SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

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

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department19@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. 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: SEPTEMBER 11, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV400275	Bour v. Global Spectrum, LP, et al. (Class Action)	See Line 1 for tentative ruling.
LINE 2	19CV359055	Kaga FEI Co., Ltd. v. Cypress Semiconductor Corp.	See Line 2 for tentative ruling.
LINE 3	19CV359055	Kaga FEI Co., Ltd. v. Cypress Semiconductor Corp.	See Line 2 for tentative ruling.
LINE 4	18CV338800	Chambers v. Crown Asset Management, LLC (Class Action)	See Line 4 for tentative ruling.
LINE 5	20CV371934	Manalo v. San Jose, LLC, et al. (Class Action)	See Line 5 for tentative ruling.
LINE 6	20CV370503	Velocity Investments LLC v. Sipin	See Line 6 for tentative ruling.
LINE 7			
LINE 8			

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LAW AND MOTION TENTATIVE RULINGS

LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Bour v. Global Spectrum, LP, et al. (Class Action)
Case No.: 22CV400275

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 11, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a class and representative action arising out of alleged wage and hour violations. Plaintiff Kirstinn Bour ("Plaintiff") initiated this action on July 12, 2022 by filing a class action complaint against Defendants Global Spectrum, LP and Oak View Group, LLC ("Defendants"). On November 10, 2022, Plaintiffs filed the operative First Amended Class Action Complaint ("FAC"), setting forth the following causes of action:

(1) failure to pay minimum wages;
(2) failure to pay overtime wages;
(3) failure to provide meal periods;
(4) failure to permit rest breaks;
(5) failure to reimburse business expenses;
(6) failure to provide accurate itemized wage statements;
(7) failure to pay wages timely during employment;
(8) failure to pay all wages due upon employment;
(9) violation of Business & Professions Code §§ 17200, *et seq.*; and
(10) enforcement of Labor Code § 2698, *et seq.* ("PAGA").

The parties have reached a settlement. Plaintiffs now move for preliminary approval of the settlement. The motion is unopposed.

II. Legal Standard for Settlement Agreements

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

(*Wershba, supra,* 91 Cal.App.4th at p. 245, citation omitted.)

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) 596 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, 2016 U.S. Dist. LEXIS 140759, at *20-24.)

III. Discussion

A. Provisions of the Settlement

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

> [A]ll current and former non-exempt employees employed by Defendants in the State of California during the Class Period [January 16, 2018 through September 21, 2023].

(Declaration of Lisa B. Iturriaga ("Iturriaga Dec."), Ex. 1 ("Agreement"), ¶ 1.5, 1.12.)

The settlement also includes a subset PAGA class of Aggrieved Employees defined as "all current and former non-exempt employees employed by Defendants in the State of California at any time during the PAGA Period [July 12, 2021 through September 21, 2023]." (Agreement, ¶¶ 1.4, 1.31.)

According to the terms of the settlement, Defendant will pay a gross settlement amount of $447,500. (Agreement, ¶¶ 1.22, 3.1.) The gross settlement amount includes a service payment to Plaintiff of $12,500, attorney fees up to 35% of the gross settlement amount

($156,625), litigation costs not to exceed $25,000, settlement administration costs to exceed $7,950, a PAGA allocation of $35,000 (with 75% allocated to the LWDA and 25% allocated to Aggrieved Employees). (*Id.* at ¶¶ 3.2.1-3.2.3, 3.2.5.) The court approves CPT Group as the settlement administrator. The net settlement amount will be distributed to participating class members on a pro rata basis according to the number of workweeks they were employed by Defendant. (*Id.* at ¶ 3.2.4.) Similarly, payments to Aggrieved Employees will be distributed on a pro rata basis according to the number of pay periods worked. (*Id.* at ¶ 3.2.5.1.)

The Agreement states that individual settlement payment checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be distributed to the California Controller's Unclaimed Property Fund. (Agreement, ¶¶ 4.4.1, 4.4.3.) The parties' proposal to send funds from uncashed checks issued to class member to the State of California Unclaimed Property Fund does not comply with Code of Civil Procedure section 384, which mandates that unclaimed or abandoned class members funds be given to "nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent."

The court is disinclined to grant preliminary approval of a settlement that does not comply with Code of Civil Procedure section 384. Therefore—prior to the upcoming hearing, if possible—the parties are encouraged to designate a *cy pres* recipient by agreement in writing (for example, by stipulation). Otherwise, the motion will be CONTINUED to December 18, 2024.

In exchange for the settlement, the class members agree to release Defendant, and related entities and persons, from all claims that were, or reasonably could have been, alleged based on the facts pleaded in the FAC occurring during the Class Period. (Agreement, ¶¶ 1.41, 6.2.) Aggrieved Employees agree to release Defendant, and related entities and persons, from all claims for PAGA civil penalties that were alleged based on facts pleaded in the FAC and the LWDA notice. (*Id.* at ¶¶ 1.41, 6.3.) Plaintiffs also agree to comprehensive general release. (*Id.* at ¶ 6.1.) The scope of the release provisions are appropriately tied to the

factual allegations in the complaint. (See *Amaro Arean Management, LLC* (2021) 69 Cal.App.5th 521, 538.)

B. Fairness of the Settlement

Plaintiff states that the settlement was reached through discovery, analysis, and mediation with Hon. Lisa Hart (Ret.). (Iturriaga Dec., ¶ 6.) Prior to mediation, Plaintiff obtained information through formal and informal discovery and engaged an expert to quantify potential exposure. (*Id.* at ¶ 10.) Plaintiff contends her claims are based on Defendants' common, class-wide policies and procedures, and she asserts that the settlement amount is a fair and reasonable compromise figure. (*Id.* at ¶¶ 10-13.)

Plaintiffs present an analysis of the value of their claims, including Defendant's estimated maximum exposure and realistic exposure for each claim. (Iturriaga Dec., ¶¶ 12-20.) According to Plaintiff's exposure analysis, Defendant's total maximum potential liability for all claims is approximately $3,648,498, while its total realistic exposure for all claims amounts to approximately $490,437. (*Ibid.*) Plaintiffs provide a breakdown of these amounts by claim. (*Ibid.*) Defendants estimate there are 296 Class Members who collectively worked a total of 11,491 workweeks, and 281 Aggrieved Employees who worked a total of 4,963 PAGA pay periods. (Agreement, ¶ 4.1.) Based on the class size, the average net payment to Class Members will be approximately $710.90.

The gross settlement amount of $447,500 represents approximately 13.4% of the maximum potential recovery. Therefore, the proposed settlement amount is within the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D. Cal., Feb 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist. LEXIS 30201, at *41-42 [citing cases approving settlements in the range of 5 to 35 percent of the maximum potential exposure].)

The court has reviewed Plaintiff's written submissions in support of the proposed settlement. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation. Based on the circumstances of the case, including the strength of Plaintiffs' case and the likelihood of obtaining recovery from Defendant, the court finds the terms of the settlement to be fair.

C. Incentive Award, Fees and Costs

Plaintiff requests an incentive award of $12,500.

> The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks, brackets, ellipses, and citations omitted; see also *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].).

Plaintiff submitted a declaration describing her participation in this action. (Declaration of Kristinn Bour, ¶¶ 8-17.) Plaintiff states her participation has included communicating with her attorneys, gathering documents, responding to discovery and requests for information, preparing for mediation, and reviewing key documents. (*Id.* at ¶¶ 8-11.) She states that she delayed potential recovery to herself by pursuing this action on a class basis and that she knowingly undertook risk to her future employment by attaching her name to this case. (*Id.* at ¶¶ 14-16.) Plaintiff estimates that she has spent approximately 40 hours of her time, not including time that may be spent on future tasks. (*Id.* at ¶ 17.)

Plaintiff has spent time in connection with this litigation, has undertaken risk by attaching her name to this case because it might impact her future employment, and has agreed to a comprehensive release. While the court agrees with Plaintiff that a service award is justified, the amount requested is more than the court normally awards in similar circumstances. Accordingly, the court finds reasonable and approves a service award to Plaintiff in the amount of $10,000.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel will seek attorney fees of up to 35% of the gross settlement amount ($156,625) and litigation costs not to exceed $25,000. Prior to the final approval hearing, Plaintiff's counsel shall submit lodestar information (including hourly rate and hours worked) so the court can compare the lodestar information with the requested fees. Plaintiff's counsel shall also submit evidence of actual costs incurred as well as evidence of any settlement administration costs.

D. Conditional Certification of Class

Plaintiff requests that the class be conditionally certified for purposes of the settlement. 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 . . . ." As interpreted by the California Supreme Court, section 382 requires: (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 (*Sav-On*).)

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, supra,* 34 Cal.4th at p. 326.) "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.)

As explained by the California Supreme Court,

> The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. A trial court ruling on a

> certification motion determines 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 advantageous to the judicial process and to the litigants.

(*Sav-On, supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiff states there are approximately 296 class members, who can be identified from a review of Defendant's records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

The content of a class notice is subject to court approval. "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court." (Cal. Rules of Court, rule 3.769(f).) "The 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 describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement or object. (Agreement, pp. 21-30.) The settlement amounts, including the attorney fees and payment to the named plaintiff, are stated. The notice directs class members that they may appear at the final fairness hearing to make an oral objection without filing a written objection and provides instructions for attending the hearing remotely.

However, the final paragraph beginning on the first page of the class notice is misleading as it states that class members "have two basic options under the Settlement": (1) "Do Nothing"; and (2) "Opt-Out of the Class Settlement." This portion of the class notice

must be modified to reflect that class members have a third option—they may object to the settlement.

Also, section 8 of the class notice must be amended to include the following language regarding the final approval hearing:

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

Further, as discussed above, Plaintiff shall provide a *cy pres* recipient in compliance with Code of Civil Procedure section 384, and the class notice must be amended to indicate this change.

IV. Conclusion

Accordingly, unless the parties are able to designate a *cy pres* recipient by agreement in writing (for example, by stipulation) prior to the upcoming hearing, the motion for settlement approval will be CONTINUED to December 18, 2024 in Department 19 at 1:30 p.m.

Prior to the continued hearing, Plaintiffs' counsel shall provide the parties' stipulation regarding a new *cy pres* recipient in compliance with Code of Civil Procedure section 384 as well as the revised class notice. Prior to the final approval hearing (presuming the court grants preliminary approval upon resolution of the *cy pres* issue) Plaintiff's counsel shall submit lodestar information (including hourly rate and hours worked) and evidence of actual costs incurred as well as evidence of any settlement administration costs.

Plaintiffs shall prepare the order.

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Calendar Lines 2 – 3

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

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 11, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

Plaintiff Kaga FEI Co. ("KFEI") alleges that Defendant Cypress Semiconductor Corporation ("Cypress") breached the parties' agreement (the "Distributor Agreement") governing KFEI's role as a nonexclusive distributor of Cypress products.[1]

On November 25, 2019, KFEI filed a Complaint against Cypress, setting forth causes of action for: (1) breach of contract; and (2) breach of the covenant of good faith and fair dealing. On September 10, 2021, KFEI filed a First Amended Complaint, setting forth the same causes of action against Cypress.

On May 12, 2023, KFEI filed a Second Amended Complaint against Cypress, setting forth causes of action for: (1) breach of the Distributor Agreement; (2) breach of the covenant of good faith and fair dealing; (3) breach of September 5, 2017 settlement agreement; (4) breach of October 28, 2016 letter agreement; (5) fraudulent inducement/intentional misrepresentation; (6) false promise; (7) intentional interference with contractual relations; and (8) intentional interference with prospective economic relations.

On March 25, 2024, KFEI filed the operative Third Amended Complaint ("TAC") against Cypress, setting forth causes of action for: (1) breach of the Distributor Agreement; (2) breach of the covenant of good faith and fair dealing; (3) fraudulent inducement/intentional misrepresentation; (4) false promise; (5) intentional interference with contractual relations; (6) intentional interference with prospective economic relations; and (7) implied contractual indemnity/equitable indemnity.

[1] On March 9, 2021, Plaintiff KFEI notified that it changed its corporate name from Fujitsu Electronics Inc. to Kaga FEI Co., Ltd.

On April 29, 2024, Cypress filed its operative Third Amended Cross-Complaint ("TACC") against KFEI, setting forth the following causes of action: (1) breach of the Distributor Agreement; (2) fraudulent concealment; (3) civil conspiracy; (4) breach of the covenant of good faith and fair dealing; (5) Business & Professions Code section 17200 (unfair business act and practices).

As relevant here, the TAC sets forth the following allegations: KFEI is an electronic components trading company based in Japan, with a large and prestigious portfolio of Japanese manufacturing customers. (TAC, ¶¶ 2, 17.) Cypress is a global company based in the United States that designs and manufactures memory chips and micro controllers used to power electronic devices. (*Id.* at ¶¶ 18-19.)

On September 10, 2015, KFEI and Cypress entered into the Distributor Agreement whereby they agreed that KFEI would act as a nonexclusive distributor of Cypress products to Japanese companies and their offshore affiliates. (TAC, ¶ 3.) The parties expected that KFEI would distribute hundreds of millions of dollars in Cypress products to its Japanese customers per year, and KFEI in fact did so. (*Id.* at ¶ 4.) In late 2016, Cypress appointed new management who implemented a strategy called "Cypress 3.0" and designed to increase profitability and position Cypress for acquisition. (*Id.* at ¶ 5.) On April 10, 2019, Cypress provided KFEI with a notice of termination. (*Id.* at ¶ 12.)

Under the Distributor Agreement, Cypress made certain warranties. (TAC, ¶ 260, Ex. A (the Distributor Agreement).) After certain defects and/or non-compliance were discovered, Cypress accepted responsibility (in whole or in part) but refused to honor in full certain warranty claims. (*Id.* at ¶ 261.) After Cypress and its replacement distributors failed to honor warranty claims, certain customers demanded compensation from KFEI even though KFEI was no longer serving as a distributor of Cypress products. (*Id.* at ¶ 262.)

Under separate agreements between KFEI and its customers, KFEI warranted the quality of the products it distributed (including some products designed and manufactured by Cypress) and also agreed to compensate customers for defective products. (*Id.* at ¶ 263.) As a result of Cypress's failure to pay, as well as KFEI's contractual obligations to its customers, KFEI was obligated to compensate its customers for Cypress's provision of defective and/or

non-compliant products. (*Id.* at ¶ 264.) KFEI engaged in extensive negotiations with each of these customers to reduce their compensation claims but was ultimately forced to incur costs to resolve the claims. (*Ibid.*)

The payments made by KFEI to settle these warranty claims were caused by Cypress's actions and inactions, including its refusal to supply products free from defects and honor its warranty obligations under the Distributor Agreement, as well as its failure to pay amounts demanded by specific customers, even though Cypress agreed that the products supplied to these customers did not meet Cypress's quality standards. (*Id.* at ¶ 265.) KFEI's payments to these customers arose not because of any fault on the part of KFEI, but because of KFEI's contractual relationships with these customers. (*Id.* at ¶ 266.)

According to the TAC, KFEI is entitled to equitable indemnity from Cypress in a specified amount for the resolution of the claims of certain customers, and Cypress has not paid any of these amounts to KFEI. (TAC, ¶ 267.)

Currently before the court are: (1) Cypress's demurrer to KFEI's TAC; (2) motions to seal related to Cypress's pending demurrer; and (3) Cypress's motion seal portions of its TACC. KFEI opposes the demurrer, and the motions to seal are unopposed.

II. Demurrer to the TAC

Defendant and Cross-Complainant Cypress demurs to the seventh cause of action of KFEI's TAC on the ground that it fails to sufficient facts. (Notice of Demurrer and Demurrer, p. 2:3-10; Code Civ. Proc., § 430.10, subd. (e).)

A. Legal Standard

A demurrer tests the legal sufficiency of the complaint. (*Chen v. PayPal, Inc.* (2021) 61 Cal.App.5th 559, 568 (*Chen*).) Consequently, it "reaches only to the contents of the pleading and such matters as may be considered under the doctrine of judicial notice." (*Weil v. Barthel* (1955) 45 Cal.2d 835, 837; see also Code Civ. Proc., § 430.30, subd. (a).) "It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. … Thus, … the facts alleged in the pleading are deemed to be true, however improbable they may be." (*Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958, internal quotations and citations omitted.)

In ruling on a demurrer, the allegations of the complaint must be liberally construed, with a view to substantial justice between the parties. (*Glennen v. Allergan, Inc.* (2016) 247 Cal.App.4th 1, 6.) Nevertheless, while "[a] demurrer admits all facts properly pleaded, [it does] non [admit] contentions, deductions or conclusions of law or fact." (*George v. Automobile Club of Southern California* (2011) 201 Cal.App.4th 1112, 1120.) A demurrer will succeed where the allegations and matter subject to judicial notice clearly disclose a defense or bar to recovery. (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 183.)

B. Discussion

Cypress contends that the TAC's seventh cause of action fails due to the provisions of the parties' Distributor Agreement and because the TAC does not sufficiently allege the elements of the cause of action. (Cypress's Memorandum of Points and Authorities in Support of Demurrer to TAC ("Cypress's MPA"), p. 2:5-13.) In opposition, KFEI maintains that the Distributor Agreement does bar its implied indemnity claim and that the TAC sufficiently alleges the requisite elements. (KFEI's Opposition to Cypress's Demurrer to TAC ("KFEI's Opp."), pp. 1:13-2:2.)

i. Effect of the Distributor Agreement

Cypress initially contends that the parties expressly agreed in the Distributor Agreement that Cypress does not a have the indemnity obligation that KFEI now seeks to enforce. (Cypress's MPA, p. 3:19.) The TAC's seventh cause of action references both "implied contractual indemnity" and "equitable indemnity." (See TAC, p. 46:19.) As observed by Cypress, the California Supreme Court has explained indemnity as its forms as follows:

> In general, indemnity refers to the obligation resting on one party to make good a loss or damage another party has incurred. Historically, the obligation of indemnity took three forms: (1) indemnity expressly provided for by contract (express indemnity); (2) indemnity implied from a contract not specifically mentioning indemnity (implied contractual indemnity); and (3) indemnity arising from the equities of particular circumstances (traditional equitable indemnity).
>
> Although the foregoing categories of indemnity were once regarded as distinct, we now recognize there are only two basic types of indemnity: express indemnity and equitable indemnity. Though not extinguished, implied contractual indemnity is now viewed simply as a form of equitable indemnity.

(*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1157 (*Prince*), internal punctuation and citations omitted.)

Express indemnity is an obligation that arises "by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances." (*Prince*, *supra*, 45 Cal.4th at p. 1158, quoting and citing *Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1029.) "Express indemnity generally is not subject to equitable considerations or a joint legal obligation to the injured party; rather, it is enforced in accordance with the terms of the contracting parties' agreement." (*Prince*, *supra*, 45 Cal.4th at p. 1158, citing *Markley v. Beagle* (1967) 66 Cal.2d 951, 961 (*Markley*).) "Unlike express indemnity, traditional equitable indemnity requires no contractual relationship between an indemnitor and an indemnitee. Such indemnity is premised on a joint legal obligation to another for damages, but it does not invariably follow fault." (*Prince*, *supra*, 45 Cal.4th at p. 1158.)

"Each of these two basic forms of indemnity is subject to its own distinctive legal rules and limitations." (*E.L. White, Inc. v. Huntington Beach* (1978) 21 Cal.3d 497, 507 (*E.L. White*).)

> "Within the limitations of the language used, however, an express indemnity clause is accorded a certain preemptive effect, displacing any implied rights which might otherwise arise within the scope of its operation. Thus, as we stated in [*Markley*, *supra*, 66 Cal.2d at p. 961], when parties by express contractual provision establish a duty in one party to indemnify the other, 'the extent of *that duty* must be determined from the contract and not from the independent doctrine of equitable indemnity.' (Italics added.) [Citations.] When, however, the duty established by contract is by the terms and conditions to the particular factual setting before the court, the equitable principles of indemnity may indeed come into play.

(*Id.* at pp. 507-508.)

Cypress contends that equitable principles of indemnity do not come into play because any indemnity owed by Cypress to KFEI is expressly restricted by the indemnity provisions found within the Distributor Agreement. (Cypress's MPA, p. 4:1-10, referencing the Distributor Agreement, § 14.1.) According to Cypress, the terms of the Distributor Agreement confines indemnification to particular claims not present here. (*Ibid.*) Cypress also points to the "limited product warranty" provisions of the Distributor Agreement, found at section 10.4. (*Id.* at

p. 4:11-19.) According to Cypress, section 10.4.2 is directly applicable here and, additionally and independently from section 10.4, precludes KFEI's claim for indemnification.

In opposition, KFEI contends that the Distributor Agreement's indemnification provisions do not have a relevant preemptive effect because they do not address whether or not Cypress has a duty to indemnify KFEI under the circumstances presented here. (KFEI's Opp., pp. 4:14-5:4.) KFEI points to language from section 4.3 of the Distributor Agreement and asserts that it brings into play equitable considerations, including the goal of preventing Cypress's unjust enrichment. (*Id.* at pp. 4:20-23, 5:5-8.)

The court has carefully reviewed the Distributor Agreement (incorporated into the TAC as Exhibit A, filed separately under seal), with special attention to the particular provisions identified by the parties. The court concludes that the provisions in question do not necessarily address the indemnification claim asserted by the TAC's seventh cause of action. (See Distributor Agreement, attached as Exhibit In light of of the applicable motions to seal and the parties' Mutual Confidentiality Agreement (discussed further below), the court explains its reasoning in general terms as follows: First, section 14.1 of the Distributor Agreement sets forth an express indemnification provision related to intellectual property, and the parties apparently agree that section 14.1 does not address KFEI's indemnification claim as stated in the TAC. Next, section 14.4 of the Distributor Agreement also expressly excludes Cypress's liability for certain claims and certain amounts and types of damages.

Nevertheless, the court does not interpret the indemnification provisions of the Distributor Agreement to encompass all possible indemnification claims that a distributor, such as KFEI here, might bring. For instance, notwithstanding the indemnification claims identified and damages that are specifically disallowed, section 14 suggests that a distributor can still bring a claim for indemnification against Cypress based on a theory not specifically foreclosed by the Distributor Agreement. However, recovery under such a claim is limited to those damages not specifically excluded by the language of section 14.4.

Thus, absent a more detailed factual inquiry into the nature of the indemnification claims and corresponding damages, the court cannot say as a matter of law that the indemnification claims asserted in the TAC's seventh cause of action are completely and

necessarily subject to demurrer due to the Distributor Agreement. Based on the TAC's allegations, it is possible that Distributor Agreement's express indemnity provisions are inapplicable, in which case, "the equitable principles of implied indemnity may indeed come into play." (*E.L. White*, *supra*, 21 Cal.3d at p. 508; see also *Chen*, *supra*, 61 Cal.App.5th at p. 568 [a demurrer tests the legal sufficiency of the complaint, admitting all material facts properly pleaded and facts that are reasonably implied or may be inferred from the complaint's express allegations].)

Accordingly, the Distributor Agreement does not provide a sufficient basis to sustain the demurrer.

ii. Elements of Equitable Indemnity

Cypress next contends that KFEI has not adequately pled the elements of equitable indemnity. (Cypress's MPA, p. 5:18.) More specifically, Cypress argues that the TAC fails to allege both Cypress's legal obligation to KFEI customers and damages attributable to Cypress. (*Id.* at pp. 6:7, 8:17.) KFEI counters that the TAC adequately alleges these elements. (KFEI's Opp., pp. 9:1, 10:22.)

"The elements of a cause of action for indemnity are (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is … equitably responsible. [Citation.]" (*Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 217 (*Bailey*), quoting and citing *Expressions at Rancho Niguel Assn. v. Ahmanson Developments, Inc.* (2001) 86 Cal.App.4th 1135, 1139 (*Expressions*).) "The right to indemnity flows from payment of a joint legal obligation on another's behalf. [Citations.]" (*Expressions*, *supra*, 86 Cal.App.4th at p. 1139.)

As relevant here, the TAC alleges the following:

> ¶ 260. Under the Distributor Agreement, Cypress [made certain warranties].
>
> ¶ 261. After defects and/or non-compliance were discovered in Cypress's [products], Cypress accepted responsibility for the defects and non-compliance (in whole or in part), but refused to honor in full the warranty claims of [customers].
>
> ¶ 262. Given the failure of Cypress and its replacement distributors to honor warranty claims, [customers] each demanded compensation from KFEI even though KFEI was no longer serving as distributor of Cypress products.

> ¶ 263. Under [agreements between KFEI and customers], KFEI warranted the quality of products it distributed, including [products] designed and manufactured by Cypress, and also agreed to compensate customers for defective products.
>
> ¶ 264. As a result of Cypress's failure to pay, as well as KFEI's contractual obligations to its customers, KFEI was obligated to compensate its customers for Cypress's provision of defective and/or non-compliant products. KFEI engaged in extensive negotiations with each of these customers to reduce their compensation claims, but was ultimately forced to incur [specified amounts] to resolve the claims of [customers].
>
> ¶ 265. The payments made by KFEI to settle these warranty claims were caused by Cypress's action and inactions, including its refusal to supply products free from defects and honor its warranty obligations under the Distributor Agreement, as well as its failure to pay amounts demanded by [customers] even though agreeing that the products supplied to these customers did not meet Cypress's quality standards.
>
> ¶ 266. KFEI's payments to [customers] arose not because of any fault on the part of KFEI, but because of KFEI's contractual relationships with these customers.
>
> ¶ 267. KFEI is entitled to equitable indemnity from Cypress [in specified amounts for resolution of customer's claims]. However, Cypress not paid any of these amounts.

(TAC, ¶¶ 260-267.)

In the court's view, these allegations sufficiently state a claim for equitable indemnity against Cypress because they allege fault on the part of Cypress and resulting damages incurred by KFEI. (See *Bailey*, *supra,* 199 Cal.App.4th at p. 217.) Cypress asserts that the allegations lack a showing of a joint legal obligation owed by Cypress and KFEI to KFEI's customers. (Cypress's MPA, p. 6:7-17.) However, *Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, a case relied by Cypress states that "[t]raditional equitable indemnity is rooted in principles of equity, and requires no contractual relationship between an indemnitor and an indemnitee." (*Id*. at p. 573, internal quotations and citations omitted.)

As KFEI argues in opposition, the TAC alleges, at a minimum, that Cypress made certain promises with respect to the review of claims for reimbursement from end users. (KFEI's Opp., pp. 3:16-26 [citing the Distributor Agreement, § 10.4.2], 6:13-16; see also TAC.) The TAC also alleges that, historically, KFEI customers would notify KFEI of defects and KFEI would then notify Cypress, who would reimburse KFEI for payments KFEI made to customers to resolve damage, loss, and expense claims. (TAC, ¶ 156.)

The TAC further alleges that, beginning in 2017 and as part of the "Cypress 3.0" strategy, Cypress began to "systematically deny" KFEI's requests for reimbursement for payments made to KFEI customers, including payments that Cypress agreed to make. (*Id.* at ¶ 157.) As set forth above, the TAC also alleges that KFEI incurred specific sums in damages, not through its own fault, but as the result of the Cypress's failure to pay reimbursement claims. (TAC, ¶¶ 264-266.)

Thus, the court finds that the TAC adequately pleads the elements of the seventh cause of action, and whether KFEI can ultimately prove these elements is not before the court at this time. (*Chen, supra,* 61 Cal.App.5th at p. 568 [a demurrer tests the legal sufficiency of the complaint, admitting all material facts properly pleaded and facts that are reasonably implied or may be inferred from the complaint's express allegations].)

Accordingly, the demurrer to the TAC's seventh cause of action is OVERRULED.

III. Motions to Seal

The parties have moved to seal their respective papers filed in connection with Cypress's demurrer to the TAC. Cypress has also moved to seal portions of its TACC filed on April 29, 2024. The motions to seal are unopposed.

A. Legal Standard

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

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn.

3 (*Providian*).) "[A] binding contractual agreement not to disclose" may suffice. (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 107.) In addition, confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285-1286 (*Universal*).)

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

B. Motions to Seal Relating to Cypress's Demurrer

Before the court are three motions to seal relating to Cypress's instant demurrer. First, Cypress moves to seal the redacted portions of its MPA submitted in support of its demurrer. Cypress explains that the material at issue contains private business information from the Distributor Agreement between Cypress and KFEI, which may not be publicly disclosed pursuant to the "Mutual Confidentiality Obligation" found at Section 13 of the Distributor Agreement. (Declaration of Elspeth V. Hansen [filed April 26, 2024], ¶ 3.) The redacted portions of Cypress's MPA describe confidential and sensitive terms of the Distributor Agreement and disclose details relating to warranties, the handling of disputes, and information about specific customers. (*Id.* at ¶ 4.) This information is not publicly available, and its disclosure could have significant negative effects on Cypress's business and harm the parties' future negotiations. (*Id.* at ¶ 5.)

Second, KFEI moves to seal the redacted portions of its brief filed in opposition to Cypress's demurrer. KFEI explains that the material at issue relates to its business relationships, business strategy, and financial information and may not be disclosed pursuant to the Mutual Confidentiality Agreement found at Section 13 of the Distributor Agreement between KFEI and Cypress. (Declaration of Benjamin P. Smith [filed July 10, 2024], ¶¶ 3-4.)

The redacted portions of KFEI's opposition brief describe the terms of the Distributor Agreement as well as related sensitive financial details. (*Id.* at ¶ 4.) The public disclosure of this information could have a significant negative effects on KFEI's business. (*Id.* at ¶ 5.)

Third, Cypress moves to seal the redacted portions of its reply in support of its demurrer. Cypress explains that the material at issue contains private business information from the Distributor Agreement between Cypress and KFEI, which may not be publicly disclosed pursuant to the "Mutual Confidentiality Obligation" found at Section 13 of the Distributor Agreement. (Declaration of Elspeth V. Hansen [filed August 27, 2024], ¶ 3.) The redacted portions of Cypress's MPA describe confidential and sensitive terms of the Distributor Agreement and disclose details relating to warranties, the handling of disputes, and information about specific customers. (*Id.* at ¶ 4.) This information is not publicly available, and its disclosure could have significant negative effects on Cypress's business and harm the parties' future negotiations. (*Id.* at ¶ 5.)

These proposed sealing appears to be narrowly tailored to confidential information. Therefore, the court finds that the parties have established overriding interests that justify sealing these materials and that the other factors set forth in rule 2.550 are satisfied. (See *Universal*, *supra*, 110 Cal.App.4th 1273 at p.1286 [information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party].)

Accordingly, the three motions to seal relating to Cypress's demurrer to KFEI's TAC are GRANTED.

C. Cypress's Motion to Seal Portions of its TACC

Cypress moves to seal portions of its TACC (Third Amended Cross-Complaint), filed on April 29, 2024. Cypress explains that Cypress explains that the material at issue contains private business information from the Distributor Agreement between Cypress and KFEI, which may not be publicly disclosed pursuant to the "Mutual Confidentiality Obligation" found at Section 13 of the Distributor Agreement. (Declaration of Elspeth V. Hansen [filed

April 29, 2024], ¶ 3.) The redacted portions of Cypress's MPA describe confidential and sensitive terms of the Distributor Agreement and disclose details relating to warranties, the handling of disputes, and information about specific customers. (*Id.* at ¶ 4.) This information is not publicly available, and its disclosure could have significant negative effects on Cypress's business and harm the parties' future negotiations. (*Id.* at ¶ 5.)

The proposed sealing of Cypress's TACC appears to be narrowly tailored to confidential information. Although, as a general rule, pleadings should be open to public inspection, they may be filed under seal in appropriate circumstances. (*Mercury, supra*, 158 Cal.App.4th at p. 104, fn. 35.) The court finds that such appropriate circumstances are present here because Cypress has established an overriding interest that justifies sealing these materials and that the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra*, 110 Cal.App.4th 1273 at p.1286 [information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party].)

Accordingly, Cypress' motion to seal portions of its TACC is GRANTED.

IV. Conclusion

The demurrer to the TAC's seventh cause of action is OVERRULED.

The motions to seal are GRANTED.

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

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Calendar Line 3

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

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Calendar Line 4

Case Name: Chambers v. Crown Asset Management, LLC (Class Action)
Case No.: 18CV338800

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 11, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative consumer class action brought pursuant to the California Fair Debt Buying Practices Act, Civil Code section 1788.50-1788.64 ("CFDBPA"). According to the Class Action Complaint for Statutory Damages ("Complaint"), filed on December 4, 2018, plaintiff Pamela Shereé Chambers ("Plaintiff") seeks statutory damages against defendant Crown Asset Management, LLC ("Defendant") arising from its routine practice of sending initial written communications in smaller that 12-point type. (Complaint, ¶ 1.) The Complaint sets forth a single cause of action under the CFDBPA.

On December 27, 2022, the court granted Plaintiff's motion for class certification. On January 10, 2023, the court entered a Stipulation Regarding Type Size and Order Thereon, which provides that the collection letter attached as Exhibit 1 to the Complaint provided the notice required by Civil Code section 1788.52, subdivision (d)(1) in 10-point type size.

The parties reached a settlement, and Plaintiff and Defendant jointly moved for preliminary approval. The court initially continued the hearing on the motion and asked Plaintiff's counsel to submit a supplemental declaration estimating Defendant's maximum potential liability for statutory damages to the class and explaining how the estimate was reached given Defendant's net worth. Thereafter, Plaintiff's counsel filed a supplemental declaration. On January 2, 2024, the court entered an order granting preliminary approval of the settlement.

Now before the court are (1) the parties' joint motion for final approval of the settlement and (2) Plaintiff's unopposed motion for approval of her attorney fees, costs, and service award.

II. Legal Standard

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

III. Terms and Administration of Settlement

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

> All persons with addresses in California to whom McCarthy, Burgess & Wolff, Inc., sent, or caused to be sent, an initial written communication in the form of Exhibit "1" [attached to the Complaint] on behalf of [Defendant] in an attempt to collect a charged-off consumer debt originally owed to Synchrony Bank, which was sold or resold to [Defendant] on or after January 1, 2014, which were

not returned as undeliverable by the U.S. Post Office during the period December 4, 2017, through the date of class certification.

Defendant will pay a non-reversionary amount of $158,095 to the class (i.e., no less than $35 to each of the estimated 4,517 class members). Defendant will pay all costs associated with settlement administration, statutory damages in the amount of $1,000 to Plaintiff, a service award not to exceed $3,500 to Plaintiff, and attorney fees and costs not to exceed $250,000.

The class fund will be distributed to the class members on a pro rata basis. Settlement checks will become void 90 days after mailing and funds from uncashed checks will be distributed to the Katherine & George Alexander Community Law Center. The *cy pres* recipient is approved.

In exchange for the settlement, class members agree to release Defendant, and related persons and entities, from all claims alleging a violation of Civil Code section 1788.52, subdivision (d)(1) or similar related claims or causes of action, arising from or relating to collection letters mailed on behalf of Defendant in the form attached as Exhibit 1 to the Complaint during the class settlement period.

On June 4, 2024, the settlement administrator mailed the Notice of Class Action Settlement to 4,490 class members. (Declaration of American Legal Claim Services, LLC Regarding Due Diligence in Noticing, ¶ 4.) The administrator clarifies that the initial mailing list contained 4,517 records, but this number was reduced to 4,490 after duplicates were identified. (*Id.* at ¶ 3.) Ultimately 364 of the mailed notices were deemed undeliverable, and the remaining 91.89% of the notices were deemed delivered. (*Id.* at ¶¶ 5, 6.) As of August 3, 2024, the administrator received one request for exclusion and no objections to the proposed settlement. (*Id.* at ¶¶ 7, 8.) Thus, the notice process has now been completed. According to the court's calculation, each class member should receive about $35.21.

At preliminary approval, the court found the settlement to be fair and reasonable. It finds no reason to deviate from this finding now, given there are no objections. Accordingly, the court finds that the settlement is fair and reasonable for purposes of final approval.

IV. Attorney Fees, Costs, and Incentive Award

Plaintiff requests a service award of $3,500.

> The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, internal punctuation and citations omitted.)

Plaintiff Pamela Shereé Chambers submitted a declaration and states that her participation in this action included communication with her attorneys, preparing for and attending her deposition (which lasted a total of nine hours over two days), and reviewing relevant documents, including those related to discovery. The court finds that the requested service award is reasonable and appropriate, and therefore approves a service award to Plaintiff in the amount of $3,500.

The benefits achieved by the settlement justify an award of attorney fees to class counsel. Plaintiff seeks a fee and costs award in the amount of $229,010.62. (Declaration of Fred W. Schwinn, ¶¶ 15-18, Ex. A.) This amount is less than the $250,000 maximum negotiated by the parties as stated in the settlement agreement.

The court has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) The lodestar method is a recognized method for calculating attorney fees in civil class actions and is appropriately employed in this case. (See *Wershba*, *supra*, 91 Cal.App.4th at p. 254 ["Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method."]; *Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 556–557 [trial court properly awarded attorney fees in consumer class action based on lodestar method where there was no "common fund" justifying a percentage recovery].)

> The lodestar (or touchstone) is produced by multiplying the number of hours reasonably expended by counsel by a reasonable hourly rate. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative 'multiplier' to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented.

(*Consumer Privacy Cases*, *supra,* 175 Cal.App.4th at p. 556, internal citation and quotations omitted.)

Plaintiff's counsel submits that their lodestar in this action is $226,660.50, based on 327.7 hours spent on the case by counsel with billing rates of $605 - $825 per hour. These hours are reasonable based on the summaries provided, and counsel's hourly rates are also reasonable considering their experience and the market in which they practice. Counsel also incurred $2,350.12 in costs, so that the combined fee and cost award is $229,010.62, under the $250,000 maximum as set forth in the settlement agreement. The court finds that the fee and cost award requested by Plaintiff is fair and reasonable without the use of a multiplier and approves a combined fee and cost award the amount of $229,010.62.

V. Conclusion

The motion for final approval is GRANTED.

The class as defined herein is certified for settlement purposes. 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 May 7, 2025 at 2:30 P.M. in Department 19. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted to the *cy pres* recipient; 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 prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 5

Case Name: Manalo v. San Jose, LLC, et al. (Class Action)
Case No.: 20CV371934

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 11, 2024 at 1:30 pm in Department 19. The court issues its tentative ruling as follows:

I. Introduction

Plaintiff Joanne Manalo ("Plaintiff") brings this wage and hour action, on behalf of herself and other similarly situated employees,[2] against defendants San Jose, LLC ("SJ") and San Jose Healthcare System, L.P. d/b/a Regional Medical Center of San Jose ("Medical Center") (collectively, "Defendants").

On April 25, 2024, Plaintiff filed the operative First Amended Complaint ("FAC"), setting forth the following causes of action: (1) Failure to Provide Meal Periods and/or Pay Meal Period Premiums (Labor Code, §§ 226.7, 512; Wage Order 5-2001); (2) Failure to Authorize and Permit Rest Breaks and/or Pay Rest Break Premiums (Labor Code, §§ 226.7, 512; Wage Order 5-2001); (3) Failure to Pay Overtime Wages (Labor Code, §§ 1194, 1198, 510, 515(d); Wage Order 5-2001); (4) Failure to Pay for All Hours Worked (Labor Code, §§ 200, 201, 202, 204; Wage Order 5-2001); (5) Failure to Provide Accurate Itemized Wage Statements (Labor Code, § 226(a), (e); Wage Order 5-2001); (6) Civil penalties for Violation of Private Attorneys General Act ("PAGA") (Labor Code, § 2698 et seq.); and (7) Failure to Pay All Wages Due Upon Separation (Labor Code, §§ 201-203).

According to the allegations of the FAC, SJ owns, operates, manages, and controls the Medical Center, a hospital. (FAC, ¶ 15.) Defendants employed more than 1,300 nonexempt nurses during the relevant class period. (*Ibid*.) Plaintiff was employed by Defendants as a registered nurse from 2003 until March 14, 2021.[3] (FAC, ¶ 16.)

Plaintiff was only allowed to work eight hours per day. (FAC, ¶ 18.) Defendants prohibited Plaintiff to work in excess of eight hours despite the inability to complete all the

[2] Whenever the Court refers to Plaintiff, it is also referring to those similarly situated employees.
[3] Plaintiff's opposition indicates she resigned on September 23, 2021; however, the FAC alleges her resignation took place on March 14, 2021. (See FAC, ¶¶ 16, 95.)

required duties within that time period. (*Ibid*.) In order to complete these duties, Plaintiff would often clock out and continue to work unpaid. (*Ibid*.) Similarly, Plaintiff would also work off the clock during her meal periods to complete the heavy workload. (FAC, ¶ 19.) Plaintiff has been denied wages owed for work performed off the clock. (FAC, ¶ 20.)

Additionally, Defendants routinely failed to provide coverage that would allow Plaintiff to take timely, uninterrupted, and complete off-duty meal periods. (FAC, ¶ 21.) Plaintiff regularly worked more than five hours per workday and was not provided with an opportunity to take an uninterrupted 30-minute meal break during those five hours of work or at all. (*Ibid*.) Defendants also failed to pay one additional hour of pay when Plaintiff worked during her meal periods. (*Ibid*.) Further, Defendants failed to provide Plaintiff with an opportunity to take a 10-minute off-duty rest period for each four hours of work. (FAC, ¶ 25.)

During the relevant class period, Defendants maintained an unlawful compensation policy that failed to include all hours of work, including off the clock hours in wage statements, causing class members' gross and net wages to be recorded inaccurately. (FAC, ¶ 29.)

At the time Plaintiff filed her initial complaint, she was still employed by Defendants. On April 25, 2024, Plaintiff filed her FAC adding a new claim for waiting time penalties under Labor Code 203.

II. Legal Standard

"The court may, . . . upon terms it deems proper," strike out "irrelevant, false or improper" matters from a complaint. (See Code Civ. Proc, § 436, subd. (a).) Irrelevant matter includes (1) an allegation that is not essential to the statement of a claim or defense, (2) an allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense, and (3) a demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint. (See *id.*, § 431.10, subds. (b), (c).)

The motion "is traditionally used to reach pleading defects that are not subject to demurrer" because they impact only a portion of a cause of action. (*CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1146.) The motion is properly employed in this context "when a substantive defect is clear from the face of a complaint, such as a violation of the applicable statute of limitations or a purported claim of right which is legally invalid[.]" (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682–1683 (*PH II*).)

However, "such use of the motion to strike should be cautious and sparing." (*Id.* at p. 1683.) The motion does not "creat[e] a procedural 'line item veto' for the civil defendant." (*Ibid*.)

As with a demurrer, the policy of the law is to construe the pleadings liberally with a view to substantial justice. (See Code Civ. Proc, § 452.) The allegations in the complaint are considered in context and presumed to be true. (See *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.)

III. Discussion

SJ moves to strike a portion of Paragraph 33 of the FAC, which states:

> All persons who are or have been employed by Defendants as hourly nonexempt registered nurses at any time during the period from October 22, 2019 to the final disposition of this case ("Class Period") at "Regional Medical Center of San Jose", located at 225 North Jackson Avenue, San Jose California.

(FAC, ¶ 33.)

SJ contends that Plaintiff's new claim for waiting time penalties does not relate back to the date of filing of Plaintiff's original complaint and that the limitations period of the waiting time penalties for the proposed class must be governed by the filing date of the FAC on April 25, 2024. (Motion, p. 6:4-6, 12-14.) SJ argues that the statute of limitations applicable to violations of Labor Code section 203 is three years. (Motion, p. 8:3-5, citing Labor Code, § 203, subd. (b); Code Civ. Proc., § 338, subd. (a).) It asserts that because Plaintiff's waiting time penalties claim does not relate back to the filing date of the original complaint, the relevant time period for the waiting time penalties claim begins three years prior to the filing date of the FAC. (Motion, p. 8:6-8, 13-14.)

"The relation-back doctrine requires that the amended complaint must (1) rest on the same general set of facts, (2) involve the same injury, and (3) refer to the same instrumentality, as the original one." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409.)

SJ argues the amended complaint does not satisfy the first element of the relation-back doctrine. Specifically, it argues that the waiting time penalties arise from a different set of alleged facts because Labor Code section 203 provides for penalties when an employer willfully fails to pay all wages owed to the employee upon separation. SJ contends that the initial complaint alleged Plaintiff was still an employee and it was therefore not on notice that

Plaintiff's employment ended and that she was not timely paid final wages at the time the complaint was filed. (Motion, p. 9:2-6.)[4] Additionally, SJ asserts that the waiting time penalties did not relate back because Plaintiff did not have standing to bring the claim and therefore, she lacked typicality. (Motion, p. 9:15-16, citing *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 212 ["the class action proponent must show it has claims or defenses that are typical of the class, and it can adequately represent the class"].)

In opposition, Plaintiff argues the claim for waiting time penalties is derived from the same factual circumstances as those alleged in the original complaint, including that Plaintiff was not paid for off the clock hours, Defendants failed to pay an additional hour of pay for missed meal and rest periods, and that Defendants denied rest period premiums under Labor Code section 226.7. (See Opposition, pp. 6:15-17, 23-28, 7:3.) Plaintiff asserts that during the period from October 23, 2020 to the date of her resignation, SJ committed violations that resulted in unpaid wages to all employees who were terminated or resigned during the same period, thereby giving rise to the Labor Code section 203 claim. (Opposition, p. 7:20-26, citing *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1200 (*Amaral*) [overruled in part on other grounds].)

In *Amaral*, the Appellate Court explained that cases applying the relation back rule "have made it clear that 'it is the sameness of the facts rather than the rights or obligations arising from those facts that is determinative.' . . . Thus, amendments alleging a new theory of liability against the defendant have been found to relate back to the original complaint, so long as the new cause of action is based on the same set [of] facts previously alleged." (*Amaral, supra,* 163 Cal.App.4th at pp. 1199-1200.) The *Amaral* Court further explained that "an amendment seeking new damages relates back to the original complaint if such damages resulted from the same operative facts-i.e., the same misconduct and the same injury-previously complained of." (*Id*. at p. 1200.)

The Court finds persuasive Plaintiff's argument that the claim for waiting time penalties is directly related to the initial complaint's allegations that she was not paid for off

[4] SJ relies on exhibits attached to the Habib Declaration. As with a demurrer, a court may not consider extrinsic evidence on a motion to strike. The grounds for a motion to strike must appear on the face of the complaint or from matters which the Court may judicially notice. No request for judicial notice was filed with the motion to strike. Accordingly, the court does not rely on SJ's arguments that are supported by the Habib Declaration.

the clock hours, did not receive meal and rest breaks or an additional hour of pay, and that rest period premiums were denied. As the opposition notes, unpaid meal and rest break premiums and unpaid overtime can form the basis for waiting time penalties under Labor Code section 203. (See Opposition, p. 6:1-6, citing *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 117 (*Naranjo*); *Mamika v. Barca* (1998) 68 Cal.App.4th 487 492.) In *Naranjo*, for example, the California Supreme Court explained that "missed-break premium pay constitutes wages for purposes of Labor Code section 203, and so waiting time penalties are available under that statute ***if the premium pay is not timely paid***." (*Naranjo, supra*, 13 Cal.5th at p. 117 [emphasis added].) Here, the underlying complaint alleged that those premiums were not timely paid, thus, SJ should have been aware that, upon Plaintiff's separation, waiting time penalties would be available. Furthermore, as to SJ's argument that Plaintiff lacks typicality, it is not necessary that the class representative have personally incurred all of the damages suffered by each of the other class members. (See *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238 [overruled in part on other grounds]; see also *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375.) Accordingly, the claim for waiting time penalties relates back to the initial complaint and the statute of limitations for the waiting time penalties runs from the date Plaintiff resigned from employment.

Based on the foregoing, the motion to strike Paragraph 33 of the FAC is DENIED.

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

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Calendar Line 6

Case Name: Velocity Investments LLC v. Sipin
Case No.: 20CV370503

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 11, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

On September 10, 2020, Plaintiff Velocity Investments LLC ("Velocity Investments") filed a Complaint for Money ("Complaint") against Defendant Farrah Sipin ("Sipin") to recover an alleged debt. The Complaint sets forth causes of action for: (1) account stated; (2) open book account; and (3) indebtedness. On September 29, 2020, Sipin filed a Cross-Complaint against Velocity, stating causes of action for: (1) California Fair Debt Buying Practices Act; (2) Fair Debt Collection Practices Act; and (3) Rosenthal Fair Debt Collection Practices Act.

On August 26, 2021, Sipin filed a First Amended Cross-Complaint ("FACC"), adding alter-ego allegations specific to cross-defendant Velocity Portfolio Group, Inc. ("VPGI"), allegations clarifying Sipin's claims, and class allegations.

On September 27, 2021, VPGI filed a special motion to strike pursuant Code of Civil Procedure section 425.16, and Velocity Investments and VPGI (collectively, "Velocity") jointly demurred to the FACC on the grounds of uncertainty and failure to state sufficient facts. On November 8, 2021, Sipin filed a motion to conduct limited discovery to oppose the motion to strike, and on January 26, 2022, the court granted Sipin's discovery motion and continued the hearings on the motion to strike and demurrer. On June 15, 2022, the court entered an order on the parties' stipulation that VPGI is the alter-ego of Velocity Investments, who withdrew its special motion to strike. On August 8, 2022, the court overruled the demurrer to the FACC.

On February 7, 2023, Sipin moved for class certification, and on May 23, 2023, the court entered an order granting the motion for class certification.

On March 6, 2024, Velocity filed the motion now before the court, a motion for summary judgment of Sipin's FACC. On May 15, 2024, Velocity filed a brief notifying the

court that Sipin had not filed an opposition by May 1, 2024, the deadline set by the Stipulation and Order entered by the court on January 25, 2024. On July 17, 2024, Sipin filed an ex parte application to amend the briefing schedule for Velocity's motion for summary judgment, and on July 19, 2024, the court granted the request, setting revised deadlines for Sipin's opposition and Velocity's reply. Sipin filed her opposition on August 9, 2024, and Velocity filed its reply on August 28, 2024.

The court has reviewed the parties' written submissions, and now issues its tentative ruling on Velocity's motion for summary judgment.

II. Judicial Notice

In connection with its motion for summary judgment, Velocity asks the court to take judicial notice of two pleadings in this action: (A) its Complaint filed on September 10, 2020; and (B) Sipin's FACC filed on or about August 26, 2023. These items are attached as Exhibits A and B to Velocity's Compendium of Documentary Evidence filed on March 6, 2024. Additionally, in connection with its reply, Velocity asks the court to take judicial notice of the proof of service of summons filed on September 23, 2020. These items are proper subjects of judicial notice under Evidence Code section 452, subdivision (d), which permits judicial notice of "[r]ecords of any court of this state." (See *People v. Woodell* (1998) 17 Cal.4th 448, 455 [court may take judicial notice of court records but "cannot take judicial notice of the truth of hearsay statements is decisions or court files, including pleadings, testimony, or statements of fact."].)

Accordingly, the court GRANTS the request for judicial notice as to the existence of the Complaint, the FACC, and the proof of service of summons, but not as to the truth of any hearsay statements contained therein.

In connection with its brief regarding Sipin's non-opposition, filed on May 15, 2024, Velocity asked the court to take judicial notice of several items. However, as the court has since granted Sipin's ex parte application to amend the relevant briefing schedule, the request for judicial notice in connection with the non-opposition issue is MOOT.

III. Relevant Facts

In support of its motion for summary judgment, Velocity sets forth the following purportedly undisputed material facts: On August 30, 2018, Sipin obtained a loan from WebBank through LendingClub Corporation ("LendingClub"). (Velocity's Separate Statement of Undisputed Material Facts ("Velocity's UMF"), No. 1.) On March 27, 2019, Velocity purchased Sipin's account and became the sole owner of the debt and the successor in interest of the charge-off creditor. (*Id.* at No. 2.)

On June 2, 2020, Velocity send Sipin a letter that contained the details of the account, informed Sipin of its intention to collect her debt which then totaled $6,958.12, and informed Sipin of her rights. (Velocity's UMF, No. 3.) On August 4, 2020, Velocity sent an additional letter to Sipin informing her of its intention to file a collection lawsuit to collect the outstanding debt. (*Id.* at No. 4.)

On September 10, 2020, Velocity filed its Complaint against Sipin alleging causes of action for account stated, open book account, and indebtedness and attaching the Loan Summary and Bill of Sale. (Velocity's UMF at No. 5.) The Complaint stated that Velocity complied with California Civil Code section 1788.52. (*Id.* at No. 6.) The Loan Summary attached to the Complaint identifies the last four digits of the Loan ID/account number, identifies Farah Sipin as the borrower, lists Sipin's address, lists the original issue date of the loan, lists the original loan amount and principal balance, contains the borrower agreement, identifies LendingClub as involved in the debt, and was attached to comply with the requirements of the California Fair Debt Buying Practices Act. (*Id.* at No. 7.)

At the time of the filing of the Complaint, Velocity had purchased the debt, was the sole owner of the debt, the debt was assigned to Velocity, who had previously informed Sipin that they now owned the debt, had an accounting of the debt owed to them by Sipin, had evidence that Sipin owed the debt, and Sipin owed $6,958.12 on the debt. (Velocity's UMF, No. 8.) On August 26, 2021, Sipin filed her FACC asserting allegation based on Velocity's Complaint. (*Id.* at No. 9.)

According to Velocity, while Sipin's FACC seeks actual damages, Sipin has provided no evidence that she has suffered any actual damages as a result of any of Velocity's alleged violations. (Velocity's UMF, No. 10.) Sipin has waived any claim to personal injury type actual

damages recoverable and stated that "[t]he only actual damages sought are the attorney fees and costs associated with defending [herself] against [Velocity's] Complaint for Money." (*Id.* at No. 11.) However, when Velocity deposed Sipin regarding the topic of attorney fees and costs incurred, Sipin was instructed not to answer. (*Id.* at No. 12.)

When questioned about how her rights were violated, Sipin testified that her rights were violated because Velocity lied to her because she did not borrow money from Velocity, but Velocity claimed that she did. (Velocity's UMF, No. 13.) Sipin retained her attorneys after receiving Velocity's Complaint and googling consumer law and Velocity. (*Id.* at No. 15.) Sipin does not dispute that she took out a loan from LendingClub, ceased making payments, and owes an outstanding balance. (*Id.* at No. 16.)

In opposition, while Sipin does not dispute the majority of the aforementioned facts, there are some notable exceptions found in her response: Control of the electronic promissory note was never transferred to Cross-Defendants. (Sipin's Response to Velocity's Separate Statement of Undisputed Material Facts ("Sipin's UMF"), Nos. 2, 8.) The Loan Summary attached to Velocity's Complaint does not comply with the California Fair Debt Buying Practices Act. (*Id.* at No. 7.)

Sipin testified and provided documentary evidence that she incurred attorney fees and costs in defending Velocity's unlawful Complaint. (Sipin's UMF, No. 10.) Sipin disputes that "personal injury type actual damages" are different from actual damages incurred by Sipin herein. (*Id.* at No. 11.) Sipin does not concede that she owes an outstanding balance to Velocity Investments. (*Id.* at No. 16.)

IV. Legal Standard for Summary Judgment

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue of material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*) "[I]f the court concludes that the [opposing party's] evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the [moving party's] motion." (*Id.* at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences reasonably drawn therefrom[.]" (*Aguilar*, *supra*, 25 Cal.4th at p. 844 [internal quotations omitted].) The moving party's evidence is strictly construed, while the opposing party's evidence is liberally construed. (*Id.* at p. 843.)

V. The Causes of Action

Velocity moves for summary judgment of Sipin's FACC, which sets forth causes of action for violations of the following: (a) California Fair Debt Buying Practice Act (the "CFDBPA"); (b) Fair Debt Collection Practices Act (the "FDCPA"); and (c) Rosenthal Fair Debt Collection Practices Act (the "RFDCPA" or "Rosenthal Act"). Before discussing the merits of Velocity's motion, the court briefly describes the causes of action at issue, and their underlying statutory basis, as follows:

A. CFDBPA Claim

The FACC's first cause of action is brought under the CFDBPA, California Civil Code, sections 1788.50 through 1788.64.[5] (FACC, ¶ 52.) "The purpose of the CFDBPA as set forth in the uncodified legislative findings and declarations, is to regulate the adequacy of documentation required to be maintained by debt buying industry in support of its collection activities and litigation and ensure the documentation used to support the collection of a debt is sufficient to prove that the individual who is being asked to pay the debt is in fact the individual associated with the original contract or agreement." (*Aguilar v. Mandarich Law Group, LLP* (2023) 87 Cal.App.5th 607, 625 (*Mandarich*), internal punctuation and citations

[5] Further statutory references are to the California Civil Code unless otherwise specified.

omitted.)The FACC alleges that the financial obligation asserted in Velocity's Complaint is a "charged-off consumer debt" as defined by California Civil Code section 1788.50, subdivision (a)(2). (*Id.* at ¶ 60.) It also alleges that Velocity violated section 1788.58, subdivision (b), by failing to attach to the Complaint a copy of the contract or other document described in subdivision (b) of section 1788.52. (*Id.* at ¶ 62.) The FACC further alleges that "Cross-Defendants have engaged in a pattern and practice of violating the CFDBPA, California Civil Code §§ 1788.52(b), 1788.58(a)(9), and 1788.58(b)." (*Id.* at ¶ 63.)

Section 1788.52, subdivision (b), states:

> A debt buyer shall not make any written statement to a debtor in an attempt to collect a consumer debt unless the debt buyer has access to a copy of a contract or other document evidencing the debtor's agreement to the debt. If the claim is based on debt for which no signed contract or agreement exists, the debt buyer shall have access to a copy of a document provided to the debtor while the account was active, demonstrating that the debt was incurred by the debtor. For a revolving credit account, the most recent monthly statement recording a purchase transaction, last payment, or balance transfer shall be deemed sufficient to satisfy this requirement.

Section 1788.58 provides as follows in pertinent part: "In an action brought by a debt buyer on a consumer debt: [¶] (a) The complaint shall allege all of the following: … [¶] (9) That the debt buyer has complied with Section 1788.52. [¶] (b) A copy of the contract or other document described in subdivision (b) of Section 1788.52 shall be attached to the complaint." (Section 1788.58, subds. (a)(9) and (b).)

B. FDCPA Claim

The FACC's second cause of action is brought under the federal FDCPA, 15 U.S.C. sections 1692 through 1692p. (FACC, ¶ 67.) "The federal FDCPA regulates the conduct of debt collectors by prohibiting 'any false, deceptive, or misleading representation or means in connection with the collection of any debt.' (15 U.S.C. § 1692e.)" (*Mandarich*, *supra*, 87 Cal.App.5th at p. 622.)

> The federal FDCPA regulates the conduct of debt collectors by prohibiting 'any false, deceptive, or misleading representation or means in connection with the collection of any debt.' (15 U.S.C. § 1692e.) It is a violation of the FDCPA to falsely represent 'the character, amount, or legal status of any debt' (15 U.S.C. § 1692e(2)(A)) or to 'use …any false representation or deceptive means to collect or attempt to collect any debt.' (*Id.*, § 1692e(10.) A false or misleading statement is not actionable under the FDCPA unless it is material. (*Afewerki v.*

> *Anaya Law Group* (9th Cir. 2017) 868 F.3d 771, 773 (*Afewerki*) ["To constitute a violation of the FDCPA, a false statement must be 'material.'"], citing *Donohue v. Quick Collect, Inc.* (9th Cir. 2010) 592 F.3d 1027, 1033 (*Donohue*).)

(*Mandarich*, *supra*, 87 Cal.App.5th at p. 622.)

The FACC alleges that Velocity "made and used false, deceptive, and misleading representations in an attempt to collect the debt, in violation of 15 U.S.C. §§ 1692e, 1692e(2)(A), 1692e(5), and 1692e(10)." (FACC, ¶ 73.) The FACC further alleges that Velocity committed such violations intentionally with the "purpose of coercing Cross-Complainant to pay the alleged debt." (*Id.* at ¶ 74.) The FACC alleges that Sipin is entitled to "an award of actual damages in an amount to be proven at trial, pursuant to 15 U.S.C. § 1692k(a)(1)." (*Id.* at ¶ 75.)

C. Rosenthal Act Claim

The FACC's third cause of action is brought "under the California Rosenthal Fair Debt Collection Practices Act ('RFDCPA'), California Civil Code §§ 1788-1788.33." (FACC, ¶ 78.) The FACC alleges that Velocity "made and used false, deceptive, and misleading representations in an attempt to collect the debt, in violation of California Civil Code § 1788.17." (*Id.* at ¶ 85.) The FACC further alleges that Velocity committed such acts "willfully and knowingly with the purpose of coercing Cross-Complaint to pay the alleged debt, within the meaning of California Civil Code § 1788.30(b).)" (*Id.* at ¶ 86.)

"The Rosenthal Act, through section 1788.17, thus incorporates by reference the federal FDCPA's requirements and makes available the FDCPA's remedies for violations. A violation of any of these FDCPA provisions is per se a violation of the Rosenthal Act. A Rosenthal Act claim premised on a violation of the federal FDCPA, however, remains a state claim." (*Mandarich*, *supra*, 87 Cal.App.5th at p. 622, internal punctuation and citations omitted.) "Insofar as section 1788.17 incorporates the FDCPA, so that a violation of the FDCPA is per se a violation of the Rosenthal Act, we conclude the inverse is also true: A misrepresentation that is immaterial and thus not actionable under the FDCPA fails to support a prima facie violation of section 1788.17." (*Id.* at p. 627, internal punctuation and citations omitted.)

VI. Discussion

As an initial matter, Velocity argues in reply that Sipin's opposition brief violates California Rules of Court, rule 3.1113(d), which states in relevant part: "In a summary

judgment or summary adjudication motion, no opening or responding memorandum may exceed 20 pages. … The page limit does not include the caption page, the notice of motion and motion, exhibits, declaration, attachments, the table of contents, the table of authorities, or the proof of service." Here, Sipin's opposition is 28 pages long, including the first six pages, which are not subject to the page limit, and the 28th page bears only a one-line conclusion. As Velocity was able to file a detailed reply after receiving the opposition more than one month before the hearing, the court find any prejudice to minimal, and has therefore considered the entirety of Sipin's opposition. Nonetheless, the parties are reminded to comply with page limits and other filing requirements with respect to any future written submissions.

In support of its motion for summary judgment, Velocity initially contends that Sipin lacks standing for all of her asserted claims because she has not alleged a concrete injury. (Velocity's Notice of Motion and Memorandum of Points and Authorities ("Velocity's MPA"), pp. 11:24, 13:2.) Velocity relies upon the Court of Appeal's relatively recent decision in *Limon v. Circle K Stores Inc.* (2022) 84 Cal.App.5th 671 (*Limon*).

Velocity maintains that the existence of "concrete harm" is a prerequisite to recover statutory damages. (Velocity's MPA, p. 15-20, citing *Limon*, *supra*, 84 Cal.App.5th at p. 702.) Velocity asserts that neither the FDCPA nor the CFDBPA "automatically awards any amount as a penalty, and the statutorily available amounts are designed to only be available when an actual injury for which a plaintiff could be compensated exists." (Velocity's MPA, p. 23-26.)

In opposition, Sipin contends that Velocity's reading of *Limon* is expansive, that *Limon* is factually distinguishable, and that *Limon* was wrongly decided. (Sipin's Memorandum of Points and Authorities in Opposition ("Sipin's Opp."), p. 9:14-20.) According to Sipin, "*Limon* does not stand for the blanket proposition that no consumer has standing to bring a statutory damages-only consumer protection action." (*Id.* at p. 13:13-15.)

In *Limon*, a job applicant alleged that Circle K violated the Fair Credit Reporting Act ("FCRA") by failing to provide him with proper FCRA disclosure "when it sought and received his authorization to obtain a consumer report about him in connection with his application for employment, and by actually obtaining the consumer report in reliance on that authorization." (*Limon*, *supra*, 84 Cal.App.5th at p. 680.) Circle K successfully demurred on

the basis that Limon "did not allege or suffer any resulting, cognizable harm or injury." (*Ibid.*) On appeal, *Limon* argued that no injury is required to pursue his causes of action under the FCRA, and alternatively, that he was injured as a result of Circle K's alleged FCRA violations. (*Ibid.*)

The *Limon* court concluded that the job applicant lacked standing to pursue his claims in a California court because he did not allege any concrete injury in connection with a claimed informational injury under the FCRA. (*Limon*, *supra*, 84 Cal.App.5th at p. 707

> Limon has failed to allege any concrete injury in connection with his claim of informational injury. Thus, his alleged informational injury is insufficient under California law to confer standing to pursue his claims in state court. We conclude, that under California law, that informational injury that cause no adverse effect is insufficient to confer standing upon a private litigant to sue under the FCRA.

(*Limon*, *supra*, 84 Cal.App.5th at p. 707.)

Sipin argues that *Limon* does not apply here because the facts are different. (Sipin's Opp., pp. 14:12-15:9.) Sipin points out that the federal FCRA and California's CFDBPA and Rosenthal Act are different statutes. (*Id.* at p. 14:11-22.) She also argues that a consumer cannot waive the protections of the CFDBPA or the Rosenthal Act. (*Id.* at p. 15:4-8.) Sipin cites *Holmes v. Cal. Nat. Guard* (2001) 90 Cal.App.4th 297, 315, where the appellate court stated: "A complaining party's demonstration that the subject of a particular challenge has the effect of infringing some constitutional or statutory right may qualify as a legitimate claim of beneficial interest sufficient to confer standing on that party. [Citation.]" Sipin also cites *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175, where our high court stated that "[s]tanding rules may vary according to the intent of Legislature and the purpose of the enactment."

Turning to the statutes at issue here, Velocity persuasively argues that the CFDBPA does not confer standing to sue based on an informational injury, such as those raised in the FACC, alone because it does not classify statutory damages as a penalty. (Velocity's MPA, pp. 13:2-14:15.) Velocity points out the similarities between the damages provisions of the FCRA and the CFDBPA, noting that neither contains penalty language. (*Ibid.*)

Sipin contends that "it is clear the California Legislature intended to require attachment [to the complaint] of the actual contract evidencing the debt which is the subject of the Cross-

Defendants' collection complaint." (Sipin's Opp., p. 12:17-19.) Nevertheless, while Sipin stresses that the court must consider the legislative intent, Sipin does not clearly show that it was the Legislature's intent in enacting the CFDBPA to the confer standing to consumers based upon a violation alone absent the showing of a concrete injury.

Sipin directs the court the Senate Bill No. 233 and provides a link to the same, albeit without making a request for judicial notice. (Sipin's Opp., p. 12: 22, fn. 1.) Sipin notes that the Legislature sought to "create documentation and process standards in a legal action on the debt," and intended to "impose enforceable standards upon the collection and litigation of consumer debt that has been purchased by a debt buyer following the consumer debt's charge off by a creditor." (*Id.* at pp. 12: 25-26, 13:1-3, citing Senate Bill 233 at sections 1(d)-1(e)[6].) However, Sipin does not point to any language to support her position. Furthermore, Senate Bill 233 states: "This act is not intended to affect the legal enforceability, or collectability, of a charged-off consumer debt[.]" (Senate Bill 233 at section 1(e).) Yet, Sipin's construction of the CFDBPA would do just that, i.e., affect the enforceability of a charged-off consumer debt by granting standing even when there is no showing of concrete injury.

Similarly, with respect to the standing issue under the FDCPA and Rosenthal Act claims, Sipin does set forth case authority or legislative history that would support her position regarding standing based upon an information injury. Velocity's argument in reply that Sipin has abandoned her FDCPA and RFDCPA claims therefore appears to have some merit. (See Reply, p. 5:2-18; see also *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566 [failure to address a point operates as a concession].) In sum, the court is not persuaded by Sipin's arguments that legislative intent prevents the application of the holding in *Limon* to the facts of this case. Sipin herself acknowledges that *Limon* is persuasive. (Sipin Opp., p. 15:12-18.)

Here, the only injury that Sipin alleges is her attorney fees incurred in defending Velocity's alleged unlawful complaint. (See Sipin's UMF, No. 10.) While Sipin disputes that

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[6] On its own motion, the court takes judicial notice of Senate Bill 233, the full text of which is found at: http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0201-0250/sb_233_bill_20130711_chaptered.pdf. (See Evid. Code, § 452, subd. (c), [court may take judicial notice of official acts of the legislative department of any state].)

the damages required here are different from what she has incurred, in the court's view, she does not sufficiently support this position with facts or legal authority. Like the job applicant in *Limon*, Sipin has failed to allege any concrete injury in connection with her claim of informational injury. (*Limon, supra*, 84 Cal.App.5th at p. 707.) Her claim that her attorney fees incurred in *defending* against Velocity's action to enforce the loan constitute are sufficient to establish standing is unsupported by any controlling authority or stated legislative intent.

Thus, the court finds that Velocity has met its initial burden of establishing that Sipin lacks standing to pursue the claims alleged in her FACC, and that Sipin has failed to meet her burden in opposition.[7] Accordingly, the motion for summary judgment is GRANTED.

VII. Conclusion

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

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[7] Because Sipin's lack of standing is dispositive to the instant motion, the court does not address Velocity's further arguments regarding the litigation privilege and materiality.

Calendar Line 7

Case Name:
Case No.:

- oo0oo -

Calendar Line 8

Case Name:
Case No.:

- oo0oo -

Calendar Line 9

Case Name:
Case No.:

- oo0oo -

Calendar Line 10

Case Name:
Case No.:

- oo0oo -

Calendar Line 11

Case Name:
Case No.:

- oo0oo -

Calendar Line 12

Case Name:
Case No.:

- oo0oo -

Calendar Line 13

Case Name:
Case No.:

- oo0oo -