SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Theodore C. Zayner Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2310

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department19@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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LAW AND MOTION TENTATIVE RULINGS
DATE: JANUARY 10, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV388108	Sansoni v. Maxar Space LLC, et al. (Class Action/PAGA)	See Line 1 for tentative ruling.
LINE 2	21CV383092	Reyes v. Vitas Healthcare Corporation of California (Class Action/PAGA)	See Line 2 for tentative ruling.
LINE 3	20CV368472	Tesla, Inc. v. Pascale, et al.	See Line 3 for tentative ruling.
LINE 4	19CV352173	Cabuag v. Westgate Premier Healthcare Services, Inc., et al. (Class Action)	See Line 4 for tentative ruling.
LINE 5	23CV414144	Huang v. Credit Sesame, Inc., et al. (PAGA)	See Line 5 for tentative ruling.
LINE 6	23CV417697	Cheung v. C2 Educational Systems, Inc. (PAGA)	See Line 6 for tentative ruling.
LINE 7	20CV366939	ZL Technologies, Inc. v. Splitbyte Inc., et al. (LEAD CASE; Consolidated With 20CV373027, 20CV373149, 21CV378097, 21CV382329)	See Line 7 for tentative ruling.

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LAW AND MOTION TENTATIVE RULINGS

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

Calendar Line 1

Case Name: Sansoni v. Maxar Space LLC, et al. (Class Action/PAGA)
Case No.: 21CV388108

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on January 10, 2024, at 9:00 a.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a putative class and representative action arising out of various alleged wage and hour violations. The operative First Amended Class Action and Representative Action Complaint, filed on March 23, 2023, sets forth causes of action for: (1) Violation of Cal. Labor Code §§ 510 and 1198 (Unpaid Overtime); (2) Violation of Cal. Labor Code §§ 226.7 and 512, subd. (a) (Unpaid Meal Period Premiums); (3) Violation of Cal. Labor Code § 226.7 (Unpaid Rest Period Premiums); (4) Violation of Cal. Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages); (5) Violation of Cal. Labor Code §§ 201, 202, and 203 (Final Wages Not Timely Paid); (6) Violation of Cal. Labor Code §§ 204 and 210 (Wages Not Timely Paid During Employment); (7) Violation of Cal. Labor Code § 226, subd. (a) (Failure to Provide Accurate Wage Statements); (8) Violation of Cal. Labor Code §§ 2800 and 2802 (Failure to Reimburse Necessary Business Expenses); (9) Violation of Cal. Business & Professions Code § 17200, et seq.; and (10) Violation of Cal. Labor Code § 2699, et seq. (Private Attorneys General Act).

The parties have reached a settlement. Plaintiff Mill Sansoni ("Plaintiff") moved for preliminary approval of the settlement.

On June 21, 2023, the court granted preliminary approval of the settlement subject to approval of an amended class notice and the parties' identification of a new *cy pres* recipient in compliance with Code of Civil Procedure section 384. The parties were ordered to submit the revised class notice and *cy pres* recipient by July 7, 2023.

On July 7, 2023, Plaintiff filed an amended class notice, which made the changes requested by the court. That same day, the parties filed an Amendment to Stipulation of Class and PAGA Representative Action Settlement, identifying Child Advocates of Silicon Valley as

the new *cy pres* recipient. The court then approved the amended class notice and *cy pres* recipient.

Plaintiff now moves for final approval of the settlement. The motion is unopposed.

II. LEGAL STANDARD

Generally, "questions whether a 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*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

> 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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba*, *supra*, 91 Cal.App.4th at p. 245.) The 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*., quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba*, *supra*, 91 Cal.App.4th at p. 245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

> The case has been settled on behalf of the following class:
> [A]ll current and former California non-exempt employees of the Maxar Defendants, and of companies that supply contingent workers to the Maxar Defendants and who are assigned to work at the Maxar Defendants (including, but not limited to, [defendant Zenex Partners, Inc. ("Zenex")]), during the Class Settlement Period.

The Maxar Defendants are defined as defendants Maxar Space LLC, Maxar Intelligence Inc., Maxar Mission Solutions Inc., Maxar Technologies Holdings Inc., Maxar Space Holdings LLC, and Maxar Space Robotics LLC, collectively. The Class Settlement Period is define as the period beginning October 14, 2017, and ending on either the Preliminary Approval Date or 120 days from the date of mediation (i.e., April 16, 2023), whichever date occurs earlier. The class also contains a subset of PAGA Members that are defined as "all current and former California non-exempt employees of the Maxar Defendants, and of companies that supply contingent workers to the Maxar Defendants and who are assigned to work at the Maxar Defendants (including, but not limited to, [Zenex]), during the PAGA Settlement Period." The PAGA Settlement Period is defined as the period beginning October 14, 2020, and ending on either the Preliminary Approval Date or 120 days from the date of mediation (i.e., April 16, 2023), whichever date occurs earlier.

According to the terms of settlement, Maxar Defendants will pay a total non-reversionary amount of $3,228,140. The total settlement payment includes attorney fees of $1,129,849 (35 percent of the gross settlement amount), litigation costs up to $50,000, an incentive award for the class representative not to exceed $7,500, settlement administration costs (estimated not to exceed $16,500), and a PAGA allocation of $300,000 (from which $225,000 will be paid to the LWDA and $75,000 will be paid to PAGA Members).

The net settlement amount of approximately $1,600,000 will be distributed to the class members on a pro rata basis based on the number of workweeks worked during the Class Settlement Period. Similarly, PAGA Members will receive a pro rata share of the 25 percent portion of the PAGA payment allocated to aggrieved employees based on the number of workweeks worked during the PAGA Settlement Period.

Checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be distributed to Child Advocates of Silicon Valley.

In exchange for the settlement, class members agree to release Defendants, and related persons and entities, from all claims asserted in any of the complaints filed in the action, and all claims that could have been asserted in the action arising from the same alleged facts or in any PAGA letter sent by Plaintiff to the LWDA, that accrued or arose during the Class Settlement Period. PAGA Members agree to release Defendants, and related persons and entities, from all claims for civil penalties under PAGA asserted in any of the complaints filed in the action, and all claims that could have been asserted in the action based on the same alleged facts in the complaints or in any PAGA letter sent by Plaintiff to the LWDA.

On October 12, 2023, the settlement administrator mailed notice packets to 1,384 class members. (Declaration of Nathalie Hernandez of ILYM Group, Inc., in Support of Motion for Final Approval of Class Action Settlement ("Hernandez Dec."), ¶¶ 5-7.) On November 30, 2023, Defendants informed the settlement administrator that one individual was inadvertently omitted from the class list and should be added, which brought the class list up to 1,385 class members. (Id. at ¶ 8.) Ultimately, 23 notice packets were deemed undeliverable. (Id. at ¶ 11.) As of December 13, 2023, there were no objections and no requests for exclusion. (Id. at ¶¶ 12-13.) The highest individual settlement share to be paid is approximately $3,230.17 and the average individual settlement share to be paid is approximately $1,271.45. (Id. at ¶ 15.)

The court has concerns regarding the adequacy of the notice. First, Plaintiff previously advised the court in connection with the motion for preliminary approval of settlement that there were approximately 1,420 class members. Notice packets were mailed to substantially fewer class members. Plaintiff does not explain this discrepancy. It is unclear whether there are actually fewer class members than the parties previously anticipated or whether notice was not provided to the additional class members. Second, the declaration from the settlement administrator does not establish when, if ever, notice was provided to the one individual who was inadvertently omitted from the class list. Assuming for the sake of argument that the individual was provided notice on November 30, 2023 (i.e., the date on which Defendants informed the settlement administrator of the omission), the time period for that individual to

respond would elapse on January 29, 2024. Thus, it is unclear whether this individual has been given sufficient time to respond to the settlement. In light of the foregoing, a continuance of this matter is warranted. Plaintiff is directed to provide a supplemental declaration clarifying why notice packets were only mailed to fewer than 1,420 class members and when, if ever, notice was provided to the one individual omitted from the class list.

Plaintiff requests an incentive award of $7,500 for the class representative. In its order granting preliminary approval of the settlement, the court directed the class representative to file a declaration detailing his participation in the action and an estimate of the time spent. Plaintiff has filed a declaration in support of his request for an incentive award. However, Plaintiff's declaration does not include an estimate of the time spent in connection with this action. Prior to the continued hearing, Plaintiff shall file a supplemental declaration estimating that total amount of time spent in connection with this action.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel seeks attorney fees of $1,129,849 (35 percent of the total settlement fund). Plaintiff's counsel provides evidence that the attorneys of the Protection Law Group spent 621.15 hours on the case and bill at hourly rates between $375 to $800. (Declaration of Heather M. Davis in Support of Motion for Final Approval of Class Action and PAGA Settlement ("Davis Dec."), ¶¶ 49-54 & Ex. E.) Although the hours include work by multiple attorneys who bill at different hourly rates, Plaintiff's counsel does not state how many hours were worked by each attorney; instead, Plaintiff's counsel asserts that a "blended hourly rate" of at least $650 is appropriate. Given the absence of this additional information, the court cannot accurately determine the lodestar for purposes of performing a cross-check. Prior to the continued hearing on this motion, Plaintiff's counsel shall file a supplemental declaration setting forth the hours worked by each attorney on this matter.

Plaintiff's counsel also requests litigation costs in the total amount of $13,332.55 and provides evidence of incurred costs in that amount. (Davis Dec., ¶ 64 & Ex. F.) Therefore, the

litigation costs are reasonable and approved. The settlement administration costs of $16,500 are also approved. (Hernandez Dec., ¶ 16.)

Accordingly, the motion for final approval of the class action settlement is CONTINUED to February 21, 2024, at 1:30 p.m. in Department 19. Plaintiff shall file supplemental declarations with the additional information requested by the court no later than February 7, 2024. No additional filings are permitted.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 2

Case Name: Reyes v. Vitas Healthcare Corporation of California (Class Action/PAGA)
Case No.: 21CV383092

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on January 10, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

IV. INTRODUCTION

This is a class and representative action arising out of alleged wage and hour violations. The operative Second Amended Class & PAGA Action Complaint ("SAC"), filed on March 28, 2023, sets forth the following causes of action: (1) Failure to Pay All Minimum Wages; (2) Failure to Pay All Overtime Wages; (3) Rest Period Violations; (4) Meal Period Violations; (5) Wage Statement Violations; (6) Failure to Reimburse for Necessary Business Expenses; (7) Waiting Time Penalties; (8) Failure to Timely Pay Wages During Employment; (9) Unfair Competition; and (10) PAGA Penalties.

The parties reached a settlement. Plaintiffs Erlinda Reyes ("Reyes") and Jazzina Williams ("Williams") (collectively, "Plaintiffs") moved for preliminary approval of the settlement.

On May 17, 2023, the court continued the motion for preliminary approval of the settlement to June 28, 2023. In its minute order, the court noted that there were multiple problems with the settlement First, the settlement agreement purported to settle this lawsuit as well as a different case not before the court, *Jazzina Williams v. VITAS Healthcare Corporation of California* (Alameda County Superior Court, Case No. RG17853886) ("*Williams* Action"). The court ordered Plaintiffs to file a supplemental declaration addressing the court's authority to approve the settlement to the extent it encompassed the *Williams* Action. Next, the court directed Plaintiffs to designate a new *cy pres* recipient in compliance with Code of Civil Procedure section 384. The court further informed the parties that the settlement agreement must be modified to provide for two separate calculations and payments: one for payments related to the settlement of the class claims; and one for payments related to the settlement of the PAGA claim. The court also ordered Plaintiffs to file supplemental

declarations specifically detailing their participation in the actions and an estimate of the time spent. Lastly, the court asked the parties to make several changes to the class notice.

On June 16, 2023, Plaintiffs' counsel filed a supplemental declaration with the court.

On June 28, 2023, the court granted preliminary approval of the settlement, noting that the parties had addressed the majority of the problems identified in the prior court order.

On July 6, 2023, Plaintiffs' counsel filed a Notice of Errata, informing the court of a typographical error in the definition of the settlement class set forth in the settlement agreement. On July 21, 2023, the court entered an order approving the settlement with the corrected definition.

Plaintiffs now move for final approval of the settlement. The motion is unopposed.

V. LEGAL STANDARD

Generally, "questions whether a 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*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

> 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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba*, *supra*, 91 Cal.App.4th at p. 245.) The 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*., quoting *Dunk*, *supra*, 48

Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba*, *supra*, 91 Cal.App.4th at p. 245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

VI. DISCUSSION

> The settlement provides that this case has been settled on behalf of the following class: [A]ll persons who are or were employed by [d]efendant [VITAS Healthcare Corporation of California ("Defendant")] in California classified as a non-exempt clinical employee during the Class Period.

The Class Period is defined as May 16, 2019 until January 16, 2023. The settlement also includes Aggrieved Employees, who are defined as "all persons who are or were previously employed by Defendant in California classified as a non-exempt clinical employee at any time from May 16, 2019, until January 16, 2023."

As discussed in connection with preliminary approval, Defendant will pay a maximum, non-reversionary settlement amount of $3,450,000. The gross settlement amount includes attorney fees up to $1,150,000 (1/3 of the gross settlement amount), litigation costs not to exceed $25,000, a PAGA allocation of $20,000 (75 percent of which will be paid to the LWDA), incentive awards in the total amount of $20,000 (up to $10,000 for each class representative), settlement administration costs not to exceed $20,000, and an individual award to Williams in the amount of $15,000. The net settlement amount will be distributed to participating class members pro rata basis. Checks that remain uncashed 180 days from the date the checks are dated will be void and the funds from those checks will be distributed to Legal Aid at Work.

On August 11, 2023, the settlement administrator mailed notice packets to 2,227 class members. (Declaration of Kevin Lee with Respect to Notice and Settlement Administration in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Lee Dec."), ¶¶ 3-5.) Ultimately, 17 notice packets were deemed undeliverable. (*Id.* at ¶ 7.) As of November 30, 2023, there were no objections and three requests for exclusion. (*Id.* at ¶¶ 8-9.)

The highest individual settlement share to be paid is approximately $32,142.43, the lowest individual settlement share to be paid is approximately $10.93, and the average individual settlement share to be paid is approximately $992.65. (*Id.* at ¶ 14.)

The court has concerns regarding the adequacy of the notice. Plaintiffs previously advised the court in connection with the motion for preliminary approval of settlement that there were approximately 2,498 class members. However, notice packets were only mailed to 2,227 class members. Plaintiffs do not explain this discrepancy. It is unclear whether there are only 2,227 class members or whether notice was not provided to the additional 271 class members. In light of the foregoing, a continuance of this matter is warranted. Plaintiff is directed to provide a supplemental declaration clarifying why notice packets were only mailed 2,227 class members. Additionally, Plaintiffs shall provide a supplemental declaration from the settlement administrator identifying the three class members who requested exclusion from the settlement.

Plaintiffs request incentive awards in the total amount of $20,000 (up to $10,000 for each class representative). In its order granting preliminary approval of the settlement, the court directed the class representatives to file declarations detailing their participation in the action and an estimate of the time spent. Although Williams submitted a declaration in support of the request for incentive awards, Reyes has not. Furthermore, it appears from Plaintiffs' papers that Reyes intended to file such a declaration. Prior to the continued hearing, Plaintiffs shall file the declaration from Reyes referenced in their moving papers. The court will make a determination as to the incentive awards at that time.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel seek attorney fees of 1,150,000 (1/3 of the gross settlement amount). Plaintiffs' counsel state that their total combined lodestar is $598,090. Plaintiffs' counsel provide sufficient evidence supporting the hourly rates and hours billed by Kevin Woodall, Collin Bowman, and Donna Pilling. (Declaration of Kevin Woodall in Support of Plaintiffs' Unopposed Motion for Attorney's Fees, Costs and Service Awards ("Woodall Dec."), ¶¶ 7-13.) While the

declarations submitted by Mehrdad Bokhour ("Bokhour") and Joshua Falakassa ("Falakassa") establish Bokhour's and Falakassa's hourly rates, their declarations do not demonstrate that they billed 142.5 hours and 128.5 hours, respectively, in connection with this action. Prior to the continued hearing, Bokhour and Falakassa shall file supplemental declarations setting forth the time that they have actually billed in connection with this action.

Plaintiffs' counsel also request litigation costs in the total amount of $18,343.05, but only provide evidence of incurred costs in the amount of $18,273.20. (Woodall Dec., ¶ 14; Declaration of Mehrdad Bokhour in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, ¶ 25.) Therefore, the litigation costs in the lesser amount of $18,273.20 are reasonable and approved. The settlement administration costs of $19,000 are also approved. (Lee Dec., ¶ 17.)

Accordingly, the motion for final approval of settlement is CONTINUED to February 21, 2024, at 1:30 p.m. in Department 19. Plaintiffs shall file supplemental declarations with the additional information requested by the court no later than February 7, 2024. No additional filings are permitted.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 3

Case Name: Tesla, Inc. v. Pascale, et al.
Case No.: 20CV368472

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on January 10, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VII. INTRODUCTION

This action arises out of the alleged misappropriation of trade secrets owned by plaintiff Tesla, Inc. ("Plaintiff"). According to the allegations of the operative Fourth Amended Complaint ("FAC"), filed on September 21, 2021, Plaintiff designs, manufactures, and sells electric cars, electric vehicle powertrain components, as well as scalable energy generation and storage products. (FAC, ¶ 36.) Plaintiff sells successful electric vehicles and is poised to enter the pickup truck market, with over 500,000 reservations for its highly anticipated Cybertruck. (*Ibid*.)

Defendants Rivian Automotive, Inc. and Rivian Automotive, LLC (collectively, "Rivian") are a prospective electric vehicle manufacturer with a desire to bring to market a truck or SUV based on an electric drivetrain. (FAC, ¶ 37.) Plaintiff, as the world leader in electric vehicles and vehicle automation, is Rivian's number one target from which to acquire information, including trade secret, confidential, and proprietary information. (*Id.* at ¶ 38.) Rivian has hired at least 70 employees directly from plaintiff Tesla. (*Ibid*.) Thirteen of Rivian's recruiters are former Tesla employees who are familiar with the type of information Tesla employees have access to and what information would be useful to Rivian. (*Id.* at ¶ 39.)

Tesla has in place a comprehensive set of policies and practices that robustly protect its trade secret, confidential, and proprietary information. (FAC, ¶ 41.) As a condition of employment, all Tesla employees must sign an Employee Nondisclosure and Inventions Assignment Agreement ("NDA"). (*Ibid*.) Defendants Vince Tanner-Duran ("Tanner-Duran"), Tami Pascale ("Pascale"), Kim Wong ("Wong"), Jessie Yoste ("Yoste"), Savayia Bero ("Bero"), Jessica Siron ("Siron"), Carrington Bradley ("Bradley"), Andrea Zechmann

("Zechmann"), Ashwin Alinkil ("Alinkil"), Saikat Das, and David Wu ("Wu") (collectively, "Individual Defendants") each electronically signed the NDA. (*Ibid*.)

Through the NDA, employees pledge, among other things, not to disclose Plaintiff's "Proprietary Information," defined to include "all information, in whatever form and format, to which I have access by virtue of and in the course of my employment," and encompassing, as relevant here, "technical data, trade secrets, know-how, plans, designs,. .. methods, processes, data, programs, lists of or information relating to, employees, suppliers, financial information and other business information." (FAC, ¶ 42.)

Plaintiff's Internet Usage Policy and Technology Systems and Electronic Communications Policy both specifically prohibit the unauthorized "transmitting, copying, downloading, or removing" of Tesla trade secret, proprietary, or confidential business information. (FAC, ¶ 44.) Plaintiff also reminds employees that they "must not … forward work emails outside of … Tesla or to a personal email account." (*Ibid*.)

Plaintiff takes extensive measures to ensure that its trade secret, confidential, and proprietary information cannot be wrongfully misappropriated, such as implementing stringent information and security policies and practices. (FAC, ¶¶ 46-47.)

Rivian is knowingly encouraging the misappropriation of Plaintiff's trade secret, confidential, and proprietary information by employees that Rivian hires. (FAC, ¶ 48.) Plaintiff has discovered a pattern of its employees surreptitiously stealing trade secret, confidential, and proprietary information and departing for Rivian. (*Id*. at ¶ 48.) Rivian directs and encourages those thefts even though defendant Rivian is well aware of Tesla employees' confidentiality obligations. (*Ibid*.) Furthermore, Rivian employees, who were previously employed by Plaintiff, are soliciting Plaintiff's employees to steal Plaintiff's trade secrets by secretly sending highly confidential files to Rivian while attempting to avoid detection by Plaintiff. (*Ibid.*)

The information misappropriated by the Individual Defendants allows Rivian to copy significant parts of Plaintiff's work in key areas without investing the substantial effort, time, and resources that defendant Rivian would need to develop these systems on its own. (FAC,

¶ 126.) This is information Plaintiff does not make available to its competitors or to the public. (*Ibid*.)

Based on the foregoing allegations, the FAC sets forth causes of action for: (1) Violation of the Uniform Trade Secrets Act (Cal. Civ. Code § 3426 et seq.); (2) Breach of Contract; and (3) Violation of California Computer Access and Fraud Act (Cal. Pen. Code § 520 et seq.).

Now before the court is the motion by Plaintiff to compel forensic inspection of Alinkil's personal devices. Alinkil opposes the motion.

II. NATURE OF THE MOTION

As an initial matter, the court addresses the nature of the motion. Plaintiff served Alinkil with Request for Inspection ("RFI") No. 1 on June 6, 2023. That discovery request seeks to inspect all computers, laptops, notebooks, tablets, hard drives, external storage devices, email and/or cloud-based storage accounts, cellular phones, smart phones and/or other mobile devices in Alinkil's possession, custody, or control that are or have ever been used to view, store, access, send, receive, or communicate about any Tesla Proprietary Information at any time. On July 10, 2023, Alinkil provided an objection-only response to the request. Thereafter, the parties met and conferred, and attended an IDC, but were unable to informally resolve their dispute. Based on the foregoing, Plaintiff moves to compel a forensic inspection of Alinkil's personal devices. Plaintiff cites Code of Civil Procedure sections 2031.300 and 2031.310 as the statutory bases for its motion.

The Discovery Act permits motions to compel initial responses to demands for inspection, motions to compel further responses to demands for inspection, and motions to compel compliance with agreements to comply set forth in responses to demands for inspection. (See Code Civ. Proc., §§ 2031.300, 2031.310, & 2031.320.)

The instant motion as framed by Plaintiff, i.e., as one to compel inspection, is not authorized by the Discovery Act. As Alinkil has served an objection-only response to RFI No. 1 and refused to permit the requested inspection, it appears that the instant motion is most appropriately characterized as a motion to compel a further response to an inspection demand. The court, therefore, construes the motion as one to compel a further response to RFI No. 1.

III. LEGAL STANDARD

If a party demanding a response to a demand for inspection deems that an objection in the response is without merit or too general, that party may move for an order compelling a further response. (See Code Civ. Proc., § 2031.310, subd. (a).) On a motion to compel a further response to a demand for inspection, it is the moving party's burden to demonstrate good cause for the discovery sought. (*Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) Once good cause has been shown, the burden shifts to the responding party to justify any objections. (*Ibid*.)

IV. DISCUSSION

RFI No. 1 demands inspection of all computers, laptops, notebooks, tablets, hard drives, external storage devices, email and/or cloud-based storage accounts, cellular phones, smart phones and/or other mobile devices in Alinkil's possession, custody, or control that are or have ever been used to view, store, access, send, receive, or communicate about any Tesla Proprietary Information at any time. In his response to the request, Alinkil objected on the grounds of attorney-client privilege, work product doctrine, privacy, relevance, and lack of good cause.

A. Plaintiff's Arguments

Plaintiff state that Alinkil used a personal texting application as well as his personal computers to communicate and store information regarding its alleged confidential and trade secret information. Plaintiff argues there is good cause to compel forensic inspection of Alinkil's personal devices because Alinkil has either failed to produce, destroyed, or somehow relocated highly relevant messages between himself and Das (including messages sent after Das's phone was imaged on August 5, 2021). Plaintiff states that it obtained relevant text messages between Das and Alinkil when it imaged Das's phone. (Declaration of Sara Pollock

in Support of Plaintiff Tesla, Inc.'s Motion to Compel Forensic Inspection of Defendant Ashwin Alinkil's Personal Devices ("Pollock Dec."), Exs. B & I.) However, Alinkil failed to produce those same text messages in response to Plaintiff's requests for production of documents. (Pollock Dec., L). Plaintiff contends that if Alinkil no longer has the messages, it is entitled to know when and how they came to be deleted and what other messages, or documents, were destroyed or relocated, how he did it, and when. Plaintiff states that Alinkil's counsel will not confirm what search terms, if any, were used to identify documents responsive to Plaintiff's requests for production of documents, what devices or accounts were searched, or how the searches were conducted.

Plaintiff maintains that Alinkil is not relieved of his production obligations simply because Plaintiff has been able to obtain a subset of relevant communications from other sources. Plaintiff states that information already obtained during the course of discovery shows that Alinkil had relevant communications with Das, Meng Wang ("Wang"), and Daniel Davies ("Davies"). (Pollock Dec., Ex. B & D.) Plaintiff notes that Wang and Davies deleted their messages with Alinkil, and Das no longer has messages after Tesla imaged his phone on due to a problem that occurred around October 2021. Plaintiff, therefore, contends that inspection of Alinkil's personal devices is the only source of discovery that would allow Plaintiff to potentially learn the full scope of Alinkil's conduct.

Plaintiff also asserts that there is evidence of Alinkil seeking to hide documents and evidence. Specifically, Plaintiff points to messages Alinkil sent instructing others not to upload documents onto certain drives and to download the documents onto personal computers in order to avoid the actions being traced, as well as discussions between Alinkil and Das regarding the deletion of chats. (Pollock Dec., Ex. B.)

In addition, Plaintiff notes that Alinkil has produced thousands of Plaintiff's documents that were found in his personal files and devices. (Pollock Dec., Ex. O.) Plaintiff argues that it must be allowed to conduct forensic imaging of Alinkil's personal devices in order to evaluate Alinkil and Rivian's claim that Das's final theft and sharing of documents with Alinkil occurred before Alinkil could download or access the documents and that the documents were

shared in "view only" mode, and assess whether the documents were further disseminated by Alinkil.

Finally, Plaintiff maintains that it has no interest in Alinkil's irrelevant personal information, such as his immigration, financial, or tax documents. Plaintiff states that it is willing to stipulate that the forensic inspection and collections should be conducted by a neutral third-party in order to minimize the collection and/or review of irrelevant or privileged information before it is produced to Plaintiff.

B. Alinkil's Arguments

In opposition, Alinkil argues there is no good cause to compel forensic examination of his personal devices. Alinkil states that he has already produced thousands of documents from those devices and his production contains all the responsive documents in his possession, custody, or control found after a reasonable search. Alinkil advises that his counsel manually reviewed WhatsApp messages, and has already conducted a forensic inspection of the devices at issue (which included an attempt to recover deleted files). Alinkil states that to the extent deleted files existed and were recoverable, they were produced. Alinkil concludes that RFI No. 1 is, therefore, duplicative of Plaintiff's prior requests for production of documents.

Similarly, Alinkil asserts that Plaintiff already obtained some of the relevant information sought by RFI No. 1 from other sources. Alinkil states that there is no basis to believe that anything is missing from those other productions. Alinkil concludes that Plaintiff, therefore, will not suffer any prejudice if it is not permitted to conduct forensic inspection of his personal devices.

Alinkil also contends that forensic inspection of his personal devices raises privacy concerns as the devices contain non-relevant and highly personal information. Specifically, Alinkil maintains that the devices contain tax records, immigration documents, medical information, and attorney-client privileged materials.

Finally, Alinkil argues that the likely burden involved in a forensic inspection of his personal devices will outweigh any potential benefit. Alinkil contends that his counsel would have to review all the files on the subject devices, there are over 895,000 files, and such a

review would be unduly burdensome. Alinkil contends that the alternative of not having his counsel review the documents would be untenable.

C. Analysis

A "party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action […] if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017, subd. (a).) "In the context of discovery, evidence is 'relevant' if it might reasonably assist a party in evaluating its case, preparing for trial, or facilitating a settlement. Admissibility is not the test, and it is sufficient if the information sought might reasonably lead to other, admissible evidence." (*Glenfed Development Corp. v. Superior Court* (1997) 53 Cal. App. 4th 1113, 1117 (*Glenfed*).) In the more specific context of a demand for production of a tangible thing, the party who asks the trial court to compel production must show "good cause" for the request—but unless there is a legitimate privilege issue or claim of attorney work product, that burden is met simply by a fact-specific showing of relevance. (Code Civ. Proc., § 2031, subds. (a)(2), (l); cf. *Glenfed, supra*, 53 Cal. App. 4th at p. 1117.)

Having reviewed the parties' arguments and evidence, the court finds that there is good cause for discovery sought by RFI No. 1. It is undisputed that Alinkil's personal devices were used to view, store, access, send, receive, or communicate about Tesla Proprietary Information. Thus, the discovery is indisputably relevant to Plaintiff's misappropriation claims.

Furthermore, courts have found forensic inspection of devices to be justified in cases, where, as here, the electronic information on the devices is relevant to a plaintiff's claims or a defendant's defenses. (*TBG Ins. Services Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 448 (*TBG*); see *Vasquez v. California School of Culinary Arts, Inc*. (2014) 230 Cal.App.4th 35, 42-43 [" ' "Because of the similarity of California and federal discovery law, federal decisions have historically been considered persuasive absent contrary California decisions." ' [Citation.]"]; see also *Brocade Communs. Sys. v. A10 Networks, Inc*. (N.D.Cal. Jan. 9, 2012, No. 10-CV-03428-LHK) 2012 U.S.Dist.LEXIS 2846, at *6-7; *Ameriwood Industries, Inc. v. Liberman* (E.D. Mo. Dec. 27, 2006. No. 4:06-CV-524-DJS) 2006 U.S. Dist. LEXIS 93380, 2006 WL 3825291, at *1 ["Considering the close relationship between plaintiff's claims and

defendants' computer equipment, and having cause to question whether defendants have produced all responsive documents, the Court will allow an independent expert to obtain and search a mirror image of defendants' computer equipment."]; *Balboa Threadworks, Inc. v. Stucky* (D. Kan. Mar. 24, 2006, No. 05-11157-JTM-DWB) 2006 U.S. Dist. LEXIS 29265, 2006 WL 763668, at *3 ["Courts have found that such access is justified in cases involving both trade secrets and electronic evidence, and granted permission to obtain mirror images of the computer equipment which may contain electronic data related to the alleged violation."].)

The fact that Plaintiff has already obtained some responsive information and documents from other source is not dispositive as Plaintiff is entitled to discover any nonprivileged information, cumulative or not, that may reasonably assist it in evaluating its case, preparing for trial, or facilitating a settlement. (*TBG, supra,* 96 Cal.App.4th at pp. 448-449 ["Here, the home computer is indisputably relevant (Zieminski does not seriously contend otherwise), and the trial court's finding that TBG already has other 'extensive evidence' misses the mark. TBG is entitled to discover any nonprivileged information, cumulative or not, that may reasonably assist it in evaluating its defense, preparing for trial, or facilitating a settlement. Admissibility is not the test, and it is sufficient if the information sought might reasonably lead to other, admissible evidence. (*Irvington-Moore, Inc. v. Superior Court* (1993) 14 Cal. App. 4th 733, 738-739 [18 Cal. Rptr. 2d 49] [a party may use multiple methods to obtain discovery and the fact that information was disclosed under one method is not, by itself, a proper basis to refuse to provide discovery under another method].) Zieminski offers no authority to the contrary, and we know of none."].)

Furthermore, Alinkil does not dispute Plaintiff's contention that his prior production of documents omitted some relevant communications between Alinkil and other parties, which Plaintiff was able to obtain from other sources. In light of the foregoing, a forensic inspection of Alinkil's devices is warranted so Plaintiff can investigate whether Alinkil failed to produce relevant communications or whether the communications were deleted, destroy, or lost by some other method. As other parties have also deleted relevant communications with Alinkil, Alinkil's personal devices are an important potential source of relevant evidence.

Moreover, the court finds that Alinkil's privacy objection is not well-taken. Although Alinkil's personal devices contain irrelevant information and documents that are protected by Alinkil's right to privacy (e.g., medical, immigration, and tax information), Plaintiff does not seek direct access to Alinkil's devices or forensic images. Instead, Plaintiff is willing to stipulate that the forensic inspection and collections should be conducted by a neutral third-party. It appears to the court that such a procedure would adequately address any privacy issues and minimize the collection and/or review of irrelevant or privileged information before it is produced to Plaintiff.

This procedure would also appear to address Alinkil's concerns regarding the burden involved in conducting forensic inspection of his devices. After the neutral third-party completes the review and collection of purportedly responsive documents, Alinkil's counsel can review the documents collected for any privacy and/or privilege issues before the documents are produced to Plaintiff. In this scenario, Alinkil's counsel would not be required to review all of the files contained on Alinkil's devices. Consequently, Alinkil's undue burden objection is not well-taken.

Notably, Alinkil does not address Plaintiff's proposal regarding the use of a neutral third-party or explain why it is not sufficient to address his concerns.

Accordingly, Plaintiff's motion to compel Alinkil to provide a further response to RFI No. 1 is GRANTED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 4

Case Name: Cabuag v. Westgate Premier Healthcare Services, Inc., et al. (Class Action)
Case No.: 19CV352173

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on January 10, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VIII. INTRODUCTION

This is a putative class action in which plaintiff Darlene Cabuag ("Plaintiff") alleges that defendants Westgate Premier Healthcare Service, Inc. and Amberwood Gardens committed various wage and hour violations. The Complaint, filed on August 1, 2019, sets forth claims for: (1) Violation of California Labor Code §§ 510 and 1198 (unpaid overtime); (2) Violation of California Labor Code §§ 226.7 and 512(a) (failure to provide meal periods); (3) Violation of California Labor Code § 226.7 (failure to provide rest periods); (4) Violation of California Labor Code §§ 1194, 1197 and 1197.1 (unpaid minimum wages); (5) Violation of California Labor Code §§ 201 and 202 (failure to timely pay final wages); (6) Violation of California Labor Code § 204 (failure to timely pay wages); (7) Violation of California Labor Code § 226(d) (failure to provide accurate wage statements); (8) Violation of California Labor Code § 1174(d) (failure to maintain accurate payroll records); (9) Violation of California Labor Code §§ 2800 and 2802 (failure to reimburse expenses); and (10) Violation of California Business and Professions Code §§ 17200, et seq. (unfair business practices).

On September 20, 2019, Westgate Premier Healthcare Service, Inc. d/b/a Amberwood Gardens ("Defendant") filed an Answer to the Complaint, stating that it was erroneously sued as both Westgate Premier Healthcare Service, Inc. and Amberwood Gardens.

Plaintiff and Defendant have reached a settlement.

On April 19, 2023, the court granted preliminary approval of the settlement subject to the court's approval of an amended class notice.

On May 18, 2023, the court entered a Stipulation to Amend Class Notice; [and] Order Thereon, which approved the amended class notice.

Plaintiff subsequently moved for final approval of settlement.

On October 18, 2023, the court continued the motion for final approval of settlement to January 10, 2024. In its minute order, the court directed the parties to identify a new *cy pres* recipient in compliance with Code of Civil Procedure section 384. The court also ordered Plaintiff's counsel to file a supplemental declaration setting forth the hours worked by each attorney on the matter, their experience, and their hourly rates. The court otherwise determined that the settlement was fair, and approved the enhancement award in the amount of $7,500, litigation costs in the amount of $10,926.08, and settlement administration costs in the amount of $10,000.

On December 22, 2023, Plaintiff's counsel filed a supplemental declaration in support of the motion for final approval.

IX. LEGAL STANDARD

Generally, "questions whether a 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*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

> 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, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba*, *supra*, 91 Cal.App.4th at p. 245.) The 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*., quoting *Dunk*, *supra*, 48

Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba*, *supra*, 91 Cal.App.4th at p. 245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

X. DISCUSSION

Plaintiff's counsel has now filed a supplemental declaration identifying California Court Appointed Special Advocates as the new *cy pres* recipient and demonstrating that the parties amended the settlement agreement accordingly. (Supplemental Declaration of Edwin Aiwazian in Support of Plaintiff's Motion for Final Approval of Class Action Settlement, Attorneys' Fees and Costs, and Class Representative Enhancement Payment ("Supp. Aiwazian Dec."), ¶ 5.) The new *cy pres* recipient complies with Code of Civil Procedure section 384 and is approved.

In addition, the supplemental declaration sets forth the hours worked by each attorney on the matter, their experience, and their hourly rates. (Supp. Aiwazian Dec., ¶ 4.) Plaintiff's counsel provides evidence that attorneys at Lawyers for Justice, PC spent 423.90 hours on the action at hourly rates ranging from $525 to $975 for a total lodestar of $309,235. (Declaration of Edwin Aiwazian in Support of Plaintiff's Motion for Final Approval of Class Action Settlement […] ("Aiwazian Dec."), ¶ 11 & Ex. A.) This results in a negative multiplier.

Here, the percentage of the common fund sought by counsel is higher than the 33.33 percent typically awarded in wage and hour cases. While the lodestar is above the requested fee award, the court finds no reason to award counsel in this matter more than the typical one-third of the common fund considering the relevant factors. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 [in order to reflect the fair market value of attorney services, lodestar may be adjusted with a multiplier based on factors including the extent to which the nature of the litigation precluded other employment by the attorneys and the contingent nature of the fee award].) Notably, the recovery achieved for the class is a relatively modest result. Consequently, the court approves attorney fees in the amount of $233,333.33 (1/3 of the gross

settlement amount). The unapproved portion of the fee request shall become part of the net settlement to be distributed to the class members.

Accordingly, the motion for final approval of the class action settlement is GRANTED subject to the reduction in attorney fees.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 5

Case Name: Huang v. Credit Sesame, Inc., et al. (PAGA)
Case No.: 23CV414144

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on January 10, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XI. INTRODUCTION

This is an action arises out of plaintiff Meilinda Huang's ("Plaintiff") employment with defendant Credit Sesame, Inc. ("CS"). (Complaint, ¶¶ 3-4.) Defendants Alison Hu ("Hu") and Marcus Beisel ("Beisel") were alleged CS's Head of People Operations and Plaintiff's manager. (*Id.* ¶¶ 5-6.) Plaintiff alleges Hu and Beisel are joint employers with CS. (*Id.* ¶¶ 4-6.) The Complaint, filed on April 4, 2023, alleges causes of action for: (1) Discrimination Based on Pregnancy; (2) Failure to Accommodate; (3) CFRA Interference; (4) CFRA Retaliation; (5) Discrimination Based on Sex; (6) Wrongful Termination in Violation of Public Policy; (7) Retaliation; (8) Failure to Prevent Discrimination; (9) Negligent Failure to Train and Supervise; (10) California Labor Code § 1030; (11) California Labor Code § 1102.5; (12) Failure to Produce Records; (13) Unfair Business Practices; (14) Private Attorney General Act; and (15) Statutory Prejudgment Interest.

Now before the court is CS, Hu, and Beisel's (collectively, "Defendants") joint motion to compel Plaintiff to arbitrate her individual claims and stay her representative PAGA claim. Plaintiff opposes the motion.

II. REQUEST FOR JUDICIAL NOTICE

In connection with their moving papers, Defendants ask the court to take judicial notice of the letter Plaintiff submitted to the Labor and Workforce Development Agency ("LWDA") on April 27, 2023.

The LWDA letter is not a proper subject of judicial notice. The letter is not referenced or otherwise incorporated into the Complaint. Nor does the letter become an official act or record of the State of California simply because it is addressed to a state agency. Furthermore, Defendants did not provide the court with a copy of the letter, despite their representation that

it was attached as Exhibit C to the Declaration of Thomas M. McInerney in Support of Defendants Credit Sesame, Inc., Alison Hu, and Marcus Beisel's Motion to Compel Arbitration.

Accordingly, Defendants' request for judicial notice is DENIED.

III. LEGAL STANDARD

"The FAA [Federal Arbitration Act], which includes both procedural and substantive provisions, governs [arbitration] agreements involving interstate commerce." (*Avila v. Southern California Specialty Care, Inc*. (2018) 20 Cal.App.5th 835, 840.) Here, there is no dispute that the FAA applies. However, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid*.)

The California Arbitration Act provides that a court must grant a petition to compel arbitration "if it determines that an agreement to arbitrate … exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement," among other exceptions. (Code Civ. Proc., § 1281.2.)

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co*. (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp*. (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of the evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal, supra,* 14 Cal.4th at p. 413.) "In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

IV. DISCUSSION

Defendants move to compel Plaintiff to pursue her individual claims in arbitration and ask the court to stay her representative PAGA claim. Defendants assert that Plaintiff electronically signed an Employment Offer Letter on September 20, 2019, which included an

agreement to resolve any claim or dispute relating to or arising out of Plaintiff and CS's employment relationship by binding arbitration. (Declaration of Ashlynn Wright in Support of Defendants Credit Sesame, Inc., Alison Hu and Marcus Beisel's Motion to Compel Arbitration ("Wright Dec."), ¶¶ 4-5 & Ex. 1.) In addition, Defendants assert that Plaintiff electronically signed an At-Will Employment Confidential Information, Invention Assignment, and Arbitration Agreement ("Employment Agreement"), which was referenced in the Employment Offer Letter, at the time she commenced her employment on October 28, 2019. (*Id.* at ¶¶ 6-9 & Ex. 2) Defendants contend that under Section 12 of The Employment Agreement, Plaintiff agreed to arbitrate any claims or disputes arising out of or relating to her employment with CS. (*Ibid.*)

In opposition, Plaintiff does not dispute that she and CS signed the Employment Offer Letter, that the Employment Offer Letter includes a binding agreement to arbitrate, or that the scope of the agreement to arbitrate set forth in the Employment Offer Letter covers the claims alleged in her Complaint. Instead, Plaintiff's arguments in opposition focus solely on the Employment Agreement. Plaintiff initially argues that the Employment Agreement does not constitute a binding agreement to arbitrate because neither party signed the arbitration provision set forth in Section 12 and CS did not sign the Employment Agreement. Plaintiff also argues that the Employment Agreement does not constitute a binding agreement to arbitrate because CS did not provide consideration for her promise to arbitrate. In addition, Plaintiff contends that the Employment Agreement is unconscionable because it is a contract of adhesion, the arbitration agreement is not mutual, and the referenced AAA rules are not included with the Employment Agreement. Finally, Plaintiff asserts that even if the court is inclined to compel her individual claims to arbitration, the court should allow the representative PAGA claim to proceed in court pursuant to *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104 (*Adolph*).

A. Existence of Agreement to Arbitrate

> The burden of persuasion is always on the moving party to prove the existence of an arbitration agreement with the opposing party by a preponderance of the evidence: "Because the existence of the agreement is a statutory prerequisite to granting the [motion or] petition, the [party seeking arbitration] bears the burden of proving its existence by a preponderance of the evidence." [Citation.]
>
> However, the burden of production may shift in a three-step process.

> First, the moving party bears the burden of producing "prima facie evidence of a written agreement to arbitrate the controversy." [Citation.] The moving party "can meet its initial burden by attaching to the [motion or] petition a copy of the arbitration agreement purporting to bear the [opposing party's] signature." [Citation.] Alternatively, the moving party can meet its burden by setting forth the agreement's provisions in the motion. [Citation.] For this step, "it is not necessary to follow the normal procedures of document authentication." [Citation.] If the moving party meets its initial prima facie burden and the opposing party does not dispute the existence of the arbitration agreement, then nothing more is required for the moving party to meet its burden of persuasion.

(*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 164-166 (*Gamboa*); *Iyere v. Wise Auto Group* (2023) 87 Cal.App.5th 747, 755 (*Iyere*).)

> If the movant bears its initial burden, the burden shifts to the party opposing arbitration to identify a factual dispute as to the agreement's existence—in this instance, by disputing the authenticity of their signatures. To bear this burden, the arbitration opponent must offer admissible evidence creating a factual dispute as to the authenticity of their signatures. The opponent need not prove that his or her purported signature is not authentic, but must submit sufficient evidence to create a factual dispute and shift the burden back to the arbitration proponent, who retains the ultimate burden of proving, by a preponderance of the evidence, the authenticity of the signature. [Citation.]

(*Iyere, supra,* 87 Cal.App.5th at p. 755.)

"If the opposing party meets its burden of producing evidence, then in the third step, the moving party must establish with admissible evidence a valid arbitration agreement between the parties. The burden of proving the agreement by a preponderance of the evidence remains with the moving party. [Citation.]" (*Gamboa, supra,* 72 Cal.App.5th at pp. 165-166.)

With their moving papers, Defendants submitted a copy of the Employment Offer Letter and Employment Agreement, both of which contain agreements to arbitrate and are purportedly signed by Plaintiff. This is sufficient for Defendants to meet their initial burden to show the existence of an agreement to arbitrate. (See *Gamboa, supra,* 72 Cal.App.5th 158, 165; see also *Iyere, supra,* 87 Cal.App.5th at p. 755.) In opposition, Plaintiff does not present any evidence contesting the authenticity of her electronic signatures on the Employment Offer Letter and Employment Agreement. Thus, the record evidence is sufficient to establish that Plaintiff agreed to arbitrate her claims.

Notwithstanding her consent to arbitration, Plaintiff asserts that the Employment Agreement does not constitute a binding agreement to arbitrate because neither party signed the arbitration provision set forth in Section 12, CS did not sign the Employment Agreement,

and CS did not provide consideration for her promise to arbitrate as set forth in the Employment Agreement.

As an initial matter, Plaintiff's arguments regarding the Employment Agreement appear to be immaterial as the Employment Offer Letter, independent of the Employment Agreement, contains an agreement to arbitrate. The Employment Letter states:

> As a condition of your employment, you are also required to sign and comply with an At- Will Employment, Confidential Information, Invention Assignment and Arbitration Agreement. […]
>
> In the event of any dispute or claim relating to or arising out of our employment relationship, you and the Company agree that (i) any and all disputes between you and the Company shall be fully and finally resolved by binding arbitration, (ii) you are waiving any and all rights to a jury trial but all court remedies will be available in arbitration, (iii) all disputes shall be resolved by a neutral arbitrator who shall issue a written opinion, (iv) the arbitration shall provide for adequate discovery, and (v) the Company shall pay all the arbitration fees, except an amount equal to the filing fees you would have paid had you filed a complaint in a court of law. The arbitration provided under this Agreement shall be conducted by a single arbitrator in accordance with the then-current rules issued by the American Arbitration Association ("AAA") for the resolution of employment disputes. The parties understand and agree that the arbitration shall take place in Santa Clara County, California.
>
> Upon your acceptance and the satisfactory results of your background check, this letter along with any agreements relating to proprietary rights between you and the Company, set forth the terms of your employment with Credit Sesame, Inc. and supersede any prior representation or agreements including, but not limited to, any representations made during your recruitment, interviews or pre-employment negotiations, whether written or oral. This letter, including, but not limited to, it's at-will employment provision, may not be modified or amended except by a written agreement signed by the CEO and you.
>
> (Wright Dec., Ex. 1.)

As the claims alleged in Plaintiff's Complaint are related to her employment with CS, they fall within the scope of the arbitration agreement set forth in the Employment Offer Letter. Furthermore, the Employment Offer Letter is signed by both Plaintiff and CS, and it is well-established that the mutual promises of the parties to arbitrate their disputes comprise adequate consideration for the agreement. (*Garner v. Inter-State Oil Co*. (2020) 52 Cal.App.5th 619, 625 [holding that the parties' mutual, obligating promises to arbitrate constituted adequate consideration] (*Garner*); *Gennarelli v. Charter Communs.* (C.D.Cal. Apr. 22, 2021, No. 2:19-cv-09635-JLS-ADS) 2021 U.S.Dist.LEXIS 207160 (*Gennarelli*), at *11 [holding that the parties' promises to arbitrate claims relating to the plaintiff's employment were mutual and, therefore, constituted adequate consideration on their own]; *Strotz v. Dean Witter Reynolds, Inc*. (1990) 223 Cal.App.3d 208, 216 (*Strotz*), overruled on other grounds,

Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal.4th 394 ["[W]hatever the law may be regarding *unilateral waiver* of the right to select a judicial forum, it is not instructive in the context of a bilateral agreement to arbitrate. Where an agreement to arbitrate exists, the parties' mutual promises to forego a judicial determination and to arbitrate their disputes provide consideration for each other. Both parties give up the same rights and thus neither gains an advantage over the other."].) Consequently, the Employment Offer Letter does not suffer from any of the defects complained of by Plaintiff and is an independently enforceable agreement to arbitrate.

Moreover Plaintiff's arguments regarding the Employment Agreement are not well-taken. The fact that Defendants did not sign any portion of the Employment Agreement is not dispositive. (See *Cruise v. Kroger Co*. (2015) 233 Cal.App.4th 390, 397 [enforcing arbitration agreement not signed by defendant]; see also *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 176 ["It is not the presence or absence of a signature which is dispositive; it is the presence or absence of evidence of an agreement to arbitrate which matters"].) Here, Plaintiff asserts that the arbitration agreement was drafted by Defendants, and Section 12 of the Employment Agreement indicates that the agreement to arbitrate applies equally to Defendants and Plaintiff: "In consideration of my employment with the Company, *its promise to arbitrate all employment-related disputes*, and […] I agree that any and all controversies, claims or disputes with anyone (including the Company and any employee[…]) […] arising out of, relating to, or resulting from my employment with the Company or termination […]"; "I further understand that *this agreement to arbitrate also applies to any disputes that the Company may have with me*"; "I understand that *the Company will pay for any administrative or hearing fees charged by the arbitrator or AAA* except that I shall pay the first $125.00 of any filing fees associated with any arbitration I initiate"; "except as provided by the rules and this agreement, *arbitration shall be the sole, exclusive and final remedy for any dispute between me and the Company*"; and "*neither I nor the Company will be permitted to pursue court action regarding the claims that are subject to arbitration* […]." (Wright Dec., 12(A), italics added.) This demonstrates that Defendants are bound by the Employment Agreement.

As Defendants are bound by the Employment Agreement, their promise to arbitrate constitutes sufficient consideration and Plaintiff's argument regarding the lack of consideration lacks merit. (See *Garner, supra,* 52 Cal.App.5th at p. 625; see also *Gennarelli, supra* 2021 U.S.Dist.LEXIS 20716, at *11; *Strotz, supra,* 223 Cal.App.3d at p. 216.)

B. Unconscionability

Plaintiff asserts that the arbitration agreement in the Employment Agreement is unconscionable because it is a contract of adhesion, it is not mutual, and the referenced AAA rules are not included with the Employment Agreement.

Unconscionability has both procedural and substantive elements. (*Armendariz v. Foundation Health Psychare Services, Inc*. (2000) 24 Cal.4th 83, 114 (*Armendariz*), abrogated in part by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (*Concepcion*); *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1539 (*Jones*).) Both must appear for a court to invalidate a contract or one of its individual terms (*Armendariz, supra,* 24 Cal.4th at p. 114; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174), but they need not be present in the same degree: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa" (*Armendariz, supra*, 24 Cal.4th at p. 114.)

Procedural unconscionability focuses on the elements of oppression and surprise. (*Armendariz, supra*, 24 Cal.4th at p. 114.) "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice," while "[s]urprise involves the extent to which the terms of the bargain are hidden in a prolix printed form drafted by a party is a superior bargaining position." (*Davis v. TWC Dealer Group, Inc.* (2019) 41 Cal.App.5th 662, 671, internal citation and quotation marks omitted.)

Here, none of Plaintiff's arguments show that the agreement to arbitrate in the Employment Offer Letter is unconscionable. The evidence before the court demonstrates that Plaintiff negotiated the terms of the Employment Offer Letter and it was not a contract of adhesion. (Supplemental Declaration of Ashlynn Wright in Support of Defendants Credit Sesame, Inc., Alison Hu and Marcus Beisel's Motion to Compel Arbitration, ¶ 3.) Additionally, the Employment Offer Letter does not lack mutuality as it contains the parties'

mutual promises to arbitrate disputes between them. Finally, although the Employment Offer Letter does not include the AAA rules referenced in the agreement, in the cases in which the failure to include rules of arbitration was held to support a finding of procedural unconscionability, the plaintiff's unconscionability claim depended in some manner on the arbitration rules in question. (*Baltazar v. Forever 21, Inc*. (2016) 62 Cal.4th 1237, 1246.) Here, Plaintiff's challenge does not concern some element of the applicable rules of which she were unaware when she signed the arbitration agreements. Thus, Defendants' failure to attach the arbitration rules does not create any unconscionability. (See *ibid.*)

With respect to the Employment Agreement, it is undisputed that the contract constitutes a contract of adhesion. However, a contract of adhesion in the employment context contains only a modest amount of procedural unconscionability, unless the contract involves surprise or other sharp practices. (*Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 248; *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 244.) Here, no portion of the arbitration agreement was hidden from Plaintiff. In fact, Section 12 of the Employment Agreement is written in bold-face type. Additionally, there is no evidence that Plaintiff was prevented from reading the terms before becoming bound by the agreement. Thus, Plaintiff has established only a modest degree of procedural unconscionability with respect to the Employment Agreement.

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

Plaintiff has not identified any provision of the Employment Agreement that is substantively unconscionable. Plaintiff asserts that the arbitration agreement therein is not mutual, but as explained above this argument lacks merit. Plaintiff also asserts that the Employment Agreement is substantively unconscionable as it limits her potential remedies, limits her right to conduct discovery, and does not provide for judicial review. Here, the Employment Agreement incorporates the AAA rules by reference. Plaintiff does not identify any portion of the AAA rules that purportedly limit her potential remedies, limit her right to discovery, or preclude judicial review. Moreover, Plaintiff does not cite any legal authority establishing that such features render the agreement substantively unconscionable. Consequently, Plaintiff's argument lacks merit.

D. Representative PAGA Claim

The California Supreme Court recently issued its decision in *Adolph*, in which the court concluded unanimously that a plaintiff compelled to arbitrate individual claims still has standing to pursue in court representative PAGA claims. (*Adolph, supra*, 14 Cal.5th at p. 1114 ["Where a plaintiff has brought a PAGA action comprising individual and non-individual claims, an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA."].) Based upon the guidance provided by *Adolph* and subsequent case law, the court finds that a stay of the representative PAGA claim is warranted pending the outcome of arbitration proceedings.

E. Conclusion

Accordingly, Defendants' motion to compel arbitration is GRANTED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 6

Case Name: Cheung v. C2 Educational Systems, Inc. (PAGA)
Case No.: 23CV417697

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on January 10, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XII. INTRODUCTION

This is a representative action arising out of various alleged wage and hour violations. The Complaint, filed by plaintiff Sharon Cheung ("Plaintiff") on June 16, 2023, sets forth a single cause of action for Civil Penalties Under the Private Attorneys General Act (Labor Code §§ 2698, et seq.).

Defendant C2 Educational Systems, Inc. ("Defendant") now moves for an order compelling Plaintiff to arbitrate her individual PAGA claim and staying her representative PAGA claim. Plaintiff opposes the motion.

II. LEGAL STANDARD

"The FAA [Federal Arbitration Act], which includes both procedural and substantive provisions, governs [arbitration] agreements involving interstate commerce." (*Avila v. Southern California Specialty Care, Inc*. (2018) 20 Cal.App.5th 835, 840.) Here, there is no dispute that the FAA applies. However, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid*.)

The California Arbitration Act provides that a court must grant a petition to compel arbitration "if it determines that an agreement to arbitrate … exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement," among other exceptions. (Code Civ. Proc., § 1281.2.)

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co*. (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp*. (1996) 14 Cal.4th 394, 413 (*Rosenthal*)

[moving party's burden is a preponderance of the evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal, supra,* 14 Cal.4th at p. 413.) "In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

III. DISCUSSION

Defendant moves for an order compelling arbitration of Plaintiff's individual PAGA claim on the ground that Plaintiff signed an Employment At-Will and Arbitration Agreement on July 8, 2021, which requires arbitration of all disputes with Defendant that arise from or relate to her employment with Defendant. (Declaration of Ashley Brooks in Support of Defendant's Motion to Compel Individual Arbitration and Stay PAGA Representative Action ("Brooks Dec."), Ex. 1, ¶ 2(A).) Defendant asserts that Plaintiff's individual PAGA claim for wage and hour violations is covered by the arbitration agreement because the claim arises out of Plaintiff's employment. Defendant further argues that the court should compel Plaintiff's individual PAGA claim to arbitration and stay her representative PAGA claim because the arbitration agreement provides that all claims in arbitration must be brought on an individual basis. Defendant acknowledges language in the arbitration agreement that expressly states that "claims brought under The Labor Code Private Attorneys General Act of 2004 (Cal. Lab. Code §§ 2698, et seq.)" are not included within the scope of the agreement (Brooks Dec., Ex. 1, ¶ 2(A)), but contends that the parties only intended to exclude representative PAGA claims. Defendants conclude that Plaintiff's individual PAGA claim is, therefore, arbitrable given the holding in *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___ [142 S.Ct. 1906, 2022 U.S. LEXIS 2940] *(Viking River).*

In opposition, Plaintiff argues that the carve-out language stating claims under PAGA are not within the scope of the agreement to arbitrate is unambiguous and cannot be reasonably interpreted to mean the parties agreed to arbitrate Plaintiff's individual PAGA claim.

Arbitration is strictly a matter of consent. A party cannot be required to arbitrate a dispute that he or she has not agreed to submit to arbitration. (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 252.) Thus, as a general rule, the parties may freely delineate in their contract which disputes will be arbitrated and which will not. (See *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 Cal.App.4th 761, 771 (*Gravillis*).) Whether the parties agreed to arbitrate all or a portion of "the present controversy turns on the language of the arbitration clause." (*EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1320 (*EFund*); *Duran v. EmployBridge Holding Co.* (2023) 92 Cal.App.5th 59, 65 (*Duran*).)

The court's interpretation of the arbitration agreement employs the ordinary rules of contract interpretation. (*EFund, supra*, 150 Cal.App.4th at p. 1321.) The goal is to give effect to the mutual intention of the parties at the time the contract was formed. (*Ibid*.) The contractual language must be given its usual and ordinary meaning, the agreement must be interpreted as a whole, and the language must not be determined to be ambiguous in the abstract. (*Ibid*.) California has a strong public policy favoring arbitration and, as a result, ambiguities or doubts about the scope of the arbitration provision should be resolved in favor of arbitration. (*Gravillis, supra*, 143 Cal.App.4th at p. 771.) In accordance with this policy, "an exclusionary clause in an arbitration provision should be narrowly construed." (*Ibid*.) The policy favoring arbitration, however, does not apply when unambiguous language shows the parties did not agree to arbitrate all or a part of the dispute. (*Id*. at p. 772.)

As is relevant here, the arbitration agreement states the following:

> 2. Agreement to Arbitrate Disputes. I further agree and acknowledge that the Company and I will utilize binding arbitration to resolve all disputes that may arise out of the employment context.
>
> A. Both the Company and I agree that any claim, dispute, and/or controversy that either I may have against the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) or that the Company may have against me, arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act (9 U.S.C. §§ 1, et seq.) in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec. 1280 et. seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). *Included within the scope of this Agreement are all disputes, whether based on tort, contract, statute* (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the

> Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), *equitable law, or otherwise, with the exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, claims for unemployment insurance benefits which are brought before the Employment Development Department, and claims brought under The Labor Code Private Attorneys General Act of 2004 (Cal. Lab. Code §§ 2698, et seq.) or as otherwise required by state or federal law.* Nothing herein, however, shall prevent me from filing and pursuing proceedings before the California Department of Fair Employment and Housing, or the United States Equal Employment Opportunity Commission (although if I choose to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to the provisions of this Agreement).
>
> [¶…¶]
>
> D. I understand and agree that *all claims covered by this agreement* that I may have against the Company must be brought in my individual capacity and not as a plaintiff or class member in any purported class action, collective action or representative action proceeding. Similarly, any claims covered by this Agreement that the Company may against me may not be brought as a plaintiff or class member in any purported class action, collective action, or representative action proceeding. I understand that there is no right or authority *for any dispute covered by this Agreement* to be heard or arbitrated on a collective action basis, class action basis, or on bases involving claims or disputes brought in a representative capacity, including on behalf of the general public, on behalf of other Company employees (or any of them), or on behalf of other persons alleged to be similarly situated. I understand that there are no bench or jury trials and no class actions or representative actions permitted under this Agreement. The Arbitrator shall not consolidate claims of different employees into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class action, collective action, or representative action

(Brooks Dec., Ex. 1, ¶ 2, italics added.)

Under California law, the first step in analyzing the meaning of a contract is to determine whether the language is ambiguous—that is, reasonably susceptible to more than one meaning. (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 754-755 [a court's threshold question when interpreting a contract is whether the writing is ambiguous].) Here, the parties presented no extrinsic evidence and, therefore, the question of ambiguity must be resolved based solely on the contents of the agreement.

As drafted, the carve-out provision contains no qualifying language. It simply says that "claims brought under The Labor Code Private Attorneys General Act of 2004 (Cal. Lab. Code §§ 2698, et seq.)" are not included within the scope of the agreement. (Brooks Dec., Ex. 1, ¶ 2(A).) Civil Code section 1638 provides that the "language of a contract is to govern its interpretation, if the language is clear and explicit." Accordingly, courts enforce an

unambiguous agreement as written rather than rewriting it to contain limitations the parties did not express. (*Ibid*.; see *Scheenstra v. California Dairies, Inc*. (2013) 213 Cal.App.4th 370, 393, fn. 16 [courts determine the objective meaning of the contract's language to protect the parties' objectively reasonable expectations].) Moreover, the policy favoring arbitration does not override an agreement's clear language and create an ambiguity where none exists. (See *Gravillis, supra*, 143 Cal.App.4th at p. 772.)

The court concludes that the language stating claims brought under PAGA are not included in the agreement is unambiguous. It cannot be reasonably interpreted to mean the parties agreed to arbitrate the category of PAGA claims seeking to recover civil penalties that will be split 75 percent to the state and 25 percent to Plaintiff—that is, the claims seeking to recover penalties for Labor Code violations suffered by Plaintiff. (Cf. *Olabi v. Neutron Holdings, Inc*. (2020) 50 Cal.App.5th 1017, 1021 [arbitration agreement carved out PAGA representative actions; denial of motion to compel arbitration affirmed].) In other words, both individual and representative PAGA claims are claims under PAGA for purposes of the carve-out provision.

The court is not persuaded by Defendant's argument that the clear intent of the carve-out provision was to simply exclude representative PAGA claims. Under this interpretation, the modifier "representative" would be inserted before "claims brought under The Labor Code Private Attorneys General Act of 2004 (Cal. Lab. Code §§ 2698, et seq.)." Defendants' argument fails to consider Code of Civil Procedure section 1858, which states:

> In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Courts have applied this statutory provision to contracts, which implies that the term "instrument" encompasses contracts. (E.g. *Sayble v. Feinman* (1978) 76 Cal.App.3d 509, 515,; see Black's Law Dict. (6th ed. 1990) p. 801 [instrument defined as a formal document in

writing, such as a contract].) In light of Code of Civil Procedure section 1858, this court declines Defendant's invitation to rewrite the parties' agreement.

According to Defendants, the language "or as otherwise required by state or federal law" in the excluded claims provision when read in conjunction with the representative action waiver, shows that the parties intended to divide their individual and representative PAGA claims. However, if Defendant intended the carve-out provision to be a truism—that is, to provide that only nonarbitrable PAGA claims would not be arbitrable under the agreement—it should have drafted the clause to say so. (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 980 [a party's undisclosed intent or understanding is irrelevant to contract interpretation]; see *Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 8 [objective intent, as evidenced by the words of the contract, rather than one party's subjective intent, controls the interpretation].) Notably, Defendants did not presented extrinsic evidence showing this alleged intention was communicated between the parties. (See *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 [use of extrinsic evidence when determining a contract's meaning].)

Similarly, Defendant's reliance on *Piplack v. In-N-Out Burgers* (2023) 88 Cal.App.5th 1281 (*Piplack*) is unavailing. The holding in *Piplack* does not arise from ambiguity in the agreement, as Defendant suggests, but rather from its clarity: "the agreement makes clear, 'The … Private Attorney General Waiver … shall be severable in any case in which the dispute is filed as an individual action and severance is necessary to ensure that the individual action proceeds in arbitration.'" (*Piplack, supra*, 88 Cal.App.5th at p. 1289.) The agreement in this case contains no analogous language expressing the parties' clear agreement to submit individual PAGA claims to arbitration.

Based on the interpretation that the arbitration agreement excludes all PAGA claims from arbitration, the court need not reach other issues involving *Viking River*.

Accordingly, Defendant's motion is DENIED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 7

Case Name: ZL Technologies, Inc. v. Splitbyte Inc., et al. (LEAD CASE; Consolidated With 20CV373027, 20CV373149, 21CV378097, 21CV382329)
Case No.: 20CV366939

The above-entitled actions come on for hearing before the Honorable Theodore C. Zayner on January 10, 2024, at 9:00 a.m. in Department 19. The court now issues its tentative ruling as follows:

XIII. INTRODUCTION

This consolidated action involves five related matters:

(1) *ZL Technologies, Inc. v. SplitByte Inc, et al.* (Case No. 20CV366939);

(2) *Arvind Srinivasan v. ZL Technologies, Inc., et al*. (Case No. 20CV373027);

(3) *Arvind Srinivasan v. ZL Technologies, Inc*. (Case No. 20CV373149);

(4) *ZL Technologies, Inc., et al. v. Arvind Srinivasan* (Case No. 21CV378097); and

(5) *Arvind Srinivasan v. ZL Technologies, Inc*. (Case No. 21CV382329).

On August 29, 2022, the court (Hon. Patricia M. Lucas) entered an Order Re: Pretrial and Trial Dates, which set the date for completion of written discovery as November 19, 2022. The order states that ZL Technologies, Inc. ("Plaintiff") and Arvind Srinivasan ("Srinivasan"), Splitbyte Inc., Kapisoft, Inc. ("Kapisoft"), and MI17, Inc. ("Defendants") "agree on this date" except that Plaintiff requested an unwarranted carve-out for "any outstanding source code issues." The court further noted that the parties had a discovery referee in place who was up to speed on the issues and the parties should act expeditiously to resolve any outstanding issues. In its order, the court also set trial for September 25, 2023. The court noted that Defendants proposed a trial date of January 31, 2023, and Plaintiff proposed a trial date of March 11, 2024.

The trial date was later continued to October 2, 2023.

On July 21, 2023, Defendants filed a Case Management Submission Re Trial Date, asserting that "a very short continuance" of trial was warranted given the consolidation of the defamation case and the recent Court of Appeal decision allowing certain defamation allegations to go forward. Defendants asserted that the claims that survived appeal involved narrow issues and would require minimal discovery. Defendants requested the earliest possible trial date.

On July 26, 2023, the court vacated the October 2, 2023 trial date and ordered the parties to meet and confer regarding a new trial date.

On October 5, 2023, Defendants served Plaintiff with new written discovery (i.e., requests for admissions, form interrogatories, and special interrogatories) related to *Arvind Srinivasan v. ZL Technologies, Inc., et al*. (Case No. 20CV373027).

On November 7, 2023, Plaintiff objected to the requests on several grounds, including that the November 19, 2022 cutoff date for written discovery had expired.

On November 9, 2023, Defendants' counsel sent a meet and confer letter to Plaintiff's counsel regarding Plaintiff's discovery responses. Plaintiff's counsel sent a reply letter later the same day.

Now before the court is the motion by Defendants to reopen written discovery and set a new cutoff date for written discovery. Plaintiff opposes the motion.

II. REQUEST FOR JUDICIAL NOTICE

In connection with their moving papers, Defendants ask the court to take judicial notice of several court orders entered in this consolidated action.

The court orders are proper subjects of judicial notice as they are court records relevant to the pending motion. (See Evid. Code, 452, subd. (d) [permitting judicial notice of court records]; see also *People v. Woodell* (1998) 17 Cal.4th 448, 455 [Evid. Code, § 452, subd. (d) permits the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

Accordingly, Defendants' request for judicial notice is GRANTED.

III. LEGAL STANDARD

On motion of any party, the court may "grant leave to complete discovery proceedings, or to have a motion concerning discovery heard, closer to the initial trial date, or to reopen discovery after a new trial date has been set." (Code Civ. Proc., § 2024.050, subd. (a).) "This motion shall be accompanied by a meet and confer declaration under Section 2016.040." (*Ibid.*) In exercising its discretion to grant or deny such a motion, the court shall take into consideration any matter relevant to the leave requested, including: (1) the necessity and reasons for the discovery; (2) the diligence or lack

thereof on the part of the party seeking the discovery, and the reasons that discovery was not completed earlier; (3) any likelihood that permitting the discovery will prevent the case from going to trial on the date set, or otherwise interfere with the trial calendar, or result in prejudice to any other party; and (4) the length of time that has elapsed between any date previously set, and the date presently set, for the trial of the action. (Code Civ. Proc., § 2024.050, subd. (b).)

IV. DISCUSSION

The court in its discretion declines to reopen discovery. A party seeking to reopen discovery must establish that they adequately met and conferred prior to filing their motion. (Code Civ. Proc., § 2024.050, subd. (a).) The court's Complex Civil Litigation Guidelines require an actual conference between counsel as well as an Informal Discovery Conference ("IDC") with the court prior to the filing of any discovery motion. (Complex Civil Guidelines, § VI(2) ["Discovery meet and confer obligations require an actual conference (in-person, telephonic, or videoconference) between counsel. If a resolution is not reached, parties are required to have an informal discovery conference (IDC) with the Court before filing any discovery motion, unless otherwise authorized by the Court."].) Here, Defendants failed to adequately meet and confer prior to filing the instant discovery motion. There is no evidence in the record that Defendants' counsel participated in an in-person, telephonic, or video conference with Plaintiff's counsel regarding the instant discovery dispute. Furthermore, Defendants did not request, and the parties did not participate in, an IDC regarding the reopening of written discovery.

Accordingly, Defendants' motion to reopen discovery and reset the discovery cutoff date is DENIED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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