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.

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DATE: NOVEMBER 15, 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	22CV407762	Ayala, et al. v. Central Coast Agriculture, Inc. (Class Action)	See Line 1 for tentative ruling.
LINE 2	20CV366939	ZL Technologies, Inc. v. Splitbyte Inc., et al. (LEAD CASE; Consolidated With 20CV373027, 20CV373149, 21CV378097, 21CV382329)	See Line 2 for tentative ruling.
LINE 3	17CV319705	Group One Construction, Inc. v. La Encina Development, L.L.C., et al.	See Line 3 for tentative ruling.
LINE 4	23CV415220	Lampkins v. Belmont Village, L.P. (PAGA)	See Line 4 for tentative ruling.
LINE 5	20CV365252	Flores v. ACCO Engineered Systems, Inc. (Included in Acco Wage and Hour Cases, JCCP5172, Santa Clara)	See Line 5 for tentative ruling.

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LINE 6	19CV348674	In Re Cloudera, Inc. Securities Litigation (formerly Lazard v. Cloudera, Inc., et al.) Lead Case/Consolidated Action	Hearing VACATED, to be reset upon case reassignment, due to Department 19 recusal.
LINE 7	21CV389519	Tinoco v. SWA Services Group, Inc. (Class Action/PAGA)	See Line 7 for tentative ruling.
LINE 8	20CV362163	Edgar v. Aegion Corporation, et al. (Class Action)	See Line 8 for tentative ruling.
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Ayala, et al. v. Central Coast Agriculture, Inc. (Class Action)
Case No.: 22CV407762

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 15, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

On March 6, 2023, plaintiffs Christian Ayala ("Ayala") and Emmett Reiner ("Reiner") (collectively, "Plaintiffs") filed a First Amended Class Action Complaint ("FAC") against defendant Central Coast Agriculture, Inc. ("Defendant"), which sets forth the following causes of action: (1) Violation of the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, et seq.; (2) Violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, et seq.; (3) Violation of the California False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, et seq.; (4) Breach of Express Warranty; (5) Breach of Implied Warranty of Merchantability; (6) Unjust Enrichment; and (7) Fraud.

Defendant demurred to each and every cause of action of the FAC on the grounds of uncertainty and failure to allege sufficient facts to state a cause of action. (See Code Civ. Proc., § 430.10, subds. (e), (f).) Plaintiffs opposed the demurrer.

On July 17, 2023, the court entered an order overruling the demurrer on the ground of uncertainty and sustained the demurrer on the ground of failure to allege sufficient facts to state a cause of action with leave to amend.

On July 21, 2023, Plaintiffs filed the operative Second Amended Class Action Complaint ("SAC"), which alleges the following causes of action: (1) Violation of the California Consumers Legal Remedies Act, Cal. Civ. Code §§ 1750, et seq.; (2) Violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, et seq.; (3) Violation of the California False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, et seq.; (4) Breach of Express Warranty; (5) Breach of Implied Warranty of Merchantability; (6) Unjust Enrichment; and (7) Fraud.

Now before the court is Defendant's demurrer to each and every cause of action of the SAC on the grounds of uncertainty and failure to allege sufficient facts to state a cause of action. (See Code Civ. Proc., § 430.10, subds. (e), (f).) Plaintiffs oppose the demurrer.

II. REQUEST FOR JUDICIAL NOTICE

In connection with its moving papers, Defendant asks the court to take judicial notice of: (1) an article titled, "EXCLUSIVE: We tested top Calif. Prerolls for potency inflation," published by WeedWeek on September 8, 2022; (2) a Certificate of Analysis of "Raw Garden (Pre-Roll)" by Anresco Laboratories ("Anresco") dated August 10, 2022; and (3) a Certificate of Analysis of "Raw Garden (Pre-Roll)" by Infinite Chemical Analysis Labs ("Infinite") dated August 19, 2022. The request for judicial notice is unopposed

Item Nos. 1-3 are proper subjects of judicial notice under Evidence Code section 452, subdivision (h) because the subject article, and the testing results discussed in the article, are referenced repeatedly in the SAC. (See Evid. Code, § 452, subd. (h); *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9 [indicating that a document referenced in a pleading under review is judicially noticeable]; see also *Salvaty v. Falcon Cable TV* (1985) 165 Cal.App.3d 798, 800, fn. 1; *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285, fn. 3 [taking judicial notice of a letter and media release that formed the basis of the allegations in the complaint].)

Accordingly, Defendant's request for judicial notice is GRANTED.

III. LEGAL STANDARD

The function of a demurrer is to test the legal sufficiency of a pleading. (*Trs. Of Capital Wholesale Elec. Etc. Fund v. Shearson Lehman Bros.* (1990) 221 Cal.App.3d 617, 621.) Consequently, " '[a] demurrer reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice' [citation]." (*Hilltop Properties, Inc. v. State* (1965) 233 Cal.App.2d 349, 353; see Code Civ. Proc., § 430.30, subd. (a).) " 'It is not the ordinary function of a demurrer to test the truth of the … allegations [in the challenged pleading] or the accuracy with which [the plaintiff] describes the defendant's conduct. … .' [Citation.] Thus, … 'the facts alleged in the pleading are deemed to be true,

however improbable they may be. [Citation.]' [Citations.]" (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958.)

IV. DISCUSSION

A. Uncertainty

Defendant demurs to each and every cause of action of the SAC on the ground of uncertainty. (See Code Civ. Proc., § 430.10, subd. (f).)

However, Defendant's memorandum of points and authorities is devoid of any argument specifying an allegation in the first through seventh causes of action that Defendant contends is uncertain, ambiguous, and/or unintelligible. (See *Fenton v. Groveland Community Services Dist*. (1982) 135 Cal.App.3d 797, 809 [the "failure to specify the uncertain aspects of a complaint will defeat a demurrer based on the grounds of uncertainty"], overruled on other grounds by *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 328, fn. 30.) Furthermore, it appears that Defendant contends the claims are vague, ambiguous, and/or uncertain because Plaintiffs fail to allege sufficient facts to plead each element of their claims. In this regard, Defendant misunderstands the nature of uncertainty as a ground for demurrer. The law is settled that "[a] special demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading but is directed at the uncertainty existing in the allegations already made." (*Butler v. Sequiera* (1950) 100 Cal.App.2d 143, 145-146.) Consequently, the demurrer on the ground of uncertainty fails.

Accordingly, the demurrer to each and every cause of action of the SAC on the ground of uncertainty is OVERRULED.

B. Failure to Allege Sufficient Facts to Constitute a Cause of Action

Each of Plaintiffs' claims are predicated on the general allegation that the products purchased by Plaintiffs were falsely and misleadingly labelled because the amount of THC contained in the products was less than the amount stated on the product labels (i.e., the amount of THC listed on the product labels was inflated). (FAC, ¶¶ 1, 14-15, 21, 23-28, 43.)

Defendant demurs to each and every cause of action of the SAC on the ground of failure to allege sufficient facts to constitute a cause of action, arguing that Plaintiffs do not allege facts demonstrating that that the products purchased by Plaintiffs actually contained less

THC than the amount of THC listed on the product labels. In other words, Defendant contends that Plaintiffs have not established that they sustained any injury or damage.

Defendant's argument is well-taken. Reiner allegedly purchased a Raw Garden Infused Joints three-pack in the "Sunset Cookies" strain in April 2022, and Ayala allegedly purchased Raw Garden Infused Joints in the "Caribbean Slurm" strain in June 2022. (FAC, ¶¶ 29, 33.) Plaintiffs allege that WeedWeek, an online newsletter for cannabis professionals, released an article on September 8, 2022, stating that it had two laboratories test a single pre-rolled Raw Garden joint of the "Caribbean Slurm" strain and the product tested had significantly less THC than the amount of THC listed on the label. (*Id.* at ¶¶ 23-24; RJN, Ex. A.) Specifically, Plaintiffs allege that the product was labeled as having 44 percent THC potency, but Anresco's results showed 31 percent and Infinite's results showing 25 percent. (*Id.* at ¶ 24; RJN, Exs. B-C.)

Notably, the judicially noticeable documents show Anresco's and Infinite's testing was performed in August 2022, approximately two months after Ayala allegedly purchased Raw Garden Infused Joints in the "Caribbean Slurm" strain. (RJN, Exs. B-C.)

Plaintiffs further allege that their counsel obtained independent laboratory testing of Defendant's Fire Walker THC Product, which showed that the Fire Walker THC Product contained less THC than the amount listed on the label. (FAC, ¶ 25.)

These factual allegations are insufficient to establish that the amount of THC in the specific products purchased by Plaintiffs was less than the amount of THC listed on the product labels. Plaintiffs have not alleged facts showing that the Raw Garden Infused Joints tested by WeedWeek were the same as the products that were purchased by Plaintiffs in April and June 2022. There are no factual allegations showing that any testing whatsoever was done of "Sunset Cookies" strain purchased by Reiner. The allegations of the SAC and the judicially noticeable documents show that only a single pre-rolled joint of the "Caribbean Slurm" strain was tested in August 2022, two months after Ayala purchased joints of the "Caribbean Slurm" strain. The WeedWeek article cited by Plaintiffs states that "[t]he tests don't account for many variables such as how long product had been on shelves, its temperature exposure, the potential for testers' bias, human error and a host of other possible corruption." (RJN, Ex. A.) The SAC

does not set forth any facts regarding when the "Caribbean Slurm" joint tested by Anresco and Infinite was produced or sold. Additionally, there are no factual allegations establishing that the percentage of THC listed on the package of the "Caribbean Slurm" joint tested in August 2022, was the same percentage of THC listed on the package of "Caribbean Slurm" joints purchased by Ayala. Similarly, there are no factual allegations establishing that the percentage of THC in the joint tested in August 2022, was the same percentage of THC contained in the joints purchased by Ayala. Thus, the allegation that the Raw Garden joint tested by WeedWeek contained less THC than the amount stated on the product label does not permit a reasonable inference that the specific products purchased by Plaintiffs also contained less THC than the amount stated on the product labels.

Similarly, the fact that the Fire Walker THC Product tested by Plaintiff's counsel contained less THC than the amount listed on the product label does not demonstrate that the Raw Garden Infused Joints "Sunset Cookies" strain and Raw Garden Infused Joints "Caribbean Slurm" strain purchased by Plaintiffs also contained less THC than the amount of THC listed on the product labels. Notably, the allegations in the FAC that different strains of the Raw Garden Infused Joints are the "same type of infused joint [p]roduct," have substantially similar packaging, and come from a single farm (see SAC, ¶¶ 1, 15, 19-22) do not establish that the amount of THC in different strains was the same. In fact, the specific factual allegations of the SAC demonstrate that the amount of THC listed on the product label, and the amount of THC actually contained in the product, differed from strain to strain. (*Id.* at ¶¶ 14, 15, 19-21, 23, 24.) The court disregards the conclusory allegation that "each of the Products is the same for all purposes relevant to Plaintiffs' claims" (*id.* at ¶ 21) because it is belied by the specific factual allegations set forth in the SAC (*id.* at ¶¶ 14, 15, 19-21, 23, 24).

Accordingly, the demurrer to each and every cause of action of the SAC on the ground of failure to allege sufficient facts to state a cause of action is SUSTAINED without leave to amend.

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

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Calendar Line 2

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

The above-entitled actions come on for hearing before the Honorable Theodore C. Zayner on November 15, 2023, at 9:00 a.m. in Department 19. The court now issues its tentative ruling as follows:

II. INTRODUCTION

This consolidated action involves five related matters:

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

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

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

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

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

Now before the court are: (1) the motion to seal by ZL Technologies, Inc. ("ZL"); and (2) the motion by Arvind Srinivasan ("Srinivasan"), Splitbyte Inc., Kapisoft, Inc. ("Kapisoft"), and MI17, Inc. ("Defendants") for an order disqualifying James M. Wagstaffe ("Wagstaffe") and Wagstaffe, Von Loewenfeldt, Busch & Radwick LLP ("WVBR") (collectively, "Plaintiffs' counsel") as counsel for ZL, Kon Leong ("Leong"), and Chimmy Shioya ("Shioya"). ZL, Leong, and Shioya oppose the motion to disqualify counsel.

III. 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).) "A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties." (Cal. Rules of Court, rule 2.551(a).) 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).)

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.)

Further, where some material within a document warrants sealing but other material does not, the document should be edited or redacted if possible, to accommodate the moving party's overriding interest and the strong presumption in favor of public access. (See Cal. Rules of Court, rule 2.550(e)(1)(B); see also *In re Providian Credit Card Cases*, *supra*, 96 Cal.App.4th at p. 309.) 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. (*In re Providian Credit Card Cases*, *supra*, 96 Cal.App.4th at p. 309.)

B. Discussion

ZL asks the court to seal exhibits, portions of exhibits, and portions of declarations filed by ZL on November 1, 2023, in opposition to the pending motion to disqualify counsel. ZL asserts that the subject materials include: declarations of its technical expert containing specific reference and summaries from source code as well as detailed findings about specific functions of its proprietary software; confidential and private employment documents; documents regarding the parties' business and customers; and other documents designated confidential under the parties' protective order. ZL asserts that information regarding its proprietary software is not public knowledge and would be harmful if disclosed to the general public and competitors. Furthermore, ZL states that disclosure of

the additional information regarding its business and customers, and confidential employment documents, would create a substantial risk of harm to its business interests.

In support of its motion to seal, ZL provides a declaration from its counsel, which generally supports the request for sealing. (Declaration of Maria Radwick in Support of ZL Technologies, Inc.'s Motion to File Confidential Documents Under Seal, ¶¶ 3-7.)

Information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party. (*Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1286.) In addition, courts have found that, under appropriate circumstances, trade secrets, when properly asserted and not waived, may constitute overriding interests warranting sealing. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1222, fn. 46; see Civ. Code, § 3426.5.) Finally, individuals have a right to privacy in their personal employment information. (See *In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn.3 ["Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests."].) Thus, as a general matter, the subject materials appear to be subject to sealing. Moreover, the sealing request is narrowly tailored as it only seeks to seal explicit references to the confidential information disclosed in the documents.

Accordingly, the motion to seal is GRANTED.

IV. MOTION TO DISQUALIFY COUNSEL

A. GENERAL PRINCIPLES OF ATTORNEY DISQUALIFICATION

In *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc*. (1999) 20 Cal.4th 1135, 1144–1146 […] (*SpeeDee Oil*), our Supreme Court set forth the "disqualification principles": "A motion to disqualify a party's counsel may implicate several important interests. Consequently, judges must examine these motions carefully to ensure that literalism does not deny the parties substantial justice. [Citation.] Depending on the circumstances, a disqualification motion may involve such considerations as a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. [Citations.] Nevertheless, determining whether a conflict of interest requires disqualification involves more than just the interests of the parties.

"A trial court's authority to disqualify an attorney derives from the power inherent in every court '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a

> judicial proceeding before it, in every matter pertaining thereto.' [Citations.] Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citations.]
>
> "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring '"the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." [Citation.]' [Citation.] To this end, a basic obligation of every attorney is '[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.' (Bus. & Prof. Code, § 6068, subd. (e).)" (*SpeeDee Oil*, *supra*, 20 Cal.4th at pp. 1144-1146.)

(*Victaulic Co. v. American Home Assurance Co.* (2022) 80 Cal.App.5th 485, 504 (*Victaulic*).)

B. DISCUSSION

Defendants initially argue the court should disqualify Wagstaffe and WVBR as counsel for ZL, Leong, and Shioya because Plaintiffs' counsel wrongfully acquired privileged or confidential communications. Defendants assert that Phani Kuppa ("Kuppa") recorded numerous videos of multiple Google Hangout sessions with Srinivasan without Srinivasan's knowledge or consent from January 2020 to May 2020, and took screenshots and videos of Google Hangout sessions with Srinivasan from December 2021 to January 2022. Defendant state that the videos and photos taken from November 2021 to January 2022, included: Srinivasan's review of Leong's deposition transcript; draft of information that Srinivasan was preparing for, and at the direction of, defense counsel; Srinivasan's preparation of a rebuttal of Leong's declaration in support of ZL's opposition to Defendants' motion for summary adjudication; Srinivasan's disclosure of potential business transactions between Orchid Innovations, Inc. and MI17; and Srinivasan's disclosure that he intended to seek full-time employment with Apple, Inc. Defendants contend that the communications were confidential and, therefore, Kuppa violated Penal Code section 632 when he recorded them. Defendants contend that Kuppa is a consultant for Plaintiffs' counsel, Plaintiffs' counsel used the evidence in violation of California Rules of Professional Conduct 1.4(a)(4) and 3.3(b), and illegally obtained the communications at the direction of Plaintiffs' counsel.

Similarly, Defendants assert that Kuppa, as a consultant for Plaintiffs' counsel, illegally stole a desktop computer from Kapisoft in July 2021. Defendants also contend that Kuppa fraudulently promised to perform services for Kapisoft and thereby gained access to confidential Kapisoft and Splitbyte information and data. Defendants state that Kuppa then provided the materials and information to Plaintiffs' counsel.

Next, Defendants argue that Wagstaffe must be disqualified as counsel for ZL, Leong, and Shioya because he is an advocate-witness in this consolidated action. Defendants contend that the trier of fact will have to determine whether rescission of the IP agreement is appropriate and, as outside counsel, Wagstaffe reviewed and discussed the IP Agreement with ZL's in-house counsel. Defendants conclude that Wagstaffe's testimony will be material to the trier of fact and could confuse the jury.

Lastly, Defendants argue that Wagstaffe must be disqualified as counsel for ZL, Leong, and Shioya because Wagstaffe has a conflict of interest because he has been outside counsel for ZL for years prior to this action. Defendants assert that the controversies between ZL, Leong, and Srinivasan create an actual conflict of interest for Wagstaffe. Defendants assert that there is a conflict between ZL and Leong because Srinivasan, a director and shareholder, has brought claims against Leong for mismanagement and breach of fiduciary duty.

First, the court finds that Defendant's motion is untimely to the extent it is predicated on Wagstaffe's purported status as an advocate-witness and his concurrent representation of ZL, Leong, and Shioya. It is clear that attorney disqualification can be impliedly waived by failing to bring the motion in a timely manner. (*Liberty National Enterprises, L.P. v. Chicago Title Ins. Co*. (2011) 194 Cal.App.4th 839, 845 (*Liberty*); *Antelope Valley Groundwater Cases* (2018) 30 Cal.App.5th 602, 625 (*Antelope*).) Here, the delay in bringing the disqualification motion on the basis of Wagstaffe's purported status as an advocate-witness and his concurrent representation of ZL, Leong, and Shioya was unreasonable. At all relevant times, Defendants were aware of Wagstaffe's role as outside-counsel for ZL. In addition, Defendants deposed Wagstaffe in September 2020, regarding his involvement, if any, regarding the preparation of the IP Agreement. While Wagstaffe was initially counsel of record for Plaintiffs' only with respect to the defamation case, he substituted in as Plaintiffs' counsel of record for all matters in October 2021. Thus, Defendants knew of Wagstaffe's

purported status as an advocate-witness and his concurrent representation of ZL, Leong, and Shioya for approximately two years before filing its disqualification motion.

This delay is unreasonable given the stage at which the disqualification motion is made. (See *Liberty, supra,* 194 Cal.App.4th at p. 846.) Defendants filed their motion after substantial discovery has taken place and summary judgment motions have been filed. (See *id.* at pp. 846-847 ["the motion was made roughly midway through the case, which is a very bad time to have to change lawyers, especially in a case that involves the interplay of many documents and several witnesses"].) The delay is significant not only from the perspective of prejudice to Plaintiffs, but it is also an indication that Wagstaffe's status as an advocate-witness and his concurrent representation of ZL, Leong, and Shioya was not seen as a serious or substantial problem by the Defendants. (See *id.* at p. 847; *Antelope, supra,* 30 Cal.App.5th at pp. 626-628.) The length of the delay further suggests that Defendants brought the instant motion as a tactical device to delay litigation. (See *Geringer v. Blue Rider Finance* (2023) 94 Cal.App.5th 813, 824.)

Moreover, the prejudice to Plaintiffs would be extreme if Wagstaffe were disqualified. Wagstaffe not only knows ZL as a result of having represented it as outside counsel for many years, he gained mastery of this case as it was being developed for the past two years. "[M]astery over a complex case is best acquired as the case progresses through discovery." (*Liberty, supra,* 194 Cal.App.4th at p. 848.) Given Wagstaffe's substantial participation in this action, he is a lawyer of great value for Plaintiffs. Furthermore, when, as here, the delay was so unreasonable as to amount to an implied waiver of disqualification, the interests and rights of Plaintiffs to the lawyer of their choice should be taken into account. And, in this case, that interest is very clearly a continuation of Wagstaffe as counsel for Plaintiffs.

The court now turns to the remaining ground for the motion—Plaintiffs' counsel wrongfully acquisition of Defendants privileged and/or confidential communications and property. At this time, the court need not make any comments or judgment as to the nature of Kuppa's conduct (such as whether the subject recordings violated Penal Code section 632 or whether Kuppa stole property from Defendants). The sole issue facing the court is whether Wagstaffe and WVBR must or should be disqualified from representing ZL, Leong, and Shioya as a result of their receipt and use of evidence allegedly illegally obtained by Kuppa.

As Plaintiffs' counsel persuasively argue, there is no evidence that they themselves engaged in any misconduct that violated any law or Rule of Professional Conduct. They played no part in obtaining any confidential information through unauthorized channels. There is no evidence that Kuppa was communicating with or working for Plaintiffs' counsel at the time he received the desktop computer and obtained access Defendants' information in connection with his alleged work as a consultant for Kapisoft. Similarly, there is no evidence that Plaintiffs' counsel encouraged Kuppa to surreptitiously record Srinivasan or even knew about it. The record evidence shows that Kuppa made the subject recordings from January 2020 to May 2020, and November 2021 to January 2022. The evidence demonstrates that Plaintiffs' counsel first learned of the information Kuppa possessed (e.g., the photographs and recordings) when they spoke with Kuppa in February 2022. There is no evidence that Plaintiffs' counsel was aware of Kuppa's actions, directed his conduct, or retained him as a consultant prior to that time. Even if the photographs and recordings taken by Kuppa constitute illegally obtained evidence, the correct judicial response would be suppression of the subject evidence (see Penal Code, § 632, subd. (d) [stating that evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section is not admissible in any judicial proceeding]), not disqualification.

Moreover, the court is not convinced that Plaintiffs' counsel has ever known Kuppa's conduct was illegal. With respect to the allegedly stolen property, Kuppa maintains that the desktop computer was actually given to him by Srinivasan as a gift. Furthermore, there is a legitimate question as to whether Srinivasan's Google Hangout sessions with Kuppa constituted confidential communications under Penal Code section 632. The communications recorded by Kuppa from January 2020 to May 2020, were made at a time when Kuppa was an employee of ZL. Plaintiffs' counsel could have concluded that Srinivasan did not have a reasonable expectation that his communications regarding his alleged misconduct would be kept confidential from ZL in light of Kuppa's obligations as ZL's employee. With respect to the communications from November 2021 to January 2022, nothing on the face of the communications established that they were confidential or privileged. Kuppa declares that he was present during the Google Hangout sessions because Srinivasan wanted him to learn about e-discovery as a business model. Consequently, the evidence in the record does not establish that

Srinivasan's disclosure of litigation materials to Kuppa was made to further Srinivasan's interest in the litigation or was necessary to accomplish any litigation purposes.

Moreover, disqualification is simply too drastic a sanction in this case. Defendants were aware of the materials taken by Kuppa by February 2023. However, Defendants waited six months before filing their motion for disqualification. There is no evidence in the record that Defendants objected to Plaintiff's counsel receipt or use of the photographs and recordings on the grounds that they included illegally obtained confidential and privileged communications prior to filing their motion for disqualification. There is no evidence that Defendants took any steps to clawback or otherwise protect purportedly privileged information, and Defendants waived any claim of confidentiality or privilege when they themselves published the subject material when they filed, in the public record, Kuppa's March 1, 2022 declaration as an exhibit in support of their motion. (See *Layer2 Communs. Inc. v. Flexera Software LLC* (N.D.Cal. June 5, 2014, No. C-13-02131 DMR) 2014 U.S.Dist.LEXIS 77693, at *20-22 ["By broadcasting on the public record what it claims to be confidential information, Flexera has waived any assertion of privilege it could have made over this information."]; see also *EXDS, Inc. v. Devcon Constr., Inc. (In re Exds, Inc.)* (N.D.Cal. Aug. 24, 2005, No. C 05-0787 PVT) 2005 U.S.Dist.LEXIS 47032, at *18-20 ["EXDS never sought an order to seal Fetzer's declarations. Thus, it is apparent that EXDS does not truly believe there is any information of a confidential nature in the Fetzer declarations. […] Similarly, EXDS' public filing of copies of documents Fetzer gave Defense counsel shows it does not consider those documents to be confidential."].) It would seem that had Defendants truly been concerned about the disclosure of purportedly confidential or privileged information, they would have taken steps to protect that information and moved for disqualification earlier.

Accordingly, Defendants' motion to disqualify counsel is DENIED.

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

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Calendar Line 3

Case Name: Group One Construction, Inc. v. La Encina Development, L.L.C., et al.
Case No.: 17CV319705

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 15, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

V. INTRODUCTION

This case arises from a construction contract dispute between plaintiff Group One Construction, Inc. ("Group One"), a California general building contractor, and defendant La Encina Development LLC ("La Encina"), a California development company. La Encina hired Group One to construct five homes in San Jose but the contract was terminated prior to the completion of the project. On November 28, 2017, Group One filed a complaint for breach of contract and to foreclose a mechanics lien in the amount of approximately $985,000.

On February 5, 2018, La Encina filed a Cross-Complaint, which alleged claims for: (1) Breach of Contract; (2) Declaratory Relief; (3) Constructive Trust; and (4) Piercing the Corporate Veil. The first through third causes of action were alleged against Group One. The fourth cause of action was asserted against cross-defendant Richard Lee Foust ("Foust").

On May 7, 2019, La Encina dismissed its Cross-Complaint with prejudice as to Group One.

On August 15, 2019, Foust filed a Cross-Complaint against Jen Hao Richard Chen ("Chen"), which set forth causes of action for: (1) Intentional Misrepresentation; (2) Negligent Misrepresentation; (3) Slander Per Se; and (4) Alter Ego.

On February 20, 2020, Foust filed a First Amended Cross-Complaint ("FACC") against La Encina and Chen, alleging claims for: (1) Intentional Misrepresentation; (2) Negligent Misrepresentation; and (3) Slander Per Se.

Foust substituted Sheena Chang ("Chang") as ROE 1 and Chung Yeh ("Yeh") as ROE 2 on April 24, 2020.

Foust substituted Chien Huanchu ("Huanchu") as ROE 3, Yehs II Family Limited Partnership as ROE 4, Chinche Huang ("Huang") as ROE 5, and Chuan, LLC ("Chuan") as ROE 6 on January 25, 2021.

La Encina substituted Cal Pacific Enterprises, Inc. ("Cal Pacific") as ROE 1 and Elizabeth Simic ("Simic") on March 15, 2021.

On July 23, 2021, La Encina filed a First Amended Cross-Complaint, which set forth causes of action for: (1) Breach of Contract; (2) Declaratory Relief; (3) Constructive Trust; and (4) Fraud. The first through third causes of action were alleged against Foust and Simic individually and as alter egos of Group One, and against Cal Pacific as Group One's successor. The fourth cause of action was alleged against Foust and Simic individually.

On September 13, 2021, Foust filed his operative Second Amended Cross-Complaint ("SACC") against La Encina, Chen, Chang, Yeh, Huanchu, Yehs II Family Limited Partnership, Huang, and Chuan, alleging claims for: (1) Intentional Misrepresentation; (2) Negligent Misrepresentation; (3) Slander Per Se; and (4) Concealment. The first, second, and fourth causes of action are alleged against all of the cross-defendants. The third cause of action is alleged only against Chen.

On March 11, 2022, La Encina filed a Second Amended Cross-Complaint, which set forth causes of action for: (1) Declaratory Relief; (2) Breach of Contract; (3) Constructive Trust; (4) Fraud. The first and second causes of action were alleged against Foust and Simic as alter egos of Group One, and against Cal Pacific as Group One's successor. The third cause of action was alleged against Foust and Simic individually and as alter egos of Group One, and against Cal Pacific as Group One's successor. The fourth cause of action was alleged against Foust and Simic individually.

On February 23, 2023, La Encina filed its operative Third Amended Cross-Complaint ("TACC"), which alleges claims for: (1) Declaratory Relief; (2) Breach of Contract; (3) Constructive Trust; (4) Fraud; and (5) Violation of Penal Code section 496. The first and second causes of action are alleged against Foust and Simic as alter egos of Group One, and against Cal Pacific as Group One's successor. The third cause of action is alleged against Foust and Simic individually and as alter egos of Group One, and against Cal Pacific as Group One's successor. The fourth cause of action is alleged against Foust and Simic individually. The fifth cause of action is alleged against Foust and Simic individually and as alter egos of Group One.

On March 23, 2023, the court (Hon. Amber Rosen) entered an order granting La Encina's motion for summary judgment of the first, second, and fourth causes of action of the SACC. The court opined that paragraph 26 of the SACC "demonstrates that Foust and Group One did not reasonably rely on misrepresentations that La Encina had sufficient capital to cover the construction costs and that it could pay Group One's monthly invoices." The court also determined that "Foust's supplemental declaration in support of his opposition to the

motion to expunge lis pendens and mechanic's lien, and Chen's declaration also demonstrate that Foust and Group One did not reasonably rely on misrepresentations that it would not leverage or borrow against the land owned free and clear."

Currently before the court are the following motions: (1) the nonstatutory motion for judgment on the pleadings of Foust's SACC by Chen, Chang, Yeh, Huanchu, Yehs II Family Limited Partnership, Huang, and Chuan (collectively, "La Encina's Managers and Members"); (2) the motion for summary judgment or, alternatively, summary adjudication of Foust's SACC by La Encina's Managers and Members; (3) the motion for summary judgment or, alternatively, summary adjudication of La Encina's TACC by Cal Pacific; and (4) the motion for summary judgment or, alternatively, summary adjudication of La Encina's TACC by Foust. All of the motions are opposed.

II. MOTION FOR JUDGMENT ON THE PLEADINGS

A. REQUESTS FOR JUDICIAL NOTICE

1. La Encina's Managers and Members' Request

La Encina's Managers and Members ask the court to take judicial notice of the court order entered on March 23, 2023, granting La Encina's motion for summary judgment.

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

Accordingly, La Encina's Managers and Members' request for judicial notice is GRANTED.

2. Foust's Request

Foust asks the court to take judicial notice of: (1) an order entered on August 11, 2020, overruling La Encina and Chen's demurrer to the first and second causes of action of Foust's FACC and denying La Encina and Chen's motion to strike portions of Foust's FACC;

(2) Chen's demurrer to Foust's Cross-Complaint filed on October 8, 2019; (3) La Encina's Managers and Members' demurrer to Foust's SACC; and (4) a Certificate of Limited Partnership of Yehs II Family Limited Partnership filed with the California Secretary of State on January 8, 2013.

Item Nos. 1-3 are proper subjects of judicial notice as they are court records relevant to arguments raised in connection with the pending motion. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *Woodell, supra,* 17 Cal.4th at p. 455 [Evid. Code, § 452, subd. (d) permits the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

Item No. 4. while the court can take judicial notice of the existence of the certificate filed with the California Secretary of State, it cannot accept as true the statements therein. (See *StorMedia Inc. v. Superior Court (Werczberger)* (1999) 20 Cal.4th 449, 456-457, fn. 9 [granting judicial notice of the existence of a proxy statement and registration statement filed with SEC, explaining that "[w]hen judicial notice is taken of a document, … the truthfulness and proper interpretation of the document are disputable"]; see also *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 ["While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein."].)

Accordingly, Foust's request for judicial notice is GRANTED as to the existence of Item Nos. 1-4.

B. LEGAL STANDARD

Prior to the enactment of Code of Civil Procedure section 438 in 1994, a motion for judgment on the pleadings was described as "a nonstatutory but well established procedure with the purpose and effect of a general demurrer." (*Sofias v. Bank of America* (1985) 172 Cal.App.3d 583, 586.) Even though Code of Civil Procedure section 438 was enacted to govern these motions, courts still recognize the right to bring a non-statutory motion for judgment on the pleadings. (See *Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 325;

Stoops v. Abbassi (2002) 100 Cal.App.4th 644, 650 (*Stoops*); see also *Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729, 746 (*Payne*); *Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5; *Cordova v. 21st Century Ins. Co*. (2005) 129 Cal.App.4th 89, 109.) A non-statutory motion only reaches the grounds upon which a general demurrer may have been brought. (See *Stoop, supra*, 100 Cal.App.4th at p. 650; *Payne, supra*, 130 Cal.App.4th at p. 746.)

C. DISCUSSION

La Encina's Managers and Members argue that the causes of action alleged against them in the SACC fail to state a cause of action because Foust cannot establish that he justifiably relied on the representations alleged in the SACC. La Encina's Managers and Members highlight that the court (Hon. Amber Rosen) determined that Foust did not reasonably rely on the misrepresentations that form the basis of the SACC when it entered its order granting La Encina's motion for summary judgment of the first, second, and fourth causes of action of the SACC. La Encina's Managers and Members note that the charging allegations against them are the same as the allegations made against La Encina. La Encina's Managers and Members conclude, in light of the prior order on La Encina's motion for summary judgment, that Foust cannot establish that he justifiably relied on the alleged representations and no viable claims remain against them.

Before responding to the substance of the foregoing argument, Foust argues, unpersuasively, that La Encina's Managers and Members' motion for judgment on the pleadings is procedurally improper because La Encina's Managers and Members previously demurred to the SACC on the ground of failure to allege sufficient facts to constitute a cause of action and the court overruled the demurrer. Foust contends that under Code of Civil Procedure section 438, subdivision (g)(1), La Encina's Managers and Members are required to show that there has been a material change in applicable case law or statute since the ruling on the demurrer and they have not done so. Foust's argument is unpersuasive because the instant motion for judgment on the pleadings is not brought pursuant to Code of Civil Procedure section 438. Rather, La Encina's Managers and Members have brought a nonstatutory motion

for judgment on the pleadings, and a nonstatutory motion for judgment on the pleadings can be filed at any time, even at trial. (*Stoops, supra*, 100 Cal.App.4th at p. 650.)

Next, Foust asserts that the summary judgment in favor of La Encina has no impact on his non-alter ego claims and he has alleged direct liability claims against Chen, Yeh, Chang, and Yehs II Family Limited Partnership.

However, as La Encina's Managers and Members persuasively argue, the prior court order granting La Encina's motion for summary judgment applies equally to the direct liability claims alleged against Chen, Yeh, Chang, and Yehs II Family Limited Partnership. The court (Hon. Amber Rosen) opined that paragraph 26 of the SACC "demonstrates that Foust and Group One did not reasonably rely on misrepresentations that La Encina had sufficient capital to cover the construction costs and that it could pay Group One's monthly invoices." The court also determined that "Foust's supplemental declaration in support of his opposition to the motion to expunge lis pendens and mechanic's lien, and Chen's declaration also demonstrate that Foust and Group One did not reasonably rely on misrepresentations that it would not leverage or borrow against the land owned free and clear." Consequently, the ruling was not based on a determination that the alleged misrepresentations were made on grounds that only defeat vicarious liability. Instead, the ruling was predicated on the court's determination that Foust could not reasonably rely on any alleged misrepresentations made by the managers of La Encina. That holding applies equally to La Encina's Managers and Members.

Foust also contends that the court (Hon. Amber Rosen) erroneously granted summary judgment against La Encina and this court should now reconsider that order and the determination that he could not reasonably rely on any of the misrepresentations alleged in the SACC. This court declines to reconsider the prior order entered on March 23, 2023, as Foust has not brought a properly noticed motion for reconsideration.

Finally, Foust argues that he should be granted leave to amend the SACC in order "to plead additional facts in support of his fraud claims, and his justifiable reliance." The court finds that leave to amend is not warranted here. Foust does not identify what additional facts he would plead or explain how those additional facts would change the legal effect of his pleading. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of

his pleading."].). Notably, Foust has requested leave to amend his SACC on several prior occasions and his request has been denied every time.

Accordingly, La Encina's Managers and Members' motion for judgment on the pleadings of Foust's SACC is GRANTED, without leave to amend.

III. MOTIONS FOR SUMMARY JUDGMENT AND/OR ADJUDICATION

A. LEGAL STANDARD

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

A motion for summary judgment must dispose of the entire action. (Code Civ. Proc., § 437c, subd. (a); *All Towing Services LLC v. City of Oran*ge (2013) 220 Cal.App.4th 946, 954 (*All Towing*) ["Summary judgment is proper only if it disposes of the entire lawsuit."].) "Summary judgment is properly granted when no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. [Citation.] Once the defendant has met that burden, the burden shifts to the plaintiff 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Madden v. Summit View, In*c. (2008) 165 Cal.App.4th 1267, 1272 (*Madde*n).)

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

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

B. MOTION BY LA ENCINA'S MANAGERS AND MEMBERS

La Encina's Managers and Members move for summary judgment or, alternatively, summary adjudication of Foust's SACC.

In light of the court's ruling on La Encina's Managers and Members' motion for judgment on the pleadings, as set forth above, La Encina's Managers and Members' motion for summary judgment or, alternatively, summary adjudication of Foust's SACC is deemed MOOT.

C. MOTION BY CAL PACIFIC

1. Evidentiary Objections

La Encina's objections to the declarations of Foust and Mauricio Mejia filed in support of Cal Pacific's motion for summary judgment or alternatively summary adjudication are OVERRULED. The court declines to rule on La Encina's remaining objections as they are not material to its disposition of the motion. (See Code Civ. Proc., § 437c, subd. (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion."].)

2. Request for Judicial Notice

In connection with its moving papers, Cal Pacific asks the court to take judicial notice of: (1) the Cross-Complaint filed on February 5, 2018; (2) the ROE Amendment filed on March 15, 2021; (3) the Voluntary Petition for Non-Individuals Filing for Bankruptcy

("Petition") filed on September 21, 207; (4) the settlement agreement between La Encina and the bankruptcy trustee for Group One filed on January 2, 2019; (5) the Request for Dismissal filed on May 7, 2019; (6) Foust's Notice of Motion and Motion for Summary Judgment filed on November 13, 2020; (7) La Encina's ex parte application filed on March 17, 2021; (8) La Encina's Notice of Motion for Leave to File Amended Cross-Complaint filed on April 27, 2021; (9) the First Amended Cross-Complaint filed on July 7, 2021; (10) the Second Amended Cross-Complaint filed on March 11, 2021; (11) the TACC filed on February 23, 2023; (12) the Declaration of Michael C. Fallon in Support of Motion for Summary Judgment or Alternatively Summary Adjudication ("Fallon Declaration") filed on December 21, 2023; (13) Declaration of Richard Foust in Support of Motion for Summary Judgment or Alternatively Summary Adjudication ("Foust Declaration") filed on December 21, 2023; (14) the Order Authorizing Trustee to Reject Lease of Non-Residential Real Property Located at 1040 Dell Avenue, Suite 4, Campbell, California aka 1050 Dell Avenue, Campbell, California on 24 Hours' Notice Pursuant to B.L.R. 6006-1(b) filed on August 27, 2018 ("Order Authorizing Release"); (15) the Chapter 7 Trustee's Final Account and Distribution Report Certification that the Estate Has Been Fully Administered and Application to be Discharged ("Final Account and Distribution Report") filed on October 19, 2020; (16) the Order Authorizing Employment of Accountant filed on September 3, 2018 ("Order Authorizing Account"); (17) the Final Decree filed on October 2, 2020; and (18) the Order Approving Trustee's Compromise of Controversy with La Encina filed on March 27, 2019.

La Encina objects to the request for judicial notice of the Fallon Declaration and the Foust Declaration to the extent Cal Pacific seeks to have the court judicially notice the contents of the declarations. La Encina also objects to the court taking judicial notice of the Petition, the Order Authorizing Release, the Final Account and Distribution Report, the Order Authorizing Account, and Final Decree on the grounds that those documents are irrelevant.

The subject documents are generally proper subjects of judicial notice as they are court records relevant to arguments raised in the pending motion. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *Woodell, supra,* 17 Cal.4th at p. 455 [Evid. Code, § 452, subd. (d) permits the trial court to "take judicial notice of the existence of

judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].) Notably, the court may properly take judicial notice only of the existence of the documents, along with the truth of the results reached in court orders.

Accordingly, Cal Pacific's request for judicial notice is GRANTED.

3. Discussion

Cal Pacific argues that it is entitled to summary judgment of La Encina's TACC because: (1) Cal Pacific is not a successor entity to Group One; (2) Cal Pacific was not timely served with the summons and cross-complaint pursuant to Code of Civil Procedure section 583.210; (3) La Encina's failure to comply with the terms of the AIA Contract waived any alter ego claims against Cal Pacific; (4) La Encina's settlement with the bankruptcy trustee for Group One waived any successor entity claims against Cal Pacific; and (5) La Encina waived all consequential damages.

With respect to its first argument, Cal Pacific asserts that La Encina cannot prove it is a successor entity to Group One because Cal Pacific did not assume any project of Group One or acquire any assets belonging to Group One. Cal Pacific maintains that it was formed for the purpose of operating simultaneously with Group One, whereby Cal Pacific would perform larger union projects while Group One performed small to midsize non-union work, and was not created to defraud creditors.

Under the "successor corporation" theory, when a corporation sells or transfers] all of its assets to another corporation constituting its mere continuation, the latter is also liable for the former's debts and liabilities. (*Wolf Metals Inc. v. Rand Pacific Sales Inc.* (2016) 4 Cal.App.5th 698, 704-705 (*Wolf Metals*).) "Generally, ' "California decisions holding that a corporation acquiring the assets of another corporation is the latter's mere continuation and therefore liable for its debts have imposed such liability only upon a showing of one or both of the following factual elements: (1) no adequate consideration was given for the predecessor

corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations. [Citations.]" ' [Citations.]" (*Id.* at p. 705.)

Cal Pacific presents evidence demonstrating that Cal Pacific was first conceived during the Summer of 2016, before Group One filed for bankruptcy. (Cal Pacific Enterprises Inc.'s Separate Statement of Undisputed Facts in Support of Motion for Summary Judgment, or Alternatively Motion for Summary Adjudication, Undisputed Material Fact ("UMF") No. 8.)

In early 2017, Foust and Mauricio Mejia ("Mejia") began discussions with the union related to securing a union contract for the company that ultimately became Cal Pacific. (UMF Nos. 7-8.) In September 2017, after Cal Pacific's name was approved by the California Secretary of State, Mejia had business cards made for him and Foust, identifying their roles in Cal Pacific. (UMF No. 9.) Additionally, on September 5, 2017, Cal Pacific filed its Articles of Incorporation with the California Secretary of State. (UMF No. 10.) On November 22, 2017, Cal Pacific secured its own Class B General Contractors License with the California Contractor's State Licensing Board. (UMF No. 11.)

On December 1, 2019, Cal Pacific entered into an agreement with the local contractors union. (UMF No. 12.) Cal Pacific then procured its own Federal and State Tax ID numbers, contactor's license, business licenses, insurance policies, and its own bank accounts. (UMF No. 13.)

Since 2007, Foust had been the tenant for office space at 1050 Dell Avenue, Campbell, California. (UMF Nos. 15, 18.) Foust sublet the space to Group One. (UMF Nos. 15-16) But the bankruptcy trustee rejected the sublease and Cal Pacific subleased the space instead. (UMF Nos. 16-17.) Additionally, Cal Pacific did not, and cannot, assume Group One's non-union projects. (UMF Nos. 19-20.) Furthermore, Cal Pacific did not acquire any trade secrets of Group One as Group One did not have or possess any trade secrets. (UMF No. 21.)

This evidence is sufficient to meet Cal Pacific's initial burden as it demonstrates that Cal Pacific did not acquire the assets of Group One. (See *Wolf, supra,* 4 Cal.App.5th at pp. 704-705; see also *Ray v. Alad Corp*. (1977) 19 Cal.3d 22, 28 [the general rule of successor liability is that a corporation purchasing the principal assets of another corporation does not

assumes the other's liabilities unless (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts].)

In opposition, La Encina fails to raise a triable issue of material fact. La Encina highlights the fact that there was an overlap of personnel between Group One and La Encina. But this does not establish that La Encina obtained any of Group One's assets. La Encina also asserts that La Encina and Group One shared the work space at 1050 Dell Avenue, Campbell, California. But this does not demonstrate that La Encina acquired any assets of Group One as the evidence shows that Foust has always been the tenant and the bankruptcy trustee rejected Group One's sublease of the space. Similarly, the evidence shows that any "Tenant Improvements" were made by Foust and not owned by Group One.

Notably, La Encina relies heavily on *Wolf*. But that case is easily distinguishable. In *Wolf*, the evidence showed that the defendant took possession of its predecessor's remaining assets and offered services identical to those provided by its predecessor. (Wolf, supra, 4 Cal.App.5th at pp. 709-710 [following the bankruptcy proceeding, the defendant "simply took possession of [its predecessor's] remaining furniture and other items"].) Here, there is no evidence that Cal Pacific actually obtained any asset of Group One, and Cal Pacific handles, at least in part, union contracts which Group One could not.

In light of the foregoing, Cal Pacific's initial argument is well-taken and dispositive of the motion. Consequently, the court need not reach the parties remaining arguments.

4. Request for Continuance

In the final paragraph of its opposition, La Encina requests a continuance of this matter "for the reasons set forth in the separate Application for Continuance of Hearing on Motion submitted herewith."

The court previously granted La Encina's ex parte application for a continuance of Cal Pacific's Motion on May 31, 2023. There is no basis for any further continuance at this time. Accordingly, La Encina's request for a continuance is DENIED.

5. Conclusion

Accordingly, Cal Pacific's motion for summary judgment of La Encina's TACC is GRANTED.

D. MOTION BY FOUST

1. Evidentiary Objections

Foust's objections to the declarations of Steven Boyles and Cheryl Norris filed in support of Las Encina's opposition are OVERRULED. La Encina's Objection No. 34 to Foust's declaration and Objection No. 8 to the declaration of Michael C. Fallon are SUSTAINED. The court declines to rule on the parties' remaining objections as they are not material to its disposition of the motion. (See Code Civ. Proc., § 437c, subd. (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion."].)

2. Request for Judicial Notice

a. Foust's Request

In connection with his moving papers, Foust asks the court to take judicial notice of: (1) the Cross-Complaint filed on February 5, 2018; (2) the Petition filed on September 21, 2017; (3) the Order Converting Chapter 11 Case to Chapter 7 filed on August 13, 2018; (4) the Order Authorizing Employment of Accountant filed September 4, 2018; (5) the Final Application for Compensation by Accountant for Trustee filed on April 13, 2020; (6) the Chapter 7 Trustee's Final Account and Distribution Report Certification that the Estate Has Been Fully Administered and Application to be Discharged ("Final Account and Distribution Report") filed on October 19, 2020; (7) the settlement agreement between La Encina and the bankruptcy trustee for Group One filed on January 2, 2019; (8) the Request for Dismissal filed on May 7, 2019; (9) the Order Approving Trustee's Compromise of Controversy with La Encina filed on March 27, 2019; (10) Foust's Notice of Motion and Motion for Summary Judgment filed on November 13, 2020; (11) Amendment to Cross-Complaint of La Encina Development, LLC Substituting ROE 1 and 2 filed on March 15, 2021; (12) La Encina's ex

parte application filed on March 17, 2021; (13) La Encina's Notice of Motion for Leave to File Amended Cross-Complaint filed on April 27, 2021; (14) the First Amended Cross-Complaint filed on July 7, 2021; (15) court order filed on February 25, 2022; (16) the Second Amended Cross-Complaint filed on March 11, 2021; and (17) the TACC filed on February 23, 2023.

La Encina objects to the request for judicial notice to the extent Cal Pacific seeks to have the court judicially notice the contents of the documents.

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

Accordingly, Foust's request for judicial notice is GRANTED.

b. La Encina's Request

In connection with its opposition, La Encina asks the court to take judicial notice of: (1) the fact that a creditor of Group One, Mayra Castillo, sought a writ of attachment on June 20, 2017; and (2) the fact that the Santa Clara County Superior Court granted the writ in the amount of $210,892.71. In support of its request, La Encina submits excerpts for the register of action in *Mayra Castillo v. Group One Construction, Inc., et al.* (Santa Clara County Superior Court, Case No. 17CV306558).

The register of action and the facts that it evidences are proper subjects of judicial notice as the register of action is a court record and the subject facts are not reasonably in dispute. (Evid. Code, § 452, subds. (c)-(d).)

Accordingly, La Encina's request for judicial notice is GRANTED.

3. Discussion

Foust argues that he is entitled to summary judgment of La Encina's TACC because: (1) he is not the alter ego of Group One; (2) La Encina released any claim for alter ego liability against Foust through its settlement with Group One; (3) La Encina's failure to comply with the terms of the AIA Contract waived any alter ego claims against Foust; (4) the third through fifth causes of action are time-barred by the applicable statute of limitations; (5) no evidence of wrongdoing with respect to the third through fifth causes of action; and (6) La Encina waived all consequential damages.

a. Alter Ego

Foust maintains that he is not the alter ego of Group One. Foust initially states that there is no evidence that he converted any of Group One's assets for his own use because the bankruptcy forensic accountants inspected all of Group One's financial records, conducted a four-year forensic accounting of Group One, and concluded the he did not use or direct any corporate funds belonging to Group One for his own use.

Foust's initial argument is largely based on inadmissible evidence. Foust, and his counsel, declare that the bankruptcy accounts told them that Foust had not misappropriated any money from Group One. However, the court sustained La Encina's objections to that testimony.

Moreover, Foust does not submit a declaration from the accountants or the bankruptcy trustee to demonstrate that such a finding was ever made. Foust does not submit any report from the accountant containing the factual results of any investigation they conducted. And as La Encina persuasively argues, nothing can be inferred from the fact that the bankruptcy trustee took no additional action as the trustee simply could have chosen not to pursue claims or did not have the resources to do it.

Foust also contends that La Encina cannot produce any evidence to demonstrate that Group One was inadequately capitalized. Foust states that Group One was a corporation in good standing with the California Secretary since its inception in 2011 through its bankruptcy in 2017. Foust asserts that Group One operated successfully until La Encina terminated its AIA Contract.

Even assuming for the sake of argument that Foust has met his burden with respect to the inadequate capitalization factor, La Encina raises a triable issue of material fact with respect to other factors.

> Whether a party is liable under an alter ego theory is normally a question of fact. [Citations.] "The conditions under which the corporate entity may be disregarded, or the corporation be regarded as the alter ego of the stockholders, necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court." [Citation.] Nevertheless, it is generally stated that in order to prevail on an alter ego theory, the plaintiff must show that "(1) there is such a unity of interest that the separate personalities of the corporations no longer exist; and (2) inequitable results will follow if the corporate separateness is respected." [Citation.]
>
> "The alter ego test encompasses a host of factors: '[1] [c]ommingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses … ; [2] the treatment by an individual of the assets of the corporation as his own … ; [3] the failure to obtain authority to issue stock or to subscribe to or issue the same … ; [4] the holding out by an individual that he is personally liable for the debts of the corporation … ; the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities … ; [5] the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family … ; [6] the use of the same office or business location; the employment of the same employees and/or attorney … ; [7] the failure to adequately capitalize a corporation; the total absence of corporate assets, and undercapitalization … ; [8] the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation … ; [9] the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities … ; [10] the disregard of legal formalities and the failure to maintain arm's length relationships among related entities … ; [11] the use of the corporate entity to procure labor, services or merchandise for another person or entity … ; [12] the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another … ; [13] the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions … ; [14] and the formation and use of a corporation to transfer to it the existing liability of another person or entity.' … [¶] This long list of factors is not exhaustive. The enumerated factors may be considered '[a]mong' others 'under the particular circumstances of each case.' " [Citations.] "No single factor is determinative, and instead a court must examine all the circumstances to determine whether to apply the doctrine. [Citation.]" [Citation.]

(*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 811-812, citations omitted.)

Here, La Encina submits evidence that corporate formalities were not followed (Declaration of Cheryl Norris, ¶¶ 14-18, Exs. E & F; Declaration of William Gutierrez, ¶¶ 5-9 & Ex. C, pp. 71, 72, 96, 97, 107, 108) and Foust expended corporate funds for his own use (Declaration of Steven Boyles in Support of Cross Complainant La Encina Development,

LLC's Opposition to Cross-Defendant Richard Foust's Motion for Summary Judgment/Adjudication. ¶¶ 31-32).

b. Release Due to Settlement

Foust argues that La Encina release any alter ego claim against him through its settlement with Group One. Foust states that pursuant to the settlement the parties released all claims they had against one another, and La Encina dismissed its claims against Group One with prejudice. Foust contends that the dismissal with prejudice acts as a judgment on the merits such that La Encina cannot now assert alter ego claims against him.

As La Encina persuasively argues in opposition, the settlement agreement between it and Group One does not constitute a waiver of La Encina's alter ego claims against Foust. First, the release explicitly states, "The foregoing releases do not release or compromise any claim against a third party, including shareholders, officers, directors, principals, affiliates, subsidiaries or creditors of the Debtor." Thus, the settlement release excludes claims against Foust. Even as to claims that might otherwise be barred, "'parties may by agreement limit the legal effect of a dismissal with prejudice so that it would not constitute a retraxit and affect their rights in a later pending action.'" (*Legendary Investors Group No. 1, LLC v. Niemann* (2014) 224 Cal.App.4th 1407, 1411.) "Where a settlement agreement expressly excludes certain claims, the resulting dismissal does not preclude further litigation on the excluded claim." (*Kim v. Reins International California, Inc.* (2020) 9 Cal.5th 73, 91-9].)

Furthermore, in *Mesler v. Bragg Management Co*. (1985) 39 Cal.3d 290 (*Mesler*), the California Supreme Court construed Code of Civil Procedure section 877, which abrogates the common law rule that settlement with one alleged tortfeasor bars action against any other claimed liable for the same injury. The defendant in *Mesler* maintained that the section was applicable only to joint tortfeasors and did not control when alter ego is alleged as the basis for the nonsettlor's liability; however, the California Supreme Court found the point untenable. (*Mesler, supra,* 39 Cal.3d at pp. 301-303.). The court stated that "[t]he rule is clear in California that section 877 applies to principal-agent liability." (*Id.* at p. 303.)

c. Release Pursuant to AIA Contract

Foust asserts that La Encina waived any alter ego claims against him because, under the terms of the AIA Contract, the Group One and La Encina agreed to submit all claims between them to binding arbitration. Foust then cites to Section 13.7 of the General Conditions of the Contract for Construction, which are included and incorporated in the AIA Contract. As is relevant here, that provision states that "[t]he Owner and Contractor shall commence all claims […] against the other arising out of or related to the Contract in accordance with the requirements of the final dispute resolution method selected in the Agreement within the time specified by applicable law, but in any case not more than 10 years after the date of Substantial Completion of the Work. The Owner and Contractor waive all claims and causes of action not commenced in accordance with this Section 13.7.

As La Encina persuasively argues, Section 13.7, which is entitled "Time Limits on Claims," is the equivalent of a statute of repose. In other words, it is intended to cut off all liability after a certain period of time. Section 15 which governs arbitration does not state that failure to bring claims in arbitration results in a waiver of claims.

Furthermore, Foust has waived his right to demand arbitration. (See *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196; see also *Cinel v. Barna* (2012) 206 Cal.App.4th 1383, 1389-1390.) As noted above, Foust seeks to enforce provisions in the AIA Contract, which was entered into by his alleged alter ego Group One. Group One, his alleged alter ego, initiated this lawsuit. Furthermore, Foust brought, and obtained rulings on, two demurrers, answered the pleading, and has filed multiple motions without raising the arbitration issue. Thus, any right to demand arbitration has been waived.

d. Statute of Limitations

Foust contend that the third through fifth cause of actions are time-barred by the statute of limitations and that the claims does not relate back to the filing of the initial complaint. Foust asserts that the three-year statute of limitations under Civil Code section 338 applies and that La Encina should have been aware of the claim by August 15, 2017, the date the contract with Group One was terminated. La Encina does not argue that a different statute of limitations applies.

La Encina disputes that the statute of limitations began to run on August 15, 2017 and asserts that when it discovered or should have discovered the alleged wrongdoing is a question

on which there is a triable issue of fact. It also contends that Foust fraudulently concealed the basis for the claim, thereby tolling the statute of limitations. Specifically, La Encina argues that Foust turned over the project records to the bankruptcy trustee when Group One declared bankruptcy and did not keep a copy, forcing La Encina to obtain the records from the trustee. La Encina maintains that it did not receive the project records until late 2020 and that it did not receive necessary banking records until January 2021, which is when it discovered the basis for the claim.

The limitations period in Civil Code section 338 begins to run on discovery of the violation. (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 258.) "Discovery occurs when the plaintiff suspects, or reasonably should suspect, that someone has done something wrong to the plaintiff, causing the injury (here, 'wrong' is not used in a technical sense, but in a lay one). [Citations.]" (*Ibid*.) " 'A plaintiff has reason to suspect when he has notice or information of circumstances to put a reasonable person on inquiry.' [Citations.]" (*Ibid*.)

Even assuming for the sake of argument that the statute of limitations has run with respect to the third through fifth causes of action, the claims relate back to the filing of the initial complaint. Foust asserts that the claims do not relate back to the filing of the initial complaint because they do not involve the same injury and instrumentality as the claims raised in the initial complaint and because the initial complaint did not give him adequate notice of the new claims. Foust asserts that all claims from the initial complaint were dismissed other than the alter ego claim against him.

> An amended complaint is considered a new action for purposes of the statute of limitations only if the claims do not 'relate back' to an earlier timely filed complaint. Under the relation-back doctrine, an amendment relates back to the original complaint if the amendment (1) rests on the same general set of facts; (2) involves the same injury; and (3) refers to the same instrumentality. [Citations.] An amended complaint relates back to an earlier complaint if it is based on the same general set of facts, even if the plaintiff alleges a different legal theory or new cause of action. [Citations.] However, the doctrine will not apply if the 'the plaintiff seeks by amendment to recover upon a set of facts entirely unrelated to those pleaded in the original complaint.' [Citation.]

(*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 276-277.) "In determining whether the amended complaint alleges facts that are sufficiently similar to those alleged in the original complaint, the critical inquiry is whether the defendant had adequate notice of the claim based on the original pleading."

(*Id.* at p. 277.)

A cause of action cannot relate back to the filing of a prior complaint where the entirety of the prior complaint was voluntarily dismissed without prejudice. (*Thomas v. Gilliland* (2002) 95 Cal.App.4th 427, 433.) However, Foust cites to no authority indicating that a complaint cannot relate back to a prior complaint where some, but not all, of the causes of action had been dismissed involuntarily. Further, there is no authority cited indicating that the new complaint must relate back to the facts alleged in the remaining cause(s) of action where, as here, the initial complaint alleges the necessary facts to show the cause of action relates back outside of any dismissed cause of action. The court finds that the third through fifth causes of action relate back to the filing of the initial complaint because the initial complaint alleged that Group One failed to pay the same subcontractors, sub-subcontractors, and suppliers the TACC alleges were not paid and that Group One requested payment on behalf of these groups with no intention of paying them.

Foust argues that the TACC does not allege the same injury, accident, or instrumentality because the initial complaint alleged breach of contract whereas the TACC alleges that Foust fraudulently induced La Encina to pay him money earmarked for same subcontractors, sub-subcontractors, and suppliers. But, relation back is not thwarted when the plaintiff alleges a new legal theory or different cause of action and the initial complaint alleged that Group One requested payment from La Encina on behalf of those groups when it had no intention of actually paying those groups as required. Thus, this argument fails to dispose of the third through fifth causes of action.

e. Evidence of Wrongdoing

Foust argues La Encina cannot produce any evidence that he used Group One assets for his own personal benefit or that he otherwise received any improper benefits from Group One. Foust asserts that the bankruptcy forensic accountants inspected all of Group One's financial records, conducted a four-year forensic accounting of Group One, and concluded the he did not use or direct any corporate funds belonging to Group One for his own use.

Foust's argument is largely based on inadmissible evidence. Foust, and his counsel, declare that the bankruptcy accounts told them that Foust had not misappropriated any money from Group One. However, the court sustained La Encina's objections to that testimony.

Moreover, Foust does not submit a declaration from the accountants or the bankruptcy trustee to demonstrate that such a finding was ever made. Foust does not submit any report

from the accountant containing the factual results of any investigation they conducted. And as La Encina persuasively argues, nothing can be inferred from the fact that the bankruptcy trustee took no additional action as the trustee simply could have chosen not to pursue claims or did not have the resources to do it.

Even if Foust had met his initial burden, which he has not, La Encina raises a triable issue of material fact as it presents evidence that Group One made undocumented loans to Foust and paid Foust's personal expenses. (Declaration of Steven Boyles in Support of Cross Complainant La Encina Development, LLC's Opposition to Cross-Defendant Richard Foust's Motion for Summary Judgment/Adjudication. ¶¶ 31-32.)

f. Consequential Damages

Foust asks the court to summarily adjudicate the availability of "lost profits" as damages in this action. Foust contends La Encina cannot recover any alleged damages for lost profits as La Encina waived its ability to recover any consequential damages arising from Group One's performance of the contract.

As La Encina persuasively argues, Foust's alternative motion for summary adjudication of the issue of consequential damages is procedurally improper.

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

As is relevant here, Foust does not seek summary adjudication of r a claim for damages as specified in Civil Code section 3294. Rather, he seeks to summarily adjudicate the issue of consequential damages. However, Foust has not complied with Code of Civil Procedure section 437c, subdivision (t) and, therefore, his motion in this respect is improper.

g. Conclusion

Accordingly, Foust's motion for summary judgment or, alternatively, summary adjudication is DENIED.

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

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Calendar Line 4

Case Name: Lampkins v. Belmont Village, L.P. (PAGA)
Case No.: 23CV415220

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 15, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VI. INTRODUCTION

This is a representative action arising out of alleged wage and hour violations. The Complaint, filed by plaintiff Camille Lampkins ("Plaintiff") on April 25, 2023, sets forth causes of action for: (1) Meal and Rest Period Violations Pursuant to Labor Code § 2698 et seq.; (2) Minimum Wage Violations Pursuant to Labor Code § 2698 et seq.; (3) Overtime Violations Pursuant to Labor Code § 2698 et seq.; (4) Wage Statement Violations Pursuant to Labor Code § 2698 et seq.; (5) Failure to Reimburse Pursuant to Labor Code § 2698 et seq.; and (6)Failure to Pay Wages Upon Separation Pursuant to Labor Code § 2698 et seq.

Now before the court is the motion by defendant Belmont Village, L.P. ("Defendant") for an order compelling Plaintiff to arbitrate her individual PAGA claims and dismissing or staying the representative PAGA claims. Plaintiff opposes the motion.

II. LEGAL STANDARD

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

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

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger*

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

III. DISCUSSION

Defendant moves to compel Plaintiff to pursue her individual PAGA claims in arbitration, and asks the court to dismiss or stay Plaintiff's representative PAGA claims. Defendant states that Plaintiff was hired on May 12, 2022. Defendant asserts that Plaintiff signed a Mutual Agreement to Arbitrate in connection with her employment. Defendant argues that under the terms of the arbitration agreement, Plaintiff agreed to arbitrate all claims arising out of her employment, such as her PAGA claim, on an individual basis. Defendant points out that the agreement to arbitrate contains a class and representative action waiver. Defendant contends that in light of the severability provision in the arbitration agreement and *Viking River Cruises, Inc. v. Moriana* (2022) ___U.S.___ [142 S. Ct. 1906, 2022 U.S. LEXIS 2940] (*Viking River*), the court can compel Plaintiff's individual PAGA claims to arbitration. Defendant also maintains that the court should dismiss the representative PAGA claims pursuant to *Viking River* or, alternatively, and stay the representative PAGA claims pending the resolution of Plaintiff's individual arbitration.

In opposition, Plaintiff argues the court should deny Defendant's motion because Defendant did not present sufficient evidence to establish that she signed the arbitration agreement. Plaintiff further argues that her Complaint alleges PAGA claims only in a

representative capacity and, therefore, there are no individual claims to be compelled to arbitration and her lawsuit should be allowed to proceed.

Plaintiff's argument that she alleges only representative PAGA claims, not individual PAGA claims is dispositive of the instant motion. For purposes of PAGA, claims are divided into two types: "A" and "O." (*Galarsa v. Dolgen California, LLC* (2023) 88 Cal.App.5th 639, 648-649 (*Galarsa*); see *Adolph v. Uber Technologies, Inc*. (2023) 14 Cal.5th 1104, 1120-1123 (*Adolph*).) "Type A" is used for a claim seeking to recover a civil penalty imposed because of a Labor Code violation suffered by the plaintiff, which civil penalty, if recovered, will be distributed 75 percent to the Labor and Workforce Development Agency ("LWDA") and 25 percent to the plaintiff as the employee aggrieved by the violation pursuant PAGA. (*Ibid.*) This type of PAGA claim will be ordered to arbitration if it is covered by an arbitration agreement subject to the FAA. (*Galarsa, supra,* 88 Cal.App.5th at pp. 648-649; see *Adolph, supra,* 14 Cal.5th at pp. 1120-1123.) "Type O" is used for a claim seeking to recover a civil penalty imposed because of a Labor Code violation suffered by an employee other than the plaintiff. (*Ibid.*) Under PAGA, that civil penalty, if recovered, will be split 75-25 between the LWDA and the employee aggrieved by the violation. (*Ibid.*) This type of claim involves a Labor Code violation suffered by an employee other than the plaintiff. (*Ibid.*) "Type O" claims, unlike "Type A" claims, are not subject to arbitration under an arbitration agreement. (*Ibid*)

In both the caption and the body of her Complaint, Plaintiff states that her PAGA claims are brought *only* in a representative capacity on behalf of all aggrieved employees. (Complaint, p. 1:1-2, ¶ 11.) Consequently, as drafted, the Complaint does not allege an individual PAGA claim seeking to recover a civil penalty imposed because of Labor Code violation suffered by Plaintiff. In other words, Plaintiff's Complaint alleges PAGA claims for Labor Code violations suffered by employees other than Plaintiff.

The fact that the Complaint contains allegations regarding Labor Code violations suffered by Plaintiff does not undermine this analysis. To have standing to bring her representative PAGA claims, Plaintiff must allege facts showing that she is an aggrieved employee. (*Galarsa, supra,* 88 Cal.App.5th at pp. 648-649, 652-653; *Adolph, supra,* 14

Cal.5th at pp. 1120-1123.) However, she does not need to assert her individual PAGA claims in order to have standing to bring her representative PAGA claims. (*Ibid*.)

Accordingly, Defendant's motion to compel arbitration is DENIED.

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

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Calendar Line 5

Case Name: Flores v. ACCO Engineered Systems, Inc. (Included in Acco Wage and Hour Cases, JCCP5172, Santa Clara)
Case No.: 20CV365252

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 15, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VII. INTRODUCTION

This coordinated action includes three wage and hour cases. The Second Amended Complaint in *Victor Flores v. ACCO Engineered Systems, Inc.* ("*Flores"*), filed on March 22, 2021, alleged the following claims: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Overtime Wages; (3) Failure to Provide Meal Periods, or Pay Premiums in lieu thereof; (4) Failure to Permit Rest Breaks, or Pay Premiums in lieu thereof; (5) Failure to Reimburse Necessary Business Expenses; (6) Failure to Provide Accurate Itemized Wage Statements; (7) Failure to Timely Pay Wages; (8) Failure to Pay All Wages Due Upon Separation of Employment; (9) Violation of Business and Professions Code §§ 17200, et seq.; and (10) Enforcement of Labor Code 2698 et seq. ("PAGA").

A second case, *Martin Heredia v. ACCO Engineered Systems, Inc., et al.* ("*Heredia 1"*), Case No. 20STCV48111, was filed in Los Angeles County Superior Court on December 17, 2020. The putative class action Complaint set forth the following causes of action: (1) Violation of California Labor Code §§ 510 and 1198 (Unpaid Overtime); (2) Violation of California Labor Code §§ 226.7 and 512(a) (Unpaid Meal Period Premiums); (3) Violation of California Labor Code § 226.7 (Unpaid Rest Period Premiums); (4) Violation of California Labor Code §§ 1194, 1197, and 1197.1 (Unpaid Minimum Wages); (5) Violation of California Labor Code §§ 201 and 202 (Final Wages Not Timely Paid); (6) Violation of California Labor Code § 204 (Wages Not Timely Paid During Employment); (7) Violation of California Labor Code § 226(a) (Non-Compliant Wage Statements); (8) Violation of California Labor Code § 1174(d) (Failure To Keep Requisite Payroll Records); (9) Violation of California Labor Code §§ 2800 and 2802 (Unreimbursed Business Expenses); and (10) Violation of California Business and Professions Code §§ 17200, et seq.

A third case, *Martin Heredia v. ACCO Engineered Systems, Inc., et al.* ("*Heredia 2"*), Case No. 21GDCV00084, was filed in Los Angeles County Superior Court on January 21, 2021. The Complaint set forth a single cause of action for civil penalties pursuant to PAGA. That cause of action has allegations regarding various wage and hour violations, including failure to pay overtime, failure to provide meal periods, failure to provide rest periods, failure to timely pay wages upon termination, failure to timely pay wages during employment, failure to provide complete and accurate wage statements, failure to keep complete and accurate payroll records, and failure to reimburse necessary business-related expenses and costs.

On June 2, 2021, a petition to coordinate *Flores*, *Heredia 1*, and *Heredia 2* was granted. The court determined that the three cases asserted very similar claims against the same defendant, ACCO, and were still in the relatively early stages of litigation. The court found that coordination would be a more efficient way to manage the cases and avoid conflicting rulings.

Subsequently, defendant ACCO Engineered Systems, Inc. ("ACCO") moved for an order: (1) compelling arbitration of *Heredia 1*; (2) compelling arbitration as to those putative class members included in *Flores* that are subject to the arbitration agreement at issue in the motion; (3) dismissing *Heredia 2*; and (4) dismissing those alleged aggrieved employees that are included in PAGA claim in *Flores* that agreed to the PAGA waiver pursuant to California Labor Code section 2699.6. In the alternative, ACCO requested a stay, pending the resolution of the arbitration proceedings, in the *Heredia 1*, *Heredia 2*, and *Flores* as to those putative class members subject to the arbitration agreement.

On November 10, 2021, the court entered an order denying ACCO's request for an order compelling arbitration as to those putative class members included in *Flores* that are purportedly subject to the same CBA as plaintiff Martin Heredia; denying ACCO's request for an order dismissing those alleged aggrieved employees who are included in the *Flores* PAGA claim and who purportedly agreed to the PAGA waiver in the CBA; granting ACCO's request to compel arbitration of the individual claims in *Heredia 1*; granting ACCO's request to dismiss *Heredia 2*; and denying ACCO's request for a stay except as to *Heredia 1*.

On January 10, 2023, the court entered a Stipulation and Order Allowing Plaintiff to File Third Amended Complaint and Allowing Defendant to Bring a Pleading Challenge to the Same ("Stipulation"). The Stipulation reflects that plaintiff Victor Flores passed away on March 8, 2022. Victor Flores advised that he intended to amend the SAC to add Boliver Jones ("Jones"), Roberto Jovel ("Jovel"), and Ron T. Metoyer ("Metoyer") as plaintiffs and class representatives, and add Metoyer as an aggrieved employee. Victor Flores further advised that his estate intended to substitute into the case after the amended complaint was filed. ACCO asserted that Victor Flores lacked the ability to continue to act as an aggrieved employee in the PAGA claim, Metoyer's PAGA claims do not relate back to Plaintiff's notice letters, and the putative class definition is overbroad in light of the court's ruling on ACCO's motion to compel arbitration. To resolve the dispute, the parties agreed that Victor Flores would be permitted to file an amended complaint and ACCO would be allowed to file a motion challenging the pleading.

The next day, plaintiffs Victor Flores, Jones, Jovel, and Metoyer (collectively, "Plaintiffs") filed a Third Amended Class Action Complaint ("TAC"), alleging the following claims: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Overtime Wages; (3) Failure to Provide Meal Periods, or Pay Premiums in lieu thereof; (4) Failure to Permit Rest Breaks, or Pay Premiums in lieu thereof; (5) Failure to Reimburse Necessary Business Expenses; (6) Failure to Provide Accurate Itemized Wage Statements; (7) Failure to Timely Pay Wages; (8) Failure to Pay All Wages Due Upon Separation of Employment; (9) Violation of Business and Professions Code §§ 17200, et seq.; and (10) Enforcement of Labor Code 2698 et seq. ("PAGA").

On August 28, 2023, the court entered an order granting Antonio Flores's motion to be substituted in this action as successor in interest to Victor Flores's class claims and granting ACCO's motion to the extent it sought to remove Victor Flores as a named plaintiff in the tenth cause of action.

Now before the court is ACCO's and defendant Air Conditioning Company, Inc.'s (collectively, "Petitioners") petition to coordinate an add-on case—*Justin Han-Nguyen v. ACCO Engineered Systems, Inc.* (Los Angeles County Superior Court, Case No.

23STCV07134) ("*Han-Nguyen* Lawsuit")—with *In re ACCO Wage and Hour Cases*.[1]

Plaintiffs and plaintiff Justin Han-Nguyen ("Han-Nguyen") oppose the petition.

VIII. PETITION FOR COORDINATION

A. Legal Standard

> When civil actions sharing a common question of fact or law are pending in different courts, a petition for coordination may be submitted to the Chairperson of the Judicial Council, by the presiding judge of any such court, or by any party to one of the actions after obtaining permission from the presiding judge, or by all of the parties plaintiff or defendant in any such action. A petition for coordination, or a motion for permission to submit a petition, shall be supported by a declaration stating facts showing that the actions are complex, as defined by the Judicial Council and that the actions meet the standards specified in Section 404.1. On receipt of a petition for coordination, the Chairperson of the Judicial Council may assign a judge to determine whether the actions are complex, and if so, whether coordination of the actions is appropriate, or the Chairperson of the Judicial Council may authorize the presiding judge of a court to assign the matter to judicial officers of the court to make the determination in the same manner as assignments are made in other civil cases.

(Code Civ. Proc., § 404.)

> Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied.

(Code Civ. Proc., § 404.1.)

B. DISCUSSION

Petitioners argue that the *Han-Nguyen* Lawsuit and this action should be coordinated because they involve overlapping common issues of law and fact against the same defendant on behalf of overlapping groups of employees. In this coordinated action, *Heredia II* has been dismissed, the class claims in *Heredia I* have been dismissed, and the individual claims in *Heredia I* have been sent to arbitration; consequently, the coordinated action now consists of the wage and hour claims allege in *Flores*. *Han-Nguyen* Lawsuit, filed against ACCO on April 3, 2023, sets forth causes of action for: (1) Unfair Competition in Violation of Cal. Bus. &

[1] The moving papers also request a stay of this action pending a determination on the petition; however, in the Joint Case Management statement filed on November 3, 2023, ACCO withdraws its request for a stay of proceedings.

Prof. Code §§ 17200, et seq.; (2) Failure to Pay Minimum Wages in Violation of Cal. Lab. Code §§ 1194, 1197 & 1197.1; (3) Failure to Pay Overtime Wages in Violation of Cal. Lab. Code § 510; (4) Failure to Provide Required Meal Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable Wage Order; (5) Failure to Provide Required Rest Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable Wage Order; (6) Failure to Provide Accurate Itemized Statements in Violation of Cal. Lab. Code § 226; (7) Failure to Reimburse Employees for Required Expenses in Violation of Cal. Lab. Code § 2802;(8) Failure to Provide Wages When Due in Violation of Cal. Lab. Code §§ 201, 202, and 203; and (9) Failure to Pay Sick Pay Wages in Violation of Cal. Lab. Code §§ 201-204, 233, 246. The putative class action lawsuit is brought on behalf of "all individuals who are or previously were employed by [ACCO] in California, including any employees staffed with [ACCO] by a third party, and classified as non-exempt employees […] at any time during the period beginning four (4) years prior to the filing of this Complaint …." (Declaration of Benjamin A. Emmert in Support of Petition for Coordination of Add-On Lawsuit and Application for Stay Order […] ("Emmert Dec."),Ex. K, ¶ 4.)

Petitioners note that this coordinated action and the *Han-Nguyen* Lawsuit have been designated complex. (Emmert Dec., Ex. M.) Petitioners further note that the *Han-Nguyen* Lawsuit is currently stayed. Petitioners assert that the actions are all in the relatively early stages of litigation, and no class certification deadlines, discovery cut-off dates, or trial dates have been set. Petitioners further state the parties in the coordinated action are in the process of formalizing a settlement agreement, and coordination of the add-on will promote settlement as the proposed settlement encompasses causes of action alleged in the *Han-Nguyen* Lawsuit (given its overlap with the claims alleged in *Flores*). Petitioners also assert that coordination will help avoid the risk of inconsistent proceedings and rulings given the overlapping claims and alleged classes of employees.

Petitioners' arguments have merit. There is significant overlap between *Flores* and the *Han-Nguyen* Lawsuit, including the legal and factual issues, as well as the parties. Given the overlap between the cases, coordination will also advance the convenience of the parties, counsel, and at least some witnesses. Having the parties conduct the same discovery and make

the same arguments in two separate courts would waste significant time and resources for all involved. Coordination will also significantly reduce the likelihood of inconsistent rulings. While some written discovery has been conducted in *Flores*, this will prevent duplication of the same discovery needing to be conducted in the *Han-Nguyen* Lawsuit. Notably, if coordination is denied, and the matters continue to proceed on separate tracks, settlement only becomes less attractive to Petitioners, as it makes a single global settlement less likely. Therefore, the court finds the cases should be coordinated.

The petition for add-on coordination is GRANTED, with Santa Clara County Superior Court as the court to hear the coordinated actions and the Sixth Appellate District of the Court of Appeal as the reviewing court having appellate jurisdiction.

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

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Calendar Line 6

Case Name: In Re Cloudera, Inc. Securities Litigation (formerly Lazard v. Cloudera, Inc., et al.)
Lead Case/Consolidated Action
Case No.: 19CV348674

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Calendar Line 7

Case Name: Tinoco v. SWA Services Group, Inc. (Class Action/PAGA)
Case No.: 21CV389519

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 15, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

IX. INTRODUCTION

This is a class and representative action arising out of alleged wage and hour violations. The operative First Amended Class Action and Representative Action Complaint ("FAC"), filed on March 15, 2022, sets forth the following causes of action: (1) Failure to Pay Minimum Wages [Cal. Lab Code §§ 204, 1994, 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 and 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]; (8) Unfair Business Practices [Cal. Bus. & Prof. Code §§ 17200, et seq.]; and (9) Civil Penalties Under PAGA [Cal. Lab Code §§ 2699, et seq.].

The parties have reached a settlement. Plaintiff Judith Cortes Tinoco ("Plaintiff") moved for preliminary approval of the settlement.

On February 1, 2023, the court continued the motion for preliminary approval of settlement to March 29, 2023. In its minute order, the court directed the parties to meet and confer to discuss amending the settlement agreement to clarify the terms of the settlement regarding the PAGA Allocation and limiting the scope of the class release and PAGA release. The court also asked Plaintiff to provide a supplemental declaration providing additional information supporting her assessment of the potential cash value of her claims and explaining why the discount applied to each claim was reasonable.

On March 13, 2023, Plaintiff's counsel filed a supplemental declaration.

On March 29, 2023, the court granted the motion for preliminary approval of settlement subject to approval of the modified class notice.

Subsequently, Plaintiff submitted an amended class notice to the court for its review. On May 2, 2023, the court approved the modified class notice.

Plaintiff moved for final approval of the settlement.

On September 27, 2023, the court adopted its tentative ruling continuing the motion for final approval of settlement to November 15, 2023. The court noted that it was concerned regarding the adequacy of class notice with respect to the two individuals inadvertently left off the class list. The court directed Plaintiff's counsel to file a supplemental declaration from the settlement administrator addressing this issue. The court indicated that the settlement was otherwise appropriate for final approval.

Later that day, Plaintiff's counsel filed a supplemental declaration from the settlement administrator.

On October 23, 2023, Plaintiff's counsel filed a supplemental declaration, which included a further supplemental declaration from the settlement administrator.

X. 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.)

XI. DISCUSSION

The supplemental declarations by Plaintiff's counsel and the settlement administrator adequately address the court's concerns regarding the adequacy of class notice with respect to the two individuals inadvertently left off the class list. (Further Supplemental Declaration of Kane Moon in Support of Plaintiff Judith Cortes Tinoco's Motion for Final Approval of Class and PAGA Action Settlement, Ex. 1 Second Further Supplemental Declaration of Nathalie Hernandez of ILYM Group, Inc. in Support of Motion for Final Approval of Class Action Settlement, ¶¶ 8, 12, 13.) The settlement administrator declares that the two individuals who were inadvertently excluded from the class list were mailed notice packets on August 12, 2023. (*Ibid.*) The deadline for those individuals to request exclusion or object to the settlement was October 11, 2023. (*Ibid.*) The settlement administrator did not receive any requests for exclusion or objections as of October 18, 2023. (*Ibid.*) Thus, the court finds that adequate notice has been provided to the class.

Accordingly, the motion for final approval of the class and representative action settlement is GRANTED.

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

The court will set a compliance hearing for July 17, 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 8

Case Name: Edgar v. Aegion Corporation, et al. (Class Action)
Case No.: 20CV362163

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on November 15, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XII. INTRODUCTION

This is a class action arising out of alleged violations of the Fair Credit Reporting Act ("FCRA"). The Class Action Complaint, filed by plaintiff Javonti Edgar ("Plaintiff") against defendants Aegion Corporation, Schultz Industrial Services, Inc., and Schultz Mechanical Contractors, Inc. (collectively, "Defendants") on January 21 2020, sets forth a single cause of action for Violation of 15 U.S.C. §§1681b(b)(2)(A) (FCRA).

Plaintiff reached a settlement with Defendants. On March 29, 2023, the court adopted its tentative ruling, granting preliminary approval of the settlement subject to approval of the amended class notice.

Plaintiff's counsel filed an amended class notice on May 1, 2023. On May 3, 2023, the court entered a formal order granting preliminary approval of the settlement.

Plaintiff subsequently moved for final approval of the settlement.

On October 11, 2023, the court adopted its tentative ruling continuing the motion for final approval of settlement to November 15, 2023. The court directed the parties to file a copy of their Joint Stipulation Designating Cy Pres, which purportedly identified Alliance for Children's Rights as the *cy pres* recipient. The court also directed Plaintiff to file a declaration supporting his request for an enhancement award in the amount of $10,000.

On October 17, 2023, Plaintiff filed the parties Joint Stipulation Designating Cy Pres, which reflects that the parties agreed to specify Alliance for Children's Rights as the *cy pres* recipient. Plaintiff also filed a declaration in support of his request for an enhancement award.

XIII. 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.)

XIV. DISCUSSION

The filing of the parties' Joint Stipulation Designating Cy Pres adequately addresses the court's concerns regarding the *cy pres* recipient. Consequently, the *cy pres* recipient is approved.

With respect to the enhancement award, Plaintiff now declares that he spent approximately 20 hours in connection with this litigation, including discussing the case with counsel, gathering information and documents, gathering coworker contact information, being

available for mediation, and reviewing settlement documents. (Declaration of Javonti Edgar in Support of Plaintiff's Motion for Final Approval of Class Action Settlement, ¶ 11.) As the court noted in its prior order, the requested enhancement award in the amount of $10,000 is excessive. Each class member will receive approximately $82.38. Consequently, the sought-after enhancement award would amount to more than 121 times the estimated average payout. In light of the foregoing, the court finds that an enhancement award in the amount of $2,500 is reasonable and it approves the award in that lesser amount.

Accordingly, the motion for final approval of the class action settlement is GRANTED.

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

The court will set a compliance hearing for July 17, 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 Defendants, 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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