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: NOVEMBER 6, 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	23CV412292	Spalinger v. El Camino Hospital (Class Action)	See Line 1 for tentative ruling.
LINE 2	19CV359055	Kaga FEI Co., Ltd. v. Cypress Semiconductor Corp.	See Line 2 for tentative ruling.
LINE 3	23CV428313	Martinez v. C&W Facility Services, Inc., et al. (Class Action)	See Line 3 for tentative ruling.
LINE 4	16CV292208	Corinthian International Wage and Hour Cases (JCCP4886)	See Line 4 for tentative ruling.
LINE 5	21CV391898	Gatchalian v. CKS Prime Investments, LLC, et al. (Class Action)	See Line 5 for tentative ruling.
LINE 6			

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 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Spalinger v. El Camino Hospital (Class Action)
Case No.: 23CV412292

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 6, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative class action arising from alleged unlawful disclosure of personally identifiable information and protected health information. On February 28, 2023, Plaintiff Indigo Spalinger ("Plaintiff") initiated this action by filing Class Action Complaint against Defendant El Camino Hospital ("Defendant").

According to the Complaint's allegations, this action is brought on behalf of all California residents who have used Defendant's website. (Complaint, ¶ 1.) Defendant is a non-profit entity providing medical services and owns and operates the website. (*Id.* at ¶ 6.) Plaintiff has regularly used the website since approximately 2021 using her phone and computers. (*Id.* at ¶ 8.) Plaintiff has a Facebook account. (*Id.* at ¶ 9.) Defendant assisted Facebook with intercepting Plaintiff's communications, including those containing personally identifiable information ("PII") and protected health information ("PHI"). (*Id.* at ¶ 10.) By failing to receive the requisite consent, Defendant breached their duties of confidentiality and unlawfully disclosed Plaintiff's PII and PHI. (*Id.* at ¶ 11.) Facebook sells advertising based on its ability to effectively target users using "Meta Pixel." (*Id.* at ¶ 23 and fn. 10.)

Based on the forgoing allegations, among others, the Complaint sets forth the following causes of action: (1) violation of the California Invasion of Privacy Act, Penal Code section 631; (2) violation of the California Confidentiality of Medical Information Act, Civil Code section 56.10; (3) invasion of privacy in violation of the California Constitution.

On May 12, 2023, Defendant removed this action to the United States District Court, Northern District of California. On August 28, 2023, the United States District Court (Judge Vince Chhabria) granted Plaintiff's motion to remand the action to this court. On September 20, 2023, Defendant filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit.

On October 20, 2023, Defendant filed a motion to stay these proceedings pending its appeal to the Ninth Circuit. On March 13, 2024, this court issued an order denying Defendant's motion to stay.

On May 31, 2024, Defendant filed what is now before the court, a demurrer to Plaintiff's Complaint. On July 30, 2024, Plaintiff's counsel filed a motion to withdraw as attorney. On August 9, 2024, the court issued an order on the Parties' stipulation, extending Plaintiff's deadline to file her opposition to the demurrer to September 6, 2024, and continuing the hearing date for Defendant's demurrer to November 6, 2024. According to court records, Defendant's demurrer remains unopposed.

II. Legal Standard

A demurrer may be utilized by the party against whom a complaint has been filed to object to the legal sufficiency of the pleading as a whole or to any cause of action stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).) As relevant here, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one more of the following grounds: … (e) The pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).)

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

III. Discussion

Defendant demurs to the Complaint's first, second and third causes of action on the ground that the pleading fails to state sufficient facts pursuant to Code of Civil Procedure section 430.10, subdivision (e). (Notice of Demurrer and Demurrer, p. 1.)

Defendant contends that, while Plaintiff claims she used Defendant's website to access her patient portal, there is not a single well-pled fact throughout the Complaint plausibly establishing that PHI accessible in the patient portal was transmitted to Meta Platforms, Inc. ("Meta") or any other third party.[1] (Defendant's Memorandum of Points and Authorities ("MPA"), p. 1:15-17.) Defendant argues that Plaintiff refers to a hypothetical "patient" throughout the Complaint instead of pleading facts specific to herself. (*Id.* at p. 1:18-20.) Defendant argues that Plaintiff otherwise provides no supporting facts for her conclusory allegations. (*Id.* at p. 2:4-8.)

A. First Cause of Action

The first cause of action is for violation of the California Invasion of Privacy Act, Penal Code section 631 ("CIPA"). Plaintiff alleges that Defendant violated CIPA, particularly subdivision (a) of Penal Code section 631. That subdivision provides as follows in pertinent part:

> Any person who,
>
> [1] by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection … with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system[;] or
>
> [2] who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or

[1] The Complaint refers to both Facebook, Inc. and Meta Platforms, Inc. collectively as "Facebook." Facebook, Inc. rebranded as Meta Platforms, Inc. in 2021. (Demurrer, p. 1 at fn. 1.)

> [3] who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained;
>
> [4] or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned above in this section,
>
> is punishable by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year… .

(Pen. Code § 631, subd. (a), brackets added.)

The Complaint alleges that Defendant violated Penal Code section 631, subdivision (a), because "Defendant aided, agreed with, and conspired with Facebook to track and intercept Plaintiff's and Class Member's internet communications while accessing www.elcaminohealth.org. These communication were intercepted without the authorization and consent of the Plaintiff and Class Members." (Complaint, ¶ 58.)

Defendant contends that Plaintiff can only maintain this aiding and abetting cause of action if she first alleges an underlying violation of either "clause" two or three (as bracketed above). (Demurrer, p. 5:5-10, citing *People v. Perez* (2005) 35 Cal.4th 1219, 1225 ("absent proof of a predicate offense, … an aiding and abetting theory cannot be sustained.") Defendant further argues that the Complaint's allegations do not support either a violation of clause two or clause three because Plaintiff fails to allege facts showing that "the contents" of the communications are at issue or that Meta (via "Meta Pixel") intercepts communications "in transit," and because Plaintiff fails to allege facts showing that Meta used or attempted to use Plaintiff's information obtained through a violation of clause two. (*Id.* at p. 5:10-16.)

As mentioned, Plaintiff has submitted no opposition to the instant Demurrer, and therefore implied concedes Defendant's arguments above. (See *Glendale Redevelopment Agency v. Parks* (1993) 18 Cal.App.4th 1409, 1424 [issue is impliedly conceded by failing address it]; see also *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566 [party concedes an issue by failing to argue the contrary].) The court finds that Defendant's argument regarding the absence of predicate offense is a sufficient basis

to sustain the demurrer, and therefore declines to address Defendant's additional arguments as to the first cause of action.

Given Plaintiff's failure to oppose the demurrer, and consequently failure to offer any indication as to how the pleading can be amended to the cure defect identified, the court is disinclined to grant leave to amend. However, because there has not yet been a hearing on the demurrer and Plaintiff has not yet amended her Complaint, the court will grant leave to amend.

Accordingly, the demurrer to the first cause of action is SUSTAINED with 20 days' leave to amend.

B. Second Cause of Action

The second cause of action is for violation of the California Confidentiality of Medical Information Act, Civil Code section 56.10 ("CMIA"). CMIA is "intended to protect the confidentiality of individually identifiable medically information obtained from a patient by a health care provider, while at the same time setting forth limited circumstances in which the release of such information to specified entities or individuals is permissible." (*Brown v. Mortensen* (2011) 51 Cal.4th 1052, 1070.)

Section 56.10, subdivision (a), provides that "[n]o provider of health care, health care service plan, or contractor shall disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization." Under CIMA, "medical information" is defined as "any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care, health care service plan, pharmaceutical company, or contractor regarding a patient's medical history, mental health application information, mental or physical condition, or treatment." (Civ. Code § 56.05, subd. (i).)

The Complaint alleges that Defendant violated CMIA by disclosing medical information to Facebook regarding Plaintiff's use of Defendant's website. (Complaint, ¶¶ 69-70.) Defendant persuasively argues that information about Plaintiff's alleged activities on Defendant's *public website* does not amount to "medical information" and are therefore insufficient to support a CMIA claim. (Demurrer, pp. 9:18-10:22, citing *Smith v. Facebook,*

Inc. (9th Cir. 2018) 745 F.App'x 8, 9, affirming *Smith v. Facebook, Inc.* (N.D. Cal. 2017) 262 F. Supp. 3d 943, 954-55.)

For the same reasons discussed previously, Plaintiff impliedly concedes Defendant's argument by failing to oppose the demurrer. Accordingly, the demurrer to the second cause of action is SUSTAINED with 20 day's leave to amend.

C. Third Cause of Action

The third cause of action is for invasion of privacy under California's Constitution. A privacy claim under the California Constitution requires a showing of: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by the defendant that amounts to a serious invasion of the protected privacy interest. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 282.)

The Complaint alleges that Defendant intentionally invaded Plaintiff's and Class Member's privacy rights under the California Constitution by using Facebook Tracking Pixel to record and communicate patient's Facebook IDs alongside their confidential medical communications. (Complaint, ¶ 77.) Defendants persuasively argue that Plaintiff fails to plead facts satisfying these elements. (Demurrer, p. 12:19-22.) For example, Defendant argues that Plaintiff fails to allege a serious invasion of privacy because she fails to allege that her medical information was disclosed or viewed. (*Ibid.*)

For the same reasons discussed previously, Plaintiff impliedly concedes Defendant's argument by failing to oppose the demurrer. Accordingly, the demurrer to the second cause of action is SUSTAINED with 20 day's leave to amend.

IV. Conclusion

Defendant's demurrer is SUSTAINED with 20 days' leave to amend.

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

- oo0oo -

Calendar Line 2

Case Name: Kaga FEI Co., Ltd. v. Cypress Semiconductor Corp.
Case No.: 19CV359055

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 6, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This action arises from alleged breaches of a distributor agreement. Plaintiff and Cross-Defendant Kaga DEI Co. ("KFEI") and Defendant and Cross-Complainant Cypress Semiconductor Corporation ("Cypress") agreed that KFEI would serve as a nonexclusive distributor of Cypress's products to Japanese companies (the "Distributor Agreement").[2]

On November 25, 2019, KFEI commenced this action by filing a Complaint against Cypress, setting forth causes of action for: (1) breach of contract; and (2) breach of the covenant of good faith and fair dealing. KFEI's operative Third Amended Complaint, filed March 25, 2024, alleges the following causes of action: (1) breach of the Distributor Agreement; (2) breach of the covenant of good faith and fair dealing; (3) fraudulent inducement/intentional misrepresentation; (4) false promise; (5) intentional interference with contractual relations; (6) intentional interference with prospective economic relations; and (7) implied contractual/equitable indemnity.

On May 23, 2022, Cypress filed a Cross-Complaint against KFEI and Cross-Defendant Fujitsu Semiconductor Limited ("FSL"), alleging causes of action for: (1) breach of written contract; (2) breach of the covenant of good faith and fair dealing; and (3) intentional interference with contract.

On November 23, 2022, Cypress filed a First Amended Cross-Complaint against KFEI and FSL, setting forth causes of action for: (1) breach of written contract; (2) breach of the covenant of good faith and fair dealing (KFEI); (3) breach of the covenant of good faith and fair dealing (FSL); (4) intentional interference with contract; (5) implied and equitable

[2] On March 9, 2021, Plaintiff notified the court that it changed its corporate name from Fujitsu Electronics Inc. to Kaga FEI Co., Ltd.

indemnity; and (6) violation of California's Unfair Competition Law ("UCL") (Business and Professions Code, section 17200, *et seq.*).

On November 21, 2023, Cypress filed a Second Amended Cross-Complaint ("SACC") against KFEI, alleging the following causes of action: (1) breach of the Distributor Agreement; (2) fraudulent concealment; (3) civil conspiracy; (4) breach of the covenant of good faith and fair dealing; (5) declaratory judgment (Sections 15.2.1, 15.2.4, and 16.7 of the Distributor Agreement); (6) declaratory judgment (Section 15.3.5 of the Distributor Agreement); (7) violation of California's UCL; and (8) intentional interference with prospective economic relations.

On December 15, 2023, KFEI filed a demurrer to the second, third, fifth, sixth, seventh, and eighth causes of action of Cypress's SACC. On April 17, 2024, the court issued an order sustaining KFEI's demurrer to the fifth, sixth, seventh, and eighth causes of action, and overruling KFEI's demurrer to the second and third causes of action (the "April 17, 2024 Order"). As relevant here, the court sustained with leave to amend the demurrer to the seventh cause of action for violation of the UCL, finding merit to KFEI's argument that "Cypress has no available remedy because it does not seek injunctive relief and it cannot allege an entitlement to restitution; rather, it seeks to recover damages in the form of lost profits." (April 17, 2024 Order, p. 14:9-15.)

On April 29, 2024, Cypress filed its operative Third Amended Cross-Complaint ("TACC"), alleging the following causes of action: (1) breach of the Distributor Agreement; (2) fraudulent concealment; (3) civil conspiracy; (4) breach of the covenant of good faith and fair dealing; and (5) violation of California's UCL. On October 7, 2024, the court issued an order granting Cypress' motion to seal portions of its TACC.

Now before the court are the following: (1) KFEI's demurrer to the fifth cause of action of Cypress's TACC; (2) KFEI's motion to seal portions of its demurrer and supporting papers; and (3) Cypress's motion to seal portions of its papers filed in opposition to KFEI's demurrer. The motions to seal are unopposed; Cypress opposes the demurrer.

//

II. Motions to Seal

KFEI moves to seal portions of its demurrer to Cypress's TACC. Cypress moves to seal portions of its opposition to the demurrer.

A. Legal Standard

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).) Pleadings, in particular, should be open to public inspection "as a general rule," although they may be filed under seal in appropriate circumstances. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 104, fn. 35.)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3 (*Providian*).) "[A] binding contractual agreement not to disclose" may suffice. (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 107.) In addition, confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285-1286 (*Universal*).)

Where some material within a document warrants sealing but other material does not, the document should be edited or redacted, if possible, to accommodate both the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*Providian, supra,* 96 Cal.App.4th at p. 309.)

//

//

B. KFEI's Motion to Seal

KFEI moves to seal the redacted portions of its Notice of Demurrer, Demurrer, and Memorandum of Points and Authorities in Support of its Demurrer to the First Cause of Action in Cypress Semiconductor Corp.'s Third Amended Cross-Complaint (the "Demurrer"). Cypress does not oppose KFEI's motion to seal.

KFEI explains that the material at issue relates to its business relationships, business strategy, and financial information and may not be disclosed pursuant to the Mutual Confidentiality Agreement found at Section 13 of the Distributor Agreement between KFEI and Cypress. (Declaration of Benjamin P. Smith [filed May 30, 2024], ¶¶ 3-4.) The redacted portions of KFEI's Demurrer describe the terms of the Distributor Agreement as well as related sensitive financial details. (*Id.* at ¶ 4.) KFEI has taken reasonable steps to maintain the confidentiality of its public disclosure of this information could have a significant negative effects on KFEI's business. (*Id.* at ¶ 5.)

The proposed sealing appears to be narrowly tailored to confidential information. Therefore, the court finds that KFEI has established overriding interests that justifies sealing these materials and that the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra,* 110 Cal.App.4th 1273 at p.1286 [confidential information relating to a party's business operations can be sealed].)

Accordingly, KFEI's motion to seal is GRANTED.

C. Cypress's Motion to Seal

Cypress moves to seal portions of its Opposition to KFEI's Demurrer to the Fifth Cause of Action in Cypress's Third Amended Cross-Complaint (the "Opposition"). KFEI does not oppose Cypress's motion to seal.

Cypress explains that the material at issue contains private business information from the Distributor Agreement between Cypress and KFEI, which may not be publicly disclosed pursuant to the "Mutual Confidentiality Obligation" found at Section 13 of the Distributor Agreement. (Declaration of Elspeth V. Hansen [filed September 12, 2024], ¶ 3.) The redacted portions of Cypress's Opposition describe confidential and sensitive terms of the Distributor Agreement and disclose details relating to warranties, the handling of disputes, and information

about specific customers. (*Id.* at ¶ 4.) This information is not publicly available, and its disclosure could have significant negative effects on Cypress's business and harm the parties' future negotiations. (*Id.* at ¶ 5.)

The proposed sealing appears to be narrowly tailored to confidential information. Therefore, the court finds that Cypress has established an overriding interest that justifies sealing these materials and that the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra*, 110 Cal.App.4th 1273 at p.1286 [confidential information relating to a party's business operations can be sealed].)

Accordingly, Cypress's motion to seal is GRANTED.

III. Demurrer to TACC

A. Legal Standard

A demurrer may be utilized by the party against whom a complaint has been filed to object to the legal sufficiency of the pleading as a whole or to any cause of action stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).) As relevant here, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one more of the following grounds: … (c) The pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).)

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

B. Discussion

KFEI demurs to Cypress's TACC on the ground that the fifth cause of action for violation of California's UCL fails to state sufficient facts to constitute a cause of action under Code of Civil Procedure section 430.10, subdivision (e). (Demurrer, PDF p. 3 of 10.)

As discussed above in relation to Cypress's SACC, the court previously sustained KFEI's demurrer to Cypress's UCL claim (then the seventh cause of action), finding merit to KFEI's argument that "Cypress has no available remedy because it does not seek injunctive relief and it cannot allege an entitlement to restitution; rather, it seeks to recover damages in the form of lost profits." (April 17, 2024 Order, p. 14:9-15.)

KFEI contends that Cypress has simply changed label of the same harm allegedly incurred from "damages" to "restitution," in order to address the defect previously identified by the court. (Demurrer, p. 1:11-16.) KFEI argues that the fifth cause of action fails to allege an available remedy and that Cypress's amended UCL allegations violate the sham pleading doctrine. (*Id.* at pp. 3:15, 6:18.) In opposition, Cypress argues it has adequately stated a claim for restitution of money in which it had a vested interest, and that the sham pleading doctrine does not apply because its amended pleading is entirely consistent with its prior pleading. (Opposition, p. 1:6-10.)

As the court discussed in its April 17, 2024 Order, "[w]hile the scope of conduct covered by the UCL is broad, its remedies are limited." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 114 (*Korea Supply*).) Because a "UCL action is equitable in nature[,] damages cannot be recovered." (*Ibid.*) Instead, "[p]revailing plaintiffs are generally limited to injunctive relief and restitution." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 179.) Under the UCL, injunctive relief is appropriate only when there is a threat of continuing misconduct. (*Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 463 (*Madrid*).)

The California Supreme Court has defined "restitution" under the UCL as the "return [of] money obtained through an unfair business practice to those persons who had an ownership in the property… ." (*Korea Supply, supra,* 29 Cal.4th at pp. 1144-1145.) "The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." (*Id.* at p. 1149.) When a cause of action seeks only remedies

that are not recoverable under the UCL, the cause of action fails to state a claim under the UCL. (*Id.* at p. 1166; *Madrid*, *supra*, 130 Cal.App.4th at p. 467.)

In its SACC, Cypress alleged that KFEI's conduct caused Cypress "to suffer monetary losses in the form of, among other things, lost profits from selling products to [KFEI] at uncompetitive prices, rather than at the competitive prices that would have been paid had the products been sold to end users by other distributors." (SACC, ¶ 120.) In sustaining KFEI's demurrer to the UCL claim, the court found that the SACC alleged in a conclusory manner that it was entitled to restitution, observing that lost profits or business opportunity is a measure of damages, not restitution. (April 17, 2024 Order, p. 15:5-9.)

In its TACC, Cypress now alleges that KFEI induced Cypress to agree to a lower price than it "would have agreed to accept had it known the truth." (TACC, ¶ 104.) Cypress alleges it "has a vested interest in the monies unlawfully withheld by KFEI when KFEI used unfair business practices to induce Cypress to agree to a … reduction in the [price], a reduced payment that Cypress would not have agreed to had it known the truth about the anticipated sale of KFEI." (*Id.* at ¶ 108.) The TACC further alleges that "KFEI has withheld from Cypress monies that it would have paid to Cypress for Cypress's parts but for KFEI's unfair business practices[,]" and that "Cypress is entitled to restitution, in order to have restored to Cypress those amounts that KFEI failed to pay to Cypress as a result of the unfair business practices." (*Id.* at ¶¶ 113-114.)

The California Supreme Court has explained that a court's equitable powers in a UCL action "are to be used to 'prevent' practices that constitute unfair competition and to 'restore to any person in interest' any money or property acquired through unfair practices. [Bus. & Prof. Code, § 17203]." (*Korea Supply*, *supra*, 29 Cal.4th at pp. 1147-1148.) Where, as here, a plaintiff is not seeking injunctive relief, the plaintiff must be "seeking the return of money of property that was once in its possession," or alternatively, the plaintiff must be seeking "to recover money or property in which he or she has a vested interest." (*Id.* at p. 1149.)

Here, KFEI persuasively argues that the TACC still fails to allege the existence of a restitution remedy under either of these theories. (Demurrer, pp. 3:23-6:17.) First, Cypress is not seeking the recovery of money that was ever in its possession, but instead seeks the money

that KFEI allegedly "would have paid" to Cypress, but for KFEI's alleged unfair business practices. (TACC, ¶ 113.) As *Korea Supply* explains, the money that KFEI allegedly "would have paid" Cypress cannot be considered "restitution" under the UCL "because plaintiff does not have an ownership interest in the money it seeks to recover from [KFEI]." (*Korea Supply*, 29 Cal.4th at p. 1149.)

Both Parties focus their arguments upon the second theory of restitution based on recovery of money or property in which plaintiff allegedly "has a vested interest." (*Korea Supply*, 29 Cal.4th at p. 1149.) The California Supreme Court addressed this theory in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163 (*Cortez*). There, the plaintiff filed a class action for unpaid overtime wages. (*Id.* at p. 169.) The plaintiff sought restitution for herself and other employees of the unpaid overtime pursuant to the UCL as well as injunctive relief requiring the defendant to give notice to those employees owed restitution. (*Id.* at p. 170.) The trial court denied relief on plaintiff's UCL cause of action on behalf of other employees. (*Ibid.*)

In *Cortez,* our high court stated that unlawfully withheld wages may be recovered as restitution in a UCL action. (*Id.* at p. 173.) "The concept of restoration or restitution, as used in the UCL, is not limited only to the return of money or property that was once in the possession of [the plaintiff]." (*Id.* at p. 178.) The court found that "earned wages that are due and payable … are as much the property of the employee who has given his or her labor to the employer in exchange for that property as is property a person surrenders through an unfair business practice." (*Ibid.*) Thus, the court concluded that the unpaid wages were recoverable as restitution, not as damages, under the UCL. (*Ibid.*, quoting and citing *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1080 ["Earned but unpaid salary wages are vested property rights, claims for which may not be properly characterized as actions for monetary damages."].)

Nevertheless, while earned but unpaid wages are recoverable as restitution under the UCL, lost market share, loss of business opportunity, or lost profits are not. (*Lee v. Luxottica Retail North America, Inc.* (2021) 65 Cal.App.5th 793 (*Lee*).) "[Lost business] does not represent money the plaintiff ever parted with, nor does the plaintiff have any legally

enforceable property interest in it, analogous to wages that have been *earned* but unlawfully withheld (*Cortez*)." (*Id.* at p. 803.) "There is thus no sense is which plaintiff's interest in future income from his customer base is vested, as opposed merely contingent. [Citation.]" (*Ibid.*; see also *Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1402 [unearned wages cannot be recovered as restitution because employees have no "vested interest" in those funds].)

As KFEI persuasively argues, Cypress has not and cannot allege any legally enforceable interest in a higher price for its products that KFEI purportedly would have paid absent the alleged unfair competition. (Demurrer, pp. 4:15-5:1.) Cypress has not identified any part of the Parties' Distributor Agreement requiring KFEI to make the purchases it allegedly would have made, such that Cypress had a vested interest in the anticipated profits from such purchases. (*Ibid.*) At most, Cypress has stated an expectancy or contingency interest in sales to KFEI that Cypress alleges "would have" occurred. This is not sufficient to state a "vested interest" in amounts recoverable as restitution under the UCL. (See *Lee, supra*, 65 Cal.App.5th at p. 803 ["*Korea Supply* stands unequivocally for the proposition that unearned income (there, commission from a single business transaction that failed to materialize) is not recoverable as restitution under the UCL—because the plaintiff has no ownership interest in it."].)

Cypress's arguments in opposition do not persuade the court otherwise. Cypress asserts the California courts' interpretation of restitution is synonymous with unjust enrichment, relying upon *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370 (*Durell*). (Opposition, p. 3:15-19.) However, in comparing restitution with unjust enrichment, the *Durell* court was not addressing the relief available as restitution under the UCL but was instead clarifying that there is no stand-alone cause of action in California for unjust enrichment. (*Durell, supra,* 183 Cal.App.4th at p. 1370.) The *Durell* court went to reject the application of an unjust enrichment theory in that case because the plaintiff alleged that parties entered into an express contract. (*Ibid.*)

Cypress's reliance upon *Juarez v. Arcadia Financial, Ltd.* (2007) 152 Cal.App.4th 889 (*Juarez*) is also misplaced. (See Opposition, pp. 2:27-3:6.) There, the plaintiffs adequately stated a UCL claim based upon restitution because they sought money that defendant "wrongfully collected" from them through invalid deficiency judgments. (*Juarez, supra,* 152

Cal.App.4th at pp. 912, 917.) Here, by contrast, there is no similar allegation that KFEI employed an invalid deficiency judgment to "wrongfully collect" sums from Cypress in which Cypress had a vested interest. Here, the relief Cypress seeks in its UCL cause of action is much more akin to lost profits than it is to monies wrongfully collected on a debt.

In sum, for effectively the same reasons that the court discussed in its April 17, 2024 Order, Cypress has not pleaded any facts showing that it actually seeks restitution, as opposed to damages. Thus, the fifth cause of action does not state facts sufficient to constitute a cause of action for violation of the UCL. Having reached this conclusion, the court need not address KFEI's additional argument that Cypress's amended pleading violates the sham pleading doctrine.

Finally, the court declines to grant leave to amend because it has already given Cypress leave to amend once, Cypress has not requested leave to amend here, and Cypress has not offered any indication as to how the pleading could be amended to cure the defect as to the UCL cause of action. (*Goodman v. Kennedey* (1976) 18 Cal.3d 335, 349 [the burden is on the plaintiff to show in what manner the plaintiff can amend the pleading and that amendment will change the pleading's legal effect].)

Accordingly, the demurrer is SUSTAINED WITHOUT LEAVE TO AMEND.

IV. Conclusion

The motions to seal are GRANTED. KFEI's demurrer to the fifth cause of action of Cypress's TACC for violation of California's Unfair Competition Law is SUSTAINED WITHOUT LEAVE TO AMEND.

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

- oo0oo -

Calendar Line 3

Case Name: Martinez v. C&W Facility Services, Inc., et al. (Class Action)
Case No.: 23CV428313

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 6, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative class action arising from alleged wage and hour violations. On December 28, 2023, Plaintiff Ana Lyly Gonzalez Martinez ("Plaintiff") filed the operative Complaint against C&W Facility Services, Inc. ("Defendant") and Jake Racker, setting forth causes of action for: (1) failure to pay overtime wages; (2) failure to pay minimum wages; (3) failure to provide meal periods; (4) failure to provide rest periods; (5) waiting time penalties; (6) wage statement violations; (7) failure to timely pay wages; (8) failure to indemnify; (9) violation of Labor Code section 227.3; and (10) unfair competition.

Now before the court is Defendant's Demurrer and Motion to Compel Plaintiff's Surviving Individual Claims into Mediation or Arbitration Pursuant to the Applicable Collective Bargaining Agreement. Plaintiff opposes the Demurrer and Motion to Compel.

II. Evidentiary Objections

A. Plaintiff's Objections

In connection with her opposition, Plaintiff submits objections to the Declaration of Tim Hoppa ("Hoppa Dec.") filed by Defendant.

Plaintiff's objections do not comply with California Rules of Court, rule 3.1354. The rule requires the objecting party to submit its written objections and a proposed order in separate documents. Here, Plaintiff submitted a single document containing her objections, detailed arguments in support, and blanks for the court to indicate its rulings and a place for the court to sign. (See Cal. Rules of Ct., rule 3.1354, subd. (b) [a party must provide written objections that comply with one of the formats described in the rule], and subd. (c) [a party must provide a proposed order that complies with one of the formats described in the rule].) Plaintiff's hybrid document does not comply with the rule.

The court is not required to rule on evidentiary objections that do not comply with the California Rules of Court. (See *Vineyard, supra*, 120 Cal.App.4th 633, 642 [trial court only have duty to rule on evidentiary objections presented in proper format]; see also *Hodjat v. State Farm Mut. Auto. Ins. Co.* (2012) 211 Cal.App.4th 1, 8 [the trial court is not required to rule on objections that do not comply with California Rules of Court, rule 3.1354 and is not required to give objecting party a second chance at filing properly formatted papers].)

Accordingly, the court declines to rule on Plaintiff's evidentiary objections.

B. Defendant's Objections

In connection with its reply, Defendant submits objections to the Declaration of Ana Lyly Gonzalez Martinez ("Martinez Dec.") and to the Declaration of Jasmin Aradi ("Aradi Dec."), filed by Plaintiff in support of her opposition.

Defendant's objections do not comply with California Rules of Court, rule 3.1354. As explained above, the rule requires the objecting party to submit its written objections and a proposed order in separate documents. Here, Defendant submitted a single document containing its objections, detailed arguments in support, and blanks for the court to indicate its rulings and a place for the court to sign. Defendant's hybrid document does not comply with the rule, and the court is not required to rule on evidentiary objections that do not comply with the California Rules of Court.

Accordingly, the court declines to rule on Defendant's evidentiary objections.

III. Motion to Compel Arbitration

Defendant contends that Plaintiff is bound by a collective bargaining agreement ("CBA") between Service Employees International Union, United Service Workers West ("SEIU-USWW") and Defendant, containing a class action waiver and a binding arbitration agreement. (Defendant's Notice of Motion and Motion, p. 1:4-15.)

A. Legal Standard

As general matter, arbitration provisions in CBAs are enforceable with respect to claims made by a union member. (*14 Penn Plaza LLC, v. Pyett* (2009) 556 U.S. 247, 260 (; *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 180.) Whether a CBA creates a duty for

the parties to arbitrate a particular grievance is a legal issue to be decided by the court. (*AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 649.)

In ruling on a motion to compel arbitration, the court must inquire as to (1) whether there is valid agreement to arbitrate, and (2) if so, whether the scope of the agreement covers the claims alleged. (See *Howson v. Dean Witter Reynolds* (2002) 537 U.S. 79, 84; see also *Pinnacle Museum Tower Association* (2012) 55 Cal.4th 223, 236 (*Pinnacle*) ["[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate."].)

"Under both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate. [Citations.] The threshold question requires a response because if such an agreement exists, then the court is statutorily required to order the mater to arbitration." (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13, 19 (*Fleming*), internal quotation marks and citation omitted.)

"In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, court's apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle, supra,* 55 Cal.4th at p. 236.) "The procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement. [Citations.]" (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 840, fn. omitted.)

"As the United States Supreme Court observed two decades ago: 'Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements," [citation] we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.' (*EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 294 [].) 'For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' (*United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 582.)" (*Fleming, supra*, 88 Cal.App.5th at pp. 19-20.)

"The trial court may resolve motions to compel arbitration in summary proceedings, in which the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other

documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination." (*Mendoza v. Trans Valley Transport* (2022) 75 Cal.App.5th 748, 763.) "The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability." (*Pinnacle*, *supra*, 55 Cal.4th at p. 236.)

A moving party can meet their initial burden by showing that an agreement to arbitrate the dispute exists. (*Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047, 1060 (*Espejo*).) "A plain reading of [Code of Civil Procedure section 1281.2] indicates that as a preliminary matter the court is only required to make a finding of the agreement's existence, not an evidentiary determination of its validity." (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 710 (*Molecular*), quoting and citing *Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 219 (*Condee*).)

"The purpose of arbitration is to have a simple, quick and efficient method to resolve controversies. For this reason, there is a strong public policy favoring contractual arbitration." (*Molecular*, *supra*, 186 Cal.App.4th at p. 704.)

B. Existence of Agreement to Arbitrate

Defendant contends Plaintiff is bound by the terms of a collective bargaining agreement ("CBA") between the Service Employees International, United Service Workers West union and Defendant. (Defendant's Demurrer and Motion ("Mot."), p. 1:2-8.) Defendant asserts the CBA includes a class action waiver requiring the dismissal of Plaintiff's class claims and an arbitration agreement requiring that her individual claims be submitted to the CBA's grievance procedures. (*Ibid.*) In opposition, Plaintiff argues that Defendant has failed to establish the existence of an agreement to arbitrate. (Plaintiff's Opposition ("Opp."), 4:7-8.)

1. *Legal Standard*

"When presented with a petition to compel arbitration, the trial court's first task is to determine whether the parties have agreed to arbitrate the dispute. [Citations.]" (*Vasserman v. Henry Mayo Newhall Memorial Hospital* (2017) 8 Cal.App.5th 236, 244 (*Vasserman*).)

"Arbitration provisions in a CBA are enforceable with respect to claims made by a union member."[3] (*Oswald v. Murray Plumbing and Heating Corp.* (2022) 82 Cal.App.5th 938, 942, citations omitted.) This is because "[a] union representative may agree on an employee's behalf as part of the collective bargaining process to require the employee to arbitrate controversies relating to an interpretation or enforcement of a CBA. [Citations.]" (*Cortez v. Doty Bros. Equipment Co.* (2017) 15 Cal.App.5th 1, 11.)

Nevertheless, "[i]n a case involving alleged statutory violations, the presumption of arbitrability that typically applies to contractual disputes arising out of a CBA is not applicable. (*Vasserman, supra,* 8 Cal.App.5th at p. 245, citations omitted.) Instead, for statutory violations, "a requirement to arbitrate statutory claims in a collective bargaining agreement must be 'particularly clear.' " (*Mendez v. Mid-Wilshire Health Care Ctr.* (2013) 220 Cal.App.4th 534, 543 [citing *Wright v. Universal Maritime Service Corp.* (1998) 525 U.S. 70].) Courts "will not infer from a general contractual arbitration provision an intent to waive the statutorily protected right to a judicial forum unless the waiver is explicitly stated." (*Ibid.*, internal quotation marks and citations omitted.)

But an arbitration agreement need not "specifically name the Labor Code provisions in order to bring those statutory labor claims within the scope of the arbitration agreement[.]" (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 686.) "Rather, the only requirement is that the language of the contract clearly evidence an intent by the parties to arbitrate the statutory labor claims." (*Ibid.*)

A motion to compel arbitration involves a shifting burden, summarized by one Court of Appeal as follows:

> The moving party bears the burden of producing prima facie evidence of a written agreement to arbitrate the controversy. 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. Alternatively, the moving party can meet its burden by setting forth the agreement's provisions in the motion. For this step, it is not necessary to follow the normal procedures of document authentication. If the moving party meets its initial prima facie burden and the opposing party does not dispute the existence of the arbitration

[3] One exception is that "a union may not prospectively waive an employee's right to a judicial forum to hear his or her statutory discrimination claims." (*Torrez v. Consol. Freightways Corp.* (1997) 58 Cal.App.4th 1247, 1259.) That is not an issue in this case.

> agreement, then nothing more is required for the moving party to meet its burden of persuasion.
>
> If the moving party meets its initial prima facie burden and the opposing party disputes the agreement, then in the second step, the opposing party bears the burden of producing evidence to challenge the authenticity of the agreement. The opposing party can do this in several ways. For example, the opposing party may testify under oath or declare under penalty of perjury that the party never saw or does not remember seeing the agreement, or that the party never signed or does not remember signing the agreement.
>
> 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.

(*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 165-166 (*Gamboa*), internal punctuation and citations omitted.)

2. *Defendant's Initial Burden*

In order to establish the existence of a CBA covering Plaintiff's claims in this action, Defendant provides a declaration by its Vice President of Employee & Labor Relations, Tim Hoppa. (Declaration of Tim Hoppa [filed June 14, 2024] ("Hoppa Dec."), ¶ 1.) Mr. Hoppa explains that he has held his current position since March of 2024, and prior to that held the position of Director of Labor Relations for Defendant, starting in December 2021. (*Ibid*.)

Mr. Hoppa states that during his time as Vice President of Employee & Labor Relations, he has overseen the employee relations and labor relations functions for Defendant throughout the United States, including California. (Hoppa Dec., ¶ 2.) He is familiar with Defendant's operations as part of his duties. (*Ibid.*) He is also familiar with and has access to the personnel files of Defendant's current and former employees and the CBA that they work under. (*Id.* at ¶ 3.) Defendant maintains such files and records in the ordinary course of business. (*Ibid.*)

Mr. Hoppa states that Plaintiff was a member of and was represented by the Service Employees International, United Service Workers West ("SEIU-USWW") union. (Hoppa Dec., ¶ 4.) He states that SEIU-USWW entered into a CBA with Defendant pursuant to the National Labor Relations Act and attaches a purported copy of the CBA as Exhibit 1 (the "SEIU-USWW CBA") to his declaration. (*Ibid.*)

Defendant explains that the CBA has an entire appendix devoted to the resolution of wage and hour claims. (Mot., pp. 3:15-4:10.) According to Defendant, the SEIU-USWW CBA "clearly and unmistakably covers all claims at issue in this action and waives any right for Plaintiff or any of those she claims to represent to be a part of or bring a class, representative or similar action[.]" (*Id.* at p. 3:15-18.) Specifically, Defendant directs the court to the following language within the SEIU-USWW CBA:

> The Parties to this Agreement believe that it is in the best interests of all involved – employees/members, employer, the Union, and the public interest – to promptly, fairly and efficiently resolve through mediation and arbitration all claims alleging violations of wage and hour and/or meal and rest period laws, including but not limited to claims based on the federal Fair Labor Standards Act, the California Labor Code, or any similar local law, ordinance or policy (collectively "Covered Claims"). As to any Covered Claim, each party waives to the maximum extent permitted by law the right to jury trial and to bench trial, and the right to bring, maintain, or participate in any class, collective, or representative proceeding, including but not limited to under the PAGA or any other applicable similar laws, whether in arbitration or otherwise, to the full extent permitted by applicable law.
>
> The Union will pursue a policy of evaluating such Covered Claims and bringing such claims to arbitration where appropriate. To this end, the parties establish the following system of mediation and arbitration to be the sole and exclusive method of resolving all such Covered Claims, whenever they arise. The Union and the Employer want those covered by this Agreement – and any attorney representing employees – to be aware of this protocol, which makes mediation and arbitration the sole and exclusive method of resolving all individual or group Covered Claims applicable to bargaining unit employees, even where the Union has declined to bring such Covered Claims to arbitration.

(SEIU-USWW CBA, Appendix G-2, § 1 ("Introduction"), at p. 132 [PDF p. 137 of 152].) The SEIU-USWW is signed at various points by representatives for the "Employers" and SEIU-USWW. (See, e.g., *id.* at p. 137 [PDF p. 142 of 152].) The final page of the document, Appendix I, contains a "List of Signatory Employers," including "C&W Services" at number four. (*Id.* at p. 146 [PDF p. 151 of 152].)

By producing a copy of what it asserts to be the SEIU-USWW CBA, and by producing a declaration signed under the penalty perjury by its Vice President of Employee & Labor Relations, stating that Plaintiff was a member of the SEIU-USWW union and worked under the CBA during the entirety of her employment, Defendant has met its initial burden by submitting prima facie evidence of a written agreement to arbitrate the claims asserted in this action.

3. *Plaintiff's Burden*

As explained in *Gamboa*, because Defendant has met its initial burden, it is Plaintiff's burden, if she disputes the agreement, to produce evidence to challenge the authenticity of the agreement. (*Gamboa, supra*, 72 Cal.App.5th at p. 165.) To this end, Plaintiff provides her own declaration in which she states that does not read or understand English. (Declaration of Ana Lyly Gonzales Martinez ("Martinez Dec."), ¶ 3.) Plaintiff further states that she was never asked to travel to any other state to complete her work nor is she aware of any other employee being required to do so. (*Id.* at ¶ 4.) Plaintiff states that she was never presented with a copy of any collective bargaining agreement while working at C&W [Defendant]. (*Id.* at ¶ 5.)

Plaintiff further states she did not know what an arbitration agreement is until it was explained to her by her attorneys, after her employment with Defendant. (Martinez Dec., ¶ 6.) She states she did not know that an arbitration agreement would require her to waive any rights, and that she does not recognize the agreements in question here. (*Ibid.*) Plaintiff states that if she had a choice to be employed and maintain her rights to pursue a claim or dispute against Defendant in court and with the aid of a jury or to bring a class action, she would have exercised her option to do so. (*Id.* at ¶ 7.)

In her opposition, Plaintiff also sets forth several arguments challenging the authenticity of the SEIU-USWW CBA document produced by Defendant. First, Plaintiff argues that the CBA must be properly authenticated before its contents may be received in evidence and that Defendant has failed to do so. (Opp., p. 1:13-18.) However, "[f]or purposes of a petition to compel arbitration, it is not necessary to follow the normal procedures of document authentication." (*Condee, supra*, 88 Cal.App.4th at p. 218; see also *Gamboa, supra*, 72 Cal.App.5th at p. 165 [a party moving to compel arbitration need not follow the normal procedures of document authentication to meet its initial prima facie burden].) "[A]s a preliminary matter the court is only required to make a finding of the agreement existence, not an evidentiary determination of its validity." (*Molecular, supra*, 186 Cal.App.4th at p. 710, quoting *Condee, supra*, 88 Cal.App.4th at p. 219.)

Plaintiff also argues that the CBA is missing its cover page, and that Defendant is not listed among the signatories. (Opp., p. 1:22-27, observing that Appendix I indicates "C&W

Services" rather than "C&W Facility Services, Inc.") Plaintiff further contends that Defendant fails to present any evidence to establish the applicability of the FAA, and that the class action waiver is unenforceable. (*Id.* at pp. 2:17-3:10.) Plaintiff also argues that Defendant has failed to prove the applicability or relevance of the purported CBA to Plaintiff's employment. (*Id.* at p. 6:1-15.)

The evidence and argument offered by Plaintiff in opposition are not sufficient to meet her burden of challenging the authenticity or applicability of SEIU-USWW CBA. As Defendant observes in it reply, Plaintiff does not dispute that she worked for Defendant as a member of the SEIU-USWW union and under the CBA that Defendant presented in its moving papers. (See Reply, pp. 2-6.) Thus, Plaintiff's declaration does not create a factual dispute as to whether she was a member of the SEIU-USWW union or whether she is subject to the provisions of the CBA in question here. If this were a situation involving an arbitration agreement purportedly signed by Plaintiff herself, Plaintiff's inability to speak or read English would a present a possible issue regarding procedural unconscionability, depending on the facts. But here, Defendant's evidence indicates that the SEIU-USWW union signed the CBA on behalf of its members. In sum, Plaintiff's evidence and argument do not create a substantive dispute as to the existence or validity of the SEIU-USWW CBA presented by Defendant.

C. Scope of the SEIU-USWW CBA

Defendant argues that the CBA clearly and unmistakably provides for individual arbitration of the claims at issue. (Mot., p. 7:4-5.) Defendant emphasizes that the CBA specifically mentions claims wage and hour and/or meal and rest period violations, including those brought under the California Labor Code, as among those subject to binding bilateral mediation and arbitration. (*Id*. at p. 7:17-23.) Defendant further argues that Plaintiff's claims for overtime, meal period and rest break premiums, unpaid vacation time, bimonthly paydays, and sick leave pay are preempted under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185.

In opposition, Plaintiff contends that the CBA cannot be invoked here because her claims are all statutory and that any agreement to forgo her right to bring those claims in court must be explicitly stated, clear, and unmistakable. (Opp., pp. 7:1-8:12.) Plaintiff directs the

applicable authorities as to the level a clarity required to waive statutory claims. (*Ibid.*) For example, "a CBA may require arbitration of a statutory if, in a waiver that is 'explicitly stated,' it is 'clear and unmistakable' that the parties intended to waive a judicial forum for statutory claims." (*Vasserman, supra,* 8 Cal.App.5th at p. 245.)

Plaintiff relies upon *Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1467 (*Choate*) for the proposition that "[t]o be clear and unmistakable, a waiver must do more than speak in broad general language. It must be specific and mention either the statutory protection being waived or, at a minimum, the statute itself." In *Choate,* the appellate court addressed whether the CBA in question waived the plaintiffs' right to vested vacation time under Labor Code section 227.3. (*Id.* at p. 1465.) The employer in *Choate* argued that implied waivers suffice for claims under Labor Code section 227.3. (*Id.* at p. 1466.) The appellate court disagreed and found the waivers insufficiently clear as to the section 227.3 claim, noting that the agreements in question "neither mention pro rata vacation pay nor cite section 227.3." (*Id.* at p. 1467.)

Here, Plaintiff argues that "Defendant has failed to point to any provision in the purported CBA that might constitute a clear and unmistakable waiver of the right to bring any of the specific statutory rights at issue here[.]" (Opp., p. 10:3-4.) But Defendant does cite the language in the SEIU-USWW CBA defining "Covered Claims" as "all claims alleging violations of wage and hour and/or meal and rest period laws, including but not limited to claims based on the federal Fair Labor Standards Act, the California Labor Code, or any similar local law, ordinance or policy (collectively 'Covered Claims')." (Mot., pp. 3:15-4:10, quoting SEIU-USWW CBA at p. 132 [PDF p. 137 of 152].)

Plaintiff does not explain how the language of the SEIU-USWW CBA fails to waive her statutory claims clearly and unmistakably. For example, Plaintiff does not identify any particular statutory claim for which there is insufficiently clear waiver, as the plaintiffs in *Choate* did. Like the plaintiffs in *Choate,* Plaintiff has alleged a vacation pay claim under Labor Code section 227.3. However, unlike the agreements in *Choate,* the SEIU-USWW CBA here *does* specifically mention pro-rated vacation benefits that would otherwise be addressed by Labor Code section 227.3 in the absence of the CBA. (See SEIU-USWW CBA, Part Three,

Section 3 ("Vacation"), ¶ 3.D at p. 106 (PDF p. 111 of 152) ["Prorated Vacation. After six (6) months of employment, any employee whose employment terminates as well as any employee who is laid off for lack of work, shall receive pro-rated vacation benefits on the basis of calendar months worked."].)

In reply to Plaintiff's assertion that the FAA does not apply here, Defendant persuasively argues that the FAA does apply because it is a nationwide company, and even if it did not, the CBA would nevertheless be enforceable under California law. (Reply, pp. 9:4-10:1.) Plaintiff relies on *Gentry v. Superior Court* (2007) 42 Cal.4th 443 on this point. (Opp., p. 2:24-26.) But as Defendant points out, the California Supreme Court has acknowledged that *Gentry's* holding regarding class arbitration waivers [has] been abrogated by United States Supreme Court precedent." (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 129, fn. 10.) In her opposition, Plaintiff does not substantively address Defendant's arguments regarding preemption under Section 301 of the LMRA, impliedly conceded the point. (See *Glendale Redevelopment Agency v. Parks* (1993) 18 Cal.App.4th 1409, 1424 [issue it impliedly conceded by failing address it]; see also *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566 [party concedes an issue by failing to argue the contrary].)

Lastly, Plaintiff argues CBA's class action waiver is unenforceable because it requires employees to waive representative PAGA claims. (Opp., p. 10:7-18.) Nevertheless, Plaintiff's Complaint does not allege a PAGA claim, and even if it did, the United States Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 642, made clear that unenforceable PAGA waivers may be severed from arbitration agreements.

For the foregoing reasons, the court finds that Defendant has established that Plaintiff is bound by the SEIU-USWW CBA. Therefore, Defendant's motion to dismiss the Complaint's class claims and compel the remaining individual claims to the CBA's grievance procedures is GRANTED.

IV. Demurrer

A. Legal Standard

A demurrer may be utilized by the party against whom a complaint has been filed to object to the legal sufficiency of the pleading as a whole or to any cause of action stated

therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).) As relevant here, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one more of the following grounds: … (c) The pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).)

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

B. Discussion

As to Defendant's demurrer to the Complaint on the basis of the SEIU-USWW CBA, the defects identified by Defendant do not appear on the face of the Complaint, and Defendant has made no request for judicial notice. (See *Blank*, *supra*, 39 Cal.3d at p. 318.)

Accordingly, Defendant's demurrer is OVERRULED, and the action shall be STAYED pending the resolution of the union grievances process described in the SEIU-USWW CBA.

V. Conclusion

Defendant's motion to dismiss the Complaint's class claims and compel the remaining individual claims to the CBA's grievance procedures is GRANTED.

Defendant's demurrer is OVERRULED, and the action shall be STAYED pending the resolution of the union grievances process described in the SEIU-USWW CBA.

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

- oo0oo -

Calendar Line 4

Case Name: Corinthian International Wage and Hour Cases (JCCP4886)
Case No.: 16CV292208

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 6, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

These are two coordinated cases arising out of alleged Labor Code violations. On June 11, 2015, plaintiff Adrian Turner ("Turner") filed a putative class action against her former employer, defendant Corinthian International Parking Services, Inc. ("Defendant"), alleging various Labor Code violations in 2015 ("*Turner* Action").

On January 21, 2016, plaintiff Mykale Rocquemore ("Rocquemore") filed a representative action against Defendant asserting a single claim for civil penalties under the Private Attorneys General Act of 2004 ("PAGA") ("*Rocquemore* Action"). The PAGA claim is predicated on allegations that Defendant failed to compensate Rocquemore and the other aggrieved employees for all hours worked, missed meal periods and rest breaks, and necessary business expenses.

On October 28, 2016, the court granted Defendant's petition for coordination of the *Turner* Action and the *Rocquemore* Action.

On July 1, 2019, Turner filed the operative Second Amended Class Action Complaint for Damages ("SAC"), which sets forth the following causes of action: (1) Violation of California Labor Code sections 510 and 1198 (Unpaid Overtime); (2) Violation of California Labor Code sections 226.7 and 512, subdivision (a) (Unpaid Meal Period Premiums); (3) Violation of California Labor Code section 226.7 (Unpaid Rest Period Premiums); (4) Violation of California Labor Code sections 1194, 1197, and 1197.1 (Unpaid Minimum Wages); (5) Violation of California Labor Code sections 201 and 202 (Final Wages Not Timely Paid; (6) Violation of California Labor Code section 2802 (Unreimbursed Business Expenses); and (7) Violation of California Business & Professions Code section 17200, et seq. (Unfair Competition/Unfair Business Practices).

The parties reached a settlement. Turner and Rocquemore (collectively, "Plaintiffs") moved for preliminary approval the settlement. On November 14, 2023, the court issued an order granting preliminary approval of the settlement. Now before the court is Plaintiffs' motion for final approval of the settlement. The motion is unopposed.

In its May 15, 2024 minute order for the initial hearing on the motion, the court expressed concern regarding the adequacy of the class notice. Specifically, the court noted a discrepancy between the estimated class size of 3,825 at the time of preliminary approval, and the settlement administrator's representation that the class list included 3,374 class members and the class notice was mailed to 3,372 class members. The court continued the motion to July 3, 2024 and asked Plaintiff to provide a supplemental declaration explaining these discrepancies.

On June 18, 2024, the court issued an order on the Parties' stipulation to continue the hearing to November 6, 2024. On July 17, 2024, the court issued an order on the Parties' stipulation to mail additional and corrective class notices.

On October 15, 2024, Plaintiffs' counsel submitted supplemental declarations in support of the pending motion for final approval of the settlement. As discussed below, the court finds that the supplemental declarations adequately address the court's concerns, and therefore, the motion for final approval of the settlement agreement is GRANTED.

II. Legal Standard for Settlement Agreements

A. Class Action

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

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

> the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

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

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.)

> The 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, citation omitted.)

B. PAGA

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

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76-77.) It must make this assessment "in view of PAGA's purposes

to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson v. U.S. Aviation Servs. Corp.* (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-cv-02198-EMC) 2016 WL 5907869, 2016 U.S. Dist. LEXIS 140759, at *20-24.)

III. Terms and Administration of Settlement

The case has been settled on behalf of the following class:

[A]ll current and former hourly-paid or non-exempt individuals who were employed by Defendant within the State of in California at any time during the Class Period.

The Class Period is defined as the period of time from June 11, 2011 to the date of preliminary approval of the settlement.

As discussed in connection with preliminary approval, Defendants will pay a gross, non-reversionary amount of $1,050,000. The gross settlement amount includes attorney fees of $350,000 (1/3 of the gross settlement amount), actual litigation costs, a total service award of $30,000 ($15,000 for each class representative), a PAGA Payment of $50,000 (75 percent of which is to be paid to the LWDA and the remaining 25 percent is to be distributed to PAGA group members), and settlement administration costs not to exceed $100,000.

The net settlement amount will be distributed to the participating class members on a pro rata basis based on the number of workweeks worked during the Class Period. Participating class members have 180 days from the date of mailing to cash their checks; if the total amount of uncashed checks equals or exceeds $100,000, the funds will be redistributed using the same

formula for the initial distribution; if the total amount of uncashed checks is less than $100,000, the funds will be paid to California Rural Legal Assistance.

In exchange for the settlement, class members agree to release Defendant, and related entities and persons, from all claims that were or could have been asserted based on the facts alleged in the SAC by Plaintiffs. Additionally, class members employed during the PAGA Period (defined as the period between January 21, 2015 through the date of preliminary approval of the settlement) agree to release Defendant, and related entities and persons, from all claims arising under PAGA during the PAGA Period that were or could have been asserted based on the facts alleged in the SAC by Plaintiffs. Plaintiffs further agree to a general release.

As discussed above, in its May 15, 2024 minute order in reference to the initial hearing on this motion, the court identified discrepancies regarding the number of class members who were mailed a class notice. The court continued the hearing and asked Plaintiffs to submit additional information. On July 1, 2024, Plaintiffs submitted the Declaration of Sherri Carnesecca, Defendant's Chief Financial Officer, providing information regarding the changes in the class (the "Carnesecca Dec."). On July 17, 2024, the court issued an order on the Parties' stipulation providing for the mailing of a Corrective Class Notice to the class data errors and providing for the payment of additional settlement administration expenses from the $100,000 settlement administration allocation in the Parties' settlement agreement (the "July 17, 2024 Corrective Order").

On October 15, 2024, Plaintiffs filed the Supplemental Declaration of Bryn Bridley on behalf of the settlement administrator, Atticus Administration, LLC (the "Supp. Bridley Dec.), as well as the Declaration of Brittany Shaw in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement (the "Shaw Dec.") In her declaration, Ms. Shaw provides summary of the events and data errors that ultimately led to the discovery that several hundred individuals were omitted from the original class data sent to the settlement administrator. (Shaw Dec., ¶ 3; see also Carnesecca Dec., ¶¶ 5-7; see also Supp. Bridley Dec., ¶¶ 4-5.) After the errors were discovered, the Parties agreed upon a plan to address the issues, as follows: (1) process corrected data; (2) mail a Notice of Settlement to the previously omitted class

members; (3) mail a one-page notice to the originally included class members; (4) reactivate the settlement website; and (5) process elections not to participate. (Shaw Dec., ¶ 4.)

Mr. Bridley generally states that the additional notice procedures stipulated to by the Parties and ordered by the court were completed. (Supp. Bridley Dec., ¶¶ 6, 7, 11, 13, 14.) On July 22, 2024, Atticus received the July 17, 2024 Corrective Order and updated class data that included 3,765 class member records. (*Id.* at ¶ 6.) 3,277 class member records were included in both versions of the class list; 492 new class member records were included in the updated class data (including the two individuals Atticus inadvertently omitted previously); and 97 class member records from the original class data were not included in the updated class data. (*Ibid.*) Mr. Bridley explains that this last group of individuals are not class members because they were salaried employees during the Class Period or never performed any work during the Class Period. (*Ibid.*)

On August 6, 2024, Atticus mailed the Class Notice to Omitted Class Members by U.S. Mail to the 493 newly identified class members. (Supp. Bridley Dec., ¶ 7.) Ultimately, six notices from this group were determined to be undeliverable. (*Ibid.*) Also on August 6, 2024, Atticus sent a "Correction to December 2023, Notice of Settlement" to the 97 individuals who received the original notice but who determined not to be class members. (*Id.* at ¶ 9.) Ultimately, six notices from this group were determined to be undeliverable. (*Id.* at ¶ 10.)

On August 6, 2024, Atticus also sent an alternative version of the Corrective Notice to the 3,277 class members who received the original class notice and remained on the updated class list. (Supp. Bridley Dec., ¶ 11.) Ultimately, 94 notices from this group were determined to be undeliverable. (*Id.* at ¶ 12.) On or about August 15, 2024, Atticus discovered that the updated class data contained different addresses for 1,149 class members. (*Id.* at ¶ 13.) Therefore, on August 19, 2024, Atticus sent a second Corrective Notice to these 1,149 individuals. (*Id.* at ¶ 14.) Of this group, 78 notices were ultimately determined to be undeliverable. (*Ibid.*)

The settlement administrator did not receive any written objections. (Supp. Bridley Dec., ¶ 15.) Originally, Atticus received one election not to participate. (*Ibid.*) Following the

additional notice process, Atticus received two additional elections not to participate, for a total of three. (*Ibid.*)

The additional notice process has now been completed. The court has reviewed the supplemental declarations provided by Plaintiffs since the May 15, 2024 hearing on this motion. The court finds that Plaintiffs have sufficiently addressed the court's concerns regarding the notice process in this settlement.

At preliminary approval, the court found the settlement to be fair and reasonable. Given that there are no objections, it finds no reason to deviate from that finding now. Accordingly, the court finds that the settlement is fair and reasonable for purposes of final approval.

IV. Incentive Awards, Attorney Fees and Costs

Plaintiffs request a total service award of $30,000 ($15,000 for each class representative). Plaintiffs submitted declarations in support of the request, detailing their participation in the action. Turner declares that he spent approximately 80 hours in connection with this lawsuit, including discussing the case with class counsel, gathering information and documents, providing information and documents to class counsel, reviewing pleadings, participating in a full-day deposition, responding to discovery requests, assisting class counsel with preparation for mediation, and reviewing settlement documents. (Declaration of Plaintiff Adrian Turner in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, ¶¶ 6, 9-14.)

Rocquemore declares that she spent approximately 70-80 hours in connection with this lawsuit, including discussing the case with class counsel, gathering information and documents, providing information and documents to class counsel, reviewing pleadings, participating in a full-day deposition, responding to discovery requests, assisting class counsel with preparation for mediation, and reviewing settlement documents. (Declaration of Plaintiff Mykale Rocquemore in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, ¶¶ 6, 9-14.)

Plaintiffs undertook risk by putting their names on the case because it might impact their future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014

U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].)

However, the requested service awards of $15,000 to each class representative are excessive. The average payment to each class member is approximately $154.21. Consequently, each sought-after service award would amount to more than 64 times the estimated average payout. Additionally, the amount requested is higher than the court typically awards for the amount of Plaintiffs time spent in connection with this action (i.e., approximately 80 hours of work). In light of the foregoing, the court finds that a total service award in the amount of $20,000 ($10,000 for each class representative) is reasonable and it approves the award in that lesser amount.

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 seeks attorney fees of $350,000 (1/3 of the gross settlement fund). Plaintiffs' counsel submits evidence demonstrating a total combined lodestar of $1,343,931, based on 1,639.7 hours of attorney and staff time. (Declaration of Carolyn H. Cottrell in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement ("Cottrell Dec."), , ¶¶ 95-98.) This results in a negative multiplier. The court finds the attorney fees are reasonable as a percentage of the common fund and they are approved.

Plaintiffs' counsel requests litigation costs in the amount of $112,256.78. Plaintiff's counsel provides evidence of incurred costs in that amount and the costs are approved. (Cottrell Dec., ¶¶ 104-108.) As Mr. Bridley explains in his supplemental declaration, the additional notice process increased the settlement administration costs beyond the initial estimate. (Supp. Bridley Dec., ¶ 19.) The revised settlement administration costs are approved in the amount of $46,923. (*Ibid.*)

V. Conclusion

The motion for final approval of the settlement agreement is GRANTED.

The court sets a compliance hearing for June 18, 2025 at 2:30 p.m. in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall

submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted to the *cy pres* recipient; the status of any unresolved issues; and any other matters appropriate to bring to the court's attention.

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

- oo0oo -

Calendar Line 5

Case Name: Gatchalian v. CKS Prime Investments, LLC, et al. (Class Action)
Case No.: 21CV391898

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 6, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative class action arising from alleged unlawful debt collection practices. Plaintiff Harriet Gatchalian ("Plaintiff") initiated this by filing a Class Action Complaint on December 14, 2021.

On July 23, 2024, Plaintiff the operative Second Amended Class Action Complaint ("SAC") against Defendants CKS Prime Investments, LLC ("CKS"), Webcollex, LLC ("Webcollex"), Cawley & Bergan, LLC ("C&B"), National Recovery Associates, Inc. ("NRA"), and Balbec Capital, LP ("Balbec") (collectively, "Defendants"). The SAC sets forth the following causes of action: (1) violation of Business and Professions Code section 17200 (against CKS, Balbec, and Webcollex); (2) violation of the California Fair Debt Buying Practices Act (against CKS, Balbec, and Webcollex); and (3) violation of the Rosenthal Fair Debt Collection Practices Act ("RFDCPA") (against all Defendants).

Now before the court is Defendant NRA's demurrer to the SAC. Plaintiff opposes.

II. Legal Standard

A demurrer may be utilized by the party against whom a complaint has been filed to object to the legal sufficiency of the pleading as a whole or to any cause of action stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).) As relevant here, "[t]he party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one more of the following grounds: … (e) The pleading does not state facts sufficient to constitute a cause of action; (f) The pleading is uncertain. As used in this subdivision, 'uncertain' includes ambiguous and unintelligible." (Code Civ. Proc., § 430.10, subds. (e) and (f).)

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

III. Discussion

Defendant NRA demurs to the SAC's third cause of action on the ground that pleading is uncertain and ambiguous as to NRA under Code of Civil Procedure section 430.10, subdivision (f), and on the grounds that the pleading does not state facts sufficient to constitute a cause of action under Code of Civil Procedure section 430.10, subdivision (3). (NRA's Notice of Demurrer and Demurrer ("Demurrer"), p. 2:8-11.)

A. Uncertainty

Uncertainty is a disfavored ground for demurrer and is typically sustained only where the pleading is so unintelligible and uncertain the responding party cannot reasonably respond or recognize the claims against it. (*Khoury v. Maly's of Cal., Inc*. (1993) 14 Cal.App.4th 612, 616 ["A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures"].) "[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend. [Citations.]" (*A.J. Fistes Corp. v. GDL Best Contractors, Inc.* (2019) 38 Cal.App.5th 677, 695.)

Here, NRA contends that "the SAC remains hopelessly vague and ambiguous as to the existence of any valid claim by Plaintiff." (Demurrer, p. 5:4-5.) NRA further argues that the "[t]here are no allegations that NRA did anything to constitute a violation of the RFDCPA."

(*Id.* at p. 5:11-12.) NRA does not further develop its argument concerning the demurrer on the ground of uncertainty, and its arguments throughout its demurrer are directed to the sufficiency of facts alleged. Furthermore, the court does not find the SAC's allegations against NRA to be uncertain and ambiguous that it cannot reasonably respond or recognize the claims against it, as evidenced by NRA's discussion of its possible liability for the alleged conduct of C&B. (Demurrer, p. 6:14-15.)

Accordingly, the demurrer to the third cause of action on the ground of uncertainty is OVERRULED.

B. Sufficiency of Facts

NRA contends that the SAC does not allege that NRA itself communicated with Plaintiff or did anything to constitute a violation of the RFDCPA. (Demurrer, p. 5:10-4.) NRA further argues that there are no allegations that could support a claim of liability under a single-enterprise theory, an alter-ego theory, or on a joint venture theory. (*Id.* at pp. 5:15-7:23.) In opposition, Plaintiff argues that NRA's demurrer does not address the allegation that Defendant C&B is the agent of NRA, making NRA vicariously liable for the acts of C&B. (Opposition, pp. 5:6-11; 7:2-8:9.)

The sole cause of action against NRA is the third cause of action for violation of the RFDCPA, Civil Code section 1788, *et seq.*[4]

> The Rosenthal Act was enacted "to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts." (§ 1788.1, subd. (b).) The Rosenthal Act is a remedial statute that *should be interpreted broadly* in order to effectuate its purpose. It was enacted in 1977, the same that its federal counterpart, the FDCPA [Fair Debt Collection Practices Act] was enacted. In addition to its other requirements and prohibitions, the Rosenthal Act generally requires debt collectors to comply with the provisions of the FDCPA. (§ 1788.17.)
>
> The Rosenthal Act defines a "debt collector" as "any person who in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in *debt collection*." (§ 1788.2, subd. (c), italics added.) The Rosenthal Act defines the term "debt collection" as follows: "any act or practices in connection with the collection of consumer debts." (§ 1788.2, subd. (b).)
>
> The Rosenthal Act defines "consumer debt" and "consumer credit" as "money, property, or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction." (§ 1788.2,

[4] Further undesignated statutory references are to the California Civil Code.

> subdivision (f).) The Rosenthal Act further defines the phrase "consumer credit transaction" as "transaction between a natural person and another person in which property, services, or money is acquired on credit by that natural person from such other person primarily for personal, family, or household purposes." (§ 1788.2, subd. (e).)
>
> Thus, a debt collector is a person who regularly engages in the act or practice of collecting, property or their equivalent that is due or owing by a natural person as a result of a transaction between that person and another person, in which the natural person acquired property, services, or money on credit, primarily for personal, family, or household purposes.

(*Davidson v. Seterus, Inc.* (2018) 21 Cal.App.5th 283, 295-296 (*Davidson*), internal punctuation and non-statutory citations omitted.)

The SAC alleges that NRA is a corporation "engaged in the business of collecting defaulted consumer debts" in California. (SAC, ¶ 10.) It alleges that "[t]he principal purpose of NRA's business is the collection of default consumer debts (through its subsidiary C&B) using the mails, telephone, and internet, and NRA regularly attempts to collect defaulted consumer debts (through its subsidiary C&B) alleged to be due another." (*Ibid*.) The SAC further alleges that NRA is a "debt collector" as that term is defined by the RFDCPA, California Civil Code section 1788.2, subdivision (c). (*Id.* at ¶¶ 10, 98.) According to the SAC, NRA is the parent of C&B, and the two entities share office space and employees, and NRA owns all equipment used by C&B. (*Id.* at ¶ 10.) "NRA is not a licensed debt collector in any state, therefore, NRA conducts all of its debt collective activities through its subsidiary C&B." (*Ibid*.)

The SAC generally alleges that "each of the Defendant was the agent, servant, employee, alter ego, and/or joint venturer of their Co-Defendants, … and … each Defendant was acting in the full course and scope of said agency, service, employment, and/or joint venture." (SAC, ¶ 13.) In relation to the third cause of action, the SAC alleges that "Defendants made and used false, deceptive, and misleading representations in an attempt to collect the debt, in violation of California Civil Code § 1788.17." (SAC, ¶ 103.) The SAC further alleges that C&B sent collection letters to Plaintiff on December 14, 2020 and on March 26, 2021, falsely representing to Plaintiff that CKS owned the alleged debt. (SAC, ¶¶ 29, 34.)

The SAC's allegations as outlined above are sufficient to withstand Defendant NRA's demurrer. By alleging that NRA is a debt collector, is the principal of its agent C&B, and that C&B sent misleading representations to Plaintiff in an attempt to collect a debt, the SAC

adequately alleges the elements of the RFDCPA cause of action against NRA. Furthermore, Plaintiff presents persuasive authority supporting its position that principal debt collectors may be held liable for the acts of their debt collector agents. (See Opposition, pp. 6:11-7:1.)

NRA's arguments to the contrary generally avoid discussion of the RFDCPA itself and instead focus upon particular theories that NRA contends are unsupported by the SAC's allegations, such as a single-enterprise theory, an alter ego theory, and a joint venture theory. (Demurrer, pp. 5:8-7:23.) However, a pleading that states essential facts will withstand demurrer regardless of imperfections of form or mistaken theory. (*Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 291-292 ["[A] general demurrer will be overruled if the complaint contains allegations of every fact essential to the statement of a cause of action, regardless of mistaken theory or imperfections of form that make it subject to special demurrer. [Citation.]"].) "To withstand demurrer, a complaint must allege ultimate facts, not evidentiary facts or conclusions of law." (*Id.* at p. 292, internal punctuation and citations omitted.)

Notably, nearly all of the cases relied upon by NRA deal with procedurally issues *other than* demurrer. For example, NRA relies upon *Las Palmas Associates v. Las Palmas Cetner Associates* (1991) 235 Cal.App.3d 1220, in which the appellants sought review of a jury verdict, and upon *Orosco v. Sun Diamond Corp.* (1997) 51 Cal.App.4th 1659, in which the appellant challenged an adverse summary judgment ruling. (See Demurrer, p. 5:17-27.) NRA does cite one decision dealing with demurrer, *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 74 (*Stansfield*). (Demurrer, p. 7:4-7.) But *Stansfield* is readily distinguishable because it deals with the heightened pleadings requirements for a cause of action for fraud. (*Stansfield, supra*, 220 Cal.App.3d at p. 73 [observing the policy of liberal construction of the pleadings is not normally invoked with respect to the allegations of fraud].)

Here, the third cause of action is not for fraud but for violation of the RFDCPA, which California courts have emphasized "*should be interpreted broadly* in order to effectuate its remedial purpose." (*Davidson, supra*, 21 Cal.App.5th at p. 295, quoting *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 340.)

For the reasons discussed above, the court finds that the SAC adequately alleges the third cause of action against NRA. Accordingly, the demurrer on the grounds of insufficient facts is OVERRULED.

IV. Conclusion

Defendant NRA's demurrer to the SAC's third cause of action is OVERRULED in its entirety.

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

- 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 -