forth in Section 5.3 of [the Agreement], Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period.

"Aggrieved Employees" will also release "all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the facts stated in the Operative Complaint and the PAGA Notice, which arose during the PAGA Period." Consistent with the statute, Aggrieved Employees will not be able to opt out of the PAGA portion of the settlement.

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

V. FAIRNESS OF SETTLEMENT

Based on available data, Plaintiff's counsel (with the assistance of its expert) estimated Defendant's maximum exposure for each claim at the following amounts: $1,482,780 (unpaid wages); $2,161,923 (failure to provide meal periods); $4,323,804 (failure to provide rest breaks); $246,025 (failure to reimburse business expenses); $552,000 (wage statement violations) and $779,730 (waiting time penalties); and $1,094,600 (PAGA penalties). However, Plaintiff's counsel arrived at the settlement amount by offsetting or reducing Defendant's maximum theoretical liability by: the risk of class certification being denied; Defendant's arguments on the merits, including, among other things, that unpaid COVID-19 screenings did not happen as frequently as alleged, class members were provided with a mechanism for recording their time, class members routinely received and/or voluntarily waived rest and meal breaks and class members were not required to use their personal cell phones; the difficulty of establishing the willfulness of Defendant's actions; and the risk of losing at trial or on appeal.

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

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

VI. PROPOSED SETTLEMENT CLASS

Plaintiff requests that the following settlement class be provisionally certified:

> [A]ll non-exempt employees employed by Defendant in the State of California at any time during January 2, 2018 to June 30, 2023.

A. Legal Standard for Certifying a Class for Settlement Purposes

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

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

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

B. Ascertainable Class

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

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

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

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." (*Noel, supra,* 7 Cal.5th at p. 984.) Still, it has long been

held that "[c]lass members are 'ascertainable' where they may be readily identified … by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932, disapproved of on another ground by *Noel, supra,* 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 975-976 ["The defined class of all HD Package subscribers is precise, with objective characteristics and transactional parameters, and can be determined by DIRECTV's own account records. No more is needed."].)

Here, the estimated 186 class members are readily identifiable based on Defendant's records, and the settlement class is appropriately defined based on objective characteristics. The Court finds that the settlement class is numerous, ascertainable, and appropriately defined.

C. Community of Interest

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

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

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

As for the second factor,

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

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

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

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

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

D. Substantial Benefits of Class Certification

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

Here, there are an estimated 186 class members. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

VII. NOTICE

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

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

Plaintiff does not indicate whether the notice will be provided in any languages other than English and whether such translation would be reasonably necessary for the class members to understand the notice. The Court requests that class counsel be prepared to discuss, at the hearing on this matter, whether notice should be provided in languages other than English and why or why not.

Otherwise, the form of notice is generally adequate, but must be modified to instruct class members that they may opt out of or object to the settlement simply by providing their name, without the need to provide their phone number or other personal information.

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

> The judge overseeing this case encourages remote appearances. (As of August 15, 2022, the Court's remote platform is Microsoft Teams.) Class members who wish to appear remotely should contact class counsel at least three days before the hearing if possible. Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members may also appear in person if they wish.

Turning to the notice procedure, the parties have selected Rust as the settlement administrator. The administrator will mail the notice packet via first-class mail within 14 days of receipt of class data (i.e., class member identifying information and number of class period workweeks and PAGA pay periods) from Defendant, after updating class members' addresses using the National Change of Address Database. Any returned notices will be re-mailed to any forwarding address provided or a better address located through a skip trace or other search. Class members who receive a re-mailed notice will have an additional 14 days to respond. These notice procedures are appropriate and are approved.

VIII. CONCLUSION

Presuming satisfactory clarification is provided concerning whether the notice will be provided in languages other than English, the Court is inclined to GRANT the motion for preliminary approval. The final approval hearing shall take place on **June 20, 2024** at 1:30 in Dept. 1. The following class is preliminarily certified for settlement purposes:

> [A]ll non-exempt employees employed by Defendant in the State of California at any time during January 2, 2018 to June 30, 2023.

The Court will prepare the order.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

- oo0oo -

Calendar Line 4

Case Name: *Silvaco, Inc. v Andersen et al.*
Case No.: 20CV374355

The parties have presented the following discovery disputes:[7]

A. A motion by Defendant/Cross-Complainant Ole Christian Andersen to compel production of documents from Plaintiff/Cross-Defendant Silvaco, Inc.

B. A motion by Silvaco and Cross-Defendant Kathy Pesic to compel production of documents from Defendant Jens Michelsen.

C. A motion by Silvaco/K. Pesic to compel Defendants / Cross-Complainants to produce documents from the Schlinker document log that are not privileged.

D. A motion by Silvaco/K. Pesic to compel production of documents against Mr. Andersen.

I. Mr. Anderson's Motion to Compel

After reviewing the parties' briefs and the record, the Court makes the following findings/rulings:

1. The Court will interpret Mr. Andersen's motion as a motion seeking further document responses, as well as a motion for production of documents.

2. RFPs 108-114 are overbroad. Mr. Andersen's proposed narrowing doesn't substantially solve the problem. The Court will not require Silvaco to amend its responses or produce documents for these RFPs.

By contrast, RFPs 114-116 are not overbroad. The Court finds that revenue information relevant to the issues in the case. That it goes beyond the earnout doesn't necessarily make it overbroad or irrelevant. To reduce any potential burden, the Court will limit RFPs 114-116 to "documents sufficient to show" revenues for each of the three customers at issue, as opposed to "all documents." The Court does not believe cost-shifting is appropriate.

Finally, the information sought in RFP 117 is only tangentially relevant to this case. The burden to find that information seems large as compared to its utility, especially since much (or all) of the same information is being captured by RFP 118, which Silvaco did answer. The Court will not require Silvaco to amend its response or produce documents for RFP 117.

4. In conclusion, the Court GRANTS IN PART and DENIES IN PART Mr. Andersen's motion. Silvaco must provide verified amended interrogatory responses for RFPs 114-116 and provide responsive documents (if it has any), as outlined above. Both the amended responses and documents are due 30 days from the date of this order.

[7] The Court finds the parties have adequately met and conferred following the DATE informal discovery conference. The Court therefore will decide these motions.

II. Silvaco/K. Pesic's Motion to Compel Against Jens Michelsen

After reviewing the parties' briefs and the record, the Court makes the following findings/rulings:

1. The Court will not order Mr. Michelsen to produce all of his pre-3/2/18 cellular data to Silvaco/K. Pesic (collectively "Silvaco"). That is not a proper subject of a discovery motion.

2. The parties seem to argue that the 12/21/23 verification by Mr. Michelsen moots the discovery dispute. The Court therefore deems this motion MOOT.

3. However, Silvaco's sanctions request is not moot, given that the dispute was not resolved until after the discovery motion was filed. (See R. Ct. 3.1348(a).) Here, the Court believes that sanctions are appropriate: this verification should have been provided much earlier. The Court does not find Mr. Michelsen's explanation convincing; as a result, the Court finds no substantial justification for Mr. Michelsen's late verification or explanation.

The Court finds that a reasonable amount of monetary sanctions is $1000, payable to Silvaco (through its counsel) within 30 days of this order.

III. Silvaco's Motion to Compel Re Schlinker Privilege Log

After reviewing the parties' briefs and the record, the Court makes the following findings/rulings:

1. There were five documents at issue in Silvaco's motion. Following the filing of this motion, Defendants/Cross-Complainants provided redacted versions of four of the documents and an unredacted version of the final document. In light of that production, Silvaco has chosen to withdraw its motion. The Court therefore has nothing substantive on which to rule.

2. Silvaco still wants monetary sanctions. Unlike the previous motion, however, Silvaco has chosen to withdraw its motion. Note that Silvaco's motion is not moot, even accounting for the production of the above-mentioned documents. Why? Because Silvaco's motion sought *unredacted* versions of all of the documents, arguing that they were not privileged at all.

The Court finds that Silvaco's decision to withdraw its motion when the motion was not moot weighs strongly against assessing sanctions against Defendants. Put another way, even assuming the Court had the power to award sanctions in this situation, the Court finds that awarding sanctions here would be unjust. Therefore, the Court DENIES Silvaco's sanctions request.

IV. Silvaco's Motion to Compel re Mr. Andersen

After reviewing the parties' briefs and the record, the Court makes the following findings/rulings (which largely mirror the Court's finding/rulings for Silvaco's motion relating to Mr. Michelsen):

1. The Court will not order Mr. Andersen to produce all of his pre-3/2/18 cellular data to Silvaco. That is not a proper subject of a discovery motion.

2. The parties seem to argue that the 12/19/23 verification by Mr. Andersen moots the discovery dispute. The Court therefore deems this motion MOOT.

3. However, Silvaco's sanctions request is not moot, given that the dispute was not resolved until after the discovery motion was filed. (See R. Ct. 3.1348(a).) Here, the Court believes that sanctions are appropriate: this verification should have been provided much earlier. The Court does not find Mr. Andersen's explanation convincing; as a result, the Court finds no substantial justification for Mr. Andersen's late verification or explanation.

The Court finds that a reasonable amount of monetary sanctions is $1000, payable to Silvaco (through its counsel) within 30 days of this order. (This means the total amount of discovery sanctions for all of Silvaco's motions is $2000.)

- oo0oo -

Calendar Line 5

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. As discussed below, the Court SUSTAINS the demurrer with 30 days' leave to amend.

I. BACKGROUND

A. Factual

According to the allegations of the operative complaint ("Complaint"), the named plaintiffs, Jesse Granato, Stephanie Landrum, Selestia Ordway and Janice Zarad, at various dates between January 2021 and October 2021, contacted Apple and/or visited its stores due to issues with the iPhones that they had purchased, including broken screens and cameras. None of these issues were covered by the One-Year Limited Warranty that came with the phones, and Plaintiffs either paid Apple to make repairs or, in the case of Selestia Ordway, declined to do so given the cost. (Complaint, ¶¶ 11-18.)

Plaintiffs allege that under "normal circumstances," Apple customers with devices such as 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. (Complaint, ¶ 22.) However, "in an effort to accelerate the pace at which … customers need to replace their Apple devices, Apple deliberately frustrates its customers' efforts to repair their own devices or at a repair shop of their choosing by imposing restrictions on the repair of its products." (*Id*., ¶ 23.) 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. (*Id*., ¶ 24.)

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. (Complaint, ¶¶ 25-28.) If a customer repairs their own device or pays an independent repair shop to do so, Apple terminates their warranty coverage, and Apple expressly advices customers of as much. (*Id*., ¶¶ 29-33.)

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. (Complaint, ¶¶ 34, 36.) Apple has failed 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*., ¶¶ 37-39.) 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*., ¶¶ 39-40.) 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*., ¶ 40.)

The "booby traps" utilized by Apple to impede the ability of independent repair shops to make repairs include both physical (e.g., laptops manufactured with 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. (Complaint, ¶¶ 42-46.)

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. (Complaint, ¶¶ 50-52.) Apple provides training videos for AAPSs to train their technicians "to undermine third party companies and talk customers into buying more expensive first party repairs." (*Id*., ¶¶ 55-56.)

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. (Complaint, ¶¶ 57-61.) 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*., ¶¶ 65-80.)

B. Procedure

Based on the foregoing allegations, Plaintiffs 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.

II. REQUESTS FOR JUDICIAL NOTICE

Both sides submit requests for judicial notice.

First, Apple requests that the Court take judicial notice of a copy of its iPhone Hardware Warranty, effective from July 13, 2018 to January 25, 2021. Because this document is referenced and relied on in the Complaint, and its authenticity is easily verified and "not reasonably subject to dispute," it is a proper subject of judicial notice. (See Evid. Code, § 452, subd. (h); *City of Port Hueneme v. Oxnard Harbor Dist.* (2007) 146 Cal.App.4th 511, 514; *In re Apple Inc. Device Performance Litig.* (N.D Cal. 2019) 386 F.Supp.3d 1155, 1165 [taking judicial notice of Apple's hardware warranty where plaintiffs' warranty claim "necessarily depends upon the hardware warranty"].) Accordingly, Apple's request for judicial notice is GRANTED.

Plaintiffs request that the Court take judicial notice of the following: (1) California Senate Bill No. 244 (Exhibit A); (2) Apple's Letter to State Senator Susan Eggman regarding the foregoing legislation (Exhibit B); (3) FTC Report dated May 2021 concerning repair restrictions (Exhibit C); (4) President Joe Biden's Executive Order titled "Executive Order on Promoting Competition in the American Economy," dated July 9, 2021 (Exhibit D); and (5) Plaintiff's Notice of Violations of the MMWA, CLRA and UCL, sent to Apple via certified mail, dated February 19, 2022 (Exhibit E).

The Court may properly take judicial notice of Exhibits A 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 the FTC Report, and not the truth of its 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 this report is relevant to the disposition of the demurrer, and judicial notice is limited to relevant items (see *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301), it declines to take judicial notice of it. It also declines to take judicial notice of Apple's letter to State Senator Eggman and Plaintiffs' notice of violations, which it is not persuaded come within the ambit of subdivision (h) of Evidence Code section 452, as Plaintiffs maintain.

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

III. DEMURRER

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

A. Legal Standard

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

B. Discussion

1. *Second Cause of Action: Violation of the 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 warranty- Apple has violated the MMWA's prohibition of illegal tying arrangements contained in 15 U.S.C. Section 2302 ("Section 2302"), subdivision (c). (Complaint, ¶ 99.) Apple maintains that Plaintiffs fail to state such a claim for the following reasons: (1) Apple provides warranty repairs to customers free of charge, thus placing its conduct outside the purview of Section 2302, subdivision (c); (2) Plaintiffs fail to allege sufficient facts to support the existence of an improper tying arrangement between Apple warranty coverage and the use of Apple or AASP repair services; and (3) Plaintiffs fail to allege that they suffered any harm caused by alleged misconduct as required by Section 2310, subdivision (d)(1), of the MMWA.

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. (*Id*., 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 ….

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, 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).) That is, 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 Complaint demonstrate that the *only* circumstances where Apple actually *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 it is permitted to do by the MMWA and FTC regulations.

In their opposition, Plaintiffs appear to concede the foregoing, but emphasize that their MMWA claim is not limited to *free* repairs and insist that they have otherwise adequately pleaded that Apple unlawfully conditions its warranties on using Apple or an AASP for *paid* repairs. In support of this contention, they cite to their allegations: quoting language from the Limited Warranty that purportedly instruct customers to seek product servicing from only Apple (Complaint, ¶ 30); stating that warranty coverage only applies when the product is used in accordance with Apple's user manuals, which also instruct consumers to use Apple or an AASP for repairs (*id*., ¶¶ 31-32); stating Apple's policy of informing customers that it will not provide warranty service if they obtain repair services elsewhere (*id*., ¶ 33); stating Apple's practice of refusing to provide warranty service if a customer obtains repair services elsewhere (*id.*, ¶¶ 47-49). However, as Apple responds, Plaintiffs' "anti-repair" allegations find no support when the *actual* Limited Warranty provisions cited are read in toto.

The first provision Plaintiffs characterize as "anti-repair" is one advising customers to "not open the Apple Product" and that "[o]nly Apple or an AASP should perform service on this Apple product." (Opp. at 3-4, citing Complaint at ¶ 30.) But this provision has been selectively quoted by Plaintiffs, with it stating in full:

> 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.

(Limited Warranty at 6 [Attached as Exhibit A to the Declaration of Nicole C. Valco in Support of Apple's Demurrer to the Complaint.)

Notably, 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. Thus, read in full, this provision merely warns customers that if they or an independent repair provider damage their device while opening it, that damage may not be covered by the warranty, and this is consistent with the warranty exclusions that Plaintiffs notably do not challenge (and are permitted under FTC regulations- see 17 C.F.R. § 700.10, subd. (c)) that Apple does not cover "damage *caused* by service … performed by anyone who is not a representative of Apple or an [AASP]." (Ex. A at 5.) Thus, the quoted provision on which Plaintiffs rely has nothing to do with conditioning the warranty on using Apple or an AASP for repairs that fall outside of the warranty.

Plaintiffs' reliance on language of the Limited Warranty and the iPhone user manual also does not state a claim for violation of the MMWA. Notably, Plaintiffs only generally refer to the user manuals and do not actually identity any *specific* language therein that "instructs customers not to independently repair their devices" (Opp. at 4) or otherwise obligates them to use Apple or AASP repair services.

Relying on portions[8] of the FTC regulation set forth in 16 C.F.R. section 700.100, subdivision (c), Plaintiffs insist that the language in the Limited Warranty amounts to an "implicit t[ie]" under the MMWA. (Opp. at 16.) But as Apple maintains, this assertion suffers from several problems. First, the Court is not aware of any authority (nor do Plaintiffs cite any) which supports a claim for violation of the MMWA based on an "implicit" tie. Second, the portion of the FTC regulation that Plaintiffs rely on pertains only to "deceptive" warranty claims under a *different* section of the MMWA, particularly 15 U.S.C. section 2310, and not to the anti-tying claims at issue here which involve Section 2302. Third, at most, the warranty provisions excerpted by Plaintiffs advise customers that Apple or AASPs "should" repair their products so as to prevent further damage not covered by the warranty, and the word "should" is "a recommendation, not … a mandate." (*Marin Ass'n. of Pub. Emps. v. Marin Cnty. Emps.' Ret. Ass'n.*, (2016) 2 Cal.App.5th 674, 699.) This is not even close to approaching the language described in 16 C.F.R. section 700.10, subdivision (c), that could imply warranty coverage requires use of Apple or an AASP for all repairs. (See Opp. at 17, citing 16 C.F.R. § 700.10, subd. (c) ["For example, a provision in the warranty such as, '*use only* an authorized 'ABC'

[8] Plaintiffs quote the following language: "[W]arranty language that implies to a consumer acting reasonably in the circumstances that warranty coverage requires the consumer's purchase of an article or service identified by brand, trade or corporate name is similarly deceptive."

dealer' or '*use only* 'ABC' replacement parts,' is prohibited where the service or parts are not provided free of charge pursuant to the warranty."] (Emphasis added).)

In sum, the actual provisions in the warranty do not instruct customers to "use only" Apple or AASPs to repair their devices, nor do they prohibit customers from opening their devices, obtaining repairs from independent providers (or themselves) or suggest that warranty coverage will be terminated if they do so. Plaintiffs' contention that the Limited Warranty contains a "warranty-voiding condition tied to exclusive repair by" Apple is "flatly contradicted by the text" of the warranty itself.[9] (*Corn v. Target Corp.* (N.D. Ill. 2023) 2023 U.S. Dist. LEXIS 82793, *16.)

Turning to Plaintiffs' allegations that Apple has an unwritten "practice" of conditioning warranty coverage on use of Apple or AASP for repairs (see Opp. at 17-19, citing Complaint at ¶¶ 33, 47-49), most critically, Plaintiffs cite no authority, and the Court aware of none, which permits a plaintiff to state an MMWA claim based *solely* on a purported *practice* as opposed to express language in the actual warranty. Additionally, none of the plaintiffs alleges that they *personally* experienced such a practice, and secondhand allegations and anecdotes of what *others* may have experienced are insufficient to state a claim. Thus, Plaintiffs' allegations pertaining to Apple's unwritten "practice" does not support a claim for violation of the MMWA.

With its remaining argument, touched on in the preceding paragraph, Apple contends that Plaintiffs' MMWA claim additionally fails because they fail to plead that they personally experienced injuries *as a result* of Apple's alleged practices. As Apple explains, a plaintiff pursuing a claim for violation of the MMWA must allege that the purported violation caused them damages. (15 U.S.C. § 2310, subd. (d)(1).) Plaintiffs must allege what injuries they *personally* experienced, as opposed to those purportedly suffered by absent class members.

Here, the Court agrees with Apple that Plaintiffs fail to plead facts which establish that the challenged practices or warranty provisions *caused* their claimed damages, which are alleged to be paying Apple the "supra-competitive prices" it charges to repair out-of-warranty damage to their iPhone screens. Plaintiffs notably 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 purchased a screen repair from Apple) or third parties could have made repairs for less and Apple prevented them from obtaining such repairs. There is also no dispute that the named Plaintiffs do not allege that they personally purchased or repaired dozens of Apple devices (outside of their iPhones) that they purport to put at issue in the Complaint.

Given the foregoing, the Court finds that Plaintiffs have failed to state a claim for violation of the MMWA. Consequently, Apple's demurrer to the second cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED with 30 days' leave to amend.

---

[9] Plaintiffs' reliance on *In re Apple & AT & TM Antitrust Litig.* (N.D. Cal. 2008) 596 F.Supp.2d 1288, 1313 in support of their contention that they have sufficiently pleaded a claim for violation of the MMWA's anti-provision is unavailing because unlike that case, here Plaintiffs do not allege that they were ever actually refused warranty coverage.

2. *Third Cause of Action: Violation of the CLRA*

In the third cause of action, Plaintiffs allege that Apple's actions and practices violate Civil Code section 1770 of the CLRA because Apple has inserted substantively and procedurally "unconscionable" provisions in the Limited Warranty. (Complaint, ¶¶ 110-113.) The Limited Warranty is alleged to be procedurally unconscionable because it is a standardized contract of adhesion drafted by Apple, the party with superior bargaining strength, that is presented on a take-it-or-leave-it basis from customers who cannot obtain its products from other manufacturers. (*Id*., ¶ 12.) Plaintiffs allege that the warranty is substantively unconscionable because "reasonable consumers would not expect that Apple would insert unlawful provisions [in the warranty] and void their warranty if they obtained repairs from independent repair ships." (*Id*., ¶ 113.)

Apple asserts that Plaintiffs have failed to state a claim for violation of the CLRA because (1) the claim is barred by California's safe harbor doctrine given that the warranty policies challenged are affirmatively permitted under federal law, (2) Plaintiffs do not allege facts establishing that Apple's hardware warranties are either procedurally or substantively unconscionable, and (3) Plaintiffs fail to allege they suffered harm as a result of the purported misconduct.

The CLRA targets a class of "unfair methods of competition and unfair or deceptive acts or practices" enumerated in Civil Code section 1770. (Civ. Code, § 1770, subd. (a).) "Any consumer who suffers any damage as a result of the use or employment by any person of" this unlawful conduct may bring an action for damages, restitution of property, and injunctive relief. (Civ. Code, § 1780, subd. (a).) The consumer may also bring a class action on behalf of "other consumers similarly situated." (Civ. Code, § 1781, subd. (a).)

As set forth above, Apple first argues that this claim fails because it is barred by the so-called "safe harbor" doctrine. In California, CLRA and UCL claims are subject to this doctrine, which "precludes plaintiffs from bringing claims based on 'actions the Legislature permits.'" (*Ebner v. Fresh, Inc.* (9th Cir. 2016) As the California Supreme Court has explained, "[w]hen specific legislation provides a 'safe harbor,' plaintiffs may not use the general unfair competition law to assault that harbor." (*Cal-Tech Comms., Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 182 [further explaining that the scope of the UCL "is not unlimited" because "[s]pecific legislation may limit the judiciary's power to declare conduct unfair."].) An action under the CLRA can be limited by a safe harbor as well. (See *Bourgi v. West Covina Motors, Inc.* (2008) 166 Cal.App.4th 1649, 1660 ["finding the provisions of the CLRA must be read together with the safe harbor provision" of a California statute.].) The safe harbor doctrine will prevent CLRA or UCL claims if separate legislation "actually 'bar[s]' the action or clearly permit[s] the conduct." (*Cal-Tech*, 20 Cal.4th at 183.)

Apple asserts that FTC regulations affirmatively permit it to exclude damage caused by third-party repairs and "unauthorized" parts from warranty (16 C.F.R. § 700.10, subd. (c) [stating that the MMWA "does not preclude a warrantor from expressly excluding liability for defects or damage caused by 'unauthorized' articles or service"]), and to require free, in-warranty repairs be performed by Apple or an AASP (15 U.S.C. § 2302, subd. (c); 16 C.F.R. § 700.10, subd. (a)). It argues that Plaintiffs mischaracterize the terms of the hardware warranties, which it maintains neither prohibit customers from obtaining third-party repairs nor

void warranty coverage based on such repairs. A review of the Limited Warranty and the statutes and regulations it cites supports Apple's contentions.

As articulated above, Section 2302, subdivision (c), of the MMWA and FTC regulations (16 C.F.R. § 700.10, subd. (a)) expressly permit Apple to exclude damage caused by third-party repairs and "unauthorized" parts from warranty coverage and require *free*, in-warranty repairs to be performed by Apple or an AASP. In their opposition, Plaintiffs concede as much, but maintain that the safe harbor doctrine does not bar their CLRA (or UCL) claim because they are not challenging the foregoing policies. (See Opp. at 13.) Instead, they assert, their CLRA claim is predicated on Apple's alleged practice of "requiring non-covered repairs to be performed by Apple or an AASP." (*Id.*, citing Complaint at ¶¶ 27-29, 33.) However, as set forth above, Plaintiffs fail to adequately plead such a practice, and the warranties do not require out-of-warranty repairs to be performed by Apple or AASPs. Ultimately, to the extent that Plaintiffs' CLRA claim is based on the warranties, given that Apple is expressly permitted by federal law to exclude damage caused by third-party repairs, the claim is barred by the safe harbor doctrine.

Apple's next argument, that the CLRA claim fails because Plaintiffs have not pleaded facts establishing that its hardware warranties are unconscionable, is also well taken. As it notes, multiple courts have already rejected this assertion, and the Court finds the reasoning behind these decisions persuasive. (See, e.g., *Vitt v. Comput., Inc.* (9th Cir. 2012) 469 F. App'x 605, 609 [affirming dismissal of CLRA claims and rejecting unconscionability challenge to Apple's laptop warranty]; *Anderson v. Apple Inc.* (N.D. Cal. 2020) 500 F. Supp. 3d 993, 1027-28 [rejecting unconscionability challenge to iPhone warranty].)

Procedural unconscionability focuses on the elements of oppression and surprise. (See *Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 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.) Contracts are not oppressive when they concern products that may be acquired through "reasonably available alternative sources of supply" (*Anderson, supra*, 500 F.Supp.3d at 1028), and Plaintiffs have not alleged that they lacked other options for purchasing smartphones, generally.[10] As for the element of "surprise," Plaintiffs merely recite the applicable legal standard, and do not identify any warranty terms that were "hidden" or actually surprised them.

[10] While Plaintiffs allege that they could not have obtained *Apple* products from other manufacturers, the proper inquiry is whether there are *alternatives* to Apple products. (See, e.g., *Darnaa, LLC v. Google, Inc.*, (N.D. Cal. 2015) 2015 U.S. Dist. LEXIS 161791, *5 [rejecting claim of procedural unconscionability for YouTube's Terms of Service based on argument that YouTube was the "dominant, outcome-determinative website" for displaying music videos because with other file-sharing or independent websites available, the plaintiffs had other meaningful choices].) Their allegation that they could not have bought smartphones from other manufacturers without encountering similar onerous repair policies (Complaint, ¶ 112) is, without identification of any *specific* manufacturers with such policies, purely speculative and therefore does not establish oppressiveness.

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, internal citation and quotation marks omitted.) In the Complaint, Plaintiffs again recite the applicable legal standard, but fail to plead facts suggesting that any actual warranty terms are "so one-sided as to shock the conscience" (*McCaffrey Grp, Inc. v. Superior Court* (2014) 224 Cal. App.4th 1330, 1348), and the conclusory allegation that customers would not expect Apple to "void their warranty if they obtained repairs from independent repair shops" or "deprive[] [them] of the freedom of choosing repair shops" (Complaint, ¶ 113) does not establish substantive unconscionability because it is contradicted by the judicially noticeable actual warranty terms.

The Court, for the reasons discussed above in connection with the MMWA claim, also finds persuasive Apple's remaining claim that Plaintiffs fail to plead facts establishing that they personally suffered harm as result of Apple's repair practices, including the specified warranty provisions.

Given the foregoing, the Court concludes that Plaintiffs fail to state a claim for violation of the CLRA. Consequently, Apple's demurrer to the third cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED with 30 days' leave to amend.

3. *First Cause of Action: Violation of the UCL*

Plaintiffs' second cause of action is predicated on allegations that Apple's practices that are designed to deliberately frustrate its customers' efforts to repair their own devices are "unlawful" under the UCL because they violate the MMWA, the Federal Trade Commission Act ("FTC Act") and the CLRA, and are "unfair" 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, the FTC Act and the CLRA. (Complaint, ¶¶ 92-94.) Apple contends that no claim for violation of the UCL has been stated because (1) as with the CLRA cause of action, the claim is barred by California's safe harbor doctrine given that the warranty policies challenged are affirmatively permitted under federal law, (2) Plaintiffs fail to plead any unlawful or unfair conduct by Apple sufficient to state a claim and (3) Plaintiffs fail to plead a loss of money or property as a result of Apple's 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 predicate violations of the MMWA, CLRA

and Section 5 of the FTC Act. (Complaint, ¶ 93.) They concede that as a consequence, their "unlawful" UCL claim depends on the viability of their MMWA and CLRA claims. Given the Court's conclusions that Plaintiffs fail to state claims for violation of the MMWA and CLRA, the "unlawful" portion of Plaintiffs' UCL claim necessarily fails and the first cause of action will survive demurrer only if the Court finds that Plaintiffs have sufficiently pleaded that Apple's alleged actions constitute "unfair" practices within the meaning of the UCL.

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

- An act or practice is unfair "if the consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided." (*Daughtery v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 700, 710.)
- "'[A]n "unfair" business practice occurs when that practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 719, internal citations omitted.)
- An unfair business practice means "'the public policy which is a predicate to the action must be "tethered" to specific constitutional, statutory or regulatory provisions.'" (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940.)

Apple contends that Plaintiffs have not pleaded any "unfair" business practices by them, regardless of the test applied. This is clear with respect to the third test, the so-called "tethering" test, because 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.) Plaintiffs' insistence to the contrary, citing to *Diaz v. Intuit, Inc.* (N.D Cal. 2017) 2017 U.S. Dist. LEXIS 162979, that they need not plead a predicate violation to satisfy the tethering test, is unavailing. As Apple asserts, in *Intuit*, the plaintiffs generally alleged violations of California's public policy prohibiting fraudulent tax filings without alleging violations of any specific statutes or regulations that embodied that policy, and because the public policy at issue was not tied to any statute or regulation, the Court held that they were not required to "allege a direct violation of a statute to satisfy the tethering test." (*Intuit*, at *6.) But here, in contrast, 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. (See *In re Installment Fee Cases, supra*, 211 Cal.App.4th at 1419.)

Turning to the second test, which is colloquially referred to as the "balancing test," Apple argues that Plaintiffs' unfairness theory fails under this test because it is "entirely conclusory," with them pleading, without *any* factual support, that Apple's practices have no "countervailing benefits" and cause inflated repair prices, premature device replacement, harm to the environment and local businesses, and lack of access to timely repairs. They continue that Plaintiffs' theory of harm has not been adequately alleged because it is based on their "mischaracterization of Apple's hardware warranties and practices as requiring customers to obtain repairs from Apple and AASPs," which are contradicted by the actual language of the warranties. The Court agrees with Apple that such speculative allegations of harm to

consumers are insufficient to establish its acts and practices are "unfair" based on the balancing test (See, e.g., *Marsh v. Anesthesia Servs. Med. Grp., Inc.* (2011) 200 Cal.App.4th 480, 502), as are Plaintiffs' allegations that Apple's practices serve no countervailing benefit. Plaintiffs must plead more than mere conclusions, i.e., actual facts, establishing that Apple's purported "anti-repair" practices provide more harm than utility to consumers.

Finally, Apple maintains that Plaintiffs cannot satisfy the remaining test (commonly referred to as the "FTC test" given to its reliance on the definition of "unfair" in Section 5 of the FTC Act) because the test does not apply to consumer actions like the one at bench and further, even if it did apply, given that much of the analysis of the FTC test mirrors the balancing test, Plaintiffs would fail it for the same reasons. While the Ninth Circuit Court Appeals has declined to apply the FTC standard in consumer UCL actions in the absence of a clear holding from the California Supreme Court (see *Lozano v. AT&T Wireless Servs., Inc.* (9th Cir. 2007) 504 F.3d 718, 735-736), the same cannot be said for California courts. (See, e.g., *Net2Phone, Inc. v. Superior Court* (2003) 109 Cal.App.4th 583, 595; *Rubenstein v. The Gap, Inc.* (2007) 14 Cal.App.5th 870, 880.) As such, the Court rejects Apple's contention that Plaintiffs cannot satisfy the FTC test because it does not apply to this action. However, it does agree that Plaintiffs fail to satisfy this test for the same reasons as the balancing test, i.e., the dearth of factual allegations which establish that Apple's purported anti-repair practices are "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."

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

The FTC report regarding repair restrictions that Plaintiff cites does not aid them in this regard. First, while the *existence* of the report is judicially noticeable, its factual findings are not. (*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.].) But even if accepted as true, the report does not aid Plaintiffs' failure to plead *facts* establishing the requisite causal link between their damages and Apple's practices because the portions cited concern vehicle and medical equipment manufacturers' repair practices and the report makes no findings regarding smartphones or similar products, much less Apple's repair policies and their effect on the cost of repair services that Plaintiffs allegedly purchased. In sum, Plaintiffs fail to plead facts sufficient to establish their standing to pursue a UCL claim.

Given the foregoing, Apple's demurrer to the first cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED with 30 days' leave to amend.

4. *Fourth Cause of Action: Unjust Enrichment*

Plaintiffs' remaining cause of action is predicated on allegations that as a result of its unlawful repair restriction practices, Apple was able to charge increased repair costs and sell more brand-new Apple replacement products than it otherwise would have, thereby unjustly obtaining monies which rightfully belonged to Plaintiffs and the Proposed class to their detriment. (Complaint, ¶¶ 117-122.) Apple maintains that its demurrer to this claim should be sustained because (1) unjust enrichment is not a standalone claim in California, (2) even if re-cast as a quasi-contract claim, it is barred because an express contract defines the rights of the parties and (3) Plaintiffs fail plead facts which establish that Apple unjustly retained a benefit at their expense.

Turning to Apple's first argument, while it is a correct statement of law that unjust enrichment is not a cause of action, it is synonymous with restitution, and California courts are instructed overlook labels and determine if the plaintiff has pleaded a basis for restitution. (See, *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387-388.) "Restitution may be awarded where the defendant obtained a benefit form the plaintiff by fraud, duress, conversion, or similar conduct." (*Id*. at 388, emphasis added.) However, as Apple maintains, Plaintiffs cannot state a basis for restitution given the express agreement between them, i.e., the Limited Warranty. (See, e.g., *Lance Camper Mfg. Corp. v. Republic Indem.* (1996) 44 Cal.App.4th 194, 203 ["[I]t is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter."].) Plaintiffs cannot avoid the consequences of the existing warranties unless they alleged that they are void or rescinded, which they do not. (See *Russell City Energy Co., LLC v. City of Hayward* (2017) 14 Cal.App.5th 54, 70, fn. 8 [stating that a party to an express contract can only "assert a claim for restitution based on unjust enrichment by alleging in that cause of action that the express contract is void or was rescinded."].)

The Court also finds that Plaintiffs have not pleaded facts establishing that Apple unjustly retained any benefit at their expense because, as previously discussed, their allegation that Apple charged higher prices for repairs due to its alleged repair practices is wholly conclusory.

In accordance with the foregoing, Apple's demurrer to the fourth cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED with 30 days' leave to amend.

IV. CONCLUSION

Apple's request for judicial notice is GRANTED.

Plaintiffs' request for judicial notice is GRANTED IN PART. The request is GRANTED as to Exhibits A and D and otherwise DENIED.

Apple's demurrer to the Complaint on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED with 30 days' leave to amend.

The Court will prepare the order.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

- oo0oo -

Calendar Line 6

Case Name: *U.S. Bank N.A. v. Fareed Sepehry-Fard*
Case No.: 17CV314286

This is an unlawful detainer action by Plaintiff U.S. Bank National Association, as Trustee for Greenpoint Mortgage Trust Mortgage Pass-Through Certificates, Series 2007-AR2 ("U.S. Bank" or "Plaintiff") for possession of a residential property (the "Property") in Saratoga, which is currently occupied by Defendant Fareed Sepehry-Fard. Before the Court is U.S. Bank's motion for summary judgment, which is opposed by Defendant. As discussed below, the motion is GRANTED.

I. BACKGROUND

According to the allegations of the operative complaint ("Complaint"), on July 6, 2017, the Property was sold to U.S. Bank at a trustee's sale under a power of sale contained in a deed of trust executed by Defendant on January 10, 2007. (Complaint, ¶ 5, Exhibit 1.) U.S. Bank alleges that it duly perfected its title by recording the Trustee's Deed Upon Sale on July 20, 2017. (*Id.*, ¶ 6, Exhibit 2.)

On July 28, 2017, Mr. Sepehry-Fard was served with a Three-Day Notice to Quit in accordance with Code of Civil Procedure section 1162. (Complaint, ¶¶ 7-8, Exhibits 3 and 4.) Defendant failed to comply with the notice and continued to maintain possession of the Property after expiration of the notice and continues to do so at present. (*Id.*, ¶¶ 9-10.)

On August 10, 2017, Plaintiff initiated the instant action, seeking both possession of the Property, as well as monetary damages representing the unpaid fair rental value per day for the use and occupancy of the Property for each day from August 1, 2017 until entry of judgment.

II. MOTION FOR SUMMARY JUDGMENT

A. Burden of Proof

The party moving for summary judgment/adjudication bears the initial burden of production to make a prima facie case showing that there are no triable issues of material fact – one sufficient to support the position of the party in question that no more is called for. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.) Plaintiffs moving for summary judgment bear the burden of persuasion that each element of the cause of action in question has been proved, and hence there is no defense thereto. (Code Civ. Proc., § 437c.) Plaintiffs, who bear the burden of proof at trial by preponderance of evidence, therefore "must present evidence that would require a reasonable trier of fact to find the underlying material fact more likely than not- otherwise he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Aguilar, supra,* 25 Cal.4th at 851.) The defendant has no evidentiary burden until the plaintiff produces admissible and undisputed evidence on each element of a cause of action. (Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2013), ¶ 10:238.) If the plaintiff meets this initial burden, it then shifts to the defendant to "show that a triable issue of one or more material facts exists as to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(1).)

B. Discussion

1. *Unlawful Detainer Law Generally*

The instant action is authorized and governed by Code of Civil Procedure section 1161a ("Section 1161a") which provides, in pertinent part, that "a person who holds over and continues in possession of … real property after a three-day written notice to quit the property has been served … maybe removed therefrom … [w]here the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person … and the title under the sale has been duly perfected." (Code Civ. Proc., § 1161a, subd. (b)(3).)

Critically, potential triable issues of fact within an unlawful detainer proceeding are *limited*, with the California Supreme Court having long held "that in the summary proceeding in unlawful detainer the right to possession *alone* [is] involved, and *the broad question of title [cannot] be raised and litigated by cross-complaint and affirmative defense.*" (*Cheney v. Trauzettel* (1937) 9 Cal.2d 158, 159, internal citation omitted, emphasis added.) "Matters affecting the validity of the trust deed or the primary obligation itself, or other basic defects in the plaintiff's title, are neither properly raised in this summary proceeding for possession, nor are they concluded by the judgment." (*Id*. at 160.) Thus, in order to succeed in this action, U.S. Bank "need only prove a sale in compliance with the statute and deed of trust, followed by a purchase at such sale," and Mr. Sepehry-Fard "may raise objections *only* on that phase of the issue of title." (*Cheney*, 9 Cal.2d at 160, emphasis added; see also *MCA, Inc. v. Universal Diversified Enterprises Corp.* (1972) 27 Cal.App.3d 170, 176-177 ["As a consequence, defendant's attacks upon plaintiff's title *other* than by attempting to show plaintiff's noncompliance with Civil Code section 2924 did not constitute valid defenses to plaintiff's action, and therefore did not raise triable issues of fact."].)

2. *U.S. Bank Meets its Initial Burden*

With the foregoing mind, the Court turns to the evidence submitted by U.S. Bank in support of its motion.[11] According to these materials, Mr. Sepehry-Fard purchased the Property on January 10, 2007, with a loan (the "Loan") in the amount of $1.3 million from Greenpoint Mortgage Funding, Inc. ("Greenpoint") that was secured by a Deed of Trust ("DOT") executed by him on the Property and recorded on January 19, 2007. (Plaintiff's Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("UMF") Nos. 1-2.) On June 4, 2013, Mortgage Electronic Registration Systems, Inc., the nominee for Greenpoint as designated by the DOT, recorded an assignment of the DOT to Nationstar Mortgage, LLC ("Nationstar"). (UMF No. 3.) Starting July 1, 2012, pursuant to a Pooling & Servicing Agreement, Nationstar was the servicer of Defendant's Loan, which had

[11] U.S. Bank's request for judicial notice of various recorded property documents and the answer to the Complaint is GRANTED. (Evid. Code, § 452, subds. (c), (d) and (h); *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924, fn. 1 [court permitted to take judicial notice of the existence and contents of recorded real property records where the authenticity of the document is not challenged].) Defendant also makes a request for judicial notice, but fails to identify therein the specific authority for each of the items that are the subject of the request. Consequently, he fails to establish that his request compasses matters that are proper subjects of judicial notice. Consequently, Defendant's request for judicial notice is DENIED.

been in default since July 2011 and remained as such until the sale of the Property on July 6, 2017. (UMF Nos. 4-5.)

On September 9, 2015, a Notice of Default ("NOD") was recorded by Clear Recon. Corp. ("Clear Recon"), who had been substituted by Nationstar as the Trustee under the DOT. (UMF Nos. 7-8.) Prior to the recording of the NOD, Clear Recon provided all required notices and complied with the procedures mandated by the applicable provisions of the statutory scheme governing non-judicial foreclosure (see Civ. Code § 29924, et seq.). (*Id*.) On February 8, 2017, Clear Recon recorded a Notice of Trustee's Sale with a sale date of March 2, 2017. (UMF No. 9.) Clear Recon again provided all statutorily mandated notices. (*Ibid*.)

Clear Recon was instructed by Nationstar to postpone the sale date four times beginning with the original sale date of March 2, 2017, and each time Clear Recon communicated the same to the retained sale vendor, Xome Field Services. (UMF No. 10; Declaration of Tammie Laird in Support of Plaintiff's Motion for Summary Judgment ("Laird Decl."), ¶ 11.) Each postponement was announced in compliance with Civil Code section 2924g, subdivision (d), by public declaration at the time and place appointed for the sale. (Laird Decl., ¶ 11.) The last postponement set the new sale date as July 6, 2017. (*Ibid*.) This date was not postponed and therefore a trustee's sale was conducted by Clear Recon's agent, CalAgent, on that date pursuant to the power of sale contained in the DOT. (UMF Nos. 11-12.) There were three individuals present at the sale, but no third-party bid was made and therefore the property reverted to the foreclosing beneficiary, U.S. Bank, upon a credit bid of $1,445,498.74. (UMF Nos. 13-14.)

According to the auctioneer who conducted the sale, CalAgent employee Steve Neal, two individuals present at the sale repeatedly questioned him regarding the Property. (Declaration of Steve Neal in Support of Plaintiff's Motion for Summary Judgment ("Neal Decl."), ¶ 26.) One of them, who later identified himself as the owner, spoke "loudly" and in a "very confrontational manner," telling other attendees, and attempting to tell Mr. Neal, that the sale of the Property had been postponed. (*Ibid*.) Mr. Neal informed the man that he did not have any information and should wait until he received instructions and could make an announcement regarding the Property. (*Ibid*.) Throughout the calling of the sale at approximately 11:40 a.m., when Mr. Neal received clearance and instructions, until 11:44 a.m., when the sale was complete, the man and his companion continued to shout at Mr. Neal, and insisted that he had previously said the sale was postponed. (*Id*. at ¶ 28.) Mr. Neal had not, and both men were present when he called for bids on the Property. (*Ibid*.)

U.S. Bank perfected its title by recording a Trustee's Deed Upon Sale on July 14, 2017. Seven days later, on July 27, a Three-Day Notice to Quit was posted on the Property in accordance with Code of Civil Procedure section 1162 ("Section 1162"), subdivision (a)(3). (UMF No. 17.) The following day, Mr. Sepehry-Fard was served with a Three-Day Notice to Quit in accordance with Section 1162. (UMF No. 18.) Mr. Sepehry-Fard remained in possession of the Property after the expiration of the three-day notice, and has remained there since. (UMF No. 19.)

Upon review of the foregoing, the Court finds that U.S. Bank has meet its initial burden on its motion. First, the evidence submitted by Defendants establishes that the sale of the Property was in compliance with applicable provisions of the Civil Code and the DOT. As Defendant notes, "[i]f the trustee's deed recites that all statutory notice requirements and

procedures required by the law for the conduct of the foreclosure have been satisfied, a *rebuttable presumption* arises that the sale has been conducted regularly and properly." (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 831, citing Civ. Code, § 2924, subd. (c). emphasis added.) Here, the Trustee's Deed Upon Sale issued in favor of U.S. Bank includes such a recital:

> Trustee, having complied with all applicable statutory requirements of the State of California and performed all duties required by said Deed of Trust, including, among other things, as applicable, the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof.

(UMF No. 19.)

Thus, a rebuttable presumption exists that the trustee's sale conducted on July 6, 2017 was properly conducted. Critically, this presumption "may only be rebutted by substantial evidence of prejudicial procedural irregularity," i.e., "substantial evidence" that the sale was not done in compliance with the Civil Code. (*Moeller*, 25 Cal.App.4th at 833.)

Per the evidence submitted, U.S. Bank conducted all of the steps necessary to foreclose on a property subject to a deed of trust. Under California law, in order to effectuate such a foreclosure, the "trustee, mortgagee, ore beneficiary, or any of their authorized agents," must (1) file a notice of default which provides certain information and notices (see Civ. Code, §§ 2924, subd. (a)(1) and 2924c) and (2) give notice of the sale no earlier than three months after the recordation of the notice of default (see Civ. Code, § 2924, subd. (a)(3) and (f).) Here, the evidence demonstrates that Clear Recon, on behalf and at the direction of the beneficiary, Nationstar, recorded a code-compliant NOD on September 9, 2015, and complied with all related notice requirements. (UMF Nos. 1, 3, 4, 6, 7, 8; Laird Decl., ¶¶ 3-4, Exs. A-D.) It further establishes that Clear Recon recorded, served and posted a code-compliant Notice of Trustee's Sale on February 8, 2017 listing a sale date of March 2, 2017. (UMF No. 9; Laird Decl., ¶¶ 5-8, Exs. E-J.) The sale was postponed several times as permitted by Civil Code section 2924g, subdivision (c)(1), and each postponement was noticed as required Civil Code section 2924g, subdivision (c)(2). (UMF No. 10.) The sale was ultimately conducted on July 6, 2017, with U.S. Bank as the purchaser of the Property with a credit bid. (UMF No. 14.)

Under California law, title to real property "shall be deemed perfected as of 8 a.m. on the actual date of sale if the trustee's deed is recorded within 15 days after the sale …." (Civ. Code, § 2924h.) According to the evidence before the Court, a Trustee's Deed Upon Sale reflecting the sale was recorded on July 20, 2017, 14 calendar days after the sale. (UMF No. 15.) Thus, title was duly perfected as a matter of law.

Second, U.S. Bank's evidence demonstrates that Mr. Sepehry-Fard was properly served with a three-day notice to quit as required by Code of Civil Procedure section 1161a, subdivision (b), and Section 1162 when the notice was posted at the Property when no person of suitable age or discretion to serve could be found. (UMF No. 17.) The notice was also served by mail on July 28, 2017. (UMF No. 18.)

Finally, it is undisputed that Defendant has failed to vacate the property. (UMF No. 19.) Thus, U.S. Bank has demonstrated that the sale of the Property complied with applicable provisions of the Civil Code and DOT, that it purchased the Property at that sale, that it perfected title by recording the Trustee's Deed Upon Sale, and that Defendant was properly served with a three-day notice to quit but remains in possession of the property. Because U.S. Bank has met its initial burden, the burden shifts to Mr. Sepehry-Fard to raise a triable issue of material fact. To this end, the Court finds that Mr. Sepehry-Fard fails to do so.[12]

3. *Defendant Fails to Establish the Existence of a Triable Issue of Material Fact*

To reiterate, Mr. Sepehry-Fard cannot defeat U.S. Bank's motion by raising issues pertaining to the validity of the trustee's deed, the Loan, or any other alleged defects in U.S. Bank's title (see *Cheney, supra*, 9 Cal.2d at 160), and the presumption established by U.S. Bank that the trustee's sale conducted on July 6, 2017 was properly conducted "may only be rebutted by *substantial* evidence of prejudicial procedural irregularity" (*Moeller, supra*, 25 Cal.App.4th at 833).

In his opposition, Defendant asserts that U.S. Bank's motion should be denied for the following reasons: (1) U.S. Bank does not exist because it was dissolved in 2001; (2) he never received any consideration in exchange for executing the DOT; (3) he discharged his secured promissory note by tendering payment in February 2017; (4) the foreclosure sale was not properly held because U.S. Bank could not make a credit bid and he was told on the morning of the sale that it was postponed; (5) Plaintiff failed to perfect its title; (6) U.S. Bank failed to comply with a court order to provide him with an accurate payoff/reinstatement statement; and (7) he was not properly served with summons and complaint. None of these arguments are persuasive.

First, Defendant fails to submit evidence which establishes that U.S. Bank (and the trust is represents) no longer exists. In support of argument, Mr. Sepehry-Fard requests that the Court take judicial notice of a certificate of dissolution for a non-profit Minnesota Corporation that apparently copied U.S. Bank's name. (See Defendant's Request for Judicial Notice ("RJN"), pp. 371-372.) But this does not establish that Plaintiff is the same organization and as

[12] The Court notes that Mr. Sepehry-Fard has filed, as Plaintiff characterizes it, a "plethora of pleadings." Defendant has filed *fifteen* pleadings in response to the MSJ, many of which are characterized as "objections" to evidence submitted by U.S. Bank. These pleadings, which contain substantive argument as to the overall merits of this action, suffer from several procedural and substantive issues. First, an opposition to a motion for summary judgment may not exceed 20 pages (see Cal. Rules of Court, rule 3.1113(d)) *unless* the opposing party obtains the court's permission to submit an oversized memorandum by written application to the court (Cal. Rules of Court, rule 3.1113(e).) Here, no such application was filed by Defendant and therefore, to the extent these "objections" serve as space to make additional arguments concerning the merits, the Court has the discretion to refuse to consider the excessive pages. (See Cal. Rules of Court, rule 3.1113(g); *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 765.) To the extent that these pleadings are intended to be objections to evidence, they do not conform to California Rules of Court rule 3.1354 and instead essentially serve as additional space for Mr. Sepehry-Fard to make further substantive argument. Consequently, these "objections" are OVERRULED.

it responds, a national bank such as U.S. Bank, which is listed as an active bank on the website for the federal Office of the Comptroller of the Currency[13] (the "OCC"), *cannot* be incorporated or dissolved under state law. (See U.S.C. §§ 21, 26, 27, 181-183.)[14]

Defendant further argues that U.S. Bank is not authorized by the OCC to operate as a trustee of an allegedly outside trust, citing to the absence of U.S. Bank on the OCC's List of Active Trust Banks. But U.S. Bank is a normal national bank licensed under 12 U.S.C. section 21 et seq. with the power to operate as a trustee (12 U.S.C. § 24) and not a National Trust Bank that may *only* serve as a trustee (12 U.S.C. § 92a).

Finally Mr. Sepehry-Fard's assertion that the securitized trust on behalf of which Plaintiff owned his Loan and DOT never came into existence because its pooling and servicing agreement ("PSA") was supposedly never signed is unavailing because the unsigned copy filed with the SEC that he cites to does not establish that the *original* copy of that document is not signed.

Next, with regard to the issue of consideration, this issue is outside the scope of what may be litigated in this unlawful detainer proceeding because it relates to the validity of the underlying loan obligation and the DOT. (See *Cheney, supra*, 9 Cal.2d at 160.) In this action, U.S. Bank's title may be litigated only to extent of showing or challenging that "the property was sold in accordance with section 2924 of the Civil Code under a power of sale and that title under the sale has been duly perfected." (*Malkoskie v. Option One Mortgage Corp.* (2010) 188 Cal.App.4th 968, 974.) Nevertheless, even if the Court were permitted to consider the merits of this argument, Defendant provides no evidence which establishes that he did not receive consideration for executing the subject note and DOT. As "evidence" in support of this argument, he cites to subpoenas he claims Plaintiff did not respond to. But not only does he fail to demonstrate that he served such subpoenas, but noncompliance with a subpoena is enforced by a contempt proceeding and *not* deemed admissions.[15] (Code Civ. Proc., §§ 1991 and 2020.240.)

Mr. Sepehry-Fard's next argument concerning tender similarly falls outside the scope of what may be considered in this summary proceeding. Also similarly, even if the Court could consider this argument, it lacks merit because Defendant fails to demonstrate that he had the ability to fulfill his promise to pay the amounts owed. (See *Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 118.) The only thing he cites in support of his apparent offer to tender payment is a conditional, non-negotiable, unsecured *promise* to pay his unconditional, negotiable, secured promissory note. (Defendant's RJN, p. 385.) This does not establish that Defendant had the ability to pay the loan amounts due when he made the offer as another promise to pay does not discharge a prior promissory note. (*Roth v. Guardian Thrift &*

---

[13] The Court takes judicial notice of the existence of the statements made on this website listing U.S. Bank as an active bank. (See *Wood v. Superior Court* (2020) 46 Cal.App.5th 652, 580, fn. 2.)

[14] Defendant also cites an FDIC document that purportedly shows that one entity named U.S. Bank was closed when it merged into another institution in 2001. (See Defendant's RJN, p. 369.) But this document shows the continued existence of the merger survivor under the same U.S. Bank name.

[15] Efforts by Defendant to hold Plaintiff's counsel in contempt for failing to respond to a subpoena with this Court and the Court of Appeal failed.

Loan (1958) 162 Cal.App.2d 320, 322 ["[T]he taking of a note, either of the debtor or of a third person, for a prior existing debt is no payment, unless it be expressly agreed to take the note as payment, and …, upon failure to pay such note, the creditor may ignore it and sue upon the original debt."].)

Next, without citing to any authority, Defendant argues the foreclosure sale was invalid because only a lender that can show the asset on its financial statements and has paid value to acquire the subject debt may offer a credit bid. But the law is clear that a credit bid may be made by the beneficiary of the deed of trust, like U.S. Bank, without any need to prove assignment of that obligation. (Civ. Code, § 2924h, subd. (b) [stating that whereas other bidders must bring cash to a nonjudicial foreclosure sale, the present beneficiary is entitled to make a credit bid "up to the amount of the outstanding indebtedness."]; *Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 816.)

Mr. Sepehry-Fard also claims the sale was invalid because he was informed (by Clear Recon and U.S. Bank's attorney) in a call he placed the morning of the sale that it had been postponed, but the purported evidence of this is inadmissible hearsay and further, postponement of trustee's sale may be made only by the trustee's *public* announcement on the previously scheduled foreclosure date. (Civ. Code, § 2924g, subd. (d).) Additionally, a foreclosure sale is not invalidated by an irregularity in the proceeding unless it adversely affected the trustor's ability to protect his interest in the property. (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 11.) Even assuming what Mr. Sepehry-Fard says regarding what he was told concerning postponement the morning of the sale is true, he has not established that his ability to protect his interest in the Property was adversely affected because he ultimately attended the sale.

Defendant also challenges the sufficiency of Plaintiff's credit bid by arguing that it was less than the Property's market value[16], but presents no *admissible* evidence of its value, and even "a great disparity between the foreclosure price and the value of the property, by itself, is insufficient to set aside [a] sale." (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 93.)

The Court can easily dispose of Defendant's next argument that title was not perfected by U.S. Bank because he proffers no admissible evidence which supports his contention that Plaintiff "admitted that there was no underlying alleged debt owed to" it. He again relies on purported non-compliance with subpoenas to establish the foregoing, which the Court has already rejected above because non-response to a subpoena is not an admission of fact. Mr. Sepehry-Fard otherwise offers nothing which counters U.S. Bank's showing that it perfected titled by timely recording the trustee's deed upon sale.

Defendant next asserts that U.S. Bank voluntarily dismissed Case No. 2015-1-CV-286835 against him after the Court (Hon. Folan) issued an order requiring it to provide him with an accurate payoff/reinstatement statement. But any disobedience of such an order,

---

[16] The Court will not consider any cross-claim purportedly asserted by Defendant in federal court after his second removal of this action as doing so would clearly prejudice Plaintiff. (See *Laguna Village, Inc. v. Laborers' Internat. Union, Local 652* (1983) 35 Cal.3d 174, 181-182 [explaining that pleadings filed in federal court after removal are given effect in state court after the case is remanded only when the opposing party is not prejudiced and judicial policy favors recognition of the pleading.].)

assuming it happened, is not a defense to this unlawful detainer action, with any remedy lying in the action in which the order was entered.

Finally, Defendant waived any possible defect in service by making a general appearance in this action. (*Fireman's Fund Ins. Co. v. Sparks Construction, Inc*. (2004) 114 Cal.App.4th 1135, 1145 ["A general appearance operates as a consent to jurisdiction of the person, dispensing with the requirement of service of process, and curing defects in service."].) "Filing an answer on the merits constitutes a general appearance." (*Ibid*.) Here, Mr. Sepehry-Fard filed an answer to Plaintiff's Complaint in September 2017, and he did not raise a defense based on lack of proper service or lack of personal jurisdiction over him.[17]

As none of the arguments asserted by Mr. Sepehry-Fard raise a triable issue of material fact with regards to the rebuttable presumption established by Plaintiff that the foreclosure sale was properly conducted or that title was duly perfected by it, U.S. Bank's motion for summary judgment is GRANTED.

III. CONCLUSION

U.S. Bank's motion for summary judgment is GRANTED. Plaintiff must provide a proposed judgment within 10 days of the Court's final order.

The Court will prepare the order. As the Court (Judge Kulkarni) is changing assignments as of January 16, 2024, this case now be randomly reassigned to a civil case manager for future proceedings (except for those that must be handled by Judge Kulkarni).

****

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.

[17] Mr. Sepehry-Fard filed a motion to quash service of summons in January 2019, long after he had made a general appearance.

- oo0oo -

Calendar Line 7

Case Name:
Case No.:

- oo0oo -

Calendar Line 8

Case Name:
Case No.:

- oo0oo -

Calendar Line 9

Case Name:
Case No.:

- oo0oo -

Calendar Line 10

Case Name:
Case No.:

- oo0oo -

Calendar Line 11

Case Name:
Case No.:

- oo0oo -

Calendar Line 12

Case Name:
Case No.:

- oo0oo -

Calendar Line 13

Case Name:
Case No.:

- oo0oo -