SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, 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.)

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

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

LAW AND MOTION TENTATIVE RULINGS
DATE: MAY 1, 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	21CV387218	Soliman v. Satellite Healthcare, Inc. (Class Action)	See Line 1 for tentative ruling.
LINE 2	21CV382019	Bernardo, et al. v. Macial, et al. (PAGA)	See Line 2 for tentative ruling.
LINE 3	22CV398878	Zoom Video Communications, Inc. v. Certain Underwriters at Lloyd's, London, et al.	See Line 3 for tentative ruling.
LINE 4	22CV398878	Zoom Video Communications, Inc. v. Certain Underwriters at Lloyd's, London, et al.	See Line 3 for tentative ruling.
LINE 5	22CV398878	Zoom Video Communications, Inc. v. Certain Underwriters at Lloyd's, London, et al.	See Line 3 for tentative ruling.
LINE 6	22CV398878	Zoom Video Communications, Inc. v. Certain Underwriters at Lloyd's, London, et al.	See Line 3 for tentative ruling.
LINE 7			
LINE 8			
LINE 9			

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, 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.)

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

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

LAW AND MOTION TENTATIVE RULINGS

LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Soliman v. Satellite Healthcare, Inc. (Class Action)
Case No.: 21CV387218

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

I. INTRODUCTION

This class and representative action arises out of various alleged wage and hour violations. As is relevant here, plaintiff Tiffany Soliman ("Soliman") filed her original Class Action Complaint against defendant Satellite Healthcare, Inc. ("Defendant") on September 30, 2021.

Soliman then filed a First Amended Class Action Complaint ("FAC") on January 25, 2022, which set forth causes of action for: (1) Failure to Pay Lawful Wages; (2) Failure to Provide Lawful Meal Periods or Compensation in Lieu Thereof; (3) Failure to Provide Lawful Rest Periods or Compensation in Lieu Thereof; (4) Failure to Reimburse Employee Expenses; (5) Failure to Pay Correct Sick Pay Wages; (6) Failure to Timely Pay Wages During Employment; (7) Failure to Timely Pay Wages at Termination; (8) Knowing and Intentional Failure to Comply With Itemized Employee Wage Statement Provisions; (9) Violations of the Unfair Competition Law; and (10) Labor Code Private Attorney General Act (Lab. Code, § 2699).

Defendant demurred to the fifth and ninth causes of action of the FAC. Defendant also moved to strike portions of the FAC, specifically: (1) references to sick pay violations in Soliman's waiting time claims; and (2) the UCL claim to the extent it is based on alleged meal and rest period violations, waiting time violations, wage statement violations, and sick pay violations.[1]

On June 10, 2022, the court entered an order sustaining the demurrer as to the fifth cause of action without leave to amend, overruling the demurrer as to the ninth cause of action,

[1] Notably, Defendant withdrew its motion to the extent it sought to strike references to meal and rest period violations in Plaintiff's waiting time claim and wage statement claim.

and granting the motion to strike the references to sick pay without leave to amend, and granting the motion to strike portions of the UCL claim with ten days' leave to amend.

On June 17, 2022, Soliman filed a Second Amended Class Action Complaint ("SAC"), which sets forth causes of action for: (1) Failure to Pay Lawful Wages; (2) Failure to Provide Lawful Meal Periods or Compensation in Lieu Thereof; (3) Failure to Provide Lawful Rest Periods or Compensation in Lieu Thereof; (4) Failure to Reimburse Employee Expenses; (5) Failure to Timely Pay Wages During Employment; (6) Failure to Timely Pay Wages at Termination; (7) Knowing and Intentional Failure to Comply With Itemized Employee Wage Statement Provisions; (8) Violations of the Unfair Competition Law; and (9) Labor Code Private Attorney General Act (Lab. Code, § 2699).

Defendant moved to strike portions of the SAC, specifically: (1) the UCL claim to the extent it is based on waiting time violations; and (2) the UCL claim to the extent it is based on wage statement violations. On October 19, 2022, Soliman filed a Notice of Non-Opposition to Defendants Motion to Strike Portions of the Second Amended Complaint.

On November 2, 2022, the court entered an order granting the motion to strike the UCL claim, without leave to amend, to the extent it was predicated on alleged waiting time and wage statement violations.

On December 15, 2023, Soliman and plaintiffs Maria Carralez ("Carralez") and Eugene Bautista ("Bautista") (collectively, "Plaintiffs") filed the operative Third Amended Class Action Complaint ("TAC"), which alleges the following causes of action: (1) Failure to Pay Lawful Wages; (2) Failure to Pay Overtime; (3) Failure to Provide Lawful Meal Periods or Compensation in Lieu Thereof; (4) Failure to Provide Lawful Rest Periods or Compensation in Lieu Thereof; (5) Failure to Reimburse Employee Expenses; (6) Failure to Timely Pay Wages During Employment; (7) Failure to Timely Pay Wages at Termination; (8) Knowing and Intentional Failure to Comply With Itemized Employee Wage Statement Provisions; (9) Violations of the Unfair Competition Law; and (10) Labor Code Private Attorney General Act (Lab. Code, § 2699).

The parties have reached a settlement.

Now before the court is Plaintiffs' motion for preliminary approval of the class and representative action 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

A. Provisions of the Settlement

> This case has been settled on behalf of the following class:
> [A]ll current and former non-exempt California employees of Defendant who worked during the Class Period.

(Declaration of Robert J. Wassermann in Support of Motion for Preliminary Approval of Class Action Settlement ("Wassermann Dec."), Ex. 1 ("Settlement Agreement"), ¶ 6.) The Class Period is defined as the period from April 21, 2020 through September 6, 2023. (Settlement Agreement, ¶ 7.)

It is unclear to the court why the Class Period as defined in the settlement agreement begins on April 21, 2020. Prior to the continued hearing, Plaintiff shall file a supplemental declaration explaining why the parties agreed on the April 21, 2020 start date.

The settlement does not include a term or definition for the subset of employees who worked for Defendant during the PAGA Period. However, the settlement defines the PAGA Period as the period of time from September 29, 2020 through September 6, 2023. (Settlement Agreement, ¶ 22.)

According to the terms of settlement, Defendant will pay a maximum, non-reversionary settlement amount of $2,425,000. (Settlement Agreement, ¶¶ 12, 36.) The gross settlement amount includes attorney fees up to $808,333.33 (1/3 of the gross settlement amount), litigation costs not to exceed $35,000, a PAGA allocation of $50,000 (75 percent (i.e., $37,500) to be paid to the LWDA and the remaining 25 percent (i.e., $12,500) to be paid to class members who worked during the PAGA Period), enhancement awards in the total amount of $30,000 (up to $10,000 for each class representative), and settlement administration costs not to exceed $25,000. (Settlement Agreement, ¶¶ 3, 8, 12, 14-17, 21, 33, 37-39, 41.)

The settlement agreement states that the net settlement amount will be distributed to participating class members pro rata basis. (Settlement Agreement, ¶¶ 43.) Similarly, all class members who were employed during the PAGA Period will receive a pro rata share of the $12,500 portion of the PAGA allocation. (*Ibid.*)

The settlement agreement does not set forth a specific procedure for handling uncashed checks. Rather, the settlement agreement merely states that checks are considered uncashed if they have not been cashed for more than 180 calendar days (the court assumes this is 180 calendar days from the date of mailing of the checks), and the entire net settlement amount will be disbursed to participating class members. Prior to the continued hearing, the parties shall meet and confer regarding how uncashed checks should be handled and amend the settlement agreement accordingly. If necessary, the parties should designate an appropriate *cy pres* recipient in compliance with Code of Civil Procedure section 384. If the parties want funds from uncashed checks to be redistributed to participating class members who cashed settlement checks, they must amend the settlement agreement so it sets forth the details of the redistribution process.

In the settlement agreement, Plaintiffs agree to a comprehensive general release. (Settlement Agreement, ¶¶ 29, 70.)

However, the settlement agreement does not contain specific provisions whereby class members actually release class claims or class members who worked for Defendant during the PAGA Period actually release PAGA claims. Instead, the settlement agreement merely sets forth several definitions. The settlement defines "Released Parties" as Defendant, and related persons and entities. (Settlement Agreement, ¶ 29.) Next, the settlement defines "Released Claims" as

> all claims, rights, demands, liabilities, and causes of action, for, failure to pay all minimum wage and overtime, to provide meal and rest breaks and to provide meal and rest break premiums at the correct rates of pay, to reimburse business expenses, to compensate for all paid sick leave at the correct rate of pay, to provide accurate itemized wage statements, and waiting time penalties, arising under Labor Code sections 201-203, 204, [] 226, 226.7, 246, 510, 510, 512, 558, 1182.12 *et seq*., 1194, 1197, 1198, 1199, 2698 et seq., and 2802 and the applicable California wage orders, as well as any and all corresponding claims that could have been brought under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. sections 201, et seq. based on the facts alleged in the complaint and in accordance with *Rangel v. PLS Check Cashers of Cal., Inc*., 899 F.3d 1106, 1110-11 (9th Cir. 2018) (holding opt-out release of California state law claims was *res judicata* against FLSA claims "which were direct federal law counterparts to the state law claims settled"), as well as unfair business practices and imposition of PAGA civil penalties during the PAGA Period based upon the same, and any claims that were alleged in the pleadings or the LWDA letters or that could have been alleged based on the facts asserted in the pleadings or the LWDA letters during the relevant Release Period (April 21, 2020, through September 6, 2023).

(Settlement Agreement, ¶ 27.) Lastly, the settlement defines "Released PAGA Claims" as

> all claims, rights, demands, liabilities, and causes of action, for civil penalties based upon the failure to pay all minimum wage and overtime, to provide meal and rest breaks and to provide meal and rest break premiums at the correct rates of pay, to reimburse business expenses, to compensate for all paid sick leave at the correct rate of pay, to provide accurate itemized wage statements, and waiting time penalties, arising under Labor Code sections 201-203, 204, 210, 226, 226.7, 246.5, 510, 512, 558, 1182.12 *et seq*., 1194, 1197, 1198, 1199, 2698 et seq., and 2802 and the applicable California wage orders, and any claims that were alleged in the pleadings or the LWDA letters or that could have been alleged based on the facts asserted in the pleadings or LWDA letters during the PAGA Period (September 29, 2020 through September 6, 2023).

(Settlement Agreement, ¶ 28.)

Notably, the class notice includes release provisions (see Settlement Agreement, Ex. A, Section 4, "Released Claims" and "Released PAGA Claims") that do not appear in the settlement agreement.

B. Fairness of the Settlement

Plaintiffs state that the settlement was reached through discovery, analysis, and mediation with the Hon. Ronald Sabraw (Ret.) (Wassermann Dec., ¶¶ 3-24.) Plaintiffs' counsel conducted formal discovery, which included propounding requests for admission, special interrogatories, and requests for production of documents. (Wassermann Dec., ¶ 16.) Plaintiffs' counsel also conducted informal discovery, which included obtaining Plaintiffs' personnel files, payroll records, and time records; reviewing payroll and time records for the entire class; reviewing policy documents; retaining an expert to analyze the time and payroll data; and creating damages models. (*Id.* at ¶ 15.) From the information provided, Plaintiffs determined that there were approximately 2,485 class members who worked 216,787 workweeks. (*Id.* at ¶ 30.) Plaintiff estimates that Defendant's maximum potential liability for the all claims is approximately $19,297,671.40 (i.e., $13,122,671.40 for class claims and $6,175,000 for the PAGA claim). (*Id.* at ¶¶ 37-69.) Plaintiff provides a breakdown of this amount by claim. (*Ibid.*) Plaintiff discounted the value of the claims given Defendant's defenses, the possibility that the court could substantially reduce any PAGA penalties, and the risks and costs associated with class certification. (*Ibid.*) The average gross recovery per class member is $987.84. (*Id.* at ¶ 33.) The average net payment to class members will be $594.23. (*Id.* at ¶ 34.)

The gross settlement amount represents approximately 12.5 percent of the potential maximum recovery. The proposed settlement amount is within the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D.Ca|. Feb. 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist.LEXIS 30201, at *41-42 [citing cases listing range of 5 to 25-35 percent of the maximum potential exposure].)

However, upon review of the settlement agreement, the court has concerns regarding the scope of the releases. As explained above, the settlement agreement does not contain specific provisions whereby class members actually release class claims or class members who worked for Defendant during the PAGA Period actually release PAGA claims. Additionally, the class notice includes release provisions (see Settlement Agreement, Ex. A, Section 4, "Released Claims" and "Released PAGA Claims") that do not appear in the settlement agreement.

Furthermore, the definition of "Released PAGA Claims" is overbroad. As currently drafted, the "Released PAGA Claims" is not appropriately limited to all PAGA claims that could have been pled based on the facts alleged in the TAC or the LWDA notice letter. (See *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 79-86; see also *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 541-543.) Instead, the "Released PAGA Claims" include "*any claims* that were alleged in the pleadings or the LWDA letters or that could have been alleged based on the facts asserted in the pleadings or LWDA letters during the PAGA Period." This could potentially be interpreted as a release of aggrieved employees' individual claims. The "Released PAGA Claims" must be limited to claims for civil penalties brought pursuant to PAGA.

Prior to the continued hearing, the parties shall meet and confer regarding whether they can amend the term "Released PAGA Claims" to cure the overbreadth issue. Plaintiff shall then file a supplemental declaration discussing the results of the parties efforts and, if appropriate, attaching an amended settlement agreement.

The court otherwise finds the terms of the settlement to be fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

C. Incentive Award, Fees, and Costs

Plaintiffs request enhancement awards in the total amount of $30,000 ($10,000 for each class representative).

> The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks, brackets, ellipses, and citations omitted.)

The court notes that the amounts sought for the enhancement awards are higher than the court typically awards in these types of cases. Prior to the final approval hearing, Plaintiffs shall file declarations specifically describing their participation in the action as well as an estimate of time spent.

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 will seek attorney fees up to $808,333.33 (1/3 of the gross settlement amount) and litigation costs not to exceed $35,000. Plaintiffs' counsel shall submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. Plaintiffs' counsel shall also submit evidence of actual costs incurred as well as evidence of any settlement administration costs.

D. Conditional Certification of Class

Plaintiffs request that the class be conditionally certified for purposes of the settlement. Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of

a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." As interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class; and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class. (*Sav-On, supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

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

(*Sav-On, supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiffs state that there are approximately 2,485 class members that can be determined from a review of Defendant's records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiffs as class representatives. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

The content of a class notice is subject to court approval. "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court." (Cal. Rules of Court, rule 3.769(f).)

The notice generally complies with the requirements for class notice. (Settlement Agreement, Ex. A.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion.

However, the parties must amend the class notice so that it accurately reflects the terms of any releases included in the settlement agreement.

Additionally, the notice shall be modified to include the following language regarding the final approval hearing:

> Class members may appear at the final approval hearing in person or remotely using the Microsoft Teams link for Department 19 (Afternoon Session). Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members who wish to appear remotely are encouraged to contact class counsel at least three days before the hearing if possible, so that potential technology or audibility issues can be avoided or minimize.

The amended notice shall be provided to the court for approval prior to the continued hearing date.

IV. CONCLUSION

The motion for preliminary approval of the class and representative action settlement is CONTINUED to July 3, 2024, at 1:30 p.m. in Department 19. Plaintiffs shall file a supplemental declaration with the additional information requested by the court no later than June 17, 2024. No additional filings are permitted.

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

- oo0oo -

Calendar Line 2

Case Name: Bernardo, et al. v. Macial, et al. (PAGA)
Case No.: 21CV382019

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

V. INTRODUCTION

This action arises out of various alleged wage and hour violations. On April 27, 2021, plaintiffs Teresita Bernardo, Angelita (Helen) Cabanlit, Nilo Campos Tengson, Herminia Autajay, and Herman Tabudlong ("Tabudlong") (collectively, "Plaintiffs") filed a Complaint alleging causes of action for: (1) Failure to Pay Minimum Wage (Lab. Code § 1194 and IWC Wage Orders); (2) Failure to Pay Overtime (Lab. Code §§ 510, 1194); (3) Failure to Provide Authorized Meal Periods (Lab. Code §§ 226.7, 512, IWC Wage Orders); (4) Failure to Provide Authorized Rest Periods (Lab. Code §§ 226.7, 512, IWC Wage Orders); (5) Failure to Pay All Wages Upon Discharge (Lab. Code §§ 201-203); (6) Failure to Provide Itemized Wage Statements (Lab. Code § 226); (7) Unfair Competition (Bus. & Prof. Code, §§ 17200 et seq.); (8) Breach of Contract; and (9) Violation of Healthy Workplace Act §§ 245-249.

On January 14, 2022, Plaintiffs filed a First Amended Complaint, which set forth the same causes of action.

On May 20, 2022, Plaintiffs filed a Second Amended Complaint, which dismissed the cause of action for breach of contract and added a claim for civil penalties under the Private Attorneys General Act of 2004 (Lab. Code §§ 2699 et seq.) ("PAGA").

Plaintiffs moved to compel defendant C3 Care LLC ("C3") to provide further responses to special interrogatories, set 3, Nos. 86-90 and requests for production of documents, set 4, No. 78. Tabudlong also moved to compel C3 to provide further responses to special interrogatories, set 1, Nos. 1-21 and requests for production of documents, set 1, Nos. 1-14. On August 18, 2023, the court (Hon. Socrates P. Manoukian) ordered C3 to serve further, code-compliant responses to those requests within 45 days.

Tabudlong moved to compel C3 to provide further responses to special interrogatories, set 4, Nos. 91-124. On September 12, 2023, the court (Hon. Socrates P. Manoukian) ordered C3 to serve further, code-compliant responses to those requests within 20 days.

Plaintiffs also moved to have this case designated complex under California Rules of Court, rule 3.400. C3 and defendants Jaime Rafael Marcial, Jericho Marcial, and Mary Christine Marcial (collectively, "Defendants") opposed the motion.

On September 21, 2023, the court entered an order granting Plaintiffs' motion to designate the case as complex.

Now before the court is Plaintiffs' motion for issue or terminating sanctions against C3. The motion is unopposed.

VI. LEGAL STANDARD

In the discovery context, the general rule is that sanctions may be imposed only to the extent authorized by statute. (See Code Civ. Proc., § 2023.030 [a court may impose sanctions for discovery abuse "[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title"].) "This means that the statutes governing the particular discovery methods limit the permissible sanctions to those sanctions provided under the applicable governing statutes." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422 (*New Albertsons*).)

Additionally, the Civil Discovery Act only authorizes nonmonetary sanctions where a party has violated a court order. (See *New Albertsons*, *supra*, 168 Cal.App.4th at p. 1423, citing Code Civ. Proc., §§ 2030.290, subd. (c), 2030.300, subd. (e), 2031.310, subd. (e), & 2031.320, subd. (c); see also *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc*. (2008) 163 Cal.App.4th 1093, 1102 [two facts are generally prerequisite to the imposition of non-monetary discovery sanctions: (1) there must be a failure to comply with a court order and (2) the failure must be willful].) "The statutory requirement that there must be a failure to obey an order compelling discovery before the court may impose a nonmonetary sanction for misuse of the discovery process provides some assurance that such a potentially severe sanction will be reserved for those circumstances where the party's discovery obligation is clear and the failure

to comply with that obligation is clearly apparent." (*New Albertsons, supra*, 168 Cal.App.4th at p. 1423.)

The restrictions on the exercise of the court's sanctioning power set forth in the Civil Discovery Act "are binding unless they materially impair the court's ability to ensure the orderly administration of justice." (*New Albertsons, supra*, 168 Cal.App.4th at p. 1431.) In those rare circumstances, a court may exercise its inherent equity, supervisory, and administrative powers, and inherent power to control litigation, to impose nonmonetary sanctions as a remedy for litigation misconduct. (See *id*. at pp. 1424 ["Some courts, however, have held that nonmonetary sanctions for misuse of the discovery process may be imposed in certain circumstances not involving the sanctioned party's failure to obey an order compelling discovery."]; see also *Stephen Slesinger, Inc. v. Walt Disney Co*. (2007) 155 Cal.App.4th 736, 758 (*Slesinger*).) Nonmonetary sanctions may be imposed under the court's inherent powers where "misconduct during the course of the litigation … is deliberate, … egregious, and … renders any [lesser] remedy … inadequate to preserve the fairness of the trial[,]" even where such conduct did not violate a court order. (*Slesinger, supra*, 155 Cal.App.4th at pp. 758 & 763–765; see also *New Albertsons, supra*, 168 Cal.App.4th at p. 1426 ["[I]f it is sufficiently egregious, misconduct committed in connection with the failure to produce evidence in discovery may justify the imposition of nonmonetary sanctions even absent a prior order compelling discovery, or its equivalent. Furthermore, a prior order may not be necessary where it is reasonably clear that obtaining such an order would be futile."]; *Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 76 [plaintiffs not entitled to evidence sanction absent violation of a court order "or other egregious misconduct"].)

For example, courts have imposed nonmonetary sanctions without a violation of a court order where the sanctioned party cannot provide discovery it promised it would provide; the sanctioned party misrepresented the existence or availability of discovery; an order would be futile because discovery did not exist or was destroyed; the sanctioned party repeatedly and falsely assured the requesting party that all responsive discovery had been produced; or the sanctioned party engaged in a pattern of willful discovery abuses based in part on disobeying discovery orders. (*New Albertsons, supra*, 168 Cal.App.4th at pp. 1424–1431.)

VII. DISCUSSION

Plaintiffs ask the court to impose the following nonmonetary sanctions against C3 based on C3's purported failure to comply with discovery orders entered on August 18 and September 12, 2023:

> 1. An issue sanction consisting of a finding or instruction to the jury that:
>
> > (a) Plaintiff and the PAGA Aggrieved Employees represented by Plaintiff Tabudlong were not independent contractors as defined under California law (Lab. Code §§ 2775 *et seq.*, *Dynamex Operations W. Inc. v. Superior Court* (2018) 4 Cal.5th 903, and *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341);
> >
> > (b) C3 CARE LLC was not a Domestic Referral Agency within the meaning of Civil Code section 1812.5095;
> >
> > (c) Defendant C3 CARE LLC engaged in "willful misclassification" of Plaintiffs and the PAGA Aggrieved Employees as independent contractors within the meaning of Lab. Code § 226.8;
> >
> > (d) Defendant C3 CARE LLC may not offer any defense to waiting time penalties owed under Lab. Code § 203 on the basis that any non-timely payment of wages by Defendants to Plaintiffs or the PAGA Aggrieved Employees represented by Plaintiff Tabudlong, was not "willful" or was subject to a good faith dispute as to whether Defendants owed further wages; or
>
> 2. A terminating sanction against Defendant C3 CARE LLC striking its answer in this action, entering its default, and allowing Plaintiffs to proceed with default judgment prove-up against C3 CARE LLC based on the claims in Plaintiffs' operative complaint.

(Plaintiffs' Notice of Motion and Motion for Issue Sanctions or Terminating Sanctions, pp. 1:24-2:16.)

Plaintiffs' motion is not well-taken for multiple reasons. First, the court's Complex Civil Litigation Guidelines require 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, Plaintiffs did not request, and the parties did not participate in, an IDC regarding the potential imposition of nonmonetary sanctions. Consequently, Plaintiffs did not comply with the court's Complex Civil Litigation Guidelines.

Second, the only statutory bases cited by Plaintiffs for the motion are Code of Civil Procedure sections 2023.010, 2023.030, 2030.290, and 2031.300. (Plaintiffs' Notice of Motion and Motion for Issue Sanctions or Terminating Sanctions, pp. 2:20-26; Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Issue Sanctions or Terminating Sanctions, pp. 10:22-12:4.) Those statutes do not authorize the imposition of nonmonetary sanctions under the present circumstances. Code of Civil Procedure section 2023.010 defines acts that constitute misuses of the discovery process, and does not itself set forth any provisions regarding the issuance of a nonmonetary sanction. Next, Code of Civil Procedure section 2023.030 merely provides that sanctions may be imposed for misuses of the discovery process "[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title." Thus, that statute does not provide an independent basis for an award of nonmonetary sanctions. Lastly, Code of Civil Procedure sections 2030.290 and 2031.300 only authorize the imposition of nonmonetary sanctions in connection with a failure to obey an order compelling initial responses to interrogatories or requests for production of documents. (Code Civ. Proc., §§ 2030.290, subd. (c) & 2031.300, subd. (c).) The orders entered on August 18 and September 12, 2023, compelled C3 to provide further responses (not initial responses) to various discovery requests. Consequently, Code of Civil Procedure sections 2030.290 and 2031.300 do not apply here. For these reasons, nonmonetary sanctions are not authorized by the cited provisions of the Discovery Act.

Accordingly, Plaintiffs' motion for issue or terminating sanctions is DENIED, without prejudice.

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

- oo0oo -

Calendar Lines 3 – 4

Case Name: Zoom Video Communications, Inc. v. Certain Underwriters at Lloyd's, London, et al.
Case No.: 22CV398878

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

VIII. INTRODUCTION

This action arises out of defendants Certain Underwriters at Lloyd's London's (erroneously sued as Underwriters at Lloyd's, London) ("Underwriters"), Evanston Insurance Company's ("Evanston") (collectively with Underwriters, the "18/19 Tower Insurers"), Continental Casualty Company's ("Continental"), Allied World Specialty Insurance Company's ("Allied World"), and Endurance Risk Solutions Assurance Company's ("Endurance") (collectively with Continental and Allied World, the "19/20 Tower Insurers") alleged refusal to pay plaintiff Zoom Video Communications, Inc. ("Zoom") money that is due and owing under its insurance policies.

On May 25, 2022, Zoom filed a Complaint against the 18/19 Tower Insurers and 19/20 Insurers, alleging causes of action for: (1) Breach of Contract (against the 18/19 Tower Insurers); (2) Breach of Contract (against the 19/20 Tower Insurers); (3) Breach of Implied Covenant of Good Faith and Fair Dealing (against the 18/19 Tower Insurers); and (4) Breach of Implied Covenant of Good Faith and Fair Dealing (against the 19/20 Tower Insurers).

As is relevant here, on July 7, 2022, Underwriters filed an Answer, generally denying the allegations of the Complaint and asserting various affirmative defenses.

On April 10, 2024, Underwriters filed a Notice of Partial Settlement. Shortly thereafter, on April 17, 2024, Zoom, Evanston, and the 19/20 Tower Insurers filed a Joint Notice of Conditional Settlement. The notices advise that, following a private mediation, (1) Zoom and Evanston reached a settlement of all claims in this action against Evanston and (2) Zoom and the 19/20 Tower Insurers reached a settlement of all claims in this action against the 19/20 Tower Insurers.

Now before the court are: (1) the motion by Zoom for summary adjudication of the FTC Claim Issue, Underwriters' fifth affirmative defense (Definition of Claim), the Interrelatedness Issue, and Underwriters' third affirmative defense (Relatedness); (2) the motion by Underwriters for summary judgment of the Complaint and summary adjudication of Underwriters' third and fifth affirmative defenses or, alternatively, summary adjudication of Zoom's first cause of action, Zoom's third cause of action, Underwriters' third affirmative defense, and Underwriters' fifth affirmative defense; and (3) the motion by Underwriters for summary judgment of the Complaint and summary adjudication of Underwriters' third, fifth, and twenty-third affirmative defenses or, alternatively, summary adjudication of Zoom's first cause of action, Zoom's third cause of action, Underwriters' third affirmative defense, Underwriters' fifth affirmative defense, and Underwriters' twenty-third affirmative defense.[2] All three motions are opposed.

II. LEGAL STANDARD

The pleadings limit the issues presented for summary judgment or adjudication and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73.)

A motion for summary judgment must dispose of the entire action. (Code Civ. Proc., § 437c, subd. (a); *All Towing Services LLC v. City of Oran*ge (2013) 220 Cal.App.4th 946, 954 (*All Towing*) ["Summary judgment is proper only if it disposes of the entire lawsuit."].) "Summary judgment is properly granted when no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. [Citation.] Once the defendant has met that burden, the burden shifts to the plaintiff 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' [Citation.] 'There is a triable issue of material fact if, and only if, the

[2] In connection with the notices of settlement, the court vacated the hearing on the pending motions between Zoom and Evanston as well as Zoom and the 19/20 Defendants.

evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Madden v. Summit View, In*c. (2008) 165 Cal.App.4th 1267, 1272 (*Madde*n).)

"Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. ([Code Civ. Proc.,] § 437c, subd. (f).) … Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.' " (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

"A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs." (Code Civ. Proc., § 437c, subd. (f)(1).) "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1).)

A plaintiff seeking summary adjudication on a cause of action "must present evidence sufficient to establish every element of that cause of action. A plaintiff's initial burden … does not include disproving any affirmative defenses the defendant asserts. 'Once the plaintiff ... has met [its] burden, the burden shifts to the defendant ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' " (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630–631.)

A defendant seeking summary adjudication "must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. … The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co*. (2002) 98 Cal.App.4th 66, 72; see Code Civ. Proc., § 437c, subd. (p)(2).)

For purposes of establishing their respective burdens, the parties involved in a motion for summary judgment or adjudication must present admissible evidence. (*Saporta v. Barbagelata* (1963) 220 Cal.App.2d 463, 468.) Additionally, in ruling on the motion, a court cannot weigh said evidence or deny the motion on the ground that any particular evidence lacks credibility. (See *Melorich Builders v. Superior Court* (1984) 160 Cal.App.3d 931, 935; see also *Lerner v. Superior Court* (1977) 70 Cal.App.3d 656, 660.) As summary judgment or adjudication "is a drastic remedy eliminating trial," the court must liberally construe evidence in support of the party opposing the motion and resolve all doubts concerning the evidence in favor of that party. (See *Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389; see also *Hepp v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 717-718.)

III. ZOOM'S MOTION FOR SUMMARY ADJUDICATION AND UNDERWRITERS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION REGARDING THE DEFINITION OF A CLAIM AND RELATEDNESS

Zoom's motion for summary adjudication and Underwriters' motion for summary judgment or, alternatively, summary adjudication ask the court to resolve the same issues. Both motions ask the court to address:

> (1) whether the only matter noticed to Underwriters during the policy period effective October 31, 2018 to October 31, 2019 (the "18/19 Policy Period")—the Federal Trade Commission ("FTC") Civil Investigative Demand ("CID") issued to Zoom on September 16, 2019—constitutes a "Claim" as defined by the Chubb Digitech Enterprise Risk Management Policy No. F14515343 issued by Westchester Insurance Company (the "18/19 Primary Policy"); and
>
> (2) whether the FTC Draft Administrative Complaint, the FTC Draft Federal Complaint, the FTC Administrative Complaint, the action titled *Consumer Watchdog v. Zoom Video Communications, Inc.* (United States District Court for the District of Columbia, Case No. 1:20-cv-02526) ("Consumer Watchdog Action"), and the lawsuits alleging security and technological vulnerabilities in Zoom's products that were eventually consolidated into *In re Zoom Video*

Communications, Inc. Privacy Litigation (United States District Court for the Northern District of California, Case No. 5:20-cv-02155) ("Privacy Action") relate back to the FTC CID because they arise out of the same "Incident" or "Interrelated Incidents" as defined by the 18/19 Primary Policy.

1. Undisputed Material Facts

The parties generally agree that the following material facts are undisputed:

In 2018, Zoom purchased three errors and omissions policies totaling $25 million in coverage. (Separate Statement of Undisputed Material Facts in Support of Plaintiff Zoom Video Communications, Inc.'s Motion for Summary Adjudication, UMF Nos. 1-3.) Zoom purchased 18/19 Primary Policy, and two excess policies, one issued by Underwriters and one issued by Evanston. (*Ibid*.) The 18/19 Primary Policy provided a coverage limit of $10 million. (UMF No. 1.) Underwriters' excess policy provided a coverage limit of $10 million. (UMF No. 2.). Evanston's excess policy provided a coverage limit of $5 million. (UMF No. 3.) Those policies provided coverage for "Claims" made during the 18/19 Policy Period. (UMF Nos. 4, 16.) The excess policies provided coverage "in accordance with" the terms and conditions of the 18/19 Primary Policy, with limited modifications not at issue here. (UMF Nos. 5-6.)

The policies provide coverage for "Claims" relating to "technology errors and omissions," "cyber, privacy, and network security," and media. (UMF No. 15.) A "Claim" is defined to include any:

> 1. written demand against [Zoom] for monetary damages or non-monetary or injunctive relief;
>
> . . .
>
> 6. Regulatory Proceeding.

(UMF No. 17.) The policies define "Regulatory Proceeding" as any "suit, civil investigation or civil proceeding by or on behalf of a government agency . . . or regulatory authority, commenced by the service of a complaint, notice, or similar pleading based on an alleged or potential violation of Privacy or Cyber Laws as a result of a Cyber Incident, and which may reasonably be expected to give rise to a Claim under Insuring Agreement E." (UMF No. 18.) The policies define "Privacy or Cyber Laws" to include "any local, state, federal, and foreign

… privacy protection laws, legislation, statutes, or regulations, that require commercial entities that collect Protected Information to … adopt specific privacy or security controls." (UMF No. 20.) The policies define "Protected Information" to include "non-public personal information" and "third party confidential or proprietary information." (UMF No. 21.)

The Policies contained certain exclusions and exclusionary language. As is relevant here, the policies combine similar "Claims," even if made in different policy periods, into one "Claim" under the earliest relevant policy period. (UMF No. 56.) Specifically, the policies state that:

> D. MAXIMUM LIMIT OF INSURANCE FOR ALL INTERRELATED INCIDENTS AND CLAIMS
>
> Claims arising out of the same Incident and all Interrelated Incidents shall be deemed to be one Claim, and such Claim shall be deemed to be first made on the date the earliest of such Claims is first made . . . .
>
> All Interrelated Incidents shall be deemed to be one Incident, and such Incident shall be deemed to be first discovered, on the date the earliest of such Incidents is first discovered . . . .

(UMF Nos. 56-57.)

> The Policies also contain a "Pending or Prior Proceedings" exclusion that provides:
> A. EXCLUSIONS APPLICABLE TO ALL INSURING AGREEMENTS
>
> The Insurer shall not be liable for Costs, Damages, or Claims Expenses on account of any Incident or any Claim:
>
> . . .
>
> 3. Pending or Prior Proceedings
>
> alleging, based upon, arising out of, or attributable to:
>
> . . .
>
> b. any other Incident whenever occurring which, together with an Incident underlying or alleged in any pending or prior litigation, Claim, demand, arbitration, administrative or regulatory proceeding or administrative or regulatory investigation . . . would constitute Interrelated Incidents.

(UMF Nos. 56-58.) "Interrelated Incidents" includes "all Incidents that have as a common nexus any act, fact, circumstance, situation, event, transaction, cause or series of related acts, facts, circumstances, situations, events, transactions or causes." (UMF No. 59.)

On September 16, 2019, the FTC issued a CID against Zoom "pursuant to Section 20 of the [FTC Act], in the course of an investigation to determine whether there is, has been, or may be a violation of any laws administered by the [FTC]." (UMF Nos. 23-24.) The subject of the

investigation was "[w]hether [Zoom] has engaged in unfair or deceptive practices in connection with its use of the Web Server (as defined herein), its treatment of Vulnerabilities (as defined herein), its Video Settings (as defined herein), or its representations of compliance with the Privacy Shield (as defined herein), in violation of the FTC Act, 15 U.S.C. § 45, and whether [FTC] action to obtain monetary relief would be in the public interest." (UMF No. 23-25; see also UMF No. 26 [directing use of "compulsory process in nonpublic investigation of acts and practices related to consumer privacy and/or data security"].) The FTC CID "required" Zoom to produce documents in response to 9 document requests and to answer 24 interrogatories. (UMF No. 27.) The FTC CID further instructed that the "production of documents or the submission of answers . . . must be made under a sworn certificate," and "may subject [Zoom] to a penalty imposed by law for failure to comply." (UMF No. 28.)

As it proceeded, the FTC expanded its investigation into additional alleged security and technological vulnerabilities in Zoom's platform (but not Zoom sharing users' information). (UMF Nos. 39-40.) For example, the FTC investigated Zoom's representations regarding end-to-end encryption, including the level of encryption that was provided to secure users' meetings. (UMF No. 40.) The FTC also issued additional document requests and interrogatories to Zoom as part of its ongoing investigation. (UMF No. 39.)

The FTC ultimately issued several draft complaints and a final complaint against Zoom, including a FTC Draft Administrative Complaint dated June 25, 2020, a FTC Draft Federal Complaint dated August 13, 2020, and a FTC Administrative Complaint dated January 19, 2021. (UMF Nos. 41-43.) The complaints alleged that Zoom made various misrepresentations regarding the "privacy and security measures it employ[ed] to protect users' personal information"—including that it provided end-to-end encryption for its meetings, that it encrypted meetings with an AES 256-bit encryption key when it used AES 128-bit encryption, and that its security exceeded industry standards. (UMF Nos. 44-47.)

The complaints also alleged that Zoom misrepresented that its security exceeded industry standards when it did not. (UMF No. 47.) Specifically, the complaints alleged that, in addition to not providing a higher level of encryption, Zoom failed to implement robust security measures, such as multi-factor authentication or similar technology to secure remote

access to its networks and systems, and robust security training, testing, monitoring, patching, and reporting to ensure its platform was free from attacks. (UMF No. 48.) The complaints alleged that these "vulnerabilities in Zoom's infrastructure could be exploited to put users' communications at risk, as well as lead to a significant breach of users' personal information." (UMF No. 49.) Like the FTC CID, the complaints did not allege that Zoom shared users' information with third parties without consent. (UMF No. 62.)

On October 19, 2020, Zoom and the FTC entered into an Agreement Containing Consent Order to resolve the FTC Investigation, subject to final FTC approval. (UMF No. 52.) On January 19, 2021, the FTC issued a Decision and Order, finally resolving the FTC Investigation. (UMF No. 53.) This settlement imposed injunctive orders on Zoom, such as requiring Zoom to refrain from making misrepresentations, establish and monitor a comprehensive information security program, provide reports, notices, and certifications to the FTC, and create and maintain certain records. (UMF No. 54.) Zoom allegedly incurred over $6.6 million in fees and costs in connection with the FTC action before reaching the settlement. (Joint Appendix ("JA")-006738.)

Beginning on March 30, 2020, certain Zoom users commenced the Privacy Action, filing several lawsuits against Zoom that were ultimately consolidated as a class action. (UMF No. 68.) A Second Amended Consolidated Class Action Complaint was eventually filed and remained the operative complaint when the Privacy Action was later settled. (UMF Nos. 69, 78.)

The Privacy Action contained two distinct categories of allegations: (1) claims that Zoom's platform had inadequate security and technological standards; and (2) privacy claims that Zoom shared users' information with third parties like Facebook and Google without consent. Specifically, the Privacy Action alleged that Zoom claimed it was "utilizing 'end-to-end encryption for desktop and mobile devices,'" when its video conferences, and other audio and video functionality did not support end-to-end encryption. (UMF No. 70.) The Privacy Action alleged that Zoom's use of "transport encryption," as opposed to "end-to-end encryption," could result in user data being intercepted by "a hacker who can infiltrate the company's systems." (UMF No. 71.)

The Privacy Action also alleged "security breaches by unauthorized bad actors who hijack[ed] Zoom videoconferences." (UMF No. 72.) The plaintiffs claimed that Zoom "could have, but did not, provide adequate meeting security to limit or prevent altogether such Zoombombing instances or unauthorized meeting access and intrusions." (UMF No. 73.) For example, Zoom allegedly "could have implemented various other relatively simply technical solutions to limit or prevent altogether such Zoombombing attacks, for instance making it easier to allow hosts to cancel a meeting and/or eject a Zoombomber with a push of a single button, screen sharing control defaults, or implementing stronger meeting security (attendee admission) protocols such as identity verification or unique meeting passcodes." (UMF No. 74.)

On August 10, 2020, Consumer Watchdog filed a one-count complaint against Zoom in the Superior Court of the District of Columbia for allegedly "making false and deceptive representations to consumers about its data security practices," specifically relating to Zoom's encryption levels. (UMF No. 63.) The Consumer Watchdog Action alleged that Zoom misrepresented the security of its services by stating that it provided end-to-end encryption. (UMF No. 64.) For example, the complaint alleges that, instead of using end-to-end encryption as represented, Zoom used what is known as "transport encryption" or "Transport Layer Security" and that Zoom misrepresented "end-to-end encryption as a standard security feature for its video conferencing service." (UMF No. 65.) The Consumer Watchdog Action did not allege that Zoom shared users' information with third parties like Facebook and Google without consent. (UMF No. 67.)

2. Parties' Arguments

Based on the foregoing undisputed material facts, Zoom argues that the FTC CID is a "Claim" under the policies that was made on September 16, 2019, within the 18/19 Policy Period. Specifically, Zoom asserts that the FTC CID is a "Claim" because it is a "written demand" for nonmonetary relief. Zoom points out that the CID required it to respond to interrogatories and requests for production of documents under penalty of law. Zoom highlights case law (see e.g., *Minuteman Int'l, Inc. v. Great Am. Ins. Co*. (N.D.Ill. Mar. 18, 2004, No. 03 C 6067) 2004 U.S.Dist.LEXIS 4660 (*Minuteman*)) providing that governmental

subpoenas constitute demands for non-monetary relief, and contends that the FTC CID is analogous to such subpoenas. Zoom also asserts that the FTC CID is a "Claim" because it is a "Regulatory Proceeding." Zoom contends that the FTC CID is a "Regulatory Proceeding" because FTC is a government agency and regulatory authority, the FTC's investigation was commenced by service of the CID, the FTC CID was based on alleged or potential violations of Privacy or Cyber Laws (as the investigation was concerned with whether Zoom violated the FTC Act), the alleged or potential violations were the result of a Cyber Incident, and Zoom reasonably expected the investigation to give rise to a "Claim." Finally, Zoom further argues that the allegations in the underlying actions that its platform had security and technological vulnerabilities (i.e., the FTC Draft Administrative Complaint, the FTC Draft Federal Complaint, the FTC Administrative Complaint, the Consumer Watchdog Action, and portions of the Privacy Action)arise out of "Interrelated Incidents."

Conversely, Underwriters argues that the FTC CID is not a "Claim" because it is neither a "written demand" for nonmonetary relief nor a "Regulatory Proceeding." Underwriters maintains that the FTC CID does not demand injunctive or other nonmonetary relief, and is most properly characterized as a request for information. Underwriters highlights case law (see e.g., *NWHW Holdings, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, P.A.* (C.D.Cal. Dec. 22, 2023, No. SACV 22-01030-CJC (KESx)) 2023 U.S.Dist.LEXIS 228688 (*NWHW*)) providing that CIDs and investigative subpoenas, requesting documents and testimony, do not constitute demands for non-monetary relief. Underwriters also contends the FTC CID is not a Regulatory Proceeding because it is not based on an actual or potential violation of a Privacy or Cyber Law. Underwriters highlights Zoom's position that the FTC Act is a Privacy or Cyber Law, as defined in the policies, because it requires companies to adopt specific privacy or security controls. Underwriters points out that Zoom does not identify any provision of the FTC Act that requires it to adopt specific privacy or security controls, and the FTC Act merely prohibits trade practices that are unfair or deceptive. Underwriters also maintains that the FTC CID is not a "complaint, notice or similar pleading" and, therefore, is not a "Regulatory Proceeding." Lastly, Underwriters asserts that even if the FTC CID were a

claim, the Privacy Action does not arise out of any Interrelated Incidents as it arose out of end-to-end encryption misrepresentations, Zoombombing, and third-party data sharing allegations.

3. Rules of Contract Interpretation

Absent a factual dispute, the interpretation of an insurance contract and its application to undisputed facts are questions of law. (*Westrec Marina Management, Inc. v. Arrowood Indemnity Co.* (2008) 163 Cal.App.4th 1387, 1391 (*Westrec*); *Abifadel v. Cigna Ins. Co*. (1992) 8 Cal.App.4th 145, 159 (*Abifadel*) ["The interpretation of a contract is a question of law when the contract terms are unambiguous."].) Courts interpret an insurance policy using the same rules of interpretation applicable to other contracts. (*Westrec, supra,* 163 Cal.App.4th at p. 1391.) The mutual intention of the contracting parties at the time the contract was formed governs. (Civ. Code, § 1636; *Westrec, supra,* 163 Cal.App.4th at p. 1392.) Courts ascertain that intention solely from the written contract, if possible, but also consider the circumstances under which the contract was made and the matter to which it relates. (Civ. Code, §§ 1639, 1647; *Westrec, supra,* 163 Cal.App.4th at p. 1392.) Courts consider the contract as a whole and construe the language in context, rather than interpret a provision in isolation. (Civ. Code, § 1641.) Courts interpret words in a contract in accordance with their ordinary and popular sense, unless the words are used in a technical sense or a special meaning is given to them by usage. (Civ. Code, § 1644; *Abifadel, supra,* 8 Cal.App.4th at p. 159 ["A basic canon of insurance policy construction is that the words used in it are to be interpreted according to the plain meaning that a layperson would ordinarily attach to them."].) If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. (Civ. Code, § 1638.)

"Coverage clauses are interpreted broadly to afford the insured the greatest possible protection[;] [c]lauses limiting coverage are construed narrowly." (*Abifadel, supra,* 8 Cal.App.4th at p. 160.)

In defining "claims," the law focuses on the claimant's formal demands for service or payment—it requires more than an inquiry requesting for information or an explanation, the expression of dissatisfaction, mere complaining, or the lodging of a grievance as a claim. (*Abifadel, supra,* 8 Cal.App.4th at p. 160; *Hill v. Physicians & Surgeons Exch*. (1990) 225

Cal.App.3d 1, 5 (*Hill*); *Hoyt v. St. Paul Fire & Marine Ins. Co*. (9th Cir. 1979) 607 F.2d 864, 865-866.) A claim is the assertion of a liability of the party, demanding that the party perform some service or pay some money. (*Abifadel, supra*, 8 Cal.App.4th at p. 160; *Hill, supra*, 225 Cal.App.3d at pp. 5-7.)

4. Whether the FTC CID is a "Claim" Under 18/19 Primary Policy

The court agrees with Underwriters that the FTC CID does not constitute a "Claim" under the 18/19 Primary Policy because it is not a written demand for nonmonetary relief or a Regulatory Proceeding under the terms of the policies.

First, the FTC CID did not demand nonmonetary relief (e.g., injunctive relief). Instead, it is merely mechanism for requesting various forms of information. The FTC CID sought the production of documents and responses to interrogatories in connection with the FTC's investigation of potential wrongdoing. The FTC CID did not allege against Plaintiff any particular wrongdoing; it merely requested discovery to aid the FTC's determination of whether Zoom had violated the FTC Act. (See *FTC v. Invention Submission Corp*. (1992) 296 U.S.App.D.C. 124 ["At the investigatory stage, the Commission does not seek information necessary to prove specific charges; it merely has a suspicion that the law is being violated in some way and wants to determine whether or not to file a complaint"]; see also *NWHW, supra*, (C.D.Cal. Dec. 22, 2023, No. SACV 22-01030-CJC (KESx)) 2023 U.S.Dist.LEXIS 228688, at *21 [stating that the mere possibility that an investigation may lead to a formal allegation of wrongdoing is not sufficient to constitute a claim]; *First Horizon Nat'l Corp. v. Hous. Cas. Co.* (W.D.Tenn. June 23, 2017, No. 15-cv-2235-SHL-dkv) 2017 U.S.Dist.LEXIS 109935, at *33 [same].)

The court is persuaded by the cases cited by Underwriters providing that a CID essentially an administrative subpoena (*FTC v. Invention Submission Corp*. (1992) 965 F.2d 1086, 1087-1089 [CID issued by FTC in connection with investigation of possible violations of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) is an administrative subpoena]; *NWHW, supra*, (C.D.Cal. Dec. 22, 2023, No. SACV 22-01030-CJC (KESx)) 2023 U.S.Dist.LEXIS 228688, at *19; *United States v. Markwood* (6th Cir. 1995) 48 F.3d 969, 975-976) and such investigative subpoenas are not demands for nonmonetary relief (see e.g.,

NWHW, supra, (C.D.Cal. Dec. 22, 2023, No. SACV 22-01030-CJC (KESx)) 2023 U.S.Dist.LEXIS 228688, at *18-22 [holding that a CID requesting documents and testimony issued by the United States Attorney's Office related to a False Claims Act investigation was not a demand for nonmonetary relief]; *Diamond Glass Cos. v. Twin City Fire Ins. Co*. (S.D.N.Y. Aug. 18, 2008, No. 06-CV-13105 (BSJ) (AJP)) 2008 U.S.Dist.LEXIS 86752, at *9-13 [holding that grand jury subpoenas and a search warrant were not a demand for nonmonetary relief]; *BioChemics, Inc. v. AXIS Reinsurance Co*. (1st Cir. 2019) 924 F.3d 633, 640 [holding that subpoenas demanding the production of documents issued by the Securities and Exchange Commission in connection with its investigation against the company and its officers were requests made of a party for information, and were not requests made for equitable redress or benefit (such as specific performance)].)

This court does not agree with the conclusion reached in the cases cited by Zoom (e.g., *Minuteman Int'l, Inc. v. Great Am. Ins. Co*. (N.D.Ill. Mar. 18, 2004, No. 03 C 6067) 2004 U.S.Dist.LEXIS 4660). For example, the court in *Minuteman* held that "[a] demand for 'relief' " is a broad enough term to include a demand for something due, including a demand to produce documents or appear to testify. (*Minuteman, supra*, (N.D.Ill. Mar. 18, 2004, No. 03 C 6067) 2004 U.S.Dist.LEXIS 4660, at *7.) But the ordinary and accepted meaning of the word "relief" and the context in which is it used in the policies make it clear that investigative subpoenas, like the FTC CID, are not demands for nonmonetary relief. (See *Diamond, supra*, (S.D.N.Y. Aug. 18, 2008, No. 06-CV-13105 (BSJ) (AJP)) 2008 U.S.Dist.LEXIS 86752, at *11-12 ["Black's Law Dictionary defines 'relief' as '[t]he redress or benefit, esp. equitable in nature (such as injunction or specific performance), that a party asks of a court. Also termed remedy.' Black's Law Dictionary at 1317 (8th ed. 2004); see also *Foster v. Summit Medical Systems, Inc*., 610 N.W.2d 350, 354 (Minn. Ct. App. 2000)(quoting Black's Law Dictionary at 1293 (7th ed.1999) ('In a legal context, the term "relief" refers to redress or benefit, especially equitable redress such as an injunction or specific performance.'). Similarly, 'remedy' means '[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief.' *Id*. at 1320. Grand jury subpoenas and search warrants do not fit within this meaning of the term 'relief.'"].)

Second, the FTC CID is not a "Regulatory Proceeding" as defined in the policies because the investigation was not based on an alleged or potential violation of "Privacy or Cyber Law." The parties agree that the policies define a "Privacy or Cyber Law" as "any local, state, federal, and foreign … privacy protection laws, legislation, statutes, or regulations that require commercial entities that collect Protected Information to post privacy policies, adopt specific privacy or security controls, or notify individuals in the even that Protected Information has potentially been compromised." The FTC's investigation of Zoom was based on potential violations of Section 5 of the FTC Act. Zoom contends that the FTC Act falls within the definition of "Privacy or Cyber Law" because it requires entities to adopt specific privacy or security controls. However, Zoom does not identify any provision in the FTC Act that requires it to adopt specific privacy or security controls. Rather, as Underwriters persuasively argues, Section 5 of the FTC generally prohibits entities from engaging in "unfair or deceptive" acts or practices. (15 U.S.C. § 45 [the FTC is empowered to prevent entities "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."].)

For the foregoing reasons, the FTC CID is not a "Claim" under the policies.

Because the FTC CID—the only matter noticed to Underwriters during the 18/19 Policy Period—is not a "Claim," Zoom cannot prevail on its first cause of action for Breach of Contract. (Complaint, ¶¶ 68, 70, 71 [claim for breach of contract is predicated on Underwriters' denial of coverage for the FTC CID and the other purportedly Interrelated Incidents].) Under the policies, claims made after the expiration of the 18/19 Policy Period (e.g., the FTC complaints, the Consumer Watchdog Action, and the Privacy) are not covered. An exception applies where a "Claim" made after the 18/19 Policy Period and a "Claim" made during the 18/19 Policy Period arise out of Interrelated Incidents. In that circumstance, the "Claim" made after the 18/19 Policy Period will relate back to the "Claim" made during the 18/19 Policy Period. As the FTC CID was not a "Claim" made during the 18/19 Policy Period, the other underlying actions do not relate back to the FTC CID. Thus, Underwriters' alleged denial of coverage for those actions was not a breach of the policies.

Furthermore, Zoom cannot prevail on its third cause of action for breach of the implied covenant of good faith and fair dealing. Where, as here, there is no coverage, there can be no claim for breach of the duty of good faith and fair dealing. (Complaint, ¶ 84 [claim for breach of the implied covenant of good faith and fair dealing is predicated on Underwriters' alleged failure to investigate the facts giving rise to a right to coverage and its unreasonable interpretation of the policy and the facts]; *Waller v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1, 35-36 [because a contractual obligation is the underpinning of a bad faith claim, such a claim cannot be maintained unless policy benefits are due under the contract; "when benefits are due an insured, 'delayed payment based on inadequate or tardy investigations, oppressive conduct by claims adjusters seeking to reduce the amounts legitimately payable and numerous other tactics may breach the implied covenant because' they frustrate the insured's right to receive the benefits of the contract in 'prompt compensation for losses.'"; "[a]bsent that contractual right, however, the implied covenant has nothing upon which to act as a supplement, and 'should not be endowed with an existence independent of its contractual underpinnings.' "].)

Consequently, Underwriters is entitled to summary judgment of the Complaint as alleged against it.

Accordingly, Underwriter's motion for summary judgment of the Complaint is GRANTED. Underwriters' alternative motion for summary adjudication is deemed MOOT. Zoom's motion for summary adjudication is DENIED.

IV. UNDERWRITERS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION REGARDING RETROACTIVITY

Underwriters' second motion seeks summary judgment of the Complaint and, alternatively, summary adjudication of Underwriters' third, fifth, and twenty-third affirmative defenses or, alternatively, summary adjudication of Zoom's first cause of action, Zoom's third cause of action, Underwriters' third affirmative defense, Underwriters' fifth affirmative defense, and Underwriters' twenty-third affirmative defense on the ground that the alleged

"Claim" arising out of the alleged "Interrelated Incidents" first occurred prior to the January 17, 2018 Retroactive Date in the policies.

Because Underwriters' first motion completely disposes of the Complaint, the instant motion is deemed MOOT.

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

- oo0oo -

Calendar Line 4

Case Name:
Case No.:

- oo0oo -

Calendar Line 5

Case Name:
Case No.:

- oo0oo -

Calendar Line 6

Case Name:
Case No.:

- oo0oo -

Calendar Line 7

Case Name:
Case No.:

- oo0oo -

Calendar Line 8

Case Name:
Case No.:

- oo0oo -

Calendar Line 9

Case Name:
Case No.:

- oo0oo -

Calendar Line 10

Case Name:
Case No.:

- oo0oo -

Calendar Line 11

Case Name:
Case No.:

- oo0oo -

Calendar Line 12

Case Name:
Case No.:

- oo0oo -

Calendar Line 13

Case Name:
Case No.:

- oo0oo -