SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Sunil R. Kulkarni Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2110

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department1@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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LAW AND MOTION TENTATIVE RULINGS
DATE: DECEMBER 7, 2023 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	19CV357070	In Re Maxar Technologies, Inc. Shareholder Litigation (Lead Case)	See tentative ruling. The Court will prepare the final order.
LINE 2	23CV414264	Frye, et al. v. Willow Glen Business and Professional Association, Inc., et al. (Class Action)	Off Calendar
LINE 3	22CV401294	Torres v. Jan Marini Skin Research, Inc. (Class Action) [Consolidated with Case No. 22CV401296/PAGA]	See tentative ruling. The Court will prepare the final order.
LINE 4	2009-1-CV-134970	ZF Micro Devices Inc, et al. v. TAT Investment Advisory Ltd, et al.	See tentative ruling. The Court will prepare the final order.
LINE 5	23CV409446	House v. Guitar Center Stores, Inc. (PAGA)	See tentative ruling. The Court will prepare the final order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6	20CV369179	Hone Capital LLC, et al. v. Wu, et al. (Lead Case; Consolidated With 20CV369308)	The Court invites oral argument.
LINE 7	20CV373138	Envirodigm, Inc. vs Apple, Inc.	See tentative ruling. The Court will prepare the final order.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: *In Re Maxar Technologies, Inc. Shareholder Litigation*
Case No.: 19CV357070

This is a class action arising from alleged misrepresentations and omissions in the Offering Materials provided by Defendant Maxar Technologies, Inc., a satellite manufacturer, for its acquisition of and merger with DigitalGlobe, Inc., a satellite imagery company.

Before the Court is Plaintiff Michael McCurdy's motion for final approval of settlement and motion for attorney fees and costs, both of which are unopposed. As discussed below, in the event that the discrepancy between the amount of litigation expenses requested by Plaintiff's counsel and the amount provided in the notice to class members is satisfactorily resolved, the Court is prepared to GRANT both motions.

I. BACKGROUND

Maxar specializes in the manufacture of satellites and the provision of satellite-related services. (Second Amended Complaint ("SAC"), ¶ 11.) Maxar s subsidiary Space Systems/Loral LLC (SSL), its related satellite communications business, and its satellite manufacturing and R&D operations, including the facilities and business segments central to the allegations here, are located in Palo Alto. (*Ibid*.) At the time of the Merger, Maxar was incorporated under the laws of British Columbia. (*Id.*, ¶ 12.)

In February 2017, Maxar announced that it was seeking to acquire DigitalGlobe, which used satellites to provide customers with high-resolution images of the earth s surface, in a $2.4 billion debt-financed, stock-and-cash transaction. In contrast to Maxar s declining GEO business that had accounted for a bulk of the company s revenue, the imaging business on which DigitalGlobe was focused was less capital-intensive and provided better margins. Moreover, by contrast to the GEO market, the space imaging market was still growing. (SAC, ¶ 51.) To acquire DigitalGlobe, Maxar took on an increased debt load, from $600 million before the merger to $3 billion after. (*Id*., ¶ 52.)

On April 27, 2017, Defendants filed with the SEC on Form F-4 a draft registration statement, which would register the Maxar shares to be issued and exchanged in the Merger. (SAC, ¶ 56.) They filed a final amendment to the registration statement on June 2, and the SEC declared it effective on June 16, 2017. (*Id*., 57.) On June 22, 2017, Defendants filed a prospectus on Form 424B (collectively with the registration statement and the documents both filings incorporate, the Offering Materials). (*Ibid*.) On October 5, 2017, Defendants completed the Merger, issuing approximately 21 million shares of Maxar common stock directly to former shareholders of DigitalGlobe common and preferred stock. (*Id*., 58.) On that date, the market price for Maxar common stock closed at $54.30 per share. (*Ibid*.)

Plaintiff alleges that the Offering Materials overstated Maxar s assets, earnings, and other financial results, trends, and metrics by recording property, plant and equipment (PP[&]E), inventory and development assets far in excess of realizable value and thereby inflating earnings. (SAC, ¶ 4.) The Offering Materials should have reflected the impairment in the value of Maxar's geosynchronous satellite communications (GeoComm) segment. (*Ibid*.)

During the two years preceding the Merger, Maxar's GEO business had collapsed, with demand for satellite broadband Internet falling precipitously as a result of lower-cost terrestrial competition like fiber optic connections and high-speed cellular networks. As the satellite market shrank 45%, Maxar s GeoComm segment revenues dropped 20%, and the future looked even worse, with the number of GeoComm contract awards also falling rapidly. In early 2017, several months before the Merger, the bleak GeoComm market outlook led Maxar to quietly retain management consulting firm Bain & Co. (Bain) for a restructuring project intended to assess the diminished value and prospects for its GeoComm segment and advise whether it was worthwhile for Maxar to even stay in the business at all. On Bain s negative internal assessment of GeoComm's value and prospects, Maxar undertook mass layoffs firing 334 employees (including 66 critical engineers) between February and June 2017 alone, slashing new business development budgets for GeoComm satellite proposals, and steeply curtailing operations at its GeoComm facility in Palo Alto, all with an eye toward selling off its GeoComm segment or otherwise exiting the market entirely. (SAC, ¶ 5.) Had Defendants complied with governing accounting standards to timely and accurately test and accrue impairment (and its own representations that it continuously monitored and tested impairment of intangible assets) and recorded GeoComm segment assets at realizable value, by the time of the Merger Maxar would have already recorded millions of dollars in impairment charges to its reported inventories, intangible assets, and [PP&E]. (*Id*., 6.) Instead, [d]espite knowing that [Maxar s] GeoComm segment was severely impaired, Defendants continued to tout the bullish line of a GEO market recovery just around the corner. (*Id*., 54.)

A year after the Merger, rather than the profit analysts were led to expect, Maxar announced a $432 million net loss, largely attributed to impairment losses and inventory obsolescence in its GEO communications satellite business. (SAC, ¶ 83.) On this news, Maxar common stock dropped 45 percent, from a close of $27.07 on October 30, 2018 to a close of $14.91 on October 31. (*Id*., ¶ 87.) Short seller Spruce Point Capital had predicted this correction when, in August 2018, it accused Maxar of misleadingly inflating its earnings charges which Maxar denied at the time. (*Id*., ¶¶ 80, 99-100.) In December 2018, Maxar announced the sale of 4.5 acres of Palo Alto real estate (the former home of its SSL satellite design and production engineers), the proceeds of which would be used to pay down debt. (*Id*., ¶ 90.) In January 2019, defendant Howard L. Lance resigned as Maxar s CEO, President, and board member, with former DigitalGlobe president Dan Jablonsky taking his place. (*Id*., ¶ 91.) The chair of Maxar s board stated that this change in leadership occurred [g]iven the company s performance in 2018 and the loss of over 90% of our value in the marketplace. (*Ibid*., emphasis original.) Indeed, by the commencement of this action, Maxar common stock has traded as low as $3.96 per share, an approximately 93% decline since the Merger. (*Id*., ¶ 7.)

Plaintiff Michael McCurdy is a citizen and resident of Alexandria, Minnesota who acquired Maxar common stock via the Merger, in exchange for DigitalGlobe shares. (Amended Complaint, ¶ 11.) Based on the allegations summarized above, he initiated this action in October 2019, asserting claims under (1) section 11 of the Securities Act of 1933 (against all defendants), (2) section 12(a)(2) of the Securities Act (against all defendants), and (3) section 15 of the Securities Act (against all defendants) on behalf of a class of all former DigitalGlobe shareholders who received Maxar common stock pursuant to the Offering Materials. (SAC, ¶ 92).

In August 2021, the parties stipulated to certification of the class and the appointment of Plaintiff as class representative, and the Court entered an order to that effect. On March 22,

2023, after several years of amended pleadings, extensive discovery (including related litigation), consultation with expert witnesses and briefing and oral argument on numerous motions and filings, the parties reached an agreement in principle to settle this action. Plaintiff now moves for an order preliminarily approving this settlement (the Settlement) and setting its requested schedule for settlement proceedings.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

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

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

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

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

III. SETTLEMENT CLASS

For settlement purposes, the class is defined as:

> All persons who acquired Maxar common stock in exchange for DigitalGlobe common stock pursuant to Offering Materials in connection with Maxar s October 2017 merger and acquisition of DigitalGlobe. Excluded from the Class are Defendants and their families, the officers and directors and affiliates of

> Defendants, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest. Also excluded from the Class are any former DigitalGlobe shareholders who entered into a release of claims in connection with the appraisal actions. See, e.g., In re Appraisal of DigitalGlobe, Inc. Common Stock and Preferred Stock, Consol. C.A. No. 2017-0810 (Del. Ch.). Also excluded from the Class are those Persons who would otherwise be Class members but who timely and validly excluded themselves therefrom.

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

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

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

At preliminary approval, the Court provisionally certified the above-described class, determining that Plaintiff had demonstrated by a preponderance of the evidence (1) an ascertainable class, (2) a well-defined community of interest among the class members and (3) that a class action provides substantial benefits to both litigants and the Court. Consequently, the Court will certify the class for settlement purposes.

IV. TERMS AND ADMINISTRATION OF SETTLEMENT

The non-reversionary gross settlement amount is $36,500,000, plus accrued interest and minus the costs of administering the notice to the class, attorneys' fees and expenses and payment to Plaintiff as class representative. Class counsel seek attorneys' fees and expenses in an amount up to 35% of the total settlement amount (or $12,775,000), plus reimbursement for such litigation expenses incurred in the amount of $754,467.01. Plaintiff also requests a

service award in the amount of $10,000 for representing the class. Notice and administration expenses are estimated to be $500,000.

As explained in the order preliminarily approving settlement, each member's share of the net settlement amount will depend on the number of valid proofs of claim that class members send in and how many shares of Maxar common stock the member acquired for DigitalGlobe common stock pursuant to the registration statement and prospectus issued in connection with Maxar's October 5, 2017 merger with DigitalGlobe, and whether they sold any of those shares and, if so, when and at what price. The formula utilized to determine each member's share is based upon the recognized loss formula describe within the Notice, which in turn is based on the formula measuring damage set forth in the Securities Act of 1933, 15. U.S.C. § 77k. The proposed plan is designed to distribute a pro rata share of the net settlement to authorized claimants based upon their loss under the plan. In order to qualify for a settlement payment, members were required to submit a Proof of Claim and Release Form within, as suggested in Plaintiff's motion, 90 days after the Notice Date, i.e., when the Claims Administrator completed mailing of the Notice and Proof of Claim to class members. If there is any balance remaining of the net settlement amount, that amount will be reallocated among the authorized claimants by repeated redistributions until the remaining balance is no longer economically feasible to distribute to members. Thereafter, any balance that remains shall be donated to the Legal Aid Society of Santa Clara County.

In exchange for settlement, class members who submit a Proof of Claim will release:

> [A]ll claims and causes of action of every nature and description, including "Unknown Claim" … that were or could have been alleged in the Action, accrued, or unaccrued, fixed or contingent, liquidated or unliquidated, whether arising under federal, state, local, common, or foreign law, or any other law, rule or regulation, whether class or individual in nature, based on, arising out of, in connection with, or reasonably related to: (i) the purchase or acquisition of Maxar common stock pursuant to the Offering Materials issued in connection with Maxar's October 2017 merger and acquisition of DigitalGlobe; or (ii) the allegations, acts, facts, matters, occurrences, disclosures, filings, representations, statements or omissions that were or could have been alleged by Plaintiff and other members of the Class in the Action. Released Claims also includes any and all claims arising out of, relating to, or in connection with the Settlement or resolution of the Action against the Released Parties (including Unknown Claims), except claims to enforce any of the terms of this Stipulation. For avoidance of doubt, Released Claims does not include any claims brought under the federal securities law against Maxar that are unrelated to the allegations, acts, transaction, facts, events, matters, occurrences, statements, representations, misrepresentations, or omissions involved, set forth, alleged, or referred to, in this Action.

The notice period has now been completed. The settlement administrator, A.B. Data, LTD. ("A.B. Data"), received the names and contact information of 5,200 potential class members and their nominees. Using this information, on June 29, 2023, A.B. Data caused the Notice Packet to be sent by First-Class mail to these potential class members, brokerage firms, banks, institutions, and other third-party nominees. As in most class actions of this nature, the majority of class members are expected to be beneficial purchasers whose securities are held in

"street name"- i.e., the securities are purchased by brokerage firms, banks, institutions, and other third-party nominees in the name of the respective nominees, on behalf of the beneficial purchasers. The names and addresses of these beneficial purchasers are known only to the nominees. A.B. Data maintains a proprietary database with names and addresses of the largest and most common banks, brokers, and other nominees and on June 29, 2023, caused the Notice Packets to be mailed to the 4,983 mailing records contained therein.

A.B. Data initially received an additional 210 names and addresses of potential class members from individuals or brokerage firms, bank, institutions and other nominees, and also received separate requests from brokers for 6,310 and 6,500 Notice Packets to be forwarded by the nominees to their customers. Additionally, A.B. Data delivered an electronic copy of the Notice Packet to be published on the DTC Legal Notice System. On September 7, 2023, A.B. Data received an updated list from Broadridge Financial Services setting forth the names and addresses for 19,134 unique potential class members; Notice Packets were subsequently mailed directly to these members.

As of the date of the initial declaration of a Senior Project Manager for A.B. Data (Eric Nordskog) submitted in support of the instant motion- August 14, 2023- a total of 16,703 Notice Packets had been mailed to potential class members and their nominees. A.B. Data also re-mailed 11 Notice Packets to persons whose original mailings were returned and for whom updated addresses were provided. Since the initial declaration, A.B. Data has continued to disseminate copies of the Notice Packet in response to requests received, and as of the date of the supplemental declaration submitted by Mr. Nordskog- November 30, 2023- a total of 42,337 Notice Packets have been mailed to potential class members and their nominees.

As discussed in the order preliminarily approving the settlement, mailed notice was supplemented by a summary notice published in The Wall Street Journal and transmitted once over PR Newswire on July 7, 2023. A.B. Data also established a website and toll-free telephone helpline on June 29, 2023 and February 22, 2022, respectively, in order to assist potential class members.

Per the Notice, class members who wished to be excluded were to submit such a request postmarked no later than August 28, 2023. As of November 30, 2023, the date of the filing of Mr. Nordskog's supplemental declaration, the administrator had not received any requests for exclusion in response to the issuance of Notice of the settlement, nor any objections to the settlement. Only a single individual requested exclusion in response to the class certification notice. The deadline to submit a claim form was September 27, 2023. A.B. Data indicated that as of August 14, 2023, it was conducting audits of and quality assurance reviews if the submitted claims, and once it was complete, claimants with incomplete or invalid claims would be given an opportunity to supplement or complete their claims. In Mr. Nordskog's supplemental declaration, he states that as of November 30, 2023, A.B. Data has received 9,767 claims, which it is currently in the process of validating. It is anticipated that A.B. Date will complete claims processing and issuing checks to eligible class members by March 2024 and it will require a further 90 days from that time to prepare a summary accounting to allow for the initial void date on the checks to lapse.

At discussed in detail on the order preliminarily approving the parties' settlement, the Court found that the proposed settlement provides a fair and reasonable compromise to Plaintiff's claims. It finds no reason to depart from these findings now, especially considering

that there are no objections. Thus, the Court finds that the settlement is fair and reasonable for the purposes of final approval.

V. MOTION FOR ATTORNEY FEES, COSTS AND INCENTIVE AWARD

As indicated above, Plaintiffs seeks a fee award of $12,775,000 (35% of the gross settlement), as well as reimbursement of litigation expense reasonably incurred in the amount of $754,467.91. In its order granting preliminary approval, the Court instructed Plaintiff's counsel that it could "submit for the Court's review evidentiary support for a higher award than 30%." Co-lead counsel submit to the Court comprehensive declarations which exactingly detail the amount of work performed to prosecute this action, which counsel characterize as "enormous" and "atypical," as well as the risks of "total non-recovery," which they maintain support the full amount of fees requested by them. Counsels' work included: conducting extensive pre-suit investigation of Defendants' conduct and continuing to investigate that conduct over the next five years (analyzing public filings, analyst reports, press releases and media, and researching applicable law); overcoming a motion to stay this action in favor of a federal open-market fraud action and a demurrer; conducting extensive written discovery (resulting in production and review of over 580,000 pages of documents) including from ten nonparties (inclusive of foreign entities); participating in numerous IDCs and various discovery motion practice; defending Plaintiff's deposition; securing class certification; deposing 20 witnesses; retaining expert consultants and responding to the same retained by Defendants; researching applicable law with respect to the claims of Plaintiff and the class and the potential defenses thereto; and participating in three full-day mediation sessions.

As requested, Plaintiff also provides a lodestar figure of $9,926,881.50, based on 13,675 hours spent on this case by counsel and staff with billing rates of $225 to $1,195, resulting in modest multiplier of 1.3 which, as co-counsel maintain, is well within the range of multipliers that courts in California and nationwide have found to be reasonable. (See, e.g., *Sternwest Corp. v. Ash* (1986) 183 Cal.App.3d 74, 76 [remanding for a lodestar enhancement of "two, three, four or otherwise"); *Lealoa v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 24, 52 [finding trial court abused its discretion by refusing to enhance lodestar with multiplier when awarding fees, opining that a multiplier in excess of 3.5 was reasonable and not ruling out class counsel's original request for a multiplier of 8].)

The amount of fees requested by Plaintiff's counsel is just beyond one-third of the gross-settlement, which is the average fee award in class actions (see *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43, 66, fn. 11) and is supported when cross-checked against their lodestar figure, which actually *exceeds* this amount.

After consideration of the risks of non-recovery in this action, the extensive work performed by Plaintiff's counsel to reach a settlement that represents approximately 40% to 65% of counsel's estimated recoverable damages, and the case supporting similar percentage fee awards, the Court finds that the amount of fees requested by Plaintiff's counsel, $12,775,000, is reasonable and therefore approved.

Turning to the litigation expenses requested, the joint declaration of counsel breaks down the total sought into specific, itemized amounts, and expenses incurred by each firm (Girard Sharp LLP and Hedin Hall LLP), which primarily include the following: (1) expert witness and consultant fees; (2) mediator's fees; online legal and financial research; legal fees

for Canadian and out-of-state counsel who assisted with third-party discovery; (3) transportation, meals, and hotels; (6) photocopying; and (7) e-discovery database hosting. The Court is satisfied that Plaintiff's counsel has substantiated the amount of expenses requested. The Court's only concern is with regard to whether proper notice of the amount of expenses sought to be reimbursed has been provided to class members. In the copy of the notice provided to the Court, it states, in the section entitled "How Will the Plaintiff's Lawyers be Paid," that "Class Counsel will apply for an attorneys' fee and expense award for Class Counsel in the amount of up to 35% of the Settlement Fund (or $12,775,000), plus payment of Class Counsel's expenses incurred in connection with this Action in an amount *not to exceed $600,000*." However, Class Counsel is now seeking an amount in excess of $600,000 and the Court requests that they reconcile this apparent discrepancy. Outside of this discrepancy, the expense amounts requested otherwise appear to be reasonable.

Plaintiff requests a service award in the amount of $10,000. To support this request, Plaintiff previously submitted a declaration in support of his motion for preliminary approval describing his efforts on the case. Based on these efforts, the Court finds that the class representative is entitled to service award award and the amount requested is reasonable.

VI. ORDER AND JUDGMENT

In the event that the discrepancy between the amount of litigation expenses requested by Plaintiff's counsel and the amount provided in the notice to class members is satisfactorily resolved, the Court is prepared to rule as follows:

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiff's motion for final approval and motion for attorney fees and costs are GRANTED. The following class is certified for settlement purposes:

> All persons who acquired Maxar common stock in exchange for DigitalGlobe common stock pursuant to Offering Materials in connection with Maxar s October 2017 merger and acquisition of DigitalGlobe. Excluded from the Class are Defendants and their families, the officers and directors and affiliates of Defendants, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest. Also excluded from the Class are any former DigitalGlobe shareholders who entered into a release of claims in connection with the appraisal actions. See, e.g., In re Appraisal of DigitalGlobe, Inc. Common Stock and Preferred Stock, Consol. C.A. No. 2017-0810 (Del. Ch.). Also excluded from the Class are those Persons who would otherwise be Class members but who timely and validly excluded themselves therefrom.

Excluded from the class is the one individual who submitted a timely request for exclusion.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiff and the members of the class shall take from their complaint only the relief set forth in the settlement agreement and this order and judgment. Pursuant to Rule

3.769(h) of the California Rules of Court, the Court retains jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **August 1, 2024 at 2:30 P.M.** in Department 1. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted pursuant to Code of Civil Procedure section 384, subdivision (b); the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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

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Calendar Line 2

Case Name:
Case No.:

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Calendar Line 3

Case Name: *Magdalena Torres v. Jan Marini Skin Research, Inc.*
Case No.: 22CV401294

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiff Magdalena Torres alleges that Defendant Jan Marini Skin Research, Inc., a manufacturer and wholesaler of skincare products, failed to pay overtime and minimum wages, failed to provide meal and rest periods or pay associated premiums, and failed to provide code-complaint wage statements, among other Labor Code violations.

Before the Court is Plaintiff's motion for preliminary approval of a settlement, which is unopposed. As discussed below, the Court GRANTS Plaintiff's motion.

VII. BACKGROUND

On July 27, 2022, Plaintiff filed a class action complaint accusing Defendant of failing to: properly pay overtime, provide meal periods, authorize and permit rest breaks, properly pay meal and rest break premiums, pay minimum wages, pay timely pay wages during employment and upon termination, provide accurate wage statements, keep accurate payroll records and reimburse necessary business expenses. Plaintiff also alleged that Defendant's actions violated California Business and Professions Code § 17200. That same day, Plaintiff also filed a separate PAGA representative complaint asserting a single claim under PAGA seeking penalties for the same violations alleged in the class action complaint.

On December 8, 2022, the Court granted Defendant's unopposed motion to consolidate the class action with the PAGA action; the Consolidated Class Action and Representative Action Complaint was filed the following day, asserting the following causes of action: (1) unpaid overtime; (2) unpaid meal period premiums; (3) unpaid rest period premiums; (4) unpaid minimum wages; (5) final wages not timely paid; (6) wages not timely paid during employment; (7) non-compliant wage statements; (8) failure to keep requisite payroll records; (9) unreimbursed business expenses; (10) violation of Bus. & Prof. Code § 17200; and (11) violation of PAGA.

VIII. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

A. Class Action

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

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in

> settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

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

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

B. PAGA

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

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

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum

even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

IX. SETTLEMENT PROCESS

After the consolidated complaint was filed, the parties met and conferred and agreed to attend private mediation and informally stay discovery pending the mediation. In advance of the mediation, the parties engaged in informal discovery, with Defendant providing Plaintiff with all relevant policies and handbooks in place during the Class Period, Plaintiff's personnel file, the complete production of time and payroll data for all direct hires, and figures and information regarding the class size and composition. With this data, Plaintiff's counsel and their retained expert were able to perform a comprehensive damages analysis and estimate Defendant's potential liability.

On May 4, 2023, the parties participated in mediation with Kim Deck, Esq., a mediator with substantial experience handling wage and hour matters, and reached the settlement agreement now before the Court.

X. SETTLEMENT PROVISIONS

The non-reversionary gross settlement is $625,000. Attorney fees of up to $208,333.33 (one-third of the gross settlement), litigation costs not to exceed $25,000 and an estimated $7,500 in administration costs will be paid from the gross settlement. $50,000 will be allocated to PAGA penalties, 75% of which ($37,500) will be paid to the LWDA. Plaintiff will seek an enhancement payment in the amount of $5,000.

The net settlement of approximately $329,166.67 will be allocated to class members on a pro-rata basis based on the number of weeks worked during the class period. The remaining 25% of the PAGA settlement amount will be distributed to Aggrieved Employees on a pro-rata basis. Class members will not be required to submit a claim to receive their payment. For tax purposes, settlement payments will be allocated 20% to wages subject to withholding, 40% to interest and 40% to penalties. 100% of the PAGA payment to Aggrieved Employees will be allocated as penalties. Funds associated with checks uncashed after 180 days will be transmitted to the Controller of the State of California to be held in trust for such class members pursuant to California unclaimed property law.

In exchange for settlement, class members who do not opt out will release:

> [C]laims, rights, demands, liabilities and causes of actions that are alleged, or that reasonably could have been alleged, based on the facts asserted in the operative complaint in the Action including the following claims: (i) failure to pay all regular wages, minimum wages and overtime wages due; (ii) failure to provide meal periods or compensation in lieu thereof; (iii) failure to provide rest periods or compensation in lieu thereof; (iv) failure to reimburse necessary business expenses; (v) failure to provide complete, accurate wage statements; (vi) failure to pay wages timely at time of termination or resignation; (vii) failure to provide timely pay wages during employment ; (viii) unfair business practices that could have been premised on the facts pled in the operative complaint; and (ix) failure to maintain required payroll records.

Aggrieved Employees will also release "all claims for civil penalties under [PAGA] that could have been premised on the facts alleged both in the PAGA Notice provided to the LWDA and in the operative complaint including but not limited to penalties that could have been awarded pursuant to Labor Code sections 210, 226.3. 1197.1, 558 and 2699." Consistent with the statute, Aggrieved Employees will not be able to opt out of the PAGA portion of the settlement.

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

XI. FAIRNESS OF SETTLEMENT

Based on available data, Plaintiff's counsel estimated Defendant's maximum exposure at approximately $2,992,980, with specific claims valued thusly: failure to provide meal breaks at $396,548.72; failure to provide rest breaks at $396,548.72; failure to pay all minimum and overtime wages due at $144,199.54; $10,250 in unreimbursed business expenses; waiting time penalties totaling $960,585.60; penalties for inaccurate wage statements at $205,800; and liability for penalties under PAGA at $878,958.

Plaintiff's counsel determined an appropriate amount of recovery for settlement purposes- $583,418.02- by offsetting Defendant's maximum theoretical liability by: the risk of class certification being denied (particularly with respect to the meal and rest period claims); Defendant's arguments on the merits, including, among others, that employees voluntarily took short or late meal breaks and their policies otherwise complied with applicable law; the difficulty of establishing the willfulness of Defendant's actions; the expense of establishing the amount of wages due to each class member; and the risk of losing at trial or on appeal.

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

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

XII. PROPOSED SETTLEMENT CLASS

Plaintiff requests that the following settlement class be provisionally certified:

> All current and former hourly-paid, non-exempt employees of Defendant or employees of a temporary employment agency who were assigned to work for Defendant in California, at any time between July 27, 2018, and the date of preliminary approval.

A. Legal Standard for Certifying a Class for Settlement Purposes

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

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

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

B. Ascertainable Class

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

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

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

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

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

Here, the estimated 205 class members are readily identifiable based on Defendant's records, and the settlement class is appropriately defined based on objective characteristics. The Court finds that the settlement class is numerous, ascertainable, and appropriately defined.

C. Community of Interest

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

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

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

As for the second factor,

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

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

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

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

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

D. Substantial Benefits of Class Certification

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

Here, there are an estimated 205 class members. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits to both the litigants and the Court in this case.

XIII. NOTICE

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

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

The notice is generally adequate. Class members' workweek information must be displayed in bold within a box set off from the rest of the text on the first page of the notice. And class members must be informed of how notice of final judgment will be provided (for example, by posting the judgment to a settlement web site).

Regarding appearances at the final fairness hearing, the notice shall be further modified to instruct class members as follows:

> The judge overseeing this case encourages remote appearances. (As of August 15, 2022, the Court's remote platform is Microsoft Teams.) Class members who wish to appear remotely should contact class counsel at least three days before the hearing if possible. Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members may appear remotely using the Microsoft Teams link for Department 1 (Afternoon Session) or by calling the toll free conference call number for Department 1. Any class member who wishes to appear in person should check in at Court Services (1st floor, Downtown Superior Courthouse, 191 N. 1st St., San Jose) and wait for a sheriff's deputy to escort him or her to the courtroom for the hearing.

Turning to the notice procedure, the parties have selected Apex Class Action as the settlement administrator. The administrator will mail the notice packet within 52 days of preliminary approval, after updating class members' addresses using the National Change of Address Database. Any returned notices will be re-mailed to any forwarding address provided or better address located through a skip trace or other search. Class members who receive a re-mailed notice will have at least 15 days to respond. These notice procedures are appropriate and are approved.

XIV. CONCLUSION

Plaintiff's motion for preliminary approval is GRANTED. The final approval hearing shall take place on **June 6, 2024** at 1:30 in Dept. 1. The following class is preliminarily certified for settlement purposes:

> All current and former hourly-paid, non-exempt employees of Defendant or employees of a temporary employment agency who were assigned to work for Defendant in California, at any time between July 27, 2018, and the date of preliminary approval.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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

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Calendar Line 4

Case No.: 2009-1-CV-134970

This is an action for breach of fiduciary duty based on the allegations by Plaintiff ZF Micro Solutions, Inc. ("ZF Micro Solutions" or "ZF") that Defendant TAT Capital Partners ("TAT"), through its representative on the board of directors of its ZF Micro Solutions predecessor, the now deceased ZF Micro Devices, Inc. ("ZF Micro Devices"), destroyed the company while attempting to take it over and oust its management.

Before the Court is ZF Micro Solutions' motion for action to be designated as complex pursuant to Rule 3.400 of the California Rules of Court, which is opposed by TAT. As discussed below, the Court DENIES the motion.

XV. BACKGROUND

For ease of understanding the lengthy history of this action and related litigation, the Court parrots much of the summary authored by the Fourth District Court of Appeal in its remittitur issued to this Court in January 2023.

ZF Micro Devices was founded by David Feldman in 1995 to design and sell a microchip and TAT, a private equity limited partnership based in Switzerland, invested in the company and, as a result, obtained a seat on its board. Due to an inability to obtain funding, ZF Micro Devices closed in February 2002. That same year, its successor, ZP Micro Solutions, sued National Semiconductor Corp. ("NAS") of, among other things, breach of a contract with ZF Micro Devices for the production of microchips (the "NAS Action"). After a jury trial, the case settlement for $20 million.

In 2005, TAT sued ZF Micro Solutions, alleging that as a shareholder of the defunct ZF Micro Devices, it was entitled to its pro rata share of the NAS settlement ("*TAT v. Feldman*"). Around this same time, Gary Kennedy, an investor and appointee to the ZF Micro Devices Board by Sands Brothers, filed suit against ZF Micro Solutions on related grounds ("*Kennedy v. ZF Micro Solutions*"), as did Sands Brothers itself ("*Sands Brothers v. Feldman*"). ZF Micro Solutions then sued Mr. Kennedy for his alleged theft of ZF Micro Solutions' IP that the company purportedly discovered during the NAS Action ("*ZF Micro Solutions v. Kennedy*"). In March 2007, the Court (Hon. Komar) consolidated *Kennedy v. ZF Micro Solutions* with *ZF Micro Solutions v. Kennedy*, and *TAT v. Feldman* with *Sands Brothers v. Feldman* (collectively, "*TAT v. Solutions*"). ZF Micro Solutions also filed suit against it insurers for coverage and failure to defend claims related to the NAS Action ("*ZF Micro Solutions v. Lloyd's of London, et al.*"); this action was deemed related to the foregoing actions and all were deemed complex.

In 2009, ZF Micro Solutions cross-complained against TAT (in *TAT v. Solutions*) (the "ZF Cross-Complaint") on the ground that the company, through its representative on the ZF Micro Devices board, had breached its fiduciary duty as a corporate officer. The current, operative complaint in the instant action was initially a consolidation of the foregoing cross-complaint and a separate complaint filed in February 2009 by ZF Micro Devices/Solutions

against board member Mark Putney, a managing partner of TAT ("*ZF v. Putney*"), Case No. 2009-1-CV-134970.[1] The Court deemed *ZF v. Putney* as complex.

Subsequently, several of the foregoing pleadings were resolved by the parties, leaving as pending in March 2009 the three initial complaints filed in February of 2005 in *TAT v. Solutions* and the *Kennedy v. Feldman* pleadings; these actions were consolidated. With trial pending, the *Kennedy v. Feldman* pleadings settled over the ensuing months.

In December 2009, after various reassignments due to several challenges pursuant to Code of Civil Procedure section 170.6, *TAT v. Solutions* and the ZF cross-complaint (consolidated with *ZF v. Putney*) proceeded to trial before the Hon. Zepeda. However, just prior to the trial's initiation, the ZF Cross-Complaint was severed and consolidated with another case filed against TAT. After a combination court and jury trial, TAT prevailed regarding its share of the NAS settlement, and the judgment, which awarded sizable amounts of monetary damages against Mr. Feldman and other defendants, was affirmed in 2012.[2]

The instant action against TAT and its representatives came on for trial in 2013 before the Hon. Monahan. The two operative pleadings were the complaint in *ZF v. Putney* and the severed and consolidated ZF Cross-Complaint from the earlier TAT lawsuit, for breach of fiduciary duty against TAT as the principal of a director. Pursuant to TAT's motion, the court bifurcated the trial to decide a limitations issue first; TAT argued that the ZF Cross-Complaint was untimely. The jury returned a verdict in TAT's favor and judgment was entered for the company on the grounds that both the complaint and cross-complaint were time-barred. ZF Micro Devices maintains that TAT was improperly permitted to make reference to the 2010 judgment in *TAT v. Solutions* because such mention was unfairly prejudicial to it.

ZF Micro Solutions appealed on the grounds that (1) the ZF Cross-Complaint was compulsory, not permissive, and (2) regardless of the nature of the cross-complaint, the time for its filing was tolled by the filing of the TAT lawsuit in 2005. In November 2016, the Court of Appeal held the ZF Cross-Complaint to be permissive, but ruled the filing of the TAT lawsuit had tolled the timing for filing it. The court did not reach the issue of the alleged undue prejudice that resulted from TAT referencing the *TAT v. Solutions* judgment in the December 2009/2010 trial. The judgment was reversed and remanded to the trial court.[3]

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[1] This is the case number used for the instant action. *ZF v. Putney* was filed as a separate action because Putney was not a party to *TAT v. Feldman*.

[2] In 2012, Mr. Feldman and the ZF Micro Solutions investors filed several legal malpractice actions against their former counsel based on their conduct in the 2009/2010 trial; these actions were dismissed due to discovery issue sanctions that resulted from several discovery motions that were essentially unopposed by counsel for Mr. Feldman and the ZF Micro Solutions investors, Robert Machado. Mr. Machado later pleaded guilty to a felony based on a scheme he participated in with a suspended attorney, Michael Morrissey, which enabled the latter to continue practicing law when he was not legally permitted to do so; both attorneys engaged in this fraudulent conduct while purportedly advocating for Mr. Feldman in the malpractice actions. As a result, Mr. Feldman filed a fraud action in August 2019 against Mr. Machado. Trial is currently set in that action for January 16, 2024.

[3] According to ZF Micro Solutions, it anticipates filing a supplemental complaint naming Private Equity Holdings AG ("PEH") and Bank J. Vontobel ("Vontobel Bank"), the parent and controlling entities of TAT, as additional defendants. TAT has purportedly dissolved with

Upon remand, in 2018, the only remaining cause of action was the one in the ZF Cross-Complaint against TAT alone[4] for breach of fiduciary duty. The sole remedy sought was "actual damages in an amount to be proved at trial." The trial court (Hon. Barrett) decided this issue was equitable, not legal, and therefore ZF Micro Solutions was not entitled to a jury trial. After a court trial, judgment was entered in TAT's favor in July 2019 based on the finding that Mr. Putney's actions were protected by the business judgment rule. ZF Micro Solutions appealed on the ground that it was deprived of the jury trial to which it was entitled. The Court of Appeal held that ZF Micro Solutions claim was legal in nature and thus required a jury trial as a matter of law. Consequently, the judgment was reversed and the case remanded back to this Court for trial. ZF Micro Solutions now moves to have the case designated as complex.

XVI. MOTION FOR DESIGNATION AS COMPLEX CASE

A. Legal Standard

A "complex case" is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel. (Cal. Rules of Court, rule 3.400(a).)

> In deciding whether an action is a complex case under (a), the court must consider, among other things, whether the action is likely to involve:
>
> (1) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
>
> (2) Management of a large number of witnesses or a substantial amount of documentary evidence;
>
> (3) Management of a large number of separately represented parties;
>
> (4) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
>
> (5) Substantial postjudgment judicial supervision.
>
> (Cal. Rules of Court, rule 3.400(b).)

B. Discussion

ZF Micro Solutions maintains that the instant action should be designated as complex because of the extensive history and number of parties involved over the years, i.e., the "global effect" of over two decades of litigation on the issues at hand. It emphasizes that this action was at one time deemed complex and maintains that if it had been permitted to remain under the supervision of the complex department after March of 2009, as it had been the preceding

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payments to investors while adequate reserved were not maintained for the open liability of ZF Micro Solutions.

[4] The judgment against another defendant was affirmed, leaving TAT as the only party adverse to ZF Micro Solutions on remand.

four years, "every ruling that caused the ZF [Cross] Complaint to still be in a pretrial stage today would almost certainly have been avoided." (Motion at 17:26-28.) ZF Micro Solutions continues that the issues presented in its Cross-Complaint will necessarily begin with the inception of the company (as ZF Micro Devices), and argues that the "inter-relation of the facts and the varying principles of law here" warrant a complex designation so that one judge can be assigned to handle all matters.

The problem with ZF Micro Solution's argument is that it is predicated on what happened in the *past*, and not the specifics of the case that is presently before the Court. The mere fact that the events of this action span over 20 years does not, by itself, make it complex, and Plaintiff appears to be approaching this case from the perspective of the relevant landscape as it existed in 2009 and *not* as the case exists now. There is no doubt that the numerous actions between these same players over the years have involved voluminous motion practice, particularly motions in limine, severed actions, appeals, retrials and reversals. But what remains now is a *single* pleading by ZF Micro Solutions against TAT for breach of fiduciary duty. All of the other actions involving the various parties in this long-running dispute were still pending when many of them were deemed complex, but this is not the case now. Nearly all of them have been adjudicated or settled, and determinations concerning threshold legal questions that may be determinative in this action have been made by the Court of Appeal (e.g., statute of limitations). There are no underlying moving parts such that it would make sense for the case to be overseen by one judge for all purposes.

As TAT asserts in its opposition, an evaluation of the five factors set forth in Rule 3.400(b) supports the conclusion this action does *not* warrant a complex designation. First, ZF Micro Solutions fails to persuasively demonstrate that this action will involve "numerous pretrial motions raising different or novel legal issues that will be time-consuming to resolve." As stated above, such issues are likely to have already been resolved in prior proceedings or by thee Court of Appeal and even if there are some that have not, the Court does not believe that they are "novel" and will be "time-consuming to resolve." Moreover, this case asks a relatively straightforward question: did TAT, through the alleged actions of Mark Putney, breach its fiduciary duty to ZF Micro Devices? Second, ZF has not established that this case involves "a large number of witnesses or a substantial amount of documentary evidence" and, as TAT suggests, given that the events underlying this action occurred over 20 years ago, it is likely that it will be difficult to locate witnesses and the parties will have to rely on deposition testimony. Third, this case does not involve "a large number of separately represented parties"; at present, only TAT and ZF are parties, and the potential addition of two more defendants[5] does not move the needle to a "large number." Fourth, there are no related, pending actions that need to be coordinated with the instant action; the other cases discussed by ZF are resolved and/or not part of this case (e.g., the fraud allegedly suffered by Mr. Feldman by his former counsel). Finally, this case seeks only monetary relief and thus is seems likely that no injunctive or post-judgment supervision will be required.

The instant action represents what might be the tail end of a long, complicated, litigious history between ZF and TAT. But the Court is not persuaded that the ZF Cross-Complaint requires complex treatment. It may have in the past when numerous other related actions were pending, but that ship has sailed. Therefore, ZF's motion to designate this action as complex is DENIED.

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[5] It is not even clear that ZF will be able to add these two foreign entities so late in the case.

XVII. CONCLUSION

ZF Micro Solutions' motion to have this action designated as complex is DENIED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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

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Calendar Line 5

Case Name: *Mitch House v. Guitar Center Stores, Inc., et al.*
Case No.: 23CV409446

This is a representative action under the Private Attorneys General Act ("PAGA") for civil penalties based on alleged wage and hour violations by Defendants Guitar Center Stores, Inc. ("Guitar Center"), AVDG, LLC and GC Business Solutions, Inc. (collectively, "Defendants"). Before the Court is Defendants' motion to compel arbitration and dismiss Plaintiff Mitch House's claims against Defendants with prejudice or, in the alternative, stay the representative action pending the outcome of arbitration of Plaintiff's individual claims.

As discussed below, the Court GRANTS Defendants' motion to compel arbitration of Plaintiff's individual PAGA claim. Plaintiff's representative PAGA claim is stayed pending the outcome of his individual claim pursuant to Code of Civil Procedure section 1281.4.

XVIII. BACKGROUND

According to the allegations of the operative Complaint, Plaintiff was employed by Defendants as an instructor, an hourly, non-exempt position, at their Guitar Center store location in Dublin. (Complaint, ¶ 6.) Plaintiff alleges that Defendants, among other things, failed to pay him and all other aggrieved employees for all hours worked, failed to compensate them for overtime hours worked, failed to pay all minimum wages due, failed to provide them with all rest and meal breaks to which they were entitled and compensate them for any missed breaks, failed to provide statutorily compliant wage statements, failed to provide split shift premium pay where indicated and failed to provide appropriate seating. Based on the foregoing, Plaintiff initiated this action with the filing of the Complaint on January 3, 2023, asserting a single cause of action for civil penalties under PAGA.

XIX. MOTION TO COMPEL ARBITRATION

Defendants moves to compel arbitration of Plaintiff's individual PAGA claim based on an agreement purportedly executed by him (the "Arbitration Agreement") upon accepting Defendants' offer of employment.

A. Legal Standards

"The FAA [Federal Arbitration Act], which includes both procedural and substantive provisions, governs [arbitration] agreements involving interstate commerce." (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 840.) However, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid*.) Here, the Agreement expressly provides that "the [FAA] and federal common law applicable to arbitration shall govern [its] interpretation and enforcement," and thus federal procedural and substantive law apply. (See *Rodriguez v. American Technologies, Inc*. (2006) 136 Cal.App.4th 1110, 1122 ["[t]he phrase 'pursuant to the FAA' is broad and unconditional," and unambiguously adopts both the procedural and substantive aspects of the FAA].)

Under the FAA, the Court must grant a motion to compel arbitration if any suit is brought upon "any issue referable to arbitration under an agreement for such arbitration" (9 U.S.C. § 3), subject to "such grounds as exist at law or in equity for the revocation of any contract…" (9 U.S.C. § 2). The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal*, *supra*, 14 Cal.4th at p. 413.)

"In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

> But the FAA's policy favoring arbitration … is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. Or in another formulation: The policy is to make arbitration agreements as enforceable as other contracts, but not more so. Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind.

(*Morgan v. Sundance, Inc.* (2022) ___U.S.___ [142 S.Ct. 1708, 1713] (*Morgan*), internal citations and quotation marks omitted.)

B. Existence and Scope of Agreement to Arbitrate

To establish that Mr. House consented to the Arbitration Agreement, Defendants submit the declaration of Kristin Jamarillo, the Director of Human Resources for Guitar Center, who explains that he executed the agreement on May 29, 2019, as part of the "onboarding" process. According to Ms. Jamarillo, the process is executed electronically, with the Arbitration Agreement presented to the applicant/employee after he or she logs into Recruitment Management, an ADP platform utilized by Guitar Center to enable to employee to complete all documents necessary to the hiring process. Ms. Jamarillo reviewed the complete trainings and electronically signed documents for Mr. House through a Workflow History, which reflected him as having accepted the offer of employment, with the Arbitration Agreement, on May 29, 2019, at 10:34 a.m. The offer letter provided to Plaintiff stated that "your employment is contingent upon acknowledgment and agreement of the [Arbitration Agreement] included with this offer …" and that "[y]our electronic signature will indicate your acceptance of this offer and signature to the [Arbitration Agreement]." The attached Arbitration Agreement itself provided that "[t]his agreement and agreeing to subject to the Arbitration Program is a condition of new or continued employment. If you accept or continue employment with the company, both you and the company will be bound by its terms."

The Arbitration Agreement expressly provides that the following disputes ("among others") "will be resolved exclusively by final and binding arbitration":

- whether or not a dispute is covered by the Arbitration Program;
- *disputes arising out of your hiring, employment or termination of employment;*
- *disputes alleging violation of wage and hour laws or pay practices*;
- disputes involving confidentiality or trade secret violations or unfair competition;
- disputes alleging harassment or discrimination (including, among others, discrimination based on sex, pregnancy, race, national or ethnic origin, age, religion, creed, marital status, sexual orientation, mental or physical disability or medical condition or other characteristics protected by law);
- disputes alleging a breach of an express or implied duty, such as among others, breach of contract or breach of the covenant of good faith and fair dealing;
- disputes alleging a violation of public policy;
- disputes alleging any other violation of federal, state or local law; and
- disputes alleging any other tort or violation of contractual or common law rights.

(Arbitration Agreement, p. 1, emphasis added.)

The Arbitration Agreement purports to also contain a waiver of "multi-plaintiff, class, collective and representative actions." (*Id*.)

As one Court of Appeal summarized,

> [T]he moving party bears the burden of producing "prima facie evidence of a written agreement to arbitrate the controversy." (*Rosenthal, supra*, 14 Cal.4th at p. 413.) The moving party "can meet its initial burden by attaching to the [motion or] petition a copy of the arbitration agreement purporting to bear the [opposing party's] signature." (*Bannister v. Marinidence Opco, LLC* (2021) 64 Cal.App.5th 541, 543–544 [279 Cal. Rptr. 3d 112] (*Bannister*).) Alternatively, the moving party can meet its burden by setting forth the agreement's provisions in the motion. (*Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 219 [105 Cal. Rptr. 2d 597] (*Condee*); see also Cal. Rules of Court, rule 3.1330 ["The provisions must be stated verbatim or a copy must be physically or electronically attached to the petition and incorporated by reference."].) For this step, "it is not necessary to follow the normal procedures of document authentication." (*Condee*, at p. 218.) If the moving party meets its initial prima facie burden and the opposing party does not dispute the existence of the arbitration agreement, then nothing more is required for the moving party to meet its burden of persuasion.

(*Gamboa v. Northeast Community Clinic* (2021) 72 Cal.App.5th 158, 165–166.)

Here, Defendants submit a copy of the online record showing Plaintiff's acceptance of the Arbitration Agreement as part of onboarding process, and he does not dispute having done so in his opposition. Thus, Defendants have established the existence of an agreement to arbitrate between themselves and Plaintiff. As for the agreement's scope, given its express language that all disputes "arising out of [Plaintiff's] hiring, employment or termination of employment" and "alleging violation of wage and hour laws or pay practices" "will be resolved exclusively by final and binding arbitration," it seems clear that any claim by Plaintiff under PAGA for

purported violations of the Labor Code as alleges in the Complaint fall directly within it and must be arbitrated.

Relying on the U.S. Supreme Court's decision in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S. Ct. 1906 (*Viking River*), Defendants maintain that pursuant to the holding of that case, Plaintiff's *individual* PAGA claim must be compelled to arbitration, with the remaining representative PAGA action dismissed. In his opposition, Plaintiff's position that the motion should be denied is not based on the contention that the Arbitration Agreement is unenforceable due unconscionability; instead, he argues that Defendants' motion should be denied as neither the holding nor disposition of *Viking River* applies because the Arbitration Agreement contains (1) a wholesale waiver of the right to bring PAGA claims, which the high court agreed is unenforceable and (2) a mandate that, if the waiver is found to be unenforceable, then the case "must be filed in a court of competent jurisdiction and that court will be the exclusive forum for that dispute." The Court does not find Plaintiff's arguments persuasive, as they ignore the import of the California Supreme Court's decision in *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104 (*Adolph*), as well as the *entirety* of the waiver section to which he refers, which recognizes the severability of individual and representative claims.

The disposition of Defendants' motion depends primarily on the holdings of three decisions, as well as the language of the Arbitration Agreement: *Viking River*, *Adolph* and *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*). In *Iskanian*, the California Supreme Court reached two conclusions about PAGA actions that are relevant here: first, it held that "an employee's right to bring a PAGA action is unwaivable," and second, it "rejected the employer's argument that the particular waiver it drafted should be upheld because it only waived nonindividual PAGA claims and preserved the employee's right to arbitrate individual ones." (*Iskanian*, 59 Cal.4th at 383-384.) Appellate courts interpreted the latter conclusion as "prohibiting splitting PAGA claims into individual and nonindividual components to permit arbitration of the individual claims." (*Nickson v. Shemran, Inc.* (2023) 90 Cal.App.5th 121, 128.)

In June 2022, the U.S. Supreme Court issued its decision in *Viking River, supra*, in which it considered whether the FAA preempted the *Iskanian* rules against waiver and splitting of PAGA claims. The court held that *Iskanian's* prohibition on the waiver of PAGA claims was *not* preempted by the FAA, but made the contrary conclusion with respect to *Iskanian's* secondary rule prohibiting the splitting of PAGA claims, explaining that such a ruling "circumscribe[d] the freedom of parties to determine the issues subject to arbitration and the rules by which they will arbitrate[.]" (*Viking River, supra*, 142 S. Ct. at 1923-1924, internal quotations omitted.) The court then turned to the specific arbitration agreement at issue and concluded that the waiver of PAGA claims was unenforceable "if construed as a wholesale waiver of PAGA claims." (*Id*. at 1924.) However, because there was a severability clause in the agreement which provided that if the waiver provision was invalid in some respect, any portion that remained valid was still to be enforced in arbitration, the court held that Viking River Cruises was still entitled to enforce arbitration of the plaintiff's *individual* PAGA claim. (*Ibid*.) The court lastly concluded that the non-individual PAGA claims that remained should be dismissed for lack of statutory standing.

It was this final conclusion in *Viking River* that was at issue in *Adolph*, with the court concluding that a PAGA plaintiff who is compelled to arbitrate his or her individual PAGA

claims *maintains* standing to assert the remaining non-individual PAGA (i.e., representative) claims in court. (*Adolph*, 14 Cal.5th at 1123.) Consequently, dismissal of the non-individual PAGA claims is *not* required when arbitration of individual PAGA claims is compelled, and "the trial court may exercise its discretion to stay the non-individual claims pending the outcome of the arbitration pursuant to section 1281.4 of the Code of Civil Procedure." (*Ibid*.)

With the foregoing in mind, the Court turns to the language of the Arbitration Agreement, as instructed by *Viking River*. Contrary to what Plaintiff argues, the agreement does *not* contain an unlawful wholesale waiver because by its terms the waiver section recognizes the severability of individual and representative claims, to wit:

> Covered disputes must be brought on an individual basis only and an individual award is the exclusive remedy that may be provided by the arbitrator. Neither you nor the company may submit a multi-plaintiff, class, collective or representative action for resolution under the Arbitration Program and no arbitrator has authority proceed with arbitration on that basis. Any disputes concerning the validity of the waiver included in this section will be decided by a court of competent jurisdiction, not by the arbitrator. *In those matters, we will assert that you have agreed to pursue all claims individually pursuant to arbitration and may ask a court to compel arbitration of your individual claims* …. In the event a court determines the waiver included in this section is unenforceable with respect to a dispute, then the waiver will not apply to that dispute. In that case, the dispute must be filed in a court of competent jurisdiction and that court will be the exclusive forum for that dispute.

(Arbitration Agreement, p. 1, emphasis added.)

This language is *not* ambiguous and does not run afoul of *Viking River's* holding that "the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate" (*Viking River, supra*, at 1913) because it does preclude such division but rather *expressly* recognizes the possibility that PAGA claims, which are both representative and individual in nature, can be divided by clearly stating that Guitar Center will seek arbitration of the individual claims. The Court agrees with Defendants' assertion that this language "equates to language dictating that if a remaining portion of a class or representative waiver remains valid, it can be compelled to arbitration." (Reply at 4:5-7.) This conclusion is further supported by the language that "[i]n the event a court determines the waiver included in this section is unenforceable with respect to *a* dispute, then the waiver will not apply to *that* dispute"; such language contemplates that the waiver may be unenforceable with respect to *particular* disputes, but not all. Here, the waiver of representative PAGA claims is undoubtedly unenforceable under *Iskanian* and thus those claims may be pursued in this Court. However, Plaintiff otherwise clearly agreed to arbitrate his *individual* claims, of which his individual PAGA claim is one, and thus there is no wholesale waiver which compels denial of Defendants' motion.

Given the foregoing, the Court will grant Defendants' motion to compel arbitration of Plaintiff's individual PAGA claim and, pursuant to the California Supreme Court's guidance in *Adolph*, will stay Plaintiff's representative PAGA claim pending the outcome of his individual claim pursuant to Code of Civil Procedure section 1281.4.

XX. CONCLUSION

Defendants' motion to compel is GRANTED with respect to Plaintiff's individual PAGA claim. Plaintiff's representative PAGA claim is stayed pending the outcome of his individual claim pursuant to Code of Civil Procedure section 1281.4.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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Calendar Line 6

Case Name:
Case No.:

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Calendar Line 7

Case Name: *Envirodigm, Inc. v. Apple, Inc.*
Case No.: 20CV373138

This is an action for breach of contract and trade secret misappropriation, among other things, based on Defendant Apple, Inc.'s ("Apple") alleged unauthorized use of an anodizing process developed by Plaintiff Envirodigm, Inc. ("Envirodigm") for its iPhones that was disclosed to Apple pursuant to a non-disclosure agreement ("NDA"). Before the Court is Apple's motion for this action to be designated as complex pursuant to Rule 3.400 of the California Rules of Court, which is opposed by Envirodigm, and Envirodigm's motion to seal certain related materials as well as its trade secret disclosure, which is unopposed by Apple. As discussed below, the Court GRANTS both motions.

XXI. BACKGROUND

A. Factual

According to the allegations of the first amended complaint ("FAC"), on September 12, 2012, Apple introduced the iPhone 5 as its latest iteration of the product. (See FAC, ¶ 10.) However, consumers indicated that they were unhappy with scratches and marks on their products. (*Id.*, ¶¶ 11-12.) On November 29, 2012, Greg Gentile of Apple arranged a meeting with Shawn Sahbari, a recognized leader in the area of semiconductor and electronic surface preparation and cleaning, to develop a better cleaning process for the iPhone's aluminum body. (*Id*., ¶¶ 13-15.) On November 30, 2012, Mr. Gentile emailed Mr. Sahbari to execute Apple's NDA, and requested that Mr. Sahbari create a chemical solution to clean certain aluminum samples for a December 5, 2012 meeting. (*Id.*, ¶¶ 16-17.) On December 13, 2012, Mr. Sahbari issued a report detailing his findings and recommendations to Apple. (*Id*., ¶ 17.) On January 25, 2013, Apple asked Mr. Sahbari to run the same lab tests on some aluminum samples from its production facilities in China, and sought help with the plating process for its products. (*Id.*, ¶ 18.) Mr. Sahbari developed an anodizing, polish and micro-etch surface preparation process that addressed Apple's scratching and marking problem, and Mr. Sahbari met with Apple on April 24, 2013 to discuss and describe the process and how it could be scaled for manufacturing purposes. (*Id.*, ¶¶ 18-19.) Mr. Sahbari and Mr. Gentile continued to discuss the progress made on the process, and on August 5, 2013, Mr. Gentile indicated that Apple had an interest in discussing microtech and other technologies with Envirodigm, including the color anodization process developed by Mr. Sahbari, and that as Mr. Sahbari's company name had changed to Envirodigm, a new NDA needed to be signed. (*Id.*, ¶¶ 20-23.)

On August 14, 2013, Mr. Sahbari met with Mr. Gentile, Apple engineer Rebecca Gilden and several other members of the Apple industrial design team, and Envirodigm showed Apple the chemical means of a superior coating and graphic anodizing, and Mr. Sahbari discussed Envirodigm's color anodization process and provided a power point presentation giving an overview of the process to the Apple team. (See FAC, ¶ 24.) After the August 14, 2013 meeting, Mr. Sahbari and Mr. Gentile exchanged emails indicating that the Envirodigm color anodization process provided a solution for Apple where a more robust finish is possible not prone to chipping or scratching off, and they agreed that it would make sense for Envirodigm to demonstrate the process on Apple's parts. (*Id.*, ¶¶ 25-27.) However, shortly thereafter, Apple went quiet on further discussions with Mr. Sahbari regarding the

matter until July 17, 2014, when Mr. Sahbari received an unsolicited email from a recruiter for Apple seeking his aid in the creation of newly highly cosmetic surface finishes by serving as the company's recognized technical leader to define surface chemistry and process requirements needed to deliver world class surface finishes, to which Mr. Sahbari declined. (*Id.*, ¶¶ 27-28.)

In September 2016, Apple released the iPhone 7, introducing an aluminum body created through what Apple promoted as an innovative nine-step process of anodization and polish for a uniform, glossy finish, beginning with an anodization phase to make the surface of the body a porous aluminum oxide, and then using a machine to sweep the body of the product through a powered compound, absorbed by aluminum oxide, and concluded with an ultrafine particle bath for additional finishing the profess that Envirodigm disclosed to Apple pursuant to the NDA in 2013. (See FAC, ¶ 29.) Mr. Sahbari had no reason to suspect Apple had used the process he disclosed pursuant to the NDA; however, in July 2017, Mr. Sahbari conducted a Google search related to other matters when he came upon an image of a red special edition of the iPhone 7, which was released on March 21, 2017, prompting him to visit a local Apple retail store to physically examine the special edition iPhone 7 product. (*Id.*, ¶¶ 30-31.) Only upon seeing the product did Mr. Sahbari for the first time suspect that this product likely utilized the anodizing process that Mr. Sahbari had confidentially discussed with Apple and which was the subject of the parties NDA. (*Id*.) The initially released iPhone 7 also utilized the anodizing process that Mr. Sahbari had confidentially shown Apple pursuant to the parties NDA; however, because of its lack of color, it was not apparent to Mr. Sahbari and Mr. Sahbari did not reasonably suspect, that the initially released iPhone 7 may have also utilized the anodizing process that Mr. Sahbari had confidentially discussed with Apple. (*Id.*, ¶ 33.)

B. Procedural

Based on the foregoing allegations, Apple initiated this action with the filing of the Complaint on November 5, 2020, asserting the following causes of action: (1) breach of contract; (2) unjust enrichment; (3) unfair business practice; (4) violation of the California Uniform Trace Secrets Act ("CUTSA"); (5) fraud; and (6) breach of implied covenant or good faith and fair dealing. After Apple demurred, Envirodigm filed the operative FAC asserting the same claims. Apple again demurred, and in May 2021, the motion was sustained with leave to amend as to the third and fifth cause of action and overruled with respect to the first, second, fourth and sixth causes of action. Envirodigm did not file an amended pleading, accordingly, four causes of action remain in the FAC for breach of contract, unjust enrichment, violation of the CUTSA and breach of the implied covenant of good faith and fair dealing.

XXII. MOTION FOR DESIGNATION AS COMPLEX CASE

C. Legal Standard

A "complex case" is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel. (Cal. Rules of Court, rule 3.400(a).)

> In deciding whether an action is a complex case under (a), the court must consider, among other things, whether the action is likely to involve:

(1) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;

(2) Management of a large number of witnesses or a substantial amount of documentary evidence;

(3) Management of a large number of separately represented parties;

(4) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or

(5) Substantial postjudgment judicial supervision.

(Cal. Rules of Court, rule 3.400(b).)

D. Discussion

Very early in this case, during a January 4, 2021 meet and confer call regarding Apple's demurrer to the FAC, Plaintiff asked Apple if it was amendable to, and requesting that, the action be designated as complex due to discovery that Plaintiff expected would yield a large amount of documents and likely contested discovery issues. Apple declined to do so, and the action proceeded, with the parties propounding discovery. Two years later, on January 5, 2023, Apple asked Envirodigm whether it would designate the case as complex; Plaintiff declined to so and Apple filed the instant motion.

Apple maintains that this case, the scope of which it describes as having "ballooned" since it was initially filed, should be deemed complex due to the following circumstances: (1) a substantial increase in the complexity of the action and the accompanying motion practice, (2) a substantial increase in the scope and volume of documentary evidence, and (3) the multiplying number of witnesses.

First, with regard to the nature of this case, Apple explains that in the FAC, Envirodigm focused on the surface finish of one device, the iPhone 7 and, after propounding discovery targeting information for that device, Apple produced over 50,000 documents. However, it maintains, Plaintiff significantly broadened the scope of its discovery- as a consequence of changes made to the trade secret upon which this case is predicated- to cover *thirty-two* devices. According to Apple, it has continuously faced difficulties when it comes to nailing down the exact trade secret Plaintiff alleges it misappropriated. Apple states that Plaintiff initially disclosed an anodizing process involving a specified number of steps in its Code Civil Procedure section 2019.210 disclosure served on September 15, 2021. After Apple challenged the foregoing as overly broad and containing public information, Plaintiff represented that its trade secret was the specific "combination" of the commonly known steps and specifications listed in the trade secret disclosure which must be followed in the disclosed order and using the same specifications to achieve the desired surface. After Apple served discovery responses confirming that it did not use the aforementioned process, Envirodigm purportedly shifted its claimed trade secrets without amending its disclosure by serving discovery responses and providing deposition testimony (by Mr. Sahbari) suggesting the existence and involvement of additional and/or differently defined trade secrets. Apple asserts that it presently lacks clarity on what trade secret/secrets Plaintiff claims it misappropriated.

At present, both sides have conducted numerous depositions. In July 2023, Envirodigm asked to depose eleven additional current and former Apple employees. According to Apple, three of these witnesses reside outside of the country (including in China, which prohibits participation in foreign depositions) and two reside out of California, making the logistics of scheduling their depositions complex and time-consuming. It continues that Plaintiff also served a deposition for a person most knowledgeable ("PMK") covering eleven topics and complying with this notice will require Apple to produce (or re-produce) multiple witnesses. All told, Apple asserts, there is currently a witness list in the double-digits and a complex designation is needed to prevent management of these witnesses from becoming "unwieldly."

As for written discovery, as of the date of the filing of this motion, Envirodigm has propounded sixty-eight interrogatories, fifty-seven requests for production and twenty-one request for admission. Apple has produced nearly 700,000 pages of documents. Apple, in turn, as of the date this motion was filed, has propounded seventy-six interrogatories, sixty-nine request for production and forty requests for admission. The parties have disagreed on the scope of discovery and many of these disputes, which the parties have been unable to resolve informally, have resulted in nearly a dozen prior motions on discovery and confidentiality designations. Currently, there are three motions to compel pending, as well as a motion by Apple to maintain confidentiality designations, which are currently set to be heard on December 21, 2023. The parties are presently meeting and conferring over purported deficiencies in Envirodigm's responses to Apple's recent requests for admission, requests for production and interrogatories, as well as two third-party subpoena's served by Plaintiff on a former Apple employee and a third-party company. In the period since this motion was filed, Apple served further requests for production of documents and special interrogatories on Envirodigm (on November 22) and a notice to depose Plaintiff's PMK on fifty topics (on November 27). Apple anticipates that it may need to serve more deposition notices on third parties.

Apple concludes that the circumstances above illustrate the need for a complex designation not just for management of upcoming discovery and pretrial motion practice (e.g., motions for summary judgment, challenges to expert testimony and the complicated science at issue), but for a trial as well as it will likely involve over a dozen facts witnesses, several expert witnesses, substantial documentary evidence, complex scientific issues, and a complicated damages analysis.

In its opposition, Plaintiff maintains that whatever efficiencies and benefits may have been conferred on the parties and the Court by virtue of a complex designation earlier in this case no longer exist because "deposition and written discovery are in its final phases, discovery-related motions have been fully briefed and are scheduled, and the parties have a clear path to trial in July of 2024." (Opp. at 1:4-7.) It further asserts that Apple has misrepresented the facts and history of this case, particularly with regard to its scope, arguing that contrary to what Apple states, it has never been Envirodigm's contention that this case is only about a single device, the iPhone 7; rather, it has always maintained that this case is about *all* iPhone models and any other Apple product that utilized the proprietary formula and process that Mr., Sahbari shared with Apple in 2013. Moreover, it continues, the trade secret has been the same since the parties met in August of 2013. Plaintiff insists that Apple is seeking a confidentiality designation at this stage of the proceedings solely for the purposes of delaying trial.

It must be noted that Plaintiff's opposition was filed just prior to when Apple's latest discovery was propounded and thus it is not entirely accurate to state that deposition and written discovery are in its "final phases." The Court cannot state with any confidence what the latest requests portend with regard to further discovery disputes, nor how the pending motions to compel will be resolved and if amended responses will be required subsequent to their disposition. As such, the present procedural posture of the case is not entirely clear. As for Plaintiff's objection to Apple's characterization of the scope of this case, while the Court agrees that the allegations of the initial complaint and FAC make clear that Envirodigm's claims are not limited to the iPhone 7 (see, e.g., FAC, ¶¶ 3, 25, 39, 41, 68), it finds less persuasive Plaintiff's insistence that the trade secret at issue has been clear since 2013. The trade secret disclosure served on Apple only described a multi-step anodization process, whereas testimony by Mr. Sahbari suggested that the trade secret included this process as well as a chemical etchant and an anodization additive. As a result of this, Apple was compelled to propound additional discovery.

On balance, the Court believes that this action warrants a complex designation. Although it is true, as Envirodigm argues in its opposition, that most of the factors set forth in Rule 3.400(b) are not implicated here, the second factor (management of a large number of witnesses or a substantial amount of documentary evidence) most certainly is, and the Court's determination of whether a case warrants a complex designation is not limited solely to the factors listed. Given this, the nature of the case (the alleged misappropriation of a trade secret involving complex scientific matters) and the amount of motion practice that has transpired between the parties, particularly in connection with discovery that has resulted in a substantial amount of documentary evidence and has yet to be completed, the Court believes that complex treatment will expedite the process, keeps costs reasonable and promote effective decision making by all involved.[6] (See Cal. Rules of Court, rule 3.400(a).) Accordingly, Apple's motion to designate this case as complex is GRANTED.

XXIII. MOTION TO SEAL

Envirodigm moves to seal the following:

- Portions of Apple's motion to deem this action complex (motion at 6:12-15, 6:25-27);
- Plaintiff's Confidential Trade Secret Designation ("TSD"), attached as Exhibit 1 to the Hodson Declaration filed in support of motion to deem this action complex;
- Plaintiff's Confidential TSD appended to parties' October 15, 2021 joint IDC letter, attached as Exhibit 2 to the Hodson Declaration;
- Plaintiff's Confidential TSD and Exhibit B thereto, attached as Exhibit 3 to the Hodson Decl.; and
- Excerpts of Mr. Sahbari's deposition, attached as Exhibit 4 to the Hodson Decl.

A. Legal Standard

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial

[6] The Court acknowledges Plaintiff's concern that designating this case as complex will delay trial in July 2024 and will do its utmost to avoid such a result unless absolutely warranted.

probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).) Pleadings, in particular, should be open to public inspection "as a general rule," although they may be filed under seal in appropriate circumstances. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 104, fn. 35.)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3 (*Providian*).) Confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285–1286.)

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

B. Discussion

As Envirodigm explains in its motion, the Court has already ruled that Plaintiff's TSD is sealed from public view, determining that:

> Plaintiff has established that: (1) There exists an overriding interest that overcomes the right of access to the records; (2) The overriding interest supports sealing the records; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest.

(November 8, 2022 Minute Order re: Motion to Seal.)

Given this fact, and that the materials that are the subject of this motion either consist of the TSD itself or refer to specific details contained therein, the Court finds that the requirements of California Rules of Court, rule 2.550(d) have been met. Accordingly, the motion to seal is GRANTED.

C. CONCLUSION

Apple's motion to designate this action as complex is GRANTED.

Envirodigm's motion to seal is GRANTED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

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

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

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

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