SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

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LAW AND MOTION TENTATIVE RULINGS
DATE: OCTOBER 30, 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	20CV366939	ZL Technologies, Inc. v. Splitbyte Inc., et al. (LEAD CASE; Consolidated With 20CV373027, 20CV373149, 21CV378097, 21CV382329)	See Line 1 for tentative ruling.
LINE 2	23CV420252	SJSC Properties, LLC v. WSP USA, Inc., et al.	See Line 2 for tentative ruling.
LINE 3	23CV417680	Waltrip v. Highgate Hotels, L.P. (Class Action)	See Line 3 for tentative ruling.
LINE 4	21CV382771	Rodriguez v. Palo Alto Hills Golf And Country Club, Inc. (PAGA)	See Line 4 for tentative ruling.
LINE 5	23CV412254	Rocha v. The Great American Plumbing Company, Incorporated, et al. (PAGA)	See Line 5 for tentative ruling.
LINE 6			

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LAW AND MOTION TENTATIVE RULINGS

LINE 7			
LINE 8			
LINE 9			
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LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: ZL Technologies, Inc. v. SplitByte, Inc. et al.
Case No.: 20CV366939 (Lead Case, consolidated with 20CV366939; 20CV373027; 20CV373149; 21CV378097; 21CV382329)

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

I. Introduction

This is a consolidated action comprised of five matters in this superior court, arising from disputes between Plaintiff/Cross-Defendant ZL Technologies, Inc. ("ZL") and Defendant/Cross-Complainant Arvind Srinivasan ("Srinivasan").[1]

The consolidated cases are: (1) *ZL Technologies, Inc. v. SplitByte Inc. et al.* (Case No. 20CV366939) (the "First Action"); (2) *Arvind Srinivasan v. ZL Technologies, Inc. et al.* (Case No. 20CV373027) (the "Second Action" or "304 Action"); (3) *Arvind Srinivasan v. ZL Technologies, Inc.* (Case No. 20CV373149) (the "Third Action"); (4) *ZL Technologies, Inc. et al. v. Arvind Srinivasan* (Case No. 21CV378097) (the "Fourth Action"); (5) *Arvind Srinivasan v. ZL Technologies, Inc. et al.* (Case No. 21CV382329) (the "Fifth Action").

On June 2, 2020, ZL Technologies, Inc. ("ZL") initiated the First Action by filing a Complaint against SplitByte Inc. ("SplitByte") and Arvind Srinivasan ("Srinivasan"). On August 1, 2022, ZL filed the now operative Second Amended Complaint ("SAC") against SplitByte, Srinivasan, Kapisoft Inc. ("Kapisoft"), MI17 Inc. ("MI17").

According to the SAC's allegations, ZL is a California corporation co-founded by Srinivasan, a former officer and employee of ZL. (SAC, ¶¶ 1, 3, 8.) In April 2020, the ZL board of directors voted to remove Srinivasan as Chief Technology Officer ("CTO") and terminate his employment. (*Id.* at ¶ 3, 8.) While at ZL, Srinivasan founded Kapisoft and MI17 without the knowledge or consent of the ZL board of directors. (*Id.* at ¶ 8.) Kapisoft and MI17's technology competes with ZL's technology. (*Id.* at ¶¶ 4-5.)

[1] In its *Order Re: Motion for Consolidation of Related Cases and Designation of Consolidated Cases as Complex*, issued on September 22, 2021, the court (Hon. Patrcia M. Lucas) sets forth a detailed description of the five matters comprising this consolidated action.

The SAC alleges Srinivasan improperly controlled and managed ZL's technology and related personnel, allowing him to make unfair and overreaching demands of ZL in breach of his fiduciary duties to ZL. (SAC, ¶ 9.) Srinivasan recruited ZL's employees to work for SplitByte and used his knowledge as a director and officer of ZL to solicit investments in SplitByte. (*Id.* at ¶¶ 19-22.) Srinivasan made unfair demands of ZL, including a demand to open a ZL office in Chennai, India (with office space rented from his parents) and a demand for a $500,000 personal loan. (*Id.* at ¶¶ 11, 27.)

Also in the First Action, Srinivasan filed a Cross-Complaint against ZL on August 21, 2020. As relevant here, the now operative Second Amended Cross Complaint in the First Action ("SACC") alleges a Fourteenth Cause of Action for Intentional Interference with Prospective Economic Advantage and a Fifteenth Cause of Action for Negligent Interference with Prospective Economic Advantage.

According to the SACC's allegations, Srinivasan co-founded ZL along with Kon Leong ("Leong") and Arvind Parthasarathi in 1999. (SACC, ¶¶ 5-6.) Srinivasan became employed as ZL's CTO, a position he retained until April 13, 2020, when ZL wrongfully terminated his employment. (*Id.* at ¶ 6.) Leong, as ZL's Chief Executive Officer ("CEO"), board chairman and largest shareholder, controls ZL and has run it to benefit himself and his wife, Chimmy Shioya ("Shioya") without regard to the benefit of other shareholders. (*Id.* at ¶ 10.)

In 2017, Srinivasan advised ZL and Leong that he was forming SplitByte, his own corporation, to develop his own security software called "secret-sharing," on his own time and without using ZL's proprietary property. (SACC, ¶ 103.) ZL and Leong had no objection, and the software that Srinivasan developed through SplitByte performs separate and distinct functions from ZL's software. (*Ibid.*)

In May 2019, Srinivasan had a meeting with Leong, telling him that he wanted to depart ZL to start his own software business. (SACC, ¶ 104.) Leong insisted that Srinivasan's continued employment with ZL was critical and offered him a bonus to continue working at ZL. (*Ibid.*) Leong acknowledged the separate software that Srinivasan developed through SplitByte and Kapisoft. (*Ibid.*)

Srinivasan agreed to continue working for ZL while developing his secret-sharing technology on his own time. (SACC, ¶ 105.) In January 2020, Srinivasan disclosed to ZL and Leong that he had applied for a patent and requested the ZL acknowledge Srinivasan's ownership of that technology. (*Ibid.*) ZL and Leong executed an agreement on March 2, 2020. (*Ibid.*)

In November 2020, after ZL terminated Srinivasan in April 2020, Leong made false representations about Srinivasan to several people at a ZL stockholders meeting. (SACC, ¶ 106.) Leong said that Srinivasan had breached his fiduciary duty to ZL by developing the -sharing technology. (*Ibid.*) ZL falsely represented that the secret-sharing technology belonged to ZL. (*Ibid.*)

ZL intended to prevent Srinivasan from developing his own security software company and, and ZL's act denied Srinivasan the prospect to secure a substantial economic benefit from his work. (SACC, ¶ 107.) ZL's intentional interference with Srinivasan's prospective business and economic advantage has cause immense damage to Srinivasan, and ZL acted with malice. (*Id.* at ¶ 108.) Alternatively, ZL acts constitute negligence interference with Srinivasan's prospective economic advantage. (*Id.* at ¶ 110.)

On November 3, 2020, Srinivasan commenced the Second Action against ZL and Leong, seeking the removal of Leong as director under Corporations Code section 304. Srinivasan then filed the Third and Fourth Actions, respectively for production of corporate records and for alleged indemnity. ZL, Leong, and Shioya brought the Fifth Action against Srinivasan for defamation.

On August 6, 2021, Srinivasan filed a motion to consolidate the five related cases and for assignment of the cases to the complex division. On September 22, 2021, the court (Hon. Patricia M. Lucas) issued an order granting Srinivasan's consolidation motion.

On June 23, 2023, the Sixth District Court of Appeal affirmed in part and reversed in part an order by the court (Hon. Drew C. Takaichi) denying Srinivasan's special motion to strike the defamation cause of action under the anti-SLAPP statute. Specifically, the reviewing court directed the trial court to issue a new order granting the motion to strike defamation claims arising out of an October 7, 2020 letter that Srinivasan's counsel sent to ZL's counsel

and denying the motion with respect to claims arising out of other republications and communications. (See *Zl Techs. v. Srinivasan* (June 26, 2023, No. H049444) [2023 Cal. App. Unpub. LEXIS 3675, at **22-23].)

On October 24, 2024, the court entered an order denying Srinivasan's Motion to Bifurcate the Second Action for court trial and denying ZL's Motion for Terminating Sanctions. Trial is currently set to begin on May 5, 2025.

Now before the court is ZL's motion for summary adjudication of: (1) the Fourteenth Cause of Action for Intentional Interference with Prospective Economic Relations; and (2) the Fifteenth Cause of Action for Negligent Interference with Prospective Economic Relations, as set forth in Srinivasan's SACC in the First Action. Srinivasan opposes the motion.

II. Facts Presented

A. ZL's Facts

In support of its motion for summary adjudication, ZL proffers the following purportedly undisputed material facts: Srinivasan was ZL's CTO from its founding until his removal and termination as an employee on April 13, 2020. (ZL's Separate Statement of Undisputed Material Facts ("ZL's UMF"), No. 1.) While at ZL, Srinivasan founded three startup companies: Kapisoft and MI17 (both founded in 2017 and 100% percent owned by Srinivasan); and SplitByte (fully formed in August 2020). (*Id.* at No. 2.) According to Srinivasan, Kapisoft and MI17 have taken very limited investments from Srinivasan and have not solicited any capital investment. (*Id.* at No. 3.)

According to Srinivasan, Kapisoft was originally intended to be a software technology platform company to build turnkey solutions (i.e., custom software) to be used in future startups, but Kapisoft has not built any turnkey solutions due to a lack of requests from potential customers, and Kapisoft has no products other than a generic platform software. (ZL's UMF, No. 4.) According to Srinivasan, MI17 was originally intended to be a consulting business leveraging Kapisoft's general purpose platform, but MI17 never got a consulting contract. (ZL's UMF, No. 5.)

According to Srinivasan, SplitByte was incorporated in August 2019, but the formation could not be completed until August 2020 because its counsel required an Intellectual Property

release ("IP Agreement") from ZL, the COVID-19 pandemic started, ZL terminated Srinivasan, sought to rescind the IP agreement, and initiated this litigation. (ZL's UMF, No. 6.) In June 2021, Srinivasan reported that SplitByte had zero customers and had engaged in zero sales calls. (*Ibid.*) Kapisoft, MI17, and SplitByte all have their place of business at Srinivasan's home in Los Gatos. (*Id.* at No. 7.) According to Srinivasan, neither Kapisoft nor MI17 had any employees, contractors, or consultants. (*Id.* at No. 8.) As of June 2021, only the CEO of SplitByte, Raghu Rao, was a formal employee of SplitByte; the other two founders (Srinivasan and Saket Bohania) were working without a salary. (*Ibid.*)

On June 2, 2020, ZL initiated this litigation by filing the Complaint in the First Action against SplitByte and Srinivasan. (ZL's UMF, No. 9.) ZL then filed the First Amended Complaint in that action against SplitByte, Srinivasan, Kapisoft, and MI17 (collectively, "Defendants") for breach of fiduciary duty and related claims arising from Srinivasan's conduct in forming competing companies while employed by ZL and engaging in a scheme to defraud ZL for his and Defendants' financial benefit. (*Ibid.*)

On November 3, 2020, Srinivasan initiated the Second Action against ZL and Leong, seeking the removal of Leong as director under Corporations Code section 304 (the "section 304 action"). (ZL's UMF, No. 10.) Srinivasan then filed two other cases to produce corporate records and for indemnity. (*Ibid.*) ZL, Leong, and Shioya have brought an action against Srinivasan for defamation, which was stayed for two years, while Srinivasan pursued an appeal seeking its dismissal. (*Ibid.*) On Defendants' motion, all these actions were consolidated, and the proceeding was designated complex by order of this court on September 23, 2021. (*Ibid.*)

On March 9, 2022, the court denied Srinivasan's motion for summary adjudication on ZL's cause of action rescission of the IP Agreement. (ZL's UMF, No. 11.) According to Srinivasan, since the first quarter of 2022, any work on Srinivasan's startups stopped because of the ongoing litigation. (*Id.* at No. 12.) After being terminated by ZL, Srinivasan found a job at Apple around April 2022 as an AI engineer but was terminated from that job sometime in 2023, which, according to Srinivasan, happened because ZL served Apple with a subpoena, and Apple found out about the lawsuit. (*Id.* at No. 13.)

When he applied for the Apple job, Srinivasan stopped doing any work for the startups, "resigned," and did not attempt to get any business for them and put them "in hibernation." (ZL's UMF, No. 14.) During his employment at Apple, Srinivasan made no effort to earn any income through his startups. (*Ibid.*) In June 2022, ZL's counsel served a subpoena in connection with this litigation on the custodian of records for Apple to produce records. (ZL's UMF, No. 15.)

On August 1, 2022, Srinivasan filed the SACC in the First Action, adding a Fourteenth Cause of Action titled "Intentional Interference with Prospective Economic Relations" and a Fifteenth Cause of Action titled "Negligent Interference with Prospective Economic Relations," both brought against ZL. (ZL's UMF, No. 16.) The SACC alleges that ZL took acts to prevent Srinivasan from developing his own security software company (SplitByte) and thus denied Srinivasan the prospect to secure a substantial economic benefit from his own work. (*Ibid.*) The SACC further alleges that ZL's intentional interference with Srinivasan's prospective business and economic advantage has caused immense damages to Srinivasan, or alternatively, that ZL's interference was negligent. (*Ibid.*) Srinivasan claims that the economic damage for these actions is immense and runs into many millions of dollars. (*Ibid.*)

When asked through interrogatories to identify the economic relationships he contends that ZL interfered with, Srinivasan identified his relationship with ZL as one such relationship and stated that Leong, as CEO of ZL, was using the litigation as leverage to control Srinivasan. (ZL's UMF, No. 17.) Srinivasan also identified several purported relationships which were unknown to ZL until after this litigation began. (*Id.* at No. 18.)

Srinivasan testified that after his employment at Apple terminated, he was unable to find another job because of the ZL lawsuit and that, other than the Apple employment, Srinivasan has not had any employment or consulting engagement since his termination by ZL in April 2020 to the present. (ZL's UMF, No. 19.) Srinivasan testified that, after Apple terminated his employment him until the present, the only work he has done on the startups was on this litigation because every effort to proceed further with the startup business (whether to get customers or investors) failed because of this litigation. (*Id.* at No. 20.)

According to Srinivasan's sworn testimony and interrogatory responses, this litigation is the reason for his inability to make money from his startup businesses. (ZL's UMF, No. 21.) Srinivasan testified that the foreign subsidiaries of Kapisoft and MI17, which he caused to be formed in India before his employment with ZL was terminated, are not doing any business and are all waiting for the litigation to end so Srinivasan can reactivate everything. (*Id.* at No. 22.) At his deposition, Srinivasan testified that there is no history of profitability at SplitByte, Kapisoft, or MI17. (*Id.* at No. 23.)

Discovery revealed that a custom software development agreement was entered into as of September 15, 2021, between MI17 and Orchid Innovations ("Orchid"), a company to be formed by the wives of Srinivasan's brothers. (ZL's UMF, No. 24.) Srinivasan's family members entered the Orchid agreement despite knowing of the litigation. (*Id.* at No. 25.) According to Srinivasan, his family members became alarmed when ZL served them with a subpoena, and they asked for the return of the entire sum advanced under the agreement, which Srinivasan agreed to return. (*Ibid.*) Other than the Orchid agreement and the agreements between Srinivasan's startups, the startups have not entered into any technology license or development agreements. (*Id.* at No. 26.)

B. Srinivasan's Facts

In support of his opposition to ZL's motion for summary adjudication, Srinivasan proffers the following responses to ZL's purportedly undisputed material facts: SplitByte was incorporated in Delaware on October 30, 2019. (Srinivasan's Separate Statement of Undisputed Material Facts in Opposition to ZL's Motion for Summary Adjudication [] ("Opp. UMF"), No. 1.) Kapisoft was formed to explore and incubate the secret-sharing idea in March 2017 due to the potential sale of ZL. (*Id.* at No. 4.) Kapisoft intended to develop and license a platform for startups to develop software. (*Ibid.*)

MI17 was initially formed to enter a consulting arrangement agreed upon with ZL on August 17, 2017. (Opp. UMF, No. 5.) On April 2, 2020, MI17 acquired the license to Kapisoft's platform. (*Ibid.*) In 2017, Srinivasan began to form the venture that would eventually become SplitByte, which was incorporated in Delaware on October 30, 2019. (*Id.* at No. 6.) Beginning in 2017, Leong knew that Srinivasan was forming a new secret-sharing

venture. (*Ibid.*) SplitByte counsel asked Srinivasan to secure a release of the intellectual property related to the secret-sharing patent. (*Ibid.*)

ZL knew that Srinivasan had participated in the RSA Conference for IT Security on behalf of SplitByte in February 2020. (Opp. UMF, No. 6.) On March 2, 2020, ZL signed an agreement acknowledging Srinivasan and SplitByte's ownership and assignment of the secret-sharing patent and related intellectual property and technology. (*Ibid.*) On April 13, 2020, ZL sent a notice of rescission of the IP agreement only to Srinivasan, despite knowing the agreement was also signed by Seshadri Paravastu as the President of SplitByte. (*Ibid.*) SplitByte employed Srinivasan as its CEO but did not pay him a salary pending funding from investors. (*Id.* at No. 8.) Srinivasan would have received a salary once SplitByte obtained funding. (*Ibid.*)

In its FAC in the First Action, ZL alleged that Srinivasan breached his fiduciary duty and that Kapisoft, MI17, and SplitByte aided and abetted Srinivasan's breach of fiduciary duty. (Opp. UMF, No. 9.) Srinivasan filed the Second Action seeking only the removal of Leong as a director under Corporations Code section 304, based on fraud, dishonest acts, and gross abuse of authority and discretion against ZL. (*Id.* at No. 10.) On June 26, 2023, the Court of Appeal issued its Opinion affirming in part and reversing in part the trial court's order denying Srinivasan's special motion to strike the defamation cause of action. (*Ibid.*)

Srinivasan's startups were forced to stop operating due to ZL's conduct, which is at issue in this litigation, including ZL's wrongful termination of Srinivasan, its subsequent attempt to rescind the IP agreement, and its false representations that Srinivasan breached his fiduciary duty and that Srinivasan's idea belonged to ZL. (Opp. UMF, Nos. 12, 20, 21.)

Apple terminated Srinivasan due to ZL's wrongful termination of Srinivasan for cause. (Opp. UMF, No. 13.) ZL knew of Srinivasan's economic relationships with Kapisoft, MI17, and SplitByte. (*Id.* at No. 17.) Srinivasan could not find another job due to ZL's wrongful termination of him for cause. (*Id.* at No. 19.) Srinivasan could not use his technology with his startups due to ZL's wrongful claim of ownership of the patent and technology. (*Ibid.*)

Orchid demanded a refund of the $400,000 advance paid to MI17 before MI17 performed any work or services because it was concerned about the ownership of the

intellectual property to be incorporated into the software that Orchid retained MI17 to develop. Srinivasan agreed to refund the advance because ZL had wrongfully claimed ownership of the technology he had developed. (Opp. UMF, Nos. 24 and 25.)

In further support of his opposition, Srinivasan also proffers additional facts, including the following: Leong has been and still is the Chairman of the Board, President, CEO, Treasurer, and Secretary of ZL. (Srinivasan's Separate Statement [], Additional Material Facts ("Opp. AMF"), No. 55.) Srinivasan informed Leong of the secret-sharing idea beginning in 2016. (*Id.* at No. 59.) Leong knew that Srinivasan claimed the intellectual property for the secret-sharing idea as his own. (*Id.* at No. 60.)

In 2017, Srinivasan began demanding transparency from the ZL board and requested corporate information and documents, including the ZL bylaws. (Opp. AMF, No. 66.) Srinivasan continued to demand formal board meetings, corporate information, and documents. (*Id.* at No. 70.) On March 8, 2018, Srinivasan asked Leong and his wife, Shioya, to provide a copy of the ZL bylaws. (*Ibid.*) Without providing a copy of the bylaws, Leong drafted a document to appoint Koichi Sekiyama ("Sekiyama") as a third director of ZL, which Leong and Srinivasan signed on March 17, 2018. (*Id.* at No. 71.)

On June 7, 2019, Leong and Srinivasan met at ZL's headquarters, and Srinivasan disclosed all his startups in detail while Leong took notes on a whiteboard. (Opp. AMF, No. 76.) The two also discussed a potential spinoff of ZL's File Analytics and Management product as a separate company to be headed by Srinivasan in Chennai, India. (*Ibid.*) On November 23, 2019, ZL provided Srinivasan with a consulting agreement for MI17 to provide consulting services to ZL. (*Id.* at No. 79.)

On January 29, 2020, Srinivasa asked ZL to execute an IP agreement to release a patent to SplitByte. (Opp. AMF, No. 81.) Srinivasan explained he needed the release to pursue investments for SplitByte, and Leong knew that Srinivasan sought the agreement to raise funds for SplitByte. (*Ibid.*) After numerous drafts and discussions, Leong forwarded the IP Agreement to Sekiyama and signed it on March 2, 2020. (*Id.* at No. 83.) After receiving the signed IP Agreement, Srinivasan relied upon it to seek investments. (*Ibid.*)

After signing the IP Agreement, Leong attempted to convince Srinivasan to transition out of ZL. (Opp. AMF, No. 84.) On March 27, 2020, Leong and Srinivasan met to discuss Srinivasan's potential transition out of ZL. (*Id.* at No. 85.) Leong agreed to make an offer allowing Srinivasan to transition from CTO to consultant, but Leong never provided such an agreement. (*Ibid.*)

On April 13, 2020, within a matter of a few hours, ZL sent Srinivasan a notice of termination, a notice of rescission of the IP Agreement, and a notice of rescission of an Employee Loan Agreement and Promissory Note dated June 5, 2017. (Opp. AMF, No. 87.) ZL claims that the termination of Srinivasan was for cause for breach of fiduciary duty based on disloyalty to ZL. (*Id.* at No. 88.)

Kapisoft was incorporated in California on March 23, 2017, and Srinivasan is its sole shareholder. (Opp. AMF, No. 89.) MI17 was incorporated in California on September 8, 2017, and Srinivasan is its sole shareholder. (*Id.* at No. 90.) SplitByte was incorporated in Delaware on October 30, 2019, and Srinivasan is a director, the CTO, and a majority shareholder. (*Id.* at No. 91.) Srinivasan assigned SplitByte ownership of the patent and related intellectual property and technology in exchange for equity in SplitByte. (*Ibid.*)

On November 3, 2020, Srinivasan filed the Second Action against Leong and ZL, seeking the removal of Leong pursuant to Corporations Code section 304. (Opp. AMF, No. 94.) On November 17, 2020, ZL held a special meeting of the shareholders to vote on competing proposals by Srinivasan and Leong. (*Id.* at No. 96.) ZL claims that approximately 71% of ZL's issued and outstanding shares were represented in person or by proxy but has provided no record of how that number was calculated or the tabulation of the votes. (*Ibid.*) ZL claims that Srinivasan's proposal to investigate Leong and him as a Director and CEO was denied and that Leong's proposal to investigate Srinivasan was approved. (*Ibid.*)

During this litigation, SplitByte continued to seek funding from investors. (Opp. AMF, No. 98.) On June 1, 2021, SplitByte was in the process of providing due diligence to investors. (*Ibid.*) Potential investors became concerned when they discovered that ZL had sent a notice of rescission of the IP Agreement. (*Ibid.*)

On September 15, 2021, MI17 agreed with Orchid to develop custom software and provide related services. (Opp. AMF, No. 99.) Orchid paid an advance of $400,000 to MI17, but after being served with a subpoena by ZL, Orchid became concerned and demanded a refund. (*Ibid.*) On March 9, 2022, the court denied Srinivasan's motion for summary adjudication of ZL's cause of action for rescission of the IP Agreement. (*Id.* at No. 100.) Srinivasan was forced to cease pursuing his startups, given the could on the title and ownership of the intellectual property he had developed during his employment with ZL. (*Id.* at No. 101.) Srinivasan then began seeking other employment. (*Ibid.*)

III. Legal Standard for Summary Adjudication

Any party may move for summary judgment. (Code Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material facts and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra,* 25 Cal.4th at p. 843.) The purpose of the summary judgment procedure is "to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar, supra,* 25 Cal.4th at p. 843.)

"Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. ([Code Civ. Proc.,] § 437c, subd. (f).)" (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.) "A summary adjudication is properly granted only if a motion therefor completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty. ([Code Civ. Proc.,] § 437c, subd. (f)(1).)" (*Ibid.*) "Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment. ([Code Civ. Proc.,] § 437c, subd. (f)(2)." (*Ibid.*)

The moving party "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar, supra,* 25 Cal.4th at p. 850.) "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.)

IV. Discussion

ZL moves for summary adjudication of: (1) the Fourteenth Cause of Action for Intentional Interference with Prospective Economic Relations; and (2) the Fifteenth Cause of Action for Negligent Interference with Prospective Economic Relations, as set forth in Srinivasan's SACC in the First Action. (ZL's Notice of Motion and Motion for Summary Adjudication, p. 2:2-11.) ZL contends that there is no triable issue as to any material fact and that ZL is entitled to summary adjudication as a matter of law. (*Ibid.*) In opposition, Srinivasan contends that the motion must be denied because ZL fails to meet its initial burden in showing the nonexistence of any triable issue of material fact. (Srinivasan's Opposition ("Opp."), pp. 9:23-10:7.)

A. Fourteenth Cause of Action

The Fourteenth Cause of Action is for Intentional Interference with Prospective Economic Advantage. "Intentional interference with prospective economic advantage has five elements: (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately

caused by the defendant's action." (*Roy Allan Slurry Seal, Inc. v. American-Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512 (*Roy Allen*); citing *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1164-1165 (*Korea Supply*); see also *Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal.App.4th 579, 596 (*Winchester Mystery House*).)

ZL initially contends that Srinivasan cannot meet the third element by showing intentionally wrongful acts by ZL. (ZL's Motion for Summary Adjudication ("Mot."), pp. 13:9-15:15.) ZL then argues that Srinivasan cannot meet the other required elements of the tort. (*Id.* at pp. 15:16-20:13.)

1. Intentionally Wrongful Acts

To meet the third element of the intentional interference claim, Srinivasan must establish that ZL engaged in intentionally wrongful acts designed to disrupt Srinivasan's prospective economic relationship. (*Korea Supply*, *supra*, 29 Cal.4th 1134, 1164.) Unlike the other elements of this tort, the third element presents a legal question to be resolved by the trial court as a matter of law. (*Drink Tank Ventures LLC v. Real Soda in Real Bottles, Ltd.* (2021) 71 Cal.App.5th 528, 538 (*Drink Tank*).)

"Where, as here, the plaintiff asserts the right to a trial by jury, it is the jury's job adjudicate whether the plaintiff has proven every element—except the third element." (*Drink Tank*, *supra*, 71 Cal.App.5th at p. 538.) "The responsibility of adjudicating the third element is divided between the jury and the trial court: Whether the defendant engaged in interfering conduct … is, like the other elements of this tort, a factual question for the jury, but whether that conduct is independently wrongful … is a legal question for the trial court." (*Ibid*.; see also 1 CACI No. 2202, Directions for Use ["Whether the conduct alleged qualified as wrongful if proven or falls within the privilege of fair competition is resolved by the court as a matter of law. If the court lets the case go to the trial, the jury's role is not to determine wrongfulness, but simply to find whether or not the defendant engaged in the conduct."].)

> With respect to the third element, a plaintiff must show that the defendant engaged in an independently wrongful act. It is not necessary to prove that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage. Instead, it is sufficient for the plaintiff to plead that the defendant knew that the interference is certain or substantially certain to occur as a result of his action. An act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common

> law, or other determinable legal standard. An act must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive.

(*San Jose Construction, supra*, 155 Cal.App.4th at pp. 1544-1545, internal punctuation and citations omitted.) "It is this independent wrongfulness requirement that makes defendants' interference with plaintiff's business expectancy a tortious act." (*Korea Supply, supra*, 29 Cal.4th at p. 1159.)

"Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement." (*Pmc, Inc. v. Saban Entm't* (1996) 45 Cal.App.4th 579, 603, citation omitted, disapproved on other grounds in *Korea Supply, supra*, 29 Cal.4th at p. 1159, fn. 11; see also *Winchester Mystery House, supra*, 210 Cal.App.4th at p. 596 ["A plaintiff must also show that the defendant's conduct was independently unlawful, that is, 'proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.' [Citation.]"].)

Here, ZL contends that Srinivasan cannot meet the third element simply by relying upon this litigation as the independently wrongful conduct that interfered with his prospective economic relationships. (Mot., p. 13:9-15.) "Srinivasan repeatedly and unequivocally attributed his failure to make any money from his startup ventures, as well as his failure to remain employed, to ***one reason only – this litigation***." (*Id.* at p. 13:10-12, emphasis original, citing ZL's UMF Nos. 11-26, 37-52.) ZL argues that Srinivasan's reliance upon this litigation as the wrongful conduct represents a fundamental flaw in his tortious interference claim. (*Id.* at p. 13:12-15.)

In opposition, Srinivasan contends that ZL's argument as to the third element is fundamentally flawed for focusing solely upon this litigation, rather than upon Srinivasan allegations of ZL's wrongful conduct. (Opp., p. 11:4-14.) Srinivasan argues that he has alleged wrongful conduct on the part of ZL independent from ZL's act of initiating and pursuing this litigation. (*Ibid.*) More specifically, Srinivasan asserts that ZL's alleged independently wrongful acts include: (1) ZL's wrongful termination of Srinivasan; (2) ZL's fraudulent representations

of approval and subsequent rescission of the IP Agreement; and (3) Leong's false representations to ZL shareholders regarding Srinivasan. (*Ibid.*)

In reply, ZL argues that Srinivasan is attempting to escape his deposition testimony as a means to create a triable issue of fact. (Reply, pp. 8:16-25; 9:22-10:5.) ZL contends that because Srinivasan pointed to this litigation as the reason his startups failed, he cannot now argue that the alleged wrongful conduct was ZL's wrongful termination of him or its fraudulent representations regarding him. (*Ibid.*, see also ZL's UMF No. 21 ["According to Srinivasan's sworn testimony and interrogatory responses, this litigation is the reason for his inability to make money from his startup business."].)

However, the pleadings determine the scope of the issues to be addressed on summary judgment or summary adjudication. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258 ["It is the allegation in the complaint to which the summary judgment motion must respond. [Citations.]"]; see also *Gray v. La Salle Bank* (2023) 95 Cal.App.5th 932, 946 [the pleadings play a key role in a summary judgment motion and function to limit the scope of the issues and frame the outer measure of materiality].) ZL contends that Srinivasan is making a last minute attempt to shoehorn ZL's conduct other than this litigation as the required independent wrongful act. (Reply, pp. 9:27-10:17 and fn. 3.) While Srinivasan points to the subject matter in the litigation as the wrongful conduct, ZL argues this is a distinction without difference. (*Ibid.*) Nevertheless, the SACC's allegations regarding the Fourteenth Cause of Action do not limit the allegedly wrongful conduct to the litigation. (SACC, ¶¶ 103-107.) Instead, the pleading specifically references Srinivasan's termination from ZL as well as ZL's allegedly fraudulent representations as facts supporting his claim for intentional interference with prospective economic relations. (SACC, ¶¶ 106-107.)

ZL relies upon *Benavidez v. San Jose Police Department* (1999) 71 Cal.App.4th 853, 860-861 (*Benavidez*), for the proposition that Srinivasan cannot submit a declaration to contradict his sworn testimony that this litigation is the independently wrongful conduct that interfered with his startups. (Reply, pp. 8:16-9:2.) In *Benavidez*, the plaintiff argued in opposition to summary judgment that officers from the defendant police department had a duty to offer affirmative assistance because, according to her declaration, she had asked to be taken

to a shelter. (*Benevidez, supra*, 71 Cal.App.4th at pp. 859-861.) The plaintiff's statement that she asked to be taken to a shelter directly contradicted her prior unequivocal deposition testimony that she did not tell the officers that she wanted to leave her apartment. (*Ibid*.) The trial court properly disregarded the plaintiff's statements in her declaration that unequivocally contradicted her prior deposition testimony. (*Ibid.*)

Here, ZL is attempting to hold Srinivasan to his deposition testimony and discovery responses that purportedly establish that this litigation is the only wrongful conduct giving rise to the Fourteenth Cause of Action. But here, in contrast to *Benavidez*, the statements ZL focuses upon are not regarding specific facts of what did or did not occur, but rather Srinivasan's interpretation and conclusions following repeated and leading questions from ZL's counsel, such as: "So I'm getting it right that – are you trying to tell us that the lawsuit is the cause of your inability to make money for these business." (ZL's UMF No. 21, at p. 10:4-8.) Moreover, the court is not convinced that Srinivasan's prior statements unequivocally establish that the lawsuit itself is the *only* wrongful conduct at issue.

For example, in the special interrogatory response relied upon by ZL, Srinivasan stated: "The legal lawsuit especially, based on so many false narratives by ZL and Leong, is the main reason the companies could not close the investment and business." (ZL's UMF No. 21, quoting Srinivasan's November 18, 2022 Responses to ZL's Special Interrogatories to Srinivasan, Set Three, No. 193.) It can reasonably be inferred from this statement that the litigation itself is not the only reason the startups could not obtain business, and further, that when Srinivasan refers to the "legal lawsuit" he is also referencing ZL's allegedly fraudulent representations, i.e. "false narratives," that are a part of the litigation as a whole. (*Ibid.*)

In this case, the SACC alleges wrongful conduct other than the litigation itself, including ZL's wrongful termination of Srinivasan and ZL's false representations regarding the IP Agreement and whether Srinivasan breached his fiduciary duty. (See SACC, ¶¶ 106-107; see also Opp. UMF, No. 21.) The court also observes that ZL previously argued that there are multiple triable issues of material fact regarding the formation and meaning of the IP Agreement. (See the court's (Hon. Patricia M. Lucas) Order Re: Motions to Seal; Motion for

Summary Adjudication; and Alternative Motion for Bifurcation, issued March 9, 2022, p. 12:12-21.)

For these reasons, ZL has not shown that Srinivasan cannot establish the third element of the Fourteenth Cause of Action.

2. Remaining Elements

Next, ZL contends that Srinivasan cannot establish the remaining elements of the claim for intentional interference with prospective economic relations. (Mot., pp. 16:16-20:13.) As discussed previously, the remaining elements are more factual in nature and are left to the jury to decide, when a jury trial has been requested. (*Drink Tank, supra*, 71 Cal.App.5th at p. 538 [where plaintiff seeks a jury trial, it is the jury's job adjudicate whether the plaintiff has proven every element, other than the third element].)

To meet the remaining elements for the cause of action, a plaintiff must plead and prove:

"(1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; … (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action." (*Roy Allan*, *supra*, 2 Cal.5th at p. 512.)

ZL's remaining arguments generally focus upon the first and fifth elements.[2] More specifically, ZL contends that Srinivasan cannot show an economic relationship with a reasonable probability of being realized and cannot show damages that are not speculative. (Mot., pp. 16:4-17, 17:22-26.) According to ZL, Srinivasan has repeatedly conceded that his start-up businesses have never made a profit. (*Id.* at pp. 17:17-21 [citing ZL UMF Nos. 17-18, 43-44], and 18:14-16.) As such, ZL argues that the amount of any profit that Srinivasan might have made from his startups is speculative and uncertain. (*Id.* at pp. 19:26-20:9.)

In opposition, Srinivasan asserts that his economic relationships are undeniable because he is the sole shareholder of Kapisoft and MI17 and a majority shareholder of SplitByte. (Opp.,

[2] ZL also argues that it did not have knowledge of any of Srinivasan's claimed economic relationships (with the exception of the one with ZL). (Mot., pp. 16:25-17:21.) ZL further argues, with respect to the negligent interference cause of action, that Srinivasan fails to establish that ZL owed him a duty of care. (*Id.* at pp. 20:14-21:5.) The court need not address these arguments in light of the conclusion below.

p. 14:1-5.) Srinivasan contends that ZL is improperly focusing on the harm to the startups because he is the one bringing the cause of action. (*Id.* at p. 14:8-12.) Srinivasan further argues that he had a reasonable probability of economic benefit from his relationships with his startups. (*Id.* at p. 14:13-21.) Srinivasan argues that the expectation of economic benefit from his relationship with MI17 was substantially more than speculative because Srinivasan received a consulting agreement from ZL for MI17 to provide consulting services to ZL. (*Id.* at p. 14:22-26.) He also argues that the expectation of economic is further supported by the fact that Orchid paid a $400,000 advance. (*Ibid.* at p. 14:26-28.)

Srinivasan directs the court to the *Korea Supply* decision, stating that the probability of an economic benefit to him in this case is analogous to the economic relationship discussed in that case. (Opp., p. 14:13-21.) In *Korea Supply*, the plaintiff represented a manufacturer bidding on a large military equipment contract, and the plaintiff stood to receive $30 million if the manufacturer's bid was accepted. (*Korea Supply*, *supra*, 29 Cal.4th at p. 1140.) The contract was ultimately awarded to the defendant, a different manufacturer bidding on the contract. (*Ibid.*) The plaintiff contended the manufacturer it represented was not awarded the contract because the defendant and its agent offered bribes and sexual favors to key government officials. (*Ibid.*) The trial court sustained the defendant's demurrer, and the Court of Appeal reversed, finding that the plaintiff had sufficiently stated causes of action for unfair competition and for intentional interference with prospective economic advantage. (*Id.* at pp. 1142-1143.)

In its *Korea Supply* decision, the California Supreme Court affirmed the Court of Appeal's decision that the plaintiff had sufficiently stated a claim for the tort of interference with prospective economic advantage. (*Korea Supply*, *supra*, 29 Cal.4th at p. 1166.) The court concluded that the tort "does not require the plaintiff to plead that the defendant acted with specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage." (*Id.* at p. 1153.) Rather, the court stated it is sufficient "to plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Ibid.*)

The *Korea Supply* decision explains that a plaintiff pleading this tort must first "allege the existence of an economic relationship with some third party that contains the probability of

future economic benefit to the plaintiff." (*Korea Supply*, *supra,* 29 Cal.4th at p. 1164.) "This tort therefore 'protects the expectation that the relationship eventually will yield the desired benefit, not necessarily the more speculative expectation that a potentially beneficial relationship will arise.'" (*Ibid.*, quoting *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 524.)

In *Korea Supply*, the plaintiff had an agency relationship with the manufacturer it represented with commission fixed at 15 percent of the contract price. (*Korea Supply*, *supra,* 29 Cal.4th at p. 1164.) The plaintiff alleged that, based on the contract in question, it would have been awarded a commission of at least $30 million if it had been awarded the contract. (*Ibid.*) "This business relationship and corresponding expectancy is sufficient to meet this first element. Only plaintiffs that can demonstrate an economic relationship with a probable future economic benefit will be able to state a cause of action for this tort." (*Ibid.*)

In this case, the court is not persuaded by Srinivasan's contention that the probability of economic benefit to him is analogous to that of the plaintiff in *Korea Supply*. There, the plaintiff alleged an amount of economic benefit and demonstrated the reasonableness of its expectation based on its relationship specifically providing for a 15 percent commission on the particular contract in question. Here, the SACC alleges that ZL's "intentional interference with Srinivasan's prospective business and economic advantage has caused immense damage to Srinivasan, in an amount to be established at trial." (SACC, ¶ 108.) Srinivasan does not direct the court to any particular transaction or identify a basis for his assessment of "immense damage," which can reasonably be characterized as vague and speculative.

Furthermore, ZL persuasively argues that Srinivasan cannot rely upon his relationship with ZL as the basis for his claim for intentional interference with prospective economic advantage. (Mot., p. 17:1-10.) "There is an important limitation to the use of this tort as remedy for the disruption of contractual relationships. *It can only be asserted against a stranger to the relationship.*" (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 262, emphasis original.) A party "certainly should not have to bear a burden in tort for refusing to *enter into* a contract where he or she has obligation to do so." (*Id.* at p. 266, emphasis original.) It follows that, as a matter of law, a party to an economic relationship cannot commit a tortious

interference with that relationship. (*Id.* at p. 262.) Srinivasan concedes this argument by failing to address it in his opposition. (See *Glendale Redevelopment Agency v. Parks* (1993) 18 Cal.App.4th 1409, 1424 [issue it impliedly conceded by failing address it]; see also *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566 [party concedes an issue by failing to argue the contrary].)

Thus, while Srinivasan may have shown a speculative expectation that a potentially beneficial relationship could have developed, he has not demonstrated an economic relationship with a probable future economic benefit. For similar reasons, Srinivasan has not shown economic harm proximately caused by ZL's acts. In sum, ZL has met its initial burden with respect to the first and fifth elements of the intentional interference cause of action, and Srinivasan has failed to meet his burden in opposition.

Accordingly, the motion for summary adjudication of the Fourteenth Cause of Action is GRANTED.

B. Fifteenth Cause of Action

"The tort of negligent interference with prospective economic advantage is established when a plaintiff demonstrates that: (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." (*Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1078; see also *Nelson v. Tucker Ellis LLP* (2020) 48 Cal.App.5th 827, 884, fn. 5.)

"The tort of *negligent* interference with economic relationship arises only when the defendant owes the plaintiff a duty of care." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 348 (*LiMandri*), original italics, citation omitted.) ZL contends that this cause of action fails because Srinivasan cannot establish that ZL owed him a duty of care. (Mot., pp. 20:14-21:5.)

In opposition, Srinivasan argues that ZL's duty arose from its knowledge of Srinivasan's relationship with his startups. (Opp., pp. 15:15-16:8.)

Here, the alleged economic relationships in question are the same as those discussed above in relation to the Fourteenth Cause of Action. While the tort of negligent inference with prospective economic relations does not require showing an intentionally wrongful act, it still requires showing an economic relationship with a probable economic benefit and damages based on benefits or advantage reasonably expected from the relationship. Thus, for the same reasons discussed above, ZL's has shown that Srinivasan cannot establish these elements, and Srinivasan has not established a triable issue of material fact in reply.

Accordingly, the motion for summary adjudication of the Fifteenth Cause of Action is GRANTED.

V. Conclusion

The motion for summary adjudication is GRANTED in its entirety.

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

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Calendar Line 2

Case Name: SJSC Properties, LLC v. WSP USA, Inc. et al.
Case No.: 23CV420252

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

I. Introduction

This action arises out of the construction of a mixed-use project in San Jose. On August 1, 2023, Plaintiff SJSC Properties, LLC ("Plaintiff") commenced this action by filing a Complaint against Defendants WSP USA Inc. ("WSP"), Pan-Pacific Mechanical LLC ("PPM"), Critchfield Mechanical, Inc. ("CMI"), and Zurn Industries LLC ("Zurn"), setting forth causes of action for: (1) professional negligence; (2) negligence; (3) breach of third-party beneficiary contract; (4) breach of warranty; (5) strict products liability; (6) negligence in design and/or manufacture; and (7) breach of contract.

Plaintiff then filed a First Amended Complaint, followed by an amendment substituting Defendants AERCO International, Inc. ("AERCO") and Suffolk Construction Company, Inc. ("Suffolk") in place of DOE defendants.

On September 3, 2024, Plaintiff filed the operative Second Amended Complaint ("SAC"). As relevant here, the SAC sets forth the following allegations: Plaintiff is a limited liability company and the owner of the real property located at 167 – 193 East Santa Clara Street in San Jose (the "Property"). (SAC, ¶¶ 1, 10.) The Property is located directly across from San Jose City Hall, and Plaintiff recently substantially completed the construction of mixed-used project comprised of two 28-story towers and an underground parking garage (the "Project"). (*Id.* at ¶¶ 1-2.) The construction of the entire Project was substantially completed on or around April 25, 2022. (*Id.* at ¶ 3.)

Plaintiff purchased the Property in or around May 2015. (SAC, ¶ 27.) Between October 2015 and November 2017, Plaintiff entered into multiple contracts regarding the design, engineering, and construction of the Project. (*Id.* at ¶ 28.) On or about November 7, 2017,

Plaintiff and Suffolk entered into a written agreement for Suffolk to act the general contractor for the construction of the Project. (*Id.* at ¶¶ 33-35.)

On or around January 9, 2018, Suffolk and PPM entered into a written subcontract for the design and construction of the Project's plumbing systems. (SAC, ¶ 36 and Ex. C (the "PPM Subcontract").) On or around December 20, 2017, Suffolk and CMI entered into a written subcontract for the design and construction of the HVAC/Mechanical systems for the Project. (*Id.* at ¶ 37 and Ex. D (the "CMI Subcontract").) The PPM and CMI Subcontracts contain similar provisions relating to the performance of the work to be completed and identify Plaintiff as the owner of the Property. (*Id.* at ¶¶ 38-39.) The PPM and CMI Subcontract also contain the same indemnity provision, found at section 8.1.1. (*Id.* at ¶ 40.)

Under the PPM Subcontract, PPM was responsible for designing, furnishing, and installing a complete and functioning plumbing system in accordance with building codes and contract documents. (SAC, ¶ 42.) The plumbing system that PPM designed and installed is not functioning as intended or expected as there have been repeated leaks and system failures caused by defects in PPM's design, construction materials, and construction services. (*Ibid.*) Under the CMI Subcontract, CMI was responsible for designing, furnishing, and installing a complete and functioning HVAC system. (*Id.* at ¶ 46.) The HVAC system that CMI designed and installed is not functioning as intended or expected as there have repeated service needs and system failures. (*Id.* at ¶ 47.)

The Project has suffered from repeated leaks and plumbing system failures, sustaining a pattern of water damage as a result. (SAC, ¶¶ 48-54.) Plaintiff has also discovered various defects and deficiencies with both the plumbing system and the HVAC system. (*Id.* at ¶¶ 62-78.)

The SAC sets forth the following causes of action: (1) professional negligence (against WSP, Suffolk, PPM, and CMI); (2) negligence (against Suffolk, PPM, and CMI); (3) breach of third-party beneficiary contract (against WSP, PPM, CMI, AERCO, and Zurn); (4) breach of warranty (against Suffolk, PPM, CMI, AERCO, and Zurn); (5) strict products liability regarding PRVs [pressure reducing valves] (against Suffolk, PPM, and Zurn); (6) negligence in design and/or manufacture regarding PRVs (against Suffolk, PPM, and Zurn); (7) breach of

contract (against Suffolk); (8) express indemnity (against PPM and CMI); (9) declaratory relief (against PPM and CMI); (10) strict products liability regarding AERCO boilers (against Suffolk, PPPM and AERCO); (11) negligence in design and/or manufacture regarding AERCO boilers (against Suffolk, PPM and AERCO).

Now before the court is PPM and CMI's (collectively hereinafter, "Defendants") Demurrer to the eighth and ninth causes of action set forth in Plaintiff's SAC.[3] Plaintiff opposes.

II. Legal Standard

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

The court treats a demurrer as "admitting all properly pleaded material facts, but not contentions, deductions or conclusions of fact or law." (*Piccini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint …; the question of plaintiff's ability to prove these allegations, or the possibility in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214, internal quotations and citations omitted.) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

III. Discussion

[3] Defendants initially filed their Demurrer on June 13, 2024, before Plaintiff filed its operative SAC. On August 26, 2024, the court entered an order permitting Plaintiff to file its proposed SAC and permitting Defendants to file an amended notice of hearing on their Demurrer.

Defendants demur to the eighth cause of action for express indemnity and the ninth cause of action for declaratory relief on the grounds that the SAC does not state facts sufficient to constitute the causes of action. (Defendants' Notice of Demurrer and Demurrer []; Memorandum of Points and Authorities in Support Thereof ("Demurrer"), p. 2:3-13.)

Defendants contend that Plaintiff is improperly seeking attorney fees in this action against the subcontractors based on the express indemnity provisions in the subcontracts between Defendants and the contractor (Suffolk). (Demurrer, p. 6:2-12.) Defendants further argue that an indemnity clause generally only applies to third party claims and that there is nothing in the subcontracts in question to suggest that the indemnity clauses were intended to apply to a first party claim. (*Id.* at p. 6:14-17.)

In opposition, Plaintiff argues that the language of the subcontracts indicates a clear and obvious intention of the parties for the indemnity provisions to encompass first party claims. (Plaintiff's Opposition to Defendants' Demurrer ("Opposition"), p. 5:8-10.) Plaintiff also argues that the term "any and all claims" as well as a reference to costs for investigation and repairs demonstrate an intention for the indemnity provisions to reach first party claims. (*Id.* at p. 5:13-19.)

A. Express Indemnity

The eighth cause of action is for express indemnity, and the ninth cause of action is for declaratory relief regarding Defendants' duty to indemnify Plaintiff.

"Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person." (Civ. Code, § 2772.) "Generally, indemnity is defined as an obligation of one party to pay or satisfy the loss or damage incurred by another party. [Citation.]" (*Rideau v. Stewart Title of California, Inc.* (2015) 235 Cal.App.4th 1286, 1294.) "A contractual indemnity provision may be drafted either to cover claims between the contracting parties themselves, or to cover claims asserted by third parties. [Citations.]" (*Ibid.*)

The general rule is that indemnity refers to third party claims. (*Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1024 (*Zalkind*) ["Indemnity generally refers to third party claims."]; see also *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 14

Cal.App.4th 949, 969 (*Myers*) ["Indemnification agreements ordinarily relate to third party claims."]; see also *Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 600 (*Alki*) ["Generally, an indemnification provision allows one party to recover costs incurred defending actions by third parties, not attorney fees incurred in an action between the parties to the contract."]; see also *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 555 (*Dream Theater*) ["[T]he term 'indemnify' ordinarily relates to third party claims."].)

While indemnity provisions are normally limited to third party claims, the contracting parties may agree to a broader scope. (*Hot Rods, LLC v. Northrup Grumman Systems Corp.* (2015) 242 Cal.App.4th 1166, 1179 (*Hot Rods*) ["Indemnity provisions typically refer to third party claims, but if the parties so intend, such provisions may also encompass direct claims."].) "Although indemnity generally relates to third party claims, 'this general rule does not apply if the parties to a contract use the term "indemnity" to include direct liability as well as third party liability.'" (*Zalkind*, *supra*, 194 Cal.App.4th at p. 1024, quoting *Dream Theater*, *supra*, 124 Cal.App.4th at p. 555.)

"An indemnity agreement is to be interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract. [Citations.]" (*Myers*, *supra*, 14 Cal.App.4th at p. 968.) "The extent of the duty to indemnify is determined from the contract. The indemnity provisions of a contract are to be construed under the same rules governing other contracts with a view to determining the actual intent of the parties." (*Id.* at pp. 968-969, citations omitted.) "Accordingly, the contract must be interpreted to 'give effect to the mutual intention of the parties.' [Civ. Code, § 1636.] The intention of the parties is to be ascertained from the 'clear and explicit' contract language. [Civ. Code, § 1638.]" (*Alki*, *supra*, 4 Cal.App.5th at p. 600.)

> The question of whether an indemnity agreement covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as express in the agreement that should control. When the parties knowingly bargain for the protection at issue, the protection should be afforded. This requires an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts.

(*Zalkind*, 194 Cal.App.4th at p. 1024, quoting *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 633.)

Here, the relevant indemnity provision, found within Section 8.8 in both the PPM Subcontract and the CMI Subcontract, provides as follows in pertinent part:

> **8.8.1 Indemnity.** The work performed by Subcontractor shall be at the risk of Subcontractor and its employees and agents exclusively. To the fullest extent permitted by law, Subcontractor shall indemnify, defend, and hold harmless Contractor [Suffolk] and Owner [Plaintiff], and their respective officers, directors, employees …, from and against any and all claims for bodily injury or death, damage to property, demands, damages, actions, causes of action, suits, losses, judgments, obligations and any liabilities, costs and expenses (including, but not limited to investigative and repair costs, attorney's fees and costs and consultant's fees and costs) …, which arise out of or are in any way connected with the work performed, materials furnished, or services provided under this agreement, by Subcontractor or its agents.

(SAC, Ex. C, § 8.8.1.)

The SAC alleges that, by virtue of the above indemnity provisions, Defendants have a duty to indemnify Plaintiff from any and all claims arising out of or connected with the work performed pursuant to the subcontracts, including from investigative and repair costs, attorney's fees and costs, and consultant's fees and costs. (SAC, ¶¶ 134-136.)

In support of their Demurrer, Defendants contend the indemnity provision does not apply to Plaintiff because there is no third party claim against Plaintiff for which Defendants need to hold Plaintiff harmless. (Demurrer, pp. 6:8-9, 10:3-5.) Defendants argue that Plaintiff's intent cannot affect the interpretation of the indemnity provisions because Plaintiff did not draft or sign the Subcontracts in question. (*Id.* at p. 10:24-26.) Defendants point out that the Subcontracts lack any provisions specifically providing for attorney's fees in an action on the contract. (*Id.* at p. 11:17-18.)

Defendants also argue that the indemnity provision here contains no language indicating an intention that the indemnity shall extend beyond third party claims. (Demurrer, pp. 12:15, 12:21.) They also state that the indemnity provisions here do not include breach of contract claims. (*Id.* at p. 13:8-11.) According to Defendants, the scope of indemnity in this case should be limited to third party claims in accordance with the general rule. (*Ibid.*)

In opposition, Plaintiff contends the language of the subcontracts "indicates a clear and obvious intention of the parties for the indemnity provision to broadly apply to first and third-party indemnity claims." (Opposition, p. 5:8-10.) Plaintiff also argues that the subcontracts

were entered into exclusively for the purpose of performing work on the Project and that Plaintiff is the party that directly benefits from the subcontracts. (*Id.* at p. 9:9-11.) Plaintiff points out that it is expressly named and repeatedly referenced in subcontracts as the "Owner." (*Id.* at p. 9:11-22.)

Plaintiff further argues that the indemnity language does not contain any specific limitation to third-party claims. (Opposition, p. 10:6-21.) Plaintiff also contends the phrase "any and all claims" is broad enough to encompass first-party claims. (*Ibid.*) Plaintiff argues that there are limitations to the indemnity provisions, such as those for active negligence and willful misconduct, and that if the parties intended to limit the indemnity to third-party claims, they could have expressly included such a limitation within the detailed language of the subcontracts. (*Id.* at p. 10:22-28.)

Plaintiff primarily relies upon the *Hot Rods* decision, wherein the appellate court determined that the parties expressly adopted broad definitions covering both first and third party claims. (Opposition at pp. 11:9-12:18, citing *Hot Rods*, *supra*, 242 Cal.App.4th at pp. 1179, 1181-1182.) Plaintiff asserts that, in this case, the indemnity provisions' specific reference to investigative and repair costs "indicate a contemplation of recovery for claims made by [Plaintiff]" because such costs "would largely fall upon Plaintiff as owner of the Project." (Opposition, p. 12:18-20.) Finally, Plaintiff argues that Defendants should have expected a first-party breach of express indemnity claim because Defendants signed the subcontracts and were aware of the language of the indemnity provisions. (*Id.* at p. 12:21-23.)

Plaintiff's arguments fail to persuade the court that the general rule limiting indemnity to third-party claims should not apply here. First, *Hot Rods* is distinguishable. There, the parties executed a purchase and sale agreement for a 9.5 acre property containing an environmental indemnity provision. (*Hot Rods*, *supra*, 242 Cal.App.4th at pp. 1172-1173.) Under the agreement, the seller agreed to indemnify the buyer and buyer's lenders from claims involving an environmental condition or liability caused by an act or omission of the seller or related persons and entities. (*Id.* at p. 1177.)

More specifically, the indemnity provision at issue in *Hot Rods* purported to indemnify Hot Rods from "*any* claims, demands, penalties, fees, fines, liability, damages, costs, losses, or other expenses including, without limitation, reasonable environmental consulting fees and reasonable attorney fees." (*Hot Rods*, *supra*, 242 Cal.App.4th at p. 1181, italics added by appellate court in *Hot Rods*.) The agreement defined "claim" as "any claim or demand by any Person for any alleged liabilities, whether based in contract, tort, implied or express warranty, strict liability, criminal or civil statute, Permit, ordinance, regulation, common law, equity or otherwise." (*Ibid.*) The agreement defined "Person" as "any person, employee, individual, corporation, unincorporated association, partnership, trust, federal, state or local government agency, authority or other private or public entity." (*Ibid.*)

After examining the above indemnification language, the appellate court in *Hot Rods* found that "the parties expressly adopted a broad definition of 'claim' and 'person' that encompasses 'any alleged liabilities,' and covers both first and third party claims." (*Hot Rods*, *supra*, 242 Cal.App.4th at p. 1181.) The court also found that the language of the rest of the contract as a whole strengthened its conclusion that the indemnity provision applies to both first and third party claims. (*Id.* at p. 1182.)

> The reasonable inference was that Hot Rods wanted to make certain that it would not be responsible for covering the costs of environmental problems or cleanup, either directly or indirectly, and that Northrup was willing to so guarantee. Thus, interpreting the indemnity clause to cover both first and third party claims is consistent with the overall intent of the agreement.

(*Ibid.*)

Here, by contrast, the indemnity provision does not specifically define the covered claims to include claims based in contract, nor does it state that it covers claims brought by any person or entity. (See SAC, Ex. C, § 8.8.1.) Instead, the pertinent language in the indemnity clause generally refers to tort claims, starting with "any and all claims for bodily injury or death[.]" (*Ibid.*) Furthermore, Plaintiff does not identify any other language within the subcontracts that would support the conclusion that the contracting parties intended the indemnity to apply to both first and third party claims.

Notably, the contract at issue in *Hot Rods* was not a subcontract arising from a construction project, as here, but was instead a land sale contract with unique provisions

related the buyer's concerns regarding environmental liability. Also, as Defendants point out in reply, there is little merit to Plaintiff's argument that the indemnity clause contains "some agreed upon limitations." (Reply, p. 7:9-18.) That the indemnity provision does not cover claims that arise from the indemnified party's active negligence or willful misconduct is unlikely to be a bargained-for provision because these limitations are specifically required by Civil Code section 2782.05, a statute specifically applicable to construction contracts and subcontracts.[4] The fact that the indemnity language is identical for both the plumbing and HVAC subcontracts reinforces the conclusion that the parties here did not specifically negotiate for or other otherwise contemplate indemnity reaching beyond the general limitation to third-party claims.

Plaintiff asserts that "the indemnity provision does not contain express language which limits Defendants' obligations to third-party claims, and in fact, the broad language of the provision can only be interpreted to mean that the indemnity protection extends to first party claims." (Opposition, p. 11:23-26.) However, this ignores the general rule that, absent some indication of the parties' intention otherwise, an indemnity provision applies only to third-party claims. (See *Zalkind*, *supra*, 194 Cal.App.4th at p. 1024 ["Indemnity generally refers to third party claims."].)

In light of the specific language employed here, and in view of the surrounding provisions of the subcontract, the court interprets the indemnity provisions here to be limited to claims brought by third parties. (See *Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14, 20 ["Generally, the inclusion of attorney fees as an item of loss in a third-party claim-indemnity provision does not constitute a provision for the award of attorney fees in an action on the contract[.]"].)

Accordingly, the demurrer to the eighth cause of action for express indemnity is SUSTAINED. As the ninth cause of action seeks declaratory relief concerning Defendants'

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[4] Civil Code section 2782.05 provides, in pertinent part: "[P]rovisions, clauses, covenants, and agreements contained in, collateral to, or affecting any construction contract … that purport to insure or indemnify … against liability for claims of death or bodily injury, injury to property, or any other loss, damage, or expense are void and unenforceable to the extent the claims arise out of, pertain to, or relate to the active negligence or willful misconduct of the [indemnified party]…."

duty to indemnify, it rises or falls with the eighth cause of action. (See SAC, ¶¶ 139-142.) Therefore, the demurrer to the ninth cause of action for declaratory relief is SUSTAINED.

B. Leave to Amend

Plaintiff requests leave to amend, asserting that "to the extent the Court determines any additional details are necessary, the defect is curable by amendment." (Opposition, p. 13:25-28.)

It is an abuse of discretion for the court to deny leave to amend where there is a reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) However, the burden is on the plaintiff to "show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. [Citations.]") (*Ibid.*) "Leave to amend should be denied where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law. [Citations.]" (*Lawrence v. Bank of America* (1935) 163 Cal.App.3d 431, 436.)

Here, the pertinent facts are not in dispute and the nature of the claims are clear. Both sides agree that the indemnity language set forth in the SAC is accurate; the dispute lies in the interpretation of that language. Furthermore, Plaintiff does not identify how the pleading would or could be amended to withstand Defendants' grounds for demurrer. (*Ibid.*)

For these, the court is disinclined to grant leave to amend. Nevertheless, as Plaintiff has not yet had an opportunity to amend the pleading in response the court's ruling on demurrer, the court will grant Plaintiff's request for leave to amend.

IV. Conclusion

The demurrer to the eighth and ninth causes of action is SUSTAINED WITH 10 DAYS LEAVE TO AMEND.

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

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Calendar Line 3

Case Name: Waltrip v. Highgate Hotels, L.P. (Class Action)
Case No.: 23CV417680

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

I. Introduction

This is a putative class and representative action arising from alleged wage and hour violations. On June 15, 2023, Plaintiff Glenn Waltrip ("Plaintiff") commenced this action by filing a Class Action Complaint against Defendant Highgate Hotels, L.P. ("Defendant").

On October 17, 2024, Plaintiff filed the operative Second Amended Complaint ("SAC"), setting forth the following causes of action: (1) failure to provide meal periods; (2) failure to provide rest periods; (3) failure to pay hourly wages; (4) failure to pay sick time; (5) failure to indemnify; (6) failure to provide accurate written wage statements; (7) failure to timely pay all final wages; (8) wages not timely paid during employment; (9) failure to keep requisite payroll records; (10) failure to pay interest on deposits; (11) failure to pay vacation wages; (12) unfair competition in violation of Business and Professions Code section 17200, *et seq.*; (13) civil penalties in violation of Labor Code section 2698, *et seq.* (Private Attorneys General Act ["PAGA"]).

The parties have reached a settlement. Now before the court is Plaintiff's unopposed motion for approval of the settlement.

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 employees of Defendant in hourly or non-exempt positions in California at any time from January 12, 2022 through the date of preliminary approval, subject to section III.L.1 of this Agreement.

(Declaration of Shaun Setareh ("Setareh Dec."), Ex. A ("Agreement"), § I.D.)

Section III.L.1 is an escalator clause providing that, in the event the actual number of workweeks during the class period is determined to be above the estimated number of workweeks by more than 10 percent, then the Defendant shall have the choice of increasing the gross settlement amount on a proportional basis or electing to end the class period on the date earlier.

The settlement also includes a subset PAGA class of Aggrieved Employees defined as "[A]ll current and former hourly-paid or non-exempt employees of [Defendant] in California

during the PAGA Covered Period." (Agreement, § I.B.) The "PAGA Covered Period" means the time period from May 8, 2022 through the date of preliminary approval. (*Id.* at § I.Z.)

According to the terms of the settlement, Defendant will pay a gross settlement amount of $1,200,000, subject to the escalator clause. (Agreement, § I.U.) The gross settlement amount includes attorney fees of up to one-third of the gross settlement amount (currently estimated to be $400,000), litigation costs not to exceed $15,000, a PAGA allocation of $100,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to PAGA Employees as individual PAGA payments), an incentive award of $5,000; and settlement administration expenses not to exceed $32,500. (*Id.* at §§ III.L.3-III.L.7.) 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 § III.L.4.)

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, § III.L.5.) 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.

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 operative Complaint occurring during the Class Period. (Agreement, §§ I.DD, I.FF, III.B.) 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 operative Complaint and the LWDA notice. (Agreement, §§ I.EE, I.FF, III.C.) Plaintiff also agrees to a comprehensive general release. (*Id.* at § III.D.) The release provisions are appropriately tailored to the factual allegations of the operative pleading. (See *Amaro v. Anaheim Arena 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 Michael Loeb, Esq. (Setareh Dec., ¶¶ 6-7.) Prior to mediation, Plaintiff obtained information through informal discovery, including time keeping and payroll records for a sampling of the 4,181 Class Members, relevant employment policies and agreements, and aggregate data for the Class Members and Aggrieved Employees. (*Id.* at ¶ 6.) Plaintiff's counsel asserts that the settlement is fair, reasonable, and adequate in light of the complexities of the case and the uncertainties of further litigation. (*Id.* at ¶ 7.)

Plaintiff estimates that Defendant's total maximum potential exposure, including PAGA penalties, is $34,714,545.67. (Setareh Dec., ¶ 8.) This amount includes $7,384,599.08 in compensatory, non-penalty class claims, $19,945,347.50 in statutory penalties, and $7,145,000.00 in PAGA penalties. (*Ibid.*) Plaintiff provides a more detailed breakdown of these amounts by claim. (*Ibid.*) Plaintiff explains that he substantially discounted the value of his compensatory claims because there is an extremely low likelihood that he will prevail on all his claims. (*Id.* at ¶ 9.) Plaintiff details the significant risks associated with his various class claims, including the difficulty in proving intentional violations of specific Labor Code provisions as well as Defendant's contentions that its policies and practices are lawful. (*Ibid.*) Plaintiff also explains that the risks of litigation are heightened due to the potential that Defendant's policies and practices are ultimately deemed to be legal, the risk that collective treatment could be deemed improper for other than settlement purposes, and the risk that any PAGA penalties could be significantly reduced by the court in its discretion. (*Ibid.*)

The proposed gross settlement amount of $1,200,000 represents approximately 3.5 percent of Defendant's estimated total potential exposure of $34,714,545.67. This amount is below the general range of percentage recoveries that California court typically find 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].) Nevertheless, although the settlement is low, the court finds that Plaintiff's detailed analysis sufficiently explains the rationale for the settlement amount. (See Setareh Dec., ¶ 9.)

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 relative strengths of Plaintiffs' case and Defendant's arguments in defense, the court finds the terms of the settlement to be fair.

C. Incentive Award, Fees and Costs

Plaintiffs request enhancement awards in the total amount of $5,000.

> 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.)

In his supporting declaration, Plaintiff Glenn Waltrip states that his participation in this action has included researching law firms, ongoing communication with his attorneys, gathering and reviewing documents, and attending an all-day mediation. Plaintiff estimates that he has spent approximately 25 hours participating in this litigation.

Plaintiff points out that there is a public record of this lawsuit. Plaintiff took risk by attaching his name to this case because it might impact his future employment. (See *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].)

For these reasons, the court finds that an incentive award is justified, and the amount requested is reasonable. The requested incentive award is approved.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel will seek attorney fees of up to one-third of the maximum settlement amount (currently estimated to be $400,000), and litigation costs not to exceed $15,000. Prior to the final approval hearing, Plaintiff's counsel shall submit lodestar information (including hourly rate and hours worked), evidence of actual costs incurred, and evidence of settlement administration costs. The court approves Phoenix Settlement Administrators as the settlement administrator.

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 4,181 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 informs class member that they may opt out of the settlement or object. (Agreement, Ex. 1.) The settlement amounts, including attorney fees and payment to the named plaintiff, are stated.

However, Section 14 of the notice informs class members that they may object to the settlement, but it states that they must do so in writing. This portion of the notice must be

modified to state that class members may appear at the final fairness hearing to make an oral objection without filing a written objection.

Also, Section 16 of the notice must be modified to include the following instructions regarding how to attend 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. Provided that the above changes are made to the notice prior to its mailing, the notice is approved.

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 November 20, 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.

Plaintiff shall prepare the order.

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Calendar Line 4

Case Name: Rodriguez v. Palo Alto Hills Golf and Country Club, Inc. (PAGA)
Case No.: 21CV382771

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

I. Introduction

This is a putative representative action arising from alleged wage and hour violations. On June 7, 2021, Plaintiff Armando Rodriguez ("Plaintiff") commenced this action by filing a Complaint against Defendant Palo Alto Hills Golf and Country Club, Inc. ("Defendant"), alleging a sole cause of action for violation of the Private Attorneys General Act ("PAGA").

According to the Complaint's allegations, Plaintiff was employed by Defendants as a non-exempt employee from approximately May 2018 to approximately April 2020. (Complaint, ¶ 20.) Defendant engaged in a uniform policy and systematic scheme of wage abuse against their hourly-paid or non-exempt employees. (*Id.* at ¶ 27.)

The parties have reached a settlement. Now before the court is Plaintiff's unopposed motion for approval of the settlement.

II. Legal Standard

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___ [2022 U.S. LEXIS 2940].) Seventy-five percent of any penalties recovered go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining 25 percent for the employees. (*Ibid*.) PAGA is intended "to augment the limited enforcement capability of [the LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id*. at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

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

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

(*Patel v. Nike Retail Services, Inc.* (N.D. Cal. 2019) 2019 WL 2029061, 2019 U.S. Dist. LEXIS 77988 (*Patel*), at *5.)

As part of this analysis, these courts have evaluated proposed PAGA settlements under the relevant factors from *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. (*Patel, supra,* 2019 U.S. Dist. LEXIS 77988 at *5-6.) "Of the *Hanlon* factors, the following are relevant to evaluating [a] PAGA settlement: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel." (*Ibid*.)

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, supra,* 383 F. Supp. 3d at p. 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*).)

"[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."

(*O'Connor, supra* at p. 1133.) The settlement must be reasonable in light of the potential verdict value. (*Id.* at 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 *8-9.)

III. Discussion

A. Provisions of the Settlement

Plaintiff moves for approval of a proposed settlement made on behalf of:

> [A]ll current and former hourly employees employed by Defendant during the PAGA Period [the period from October 4, 2019 through October 31, 2022].

(Declaration of Edwin Aiwazian ("Aiwazian Dec."), Ex. 1 ("Agreement"), § 3(a)(5).)

According to the terms of the settlement, Defendant will pay a gross maximum settlement amount of $350,000. (Agreement, § 3(a).) This amount includes attorney fees in the amount of $140,000 (40 percent of the maximum settlement amount), litigation costs not to exceed $15,000, a general release fee to Plaintiff of $10,000, and settlement administration costs up to $6,000. (*Id.* at §§ 3(a)(1)- 3(a)(3).)

Of the remaining net settlement amount, 75 percent will be paid to the LWDA, and 25 percent will be distributed to aggrieved employees based on the pro rata number of pay periods worked by each aggrieved employee during the Representative Period. (Agreement, §§ 3(a)(5), 7(a).) Funds from checks that not cashed within 90 days from the date of mailing will be sent to the Controller of the State of California to be held pursuant to the Unclaimed Property Law. (*Id.* at §7(c)(4).)

In exchange for the settlement, the aggrieved employees will be deemed to have released the Defendant and related persons and entities from all claims that were or reasonably could have been alleged in the complaint based on the facts and matter contained in the operative Complaint and PAGA Notice. (Agreement, § 8(a).) Plaintiff also agrees to a broader, comprehensive general release. (*Id.* at § 8)(b).) The release provisions are appropriately tailored to the factual allegations of the operative pleading. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 538.)

B. Fairness of the Settlement

Plaintiff contends that the PAGA settlement is fair, reasonable, and adequate. (Aiwazian Dec., ¶¶ 16, 23.) The parties participated in a full-day mediation conducted by Lynn S. Frank, Esq. (*Id.* at ¶¶ 12, 16.) Prior to reaching the settlement, the parties conducted significant investigation and informal discovery, including the production and analysis of Plaintiff's employment records, a sampling of Aggrieved Employees' time and pay data, different versions of Defendant's employee handbook and related documents, and Defendant's operations and employments practices, policies, and procedures. (*Id.* at ¶ 13.) Counsel evaluated Plaintiff's allegations and claims and calculated the potential recovery under PAGA. (*Id.* at ¶¶ 13-16.)

Plaintiff estimates that the net settlement amount will be no less than $184,066.06. (Plaintiff's Notice of Motion and Motion []; Memorandum of Points and Authorities ("MPA"), p. 1:18-20.) Based on information provided by Defendant, there are approximately 325 Aggrieved Employees. (*Id.* at p. 4:5-6.) Counsel for the parties undertook significant investigation, including calculating the potential monetary recovery under PAGA. (*Id.* at p. 15:14-16.)

However, while Plaintiff's counsel asserts that he has calculated Defendant's potential exposure under PAGA, he does not set forth his calculations or any other concrete description of Defendant's estimated maximum potential exposure. Accordingly, the motion shall be CONTINUED, and prior to the continued hearing, Plaintiff's counsel shall submit a supplemental declaration including his calculations regarding Defendant's potential exposure under PAGA and the rationale behind the proposed settlement amount. The court will revisit the issue of the fairness of the settlement after reviewing the supplemental declaration.

C. Incentive Award, Fees and Costs

As part of the settlement, Plaintiff seeks a general release fee in the amount of $10,000. Although service awards are common in class actions, there is less authority regarding the propriety of service awards in PAGA cases. Nevertheless, a PAGA case is a representative action like a class action, and courts have recognized that an individual's willingness to act as a

private attorney general may merit a service award. (See *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 959.)

Plaintiff has submitted a declaration detailing his participation in this litigation. Plaintiff conducted initial research of the relevant law and potential law firms. Plaintiff states he has spent significant time communicating with his attorneys, gathering documents, and reviewing the settlement agreement. Plaintiff states he has spent at least 40 hours of his time on this litigation.

The court finds that an incentive award is justified. The court also finds that the amount requested is reasonable in light of the time spent on the litigation, the broader release agreed to by Plaintiff, and the reputational risk undertaken by Plaintiff in bringing this action. Therefore, the court approves an incentive award of $10,000.

Plaintiff's counsel seeks attorney fees of $140,000 (40 of the maximum settlement amount). (Aiwazian Dec., ¶ 17.) Plaintiff counsel states that his firm has spent 295.30 hours of attorney time on this action and provides evidence supporting that figure. (*Id.* at ¶ 19, Ex. 3.) Plaintiff's documentation does not provide an hourly rate for the attorneys, and he asserts that the work performed, and the background of the firm support a reasonable blended hourly rate of at least $850. (*Id.* at ¶ 20.) This amounts to a lodestar of $251,005, which results in a negative multiplier. The court will revisit the amount of attorney fees after receiving counsel's declaration regarding the valuation of the PAGA settlement.

Plaintiff's counsel also requests litigation costs in the total amount of $9,814.69 and provides evidence of incurred costs in that amount. (Aiwazian Dec, ¶ 21, Ex. 4 (at last page of declaration.) Therefore, the court finds cost in the amount of $9,814.69 to be reasonable and approves that amount.

Plaintiff also asks for settlement administration costs in the amount of $6,000. (Aiwazian Dec., ¶ 10.) However, Plaintiff has not provided the court with a declaration or other evidence from the proposed settlement administrator supporting an award in the amount requested. Accordingly, prior to the continued hearing, Plaintiff shall submit evidence of estimated settlement administration costs.

IV. Conclusion

The motion for approval of PAGA settlement is CONTINUED to December 11, 2024 at 1:30 p.m. in Department 19.

At least ten court days prior to the continued hearing, Plaintiff's counsel shall submit a supplemental declaration including his calculations regarding Defendant's potential exposure under PAGA and the rationale behind the proposed settlement amount, as well as submit evidence of estimated settlement administration costs.

Plaintiff shall prepare the order.

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Calendar Line 5

Case Name: Rocha v. The Great American Plumbing Company, Incorporated, et al. (PAGA)
Case No.: 23CV412254

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

I. Introduction

This is a putative representative action arising from alleged wage and hour violations. On March 1, 2023, Plaintiff Jorge Rocha ("Plaintiff") filed the operative Complaint against Defendants, The Great American Plumbing Company, Incorporated, and Valerie Denise McGinnis (collectively, "Defendants").

On September 13, 2024, Defendants' attorneys, John F. McIntyre and Kevin R. Elliott of Shea & McIntyre P.C., filed a motion to be relieved as counsel. The motion is unopposed.

II. Legal Standard

Motions to be relieved as counsel are technical and governed by rule 3.162 of California Rules of Court ("Rule 3.1362"). Notice and motion must be directed to the client on Judicial Council Form MC-051. No memorandum is required. (Rule 3.1362(a) & (b).) Counsel must provide a declaration on Judicial Council Form MC-052 stating "in general terms and without compromising the confidentiality of the attorney-client relationship why a motion under Code of Civil Procedure section 284(2) is brought instead of filing a consent under Code of Civil Procedure section 284(1)."[5] (Rule 3.1362(c).)

The notice of motion and motion, the declaration, and the proposed order must be served on the client and all parties "by personal service, electronic service, or mail." (Rule 3.1362(d)). Rule 3.1362(d) sets forth the services requirements, as follows:

> If the notice is served on the client by mail under Code of Civil Procedure section 1013, it must be accompanied by a declaration stating facts showing that either:

[5] Code of Civil Procedure section 284 provides, in its entirety: The attorney in an action or special proceeding may be changed at any time before or after judgment of final determination, as follows: [¶] 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; [¶] 2. Upon the order of the court, upon the application of either client or attorney, after notice one to the other.

> (A) The service address is the current residence or business address of the client; or
> (B) The service address is the last known residence or business address of the client and the attorney has been unable to locate a more current address after making reasonable efforts to do so within 30 days before the filing of the motion to be relieved.

(Rule 3.1362(d).)

> The proposed order relieving counsel must be prepared on the Order Granting Attorney's Motion to Be Relieved as Counsel—Civil (form MC-053) and must be lodged with the court with the moving papers. The order must specify all hearing dates scheduled in the action or proceeding, including the date of trial, if known. If no hearing date is presently scheduled, the court may set one and specify the date in the order. After the order is signed, a copy of the signed order must be served on the client and on all parties that have appeared in the case. The court may delay the effective date of the order relieving counsel until proof of service of a copy of the signed order on the client has been filed with the court.

(Rule 3.1362(e).)

III. Discussion

Counsel states that the motion is required because the clients have breached the attorney client fee agreement and have not cured after multiple requests for cure by counsel. Counsel states it has provided clients with reasonable warning that they will withdraw unless the clients cured the breach.

Counsel has provided the court with the required form motion and declaration. Counsel has provided a proposed order on the correct judicial council form (MC-053). Counsel's declaration indicates that the motion, declaration, and proposed order have been served to Defendant at Defendants' last known mailing address, and that counsel has confirmed by email within the last 30 days that the client's mailing address is current. Counsel has also provided a proposed order on the appropriate judicial council form, accurately indicating that the next court date is December 18, 2024 at 2:30 p.m. in Department 19 for a case management conference.

Accordingly, Defendants' counsel has stated good cause for the motion to be relieved as counsel, and the motion complies with the statutory requirements.

III. Conclusion

The motion to be relieved as counsel by Defendants' attorneys John F. McIntyre and Kevin R. Elliott of Shea & McIntyre P.C., is GRANTED.

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

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