SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

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

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

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

- **Remote appearances are encouraged and, as of August 15, 2022, must be made through Microsoft Teams,** unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.
- If any party/attorney wishes to appear in person, please check in at Court Services (1st floor, Downtown Superior Courthouse, 191 N. 1st St., San Jose) and wait for a sheriff's deputy to escort you to the courtroom for your hearing.
- If any party wants a Court Reporter, the appropriate form must be submitted. The Reporter must appear remotely.
- Members of the public who wish to observe can do so through Microsoft Teams (using the link discussed above). Please make sure to turn your camera off and mute yourself if you are observing the proceedings. The Court no longer is using a public access line. Members of the public who wish to observe in person must check in at Court Services (1st floor, Downtown Superior Courthouse, 191 N. 1st St., San Jose) and wait for a sheriff's deputy to escort you to the courtroom.
- As a reminder, state and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while in the courtroom and while on Microsoft Teams.

DATE: SEPTEMBER 27, 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	22CV393451	Guillen v. DMD Construction, Inc., et al. (Class Action/PAGA)	See Line 1 for tentative ruling.
LINE 2	21CV389519	Tinoco v. SWA Services Group, Inc. (Class Action/PAGA)	See Line 2 for tentative ruling.
LINE 3	2014-1-CV-263183	Oliver, et al. v. Konica Minolta Business Solutions, USA	See Line 3 for tentative ruling.
LINE 4	21CV386748	Lopez, et al. v. San Andreas Regional Center	See Line 4 for tentative ruling.
LINE 5	23CV413563	Rosedale-Rio Bravo Water Storage District v. Buena Vista Water Storage District, et al.	See Line 5 for tentative ruling.
LINE 6	19CV359055	Kaga FEI Co., Ltd. v. Cypress Semiconductor Corp.	See Line 6 for tentative ruling.

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- If any party/attorney wishes to appear in person, please check in at Court Services (1st floor, Downtown Superior Courthouse, 191 N. 1st St., San Jose) and wait for a sheriff's deputy to escort you to the courtroom for your hearing.
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LINE 7	22CV407296	Madriz v. Premier International Group, Inc. (Class Action)	Unopposed motion to be relieved as counsel for Defendant is GRANTED. Counsel to submit proposed Order.
LINE 8	20CV365134	Attaway, et al. v. Alliance Residential, LLC (Included in Alliance Residential Wage and Hour Cases, JCCP5173)	See Line 8 for tentative ruling.
LINE 9	22CV394491	Bridges v. Premier Nissan of San Jose, LLC, et al. (PAGA)	See Line 9 for tentative ruling.
LINE 10	20CV375153	Boyer v. Lucile Salter Packard Childrens Hospital at Stanford (Class Action/PAGA)	See Line 10 for tentative ruling.
LINE 11	19CV344971	Alorica Inc. v. Fortinet, Inc.	Unopposed motion for admission *pro hac vice* is GRANTED. No appearance necessary.
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Guillen v. DMD Construction, Inc., et al. (Class Action/PAGA)
Case No.: 22CV393451

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 27, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a class and representative action arising out of alleged wage and hour violations. The operative Second Amended Class Action Complaint ("SAC"), filed on August 4, 2022, sets forth the following causes of action: (1) Failure to Pay Wages for All Hours Worked, Labor Code sections 204(b), 223, 1194, 1194.2 Wage Orders; (2) Failure to Pay Overtime Wages, Labor Code sections 510, 1194, 1198, Wage Orders; (3) Failure to Provide Meal Periods, or Pay Premium Wages in Lieu Thereof; (4) Failure to Provide Rest Breaks, or Pay Premium Wages in Lieu Thereof; (5) Failure to Provide Accurate Itemized Wage Statements, Labor Code section 226; (6) Failure to Timely Pay Final Wages at Termination, Labor Code sections 201-203; (7) Failure to Reimburse Necessary Business Expenses, Labor Code section 2802; (8) Violation of California's Unfair Competition Law, Business & Professions Code sections 17200, et seq.]; and (9) Violation of Private Attorneys General Act, Labor Code §§ 2698, et seq. ("PAGA").

The parties have reached a settlement. Plaintiff Edgar Efren Guillen ("Plaintiff") moved for preliminary approval of the settlement. The motion was unopposed.

On March 29, 2023, the court granted the motion for preliminary approval of settlement subject to approval of the modified class notice. Specifically, the court directed the parties to modify section J of the class notice to clarify that class members could object in writing, but could also object to the settlement by appearing at the final approval hearing without submitting any written objection and with no prior notice. The court also instructed the parties to include specific language regarding the final approval hearing and class members' ability to appear remotely via Microsoft Teams.

Based upon a review of the record, it does not appear that the parties submitted an amended class notice to the court for approval.

Plaintiff now moves for final approval of the settlement. The motion is unopposed.

II. LEGAL STANDARD

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

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

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

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

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

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

III. DISCUSSION

The court is unable to grant final approval of the settlement at this time. As noted in its ruling on preliminary approval, the content of a class notice is subject to court approval. "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court." (Cal. Rules of Court, rule 3.769(f).)

The class notice submitted in connection with the motion for preliminary approval was inadequate. As previously explained in connection with preliminary approval, section J of the class notice states, in part, that "[t]o object, you must email, fax, or mail a letter to the Settlement Administrator […]." The court expressly directed the parties to amend the class notice to make clear that class members may object in writing, but may also object to the settlement by appearing at the final approval hearing without submitting any written objection and with no prior notice. Additionally, the court instructed the parties to include the following language regarding the final approval hearing:

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

The court advised the parties that the amended notice must be provided to the court for approval prior to mailing.

There is no evidence in the record that the parties obtained the court's approval of the class notice prior to its mailing. Furthermore, the court has reviewed the notice that was mailed to the class on May 3, 2023, and the notice contains the defects described in the prior court order. (Declaration of Jarrod Salinas With Respect to Notice and Settlement Administration, ¶ 5 & Ex. A.) Consequently, the court is concerned that adequate notice was not provided to the class.

Accordingly, the motion for final approval is CONTINUED to February 21, 2024, at 1:20 p.m. in Department 19. The parties shall amend the class notice as directed by the court, submit the amended class notice to the court for its approval, and then mail the amended notice

to the class. The amended class notice must reflect and advise class members of the continued hearing date (i.e., February 21, 2024). Plaintiff's counsel shall submit a supplemental declaration from the claims administrator regarding the amended notice provided to the class, and any response thereto, no later than February 9, 2024. No additional filings are permitted.

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Calendar Line 2

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 September 27, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

IV. 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 now moves for final approval of the settlement. The motion is unopposed.

V. LEGAL STANDARD

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

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

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

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

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

> counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

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

VI. DISCUSSION

> The case has been settled on behalf of the following class:
> [A]ll current and former hourly-paid or non-exempt employees who have worked for Defendant [SWA Services Group, Inc. ("Defendant")] in the State of California at any time during the Class Period ….

The Class Period means the period from October 28, 2017 through July 14, 2022. The class includes a subset of PAGA Members, who are defined as "all Class Members who are employed or have been employed by Defendant in the State of California during the PAGA Period. The PAGA Period means the period from October 28, 2020 through July 14, 2022.

As discussed in connection with preliminary approval, Defendant will pay a maximum, non-reversionary settlement amount of $335,000. The maximum settlement amount includes attorney fees not to exceed $111,666.67 (1/3 of the maximum settlement fund), attorney costs not to exceed $17,000, a PAGA allocation of $30,000, a service payment for the class representative not to exceed $7,500, and settlement administration costs not to exceed $15,000. The net settlement amount will be distributed to class members pro rata basis. Checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be sent to Legal Aid At Work.

In exchange for the settlement, the class members agree to release "all Settled Claims against any and all Released Parties." The term "Settled Claims" is defined as:

> [A]ll claims, charges, complaints, liens, demands, causes of action, obligations, damages and liabilities, arising during the Class Period that each Class Member had, now has, or may hereafter claim to have against the Released Parties and that were asserted in the Complaint, or that could have been asserted in the Complaint based on any of the facts alleged in the Complaint, regardless of whether such claims arise under federal, state and/or local law, statute, ordinance, regulation, common law, or other source of law. The Settled Claims specifically include, but are not limited to, claims for: (1) Violation of California Labor Code §§ 1194, 1194.2, 1197, and 1197.1 (failure to pay minimum and straight time wages); (2) Violation of California Labor Code §§ 510 and 1198 (failure to pay overtime wages); (3) Violation of California Labor Code §§ 226.7 and 512(a) (failure to provide compliant meal periods and associated premiums); (4) Violation of California Labor Code § 226.7 (failure to provide compliant rest periods and associated premiums); (5) Violation of California Labor Code §§ 2800 and 2802 (failure to indemnify business expenses); (6) Violation of California Labor Code §§ 201, 202 and 203 (failure to timely pay final wages); (7) Violation of California Labor Code § 204 (failure to timely pay wages during employment); (8) Violation of California Labor Code § 226(a) (failure to provide compliant wage statements); (9) Violation of California Labor Code § 1174(d) (failure to keep requisite payroll records);

> (10) Violation of California Business & Professions Code §§ 17200, et seq.; and (11) incorporated or related claims asserted through the Private Attorneys General Act ("PAGA") for any of the above alleged California Labor Code Violations.).

"Released Parties" are defined as:

> Defendant and each of its owners, members, partners, shareholders, agents (including, without limitation, investment bankers, accountants, insurers, reinsurers, attorneys, and any past, present, or future officers, directors, and employees), servants, assigns, subsidiaries, affiliates, independent contractors, volunteers, predecessors, successors, parent companies and organizations, and any and all other persons, firms, companies, and corporations in which Defendant may have an interest.

PAGA Members agree to release the Released Parties "from any and all Settled PAGA Claims during the PAGA Period." The term "Settled PAGA Claims" is defined as "any of the Settled Claims that may serve as a basis for any claim under the PAGA for any of the California Labor Code Violations and/or Violations of Wage Orders alleged within the Complaint, including, but not limited to, California Labor Code §§ 201, 202, 203, 204, 226(a), 226.7, 510, 512(a), 1174(d), 1194, 1197, 1197.1, 1198, 2800 and 2802."

In addition, Plaintiff agrees to a comprehensive general release.

On July 12, 2023, notice packets were mailed to 365 class members. (Supplemental Declaration of Nathalie Hernandez of ILYM Group, Inc., in Support of Motion for Final Approval of Class Action Settlement ("Hernandez Dec."), ¶ 7.) On August 11, 2023, Defendant's counsel informed the settlement administrator that two individuals were inadvertently left off the class list and should be added (i.e., there are 367 class members). (*Id.* at ¶ 8.) Ultimately, 17 notice packets were deemed undeliverable. (*Id.* at ¶¶ 9-11.) As of September 13, 2023, there were no exclusions and no objections. (*Id.* at ¶¶ 12-13.)

The estimated average gross payment is $453.66 and the estimated highest gross payment is $2,799.19. (Hernandez Dec., ¶ 16.) The court previously found the proposed settlement is fair and, in general, the court continues to make that finding for purposes of final approval.

However, the court has a concern regarding the adequacy of class notice with respect to the two individuals inadvertently left off the class list. The declaration from the settlement administrator does not identify when, if ever, notice was provided to those two individuals.

Prior to the continued hearing date, Plaintiff's counsel shall submit a supplemental declaration from the settlement administrator addressing this issue.

Plaintiff requests an incentive award of $7,500. In connection with preliminary approval, the court previously found the incentive award warranted and it continues to approve the award.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co*. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel requests attorney fees of $111,666.67 (1/3 of the maximum settlement fund). Plaintiff's counsel provides evidence demonstrating a total lodestar of $99,265.50. (Declaration of Kane Moon in Support of Plaintiff Judith Cortes Tinoco's Motion for Final Approval of Class and PAGA Action Settlement ("Moon Dec."), ¶¶ 28-41.) This results in a multiplier of 1.13. The fees requested are reasonable as a percentage of the common fund and are approved.

Plaintiff's counsel also requests costs of $11,674.59 and presents evidence of incurred costs in that amount. (Moon Dec., ¶ 52 & Ex. 4.) Consequently, the litigation costs are approved. The settlement administration costs of $ 9,840 are also approved. (Hernandez Dec., ¶ 18.)

Accordingly, the motion for final approval of the class and representative action settlement is CONTINUED to January 24, 2024, at 1:30 p.m. in Department 19. Plaintiff's counsel shall file a supplemental declaration from the settlement administrator no later than January 12, 2024, addressing when notice was provided to the two individuals inadvertently left off the class list.

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

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Calendar Line 3

Case Name: Oliver, et al. v. Konica Minolta Business Solutions, USA
Case No.: 2014-1-CV-263183

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 27, 2023 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VII. INTRODUCTION

Plaintiffs Michael Oliver ("Oliver") and Norris Cagonot (collectively, "Plaintiffs") bring this class and representative action on behalf of themselves and all other service technicians who worked for defendant Konica Minolta Business Solutions USA ("Defendant") in California for the four years preceding the filing of the original Complaint on April 2, 2014. (First Amended Complaint, ¶ 7.) According to the operative First Amended Complaint, filed on October 29, 2015, Plaintiffs worked as service technicians for Defendant. (*Id.* at ¶ 5.) Defendant allegedly required Plaintiffs and similarly situated service technicians to drive their personal vehicles to and from the first and last job of the day while transporting the tools and equipment necessary to do their jobs, but did not provide compensation for the time spent driving. (*Id.* at ¶ 6.) Plaintiffs also allege that Defendant failed to reimburse service technicians for all expenses incurred, including those for miles driven, and failed to provide accurate wage statements (among other things, Defendant did not provide hard copies of the statements and did not list all hours worked). (*Ibid.*)

The First Amended Complaint sets forth the following causes of action: (1) Failure to Pay Overtime Wages Pursuant to California Labor Code § 1194; (2) Failure to Reimburse for Work Related Expenses in Violation of Labor Code § 2802; (3) Unlawful, Unfair and Fraudulent Business Practices Pursuant to Business & Professions Code § 17200, et seq.; and (4) Labor Code Private Attorneys General Act of 2004: Labor Code Sec. 2698.

The parties have reached a settlement. Plaintiffs moved for preliminary approval of the settlement.

On March 29, 2023, the court granted the motion for preliminary approval subject to approval of the amended class notice.[1] The court later approved the amended class notice on April 11, 2023.

Plaintiffs now move for final approval of the settlement. The motion is unopposed.

II. REQUEST FOR JUDICIAL NOTICE

Plaintiffs ask the court to take judicial notice of several documents previously filed in connection with their motion for preliminary approval. The documents are court records that are generally relevant to the pending matter. Consequently, the documents are proper subjects of judicial notice. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records].) Accordingly, the request for judicial notice is GRANTED.

III. 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

[1] The court memorialized its order granting preliminary approval in the Order Re: Motion for Preliminary Approval of Class Action Settlement filed on May 3, 2023.

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.)

IV. DISCUSSION

> The case has been settled on behalf of the following class:
> [A]any current or former hourly-paid or non-exempt employee who worked for Defendant as a Service Technician within the State of California at any time between April 2, 2010, and the date of a Preliminary Approval Order, with the exception of certain Service Technicians whom Defendant has determined did not transport parts/tools to customers in the field in their personal vehicles.

The class includes a subset of PAGA Members, who are defined as "any Class Member who is or was employed as a non-exempt Service Technician by Defendant or their predecessor or merged entities in the State of California at any time between September 2014, through the date of a Preliminary Approval Order.

As discussed in connection with preliminary approval, Defendant will pay a maximum, non-reversionary settlement amount of $11,000,000. The maximum settlement amount includes attorney fees not to exceed $3,630,000 (33 percent of the maximum settlement fund), litigation costs not to exceed $100,000, a PAGA allocation of $250,000 (75 percent to be paid to the LWDA and 25 percent to be paid to PAGA Members), incentive awards up to $25,000 for each class representative, and settlement administration costs not to exceed $13,000. The net settlement amount will be distributed to class members pro rata basis. Checks that remain uncashed 180 days from initial mailing will be void and the funds from those checks will be distributed to Bay Area Legal Aid.

In exchange for the settlement, the class members agree to release Defendant, and related entities and persons, from any and all claims based on, or that could have been alleged,

based on the facts alleged in the lawsuit. In addition, Plaintiffs agree to a comprehensive general release.

On June 2, 2023, notice was mailed to 428 class members. (Declaration of Tina Chiango Regarding Dissemination of Notice to the Class ("Chiango Dec."), ¶ 5.) Ultimately, five notices were deemed undeliverable. (*Id.* at ¶ 6.) As of August 7, 2023, there were no requests for exclusion and no objections. (*Id.* at ¶¶ 7-8.)

The average individual settlement payment is $16,254.67 and the highest individual settlement payment is $35,243. (Chiango Dec., ¶ 10.) The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiffs request service awards of $25,000 for each class representative ($50,000 total). As previously noted in connection with preliminary approval, the class representatives' efforts in the case resulted in a significant benefit to the class. However, the court continues to find that the amounts requested for the service awards are substantially higher than normally awarded by this court and excessive when compared to the average recovery to be received by other class members for their claims. Accordingly, the court finds the service awards are warranted and they are approved in the amount of $15,000 for each class representative.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co*. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel requests attorney fees of $3,630,000 (33 percent of the maximum settlement fund). Plaintiffs' counsel provides evidence demonstrating a total lodestar of $2,396,605.75. (Declaration of Robin G. Workman in Support of Plaintiffs' Motion […] ("Workman Dec."), ¶¶ 8-10 & Ex. A.) This results in a multiplier of 1.51. The fees requested are reasonable as a percentage of the common fund and are approved.

Plaintiffs' counsel requests litigation costs in the amount of $75,822.54 and presents evidence of incurred costs in that amount. (Workman Dec., ¶ 27 & Ex. A.) Consequently, the litigation costs are approved. The settlement administration costs of $13,000 are also approved. (Chiango Dec., ¶ 11.)

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

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

The court will set a compliance hearing for May 22, 2024, at 2:30 p.m. in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein, the number and value of any uncashed checks, amounts remitted to Defendant, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

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Calendar Line 4

Case Name: Lopez, et al. v. San Andreas Regional Center
Case No.: 21CV386748

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on August 2, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VIII. INTRODUCTION

This action arises out of defendant San Andreas Regional Center's ("SARC") alleged failure to implement or follow reasonable data security procedures to protect putative class members' personal identifying information ("PII") and protected health information ("PHI") from unauthorized access. (First Amended Complaint ("FAC"), ¶ 4.) As a result of SARC's conduct, unknown and unauthorized persons allegedly accessed and viewed class members' PII and PHI through SARC's remote desktop portal. (*Id.* at ¶¶ 5 & 7.) On or about August 27, 2021, SARC provided notice of the security breach to over 57,000 people regarding the unauthorized access of their PII and PHI. (FAC, ¶¶ 6, 23, & 26.) Based on the foregoing allegations, the operative FAC, filed on January 27, 2022, sets forth the following causes of action: (1) Violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq.; and (2) Violation of the California Confidentiality of Medical Information Act ("CMIA"), Cal. Civ. Code § 56, et seq.

The parties reached a settlement. On July 18, 2022, plaintiffs Krystal Lopez ("Lopez"), as parent, guardian, and next friend of her minor child A.L., and Rebecca Acosta ("Acosta"), as parent, guardian, and next friend of her minor child A.A. ("Plaintiffs") moved for preliminary approval of the class action settlement.

On October 12, 2022, the court entered an order continuing the motion for preliminary approval of settlement to November 23, 2022, to allow the parties to provide supplemental information to the court. As is relevant here, the court directed Plaintiff to submit the confidential declaration referenced in the motion for preliminary approval of settlement regarding the remedial steps taken by SARC under the terms of the settlement. The court further asked Plaintiffs to provide an estimate of the maximum amount of SARC's potential

liability for each claim and explain why, and how much, the value of the claims was discounted for settlement purposes. The court also noted that the definitions of Ordinary Expense Reimbursement and Extraordinary Expense Reimbursement in the settlement agreement were unclear as the definitions did not explain what was meant by "normal reimbursement categories." The court advised that an amended settlement agreement could address this defect. Next, the court explained that it appeared the parties intended unclaimed funds to revert to SARC, but the settlement agreement lacked an express reversion provision and failed to identify a cy pres recipient in compliance with Code of Civil Procedure section 384. The court advised that an amended settlement agreement would be necessary to identify a code-compliant cy pres recipient. The court also informed the parties that it was concerned about the claims-made aspect of the settlement. Plaintiffs represented that a claims form was justified because SARC had limited financial resources; but the court explained that discouraging class members from applying for payment so that a defendant pay avoid paying an agreed-upon settlement is not a legitimate justification. The court further stated that the claims form was not required to identify class members because class members can be identified through SARC's records. The court concluded that it was unclear why individualized documentation of the claims were necessary when membership in the class can be established through SARC's records. The court requested the parties explain why a claim form should be required in this case. The court also directed Plaintiffs' counsel to submit lodestar information given that the amount of attorneys' fees and costs.

On October 28, 2022, Plaintiffs filed a Declaration of Gregory Haroutunian in Support of Motion for Preliminary Approval of Class Action Settlement, which attached fully redacted copies of two exhibits. The declaration also stated that unredacted copies "are being filed under seal," but by the time of the continued hearing on November 23, 2022, no such unredacted copies had been filed under seal. The court so noted in the November 22, 2022 tentative ruling.

On November 29, 2022, Plaintiffs lodged two documents conditionally under seal: a Confidential Declaration of ***** Regarding Insurance and a Confidential Declaration of

***** Regarding Security Improvements. However, no application to file documents under seal pursuant to California Rules of Court, rules 2.550 and 2.551 had been filed.

On December 2, 2022, Plaintiffs filed an application to seal which included a Declaration of M. Anderson Berry. However, the proposed order provided by Plaintiffs on that date did not set forth the findings and facts required by California Rules of Court, rules 2.550(d) and (e). Plaintiffs submitted another proposed order on December 6, 2022, which also failed to comply with the Rules of Court.

On December 6, 2022, the court ordered sealed the Confidential Declaration of ***** Regarding Insurance and the Confidential Declaration of ***** Regarding Security Improvements.

On December 9, 2022, the parties filed a version, signed by counsel, of an amended Settlement Agreement originally submitted on October 28, 2022 in redlined and unsigned form. The motion for preliminary approval of settlement was submitted for decision at that time.

On December 13, 2022, the court granted preliminary approval of the class action settlement, subject to approval of the amended notices. The court approved the amended notices on January 10, 2023.

Lopez now moved for final approval of the settlement.

On August 2, 2023, the court continued the motion for final approval of settlement to September 27, 2023. The court directed Plaintiffs' counsel to file a supplemental declaration providing additional information regarding Acosta's status as a member of the class and explaining what impact, if any, her non-participation has on the parties' settlement and this action going forward. The court also noted that Plaintiffs' memorandum of points and authorities referenced a Declaration of Navid Zivari of Angeion Group LLC Regarding Settlement Administration. However, no such declaration was filed with the court. Thus, there was no evidence before the court regarding notice to the class and class members' responses to the settlement. The court instructed Plaintiffs' counsel to file a declaration from the settlement administrator that addresses these issues.

Lopez subsequently filed supplemental declarations with the court on August 2 and September 11, 2023.

IX. 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.)

X. TERMS OF THE SETTLEMENT AGREEMENT

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

> [A]ll persons to whom SARC mailed notice that on or about July 5, 2021, SARC was the target of a cyberattack in which third-party criminals gained unauthorized access to SARC'S network, encrypted some of SARC'S systems, and gained unauthorized access to the personal information of consumers.

As discussed in connection with preliminary approval, the settlement agreement executed by the parties provides for Ordinary Expense Reimbursement, Extraordinary Expense Reimbursement, and Cash Payments for California Subclass Members to be made to class members under certain circumstances.

> With respect to Ordinary Expense Reimbursement,
> All members of the Settlement Class who submit a Valid Claim using the Claim Form are eligible for the following documented out-of-pocket expenses, not to exceed $500 per member of the Settlement Class, that were incurred as a result of the Data Incident: (i) out of pocket expenses incurred as a result of the Data Incident, including bank fees, long distance phone charges, cell phone charges (only if charged by the minute), data charges (only if charged based on the amount of data used), postage, or gasoline for local travel; (ii) fees for credit reports, credit monitoring, or other identity theft insurance product purchased after the July 5, 2021 Data Incident and before August 27, 2021, when SARC sent offers of credit monitoring; (iii) up to 3 hours of lost time, at $20/hour spent dealing with the Data Incident with an additional attestation that they spent the claimed time responding to issues raised by the Data Incident. Claims for lost time are including within the $500 cap on ordinary unreimbursed economic losses. The foregoing shall constitute the "normal reimbursement categories." To receive reimbursement for any of the above-referenced out-of-pocket expenses, Settlement Class Members must submit (i) their name and current address; (ii) supporting documentation of such out-of-pocket expenses; and (iii) a description of the loss, if not readily apparent from the documentation.

> With respect to Extraordinary Expense Reimbursement,
> All members of the Settlement Class who have suffered a proven monetary loss and who submit a Valid Claim using the Claim Form are eligible for up to $2,500 if: (i) the loss is an actual, documented and unreimbursed monetary loss; (ii) the loss was more likely than not caused by the Data Incident, and an attestation by Claimant that they have not received any notice that their information was exposed in a prior unrelated data breach; (iii) the loss occurred between July 5, 2021 and the Claims Deadline; (iv) the loss is not already covered by one or more of the normal reimbursement categories; and the settlement class member made reasonable efforts to avoid, or seek reimbursement for, the loss, including but not limited to exhaustion of all available credit monitoring insurance and identity theft insurance; and (v) confirmation that claimant enrolled in the complementary credit monitoring and identity theft services that SARC offered.

Class members seeking Ordinary Expense Reimbursement or Extraordinary Expense Reimbursement

> must complete and submit a Claim Form to the Claims Administrator, postmarked or submitted online on or before the 90th day after the Notice Commencement Date. … The Claim Form must be verified by the member of the Settlement Class with a statement that his or her claim is true and correct, to the best of his or her knowledge and belief, and is being made under penalty of perjury. Notarization shall not be required. The member of the Settlement Class must submit reasonable documentation that the out-of-pocket expenses and charges claimed were both actually incurred and plausibly arose from the Data Incident. Failure to provide supporting documentation of the out-of-pocket expenses referenced above, as requested on the Claim Form, shall result in denial of a claim. No documentation is needed for lost-time expenses.

Furthermore, all "Class Members who reside in California and who submit a Valid Claim using the Claim Form" for Ordinary Expense Reimbursement or Extraordinary Expense Reimbursement "are also eligible to receive a separate, California statutory damages award." "All such Class Members who submit a timely and valid claim" for Ordinary Expense Reimbursement or Extraordinary Expense Reimbursement "and provide their California address shall be awarded $100. This additional amount shall be subject to the caps" for Ordinary Expense Reimbursement or Extraordinary Expense Reimbursement.

The Ordinary Expense Reimbursement, Extraordinary Expense Reimbursement, and Cash Payments for California Subclass Members are further subject to an overarching settlement cap of $200,000. "The cap is the maximum amount that SARC or any insurer of SARC on behalf of SARC, could have to pay" in connection with those settlement benefits. "If the cap is reached, the Claims Administrator will apply a pro rata reduction to the amounts to be paid pursuant to all approved claims" for Ordinary Expense Reimbursement, Extraordinary Expense Reimbursement, and Cash Payments for California Subclass Members "to ensure the cap is not exceeded."

> In addition to the payments discussed above,
> All members of the Settlement Class who submit a Valid Claim using the Claim Form are eligible for two (2) years of free single bureau credit monitoring and identity theft protection services, called IDX Identity Protection Services. For members of the Settlement Class who opted to receive the credit monitoring initially offered by SARC, IDX Identity Protection Services shall be in addition to that monitoring. IDX Identity Protection Services includes, at least, the following, or similar, services: Cyberscan Dark Web Monitoring; $1 million Reimbursement Insurance; Fully-Managed Identity Restoration; Member Advisory Services; and Lost Wallet Assistance.

The settlement sets forth a detailed dispute resolution procedure for rejected claims or any "claims the that Settlement Administrator determines to be implausible."

The settlement further provides that "Plaintiffs have received assurances that SARC has implemented or will implement certain reasonable steps to adequately secure its systems and environments, including taking the steps listed in Exhibit 1 to Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement (the confidential declaration agreed upon by the Parties), on or before December 31, 2022. … Exhibit 1 will be filed under seal."

Costs for notice to the class, costs of claims administration, and 50 percent of the costs of the dispute resolution procedure shall be paid by SARC, with the other 50 percent of the dispute resolution costs paid by class counsel. The settlement also states that SARC shall pay attorneys' fees and litigation costs not to exceed $185,000 and service awards in the total amount of $4,000 ($2,000 to each class representative).

Settlement checks that are uncashed for 90 days will be void. "If a check becomes void, the Settlement Class Member shall have until five months after the Effective Date to request re-issuance." "If no request for re-issuance is made within this period, the Settlement Class Member will have failed to meet a condition precedent to recovery of settlement benefits, the Settlement Class Member's right to receive monetary relief shall be extinguished, and SARC shall have no obligation to make payments to the Settlement Class Member …."

IV. DISCUSSION

Lopez has now filed the Declaration of Navid Zivari of Angeion Group, LLC Regarding Settlement Administration Re Plaintiffs' Motion for Final Approval of Class Action Settlement ("Zivari Dec."). The declaration shows that notice was mailed to 56,993 class members on January 12, 2023. (Zivari Dec., ¶ 6.) Ultimately, 7,243 of the notices were undeliverable. (*Id.* at ¶¶ 7-8.) As of July 5, 2023, there were five requests for exclusion from the following individuals: Julien Hagemeyer, Mason Khuong, Jonathan Wu, Miguel Lopez, and Michael Callaway.[2] (*Id.* at ¶ 14 & Ex. D.) There were no objections. (*Id.* at ¶ 15.)

The settlement administrator received 516 claim forms (296 via the online portal and 220 via mail). (Zivari Dec., ¶ 12.) Of the 516 claim forms, 298 were approved, 8 were denied as duplicative of other claim forms, and 210 were denied for being submitted by an individual

[2] The settlement administrator notes that there are four class members named Miguel Lopez. The settlement administrator has attempted to reach out to the Miguel Lopez who requested exclusion in order to identify which Miguel Lopez they are, but has been unable to reach them.

who was not on the class list. (*Id.* at ¶ 13.) With respect to the approved claim forms, 282 claim forms were approved to receive credit monitoring services, 2 claims were approved to received reimbursement for out-of-pocket expenses in the amount of $205.24, 88 claims were approved to receive reimbursement for time spent in the amount of $4,520, and 92 claims were eligible to receive reimbursement under the California subclass in the amount of $9,200. (*Ibid.*) None of the claims were eligible to receive reimbursement for fees paid or extraordinary expenses. (*Ibid.*)

The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiffs' counsel has also filed a supplemental declaration clarifying that although Acosta no longer wishes to receive a service award, she still remains a member of the class and her non-participation as a named representative should not have any impact on the action going forward. (Declaration of M. Anderson Berry in Further Support of Motion for Final Approval of Class Action Settlement, ¶¶ 2-8.)

Lopez requests an incentive award of $2,000. Lopez has submitted a declaration detailing her participation in the case. Lopez states that she spent approximately 14 hours on the case, including discussing the case with counsel, reviewing documents, assisting counsel with investigation and discovery, and making herself available during mediation. (Declaration of Krystal Lopez in Support of Plaintiffs' Motions for (1) Final Approval of Class Action Settlement; and (2) Award of Attorneys' Fees, Expenses, and Service Awards, ¶ 4.) Based on the foregoing, the court finds the service award warranted and it is approved.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel requests attorney fees and costs in the total amount of $185,000. Plaintiffs' counsel presents evidence of incurred costs in the amount of $10,346.36. (Declaration of David K. Lietz in Support of Plaintiff's Motion for Award of Attorneys' Fees, Expenses, and Service Award ("Lietz Dec."), ¶ 26; Declaration of M. Anderson Berry in Support of Plaintiff's Motion for Award of Attorneys' Fees, Expenses, and Service Award ("Berry Dec."), ¶ 14.) Plaintiffs'

counsel also provides evidence demonstrating a total combined lodestar of $230,755.90. (Lietz Dec., ¶¶ 14 & 21; Berry Dec., ¶ 9.) This results in a negative multiplier. In light of the foregoing, the court finds that the fees and costs requested are reasonable and are approved.

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

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

The court will set a compliance hearing for May 22, 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 SARC, 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 5

Case Name: Rosedale-Rio Bravo Water Storage District v. Buena Vista Water Storage District, et al
Case No.: 23CV413563

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 27, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XI. INTRODUCTION

On February 10, 2023, plaintiff Rosedale-Rio Bravo Water Storage District ("Plaintiff") filed a Complaint against defendants Buena Vista Water Storage District, City of Bakersfield, Kern Delta Water District, North Kern Water Storage District, Kern County Water Agency, and L. Mark Mulkay ("Mulkay"), which sets forth a single cause of action for declaratory and injunctive relief. Specifically, Plaintiff seeks a judgment declaring that it holds valid pre-1914 appropriative rights on the South of Fork of the Kern River, it can change the point of diversion and place of use of its rights (provided it does not injure others), its rights include the right to allow the free flow of its water rights to and through Isabella Reservoir and into the channel of the Kern River, its plan to move the water includes reasonable conditions and element to prevent injury to others, it has rights under the Pioneer Participation Agreement and Agreement No. 96-356, as amended, to convey to and recharge the water in facilities within the Pioneer Project Area. Plaintiff also seeks an injunction preventing the defendants from interfering with the free flow of the water to and through Isabella Reservoir, directing Mulkay to account for the water that Plaintiff allows to flow to and through Isabella Reservoir and the delivery of such water downstream, and preventing the defendants from interfering with Plaintiff's lawful exercise of its rights to use certain facilities and lands under the Pioneer Participation Agreement and Agreement No. 96-356, as amended.

Now before the court is the demurrer by Buena Vista Water Storage District, City of Bakersfield, Kern Delta Water District, North Kern Water Storage District, Kern County Water Agency to the Complaint on the grounds of lack of jurisdiction and failure to allege facts

sufficient to constitute a cause of action (collectively, "Moving Defendants").[3] (See Code Civ. Proc., § 430.10, subds. (a) & (e).) Plaintiff opposes Defendants' demurrer.

II. REQUEST FOR JUDICIAL NOTICE

A. MOVING DEFENDANTS' REQUEST

In connection with their moving papers, Moving Defendants ask the court to take judicial notice of a certified copy of the 1964 agreement between the United States and local districts concerning the use of storage capacity in Isabella Dam and Reservoir. The agreement is recorded in the official records of Kern County, California in Book 3779, beginning n page 379 The request is unopposed.

The court may take judicial notice of the 1964 agreement as recorded documents are generally proper subjects for judicial notice under Evidence Code section 452. (See Evid. Code, § 452, subd. (c); see also *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-265 (*Fontenot*), disapproved on other grounds in *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919 ["[t]he official act of recordation and the common use of a notary public in the execution of such documents assure their reliability, and the maintenance of the documents in the recorder's office makes their existence and text capable of ready confirmation, thereby placing such documents beyond reasonable dispute"].) While it would be improper to take judicial notice of the truth of statements of fact recited within such documents, a court is permitted to take judicial notice of the legal effect of the language therein when that effect is clear. (*Fontenot, supra*, 198 Cal.App.4th at p. 265.)

Accordingly, Moving Defendants' request for judicial notice is GRANTED.

B. PLAINTIFF'S REQUEST

In connection with its opposition, Plaintiff asks the court to take judicial notice of the Flood Control Act of 1944, 58 Stat. 887 (December 22, 1944). The request is unopposed.

The Flood Control Act is a proper subject of judicial notice as it is statutory law of the United States. (See Evid. Code, §§ 451, subd. (a), 452, subd. (a).)

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

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[3] Notably, Defendants jointly filed one set of moving papers, which sets forth several arguments in support of their demurrer. City of Bakersfield also filed a second set of moving papers, which advance an additional argument in support of the demurrer on the ground of failure to allege facts sufficient to constitute a cause of action.

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. LACK OF JURISDICTION

Moving Defendants demur to the Complaint on the ground that the court has no jurisdiction of the subject of the cause of action alleged in the pleading, arguing that the court lacks jurisdiction over this matter because Plaintiff has not exhausted administrative remedies available under the "Wheeling Statutes." Moving Defendants assert that the "Wheeling Statutes" apply here because Plaintiff seeks to convey water through the Isabella Dam and Reservoir. Moving Defendants point out that the 1964 agreement with the United States grants them some control over the operation of, and release of water from, Isabella Dam and Reservoir. Specifically, the Kern River Watermaster, Mulkay, represents Moving Defendants and coordinates the movement of water through, and the release of water from, the Isabella Dam and Reservoir. Moving Defendants contend the movement of water through, and the release of water from, the Isabella Dam and Reservoir falls within the statutory scheme for the conveyance of water because the incidental use of the Isabella Dam and Reservoir is necessary for the transportation of Plaintiff's water. Moving Defendants note that in order facilitate movement of water to Plaintiff's service area downstream the water must pass through and be released from Isabella Dam and Reservoir.

In opposition, Plaintiff argues the "Wheeling Statutes" are inapplicable because the Isabella Dam is not owned by a state agency. Rather, Isabella Dam is owned by the United States. Plaintiff also argues that the Isabella Dam and Reservoir, which is located on the natural channel of the Kern River, is not a water conveyance facility under the "Wheeling Statutes" because it merely stores water; it does not convey or transport water.

"The 'rule of exhaustion of administrative remedies is well established in California jurisprudence … .' [Citation.] Generally, it means a party must exhaust administrative remedies before resorting to the courts. [Citation.]" (*Parthemore v. Col* (2013) 221 Cal.App.4th 1372, 1379 (*Parthemore*).) In particular, " '[t]he doctrine of exhaustion of administrative remedies requires that where a remedy before an administrative agency is provided by statute, regulation, or ordinance, relief must be sought by exhausting this remedy before the courts will act.' [Citation.]" (*Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 99-100.)

"The exhaustion doctrine has at least three distinct strands." (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 209.) "First, when a statute or regulation establishes a quasi-judicial administrative tribunal to adjudicate statutory remedies, a party generally must pursue a remedy before that tribunal and exhaust any administrative appeal before seeking relief in court." (*Ibid*.) "Second, a party challenging a decision by a public or private organization must pursue an internal remedy provided by that organization before challenging the decision in court." (*Id*. at p. 210.) "Third, courts have required parties to pursue remedies before quasi-judicial administrative tribunals before pursuing common law causes of action in court in some circumstances despite the absence of a clear legislative intent that an administrative remedy be pursued in the first instance." (*Ibid*.)

"The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary)." (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391 (*Farmers*).)

"The 'failure to exhaust administrative remedies is a proper basis for demurrer.' [Citations.] A complaint is vulnerable to demurrer on administrative exhaustion grounds when it fails to plead either that administrative remedies were exhausted or that a valid excuse exists for not exhausting. [Citations.] A complaint is also vulnerable to demurrer on administrative exhaustion grounds where the complaint's allegations, documents attached thereto, or judicially noticeable facts indicate that exhaustion has not occurred and no valid excuse is alleged in the pleading to avoid the exhaustion requirement. [Citations.]" (*Parthemore, supra*, 221 Cal.App.4th at p. 1379.)

> The doctrine of exhaustion of administrative remedies, it has been held, is not a matter of judicial discretion but is a fundamental rule of procedure. [Citation.] "In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." [Citation.] When no exception applies, the exhaustion of an administrative remedy is a jurisdictional prerequisite to resort to the courts. [Citation.] The cases which so hold are legion. [Citation.] As Witkin explains it, "[the] administrative tribunal is created by law to adjudicate the issue sought to be presented to the court. The claim or 'cause of action' is within the special jurisdiction of the administrative tribunal, and the courts may act only to review the final administrative determination. If a court allowed a suit to be maintained prior to such final determination, it would be interfering with the subject matter jurisdiction of another tribunal. Accordingly, the exhaustion of an administrative remedy has been held jurisdictional in California." [Citation.]

(*County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 73, citations and italics omitted.)

As is relevant here, California's Water Code sets forth a comprehensive statutory scheme governing the transportation, or "wheeling," of water.

> Since 1980 it has been the declared policy of this state to facilitate the voluntary transfer of water. The Wheeling Statutes addressed a potential impediment to wheeling transfers. Public and private water rights holders who wanted to sell surplus water could do so only by agreement with the owners of conveyance systems. Otherwise, there was no practical way to move water from seller to buyer. However, some conveyance system owners had refused to wheel water, or had allowed wheeling only after protracted negotiations. [Citation.]
>
> The Legislature recognized the sale of excess water could be a source of income for farmers while also promoting efficient use of a scarce resource. To effectuate these goals, the Wheeling Statutes prohibit state, regional, or local agencies from withholding use of their water conveyance systems by others provided that unused wheeling capacity is available and fair compensation is paid to the conveyance owner. [Citation.]
>
> Section 1810 states, in relevant part: "Notwithstanding any other provision of law, neither the state, nor any regional or local public agency may deny a bona fide transferor of water the use of a water conveyance facility which has unused capacity, for the period of time for which that capacity is available, if fair

> compensation is paid for that use ….” Section 1811, subdivisions (c) and (d) define the terms “fair compensation” and “replacement costs” […].”
>
> Section 1812 states: “The state, regional, or local public agency owning the water conveyance facility shall in a timely manner determine the following: [¶] (a) The amount and availability of unused capacity. [¶] (b) The terms and conditions, including operation and maintenance requirements and scheduling, quality requirements, terms or use, priorities, and fair compensation.”
>
> Section 1813 specifies review under the Wheeling Statutes: “In making the determinations required by this article, the respective public agency shall act in a reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water and shall support its determinations by written findings. In any judicial action challenging any determination made under this article the court shall consider all relevant evidence, and the court shall give due consideration to the purposes and policies of this article. In any such case the court shall sustain the determination of the public agency if it finds that the determination is supported by substantial evidence.”

(*Central San Joaquin Water Conservation Dist. v. Stockton East Water Dist*. (2016) 7 Cal.App.5th 1041, 1049-1050, citations omitted.)

In is undisputed that Plaintiff has not sought any administrative remedies available under the “Wheeling Statutes.” Thus, if the “Wheeling Statutes” apply here, Plaintiff has failed to exhaust its administrative remedies and the court lacks jurisdiction over this matter. With this in mind, the court now addresses whether the “Wheeling Statutes” apply to this case.

In the Complaint, Plaintiff alleges that the Moving Defendants, which are regional or local public agencies, are denying Plaintiff use of the Isabella Dam and Reservoir because Moving Defendants are refusing to release Plaintiff’s water and allow it to flow through the Isabella Dam and Reservoir and continue downstream. (Complaint, ¶¶ 2 [“Rosedale … is trying to move the water rights … through Isabella Reservoir and into the valley floor”], 3 [“Defendants have and continue to refuse to recognize Rosedale’s right to move the SF Water through Isabella Reservoir and into the lower Kern River”], 4 [“Rosedale needs a judicial declaration of … its right to move the SF Water downstream through Isabella Reservoir, and its right to use certain Kern River facilities to convey the SF Water …”], 5 [“Rosedale further needs an injunction to prevent Defendants from interfering with the movement of Rosedale’s SF Water”], 14 [“Mulkay … is the contractually designated Kern River Watermaster, and agent of the Kern River Interests for purposes of … the movement of Kern River water through Isabella Reservoir”], 62-63 [Plaintiff needs Mulkay to recognize its water when if flows

through and is released from the Isabella Dam and Reservoir], 64 ["Rosedale needs to be able to covey its water through … other facilities Rosedale has a right to use …"].)

Water Code section 1810 expressly governs such a situation as it provides that a regional or local public agency may not deny a bona fide transferor of water the use of a water conveyance facility which has unused capacity, for the period of time for which that capacity is available, if fair compensation is paid for that use.

Plaintiff asserts that the "Wheeling Statutes" do not govern Moving Defendants' alleged conduct because the Isabella Dam is owned by the United States, which is not a regional or local public agency. In support of its position, Plaintiff cites Water Code section 1812, which describes the determinations that must be made by the "regional[ ] or local public agency owning the water conveyance facility." However, the provisions of the Water Code governing dams and reservoirs provide that an "owner" of a dam or reservoir includes every municipal or quasi-municipal corporation, public utility, district, and person who controls, operates, maintains, or manages a dam or reservoir. (Water Code, § 6005.) Here, the Complaint alleges that Moving Defendants, through their agent Mulkay, exercise some control over the operation of Isabella Dam and Reservoir. (Complaint, ¶¶ 13-14 ["Mulkay … is the contractually designated Kern River Watermaster, and agent of the Kern River Interests for purposes of … the movement of Kern River water through Isabella Reservoir"], 36-37.) Thus, Moving Defendants are "owners" of the Isabella Dam and Reservoir for purposes of applying the "Wheeling Statutes."

Next, Plaintiff argues that the Isabella Dam and Reservoir is not a water conveyance facility, as described in the "Wheeling Statutes," because it does not convey water, but merely stores water. This contention is belied by the allegations of the complaint. Plaintiff is not seeking to store water in Isabella Dam and Reservoir; instead, Plaintiff is asking Moving Defendants to allow Plaintiff's water to travel through and flow out of Isabella Dam and Reservoir. (Complaint, ¶¶ 2-5, 13-14, 18-19, 36-37, 62-67.)

The Second District Court of Appeal's decision in *San Luis Coastal Unified Sch. Dist. v. City of Morro Bay* (2000) 81 Cal.App.4th 1044 (*San Luis*) is also instructive here. In *San Luis*, "[a] school district claimed the right to transport water through a city's water conveyance

system pursuant to section 1810. When the city refused, the school district petitioned for a writ of mandate." (*San Luis , supra*, 81 Cal.App.4th at p. 1046.) In its decision, the court explained that

> Morro Bay argues the facilities the school district seeks to use are not "conveyance facilities" as contemplated by the statute. Morro Bay believes "conveyance facilities" means such systems as aqueducts and canals and not local distribution systems. But local distribution systems as well as aqueducts and canals are facilities used to convey water. Had the Legislature intended to exclude local distribution systems, we assume it would have said so.
>
> Morro Bay claims the school district intends to use more than water conveyance facilities. Morro Bay points out that the school district's plans mention the use of Morro Bay's water storage facilities.
>
> It is true the statutory scheme makes no mention of the use of water storage facilities. *To the extent, however, that storage facilities are an integral part of the water conveyance system, incidental use of the storage facilities will be necessary for the transportation of water. Such necessary and incidental use of integrated storage facilities must be considered to be within the scope of the statutory scheme for the conveyance of water*. We cannot expand the scope of the statute, however, by interpreting it to include the right of the school district to use Morro Bay's water storage facilities to store water over a period of time greater than that necessary to convey the water through the system.
>
> It is not clear from the record whether the school district's plan includes storage of water in Morro Bay's facilities for a longer time than is necessary to convey the water through the system. If so, Morro Bay has no duty to allow the school district to store its water.

(*Id.* at pp. 1048-1049, italics added.) Here, the incidental use of Isabella Dam and Reservoir is necessary for the transportation of water. In other words, Plaintiff must use Isabella Dam and Reservoir in order to convey its water to its downstream service areas. Consequently, under the circumstances presented here, Isabella and Dam and Reservoir is within the scope of the "Wheeling Statutes."

Because the "Wheeling Statutes" apply to this dispute and Plaintiff has not sought the administrative remedies available to it under those statutes, the court lacks jurisdiction over this matter.

Accordingly, Moving Defendants' demurrer to the Complaint on the ground that the court has no jurisdiction of the subject of the cause of action alleged in the pleading is SUSTAINED, without leave to amend.

B. FAILURE TO ALLEGE FACTS SUFFICIENT TO STATE A CLAIM

Moving Defendants demur to the Complaint on the ground of failure to allege facts sufficient to constitute a cause of action, arguing that Plaintiff does not allege facts

demonstrating that it has any rights concerning the operation of Isabella Dam and Reservoir. City of Bakersfield further argues that Plaintiff can only seek judicial review of the defendants' alleged actions, or inactions, pursuant to Code of Civil Procedure section 1094.5.

As the court has already sustained the demurrer to the Complaint without leave to amend on alternate bases, the court need not reach this basis for demurrer.

Accordingly, Moving Defendants' demurrer to the Complaint on the ground of failure to allege facts sufficient to constitute a cause of action is deemed MOOT.

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

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 27, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XII. INTRODUCTION

This action arises from alleged breaches of the Distributor Agreement by which plaintiff and cross-defendant Kaga FEI Co.[4] ("KFEI") and defendant and cross-complainant Cypress Semiconductor Corporation ("Cypress") agreed that KFEI would serve as a nonexclusive distributor of Cypress products to Japanese companies and their affiliates.

On November 25, 2019, KFEI filed a complaint against Cypress, alleging claims for: (1) Breach of Contract; and (2) Breach of the Covenant of Good Faith and Fair Dealing.

On September 10, 2021, KFEI filed a First Amended Complaint against Cypress, which set forth the following causes of action: (1) Breach of Contract; and (2) Breach of the Covenant of Good Faith and Fair Dealing.

On May 23, 2022, Cypress filed a Cross-Complaint against KFEI and cross-defendant Fujitsu Semiconductor Limited ("FSL"), alleging causes of action for: (1) Breach of Written Contract; (2) Breach of Covenant of Good Faith and Fair Dealing; and (3) Intentional Interference with Contract.

On November 23, 2022, Cypress filed a First Amended Cross-Complaint against KFEI and FSL, which sets forth the following causes of action: (1) Breach of Written Contract; (2) Breach of Covenant of Good Faith and Fair Dealing (KFEI); (3) Breach of Covenant of Good Faith and Fair Dealing (FSL); (4) Intentional Interference with Contract; (5) Implied and Equitable Indemnity; and (6) Violation of California UCL (Cal. Bus. Code § 17200 et seq.).

On May 12, 2023, KFEI filed the operative Second Amended Complaint ("SAC") against Cypress, alleging causes of action for: (1) Breach of Distributor Agreement; (2) Breach of Covenant of Good Faith and Fair Dealing; (3) Breach of September 5, 2017 Settlement

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

Agreement; (4) Breach of October 28, 2016 Letter Agreement; (5) Fraudulent Inducement/Intentional Misrepresentation; (6) False Promise; (7) Intentional Interference with Contractual Relations; and (8) Intentional Interference with Prospective Economic Relations.

Currently before the court are: (1) Cypress's motion to seal portions of its demurrer; (2) KFEI's motion to seal portions of its opposition to the demurrer; (3) Cypress's motion to seal portions of its reply in support of its demurrer; and (4) Cypress's demurrer to the third through eighth causes of action of the SAC. The motions to seal are unopposed. KFEI opposes the demurrer.

II. MOTIONS TO SEAL

A. LEGAL STANDARD

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

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

(See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285-1286 (*Universal*).)

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

B. CYPRESS'S MOTION TO SEAL PORTIONS OF DEMURRER

Cypress seeks to seal portions of its memorandum of points and authorities filed in support of its demurrer to the SAC. The material at issue relates to the confidential terms of the parties' business relationship, the parties' confidential business strategies, customer information, and pricing margins. (Declaration of Elspeth V. Hansen in Support of Motion to Seal Portions of Demurrer to Second Amended Complaint by Cypress Semiconductor Corporation, ¶¶ 3-8.) This information is not publicly available, and its disclosure could harm the parties' positions when entering into future agreements or negotiations. (*Ibid*.) Additionally, the parties' Distributor Agreement provides that the parties will not disclose any such non-public business information. Notably, the court previously sealed similar information in the SAC. The proposed redactions in Cypress's memorandum of points and authorities are narrowly tailored to this information.

The court therefore finds that Cypress has established an overriding interest that justifies sealing these limited portions of its memorandum of points and authorities, and the other factors set forth in rule 2.550 are satisfied. (See *Universal*, *supra,* 110 Cal.App.4th at pp. 1283 [a contractual obligation not to disclose can constitute an overriding interest which warrants sealing] & 1286 [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].)

Accordingly, the motion to seal portions of Cypress's demurrer is GRANTED.

C. KFEI'S MOTION TO SEAL PORTIONS OF OPPOSITION

KFEI seeks to portions of its opposition to Cypress's demurrer. The material at issue relates to the confidential terms of KFEI's business relationship with Cypress, KFEI's confidential business strategies, KFEI's customer lists, and KFEI's product prices. (Declaration of Benjamin P. Smith in Support of Plaintiff's Motion to Seal, ¶¶ 2-6.) This information is not publicly available, and its disclosure could harm the parties' positions when entering into future agreements or negotiations. (*Ibid.*) Additionally, the parties' Distributor Agreement provides that the parties will not disclose any such non-public business information. (*Ibid.*) The proposed redactions in the opposition are narrowly tailored to this information.

The court therefore finds that KFEI has established an overriding interest that justifies sealing these limited portions of its opposition, and the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra,* 110 Cal.App.4th at pp. 1283 [a contractual obligation not to disclose can constitute an overriding interest which warrants sealing] & 1286 [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].)

Accordingly, the motion to seal portions of KFEI's opposition is GRANTED.

D. CYPRESS'S MOTION TO SEAL PORTIONS OF REPLY

Cypress seeks to seal portions of its reply filed in support of its demurrer to the SAC. The material at issue relates to the confidential terms of the parties' business relationship, the parties' confidential business strategies, customer information, and pricing margins. (Declaration of Elspeth V. Hansen in Support of Cypress Semiconductor Corporation's Motion to Seal Portions of [Its] Reply in Support of Its Demurrer to Second Amended Complaint, ¶¶ 2-7.) This information is not publicly available, and its disclosure could harm the parties' positions when entering into future agreements or negotiations. (*Ibid.*) Additionally, the parties' Distributor Agreement provides that the parties will not disclose any such non-public

business information. The proposed redactions in Cypress's reply are narrowly tailored to this information.

The court therefore finds that Cypress has established an overriding interest that justifies sealing these limited portions of its reply, and the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra*, 110 Cal.App.4th at pp. 1283 [a contractual obligation not to disclose can constitute an overriding interest which warrants sealing] & 1286 [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].)

Accordingly, the motion to seal portions of Cypress's reply is GRANTED.

III. DEMURRER

Cypress demurs to the third through eighth causes of action of the SAC on the ground of failure to state facts sufficient to constitute a cause of action. (See Code Civ. Proc., § 430.10, subd. (e).)

A. 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.)

B. THIRD AND FOURTH CAUSES OF ACTION

The main trust of Cypress's demurrer to the third cause of action for Breach of September 5, 2017 Settlement Agreement and the fourth cause of action for Breach of October 28, 2016 Letter Agreement is that the claims are time-barred under the applicable statute of limitations. Cypress asserts that the applicable statute of limitations is four years, and the alleged breaches upon which the claims are predicated occurred in 2018. Cypress points out that the SAC was filed more than four years later, on May 12, 2023. Cypress further asserts that the claims do not relate-back to earlier pleadings because those pleadings do not mention the September 5, 2017 Settlement Agreement or the October 28, 2016 Letter Agreement.

In opposition, KFEI contends the demurrer to the third and fourth causes of action is deficient because it does not address KFEI's discovery of the alleged breaches. KFEI also argues that the claims relate back to the filing of the original complaint.

Regarding the statute of limitations, a general demurrer lies where the dates alleged in the complaint show the action is barred by the statute of limitations. (*Saliter v. Pierce Bros. Mortuaries* (1978) 81 Cal.App.3d 292, 300.) The running of the statute must appear clearly and affirmatively from the dates alleged; it is not enough that the complaint might be barred. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.)

As is relevant here, the statute of limitations for a cause of action for breach of a written contract is four years (Code Civ. Proc., § 337, subd. (a)), and the claim accrues, thereby triggering the running of the limitations period, at the time of the breach. (*Barlow v. Collins* (1958) 166 Cal.App.2d 274, 278-279; *Cochran v. Cochran* (1997) 56 Cal.App.4th 1115, 1120.)

Here, KFEI alleges the September 5, 2017 Settlement Agreement and the October 28, 2016 Letter Agreement were breached in 2018. (SAC, ¶¶ 233-236 & 239-242.) Thus, the statute of limitations for those claims expired in 2022. Because the SAC was not filed until May 12, 2023, the third and fourth causes of action are time-barred unless they relate back to KFEI's earlier pleadings.

"The requirement that the complaint allege ultimate facts forming the basis for the plaintiff's cause of action is central to the relation-back doctrine and the determination whether an amended complaint should be deemed filed as of the date of the original pleading." (*Davaloo v. State Farm Ins. Co.* (2005) 135 Cal.App.4th 409, 415.) "The relation-back

doctrine allows an amendment filed after the statute of limitations has run to be deemed filed as of the date of the original complaint ' "provided recovery is sought in both pleadings on the same general set of facts." ' [Citation.] 'In order for the relation-back doctrine to apply, "the amended complaint must (1) rest on the same general set of facts, (2) involve the same injury, and (3) refer to the same instrumentality, as the original one." ' [Citation.]" (*Bridgeman v. Allen* (2013) 219 Cal.App.4th 288, 296.)

"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." (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 277.) "The amended pleading will not relate back to the original if it refers to a different incident, even though it alleges the same resulting injury. [Citation.]" (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230.)

Here, KFEI's original complaint and FAC alleged facts regarding the existence and breach of the parties' Distributor Agreement and subsequent amendments to that agreement. The third and fourth causes of action of the SAC change the essential facts upon which recovery is sought as they are predicated on different and independent contracts. KFEI's earlier pleadings do not contain any facts regarding the existence or terms of the September 5, 2017 Settlement Agreement or the October 28, 2016 Letter Agreement. The original complaint and FAC gave no notice to Cypress that such agreements existed and were the basis of any breach. While the court recognizes that some of the evidence against Cypress for alleged breach of Distributor Agreement would apply to KFEI's claim against Cypresss for alleged breach of the September 5, 2017 Settlement Agreement and the October 28, 2016 Letter Agreement, it cannot be said that based on the facts alleged in the earlier pleadings, Cypress was given adequate notice that KFEI would bring claims pursuant to the September 5, 2017 Settlement Agreement and the October 28, 2016 Letter Agreement. Therefore, the third and fourth causes of action do not relate back and those claims are time-barred.

Accordingly, the demurrer to the third and fourth causes of action is SUSTAINED, without leave to amend.

C. FIFTH AND SIXTH CAUSES OF ACTION

Cypress argues that the fifth cause of action for Fraudulent Inducement/Intentional Misrepresentation and the sixth cause of action for False Promise fail to state a claim because the affirmative misrepresentations allegedly made prior to the parties' October 8, 2018 agreement (as set forth in paragraphs 100, 245, and 259 of the SAC) are vague and insufficiently concrete.

As KFEI persuasively contends, Cypress's argument is improperly directed only to a portion of the fifth and sixth causes of action. A demurrer cannot be sustained to part of a cause of action. (*Kong v. City of Hawaiian Gardens Redevelopment Agency* (2002) 108 Cal.App.4th 1028, 1047; *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682 ["A demurrer does not lie to a portion of a cause of action."].) Here, Cypress attacks only the affirmative misrepresentations allegedly made prior to the parties' October 8, 2018 agreement. However, the fifth cause of action is also predicated on Cypress's alleged concealment and nondisclosure of material facts. (See SAC, ¶¶ 248-249.) Furthermore, the fifth and sixth causes of action are also predicated on alleged affirmative misrepresentations made in 2019. (See SAC, ¶¶ 247, 251, 259.) Notably, the court disagrees with Cypress that the alleged affirmative misrepresentations made in 2019, are materially the same as the alleged 2018 misrepresentation that KFEI would retain its largest customer accounts so long as KFEI agreed to keep margins for the those customers at a certain level for a particular time period. Consequently, the demurrer to the fifth and sixth causes of action on this basis fails as it does not dispose of the claims in their entirety.

Next, Cypress argues that the fifth and sixth causes of action fail because the SAC does not contain facts supporting the conclusory allegation that Cypress did not intend to keep its fraudulent promises at the time it made them.

This argument is not well-taken. The allegation that Cypress did not intend to keep its promises at the time they were made is an ultimate fact that must be accepted as true on demurrer. (See *People v. Rogers* (2013) 57 Cal.4th 296, 338 [stating that a defendant's knowledge or intent is an "ultimate fact"]; see also 5 Witkin, Cal. Proc. (5th ed. 2008), Plead § 728 [stating that intent, like knowledge, is a fact and general allegation of intent is

sufficient].). Notably, the California cases cited by Cypress are distinguishable as they discuss the standard of proof for the element of intent, not the pleading standard.

Accordingly, the demurrer to the fifth and sixth causes of action is OVERRULED.

D. SEVENTH CAUSE OF ACTION

Cypress initially argues that the seventh cause of action for Intentional Interference with Contractual Relations fails because the customer contracts at issue here are at-will and the claim is devoid of any allegations of independent wrongful conduct.

"Tortious interference with contractual relations requires '(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.' [Citations.] It is generally not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself. [Citation.]" (*Ixchel Pharma, LLC v. Biogen, Inc*. (2020) 9 Cal.5th 1130, 1141 (*Ixchel*).) Intentionally interfering with an existing contract is generally a wrong in and of itself. (*Id.* at p. 1142.)

However, "[t]his general rule is subject to certain exceptions …." (*Ixchel, supra*, 9 Cal.5th at p. 1141.) One such exception is that stating a claim for interference with an at-will contract requires pleading an independently wrongful act. (*Id.* at p. 1148.)

Here, KFEI cites allegations in the SAC demonstrating that at least some of the customer contracts at issue were not at-will because they could not be terminated without cause. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336 (*Guz*) [distinguishing between a contract that can be terminated at-will and a contract that can only be terminated for good cause].) Because the seventh cause of action is predicate, in part, on contracts that are not at-will, Cypress's argument does not dispose of the claim in its entirety.

Cypress further asserts that the seventh cause of action fails because it is duplicative of KFEI's other contract claims.

Even assuming for the sake of argument that the seventh cause of action is duplicative of the breach of contract claims, the fact that a cause of action is duplicative is not a ground on which a demurrer may be sustained. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC*

(2008) 162 Cal.App.4th 858, 890 (*Blickman*); see *Tracfone Wireless, Inc. v. Los Angeles County* (2008) 163 Cal.App.4th 1359, 1368 [indicating same]; see also Code Civ. Proc., § 430.10 [setting forth the grounds for demurrer].) While some cases indicate that duplicative causes of action "may be disregarded" or stricken (see e.g. *Ponce-Bran v. Trustees of Cal. State Univ*. (1996) 48 Cal.App.4th 1656, 1658, *Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1395, and *Bionghi v. Metropolitan Water Dist. of So. California* (1999) 70 Cal.App.4th 1358, 1370), the Sixth District Court of Appeal has found that duplicativeness "is the sort of defect that, if it justifies any judicial intervention at all, is ordinarily dealt with most economically at trial, or on a dispositive motion such as summary judgment" (*Blickman, supra*, 162 Cal.App.4th at p. 890; see also *Guz, supra*, 24 Cal.4th at pp. 349-350 [on a motion for summary judgment the California Supreme Court stated that "where breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous"]). This court follows the Sixth District's guidance and declines to sustain the demurrer on this basis.[5] (See *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315 [as a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district].)

Next, Cypress contends that the seventh cause of action fails because it has a financial interest in KFEI's customer contracts and, therefore, Cypress is not a stranger to the contracts.

This argument lacks merit. As KFEI persuasively argues, "a stranger," for purposes of a claim for intentional interference with contractual relations, means one who is not a party to the contract or an agent of a party to the contract. (*Asahi Kasei Pharma Corp. v. Actelion Ltd.* (2013) 222 Cal.App.4th 945, 963-964.) Here, it is undisputed that Cypress is not a party to the customer contracts or an agent of a party to the customer contracts. Furthermore, Cypress's purported financial interest in the customer contracts is insufficient to render it immune. (*Id.* at

[5] The court acknowledges the Fourth District has affirmed decisions by lower courts sustaining demurrers to duplicative causes of action. (*Palm Springs Villas II Homeowners Assn. v. Parth* (2016) 248 Cal.App.4th 268, 290, citing *Award Metals, Inc. v. Superior Court* (1991) 228 Cal.App.3d 1128, 1135 (*Award Metals*) [finding cause of action "add[ed] nothing to the complaint by way of fact or theory."].) Yet, Cypress does not cite these decisions or discuss the soundness of their reasoning and applicability here. (See e.g., *Award Metals, supra*, 228 Cal.App.3d at 1135 [holding demurrer lies to duplicative cause of action], citing *Rodrigues v. Campbell Industries* (1978) 87 Cal.App.3d 494, 498 [holding trial court properly sustained demurrer without leave to amend to cause of action "combin[ing] all the preceding causes, alleging they are joint and concurrent causes of plaintiffs' damages" because it was not a recognized cause of action].) Accordingly, the court will not follow these decisions.

p. 963 [noting that courts have rejected the notion that "a defendant who has no more than an economic interest or connection to the plaintiff's contract with some other entity" is immune].)

Accordingly, the demurrer to the seventh cause of action is OVVERULED.

E. EIGHTH CAUSE OF ACTION

Cypress argues that the eighth cause of action for Intentional Interference with Prospective Economic Relations fails because the claim is devoid of any allegations of independent wrongful conduct.

However, as KFEI persuasively argues, the SAC sets forth claims for intentional misrepresentation and false promise, which are constitute independently wrongful conduct. As KFEI's fraud claims survive demurrer, they may also serve as a basis for the eighth cause of action.

Accordingly, the demurrer to the eighth cause of action is OVERRULED.

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

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Calendar Line 7

Case Name: Madriz v. Premier International Group, Inc. (Class Action)
Case No.: 22CV407296

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Calendar Line 8

Case Name: Attaway, et al. v. Alliance Residential, LLC (Included in Alliance Residential Wage and Hour Cases, JCCP5173)
Case No.: 20CV365134

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 27, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XIII. INTRODUCTION

This is a coordinated action involving the following cases:

(1) *Montano v. Alliance Residential, LLC*, Case No. RIC2002097, Riverside County Superior Court ("*Montano*"); and

(2) *Attaway v. Alliance Residential, LLC*, Case No. 20CV365134, Santa Clara County Superior Court ("*Attaway*").

Montano included a single cause of action for civil penalties under the Private Attorneys General Act ("PAGA"). The PAGA claim was based on allegedly deficient wage statements.

Attaway set forth the following causes of action: (1) Failure to Pay All Overtime Wages; (2) Rest Period Violations; (3) Failure to Indemnify All Necessary Business Expenditures; (4) Wage Statement Violations; (5) Waiting Time Penalties; (6) Unfair Competition; and (7) Civil Penalties Under the Private Attorneys General Act.

The court granted coordination of the cases on May 26, 2021, finding that the wage statement claims overlapped and there were sufficient similarities between the cases such that coordination would add to judicial efficiency and aid in their resolution.

On June 22, 2021, plaintiffs Tania Attaway ("Attaway") and Armando Montano ("Montano") filed a First Amended Consolidated Representative Action Complaint ("FAC") in *Attaway*, which set forth a single cause of action for Civil Penalties Under the Private Attorneys General Act (Labor Code § 2698 et seq.).[6]

[6] Upon review of the record, it does not appear that Attaway and Montano requested, or received, leave to file the FAC (see Code Civ. Proc., §§ 472, 473; see also *Hodges v. County of Placer* (2019) 41 Cal.App.5th 537, 544 [after expiration of the time in which a pleading can be amended as a matter of course, the pleading can only be amended by obtaining the permission of the court]), or filed a request for the court to dismiss the putative class allegations in the *Attaway* complaint pursuant to California Rules of Court, rule 3.770 (see Cal. Rules Ct., Rule

On December 23, 2022, the court entered a Joint Stipulation to File Second Amended Consolidated Representative Action Complaint and Order Thereon, which granted Attaway and Montano leave to file a Second Amended Consolidated PAGA Representative Action Complaint ("SAC").

On December 27, 2022, Attaway, Montano, and plaintiff Mahogani Woods ("Woods") (collectively, "Plaintiffs") filed the SAC, which sets forth a single cause of action for Civil Penalties Under the Private Attorneys General Act (Labor Code § 2698 et seq.).

The parties reached a settlement. Plaintiffs moved for approval of the PAGA settlement.

On May 24, 2023, the court continued the motion for approval of PAGA settlement to August 2, 2023. The court explained that multiple issues prevented approval of the settlement. As is relevant here, the parties' settlement agreement purported to settle and release claims alleged in a case that was not before the court—*Mahogani Woods v. Alliance Residential, LLC, et al.* (Los Angeles County Superior Court, Case No. 21STCV29050) ("*Woods*")—in addition to the claims alleged in this coordinated action. The court directed Plaintiffs to file a supplemental declaration addressing the court's authority to approve the settlement to the extent it encompassed *Woods.* In addition, the court found the release of claims by PAGA Members overbroad because the release encompassed not only PAGA claims based on the facts alleged in the SAC, but PAGA claims based on the legal assertions and/or primary rights alleged therein. The court instructed the parties to meet and confer about whether they could amend the release to conform with *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521 (*Amaro*). Third, the court noted that the settlement purported to release PAGA Members' claims against non-party Greystar Management Services, LP. The court ordered Plaintiffs to file a supplemental declaration explaining why it was fair and reasonable for PAGA Members to release their claims against this entity.

On July 17, 2023, Plaintiffs filed supplemental declarations in support of their motion for approval of PAGA settlement.

3.770(a) ["A dismissal of an entire class action, or of any party or cause of action in a class action, requires court approval. […] Requests for dismissal must be accompanied by a declaration setting forth the facts on which the party relies. The declaration must clearly state whether consideration, direct or indirect, is being given for the dismissal and must describe the consideration in detail."]).

At the August 2, 2023 hearing, the court advised the parties that the Supplemental Declaration of Mehrdad Bokhour in Support of Motion to Approve PAGA Settlement did not adequately address the court's concerns regarding the settlement. Specifically, the parties did not amend the settlement agreement to remove the references to *Woods* or limit the scope of the release. Lastly, the court noted that the parties had not adequately explained Greystar Management Services, LP's relationship to the parties to this action. It remained unclear to the court what, if any, ownership or other relationship Greystar Management Services, LP has with Greystar ARC Residential, LLC. Consequently, the court indicated that parties had not demonstrated that it is fair and reasonable for PAGA Members to release claims against Greystar Management Services, LP. The court continued the motion for approval of PAGA settlement to September 27, 2023.

On September 15, 2023, Plaintiff's counsel filed a second Supplemental Declaration of Mehrdad Bokhour in Support of Motion to Approve PAGA Settlement, which includes an amended settlement agreement.

XIV. LEGAL STANDARD

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380.) 75 percent of any penalties recovered go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining 25 percent for the employees. (*Ibid*.) PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id*. at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

A superior court must review and approve any PAGA settlement. (Lab. Code, § 2699, subd. (l)(2).) The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) The proposed settlement must be submitted to the LWDA at the same time it is submitted to the court. (*Ibid*.)

> As discussed by one court:
> PAGA does not establish a clear standard for evaluating PAGA settlements.
> …
> Accordingly, certain courts have been willing to approve PAGA settlements only if (1) the statutory requirements set forth by PAGA have been satisfied, and (2) the settlement agreement is fair, reasonable, and adequate in view of PAGA's public policy goals.

(*Patel v. Nike Retail Services, Inc.* (N.D. Cal. 2019) 2019 WL 2029061 at *2.)

As part of this analysis, these courts have evaluated proposed PAGA settlements under the relevant factors from *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. (*Patel v. Nike Retail Services, Inc.*, *supra*, 2019 WL 2029061 at *2.) "Of the *Hanlon* factors, the following are relevant to evaluating [a] PAGA settlement: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel. (*Ibid*.)

"[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *13.) The settlement must be reasonable in light of the potential verdict value. (See *O'Connor v. Uber Technologies, Inc*. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc*. (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

XV. DISCUSSION

The second Supplemental Declaration of Mehrdad Bokhour in Support of Motion to Approve PAGA Settlement ("Bokhour Dec.") adequately address the court's concerns regarding the settlement. The declaration includes a copy of the parties' amended settlement agreement. (Bokhour Dec., Ex. B.) The amended settlement agreement removes the

references to *Woods*, narrows the scope of the PAGA release to claims alleged in the SAC, and removes references to non-party Greystar Management Services, LP.

Accordingly, the motion for approval of PAGA settlement is GRANTED.

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

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Calendar Line 9

Case Name: Bridges v. Premier Nissan of San Jose, LLC, et al. (PAGA)
Case No.: 22CV394491

The above-entitled actions come on for hearing before the Honorable Theodore C. Zayner on September 27, 2023, at 9:00 a.m. in Department 19. The court now issues its tentative ruling as follows:

XVI. INTRODUCTION

On October 28, 2021, plaintiff Jamie Bridges ("Plaintiff") filed a wage and hour action—*Bridges v. Premier Nissan of San Jose, LLC, et al.* (Santa Clara County Superior Court, Case No. 21CV390763) ("*Bridges I*")—against defendants Premier Nissan of San Jose, LLC ("Premier Nissan SJ") and Troy Duhon ("Duhon") (collectively, "Defendants"). According to the allegations of Plaintiff's individual complaint, Defendants failed to provide Plaintiff all meal periods to which they were entitled, pay meal period premiums, provide employees all rest periods to which they were entitled, pay rest period premiums, pay minimum wages for all hours worked, pay overtime wages for all overtime hours worked, reimburse employees for necessary business expenses, furnish itemized wage statements and maintain accurate pay records. (Complaint, ¶¶ 43-98.) Defendants also retaliated against Plaintiff for complaining about unlawful pay practices, wrongfully terminated Plaintiff in violation of public policy, and willfully failed to pay wages upon his separation of employment. (*Id.* at ¶¶ 100-104, 108-112, & 115-116.) Based on these allegations, the complaint in *Bridges I* sets forth causes of action for: (1) Failure to Pay Minimum Wage in Violation of Labor Code § 1197; (2) Failure to Pay Overtime Wage in Violation of Labor Code § 510; (3) Failure to Provide Meal Periods Labor Code §§ 226.7, 512(a), and 1198; (4) Failure to Provide Rest Periods Labor Code §§ 226.7 and 1198; (5) Failure to Indemnify for Necessary Expenditures in Violation of Labor Code § 2802; (6) Failure to Furnish Accurate Wage Statements and Failure to Maintain Accurate Payroll Records in Violation of Labor Code §§ 226, 1174(d), and 1198; (7) Retaliation in Violation of Labor Code § 1102.5; (8) Wrongful Termination in Violation of Public Policy; (9) Willful Failure to Pay Wages in Violation of Labor Code §§ 201-203; and (10) Failure to Timely Pay Wages in Violation of Labor Code § 204.

On February 8, 2022, the court ordered *Bridges I* submitted to binding arbitration pursuant to the terms of the parties' arbitration agreement and the parties' stipulation, and stayed *Bridges I* pending the outcome of the arbitration.

On February 18, 2022, Plaintiff filed this Private Attorneys General Act ("PAGA") action—*Jamie Bridges v. Premier Nissan of San Jose, LLC, et al.* (Santa Clara County Superior Court, Case No. 22CV394491) ("*Bridges II*")—on behalf of current and former employees of Defendants. According to the allegations of the Complaint, Defendants failed to provide employees all meal periods to which they were entitled, pay meal period premiums, provide employees all rest periods to which they were entitled, pay rest period premiums, pay minimum wages for all hours worked, pay overtime wages for all overtime hours worked, reimburse employees for necessary business expenses, furnish itemized wage statements and maintain accurate pay records. (Complaint, ¶¶ 48-49, 55, 59, 64, 67, & 70-74.) Based on these alleged Labor Code violations, the Complaint sets forth a single cause of action for Civil Penalties in Violation of Labor Code § 2698, et seq.

Bridges I was dismissed with prejudice on March 27, 2023.

The Plaintiff and Premier Nissan SJ have reached a settlement agreement. Plaintiff moved for approval of PAGA settlement. No opposition was filed.[7]

On August 19, 2023, the court continued the motion for approval of PAGA settlement to September 27, 2023. The court explained that it had several concerns regarding the settlement. First, the settlement agreement purported to release claims against Duhon, but did not include Duhon as a party or signatory. Second, the start date of the PAGA Period as defined in the settlement agreement (i.e., June 1, 2019) was earlier than the PAGA Period start date alleged in the Complaint (i.e. October 26, 2020). Third, the court noted Plaintiff entered into a separate settlement agreement for his individual Labor Code claims as alleged in *Bridges I*, and requested that Plaintiff provide a copy of the individual settlement for its review. Fourth, the court was concerned that the proposed settlement undervalued and unfairly discounted the value of the PAGA claims. The court noted that the informal discovery conducted was meager: only 386 pages of documents were produced for PAGA claims for 201 aggrieved employees and a significant portion of those payroll and time records pertained only to

[7] Notably, proposed intervenor Celia Arreola ("Arreola") moved ex parte to continue the prior hearing on this motion, arguing that the settlement is unfairly discounted. The court denied the ex parte application on August 11, 2023. Arreola's motion to intervene is currently set for hearing on November 29, 2023. Arreola has not moved to advance the hearing on her motion to intervene.

Plaintiff. Additionally, the court explained that Plaintiff appeared to underestimate the value of the PAGA claims given the maximum number of allegedly violations. Finally, the court indicated that the amount of attorney fees and costs requested appeared to be excessive. The percentage of the common fund sought by counsel was higher than the 33.33 percent typically awarded in wage and hour cases. Furthermore, Plaintiff's counsel sought to recover fees and costs for work on *Bridges I* as well as work on other unrelated cases (e.g., *Silva v. Premier Chevrolet of Buena Park, LLC*). The court directed Plaintiff's counsel to file a supplemental declaration addressing these issues.

On September 11, 2023, Plaintiff's counsel filed a supplemental declaration.

XVII. LEGAL STANDARD

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380.) 75 percent of any penalties recovered go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining 25 percent for the employees. (*Ibid*.) PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id*. at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

A superior court must review and approve any PAGA settlement. (Lab. Code, § 2699, subd. (l)(2).) The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) The proposed settlement must be submitted to the LWDA at the same time it is submitted to the court. (*Ibid*.)

> As discussed by one court:
> PAGA does not establish a clear standard for evaluating PAGA settlements.
> …
> Accordingly, certain courts have been willing to approve PAGA settlements only if (1) the statutory requirements set forth by PAGA have been satisfied, and (2) the settlement agreement is fair, reasonable, and adequate in view of PAGA's public policy goals.

(*Patel v. Nike Retail Services, Inc.* (N.D. Cal. 2019) 2019 WL 2029061 at *2.)

As part of this analysis, these courts have evaluated proposed PAGA settlements under the relevant factors from *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. (*Patel v. Nike Retail Services, Inc., supra*, 2019 WL 2029061 at *2.) "Of the *Hanlon* factors, the following are relevant to evaluating [a] PAGA settlement: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel. (*Ibid*.)

"[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *13.) The settlement must be reasonable in light of the potential verdict value. (See *O'Connor v. Uber Technologies, Inc*. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc*. (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

III. DISCUSSION

The proposed settlement has been made with regard to the following aggrieved employees: "all persons within the State of California who are or were employed by Defendant in the State of California from June 1, 2019, through the Effective Date …." (Plaintiff's Notice of Errata Re: Motion for Approval of PAGA Settlement, Ex. 1 ("Settlement Agreement"), ¶ I.2.) The term "Defendant" is defined in the settlement agreement as Premier Nissan SJ. (Settlement Agreement, p. 1, ¶ 1.) The "Effective Date" is defined as "the date upon entry of an Order by the Court approving this Settlement." (Settlement Agreement, ¶ I.5.)

Pursuant to the terms of the settlement, Premier Nissan SJ will pay a non-reversionary, gross settlement amount of $54,850. (Settlement Agreement, ¶¶ I.8, III.2.) This amount includes attorney fees in the amount of $19,197.50 (35 percent of the gross settlement amount), litigation costs up to $13,000, and settlement administration costs up to $3,250. (Settlement Agreement, ¶¶ I.8, I.9, III.3.) Of the remaining net settlement amount, 75 percent will be paid to the LWDA and 25 percent will be

distributed to aggrieved employees based on the pro rata number of pay periods worked by each aggrieved employee during the PAGA Period. (Settlement Agreement, ¶¶ I.8, I.9, I.11, III.3.) Funds from checks that are not cashed within 180 days from the date of mailing will be sent to the State Controller's Office under the unclaimed property fund laws. (Settlement Agreement, ¶ IV.4.)

In exchange for the settlement, the aggrieved employees agree to release Premier Nissan SJ and "Released Parties" from:

> any and all claims relating to any and all facts and claims asserted or that could have been asserted in the Action or any other claims, under PAGA, based on the facts alleged, including but not limited to any and all claims for PAGA penalties for violations of the California Labor Code governing: meal and rest breaks; minimum wages, overtime and double time wages (including, but not limited to, any and all theories related to "off the clock work" or incorrect calculation of the "regular rate of pay"); expense reimbursement; late payment of wages; failure to properly record and maintain employment records; waiting time penalties; meal and rest period penalties; wage statement violations; separation pay violations; and unfair business practices.

(Settlement Agreement, ¶¶ I.12, I.13, III.5, III.6.) The term "Released Parties" is defined as Premier Nissan SJ and "all persons, agents (specifically including co-defendant Troy Duhon), servants, representatives, officers, directors, stockholders, employees, associations, joint ventures, corporations, parent corporations, subsidiaries, affiliates, partners, members, predecessors and successors in interest, insurers, re-insurers, and assigns, and all other legal entities with whom Defendant has been, are now, or may hereafter be affiliated with." (Settlement Agreement, ¶ I.12.) Plaintiff also agrees to a general release. (Settlement Agreement, ¶ III.7.)

Plaintiff contends the PAGA settlement is fair, reasonable, and adequate. In his moving papers, Plaintiff indicated that the settlement resolves PAGA claims on behalf of 201 aggrieved employees who collectively worked 5,340 pay periods during the PAGA Period. Plaintiff stated that Defendant produced a total of 386 pages in connection with the parties' informal discovery. The document production included Plaintiff's wage statements, Defendant's employee handbook, and policies related to meal and rest periods. Plaintiff also received information regarding the number of aggrieved employees and the corresponding pay periods. The parties participated in a full-day mediation with Steven Rottman, Esq., which resulted in a global settlement of Plaintiff's individual and PAGA claims. Plaintiff stated that he received a $50,000 payment for the settlement of his individual claims. Plaintiff estimated that the average individual settlement payment for the PAGA claims is approximately $24.13.

Regarding the value of his PAGA claims, Plaintiff stated that the maximum number of violations Defendant allegedly committed is 37,380 and, assuming a $100 penalty per violation, Defendant's maximum potential exposure for the PAGA claims is $3,204,000. Notably, Plaintiff did not provides a breakdown of the potential exposure based on the underlying Labor Code violations. Plaintiff further stated that it is possible that the penalty award could be reduced by anywhere from 10 percent to 90 percent. Plaintiff stated that "[t]he only evidence of widespread, systematic Labor Code violations committed by Premier Nissan against its employees during the PAGA period that Plaintiff uncovered was as to its technicians." Plaintiff explained that witnesses largely corroborated Plaintiff's allegations that employees were not authorized or permitted to take compliant meal and rest periods, but there was some divergence of opinion as to whether technicians skipped their meal and rest periods out of their personal preference. Plaintiff concluded that although he would have proven meal and rest period violations at trial, it is uncertain how many pay periods the court would have found the violations to have occurred. Plaintiff also stated that Premier Nissan SJ produced facially compliant policies regarding meal and rest periods, which raised an issue of fact as to whether it had knowledge of or authorized the missed meal or rest periods. Plaintiff asserted that "[t]here would have been a nearly 50/50 likelihood that the violations would have been proven to be knowing and intentional."

Plaintiff has now provided a supplemental declaration from his counsel in support of the motion for approval of PAGA settlement. First, Plaintiff's counsel states that the scope of the release appropriately includes PAGA claims alleged against Duhon, in addition to PAGA claims alleged against Premier Nissan SJ, because Plaintiff has not asserted any PAGA violations specific to Duhon; rather, he is simply an agent of Premier Nissan SJ. (Plaintiff's Supplemental Declaration in Support of Motion for PAGA Approval ("Supp. Dec."), ¶ 3.) Next, Plaintiff's counsel acknowledges that the PAGA Period covered by the settlement agreement is different than the PAGA Period alleged in the Complaint. (*Id.* at ¶ 4.) Plaintiff's counsel states that the PAGA Period was enlarged for settlement purposes because Defendant is defending against several other PAGA lawsuits and the parties wanted to encompass the PAGA claims alleged in the other lawsuits. (*Ibid.*) Plaintiff's counsel asserts that the is fair to the aggrieved employees because the settlement adequately values their PAGA claims. (*Id.* at ¶¶ 5-6.) With respect to the valuation of the PAGA claims, Plaintiff's counsel appears to acknowledge that the value of Premier Nissan SJ's maximum potential exposure stated in the moving

papers (i.e., $3,204,000) was incorrect. Plaintiff's counsel now states that Premier Nissan SJ's maximum potential exposure for the PAGA claims would be $3,738,000. (Supp. Dec., ¶ 8.) Plaintiff's counsel states that this amount should be discounted because Plaintiff faces risks regarding the merits of the PAGA claim, the valuation relies on "stacking" multiple violations during each pay period, and courts may substantially reduce a PAGA award. (*Id.* at ¶¶ 8-10.) Plaintiff's counsel also states that Plaintiff recently "engaged in some confirmatory discovery during the preparation of this declaration," which included time records and wage statements for a random sample of 15 aggrieved employees. (*Id.* at ¶ 13.) The additional discovery revealed a potential meal period violation rate of 20.1 percent. (*Ibid.*) Plaintiff's counsel states that the wage statements otherwise confirmed that Premier Nissan SJ paid meal period premiums and reimbursed for cell phone use. (*Ibid.*) Finally, Plaintiff's counsel concedes that the attorney fees and costs sought included work on *Bridges I.* Plaintiff's counsel states that she has highlighted fees and costs incurred solely in connection with *Bridges I.* Plaintiff's counsel asserts that the remaining amounts reflect work on both cases that was inextricably linked. (*Id.* at ¶¶ 14-18.)

Plaintiff's counsel also provides the court with a copy of Plaintiff's settlement agreement from *Bridges I.*

After reviewing Plaintiff's supplemental information, the court continues to have several concerns regarding the settlement. First, it is undisputed that the start date of the PAGA Period as defined in the settlement agreement is different from the start date of the PAGA Period alleged in the Complaint. In the Complaint, Plaintiff alleges that he gave notice to the LWDA of his PAGA claims on October 26, 2021. (Complaint, ¶ 77.) This suggests that the PAGA Period start date is October 26, 2020. (See *Browns v. Ralph Grocery Co.* (2018) 28 Cal.App.5th 824, 839 [the statute of limitations for a PAGA claim is one year].) However, the settlement agreement states that the PAGA Period begins on June 1, 2019. Plaintiff's counsel advises that the PAGA Period was enlarged for settlement purposes for the sole purpose of eliminating Premier Nissan SJ's liability in other pending PAGA lawsuits. This is cause for concern and suggests that the settlement is not the product of non-collusive negotiations.

Second, the supplemental declaration from Plaintiff's counsel confirms that the moving papers undervalued and unfairly discounted the value of the PAGA claims. Although Plaintiff initially

asserted that Premier Nissan SJ's maximum potential exposure for the PAGA claims was $3,204,000, Plaintiff now confirms that Premier Nissan SJ's maximum potential exposure for the PAGA claims is $3,738,000. Consequently, the proposed settlement actually represents 1.4 percent of the potential maximum value of the PAGA claims. In other words, the PAGA claims have been discounted by approximately 98.6 percent. Thus, proposed settlement amount is far below the low end of the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc*. (E.D.Ca|. Feb. 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist.LEXIS 30201, at *41-42 [citing cases listing range of 5 to 25-35 percent of the maximum potential exposure].) Although Plaintiff highlights the trial court's ability to reduce PAGA penalties and the fact that Premier Nissan SJ has raised defenses to the meal and rest period violations, Plaintiff does not adequately explain why this warrants such a steep discount of the PAGA claims. (See *O'Connor v. Uber Techs., Inc.* (N.D.Cal. 2016) 201 F. Supp. 3d 1110, 1133- [holding that the PAGA settlement was not fair and adequate when the plaintiffs sought to settle a PAGA claim for $1 million, despite conceding that the PAGA claim could potentially result in penalties over $1 billion (i.e., settling the PAGA claim for 0.1% of its estimated full worth; a 99.9 percent reduction in the potential maximum value of the claim)].) The 98.6 percent reduction applied here does not adequately reflect the parties' respective risks. Here, the risks at issue rest primarily on the merits of Plaintiff's Labor Code claims and the discretionary reduction of statutory penalties. However, those risks are not limited to Plaintiff; Premier Nissan SJ also takes on a significant risk that should a representative PAGA claim be litigated and adjudicated, it could lose and such an adverse judgment would carry not only a direct monetary penalty, but potentially could affect other litigation. Instead of adequately considering these risks to Premier Nissan SJ and the full value of the PAGA claim, in settling the PAGA claim herein, Plaintiff appears to treat the PAGA claim simply as a bargaining chip in obtaining a global settlement for Premier Nissan SJ's benefit.

Notably, Plaintiff's supplemental declaration confirms that the informal discovery conducted by Plaintiff prior to settlement was meager. Only 386 pages of documents were produced for PAGA claims that cover 201 employees, and a significant portion of those payroll and time records pertain only to Plaintiff. Although Plaintiff stated that "[t]he only evidence of widespread, systematic Labor Code violations committed by Premier Nissan against its employees during the PAGA period that

Plaintiff uncovered was as to its technicians," Plaintiff did not obtain a sampling of aggrieved employees' payroll and time records from Premier Nissan SJ. After the prior hearing on this motion, Plaintiff obtained wage statements for 15 additional employees (i.e., approximately 7 percent of the aggrieved employees). Plaintiff's counsel states that the additional discovery showed a potential meal period violation rate of 20.1 percent, but otherwise confirmed that Premier Nissan SJ paid meal period premiums and reimbursed for cell phone use. However, Plaintiff's counsel does not discuss what, if anything, the discovery revealed regarding Plaintiff's allegations regarding rest period violations, failure to pay minimum wages, failure to pay overtime wages, and failure to maintain accurate records.

Third, the amount of attorney fees requested is excessive. Plaintiff's counsel seeks attorney fees of $19,197.50 (35 percent of the gross settlement amount). The percentage of the common fund sought by counsel is higher than the 33.33 percent typically awarded in wage and hour cases. Moreover, the recovery achieved for the aggrieved employees is modest and not an unusually good result. Furthermore, the lodestar stated in Plaintiff's moving papers is inflated as the amount includes time spent on Plaintiff's individual claims and other cases. (Declaration of Yesenia L. Rodriguez ("Rodriguez Dec."), ¶ 21 & Ex. 4 [billing records which include time entries for work on Plaintiff's individual settlement, the dismissal of *Bridges I*, arbitration in *Bridges I*, "Bridges v. Premier Chevrolet of Buena Park, LLC," and "Silva v. Premier Chevrolet of Buena Park, LLC"].) Moreover, Plaintiff's counsel continues to seek to recover fees and costs for work performed in connection with *Bridges I* despite the fact that Plaintiff's counsel already received payment for attorney fees in connection with *Bridges I* (as confirmed by the court's review of Plaintiff's individual settlement).

In light of the foregoing, the court cannot find that the PAGA settlement is fair and adequate in view of the purposes and policies of the statute.

Accordingly, Plaintiff's motion for approval of PAGA settlement is DENIED.

The Court will prepare the Order after hearing.

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Calendar Line 10

Case Name: Boyer v. Lucile Salter Packard Childrens Hospital at Stanford (Class Action/PAGA)
Case No.: 20CV375153

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 27, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a putative class and Private Attorneys General Act ("PAGA") action arising out various alleged wage and hour violations. The operative First Amended Complaint ("FAC"), filed on November 4, 2021, sets forth the following causes of action: (1) Failure to Reimburse Business Expenses (Labor Code § 2802); (2) UCL Violations (Cal. Bus. & Prof. Code §§ 17200-17204); and (3) PAGA Penalties (Labor Code § 2698 et seq.).

The parties have reached a settlement. Plaintiff Valerie Boyer ("Plaintiff") moved for preliminary approval of the settlement.

On August 30, 2023, the court continued the motion for preliminary approval of settlement to September 27, 2023. The court asked the parties to clarify how funds from uncashed settlement checks should be distributed as the settlement agreement contained inconsistent provisions. The court also requested a copy of Plaintiff's LWDA PAGA letter so it could determine whether the letter was consistent with the FAC. The court otherwise found the settlement fair for purposes of preliminary approval. The court also approved the request for an incentive award in the amount of $10,000, and certified the class for settlement purposes. Finally, the court requested the parties submit an amended class notice adding certain language regarding the final approval hearing.

On September 8, 2023, Plaintiff's counsel filed a supplemental declaration, which included a copy of Plaintiff's LWDA PAGA letter, the Amended Joint Stipulation of Class Action and PAGA Settlement ("Amended Settlement Agreement"), and the amended Notice of Class Action and PAGA Settlement ("Amended Class Notice").

II. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion. [Citation.]" (*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, quoting *Dunk, supra,* 48 Cal.App.4th at p. 1801 and citing *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. [Citation.]" (*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. [Citations.]" (*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, quoting *Dunk, supra,* 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

The supplemental declaration from Plaintiff's counsel, filed on September 8, 2023, adequately addresses the court's concerns regarding the settlement. Specifically, the Amended Settlement Agreement now clarifies that funds associated with uncashed checks will be re-

distributed pro rata to participating class members who cashed their settlement checks. (Supplemental Declaration of Craig J. Ackermann in Support of Plaintiff's Motion […], ¶¶ 5-6 & Ex. B, ¶¶ III.G.6 & III.J.13.) The Amended Settlement Agreement also reflects the updated settlement administration costs in the amount of $18,000. (*Ibid.*) Next, Plaintiff's counsel includes a copy of Plaintiff's LWDA PAGA letter, which is consistent with the FAC. (*Id.* at ¶ 4 & Ex. A.) Finally, the amended class notice contains the changes requested by the court. (*Id.* at ¶¶ 8-9 & Ex. F.)

Accordingly, the motion for preliminary approval of settlement is GRANTED. The final approval hearing is set for March 27, 2024, at 1:30 p.m. in Department 19.

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

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