SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

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

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

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- 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: MARCH 28, 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	20CV366070	Welch v. Staffmark Holdings, Inc., et al. (Class Action/PAGA)	See Line 1 for tentative ruling.
LINE 2	23CV417807	Cadence Design Systems, Inc. v. TCL Industrial Holdings, Co., Ltd., et al.	See Line 2 for tentative ruling.
LINE 3	23CV417807	Cadence Design Systems, Inc. v. TCL Industrial Holdings, Co., Ltd., et al.	Continued to September 12, 2024, at 1:30 p.m.
LINE 4	23CV414401	Lazard v. County of Santa Clara (Class Action/PAGA)	Continued to April 25, 2024, at 1:30 p.m.
LINE 5	21CV386962	Loera v. Cellco Partnership (Class Action) (Lead Case; Consolidated with 21CV386960)	See Line 5 for tentative ruling.
LINE 6	20CV374355	Silvaco, Inc. v. Andersen, et al.	Tentative ruling provided directly to the parties.
LINE 7			
LINE 8			

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LAW AND MOTION TENTATIVE RULINGS

LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Herman Welch v. Staffmark Holdings, Inc., et al.*
Case Nos.: 20CV366070

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff Herman Welch alleges that defendants Staffmark Holdings, Inc., Staffmark Investment LLC and Air Menzies International (U.S.A.), Inc. (collectively, "Defendants") failed to pay overtime and minimum wages, failed to provide meal and rest periods or pay associated premiums, and failed to provide code-complaint wage statements, among other Labor Code violations.

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

I. BACKGROUND

According to the allegations of the operative First Amended Complaint ("FAC"), Plaintiff was employed by Defendants as a non-exempt hourly employee (specifically, a warehouse worker) from October 15, 2015 until January 25, 2019. Plaintiff alleges that he was not provided with all meal periods and/or rest breaks, that he was directed by his managers not to clock out for meal periods and that he would have to work through them, that he was not paid out all his accrued but unused vacation time, that he was not paid at the regular rate of pay for any overtime worked and/or meal period and/or rest break premiums, and that he was not reimbursed for all accrued business expenses. (FAC, ¶¶ 20-44.)

Based on the foregoing, Plaintiff initiated this action with the filing of the class action complaint on April 15, 2020. Plaintiff filed the operative FAC on December 21, 2023 asserting the following causes of action: (1) failure to provide meal periods; (2) failure to provide rest periods; (3) failure to pay hourly wages; (4) failure to pay vacation wages; (5) failure to indemnify business expenses; (6) failure to provide accurate written wage statements; (7) failure to timely pay all final wages; (8) unfair competition; and (9) civil penalties under PAGA.

Plaintiff now seeks an order: preliminarily approving the proposed Class Action Settlement (the "Settlement"); provisionally certifying the proposed class for settlement purposes only; appointing Plaintiff as class representative; appointing Shaun Setareh and William M. Pao of Setareh Law Group as class counsel; appointing ILYM Group, Inc. ("ILYM") as the Settlement Administrator and authorizing ILYM to send notice of the Settlement to class members; and setting a final approval hearing date.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad

discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234–235 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

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

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

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

B. PAGA

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

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

statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

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

III. SETTLEMENT PROCESS

In February 2022, the parties engaged in informal discovery, with Defendants producing Plaintiff's personnel file, a sampling of payroll and timekeeping records for class members and PAGA employees, the headcount and workweeks for those individuals covering the relevant time periods, and their handbooks and policies covering the relevant time periods in this action.

As part of their investigation of Plaintiff's claims, Plaintiff's counsel discovered that some members of the putative class might by exempt from the Federal Arbitration Act and thus any purported agreement to arbitrate this dispute. While Defendants did not concede this point, the parties wished to resolve all claims in this action. On May 23, 2023, after more than a year of settlement negotiations, the parties reached the Settlement that is now before the Court.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement is $300,000. Attorney's fees of up to one-third of the gross settlement ($100,000), litigation costs of up to $1,403.99, and administration costs not to exceed $3,000 will be paid from the gross settlement. $15,000 will be allocated to PAGA penalties, 75% of which ($11,250) will be paid to the LWDA, with the remaining 25% dispensed to "PAGA Employees," who are defined as:

> (1) All persons who have previously been or currently are employed in California by Air Menzies International (U.S.A.) Inc., whether directly or through any staffing agencies or any third parties, in hourly or non-exempt positions in California at any time during the PAGA Period; and
> (2) All persons who were employed by Staffmark Investment LLC as a temporary non-exempt employee and placed to work on assignment with Air Menzies International (U.S.A.) Inc. in California at any time during the PAGA Period.

The "PAGA Period" is defined as the period of time from February 10, 2019 to November 1, 2023. Plaintiff will also seek an enhancement award of $5,000.

The net settlement will be allocated to class members- who are defined nearly the same as PAGA Employees, barring class period running from April 15, 2016 to November 1, 2023- on a pro rata basis based on the number of weeks worked during the class period. With a class size of approximately 95 individuals, class members will, on average, receive $3,157.89. Class members will not be required to submit a claim to receive their payment. For tax purposes,

settlement payments will be allocated 33% to wages and 66.67% to penalties and interest. The employer-side payroll taxes on the portion allocated to wages will be paid by Defendants separate from, and in addition to, the gross settlement amount, 100% of the payment to PAGA Employees will be allocated to penalties. Funds associated with checks uncashed after 180 days will be transmitted to the Alliance for Children's Rights, a third-party nonprofit organization selected by the parties as the *cy pres* recipient.

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

> [A]all claims, judgments, liens, losses, debts, obligations, guarantees, penalties (including but not limited to all penalties available under the California Labor Code), costs, expenses, attorneys' fees, damages, indemnities, actions, demands, rights, liabilities, and causes of action of any kind whatsoever, known or unknown, disclosed or undisclosed, suspected or unsuspected, that have been, or that could have been, asserted against the Released Parties, whether or not presented, based on the primary rights or the facts alleged at any point in time in this Action….

PAGA Employees will release "all PAGA Claims that were actually alleged or could have been alleged in the Complaint in this Action or in the Notice of PAGA Claim submitted by Plaintiff to the California Labor and Workforce Development Agency on February 10, 2020, on behalf of the State of California, himself, and PAGA Employees …." Consistent with the statute, Aggrieved Employees will not be able to opt out of the PAGA portion of the settlement.

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

V. FAIRNESS OF SETTLEMENT

Based on available data, Plaintiff's counsel (with the assistance of an expert) estimated Defendants' maximum exposure for each claim thusly: $167,457.87 (unpaid wages); $272,032.57 (meal period violations); $481,068.34 (rest period violations); $57,165.49 (unreimbursed business expenses); $73,750 (wage statement violations); $157,831.20 (Labor Code § 203 penalties); and $911,840 (PAGA penalties). Plaintiff's counsel discounted these amounts by various percentages (50% or 75%) to account for the following: the risk of class certification being denied due to individualized issues; potential manageability problems based on the diversity of worksites, locations and workforce; the likelihood that PAGA penalties would be reduced by the Court in its discretion; the risk of being unable to prove violations for all PAGA Employees; and the risk of losing at trial or on appeal. This resulted in a risk-adjusted recovery amount of $471,242.66. The gross settlement amount of $300,000 represents 63% of this figure.

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

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

VI. PROPOSED SETTLEMENT CLASS

Plaintiff requests that the following settlement class be provisionally certified:

> All persons who have previously been or currently are employed in California by Air Menzies International (U.S.A.) Inc., whether directly or through any staffing agencies or any third parties, in hourly or non-exempt positions in California at any time from April 15, 2016, to November 1, 2023, and all persons who were employed by Staffmark Investment LLC as a temporary non-exempt employee and placed to work on assignment with Air Menzies International (U.S.A.) Inc. in California at any time from April 15, 2016 to November 1, 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 95 class members are readily identifiable based on Defendants' records, and the settlement class is appropriately defined based on objective characteristics. The Court finds that the settlement class is numerous, ascertainable, and appropriately defined.

C. Community of Interest

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

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

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

As for the second factor,

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

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

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

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

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

D. Substantial Benefits of Class Certification

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

Here, there are an estimated 95 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).)

The parties have selected ILYM as the settlement administrator. Within 30 days after preliminary approval of the Settlement, Defendants will provide ILYM with a list of all class members along with pertinent identifying information (including last known address). Within 15 days after receipt of this data, ILYM will mail the notice packet to class members after updating their addresses through a search on the National Change of Address Database.

The notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement (except the PAGA component) or object. The gross settlement amount and estimated deductions are provided. Class members are informed of their qualifying pay periods as reflected in Defendants' records and are instructed how to dispute this information. Class members are given 45 days to request exclusion from the class, submit a written objection to the settlement, or challenge the amount of workworks listed. Returned notices will be re-mailed to any forwarded address provided or updated address located through a skip trace within 10 days from return. The form of notice is adequate.

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

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

> The judge overseeing this case encourages remote appearances. (As of August 15, 2022, the Court's remote platform is Microsoft Teams.) Class members who wish to appear remotely should contact class counsel at least three days before the hearing if possible. Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members may appear remotely using the Microsoft Teams link for Department 7 (Afternoon Session) or by calling the

toll free conference call number for Department 7. Any class member who wishes to appear in person should check in at Court Services (1st floor, Downtown Superior Courthouse, 191 N. 1st St., San Jose) and wait for a sheriff's deputy to escort him or her to the courtroom for the hearing.

These notice procedures are otherwise appropriate and are approved.

VIII. CONCLUSION

Presuming satisfactory clarification is provided concerning whether the notice will be provided in languages other than English, the Court will GRANT the motion for preliminary approval.

The final approval hearing shall take place on **September 28, 2024** at 1:30 in Dept. 7. The following class is preliminarily certified for settlement purposes:

> All persons who have previously been or currently are employed in California by Air Menzies International (U.S.A.) Inc., whether directly or through any staffing agencies or any third parties, in hourly or non-exempt positions in California at any time from April 15, 2016, to November 1, 2023, and all persons who were employed by Staffmark Investment LLC as a temporary non-exempt employee and placed to work on assignment with Air Menzies International (U.S.A.) Inc. in California at any time from April 15, 2016 to November 1, 2023.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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

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Calendar Line 2

Case Name: *Cadence Design Systems, Inc. v. TCL Industrial Holdings, Co., Ltd., et al.*
Case Nos.: 23CV417807

This is an action for breach of contract and unfair competition arising out of Defendants TCL Industrial Holdings, Co., Ltd., et al.[1] (collectively, "TCL" or "Defendants") alleged piracy of Plaintiff Cadence Design Systems, Inc.'s ("Cadence" or "Plaintiff") electronic design automation software. Before the Court is Defendants' demurrer to the complaint ("Complaint"), which is opposed by TCL.

As discussed below, Defendants' demurrer to the Complaint and the claims asserted therein on the ground of failure to state sufficient facts is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND and their demurrer to the Complaint on the ground of uncertainty is OVERRULED.

IX. BACKGROUND

According to the allegations of the Complaint, Cadence is a worldwide leader in Electronic Design Automation ("EDA"), as well as semiconductor intellectual property, whose custom and analog tools help engineers design the transistors, standard cells, and IP blocks that make up systems on chips, integrated circuits and printed circuit boards. (Complaint, ¶ 90.) Cadence licenses its propriety software throughout the world. (*Id*., ¶ 92.)

As part of Plaintiff's license protection system, Cadence software will not operate unless a user first installs the Cadence License Manager directly on that computer. (Computer, ¶ 95.) If the user wants to use a network license to use Cadence Software on multiple computers on a network, the user has to install the License Manager on a server accessible over the network. (*Id*.) In order to install the License Manager, the user must first execute the "Cadence Design Systems, Inc. Software License and Maintenance Agreement ("SLMA"); multiple versions of this agreement have been incorporated by Cadence into the License Manager installation process. (*Id*., ¶¶ 96-109, Exhibits 1-11.) After the License Manager is installed, the user can then install the Cadence Software, but must again accept the terms of the SLMAs. (*Id*., ¶ 113.) Cadence utilizes various measures and anti-piracy tools to track the unauthorized use of its products and verify that its software is being used according to an appropriate license. (*Id*., ¶¶ 114-116.)

Plaintiff alleges that TCL have "repeatedly and extensively copied, reproduced, distributed, and used Cadence Software without a valid license file and without authorization from Cadence." (Complaint, ¶ 117.) Cadence has identified at least 370,000 instances of infringement of its software on at least 1,827 machines, a significant portion of which were provisioned by TCL. (*Id*., ¶¶ 118-127.) Under the SLMAs, Defendants agreed to take all reasonable efforts to protect Plaintiff's products from authorized use. (*Id.*, ¶ 130.) Cadence alleges that Defendants have altered and/or "cracked," and/or used altered or "cracked" or unauthorized versions of the License Manager and/or Cadence Software to circumvent its

[1] Named as defendants in this action are 12 different entities (corporations or LLCs) that are represented by the same counsel. Plaintiff alleges that Defendants are alter egos of one another and hold themselves out as a single enterprise known as "TCL." (Complaint, ¶¶25-26.)

access-control (i.e., anti-piracy) measures. (*Id*., ¶¶ 131-134.) By using these "cracked" versions, TCL was also able to access additional Cadence products that would have otherwise required an independent purchase. (*Id*., ¶¶ 137-138.)

Plaintiff alleges that TCL breached the terms of SLMAs and End User License Agreement by "installing the Cadence Software using counterfeit license files, using the Cadence software without authorization, allowing the Cadence Software to be used or copied by unlicensed persons, and by failing to take reasonable steps and exercise due diligence to protect the Cadence Software from unauthorized reproduction, publication, or distribution." (Complaint, ¶ 135.)

Based on the foregoing allegations, Plaintiff asserts the following causes of action in its Complaint: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing; and (3) unfair competition (violation of Business & Professions Code § 17200 ("UCL")).

X. 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.)

XI. DISCUSSION

Defendants demur to the Complaint and each of the three claims asserted therein the ground of failure to state facts sufficient to constitute a cause of action and also demur to the entire complaint on the ground of uncertainty. (Code Civ. Proc., § 430.10, subds. (e) and (f).)

In its demurrer to the Complaint, TCL makes the following arguments: (1) Cadence's claims are preempted by the federal Copyright Act of 1976; (2) the breach of contract claim fails because (a) Cadence pleads inconsistent factual theories, (b) Cadence fails to adequately plead breach and (c) the agency allegations are conclusory; (3) Cadence fails to plead breach of the implied covenant; (4) the UCL claim fails because (a) Cadence fails to plead "unfair" competition, (b) the UCL claim is duplicative of the breach of contract claim and (c) Cadence seeks improper relief; and (4) the Complaint is uncertain.

A. Copyright Preemption

TCL first argue that all of Plaintiff's claims are preempted by the federal Copyright Act of 1976 (17 U.S.C., § 101, et seq.) (the "Copyright Act" or the "Act"). The Copyright Act protects "original works of authorship," including software programs (17 U.S.C. §§ 101-103), and grants the copyright owner exclusive rights to reproduce, adapt, distribute, perform, and

display the copyrighted work (17 U.S.C. §§ 106). Section 301, subdivision (a), of the Act expressly preempts state laws that protect "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope as specified by [section 106]." (*Kabehie v. Zoland* (2002) 102 Cal.App.4th 513, 520, internal citations and quotations omitted (*Kabehie*).) The Act does not preempt all state common law affecting copyright material (see Section 301, subd. (b)[2]); in order to ascertain whether a state law claim is preempted, courts have fashioned a "two-part test," and a claim is preempted is both parts are satisfied. (*Laws v. Sony Music Entm't, Inc.* (9th Cir. 2006) 448 F.3d 1134, 1137.) The following conditions must be met:

> [F]irst, the subject of the claim must be fixed in a tangible medium of expression and come within the subject matter or scope of copyright protection …, and second, the right asserted under state law must be equivalent to the exclusive rights contained in section 106.

(*Fleet v. CBS, Inc.* (1996) 50 Cal.App.4th 1911, 1918-1919.)

The first step merely requires a determination of whether the "subject matter" of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. sections 102 and 103. (*Maloney v. T3Media, Inc.* (9th Cir. 2017) 853 F.3d 1004, 1010.) As for the second step, in determining whether the rights asserted through a state law claim are "equivalent" to the exclusive rights of copyright holders, a court must (1) engage in a "fact-specific analysis" of the "nature" of the state law claim as alleged by the plaintiff in that case; and (2) determine whether that state law claim, as alleged, "protects rights which are qualitatively" the same as "the [exclusive] rights" conferred by the Act. (*Id*. at 1019.) If the state law claim has an "extra element" that "changes the nature of the action so that it is qualitatively different from a copyright infringement claim" that claim is not preempted. (*Kabehie, supra*, 102 Cal.App.4th at 520-521.) When assessing the "nature" of the state law claim, what matters is the "right sued upon and not the form of action" (*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1153) as holding otherwise could allow plaintiffs to avoid the Act's preemptive effect through "artful pleading" (*Kabehie,* at 526.)

California courts have applied the so-called "extra element" test in the context of a breach of contract cause of action. In *Kabehie, supra,* the first published decision to do so, the court rejected the approach of some courts that hold that breach of contract actions are never preempted because the cause of action includes a promise and the existence of the promise is the "extra element" avoiding preemption, instead concluding that in order to determine if the breach claim is preempted, one must undertake a "fact-specific analysis of the particular promise alleged to have been breached and the particular right alleged to have been violated." (*Kabehie,* 102 Cal.App.4th at 521.) The court reached this conclusion based on "the language of the [Copyright Act], the legislative history of the Act, and the opinions of the majority of courts that have considered the issue." (*Id*.)

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[2] This subsection represents the observe of the preceding subsection, permitting states to regulate "activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by [section 106]." (17 U.S.C. § 301, subd. (b).)

TCL urge that Plaintiff's claims are preempted by the Copyright Act because they do not involve the protection of rights that are "qualitatively different" from copyright infringement. They explain that Cadence's allegations that they "copied, reproduced, distributed, and used" Cadence's software without authorization "parrot" the exclusive copyrights listed in the Act (see 17 U.S.C. § 106) and thus do not provide the "extra element" necessary to escape the scope of federal preemption.

The problem with TCL's argument is that it is not completely clear from the allegations of the Complaint exactly *where* the alleged piracy and infringement took place with respect to every defendant. This is critical because "federal copyright law does not apply to *extraterritorial* acts of infringement" and thus "does not preempt causes of action premised upon [such] infringement." (*Allarcom Pay TV, Ltd. v. General Instrument Corp.* (9th Cir. 1995) 69 F.3d 381, 387 (*Allarcom*).) Anticipating this issue, TCL assert that Cadence's Complaint implicates U.S.-based conduct because it alleges that Defendants TCL Holdings, Co., Ltd., TCL Technology Group Corporation, TCL Electronics Holdings Limited, TCL China Star Optoelectronics Technology Co., Ltd., Wuhan TCL CSOT technology Co., Ltd., TCL King Electrical Appliances (Huizhou) Co., Ltd., TCL Mobile Communication Holdings Limited, Huizhou TCL Mobile Communication Co., Ltd., Shenzhen TCL Research Co., Ltd., and Mooresilicon Semiconductor (Guangdong) Co., Ltd.'s "misconduct and/or infringement was *expressly aimed at this forum*." (Complaint, ¶ 82, emphasis added.) Not included in this allegation are Defendants TCT Mobile, Inc., TCT Mobile (US), Inc. and TTE Technology, Inc., although they are alleged to be the "agents and general managers of all other Defendants." (*Id*., ¶ 53.) But as Cadence responds, in order for U.S. copyright law to apply, "at least one alleged infringement must be *completed entirely* within the United States" and "mere authorization of extraterritorial infringement [is] not a completed act of infringement in the United States." (*Allarcom, supra*, 69 F.3d at 387.) Given what is currently alleged in the Complaint, the Court cannot discern whether Cadence's claims are predicated on U.S.-based conduct (if at all), extraterritorial conduct, or both. And because a demurrer does not lie to part of a cause of action (see *PH II, Inc. Superior Court* (1995) 33 Cal.App.4th 1680, 1682), unless it is abundantly clear that each cause of action asserted in the Complaint is predicated solely on actions occurring in the U.S., the Court would not be able to sustain the demurrer even if it concluded that liability for infringement taking place in the U.S. is preempted by the Copyright Act.

TCL's response to the foregoing is to argue that:

> [T]he Complaint does not sufficiently allege extraterritorial conduct by the Domestic Defendants that might avoid preemption. Cadence asserts that its Complaint alleges infringement in China and Hong Kong in part because it alleges that certain Defendants are registered and have principal places of business in China and Hong Kong. (Opp. at 4 (citing Compl. ¶¶ 8-15, 18, 20)). By that logic, given Domestic Defendants are incorporated in Delaware and have principal places of business in California (Compl. ¶¶ 16-19, 20), the Complaint alleges domestic infringement. The Complaint fails to allege that Domestic Defendants engaged in any infringing act outside of California, and the claims against them are therefore preempted.

(Reply at 4:2-10.)

Presuming, for the sake of argument, that Cadence's allegations of infringement are true, it is not illogical to assume that the U.S.-based defendants' acts occurred in the U.S. But an assumption is not a sufficient basis upon which to find preemption and sustain a demurrer. And while it is true, as TCL argues, that California federal courts have held that, to the extent a claim is premised upon conduct in the U.S., claims based on those acts are preempted despite claims based on other acts surviving preemption, the case they cite to for this proposition did not involve a pleading challenge and therefore did not implicate the fact of a demurrer not laying to only part of a cause of action. (See *Thane Int'l, Inc. v. 9472541 Can. Inc.* (C.D. Cal. 2020) 2020 U.S. Dist. LEXIS 242114, *16-*17 [on motion for summary judgment, concluding that to extent plaintiff's claim was premised on acts occurring in the U.S., those acts were preempted and could not proceed to trial. However, claim for relief as limited to and premised only upon extraterritorial acts *could* proceed.].) All told, the Court is not persuaded that it can sustain TCL's demurrer to any of the Defendants, including the domestic ones, on preemption grounds based solely on what is pleaded in the Complaint.[3] Therefore, the Court will not sustain the demurrer on this basis.

B. Failure to State Sufficient Facts

1. *Breach of Contract*

TCL first assert that Plaintiff has failed to state a claim for breach of contract because it fails to plead mutual assent and consideration, with its allegations undermining the existence of either element.

In order to state a claim for breach of contract, a plaintiff must allege (1) the contract, (2) the plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff. (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 921.) Mutual assent or consent is necessary for the formation of a contract. (Civ. Code, §§ 1550, 1565.) For a meeting of the minds to exist, parties must agree on all material contract terms. (*Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1430.) Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings. (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 119, p. 144.) Finally, every executory contract requires consideration, which may be an act, forbearance, change in legal relations, or a promise. (*Chicago Title Ins. Co. v. AMZ Ins.. Services, Inc.* (2010) 188 Cal.App.4th 401, 423.) "[F]or the contract to bind either party, both must have assumed some legal obligations." (*Bleecher v. Conte* (1981) 29 Cal.3d 345, 350, internal quotations omitted.)

TCL explain that it is inconsistent and incongruous for Cadence to both plead that it and TCL are "parties to binding, enforceable and subsisting agreements, which are supported by adequate consideration" and that "Defendants agreed to the terms of the SLMAs…by accepting their terms during the installation of Cadence Software" (Complaint, ¶¶ 143-144), while also repeatedly alleging that TCL did *not* have a valid license to the Cadence Software

[3] In their reply, TCL assert that if any of Cadence's claims survive preemption based on extraterritoriality, any future claims premised on U.S. acts "should be deemed waived and/or preempted." The Court cannot make such a holding on a demurrer and notes that TCL is not foreclosed from re-asserting its preemption argument in future proceedings.

(Complaint, ¶¶ 126, 128-129). If they used a pirated version of the software and never possessed a valid license, TCL assert, then Cadence never would have offered the SLMA, they would never have accepted its terms, and the parties would not have entered into any agreement.

Cadence responds in its opposition that it is not inconsistent for it to allege that TCL has engaged in infringement of its software *and* accepted the terms of the SMLA because it is possible for TCL to have done *both*. It explains that the SMLAs were offered to *anyone* installing its software, and not just those having a valid license. But as TCL argue, nowhere in the Complaint is any distinction between those with or without a valid license who are presented with the SLMA made by Cadence and, by underscoring with its allegations how the License Manager is used as a mechanism to protect its software against unauthorized use, Cadence's allegations suggest that only users with a *valid* license will be prompted to accept the terms of the SLMAs. (See Complaint, ¶ 95 ["Cadence Software will not operate unless a user first installs the Cadence License Manager]; ¶ 96 ["The Cadence License Manager cannot be installed unless a user first executes [the SLMA] with Cadence"]; ¶¶ 112-113 [After the user installs the License Manager, the user may then install the Cadence Software …. When the user installs the Cadence software, the user must again accept the terms of the SLMAs by selecting the "I accept" option …. [] if the user does not … [he] cannot proceed with installation of the Cadence Software."].) Because Cadence has alleged that TCL did not possess a valid license for its software, the allegations suggest that TCL could not have been prompted to enter into the SMLAs and thus did not assent to its terms. In the absence of such assent, no claim for breach of contract based on the SMLAs has been pleaded and the demurrer to this cause of action must be sustained.

TCL continue that Plaintiff's contract claim also fails for lack of consideration, with no allegations evincing any benefit or detriment that either party received by entering into the SLMAs. But as Cadence responds, a written agreement is *presumptive* evidence of consideration, and therefore need not be expressly alleged where the contract at issue is written. (See, e.g., *Hualde Ranch Co. v. Beebe* (1935) 3 Cal.App.2d 592, 593.) Thus, this argument does not provide a basis upon which to sustain the demurrer.

TCL next assert that Cadence has failed to adequately plead breach because it has not specifically set forth which express terms of the SMLAs or the End User License Agreement ("EULA") they allegedly breached. The Court does not find this argument persuasive because not only has Cadence attached to the Complaint the copies of the SMLAs alleged to have been breached, but it has also specified which terms of those agreements are the basis of its claim by pleading that:

> Defendants breached at least Section 3 of the SLMAs attached hereto as Exhibits 1 through 11 by copying, sharing, and using the Cadence Software without authorization from Cadence, by bypassing the license file entry and not using valid license files, by taking actions to circumvent the entry of license file information, by continuing to use the Cadence software for commercial purposes without any valid license, by installing and using the Cadence software on its computers without authorization, and by not paying a licensing fee.

(Complaint, ¶ 115, see also ¶ 130.)

While Plaintiff has not identified the *exact* location of the foregoing terms in the SLMAs, the Court does not believe that it needs to provide such detail in order to adequately plead the element of breach given the foregoing allegations and the inclusion of the SMLAs in the Complaint.

TCL lastly assert that Cadence has failed to sufficiently plead the agency relationships it alleges in the Complaint. (See Complaint, ¶ 145 ["On information and belief, the individuals who consented to the terms of the SLMAs [attached to the Complaint] are agents with authority to bind Defendants, including with authority to bind each Defendant."].) Such allegations, they maintain, are mere legal conclusions that are insufficient to survive demurrer. The Court rejects this argument because many cases treat the allegation of agency as one of ultimate fact (or a permissible legal conclusion) and thus approve as sufficient the simple, general averment that one party was operating as the agent of another. (See, e.g., *Frasch v. London & Lancashire Fire Ins. Co.* (1931) 213 Cal. 2019, 224.) Consequenlty, the Court will not sustain the demurrer on this basis.

In accordance with the foregoing, TCL's demurrer to the first cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

2. *Breach of the Implied Covenant*

Turning to the second cause of action, TCL argue that because Plaintiff has not stated a claim for breach of contract, its implied covenant claim necessarily fails. Indeed, "[t]he prerequisite for any action for breach of the implied covenant of good faith and fair dealing is the existence of a contractual relationship between the parties, since the covenant is an implied terms in the contract." (*Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 433.) As explained above, Cadence has not stated a claim for breach of contract against TCL by failing to adequately plead the mutual assent necessary to plead the existence of a contract. It therefore follows that absent an existing contract between the parties, no claim for breach of the implied covenant has been stated.

The Court also agrees with TCL that even if Cadence *had* pleaded the existence of a valid contract, the second cause of action would fail because it is duplicative of the first cause of action. "If the allegations [of an implied covenant claim] do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claim in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Careau & Co. v. Security Pacific Business Credits, Inc.* (1990) 222 Cal.App.3d 1371, 1395.) Though this claim does not refer to the breach of specific sections of the SLMAs like the preceding claim, practically speaking they allege the same thing, namely, TCL's piracy of Cadence's software. Consequently, this claim is duplicative and thus superfluous.

Based on the foregoing, TLC's demurrer to the second cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

3. *UCL*

TCL contend that Cadence's remaining claim for violation of the UCL is defective because: Cadence fails to plead "unfair" conduct; the claim is duplicative of its breach of contract claim; and it seeks improper relief under the UCL.

The UCL prohibits "unfair competition," which is broadly defined to include any unlawful, unfair, or fraudulent act or practice. (Bus. & Prof. Code, § 17200.) "Because the UCL is written in the disjunctive, it establishes three varieties of unfair competition- acts or practices which are unlawful, or unfair, or fraudulent. An act can be alleged to violate any or all of the three prongs of the UCL- unlawful, unfair, or fraudulent." (*Berryman v. Merit Prop. Mgm't, Inc.* (2007) 152 Cal.App.4th 1544, 1554.) The UCL "borrows" violations of other laws and treats them as unlawful practices independently actionable under the act. (*Gafcon, Inc. v. Ponsor & Assocs.* (2002) 98 Cal.App.4th 1388, 1425, fn. 15.) Here, Cadence alleges that TCL violated the UCL by engaging in "unfair, fraudulent, and/or unlawful business practices … by using 'cracked' or otherwise unauthorized versions of Cadence Software without paying the required license fees." (Complaint, ¶ 171.) Cadence further alleges that TCL engaged in an "unfair business practice in which they use pirated versions of Cadence Software in China (and elsewhere) to design and build their electronics, which they then sell to consumers in California." (*Id*., ¶ 176.)

Despite the foregoing, TCL argue, there are no facts by Cadence articulating how their alleged actions are "fraudulent" and "unlawful" and thus this claim in actuality appears to be based solely on "unfair" conduct. There are different tests for determining whether a practice is "unfair" within the meaning of the UCL depending on if the claim is being asserted in a "consumer" action or a "competitor" action. TCL approach this claim as if it is in the former category and, as they note, in this category of UCL cases, a split of authority exists with regard to the proper test for determining whether a business practice is unfair under the statute, with the California Courts of Appeal adopting three different tests for determining unfairness in the consumer context. (See, e.g., *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 380, fn. 9.) These tests consist of the following:

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

TCL maintain that Cadence has not pleaded that it engages in actions that qualify as "unfair" under *any* of the foregoing tests because it has not identified any public policy that their alleged piracy violated, let alone any legislative policy "tethered" to their activities.

In its opposition, Cadence insists that it has pleaded that TCL are significantly harming the software industry and electronics competitors by using pirated software. By making this

argument, Cadence appears to be suggesting this is a *competitor*, not consumer, UCL action. In a competitor action, the effect on competition determines unfairness, with the determinative inquiry being whether the act or practice threatens "an incipient violation of an antitrust law, or violates the policy or spirit of one of the antitrust laws because its effects are comparable to, or are the same as, a violation of the law." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 187.) But this test is only applicable to actions between direct competitors (see *Watson Labs, Inc. v. Rhone-Poulenc Rorer, Inc.* (C.D. Cal. 2001) 178 F.Supp.2d 1099, 1118, fn. 13), and TCL are not alleged to be a direct competitor of Cadence. Consequently, to the extent Cadence is attempting to state a UCL based on unfair practices by a competitor, they have not done so and the demurrer to this claim must be sustained.

The Court is not persuaded by TCL's next argument that the UCL claim is duplicative of the breach of contract cause of action. The case on which TCL rely in making this argument, *Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1555, is distinguishable because in that case the plaintiffs, incidental beneficiaries to various contracts, were attempting to use the contracts to "bootstrap liability" under other theories, including the UCL, in order to avoid the barrier against a third party suing on a contract to which he was only an incidental beneficiary. That is not the case here.

The Court also rejects TCL's remaining argument that Cadence seeks improper relief under the UCL by seeking disgorgement and failing to appropriately define the scope of restitution sought. The appropriate instrument to address such a purported pleading deficiency is a motion to strike and *not* a demurrer. (See *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1562 ["[A] demurrer tests the sufficiency of the factual allegations of the complaint rather than the relief suggested in the prayer of the complaint."].)

In accordance with the foregoing, TCL's demurrer to the third cause of action on the ground of failure to state facts sufficient to constitute a cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

C. Uncertainty

TCL demurs to the Complaint on the ground of uncertainty, arguing that the Complaint qualifies as such because Cadence has failed to articulate which specific defendant is alleged to have engaged in which specific conduct.

Demurrers for uncertainty are disfavored and sustained "only if the pleading is so incomprehensible that a defendant cannot reasonably respond." (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135; see also *Khoury v. Maly's of Cal., Inc.* (1993) 14 Cal.App.4th 612, 616 ["A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures."]) Here, the Court is not persuaded that the allegations of the Complaint, which clearly plead that the TCL entities are all alter egos of one another and that TCL hold themselves out as a "single enterprise," are so "incomprehensible" that TCL cannot reasonably respond to them. To the extent there are any distinctions between the actions of each defendant, they can be sussed out in discovery. Accordingly, TCL's demurrer to the Complaint on the ground of uncertainty is OVERRULED.

XII. CONCLUSION

TCL's demurrer to the Complaint and the claims asserted therein on the ground of failure to state sufficient facts is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

TCL's demurrer to the Complaint on the ground of uncertainty is OVERRULED.

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 5

Case Name: *Loera, et al. v. Cellco Partnership*
Case Nos.: 21CV386962 (consolidated with 21CV386960)

This is a consolidated putative class action and representative action under the Private Attorneys General Act ("PAGA"). Plaintiffs John Loera and Manuel Nieto (collectively, "Plaintiffs") allege that Defendant Cellco Partnership d/b/a Verizon Wireless ("Defendant" or "Verizon") 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 Plaintiffs' motion for preliminary approval of settlement, which is unopposed. As discussed below, if satisfactory clarification is provided concerning whether the notice will be provided in languages other than English, the Court will GRANT the motion.

XIII. BACKGROUND

According to the allegations of the operative Third Amended Consolidated Complaint ("TAC"), Plaintiffs were both formerly employed by Defendant as hourly-paid, non-exempt employees, with Mr. Loera employed from November 2010 to March 2020 and Mr. Nieto employed from November 2010 to April 2019. (TAC, ¶¶ 27-28.) Plaintiffs allege that Defendant failed to pay them all regular and overtime wages earned, failed to provide them the meal and rest periods to which they were entitled, and failed to pay them statutorily mandated premiums for the missed rest and meal periods. (*Id.*, ¶¶ 36-42.) Plaintiffs further allege that Defendant failed to provide suitable seating for members of the class and aggrieved employees who could have performed their duties while seated. (*Id.*, ¶ 47.) Defendant also did not provide employees with all wages due to them upon the termination of their employment.

On January 20, 2021, Mr. Nieto filed a PAGA representative action in Santa Cruz County Superior Court seeking civil penalties for numerous violations of the Labor Code. Mr. Loera filed a class action complaint against Defendant in this Court on September 22, 2021, alleging essentially the same wage and hour claims as those set forth in Mr. Nieto's PAGA action. That same day, Mr. Loera also filed a separate PAGA action against Defendant.

In August 2022, counsel for Mr. Nieto and counsel for Mr. Loera began working together. On March 15, 2023, Mr. Loera received the Court's permission to amend his class complaint to add Mr. Nieto as a plaintiff and class representative. In an order dated November 30, 2023 and pursuant to a stipulation between the parties, the Court consolidated the actions initiated by Mr. Loera and granted Plaintiffs leave to file the TAC. The TAC was ultimately filed on December 5, 2023 and asserts 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 Business & Professions Code § 17200; and (11) civil penalties under PAGA.

Plaintiffs now seek an order: preliminarily approving the proposed settlement; conditionally certifying the proposed class for settlement purposes only; appointing Mr. Nieto as class representative; appointing the Law Offices of Mark Yablonovich and Lawyers for Justice, APC, as class counsel; appointing Phoenix Settlement Administrators ("Phoenix") as the Settlement Administrator and authorizing Phoenix to send notice of the Settlement to class members; and setting a final approval hearing date.[4]

XIV. 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.)

[4] Plaintiffs' additionally request preliminary approval of attorney's fees, litigations costs, administration costs and enhancement awards; the items will be addressed subject to a motion for final approval.

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.)

XV. SETTLEMENT PROCESS

After the initiation of his action in Santa Cruz County Superior Court, which was preceded by a thorough investigation of the pertinent factual and legal issues by his counsel, Mr. Nieto propounded formal discovery on Defendant to obtain contact information for all of its California employees, time and pay records, and its employment policies. Responses were provided in the summer of 2021, and Defendant propounded its own discovery on Plaintiff. The parties engaged in further discovery, as well as related meet and confer over perceived deficiencies in each other's discovery responses. In early 2022, the parties agreed to an informal stay of discovery pending mediation on the condition that the informal production of data would be completed by an agreed upon deadline prior to participation in the mediation. This data, including a random sample of electronic time and pay records for approximately 30% of Defendant's employees, was produced on a rolling basis on several dates in July, September and October 2022.

Prior to the initiation of the actions by Mr. Loera, his counsel conducted an investigation into the relevant facts and circumstances as well as the legal issues and applicable law. Through informal discovery, Plaintiff obtained records from Defendant which enabled his counsel to evaluate the value and strength of his claims and calculate Defendant's potential maximum exposure.

On October 10, 2022, the parties participated in all-day mediation with mediator Michael Dickstein, but were unable to resolve the various actions. However, the parties continued mediated settlement discussions through Mr. Dickstein, and after months of negotiations, accepted his proposal on April 13, 2023, that encompassed the principle terms of the settlement now before the Court. The parties' memorialized the terms of their agreement shortly thereafter.

XVI. SETTLEMENT PROVISIONS

The non-reversionary gross settlement amount is $3,500,000. Attorney fees of up to one-third of the gross settlement ($1,166,666.66), litigation costs up to $50,000, and administration expenses not to exceed $32,000 will be paid from the gross settlement. $280,000 will be allocated to PAGA penalties, 75% of which ($210,000) will be paid to the LWDA, with the remaining 25% ($70,000) paid to "PAGA Group Members," who are defined as "all individuals who were employed by Verizon as a nonexempt retail employee and performed work in California at any time during the period beginning on May 26, 2019 and ending on May 15, 2023." Plaintiffs will also each seek an enhancement award of $10,000.

The net settlement will be allocated to class members- defined as "[a]ll individuals who were employed by Verizon as a nonexempt retail employee and performed work in California at any time during the period beginning on March 27, 2017 and ending on May 15, 2023"- on a pro rata basis based on the number of weeks worked during the class period. For tax purposes, settlement payments will be allocated 40% to wages and 60% to interest and penalties. The employer side payroll taxes will be paid by Defendant separately from the gross settlement amount. 100% of the PAGA payment to PAGA Group Members will be allocated to penalties. Funds associated with checks uncashed after 180 days will be transmitted to Legal Aid at Work as the *cy pres* recipient.

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

> [A]ny and all claims, rights, demands, liabilities, and causes of action of any kind, whether known or unknown, arising from the alleged violation of any provision of common law, California law, and/or federal law which was or could be raised based on the same operative facts or theories asserted in any of Plaintiffs' complaints, amended complaints or in the letters to the Labor and Workforce Development Agency, including but not limited to claims for off-the-clock work, unpaid wages, unpaid overtime wages, failure to pay all wages earned every pay period, failure to pay all compensation at the regular rate of pay or the correct regular rate of pay, failure to provide meal periods or rest periods, unpaid premium wages for meal periods or rest periods, untimely payment of wages, inaccurate wage statements, recordkeeping violations, failure to timely pay all wages owed upon termination, unfair competition, reimbursement of business expenses, unlawful deductions from wages, reporting time pay violations, failure to provide wage notices, violation of suitable seating requirements, claims under California Labor Code sections 201, 202, 203, 204, 223, 226, 226.3, 226.7, 510, 512, 551, 552, 558, 1174, 1182.12, 1194, 1197, 1197.1, 1198, 2800, 2802, 2804, 2810.5, California Code of Regulations, Title 8 Section 11000 et seq., the applicable Industrial Welfare Commission (IWC) Wage Orders, Business & Professions Code §§ 17200–17208, the Fair Labor

> Standards Act, or any related damages, penalties, restitution, disgorgement, interest or attorneys' fees, that arose during the Class Period.

PAGA Group Members will release:

> Any and all claims under PAGA which were or could be raised based on the same operative facts or theories asserted in any of Plaintiffs' complaints, amended complaints or in the letters to the Labor and Workforce Development Agency, and that arose during the PAGA Period, including claims for PAGA penalties under Labor Code sections 2698-2699.5 for violations of California Labor Code sections 201, 202, 203, 204, 223, 226, 226.3, 226.7, 510, 512, 551, 552, 558, 1174, 1182.12, 1194, 1197, 1197.1, 1198, 2800, 2802, 2804, 2810.5, including based on assertions of off-the-clock work, unpaid wages, unpaid overtime wages, failure to pay all wages earned every pay period, failure to pay all compensation at the regular rate of pay or the correct regular rate of pay, failure to provide meal breaks or rest periods, unpaid premium wages for meal periods or rest periods, untimely payment of wages, inaccurate wage statements, recordkeeping violations, failure to timely pay all wages owed upon termination, reporting time pay violations, failure to provide wage notices, reimbursement of business expenses, unlawful deductions from wages, and violation of suitable seating requirements.

Consistent with the statute, PAGA Group Members will not be able to opt out of the PAGA portion of the settlement. The foregoing releases are both appropriately tailored to the allegations at issue. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.)

XVII. FAIRNESS OF SETTLEMENT

Plaintiffs' counsel determined an appropriate range of recovery for the claims asserted in the consolidated class action offsetting Defendant's maximum theoretical exposure for each claim (which was itself calculated based on information and data produced by Defendant) by: (i) the strength of Defendant's substantive and affirmative defenses to those claims (e.g., the failure to take meal or rest breaks was due to the discretion of employees and not Defendant's policies, off-the-clock work could not be proven and was not permitted by Defendant's policies and any non-compliance was inadvertent and not willful); (ii) the risk of class certification being denied; (iii) the risk of the Court finding that a PAGA trial would be unmanageable;10 (iv) the risk of losing on any dispositive motion that could have eliminated all or some of Plaintiffs' claims or barred evidence; (v) the risk of losing at trial or prevailing on only some of the claims; (vi) the chances of the Court exercising its discretion to reduce PAGA penalties (*see* Lab. Code section 2699(e)); (vii) the chances that a favorable verdict or ruling would be reversed on appeal; and (viii) the difficulties attendant to collecting on a judgment. Additionally, Plaintiffs had to contend with prior settlements in similar actions that truncated a substantial portion of Defendant's exposure and liability for the overlapping periods and claims.

Plaintiffs' identify the settlement recovery for each of their claims as follows: $595,201 (meal period violations); $1,583,849 (rest period violations); $92,803 (off-the-clock work); $41,001 (liquidated damages for minimum wage violations); $12,000 (underpaid regular rate of pay for overtime and premiums); $146,432 (untimely payment of wages during

employment); $217,843 (failure to pay wages due at termination); $231,900 (non-compliant wage statements); $140,625 (inaccurate records); $20,992 (reporting time pay); $112,500 (unreimbursed business expenses); $280,000 (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 Plaintiff would have had to overcome to prevail on her claims, the settlement achieves a good result for the class. For purposes of preliminary approval, the Court finds that the settlement is fair and reasonable to the class, and the PAGA allocation is genuine, meaningful, and reasonable in light of the statute's purposes.

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

XVIII. PROPOSED SETTLEMENT CLASS

Plaintiffs request that the following settlement class be provisionally certified:

> All individuals who were employed by Verizon as a nonexempt retail employee and performed work in California at any time during the period beginning on March 27, 2017, and ending on May 15, 2023.

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 4500 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 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 Defendant as a non-exempt employee and alleges 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 4500 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 and it is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

XIX. 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).)

The parties have selected Phoenix as the settlement administrator. Within fourteen calendar days of preliminary approval, Defendant will provide a list of all class members along with pertinent identifying information (including last known address) to the administrator. Within an additional fourteen calendar days, Phoenix will mail the notice packet to class members after updating their addresses through a search on the National Change of Address Database.

Here, the notice describes the lawsuit, explains the settlement, and instructs Class Members that they may opt out of the settlement (except the PAGA component) or object. The gross settlement amount and estimated deductions are provided. Class Members are informed of their qualifying pay periods as reflected in Defendant's records and are instructed how to dispute this information. Class Members are given 60 days to request exclusion from the class or submit a written objection to the settlement. Returned notices will be re-mailed to any forwarded address provided or an updated address located though a skip trace within three business days of return.

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

The foregoing notice procedures are appropriate and are approved.

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

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

> The judge overseeing this case encourages remote appearances. (As of August 15, 2022, the Court's remote platform is Microsoft Teams.) Class members who wish to appear remotely should contact class counsel at least three days before the hearing if possible. Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members may appear remotely using the Microsoft Teams link for Department 7 (Afternoon Session) or by calling the toll free conference call number for Department 7. Any class member who wishes to appear in person should check in at Court Services (1st floor, Downtown Superior Courthouse, 191 N. 1st St., San Jose) and wait for a sheriff's deputy to escort him or her to the courtroom for the hearing.

XX. CONCLUSION

Presuming satisfactory clarification is provided concerning whether the notice will be provided in languages other than English, the Court will GRANT the motion for preliminary approval.

The final approval hearing shall take place on **September 19, 2024** at 1:30 in Dept. 7. The following class is preliminarily certified for settlement purposes:

> All individuals who were employed by Verizon as a nonexempt retail employee and performed work in California at any time during the period beginning on March 27, 2017, and ending on May 15, 2023.
>
> The Court will prepare the order.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

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