SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

Thomas Duarte, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2170

To contest a tentative ruling, you must:

1. Call (408) 808-6856 before 4:00 P.M. and leave a voicemail message containing the information described below, and
2. Notify the other side before 4:00 P.M. that you will appear at the hearing to content the tentative ruling.

In the voicemail message, please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested.

PLEASE NOTE:

- If you do not notify the court or opposing side as required by California Rule of Court, rule 3.1308(a)(1) and Civil Local Rule 8(E), the Court will not hear argument and the tentative ruling will be adopted even if all parties appear at the hearing.
- Sending an email to the department or to the Complex Clerk will no longer suffice to constitute notice to the Court of the need for a hearing regarding a tentative ruling.

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.
- 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.

DATE: OCTOBER 31, 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	19CV349343	Tielemans v. Aegion Energy Services, Inc., et al. (Class Action)	See Line 1 for tentative ruling.
LINE 2	24CV433319	Apple Inc. v. Aude	See Line 2 for tentative ruling.
LINE 3	23CV412578	Regalado, et al. v. Kellogg Company (Class Action/PAGA)	See Line 3 for tentative ruling.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

Thomas Duarte, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2170

To contest a tentative ruling, you must:

1. Call (408) 808-6856 before 4:00 P.M. and leave a voicemail message containing the information described below, and
2. Notify the other side before 4:00 P.M. that you will appear at the hearing to content the tentative ruling.

In the voicemail message, please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested.

PLEASE NOTE:

- If you do not notify the court or opposing side as required by California Rule of Court, rule 3.1308(a)(1) and Civil Local Rule 8(E), the Court will not hear argument and the tentative ruling will be adopted even if all parties appear at the hearing.
- Sending an email to the department or to the Complex Clerk will no longer suffice to constitute notice to the Court of the need for a hearing regarding a tentative ruling.

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.
- 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.

LINE 4	20CV372622	Temujin Labs Inc. v. Abittan, et al.	On the Court's own motion, the hearing on motions to compel is RESCHEDULED for November 14, 2024 at 1:30 p.m.
LINE 5	21CV375422	Temujin Labs Inc. v. Fu	
LINE 6	20CV372622	Temujin Labs Inc. v. Abittan, et al.	Jingjing Ye's motion to be relieved as counsel for Discreet Labs Ltd. is GRANTED. The Court will sign the proposed order.

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 7, Honorable Charles F. Adams Presiding

Thomas Duarte, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2170

To contest a tentative ruling, you must:

1. Call (408) 808-6856 before 4:00 P.M. and leave a voicemail message containing the information described below, and
2. Notify the other side before 4:00 P.M. that you will appear at the hearing to content the tentative ruling.

In the voicemail message, please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested.

PLEASE NOTE:

- If you do not notify the court or opposing side as required by California Rule of Court, rule 3.1308(a)(1) and Civil Local Rule 8(E), the Court will not hear argument and the tentative ruling will be adopted even if all parties appear at the hearing.
- Sending an email to the department or to the Complex Clerk will no longer suffice to constitute notice to the Court of the need for a hearing regarding a tentative ruling.

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.
- 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.

LINE 7	20CV372622	Temujin Labs Inc. v. Abittan, et al.	On the Court's own motion, the hearing on SAC Attorneys, LLP's motions to be relieved as counsel is RESCHEDULED for November 14, 2024 at 1:30 p.m.
LINE 8	21CV375422	Temujin Labs Inc. v. Fu	
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Otto Tielemans v. Aegion Energy Services, Inc., et al.*
Case No.: 19CV349343

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff Otto Tielemans alleges that Defendants Aegion Energy Services, Inc. and Schultz Industrial Services, Inc. and Schultz Mechanical Contractors, Inc. (collectively, "Defendants"), committed various wage and hour violations.

Before the Court is Defendants' Motion for Summary Judgment, or Alternatively Summary Adjudication, Determining that Plaintiff Lacks Standing to Pursue Representative PAGA Claims, which is opposed by Plaintiff.[1] As discussed below, the Court GRANTS Defendants' motion.

I. BACKGROUND

A. Factual

According to the allegations of the operative First Amended Complaint ("FAC"), Plaintiff worked for Defendants as a non-exempt, hourly employee from approximately August 11, 2016 through July 2, 2018. (FAC, ¶ 24.) When Plaintiff applied for employment, Defendants performed a background check on him. (*Id.* at ¶ 25.) But Defendants did not provide legally compliant disclosure and authorization forms to Plaintiff and the putative class. (*Id.* at ¶ 26.) In addition, Plaintiff and the putative class were not paid for their travel time to and from their jobsite to "the yard," a predetermined location where they were required to meet and wait for the foreman and/or supervisor. (*Id.* at ¶¶ 27-36.) Moreover, Plaintiff and other class members were not allowed to take off duty meal breaks due to their rigorous work schedules. (*Id.* at ¶¶ 40-51.) They were also denied proper rest periods. (*Id.* at ¶¶ 52-54.) Furthermore, Plaintiff and the putative class were not reimbursed for business expenses incurred in purchasing their own steel-toe boots, fire-retardant pants, safety goggles, gloves, and other tools. (*Id.* at ¶¶ 55-57.) Due to these violations, Defendants failed to provide employees with compliant itemized wage statements and violated the Unfair Competition Law ("UCL"). (*Id.* at ¶¶ 58-62.) The violations also provide the basis for Plaintiff's representative action for civil penalties under PAGA. (*Id.* at ¶¶ 184-189.)

B. Procedural

Based on the foregoing allegations, Plaintiff initiated this action in June 2019 and filed the FAC on August 23, 2019, asserting the following causes of action: (1) failure to provide proper disclosures under the Fair Credit Reporting Act ("FCRA"); (2) failure to provide required meal periods in violation of Labor Code sections 204, 218.6, 223, 226.7, 512, and 1198; (3) failure to provide required rest periods in violation of Labor Code sections 204, 223, 226.7, and 1198; (4) failure to pay hourly and overtime wages in violation of Labor Code sections 204, 218.6, 223, 510, 1194, 1197, and 1198; (5) failure to reimburse in violation of Labor Code section 2802; (6) failure to provide accurate itemized wage statements in violation of Labor Code section 226; (7) failure to pay wages when due in violation of Labor Code

[1] Plaintiff's request for judicial notice is GRANTED. (Evid. Code, § 452, subd. (d).)

sections 201-203; (8) unfair competition in violation of the UCL; and (9) violation of PAGA, Labor Code section 2698, et seq.

In October 2019, Defendants filed a motion to compel arbitration of Plaintiff's claims and stay the proceedings. On January 17, 2020, the Court (Hon. Walsh) issued an order compelling Plaintiff's individual wage and hour claims to arbitration and staying the FCRA and PAGA claims. Shortly thereafter, Plaintiff dismissed his FCRA claim, and the parties proceeded to arbitration in April 2021.

On April 6 and 7, 2021, the parties arbitrated the matter before the Hon. Wayne D. Brazil (Ret.). On June 22, 2021, Judge Brazil issued an order denying all of Plaintiff's individual wage and hour claims and finding in Defendants' favor on all counts.

On August 27, 2021, Plaintiff moved to confirm the arbitration award, and the Court (Hon. Kulkarni) granted the motion on December 29, 2021. On January 20, 2022, the Court entered judgment against Plaintiff following confirmation of the arbitration award. Plaintiff appealed, challenging the Court's determinations as to the arbitration agreement. On August 1, 2023, the Sixth District Court of Appeal issued a Remittitur affirming the Court's judgment.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY, SUMMARY ADJUDICATION

A. Legal Standard

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

This standard provides for a shifting burden of production; that is, the burden to make a prima facie showing of evidence sufficient to support the position of the party in question. (See *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850-851.) The burden of persuasion remains with the moving party and is shaped by the ultimate burden of proof at trial. (*Ibid.*) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) The opposing party must produce substantial responsive evidence that would support such a finding; evidence that gives rise to no more than speculation is insufficient. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163.)

The traditional method for a defendant to meet its burden on summary judgment is by "negat[ing] a necessary element of the plaintiff's case" or establishing a defense with its own evidence. (*Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317, 334.) The defendant may also demonstrate that an essential element of plaintiff's claim cannot be established by "present[ing] evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence-as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 855.)

On summary judgment, "the moving party's declarations must be strictly construed and the opposing party's declaration liberally construed." (*Hepp v. Lockheed-California Co*. (1978) 86 Cal.App.3d 714, 717 (*Hepp*); see also *Johnson v. American Standard, Inc*. (2008) 43 Cal.4th 56, 64 [the evidence is viewed in the light most favorable to the opposing plaintiff; the court must "liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor"].) Summary judgment may not be granted by the court based on inferences reasonably deducible from the papers submitted, if such inferences are contradicted by other inferences which raise a triable issue of fact. (*Hepp, supra,* 86 Cal.App.3d at pp. 717-718.)

B. Discussion

As indicated by the title of their motion, Defendants seek an order summarily adjudicating the issue of Plaintiff's lack of standing to pursue representative claims under PAGA. Defendants make this motion on the following grounds: (1) Plaintiff's individual claims were adjudicated and completely disposed of through a final arbitration award that was confirmed by a judgment of this Court and affirmed on appeal; (2) Plaintiff was found not to have suffered any alleged violation at issue in this matter; and (3) as a result, Plaintiff no longer has standing to pursue representative claims under PAGA in light of the California Supreme Court's July 17, 2023 decision in *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal. 5th 1104, 1124 (*Adolph*), and related authorities.

To begin, as Defendants explain, there are two threshold requirements to having standing to bring claims under PAGA on behalf of situated individuals: "[t]he plaintiff must be an aggrieved employee, that is, someone 'who was employed by the alleged violator' and 'against whom one or more of the alleged violations was committed.'" (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 83-84; *Adolph, supra,* 14 Cal.5th at p. 1114.) Thus, if Mr. Tielemans did not personally suffer any of the Labor Code violations alleged to have been committed by Defendants, he has no standing to bring claims under PAGA on behalf of others. Defendants assert that, as a matter of law, Plaintiff lacks standing because the arbitrator, Judge Brazil, expressly found that he failed to prove any of his substantive claims against them and this determination has preclusive effect in this action under the doctrine of issue preclusion. That is, Defendants assert that Plaintiff cannot relitigate the issue of whether any of the Labor Code violations alleged to have been made by Defendants in the FAC were committed against him.

Issue preclusion "precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) The doctrine applies if the following requirements are met: (1) the issue sought to be precluded from relitigation is identical to that decided in a former proceeding; (2) the issue was actually litigated in the proceeding; (3) the issue was necessarily decided; (4) the decision was final and on the merits; and (5) the party against whom preclusion is sought is the same as, or in privity with, the party in the prior proceeding." (*Ibid*.) Defendants maintain that all of the requirements for issue preclusion are satisfied here with respect to the issue of whether Mr. Tielemans is an "aggrieved employee." Upon review, the Court agrees.

First, Judge Brazil's finding addressed the same issues that Mr. Tielemans seeks to relitigate with respect to PAGA standing, i.e., whether Defendants committed any of the wage

and hour violations alleged in the FAC against him. In the Final Award issued by Judge Brazil, he expressly found that:

- Mr. Tielemans failed to prove Defendants did not pay him for all hours he worked;
- Mr. Tielemans failed to prove Defendants did not provide him with compliant meal periods or rest breaks, or that he is entitled to any compensation for missed, short, or delayed meal periods or rest breaks;
- Mr. Tielemans failed to prove he expended his own resources on required equipment or apparel and that he is entitled to reimbursement for any expenditures on such items; and
- Because Mr. Tielemans failed to prove any of his substantive claims, he also failed to prove his derivative claims under provisions of the Labor Code or under Business and Professions Code section 17200.

(Defendants' Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment/Adjudication ("UMF"), No. 7.)

Based on his findings of fact and conclusions of law, Judge Brazil entered a Final Award in favor of Defendants and against Plaintiff. (UMF No. 8.) Thus, the foregoing issues were actually litigated in the arbitration and necessary to the resolution of Mr. Tielemans claims. Judge Brazil's Final Award— which Mr. Tielemans successfully moved to confirm and was reduced to a final judgment by the Court that was ultimately affirmed on appeal—is final and binding on Mr. Tielemans as he was a party to the arbitration. The Court, when it affirmed the arbitration award, expressly held that "Plaintiff's individual claims against Defendants are dismissed as to Plaintiff on the merits and with prejudice." (UMF No. 11.) Thus, all the requirements of issue preclusion are met.

The foregoing is precisely the procedure described in *Adolph*,[2] wherein the California Supreme Court explained that as to claims asserted under PAGA, "[i]f the arbitrator determines that [the plaintiff] is not an aggrieved employee and the court confirms that determination and reduces it to a final judgment, the court would give effect to that finding, and [the plaintiff] could no longer prosecute his non-individual claims due to lack of standing." (*Adolph, supra,* 14 Cal.4th at p. 1124.) Respecting *Adolph,* Plaintiff lacks standing to pursue a PAGA claim on behalf of others.

Relying on a variety of authorities, principally *Gavriiloglou v. Prime Healthcare Management, Inc*. (2022) 83 Cal.App.5th 595 (*Gavriiloglou*) and *Donahue v. AMN Services, LLC* (2021) 11 Cal.5th 58 (*Donahue*), Plaintiff insists that he does *not* lack standing to pursue his representative claim and California case law permits him to pursue that claim despite Judge Brazil's findings. He additionally argues that application of issue preclusion in this action is barred by the "full and fair opportunity" exception to that doctrine and further, public policy concerns of PAGA claims warrant denial of Defendants' motion. The Court is not persuaded by these arguments.

Plaintiff's reliance on *Gavriiloglou* is understandable. In that case, the appellate court concluded that an arbitration award concluding that "the alleged Labor Code violations did not

[2] At the time that Judgment was entered in this action following confirmation of the arbitration award in 2022, *Adolph* had yet to be issued. This explains why the Court's order noted that "This Judgment does not resolve the remaining PAGA cause of action."

occur" against the plaintiff did *not* preclude that same plaintiff from qualifying as an "aggrieved employee" under PAGA based on the same alleged Labor Code violations because the plaintiff was acting in *different* capacities in bringing her individual claim and her PAGA claim. Mr. Tielemans insists that the same conclusion must be made here.

But the pre-*Adolph* holding from *Gavriiloglou* appears to be an outlier in this area and its reasoning and conclusion present a variety of problems, as best described by the court in *Rocha v. U-Haul Co. of Cal.* (2023) 88 Cal.App.5th 65 (*Rocha*), which decision this Court finds the better reasoned and more persuasive.[3] *Rocha* is analogous to the case at bar—an arbitrator found no retaliation against two individual plaintiffs, which was held to preclude those individuals' from relying on retaliation allegations to establish PAGA standing as aggrieved employees.[4] As the *Rocha* court explained when addressing *Gavriiloglou,* the appellate court in that case relied on the purported "general rule" that "'[w]ith respect to issue preclusion, a party appearing in successive actions … is not precluded where the capacities in which he participated are different.' [Citation]." (*Rocha, supra,* 88 Cal.App.5th at p. 80.) To support this proposition, *Gavriiloglou* cited: (1) a portion of the Restatement Second of Judgments, (2) Code of Civil Procedure section 1908, subdivision (a), and (3) a variety of other cases. However, as explained in *Rocha,*

> [n]one of these cases … applied a broad rule that issue preclusion requires the precluded party to have been acting in the same capacity in both proceedings at issue—indeed, none of them even involves issue preclusion at all. Rather these cases—and the cited Code of Civil Procedure section—on which *Gavriiloglou* relies all involve claim preclusion, also referred to as res judicata. (See Code Civ. Proc., § 1908, subd. (a)(2) [*judgment* is conclusive between the parties when "litigating … in the same capacity"].) Claim preclusion or "'[r]es judicata' describes the preclusive effect of a final judgment on the merits" and "prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.'" [Citation.]

(*Rocha, supra,* 88 Cal.App.5th at pp. 80-81, emphasis in original.)

The *Rocha* court explained that the claim preclusion or res judicata cases cited in *Gavriiloglou* were also each distinguishable in many other ways, and, as a result, those cases "[could not] provide authority for a proposition they do not address." (*Id.* at p. 81.) Further, the court explained, it "[was not] aware of any basis in the case law or logic for creating an identical capacity requirement for issue preclusion now." (*Ibid.*)

The *Rocha* court reasoned that, "even assuming, for the sake of argument, that *Gavriiloglou* is correct that the identical capacity requirement applies to issue preclusion, we

---

[3] In situations like this one where the intermediate state appellate courts are in conflict, "the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.)

[4] The Court does not find Plaintiff's efforts to distinguish *Rocha* to be persuasive as the procedural posture of that case played no role in its issue preclusion analysis.

still disagree with the decision's further conclusion that the 'same right' exception to the requirement is inapplicable under circumstances like those presented here." (*Rocha, supra,* 88 Cal.App.5th at p. 81.) Under this exception, [w]here a party though appearing in two suits in different capacities is in fact litigating the same right, the judgment in one estops him in the other." (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 814.) The court explained that the *same* right was at issue in the arbitrator's assessment of whether the defendant's treatment of the named plaintiffs violated a particular Labor Code section, an assessment "made in the context of adjudicating an individual [Labor] Code claim," and in the court's determination of whether that same conduct constituted a violation of that same Labor Code section, a determination "made in the context of a PAGA standing analysis." (*Id*.) The court continued: "[t]he two assessments depend on exactly the same law and exactly the same conduct. Regardless of the context on which this question is asked, the employer either violated the employee's rights or it did not; this determination 'derive[s] from readily ascertainable facts' that are the same in both contexts. [Citation.]." (*Ibid*.) Thus, the differences in the capacities that the named plaintiffs appeared in *had no bearing* "on either assessment, the conduct considered, or the applicable law." (*Id*. at 82.) Similarly here, even assuming Mr. Tielemans is correct that issue preclusion embraces an identical capacity requirement (which the Court is not convinced is true), issue preclusion would *still* apply because he was litigating the *same* right in arbitration before Judge Brazil that he now seeks to litigate here—that is, whether Mr. Tielemans personally suffered any of the Labor Code violations alleged in the FAC such that he has standing to assert claims under PAGA on behalf of others.

Given the foregoing, the Court agrees that *Gavriiloglou* and any purported "identical capacity" requirement is ultimately of no consequence to the preclusive effect of the arbitration award as to Plaintiff's PAGA standing.

Donohue also does not assist Plaintiff. Plaintiff maintains that Judge Brazil's decision does not comport with the *Donohue*, a decision issued four months prior to Judge Brazil's decision that Plaintiff insists represents a material change in the law. But not only did Judge Brazil's decision discuss *Donohue* (see Declaration of Michelle L. Abdolhosseini in Support of Defendants' Motion for Summary Judgment/Adjudication, ¶ 7, Exhibit 5 at pp. 6-9), Plaintiff needed to move to *vacate* the arbitration award on those grounds, which he did not do. Instead, he did the exact opposite by moving to *confirm* the award and enter judgment against himself. Further, while it is true that the doctrine of issue preclusion will not apply when there has been a material change in the governing law (see *Sacramento County Employees' Ret. Sys. V. Superior Court* (2011) 195 Cal.App.4th 440, 452), Plaintiff fails to cite any new authority that overruling or materially changing any legal authorities on which the arbitrator relied. Thus, there has been no material change in substantive law that precludes issue preclusion in this action.

Plaintiff's remaining arguments concerning the "full and fair opportunity" exception and public policy considerations with regards to PAGA claims also lack merit. With regard to the first point, issue preclusion cannot be used as a bar "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." (*Kremer v. Chemical Constr. Corp.* (1982) 456 U.S. 461, 480-481.) But as Defendants contend, many of the cases cited by Plaintiff involve *offensive* use of issue preclusion; here, Defendants seek to use it defensively, and offensive use is to be "treated differently" because, for example, "[i]f a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously …" (*Parklane Hosiery Co.*

v. Shore (1979) 439 U.S. 322, 330.) In determining whether the exception applies, the most important factor to consider is the parties' incentives to litigate in the two actions. (See *Maciel v. Comm'r* (2006) 489 F.3d 1018, 1023.) As Defendants argue, there is no question that Mr. Tielemans had an incentive to litigate his claims at arbitration and did in fact do so by testifying on his own behalf, compiling exhibits, engaging in discovery, and vigorously litigating the case for years. Further, it cannot be disputed that Mr. Tielemans personally had more to gain financially from his individual claims against Defendants than he would have as a proxy of the state pursuing the representative PAGA claim. In sum, the record shows that Plaintiff plainly had a full and fair opportunity to litigate whether he suffered the Labor Code violations alleged in the FAC. The "full and fair opportunity" exception simply does not apply.

Finally, Plaintiff cites no authority for the proposition that giving preclusive effect to an arbitrator's finding would frustrate the objectives of PAGA or public policy. Where the elements of issue preclusion are met, courts should "determine whether applying issue preclusion would be consistent with the public policies underlying the doctrine." (*In re Marriage of Brubaker & Strum* (2021) 73 Cal.App.5th 525, 538.) Such policies include "conserving judicial resources and promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial systems, and avoiding the harassment of parties through repeated litigation." (*Id*.) Here, applying issue preclusion would be *consistent* with all of the foregoing; the doctrine's effect would avoid the possibility of inconsistent judgments on identical allegations of Labor Code violations and avoid the relitigation of Plaintiff's aggrieved status in a different forum. It is also consistent with legislative intent and the plain language of the PAGA statute, which idea is supported by the California Supreme Court's recognition of that exact outcome in *Adolph*.

Accordingly, the Court finds based on the arbitration award that Plaintiff lacks the requisite standing to prosecute the representative PAGA action as a matter of law. Therefore, Defendants' motion is GRANTED.

III. CONCLUSION

Defendants' Defendants' Motion for Summary Judgment, or Alternatively Summary Adjudication, Determining the Plaintiff Lacks Standing to Pursue Representative PAGA Claims is GRANTED.

The Court will prepare the order.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

- oo0oo -

Calendar Line 2

Case Name: *Apple, Inc. v. Andrew Aude*
Case No.: 24CV433319

This is an action for breach of contract and breach of the duty of loyalty arising out of Defendant Andrew Aude's ("Mr. Aude" or "Defendant") alleged disclosure of confidential information belonging to his former employer, Apple, Inc. ("Apple" or "Plaintiff"). Before the Court is Mr. Aude's special to strike Apple's Complaint in its entirety, which is opposed by Apple. Also before the Court is Apple's motion to seal certain evidence submitted in support of its opposition to the anti-SLAPP motion, which Mr. Aude opposes.

As discussed below, the Court GRANTS IN PART and DENIES IN PART Mr. Aude's special motion to strike and GRANTS Apple's motion seal.

I. BACKGROUND

Apple is a world-renowned technology company and global leader in consumer electronics, mobile communications, and computing. (Complaint, ¶ 1.) Apple's unique and innovative technologies, processes, and methodologies underpin its market leadership and competitive edge in hardware and software markets and it "goes to great lengths to surprise and delight the public with its new products and features." (*Id*., ¶¶ 20-21.) Unauthorized leaks can cause Apple to lose control of the messaging and timing of product releases, which may result in diminished media and consumer interest and can negatively impact the sales of a new product when it is ultimately released. (*Id*., ¶ 21.)

Mr. Aude was hired by Apple in 2016 as an iOS Software Engineer. (Complaint, ¶ 23.) During his tenure, Mr. Aude worked on optimizing battery performance, among other things. On February 10, 2016, as part of his relationship with Apple, Mr. Aude executed an Intellectual Property Agreement ("IPA") pursuant to which he agreed not to use or disclose Apple's confidential and proprietary information except as necessary in the course of his employment. (*Id*., ¶¶ 25-26.)

Despite his contractual, ethical and other legal obligations, and in clear violation of the IPA, Mr. Aude leaked highly sensitive Apple information over the course of a five-year period to individuals outside of Apple; specifically, to employees of other technology companies and at least three national journalists. The leaked information included: details of an unannounced app; strategies for regulatory compliance; product hardware characteristics; research and development efforts in the spatial computing space; product development policies; and even corporate and department headcount. (Complaint, ¶¶ 3-4, 34-45.) Defendant leaked the foregoing information using his Apple-issued work iPhone—and did so via text messages, encrypted messages, and phone calls. (*Id*., ¶ 5.) Mr. Aude's disclosures of Apple's confidential and proprietary information were "extensive and purposeful." (*Id*., ¶ 44.) In connection with various leaks, Mr. Aude admitted that his actions violated his obligations with Apple, and that he did so that he could "kill" products and features with which he took issue. (*Id*., ¶ 6.) Attempting to justify his actions, he explained that he intended to "[expletive] with policy and [the] press." (*Id*., ¶ 7.)

In the fall of 2023, Apple learned of Mr. Aude's misconduct and met with him to discuss his improper disclosures. (Complaint, ¶¶ 8, 50.) During the November 7, 2023 meeting, Mr. Aude denied leaking confidential or proprietary information to third parties, including journalists, and denied having his Apple-issued work iPhone with him. (Complaint, ¶ 50.) However, mid-meeting, Mr. Aude feigned the need to use the restroom and, during the resulting break, pulled out his Apple-issued work iPhone and deleted evidence of his communications about Apple with third parties. (*Id*., ¶ 51.) Mr. Aude's deletions included the Signal app, which he had used to disclose Apple's confidential or proprietary information to at least one journalist. (*Id*., ¶ 52.) Because the app and its associated encrypted messages were deleted by Plaintiff, Apple cannot know the content of these messages or to whom else he sent proprietary information. (*Id*.)

On December 12, 2023, Apple met with Plaintiff again and during this meeting he admitted to leaking information about Apple's strategies for regulatory compliance, unannounced products, development policies, and hardware characteristics of certain released products to at least two journalists. (Complaint, ¶ 53.) These disclosures resulted in the publication of at least five different articles discussing Apple's confidential and proprietary information. (*Id*.) On December 15, 2023, Apple terminated Mr. Aude for misconduct. Apple alleges that he poses an ongoing threat due to his knowledge of Apple's confidential and proprietary information. (*Id*., ¶¶ 55-56.)

During his employment at Apple, Plaintiff received several discretionary "Restricted Stock Unit" ("RSU") awards from Apple, which were subject to specific terms and conditions outlined in the Apple Stock Plan and the Restricted Stock Unit Award Agreement ("RSU "Agreement"). (Complaint, ¶ 46.) These include Apple's right to require Mr. Aude to return his RSUs or any shares acquired under the RSU Agreement if it determined, among other things, that he "committed or engaged in a breach of confidentiality, or an unauthorized disclosure or use of inside information, customer lists, trade secrets or other confidential information of the [Apple] or any of its Subsidiaries; or … committed or engaged in an act of theft, embezzlement or fraud, or materially breached any agreement to which the [he was] a party with [Apple] or any of its Subsidiaries." (*Id*., ¶ 47.) After terminating Plaintiff for his misconduct, Apple asked him to return any proceeds and profits from the sale of the shares acquired pursuant to any vested RSUs. Mr. Aude refused and thus has breached the terms of the RSU Agreement. (*Id*., ¶ 49.)

Based on the foregoing, Apple initiated this action on March 18, 2024, and asserts the following causes of action: (1) breach of contract (IPA); (2) breach of duty of loyalty; and (3) breach of contract (RSU Agreement).

II. APPLE'S MOTION TO SEAL

A. Legal Standard

"Unless confidentiality is required by law, court records are presumed to be open." (Cal. Rules of Court, rule 2.550(c).) "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.)

A party moving to seal a record must file a memorandum and a declaration containing facts sufficient to justify the sealing. (Cal. Rules of Court, rule 2.551(b)(1).) A declaration supporting a motion to seal should be specific, not conclusory, as to the facts supporting the overriding interest. If the court finds that the supporting declarations are conclusory or otherwise unpersuasive, it may conclude that the moving party has failed to demonstrate an overriding interest that overcomes the right of public access. (See *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 305 (*Providian*).)

It is settled that the protection of alleged trade secrets and confidential information are overriding interests that can support a sealing request. (See *McGuan v. Endovascular Technologies, Inc.* (2010) 182 Cal.App.4th 974, 988 (*McGuan*); *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1281 (*Universal City Studios, Inc*.) Civil Code section 3426.5 provides that "a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include … sealing the records of the action …."

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. Discussion

Apple moves to seal portions of various declarations filed in support of its opposition to Mr. Aude's special motion to strike (see Mot. at 3-4) on the ground that these portions contain Apple's confidential business and competitive information. Plaintiff opposes the motion, arguing that Apple has failed to show an overriding interest sufficient to overcome the public's right to access the record, and has also not demonstrated a substantial probability of prejudice if the information is not sealed. The Court disagrees with Mr. Aude.

The scope of what Apple actually seeks to seal is relatively narrow (and thereby appropriately tailored).[1] The Court finds persuasive Apple's contention that if the materials it seeks to seal are publicly filed, its interests in enforcing its confidentiality agreements and preventing competitive harm could be prejudiced. Apple effectively demonstrates that overriding interests support sealing its confidential pre-release details about an unannounced app, strategies for regulatory compliance, internal analysis regarding Apple product hardware characteristics, internal webpages with explanations and analysis of Apple's discretionary equity programs for employees, confidential information reported in Apple's exit interviews with employees, Apple's headcount costs and confidential information used to derive them, and portions of an internal webpage referencing an internal email address and an internal

[1] Of Apple's approximately 340-page opposition filing, Apple seeks to seal 11 paragraphs, 7 visual elements, and a combined total of 14 pages of exhibits.

security tool. As articulated above, protection of alleged trade secrets and confidential information are overriding interests that can support a sealing request. (See *McGuan, supra,* 182 Cal.App.4th at p. 988; *Universal City Studios, Inc., supra,* 110 Cal.App.4th at p. 1281.)

As Apple has demonstrated each of the requirements of California Rules of Court, rule 2.550(d) are met with respect to the information is seeks to seal, the Court GRANTS the motion.

III. MR. AUDE'S SPECIAL MOTION TO STRIKE

A. Legal Standard

Code of Civil Procedure section 425.16 provides a summary procedure by which defendants may dispose of "strategic lawsuits against public participation" or "SLAPP" lawsuits, i.e., lawsuits brought "primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for redress of grievances." (See Code Civ. Proc., § 425.16, subd. (a).) Courts must broadly construe the anti-SLAPP statute to further the legislative intent of "encouraging continued participation in matters of public significance by preventing the chilling of such participation through abuse of the judicial process." (See *Kimbler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 199, internal citations omitted.)

The court's approach to ruling on a special motion to strike has been summarized thusly:

> Section 425.16, subdivision (b)(1) requires the court to engage in a two- step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from the protected activity. The moving defendant's burden is to demonstrate that the act or acts of which Plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue" as defined in the statute. (§ 425.16, subd. (b)(1.) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers "the pleadings, and supporting and opposing affidavits stating facts upon which the liability or the defense is based.

(See *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

B. Discussion

1. *First Prong*

To satisfy the first step of the anti-SLAPP analysis, Plaintiff need only make a prima facie showing that Apple's claims against him "arise[] from" his exercise of free speech or petition rights as defined in Code of Civil Procedure section 425.16, subdivision (e), i.e., protected activity. (See *Governor Gray Davis Committee v. American Taxpayer Alliance*

(2002) 102 Cal.App.4th 449, 458-459.) Code of Civil Procedure section 425.16, subdivision (e) provides that:

> [An] "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law: (3) any written or oral statement or writing made in a place open to the public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(Code Civ. Proc., § 425.16, subd. (e).)

In determining whether a defendant has sustained its initial burden, the court considers the pleadings, declarations and matters that may be judicially noticed. (See *Brill Media Co., LLC v. TCW Group, Inc.* (2005) 132 Cal.App.4th 324.)

Here, Defendant maintains that his alleged leaking of information to "at least three national journalists" is a "core" protected activity under the anti-SLAPP statute as information that was to be contained in a public forum and concerned a matter of public interest, i.e., the categories of protected conduct set forth in subdivisions (e)(3) and (4) of Section 425.16. Both of the foregoing provide that in order to qualify as protected conduct, the statements that are the subject of the special motion to strike must involve an issue of public interest; the only distinction between the two is that one specifically applies to statements made in a public forum or a place that is open to the public.

Generally, the release of information concerning a public issue or an issue of public interest to a journalist qualifies as protected newsgathering activity under subdivisions (e)(3) and (4) of the anti-SLAPP statute. (See *Collondrez v. City of Rio Vista* (2021) 61 Cal.App.5th 1039, 1049-1050 (*Collondrez*); *San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, 101 ["Reporting the news [qualifies] as an exercise of free speech. Reporting the news requires the assistance of newsgathering and other related conduct and activity, which are acts undertaken in furtherance of the news' media's right to free speech. Such conduct is therefore protected conduct under the anti-SLAPP statute."].) Mr. Aude asserts that the information he allegedly disclosed—"details of an unannounced app; strategies for regulatory compliance; product hardware characteristics; research and development efforts in the spatial computing space; product development policies; and … corporate and department headcount" (Complaint, ¶¶ 4, 34)—inherently involve an issue of public interest because Apple is an "entity in the public eye." (Plaintiff's Memo. at 10:22-23, quoting *Hoang v. Tran* (2021) 60 Cal.App.5th 513, 527.)

Apple's initial response to the foregoing is to assert that Mr. Aude's alleged conduct is illegal under Penal Code section 484 ("Section 484"), subdivision (a), and thus does not fall within the scope of the anti-SLAPP statute. Apple is correct that a special motion to strike cannot be used by a defendant whose allegedly protected activity was illegal. (See *Flatley v.*

Mauro (2006) 39 Cal.4th 299, 320.) But do the acts allegedly committed by Plaintiff, as pleaded in the Complaint, describe conduct that is illegal under Section 484? Subdivision (a) of Section 484 makes it illegal to "fraudulently appropriate property which has been entrusted to" an individual. Relying on a non-binding federal district court order, Apple contends the term "property" as used in Section 484 includes "confidential information … acquired through employment[.]" (Apple's Opp. at 14:3-4, quoting *United States v. Abouammo* (N.D. Cal. 2021) 2021 U.S. Dist. LEXIS 34725, *20 (*Abouammo*).) The Court is not persuaded, at least in this context. The district court case cited by Apple, *Abouammo,* discussed the concept of confidential information as property in relation to federal charges for wire fraud and mail fraud. The case did not involve a discussion of Section 484, and Apple cites no other case where a court has held that a defendant can be criminally liable under Section 484 for the disclosure of "confidential information." And, notably, another judge from the same district court as *Abouammo* has held differently. (See *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress* (N.D. Cal. 2016) 214 F.Supp.3d 808, 822 [agreeing with the contention that "because plaintiffs have failed to allege facts identifying trade secrets that were allegedly acquired through wire or mail fraud, plaintiffs have failed to plead" a violation].) In the Complaint, Apple does not allege the misappropriation of trade secrets.

Apple next argues that Defendant's alleged conduct does not fall within the ambit of subdivision (e)(3) of the anti-SLAPP statute because he did not make his statements containing leaked information "in a place open to the public or a public forum"; he made them directly to others. But *Collondrez* still found that subdivision (e)(3) was implicated where the disclosure of information was made to a journalist who then published that information, making it available to the public at large. In other words, the fact that the initial disclosure was made directly to individuals rather than the public was of no consequence to the first-prong analysis when those individuals were engaged in newsgathering. Thus, the Court finds this argument lacks merit.

Apple next argues that Mr. Aude failed to demonstrate the information he allegedly disclosed to others involved a "public issue or an issue of public interest." To that end, Apple contends the assertion that information involving Apple is an issue of public interest because the company is "in the public eye" is far too expansive. Apple continues that under that interpretation, *any* employee conduct adverse to Apple's interests would be subject to anti-SLAPP protection. Apple may very well be correct that not *all* information involving the company qualifies as a matter of public interest or a public issue. However, its allegations that Defendant disclosed information that undermined its ability to "surprise and delight" its customers and gave its competitors critical information about its "policies, product roadmap, and strategy" (Complaint, ¶¶ 13, 21) support the conclusion that this information concerned an "issue of public interest"; as Mr. Aude urges, information that would be of interest to customers and competitors of one of the world's largest companies inherently qualifies as such.

Because the information purportedly disclosed by Mr. Aude concerned an issue of public interest, subdivision (e)(4) of Section 425.16 is implicated with respect to disclosure made to non-journalists, i.e., disclosures that were not made in a "place open to the public or a public forum." (Complaint, ¶¶ 37, 39, 40.) In accordance with the foregoing, the Court finds that Apple's claims against Mr. Aude arise out of protected activity. Therefore, the burden now shifts to Apple.

2. *Second Prong*

In order to meet its burden to defeat a defendant's special motion to strike, a plaintiff "must demonstrate that the [challenged claims are] both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Soukop v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) This "probability of prevailing" standard is tested by the same standard governing a motion for summary judgment in that it is the plaintiff's burden to make a prima facie showing of facts that would support a judgment in the plaintiff's favor. (See *Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) A plaintiff must show that there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment. (See *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108.) The court may not weigh credibility or comparative strength of the evidence; the court must consider the defendant's evidence only to determine if it defeats the plaintiff's showing as a *matter of law*. (See *Soukop, supra,* 39 Cal.4th at p. 291, emphasis added.) "In making this assessment it is the court's responsibility … to accept as true the evidence favoring the plaintiff …. The plaintiff need only establish that his or her claim has 'minimal merit' to avoid being stricken as a SLAPP." (*Id*., internal quotations and citations omitted.)

While the burden on the second prong belongs to a plaintiff, in considering whether a party has established a probability of prevailing on the merits of his or her claims, a court considers not only the substantive merits of those claims, but also all defenses available to a defendant. (See *Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.) If the defendant establishes the applicability of a defense to a claim, the plaintiff must overcome it in order to demonstrate a probability of prevailing on that claim. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 926-927.)

Here, Apple maintains that its claims have at least "minimal merit" under the second prong and thus Mr. Aude's motion should be denied. Defendant conversely argues that Apple cannot demonstrate a probability of success on claims for the following reasons: Apple cannot claw back his restricted stock and does not plead that he agreed to the RSU Agreement's terms; Apple fails to plead its breach of contract claims with sufficient specificity; the confidentiality provision of the IPA is facially unenforceable because it constitutes an unlawful noncompete agreement; and Apple's breach of loyalty claim fails as a matter of law because it is superseded by the California Uniform Trade Secret Act ("CUTSA") and is premised on a duty arising out of contract.

a. Breach of Contract (IPA)

In order to succeed on a claim for breach of contract, a plaintiff must plead and prove the following elements: the existence of a contract; (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's breach; and (4) damages to the plaintiff as a result of the breach. (*CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239.)

It is undisputed that Plaintiff executed the IPA when he was hired by Apple in February 2016 and thus agreed not to disclose the company's confidential and proprietary information without its written consent, "except as necessary to perform [his] duties as an employee …" (See Declaration of Jeannie Wong in Support of Apple's Opposition to Special Motion to

Strike ("Wong Decl."), ¶ 3, Exhibit A, § 1.) "Proprietary information" is defined by the IPA to mean:

> [A]ll information not generally known outside Apple and/or kept confidential by Apple, including for example but not limited to (a) trade secrets, R&D records, reports, samples, manuals, plans, specifications, inventions, ideas, designs, prototypes, software, source code, or any other materials or information relating to past, existing, and future products and services whether or not developed, marketed, used, or rejected by Apple or persons or companies dealing with Apple; (b) sales, profits, organization, customer lists, pricing, sources of material, supply, costs, manufacturing, financials, forecasts, market research, or any other information relating to the business operations or affairs of Apple or persons or companies dealing with Apple; and (c) the employment and personnel information of Apple, such as compensation, training, recruiting, and other human resource information.

(*Id*.)

Apple submits evidence that Plaintiff breached his obligations under the IPA by disclosing confidential information to third parties over several years via text, encrypted messages, and phone calls, including:

- August 2021: Aude corroborated a rumor about an unreleased Apple feature—"one of [its] best secret features" to a non-Apple employee. (Compl. ¶ 40; Declaration of Daniel Roffman in Support of Opposition to Plaintiff's Special Motion to Strike ("Roffman Decl."), ¶ 26, Table 8);

- November 2022: Aude shared "top secret" and confidential details about Apple's strategies for regulatory compliance with an acquaintance at another technology company and with a WSJ journalist. (Compl. ¶ 37; Roffman Decl. ¶ 26, Table 9.)

- April 2023: Aude "read an e-mail containing the final feature list for an unannounced Apple app to a WSJ journalist [] over the phone." (Compl. ¶ 35.) The email itself noted its "confidential" nature and that Apple "only ha[d] one shot" to make a good "first impression." (Roffman Decl. ¶ 18; Declaration of Daniel Brody in Support of Apple's Opposition to Special Motion to Strike ("Brody Decl."), ¶ 3(b).)

- May 2023: Aude "disclosed confidential details regarding Apple's internal product development policies" to a WSJ journalist. (Compl. ¶ 41; Brody Decl. ¶ 3(d).)

- August 2023: Aude "shared information related to Apple's internal staffing on a specific Apple team" to a journalist. (Compl. ¶ 43; Roffman Decl. ¶ 20; Brody Decl. ¶ 3(c).)

- September 2023: Aude "disclosed confidential details about Apple's analysis of its product hardware characteristics to a journalist." (Compl. ¶ 42; Roffman Decl. ¶ 17; Brody Decl. ¶ 3(b).)

Apple additionally submits evidence, in the form of saved screenshots on Mr. Aude's Apple-issued work iPhone, that the foregoing leaks were done on purpose, with Plaintiff stating that his intentions were: to "kill" Apple products; to create "chaos" for "Apple[;s] corporate people"; and to "[f---] with policy and [the] press. (Compl., ¶¶ 6, 36, 45; Roffman Decl., ¶¶ 16, 27-28.) In another saved screenshot, Mr. Aude expressed that he "love[d] it" when he got to leak information. (*Id*.)

Relying primarily on *Brown v. TGS Mgmt., Co., LLC* (2020) 57 Cal.App.5th 303 (*Brown*), Mr. Aude insists that the confidentiality provision of the IPA is facially unenforceable because it constitutes an unlawful noncompete agreement under Business & Professions Code section 16600 ("Section 16600"). This code section declares "every contract" that restrains "anyone … from engaging in a lawful profession, trade, or business of any kind is to that extent void." Section 16600 "evinces a settled legislative policy in favor of open competition and employee mobility." (*Edwards v. Arthur Anderson LLP* (2008) 44 Cal.4th 937, 946.) "The interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change." (*Dowell v. Biosense Webster, Inc.* (2009) 179 Cal.App.4th 564, 575, internal citation and quotations omitted.)

In *Brown*, the court reversed a judgment confirming an arbitration award in favor of the respondent employer, concluding that the arbitrator exceeded his power by enforcing provisions of the employment contract that illegally restricted the employee's right to work in violation of Section 16600. The court held that the overly broad confidentiality provisions of the contract operated as a de facto noncompete provision because they barred the employee in perpetuity from doing any work in the securities field, much less in the appellant's chosen field of statistical arbitrage. Mr. Aude argues that the confidentiality provisions of the IPA are so similarly overbroad as to constitute a de facto noncompete provision in violation of Section 16600.[2] The Court disagrees.

While the confidentiality provision of the IPA is broad, it is not so broad so as to be void under Section 16600. Critically, the confidentiality provision in *Brown* defined confidential information as any information that is "usable in" or "relates to" the *entire* securities industry, whereas here, the subject provision in the IPA is more narrowly tailored to information that is "not generally known outside Apple and/or kept confidential by Apple." Thus, absent contrary evidence that Mr. Aude does not offer, he can comply with the non-disclosure provisions of the IPA and still work in his chosen field. While he asserts that there is "no way for a current or former Apple employee to know" what information is confidential to Apple (Mot. at 18), his own messages belie that point as he identified Apple's "top secret" information and "best secret features" to non-Apple employees. (See Roffman Decl. ¶ 26, Table 8.) Apple also submits that it instructs its employees as to what information is

[2] In making his argument, Mr. Aude relies in part on *Doe v. Google, Inc.* (Super. Ct. S.F. City and County, June 3, 2022, No. CGC-16-556034). The Court will not consider this unpublished trial court order. Unpublished opinions of the California courts of appeal, let alone superior court orders, "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Court, rule 8.1115(a); *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 448, fn. 4 ["in the absence of some additional showing—such as the conditions for claim or issue preclusion—the actions of other judges are simply irrelevant"].)

confidential and how to maintain the confidentiality of that information, *including* by not responding to press inquiries. (See Roffman Decl., ¶ 18, Images 4-7; Declaration of Joseph Thomas in Support of Apple's Opposition to Special Motion to Strike ("Thomas Dec."), ¶¶ 14-15; Brody Decl., ¶¶ 4-10; Wong Decl., ¶¶ 2-3.)

Further, as Apple argues, courts routinely enforce employment agreements like Apple's that prohibit the disclosure of confidential information. (See, e.g., *SPS Techs., LLC v. Briles Aerospace, Inc*. (C.D. Cal. 2021) 2021 U.S. Dist. LEXIS 169467, *48-*49 [upholding agreement protecting "all inventions, discoveries, improvements, developments, designs, methods, systems, computer programs, trade secrets or any other intellectual property," or "other private or confidential matters"]; *VibrantCare Rehabilitation, Inc. v. Deol* (E.D. Cal. 2021) 2021 U.S. Dist. LEXIS 79718, *16; *World Fin'l Group Ins. Agency v. Eric Olson* (N.D. Cal. 2004) 2024 U.S. Dist. LEXIS 30637, *30 [upholding provision that "while broad," was "not so broad as to be void under section 16600"]; *Skye Orthobiologics, LLC v. CTM Biomedical, LLC* (C.D. Cal. 2023) 2024 U.S. Dist. LEXIS 70271, *17-*18 [upholding agreement that "read literally," did not "encompass information that is generally known in the industry"].)

Given the foregoing, the Court rejects Plaintiff's contention that the confidentiality provision of the IPA is unenforceable under Section 16600.

The Court also finds unpersuasive Mr. Aude's assertions that Apple has not sufficiently pleaded all of the elements of this claim, particularly breach and damages. He asserts that Apple has failed to adequately plead breach because it has not specifically identified the information that he purportedly disclosed, and has failed to plead damages because it does not specify how his alleged actions injured Apple. However, in alleging that Mr. Aude disclosed details of an unannounced app, strategies for regulatory compliance, product hardware characteristics, research and development efforts in the spatial computing space, and corporate and department headcount, the Court finds that Apple has sufficiently pleaded that Defendant breached his obligations under the IPA by leaking confidential or proprietary information. (Complaint, ¶ 34.) The authorities that Mr. Aude cites to the contrary are distinguishable, as they take issue with the plaintiff's failure to plead what information was revealed, how it was revealed, to whom, and when. (See *SriCom, Inc. v. EbisLogic, Inc.* (N.D. Cal. 2012) 2012 U.S. Dist. LEXIS 131082, *15-*16 [failed to plead facts concerning "what specific information was revealed, when, how or to whom it was revealed, or whether or how" the information was used"]; *Rock Safety Prods., LLC v. Double Backstop, Inc.* (C.D. Cal. 2023) 2023 U.S. Dist. LEXIS 40095, *19 [plaintiff did not plead "facts showing *how* the breach happened."]; *Baldwin v. AAA N. Cal., Nev. & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 550-551 [plaintiff offered "no specific allegations identifying" the breach].) Here, Apple pleads those facts in the Complaint.

As for damages, the fact that Apple has not pleaded a precise amount of damages is not fatal to its claim. (See *Duran v. U.S. Bank Nat'l Assn.* (2014) 59 Cal.4th 1, 40 ["Uncertainty of the *fact*" of damages is "fatal to recovery," but "uncertainty as to the *amount* is not . . . ."] [quotation omitted] [italics in original].) Apple otherwise sufficiently pleads the element of damages in alleging that as a result of Mr. Aude's actions, it "has suffered and continues to suffer monetary and non-monetary injury and harm in an amount to be proven at trial, including lost profits from the unauthorized disclosure of its confidential information and his unwarranted receipt of discretionary bonuses, discretionary RSUs including, unvested RSUs

and shares underlying vested RSUs and/or the cash equivalent, and any related proceeds and profits." (Complaint, ¶ 64.) Apple further alleges that it "also has incurred and will continue to incur additional damages, costs, and expenses, including attorneys' fees and other investigation costs, from Mr. Aude's breach." (*Id*.) Apple submits evidence that it has incurred such costs. (See Declaration of Catherine Spevak in Support of Apple's Opposition to Motion to Strike, ¶¶ 2-7.)

Based on the foregoing, the Court finds that Apple has met its burden and demonstrated a probability of prevailing the merits of its first cause of action for breach of the IRA. Consequently, Mr. Aude's motion is DENIED as this claim.

b. Breach of Contract (RSU Agreement)

Mr. Aude does not dispute that he received RSU awards and refuses to return related vested shares or resulting proceeds in breach of his RSU Agreement. But he asserts that Apple cannot establish a probability of prevailing on its second cause of action for breach of this agreemenrt because (1) he never agreed to its terms, (2) restricted stocks are "wages," and consequently, returning them would be an "unlawful penalty" under California law and (3) Apple has not explained his breach.

The Court easily dispenses with Mr. Aude's third argument. The RSU Agreement allows Apple to require an employee to "deliver or otherwise repay" RSUs if the employee has "engaged in a breach of confidentiality, or an unauthorized disclosure or use of . . . [Apple] confidential information[.]" (Thomas Decl. ¶ 8; Complaint, ¶ 47.) Apple alleges that Mr. Aude breached the RSU Agreement by violating the IPA and then not returning his vested shares from RSUs and related proceeds. (Complaint, ¶ 49.) This is sufficient to plead the element of breach, and the evidence submitted by Apple in support of its preceding breach claim is enough to establish the actual breach itself.

With regard to whether Mr. Aude assented to the terms of the RSU Agreement, every contract requires consenting parties. (Civ. Code, §§ 1550 and 1565.) The manifestation of mutual consent is usually accomplished through the actions of an offer communicated to an offeree and an acceptance communicated to the offeror. (See *DeLeon v. Verizon Wireless, LLC* (2012) 207 Cal.App.4th 800, 813.) The manifestation may be made "even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined." (See *Bundsen v. Work. Comp. App. Board* (1983) 147 Cal.App.3d 106, 110, quoting Rest.2d, Contracts § 22(2).) Defendant asserts that he did not assent to the RSU Agreement and had never seen it until *after* Apple's counsel emailed him on March 4, 2024. (Declaration of Andrew Aude in Support of Special Motion to Strike ("Aude Decl."), ¶ 4.) Because he had never seen it, he explains, he never affirmatively manifested his acceptance of its terms.

In the Complaint, Apple alleges that:

> The RSU Agreement for Mr. Aude's awards was referenced in correspondence from Apple to Mr. Aude regarding his RSU awards and available in his personal RSU brokerage account with Apple's designated broker. Mr. Aude had the opportunity to reject the terms of the RSU Agreement if he disagreed with them

> but did not do so. Mr. Aude therefore agreed to the terms in the RSU Agreement for each RSU award granted to him by accepting the award

(Complaint, ¶ 46.)

Mr. Aude argues that the foregoing allegations are "woefully insufficient" to establish contract formation (mot. at 13) and thus Apple cannot succeed on its claim.

Apple responds that under Civil Code section 1589, "[a] voluntary acceptance of the benefit of a transaction is equivalent to … consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." It explains that for each RSU award, Apple notified Mr. Aude of the applicable RSU Agreement, advised him that it was available in his personal brokerage account, and instructed him that he could reject its terms and conditions by declining his award.[3] (Thomas Decl., ¶¶ 9-14.) Defendant did not decline any of his awards and instead accepted them. (*Id*., ¶¶ 16-17.) In his reply, Mr. Aude counters that even if Apple's evidence is credited, it shows only that Apple sent Mr. Aude an email stating that he was being awarded RSUs and that his award was subject to an agreement that he had never seen and that Apple did not provide to him.

To reiterate, at this stage of the proceedings, the Court may not weigh credibility or comparative strength of the evidence; it must consider the defendant's evidence only to determine if it defeats the plaintiff's showing as a *matter of law*. (See *Soukop, supra,* 39 Cal.4th at p. 291, emphasis added.) "In making this assessment it is the court's responsibility … to accept as true the evidence favoring the plaintiff …. The plaintiff need only establish that his or her claim has 'minimal merit' to avoid being stricken as a SLAPP." (*Id*., internal quotations and citations omitted.) The Court finds that the evidence submitted by Apple—particularly the contents of and exhibits attached to the declaration of Joseph Thomas, Apple's Director of Global Strategy and Executive Compensation—is sufficient to establish, for the purpose of this motion, that Mr. Aude assented to the terms of the RSU Agreement by accepting, and not declining, the RSU awards granted to him and that those RSUs were subject to the agreement's terms. Mr. Thomas explains that he is personally familiar with how RSU grants are communicated to employees, among other things, and the Court credits as it must at this stage the representations regarding the availability of the RSU Agreements to employees for their review, including Mr. Aude, upon notification to those individuals that they were being granted RSUs. Thus, the Court concludes that Apple has demonstrated that Mr. Aude assented to the terms of the RSU Agreement.

Turning to Defendant's next argument, he explains per Labor Code section 221 ("Section 221"), it is "unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employer," and the California Supreme Court has recognized that "shares of restricted stock issued … constitute[] a wage" under Section 221. (See Mot. at 11, quoting *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 619

[3] For example, Mr. Aude's offer latter dated February 15, 2016 described his first discretionary RSU award, and advised him that "the specific terms and conditions applicable to the grant, including the vesting schedule, will be available in the RSU award agreement." It also notified him that his grant would "be the subject to the terms and conditions of Apple's 2014 Employee Stock Plan as well as the terms and conditions of the RSU award agreement." (See Thomas Decl., ¶ 9, Exhibit G.)

(*Schachter*.) Consequently, he continues, it is unlawful for Apple to demand return of the RSUs that have already been earned and issued to him.

Apple responds that *Schachter* is distinguishable because the employee in that case chose to "receive awards of restricted company stock 'in lieu of cash payment of a percentage of the employee's annual compensation'" (*Schachter*, 47 Cal.4th at p. 614) whereas here, in contrast, Apple and Mr. Aude did *not* agree that he would receive RSUs in lieu of salary or compensation. Apple continues that *Schachter* involved restricted stock, which are issued when granted, and not RSUs which are not granted as actual shares until they vest. Consequently, Apple insists, RSUs are more analogous to stock options, which courts have concluded are *not* wages. (See, e.g., *Shah v. Skillz Inc.* (2024) 101 Cal.App.5th 285, 314 [stock options are "not wages" because their value "is not 'fixed or ascertainable'" when agreements are made] [internal citations omitted].) Finally, Apple urges that to the extent *Schachter* applies, it supports enforcing terms the parties agreed to. In *Schachter*, the parties expressly agreed not only that restricted stock would be wages, but also that the stock was "'subject to all of the provisions and administrative rules of the Plan.'" (*Schachter, supra*, 47 Cal.4th at p. 619.) Because the employee did not satisfy the provisions, having voluntarily terminated his employment before his restricted stock fully vested, he did not earn the restricted stock or the funds used to purchase it. In other words, it was the plaintiff's action that resulted in the loss of contingent incentive compensation, and not the defendant employer's.

Mr. Aude emphasizes that Apple is seeking to claw back *actual* stock from him, or the cash he received from selling stock, and not options or future promises of stock. When he was issued his RSU's by Apple, Mr. Aude explains, he was credited with one share of Apple stock, and after the RSUs vested, he had an unrestricted share of Apple stock. Consequently, he argues, their value was always known, and even if they were not "wages" when issued to him, they became as much were they vested and were converted into shares.

Upon review, the Court finds Mr. Aude's contentions more persuasive and agrees that *Schachter* supports the conclusion that the RSUs, at the very least to the extent they are vested, qualify as wages. In *Schachter*, the fact that the plaintiff had agreed to receive awards of restricted company stock in lieu of cash payment of a percentage of the employee's annual compensation was *not* the basis for the court's conclusion that restricted stock are wages. Thus, this factual distinction is of no consequence. Further, the Court agrees that because restricted stock have an ascertainable value and are immediately issued to the employee, they are not akin to stock options, which possess neither characteristic. Under the Labor Code, "wages" are defined as including "all amounts for labor performed by employees of every description, whether the amount is *fixed* or *ascertained* by the standard of time, task, piece, commission basis, or other method of calculation." (Lab. Code, § 200, subd. (a) [emphasis added].) As the RSUs are wages, Section 221 makes enforcement of the claw back provision of the RSU Agreement unlawful. It does not matter that Mr. Aude purportedly assented to the terms of the agreement by accepting the RSU grants as Apple contends; Labor Code section 219 prohibits private agreements that contravene the provisions of the Labor Code.

Given the unenforceability of the claw back provision, Apple has not demonstrated a probability of succeeding on its third cause of action for breach of the RSU Agreement. Consequently, the Court GRANTS Defendant's motion as to this claim.

c. Breach of Duty of Loyalty

In order to succeed on a claim for of the duty of loyalty, a plaintiff must plead and prove the following elements: (1) the existence of a fiduciary duty or a duty of loyalty; (2) breach of that duty; and (3) damages proximately caused by the breach. (See *Hong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 410.) Mr. Aude contends that Apple cannot demonstrate a probability of success on this claim because (1) it is superseded by CUTSA and (2) is premised on a duty arising out of a contract.

Mr. Aude is generally correct that, as a matter of law, CUTSA "serves to preempt all claims premised on the wrongful taking and use of confidential business and proprietary information, even if that information does not meet the statutory definition of a trade secret." (*ChromaDex, Inc. v. Elysium Health, Inc.* (C.D. Cal. 2019) 369 F.Supp.3d 983, 989 [citing *Silvaco Data Sys. v. Intel Corp*. (2022) 184 Cal.App.4th 210, 239, fn. 22, disapproved on other grounds by *Kwikset Corp. v. Superior. Court* (2011) 51 Cal.4th 310]; see also *Mattel, Inc. v. MGA Ent., Inc.* (C.D. Cal. 2010) 782 F.Supp.2d 911,987 ["In an effort to align with the California [state] courts that have addressed this issue, the Court concludes that [C]UTSA supersedes claims based on the misappropriation of confidential information, whether or not that information meets the statutory definition of a trade secret."].) Thus, courts have found claims superseded if they are "based on the same nucleus of facts" as a misappropriation claim. *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc*. (2009) 171 Cal.App.4th 939, 960-962 [finding "breach of confidence" claim and others superseded by CUTSA].)

In the Complaint, Apple's breach of duty of loyalty cause of action incorporates the same factual allegations underlying the breach of IPA claim and alleges, in pertinent part: "Mr. Aude breached his duty of loyalty by, among other things, while employed by Apple, disclosing Apple confidential and proprietary information to third parties without Apple's authorization. Mr. Aude's correspondence demonstrates that he leaked certain Apple confidential and proprietary information with the goal of harming Apple." (Complaint, ¶ 72.) Is it entirely unclear what "among other things" refers to and, as pled, the breach of loyalty claims appears to be based only on Mr. Aude's alleged disclosure of confidential information. In such a circumstance, the claim is preempted by CUTSA.

Apple resists this conclusion by arguing that the claim is based on "disloyal conduct unrelated to misuse of confidential information." (See Opp. at 23.) But the conduct Apple cites in the Complaint is the *same* conduct at issue in the alleged disclosure of confidential information. Apple continues that "[i]n similar situations, courts have found that CUTSA does not preempt a duty of loyalty claim." (Opp. at 23, citing *Angelica Textile Servs., Inc. v. Park* (2013) 220 Cal.App.4th 495, 499 and *C2 Educ. Sys., Inc. v. Lee,* 2019 WL 3220251 (N.D. Cal. 2019) 2019 U.S. Dist. LEXIS 119272.) But these cases are distinguishable, as they involved employees who were allegedly *competing* with their employers during their employment. Thus, in each case there was an independent basis for a breach of the duty of loyalty that was external to any alleged misappropriation of confidential or trade secret information. Here, because the sole basis for Apple's breach of loyalty claim is Mr. Aude's alleged disclosure of confidential information, it is preempted by CUTSA.

Because Apple's breach of the duty of loyalty cause of action is preempted, Apple cannot establish a probability of succeeding on the claim. Accordingly, Defendant's special motion to strike the second cause of action is GRANTED.

IV. CONCLUSION

Apple's motion to seal is GRANTED.

Defendant's special motion to strike is GRANTED IN PART and DENIED IN PART. The motion is GRANTED as to the second and third causes of action and DENIED as to the first.

The Court will prepare the order.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

- oo0oo -

Calendar Line 3

Case Name: *Steven R. Regalado, et al. v. Kellogg Company*
Case No.: 23CV412578

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiffs Enrique Martin and Edwin Faulkner (collectively, "Plaintiffs") allege that Defendant Kellogg Company committed various wage and hour violations. Before the Court is Plaintiffs' motion for preliminary approval of settlement, which is unopposed. As discussed below, assuming the requested changes to the notice are made, the Court GRANTS the motion.

I. BACKGROUND

According to the allegations of operative Second Amended Class and Representative Action Complaint ("SAC"), Plaintiffs Enrique Martin and Edwin Faulkner were formerly employed by Defendant as an Industrial Mechanic and Operations Specialist, respectively, both non-exempt, hourly-paid positions. Plaintiffs allege that Defendant failed to: pay employees for all hours worked, including all minimum and overtime wages; provide employees with meal periods or compensation in lieu thereof; to provide rest periods or compensation in lieu thereof; maintain accurate records of all hours worked; reimburse necessary business expenses; and provide accurate, itemized wage statements.

Based on the foregoing, former plaintiff Steven R. Regalado initiated this action on March 16, 2023. The First Amended Complaint was filed on March 22, 2023, with Mr. Martin added as a plaintiff. The operative SAC was filed on March 28, 2024, with Mr. Regalado no longer a named plaintiff and Mr. Faulkner added in that capacity. The SAC asserts the following causes of action: (1) failure to pay minimum wages; (2) failure to pay overtime compensation; (3) failure to provide meal periods; (4) failure to authorize and permit rest breaks; (5) failure to indemnify necessary business expenses; (6) failure to timely pay wages at termination; (7) failure to provide accurate itemized wage statements; (8) unfair business practices; and (9) civil penalties under PAGA.

Mr. Faulkner now seeks an order: preliminarily approving the parties' class action settlement; certifying the Class for settlement purposes; ordering the proposed Class Notice be sent to the settlement Class; appointing APEX Class Action Administration as the settlement administrator; conditionally appointing himself as Class representative; appointing Moon Law Group, P.C. as Class counsel; and scheduling a final approval hearing.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

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

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

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

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

B. PAGA

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

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

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

III. SETTLEMENT PROCESS

On June 27, 2023, Mr. Regalado filed a Request for Dismissal of Class and Individual Allegations without Prejudice, which requested the Court dismiss all of his pending allegations and to allow Mr. Martin to pursue his remaining causes of action; the motion was granted on June 29, 2023.

From May 2023 to January 2024, the parties agreed to engage in private mediation and engaged in an informal exchange of data and documents in preparation for it; this included, but was not limited to, the total number of putative Class Members and Aggrieved Employees during the Class and PAGA Periods, the total number of workweeks and pay periods worked by all putative Class Members and Aggrieved Employees during the Class and PAGA Periods, a fifteen percent sample of time and corresponding payroll records of all putative Class Members from March 16, 2019, to December 29, 2023 and the employee handbooks in effect during the Class Period. On February 13, 2023, the parties participated in a mediation session with mediator Mark Rudy, Esq., and reached the settlement that is now before the Court.

On February 14, 2024, Class counsel was retained by Mr. Faulkner, who submitted notice of Labor Code violations to the LWDA on February 29, 2024. On March 27, 2023, Messrs. Martin and Faulkner filed the SAC, which added Mr. Faulkner as an additional Class and PAGA representative and alleged a ninth cause of action for civil penalties under PAGA. On April 30, 2024, Class counsel filed a motion to be relieved as Mr. Martin's counsel; that motion was granted on June 27, 2024. Mr. Martin's claims remain active.

IV. SETTLEMENT PROVISIONS

The non-reversionary gross settlement is $1,357,000. Attorney's fees of up to $452,333.33 (or one-third of the gross settlement), litigation costs of up to $30,000 and administration costs not to exceed $10,000 will be paid from the gross settlement. $100,000 will be allocated to PAGA penalties, 75% of which ($75,000) will be paid to the LWDA, with the remaining 25% ($25,000) dispensed, on a pro rata basis, to "Aggrieved Employees," which are defined as "all persons who are employed or have been employed by Defendant in California as hourly non-exempt employees from March 22, 2022, [through July 20, 2024]."[1] Mr. Faulkner will seek a service award of $7,500.

[1] "Aggrieved Employees" are fully defined as "all persons who are employed or have been employed by Defendant in California as hourly non-exempt employees from March 22, 2022, through preliminary approval of the Settlement or sixty (60) days from the date this Agreement is fully executed, whichever is earlier." The settlement was fully executed on May 21, 2024, and sixty days from this date is July 20, 2024.

The net settlement will be allocated to "Class Members," who are defined as "all persons who are employed or have been employed by Defendant in California as hourly non-exempt employees from March 16, 2019, [through July 20, 2024]," on a pro rata basis based on the number of weeks worked during the Class period. For tax purposes, settlement payments will be allocated 20% to wages and 80% to penalties and interest. The employer-side payroll taxes on the portion allocated to wages will be paid by Defendant separate from, and in addition to, the gross settlement amount. 100% of the payment to Aggrieved Employees will be allocated to penalties. Funds associated with checks uncashed after 180 days will be transmitted to Controller of the State of California to be held in trust for such class members pursuant to California unclaimed property law.

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

> [T]he claims stated in the Operative Complaint or that reasonably could have been stated based upon the facts in the Operative Complaint, including: (i) all claims based on violation of California Labor Code sections 200, 201, 202, 203, 204, 208, 210, 218.5, 218.6, 221, 222, 223, 226, 226.2, 226.3, 226.7, 227.3, 246, 256, 510, 512, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, and 1199, California Industrial Commission Wage Orders, Cal. Code Regs., Title. 8, section 11040, et seq., Business and Professions Code sections 17200, et seq., California Code of Civil Procedure section 1021.5; and (ii) all claims for or related to alleged unpaid wages, under federal, state, or municipal law, concerning minimum wages, regular rate of pay, hours worked, overtime or double time wages, regular rate of pay, shift differentials, alternate workweeks, bonus and incentive pay, sick pay, timely payment of wages at separation, wage statements, meal periods and meal period premiums, rest breaks and rest break premiums, unfair competition, unfair business practices, unlawful business practices, and claims for statutory penalties based on the facts or claims alleged in the operative Complaint at any time during the Class Period (collectively, "Released Class Claims").

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

> [T]he PAGA claims that Plaintiff alleges, or reasonably could have alleged, against the Released Parties based on the facts stated in the operative Complaint and in Plaintiff's amended LWDA notice letter, including: (i) all PAGA claims seeking civil penalties premised upon California Labor Code sections 200, 201, 202, 203, 204, 208, 210, 218.5, 218.6, 221, 222, 223, 226, 226.2, 226.3, 226.7, 227.3, 246, 256, 510, 512, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, and 1199et seq., California Industrial Commission Wage Orders; and (ii) all other claims for civil penalties recoverable under the Private Attorneys General Act, California Labor Code sections 2698 et seq., based on the facts or claims alleged in the operative Complaint at any time during the PAGA Period

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

V. FAIRNESS OF SETTLEMENT

Based on the available data provided by Defendants, including class member timekeeping and payroll records, as well as class member demographics (i.e., the number of class members, workweeks, and average total compensation of the class), Plaintiff's counsel estimated Defendant's maximum exposure for each claim to be as follows: $1,465,914 (unpaid wages due to invalid alterative workweek schedule); $85,673 (unpaid wages due to improperly calculated regular rate); $347,930.06 (unpaid wages due to unpaid off-the-clock work); $2,720,559.24 (meal period violations); $2,901,984.01 (rest break violations); $134,220 (unreimbursed business expenses); $1,009,100 (inaccurate wage statements); $1,014,700 (PAGA civil penalties); and $840,946 (waiting time penalties).

Plaintiff's counsel than discounted the foregoing amounts by 5% to 50% to reach Defendant's *realistic* exposure for Plaintiff's claims (which total $1,529,500.13) as follows: $732,957 (unpaid wages due to invalid alternative work schedule; $42,836.50 (unpaid wages due to improperly calculated regular rate); $34,793.01 (unpaid wage violations due to unpaid off-the-clock work); $272,055.92 (meal period violations); $290,198.40 (rest break violations); $13,422 (unreimbursed business expenses); and $143,237.30 (derivative and PAGA penalties). The reduction to the maximum recovery amount for each claim accounted for, but is not limited to, the following: the difficulty of certifying each claim; Defendant's actual payment of additional overtime throughout the Class Period; the difficulty of proving certain violations; the execution of valid meal period waivers by Class Members; Class Members voluntarily foregoing rest breaks; Defendant having not required or encouraged Class Members to incur claimed business expenses; the strong likelihood that PAGA penalties would be substantially reduced by the Court in its discretion; and the risk of not prevailing at trial or on appeal. The gross settlement amount of $1,357,500 represents 88.75% of the realistic maximum recovery.

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

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

VI. PROPOSED SETTLEMENT CLASS

Plaintiff requests that the following settlement class be provisionally certified:

> [A]ll persons who are employed or have been employed by Defendant in California as hourly non-exempt employees from March 16, 2019, through July 20, 2024.

A. Legal Standard for Certifying a Class for Settlement Purposes

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

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

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

B. Ascertainable Class

A class is ascertainable "when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980 (*Noel*).) A class definition satisfying these requirements

> puts members of the class on notice that their rights may be adjudicated in the proceeding, so they must decide whether to intervene, opt out, or do nothing and live with the consequences. This kind of class definition also advances due process by supplying a concrete basis for determining who will and will not be bound by (or benefit from) any judgment.

(*Noel, supra,* 7 Cal.5th at p. 980, citation omitted.)

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in

order to show an ascertainable class." (*Noel, supra,* 7 Cal.5th at p. 984.) Still, it has long been held that "[c]lass members are 'ascertainable' where they may be readily identified … by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932, disapproved of on another ground by *Noel, supra,* 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 975-976 ["The defined class of all HD Package subscribers is precise, with objective characteristics and transactional parameters, and can be determined by DIRECTV's own account records. No more is needed."].)

Here, the estimated 356 Class Members are readily identifiable based on Defendant's records, and the settlement class is appropriately defined based on objective characteristics. The Court finds that the settlement class is numerous, ascertainable, and appropriately defined.

C. Community of Interest

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

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

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

As for the second factor,

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

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

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

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

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

D. Substantial Benefits of Class Certification

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

Here, there are an estimated 356 class members. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

VII. NOTICE

The content of a class notice is subject to court approval. (Cal. Rules of Court, rule 3.769(f).) "The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (*Ibid.*) In determining the manner of the notice, the court must consider: "(1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do not receive notice; and (7) The res judicata effect on class members." (Cal. Rules of Court, rule 3.766(e).)

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement (except for the PAGA component) or object. The gross settlement amount and estimated deductions are provided, and Class Members are informed of their qualifying workweeks as reflected in Defendant's records and are instructed how to dispute this information. Class members are given 60 days to request exclusion from the class or submit a written objection to the settlement.

The notice is generally adequate, but must be modified to instruct class members that they may opt out of or object to the settlement simply by providing their name, without the need to provide their address or other personal information. Regarding appearances at the final fairness hearing, the notice shall be further modified to instruct class members as follows:

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

Turning to the notice procedure, as articulated above, the parties have selected APEX Class Action Administration as the settlement administrator. The administrator will mail the notice packet within 51 days of preliminary approval of the settlement, after updating Class Members' addresses using the National Change of Address Database. Any returned notices will be re-mailed to any forwarding address provided or a better address located through a skip trace or other search. Class Members who receive a re-mailed notice will have an additional 14 days to respond. These notice procedures are appropriate and are approved.

VIII. CONCLUSION

Plaintiff's motion for preliminary approval is GRANTED.

The final approval hearing shall take place on **May 1, 2025** at 1:30 in Dept. 7. The following class is preliminarily certified for settlement purposes:

> [A]ll persons who are employed or have been employed by Defendant in California as hourly non-exempt employees from March 16, 2019, through July 20, 2024.

The Court will prepare the order.

****

LAW AND MOTION HEARING PROCEDURES

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

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

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

- oo0oo -

Calendar Line 4

Case Name:
Case No.:

- oo0oo -

Calendar Line 5

Case Name:
Case No.:

- oo0oo -

Calendar Line 6

Case Name:
Case No.:

- oo0oo -

Calendar Line 7

Case Name:
Case No.:

- oo0oo -

Calendar Line 8

Case Name:
Case No.:

- oo0oo -

Calendar Line 9

Case Name:
Case No.:

- oo0oo -

Calendar Line 10

Case Name:
Case No.:

- oo0oo -

Calendar Line 11

Case Name:
Case No.:

- oo0oo -

Calendar Line 12

Case Name:
Case No.:

- oo0oo -

Calendar Line 13

Case Name:
Case No.:

- oo0oo -