SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 03/13/2025

The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties email or call the department rendering the decision to request argument and to specify the issues to be argued. Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of their decision to appear and of the issues to be argued. Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (*Local Rule* 3.43(2).)

Note: In order to minimize the risk of miscommunication, parties are to provide an **EMAIL NOTIFICATION TO THE DEPARTMENT OF THE REQUEST TO ARGUE AND SPECIFICATION OF ISSUES TO BE ARGUED**. Dept. 39's email address is: dept39@contracosta.courts.ca.gov. Warning: this email address is not to be used for any communication with the department except as expressly and specifically authorized by the court. Any emails received in contravention of this order will be disregarded by the court and may subject the offending party to sanctions.

Submission of Orders After Hearing in Department 39 Cases

The prevailing party must prepare an order after hearing in accordance with CRC 3.1312. If the tentative ruling becomes the Court's ruling, a copy of the Court's tentative ruling **must be attached to the proposed order** when submitted to the Court for issuance of the order.

Courtroom Clerk's Calendar

1. 8:31 AM CASE NUMBER: C23-02776
CASE NAME: MARIA RIGAZIO VS. SELF-HELP FEDERAL CREDIT UNION,
***FURTHER CASE MANAGEMENT CONFERENCE**
FILED BY:
****TENTATIVE RULING:****

CMC continued to May 14, 2025, 8:30 a.m. (See Line 10 for ruling on demurrer.)

2. 9:00 AM CASE NUMBER: C24-01199
CASE NAME: CARGO SOLUTIONS MANAGEMENT, LLC VS. HARWINDER SINGH
HEARING ON ORDER TO SHOW CAUSE IN RE: WHY THE CASE SHOULD NOT BE DISMISSED FOR FAILURE TO SERVE AND FAILURE TO PROSECUTE
FILED BY:
****TENTATIVE RULING:****
See line 6. Parties to appear (by zoom is acceptable).

3. 9:00 AM CASE NUMBER: C24-02159
CASE NAME: ELMAHDI MAHFAD VS. SAN JOAQUIN VALLEY COLLEGE, INC., A CALIFORNIA CORPORATION
***FURTHER CASE MANAGEMENT CONFERENCE**
FILED BY:
****TENTATIVE RULING:****

Continued by stipulation to April 3, 2025, 9:00 a.m.

4. 9:00 AM CASE NUMBER: C22-02519
CASE NAME: REBECA MARTINEZ VS. AKKAM, INC.
***FURTHER CASE MANAGEMENT CONFERENCE**
FILED BY:
****TENTATIVE RULING:****
Continued on the Court's motion to April 3, 2025, 9:00 a.m.

Law & Motion

5. 9:00 AM CASE NUMBER: C22-02032
CASE NAME: GUZMAN VS. T&C ROOFING
HEARING ON SUMMARY MOTION JUDGMENT
FILED BY: T&C ROOFING, INC.
****TENTATIVE RULING:****

Off calendar-settled.

6. 9:00 AM CASE NUMBER: C22-02519
CASE NAME: REBECA MARTINEZ VS. AKKAM, INC.
***HEARING ON MOTION IN RE: TO COMPEL ARBITRATION**
FILED BY: AKKAM, INC.
****TENTATIVE RULING:****
Continued on the Court's motion to April 3, 2025, 9:00 a.m.

7. 9:00 AM CASE NUMBER: C23-02357
CASE NAME: LISA ROSS VS. CHENETTE CARTER
***HEARING ON MOTION FOR DISCOVERY MOTION TO COMPEL DEFT CHARLIE ROSS FOR IMMEDIATE RESPONSE TO PLAINTIFF'S WRITTEN DISCOVERY FILED BY LIS ROSS**
FILED BY:
****TENTATIVE RULING:****
Denied. No proof of service of the motion. In addition, the motion does not show proof of service of the underlying discovery request.

8. 9:00 AM CASE NUMBER: C23-02411
CASE NAME: MATTHEW KUYKENDALL VS. BRENDA TINER
HEARING ON DEMURRER TO: COMPLAINT
FILED BY: TINER, BRENDA
****TENTATIVE RULING:****

Defendant Brenda Tiner [Defendant] brings this Demurrer to the entire Complaint, filed September 29, 2023, and individually to each cause of action therein. The Demurrer is opposed by Plaintiff Matthew Kuykendall [Plaintiff].

For the following reasons, **the Demurrer is overruled as to the first, second, and third causes of action and as to the entire complaint and is sustained with leave to amend as to the fourth, fifth, and sixth causes of action**.

Background

This matter arises from Plaintiff's attempts to collect on a debt owed by the son of Defendant, Michael Tiner [Debtor]. Plaintiff alleges that Debtor transferred his property to Defendant fraudulently to avoid Plaintiff's collection of his judgment. Based thereon, Plaintiff alleges two causes of action for Voidable Transaction based on the Uniform Voidable Transfer Act (actual intent and constructive), along with causes of action for Fraudulent Transfer, Resulting Trust, Foreclosure of Lien, and Declaratory Relief.

Plaintiff contends that he obtained a judgment against Debtor in or about March 25, 2016. (Complaint, ¶¶ 11-12.) Plaintiff further alleges that Debtor assigned, transferred, conveyed and sold the majority of his assets to Defendant for a period of 10 years in exchange for rent of the property where he currently resides, which transfer was memorialized in a notarized contract signed by Debtor dated October 19, 2022. (Complaint, ¶¶ 14-15.) Plaintiff alleges that Debtor was served with an order of examination on August 20, 2022 and that he made various fraudulent representations to conceal the transfer and avoid payment of the judgment. (Complaint, ¶¶ 16-17.) Plaintiff further alleges that the order for examination of Defendant was signed on November 2, 2022, but does not allege the date that such was served. (Complaint, ¶ 27.)

Standard

The limited role of the demurrer is to test the legal sufficiency of the allegations in a complaint. (*Lewis v. Safeway, Inc.* (2015) 235 Cal.App.4th 385, 388.) It raises issues of law, not fact, regarding the form or content of the opposing party's pleading. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. (*Ibid*.) For purposes of demurrer, all facts pleaded in a complaint are assumed to be true, but the court does not assume the truth of conclusions of law. (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 967.)

Defendant's Notice of Demurrer notes that demurrer is brought pursuant to Code of Civ. Proc. § 430.10 on the basis that the pleading is uncertain and fails to state a cause of action. Plaintiff does not cite the particular subpart, which are (e) and (f).

Apart from the general standard for demurrer, Defendant's argument centers on interpretation of Code Civ. Proc. § 708.110 and Civ. C. § 3439.04(a)(2) but does not include supporting case law.

Code Civ. Proc. § 708.110 provides the procedure for examination of a judgment debtor and creation

of a lien on the personal property of the judgment debtor. Civil Code § 3429.04 provides the basis for voiding a transfer made or obligation incurred by a debtor.

Analysis

Basis for Demurrer

Defendant's demurrer centers on an argument that the opportunity for collection of the judgment has passed and that Plaintiff has not alleged sufficient facts to establish jurisdiction of this court. However, Defendant's demurrer is based only on uncertainty and failure to state a claim, pursuant to Code of Civ. Proc. § 430.10. These bases for demurrer are set forth in Code of Civ. Proc. § 430.10, subparts (e) and (f).

Defendant did not demur for lack of jurisdiction. A notice of motion must "[s]tate the basis for the motion and the relief sought," and "if a pleading is challenged, state the specific portion challenged." (CRC 3.1112) As such, Defendant has not demurred for lack of jurisdiction, because such basis is not stated in the Notice or Amended Notice of Demurrer. Further, this court notes that the underlying action in which Defendant was ordered for examination is pending in this court, Case No. MSN15-2146.

First and Second Cause of Action (Uniform Voidable Transfer Act)

The parties discuss the requirements for pleading of the first and second causes of action under Civil Code § 3439.04. Defendant contends without citation to supporting case law that Plaintiff must allege specific facts based on personal knowledge to support particular elements in order to assert such claims. Plaintiff argues based also on the plain language of the statute that the elements of Civil Code § 3439.04 only require allegation that Plaintiff is a "creditor", that Judgment Debtor made a "transfer" to Defendant, and that the judgment debtor made the transfer "with actual intent to hinder delay or defraud." (Civil Code § 3439.04.)

Defendant presents no case law to support a higher pleading standard. Moreover, this court finds that Plaintiff alleged background facts demonstrating the close relationship of Defendant and Debtor, the timing of the alleged transfer, and the effect of the transfer to support the allegation that the transfer was made and was made with the intent to hinder, delay, or defraud a creditor. (Complaint, ¶¶ 7-23.)

As such, these causes of action are not uncertain and they state sufficient facts to allege a cause of action. For such reason, the demurrer to the first and second causes of action is overruled.

Third Cause of Action (Common Law Fraudulent Transfer)

Defendant's demurer to the third cause of action is based on the same contentions as that set forth for the first and second cause of action. For the same reasons discussed above, the demurrer to the third cause of action is also overruled.

Fourth Cause of Action (Resulting Trust)

The fourth cause of action is based on the allegation that a resulting trust should be placed on the subject assets pursuant to the lien created on August 9, 2022 and on November 22, 2022, when the orders for examination were signed for Debtor and Defendant, respectively and that such liens are subject to enforcement for a period of one year thereafter. (Complaint, ¶ 27.)

Defendant demurs to this claim on the basis that any lien on the property expired. Defendant contends that "Plaintiff has had no lien on Judgement Debtor's property since September 10, 2023," because "Judgment Debtor has only been subjected to a single Order for Examination as shown by the court's record in case no. MSN15-2146." Defendant does not request judicial notice or state the legal basis for judicial notice to support this argument.

Plaintiff argues that this cause of action arises because "[a] resulting trust is enforced where a property was transferred, and circumstances show the transferee or person receiving the property was not meant to take the beneficial interest." (*Fidelity National Title Ins. Co. v. Schroeder* (2009) 179 Cal.App.4th 834, 848.) The cited case discusses enforcement of a judgment that lien attaches to real property pursuant to Code Civ. Proc., § 697.340, subd. (a)). Plaintiff also concedes that he intended to state that the lien was created when the order for examination was served, not when it was signed.

The Complaint was served within one year of the alleged date relating to the order of examination for Defendant, and the property is alleged to have been transferred to Defendant prior to such date. The allegation is that the Order was signed on November 22, 2022, and, thus, service would need to be after such date and therefore still within the one-year period. However, technically, the statement is incorrect as a lien is not created until the order for examination is served pursuant to Code Civ. Proc. Section 708.110. Plaintiff states no other basis for this claim. Further, it is unclear on what basis Plaintiff alleges a lien based on the Order of Examination for Debtor that has an alleged date of August 9, 2022.

Accordingly, Plaintiff must allege the date of the service of the order of examination and clarify the basis for the alleged lien and resulting trust. For such reasons, the demurrer is sustained with leave to amend.

Fifth Cause of Action (Foreclosure of Lien)

Plaintiff's fifth cause of action for foreclosure of lien depends upon the allegation that Plaintiff has a lien on the subject assets. (Complaint, ¶ 30.) As discussed above, Plaintiff's claim of a lien requires additional pleading and clarification of the basis for such allegations. Thus, for the reasons discussed above with respect to the fourth cause of action, the demurrer is sustained with leave to amend.

Sixth Cause of Action (Declaratory Relief)

Defendant demurs to the sixth cause of action on the basis that the lien asserted by Plaintiff has expired and is not actionable. Defendant does not cite legal authority regarding the standard for a declaratory relief claim but instead denies the factual allegations. For the reasons discussed above, to the extent that this claim is based on the creation of a lien and the allegations failed to establish creation of a lien, as discussed with respect to the fourth cause of action above, the demurrer is

sustained with leave to amend.

Entire Complaint

As Plaintiff met the pleading standard for the first, second, and third causes of action, demurrer to the Complaint in its entirety is overruled.

9. 9:00 AM CASE NUMBER: C23-02411
CASE NAME: MATTHEW KUYKENDALL VS. BRENDA TINER
***HEARING ON MOTION IN RE: TO STRIKE**
FILED BY: TINER, BRENDA
****TENTATIVE RULING:****

Defendant Brenda Tiner [Defendant] brings this Motion to Strike various paragraphs of the Complaint filed September 29, 2023 [Motion]. The Motion is opposed by Plaintiff Matthew Kuykendall [Plaintiff].

For the following reasons, **the Motion is denied**.

Analysis

Defendant brings this Motion to Strike various paragraphs in the Complaint pursuant to Code of Civ. Proc. §§ 435 and 437 on the basis that such matters are irrelevant, false, or improper matter. The cited statutes do not contain this language, and Defendant's argument does not cite the supporting statute or any supporting case law. A notice of motion must "[s]tate the basis for the motion and the relief sought," and "if a pleading is challenged, state the specific portion challenged." (CRC 3.1112) As such, Defendant failed to give the requisite notice of the basis for the Motion to Strike.

Generally, Defendant's argument for the Motion to Strike makes similar arguments to those raised on demurrer. However, the Motion but does not state a legal basis that the listed paragraphs should be stricken or make a showing that the allegations are irrelevant, false, or improper. As discussed in response to Defendant's Demurrer, Plaintiff alleged background facts to support his first, second, and third causes of action and has been given leave to amend his fourth, fifth, and sixth causes of action.

Due to the lack of legal authority supporting a basis to strike any of the allegations in the Complaint, the Motion to Strike is denied.

10. 9:00 AM CASE NUMBER: C23-02776
CASE NAME: MARIA RIGAZIO VS. SELF-HELP FEDERAL CREDIT UNION,
HEARING ON DEMURRER TO: SECOND AMENDED COMPLAINT
FILED BY: SELF-HELP FEDERAL CREDIT UNION,
****TENTATIVE RULING:****

The demurrer, filed by defendant Self-Help Federal Credit Union, is **sustained with respect to the fifth cause of action**, without leave to amend, and **otherwise overruled**, as discussed below. The answer shall

be filed on or before April 1, 2025.

Background

In this putative class action, plaintiff alleges that her credit union, defendant Self-Help Federal Credit Union, wrongfully charged both overdraft ("OD") fees and nonsufficient funds ("NSF") fees for re-submissions of the same transactions.

Plaintiff alleges that defendant's practices maximized fees contrary to its members' contracts and in violation of the laws. (SAC, ¶3.) Specifically, "more than one Non-Sufficient Funds fee ("NSF Fee"), or an NSF Fee followed by an overdraft fee ("OD Fee")" would be charged on the same electronic item or check. (SAC, ¶4.) Plaintiff contends this violated the terms of her Account Agreement (Exhibit A to SAC) and Fee Schedule (Exhibit B to SAC). (SAC, ¶19.) According to the SAC, the Account Agreement allowed defendant to take certain steps when its accountholders attempt a transaction but do not have sufficient funds to cover it: either (a) authorize the transaction and charge a single OD Fee; or (b) reject the transaction and charge a single NSF Fee. (SAC, ¶20.) "In contrast to its Account Documents during the Class Period, however, Self-Help regularly assesses two or more NSF Fees, or an OD Fee after an NSF Fee(s) on the same item or transaction." (SAC, ¶21; see also ¶¶41-52.) The subsequent fee or fees following the initial NSF Fee are referred to as "Retry NSF Fees." (*Ibid*.)

"In Self-Help's view, which was nowhere articulated in its Account Documents during the Class Period, each time Self-Help processes a check or similar instrument for payment after having been rejected for insufficient funds, it becomes a new, unique item or transaction that is subject to another NSF Fee or OD Fee. But Self-Help's Account Documents during the Class Period never even hinted that this counterintuitive result could be possible." (SAC, ¶22.)

Plaintiff alleges that defendant's contracts stated defendant would charge "a single fee" for "however many times the request for payment was processed." (SAC, ¶23.) "Self-Help breached its contract with accountholders when it charged more than one fee on the same item since the contract states—and reasonable customers understand—that the same item can only incur a single NSF Fee or OD Fee." (SAC, ¶24.)

Plaintiff alleges, by way of example, that she was charged unauthorized Retry NSF Fees on October 13, 2021, October 26, 2021, and December 10, 2020. "On information and belief, a review of Defendant's records will reveal numerous other instances of Retry NSF Fees improperly assessed against Plaintiff's and Class Members accounts throughout the Class Period." (SAC, ¶¶32-40.)

This action was originally filed on October 31, 2023. Defendant demurred in February 2024, but plaintiff responded by filing a First Amended Complaint (FAC) in April 2024. In September 2024, Judge Treat sustained defendant's demurrer to the FAC, with leave to amend. The pleading now at issue is the Second Amended Complaint (SAC). In the SAC, plaintiff continues to allege five causes of action: (1) Breach of Contract Including the Covenant of Good Faith and Fair Dealing, (2) Unjust Enrichment/Restitution, (3) Money Had and Received (4) Violation of Unfair Competition Law, and (5) Violation of the Consumer Legal Remedies Act.

After meeting and conferring with plaintiff, as required by statute (see Declaration of Camille A. Brooks in Support of Demurrer), defendant generally demurs to each cause of action in the SAC. Plaintiff opposes the demurrer.

Request for Judicial Notice

Relying on Evidence Code, § 452 (h) and *City of Port Hueneme v. Oxnard Harbor Dist*. (2007) 146 Cal.App.4th 511, 514, defendant requests judicial notice of:

(1) Plaintiff Maria Rigazio's August 2016 Account Statement

(2) A document entitled, "Subsection 2.13 4.1 General Rule for Reinitiated Entries."

Despite mention of a trial court's ability to consider "material documents referred to in the allegations of a complaint," the *City of Port Hueneme* case does not discuss or stand for any judicial notice principles. A trial court may properly take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452 (h).)

Here, the account statement is clearly not such a document. Nor is the other document attached to the request, which is dated February 21, 2023 and specifically notes it is *not* from NACHA's organizational website, nacha.org. The website cited by defendant as a location where the rules can be accessed, https://nachaoperatingrulesonline.org, is not available without a subscription. The content of the rule is not the proper subject of judicial notice. The request for judicial notice in support of the demurrer, filed with the moving papers, is **denied**.

Defendant has also filed a request for judicial notice in support of its reply brief. The documents it seeks to have this Court notice are two trial court decisions from out of state, one from an Iowa state court and the other from a federal district court in Florida, as well as the previous ruling by this Court sustaining the demurrer to the First Amended Complaint. Though the utility of the trial court rulings is limited, the request is **granted** pursuant to Evidence Code, § 452 (d). If plaintiff objects, or seeks an opportunity to respond, she may do so by contesting this ruling and raising the issue in her email or at the hearing. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537–1538 [where new evidence permitted with reply, the other party should be given the opportunity to respond].)

Standard

For purposes of a demurrer, all properly pleaded facts are admitted as true. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) The limited role of a demurrer is to test the legal sufficiency of a complaint. It raises issues of law, not fact, regarding the form or content of the opposing party's pleading. (*Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) A complaint will be upheld if it provides the defendant with "notice of the issues sufficient to enable preparation of a defense." (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 549-550.)

Only the face of the pleading attacked and matters subject to judicial notice are considered in ruling on a demurrer. (Code Civ. Proc. § 430.30(a).) The Court gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also Code Civ. Proc., § 452 ["In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."])

Discussion

1. *Statutes of Limitations – All Counts*

Defendant again demurs to all the causes of action on the grounds that the claims are time-barred by the one-year contractual limitations provision in the 2018 Account Agreement. While this argument was the basis on which the Court previously sustained the demurrer to the FAC, the plaintiff now contends she never received notice of the 2018 agreement and therefore, the governing contract between the parties was the 2011 Agreement. This diverges from the allegations of the previous complaint, wherein plaintiff alleged the 2018 contract governed.

Defendant argues that this explanation is insufficient, and that the sham pleading doctrine bars plaintiff from alleging a different governing contract. (See *Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1248 ["Under the sham pleading doctrine, a plaintiff cannot avoid allegations that are determinative to a cause of action simply by filing an amended complaint which omits the problematic facts or pleads facts

inconsistent with those alleged in the original complaint."].)

The Court disagrees that the sham pleading doctrine would bar the present complaint in light of plaintiff's explanation of the discovery status and ambiguity about which document governs. More importantly, plaintiff sought leave to plead the earlier agreement at the time she filed her opposition to the previous demurrer, prior to any ruling, so it cannot be said that the new allegations are simply the result of an adverse ruling.

Defendant also argues that the causes of action accrued long ago, setting in motion even the four-year limitations period otherwise applicable to the breach of written contract and UCL claims. But, as pointed out by the opposition, implicit in the defendant's argument is the theory that "each assessment of a Retry NSF Fee […] should be considered part of a single, continuous breach."

Defendant's reply argues that plaintiff, for her part, is attempting to invoke a "theory of continuous accrual." The Court need not decide, on demurrer, the merits of a continuous accrual theory, which would permit the revival of charges from as early as 2006. Instead, it is sufficient to say that the earlier Retry NSF Fees *might* be barred, but the later ones were "discrete, independently actionable alleged wrongs." (*Aryeh v. Canon Bus. Sols., Inc.* (2013) 55 Cal. 4th 1185, 1198.)

On demurrer, it is defendant's burden to explain why each Retry fee would *not* trigger a new limitations period. It does not sufficiently do so. The demurrer is overruled on the grounds that the statutes of limitations have run.

2. *Breach of Contract Including the Covenant of Good Faith and Fair Dealing (First C/A)*

Defendant further demurs to the first cause of action on the basis that the parties' contract allows assessment of overdraft and NSF fees in the exact way challenged. Plaintiff responds that the interpretation must be pursuant to a reasonable consumer standard, not a sophisticated financial institution. Plaintiff points to the language in the fee schedule (SAC, Ex. B) noting that the NSF Fees are incurred at the rate of $25 "each." She argues this term, as used in the fee schedule, is a term used in connection with references to transactions or items that require accountholder authorization and occur only once per authorization.

Where an ambiguous contract is attached and incorporated into the complaint, the party pleading is only required to allege in a complaint the meaning which the party ascribes to that contract. (*Southern Pacific Land Co. v. Westlake Farms, Inc.* (1987) 188 Cal.App.3d 807, 817, citations omitted.) Here, based on the facts pleaded, the contractual language is amenable to plaintiff's alleged interpretation. (See SAC, ¶¶21-24.)

The demurrer to the first cause of action is overruled.

3. *Unjust Enrichment/Restitution (2nd C/A) and Money Had and Received (3rd C/A)*

Defendant argues plaintiff's pleading of an explicit written agreement bars her from making claims for unjust enrichment and money had and received. Plaintiff responds that proceeding on alternative theories is permitted at this stage.

When the pleader is in doubt about what actually occurred or what can be established by the evidence, modern practice is to allow the party to plead in the alternative and make inconsistent allegations. (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402.)

Because it does not address the opposition argument that such alternative pleading is allowed, the reply brief appears to concede this point. The Court overrules the demurrer with respect to the second and third causes of action.

4. *Violation of Unfair Competition Law (4th C/A)*

Defendant argues California's Unfair Competition Law (UCL) claim fails because it is preempted, because the fee practice at issue is not unfair, because it is derivative of other claims that also fail, and no other violation of law can form the legal basis on which the claim is based. Plaintiff responds by citing various statutes and contractual claims she argues would permit a UCL claim.

The UCL prohibits any unlawful, unfair or fraudulent business practice. (Bus. & Prof. Code, § 17200.) The broad scope of the statute encompasses both anti-competitive business practices and practices injurious to consumers. (*CelTech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.) Because the statute is written in the disjunctive, it establishes three varieties of unfair competition—acts or practices which are unlawful, or unfair, or fraudulent. (*Id*. at 180.)

Defendants do not sufficiently show how the UCL is preempted here. While defendant cites some district court authority on this point (Memorandum in Support of Demurrer, Footnote 8), it is not clear what sort of preemption defendant is invoking, or how it applies. Further, particularly in light of the (appropriate) qualifying language (12:13-14) that the argument only applies "to the extent" plaintiff is basing her claim on "anything other than an alleged affirmative misrepresentation," this is the sort of argument best explored on summary judgment, where defendant can show, via discovery responses, the purported basis for the claim. As noted in one district court case cited by defendant, "state law claims regarding a federal credit union's failure to disclose certain fee practices or any perceived unfairness in the fee practices themselves are preempted […] [¶] On the other hand, it is equally well established that true breach of contract and affirmative misrepresentation claims are not federally preempted, even if the result of those claims may affect a federal credit union's fee disclosures." (*Lambert v. Navy Fed. Credit Union* (E.D.Va. Aug. 14, 2019, No. 1:19-cv-103-LO-MSN) 2019 U.S.Dist.LEXIS 138592, at *5-6.)

It is not necessary to explore each of plaintiff's purported bases. It is clear that parties dispute whether there was a breach of contract, a claim the Court is not deciding on demurrer. Because that claim survives, the UCL claim does as well.

The demurrer is overruled with respect to the UCL cause of action.

5. *Consumer Legal Remedies Act (5th C/A)*

As to plaintiff's claim that defendant violated the Consumer Legal Remedies Act, defendant argues the banking services plaintiff obtained do not qualify as the sort of "services" covered by the act.

The Consumers Legal Remedies Act defines "goods" as "tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not severable from the real property." (Civ. Code, § 1761, subd. (a).) It defines "services" as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." (*Id*., § 1761, subd. (b).)

Defendant cites *Berry v. American Express Publishing, Inc*. (2007) 147 Cal.App.4th 224, wherein the court held that the CLRA does not cover credit transactions, separate and apart from any sale or lease of goods or services. While the *Berry* court relied on the legislative history of the CLRA, wherein the Legislature removed references to 'money' and 'credit' before enactment (*Berry, supra,* 147 Cal.App.4th at 230), the California Supreme Court later opined that the history was unnecessary to consider. In *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 60-61, the statutory language was deemed "unambiguous" as not including life insurance policies because they are not "goods" or "related to the

sale or repair of any tangible chattel." NSF fees, in this regard, are no different.

As observed in some federal decisions discussing banking overdraft fees and following *Berry*, "[m]uch like credit cards provide an extension of credit, an overdraft provides an extension of money." (*Lloyd v. Navy Fed. Credit Union* (S.D.Cal. Apr. 12, 2018, No. 17-cv-1280-BAS-RBB) 2018 U.S.Dist.LEXIS 62404, at *66, quoting an *Gutierrez v. Wells Fargo & Co*. (N.D.Cal. 2009) 622 F.Supp.2d 946, 957.)

Plaintiff minimally engages with this argument about the definition of services, citing cases prior to *Berry* (*Knox v. Ameriquest Mortg. Co*. from 2005; *Corbett v. Hayward Dodge, Inc.* from 2004), or that omit any mention of the *Berry* case (*Hawthorne v. Umpqua Bank* from 2013 [quoting 2005 Knox case in stating that "California courts generally find financial transactions to be subject to the CRLA"]).

Because the subject matter of the transactions between defendants and plaintiff was not a "good or service" under the CLRA, the demurrer to the fifth cause of action is sustained. Plaintiff does not set forth any facts that might justify amendment, so leave to amend is denied.

11. 9:00 AM CASE NUMBER: C24-00238
CASE NAME: ROWENA ROLDAN VS. ELIJAH LEAL-SCHUMAN
***HEARING ON MOTION FOR DISCOVERY COMPEL FURTHER RESPONSES TO REQUEST FOR PRODUCTION OF DOCUMENTS NO. 14**
FILED BY: ROLDAN, ROWENA
****TENTATIVE RULING:****

Rowena Roldan, plaintiff in this auto accident case, sued the juvenile driver of the other car, along with his parents, Leal and Schuman. Plaintiff served Requests for Production of Documents, specifically Request Number 14, which sought "any and all writings including your diary, text messages, memos, letters, emails regarding the subject incident." Defendants responded without objection. A month later, they served amended responses asserting the spousal communication privilege, and included a privilege log that identified certain text messages as subject to the privilege. Plaintiff asserts that defendants waived the privilege both by failure to assert it in the initial response, and by placing the matters "in issue." Plaintiff also seeks sanctions of $5,660.

Plaintiff relies on Code of Civil Procedure section 2031.300(a), which provides that where a party that has received a request for production of documents "fails to serve a timely response to it," that party "waives any objection to the demand, including one based on privilege." The court may, on motion, relieve a party from such a waiver where it has subsequently served a response that is in substantial compliance with applicable code provisions. But that section does not apply here, because defendants did *not* fail to respond. (Thus, plaintiff's argument in reply that defendants should have filed a motion for relief from waiver is unavailing.)

More on point here is Code of Civil Procedure section 2031.240(b): "If the responding party objects to the demand for inspection…the response shall do both of the following: (1) identify with particularity any document…(2) set forth clearly the extent of, and the specific ground for the objection[.]" Plaintiff claims that this means that the privilege claim is waived, relying on *Stadish v. Superior Court* (1999) 71 Cal.App.4th 1139, 1140. In that case, however, the party had not simply failed to claim the privilege in its compliance statement, it had allowed the propounding party to review forty boxes of documents before asserting the privilege. More on point is *Catalina Island Yacht Club v. Superior Court* (2015)242 Cal.App.4th 1116, 1125, which held that a response that fails to assert

a specific objection waives that particular objection. But neither case addresses the situation in which the responding party has not located a document and submits an amended response. The initial response contained standard language stating that "[d]iscovery is continuing and these answers, therefore, state the present information and analysis of defendants and their attorneys as acquired and reviewed to date[.]" With respect to Request 14, it stated that "A diligent search and reasonable inquiry have been made in an effort to locate the items demanded. However, no responsive items are in defendants' possession, custody or control, as they are not known to exist at this time. Discovery is continuing." This language is boiler-plate, but it is boiler-plate for a reason. It is designed to protect against exactly this type of situation. Counsel attests under oath that at the time the discovery was served, she "was informed and believed that there were no texts in existence that were responsive to Plaintiff's Request for Production No. 14." As long as there is no indication of bad faith, which is not alleged here, and the amended response was served promptly after the discovery of the document, there is no reason it should not have its intended effect. The Court finds that the privilege was not waived by the initial failure to object.

Plaintiff also argues that the spousal privilege was waived because the defendants placed spousal communications at issue by raising apportionment of fault as a defense, relying on *Ex Parte Strand* (1932) 123 Cal.App.170, 172. In *Strand*, a spouse brought a personal injury action (which claim is community property), and then sought to invoke the privilege not to be compelled to testify at all, not simply a waiver of the privilege for confidential marital communications. Plaintiff also relies on *Eisendrath v. Sup. Ct*. (2003) 109 Cal.App.4th 351, 363, but that case involved an expressly confidential mediation, and the court found that express waivers of the mediation privilege would be required because "in issue" waiver does not apply to statutory mediation privilege. But the general principle of the "in issue" waiver is well-established. See *Steiny & Co. Inc. v. California Electric Supply* (2000) 79 Cal.App.4th 285, 292. "Where privileged information goes to the heart of a claim, fundamental fairness requires that it be disclosed for the litigation to proceed."

The question here is whether the affirmative defense in question was sufficient to constitute a waiver. The affirmative defense stated that "If plaintiff suffered or sustained any damages as alleged in the complaint, those damages were proximately caused and contributed to by persons other than answering defendants, including but not limited to Doe defendants. The liability of all defendants, named or unnamed, should be apportioned according to their relative degrees of fault, and the liability if any of answering defendants should be reduced accordingly." It is not limited to persons other than defendants, but it is somewhat vague on the subject. All things considered, it constitutes some degree of mutual finger-pointing, which could lead to the communications being information "that goes to the heart of a claim." But a waiver of the privilege for confidential marital communications is not to be taken lightly. Given the vagueness of the affirmative defense, the Court finds that it is not sufficient to constitute a waiver. Subsequent developments in the case, however, could require that the issue be revisited.

The **motion is denied**.

12. 9:00 AM CASE NUMBER: C24-00238
CASE NAME: ROWENA ROLDAN VS. ELIJAH LEAL-SCHUMAN
***HEARING ON MOTION IN RE: PROTECTIVE ORDER TO COMPEL ATTENDANCE**

FILED BY: ROLDAN, ROWENA
TENTATIVE RULING:
Continued on the Court's motion to April 3, 2025, 9:00 a.m.

13. 9:00 AM CASE NUMBER: C24-01199
CASE NAME: CARGO SOLUTIONS MANAGEMENT, LLC VS. HARWINDER SINGH
***HEARING ON MOTION IN RE: ORDER OF SERVICE OF SUMMONS**
FILED BY: CARGO SOLUTIONS MANAGEMENT, LLC
TENTATIVE RULING:

The application was submitted ex parte and denied on February 20, 2025.

14. 9:00 AM CASE NUMBER: C24-01301
CASE NAME: AMANDA FRITSZCHE VS. EERO, LLC
HEARING ON DEMURRER TO: COMPLAINT
FILED BY: EERO, LLC
TENTATIVE RULING:

Before the Court is a demurrer to the complaint. For the reasons set forth, the general demurrer to first and second causes of action is **sustained with leave to amend**, and the general demurrer to the third and fourth causes of action is **overruled**.

Background

Plaintiff Amanda Fritszche alleges that eero, LLC is a technology company that provides WiFi products and accepts credit cards for purchases of its goods and services. (Compl. ¶ 15, 16.) She alleges that eero unlawfully requires persons who make purchases from eero online using a credit card to provide personal identification information ("PII"), such as first and last name, home address, email address, zip code, and IP address with each credit card purchase in order to complete the sale. (Compl. ¶¶ 6, 16-18, 21.) The goods she purchased were physical products, not electronically downloadable products, and were physically delivered to her. (Compl. ¶ 19.)

Plaintiff alleges that eero recorded and retained the information collected during the sale transaction for use in subsequent undisclosed marketing efforts. (Compl. ¶¶ 7, 19, 23-25.) She alleges eero has installed and uses various tracking pixels without the knowledge or consent of Plaintiff or the other class members. (Compl. ¶¶ 27-30.) She alleges that even if there is a "cookies" disclosure on eero's website, the disclosure "does not fully disclose that the user's IP address will be automatically recorded and associated with their purchase history or obtain a user's specific consent to such practices." (Compl. ¶ 23.) The IP address is also PII because it is like a zip code or email address, as it identifies and locates the computer user. (Compl. ¶ 35.) She alleges collection of an IP address or identifications for the user's Facebook, Google or PayPal account are also not necessary for shipping products or "incidental" to the credit card transaction. (Compl. ¶ 38.)

Based on these factual allegations, Plaintiff's class action complaint alleges four causes of action against defendant eero for violation of Civil Code section 1747.08, which is part of the Song-Beverly Credit Card Act of 1971, Civil Code section 1747 *et seq.* ("Song-Beverly Act") (1st C/A), negligence (2nd C/A), invasion of privacy (3rd C/A), and unlawful intrusion (4th C/A).

Legal Standards Governing Demurrer

In ruling on the demurrer, the Court must accept as true all well-pleaded factual allegations of the complaint, but not legal or factual conclusions or contentions of law. (*City of Dinuba v. County of Tulare* (2007) 41 Cal. 4th 859, 865; *Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 374.) The Court gives "the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation omitted.]" (*Evans v. City of Berkeley* (2006) 38 Cal. 4th 1, 6.) (*See also* Code Civ. Proc. § 452.) A demurrer must dispose of an entire cause of action. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167, overruled in part on other grounds by *Sheen v. Wells Fargo Bank, N.A.* (2022) 12 Cal.5th 905, 919; *PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-1683.)

Statutory causes of action must be pleaded with particularity; the "complaint must plead every fact which is essential to the cause of action under the statute.'" (*Baskin v. Hughes Realty, Inc.* (2018) 25 Cal.App.5th 184, 207.) (*See also Fischer v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 604.) "If the complaint states a cause of action under any theory . . . that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) If a complaint fails to state a cause of action but there is a reasonable possibility of amendment to cure the deficiencies, then leave to amend must be granted. (*Id.* at 39.)

Defendant's Request for Judicial Notice

Eero requests that the Court take judicial notice of two documents which it states are found on its public webpage, specifically its "Terms of Service" as of November 1, 2024 and its "Privacy Notice" as of November 1, 2024. (Def. RJN and Yasmeh Decl. Exhs. 1 and 2.) The Court **denies** the request. The documents based on the request for judicial notice reflect webpage content as of November 1, 2024, months after the Complaint was filed and the events alleged in the Complaint occurred, and the content of material on a website is subject to change and reasonably disputable. These documents do not meet the standard for judicial notice under Evidence Code section 452(h). (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 193 ["While we may take judicial notice of the existence of the audit report, Web sites, and blogs, we may not accept their contents as true. [Citation omitted.] 'When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable. [Citation.]'," quoting *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9].) (*See also Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 114-115 ["For a court to take judicial notice of the meaning of a document submitted by a demurring party based on the document alone, without allowing the parties an opportunity to present extrinsic evidence of the meaning of the document, would be improper. A court ruling on a demurrer therefore cannot take judicial notice of the proper interpretation of a document submitted in support of the demurrer. [Citation omitted.] In short, a court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show."].)

Plaintiff's Request for Judicial Notice

Plaintiff requests the Court take judicial notice of two orders overruling demurrers by trial judges in actions in the San Francisco County Superior Court and Santa Clara County Superior Court. The Court **denies** the request; the orders are not decisions the Court can consider as they are not citable legal

precedent, and they are not otherwise relevant to this case. (*Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761 [trial court orders not citable, not precedential].)

Consideration of Plaintiff's Untimely Opposition

The date of filing of the demurrer and briefing schedule were set by a joint stipulation of the parties that was made an order of the Court. (Stip. and Order filed 10/15/2024.) Pursuant to the Order, eero filed its demurrer to the Complaint on November 5, 2024. Under the Order, Plaintiff's opposition was due on December 20, 2024, and defendant's reply was due January 16, 2025.

On January 16, 2025, eero filed a reply, noting Plaintiff did not file an opposition by the stipulated and court-ordered deadline and objecting to consideration of a late-filed opposition. Plaintiff did not file her opposition until February 18, 2025. Plaintiff's attorneys submit declarations indicating the late filing was due to an error in not calendaring the stipulated opposition deadline. (Wucetich Decl. ¶ 5; Jack Decl. ¶ 6.) Once the calendaring error was clear and Plaintiff's counsel was unable to reach a voluntary agreement with the defendant's counsel to resolve the untimeliness, Plaintiff's counsel filed the opposition approximately one month after eero's reply/notice and two months after the stipulated, court-ordered due date, without seeking relief from default from the Court in failing to timely file the opposition under Code of Civil Procedure section 473(b) or any other applicable authority.

Nevertheless, the Court will consider the untimely opposition. Defendant filed a comprehensive reply on the merits in response to the opposition. (3/5/2025 Reply.) The Court interprets the declarations filed by Plaintiff's counsel as explaining the tardiness and an informal request for the Court to consider the untimely papers. Further, on demurrer, even if the Court did not consider the opposition, the Court still must evaluate whether the demurrer should be sustained on the merits in light of the allegations of the complaint and the applicable standards for ruling on a demurrer set forth above.

Note to Both Parties on Federal Authorities

Both parties' briefs include extensive citations to federal cases, including in a number of instances federal cases addressing California law which cite California published decisions on the issue. The Court reminds the parties that federal cases construing California law are at best persuasive and not binding authority on this Court. (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 175; *Beverage v. Apple, Inc.* (2024) 101 Cal.App.5th 736, 756, fn. 6].)

Analysis

Eero generally demurs to each of the causes of action of the Complaint for failure to allege facts sufficient to state the causes of action.

A. Violation of Civil Code Section 1747.08 (1st C/A)

Civil Code section 1747.08(a) prohibits the collection of certain PII from consumers making transactions using a credit card. The statute defines PII as "information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number." (Civ. Code § 1747.08(b).) A cardholder's name, for example, by its terms is excluded from the definition of PII for purposes of this statute, since the cardholder's name

appears on the credit card.

Plaintiff cites authority that the consumer's email address and zip code are PII. (*See, e.g., Powers v. Pottery Barn, Inc.* (2009) 177 Cal.App.4th 1039 and *Harrold v. Levi Strauss & Co.* (2015) 236 Cal.App.4th 1259 [email addresses]; *Pineda v. Williams-Sonoma Stores, Inc*. (2011) 51 Cal. 4th 524, 532 [zip code, though zip codes are excepted from the statute for gasoline retailers under Civil Code section 1747.08(c)(3)(A), below].) She alleges, however, that eero did not require her to enter her email address "purely for shipping purposes," and an email address was not required to ship product to the buyer. (Compl. ¶ 37.)

Civil Code section 1747.08 prohibits the following:

> (a) Except as provided in subdivision (c), no person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business shall do any of the following:
>
> (1) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to write any personal identification information upon the credit card transaction form or otherwise.
>
> (2) Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information, which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise.
>
> (3) Utilize, in any credit card transaction, a credit card form which contains preprinted spaces specifically designated for filling in any personal identification information of the cardholder.

(Civ. Code § 1747.08(a).)

The statute also excludes certain transactions:

> (c) Subdivision (a) does not apply in the following instances:
>
> (1) If the credit card is being used as a deposit to secure payment in the event of default, loss, damage, or other similar occurrence.
>
> (2) Cash advance transactions.
>
> (3) If any of the following applies:
>
> (A) The person, firm, partnership, association, or corporation accepting the credit card is contractually obligated to provide personal identification information in order to complete the credit card transaction.
>
> (B) The person, firm, partnership, association, or

corporation accepting the credit card in a sales transaction at a retail motor fuel dispenser or retail motor fuel payment island automated cashier uses the Zip Code information solely for prevention of fraud, theft, or identity theft.

(C) The person, firm, partnership, association, or corporation accepting the credit card is obligated to collect and record the personal identification information by federal or state law or regulation.

(4) If personal identification information is required for a special purpose incidental but related to the individual credit card transaction, including, but not limited to, information relating to shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders.

(d) This section does not prohibit any person, firm, partnership, association, or corporation from requiring the cardholder, as a condition to accepting the credit card as payment in full or in part for goods or services, to provide reasonable forms of positive identification, which may include a driver's license or a California state identification card, or where one of these is not available, another form of photo identification, provided that none of the information contained thereon is written or recorded on the credit card transaction form or otherwise. If the cardholder pays for the transaction with a credit card number and does not make the credit card available upon request to verify the number, the cardholder's driver's license number or identification card number may be recorded on the credit card transaction form or otherwise.

(Civ. Code §§ 1747.08(c) and (d).)

Plaintiff alleges that the merchandise she purchased was to be "physically delivered to Plaintiff." (Compl. ¶ 19.) She alleges that none of the exceptions of Civil Code section 1747.08(c) apply to her transaction. (Compl. ¶ 36.)

Civil Code section 1747.08 was added to the Song-Beverly Act over 30 years ago and before the internet was widely used, particularly for online sales to consumers. In recognition of the context in which the statute was enacted, two California decisions have determined that, notwithstanding the language of the statute, the statute does not apply to online sales. The California Supreme Court held that Civil Code section 1747.08 does not apply to online sales of electronically downloadable products in *Apple, Inc. v. Superior Court* (2013) 56 Cal.4th 128. (*Id*. at 143.) (*See also Saulic v. Symantec Corp.* (C.D. Cal. 2009) 596 F. Supp. 2d 1323, 1325-1326, 1333, 1336 [addressing online purchases of downloadable anti-virus software, holding that the statute was intended to apply to consumer transactions with brick-and-mortar retailers and that "online transactions are not encompassed within the Act"].)

The California Supreme Court explained there are differences in the ability of brick-and-mortar

retailers and online retailers to protect against fraud: "The safeguards against fraud that are provided in section 1747.08(d) are not available to the online retailer selling an electronically downloadable product. Unlike a brick-and-mortar retailer, an online retailer cannot visually inspect the credit card, the signature on the back of the card, or the customer's photo identification. Thus, section 1747.08(d)—the key antifraud mechanism in the statutory scheme—has no practical application to online transactions involving electronically downloadable products. We cannot conclude that if the Legislature in 1990 had been prescient enough to anticipate online transactions involving electronically downloadable products, it would have intended section 1747.08(a)'s prohibitions to apply to such transactions despite the unavailability of section 1747.08(d)'s safeguards." (*Id.* at 140-141.) The Court expressly declined to determine whether Civil Code section 1747.08 applies to online transactions in contexts other than downloadable product: "We have no occasion here to decide whether section 1747.08 applies to online transactions that do not involve electronically downloadable products or to any other transactions that do not involve in-person, face-to-face interaction between the customer and retailer." (*Id.* at 143.)

In *Ambers v. Beverages & More, Inc.* (2015) 236 Cal.App.4th 508 ("*BevMo*"), the Court of Appeal held, based on the holding and rationale of the *Apple* decision, that "section 1747.08, subdivision (a) does not apply to plaintiff's online purchase of merchandise that plaintiff subsequently retrieved at a BevMo retail store." (*Id.* at 515-516 [concluding the sale transaction was completed entirely online, and not when the customer picked up the product at the store].) The Court explained, "[W]e cannot conclude that had the Legislature anticipated online sales transactions when enacting the Credit Card Act, it would have applied the prohibitions imposed by section 1747.08, subdivision (a) to online sales transactions." (*Id.*)

The Ninth Circuit Court of Appeals in an unpublished decision also recently held, based on those two California decisions, that the statute does not apply to online sales of physical products shipped to the buyer, anticipating that the California Supreme Court would so hold based on these precedents. (*Ambers v. Buy.com* (9th Cir. 2015) 617 Fed. Appx. 728, 730 ["[T]he case for obtaining a telephone number to verify the transaction here is even stronger because Buy.com shipped the DVDs to Ambers rather than allowing him to retrieve them at a retail store. In the Buy.com transaction, Ambers never showed his face to the retailer and therefore never presented any opportunity for it to verify the transaction in person. It was at least theoretically possible that in-person verification of Ambers' identity was available to the merchant in *BevMo* because he came to pick up the alcohol. Nevertheless, the Court of Appeal still found the Act inapplicable."].) The Ninth Circuit's prediction of the California Supreme Court's ruling, made in an unpublished decision, is not binding authority on this Court, but it does have some persuasive value.

The salient analysis in these cases is that online sales were not considered or intended to be covered by Civil Code section 1747.08 and that there is a rational reason for excepting online sales from the statute because online retailers do not have the same ability to protect against fraud or misuse of a credit card, such as use of stolen credit card, that merchants who make sales at brick-and-mortar stores have. The Court is bound by the holding in *BevMo* that Civil Code section 1747.08 did not apply to the transaction for the sale of tangible product where the sale transaction was conducted entirely online and was completed by the time the customer picked up the product at the store. (*BevMo, supra,* 236 Cal.App.4th at 515-516.) The facts alleged in the Complaint reasonably construed are that

Plaintiff purchased tangible products through an online transaction with a credit card, that the transaction was completed online, followed by physical delivery of the goods to her, making the facts difficult to distinguish from *BevMo.*

In her opposition, without citation to any allegations of the Complaint or the Terms of Service, Plaintiff argues that *BevMo* is distinguishable because eero's "Terms of Use" state that title to the goods purchased does not pass to the buyer until delivery, and she contends the "default" provisions of the Uniform Commercial Code for the purchase of goods, Commercial Code section 2401(2), apply. (Opp. p. 7.) Those facts might mean that *BevMo* is not determinative. These contentions made in the opposition regarding when title to the purchased goods passes are not made in the Complaint, however, nor are the Terms of Use alleged or attached to the Complaint. The Court cannot rely on unalleged facts that do not appear in the Complaint to determine the demurrer to this cause of action, and for the reasons stated, the Court does not take judicial notice of the Terms of Use document offered by Defendant in support of the demurrer. Even if those facts had been alleged, it is not clear to the Court that the date title passes to the buyer under the Commercial Code means that the holding and rationale of *Apple* and *BevMo* that Civil Code section 1747.08 was not intended to apply to online sales transactions would mean the statute should be applied in these circumstances.

Plaintiff also makes many allegations regarding surreptitious or undisclosed collection of IP addresses and related data and the use of tracking pixels for the purposes of monitoring the consumer's purchases and marketing other products and disclosure of that information to third parties. To the extent there are "cookies" disclosures, she contends those disclosures are inadequate to inform the consumer of the nature and extent of the data being collected and the use to which the data may be put. Plaintiff may be able to allege other causes of action and violations of her rights based on those facts, but the allegations of the Complaint as pleaded do not support her claim for violation of Civil Code section 1747.08. That statute does not apply to the credit card online sales transaction she engaged in for the reasons stated.

The demurrer to the first cause of action for violation of Civil Code section 1747.08 is **sustained, with leave to amend**. Leave to amend this cause of action is not limited to amending to try to state a claim under Civil Code section 1747.08 but shall include leave to amend to attempt to allege other legal theories or violations of law other than Civil Code section 1747.08, if any, that may apply under the circumstances.

B. Common Law Negligence (2nd C/A)

The elements of a negligence claim are " 'duty, breach of duty, proximate cause and damages.' [Citations omitted.]" (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 526.) (*See also Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1106 [same].) Eero does not challenge the existence of a duty element for purposes of the demurrer. Eero contends Plaintiff has not alleged facts constituting breach of duty or damages to state a cause of action for negligence.

Plaintiff alleges two duties owed to her by eero: a duty to protect her IP and payment information and to inform her of "Defendant's intended use of that information for purposes not related to the completion of their credit card transactions with Defendant." (Compl. ¶ 58.) She alleges three breaches of those duties: (1) eero "negligently" failed to take reasonable steps to protect the PII and payment information "from being collected, stored, and used without Plaintiff's . . . knowledge or

consent" (Compl. ¶ 59); (2) eero "negligently" did not inform Plaintiff that it uses the PII "for marketing, and on information and belief, that it would be sold or otherwise disseminated to third parties" (Compl. ¶ 60); and (3) based on information and belief, eero "negligently failed to comply with third-party vendor rules" which require customer consent to share PII with vendors (Compl. ¶ 61.)

The Court agrees that Plaintiff's allegations made on information and belief for two of the four alleged breaches are insufficient, as Plaintiff fails to the allege the facts on which her information and belief is based. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 551, fn. 5; *Gomez v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1158-1159.) Two of the breaches, however, are not alleged on information and belief, but eero contends those alleged breaches are not actionable under In *Folgelstrom v. Lamps Plus, Inc.* (2011) 195 Cal.App.4th 986, because eero argues Plaintiff consented to the use of her PII and payment information under its data policy, Def. RJN Exh. 2, and that the data policy was made available to her as a condition of her use of eero's products based on the terms of service document, Def. RJN Exh. 1. (MPA ISO Dem. p. 13.) For the reasons stated above, the Court does not take judicial notice of the terms of service and data policies submitted with eero's request for judicial notice. Further, Plaintiff has alleged that she did not know of or consent to the collection or use of her PII by "tracking" pixels and that the disclosures eero made regarding "cookies" and the collection and use of her IP address were not adequate to inform her of the use eero makes of this information, raising factual disputes not properly decided as a matter of law on demurrer. (Compl. ¶¶ 23 30, 59, 61.)

The Court in *Fogelstrom* addressed causes of action for unconstitutional invasion of privacy, common law invasion of privacy, violation of the Unfair Competition Law, Business & Professions Code section 17200 et seq. ("UCL"), and violation of Civil Code section 1747.08 of the Song-Beverly Act. The Court reversed and remanded the trial court's order sustaining a demurrer to the Civil Code section 1747.08 cause of action as the parties conceded a subsequent California Supreme Court decision held the collection of zip code information with a credit card sale violates Civil Code section 1747.08, but the Court affirmed dismissal of the other causes of action. (*Folgelstrom v. Lamps Plus, Inc., supra,* 195 Cal.App.4th at 988-989.) The Court did not address whether the facts alleged were sufficient to state a breach of duty for purposes of a negligence claim; the Court's statements regarding the collection of PII and use for marketing relied on by eero were made in the context of the standards for stating different causes of action with different elements and standards.

For purposes of a demurrer, the allegations are sufficient to state a breach of duty for purposes of the negligence cause of action. Having conceded a duty to protect a consumer's PII, the allegations of the Complaint are sufficiently broad to state a breach of duty for eero to maintain her PII without disclosing or granting access to that data by third parties, independent of the claim that such practices violate Civil Code section 1747.08. (*See, e.g.*, Compl. 27-30 [eero allowed tracking pixels from third party technology companies to be installed on its website "thereby allowing the tracking technologies and the associated companies to collect their PII without their knowledge or consent"].)

Defendant argues the negligence cause of action also fails because Plaintiff's Complaint does not allege any harm or damages from the collection of her PII. Plaintiff alleges she and the class members have been damaged by defendant's actions described above and by eero's "negligent misrepresentations" "by having their personal identification information accessed, stored, and

disseminated without their knowledge or consent" and they are "at serious risk for harassment, fraud¸ and identity theft from anyone who has, or may obtain access to, their personal identification information, including their home addresses, email addresses, phone numbers and billing information." (Compl. ¶¶ 63, 64.) She does not allege she has suffered any monetary damages or property damage, other than the risk of future potential damages or injury that does not satisfy the damages element to state a negligence claim. (*Zamora v. Shell Oil Co.* (1997) 55 Cal.App.4th 204, 207, 211-213 [reversing negligence judgment for 14 plaintiffs whose plumbing did not leak based on lack of appreciable harm and failure to meet the damages element though plaintiffs claimed the pipes are "inherently defective"].) While *Fogelstrom* is distinguishable for the reasons stated, the Court in that case had to address whether the plaintiff had alleged actionable harm for purposes of the demurrer to the constitutional and common law invasion of privacy claims and concluded the risk plaintiff might be victimized by identity theft was "a speculative conclusion of fact" properly disregarded in ruling on demurrer. [Citation omitted.]" (*Fogelstrom v. Lamps Plus, Inc., supra,* 195 Cal.App.4th at 993.)

Perhaps in recognition of the inadequacy of the allegations of damages to state the negligence claim, in her opposition, Plaintiff states: "To the extent the Court finds the allegations of damages lacking, Plaintiff should be granted leave to amend. For example, Plaintiff can add allegations relating to harm with respect to her loss of time in having to review and delete unwanted spam marketing, diminution in the value of her PII related to Defendant's unlawful misappropriation of it, the increased risk of identity theft, and her anxiety and emotional distress." (Opp. p. 12.)

The demurrer to the negligence cause of action is therefore **sustained, with leave to amend,** based on the failure to allege facts sufficient to state the damages element of negligence and therefore the negligence cause of action.

C. Invasion of Privacy under the California Constitution (3rd C/A)

"[A] plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. [¶] Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court. [Citation omitted.] Whether plaintiff has a reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact. If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40 [emphasis added].)

Plaintiff alleges she has legally protectable privacy interests in her PII and a reasonable expectation the PII would remain private when she entered into the credit card transaction with eero. (Compl. ¶¶ 67, 68.) She alleges eero did not disclose its intention to use her PII for "unlawful purposes, including marketing purposes prohibited by" the Song-Beverly Act, and that eero's actions constitute " 'serious' " invasions of her privacy based on their PII being "accessed, shared, and/or sold to others without their knowledge or consent" and they are "at serious risk of harassment, fraud, and identity theft as a result of Defendant's conduct." (Compl. ¶¶ 69, 70.) She alleges the information shared and given to others includes "billing information" though it is unclear whether that term includes her credit card

number which might constitute financial information. (Compl. ¶¶ 70, 71.)

Plaintiff alleges that she and other class members "have been damaged by Defendant's conduct" but without alleging any actual monetary or other harm. (Compl. ¶ 71.) Rather, she claims "irreparable harm" not compensable by monetary damages and seeks injunctive relief because of the risk of future harm from PII being used or disseminated, alleging the PII is at "risk," that eero will "continue" to use the data for profit or disclose it to others, and that there is a risk the data will be stolen and subject to identity theft and credit card fraud. (Compl. ¶ 71.)

In *Folgelstrom v. Lamps Plus, Inc., supra,* 195 Cal.App.4th 986, relied on by eero, the Court cited the elements necessary to state the claim under the California Supreme Court's *Hill* decision and held the facts were insufficient to state the cause of action as a matter of law. " 'Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.' [Citation omitted.] Here, the supposed invasion of privacy essentially consisted of Lamps Plus obtaining plaintiff's address without his knowledge or permission, and using it to mail him coupons and other advertisements. This conduct is not an egregious breach of social norms, but routine commercial behavior." (*Id.* at 992.) The Court concluded the defendant's actions were not a serious invasion of the plaintiff's privacy interests and upheld the dismissal of the invasion of privacy claim. (*Id.*)

The facts alleged in *Fogelstrom* are distinguishable from those alleged by Plaintiff. Plaintiff alleges that eero not only used the PII collected to market its products to her (the facts at issue in *Fogelstrom*) but also that it made her PII available to or otherwise disclosed her PII to others for their marketing or other purposes without her knowledge or consent. (*See* Compl. ¶¶ 68-71, and others cited above.)

The privacy interest addressed in the decision in *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360 arose in the context of class action discovery in order to certify a class of claimants, DVD purchasers whose names and addresses were obtained by the seller of defective DVDs when they complained about the defective product. (*Id.* at 363.) The issue determined by the Court was "the extent to which California's right to privacy provision (Cal. Const., art. I, § 1) protects these purchasers from having their identifying information disclosed to plaintiff during civil discovery proceedings in a consumers' rights class action against the seller." (*Id.*)

The Court found that the trial court's discovery order properly balanced the privacy interests of the DVD buyers with the need for their contact information for purposes of potentially certifying a class. (*Id.* at 374-375.) The Court recognized the existence of a privacy interest in their contact information, including their addresses, but found no serious invasion of their privacy by disclosure of their contact information to the plaintiff with restrictions on its use and further disclosure, finding that since the customers voluntarily disclosed their information to Pioneer to try to get relief, it was unlikely they had a reasonable expectation the information would be withheld from a class action plaintiff and that there was no "serious invasion of privacy" if the contact information were released only to the named plaintiff "following written notice to each customer that afforded a chance to object." (*Id.* at 372.) The Court commented that the information released did not include "details regarding one's personal finances or other financial information, but merely called for disclosure of contact information already voluntarily disclosed to Pioneer," indicating financial information may be more sensitive and subject to a nigher privacy interest. (*Id.* at 372.) The context of the privacy issue in *Pioneer* is

distinguishable, particularly since the third party disclosure was part of a court order to facilitate customers making claims against the company through a class action.

At this stage of the case for purposes of a demurrer, Plaintiff has alleged sufficient facts to plead her privacy claim. While Plaintiff may have had a diminished expectation of privacy regarding eero itself collecting, maintaining, and using her PII for its own marketing purposes as a result of Plaintiff's voluntary provision of that information to eero to commence and complete her purchase of goods from the company, she alleges facts, accepted as true on demurrer, that she had a reasonable expectation that her PII would not be disclosed by eero to third parties.

Though Defendant argues Plaintiff was aware of or consented to eero's policies regarding the collection and use of PII for marketing purposes and for sharing with third parties, the nature and extent of those disclosures to Plaintiff and whether they adequately informed Plaintiff that her PII would be turned over to others cannot be resolved on demurrer as a matter of law. The determination raises factual issues regarding the interpretation of the terms of service policies or data policies that were in effect during the transactions between Plaintiff and eero regarding "tracking" pixels of third party data or technology companies as well as interpretation of the "cookies" disclosures made to Plaintiff, which the Complaint expressly alleges did not inadequately inform her of eero's practices. (Compl. ¶¶ 27-30, among others.) The Court in *Hill* is clear that the element of a plaintiff's "reasonable expectation of privacy in the circumstances and whether defendant's conduct constitutes a serious invasion of privacy are mixed questions of law and fact," which the Court concludes in this case cannot be resolved by demurrer as a matter of law in the face of the facts alleged in the Complaint. (*Hill v. National Collegiate Athletic Assn., supra,* 7 Cal.4th at 40.)

The demurrer to the third cause of action is **overruled.**

D. Unlawful Intrusion

"A privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person." (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 286.) (*See also Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 231 ("*Shulman*") [in a case involving public disclosure of private facts, stating "the action for intrusion has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person."].)

The Court in *Shulman e*xplained the common law tort, stating "[t]o prove actionable intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff." (*Shulman v. Group W Productions, Inc., supra,* 18 Cal.4th at 232.) "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." (*Id*.) The California Supreme Court in *Hernandez* explained, "As to the first element of the common law tort, the defendant must have 'penetrated some zone of physical or sensory privacy . . . or obtained unwanted access to data' by electronic or other covert means, in violation of the law or social norms. [Citations omitted.]" (*Id.* at 286 [quoting *Shulman, supra,* 18 Cal.4th at 232 and citing *Shulman, supra,* 18 Cal.4th

at 230-231].)

Defendant again relies on *Fogelstrom*, but in that case plaintiff only alleged that the company from who he purchased product used the information he provided, obtained in violation of Civil Code section 1747.08, to send him marketing material and coupons. There was no allegation that the information was disseminated surreptitiously to third parties for their use. As the Court stated, "[W]e have found no case which imposes liability based on the defendant obtaining unwanted access to the plaintiff's private information which did not also allege that the use of plaintiff's information was highly offensive. However questionable the means employed to obtain plaintiff's address, there is no allegation that Lamps Plus used the address once obtained for an offensive or improper purpose." (*Folgelstrom v. Lamps Plus, Inc., supra,* 195 Cal.App.4th at 993.)

Here, Plaintiff alleges that without her knowledge or consent, eero installed tracking pixels of third party data and technology companies on its website which allow third parties, not just eero, to access her PII and IP address for marketing and other purposes. (Compl. ¶¶ 27-30, 73-75.) Similar to the third cause of action, though Plaintiff alleges she was damaged, she claims "irreparable harm" not adequately compensable by monetary relief. (Compl. ¶ 76.) Whether that surreptitious transfer or sale of her personal information to third parties is considered "highly offensive to a reasonable person" is not a determination the Court finds is appropriate to make as a matter of law on demurrer. (Compl. ¶¶ 74, 75.)

The demurrer to the fourth cause of action is **overruled.**

15. 9:00 AM CASE NUMBER: L23-01047
CASE NAME: BANK OF AMERICA VS. GRAYSON
***HEARING ON MOTION IN RE: FOR RECONSIDERATION OF DISMISSAL**
FILED BY: BANK OF AMERICA, N.A.
****TENTATIVE RULING:****

The **motion is denied**. Code of Civil Procedure section 1008 requires that a party moving for reconsideration must provide a satisfactory explanation for the party's failure to produce the claimed new evidence at an earlier time. (*Yolo County Dep't of Child Support Services v. Myers* (2016) 248 Cal.App.4th 42, 50.) No such showing is made. The minute order reflects that plaintiff's counsel was present and argued that the matters were not duplicates.

16. 9:00 AM CASE NUMBER: MSC20-00718
CASE NAME: JOHNSON VS. AMSPEC, LLC
HEARING IN RE: COMPLIANCE HEARING
FILED BY:
****TENTATIVE RULING:****

The settlement administrator's declaration shows that the settlement has been implemented. The administrator is directed to comply with the State Controller's direction as set forth in Paragraphs 4 and 5 of the Salvador declaration. The Administrator is authorized to disburse the remaining 10% of attorney's fees to plaintiff's counsel. No further proceedings are contemplated.

17. 9:00 AM CASE NUMBER: MSC21-00513
CASE NAME: STANDEFER VS SIERRA-AT-TAHOE
***HEARING ON MOTION IN RE: FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
FILED BY: STANDEFER, CHARLOTTE
TENTATIVE RULING:

Hearing required.

Plaintiff Charlotte Standefer moves for preliminary approval of her class action settlement with defendant Sierra-at-Taho, LLC. The case arises from the purchase of ski lift tickets, which plaintiff alleges defendant did not honor based on undisclosed terms and conditions.

A. Background and Settlement Terms

The complaint alleges that defendant sold ski left tickets by advance purchase for use on a specific day, but did not honor those tickets due to undisclosed terms and conditions regarding parking capacity.

The original complaint was filed on March 16, 2021. Defendant's demurrer was overruled. Substantial discovery was undertaken, and a class was certified. The class consists of:

> All natural persons who purchased a single day lift ticket from Defendant Sierra at Taho for use on one of the following dates that could not be used for the date purchased: December 12, 14, 18-19, and 29, 2020; January 9, 30-31, 2021; and February 6, 13, and 20, 2021.

The class excludes persons who used their ticket another day or who received a lift ticket voucher or a resort credit from Sierra-at-Tahoe, as well as any individual who timely and validly opts-out from the Settlement class.

Defendant will provide class members, at their option, with either a refund of the amount they paid for the unused ticket (electronically or by check) or a voucher that may be exchanged for a single-day lift ticket for use at Sierra-at-Tahoe, which will be valid for three ski seasons. Presumably, this means that if the price of a lift ticket has increased since that time, class members who opt for a voucher will receive a current lift ticket without paying additional funds to make up the price difference. There appear to be no limits on the days for which the voucher may be used to purchase a ticket. While class members must file a claim, Defendant represents that it has reliable business records showing who purchased tickets on-line, whether the ticket was used, and whether any refund was provided. (Settlement Agreement, Par. 4.5.)

The settlement procedure will be administered by Apex, whose costs will be paid by defendant. The class will be given postcard mail notice or email notice. Reminders will be sent to class members who do not submit claims.

The class members will be required to file a claim which may be submitted by mail or electronically. Class members may object or opt out of the settlement. At the time of certification, the class was estimated to have over 300 members.

The settlement contains release language covering all claims, demands, actions, suits, petitions, liabilities, and causes of action regarding or arising from or related to the allegations in the Action. Under recent appellate authority, the limitation to those claims with the "same factual

predicate" as those alleged in the complaint is critical. (*Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 537 ["A court cannot release claims that are outside the scope of the allegations of the complaint." "Put another way, a release of claims that goes beyond the scope of the allegations in the operative complaint' is impermissible." (*Id*., quoting *Marshall v. Northrop Grumman Corp*. (C.D. Cal.2020) 469 F.Supp.3d 942, 949.)

Formal written discovery was undertaken. The matter settled after arms-length negotiations, which included a session with an experienced mediator.

Plaintiffs' counsel will seek attorney's fees by motion.

The agreement and supporting papers do not provide an estimate of the likely amount of claims, or set a ceiling or a floor on the total amount to be paid.

B. Legal Standards

The primary determination to be made is whether the proposed settlement is "fair, reasonable, and adequate," under *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801, including "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 state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction … to the proposed settlement." (See also *Amaro v. Anaheim Arena Mgmt., LLC, supra,* 69 Cal.App.5th 521.)

California law provides some general guidance concerning judicial approval of any settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "[t]he court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not always apply, because "[w]here the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

C. Attorney fees, costs, and other payments

The parties do not agree on attorney's fee. Plaintiff will file a motion for fees in conjunction as the motion for final approval. Often in class actions, the amount sought is a percentage of a common fund. There is no identified fund here, however. Presumably, plaintiff's counsel will base the fee request on a lodestar analysis. In any event, the amount of the fee will have no effect on the relief provided to the class. The parties have not set a floor or ceiling on the amount of the fee.

Similarly, the requested representative payment of $2,000 for plaintiff will be reviewed at the time of final approval. Criteria for evaluation of representative payment requests are discussed in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.

D. Conclusion

The Court requires a hearing in order to confirm two matters that the Court referred to above with respect to the class relief. First, that if the price of a lift ticket has increased since purchase of the unused ticket, class members who opt for a voucher will receive a current lift ticket without paying

additional funds to make up the price difference. Second, that there appear to be no limits on the days for which the voucher may be used to purchase a ticket.

Assuming that the parties confirm the above two understandings, the Court will grant the motion. Under all the circumstances of this case the provision of a full cash refund, or a ticket voucher, at the option of the class member, is reasonable. The Court understands that a refund would seem to be the very least that should be done, but the availability of additional financial remedies is not assured. The notice provisions are adequate, especially given that defendant should have accurate contact information for the class members. Reasonableness of fees will be determined at final certification.

The Court finds sufficient evidence that the settlement is fair, reasonable, and adequate to justify preliminary approval.

The **motion is granted**. Counsel are directed to prepare an order reflecting this tentative ruling, the other findings in the previously submitted proposed order, and to obtain a hearing date for the motion for final approval from the Department clerk. Other dates in the scheduled notice process should track as appropriate to the hearing date. The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented. Plaintiffs' counsel are to submit a compliance statement one week before the compliance hearing date. 5% of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court.

18. 9:00 AM CASE NUMBER: MSC21-01344
CASE NAME: GONZALEZ VS AMTRUST NORTH AMERICA, ET AL.
***HEARING ON MOTION IN RE: FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
FILED BY: GONZALEZ, ROSANA
****TENTATIVE RULING:****
Hearing required.

Plaintiff Rosana Gonzalez moves for preliminary approval of her class action settlement with defendants AmTrust Financial Services, Inc., and AmTrust North America, Inc. The action alleges various Labor Code wage & hour violations. The action does not include a claim under PAGA.

A. Background and Settlement Terms

The original complaint was filed on June 30, 2021, raising class action claims on behalf of non-exempt employees, alleging that defendants violated the Labor Code in various ways, including failure to pay minimum and overtime wages, failure to provide meal breaks, failure to provide proper wage statements, failure to reimburse necessary business expenses, and failure to pay all wages due on separation.

The settlement would create a gross settlement fund of $2,500,000. The class representative payment to the plaintiffs would be $12,000. Attorney's fees would be $875,000 (35% of the settlement). Litigation costs would not exceed $20,000. The settlement administrator's costs (Phoenix Class Action Administration Solutions) would not exceed $13,000. The net amount paid directly to the class members would be about $1,580,000. The fund is non-reversionary. Based on the estimated class size of 760 individuals, the average net payment for each class member is

approximately $2,079.

The proposed settlement would certify a class of all current and former non-exempt employees employed by Defendants in California during the class period, which is June 30, 2017 through June 8, 2023.

The agreement also includes an escalator clause, under which if the number of workweeks exceed 72,000 by more than 5%, defendant may either increase the payments or shorten the Class Period to reduce the claims that must be paid.

The class members will not be required to file a claim. Class members may object or opt out of the settlement.

Various prescribed follow-up steps will be taken with respect to mail that is returned as undeliverable. Checks undelivered or uncashed 180 days after mailing will be voided, and will be paid to tendered to the CASA of Contra Costa County. Pursuant to Code of Civil Procedure section 384, counsel attests that CASA of Contra Costa County is a nonprofit organization that provides services in Juvenile Court in this county. The record does not include, however, a description of the activities of CASA to show that it meets the criteria of Code of Civil Procedure section 384. Pursuant to Code of Civil Procedure section 382.4, counsel attests that that there is no connection between Casa of Contra Costa County and counsel that could create the appearance of impropriety.

The settlement contains release language covering "all claims stated under state, federal, or local law…alleged in the operative complaint or which could have been alleged based on the factual allegations in the operative Complaint[.]" Under recent appellate authority, the limitation to those claims with the "same factual predicate" as those alleged in the complaint is critical. (*Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 537 ["A court cannot release claims that are outside the scope of the allegations of the complaint." "Put another way, a release of claims that goes beyond the scope of the allegations in the operative complaint' is impermissible." (*Id*., quoting *Marshall v. Northrop Grumman Corp*. (C.D. Cal.2020) 469 F.Supp.3d 942, 949.)

Informal and formal written discovery was undertaken, and counsel had the information evaluated by outside experts. The matter settled after arms-length negotiations, which included a session with an experienced mediator.

Counsel have provided a general discussion of their work on the case, and stated that they assessed the case, but the Mayer declaration provides no particular analysis of this particular case. While it may not be necessary to follow the common practice of actually providing a monetary estimate of the value of the claims, so discussion is the strengths and weaknesses of *this case* is missing.

B. Legal Standards

The primary determination to be made is whether the proposed settlement is "fair, reasonable, and adequate," under *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801, including "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 state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction … to the proposed settlement." (See also *Amaro v. Anaheim Arena Mgmt., LLC, supra,* 69 Cal.App.5th 521.)

California law provides some general guidance concerning judicial approval of any settlement.

First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "[t]he court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not always apply, because "[w]here the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

C. Attorney fees

Plaintiff seeks 35% of the total settlement amount as fees, relying on the "common fund" theory. Even a proper common fund-based fee award, however, should be reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Id*., at 505.) Following typical practice, however, the fee award will not be considered at this time, but only as part of final approval.

Similarly, litigation costs and the requested representative payment of $12,000 for plaintiff will be reviewed at time of final approval. Criteria for evaluation of representative payment requests are discussed in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807.

D. Conclusion

The Court finds that a supplemental declaration is necessary to establish (1) case-specific evaluation of the strengths and weaknesses of the case; (2) that the possible invocation of the "escalator clause" will not be unfair to employees whose compensable time will be reduced or eliminated by its terms; and (3) that CASA of Contra Costa County meets the criteria of Code of Civil Procedure section 394.

If the motion ultimately is granted, counsel are directed to prepare an order reflecting this tentative ruling, the other findings in the previously submitted proposed order, and to obtain a hearing date for the motion for final approval from the Department clerk. Other dates in the scheduled notice process should track as appropriate to the hearing date. The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented. Plaintiffs' counsel are to submit a compliance statement one week before the compliance hearing date. 5% of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court including amendment of the judgment to reflect the funds paid to the cy pres recipient pursuant to Code of Civil Procedure section 384.

19. 9:00 AM CASE NUMBER: N24-2018
CASE NAME: CLAIM OF:JADEN SUAREZ
HEARING IN RE: PETITION FOR APPROVAL OF COMPROMISE OF CLAIM FILED BY JADEN SUAREZ ON

11/6/24
FILED BY:
TENTATIVE RULING:
Granted. For good cause, the court waives the personal appearance of counsel, the guardian ad litem, and the minor.