

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 19, Honorable Theodore C. Zayner Presiding

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

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department19@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Thank you.

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.

- **Remote appearances are encouraged and, as of August 15, 2022, must be made through Microsoft Teams**, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.
- If any party/attorney wishes to appear in person, please check in at Court Services (1st floor, Downtown Superior Courthouse, 191 N. 1st St., San Jose) and wait for a sheriff's deputy to escort you to the courtroom for your hearing.
- If any party wants a Court Reporter, the appropriate form must be submitted. The Reporter must appear remotely.
- Members of the public who wish to observe can do so through Microsoft Teams (using the link discussed above). Please make sure to turn your camera off and mute yourself if you are observing the proceedings. The Court no longer is using a public access line. Members of the public who wish to observe in person must check in at Court Services (1st floor, Downtown Superior Courthouse, 191 N. 1st St., San Jose) and wait for a sheriff's deputy to escort you to the courtroom.
- 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 18, 2023

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	20CV367311	Alcazar v. Quality First Home Improvement, Inc. (Class Action/PAGA)	See Line 1 for tentative ruling.
LINE 2	19CV352173	Cabuag v. Westgate Premier Healthcare Services, Inc., et al. (Class Action)	See Line 2 for tentative ruling.
LINE 3	20CV368984	President v. Walgreen Co. (Class Action)	See Line 3 for tentative ruling.
LINE 4	20CV364033	Yanez v. Gardner Family Health Network, Inc. (Class Action)	Reset per Stipulation and Order to December 6, 2023
LINE 5	19CV347249	Charles, et al. v. Varsity Tutors, LLC	Off calendar per request of the parties.
LINE 6	20CV373306	Pacheco v. Goodwill of Silicon Valley, et al. (Class Action)	See Line 6 for tentative ruling.
LINE 7			

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

Calendar Line 1

Case Name: Alcazar v. Quality First Home Improvement, Inc. (Class Action/PAGA)
Case No.: 20CV367311

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 18, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a putative class and representative action arising out of various alleged wage and hour violations. On June 17, 2020, plaintiff Noe Alcazar (“Alcazar”) filed a Class Action Complaint (“Complaint”), setting forth the following causes of action: (1) Failure to Pay Minimum and Straight Time Wages [Cal. Lab. Code §§ 204, 1194, 1194.2, and 1197]; (2) Failure to Pay Overtime Compensation [Cal. Lab. Code §§ 1194 and 1198]; (3) Failure to Provide Meal Periods [Cal. Lab. Code §§ 226.7, 512]; (4) Failure to Authorize and Permit Rest Breaks [Cal. Lab. Code §§ 226.7]; (5) Failure to Indemnify Necessary Business Expenses [Cal. Lab. Code § 2802]; (6) Failure to Timely Pay Final Wages at Termination [Cal. Lab. Code §§ 201-203]; (7) Failure to Provide Accurate Itemized Wage Statements [Cal. Lab. Code § 226]; and (8) Unfair Business Practices [Cal. Bus. & Prof. Code §§ 17200, et seq.]. Alcazar brought “the First through Eighth Causes of Action individually and as a class action on behalf of himself and certain current and former employees” of defendant Quality First Home Improvement, Inc. (“Defendant”). (Complaint, ¶¶ 2 & 21.)

On August 26, 2020, Alcazar filed First Amended Class Action and Representative Action Complaint adding a ninth cause of action for Civil Penalties Under PAGA [Cal. Lab. Code § 2699, et seq.].

On May 13, 2022, the court entered a Joint Stipulation and Order for Leave to File Second Amended Complaint (“Stipulation and Order”). The Stipulation and Order states that Alcazar and Defendant attended mediation, reached an agreement on the essential terms of a proposed class action settlement, executed a memorandum of understanding reflecting their agreement, and were finalizing the long form settlement agreement. The parties requested and were granted leave to file a proposed Second Amended Complaint (“SAC”) for purposes of

settlement approval. The Stipulation and Order provides that the SAC “does not add new allegations or theories of recovery”; rather, the SAC “only seeks to add an additional proposed Class Representative, Luwana Diane Mahler [(“Mahler”).]” (Stipulation and Order, p. 2:17-19.)

Alcazar and Mahler (collectively, “Plaintiffs”) filed the operative SAC on May 16, 2022. As is relevant here, the first through eighth causes of action of the SAC are brought by Plaintiffs as individuals and as class representatives. (SAC, ¶ 2.)

Mahler subsequently moved for preliminary approval of the settlement.

On June 23, 2022, the court entered an order denying the motion for preliminary approval of the settlement. The court explained that the settlement agreement was fatally defective because it purported to release Alcazar’s individual claims, alleged in the first through eighth causes of action, even though Alcazar was not a signatory to the settlement agreement. The court also noted that counsel had not moved to withdraw as counsel of record for Alcazar.

Thereafter, the law firm of Moon & Yang, APC moved to be relieved as counsel of record for Alcazar.

On September 21, 2022, the court entered an order granting the motion to be relieved as counsel on condition that, no later than September 26, 2022, counsel electronically submit to the court for signature and serve on Alcazar when signed by the court and no later than October 5, 2022 a new and revised proposed order on Judicial Council form MC-053.

That same day, counsel submitted the revised proposed order to the court and the court signed the order. As is relevant here, the Order Granting Attorney’s Motion to Be Relieved As Counsel states that “[i]f Plaintiff Alcazar does not appear personally or through new counsel at the Case Management Conference set for October 26, 2022, in Department 3 at 2:30 p.m., the court may dismiss his claims, leaving only the claims of Plaintiff Luwana Mahler.”

Subsequently, the Case Management Conference was rescheduled from October 26, 2022 to November 2, 2022.

Thereafter, Mahler moved for preliminary approval of the settlement.

On November 2, 2022, the court denied Mahler's motion for preliminary approval of settlement. The court explained that Mahler's motion was based on the same settlement agreement as the prior motion and, therefore, suffered from the same fatal defect as it attempted to release Alcazar's individual claims. Alcazar was not a signatory to the motion and remained a plaintiff in this action. The court noted that should Alcazar's claims be dismissed, Mahler and Defendant may elect to enter into a different settlement agreement.

At the November 2, 2022 Case Management Conference, the court set a further Case Management Conference for March 15, 2023.

Mahler then moved for preliminary approval of an amended settlement agreement.

According to the April 19, 2023 minute order, the court determined that Alcazar's claims were dismissed with prejudice as of November 2, 2022, and the court granted preliminary approval of the amended settlement agreement subject to the court's approval of an amended class notice.

Mahler's counsel submitted an amended class notice on April 20, 2023.

On April 21, 2023, the court entered an order granted preliminary approval of the settlement.

Now before the court is Mahler's motion for final approval of settlement. The motion is unopposed.

II. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

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

(*Wershba, supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

“The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case.” (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The court must examine the “proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (*Ibid.*, quoting *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers, supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

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

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

III. DISCUSSION

The case has been settled on behalf of the following class: All persons who worked for defendant Quality First Home Improvement, Inc. (“Defendant”) in California as an hourly paid, non-exempt employee at any time from June 17, 2019 through July 1, 2022. The class of PAGA members is defined as all persons who worked for Defendant in California as an hourly paid, non-exempt employee from June 17, 2019 through July 1, 2022.

As discussed in connection with preliminary approval, Defendant will pay a maximum settlement amount of \$1,000,000. This amount includes attorney fees not to exceed \$333,333.33 (1/3 of the gross settlement amount), litigation costs up to \$25,000, settlement administration costs estimated to be \$11,500, a class representative payment of \$7,500, and a PAGA allocation of \$75,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be available to PAGA members).

The net settlement amount will be distributed to class members based on the number of workweeks worked during the class period and the number of PAGA pay periods worked

during the PAGA period. The settlement agreement states that funds from checks that remained uncashed 180 days after issuance will be transferred to the Unclaimed Property Fund of the State Controller's Office.

The parties' proposal to send funds from uncashed checks to the Unclaimed Property Fund does not comply with Code of Civil Procedure section 384, which mandates that unclaimed or abandoned class member funds be given to "nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent." Plaintiff's counsel is ordered to appear at the final approval hearing to identify a new *cy pres* recipient in compliance with Code of Civil Procedure section 384.

In exchange for the settlement, class members who do not opt out will release Defendant, and related persons and entities, from all claims that were or could have been pleaded based upon the factual allegations of the SAC. PAGA members will also release Defendant, and related persons and entities, from all claims for civil penalties that were or reasonably could have been brought based upon the notice of Labor Code violations and PAGA penalties sent to the LWDA and Defendant. Mahler also agrees to a general release of additional claims.

On July 3, 2023, the settlement administrator mailed notice packets to 879 class members. (Declaration of Taylor Mitzner Regarding Settlement Notice Administration ("Mitzner Dec."), ¶ 5.) Ultimately, 17 class notices were undeliverable. (*Id.* at ¶ 7.) As of September 19, 2023, there were no objections or requests for exclusion. (*Id.* at ¶¶ 8-9.)

The highest individual settlement share to be paid is approximately \$7,739.32, the lowest individual settlement share to be paid is approximately \$3.51, and the average individual settlement share to be paid is approximately \$623.06. (Mitzner Dec., ¶ 14.) The court previously found the proposed settlement is fair and the court continues to make that finding or purposes of final approval.

Plaintiff requests a class representative enhancement award in the amount of \$7,500. The class representative has provided a declaration detailing her participation in the lawsuit.

Mahler states she spent approximately 30-40 hours on the case, including communicating with counsel regarding the case, reviewing documents, providing documents to counsel, identifying potential witnesses, participating in mediation, and reviewing settlement documents.

(Declaration of Luwana Diane Mahler in Support of Plaintiff's Motion for Approval of Class Action Settlement, ¶¶ 6-10.) Notably, the requested enhancement award works out to a payment of \$250 to \$187.50 per hour. Given that Mahler worked for Defendant for approximately four months and only became the class representative after contact with lost with Alcazar in 2022, the finds that a lesser amount is warranted. Consequently, an enhancement award in the amount of \$5,000 is approved.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel requests attorney fees in the amount of \$333,333.33 (1/3 of the total settlement). Plaintiff's counsel provides evidence demonstrating a total lodestar of \$202,867.50. (Declaration of Kane Moon in Support of Plaintiff's Motion for Final Approval of Class Action Settlement ("Moon Dec."), ¶¶ 22-45.) This results in a multiplier of 1.64. The fees requested are reasonable as a percentage of the common fund and are approved.

Plaintiff's counsel requests costs of \$15,784.47 and presents evidence of incurred costs in that amount. (Moon Dec., ¶ 45 & Ex. 3.) Therefore, the litigation costs are approved. The settlement administration costs of \$11,500 are also approved. (Mitzner Dec., ¶ 17.)

Accordingly, the motion for final approval of the class and representative action settlement is GRANTED. Plaintiff's counsel shall appear at the final approval hearing to identify a code-compliant *cy pres* recipient, and shall also file a supplemental declaration identifying the *cy pres* recipient.

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

The court will set a compliance hearing for June 12, 2024, at 2:30 p.m. in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein, the number and value of any uncashed checks, amounts remitted to Defendant, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

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Calendar Line 2

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

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 18, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

IV. INTRODUCTION

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

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

Plaintiff and Defendant have reached a settlement.

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

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

Now before the court is Plaintiff's motion for final approval of settlement. The motion is unopposed.

V. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

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

(*Wershba, supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, quoting *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers, supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

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

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

VI. DISCUSSION

The case has been settled on behalf of the following class: all current and former hourly-paid or non-exempt employees who worked for Defendant within the State of California at any time during the class period, which is defined as the period from August 1, 2015 through October 7, 2019.

As discussed in connection with preliminary approval, Defendant will pay a gross settlement amount of \$700,000. This amount includes attorney fees not to exceed \$245,000 (35 percent of the gross settlement amount), litigation costs up to \$30,000, a class representative enhancement payment of \$7,500, and actual settlement administration costs.

The net settlement amount will be distributed to class members based on the number of workweeks worked during the class period. The settlement agreement states that funds from checks that remain uncashed 180 days after issuance will be transferred to the Unclaimed Property Fund of the State Controller's Office.

The parties' proposal to send funds from uncashed checks to the Unclaimed Property Fund does not comply with Code of Civil Procedure section 384, which mandates that unclaimed or abandoned class member funds be given to "nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent." Prior to the continued hearing, Plaintiff's counsel shall file a supplemental declaration identifying a new *cy pres* recipient in compliance with Code of Civil Procedure section 384.

In exchange for the settlement, class members who do not opt out will release Defendant, and related persons and entities, from all claims alleged or that could have been alleged based on the facts pleaded in the Complaint. Plaintiff also agrees to a general release of claims.

On June 12, 2023, the settlement administrator mailed notice packets to 539 class members. (Declaration of Lluvia Islas on Behalf of Settlement Administrator Regarding Settlement Notice Administration ("Islas Dec."), ¶ 6.) Ultimately, one class notice was

undeliverable. (*Id.* at ¶ 8.) As of September 15, 2023, there were no objections or requests for exclusion. (*Id.* at ¶¶ 10-11.)

The highest individual settlement share to be paid is approximately \$1,436.69 and the average individual settlement share to be paid is approximately \$756.03. (Islas Dec., ¶ 15.) The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiff requests a class representative enhancement award in the amount of \$7,500. In connection with preliminary approval, the court found the enhancement award warranted and the court continues to approve the award.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel requests attorney fees in the amount of \$245,000 (35 percent of the gross settlement amount). Plaintiff's counsel provides evidence that attorneys at Lawyers for Justice, PC spent 423.90 hours on the action. (Declaration of Edwin Aiwazian in Support of Plaintiff's Motion for Final Approval of Class Action Settlement [...] ("Aiwazian Dec."), ¶ 11 & Ex. A.) Although the hours include work by multiple attorneys, Plaintiff's counsel does not state how many hours were worked by each attorney or provide the hourly rate of each attorney; instead, Plaintiff's counsel asserts that a "blended hourly rate" of at least \$700 is appropriate. (*Id.* at ¶ 12.) Given the absence of this additional information, the court cannot accurately determine the lodestar for purposes of performing a cross-check. Prior to the continued hearing on this motion, Plaintiff's counsel shall file a supplemental declaration setting forth the hours worked by each attorney on this matter, their experience, and their hourly rates.

Plaintiff's counsel also requests litigation costs in the total amount of \$10,926.08 and provides evidence of incurred costs in that amount. (Aiwazian Dec., ¶ 18 & Ex. B.) Therefore, the litigation costs are reasonable and approved. The settlement administration costs of \$10,000 are also approved. (Islas Dec., ¶ 16.)

Accordingly, the motion for final approval of the class action settlement is
CONTINUED to January 10, 2024, at 1:30 p.m. in Department 19. Plaintiff's counsel shall

file a supplemental declaration with the requested information no later than December 22, 2023. No additional filings are permitted.

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

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Calendar Line 3

Case Name: President v. Walgreen Co. (Class Action)

Case No.: 20CV368984

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 18, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VII. INTRODUCTION

This is a class and representative action arising out of various alleged wage and hour violations. On August 3, 2020, plaintiff Kenneth President (“Plaintiff”) filed a Complaint, asserting the following causes of action: (1) Failure to Provide Meal Periods (Lab. Code §§ 204, 223, 226.7, 512 and 1198); (2) Failure to Provide Rest Periods (Lab. Code §§ 204, 223, 226.7 and 1198); (3) Failure to Provide Hourly and Overtime Wages (Lab. Code §§ 223, 510, 1194, 1194.2, 1197, 1997.1 and 1198); (4) Failure to Indemnify (Lab. Code § 2802); (5) Failure to Provide Accurate Written Wage Statements (Lab. Code § 226(a)); (6) Failure to Timely Pay All Final Wages (Lab. Code §§ 201, 202 and 203); and (7) Unfair Competition (Bus. & Prof. Code § 17200 et seq.).

On September 17, 2020, defendant Walgreen Co. (“Defendant”) removed the action to federal court.

On January 12, 2021, Plaintiff filed a First Amended Complaint (“FAC”) adding an eighth cause of action for Civil Penalties (Lab. Code § 2698 et seq.).

On June 17, 2022, the federal court remanded the action to this court.

The parties reached a settlement and Plaintiff moved for preliminary approval of the settlement.

On November 11, 2022, the court issued an order denying Plaintiff’s motion for preliminary approval. The court explained that some of the settlement terms were so unclear and contradictory that it was not possible to determine the correct net settlement amount and the amounts to be paid to class members. The court advised that any renewed motion for preliminary approval would need to be based on a different agreement clarifying the contradictory terms.

Subsequently, Plaintiff filed a renewed motion for preliminary approval of settlement.

On March 22, 2023, the court continued the renewed motion to April 19, 2023, to allow Plaintiff to file further documents in support of his motion.

On April 19, 2023, the court granted Plaintiff's motion for preliminary approval of the parties' Amended Joint Stipulation of Class Action Settlement.

Now before the court is Plaintiff's motion for final approval of settlement. The motion is unopposed.

VIII. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

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

(*Wershba, supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, quoting *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers, supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and

discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.”

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

IX. DISCUSSION

The case has been settled on behalf of the following class:
[A]ll current and former non-exempt, hourly customer service associates employed by Walgreen Co. who worked in California at any time during the Class Period.

(Amended Declaration of Shaun Setareh in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement [...], Ex. A (“Settlement Agreement”), ¶ I.C.) The Class Period is defined as the period of time from August 3, 2016 through April 30, 2022.

(Settlement Agreement, ¶ I.G.) The class also includes a subset of PAGA Employees who are defined as “all non-exempt employees who worked for Defendant in California during the PAGA Period,” which is defined as the period from June 19, 2019 through April 30, 2022.

(Settlement Agreement, ¶¶ I.T & I.V.)

According to the terms of the amended settlement agreement, Defendant will pay a gross, non-reversionary amount of \$10,872,500. (Settlement Agreement, ¶¶ I.O, III.A, III.O.) The gross settlement amount includes attorney fees not to exceed \$3,624,166.66 (1/3 of the gross settlement amount), litigation costs up to \$22,000, a class representative enhancement award up to \$5,000, settlement administration costs not to exceed \$85,000, and a PAGA allocation of \$350,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be distributed to PAGA Employees). (Settlement Agreement, ¶ III.O.)

Checks remaining uncashed more than 180 days after issuance will be void and the funds from those checks will be sent to the National Association of Minority and Women Owned Law Firms. (Settlement Agreement, ¶ III.O.4.)

Code of Civil Procedure section 384 mandates that unclaimed or abandoned class member funds be given to “nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent.”

It does not appear to the court that the proposed *cy pres* fits within the boundaries of the statute. Consequently, Plaintiff's counsel is ordered to appear at the final approval hearing to address this issue and, if necessary, identify a new *cy pres* recipient in compliance with Code of Civil Procedure section 384.

Notice was mailed to 29,367 class members on May 31, 2023. (Declaration of Nicole Bench of ILYM Group, Inc. Regarding Notice and Settlement Administration ("Bench Dec."), ¶ 7.) Ultimately, 1,006 notice packets were undeliverable. (*Id.* at ¶ 10.) As of August 17, 2023, there were six requests for exclusion and no objections.¹ (*Id.* at ¶¶ 11-12.)

The estimated average gross payment to be made is \$231.13 and the estimated highest gross payment to be made is \$1,427.85. (Bench Dec., ¶ 15.) The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiff requests an enhancement award of \$5,000. In connection with his motion for preliminary approval, Plaintiff submitted a declaration detailing his participation in the case. Specifically, Plaintiff stated that he communicated with class counsel about the case on a regular basis, searched for and provided documents to class counsel, prepared for his deposition, participated in mediation, and reviewed the settlement documents. (Declaration of Kenneth President in Support of Motion for Preliminary approval of Class Action Settlement, ¶¶ 7-10.)

Moreover, Plaintiff undertook risk by putting his name on the case because it might impact his future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].) Therefore, the court finds the incentive award is warranted and it is approved.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel requests attorney fees in the amount of \$3,624,166.66 (1/3 of the total settlement). Plaintiff's

¹ The six individuals who requested exclusion from the settlement are Navneet Bhatia, Benjamin Geiser, Tran L. Lieu, Tracey Raether, Andrew D. Rose, and David Sand.

counsel provides evidence demonstrating a total lodestar of \$995,436.25. (Declaration of Shaun Setareh in Support of Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement [...] ("Setareh Dec."), ¶¶ 20-25.) This results in a multiplier of 3.64.

The lodestar is based on aggressively high billing rates which take full account of counsel's expertise and experience: 49.6 percent of the lodestar represents work valued at \$925 or \$1,100 per hour. Although high billing rates are generally justified by efficiencies including having work done by the qualified person with the lowest billing rate, in this case, the efficiencies on which such high billing rates are premised were not achieved. Even taking the lodestar at face value, a large multiplier is necessary to get to the proposed fee award. The court recognizes that class counsel obtained a favorable result for the class. The court further recognizes that contingency fee agreements put counsel at risk. However, the requested fee amount does not reflect the reasonable value of the services provided by class counsel in this case. The court will exercise its discretion to authorize a multiplier of 3.25 to the lodestar. Thus, Plaintiff's counsel will receive attorney fees of \$3,235,167.81. The remaining funds shall be distributed to the class.

Plaintiff's counsel requests litigation costs in the amount of \$27,020.03 and presents evidence of incurred costs in that amount. (Setareh Dec., ¶ 19 & Ex. A.) However, the amended settlement agreement only authorizes costs up to \$22,000. (Settlement, ¶¶ I.E, III.O.6 ["Class Counsel shall not seek or receive an amount in excess of \$22,000 from the Gross Settlement Amount for all past and future litigation costs and expenses"].) Therefore, the court approves an award of litigation costs in the lesser amount of \$22,000. The remaining funds shall be distributed to the class.

The settlement administration costs of \$85,000 are also approved. (Bench Dec., ¶ 17.)

Accordingly, Plaintiff's motion for final approval of settlement is GRANTED, subject to the additions to the net settlement fund. Plaintiff's counsel shall appear at the final approval hearing to identify a code-compliant *cy pres* recipient.

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

The court will set a compliance hearing for June 12, 2024, at 2:30 p.m. in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein, the number and value of any uncashed checks, amounts remitted to Defendant, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely,

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Calendar Line 4

Case Name: Yanez v. Gardner Family Health Network, Inc. (Class Action)
Case No.: 20CV364033

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Calendar Line 5

Case Name: Charles, et al. v. Varsity Tutors, LLC
Case No.: 19CV347249

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Calendar Line 6

Case Name: Pacheco v. Goodwill of Silicon Valley, et al. (Class Action)
Case No.: 20CV373306

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 18, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

X. INTRODUCTION

This is a putative class action brought by plaintiff Kristalinna Pacheco (“Plaintiff”) alleging violations of the Fair Credit Reporting Act (“FCRA”). The Complaint, filed on November 17, 2020, set forth causes of action for: (1) Violation of 15 U.S.C. §§ 1681b(b)(2)(A) (FCRA); and (2) Violation of 15 U.S.C. §§ 1681d(a)(1) and 1681g(c) (FCRA).

On November 18, 2020, the court issued its Order Deeming Case Complex and Staying Discovery and Responsive Pleading Deadline, which stayed all discovery in this case.

On June 4, 2021, Plaintiff filed the operative First Amended Complaint (“FAC”), which sets forth causes of action for: (1) Violation of 15 U.S.C. §§ 1681b(b)(2)(A) (FCRA); and (2) Violation of 15 U.S.C. §§ 1681d(a)(1) and 1681g(c) (FCRA).

In a joint case management conference statement filed in this case on October 25, 2021, the parties stated that defendants Goodwill of Silicon Valley (“GSV”) and Goodwill Industries International, Inc. (“GII”) (collectively, “Defendants”) raised concerns regarding the adequacy of Plaintiff as a class representative because she was incarcerated, and Plaintiff’s counsel intended to name a different class representative.

The minute order from the case management conference on October 27, 2021, states that Plaintiff was to set a motion for discovery with the complex coordinator and the parties were to meet and confer on a briefing schedule.

On May 12, 2022, the court entered a Joint Stipulation to Establish Briefing Schedule and Order (“Stipulation”). The Stipulation provides that Plaintiff’s counsel notified the court and Defendants that Plaintiff “intends to seek leave from the court to conduct discovery to locate an alternate class representative, as the result of Plaintiff Pacheco’s unavailability to

serve as a class representative” (Stipulation, p. 1:5-8.) The court then approved a briefing schedule for “Plaintiff’s Motion for Leave to Conduct Discovery to Locate an Alternate Class Representative” (Stipulation, p. 2:10-11.)

Subsequently, Plaintiff moved for “leave to find a new class representative” and “an order requiring Defendant to provide the contact information of all the putative class members (‘the class list’) to a third-party administrator, who will then send a notice to the putative class and provide the class list—minus those employees who opted out—to Plaintiff’s counsel.”

Defendants opposed the motion.

On July 13, 2022, the court entered an order granting Plaintiff’s motion to the extent Plaintiff requested leave to conduct discovery to locate an alternate class representative. The discovery stay was lifted as to discovery to locate a new class representative. The motion was denied in all other respects.

On July 12, 2022, Plaintiff served Defendants with special interrogatories, set one (“SI”). Defendants served Plaintiff with objection-only responses to the SI on August 15, 2022.

On September 13, 2022, the parties attended an Informal Discovery Conference regarding Defendants’ responses to the SI, but were unable to resolve their dispute.

On December 9, 2022, the court granted in part and denied in part Plaintiff’s motion to compel Goodwill of Silicon Valley to provide further responses to the SI and Plaintiff’s motion to compel Goodwill Industries International, Inc. to provide further responses to the SI. The motions were granted only to the extent that the discovery requests sought production of the full names and contact information for putative class members to the third party administrator.

Subsequently, Setareh Law Group moved to be relieved as counsel of record for Plaintiff.

On July 12, 2023, the court denied the motion without prejudice. The court explained that there was no proof of service accompanying the motion demonstrating service of the moving papers on Plaintiff. Furthermore, the declaration submitted by Plaintiff’s counsel in support of the motion was incomplete as section 3(a), which addressed whether counsel served the moving papers on the client personally or by mail, was left blank. The court ordered

Plaintiff's counsel to promptly re-notice, timely and properly serve Plaintiff, and file fully compliant proofs of service, in accordance with the Code of Civil Procedure and California Rules of Court. The court further directed Plaintiff's counsel to submit a fully completed proposed order, which included all upcoming hearing dates.

Thereafter, Setareh Law Group renewed its motion to be relieved as counsel of record for Plaintiff. The renewed motion was granted on August 17, 2023.

Now before the court is the motion by GII for summary judgment of the FAC. The motion is unopposed.²

II. LEGAL STANDARD

A motion for summary judgment must dispose of the entire action. (Code Civ. Proc., § 437c, subd. (a); *All Towing Services LLC v. City of Orange* (2013) 220 Cal.App.4th 946, 954 [“Summary judgment is proper only if it disposes of the entire lawsuit.”].) The pleadings limit the issues presented for summary judgment and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; see also *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73 [“the pleadings determine the scope of relevant issues on a summary judgment motion”].)

“Summary judgment is properly granted when no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. [Citation.]” (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1272 (*Madden*).) To satisfy this burden, the defendant must present evidence which either conclusively negates an element of the plaintiff's cause of action, or which shows the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

² Plaintiff's opposition to the motion was due on September 20, 2023, pursuant to the Order Granting Ex Parte Application to Continue the Hearing on Defendant's Motion for Summary Judgment entered on June 8, 2023.

“Once the defendant has met that burden, the burden shifts to the plaintiff ‘to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.’ [Citation.] ‘There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.’ [Citation.]” (*Madden, supra*, 165 Cal.App.4th at p. 1272.)

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

III. DISCUSSION

GII moves for summary judgment of the FAC on the grounds that Plaintiff cannot establish all of the elements of her first cause of action for Violation of 15 U.S.C. §§ 1681b(b)(2)(A) and her second cause of action for Violation of 15 U.S.C. §§ 1681d(a)(1) and 1681g(c). GII states that both claims turn on the allegation that it procured, or caused to be procured, a consumer report. GII argues that the first and second causes of action fail because the undisputed material facts demonstrate that it never procured, or caused to be procured, a consumer report or an investigative consumer report regarding Plaintiff.

The first cause of action alleges that Defendants procured, or caused to be procured, credit and background reports without providing disclosures and obtaining authorization as required by 15 U.S.C. § 1681b(b)(2)(A) of the FCRA. (FAC, ¶¶ 35-45.) As is relevant here, that statute provides:

... [A] person *may not procure a consumer report, or cause a consumer report to be procured*, for employment purposes with respect to any consumer, unless—

- (i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and
- (ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(15 U.S.C. § 1681b(b)(2)(A), italics added.)

A consumer report is defined as:
any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness [creditworthiness], credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for— ... (B) ... employment purposes

(15 U.S.C. § 1681a(d).)

Similarly, the second cause of action alleges that Defendants procured, or caused to be procured, credit and background reports without providing adequate disclosures as required by 15 U.S.C. §§ 1681d(a)(1) and 1681g(c) of the FCRA. (FAC, ¶¶ 48-59.) Those statutes establish the conditions under which a person, such as an employer or prospective employer, may obtain an “investigative consumer report.” As is relevant here, 15 U.S.C. § 1681d(a)(1) provides:

(a) Disclosure of fact of preparation. A person *may not procure or cause to be prepared* an investigative consumer report on any consumer unless—

(1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and (B) includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section and the written summary of the rights of the consumer prepared pursuant to section 609(c) [15 USCS § 1681g(c)];

(15 U.S.C. § 1681d(a)(1), italics added.)

An “investigative consumer report” is defined as:
a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.

(15 U.S.C. § 1681a(e).)

Additionally, 15 U.S.C. § 1681g(c) provides:

(c) Summary of rights to obtain and dispute information in consumer reports and to obtain credit scores.

(1) Commission summary of rights required.

(A) In general. The Commission shall prepare a model summary of the rights of consumers under this title [15 USCS §§ 1681 et seq.].

(B) Content of summary. The summary of rights prepared under subparagraph (A) shall include a description of—

- (i) the right of a consumer to obtain a copy of a consumer report under subsection (a) from each consumer reporting agency;
- (ii) the frequency and circumstances under which a consumer is entitled to receive a consumer report without charge under section 612 [15 USCS § 1681j];
- (iii) the right of a consumer to dispute information in the file of the consumer under section 611 [15 USCS § 1681i];
- (iv) the right of a consumer to obtain a credit score from a consumer reporting agency, and a description of how to obtain a credit score;
- (v) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency without charge, as provided in the regulations of the Bureau prescribed under section 211(c) of the Fair and Accurate Credit Transactions Act of 2003; and
- (vi) the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency described in section 603(w) [15 USCS § 1681a(w)], as provided in the regulations of the Bureau prescribed under section 612(a)(1)(C) [15 USCS § 1681j(a)(1)(C)]. ...

(2) Summary of rights required to be included with agency disclosures. A consumer reporting agency shall provide to a consumer, with each written disclosure by the agency to the consumer under this section—

(A) the summary of rights prepared by the Bureau under paragraph (1);

(15 U.S.C. § 1681g(c).)

Here, GII submits the following undisputed material facts: GII is a 501(c)(3) nonprofit organization and the national membership headquarters for 155 independent, autonomous Goodwill organizations in the United States and Canada. (Goodwill Industries International's Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment [...], Undisputed Material Fact ("UMF") Nos. 1-2.) Membership organizations, such as GSV, pay dues to GII and are granted the right to use certain Goodwill trademarks. (UMF Nos. 3-4.)

GSV operates as an independent, autonomous corporation separate and apart from GII. (UMF No. 5.) GII has no control over: GSV's decisions regarding whether GSV obtains background checks or consumer reports of employees and applicants; GSV's decisions regarding which vendor it uses for background checks and consumer reports of employees and applicants; or GSV's decisions regarding what notices it provides to employees and applicants about its procurement of background checks and consumer reports. (UMF Nos. 6-8.)

Plaintiff is a former employee of GSV. (UMF No. 9.) Plaintiff has never applied for a position or had an employment relationship with GII. (UMF Nos. 13-14.) As part of the hiring and onboarding process, GSV provided Plaintiff with a form "authorization to release information and records" for a background check through its vendor Choice Screening. (UMF No. 10.) GII was not involved in GSV's background check process, the background check on Plaintiff, or the form used by GSV for the authorization. (UMF Nos. 11-12.) GII has never procured or caused to be procured any form of background check report or consumer report on Plaintiff. (UMF Nos. 15 & 18.) GII has never procured or caused to be procured any form of background check report or consumer report for any individual in connection with their application for employment or employment with GSV. (UMF Nos. 16-17, 19-20.) GII has never procured or caused to be prepared any form of investigative consumer report on Plaintiff. (UMF No. 21.) GII has never procured or caused to be prepared any form of investigative consumer report for any individual in connection with their application for employment or employment with GSV. (UMF Nos. 22-23.) These UMF are sufficient to meet GII's initial burden on summary judgment as the UMF demonstrate that GII never procured, caused to be procured, or caused to be prepared, a background check report, consumer report, or an investigative consumer report regarding Plaintiff.

When the burden shifts, Plaintiff fails to show that a triable issue of one or more material facts exists as to the first and second causes of action as she does not submit any opposition to the motion.

Accordingly, GII's motion for summary judgment of the FAC is GRANTED.

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

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