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

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LAW AND MOTION TENTATIVE RULINGS
DATE: JULY 31, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV421827	Vargas Rivera v. Flagship Facility Services, Inc., et al. (Class Action)	See Line 1 for tentative ruling.
LINE 2	23CV425996	Vargas Rivera v. Flagship Facility Services, Inc., et al. (PAGA)	See Line 1 for tentative ruling.
LINE 3	23CV415981	Kobayashi v. Dfinity USA Research LLC, et al.	See Line 3 for tentative ruling.
LINE 4	23CV415981	Kobayashi v. Dfinity USA Research LLC, et al.	See Line 3 for tentative ruling.
LINE 5	21CV392334	Balabanoff v. Classic Vacations, LLC, et al. (Class Action/PAGA)	See Line 5 for tentative ruling.
LINE 6	22CV392905	Cervantez v. Garden City, Inc.	See Line 6 for tentative ruling.
LINE 7			
LINE 8			
LINE 9			

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LAW AND MOTION TENTATIVE RULINGS

LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Lines 1 – 2

Case Name: Vargas Rivera v. Flagship Facility Services, Inc., et al. (Class Action)
Case No.: 23CV421827

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 31, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling which is the court's proposed statement of decision, subject to objection and argument, if any, at the scheduled hearing.

I. INTRODUCTION

On August 28, 2023, Plaintiff Ma Azucena Vargas Rivera ("Plaintiff") her complaint in docket 23CV421827 as a putative wage and hour class action. The still-operative complaint alleges causes of action for: (1) failure to pay overtime wages, (2) failure to pay minimum wages, (3) meal period violations, (4) rest period violations, (5) waiting time penalties, (6) wage statement violations, (7) failure to pay timely wages, (8) failure to indemnify, (9) failure to pay interest on deposits, (10) violation of Labor Code section 227.3, and (11) unfair competition.

On November 13, 2023, Plaintiff filed the operative complaint in docket 23CV425996, alleging a single cause of action for penalties under the Private Attorney General Act ("PAGA").

Defendants Flagship Services, Inc.; Flagship Enterprises Holding, Inc.; Flagship Sweeping Services, Inc., and Flagship Airport Services, Inc. (collectively, "Defendants") are named in both actions.

Defendants filed separate motions to compel arbitration in each action, Plaintiff filed a single consolidated opposition, and Defendants filed replies.

II. EVIDENTIARY OBJECTIONS

A. Plaintiff's Evidentiary Objections

Plaintiff objects to several portions of the Declaration of Ralph Terrones in Support of the Motion. She contends that the entire declaration is inadmissible hearsay because it was not made under penalty of perjury. The court overrules this motion as Defendants' have provided an updated declaration, which is made under penalty of perjury.

Plaintiff also objects to paragraphs 8 and 9 of the declaration on the grounds of lack of personal knowledge and foundation and hearsay. Plaintiff does not explain the basis for the hearsay objection. To the extent it is based on the fact that the declaration was not signed under penalty of perjury, it is overruled. With respect to the lack of personal knowledge and foundation objections, it is necessary to review the content of the targeted paragraphs. Paragraph 8, generally indicates that new hires are provided with physical copies of the dispute resolution agreement ("arbitration agreement" or "agreement") Defendants contend Plaintiff signed in this case, staff discuss the agreement with the new employee, and then the employee is given time to review the agreement and ask any questions. It also states that Terrones located a copy of the agreement purporting to bear Plaintiff's signature. The objections are not well taken as to this content as Terrones has declared that he is the director of human resources and that he has access to the Defendants' files. However, to the extent the paragraph indicates that Plaintiff herself was given a copy of the agreement and that the signature on the document is Plaintiff's, Terrones has not stated any facts indicating personal knowledge of those facts. Terrones does not state that he provided the agreement to Plaintiff nor does he indicate he was present when is was presented. He does not indicate that he witnessed Plaintiff sign the agreement. While Terrones can testify to the general practice of the company, he has not shown that he has personal knowledge of the facts surrounding Plaintiff's alleged signing of the agreement.

With respect to paragraph 9, the entirety of that paragraph states, "The personnel file that

Flagship maintains in the regular course of business for Plaintiff contains an Arbitration Agreement signed by Plaintiff. A true and correct copy of the Arbitration Agreement signed by Plaintiff on December 28, 2018, and which is contained in Plaintiffs personnel file, is attached hereto as Exhibit A." Again, only portions of this paragraph are objectionable. Terrones has not provided a basis for his statement that the agreement was signed by Plaintiff.

Accordingly, although the court overrules the objections as to the entirety of paragraphs 8 and 9, it is cognizant of the limitations of Terrones's declaration in this regard.

B. Defendants' Evidentiary Objections

Defendants also object to portions of Plaintiff's declaration in support of the opposition. On lack of personal knowledge and lack of foundation grounds, Defendants object to portions of paragraph 4 of Plaintiff's declaration indicating that she was directed to sign tax documents at her onboarding and that she was not given a copy of those documents nor permitted to take them home before signing. Defendants' objections make little sense. Plaintiff herself was present at the time these events occurred and witnessed them. Thus, she has personal knowledge of them. Defendants fail to explain how these statements are lacking in foundation. Accordingly, these objections are overruled Defendants also object, on the same grounds, to paragraph 5, which states that a Spanish interpreter interpreted the content of some additional onboarding documents and that she was not provided with those documents and she does not remember signing them. Again, Plaintiff was necessarily present when these actions occurred. Accordingly, these objections are not well taken and are overruled. Defendants object on the same ground to portions of paragraph 6 that indicate that Plaintiff "do[es] not believe the signature on Defendants' proffered copy of the arbitration agreement is hers and that she was not given a copy of the arbitration agreement at her onboarding. Plaintiff would have personal knowledge of whether she was given something and she is qualified to opine on whether the

signature on the agreement is her own signature. These objections are overruled. Defendants further object on the grounds and on the ground of speculation, to a portion of paragraph 7 that states that Plaintiff would not have signed the agreement if she had known what it was. This objection is overruled. Finally, Defendants object to the same portions of paragraph 4 and 5, the portion of paragraph 6 indicating that Plaintiff was not given a copy of the agreement at her onboarding, and a portion of paragraph 7 indicating that Plaintiff is currently unable to understand the agreement unless it was translated into Spanish on the ground of relevance. The relevance objections are overruled.

III. DISCUSSION

A. Legal Standard

Defendants contend, and Plaintiff does not dispute, that the Federal Arbitration Act ("FAA") applies in this case.

In ruling on a motion to compel arbitration, the Court must inquire as to (1) whether there is a valid agreement to arbitrate, and (2) if so, whether the scope of the agreement covers the claims alleged. (See *Howsan v. Dean Witter Reynolds* (2002) 537 U.S. 79, 84.) "Under both federal and state law, the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate. [Citations.] The threshold question requires a response because if such an agreement exists, then the court is statutorily required to order the matter to arbitration." (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13, 19 (*Fleming*), internal quotation marks omitted.)

"As the United States Supreme Court observed two decades ago: 'Because the FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements,"

[citation] we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.' (*EEOC v. Waffle House, Inc*. (2002) 534 U.S. 279, 294 [].) 'For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' (*United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 582.)" (*Fleming, supra,* 88 Cal.App.5th at pp. 19-20.) "The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the party opposing arbitration bears the burden of proving any defense, such as unconscionability." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*).) "If no agreement to arbitrate was formed, then there is no basis upon which to compel arbitration." (*Ahlstrom v. DHI Mortgage Co., L.P.* (9th Cir. 2021) 21 F.4th 631, 635.)

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

B. Analysis

i. Existence of an Agreement

Defendants assert that Plaintiff signed an arbitration agreement as part of her onboarding when she was hired. They provide the declaration of Ralph Terrones, Senior Director of Human Resources Operations of Flagship Facility Services. The purported agreement is attached. Terrones asserts that new hires, including Plaintiff are presented with the arbitration agreement during the onboarding process. (Declaration of Ralph Terrones in Support of Defendants' Motion to Compel Arbitration, to Dismiss Class Claims, and to Stay

Proceedings ("Terrones Decl."), ¶ 8.) A copy of the purported arbitration agreement is attached to the declaration as Exhibit A. Terrones further declares that in 2018, when Plaintiff was hired, Flagship Facility Services allowed employees to opt out of the arbitration agreement but Terrones's review of personal records did not reveal any request on Plaintiff's part to opt out.

Plaintiff argues that Defendants have failed to show the existence of an agreement because Terrones's declaration was not made under penalty of perjury and, therefore, it amounts to inadmissible hearsay. Under Code of Civil Procedure section 2015.5, a declaration is required to be signed under penalty of perjury. Recognizing this error, on February 13, 2024, after Plaintiff filed her opposition, Defendants filed a notice of errata with an amended Terrones declaration signed under penalty of perjury. Plaintiff has not filed anything challenging the notice of errata. Defendants contend that the court may properly consider the Terrones declaration because case law allows for the filing of a supplemental declaration to authenticate a signature in connection with a motion to compel arbitration after the authenticity of the signature is challenged in the opposition to the motion. (See *Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047, 1060.) They also assert that the court can find the lack of the "under penalty of perjury" language harmless. (*Gall v. Smith & Nephew, Inc*. (2021) 71 Cal.App.5th 117, 125 [trial court did not err in considering declaration where penalty of perjury statement did not indicate it was made under the laws of the state of California and error was cured before the hearing]; *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1204 [technical error in making declaration under penalty of perjury under the laws of the state of Arizona rather than California held harmless].) Although none of these cases involve a declaration not made under penalty of perjury at all, the court will consider the Terrones declaration.

Plaintiff also contends that the Terrones Declaration is inadmissible due to lack of personal knowledge as to the facts stated therein. However, the argument is limited to the authenticity of Plaintiff's signature on the arbitration agreement. The court finds the Terrones Declaration admissible. As Defendants point out, Terrones declares that he is a human

resources director with access to personnel files and how they are stored. (Terrones Decl., ¶¶ 1, 6.) Thus, he was able to authenticate the arbitration agreement as a business record of the company. Although paragraph 8 of the declaration indicates that the agreement bears Plaintiff's signature, this is but one of many facts stated in the declaration and, therefore, the entire declaration is not made inadmissible by the fact that Terrones does not state any facts indicating that he is able to authenticate the signature.

Plaintiff maintains that she did not enter into the agreement at issue. First, she asserts that she does not believe that the signature on the arbitration agreement is hers. (See Declaration of Ma Azucena Vargas Rivera in Support of Plaintiff's Consolidated Opposition to Defendants' Motion to Compel Arbitration (English Translation) ("Rivera Decl."), ¶ 6.) She also contends that the first time she received a copy of the arbitration agreement was on February 6, 2024, during the course of this litigation. (Rivera Decl., ¶ 6.) Defendants argue that Plaintiff's declaration is self-serving and they object to it on various grounds. The court has overruled Defendants' objections and, although the court recognizes that the declaration may be somewhat self-serving, it is the only direct evidence on this point.

Defendants rely on *Iyere v. Wise Auto Group* (2023) 87 Cal.App.5th 747 (*Iyere*) for the proposition that Plaintiff's declaration is insufficient to shift the burden to Defendants to authenticate her signature on the arbitration agreement. There, the Court of Appeal explained,

The arbitration proponent must first recite verbatim, or provide a copy of, the alleged agreement. [Citations.] A movant can bear this initial burden 'by attaching a copy of the arbitration agreement purportedly bearing the opposing party's signature.' [Citation.] At this step, a movant need not 'follow the normal procedures of document authentication' and need only 'allege the existence of an agreement and support the allegation as provided in [Cal. Rules of Court,] rule [3.1330].' [Citation.][¶] If the movant bears its initial burden, the burden shifts to the party opposing arbitration to identify a factual dispute as to the agreement's existence—in this instance, by disputing the authenticity of their signatures. To bear this burden, the

arbitration opponent must offer admissible evidence creating a factual dispute as to the authenticity of their signatures. The opponent need not prove that his or her purported signature is not authentic, but must submit sufficient evidence to create a factual dispute and shift the burden back to the arbitration proponent, who retains the ultimate burden of proving, by a preponderance of the evidence, the authenticity of the signature. [Citation.]

(*Iyere*, *supra*, 87 Cal.App.5th at p. 755.) The *Iyere* court explained that where "no plaintiff declared that he had not signed the agreement, or that his physical signature was forged or inauthentic" there was no factual dispute as to the authenticity of the signature. There, "each plaintiff declared that on his first day of work he was given a stack of documents, was told 'to quickly sign the documents so I could get to work,' and 'signed the stack of documents immediately and returned them' []. Each added, 'I do not recall ever reading or signing any document entitled Binding Arbitration Agreement … . I do not know how my signature was placed on [the document].' Each plaintiff stated further that if he had understood that the agreement waived his right to sue [the defendant], he would not have signed it." (*Id.* at p. 756.) The plaintiffs did not deny the stack contained the arbitration agreement. (*Ibid*.) This evidence was insufficient to shift the burden to the defendant to authenticate the signature.

Here, Defendants have provided the arbitration agreement purporting to bear Plaintiff's signature. Plaintiff contends that a Spanish interpreter explained the content of a stack of documents she does not recall signing. (Rivera Decl., ¶ 5.) Notably, she admits that the onboarding process, when Defendants contend the document was signed, occurred at the end of 2018, years before she signed her declaration in February 2024. (*Id*., ¶ 4; see *Iyere*, *supra*, 87 Cal.App.5th at p. 756 ["there is no conflict between their having signed a document on which their handwritten signature appears and, two years later, being unable to recall doing so"]; but see *Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 168 [declaration that plaintiff did not recall signing the document was sufficient to shift the burden to defendant to rebut that evidence].) She contends she has reviewed the signature on the arbitration agreement and "do[es] not believe" it is hers. (*Id.*, ¶ 6.) Specifically, she states, "Although the signature on page four bears a slight resemblance to my signature, I do not believe it is my signature."

(*Ibid*.) She does not explain in what ways the signature differs from her own or why she does not believe it is her signature and thus, her statement that she does not believe the signature is hers is conclusory. Further, pursuant to Evidence Code section 1417,[1] the court has compared the known signature on Plaintiff's declaration and the signature on the arbitration agreement and they appear very similar such that the court believes the signatures were made by the same person. Accordingly, Plaintiff's conclusory statement that she "do[es] not believe" the signature on the arbitration agreement belongs to her in combination with the fact that Plaintiff does not unequivocally state that she did not sign the documents in the stack of onboarding documents and that the stack did not include the arbitration agreement, the court finds that the burden does not shift to Defendants.

Plaintiff further asserts that she speaks only Spanish and that she would not have been able to understand the arbitration agreement if it had been presented to her for signature. Thus, she contends that there was no mutual agreement because the terms of the arbitration agreement were never communicated to her. Plaintiff declares, "I am a Spanish speaker and while employed at Flagship I spoke only Spanish. I have very little ability to read, write, speak, or understand English with the exception of a handful of words." (Rivera Decl., ¶ 3.) She also asserts that a Spanish interpreter orally explained to her the content of some "tax documents" and some additional documents "relating to employment rules such as harassment and discipline" which she does not remember the contents of. (Rivera Decl., ¶¶ 4-5.) She has no recollection of signing any documents other than the tax documents. (Rivera Decl., ¶ 5.) She also states,

At no point during the onboarding process was I provided an explanation as to what arbitration is. At no point during the onboarding process was I informed that I was signing or agreeing to an arbitration agreement. At no point during the onboarding process was I informed that I was signing or agreeing to a document that limited my legal rights such as my ability to pursue claims in court and request documents and information in support of those claims. At

[1] That section provides, "The genuineness of handwriting, or the lack thereof, may be proved by a comparison made by the trier of fact with handwriting (a) which the court finds was admitted or treated as genuine by the party against whom the evidence is offered or (b) otherwise proved to be genuine to the satisfaction of the court." (Evid. Code, § 1417.)

no point during the onboarding process was I informed that I had the ability to opt out of an arbitration agreement. Had I been informed what arbitration was, I would have opted out of any such agreement.

(Rivera Decl., ¶ 7.)

Plaintiff relies on *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394 (*Rosenthal*), which generally held that a contract is void when a party does not intend to enter the contract for lack of knowledge of what the party is signing. (See *id.* at p. 415.) But, that case does not support her position. In *Rosenthal*, the California Supreme Court determined that the allegations of two plaintiffs who stated that they spoke limited English *and that they were affirmatively misinformed about the content of the documents they were signing and reasonable reliance on same*, if determined to be true, could show they were deprived of the opportunity to learn the contents of the documents, such that they may be able to show fraud in the execution of the documents. (*Id.* at pp. 427-428.) However, as to two plaintiffs who produced evidence of limited English speaking ability but did not present evidence that representatives of the defendant sought to read the contracts to them or explain their contents orally or that they informed representatives of defendant that they could not read the contracts, the court held that the failure of those plaintiffs to take measures to learn of the contents of the documents they signed was attributable to their own negligence rather than any fault on the part of the defendants. (*Id.* at p. 431.)

"Generally, a party may not avoid enforcement of an arbitration provision because the party has limited proficiency in the English language. If a party does not speak or understand English sufficiently to comprehend a contract in English, it is incumbent upon the party to have it read or explained to him or her. [Citations.]" (*Caballero v. Premier Care Simi Valley LLC* (2021) 69 Cal.App.5th 512, 518-519 (*Caballero*).) "An exception to the general rule applies when a party was fraudulently induced to sign the contract. [Citations.]" (*Id.* at p. 519.) However, this exception is inapplicable in this case because Plaintiff does not argue that Defendants affirmatively prevented her from learning about the arbitration agreements terms. She contends she was not presented with the agreement at all. (See *id.* [exception inapplicable

because plaintiff did not contend that defendant "defrauded him or prevented him from learning the contract's terms. He simply states that, to the best of his recollection, he was not presented with an Arbitration Agreement in Spanish or an Arbitration Agreement in English that was explained to him."].)

Here, Plaintiff does not indicate that she took any steps to determine the contents of the arbitration agreement. Additionally, as Defendants contend, the arbitration agreement itself, which the court has found was signed by Plaintiff, contains a Spanish language "warning" indicating that it involves the employees' rights, that it is the employee's responsibility to read and understand it, and that the employee may seek assistance from advisers outside the company. Had she read the agreement, this would have provided with some amount of notice regarding the need to understand the agreement. Further, Plaintiff contends that during onboarding, which is when Defendants contend the arbitration agreement was signed, Plaintiff declares that she was provided with a Spanish interpreter, who orally explained the content of the documents. (Rivera Decl., ¶¶ 4-5.) She does not indicate that the Spanish interpreter misled her as to the content of the agreement as in *Rosenthal*. Although she states that she was not provided with the documents explained to her by the interpreter, she does not contend that she asked for them.

That said, Plaintiff also declares that she was never informed during the onboarding process that she was signing an arbitration agreement. (Rivera Decl., ¶ 7.) Because the company was aware that Plaintiff required an interpreter, it follows that she would need the content of the English language arbitration agreement explained. Defendants have not countered this evidence with evidence that the English language arbitration agreement was explained to Plaintiff in Spanish. However, in light of the above-cited authorities, the court finds that this issue goes to potential unconscionability rather than the existence of a contract. (See, e.g., *Caballero*, *supra*, 69 Cal.App.5th at p. 519 [plaintiff assented to the agreement by signing the arbitration agreement and there was no evidence he asked for a Spanish version of the agreement or assistance in understanding the English version]; *Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 85 (*Carmona*) [finding "a high degree of procedural unconscionability" where one of the clauses of the agreement was presented to

the plaintiffs in English when other portions of the agreement were translated into their native Spanish]; *Penilla v. Westmont Corp.* (2016) 3 Cal.App.5th 205, 209 ["We conclude the arbitration provision was procedurally unconscionable, as it [inter alia] was neither provided in a Spanish-language copy nor explained to respondents who did not understand written English."].)

ii. Unconscionability

Plaintiff also contends that, even if an arbitration agreement between the parties, it is unconscionable. "A contract is unconscionable if one of the parties lacked a meaningful choice in deciding whether to agree and the contract contains terms that are unreasonably favorable to the other party. [Citation.]" (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125 (*OTO*).) Unconscionability has both procedural and substantive elements. (*Armendariz v. Foundation Health Psychare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*); *Jones v. Wells Fargo Bank* (2003) 112 Cal.App.4th 1527, 1539 (*Jones*).) Both must appear for a court to invalidate a contract or one of its individual terms, (*Armendariz, supra*, 24 Cal.4th at p. 114; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174), but they need not be present in the same degree: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa" (*Armendariz, supra*, 24 Cal.4th at p. 114.)

1. Procedural Unconscionability

Procedural unconscionability focuses on the elements of oppression and surprise. (*Armendariz, supra*, 24 Cal.4th at p. 114.) "Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice," while "[s]urprise involves the extent to which the terms of the bargain are hidden in a prolix printed form drafted by a party is a superior bargaining position." (*Davis v. TWC Dealer Group, Inc.* (2019) 41 Cal.App.5th 662, 671 (*Davis*), internal citation and quotation marks omitted.) "Circumstances showing oppression include (1) the amount of time an employee is given to consider a contract; (2) the pressure exerted on him to sign it; (3) its length and complexity; (4)

his education and experience; and (5) whether he had legal assistance. [Citation.]" (*Nunez v. Cycad Management LLC* (2022) 77 Cal.App.5th 276, 284.)

The court considers whether the agreement is one of adhesion. (*Armendariz, supra*, 24 Cal.4th at p. 115 ["in the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement"].)

An adhesive contract is standardized, generally on a preprinted form, and offered by the party with superior bargaining power on a take-it-or-leave-it basis. [Citations.] Arbitration contracts imposed as a condition of employment are typically adhesive [citations], and the agreement here is no exception. The pertinent question, then, is whether circumstances of the contract's formation created such oppression or surprise that closer scrutiny of its overall fairness is required. [Citations.] Oppression occurs where a contract involves lack of negotiation and meaningful choice, surprise where the allegedly unconscionable provision is hidden within a prolix printed form. [Citations.]

(*OTO, supra*, 8 Cal.5th at p. 126, internal quotation marks omitted.)

Here, the arbitration agreement is a preprinted form, which was part of Plaintiff's new hire paperwork. Defendants correctly point out that it contains an opt out clause in paragraph 8 of the agreement, which would generally support a finding that the contract was not one of adhesion. However, in this instance, Plaintiff has declared that she was at the time of the signing and still is incapable of reading the arbitration agreement, the substantive provisions of which are entirely in English. (Rivera Decl., ¶ 6.) Plaintiff further declares that no one explained the arbitration agreement to her despite the fact that a Spanish interpreter was present to assist her. (*Id.*, ¶ 7.) Defendants present no evidence that the opt out clause was provided to Plaintiff in a form she could understand. Plaintiff also declares that the interpreter informed her that she needed to sign tax documents, which the interpreter explained to her, when she was presented with the rest of her new hire paperwork. (*Id.*, ¶ 4.) While there is no evidence that Plaintiff was told she had to sign the arbitration agreement itself as a condition of

employment, there is similarly no evidence that she was informed of the opt out provision. Given that Plaintiff has provided uncontradicted evidence that she was not informed of the content of the agreement and that she could not read it, the presence of the opt out clause is entitled to less weight than it normally would be. Further, the court notes that Plaintiff declares that she did not receive a copy of the agreement, such that she could have had someone translate the agreement and inform her of the opt out provision. (Rivera Decl., ¶¶ 4, 7.)

A contract of adhesion in the employment context adds a modest amount of procedural unconscionability and, the amount of procedurally unconscionability is increased when the fact of an adhesion contract is combined with other issues. (See *Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 248.) Here, the court finds that the facts that Plaintiff was not informed of the opt out clause and could not read it and that she was presented with the agreement along with other new hire paperwork that she "needed" to sign. The court finds that a modest amount of procedural unconscionability is present on these facts.

As discussed above, Plaintiff also contends that the arbitration agreement is procedurally unconscionable because it was presented to her in English but she is only fluent in Spanish. As in *Subcontracting Concepts (CT), LLC v. De Melo* (2019) 34 Cal.App.5th 201, 211 (*De Melo*), Plaintiff states that she is only fully fluent in Spanish, that no one explained the agreement to her, and that she did not understand the meaning of the word "arbitration." In *De Melo*, the Court of Appeal held that "at least" a moderate amount of procedural unconscionability was present where the contract was one of adhesion, the plaintiff did not fully understand the legal documents written in English, and "the arbitration clause referred to the American Arbitration Association, but did not clearly state what rules would govern arbitration, nor was respondent provided with a copy of the governing rules." (*Id.* at p. 212.)

Additionally, in *Carmona*, the Court of Appeal explained that "[w]hat elevate[d] [that] case to a high degree of procedural unconscionability … [wa]s the element of surprise regarding a key clause—the enforceability clause. … The car wash companies hid the enforceability clause and the entire confidentiality subagreement by failing to translate that portion of the agreement into Spanish. [The plaintiffs] could not read English, and yet the car wash companies provided the enforceability clause in English only. The [defendant] car wash

companies evidently knew plaintiffs required Spanish translations because they provided some translation. The record does not reveal why the car wash companies did not translate the entirety of the employment agreement. In sum, with both oppression and surprise present, there is no question the arbitration agreement was procedurally unconscionable." (*Carmona*, *supra*, 226 Cal.App.4th at p. 85, fn. omitted.) Here, similarly, Plaintiff declares that a Spanish translator was present at the time of her onboarding but that no one explained the arbitration agreement to her or provided her with a copy of it. While, there is no evidence she was prevented from taking time to review the document, requesting a copy, or consulting with others before signing, there is similarly no evidence that she was provided these opportunities.[2] Defendants were aware that Plaintiff spoke Spanish, as evidenced by the presence of the interpreter at onboarding, but Plaintiff's uncontradicted evidence is that the interpreter did not explain the content of the arbitration agreement.

Faced with this evidence, in reply, Defendants contend that the fact that the employee was unable to read or understand the contract is not a bar to enforcement of the agreement and that it was Plaintiff's responsibility to ensure she understood the agreement before signing. They rely on authorities such as *Caballero*, *supra*, 69 Cal.App.5th at p. 518-519 that indicate that "[g]enerally, a party may not avoid enforcement of an arbitration provision because the party has limited proficiency in the English language. If a party does not speak or understand English sufficiently to comprehend a contract in English, it is incumbent upon the party to have it read or explained to him or her." But, this ignores Plaintiff's evidence that some of the new hire paper work was translated while the arbitration agreement was not. Thus, the content of the arbitration agreement was essentially hidden from Plaintiff. "Surprise occurs when [an]

[2] The court notes that the Terrones Declaration provides that new hires are given as much time as they need to review the arbitration agreement and ask any questions they may have. (Terrones Decl., ¶ 8.) But, this general statement is insufficient to show that *Plaintiff herself* was given this time. To the extent Defendants seek to proffer this evidence to show that Plaintiff was given this opportunity, the court agrees with Plaintiff that Terrones has not provided sufficient facts from which the court could conclude that he has personal knowledge of the actual circumstances of Plaintiff's onboarding. Additionally, Plaintiff has provided uncontradicted evidence that she was not told she was signing an arbitration agreement. (Rivera Decl., ¶ 9.)

allegedly unconscionable provision is hidden. [Citation.]" (*Carmona, supra,* 226 Cal.App.4th at p. 84.) Here, the entirety of the agreement was hidden from Plaintiff.

Further, Plaintiff contends that, "The agreement is printed in single-spaced 10.5 point sans serif font, is over 2,300 words in length, contains lengthy complex sentences, and makes numerous statutory references and use of legal jargon. [] In sum, the agreement is entirely incomprehensible to a layperson." (Opposition at p. 10, lns. 21-24.) The court agrees that the agreement, which contains numerous references to various laws, would be difficult to decipher by a layperson. This adds an additional amount of procedural unconscionability. (See *OTO, supra,* 8 Cal.5th at p. 128 [The facts also support the trial court's finding of surprise. The agreement is a paragon of prolixity, only slightly more than a page long but written in an extremely small font. The single dense paragraph covering arbitration requires 51 lines. . . The sentences are complex, filled with statutory references and legal jargon. The second sentence alone is 12 lines long. . . A layperson trying to navigate this block text, printed in tiny font, would not have an easy journey."].)

The court finds that a high degree of procedural unconscionability is present. However, the court recognizes that the agreement is not unconscionable unless substantive unconscionability is also present.

2. Substantive Unconscionability

Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create "overly harsh" or "one-sided results", (*Armendariz, supra,* 24 Cal.4th at p. 114, internal citation and quotations omitted), that is, whether they reallocate risks in an objectively unreasonable or unexpected manner, (*Jones, supra,* 112 Cal.App.4th at p. 1539). "In assessing substantive unconscionability, the paramount consideration is mutuality." (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 241, internal citation and quotation marks omitted.) Arbitration agreements are substantively unconscionable where they lack a "modicum of bilaterality," "without at least some reasonable justification for such one-sidedness based on 'business realities.' " (*Armendariz, supra,* 24 Cal.4th at p. 117.)

"Substantive unconscionability examines the fairness of a contract's terms. This analysis ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as overly harsh, unduly oppressive, so one-sided as to shock the conscience, or unfairly one-sided. All of these formulations point to the central idea that the unconscionability doctrine is concerned not with a simple old-fashioned bad bargain, but with terms that are unreasonably favorable to the more powerful party." (*OTO, supra*, 8 Cal.5th at pp. 129-130, internal citation and quotations omitted.)

With respect to substantive unconscionability, Plaintiff argues that the agreement was not signed by Defendants, indicating a lack of mutuality. She relies on *Najarro v. Superior Court* (2021) 70 Cal.App.5th 871, 883 [in which the court found substantive unconscionability where "there is a lack of mutuality given that none of the Version One agreements were signed by any of the real parties in interest"]; see also *Carmona, supra*, 226 Cal.App.4th at p. 86 [finding substantive unconscionability where "only the employees initialed next to the clause, and only they signed the agreement. Nowhere do the car wash companies indicate they were bound by the clause. The only party clearly agreeing to the clause was the employee."].) Defendants counter that it is not necessary for both parties to sign. They point to *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 176, in which the court explained that "the writing memorializing an arbitration agreement need not be signed by both parties in order to be upheld as a binding arbitration agreement." The court reasoned

In *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, the court explained, 'it is not the presence or absence of a signature [on an agreement] which is dispositive; it is the presence or absence of evidence of an agreement to arbitrate which matters." (*Id.* at p. 361, original italics.) Evidence confirming the existence of an *agreement* to arbitrate, despite an unsigned agreement, can be based, for example, on "conduct from which one could imply either ratification or implied acceptance of such a provision." (*Ibid.*; see *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 420-423 [despite absence of a signed writing acknowledging receipt of the memorandum and brochure containing the arbitration provision, the employee's continued employment constituted implied acceptance of the agreement].)

(*Serafin, supra*, 235 Cal.App.4th at p. 176.) The court also explained, "In this case, not only was the agreement authored by Balco, and printed on Bay Alarm's letterhead, but Balco's later conduct evinces an intent to be bound by the arbitration agreement when it invoked the arbitration process . . . and when it filed the motion to stay Serafin's employment litigation and to compel arbitration." (*Id.* at pp. 176-177, fn. omitted; see also *Davis v. Kozak* (2020) 53 Cal.App.5th 897, 915 [absence of signature line for company did not show arbitration agreement lacked mutuality; agreement's presentation on company letterhead and language indicating both parties would be bound showed that "[a]s a whole, the agreement is [] reasonably construed as both parties consenting to arbitration of any disputes either party brings involving or relating to [the employee's employment".)

Here, Defendants correctly point out that the agreement is printed on letterhead bearing the name Flagship. Also, Defendants' conduct in seeking to compel arbitration suggests it also accepted to be bound by the agreement. However, the California Supreme Court recently reaffirmed that "an unconscionability assessment focuses on circumstances known at the time the agreement was made." (*Ramirez v. Charter Communications, Inc.* (July 15, 2024, No. S273802) ___Cal.5th___ [2024 Cal. LEXIS 3696, at *32].) Thus, Defendants' conduct after the agreement is signed is entitled to little weight, if any. Nonetheless, because the agreement is printed on Defendants' letterhead and the agreement contains provisions binding both Defendants and Plaintiff, the court does not find that Defendants' failure to sign the agreement renders it substantively unconscionable.

Plaintiff confusingly appears to argue that Defendants falsely contend that the agreement contains a provision waiving her rights under the Private Attorney General Act ("PAGA") but that, *if* the agreement contained one, that would render the agreement unconscionable. The court understands Defendants' argument to be that Plaintiff waived her right to pursue PAGA representative claims pursuant to a collective bargaining agreement, an agreement separate from the arbitration agreement.[3] In fact, the arbitration agreement expressly provides that "Private attorney general representative actions are not arbitrable, not within the

[3] The court acknowledges that Defendants do argue that Plaintiff has agreed to arbitration her *individual* PAGA claims pursuant to the arbitration agreement.

scope of this Agreement and may be maintained in a court of law." Accordingly, the fact that the collective bargaining agreement may contain a PAGA waiver would not render the arbitration agreement unconscionable.[4]

Plaintiff also argues that the class action waiver renders the agreement substantively unconscionable because it is unfairly one-sided. She cites to *Navas v. Fresh Venture Foods, LLC* (2022) 85 Cal. App. 5th 626, 636 (*Navas*), in which the Court of Appeal stated, "But [class actions] are the type of claims that only employees bring against employers. [A]greements that primarily require arbitration of the type of claims only employees bring against employers are substantively unconscionable as being 'one-sided and harsh.' " Defendants contend that *Navas* only involved a PAGA waiver and not a class action waiver but that is incorrect. (See *Navas*, *supra*, 85 Cal.App.5th at p. 636 ["The agreement also provides, 'There will be no right or authority under this Agreement for any dispute to be brought, heard, or arbitrated as a class or collective action.' "].) While the *Navas* court devoted the vast bulk of the decision to PAGA waivers, it did state, as Plaintiff contends that the provision of the agreement quoted above was one of the one-sided provisions in the agreement. Similarly, *Hasty v. American Automobile Assn. etc.* (2023) 98 Cal.App.5th 1041, 1062 (*Hasty*), which Plaintiff relies on and which Defendants also contend only involved a PAGA waiver stated, "the arbitration agreement is further one-sided because it requires the parties to bring their claims 'in an individual capacity,' not 'in a private attorney general capacity,' and prohibits *class*, representative, or private attorney general proceedings. *These requirements* can fairly be read to limit only the employee's rights." (Italics added.)

The court notes that class action waivers are not categorically substantively unconscionable. (*See Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 364, 366 (*Iskanian*) [rule in *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (*Gentry*) "whereby a class waiver would be invalid if it meant a de facto waiver of rights and if the arbitration agreement failed to provide suitable alternative means for vindicating employee rights" preempted by FAA], overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___, 2022 U.S. LEXIS 2940; *Evenskaas v. California Transit, Inc.*

[4] The court will discuss the collective bargaining agreement below.

(2022) 81 Cal.App.5th 285, 298 [*Gentry* rule preempted by FAA].) Citing *Epic Systems Corp. v. Lewis* (2018) 138 S. Ct 1612, 1632, Defendants contend that class action waivers are enforceable. However, as the *Navas* and *Hasty* courts held, class action waivers are one-sided in that they only apply to the employee. The court finds the class action waiver is substantively unconscionable.

Plaintiff also contends that the "provisional remedies" provision of the arbitration agreement allowing either party to pursue injunctive relief in court is unfairly one-sided because an employer is more likely to seek injunctive relief. Defendants correctly assert that the authority on which Plaintiff relies, *Carlson v. Home Team Pest Defense, Inc.* (2015) 239 Cal.App.4th 619, 634-635, involved a provision that actually applied only to the employer. (*Ibid.*) Further, the court notes that the provisional remedies provision is limited in that requests for injunctive relief may be brought "only upon the ground that the award to which that party may be entitled may be rendered ineffectual without such provisional relief." Thus, the language in the agreement tracks the language of Code of Civil Procedure section 1281.8, subdivision (b). (See *Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1247 [finding provisional relief clause was not unconscionably where "the provisional relief clause does no more than recite the procedural protections already secured by section 1281.8(b), which expressly permits parties to an arbitration to seek preliminary injunctive relief during the pendency of the arbitration" and holding that even though employers are more likely to seek injunctive relief, the parties are already entitled to the protections of section 1281.8, subdivision (b)].) Accordingly, the court does not find that the provisional remedies clause is unconscionable.

Plaintiff next argues that the confidentiality provision of the agreement is unconscionably one-sided. Plaintiff relies on *Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042 (*Ramos*), in which the Court of Appeal held unconscionable an arbitration agreement clause stating, " 'Except to the extent necessary to enter judgment on any arbitral award, all aspects of the arbitration shall be maintained by the parties and the arbitrators in strict confidence.' " (*Id.* at p. 1065.) The court reasoned that strict confidentiality regarding the

arbitration proceedings could inhibit discovery by preventing the plaintiff from discussing the arbitration with potential witnesses. (*Ibid*.)

The confidentiality clause in this case states, "Except as may be permitted or required by law as determined by the Arbitrator, neither a party nor an Arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all parties." Defendants assert that this provision is much less broad than the one in *Ramos* and that it would not inhibit discovery in the same way.

"[A] confidentiality provision in an arbitration agreement is not per se unconscionable when it is based on a legitimate commercial need (such as to protect trade secrets or proprietary information). [Citation.]" (*Murrey v. Superior Court* (2023) 87 Cal.App.5th 1223, 1254 (*Murrey*). In *Murrey*, the Court of Appeal considered a confidentiality clause in an arbitration agreement signed by an employee indicating that "she would not 'publish or disseminate' the arbitration award. (*Id*. at pp. 1253-1254.) The Court of Appeal held the provision unconscionable stating,

GE's confidentiality provision serves no purpose other than to benefit GE. Future employees cannot take advantage of findings in past arbitrations or prove a pattern of discrimination and/or retaliation. Solutions expressly provides an arbitrator cannot include in the award any requirement that GE change or revise its policies, procedures, rules and/or practices. In addition, 'keeping past findings secret undermines an employee's confidence in the fairness and honesty of the arbitration process and thus potentially discourages that employee from pursuing a valid discrimination claim.' [Citation.] Therefore, we hold that this confidentiality provision added to this agreement's substantively unconscionability.

(*Murrey*, *supra*, 87 Cal.App.5th at p. 1255.)

The *Murrey* court reasoned,

The notion that courts should condone requirements keeping the outcome of forced arbitration proceedings confidential is out of step with federal and sister state case

authority. The Ninth Circuit recognized that although confidentiality provisions are facially neutral, they usually favor companies over individuals. (See *Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1151-1152 [discussing "'repeat player' effect" putting companies in a superior legal posture for future arbitration proceedings].)

(*Murrey*, *supra*, 87 Cal.App.5th at p. 1254.)

The court finds *Ramos* and *Murrey* persuasive and finds the confidentiality provision substantively unconscionable.

Plaintiff further maintains that the discovery provisions in the agreement favor Defendants. The arbitration agreement's discovery clause provides,

In arbitration, the parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator. At a party's request or on the Arbitrator's own initiative, the Arbitrator may subpoena witnesses or documents for discovery purposes or for the arbitration hearing.

Plaintiff contends that the agreement fails to provide for a "default amount" of discovery. Thus, she asserts that the agreement does gives the arbitrator the sole discretion to determine what constitutes an "adequate" amount of discovery. Citing *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal.App.4th 154, 177, Defendants counter that any missing terms as to discovery are implied by law. The court finds Plaintiff's argument unpersuasive. In *Ramirez v. Charter Communications, Inc*., *supra*, [2024 Cal. LEXIS 3696, at *33], the California Supreme Court explained that giving the arbitrator authority to determine the scope of discovery "ensures that neither party will be unfairly hampered in pursuing a statutory claim based on circumstances that arise post-formation" and allows the arbitrator to "expand

discovery based on *Armendariz's* requirement" that employees be allowed sufficient discovery to adequately arbitrate any statutory claims.

Plaintiff also contends that the discovery provision authorizes the arbitrator to issue third party subpoenas but that the FAA prohibits this and, therefore, the subpoena power would be unavailable because the agreement does not incorporate Code of Civil Procedure section 1281.05. Defendants do not respond to this argument, thereby impliedly conceding it is meritorious. (See *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566 ["By failing to argue the contrary, plaintiffs concede this issue."].) Accordingly, the court finds the discovery provision substantively unconscionable.

Finally, Plaintiff asserts that the "free peek" provision, requiring informal resolution of any claims prior to arbitration, is unconscionable. That provision states, "Nothing contained in this Agreement shall be construed to prevent or excuse you (individually or in concert with others) or the Company from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures." While the court recognizes Defendants' argument that the provision binds both parties, it binds both parties to an informal resolution procedure that is not described in the agreement and that Defendants control. (See *Navas*, *supra*, 85 Cal.App.5th at p. 636 ["The agreement also provides that it shall not 'excuse [the employee] from utilizing the internal complaint procedures of [FVF].' But because those procedures are not described, employees do not know what they are agreeing to. [Citation.] The agreement thus funnels employee claims into both arbitration and FVF's own complaint system without requiring FVF to follow any defined procedure to limit its discretion. It creates a 'one-sided' shield exclusively for FVF's benefit. [Citation.]"].) The court finds the informal resolution provision to be unconscionable.

iii. Severability

Having found portions of the arbitration agreement substantively unconscionable, the court will turn to whether those provisions may be severed. The agreement provides, "The Class Action Waiver shall be severable from this Agreement in any case in which (1) the

dispute is filed as a class action and (2) there is a final judicial determination that the Class Action Waiver is invalid, unenforceable, unconscionable, void or voidable. In such instances, the class action must be litigated in a civil court of competent jurisdiction."

"[W]hether to sever is within the trial court's discretion." (*Navas, supra*, 85 Cal.App.5th at pp. 636-637.)

" 'In deciding whether to sever terms rather than to preclude enforcement of the provision altogether, the overarching inquiry is whether the interests of justice would be furthered by severance; the strong preference is to sever unless the agreement is "permeated" by unconscionability.' [Citation.] [¶] An agreement to arbitrate is considered 'permeated' by unconscionability where it contains more than one unconscionable provision. [Citation.] 'Such multiple defects indicate a systematic effort to impose arbitration on [the nondrafting party] not simply as an alternative to litigation, but as an inferior forum that works to the [drafting party's] advantage.' [Citation.] An arbitration agreement is also deemed 'permeated' by unconscionability if 'there is no single provision a court can strike or restrict in order to remove the unconscionable taint from the agreement.' [Citation.] If 'the court would have to, in effect, reform the contract, not through severance or restriction, but by augmenting it with additional terms,' the court must void the entire agreement." (*Magno v. The College Network, Inc.* (2016) 1 Cal.App.5th 277, 292.)

(*De Leon v. Pinnacle Property Management Services, LLC* (2021) 72 Cal.App.5th 476, 492-493, disapproved on another ground in *Ramirez v. Charter Communications, Inc.*, *supra*, [2024 Cal. LEXIS 3696, at *32]; see also *Armendariz, supra*, 24 Cal.4th at p. 124 [presence of more than one unconscionable provision weighs against severance].)

The Court declines to sever the provisions it has found unconscionable from the agreement in light of the high degree of procedural unconscionability it has found.

iv. Conclusion re Arbitration

The motion is DENIED to the extent it seeks to compel Plaintiff's claims to arbitration.

v. Dismissal of the Class Claims

Defendants also seek dismissal of Plaintiff's class claims pursuant to the arbitration agreement. The court has found the arbitration agreement unenforceable. Accordingly, the court DENIES the request to dismiss the class claims.

C. Dismissal of the PAGA Claims

Defendants contend that the PAGA claim must be dismissed under Labor Code section 2699.8 because it is subject to a PAGA waiver contained in a collective bargaining agreement ("CBA") separate from the arbitration agreement discussed above.

With respect to PAGA waivers, the United States Supreme Court recently partially overruled *Iskanian* in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___ [213 L. Ed. 2d 179, 142 S.Ct. 1906] (*Viking River*). As explained in *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104, 1117 (*Adolph*), "In *Iskanian*, we held that a predispute categorical waiver of the right to bring a PAGA action is unenforceable (*Iskanian*, *supra*, 59 Cal.4th at pp. 382-383) — a rule that *Viking River* left undisturbed (see *Viking River*, *supr*a, 596 U.S. at p. ___ [142 S.Ct. at pp. 1922–1923, 1924–1925] [the FAA does not preempt this rule])." Thus, the prohibition against categorical predispute PAGA waivers remains good law.

The representative portion of the PAGA claim (representative in the sense of addressing violations suffered by other employees) may not be waived under *Iskanian* as left intact by Viking River. (See *Adolph*, *supra*, 14 Cal.5th at p. 1118; see also *Hasty v. American Automobile Assn. etc.* (2023) 98 Cal.App.5th 1041, 1063 ["The ban on all representative [PAGA] actions thus remains unconscionable because it requires an employee to waive a right that is not waivable."].) Thus, the agreement, which prevents either party from asserting "representative action claims against the other in arbitration or otherwise" is substantively unconscionable to the extent it would prevent Plaintiff from bringing a PAGA representative action.

Nonetheless, Defendants maintain that Viking River allows for the Labor Code section 2699.8's exemption of janitorial workers from pursuing representative PAGA claims. That section provides

This part shall not apply to a janitorial employee represented by a labor organization that has represented janitors before January 1, 2021, and employed by a janitorial contractor who registered as a property service employer pursuant to Section 1423 in calendar year 2020, with respect to work performed under a valid collective bargaining agreement in effect any time before July 1, 2028, that expressly provides for the wages, hours of work, and working conditions of employees, provides premium wage rates for all overtime hours worked, and does all of the following:

(1) Requires the employer to pay all nonprobationary workers working in certain worksites, defined in an applicable collective bargaining agreement, total hourly compensation, inclusive of wages, health insurance, pension, training, vacation, holiday, and fringe benefit funds, amounting to not less than 30 percent more than the state minimum wage rate.

(2) Prohibits all of the violations of this code that would be redressable pursuant to this part, provides for a grievance and binding arbitration procedure to redress those violations, and allows the labor organization to pursue a grievance on behalf of all affected employees.

(3) Expressly waives the requirements of this part in clear and unambiguous terms.

(4) Authorizes the arbitrator to award any and all remedies otherwise available under this code, provided that nothing in this section authorizes the award of penalties under this part that would be payable to the Labor and Workforce Development Agency.

(Lab. Code, § 2699.8, subd. (a).)

Defendants contend that the CBA attached to the Terrones Declaration as exhibit B meets these requirements. The CBA expressly provides for a PAGA waiver beginning at page 135. Plaintiff does not argue that the requirements of subdivision (a) of Labor Code section 2699.8 have not been met. Instead, she contends that the Terrones Declaration is inadmissible, an argument the court has already rejected. She also argues that Defendants has not provided any evidence that they are a "property service employer pursuant to Section 1423", as required by subdivision (a) of Labor Code section 2699.8. On this point, the court must agree. Although Defendants reply to Plaintiff's opposition asserting that "Flagship Facility Services, Inc. was registered as a property service provider", (see Reply, p.

10, ln. 23), they have not provided any evidence on this point. Accordingly, the request to dismiss Plaintiff's representative PAGA claim is DENIED.

D. Requests for Sanctions

Both parties request sanctions under Code of Civil Procedure sections 128.5 and 128.7 within their motion and opposition papers. But, these requests must be made separately from other motions. (See Code Civ. Proc., §§ 128.7, subd. (c)(1) ["A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b)."]; 128.5, subd. (f)(1)(a) ["A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific alleged action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay."].) Further, the court finds that neither party's position was frivolous or unreasonable. Accordingly, both parties' requests for sanctions are DENIED.

IV. CONCLUSION

The motion to compel arbitration is DENIED. The requests to dismiss Plaintiff's class claims and representative PAGA claim are DENIED. Both parties' requests for sanctions are DENIED.

Plaintiff as the substantially prevailing party, shall prepare the order.

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Calendar Line 2

Case Name: Vargas Rivera v. Flagship Facility Services, Inc., et al. (Class Action)
Case No.: 23CV421827

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Calendar Lines 3 – 4

Case Name: Kobayashi v. Dfinity USA Research LLC, et al.
Case No.: 23CV415981

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 31, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is an action arising out of Defendant Dominic Williams' ("Williams") alleged tortious interference with Plaintiff Satoshi Kobayashi's ("Kobayashi") rights concerning his investment in a blockchain project known as Internet Computer Protocol ("ICP" or "ICP Network"). (Complaint, ¶ 1.) Williams promoted ICP from 2016 until its launch on May 10, 2021, and he solicited investments globally. (Complaint, ¶ 2.) Williams served as not only the principal promoter of ICP, but also (1) the CEO of Dfinity USA Research LLC ("Dfinity"), the Palo Alto-based company principally responsible for the operations of ICP, (2) the "Chief Scientist" of the Dfinity Foundation (the "Foundation"), a Swiss nonprofit entity with substantial operations in Palo Alto that has certain administrative responsibilities related to ICP. (Ibid.)

In 2017, Kobayashi invested 15,000 Ethereum ("ETH") tokens (currently worth over $25 million). (Complaint, ¶ 3.) Under the terms of his investment (the "Seed Donation Contract"), he was entitled to: (1) his pro rata share of ICP tokens ("Tokens") to be allocated under a formula that would see early investors receive 78% of the total available Tokens when ICP launched, (2) governance of ICP by a decentralized voting process, and (3) receipt of Tokens that would be freely tradeable upon ICP launch, which turned out to be May 21, 2021. (Ibid.)

Williams' assurances that ICP would not be a "pump-and-dump" scam were empty. (Complaint, ¶¶ 4-5.) Williams and Dfinity tortiously interfered with the rights of ICP seed investors generally and later they targeted Kobayashi specifically. (Complaint, ¶ 5.) Namely, they induced the Foundation to allocation only 27% of Tokens to early investors, ICP was wholly controlled by Williams, Tokens were not freely tradeable at the Network launch, they

caused the Foundation to remove or circumvent vesting restrictions on Williams and other insiders, and Kobayashi did not receive his pro rata share of Tokens. (Ibid.) The Tokens traded for hundreds of dollars each at the Network launch, but lost approximately 95% of their value within two months and currently, they trade at approximately $6 per token. (Complaint, ¶ 6.) This occurred as a result of Defendants' conduct and Williams' domineering control of what is supposed to be a decentralized network. (Complaint, ¶ 7.)

In an attempt to avoid investor lawsuit, Williams moved to Switzerland. (Complaint, ¶ 9.) Williams made promises with regarding to the ICP Token allocation to investors and his family members. (Complaint, ¶¶11-12.) Kobayashi complained about unfair treatment regarding last minute restrictions placed on seed investors and he received reassurances from Williams that he would receive his Tokens. (Complaint, ¶ 13.) However, in November 2021, Williams announced that the Foundation would be adopting a proposal to eliminate the mechanism that would have given investors like Kobayashi access to their Tokens later that month. (Complaint, ¶ 14.) He implemented the proposal but picked four individuals, his personal friends, to receive their Tokens, even though they had lost their seed phrases. (Complaint, ¶¶ 14-15.) Williams left no doubt that his actions were aimed towards Kobayashi. (Complaint, ¶ 14.)

The Complaint, filed on May 8, 2023, sets forth the following causes of action: (1) tortious interference with contract; (2) tortious interference with prospective economic advantage; (3) breach of fiduciary duty; (4) conversion; (5) trespass to chattels; and (6) violation of California Unfair Competition Law (Cal. Business & Professions Code § 17200 ("UCL").

Currently before the Court is (1) Specially appearing defendant Williams' motion to quash; and (2) Dfinity's demurrer. Plaintiff has opposed both motions and the defendants have filed replies.

II. WILLIAMS' MOTION TO QUASH

Williams moves to quash service of summons on the grounds that the Court does not have personal jurisdiction over him, and the fiduciary shield doctrine shields him from jurisdiction.

A. Request For Judicial Notice

(1) William's Request

Williams requests judicial notice of the following items:

(1) US Government Form I-94: Exhibit A;

(2) Seed Donation Contract: Exhibit B;

(3) Acknowledgements required of all Seed Donors: Exhibit C; and

(4) Dfinity Stiftung Donation Google Extension: Exhibit D.

Williams argues Exhibit A constitutes an "official act of the legislative, executive, and judicial departments of the United States…" which can be judicially noticed. (See Evid. Code, § 452, subd. (c).) However, it is a screenshot and it does not include any information to indicate that the government website, such as the name of the agency or a seal. Thus, the Court declines to take judicial notice of it.

The Court can take judicial notice of Exhibit B and C as Plaintiff references the Seed Donation Contract throughout the Complaint. (See Align Technology Inc. v. Tran (2009) 179 Cal.App.4th 949, 956, fn. 6 [taking judicial notice of a settlement agreement referenced in the complaint]; Chacon v. Union Pacific Railroad (2020) 56 Cal.App.5th 565, 572 ["The existence and contents of a written agreement may be the proper subject of judicial notice if there is no factual dispute that the document is genuine and accurate].)

Lastly, Exhibit D is a screenshot of the Google Chrome extension for Seed Donors, however, the screenshot contains no information about when it was accessed or when the screenshot was taken.

Thus, Williams' request for judicial notice is GRANTED as to Exhibits B and C, and DENIED as to Exhibits A and D.

(2) Plaintiff's Request

Plaintiff requests judicial notice of:

(1) William's Responsive Declaration for Order in Williams v. Williams (Case No. 19-FL-000381, filed on November 5, 2019: Exhibit 1;

(2) Melissa Williams' Supplemental Declaration in Support of Request for Orders re: Child Support, Temporary Spousal Support and Attorneys' Fees and Costs: Exhibit 2;

(3) Grant Deed signed by Melissa Wiliams and executed in counterpart by Williams: Exhibit 3;

(4) BidMarket's Statement of Information, dated April 6, 2019: Exhibit 4;

(5) TechCrunch Article by Mike Butcher, dated June 28, 2021: Exhibit 5;

(6) New York Times article by Ephrat Livni and Andrew Ross Sorkin, dated June 28, 2021: Exhibit 6;

(7) Sacha William's Declaration in Opposition to Williams' Motion to Quash Subpoena in Case No. 21CV384865, filed February 8, 2023: Exhibit 7;

(8) Legis. Serv., Legis. Couns.'s Dig. S.B. 1325 Ch. 69 § 2, Reg. Sess. 2001-2002: Exhibit 8; and

(9) Williams Declaration in Support of his Motion to Quash in Case No. 21CV384865, filed on Octobre 28, 2022: Exhibit 9.

Exhibits 1, 2, 7, and 9 are all court records, thus the Court can take judicial notice of them. (See Evid. Code, § 452, subd. (d).) However, "with respect to any and all court records, the law is settled that "the court will not consider the truth of the documents contents unless it is an order, statement of decision, or judgment. [Citation.]" (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374-375.)

The Court may take judicial notice of property records under Evidence Code section 452, subdivision (c) and (h). (See *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, disapproved of on other grounds by *Yvanova v. New Century Mortg. Corp.* (2016) 62 Cal.4th 919 [stating that "a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face" (emphasis added)].) Thus, the Court can take judicial notice of Exhibit 3.

The Court will take judicial notice of Exhibit 4 under Evidence Code section 452, subdivision (h). (See *O'Gara Coach Co., LLC v. Ra* (2019) 30 Cal.App.5th 1115, 1121, fn. 2.)

Plaintiff requests judicial notice of Exhibits 5 and 6 as factual articles regarding the subject matter of the litigation. However, his reliance on Seelig v. Infinity Broadcasting Corp. (2002) 97 Cal.App.4th 798, 807, fn. 5, which took judicial notice of new articles discussing the television program at issue and found that "the fact that the new articles discussing the topics provoked by the Show were published is not reasonably subject to dispute", is unavailing because Plaintiff relies on the Exhibits for the truth of the statements contained therein, not just that Williams was being discussed. Therefore, the Court declines to take judicial notice of Exhibits 4 & 5.

Lastly, Judicial notice of Exhibit 8 is proper under Evidence Code section 452, subdivision (c).

Thus, Plaintiff's request is GRANTED as to Exhibits 1-3, 7-9, and DENIED as to Exhibits 4 and 5.

B. Procedural Issues

Plaintiff contends this motion is improper because Williams generally appeared after his first motion to quash was denied.

Section 418.10 governs motions to quash for lack of personal jurisdiction (subdivision (a)(1)) and forum non conveniens motions (subdivision (a)(2)), as well as motions to dismiss for delay in prosecution (subdivision (a)(3)). Subdivision (d) of section 418.10 provides that "no motion under this section, … or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant." Subdivision (e) provides that a defendant may make a motion under section 418.10 "and simultaneously answer, demur, or move to strike the complaint …":

> [N]o act by a party who makes a motion under this section, including filing an answer, demurrer, or motion to strike constitutes an appearance, unless the court denies the motion made under this section. If the court denies the motion made under this section, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion.

(Code Civ. Proc., § 418.10, subd. (e)(1).)

"Failure to make a motion under this section at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution." (Code Civ. Proc., § 418.10, subd. (e)(3).)

Plaintiff attempts to rely on Section 418.10, subdivision (e)(1), in order to argue that Williams has made a general appearance in this matter. However, that section pertains to situations where the defendant files a motion to quash along with a demurrer, motion to strike, or an answer. Williams filed both motions to quash alone. Plaintiff fails to provide any binding authority which states Williams is precluded from filing a second motion to quash for lack of personal jurisdiction if his first motion to quash service is denied. Thus, the motion cannot be denied on this basis and the Court will address the merits of the motion.

C. Evidentiary Objections

Williams submits evidentiary objections to Exhibits A-C, E-K, and M attached to Plaintiff's counsel Nathan Schaffer's declaration in support of Plaintiff's opposition and Plaintiff's request for judicial notice Exhibit 1-7 and 9.

The objections to Exhibit B, C, H, I, M, 5, 6, and 7 are SUSTAINED.

The objections to Exhibit E, F, G, J, K, 1, 2, 3, 4 are OVERRULED.

D. Legal Standard

A defendant may specially appear and file a motion to quash for service for lack of personal jurisdiction under Code of Civil Procedure section 418.10, subdivision (a)(1). "[W]here a defendant properly moves to quash service of summons the burden is on the plaintiff to prove facts requisite to the effective service." (*Sheard v. Super. Ct.* (1974) 40 Cal.App.3d 207, 211.) "[T]he burden of proof is upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence." (*Evangelize China Fellowship, Inc. v. Evangelize Ching Fellowship Hong Kong* (1983) 146 Cal.App.3d 440, 444.) The plaintiff must provide affidavits and other authenticated documents to demonstrate competent evidence of specific evidentiary facts that would permit a court to form an independent conclusion on the issue of jurisdiction. (*In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 113

(*In re Automobile Antitrust Cases I & II*).) Allegations in an unverified complaint are insufficient to satisfy this burden of proof. (Id.)

Evidence of the jurisdictional facts or their absence may be in the form of declarations. "Where there is a conflict in the declarations, resolution of conflict by the trial court will not be disturbed on appeal if the determination is supported by substantial evidence. However, where the evidence of jurisdictional facts is not conflicting, the question of whether a defendant is subject to personal jurisdiction is one of law. (*Elkman v. National States Ins. Co.* (2009) 173 Cal.App.4th 1305, 1312-1313 (*Elkman*); see also *Greenwell v. Auto-Owners Ins. Company* (2015) 233 Cal.App.4th 783, 789 (*Greenwell*), citing *Elkman*.)

Under the minimum contacts test, personal jurisdiction may be either general or specific. (*Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1062 (*Snowney*).) Where general jurisdiction exists due to a non-resident defendant's "continuous and systematic" activities in a state, the defendant can be sued on causes of action not related to its activities within the state. (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147.) Absent the showing adequate to confer general jurisdiction, a defendant may still be subject to specific jurisdiction, meaning "jurisdiction in an action arising out of or related to the defendant's contacts with the forum state." (*Healthmarkets, Inc. v. Super. Ct.* (2009) 171 Cal.App.4th 1160, 1167.)

If a non-resident defendant's contacts with California are not sufficient for general jurisdiction, it may still be subject to California's specific personal jurisdiction if a three-prong test is met. First the defendant must have purposefully availed itself of the state's benefits. Second, the controversy must be related to or arise out of the defendant's contacts with the state. Third, considering the defendant's contacts with the state and other factors, California's exercise of jurisdiction over the defendant must comport with fair play and substantial justice. (*Pavlovich v. Super. Court* (2002) 29 Cal.4th 262, 269.) The plaintiff bears the burden of establishing the first two requirements. If the plaintiff does so, the burden shifts to the defendant to show that California's exercise of jurisdiction would be unreasonable. (See *Greenwell*, supra, 233 Cal.App.4th at 792.)

E. DISCUSSION

Williams argues there is no general or specific personal jurisdiction over him, and he is not subject to jurisdiction due to the fiduciary shield doctrine.

(1) Fiduciary Shield Doctrine

The "fiduciary shield doctrine" provides that nonresident individuals should not be subject to jurisdiction if their conduct in the forum state was solely in a corporate capacity. (*Taylor-Rush v. Multitech Corp.* (1990) 217 Cal.App.3d 103, 115.) Under the fiduciary shield doctrine, "for jurisdictional purposes the acts of corporate officers and directors, in their official capacities, are exclusively of (qua) the corporation, and are thus not material for purposes of establishing minimum contacts to individuals." (*Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703, 713.) However, fiduciary shield doctrine may not be applied to defeat personal jurisdiction over a corporate officer for an act for which they "would be personally liable" and which "in fact creates contact between the officer and the forum state." (*Seagate Technology v. A. J. Kogyo Co.* (1990) 219 Cal.App.3d 696, 703-704.)

Williams argues he was at all times the founder and chief scientist of the Foundation and he acted for the benefit of the Foundation. (MPA, p. 20:12-13.) While Wiliams states he currently holds no employment with Dfinity, he does not state that he never held any employment with Dfinity. (Wiliams Decl., ¶ 18.) This does not contradict Plaintiff's allegation that Williams was the CEO of Dfinity at the time of the events. (See Complaint, ¶ 23 ["At all relevant times, Wiliams has worn multiple hats, as the Founder and Chief Scientist of the non-party Foundation and the CEO of Dfinity"].) Moreover, Plaintiff alleges conduct by Williams for which he can be personally liable. Thus, fiduciary shield doctrine is not available here.

(2) General Jurisdiction

"The standard for general jurisdiction is considerably more stringent than that for specific jurisdiction. A defendant is subject to general jurisdiction when it has substantial, continuous, and systematic contacts in the forum states, i.e., its contacts are so wide-ranging that they take the place of a physical presence in the state. In assessing a defendant's contacts with the forum for purposes of general jurisdiction, we look at the contacts as they existed from

the time the alleged conduct occurred to the time of service of summons." (*Strasner v. Touchstone Wireless Repair & Logistics, LP* (2016) 5 Cal.App.5th 215, 222-223 (*Strasner*).)

Williams argues the Court lacks general jurisdiction over Williams. (MPA, p.13:12-14.) It appears Plaintiff concedes this point because he fails to address general jurisdiction in his opposition. (See *Glendale Redevelopment Agency v. Parks* (1993) 18 Cal.App.4th 1409, 1424 [point impliedly conceded by failure to address it]; *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566 ["By failing to argue the contrary, plaintiffs concede this issue."].) As a result, Plaintiff fails to meet his burden to establish general jurisdiction.

(3) Specific Jurisdiction

"When determining whether specific jurisdiction exists, courts consider the relationship among the defendant, the forum, and the ligation." (*Pavlovich v. Superior Court* (2002) 29 Cal.4th 262, 269 (*Pavlovich*).) "A court may exercise specific jurisdiction over a nonresident defendant only if: (1) the defendant has purposefully availed himself or herself of forum benefits; (2) the controversy is related to or arises out of the defendant's contacts with the forum; and (3) the assertion of personal jurisdiction would comport with fair play and substantial justice." (*Ibid*.)

"Where a nonresident defendant challenges a trial court's exercise of personal jurisdiction, the plaintiff bears the initial burden to demonstrate facts justifying the exercise of jurisdiction. To meet this burden, a plaintiff must do more than make allegations. A plaintiff must support its allegations with 'competent evidence of jurisdictional facts. Allegations in an unverified complaint are insufficient to satisfy this burden of proof.' If the plaintiff makes this showing by a preponderance of the evidence on the first two requirements (i.e., that the defendant has purposefully availed itself of the forum and the plaintiff's claims relate to or arise out of the defendant's forum related contacts), the burden shifts to the defendant to demonstrate that the exercise of jurisdiction would be unreasonable." (*Rivelli v. Hemm* (2021) 67 Cal.App.5th 380, 393 (*Rivelli*).)

a. Purposeful Availment

"An out-of-state defendant purposefully avails itself of a forum state's benefits if the defendant (1) purposefully directs its activities at the forum state's residents, (2) purposefully derives a benefit from its activities in the forum states, or (3) purposefully invokes privileges and protections of the forum state's laws by (a) purposefully engaging in 'significant activities' within the forum states or (b) purposefully creating 'continuing [contractual] obligations' between itself and the residents of the forum state. Purposeful availment can occur from afar; the out-of-state defendant's physical presence in the forum state is not required." (*Jacqueline B. v. Rawls Law Group, P.C.* (2021) 68 Cal.App.5th 243, 253 (*Jacqueline*).)

"As the name and definition of purposeful availment make plain, an out-of-state defendant's conduct toward the forum State or its residents is relevant to the jurisdictional analysis only if that conduct is purposeful, deliberate, and intentional. [Citations.] An out-of-state defendant's contact with a forum state that is 'random' 'fortuitous' or 'attenuated' is not enough. [Citations.] This is why the mere fact that the out-of-state defendant's conduct has some 'effect' on a California resident is not enough, by itself, to constitute purposeful availment [citations]; to count, that effect must be intended [citations]." (*Jacqueline B.*, *supra*, 68 Cal.App.5th at p. 254.)

Plaintiff contends the Court has specific jurisdiction over Williams because his conduct occurred in Palo Alto and the bulk of his tortious conduct occurred while he lived and worked in California. (Opp., p. 11:7-9.) Specifically, Plaintiff argues, while in California, Williams: (1) developed and orchestrated the ICP; (2) personally promoted, fundraised, and solicited investments for the ICP Network; (3) assured Plaintiff that he could access the Tokens notwithstanding his inability to access his password; (4) acted to interfere with Plaintiff's access to the Tokens; and (5) cashed in on the tortious conduct by trading Tokens on and immediately after the launch day, in such a way that it completely devalued the currency. (Opp., p. 11:10-15.) Williams argues his activities were directed outside the United States. (MPA, p.15: 26-28.) He further argues that Seed Donations were explicitly directed away from the United States, as a whole, and was not open to United States citizens, residents, or those present in the country. (MPA, p.16: 1-3; Williams' Decl., ¶ 32.) It appears Williams purposefully availed himself to the benefits of conducting business in California.

b. Controversy Arising out of Defendant's Contacts with California

California uses a "substantial connection" test in determining if a controversy is related to a defendant's purported contacts with California which is satisfied if there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim. (*Snowney, supra,* 35 Cal.4th at p. 1068.) The more significant the forum contacts are, the less related to the cause of action they need to be. (*Ibid*.)

Specific jurisdiction "requires a showing not only that the defendant ' "purposefully directed" ' its activities at the forum but also that 'the litigation results from alleged injuries that "arise out of or relate to" those activities.' [Citation.] There must be 'a connection between the forum and the specific claims at issue.' [Citation.] 'If the operative facts of the allegations of the complaint do not relate to the [nonresident's] contacts in this state, then the cause of action does not arise from that contact such that California courts may exercise specific jurisdiction.' [Citation.]" (*Rivelli, supra,* 67 Cal.App.5th at p. 399.) "[T]he forum-relatedness requirement may be supplied only by those contacts with the forum that relate to the specific claims at issue." (*Id.* at p. 400.) "[A] 'substantial connection' between the claim and the forum contacts satisfies forum-relatedness only when consistent with a finding that the claim ' "arises out of or relate[s] to" '[citation] the forum-related activities." (*Id.*)

Here, Williams' contact in California consisted of him living and working in the state. Williams argues Plaintiff's claims arise out of his Seed Donation, his contract with the Foundation, and the alleged breach by Williams in Switzerland. (MPA, p. 17:3-5.) He further argues the claims are inherently contract claims and have nothing to do with Dfinity in California or the United States. (MPA, p.17:11-13.) Plaintiff argues this case pertains to Williams' conduct while in California and his interference with the agreement. (Opp., p. 12:19-21.) Although Plaintiff's claims do involve the agreement, the gravamen of his claims involve Williams' alleged tortious conduct which occurred in California. Thus, the claims arise from Williams' forum related activities.

c. Fair Play and Substantial Justice

"In determining whether the exercise of jurisdiction would be fair and reasonable, so as to satisfy the third requirement for the exercise of specific personal jurisdiction, a court must

consider (1) the burden on the defendant of defending an action in the forum, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining relief, (4) ' "the interstate [or international] judicial system's interest in obtaining the most efficient resolution of controversies," ' and (5) the states' or nations' shared interest ' "in furthering fundamental substantive social policies." ' [Citation.] 'These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. [Citations.] On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he (or she) must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.' [Citation.]" (*Anglo Irish Bank Corp., PLC v. Super. Ct.* (2008) 165 Cal.App.4th 969, 979-980.)

Williams argues that fair play and substantial justice favor Swiss courts over California courts. (MPA, p. 17:23-25.) However, the gravamen of Plaintiff's claims is Defendants' alleged tortious conduct. He further argues that it would be burdensome for him to litigate in California when Switzerland is home to Williams and the Foundation, and documents and witnesses are located there. (MPA, p. 18:6-9.) The Court notes that much of the alleged conduct occurred in California so it is likely that some witnesses and documents will be more easily obtained in California. The international judicial system has an interest in efficiently resolving this controversy and given that the Foundation is not a party to this matter, it may be more efficient for Plaintiff to bring a case against Williams and the Foundation in Switzerland. Plaintiff argues his claims arose from misconduct in California, thus, it would not be unfair to litigate them in California. (Opp., p.12:20-25.) Plaintiff has a significant interest in obtaining relief. Moreover, California has an interest in adjudicating disputes that arise from misconduct in the State.

In balancing the interests, it appears to the Court that it would not be unreasonable to exercise jurisdiction over Williams given that the conduct at issue in this case occurred while he was doing business in California. Thus, Williams' motion to quash is DENIED.

III. DFINITY'S DEMURRER

A. Requests For Judicial Notice

(1) Dfinity's Request

DFINITY requests judicial notice of the following items:

(1) The Agreement: Exhibit 1;

(2) Foundation Donations Contract: Exhibit 2;

(3) Swiss Foundation Code: Exhibit 3;

(4) Entity Details for DFINITY USA: Exhibit 4;

(5) Statement of Information, filed October 21, 2022: Exhibit 5; and

(6) Affidavit of Lost Seed Phrase and Agreement to Indemnify: Exhibit 6.

The Court is permitted to take judicial notice of agreements that are referenced in a complaint. (*Align Technology Inc. v. Tran* (2009) 179 Cal.App.4th 949, 956, fn. 6 [taking judicial notice of a settlement agreement referenced in the complaint]; *Chacon v. Union Pacific Railroad* (2020) 56 Cal.App.5th 565, 572 ["The existence and contents of a written agreement may be the proper subject of judicial notice if there is no factual dispute that the document is genuine and accurate].) Plaintiff does not object to judicial notice of Exhibits 1, 2, and 6.

The business entity details and corporate records are generally proper subjects of judicial notice pursuant to Evidence Code section 452, subdivision (h). (See *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1286-1287 [taking judicial notice of the Secretary of State's domestic corporate certificate of filing and suspension]; see also *Pedus Bldg. Servs. V. Allen (*2002) 96 Cal.App.4th 152, 156, fn. 2 [taking judicial notice of official records of the California Secretary of State]; *O'Gara Coach Co., LLC v. Ra* (2019) 30 Cal.App.5th 1115, 1121, fn. 2 [taking judicial notice of documents filed with the Secretary of State].) Thus, the Court is permitted to take judicial notice of Exhibits 4 and 5. However, the manager and member name section of Exhibit 5 shows Artia Moghbel was stricken from the document but, Dfinity offers no explanation nor does it provide a copy of Dfinity's Statement of Information without that. Thus, judicial notice of exhibit 5 is denied.

Lastly, Dfinity USA requests judicial notice of the Swiss Foundation Code on the basis that it is foreign law. However, the Swiss Foundation Code is not itself any foreign law but rather, it is titled, "Swiss Foundation Code; Principles and Recommendations for the Establishment and Management of Gran-making Foundations." Thus, Dfinity's request for

judicial notice is GRANTED as to exhibits 1, 2, 4, and 6, and it is DENIED as to exhibits 3 and 5.

(2) Plaintiff's Request

Plaintiff request documents filed in Daniel Valenti v. Dfinity USA Research LLC, et al. (United States District Court, Northern District of California, Case No. 3:21-cv-06118-JD): Exhibit 1.

While the Court can take judicial notice of the existence of a court document, "with respect to any and all court records, the law is settled that "the court will not consider the truth of the documents contents unless it is an order, statement of decision, or judgment. [Citation.]" (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374-375.) Plaintiff requests judicial notice of the document for the truth of the statements therein. Thus, Plaintiff's request is DENIED.

B. Legal Standard

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

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

subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

C. DISCUSSION

Dfinity demurs to the Defendant demurs to each cause of action on the grounds of uncertainty and failure to state a claim. (See Code Civ. Proc., § 430.10, subds. (e) & (f).)

(1) Uncertainty

Uncertainty is a disfavored ground for demurrer; it is typically sustained only where the pleading is so unintelligible and uncertain that the responding party cannot reasonably respond to or recognize the claims alleged against it. (See *Khoury v. Maly's of Cal, Inc.* (1993) 14 Cal.App.4th 612, 616 (Khoury).) "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects uncertain, because ambiguities can be clarified under modern discovery procedures." (*Ibid*.)

"[U]nder our liberal pleading rules, where the complaint contains substantive factual allegations sufficiently apprising defendant of the issues it is being asked to meet, a demurrer for uncertainty should be overruled or plaintiff given leave to amend. (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 139, fn. 2.)

Dfinity argues Plaintiff's complaint is uncertain because, at times, he fails to identify exactly which defendant he is referring to. (MPA, p. 17:1-3.) Dfinity further argues Plaintiff fails to sufficiently allege fraud with the requisite particularity. (MPA, p. 17:17-19.) However, it appears Defendants are conflating uncertainty as a basis for demurrer with the failure to plead sufficient facts to state a claim as the basis for demurrer. (See *Buter v. Sequiera* (1950) 100 Cal.App.2d 143, 145-146 ["[a] special demurrer for uncertainty is not intended to reach the failure to incorporate sufficient facts in the pleading but it is directed at the uncertainty existing in the allegations already made"].) Moreover, the Complaint is not so unintelligible that Dfinity cannot reasonably respond to it. (See *Khoury, supra*, 14 Cal.App.4th at p. 616.) Thus, Dfinity's demurrer on the basis of uncertainty is OVERRULED.

(2) Joinder

Dfinity argues the Complaint must be dismissed because Plaintiff has not and can not name the Foundation.

Code of Civil Procedure section 430.10, subdivision (d), provides, "a defect or misjoinder of parties" as a basis for demurrer. Code of Civil Procedure section 389, provides,

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

(Code Civ. Proc. §389, subd. (a).)

In deciding whether a person or entity is a necessary party, "we analyze the three distinct parts, or clauses, of section 389, subdivision (a). Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or 'hollow' rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause (2)(i) recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence. Clause (2)(ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability." (*Countrywide Home Loans, Inc. v. Superior Court* (1999) 69 Cal.App.4th 785, 792 – 793 (Countrywide).)

"The complete relief clause requires joinder when nonjoinder precludes the court from effecting relief not in some overall sense, but between extant parties. In other words, joinder is

required only when the absentee's nonjoinder precludes the court from rendering complete justice among those already joined. . . . Properly interpreted, [the complete relief clause] is not invoked simply because some absentee may cause future litigation. The effect of a decision in the present case on the absent party is immaterial under the complete relief clause. The fact that the absentee might later frustrate the outcome of the litigation does not by itself make the absentee necessary for complete relief. The complete relief clause does not contemplate other potential defendants, or other possible remedies. Simply put, the term complete relief refers only to relief as between the persons already parties, and not as between a party and the absent person whose joinder is sought." (*Countrywide, supra,* 69 Cal.App.4th at pp. 793 – 794 [emphasis added, internal quotation marks and citations omitted].)

"Clause (2) of section 389, subdivision (a), requires joinder, if feasible, where an absentee claims an interest relating to the subject of the action, and nonjoinder could pose a risk of harm to the absentee or an existing party." (*Countrywide, supra*, 69 Cal.App.4th at p. 795.) "To the extent that the [non-joined party] and defendants share the same goal with respect to the outcome of the litigation, the [non-joined party's] interests are less likely to be impaired or impeded." (*Id*. at p. 796; see also *Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1102 (*Deltakeeper*)—"A party's ability to protect its interest is not impaired or impeded as a practical matter where a joined party has the same interest in the litigation.")

Finally, "[u]nder clause (2)(ii) of section 389, subdivision (a), joinder would be required if … the action would expose defendants to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. A 'substantial risk' means more than a theoretical possibility of the absent party's asserting a claim that would result in multiple liability. The risk must be substantial as a practical matter." (*Countrywide, supra,* 69 Cal.App.4th at p. 796 [internal quotation marks and citations omitted].

Dfinity argues any claims against the Foundation are governed by Swiss law and must be filed in Switzerland. (MPA, p.18:2-3.) It further argues the claims arise from Plaintiff's contract with the Foundation, thus, the Foundation will be directly affected by Plaintiff's claims. (MPA, p. 18:21-25.) Additionally, it argues that the Foundation is an indispensable

party and its rights are implicated by Plaintiff's claims. (MPA, p. 18:25-26.) Plaintiff argues that Dfinity fails to argue the Foundation is a necessary party. (Opp., p.14:8-9.) Plaintiff further argues that he does not seek anything from the Foundation and complete relief can be awarded even if the Foundation is not joined. (Opp., p. 14:24-25.)

If such a person cannot be joined, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder." (Code Civ. Proc., § 389, subd. (b).)

The Court has "substantial discretion in considering which factors weigh and how heavily to emphasize certain considerations in deciding whether the action should go forward in the absence of someone needed for a complete adjudication of the dispute. The subdivision (b) factors are not arranged in a hierarchical order, and no factor is determinative or necessarily more important than another." (*Dreamweaver Andalusian, LLC v. Prudential Ins. Co. of America* (2015) 234 Cal.App.4th 1178, 1176-1177.)

The Foundation has not participated in this matter, thus, it has not claimed an interest in it and Dfinity cannot claim an interest on the Foundation's behalf. (See *Hartenstine v. Superior Court* (1987) 196 Cal.App.3d 206, 222.) Moreover, it is undisputed that it is the Foundation's subsidiary. Therefore, it appears the Foundation's interests can be represented in this matter. Furthermore, Dfinity states the Foundation cannot be joined in this matter because "any claims against [it] are governed by Swiss law and must be filed in Switzerland where the Foundation is "domiciled." (MPA, p. 18:2-3.) Therefore, it appears Plaintiff will have no remedy against Dfinity if this action is dismissed for nonjoinder. Dfinity contends the Foundation will be prejudiced by any judgment rendered in this matter. Plaintiff asserts that he does not seek anything from the Foundation in this matter, thus, a judgment in the

Foundation's absence would be adequate. In weighing the factors, it appears that the Court can completely adjudicate Plaintiff's claims against Dfinity without the Foundation. Thus, the demurrer cannot be sustained on this basis.

(3) Economic Loss Rule

The economic loss rule provides, "where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses." (*Robinson Helicopter Company v. Dana Corporation* (2004) 34 Cal.4th 979, 988 (*Robinson*).) The rule requires a purchaser to recover solely in contract for purely economic loss due to disappointed expectations, unless the purchasers can demonstrate harm above and beyond a broken contractual promise. (*Id.* at p. 988.)

In general, there is no recovery in tort for negligently inflicted "economic losses." (*Southern California Gas Leak Cases* (2019) 7 Cal.5th 391, 400.) "Quite simply, the economic loss rule prevents the law of contract and the law of tort from dissolving one into the other." (*Robinson Helicopter, supra,* 34 Cal.4th at p. 988.) "Not all tort claims for monetary losses between contractual parties barred by the economic loss rule. But such claims are barred when they arise from—or are not independent of—the parties' underlying contracts." (*Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 923.)

Dfinity argues Plaintiff's tort claims are barred by the economic loss rule because they arise from his "purported entitlement to the Tokens under his contract with the Foundation." (MPA, p. 15:27-28.) But Plaintiff and Dfinity are not in contractual privity with one another, thus, they have no contract for Plaintiff's claims to arise out of. Moreover, in Robinson Helicopter, the California Supreme Court explicitly carved out an exception to this rule, holding that the rule does not bar claims for fraud and intentional misrepresentations, which are independent of the allegedly breached contract. (*Robinson Helicopter, supra*, 34 Cal.4th at p. 991.) Plaintiff alleges Williams used Dfinity to facilitate his alleged fraudulent conduct against him. Therefore, the economic loss rule is not applicable here and the demurrer cannot be sustained on this basis.

(4) Nature of Plaintiff's Claims and His Standing

"An individual may not maintain an action in his own right against the directors for destruction of or diminution in the value of the stock." (*Rankin v. Frebank Co.* (1975) 47 Cal.App.3d 75, 95.)

Dfinity argues Plaintiff's claims are derivative in nature and he lacks standing to bring this action. (MPA, p.16:19-20.) While Plaintiff does allege the loss of value of the Tokens, it appears his claims are largely based on Defendants' conduct against him personally. For example, he alleges that some donors were able to receive their Tokens, while he specifically was prevented from doing so. (See Complaint, ¶¶ 14-15.) This is an individual harm for which he can bring an individual claim. Thus, the demurrer cannot be sustained on this basis.

(5) First and Second Causes of action: Tortious Interference with Contract and Prospective Economic Advantage

The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) 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. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1239; see also CACI, No. 2201.)

The elements for the tort of intentional interference with prospective economic advantage "are usually stated as follows: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153 (*Korea*).)

"Only a stranger to [the] contract may be liable for interfering with it." (*Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, 1603.) A contracting party or its agent are not strangers to a contract and therefore cannot be held liable for tortious interference. (Id. at p. 1604.) A stranger to the contract could be a defendant that has an economic or social interest

in the contractual relationship but "who is not a party to the contract or an agent of a party to the contract." (*Caliber Paving Company, Inc. v. Rexford Industrial Realty Management, Inc.* (2020) 54 Cal.App.5th 175, 177.)

Dfinity argues this claim is deficient because it is not a "stranger to" the Foundation or some unrelated party. (MPA, p.10:22-24.) Plaintiff argues there are no allegations that Dfinity was operating as the Foundation's agent. (Opp., p. 7:17-19.)

a. Agency

"An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." (Civ. Code, § 2295.) "'An agency relationship "may be implied based on conduct and circumstances." ' " (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 262, internal citations omitted.) "It is a settled rule of the law of agency that a principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons made in the course of the business of the agency and within the scope of the agent's powers as such, although made in the name of the agent and not purporting to be other than his own personal obligation or contract." (*Daniels v. Select Portfolio Servicing, Inc*. (2016) 246 Cal.App.4th 1150, 1178.) "For an agency relationship to exist, the asserted principal must have a sufficient right to control the relevant aspect of the purported agent's day-to-day operations." (*Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 85.) "The existence of an agency relationship is a factual question for the trier of fact." (*Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp.* (2007) 148 Cal.App.4th 937, 965 (*Garlock Sealing Techs*).) "Only when the essential facts are not in conflict will an agency determination be made as a matter of law." (*Wickham v. Southland Corp*. (1985) 168 Cal.App.3d 49, 55 (*Wickham*).)

In response to Plaintiff's argument, Dfinity argues that Plaintiff has alleged Dfinity was an agent under the "control test" and the "representative services test." (Reply, p. 5:10:27; p. 6:7-28.)

"As a practical matter, the parent must be shown to have moved beyond the establishment of general policy and direction for the subsidiary and in effect taken over

performance of the subsidiary's day-to-day operations in carrying out that policy." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 542 (*Sonora Diamond Corp.*).)

The Complaint alleges that Williams was the CEO of Dfinity, but it does not allege that Dfinity acted as the Foundation's agent. The Court is not persuaded by Dfinity attempt to use Plaintiff's allegations that Williams wholly controlled the Foundation and ICP Network to establish that Dfinity was the Foundation's agent. There are no allegations that the Foundation took over performance of Dfinity's day-to-day operations. Therefore, whether Dfinity was the Foundation's agent cannot be resolved as a matter of law at this time. (See *Wickham, supra*, 168 Cal.App.3d at p. 55.) Thus, Dfinity fails to establish that it was not a "stranger to" the parties and the contract, such that it cannot be held liable for its alleged tortious interference.

The Complaint alleges there was a contract between Plaintiff and the Foundation. (Complaint, ¶ 193.) It alleges Defendants knew about the contract, they intentionally interfered with contractual relationship, the relationship was disrupted, and Plaintiff was harmed as a result. (See Complaint, ¶¶ 203, 206-209, 210-211.) Additionally, Plaintiff alleges he had an economic relationship with the Foundation, Defendants knew of the relationship, they took intentional acts to disrupt the relationship, the relationship was disrupted, and Plaintiff was harmed as a result. (Complaint, ¶¶ 224, 225-230.) This is sufficient to state Plaintiff's claims for tortious interference. Thus, Dfinity's demurrer to the first and second causes of action is OVERRULED.

(6) Third Cause of Action: Breach of Fiduciary Duty

Plaintiff is no longer pursuing the breach of fiduciary claim against Dfinity, thus, the Court will address Dfinity's arguments as to the remaining claims. (See Opp., p. 1, fn. 1.) Thus, Dfinity's demurrer to the third cause of action is SUSTAINED WITHOUT LEAVE TO AMEND.

(7) Fourth Cause of Action: Conversion

Conversion is the wrongful exercise of dominion over the property of another. (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 45.) The elements of a conversion are (1) the plaintiff's ownership or right to possession of the property at the time of the conversion; (2) the defendant's conversion by a wrongful act or disposition of property

rights; and (3) damages. (*Ibid*.) "Conversion requires affirmative action to deprive another of property, not a lack of action." (*Spates v. Dameron Hospital Assn* (2003) 114, Cal.App.4th 208, 222.) It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. (*Oakdale Village Group v. Fong* (1996) 43 Cal.App.4th 539, 544.)

To the extent Dfinity argues intangible items cannot be used to state this claim, courts have increasingly allowed for conversion to cover intangible property. (*Welco v. Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 211.) Thus, the Tokens may be the subject of Plaintiff's claims.

Next, Dfinity argues Plaintiff fails to allege that Dfinity wrongfully obtained, converted, or even possessed the Tokens. (MPA, p. 13:27-28.) It further argues it did not exist at the time Plaintiff made his Seed Donation to the Foundation. (MPA, p.14:2-3.) Plaintiff argues his claim is not based on Dfinity obtaining his ETH but rather on Dfinity exercising improper dominion over his 5,188, 487 Tokens. (Opp., p. 10:1-2.)

Dfinity argues Plaintiff lost his seed phrase, which caused his inability to access his Tokens. However, Plaintiff alleges he was unable to "access and save his phrase due to a bug in the ICP Chrome extension that was supposed to provide the phrase." (See Complaint, ¶ 127.) He further alleges Williams assured him that it was a non-issue and would have no impact on his ability to access and sell his Tokens. (Complaint, ¶ 128.) Additionally, Plaintiff alleges Defendants intentionally interfered with his right to possess the Tokens by, among other things, imposing technological roadblocks that made it difficult, if not impossible to access the Tokens, and have refused to return it. (See Complaint, ¶¶ 237-241, 244-248.) Therefore, whether Plaintiff had the right to possess the Tokens is a question of fact that cannot be resolved on demurrer.

Lastly, Dfinity argues it could never have been in possession of Plaintiff's Tokens because it was formed six months after the contract was executed. But, Plaintiff alleges Defendants have control of the Neuron(s) that contain the Tokens and the Court must accept this as true for the purposes of demurrer. (See Complaint, ¶ 246; *Olson v. Toy* (1996) 46

Cal.App.4th 818, 823.) Therefore, Plaintiff alleges sufficient facts to state a claim for conversion. (See Complaint, 237-241.) Thus, Dfinity's demurrer to the fourth cause of action is OVERRULED.

(8) Fifth Cause of Action: Trespass to Chattels

"[T]respass to chattels 'lies where an intentional interference with the possession of personal property has proximately caused injury' [citation], but the interference is ' "not sufficiently important to be classed as conversion" ' [citation]. 'Though not amounting to conversion,' in an action for trespass to chattels 'the defendant's interference must … have caused some injury to the chattel or the plaintiff's right in it.' [Citations.]" (*Berry v. Frazier* (2023) 90 Cal.App.5th 1258, 1271.)

The Court has addressed Dfinity's arguments to this claim above.

Plaintiff alleges Defendants intentionally interfered with his right to possess the Tokens, which caused injury to him. (Complaint, ¶¶ 243-248.) Thus, Dfinity's demurrer to the fifth cause of action is OVERRULED.

(9) Sixth Cause of Action: Unfair Competition (Business and Professions Code, § 17200.)

"The UCL defines 'unfair competition' to 'mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising' and any act prohibited by [Business and Professions Code] section 17500." (*Searle v. Wyndham Int'l* (2002) 102 Cal.App.4th 1327, 1332-1333 (Searle).) "Section 17200 'is not confined to anticompetitive business practices, but is also directed towards the public's right to protection from fraud, deceit, and unlawful conduct. Thus, California courts have consistently interpreted the language of section 17200 broadly." (*South Bay Chevrolet v. General Motor Acceptance Corp.* (1999) 72 Cal.App.4th 861, 877-878 [internal citations omitted].) "The statute prohibits 'wrongful business conduct in whatever context such activity might occur.'" (*Searle, supra,* 102 Cal.App.4th at p. 1333.)

Dfinity argues Plaintiff does not identify any section of the statutory scheme which was allegedly violated. (MPA, p.14:28-15:1.) It further argues Plaintiff's allegations do not establish an independent obligation owed to Plaintiff by Dfinity or the failure to undertake a

requisite act. (MPA, p. 15:6-8.) However, Dfinity fails to provide any authority that Plaintiff is required to establish either in order to state this claim for the purposes of demurrer. Plaintiff argues he alleges the unfair and unlawful prongs sufficiently. (Opp., p.11:1-6, 8-14.)

Plaintiff alleges Defendants committed acts of unfair competition when they imposed restrictions on his ability to access his Tokens, implemented technological roadblocks, failed to provide a seed phrase, refused to provide him with access to his Tokens. (Complaint, ¶ 250.) He further alleges they committed acts of unlawful conduct by tortious interfering with contract, and committing the torts of conversion and trespass to chattels. (Complaint, ¶ 251.) Therefore, Plaintiff alleges sufficient facts to state this claim. Thus, Dfinity's demurrer to the sixth cause of action is OVERRULED.

IV. CONCLUSION

Williams' motion to quash is DENIED. Dfinity's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND as to the third cause of action and OVERRULED as to first, second, fourth, fifth, and sixth causes of action.

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

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Calendar Line 4

Case Name: Kobayashi v. Dfinity USA Research LLC, et al.
Case No.: 23CV415981

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Calendar Line 5

Case Name: Balabanoff v. Classic Vacations, LLC, et al. (Class Action/PAGA)
Case No.: 21CV392334

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 31, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a putative class and representative action arising out of various alleged wage and hour violations. The operative First Amended Complaint (FAC), filed on June 14, 2023, sets forth causes of action for: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Wages and Overtime Under Labor Code § 510; (3) Meal-Period Liability Under Labor Code § 226.7; (4) Rest-Period Liability Under Labor Code § 226.7; (5) Failure to Pay Vacation Wages; (6) Failure to Comply with Labor Code §§ 245 and 246; (7) Reimbursement of Necessary Expenditures Under Labor Code § 2802; (8) Failure to Comply with Labor Code § 2751; (9) Violation of Labor Code § 226(a); (10) Failure to Keep Required Payroll Records Under Labor Code §§ 1174 and 1174.5; (11) Penalties Pursuant to Labor Code § 203; (12) Violation of Business and Professions Code § 17200 et seq.; and (13) Penalties Pursuant to Labor Code § 2699 et seq.

On January 24, 2024, the court granted preliminary approval of the settlement. Plaintiff now moves for final approval of the settlement, and Plaintiff's motion (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. [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 case has been settled on behalf of the following class:

> [A]ll persons employed by [defendant] Classic Vacations, LLC in California and classified as non-exempt employee who worked for [defendants Classic Vacations, LLC, Classic Custom Vacations (a d/b/a of Classic Vacations, LLC), Expedia, Inc., and Expedia Group, Inc. (collectively, "Defendants")] during the Class Period.

The Class Period is defined as the period from September 23, 2017, to January 16, 2023. The class also contains a subset of aggrieved employees that are defined as "person[s] employed by Classic Vacations, LLC in California and classified as a non-exempt employee who worked for Defendants during the PAGA Period." The PAGA Period is defined as the period from September 23, 2020, to January 16, 2023.

According to the terms of settlement, Defendants will pay a gross, non-reversionary

amount of $450,000. The gross settlement amount includes attorney's fees of $150,000 (1/3 of the gross settlement amount), litigation costs not to exceed $25,000, an enhancement award for the class representative not to exceed $7,500, settlement administration costs not to exceed $8,500, and a PAGA allocation of $20,000 (75 percent of which will be paid to the Labor and Workforce Development Agency (LWDA) and 25 percent of which will be paid to aggrieved employees).

The net settlement amount will be distributed to Class Members on a pro rata basis based on the number of workweeks worked during the Class Period. Similarly, PAGA members will receive a pro rata share of the 25 percent portion of the PAGA payment allocated to them based on the number of workweeks worked during the PAGA Period.

On October 4, 2023, the court continued the motion for preliminary approval to December 13, 2023. In its minute order, the court directed Plaintiff to identify a new *cy pres* recipient in compliance with Code of Civil Procedure section 384. The court also asked Plaintiff to submit evidence that the proposed settlement was submitted to the LWDA as required under Labor Code section 2699, subdivision (*l*)(2). Finally, the court asked the parties to make several changes to the class notice.

On November 14, 2023, Plaintiff's counsel filed a supplemental declaration in support of the motion for preliminary approval. The court subsequently found that this supplemental declaration adequately addressed the court's previous concerns and granted preliminary approval. Specifically, the parties executed an Addendum to Class Action and PAGA Settlement Agreement (Addendum) designating Bet Tzedek as the *cy pres* recipient in compliance with Code of Civil Procedure section 384 and made the requested changes to the class notice. Plaintiff's counsel also submitted evidence that the settlement agreement and Addendum were provided to the LWDA.

On February 16, 2024, the settlement administrator mailed out notice packets to 189 Class Members. (Amended Declaration of Jeremy Romero [] (Romero Decl.) at ¶ 7.)[5] Ultimately, one notice packet was undeliverable. (*Id*. at ¶ 9.) There was one request for

[5] Paragraph 12 of the Romero Declaration referring to "one hundred ninety-eight (189) Participating Class Members" appears to be a typographical error.

exclusion, no objections, and one dispute regarding workweeks that has now been resolved. (*Id*. at ¶ 10.) One request for inclusion to the Class was approved by Plaintiff's counsel, bringing total Class Members to 190. (*Id*. at ¶ 11.) The notice packet to this additional Class Member was mailed on June 12, 2024, and the response deadline is July 27, 2024. (*Ibid*.) At or before the final approval hearing, Plaintiff's counsel shall provide the court with updated information regarding the response (if any) of this additional Class Member.

Assuming the court awards the requested $7,500 enhancement payment to Plaintiff and other requested fees and costs, by the court's calculation, each Class Member will receive an average of $1,356.71. The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiff requests an enhancement award of $7,500 and submits a Declaration of Sasha Balabanoff in Support of Motion for Final Approval of the Class Action Settlement (Balabanoff Supp. Decl.) in addition to the declaration she previously provided at preliminary approval. At preliminary approval, the court reviewed Plaintiff's declaration "generally detailing" her participation in the case and directed Plaintiff to file a supplemental declaration "specifically detailing" her participation as well as providing an estimate of time spent in connection with this litigation. Plaintiff now states in her supplemental declaration that she spent approximately 20 hours on this case, conferred with Plaintiff's counsel, provided documents, described Defendants' policies, practices, and procedures, contacted potential witnesses, and assisted in preparation and made herself available for mediation. (Balabanoff Supp. Decl. at ¶¶ 7-9.) The supplemental declaration is adequate and considering the average class payout vis-à-vis the requested enhancement award, the $7,500 enhancement award is approved.

The court also has an independent right and responsibility to review the requested attorney's 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's fees in the amount of $150,000 (1/3 of the gross settlement amount).[6]

[6] Attorney's fees will be split, with David Yeremian & Associates, Inc. receiving 65% and D.Law, Inc. receiving 35%. (Yeremian Decl. at ¶ 35.) This fee split has been acknowledged in writing by Plaintiff. (*Ibid*.)

Plaintiff's counsel provides evidence demonstrating a total lodestar of $154,082.50. (Declaration of David Yeremian [] (Yeremian Decl.) at ¶ 15 & Exh. 1; Declaration of Roman Shkondnik [] at ¶ 5 & Exh. 1; Declaration of Emil Davtyan [] at ¶ 14.) By the court's calculation, this results in a reasonable multiplier of 0.97. The attorney's fees requested are reasonable and are approved.

Plaintiff's counsel requests and provides evidence of litigation costs of $15,081.35. (Yeremian Decl. at ¶ 28 & Exh. 3.) These costs are approved. Settlement administration costs of $8,500 are also approved. (Romero Decl. at ¶ 15.)

IV. CONCLUSION

Accordingly, the Motion is GRANTED.

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

The court will set a compliance hearing for _____, 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, 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 6

Case Name: Cervantez v. Garden City, Inc.
Case No.: 22CV392905

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on July 31, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This is a putative class and representative action brought by plaintiff Joe Cervantez (Plaintiff) alleging various wage and hour violations. The operative First Amended Complaint, filed on June 22, 2022, sets forth the following causes of action: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Overtime Wages; (3) Failure to Provide Meal Periods; (4) Failure to Permit Rest Breaks; (5) Failure to Reimburse Business Expenses; (6) Failure to Provide Accurate Itemized Wage Statements; (7) Failure to Pay All Wages Due Upon Separation of Employment; (8) Violation of Business and Professions Code 17200, et seq.; and (9) Enforcement of Labor Code 2698, et seq. (PAGA .)

On February 10, 2023, the court entered an Order on Defendant's Motion to Compel Arbitration, Dismiss Class Action, and Stay Proceedings, which sent Plaintiff's individual claims to arbitration and stayed Plaintiff's representative claims pending completion of the arbitration.

Now before the court is the motion by Aegis Law Firm, P.C., to be relieved as counsel of record for Plaintiff. The motion is unopposed.

II. LEGAL STANDARD

California Rules of Court, rule 3.1362 sets forth the requirements for a motion to be relieved as counsel. Notice and motion must be directed to the client on Judicial Council Form MC-051. No memorandum is required. (See, Cal. Rules of Ct., rule 3.1362(a) & (b).) Counsel must provide a declaration on Judicial Council Form MC-052 stating "in general terms and without compromising the confidentiality of the attorney-client relationship why a motion under Code of Civil Procedure section 284(2) is brought instead of filing a consent under Code of Civil Procedure section 284(1)." (Cal. Rules of Ct., rule 3.1362(c).)

The notice of motion and motion, along with the supporting declaration and the proposed order must be served on the client and all parties "by personal service, electronic service, or mail." (See, Cal. Rules of Ct. rule 3.1362(d).) If the notice is served on the client by mail under Code of Civil Procedure § 1013, it must be accompanied by a declaration stating facts showing that either: (A) The service address is the current residence or business address of the client; or (B) The service address is the last known residence or business address of the client and the attorney has been unable to locate a more current address after making reasonable efforts to do so within 30 days before the filing of the motion to be relieved. (Cal. Rules of Ct., rule 3.1362(d).) If the notice is served on the client by electronic service under Code of Civil Procedure § 1010.6 and rule 2.251, it must be accompanied by a declaration stating that the electronic service address is the client's current electronic service address. (See, Cal. Rules of Ct., rule 3.1362(d)(2).)

As used in this rule, "current" means that the address was confirmed within 30 days before the filing of the motion to be relieved. Merely demonstrating that the notice was sent to the client's last known address and was not returned, or no electronic delivery message was received is not, by itself, sufficient to demonstrate that the address is current. (See, Cal. Rules of Ct. rule 3.1362(d).)

Furthermore, the proposed order relieving counsel must be prepared on the Order Granting Attorney's Motion to Be Relieved as Counsel-Civil (form MC-053) and must be lodged with the court with the moving papers. (See, Cal. Rules of Ct., rule 3.1362(e).) The order must specify all hearing dates scheduled in the action or proceeding, including the date of trial, if known. If no hearing date is presently scheduled, the court may set one and specify the date in the order. (Ibid.) The determination of whether to grant a motion to withdraw as counsel lies in the sound discretion of the trial court. (See, *Manfredi & Levine v. Superior Court* (1998) 66 Cal. App. 4th 1128, 1133; see also *People v. Horton* (1995) 11 Cal.4th 1068, 1106.) The court may delay the effective date of the order relieving counsel until proof of service of a copy of the signed order on the client has been filed with the court. (See, Cal. Rules of Ct., rule 3.1362(e).)

III. DISCUSSION

The moving papers comply with all statutory requirements and rules. The motion and the supporting declaration are made on the proper MC-051 and Mc-052 Judicial Council forms. The declaration provides, (a) moving documents were served by mail on the Plaintiff at his last known address, (b) Plaintiff's last known address was confirmed through search of public records on February 27, 2024, (c) the matter is proceeding in arbitration and the arbitrator has agreed to stay the proceedings pending a decision from the court on this motion, (d) there are no upcoming hearing or trial dates, and (e) there has been an irreparable breakdown of the attorney-client relationship. The motion properly includes a proposed order on form MC-053.

The original proof of service was amended on March 13, 2024, to rectify the missing statement about effectuating Plaintiff's service by mail. The amended proof of service, titled "Certificate of Service" demonstrates that Plaintiff was served with the moving papers on March 8, 2024, via mail sent to his last known address at 695 Jackson Street, San Jose, CA 95112

Accordingly, the Court finds there is good cause to relieve counsel from continued representation, and that withdrawal will not cause any reasonably foreseeable prejudice to the rights of the Plaintiffs (See, California Rules of Professional Conduct, Rule 3-700(A)(2).) The motion to be relieved as counsel is **GRANTED**.

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