SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

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

To contest a tentative ruling, you must call (408) 808-6856 before 4:00 P.M. and leave a voicemail message containing the information described below.
PLEASE NOTE: Sending an email to the department or Complex Coordinator will no longer suffice to constitute notice to the Court of the need for a hearing regarding a tentative ruling.

In the voicemail message, please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling.
(See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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

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- 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: JULY 18, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

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LAW AND MOTION TENTATIVE RULINGS

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV401294	Torres v. Jan Marini Skin Research, Inc. (Class Action) [Consolidated with Case No. 22CV401296/PAGA]	See Line 1 for tentative ruling.
LINE 2	22CV399893	Ong v. eHealthInsurance Services, Inc. (PAGA)	See Line 2 for tentative ruling.
LINE 3	23CV412334	Thompson v. Big 5 Corp., et al. (PAGA) [Lead Case; Consolidated with Case No. 23CV412953]	See Line 3 for tentative ruling.
LINE 4	21CV389608	Case, et al. v. Pinnacle Pipeline Inspection, Inc. (Class Action)	See Line 4 for tentative ruling.
LINE 5	22CV397316	Krishna v. Cepheid (Class Action)	See Line 5 for tentative ruling.

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(See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	23CV415833	Trace3, LLC v. Sycomp, A Technology Company, Inc., et al.	See Line 6 for tentative ruling.
LINE 7	22CV399410	Rodriguez v. Balderas, et al. (Class Action)	Hearing on Order to Show Cause; appearances are required.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Magdalena Torres v. Jan Marini Skin Research, Inc.*
Case No.: 22CV401294

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff Magdalena Torres alleges that Defendant Jan Marini Skin Research, Inc., a manufacturer and wholesaler of skincare products, 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 final approval of a settlement, which is unopposed. As discussed below, the Court GRANTS Plaintiff's motion.

I. BACKGROUND

On July 27, 2022, Plaintiff filed a class action complaint accusing Defendant of failing to: properly pay overtime, 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. That same day, Plaintiff also filed a separate PAGA representative complaint asserting a single claim under PAGA seeking penalties for the same violations alleged in the class action complaint.

On December 8, 2022, the Court granted Defendant's unopposed motion to consolidate the class action with the PAGA action; the Consolidated Class Action and Representative Action Complaint was filed the following day, asserting the following causes of action: (1) unpaid overtime; (2) unpaid meal period premiums; (3) unpaid rest period premiums; (4) unpaid minimum wages; (5) final wages not timely paid; (6) wages not timely paid during employment; (7) non-compliant wage statements; (8) failure to keep requisite payroll records; (9) unreimbursed business expenses; (10) violation of Bus. & Prof. Code § 17200; and (11) violation of PAGA.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

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

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

> extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

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

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

B. PAGA

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

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

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum

even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

III. SETTLEMENT CLASS

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

> All current and former hourly-paid, non-exempt employees of Defendant or employees of a temporary employment agency who were assigned to work for Defendant in California, at any time between July 27, 2018, and July 23, 2023.

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

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

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

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

IV. TERMS AND ADMINISTATION OF SETTLEMENT

The non-reversionary gross settlement is $625,000. Attorney fees of up to $208,333.33 (one-third of the gross settlement), litigation costs of $12,302.10 and $7,500 in administration costs will be paid from the gross settlement. $50,000 will be allocated to PAGA penalties,

75% of which ($37,500) will be paid to the LWDA. Plaintiff seeks an enhancement payment in the amount of $5,000.

The net settlement of approximately $341,864.57 will be allocated to class members on a pro-rata basis based on the number of weeks worked during the class period. The remaining 25% of the PAGA settlement amount will be distributed to Aggrieved Employees on a pro-rata basis. Class members will not be required to submit a claim to receive their payment. For tax purposes, settlement payments will be allocated 20% to wages subject to withholding, 40% to interest and 40% to penalties. 100% of the PAGA payment to Aggrieved Employees will be allocated as penalties. Participating class members will receive an average payment of approximately $1,762 and the highest payment received will be approximately $9,652.74. On average, Aggrieved Employees will receive $105.04, with a maximum payment of $335.68. Funds associated with checks uncashed after 180 days will be transmitted to the Controller of the State of California to be held in trust for such class members pursuant to California unclaimed property law.

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

> [C]laims, rights, demands, liabilities and causes of actions that are alleged, or that reasonably could have been alleged, based on the facts asserted in the operative complaint in the Action including the following claims: (i) failure to pay all regular wages, minimum wages and overtime wages due; (ii) failure to provide meal periods or compensation in lieu thereof; (iii) failure to provide rest periods or compensation in lieu thereof; (iv) failure to reimburse necessary business expenses; (v) failure to provide complete, accurate wage statements; (vi) failure to pay wages timely at time of termination or resignation; (vii) failure to provide timely pay wages during employment ; (viii) unfair business practices that could have been premised on the facts pled in the operative complaint; and (ix) failure to maintain required payroll records.

Aggrieved Employees will also release "all claims for civil penalties under [PAGA] that could have been premised on the facts alleged both in the PAGA Notice provided to the LWDA and in the operative complaint including but not limited to penalties that could have been awarded pursuant to Labor Code sections 210, 226.3. 1197.1, 558 and 2699." Consistent with the statute, Aggrieved Employees will not be able to opt out of the PAGA portion of the settlement.

As the Court determined in its order preliminarily approving the settlement, the release is appropriately tailored to the factual claims at issue. (See *Amara v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.) 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 case manager Madely Nava with settlement administrator Apex Class Action, LLC ("Apex") submitted in support of the instant motion, from January 4 to February 26, 2024, Apex received from counsel several class data files containing the names, social security numbers, last known mailing addresses, and the total number of relevant workweeks worked for each of the 194 settlement class members. Apex processed the addresses it had against the National Change of Address database to confirm and update this information and then mailed the notice

packet to Class members, in both English and Spanish, on March 11, 2024 via first class mail. As of the date of Ms. Nava's declaration, June 19, 2024, Apex has received 16 returned notice packets as undeliverable; four contained forwarding addresses to which packets were promptly re-mailed. For the remaining 12, Apex conducted a skip trace and located one updated address, to which a notice packet was re-mailed. At present, 11 Notice packets have been deemed undeliverable as no updated addresses have been located.

The deadline to submit a request for exclusion, a challenge to the amount of work weeks listed, or an objection to the settlement was May 10, 2024. As of the date of Ms. Nava's declaration, none of the foregoing had been received. Consequently, there are 194 participating settlement class members.

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

V. ATTORNEYS' FEES, COSTS AND INCENTIVE AWARDS

As set forth above, Plaintiff's counsel seeks a fee award of $208,333.33, or one-third of the gross settlement amount, which is not an uncommon contingency fee allocation in a wage and hour class action. Plaintiff also provides a lodestar figure of $189,552.50, which is based on 252.70 hours of work at a billing rate of $825 per hour, resulting in a modest multiplier of 1.1. This is well within the range of multipliers that courts typically approve. (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, as the multiplier sought by Plaintiff's counsel is relatively modest, well within the range of modifiers typically approved by courts and is supported by the percentage cross-check, the Court finds counsel's requested fee award is reasonable.

Plaintiff's counsel also seeks $12,302.10 in litigation costs, which is well short of the maximum amount ($25,000) permitted under the settlement agreement. Based on the information contained in the declaration of Plaintiff's counsel, this amount is reasonable and is therefore approved. The $7,500 in administrative costs are also approved.

Finally, Plaintiff requests an incentive awards of $5,000. To support this request, Ms. Torres submits a declaration describing her efforts in this action. The Courts finds that she is entitled to an incentive award and the amount requested is reasonable and therefore is approved.

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 hourly-paid, non-exempt employees of Defendant or employees of a temporary employment agency who were assigned to work for Defendant in California, at any time between July 27, 2018, and July 23, 2023.

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

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

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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Calendar Line 2

Case Name: *Matthew Ong v. eHeathInsurance Services, Inc.*
Case No.: 22CV399893

This is a representative action under the Private Attorneys General Act ("PAGA"). Plaintiff Matthew Ong alleges that Defendant eHeathInsurance Services, Inc. ("Defendant") committed various wage and hour violations and seeks penalties under PAGA for these violations.

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

I. BACKGROUND

According to the allegations of the operative Complaint, Plaintiff was employed by Defendant as a non-exempt employee from July 2021 to April 4, 2022. He alleges that Defendant failed to: pay all minimum, regular, and overtime wages, and meal period premiums owed in violation of Labor Code sections 201-204, 226.7, 5 10, 558, 1194, 1197, and 1197.1; pay employee meal period premium wages at the correct regular rate of pay that included all non-discretionary remuneration, in violation of Labor Code sections 201-203, 226.7, and 512; pay employee rest period premium wages at the correct regular rate of pay that included all nondiscretionary remuneration, in violation of Labor Code sections 201-203 and 226.7; pay employee sick pay at the correct regular rate of pay, in violation of Labor Code sections 201-204 and 246; and provide accurate itemized wage statements in violation of Labor Code section 226.

Plaintiff initiated this action with the filing of the Complaint on July 5, 2022, asserting a single cause of action for penalties under PAGA based on the aforementioned Labor Code violations.

II. LEGAL STANDARD FOR APPROVING PAGA SETTLEMENT

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. 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.) 75 percent of any penalties recovered go to the Labor and Workforce Development Agency (LWDA), leaving the remaining 25 percent for the employees. (*Ibid.*) PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id.* at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

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.) "[C]lass certification is not required" in this

context as in a class action. (*Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 (*Haralson*).)

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 (*Moniz*).) 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, supra,* 383 F. Supp. 3d at p. 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. PLAINTIFF'S INVESTIGATION, SETTLEMENT PROCESS, AND THE PARTIES' AGREEMENT

After the initiation of this action, Defendant advised Plaintiff of the existence of an arbitration agreement, and the parties met and conferred to discuss participating in early mediation. The parties subsequently agreed to participate in private mediation with wage and hour mediator Francis J. Ortman III. In connection with mediation, the parties engaged in informal discovery, with Defendant providing information pertaining to aggrieved employees during the PAGA period, the number of pay periods at issue, Plaintiff's personnel file and wage statements, a sample of payroll records of the PAGA group, as well as production of pertinent policies. The materials provided enabled Plaintiff's counsel to analyze Defendant's liability and exposure in preparation for the mediation.

On April 13, 2023, the parties participated in a mediation session with Mr. Ortman. While they did not reach a settlement at the mediation, they continued extended settlement negotiations afterwards, facilitated by Mr. Ortman, and ultimately reached the settlement agreement that is now before the Court.

Pursuant to the parties' agreement, Defendant will pay a non-reversionary gross settlement amount of $355,000, which is comprised of up to $118,333.33 in attorney's fees (one-third of the gross settlement amount), up to $30,000 in litigation costs and administration costs not to exceed $4,750. The net settlement of approximately $205,099.44 will be distributed 75% ($153,824.58) to the LWDA and 25% ($51,274.86) to "Aggrieved Employees" on a pro rata basis based on the number of pay periods worked by each employee during the relevant period. "Aggrieved Employees" are defined as "all current and former non-exempt employees of Defendant who worked in California at any time from April 29, 2021, through April 1, 2023." Defendant represents that there are approximately 475 "Aggrieved

Employees"; based on this number, the average recovery by each Aggrieved Employee is estimated to be $107.95.[1]

In exchange for settlement, Aggrieved Employees will release Defendant from all claims for civil penalties under the PAGA that were set forth, or could have been set forth based on the facts alleged in the Action, for penalties pursuant to PAGA for violation of Labor Code sections 201-204, 226, 226.7, 246, 510, 512, 558, 1194, 1197, and 1197.1, that accrued during the PAGA Period.

The release is appropriately tailored to the allegations at issue, and does not release any claims other than those for PAGA penalties. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537; *Moniz, supra*, 72 Cal.App.5th at p. 82 [release of "all known and unknown claims under PAGA … that were or could have been pled based on the allegations of the Complaint" was appropriately approved].) Nor does it affect a waiver of claims by Aggrieved Employees against the released parties for any individual wage and hour claims.

IV. DISCUSSION

A. Potential Verdict Value

Based on the data provided by Defendant, Plaintiff's counsel estimated the maximum exposure of the PAGA claim thusly: $1,250,000 (off-the-clock violations); $163,900 (meal and rest period premiums); $25,900 (sick pay rate violations); and $3,125,000 (derivative wage statement violations). Several factors reduced these amounts, including but not limited to the following: the potential that the Court would award less penalties based on the employer lacking knowledge of any violations; the lack of willfulness on the part of Defendant; the risk that Plaintiffs may recover nothing; and Defendant's denial on the merits and related defenses. In consideration of these facts, the history of various similar PAGA decisions that significantly reduce maximum penalties amounts (e.g., 90% reduction) and the risk that Plaintiff may recover nothing, the Court finds that the proposed settlement is fair to those affected and is genuine, meaningful, and reasonable in light of the statute's purposes.

B. Attorney's Fees

While the PAGA statute does not expressly require judicial review of claimed attorney fees, the Court believes it cannot adequately fulfill its statutory duty to review the penalties associated with PAGA settlements without also considering attorney fees. The Court thus finds that it must scrutinize the attorney fee arrangement associated with a PAGA settlement. This is consistent with the observation of many courts that PAGA claims are analogous to "*qui tam*" suits like those under the federal False Claims Act: when

[1] The gross settlement is premised on a total of 12,500 pay periods worked by Aggrieved Employees during the PAGA Period. Pursuant to the parties' agreement, if the number of total pay periods worked by the Aggrieved Employees during the PAGA Period exceeds 12,500, then Defendant shall have the option of increasing the Gross Settlement Amount on a pro rata basis, based on the same pay period value for any additional pay periods over 12,500 to include additional pay periods, or limiting the end date of the PAGA Period so as to limit the pay periods to a maximum of 12,500.

reviewing settlements of *qui tam* claims, courts should and do consider any associated attorney fee arrangement. (See *U.S. v. Texas Instruments Corp.* (9th Cir. 1994) 25 F.3d 725, 728 [attorney fee award must be considered by the trial court as part of its review of the "entire settlement arrangement"].)

As set of forth above, Plaintiff seeks a fee award of $118,333.33, or one-third of the gross settlement, which is not an uncommon contingency fee allocation in a wage and hour/PAGA action. Plaintiff's counsel also submit a lodestar figure of $97,410, based on 145.2 hours spent on this case by counsel billing at rates of $600 to $750 per hour. This results in a modest multiplier of 1.2, which is well within the range of multipliers typically approved by courts in these types of actions. Accordingly, the lodestar cross check supports the percentage fee actually requested and this amount is approved. (See *Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 1 Cal.5th 480, 488, 503-504 [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].)

C. Other Costs and Awards

Counsel's request for litigation costs of $16,817.23 appears reasonable based on the supporting declarations provided which establish that counsel actually incurred costs in this amount and is approved. The Court also approves settlement costs of $4,750. Plaintiff requests a service award in the amount of $10,000 for the time and effort expended in bringing this action, which Defendant does not oppose. The request is supported by a declaration submitted by Mr. Ong and is approved.

V. ADMINISTRATION PROCESS

The parties have selected Phoenix Settlement Administrators ("Phoenix") as the administrator of the settlement. The parties have agreed that no later than 21 days following the date of approval of this settlement, Defendant will provide Phoenix with a list of all Aggrieved Employees with the relevant identifying information (including the last known home address) and the number of pay periods worked. Within 10 days following receipt of the gross settlement amount from Defendant (the deposit is required to take place no later than 21 days following the date of approval), Phoenix will pay the various amounts approved by the Court to Plaintiff's counsel, the LWDA, and each Aggrieved Employee. Each Aggrieved Employee will be sent a check in the appropriate amount. Any checks returned as non-deliverable will promptly be re-mailed to the forwarding address provided; if none is, Phoenix will attempt to locate one using a skip trace or other search method. Any checks returned as undeliverable or that remain uncashed after 180 days will be transmitted to *cy pres* beneficiary Legal Aid at Work. These administrative procedures are appropriate and are approved.

VI. ORDER AND JUDGMENT

Plaintiff's motion for approval of the parties' PAGA settlement is GRANTED. "Aggrieved Employees" are "[a]ll current and former non-exempt employees of Defendant who worked in California at any time from April 29, 2021, through April 1, 2023."

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff and Aggrieved Employees shall take from the PAGA claim in their

Complaint only the relief set forth in the parties' settlement agreement and this order and judgment. The Court retains jurisdiction over the parties to enforce the terms of the PAGA settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **March 20, 2025 at 2:30 P.M.** in Department 7. At least ten court days before the hearing, Plaintiff's counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted to the *cy pres* beneficiary; the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel may appear at the compliance hearing remotely.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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

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Calendar Line 3

Case Name: *Zareyah Thompson v. Big 5 Corp., et al.*
Case No.: 23CV412334 (consolidated with Case No. 23CV412953)

These are representative actions under the Private Attorneys General Act ("PAGA"). Plaintiffs Zareyah Thompson and Christopher Puga (collectively, "Plaintiffs") each allege that Defendants Big 5 Corp. and Big 5 Sporting Goods Corporation (collectively, "Defendants") committed various wage and hour violations and seek PAGA penalties for those violations.

Before the Court is Plaintiffs' motion for approval of PAGA settlement, which is unopposed. As discussed below, the Court GRANTS Plaintiffs' motion.

I. BACKGROUND

Plaintiff Zareyah Thompson alleges that she was employed by Defendants as a cashier, an hourly paid, non-exempt position, from approximately April 2021 to October 2021 and from February 2022 to July 202,2 at Defendants' retail store in Pinole, California. Mr. Puga alleges that he was employed as a non-exempt employee by Defendants from mid-2021 through March 2022, specifically as a human resources clerk. Plaintiffs allege that Defendants failed to, among other things: pay them (and "Aggrieved Employees") for all hours worked; pay them all overtime compensation and minimum wages to which they were entitled; provide meal periods and rest periods to which they were entitled or pay statutorily mandated premiums when none were provided; provide them with accurate wage statements; maintain accurate and complete payroll records; timely pay wages owed upon termination; and provide them with suitable seating. They also allege that Defendants wrongfully required them to release their claims for unpaid wages as a condition of receiving their paychecks. Mr. Puga also alleges that Defendants had a policy and practice of misclassifying some Aggrieved Employees as exempt, which resulted in those employees not receiving all wages to which they were entitled.

On March 13, 2023, Ms. Thompson filed a representative action against Defendants asserting a single claim for PAGA penalties based on the various Labor Code violations described above. Mr. Puga filed his representative action approximately a week later on March 21, 2023, similarly asserting a single claim for PAGA penalties. Because these actions allege substantially similar Labor Code violations against the same defendants, they were related by the Court on April 11, 2023. On June 26, 2024, in connection with the instant motion, Plaintiffs filed a joint stipulation to consolidate their actions for settlement approval purposes only.

II. LEGAL STANDARD FOR APPROVING PAGA SETTLEMENT

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. 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.) 75 percent of any penalties recovered go to the Labor and Workforce Development Agency (LWDA), leaving the remaining 25 percent for the employees. (*Ibid.*) PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id.* at p. 383.) A judgment in a PAGA

action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

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.) "[C]lass certification is not required" in this context as in a class action. (*Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 (*Haralson*).)

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 (*Moniz*).) 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, supra,* 383 F. Supp. 3d at p. 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. PLAINTIFF'S INVESTIGATION, SETTLEMENT PROCESS, AND THE PARTIES' AGREEMENT

After the commencement of these actions, counsel for both plaintiffs conducted preliminary investigations into the factual bases for their clients' claims and engaged in informal discovery with Defendants, through which they obtained employee demographic data, a sample of Aggrieved Employees' time and pay records, and Defendants' California labor policies and procedures manuals which covered a broad range of topics including, inter alia, employee clock-in policies and procedures, attendance policies, meal periods/rest periods, overtime pay, etc. The foregoing materials enabled counsel to realistically assess the value of Plaintiffs' claims and pursue possible settlement. On September 27, 2023, the parties participated in full-day mediation with Louis Marlin, Esq., an experience mediator in wage and hour actions, and were able to reach the global settlement agreement that is now before the Court.

Pursuant to the parties' agreement, Defendants will pay a non-reversionary gross settlement amount of $1,460,000, which is comprised of $486,667 in attorney's fees (one-third of the gross settlement), $19,938.07 in litigation costs, and $22,000 in administration costs. The net settlement amount of $931,394.93 will be distributed 75% ($698,546.20) to the LWDA and 25% ($232,848.73) to "Covered Employees," i.e., "all persons who were employed by

Defendants in the State of California as non-exempt, hourly-paid retail store employees at any time from January 5, 2022 through October 31, 2023," on a pro rata basis based on the number of pay periods each employee worked during the relevant period of time. It is estimated that there are approximately 9,612 Covered Employees and 175,000 pay periods. If the number of pay periods worked between January 5, 2022 to September 27, 2023, exceeds 175,000 by more than 10% (i.e., more than 192,500 pay periods), then Defendants will proportionally increase the gross settlement amount by the number of pay periods above 192,500.

In exchange for settlement, Plaintiffs and the LWDA, on behalf of themselves and "Covered Employees," will release [1]:

> [A]ll claims for remedies under PAGA, of whatever kind or nature, whether known or unknown, arising during the Settlement Period, based on the facts alleged in the Actions and/or Plaintiffs' notice letters to the LWDA including, but not limited to, Labor Code sections 201, 202, 203, 204, 206.5, 210, 216, 218.5, 221, 222, 225.5, 223, 226, 226.3, 226.6, 226.7, 227.3, 233, 234, 245, 245.5, 246, 246.5, 247, 247.5, 248, 248.5, 256, 432, 432.5, 432.7, 510, 512, 516, 558, 558.1, 1024.5, 1174, 1174.5, 1182.12, 1194, 1197, 1197.1, 1198, 1198.5, 1199, 2699, 2699.3, 2802 and 2810.5, and the corresponding provisions of the applicable IWC Wage Order, and any resulting claim for attorneys' fees and costs under PAGA.

The release is appropriately tailored to the allegations at issue, and does not release any claims other than those for PAGA penalties. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537; *Moniz, supra,* 72 Cal.App.5th at p. 82 [release of "all known and unknown claims under PAGA … that were or could have been pled based on the allegations of the Complaint" was appropriately approved].)

IV. DISCUSSION

D. Potential Verdict Value

Based on the data provided by Defendants, Plaintiffs estimated the maximum exposure of the PAGA claims to be $18.5 million. Several factors reduced this amount, including but not limited to the following: the potential that the Court would award less penalties based on the employer lacking knowledge of any violations; the lack of willfulness on the part of Defendants; the risk that Plaintiffs may recover nothing; and Defendants' denial on the merits and related defenses (including that Plaintiffs entered into binding and enforceable arbitration agreements). In consideration of these facts, the history of various similar PAGA decisions that significantly reduce maximum penalties amounts (e.g., 90% reduction) and the risk that Plaintiffs may recover nothing, the Court finds that the proposed settlement is fair to those affected and is genuine, meaningful, and reasonable in light of the statute's purposes.

E. Attorney Fees

[1] The individual plaintiffs have also executed a general release of all claims they may have against Defendants arising out of their employment in exchange for payments of $20,000 each, which Defendants will pay separate from the gross settlement amount.

While the PAGA statute does not expressly require judicial review of claimed attorney fees, the Court believes it cannot adequately fulfill its statutory duty to review the penalties associated with PAGA settlements without also considering attorney fees. The Court thus finds that it must scrutinize the attorney fee arrangement associated with a PAGA settlement. This is consistent with the observation of many courts that PAGA claims are analogous to "*qui tam*" suits like those under the federal False Claims Act: when reviewing settlements of *qui tam* claims, courts should and do consider any associated attorney fee arrangement. (See *U.S. v. Texas Instruments Corp.* (9th Cir. 1994) 25 F.3d 725, 728 [attorney fee award must be considered by the trial court as part of its review of the "entire settlement arrangement"].)

As articulated above, Plaintiffs seek a fee award of $486,667 in attorney's fees (one-third of the gross settlement), which is not an uncommon contingency fee allocation in a wage and hour/PAGA action. This award is facially reasonable under the "common fund" doctrine, which allows a party recovering a fund for the benefit of others to recover attorney fees from the fund itself. Plaintiffs also submit a lodestar figure of $288,371.50, which is based on 234.9 hours at rates of $475 to $800 per hour, resulting in a multiplier of 1.69. This is well within the range of multipliers that courts typically approve. (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 v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 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"].)

Here, because the requested multiplier sought by Plaintiffs' counsel is well within the range of multipliers regularly approved by California courts in similar actions (and in fact is on the lower end of this range) and is supported by the percentage cross-check, the Court finds counsel's requested fee award reasonable and therefore it is approved.

F. Other Costs and Expenses

Counsels' request for litigation costs of $19,938.07 appears reasonable based on the supporting declarations provided which establish that counsel actually incurred costs in this amount and is approved. Administration costs of $22,000 are also approved.

V. ADMINISTRATION PROCESS

The parties have agreed that within 14 days of the "Effective Date,"[2] Defendants will provide settlement administrator CPT Group, Inc. ("CPT"), with a list of all Covered

[2] This term is defined as "the earliest date, following entry by the Court of the Order and Judgment, upon which one of the following has occurred: (a) expiration of all potential appeal periods without a filing of a notice of appeal of the Order and Judgment; (b) final affirmance of the Order and Judgment by an appellate court as a result of any appeal(s); or (c) final dismissal or denial of all such

Employees with the relevant identifying information (including the last known home address) and the number of pay periods worked. Prior to mailing payment, CPT will perform a search based on the National Change of Address Database for information to update and correct for any known or identifiable address changes. Within 14 days of the funding of the settlement (this deposit is required to take place within 14 days of the Effective Date), CPT will pay the various amounts approved by the Court to Plaintiff's counsel, the LWDA, and each Covered Employee. Each Covered Employee will be sent a check in the appropriate amount. Any checks returned as non-deliverable will promptly be re-mailed to the forwarding address provided; if none is, CPT will attempt to locate one using a skip trace or other search method. Any checks returned as undeliverable or that remain uncashed after 180 days will be transmitted to *cy pres* beneficiary Worksafe, Inc. These administrative procedures are appropriate and are approved.

VI. ORDER AND JUDGMENT

Plaintiffs' motion for approval of the parties' PAGA settlement is GRANTED. The covered individuals are: all persons who were employed by Defendants in the State of California as non-exempt, hourly-paid retail store employees at any time from January 5, 2022 through October 31, 2023.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiffs and the Covered Employees shall take from the PAGA claim in their Complaints only the relief set forth in the parties' settlement agreement and this order and judgment. The Court retains jurisdiction over the parties to enforce the terms of the PAGA settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **March 20, 2025 at 2:30 P.M.** in Department 7. At least ten court days before the hearing, Plaintiffs' 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 Worksafe, Inc.; the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel may appear at the compliance hearing remotely.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely.

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appeals (including any petitions for review, rehearing, certiorari, etc.) such that the Order and Judgment is no longer subject to further judicial review."

No court order has been issued which would allow recording of any portion of this motion calendar.

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

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Calendar Line 4

Case Name: *Jordan Case, et al. v. Pinnacle Pipeline Inspection, Inc.*
Case No.: 21CV389608

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiffs Jordan Case, Jonell Murphy, Mark Fajardo and David Galvan (collectively, "Plaintiffs") allege that Defendant Pinnacle Pipeline Inspection, Inc. ("Defendant" or "Pipeline"), who provides inspection, cleaning and rehabilitation of pipelines throughout Northern California, committed various wage and hour violations. Currently before the Court is Plaintiffs' motion for preliminary approval of settlement, which is unopposed. As discussed below, the Court GRANTS the motion.

I. BACKGROUND

According to the allegations of the operative First Amended Complaint ("FAC"), Mr. Case was formerly employed by Defendant as an hourly-paid, non-exempt employee from July 2020 to January 2021. (FAC, ¶ 8.) Mr. Murphy and Mr. Galvan were employed in similar roles from December 2020 to January 2021 and December 2021 to approximately 2023, respectively, while Mr. Fajardo has been employed as an hourly-paid, non-exempt employee by Defendant since July 2020. (*Id*., ¶¶ 9-10.) Plaintiffs allege that throughout their employment, Defendants failed to: pay them and putative class members for all hours worked (including minimum, straight time and overtime wages); provide them with legally compliant meal periods; authorize and permit them to take rest periods; timely pay all final wages to Plaintiffs Case and Murphy when Defendants terminated their employment; furnish accurate wage statements to them; and indemnify them for expenditures incurred as a consequence of discharging their job duties. (*Id*., ¶¶ 17-25.)

Based on the foregoing allegations, Plaintiffs initiated this action with the filing of the Complaint on October 29, 2021, and filed the operative FAC on October 11, 2023, asserting the following causes of action: (1) failure to pay minimum and straight time wages; (2) failure to pay overtime wages; (3) failure to provide meal periods; (4) fail to authorize and permit rest periods; (5) failure to timely pay wages at termination; (6) failure to provide accurate itemized wage statements; (7) failure to indemnify employees for expenditures; (8) failure to produce requested employment records; (9) unfair business practices; and (10) civil penalties under PAGA.

Plaintiffs now seek an order: preliminarily approving the Class Action and PAGA Settlement Agreement and Class notice; certifying the Class for settlement purposes; approving the notice and the plan for distribution; appointing Plaintiffs as Class representatives for settlement purposes; appointing Justin F. Marquez, Benjamin H. Haber, and Arrash T. Fattahi of Wilshire Law Firm, PLC, as Class Counsel for settlement purposes; appointing ILYM Group, Inc. ("ILYM") as the settlement administrator; and scheduling a final approval hearing.

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

Subsequent to the initiation of this action, the parties engaged in informal discovery, with Defendant providing a sample of time and pay records for class members, its wage and hour policies and practices during the class period, and information regarding the total number of current and former employees. The foregoing enabled Plaintiffs' counsel to evaluate the probability of class certification, success on the merits, and Defendant's maximum monetary exposure for all claims. Class counsel also investigated the applicable law regarding the claims and defenses asserted in the litigation.

On June 22, 2023, the parties participated remotely in mediation with John Hyland, Esq., an experienced class action mediator, and reached the settlement agreement now before the Court.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement is $295,000. Attorney's fees of up to $98,333.33 (one-third of the gross settlement), litigation costs not to exceed $25,000 and administration costs not to exceed $15,000 will be paid from the gross settlement. $100,000 will be allocated to PAGA penalties, 75% of which ($75,000) will be paid to the LWDA, with the remaining 25% distributed to "PAGA Members," who are defined as "all persons who worked for Defendant in California as an hourly paid or non-exempt employee during [November 24, 2020 through September 20, 2023]," on a pro rata basis. Plaintiffs will each seek an enhancement award not to exceed $10,000.

The estimated net settlement of $119,116.67 will be allocated to members of the "Class," which is defined as "all persons who worked for Defendant in California as an hourly paid or non-exempt employee during [October 29, 2017 through September 20, 2023]," on a pro-rata basis based on the number of weeks worked during the class period. 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 67% to penalties and interest. Funds associated

with checks uncashed after 180 days will be transmitted to the Controller of the State of California to be held in trust for such class members pursuant to California unclaimed property law.

In exchange for settlement, Class Members who do not opt out and PAGA Members will release:

> [All] claims alleged in all versions of the complaints filed in the Class Action Lawsuit, as well as all any and all claims, debts, liabilities, demands, obligations, guarantees, costs, expenses, attorney's fees, damages, action or causes of action, whether known or unknown, contingent or accrued, under any legal theory under federal and state law that were or reasonably could have been brought based on the facts alleged in any version of the complaints filed in the Class Action Lawsuit and/or the PAGA Action Lawsuit, regardless of theory of recovery, including: claims under California Labor Code sections 201, 202, 203, 204, 206, 210, 218, 218.5, 221, 226, 226.7, 510, 511, 512, 1182.12, 1174, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 2800, 2802; the California IWC Wage Orders; the Fair Labor Standards Act (29 U.S.C. Section 201, et seq.); and California Business and Professions Code section 17200, et seq. (the "Released Class Claims"). Class Members shall further agree to waive their right to pursue individual lawsuits as to any of the Released Class Claims against the Released Parties to the extent such Released Class Claims accrued during the Class Period. Additionally, Plaintiffs, on behalf of the State of California and the PAGA Members, will release Defendant and the Released Parties from any and all PAGA claims or causes of action which occurred during the PAGA Period that were or reasonably could have been brought based on the facts alleged in any version of the complaints filed in the Class Action Lawsuit and/or the PAGA Action Lawsuit, and in the LWDA Letter submitted to the LWDA by Plaintiffs JORDAN CASE, JONELL MURPHY and MARK FAJARDO, regardless of theory of recovery, including but not limited to, any alleged violations of or relief under California Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174, 1174.5, 1182.12, 1194, 1197, 1197.1, 1198, 1198.5, 2802, 2699, and the applicable provisions of the applicable IWC Wage Orders ….

The foregoing release is 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, Plaintiffs' counsel estimated Defendant's maximum exposure at a total of approximately $3,293,092.24, with specific claims valued thusly: $317,790 (failure to pay for all hours worked); $849,182.40 (meal period claim); $515,508.84 (rest period claim); $50,350 (failure to reimburse business expenses); $235,732 (failure to pay overtime); and $1,324,529 (statutory and civil penalties).

Plaintiffs' counsel predicated that the realistic maximum recovery for all claims, including penalties, would be $577,963.12, which they arrived at by offsetting Defendant's maximum theoretical liability by: the risk of class certification being denied (particularly with respect to the meal and rest period claims); Defendant's arguments on the merits, including,

among others, that employees voluntarily took short or late meal breaks and their policies otherwise complied with applicable law; the difficulty of establishing the willfulness of Defendant's actions; the expense of establishing the amount of wages due to each class member; and the risk of losing at trial or on appeal. The settlement figure of $295,000 represents 51% of the realistic maximum recovery predicted by Plaintiffs' counsel.

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 Plaintiffs would have had to overcome to prevail on their 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

Plaintiffs request that the following settlement class be provisionally certified:

> All persons who worked for Defendant in California as an hourly paid or non-exempt employee during October 29, 2017 through September 20, 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 157 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. Plaintiffs' 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, Plaintiffs were employed by Defendants as non-exempt, hourly-paid employees and allege that they experienced the violations at issue. The anticipated defenses are not unique to Plaintiffs, and there is no indication that Plaintiffs' 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.)

Plaintiffs have the same interest in maintaining this action as any class member would have. Further, they have hired experienced counsel. Plaintiffs have 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 157 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, which will be delivered to class members in both English and Spanish, 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, and Class Members are informed of their qualifying workweeks 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.

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

> Although class members may appear in person, 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 appear remotely using the Microsoft Teams link for Department 7 (Afternoon Session) or by calling the toll free conference call number for Department 7.

Turning to the notice procedure, as articulated above, the parties have selected ILYM as the settlement administrator. The administrator will mail the notice packet within 45 days of preliminary approval of the settlement, 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 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

Plaintiffs' motion for preliminary approval is GRANTED. The final approval hearing shall take place on **January 9, 2025** at 1:30 in Dept. 1. The following class is preliminarily certified for settlement purposes:

> All current and former hourly-paid, non-exempt employees of Defendant or employees of a temporary employment agency who were assigned to work for Defendant in California, at any time between July 27, 2018, and the date of preliminary approval.

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.

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Calendar Line 5

Case Name: *Kamlesh Krishna v. Cepheid*
Case No.: 22CV397316

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiffs Kamlesh Krishna and Rex Servania (collectively, "Plaintiffs") allege that Defendant Cepheid ("Defendant") committed various wage and hour violations. Before the Court is Plaintiffs' motion for preliminary approval of settlement, which is unopposed. As discussed below, assuming satisfactory clarification is provided regarding the languages in which the notice will be provided, the Court will GRANT the motion.

I. BACKGROUND

According to the allegations of the operative Third Amended Complaint ("TAC"), Ms. Krishna was employed by Defendant from November 2021 to April 12, 2022, as an order picker, a non-exempt, hourly-paid position, in the logistics department at Defendant's Lodi, California location. (TAC, ¶ 6.) Mr. Servania was employed by Defendant from April 2019 to May 9, 2022, as a maintenance engineer, also a non-exempt, hourly-paid position, in Sunnyvale. Plaintiffs allege that Defendant failed to pay sick pay at the regular rate of pay as mandated by law and also failed to provide accurate itemized wage statements.

Based on the foregoing, Plaintiff Krishna initiated this action on April 26, 2022 with the filing of a class action complaint. Ms. Krishna filed a first amended complaint on June 29, 2022, adding a claim under PAGA and Mr. Servania as a plaintiff. Defendant subsequently demurred to the FAC, which was overruled by the Court on January 3, 2023. Plaintiffs filed a second amended complaint on January 5, 2023, dismissing their claim for violation of Labor Code section 204. Defendant filed a writ petition challenging the Court's order on its demurrer; the Court of Appeal denied the writ petition on March 11, 2023. Plaintiffs filed the TAC on June 28, 2023, asserting the following causes of action: (1) violation of Labor Code §§ 201-203, 233 and 246; (2) violation of Labor Code § 226(a); (3) violation of Labor Code § 2698, et seq.; and (4) violation of Business & Professions Code § 17200, et seq.

Plaintiffs now seek an order: preliminarily approving the Class and Representative Action Settlement Agreement; conditionally certifying the Class for settlement purposes; approving the notice and the plan for distribution; appointing Plaintiffs as Class representatives for settlement purposes; appointing Larry W. Lee of Diversity Law Group, P.C., William L. Marder of Polaris Law Group, Edward W. Choi of Law Offices of Choi & Associates and Dennis S. Hyun of Hyun Legal, APC, as Class Counsel; appointing CPT Group ("CPT") as the settlement administrator; and scheduling a final approval hearing.

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

Prior to the settlement of this action, the parties thoroughly investigated the facts relating to the class and PAGA claims alleged in this lawsuit and engaged in a thorough study of the legal principles applicable to the claims asserted against Defendant. The parties also engaged in informal and formal discovery, through which Plaintiffs' counsel obtained necessary data pertaining to the number of putative class members, a sampling and time and payroll records, as well as information pertaining to Defendant's commission pay and wage statement policies and practices. This information enabled Plaintiffs' counsel to evaluate Defendant's potential liability and maximum exposure.

After Defendant's writ petition was denied by the Court of Appeal, the parties agreed to mediate the action, and subsequently participated in a full-day session with mediator Daniel J. Turner on November 2, 2023. The parties did not reach an agreement at mediation, but Mr. Turner issued a Mediator's Proposal, which was accepted by the parties.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement is $750,000. Attorney's fees of up to $250,000 (one-third of the gross settlement), litigation costs not to exceed $30,000 and administration costs not to exceed $11,000 will be paid from the gross settlement. $75,000 will be allocated to PAGA penalties, 75% of which ($56,250) will be paid to the LWDA, with the remaining 25% distributed, on a pro rata basis, to "PAGA Members," who are defined as "all non-exempt California employees of Cepheid who were paid non-discretionary incentive wages covering any period in which sick pay was paid to the employees by Cepheid between April 25, 2021 and December 22, 2022, and whose employment ended, either voluntarily or involuntarily at any time from April 25, 2021 to February 6, 2024." Plaintiffs will each seek an enhancement award of $10,000.

The estimated net settlement of approximately $382,750 will be allocated, on a pro-rata basis based on the number of weeks worked during the class period, to members of the "Class," which is defined as "all non-exempt California employees of Cepheid who were paid non-discretionary incentive wages covering any periods in which sick pay was paid to the employee between April 25, 2019 and December 22, 2022, and whose employment ended, either voluntarily or involuntarily, at any time from April 25, 2019 to February 6, 2024 excluding those individuals who executed a severance agreement releasing the claims herein." For tax purposes, settlement payments will be allocated 5% to wages and 95% to penalties. The PAGA payment will be allocated 100% as income. Funds associated with checks

uncashed after 180 days will be transmitted to the Controller of the State of California to be held in trust for such class members pursuant to California unclaimed property law.

In exchange for settlement, Class Members who do not opt out will release:

> [A]ny and all claims, debts, liabilities, demands, obligations, penalties, guarantees, costs, expenses, attorney's fees, damages, action or causes of action of whatever kind or nature, whether known or unknown, contingent or accrued, that were alleged or that reasonably could have been alleged based on the facts alleged in the Action, including, but not limited to, any claims for purported sick pay wages, "waiting time" penalties, wage-statement penalties, claims under the applicable Wage Orders, and claims under Labor Code sections 200, 201, 202, 203, 204, 218.5, 226, and 246, based on purported sick pay wages paid between April 25, 2019 through December 22, 2022.

PAGA Members, who consistent with the statute will not be able to opt out of the PAGA portion of the settlement, will release:

> [A]ny and all claims under the Private Attorneys General Act of 2004 (Labor Code §§ 2698 et seq.) that were or could have been asserted based on the facts alleged inPlaintiff's written notice submitted to the LWDA, regardless of theory of liability, including claims for wages or sick pay benefits, "waiting time" penalties, wage-statement penalties, civil penalties, and claims predicated upon the applicable Wage Orders or Labor Code sections 200, 201, 202, 203, 204, 226, 246. This release is conditioned upon the release by all PAGA Employees as to the released claims set forth above, and upon convents by all PAGA Employees that they will not participate in any proceeding seeking penalties as to the released claims set forth above based on purported sick pay wages paid between April 25, 2021 through and December 22, 2022.

The foregoing release is 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, Plaintiffs' counsel estimated Defendant's maximum exposure at a total of approximately $4,482,000, with specific claims valued thusly: $58,725.52 (underpaid sick pay); $131,948.72 (penalties for failure to provide accurate itemized statement); $3,038,656.10 (penalties for failure to pay wages to discharged employee); $1,253,100 (PAGA penalties).

In evaluating whether to settle this action, Plaintiffs' counsel offset Defendant's maximum theoretical liability by: the risk of class certification being denied; Defendant's arguments on the merits; the difficulty of establishing the willfulness of Defendant's actions; and the risk of losing at trial or on appeal. The settlement figure of $750,000 represents 17% of the maximum class and PAGA penalties.

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 Plaintiffs would have had to overcome to prevail on their 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

Plaintiffs request that the following settlement class be provisionally certified:

> All non-exempt California employees of Cepheid who were paid non-discretionary incentive wages covering any periods in which sick pay was paid to the employee between April 25, 2019 and December 22, 2022, and whose employment ended, either voluntarily or involuntarily, at any time from April 25, 2019 to February 6, 2024 excluding those individuals who executed a severance agreement releasing the claims herein.

E. 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.)

F. 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 415 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.

G. 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. Plaintiffs' 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, Plaintiffs were employed by Defendants as non-exempt, hourly-paid employees and allege that they experienced the violations at issue. The anticipated defenses are not unique to Plaintiffs, and there is no indication that Plaintiffs' 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.)

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

H. 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 415 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, and Class Members are informed of their qualifying workweeks as reflected in Defendant's records and are instructed how to dispute this information. Class members are given 45 days to request exclusion from the class or submit a written objection to the settlement. While the notice is generally adequate, the Court requests clarification as to whether the notice will be provided in any additional languages beyond English. Regarding appearances at the final fairness hearing, the notice shall be further modified to instruct class members as follows:

> Although class members may appear in person, 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 appear remotely using the Microsoft Teams link for Department 7 (Afternoon Session) or by calling the toll free conference call number for Department 7.

Turning to the notice procedure, as articulated above, the parties have selected CPT Group as the settlement administrator. The administrator will mail the notice packet within 30 days of preliminary approval of the settlement. Any returned notices will be re-mailed to any forwarding address provided or better address located through a skip trace or other search. Class members who receive a re-mailed notice will have an additional 15 days to respond. These notice procedures are appropriate and are approved.

VIII. CONCLUSION

Assuming Plaintiffs have clarified whether the notice will be provided in additional languages, their motion for preliminary approval is GRANTED. The final approval hearing shall take place on **January 9, 2025** at 1:30 in Dept. 1. The following class is preliminarily certified for settlement purposes:

> All non-exempt California employees of Cepheid who were paid non-discretionary incentive wages covering any periods in which sick pay was paid to the employee between April 25, 2019 and December 22, 2022, and whose employment ended, either voluntarily or involuntarily, at any time from April 25, 2019 to February 6, 2024 excluding those individuals who executed a severance agreement releasing the claims herein.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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

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Calendar Line 6

Case Name: *Trace3, LLC v. Sycomp a Technology Company, Inc., et al.*
Case No.: 23CV415833

This is a trade secret misappropriation action brought pursuant to the California Uniform Trade Secrets Act. Plaintiff Trace3, LLC seeks statutory damages and injunctions against corporate Defendant Sycomp a Technology Company, Inc. ("Sycomp") and individual Defendants Timothy Cordell, Geoffrey Peterson, and Devin Tomcik (collectively, the "Individual Defendants").[1] Trace3 alleges that the Individual Defendants, all of whom are former Trace3 employees, joined Sycomp, a competitor, after abusing and exploiting their privileged access to Trace3's computer networks and devices to misappropriate Trace3's trade secret and confidential information to the benefit of Sycomp.

Before the Court is (1) Sycomp's demurrer to the operative Second Amended Complaint ("SAC") and (2) the Individual Defendants' demurrer to the SAC.[2] Per the notices of motion, Sycomp joins in the Individual Defendants' demurrer insofar as Trace3 fails to plead any of the essential elements of its fourth through tenth causes of action against it, and the Individual Defendants join in Sycomp's demurrer in its entirety. As discussed below, the Court (1) SUSTAINS WITHOUT LEAVE TO AMEND Sycomp's demurrer and (2) SUSTAINS WITHOUT LEAVE TO AMEND IN PART and OVERRULES IN PART the Individual Defendants' demurrer.

I. BACKGROUND

A. Factual Allegations of the SAC

Trace3 is prominent U.S.-based information technology consultancy that offers a mix of end-to-end technology services and solutions, ranging from artificial intelligence and data science to cloud computing and security consulting. (SAC, ¶ 29.) The Individual Defendants, who were formerly employed by Trace3 as Account Executive (Mr. Cordell), Lead Integration Specialist (Mr. Peterson), Strategic Account Manager (Mr. Tomcik) and Vice President of Sales for the S.F. Bay Area (Mr. Barnes), have purportedly admitted to taking a library consisting of hundreds of thousands of Trace3 files, including Trace3's trade secret customer lists, vendor lists, pricing information, and Trace3's massive compilation of project-specific Build documents related to Trace3's proprietary Rack and Roll ("RnR") methodology for Trace3's clients, and Trace3 alleges that the foregoing was provided to Sycomp in order to divert Trace3 clients to it. (*Id*., ¶¶ 2, 30-33.)

Mr. Barnes, who was employed by Trace3 from September 10, 2006 through March 15, 2023, while employed as Sycomp's Director of Sales, began working with Mr. Cordell, while

[1] On July 21, 2023, Trace3 dismissed Liliana Elias as a defendant.

[2] Sycomp seeks to join in the Individual Defendants' demurrer insofar as Trace3 fails to plead any of the essential elements of its fourth through tenth claims against it, and the Individual Defendants seek to join in Sycomp's demurrer in its entirety. The Court grants these joinder requests.

the latter was still employed at Trace3, to "derail, slow down, and in some instances, divert" Trace3 business to Sycomp. (SAC, ¶¶ 72-73.) On April 11, 2023, a Trace3 hardware vendor email Confidential Trace3 Client Y ("Client Y"), copying Mr. Cordell, requesting a quote. (*Id*., ¶ 77.) That same day, Mr. Cordell requested that his domestic partner and then-Trace3 employee, Ms. Stacy Thompson, pull historic Trace3 service information for the client from a proprietary Trace3 database. (*Id*.) Trace3 alleges that Mr. Barnes (while at Sycomp) and Mr. Cordell (while at Trace3) coordinated to use its trade secret and confidential information, including the reports generated by Ms. Thompson, to prepare the Sycomp quote for Client Y. (*Id.*, ¶ 70.) A quote was generated, with Mr. Cordell listed as the account manager, despite still being employed by Trace3 at that time. (*Id*., ¶ 77.) The following day, Mr. Barnes held a webinar meeting with Mr. Cordell that the latter was unable to subsequently explain, and while on this call, Mr. Barnes started a new email chain and emailed Mr. Cordell's contact at Client Y and provided two different options for updated quotes. (*Id*., ¶¶ 82-84.) Trace3 then lost business from Client Y. (*Id*., ¶ 87.)

Subsequent forensic examination revealed significant unauthorized computer activity by Mr. Cordell consistent with misappropriation of Trace3's trade secrets and confidential information, particularly with respect to a Dropbox account paid for by Trace3 and controlled by Ms. Thompson. (SAC, ¶ 75.) Mr. Cordell appears to have copied over multiple client and vendor lists and other company files from Trace3 devices to a Dropbox account, including on the date of his resignation. (*Ibid*.) Approximately a week after that resignation, on April 24, 2023, Mr. Cordell admitted that he deleted many files- which contained trade secret information- that he had previously transferred to a Dropbox account because he knew that he should not have taken them. (*Id*., ¶ 92.)

Mr. Peterson, a Lead Integration Specialist, drafted and generated Build Documents and related components, and also worked directly with one large Trace3 customer's key stakeholders to design and build their rack orders. (SAC, ¶ 98.) He had no legitimate business reason to access Trace3 Build Documents or other materials pertaining to other clients, particularly in his final months at the company, but nevertheless was revealed to have accessed and downloaded Trace3's entire compilation of Northern California Build Documents between April 10 and April 17. (*Id*., ¶¶ 99-100.) Mr. Peterson also downloaded over 100,000 Trace3 files between March 31 and April 19- thousands of which concerned customers for whom Mr. Peterson did not provide any services- and copied some or all of them to a personal external hard drive. (*Id*., ¶¶ 102-103.) Mr. Peterson also engaged in suspicious deletion activity of Trace3 client documents from its cloud storage account that he was not authorized or directed to do. (*Id*., ¶ 104.) Mr. Peterson's conduct harmed Trace3 by depriving it of access to the trade secrets and confidential information it had developed over the years. (*Ibid*.) Mr. Peterson engaged in further post-employment activity using his Trace3 computer following his resignation. (*Id*., ¶ 107.) When Trace3 alerted Sycomp of its concerns, Mr. Peterson failed to account for unauthorized USB use and to return all devices belonging to Trace3. (*Id*., ¶ 108.) Since the foregoing activity was uncovered, Trace3 has learned that one of customers whose Build Documents and client information Mr. Peterson downloaded in mass is in talks to, or has already moved, a project from Trace3 to Sycomp. (*Id*., ¶ 109.)

Forensic examination also revealed that Mr. Tomcik misappropriated Trace3 trade secret and confidential information through the use of at least two unauthorized USB devices, as well as laptop syncing and mirroring of Trace3 trade secret information across multiple work and personal devices with access to Dropbox for the account associated with his personal

email. (SAC, ¶¶ 114-115.) Mr. Tomcik admitted that when he receive Trace3's cease and desist letter advising him to preserve evidence around the time of his first day at Sycomp, he spoliated a USB device by destroying it with a hammer. (*Id*., ¶ 121.) Mr. Tomcik further accessed the devices he used to store stolen Trace3 trade secret and confidential information to perform work at Sycomp. (*Id*., ¶ 122.)

Immediately after learning of the aforementioned misappropriation, Trace3 sent cease-and-desist letters to Sycomp and the Individual Defendants, demanding they return all misappropriated data, cease using these materials, and agree to a voluntary remediation process. (SAC, ¶ 135.) Sycomp responded by expressing its doubt that any trade secret or confidential information had been stolen, and demanded a list of the materials that had been downloaded- an obvious non-starter. (*Id*., ¶ 136.) This action ultimately followed.

Trace3 alleges that since at least April 21, 2023, Sycomp has known or had had reason to known of the Individual Defendants' misappropriation conduct and has done nothing to stop it, including deliberately failing to implement basic protocols to ensure that Trace3 confidential and trade secret information was not bought with the Individual Defendants to Sycomp. (SAC, ¶¶ 144.) It further alleges that Sycomp has misappropriated and will continue to misappropriate its trade secret and confidential information, and/or willfully ignore the activities of its employees, formerly employed by Trace3, that inure to its benefit, i.e., giving it an unfair competitive advantage in bidding against, and performing work to, the opportunities and services that Trace3 bids on and performs. (*Id*., ¶¶ 149-153.)

All three of the Individual Defendants are alleged to have had contractually-created obligations to maintain the confidentiality of all Trace3 proprietary information that they had access to during their employment with the company, and were also alleged to have been contractually prohibited from using or accessing any USB or portable storage devices on Trace3 computers or devices to knowingly or willingly conceal, remove, mutilate, obliterate, falsify, or destroy Trace3 data or information for personal benefit or for the benefit of others. (SAC, ¶¶ 36-56.) The Individuals Defendants' purported actions breached these contractual obligations.

B. Procedural

Based on the foregoing allegations, Trace3 filed the operative FAC on October 6, 2023, asserting the following causes of action[3]: (1) violation of the California Uniform Trace Secrets Act ("CUTSA" or the "Act"); (2) breach of contract (against the Individual Defendants); (3) breach of implied covenant of good faith and fair dealing (against the Individual Defendants); (4) violation of Comprehensive Computer Data Access and Fraud Act (Penal Code § 504); (5) breach of fiduciary duty; (6) violation of Business & Professions Code § 17200; (7) intentional interference with contractual relations; (8) intentional interference with prospective economic advantage; (9) negligent interference with contractual relations; (10) negligent interference with prospective economic opportunity; (11) conversion; and (12) taking/receiving stolen property in violation of Penal Code § 496. Sycomp and the Individual Defendants subsequently demurred to the pleading.

[3] These claims are asserted against all defendants unless otherwise specified.

After the Court issued its order on the demurrers to the FAC on January 31, 2024, Trace3 filed the operative SAC on March 1, 2024, asserting the following causes of action: (1) violation of the California Uniform Trace Secrets Act ("CUTSA" or the "Act"); (2) breach of contract (against the Individual Defendants); (3) (3) breach of implied covenant of good faith and fair dealing (against the Individual Defendants); (4) violation of Comprehensive Computer Data Access and Fraud Act (Penal Code § 504); (5) breach of fiduciary duty; (6) violation of Business & Professions Code § 17200 ("UCL"); (7) intentional interference with contract; (8) intentional interference with prospective economic advantage; (9) negligent interference with prospective economic opportunity; (10) taking/receiving stolen property in violation of Penal Code § 496.

Sycomp now demurs to the fourth through tenth cause of action on the ground of failure to state fact sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).) The Individual Defendants demur to the second through tenth causes of action on the same grounds.

II. REQUESTS FOR JUDICIAL NOTICE

A. Sycomp's Request

Sycomp requests that the Court take judicial notice of the following items:

(1) the May 12, 2023 Complaint filed by Trace3 in the Superior Court of the State of Arizona in and for the County of Maricopa, Case No. CV2023-007314 (Exhibit A) (the "Arizona Action");
(2) Trace3's June 2023 Amended Complaint filed in the Arizona Action (Exhibit B);
(3) The Complaint filed in this Action on May 12, 2023 (Exhibit C);
(4) Trace3's May 17, 2023 Application for Temporary Restraining Order ("TRO") (Exhibit D);
(5) The May 15, 2023, Declaration of April Turner in Support of the preceding application (Exhibit E);
(6) The July 7, 2023, Declaration of Jeremy Morris in Support of Trace3's Motion to Modify TRO and Order Authorizing Expedited Discovery (Exhibit f);
(7) The FAC filed in this action on October 6, 2023 (Exhibit G);
(8) Transcript of December 19, 2023 hearing on Sycomp and the Individual Defendants' Demurrers to the FAC (Exhibit H);
(9) April 21, 2023 letter from Trace3's counsel to Sycomp referenced to in paragraph 85 of the FAC (Exhibit I);
(10) April 24, 2023 letter from Sycomp's counsel referenced in Paragraph 86 of the FAC (Exhibit J);
(11) April 27, 2023 letter from Trace3's counsel referenced in Paragraph 87 of the FAC (Exhibit K);
(12) April 28, 2023 letter from Sycomp's counsel referenced in Paragraph 88 of the FAC (Exhibit L); and
(13) May 1, 2023 email from Sycomp's counsel referenced in Paragraph 90 of the FAC (Exhibit M).

While the Court may properly take judicial notice of the existence of each of the foregoing items under subdivisions (d) and (h) of Evidence Code section 452, it declines to so

with respect to Exhibits A, B, I, J, K, L and M because it is not persuaded that the fact of their existence is relevant to the disposition of Sycomp's motion. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [judicial notice is limited to matters that are relevant to disposition of motion].) However, it will take judicial notice of the remaining exhibits. Accordingly, Sycomp's request for judicial notice is GRANTED IN PART and DENIED IN PART.

B. Trace3's Request

In connection with its opposition, Trace3 requests that the Court take judicial notice of:

(1) Letter dated September 12, 1984 from Assembly Member Elihu Harris presenting Assembly Bill ("A.B.") 501, which was introduced by the California Commission on Uniform State Laws for the purpose of enacting the Uniform Trade Secrets Act in California, which was pulled from the Governor's Chaptered Bill File on A.B. 501 (Exhibit A to Declaration of Nicole S. Phillis ("Phillis Decl."); and
(2) Report of the Assembly Committee on the Judiciary on A.B. 501 dated April 25, 1983, which is part of the Legislative History for A.B. 501 (Exhibit B to Phillis Decl.).

These items are proper subjects of judicial notice under Evidence Code section 452, subdivisions (c) and (h), and therefore Trace3's request is GRANTED. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005)133 Cal.App.4th 26, 31-37.)

III. SYCOMP'S DEMURRER

A. Legal Standard

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

In December 2023, Sycomp and the Individual Defendants both demurred to the FAC. After hearing extensive argument by both sides on December 19, 2023, the Court took the matter under submission. It ultimately issued its final ruling on January 31, 2024, sustaining Sycomp's demurrer to the fourth, fifth, sixth, seventh, eighth, tenth, eleventh and twelfth causes of action with leave to amend, and overruling the demurrer to the ninth cause of action as moot due to Trace3 having withdrawn that claim as to Sycomp (and the Individual Defendants). The Court sustained the Individual Defendants' demurrer to the fourth, fifth, sixth, seventh, eighth, tenth, eleventh and twelfth causes of action with leave to amend, and overruled the demurrer to the ninth cause of action as moot. Finally, the Court sustained the

Individual Defendants' demurrer to the second and third causes of action with leave to amend as to Mr. Barnes.

The primary thrust of Sycomp's demurrer to the FAC and the claims asserted against it was that all of the non-trade secret claims (i.e., Trace3's fourth through twelfth causes of action) were preempted as a matter of law by the California Uniform Trade Secrets Act ("CUTSA" or the "Act") (Civ. Code, §§ 3426-3426.11). As the Court explained in its order on Sycomp's demurrer, the CUTSA reflects "a legislative intent to occupy the field of trade secret liability to the exclusion of other civil remedies" and thus common law claims that are "based on the same nucleus of facts as the misappropriation of trade secrets claim" are preempted. (*K.C. Multimedia, Inc. v. Bank of America, Inc. v. Bank of America Tech. & Operations, Inc.* (2009) 171 Cal.app.4th 939, 957-959 (*K.C. Multimedia*).) The Act does not supersede "(1) contractual remedies, whether or not based upon misappropriation of a trade secret, [and] (2) other civil remedies that are not based on misappropriation of a trade secret." (Civ. Code, § 3426.7, subd. (b).) A plaintiff cannot simply plead a different theory of liability to get around the preclusive effect of CUTSA, and instead must "allege wrongdoing that is materially distinct from the wrongdoing alleged in [the] CUTSA claim." (*Prostar Wireless Group, LLC v. Domino's Pizza, Inc.* (N.D Cal. 2018) 360 F.Supp.3d 994, 1106, internal citations and quotations omitted.)

Thus, the Court was tasked with determining the scope of CUTSA preemption in order to ascertain whether Trace3's non-misappropriation claims survived Sycomp's demurrer. More specifically, the Court had to determine whether the CUTSA preempts claims based on appropriation of information that does not meet the statutory definition of a trade secret, i.e., what Trace3 referred to in the FAC as "confidential" information. Sycomp argued that given the legislative intention of the CUTSA that it occupy the entire field of trade secret liability, and the fact that no independent economic value is derived from "confidential" information that falls short of qualifying as a trade secret, the answer to this question was "yes." As applied to the FAC, it insisted that all of Trace3's non-trade secret claims were preempted because they did not allege wrongdoing that was "materially distinct" from the alleged misappropriation and were based on the same nucleus of facts, with the gravamen of each claim being the alleged misappropriation of Trace3's "confidential, proprietary and trade secret information." In making the foregoing arguments, Sycomp relied heavily on *Mattel, Inc. v. MGA Ent., Inc.* (C.D. Cal. 2011) 782 F.Supp.2d 911, 985-987, 999 (*Mattel*).)

Trace3's opposing position was that there was a valid distinction between its "trade secrets" and "confidential information"[4] such that claims based on the latter fell outside the scope of CUTSA preemption. Trace3 relied primarily on *Angelica Textile Services, Inc. v. Park* (2013) 220 Cal.App.4th 495 (*Angelica Textile*) in making this argument, and insisted that its common law causes of action were not based on its CUTSA claim, but rather Sycomp and the Individual Defendants' "separate and independent unlawful conduct in serving as Sycomp's agents while working at Trace3 by steering deals to Sycomp" and Sycomp's "knowingly benefiting from their own employees' coordination and collusion with then-Trace3 employees to seed Trace3 deals at Sycomp." (Trace's Opp. to Demurrer to FAC at 7.)

[4] Trace3 conceded that the "confidential information" referred to in the FAC did *not* include "trade secrets" as defined by the CUTSA.

After reviewing the cases cited by the parties and doing its own research, the Court explained in its order that it "generally agree[d] with the broad scope of CUTSA preemption described by the *Mattel* court" and thus concluded that "CUTSA operates to preempt claims that are predicated on the alleged misappropriation of mere 'confidential information' even if it does not rise to the level of a 'trade secret,' as such an approach comports with the legislative intent behind the preemption provision." (Order on Demurrer to FAC at 9.) The Court explained that limiting the scope of CUTSA preemption to only claims predicated on the alleged misappropriation of information that qualifies as a trade secret, as urged by Trace3, did not comport with the "prime purpose" of the CUTSA to "sweep away the adopting states' bewildering web of rules and rationales and replace it with a uniform set of principles for determining when one is- and is not- liable for acquiring, disclosing, or using 'information of value.'" (*Id*., quoting *Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 239, fn. 19 (*Silvaco*).)

After making the foregoing conclusion, the Court then turned to the allegations of the nine non-CUTSA claims asserted against Sycomp to determine whether those claims were preempted and, upon review of each cause of action, held that it "[was] not persuaded, as insisted by Trace3, that the FAC … alleged unlawful conduct on the part of Sycomp that [was] separate and independent from the alleged misappropriation of Trace3's trade secrets and confidential information. Rather … [the non-CUTSA claims were] based on the same nucleus of facts as the trade secret misappropriation cause of action." (Order on Demurrer to FAC at 10.) Critically, the Court explained, the allegations of the FAC showed that the harm allegedly suffered by Trace3- the steering of deals away from Trace3 to Sycomp- "was the *direct* result of the alleged misappropriation" and not some "separate and independent unlawful conduct." (*Id*. at 10-11, emphasis added.) The Court therefore sustained the demurrer on preemption grounds, but granted Trace3 leave to amend.[5]

C. Discussion

Sycomp's position in the instant motion is that the SAC is a sham pleading whose non-trade secret claims remain preempted. It asserts that Trace3 merely re-pleads, nearly verbatim, its Penal Code and interference claims, with no new or materially different factual allegations, and thus essentially concedes that it cannot amend these claims to avoid CUTSA preemption. Sycomp continues that Trace3's efforts to rescue its breach of fiduciary duty claim (and

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[5] Although the Court ultimately granted Trace3 leave to amend the FAC, its expressed skepticism at the hearing on the demurrer as to Trace3's ability to successfully amend its complaint to avoid CUTSA preemption:

> For these individual claims if I were to sustain a demurrer, and it's likely with leave to amend, then you know what I'm thinking, and then you can plead around it if you can. And if you can't, do a sham pleading doctrine or something else. I'll hear it. To me the real question is about preemption and whether- let's say I find that the claims- some or all the claims are preempted that we're talking about, what's the point in giving you another chance? I'm not exactly sure what you would do to make the claims not preempted, you know, given this sham pleading doctrine. You're kind of stuck with what you have.

(Sycomp's Request for Judicial Notice, Exhibit H at 51L7-23.)

derivative UCL claim), i.e., new allegations, should be disregarded under the sham pleading doctrine. Finally, as it did in its preceding demurrer to the FAC, Sycomp contends that Trace3's non-trade secret claims independently fail because it pleads no actionable conduct by *Sycomp* and thus fails to plead aiding and abetting or conspiracy liability.

The Court agrees with Sycomp that Trace3's non-trade secret claims as pleaded in the SAC remain preempted under the CUTSA which, as articulated above, the Court held operates to "preempt claims that are predicated on the alleged misappropriation of mere 'confidential information' *even if it does not rise to the level of a 'trade secret' ….*" (Order on Demurrer to FAC at 9, emphasis added.) The SAC, like the FAC, "seeks to redress the willful, wanton, and malicious misappropriation of [Trace3's] confidential, proprietary, and trade secret information ('Trade Secret and Confidential Information') and other tortious conduct" allegedly undertaken by Defendants. (SAC, ¶ 1.) In comparing the SAC to the FAC it is apparent, as Sycomp contends, that the substance of Trace3's tort claims have not changed, and they are still based on the same nucleus of facts as the misappropriation claim. Trace3 has notably omitted multiple FAC references to its Trace Secret and Confidential Information ("TS/CI"), including allegations that Defendants (1) "divert[ed] Trace3 clients to Sycomp using Trace3 Confidential Information and records"; (2) "arrang[ed] Sycomp quotes for confidential Trace3 clients using Trace3 information"; (3) engaged in "collective efforts" to "divert Trace3 business to Sycomp…using Trace3 Trade *Secret and Confidential Information*"; (4) took "hundreds of thousands of files, including Trace3's *trade secret customer lists, vendor lists, pricing information, and Trace3's massive compilation of project-specific Build documents*" to "help Sycomp immediately win new customer opportunities"; and (5) copied and deleted files that reflect "*textbook Trace3 trade secret information.*" *Id.*, FAC ¶¶ 2-3, 6, 21, 50, 63; *cf.* SAC ¶¶ 6, 8, 10, 63, 93 (omitting express TS/CI references).

Yet Trace3 provides no explanation for these omissions, offering that all that has changed in the SAC is "new and additional facts" uncovered in discovery that substantiate its "theory of the case." (Opp. at 10-12.) But as Sycomp responds, the discovery of new facts does not explain *why* Trace3 previously alleged that Defendants diverted Trace3 opportunities using its TS/CI but selectively removed such allegations only *after* the Court found that those very allegations rendered its non-trade secret claims preempted. Where a party "files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings…. the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384.) Critically, "[i]f he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint." (*Id*.)

Trace3 explains that it uncovered new facts related to a "separate and different" customer, "Confidential Client X" and that Defendants diverted business opportunities for this client "independent of any misappropriation," but this cannot be separated from the TS/CI alleged in the FAC and omitted from the SAC because Trace3 expressly alleges that its customer and vendor information, "information related to any proposals, bids, sales, or other prospective business opportunities of the Company," and "Trace3 internal strategy and marketing information about actual or prospective customers or clients, accounts, [and] vendors" *are* the TS/CI that Defendants allegedly misappropriated to "divert valuable opportunities developed and worked up at Trace3 over to Sycomp." (SAC, ¶¶ 32, 40, 56.)

Thus, it is *still* the case, as the Court held in its order on the prior demurrer, that Trace3 alleges wrongdoing "*by virtue* of the Individual Defendants' use of confidential information to prepare quotes for Sycomp and divert business opportunities to it," such that "CUTSA preempts" Trace3's claims. (See Order on Demurrer to FAC at 12.) The Court would make this conclusion even in the absence of any omission by Trace3 of allegations that were in the FAC, but finds these omissions, made without a satisfactory explanation, lend further credence to the merits of Sycomp's argument that the non-trade secret claims are substantively the same and the omissions were made to get around preemption.

In an effort to salvage its non-trade secret causes of action, Trace3 claims that Sycomp "overstates the scope of CUTSA 'preemption,'" and directs the Court to legislative history materials pertaining to the drafting and enacting of the CUTSA in 1983 and 1984, which it insists support the conclusion that the Act does not preempt statutory Penal Code claims. It further asserts, as it did in its prior demurrer, that the "weight of more recent authority" is in its favor on this question. But this Court already ruled that CUTSA preempts civil claims under the Penal Code sections at issue, explaining that

> *Silvaco* and *K.C. Multimedia*, taken together, are best read to broadly interpret the scope of CUTSA so as to meet CUTSA's stated purpose to "occupy the field" and "supersede other grounds of civil liability" except those "not based upon misappropriation of a trade secret." Therefore, the Court will follow the federal authorities that have concluded that CUTSA preempts civil claims for violation of these sections of the Penal Code.

(Order on Demurrer to FAC at 13-14.)[6]

The Court sees no reason to depart from the foregoing conclusion here. Moreover, *Silvaco* and *K.C. Multimedia* had the same legislative history materials available when determining the scope of CUTSA preemption, with *Silvaco* expressly rejecting Trace3's "narrow" view,[7] and

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[6] These federal authorities include: *Alert Enter., Inc. v. Rana* (N.D Cal. 2023) 2023 U.S. Dist. LEXIS 44590, *14 [acknowledging split but finding CUTSA preempted civil Section 502 claim based on same nucleus of facts as misappropriation claim]; *Tri Tool, Inc. v. Hales* (E.D. Cal. 2023) 2023 U.S. Dist. LEXIS 194200, *28 [civil claims under Penal Code § 496 preempted under CUTSA]; *Arbor Contract Carpet, Inc. v. Simon* (C.D. Cal. 2022) 2022 U.S. Dist. LEXIS 231503 [Section 502 claim preempted by CUTSA because it "involve[d] the same nucleus of fact," citing *Silvaco*]; *Best Label Co. v. Custom Label & Decal, LLC* (N.D Cal. 2022) 2022 U.S. Dist. LEXIS 72819, *10-12 [Section 502 claim preempted absent material factual difference from CUTSA claim].)

[7] The *Silvaco* court explained that Civil Code section 3426.7

> is best understood as assuming that CUTSA would occupy the field of trade secrets liability, and as seeking to limit the act's supersessive effect only as it might impair the specified statutes and remedies. This is consistent with legislative history suggesting that the purpose of the Legislature's divergence from the uniform act was not to eliminate the act's general supersession of alternative remedies but to protect the large number of statutes expressly dealing with trade secrets in particular settings….We thus reaffirm that CUTSA provides

K.C. Multimedia having the very language cited by Trace3 before it when affirming CUTSA's broad preemptive effect (see *K.C. Multimedia*, 171 Cal.App.4th at 957 [discussing CUTSA's stated purpose]; Opp. at 12-13, 16). In the SAC, the Penal Code claim are still predicated on the same nucleus of facts as the trade secret claim, and Trace3's assertion to the contrary that the violations at issue exist "independent of any trade secret claim" are not persuasive and were previously rejected by the Court.

Turning to the breach of fiduciary duty claim, Trace3 attempts to plead around CUTSA preemption by adding allegations that it maintains demonstrate a "separate and independent violation of law." (SAC, ¶¶ 2-3, 59, 64-75, 151, 198.) Specifically, Trace3 alleges that the Individual Defendants worked as "double agents" by "working up deals under the name of Trace3, but actively working to slow and subvert those deals until they could be converted to Sycomp opportunities." (*Id*. ¶¶ 2-3.) As alleged, these efforts to "divert Trace3's business opportunities for Sycomp's benefit" occurred in March 2023 and "do not involve and have nothing to do with the stealing of Trace3 Trade Secrets and Confidential Information." (*Id*. ¶¶ 2-3, 64-71.) But when read in toto, and considering the omission of prior allegations of misappropriation of Trace3's alleged TC/CI, the Court finds that this cause of action is still based on the same nucleus of facts that it was in the FAC. As Sycomp argues, Trace3 alleges that its TS/CI *includes*, among other things, customer and vendor information, "information related to any proposals, bids, sales, or other prospective business opportunities of the Company," and "Trace3 internal strategy and marketing information about actual or prospective customers or clients, accounts, [and] vendors." (SAC, ¶¶ 32, 40, 56.) Consequently, these allegations are necessarily based on the alleged *use* (i.e., misappropriation) of Trace3's TS/CI, and the Court already rejected Trace3's attempt to frame these allegations as separate from the alleged misappropriation, explaining:

> Trace3's insistence that the claim is not preempted because the claim is for a breach of the duty of loyalty independent of any use of trade secrets or confidential information given allegations that Mr. Cordell took a Trace3 business opportunity, met with Sycomp to disclose that opportunity, and ceased pursuing that opportunity on behalf of Trace3 so that Sycomp could pursue it, is unavailing. But the purported breach is alleged to have occurred *by virtue* of the Individual Defendants' use of Trace3 confidential information to prepare quotes for Sycomp and divert business opportunities to it. Thus, CUTSA preempts this claim.

(Order on Demurrer to FAC at 11 [setting forth selected portions of the FAC claiming diversion of business through misappropriation, including at ¶¶ 2, 3, 7, 19, 24, 54, 102].) The allegations of the SAC are not appreciably different. (See SAC, ¶¶ 32, 57, 63-87, 97, 109, 145, 173, 179, 196-197.) That is, the thrust of the breach of fiduciary duty claim is still that Defendants coordinated to divert deals and opportunities to Sycomp *through* the alleged misappropriation of Trace3's TS/CI. Consequently, the authorities cited by Trace3, including *Angelica Textile*, are distinguishable because the fiduciary duty claims in those cases did not depend on the alleged misappropriation. Accordingly, the fiduciary duty claim as alleged in

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> the exclusive civil remedy for conduct falling within its terms, so as to supersede other civil remedies "based upon misappropriation of a trade secret."

(*Silvaco*, 184 Cal.App.4th at 234-236.)

the SAC is still preempted. As the UCL claim is derivative of the preceding causes of action, which the Court finds are still, as pleaded in the SAC, preempted by the CUTSA, it follows that it is also preempted.[8] (See *Coast Hematology-Oncology Assocs. Med. Grp., Inc. v. Long Beach Mem'l Ctr*. (2020) 58 Cal.App.5th 748, 769 [holding that CUTSA "displaces claims for unfair competition based on the same nucleus of facts as a trade secrets claim."].)

Because the Court concludes that the non-trade secret claims asserted against Sycomp in the SAC are preempted by the CUTSA, it sustains WITHOUT LEAVE TO AMEND Sycomp's demurrer to the fourth, fifth, sixth, seventh, eighth, ninth and tenth causes of action on the ground of failure to state facts sufficient to constitute a cause of action.

IV. THE INDIVIDUAL DEFENDANTS' DEMURRER

A. The Individual Defendants' Demurrer to the FAC and the Court's Order Thereon

In their demurrer to the FAC, the Individual Defendants argued that: (1) the fourth through twelfth causes of action failed to state a claim for which relief may be granted against all the Individual Defendants; (2) the second and third causes of action failed to state a claim as to Mr. Barnes; (3) the third cause of action was duplicative of the second cause of action; and (4) the fourth through twelfth causes of action were preempted by the CUTSA.

The Court explained in its order on the Individual Defendants' demurrer that unless the fourth through twelfth causes of action each had an independent factual basis *separate* from their alleged misappropriation of Trace3's purported TS/CI, those claims were, as held on Sycomp's companion demurrer, preempted by the CUTSA. The Court ultimately concluded that no such separate factual basis had been pleaded by Trace3, i.e., the fourth through twelfth causes of action were all based on the same nucleus of facts as the trade secret misappropriation claim, and therefore were all preempted.[9]

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[8] Citing to *Digital Envoy, Inc. v. Google, Inc.* (N.D. Cal. 2005) 370 F.Supp.2d 1025, 1034, Trace3 insists that CUTSA preempts a claim *only* if it is based on the "identical nucleus of facts" as a trade secret claim, but Court already rejected this argument in its order on the demurrer to the FAC and sees no reason to accept it here.

[9] The Court explained that:

> Here … the tortious interference claims (seventh, eighth, and tenth) are based on the same nucleus of facts as the misappropriation claim, with the alleged act of interference being the misappropriation itself. The same is true for the eleventh cause of action for conversion, as the items alleged to have been converted are Trace3's trade secrets and confidential information. Accordingly, these claims are preempted.
>
> For the fifth cause of action for breach of fiduciary duty, the purported breach is alleged to have occurred by virtue of the Individual Defendants' use of Trace3's confidential information to prepare quotes for Sycomp and divert business opportunities to it, as explained above. Thus, the claim is superseded by the CUTSA.

The Court further held that no claims for breach of contract and breach of the implied covenant had been stated as to Mr. Barnes because were no allegations which accused him of engaging in conduct that breached the agreements at issue, i.e., any taking or gaining possession of any of Trace3's documents or information by him.

Finally, the Court sustained the remaining Individual Defendants' demurrer to the breach of the implied covenant claim after finding persuasive their assertion that the claim was duplicative of the preceding cause of action for breach of contract. That is, Trace3 failed to plead something beyond a mere contract breach, and therefore the third cause of action was superfluous.

B. Discussion

In the instant demurrer, the Individual Defendants argue that: (1) the second through tenth causes of action fail to state a claim for which relied may be granted against all of them; (2) the third cause of action is fatally duplicative of the second cause of action; (3) the fourth through tenth causes of action are preempted by CUTSA; and (4) the SAC violates the sham pleading doctrine by attempting to plead around the preemptive effect of CUTSA through inconsistent and omitted allegations.

1. *CUTSA Preemption*

As explained in the Court's Order on the Demurrers to the FAC and in the preceding section discussing Sycomp's demurrer to the SAC, CUTSA does not supersede "(1) contractual remedies, whether or not based upon misappropriation of a trade secret, [and] (2) other civil remedies that are not based on misappropriation of a trade secret." (Civ. Code, § 3426.7, subd. (b).) Thus, even if the second and third[10] causes of action *are* based on the same nucleus of facts as the trade secret misappropriation claim, they are not preempted by the CUTSA. However, the same obviously cannot be said for the remaining claims.

> The Penal Code claims (the fourth and twelfth causes of action) are also based on the same nucleus of facts as the trade secret misappropriation claim and seek civil remedies for the alleged misappropriation. It is not the accessing of Trace3's computerized systems and information that is the purported violation, as all of the Individual Defendants are alleged to have had access to the foregoing by virtue of their employment with Trace3. It is what happened after the accessing of the systems and information that it alleged to be wrongful, i.e., the misappropriation. Consequently, the fourth and twelfth causes of action are preempted.
>
> Finally, because the UCL claim (the sixth cause of action) is derivative of the other claims (breach of fiduciary duty, Penal Code violations, conversion, interference claims) and those claims are preempted, it follows that it is also preempted

[10] "Because a claim for breach of the implied covenant of good faith and fair dealing is a contract claim, … it is expressly not preempted/superseded by CUTSA." (*Deerpoint Grp., Inc. v. Agrigenix, LLC* (E.D. Cal. 2018) 345 F.Supp.3d 1207, 1237.)

As discussed in the Court's analysis of Sycomp's demurrer to the SAC, despite Trace3's amendments, the fourth through tenth causes of action are still based on the same nucleus of facts as the trade secret misappropriation claim, and therefore are preempted by CUTSA. Consequently, the Individual Defendants' demurrer to the fourth, fifth, sixth, seventh, eighth, nine and tenth causes of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

2. *Breach Claims as to Mr. Barnes*

The Individual Defendants assert that the second and third causes of action remain defective as to the Mr. Barnes for the same reason set forth in the Court's order on their demurrer to the FAC, namely, that there are still no allegations which accuse him of engaging in conduct which breached the agreements at issue. Newly added, conclusory allegations that Mr. Barnes breached the subject agreements by "coordinating with" or "encouraging other Trace3 employees to improperly steal" Trace3's confidential information or to act as "double agents" (SAC, ¶¶ 169, 173-179), they assert, are insufficient to plead a breach.

The Court agrees. As the Individual Defendants respond, Trace3 merely accuses Mr. Barnes of amorphous acts of "coordination" and "encouragement" committed while he was *an employee of Sycomp*. This is not enough. While Trace3 has alleged that the agreements at issue place specific post-employment obligations on the Individual Defendants, Mr. Barnes is not alleged to have breached these obligations specifically. Consequently, no claims for breach of contract, and by extension, breach of the implied covenant, have been stated against Mr. Barnes and therefore the demurrer to the second and third causes of action on the ground of failure to state specific facts is SUSTAINED WITHOUT LEAVE TO AMEND as to him.

3. *Breach of Contract*

In the SAC, Trace3 alleges that the Individual Defendants breached the various agreements entered into in connection with their employment with Trace3, "including but not limited to the [Employee Confidentiality, Noncompetition and Nonsolicitation Agreement ("ENDA")]s, [Non-Disclosure Agreement ("NDA")]s, and other agreements," which obligated them to "maintain the secrecy of Trace3 confidential information and use it only in furtherance of Trace3's business," by, among other things, "exporting and downloading Trace3's confidential information to personal files, cloud-based accounts and devices; directing or encouraging other Trace3 employees to improperly steal, access, and share Trace3 records; failing and refusing to return Trace3 devices and data at the end of their employment; using Trace3 confidential information for purposes other than performing their work at Trace3, including to divert Trace3's business to competitors; destroying Trace3 data without authorization during and after employment; and using and disclosing Trace3 confidential information to benefit Sycomp, a direct competitor of Trace3, without legal justification or excuse." (SAC, ¶¶ 169, 173.)

The Individual Defendants maintain that this claim is defectively pleaded against them as to the required elements of breach and resulting damages. (See, e.g., *Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 [setting forth elements of claim for breach of contract].) With regard to the element of breach specifically, the Individual Defendants assert that the SAC fails to describe any breaches based on misappropriation of

Trace3's "confidential information," much less adequately identify what that information is and how is differs from Trace3's trade secrets. They continue that even assuming the SAC alleged some specified confidential information was misappropriated by them, Trace3 fails to plead that it was damaged by the misuse of this information as opposed to its "trade secrets." The Individual Defendants state that while, for example, Trace3 alleges that Mr. Cordell did not diligently pursue deals for Clients X and Y, it does not allege that Client X was prepared to move forward with this deal, that Client X actually consummated this deal or any deal with Sycomp instead of Trace3, or that any confidential information was used to win the deal with Sycomp.

The Individual Defendants continue that Trace3 does not- and cannot- allege that any devices that it owned were not returned, and therefore does not allege any harm as a result of this type of breach. It asserts that the only "devices" still at issue in this case are personal devices owned by the Individual Defendants and they cannot "return" the information on those devices because Trace3 insisted that it be deleted following the creation of forensic images. Moreover, they continue, Trace3 fails to allege any damages from alleged deletions or any "failure" to return data.

In opposition, Trace3 insists that it adequately pleads breaches by the Individual Defendants in the SAC on multiple bases given that their employment agreements prohibit them from (a) improperly accessing Trace3 systems (SAC ¶¶ 41–42); (b) using Trace3 confidential information for any purpose other than for Trace3 business (*id*. ¶¶ 38-40, 43); (c) keeping Trace3's devices and data after employment ends (*id*. ¶ 45); (d) deleting Trace3's confidential data (*id*. ¶¶ 38, 41–42); and (e) encouraging others to violate Trace3's policies (*id*. ¶ 42). In the SAC, they specifically allege that the Individual Defendants (excluding Mr. Barnes) breached the agreements by:

> Mr. Cordell: improperly accessing his domestic partner's Trace3 Dropbox to store and use his own Trace3 files, accessing and deleting the same Trace3 files after his resignation, and coordinating with Mr. Barnes to steal Trace3 confidential information regarding Client Y and sharing it with Sycomp for Sycomp's own use. (SAC, ¶¶ 60-93.)
>
> Mr. Tomcik: improperly storing Trace3 confidential information on his USB drive and personal computer, which he kept after his employment ended, using the Trace3 data regarding Client Y on his USB drive for his work at Sycomp and disclosing it to Sycomp; and destroying the USB drive containing Trace3 files with a hammer, permanently deleting Trace3 business files.
>
> Mr. Peterson: improperly downloading hundreds of thousands of Trace3 files without any legitimate business purpose, saving them to his personal device, keeping Trace3 devices and files after employment ended to use them at Sycomp and improperly deleting tens of thousands of Trace3 business records. (SAC, ¶¶ 98-111, 147.)

Trace3 adds that, for its contract claims, trade secrets *also* constitute contractual confidential and therefore also establish breach.

In reply, the Individual Defendants insist that Trace3 cannot rely on their alleged misappropriation of trade secrets to state a claim for breach of contract given its allegation in the SAC that

> The confidential information at issue in these agreements is specifically identified as a unique and distinct set of data from the trade secrets specifically identified in Trace3's trade secrets disclosure- there is no overlap.

(SAC, ¶ 169.)

The Court agrees that the foregoing allegation essentially bars Trace3 from arguing that its breach of contract claim is adequately stated based on the Individual Defendants' alleged misappropriation of Trace3's trade secrets. However, this does not defeat Trace3's claim, nor do the Individual Defendants' other arguments pertaining to "confidential information" do so because the second cause of action is predicated on *more* than just the Individual Defendants' alleged misused of this information. It is also not based solely on the failure to return devices belonging to Trace3. Because the Individual Defendants have not disposed of all the alleged breaches in this claim, the Court will not sustain the demurrer to it on the ground that Trace3 has not adequately pleaded the element of breach.

As for damages, the Court believes that they are sufficiently pleaded to survive demurrer. While Trace3 may now have the devices at issue in its possession, that does not mean that its allegations of damages incurred as a result of not receiving possession of them are insufficient. That is, Trace3 can recover damages for *past* breaches. As such, the Individual Defendants' demurrer to the second cause of action on the ground of failure to state facts sufficient to constitute a cause of action is OVERRULED.

4. *Breach of the Implied Covenant*

As they argued in their prior demurrer to the FAC, the Individual Defendants assert that the third cause of action is entirely duplicative of the preceding claim for breach of contract and thus, as a superfluous claim, fails. The Court agrees, as Trace3 has simply added the same new allegations to both the second and third causes of action, such that the conduct Trace3 claims breached the implied covenant is the same conduct Trace3 claims breached the contracts. (Demurrer at 14.) In other words, both claims allege that the Individual Defendants worked together to take Trace3's "confidential information" to Sycomp and wrongfully diverted business to Sycomp, which are alleged breaches of express contract terms. (Compare SAC ¶¶ 178-79 with SAC ¶ 173.) Therefore, the Individual Defendants' demurrer to the third cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

V. CONCLUSION

Sycomp's demurrer to the fourth, fifth, sixth, seventh, eighth, ninth and tenth causes of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

The Individual Defendants' demurrer to the second cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT

LEAVE TO AMEND as to Mr. Barnes and OVERRULED as to the remaining Individual Defendants.

The individual Defendants' demurrer to the third, fourth, fifth, sixth, seventh, eighth, ninth and tenth causes of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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

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