SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 06/26/2025

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. 9:00 AM CASE NUMBER: MSC21-00412
CASE NAME: LUNDSGAARD VS JOHN MUIR HEALTH
***HEARING ON MOTION IN RE: COMPLIANCE**
FILED BY:
****TENTATIVE RULING:****
The Settlement Administrator's declaration shows that the settlement terms have been implemented. The Settlement Administrator may disburse the remaining 5% of attorney's fees to plaintiff's counsel. The Administrator is directed to comply with the Controller's Offices instructions concerning the uncashed checks. No further proceedings are contemplated.

Law & Motion

2. 9:00 AM CASE NUMBER: C22-02747
CASE NAME: JOHN KEYS VS. FRESCHI AIR SYSTEMS, LLC
***HEARING ON MOTION IN RE: PRELIMINARY APPROVAL OF CLASS AND PAGA ACTION SETTLEMENT**
FILED BY:
****TENTATIVE RULING:****

Plaintiffs John Keys and Shantell Jordan move for preliminary approval of their class action and PAGA settlement with defendant Freschi Air Systems LLC.

A. Background and Settlement Terms

The original complaint was filed by Mr. Keys on December 27, 2022, raising class action claims and PAGA claims on behalf of non-exempt employees, alleging that defendant violated the Labor Code in various ways, including misclassification of non-exempt workers, 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 currently operative complaint is a Second Amended Complaint filed on September 23, 2024, adding Ms. Jordan as a plaintiff.

The settlement would create a gross settlement fund of $480,000. The class representative payment to each plaintiff would be $7,500. Attorney's fees would be $160,000 (one-third of the settlement). Litigation costs would not exceed $35,000. The settlement administrator's costs would not exceed $6,990. PAGA penalties would be $50,000, resulting in a payment of $37,500 to the LWDA and $12,500 to plaintiffs. The net amount paid directly to the class members would be about $225,510. The fund is non-reversionary. Based on the estimated class size of 213 (86 PAGA employees), the average net payment for each class member is approximately $1,058.73.

The proposed settlement would certify a class of all current and former non-exempt employees employed by Defendants during the class period.

The class members will not be required to file a claim. Class members may object or opt out of the settlement. (Aggrieved employees cannot opt out of the PAGA portion of the settlement.) Funds would be apportioned to class members based on the number of workweeks worked during the class period.

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 transmitted to the State Controller's Office Unclaimed Property fund.

The settlement contains release language covering "all claims against Released Parties under state federal, or local law, that were asserted or could have been asserted based on the facts, claims or theories raised in the Third Amended Complaint (to be filed) or any prior complaints; facts, claims or theories expressly raised in Plaintiff's amended notice to the LWDA (to be filed)[.]" 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.)

The release of claims in two as yet unfiled documents—the Third Amended Complaint and the amended LWDA notice--potentially raised two issues. The first is solved by the fact that the Third Amended Complaint was filed on April 23, 2025, and therefore is no longer "to be filed." The amended LWDA letter has been provided to the Court. (March 10, 2025 LWDA letter, attached to Moon Dec.) Second, counsel must establish that their investigation and pursuit of the as yet unfiled claims was as diligent and thorough as that of the initially noticed and pled claims.

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

Counsel attest that they have analyzed the value of the case, and that the result achieved in this litigation is fair, adequate, and reasonable. The moving papers include an estimate of the potential value of the case, broken down by each type of claim.

The potential liability needs to be adjusted for various evidence and risk-based contingencies, including problems of proof. PAGA penalties are difficult to evaluate for a number of reasons: they derive from other violations, they include "stacking" of violations, the law may only allow application of the "initial violation" penalty amount, and the total amount may be reduced in the discretion of the court. (See Labor Code, § 2699(e)(2) [PAGA penalties may be reduced where "based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust arbitrary and oppressive, or confiscatory."])

Counsel attest that notice of the proposed settlement was transmitted to the LWDA concurrently with the filing of the motion.

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.)

Because this matter also proposes to settle PAGA claims, the Court also must consider the criteria that apply under that statute. Recently, the Court of Appeal's decision in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, provided guidance on this issue. In *Moniz*, the court found that the "fair, reasonable, and adequate" standard applicable to class actions applies to PAGA settlements. (*Id.*, at 64.) The Court also held that the trial court must assess "the fairness of the settlement's allocation of civil penalties between the affected aggrieved employees[.]" (*Id*., at 64-65.)

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 one-third 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 $10,000 for plaintiffs 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

In its tentative decision for the June 5, 2025, calendar, the Court found that, other than that issue of the recently-added claims, the Court would find that there is sufficient evidence that the settlement is fair, reasonable, and adequate to warrant preliminary approval. The Court, however, required that counsel submit a declaration establishing that those claims were investigated and pursued as thoroughly as the other claims. Counsel has provided a declaration that provides sufficient discussion of the issue.

Accordingly, the motion for preliminary approval 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.

3. 9:00 AM CASE NUMBER: C23-00007
CASE NAME: SERGIO ROSALES VS. CENTURY AUTOMOTIVE SERVICE CORPORATION
***HEARING ON MOTION IN RE: COMPLIANCE**
FILED BY:
****TENTATIVE RULING:****
The Settlement Administrator's declaration shows that the settlement terms have been implemented. The Settlement Administrator may disburse the remaining 5% of attorney's fees ($17,943.75) to plaintiff's counsel. Based on the number and amount of remaining uncashed checks, the Administrator is authorized to transmit $119,270.9, to be evenly distributed between The Alliance for

Children's Rights and the Consumer Federation of California. Counsel are directed to prepare an amended judgment in accordance with Code of Civil Procedure section 384 reflecting the final disposition of the funds, to be submitted to the Court within thirty days. No further proceedings are contemplated.

4. 9:00 AM CASE NUMBER: C23-01150
CASE NAME: EBONY KING VS. RHINO CALIFORNIA, LLC
HEARING IN RE: COMPLIANCE HEARING
FILED BY:
TENTATIVE RULING:
The Settlement Administrator's declaration shows that the settlement terms have been implemented. The Court notes that, although the Court's order directed the settlement administrator to withhold 5% of the attorney's fee pending determination that the settlement had been implemented, the Administrator apparently has already disbursed the entire amount of the funds. The Court is concerned about this, and directs the Administrator to file a supplemental statement explaining it, within 14 days. In addition, the statement says that the Administrator will send the unclaimed check amounts to the State Controller. This may not be what the Controller directs, and the Administrator is directed to comply with the Controller's Office's instructions concerning the uncashed checks. No further proceedings are contemplated.

5. 9:00 AM CASE NUMBER: C23-01613
CASE NAME: AKALI IGBENE VS. PACIFIC SERVICE CREDIT UNION
***HEARING ON MOTION FOR DISCOVERY PACIFIC SERVICE CREDIT UNION'S NOTICE OF MOTION AND MOTION TO COMPEL DEPOSITION OF PLAINTIFF AKALI IGBENE & PRODUCTION OF DOCUMENTS; TO CONTINUE MSJ; REQUEST FOR SANCTIONS**
FILED BY: PACIFIC SERVICE CREDIT UNION
TENTATIVE RULING:
Defendant moves to compel plaintiff to appear for deposition, and for an award of sanctions in the amount of $4,795. Plaintiff has not opposed the motion.

Defendant documents that he served a notice of deposition on three different occasions. Each time, the deposition was met with written objections, but was not followed up with a motion for a protective order or to quash the deposition notice. Accordingly, the objections did not stay the taking of the deposition. (C.C.P. §2025.410(c).)

As to the first notice, plaintiff made four objections, none of which were valid, including that he did not know the deponent (because of a one-letter typo in the name stated on the notice); that the fifteen-day time period did not apply, that a "Notice of Privacy rights" had not been provided, and that the demand for documents accompanying the notice was "another unabated extra-judicial act of unwarranted annoyance, oppression, undue burden and expense." Plaintiff advised that he would not attend the deposition. Plaintiff did not file a motion for a protective order, and did not appear for deposition. Defendant served an amended notice, which met with the same objections, but also

claiming that defendant could not send an amended notice "without filing a motion to compel and a ruling from the court." Defense counsel sent a meet and confer letter, which did not result in any change. It was followed by a Second Amended deposition notice. Plaintiff responded with the same objections.

The motion to compel attendance at a deposition is granted. Defendant shall serve a Third Amended Deposition notice, with the same requests for accompanying documents, but with a new date chosen by Defendant, and Plaintiff shall comply and appear.

Where a motion to compel a deposition is granted, the court shall impose a monetary sanction in favor of the party who noticed the deposition "unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (C.C.P. § 2025.450.) Defendant seeks the sanction based on 11.7 hours of time at $255. The Court finds that the hourly rate and the hours incurred are reasonable. Plaintiff has no substantial justification for his actions, and there are no special circumstances that would make the award unjust.

6. 9:00 AM CASE NUMBER: C23-01770
CASE NAME: JOSE DE LA CRUZ VS. GALPAO GAUCHO TWO, LLC
***HEARING ON MOTION IN RE: CLASS COUNSEL AND CLASS REP AWARD**
FILED BY: DE LA CRUZ, JOSE RAMON
****TENTATIVE RULING:****

Plaintiff Jose Ramon De La Cruz moves for final approval of his class action and PAGA settlement with defendants Galpao Gaucho Two, LLC (and five others). He separately moves for approval of attorney's fees and a class representative award. The motions will be considered jointly.

A. Background and Settlement Terms

The original complaint was filed on July 12, 2022, 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 $985,516.67. The class representative payment to the plaintiff would be $10,000. Attorney's fees would be $328,505.56 (one-third of the settlement). Litigation costs would not exceed $30,000. The settlement administrator's costs (Apex Class Action Administration) were bid at $13,950. PAGA penalties would be $30,000, resulting in a payment of $22,500 to the LWDA and $7,500 to plaintiffs. The net amount paid directly to the class members would be about $573,061.11. The fund is non-reversionary. There are 1,302 class members. Based on the class size, the average net payment for each class member is approximately $440.

These figures differ somewhat from those reflected in the Court's preliminary approval of the settlement, because the application of an "escalator clause," which was triggered when the calculated number of workweeks increased by more than 10% above the previous estimate. An amendment to the settlement was approved by stipulation and order on April 11, 2025.

The proposed settlement would certify a class of all current and former non-exempt employees

employed by Defendants in California from July 20, 2019 through July 1, 2024.

The class members will not be required to file a claim. Class members may object or opt out of the settlement. (Aggrieved employees cannot opt out of the PAGA portion of the settlement.) Funds would be apportioned to class members based on the number of workweeks worked during the class period.

Since preliminary approval of the settlement was granted, notice has been given to the class. Of 1,302 packages mailed, 139 were returned as undeliverable. Sip traces found another 53 mailing addresses, to which packets were remailed. 86 remain undeliverable. No objections or requests to opt out have been received.

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 California Controller's Unclaimed Property Fund in the name of the Class Members who did not cash their checks.

The settlement contains release language covering "all class claims alleged, or reasonably could have been alleged based on the facts alleged, 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.) PAGA claims are released to the extent they were "alleged in the operative complaint in the Action and Plaintiff's PAGA notice to the LWDA[.]"

Informal written discovery was undertaken, some of which was reviewed by retained statisticians and economists. The matter settled after arms-length negotiations, which included a session with an experienced mediator, in July of 2024.

Counsel also has provided an analysis of the case, and how the settlement compares to the potential value of the case, after allowing for various risks and contingencies. This included an estimate of defendant's exposure for the class claims of about $3,499,826.10.

The potential liability needs to be adjusted for various evidence and risk-based contingencies, including problems of proof. PAGA penalties are difficult to evaluate for a number of reasons: they derive from other violations, they include "stacking" of violations, the law may only allow application of the "initial violation" penalty amount, and the total amount may be reduced in the discretion of the court. (See Labor Code, § 2699(e)(2) [PAGA penalties may be reduced where "based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust arbitrary and oppressive, or confiscatory."])

Counsel attest that notice of the proposed settlement was transmitted to the LWDA concurrently with the filing of the motion.

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.)

Because this matter also proposes to settle PAGA claims, the Court also must consider the criteria that apply under that statute. Recently, the Court of Appeal's decision in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, provided guidance on this issue. In *Moniz*, the court found that the "fair, reasonable, and adequate" standard applicable to class actions applies to PAGA settlements. (*Id.*, at 64.) The Court also held that the trial court must assess "the fairness of the settlement's allocation of civil penalties between the affected aggrieved employees[.]" (*Id*., at 64-65.)

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, representative award, and administrative costs

Plaintiff seeks one-third of the total settlement amount, $328,505.56, 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.) Pursuant to the Court's earlier direction, counsel have computed a lodestar fee of $211,712.50, resulting in an implied multiplier of 1.55. The lodestar is based on 215.5 hours at a blended hourly rate of $670. Without specifically endorsing the hourly rates or the number of hours spent, no adjustment is required. The fees are approved.

Counsel seek approval of "up to $30,000," which they document currently as $22,528.63. Those costs are reasonable and are approved. Additional cost reimbursement requests, even costs that would not exceed the $30,000 cap, must be approved separately.

Plaintiff requests a representative award of $10,000. Criteria for evaluation of representative payment requests are discussed in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807. Mr. De La Cruz attests that he spent about 15-20 hours working on the case and that his participation could make it more difficult to find employment. He points out that he gave a broader release than the class, but he does not indicate that he had any additional individual claims of value. Given the size of the overall settlement and the other factors, the request is approved in the amount of

$10,000.

Settlement Administrator's costs of $13,950 are reasonable and are approved.

D. Conclusion

The Court finds the settlement is fair, reasonable, and adequate, and the motion for final approval is granted. The motion for fees and costs is granted, with the proviso that additional costs above $22,568.63 must be separately approved. Counsel are directed to prepare an order reflecting this tentative ruling and the other findings in the previously submitted proposed order. 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.

7. 9:00 AM CASE NUMBER: C23-01770
CASE NAME: JOSE DE LA CRUZ VS. GALPAO GAUCHO TWO, LLC
***HEARING ON MOTION IN RE: FINAL APPROVAL**
FILED BY:
****TENTATIVE RULING:****
See line 6.

8. 9:00 AM CASE NUMBER: C23-01980
CASE NAME: HERMINIO CEPEDA VS. ALLIED LANDSCAPE SERVICES, INC.
***HEARING ON MOTION IN RE: COMPLIANCE**
FILED BY:
****TENTATIVE RULING:****
Because the check-cashing period does not expire until June 28, 2025, the matter is continued to July 24, 2025, 9:00 a.m. The administrator shall provide a supplemental declaration no later than July 17, 2025.

9. 9:00 AM CASE NUMBER: C23-02179
CASE NAME: DMITRIY SHORNIKOV VS. LAKE ALHAMBRA PROPERTY OWNERS ASSOCIATION
HEARING ON DEMURRER TO: DEF 4TH AMENDED ANSWER
FILED BY: SHORNIKOV, DMITRIY
****TENTATIVE RULING:****

Before the Court is Plaintiff Dmitriy Shornikov's Demurrer. The Demurrer relates to Defendant Lake Alhambra Property Owners' Association II's Fourth Amended Answer to Plaintiff's Complaint.

Plaintiff demurs to the eighth affirmative defense pursuant to CCP § 430.20(a) and (b).

The Court has not considered Plaintiff's sur-reply nor his new argument therein that the eighth affirmative defense is a sham. The Code of Civil Procedure does not provide for sur replies and Plaintiff did not obtain leave of Court prior to filing it. The Court also notes that the gravamen of Plaintiff's sham argument was raised and addressed in the Court's order denying Plaintiff's order to show cause re contempt against the person who verified Defendant's answer, Steve Armanini.

For the following reasons, the Demurrer is **overruled**.

Legal Standard

Code of Civil Procedure § 430.20(a) provides for a demurrer to an answer where "[t]he answer does not state facts sufficient to constitute a defense." Code of Civil Procedure § 430.20(b) also provides for a demurrer to an Answer where "[t]he answer is uncertain," including "ambiguous and unintelligible."

CCP §431.30(b)(2) provides the statutory basis for an affirmative defense: "(b) The answer to a complaint shall contain: ... (2) A statement of any new matter constituting a defense." The phrase "'new matter' is also known as 'an affirmative defense.'" (*In Re Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 812.)

"Generally, a party must raise an affirmative defense where the matter is not responsive to essential allegations of the complaint. [Citations.] Thus, where a defendant relies on facts not put in issue by the plaintiff, the defendant must plead such facts as an affirmative defense. [Citation.] Where, however, the answer sets forth facts showing some essential allegation of the complaint is not true, such facts are not 'new matter," but only a traverse." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 698.)

"The determination of the sufficiency of the answer requires an examination of the complaint because its adequacy is with reference to the complaint it purports to answer." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 733.)

Analysis

This is Plaintiff's second challenge to Defendant's affirmative defense under Civil Code § 5145(a).

Previously, Defendant's Eighth Affirmative Defense stated:

> Defendant is informed and believes and thereon alleges that California Civil Code section 5145(a) provides Defendant a statutory defense against Plaintiff's claims in that any alleged noncompliance with statutory prescribed election procedures and/or Lake Alhambra Property Owners Association's election operating rules did not affect the results of the election.

Now, Defendant's Eight Affirmative Defense states:

> Defendant is informed and believes and thereon alleges that California Civil Code section 5145(a) provides Defendant a statutory defense against Plaintiff's claims in that any alleged noncompliance with statutory prescribed election procedures and/or Lake Alhambra Property Owners Association's election operating rules did not affect the results of the election, as there were only ten members who submitted nominations for the 2023 Board of Directors' Election by the deadline and there were eleven vacant seats. In prior elections, the Board of Directors had difficulty getting members to run for election to fill the eleven board seats. The Board of Directors often had to extend the deadline for nominations in an effort to fulfill all board seats. Thus, based on the history of board elections at Lake Alhambra Property Owners Association, it is unlikely that results of the elections would have changed for the 2023 Board of Directors' Election. Furthermore, Plaintiff was nominated and elected to the 2023 Board of Directors. The alleged violation(s) would not have changed Plaintiff's election to the Board.

The Court sustained Plaintiff's prior demurrer to this affirmative defense on the grounds that

Defendant failed to allege facts in support of the statutory defense. Defendant has now done so. Whether Defendant can establish these allegations is a matter for summary judgment or trial.

The Demurrer is **overruled**.

10. 9:00 AM CASE NUMBER: C23-02528
CASE NAME: FLUENCE ENERGY, LLC VS. DIABLO ENERGY STORAGE, LLC
HEARING IN RE: APPLICATION TO APPEAR PRO HAC VICE AS TO BIDUSHI ADHIKARI FOR PLTF FLUENCE
FILED BY: FLUENCE ENERGY, LLC
TENTATIVE RULING:

Granted.

11. 9:00 AM CASE NUMBER: C23-02528
CASE NAME: FLUENCE ENERGY, LLC VS. DIABLO ENERGY STORAGE, LLC
HEARING IN RE: AS TO KATELYN CARSON TO APPEAR AS COUNSEL PRO HAC VICE FOR PLTF FLUENCE
FILED BY: FLUENCE ENERGY, LLC
TENTATIVE RULING:
Granted.

12. 9:00 AM CASE NUMBER: C23-02586
CASE NAME: FLORENCE DROCAN VS. FULL CIRCLE OF CHOICES
***HEARING ON MOTION IN RE: FINAL APPROVAL**
FILED BY:
TENTATIVE RULING:

Plaintiff Florence Drocan moves for final approval of her class action and PAGA settlement with defendant Full Circle of Choices, Inc. Defendant is a non-profit agency that helps adults with developmental disorders live independently, and the putative class consists of employees who directly provide those services.

A. Background and Settlement Terms

The original complaint was filed on October 12, 2023, raising class action claims on behalf of non-exempt employees, alleging that defendant violated the Labor Code in various ways, including failure to pay minimum and overtime wages, failure to provide meal and rest 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 $420,000. The class representative payment to the plaintiff would be $7,500. Attorney's fees would be $140,000 (one-third of the settlement). Litigation costs are currently $17,941.03. The settlement administrator's costs (ILYM) are $5,450. PAGA penalties would be $25,000, resulting in a payment of $18,750 to the LWDA and $6,250 to plaintiffs. The net amount paid directly to the class members would be about $217,000. The fund is non-reversionary. There are an estimated 188 class members. Based on the estimated class size, the average net payment for each class member is approximately $1,140.

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 October 12, 2019

to the date of preliminary approval, or sixty days from November 5, 2024, whichever occurs first.

An escalator clause provides that if the number of work weeks increases by more than 10% above 19,049, defendant may pay a proportionally higher amount, or, at its option, reduce the class period.

The class members will not be required to file a claim. Class members may object or opt out of the settlement. (Aggrieved employees cannot opt out of the PAGA portion of the settlement.) Funds would be apportioned to class members based on the number of pay periods worked during the class period.

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 a cy pres beneficiary, Housing Consortium of the East Bay.

The settlement contains release language covering "all claims that were, or reasonably could have been, alleged, based on the facts contained in the Operative Complaint and (b) all PAGA claims that were, or reasonably could have been, alleged based on facts contained 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.)

Formal and informal written discovery was undertaken. The matter settled after arms-length negotiations, which included a session with an experienced mediator in November of 2024.

Counsel also has provided an analysis of the case, and how the settlement compares to the potential value of the case, after allowing for various risks and contingencies. This included an estimate of class claims at a "realistic maximum recovery" of about $614,000. The settlement is about 68% of that amount.

The potential liability needs to be adjusted for various evidence and risk-based contingencies, including problems of proof. PAGA penalties are difficult to evaluate for a number of reasons: they derive from other violations, they include "stacking" of violations, the law may only allow application of the "initial violation" penalty amount, and the total amount may be reduced in the discretion of the court. (See Labor Code, § 2699(e)(2) [PAGA penalties may be reduced where "based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust arbitrary and oppressive, or confiscatory."])

Counsel attest that notice of the proposed settlement was transmitted to the LWDA concurrently with the filing of the motion.

Notice was provided to the class. Notice packages were mailed to 192 class members. 17 packets were returned as undeliverable. New addresses were obtained for 13 of those addressees, and they were remailed. No requests to opt out or objections were received.

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.)

Because this matter also proposes to settle PAGA claims, the Court also must consider the criteria that apply under that statute. Recently, the Court of Appeal's decision in *Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, provided guidance on this issue. In *Moniz*, the court found that the "fair, reasonable, and adequate" standard applicable to class actions applies to PAGA settlements. (*Id.*, at 64.) The Court also held that the trial court must assess "the fairness of the settlement's allocation of civil penalties between the affected aggrieved employees[.]" (*Id*., at 64-65.)

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 representative award

Plaintiff seeks one-third 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.) Counsel have calculated a lodestar fee of $105,625, based on 186.5 hours of work, at hourly rates ranging from $375 to $900. The implied multiplier is 1.32. Without necessarily endorsing each component of the lodestar, there is no need for an adjustment here. The requested fee of $140,000 is reasonable and is approved.

Litigation costs of $17,941.03 are reasonable and are approved.

Settlement administration costs of $5,450 are reasonable and are approved.

Plaintiff requests a representative payment of $7,500. Criteria for evaluation of representative payment requests are discussed in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807. Ms. Drocan attests that she worked an unspecified number of hours on the case and that she took some risk that it would be harder for her to find employment as a result of her participation in this case. She also signed a general release, but does not indicate that she had any other claims of value. The Court grants the request in the full amount of $7,500.

D. Cy Pres Beneficiary

Code of Civil Procedure section 384 sets certain requirements for any funds paid to a third-party recipient out of "the unpaid residue or unclaimed or abandoned class member funds." Under the settlement, these funds would be paid to the Housing Consortium of the East Bay. After the Court requested a supplemental declaration establishing the activities of the Consortium, the Court determined that it fell within the statutory criteria.

Plaintiff, however, contends that because the funds from uncashed checks are paid to the Consortium, there is no "unpaid residue, and therefore the requirements of the section do not apply. The Court disagrees. The "residue" is the amount of uncashed checks before payment to the Consortium, and therefore the section applies. Accordingly, if funds are distributed to the Consortium, plaintiff's counsel shall prepare an amended judgment in accordance Code of Civil Procedure section 284.5.

E. Conclusion

The court finds that the settlement is fair, reasonable, and adequate, and the motion to approve is granted.

Counsel are directed to prepare an order reflecting this tentative ruling and the other findings in the previously submitted proposed order. 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. If funds are distributed to the cy pres recipient, counsel shall prepare an amended judgment so reflecting.

13. 9:00 AM CASE NUMBER: C24-00855
CASE NAME: WILLIAM DIXON VS. WALNUT CREEK MUTUAL NO. TWENTY-NINE
***HEARING ON MOTION IN RE: COMPEL ARBITRATION**
FILED BY: WALNUT CREEK MUTUAL NO. TWENTY-NINE
****TENTATIVE RULING:****

Defendant Walnut Creek Mutual No. Twenty-Nine's Motion for an Order Compelling Arbitration and Staying Action is **denied**. The Court finds there is no contractual or statutory basis to compel Plaintiffs to participate in arbitration.

Background

This action arises from a dispute between homeowners William and Sherry Dixon and their homeowners' association, Walnut Creek Mutual No. Twenty-Nine (the Mutual), concerning alleged water intrusion into the Dixons' condominium unit. In 2020, during the final stages of a renovation, the Dixons' contractor discovered moisture in the concrete slab foundation of their unit. Subsequent investigations by experts retained by both Plaintiffs and the Mutual concluded that the source of the water intrusion was located in the common area, which the Mutual is responsible for maintaining under both the Davis-Stirling Common Interest Development Act and the governing CC&Rs. Plaintiffs allege that despite receiving these expert reports, the Mutual refused to take corrective action, thereby preventing them from completing their renovations and causing ongoing property damage.

Plaintiffs allege that they attempted to initiate ADR by serving a Request for Resolution in accordance with Civil Code section 5930 prior to filing suit. A mediation was scheduled for October 27, 2023. However, in late September 2023, the Mutual's counsel unilaterally canceled the mediation and made no effort to reschedule. (First Amended Complaint, ¶¶ 27-28.) Plaintiffs filed this action on March 18, 2024, asserting claims for breach of the governing documents, negligence, breach of fiduciary duty, nuisance, trespass, and declaratory relief. On May 1, 2024, the Mutual filed the present motion to compel arbitration and to stay the proceedings pursuant to CCP sections 1281.2 and 1281.4.

Legal Standards

CCP section 1281.2 provides, in relevant part: "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists…"

California law favors arbitration as an efficient and cost-effective method of resolving disputes. Section 1281.2 requires a court to enforce a written arbitration agreement unless one of three exceptions applies: (1) waiver, (2) grounds for revocation, or (3) a risk of conflicting rulings due to related litigation with a third party. (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 967.)

The party seeking arbitration bears the burden of proving the existence of a valid agreement by a preponderance of the evidence; the opposing party bears the burden of proving any defense. (*Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1284.)

While courts favor arbitration where an agreement exists, "there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate." (*Rice v. Downs* (2016) 247 Cal.App.4th 1213, 1223.) Courts must construe arbitration clauses liberally, but the parties' agreement must still show mutual consent to arbitrate. (*Vianna v. Doctors' Management Co*. (1994) 27 Cal.App.4th 1186, 1189.)

Analysis

The Mutual contends that the CC&Rs require the parties to resolve their dispute through binding arbitration. The Court disagrees.

The Mutual's position rests on section 10.8 of the CC&Rs, located in Article 10, titled "Enforcement." Section 10.8 states in full:

> **10.8 Alternative Dispute Resolution**. As to any dispute between the Mutual and any Member or between two or more Members of the Mutual which is subject to California Civil Code section 1354(b), the parties shall abide by the alternative dispute resolution procedures as provided in Civil Code section 1354, or successor statute.

Former Civil Code section 1354 was repealed and renumbered as part of the 2014 reorganization of the Davis-Stirling Act. The current ADR provisions appear at Civil Code sections 5925 through 5965. These statutes require parties to attempt ADR before initiating certain enforcement actions in

superior court. Civil Code section 5925 defines "alternative dispute resolution" as "mediation, arbitration, conciliation, or other nonjudicial procedure that involves a neutral party in the decision making process," and defines an "enforcement action" to include civil actions brought to enforce the governing documents of a common interest development. (Civ. Code § 5925, subds. (a) and (b).)

Civil Code section 5930(b) defines when the pre-filing ADR requirement applies. It is limited to actions seeking solely declaratory, injunctive, or writ relief, or those seeking such relief in combination with monetary damages that do not exceed the small claims limit ($10,000 for an individual, $5,000 for an entity). Here, because the Dixons seek approximately $500,000 in damages, their lawsuit does not fall within the scope of section 5930(b).

But even if it did, Section 10.8 cannot be construed as requiring arbitration. That provision simply states that the parties "shall abide by the alternative dispute resolution procedures as provided in Civil Code section 1354, or successor statute." Although the statute defines "alternative dispute resolution" to include arbitration as one method of ADR, it does not permit one party to mandate arbitration as the exclusive method. The CC&Rs reflect a statutory obligation to attempt ADR in qualifying cases but do not evidence mutual consent to arbitrate. Absent such agreement, the Court lacks authority to compel arbitration under Code of Civil Procedure section 1281.

In its reply, the Mutual retreats from its original position that binding arbitration is required and instead asks the Court to compel the parties to participate in some form of ADR, whether arbitration or another method. (Reply, p. 4: 16-27.) The Court declines to order any specific form of ADR as the result of this motion but encourages the parties to engage in a good faith effort to resolve their dispute through a mutually agreed-upon process.

Objections to Evidence

The Mutual objects to Plaintiffs' citation to allegations from the First Amended Complaint in their opposition brief, asserting hearsay and relevance. (See Objections filed on June 18, 2025.) The objections are overruled. A motion to compel arbitration does not involve a determination on the merits. At this stage, Plaintiffs are not required to prove their claims, and allegations in the pleadings may be referenced for background context without being treated as evidence.

Conclusion

The Court finds that the Mutual has not carried its burden to prove the existence of a valid arbitration agreement by a preponderance of the evidence. As such, the motion is denied.

14. 9:00 AM CASE NUMBER: C24-01627
CASE NAME: KIMBERLY MENJIVAR VS. GENERAL MOTORS LLC
***HEARING ON MOTION FOR DISCOVERY COMPEL FURTHER RESPONSES TO PLTF REQUEST FOR PROD OF DOCS**
FILED BY: MENJIVAR, KIMBERLY
****TENTATIVE RULING:****
Plaintiff in this "lemon law" case moves to compel further answers to her requests for production of documents, specifically requests 6-9, 18, 19, 28 and 29.

The matter was reviewed by a Discovery Facilitator, under Local Rule 3.300, who issued a Report and Recommendation. The report made rulings on several requests that are not part of this motion. With respect to requests 18 and 19, the report states that defendant's responses were insufficient, did not identify any facts showing that responding would be overly burdensome, and that defendant agreed to make supplemental responses. The remaining requests at issue in this motion were not addressed by the discovery facilitator.

Plaintiff seeks to compel further responses as to the following:

Requests 6-9

No 6: documents concerning damage to the subject vehicle prior to shipment to the dealership.

No 7: documents concerning transporting the subject vehicle, including concerning damage in transit.

No. 8: all pre-delivery reports on the subject vehicle.

No. 9: all inspection reports and records for the subject vehicle.

Such documents could reveal whether there was any pre-sale damage to the car. This is relevant to the subject matter of the litigation. Given that they apply only to the subject vehicle (the Traverse purchased by plaintiff), production would not be unduly burdensome.

Requests 18-19

No. 18: records of payment on warranty claims for the subject vehicle.

No. 19: Authorizations to proceed with service.

These documents are relevant to the subject matter of the litigation, and are not unduly burdensome to produce. In addition, defendant agreed to provide a further response.

Requests 28-29

No. 28: list of consumer complaints substantially similar to the defects claimed by plaintiff.

No. 29: Voice of the Customer reports for the defects claimed by plaintiff.

These requests are relevant to the subject matter of the litigation. While more burdensome than some of the other requests, they are not unduly burdensome, because they are limited to cars of the same year, make, and model of the subject vehicle.

The Court notes two items with respect to all of the requests at issue. First, to the extent that defendant objects on the ground that the requests call for "confidential" business information, that issue would be laid to rest by the stipulated protective order, to which plaintiff refers. The Court's review of its case file, however, does not indicate that the parties submitted such a stipulation for court approval.

Second, if defendant can truthfully submit a verified response meeting the requirements of Code of

Civil Procedure section 2031.230, then it will not be necessary to produce further documents.

The motion is granted. Defendant shall serve supplemental responses no later than July 24, 2025.

15. 9:00 AM CASE NUMBER: C24-02003
CASE NAME: VICTOR WEBB VS. GENERAL MOTORS, LLC, A LIMITED LIABILITY COMPANY
***HEARING ON MOTION IN RE: LEAVE TO FILE 1ST AMENDED COMPLAINT**
FILED BY: WEBB, VICTOR JUAN ELI
****TENTATIVE RULING:****

Before the Court is a motion for leave for plaintiff to file a first amended complaint. For the reasons set forth, the motion is granted. Plaintiff shall file his first amended complaint **by July 10, 2025**.

Background

Plaintiff filed his complaint initiating this action against defendant General Motors, LLC on July 31, 2024. The complaint alleged two causes of action under the Song-Beverly Consumer Warranty Act, Civil Code section 1790 *et seq.* for breach of express and implied warranties. Plaintiff alleges that the 2017 Chevrolet Bolt he bought in 2020 had unspecified defects which the manufacturer's authorized repair facilities were unable to fix after multiple attempts. (Compl. ¶¶ 6, 12, 13, 23.)

Legal Standards

The Court has broad discretion to grant leave to amend a pleading at any stage of a case under Code of Civil Procedure sections 473(a) and 576. (*See also Hirsa v. Superior Court (Vickers)* (1981) 118 Cal.App.3d 486, 488-489.) "[L]eave to amend must be liberally granted [citation omitted], provided there is no statute of limitations concern, nor any prejudice to the opposing party, such as delay in trial, loss of critical evidence, or added costs of preparation." (*Solit v. Tokai Bank* (1999) 68 Cal.App.4th 1435, 1448.)

Delay alone is not a ground for denying leave to amend unless there is a showing of prejudice. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565 [reversing judgment on the pleadings for defendant after plaintiff's motion to amend made on the day of trial was denied where defendant was not surprised or misled by the proposed amendment, and short trial delay did not prejudice defendant].) It is a rare case when leave to amend should be denied, particularly when there is no showing of prejudice to the other side. (*Douglas v. Superior Court* (1989) 215 Cal.App.3d 155, 158; *Hong Sang Market, Inc. v. Peng* (2018) 20 Cal.App.5th 474, 488.) To the contrary, the Court may abuse its discretion by denying leave to amend when no prejudice is shown. (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1147.)

Analysis

On October 31, 2024, the California Supreme Court issued its opinion in *Rodriguez v. FCA, LLC* (2024) 17 Cal.5th 189 which held that the Song-Beverly Act does not apply to a used vehicle purchased from a dealer with an unexpired original manufacturer's warranty. (*Rodriguez, supra,* 17 Cal.5th at 205.) Plaintiff's motion was filed seven and a half months after the case commenced, and four and a half months after *Rodriguez* was decided. The proposed first amended complaint ("FAC"), a redlined version of which is attached as Exhibit 1 to the Morrow Declaration, eliminates the causes of action under the Song-Beverly Act and alleges a single cause of action for violation of the federal the federal Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. section 2301 *et*

seq.

The Court finds no unreasonable or unjustified delay warranting denial of the motion. The fact that the *Rodriguez* decision was under review by the California Supreme Court when the action was filed indicates the application of the Song-Beverly Act under the factual circumstances alleged was still unsettled when the case was filed.

The cases cited by GM in which the courts denied leave to amend involve delays of two to three years, along with other facts demonstrating prejudice to the defendant. (*See, e.g., Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 176 [over five years after suit commenced, and during oral argument on summary judgment motion]; *Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486; *Record v. Reason* (1993) 73 Cal.App.4th 472, 486 [three years]; *Bedolla v. Logan & Frazier* (1975) 52 Cal.App.3d 118, 136 [three and a half years, and motion made on fourth day of trial]; *Yee v. Mobilehome Park Rental Rev. Bd.* (1998) 62 Cal.App.4th 1409, 1428 [two years].) Other cases cited by GM are similarly distinguishable. GM did not move for summary judgment after *Rodriguez* was published, perhaps in light of the parties' attempt at settlement. (Morrow Reply Decl. ¶ 7.) When the settlement negotiations failed in early 2025, Plaintiff filed the motion for leave to amend on March 20, 2025. (*Compare to Melican, supra,* 151 Cal.App.4th at 176; *Champlin/GEI Wind Holdings, LLC v. Avery* (2023) 92 Cal.App.5th 218, 224; *Fisher v. Larsen* (1982) 138 Cal.App.3d 627, 649.)

GM offers no evidence of prejudice if leave to amend is granted, other than having to defend the Magnuson-Moss Act cause of action. (McBride Decl.; Opp. pp. 5-6.) No trial date has been set in the case, and discovery remains open. GM's generic, unsupported arguments that the amendment would "expand" the claims and scope of discovery does not show prejudice warranting denial of the motion under the circumstances.

GM's contention that the Magnuson-Moss Act claim is not legally viable addresses its merits. The policy of liberality in allowing amendment of pleadings generally overrides arguments opposing a motion for leave to amend on the ground the proposed amended complaint is substantively defective. (*See, e.g., Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760-761; *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048.) Arguments regarding the merits of the amended complaint are more appropriately addressed in a merits challenge to the FAC after it is filed. (*Atkinson, supra,* 109 Cal.App.4th at 760-761; *Kittredge Sports Co., supra,* 213 Cal.App.3d at 1048 ["[T]he preferable practice would be to permit the amendment and allow the parties to test its legal sufficiency by demurrer, motion for judgment on the pleadings or other appropriate proceedings."].)

16. 9:00 AM CASE NUMBER: C24-03056
CASE NAME: GIOVANNI VERGA VS.A.W. CHESTERTON COMPANY,CHEVRON SHIPPING COMPANY LLC
***HEARING ON MOTION IN RE: STAY OR DISMISS FOR FORUM NON CONVENIENS**
FILED BY:
****TENTATIVE RULING:****

Continued by stipulation and order to July 24, 2025, 9:00 a.m.

17. 9:00 AM CASE NUMBER: MSC10-02872
CASE NAME: GROTH V. GILAD ET AL
***HEARING ON MOTION IN RE: FOR ATTORNEYS FEES AND COSTS**
FILED BY:
****TENTATIVE RULING:****
Plaintiff William Groth moves for an award of attorney's fees against defendants Ami Gilad and Roy Gilad.

Background of the Case

On September 30, 2010, the complaint was filed, asserting causes of action for breach of fiduciary duty, derivative action, accounting, negligence, negligent misrepresentation, intentional infliction of emotional distress, negligent infliction of emotional distress, indemnity, comparative indemnity, equitable contribution, dissolution, and equitable relief-alter ego. On June 19, 2013, an amended complaint was filed, which, among other things, added the claim of breach of promissory note.

On June 24, 2015, Judge Austin granted plaintiff's motion for summary adjudication on the promissory note claim.

The remaining matters were sent to trial in a different department. On September 17, 2016, Judge Craddick issued a statement of decision finding that a partnership existed, that the parties were jointly and severally liable on the loan, that the Gilads were liable for numerous breaches of fiduciary duty, and rejected claims by the Gilads that Groth had promised to fund the partnership. (It is not clear why that court ruled on the promissory note, given that Judge Austin had granted summary adjudication on that claim.) On March 29, 2017, Judge Craddick awarded attorney's fees and costs of $331,328.

Defendants appealed the judgment (and fee award) on the ground that Judge Austin's granting Groth's motion for summary adjudication on the promissory note claim was incorrect. On November 18, 2019, the Court of Appeal found the order should not have been granted, and also that that order prejudiced the court trial held by Judge Craddick. Accordingly, the entire judgment and the fee award were reversed.

On remand, the matter was bifurcated, and this Court held a trial solely on the issue of whether there was joint and several liability on the promissory note. In a statement of decision issued on September 14, 2021, the Court found that there was joint and several liability. The remaining issues were tried by Judge Treat, who found, on September 13, 2023, that the only portion of the judgment reversed by the Court of Appeal was Judge Austin's granting of the motion for summary adjudication, and effectively readopted Judge Craddick's decision as to the other claims.

This motion for attorney's fees was first heard by Judge Treat on February 29, 2024. He denied the motion without prejudice, directing the parties to (1) engage in a meaningful meet-and-confer and/or mediation; and (2) to develop a more credible allocation of time and billing between the time spent on the promissory note issue (to which the fee clause applied) and the other issues in the case (to which there is no claim for fees).

On September 19, 2024, Judge Treat heard a renewed motion for attorney's fees, and found the same two failings in the moving and opposing papers. While imploring the parties to find a suitable mediator, he was not precise about the form in which the further material to be submitted in the event mediation was not successful. As a result, Groth submitted a Supplemental declaration of

counsel, which primarily argues that the full amount of fees should be awarded, while the other parties have submitted objections to Groth's attorney's declaration because it raises "new" issues.

On March 20, this Court held a brief hearing for the sole purpose of scheduling further briefing, i.e., allowing defendants to schedule a more substantive brief in response to Groth's supplemental declaration, and to allow Groth to file a reply, with a further hearing held shortly after. Each side filed a response.

Legal Issues Concerning Fees

Plaintiff Groth is entitled to attorney's fees as the prevailing party in the litigation to enforce the promissory note at issue, based on language in the promissory note. Where a party is successful on some claims for which fees are available and other claims for which fees are not available, the attorney's fee may be limited to the time spent on the compensable claim. (*Akins v. Enterprise* (2000) 79 Cal.App.4th 1127.)

Nonetheless, "[a]pportionment is not required where the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and non-compensable units." (*Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672, 687. See also *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 417, 424.) In his supplemental declaration, Groth argues that the matter of the validity of the note and the other issues in the case are "inextricably intertwined," and that Judge Craddick had previously so found. Therefore, he initially did not make a substantial effort to break out the fees attributable to the note claim. Judge Treat, however, in hearing the fee motion (for the most recent time) directed the parties to make a more substantial and credible effort to separate out the note-related fees.

In *Calvo, Fisher & Jacob v. Lujan* (2015) 234 Cal.App.4th 608,623-624, the court held that where the contract plaintiff sought to enforce by their complaint had an attorney's fee provision, and defeat of cross-complaint was essential to recovery on complaint based on the contract, fees incurred in defeating the cross-complaint were recoverable. The court quoted Pearl, California Attorney Fee Awards, which states that, "[p]arties prevailing on the contract claim also may be entitled to compensation for time spent on noncontract claims that contributes to the success of the contract claim." (See also *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 37 [where bank sought to recover on promissory note, fees incurred in defeating defendant's cross-complaint for fraud were awardable].) Defendants, however, rely on *Calvary SPV I, LLC v. Watkins* (2019) 36 Cal.App.5th 1070, 1100. In that case, Plaintiff brought a debt collection action and defendant cross-complained with claims that were broader and separate from the complaint. The court found that plaintiff's "ability to recover did not depend on whether" the other claims were valid, and disallowed fees.

The Parties' Contentions

Groth contends that the cases are "inextricably intertwined such that no apportionment is necessary." Nonetheless, he has, without waiving that argument, proposed such an apportionment. Pursuant to Judge Treat's orders, Groth made another attempt to apportion. (See Supplemental Dec. of 2/26/25 Ex. 2 and Ex. 3 of DB supp Dec. 2/26/25

As a result, Groth now seeks (1) $395 in BCCI costs, (based on the judgment of 10/6/23); (2) Groth Holdings costs of $1,842 (again based on the 10/26/23 judgment); and (3) $508,115.50 attorney's

fees, plus costs of $34,425.66.

Groth asserts that his total attorney's fees are $547,829.50, but he has reduced that demand to $508,115.50. (Separately, costs of $76,789.13 were requested, but on February 20, 2024, Judge Treat reduced them to $34,425.66.)

Groth has made two deductions. First, "category No. 1," related Groth's first reduction from Judge Craddick's original attorney's fees judgment, totaling $20,320.00. Second, "category No. 2," related to fees incurred after the start of the Appeal, totaling $19,395.00.

Thus, the total requested fee is $508,115.50 and the costs are $34,425.66.

The Gilads, however, propose the following reductions in fees:

> August 2010 to June 2013: 143.45 hours. (Time before promissory note claim was pled.)
>
> June 24, 2015 (date motion for summary adjudication of issues entered on note claim) through November 2015 original trial, at which the liability on the note was not at issue February 1, 2017 (appeal filed) 476.1 hours.
>
> September 2021 to present as related only to the other issues (184.2 hours).

The Gilads also dispute some fees as the result of "block billing," i.e., some entries with multiple tasks, in blocks of 3-5 hours on a single day. The Court concludes that those entries are sufficiently specific.

Analysis and Conclusion

The Gilads point out that the breach of the promissory note was not initially asserted and pled. Groth says his strategy was to first establish that there was a partnership as a predicate to establishing that the parties were jointly and severally liable for the debts of the partnership, which would include the promissory note. The partnership claims certainly were related to the promissory note claim, in the sense that the existence of the partnership provided the explanation for why Groth would lend money, to whom he would lend it, and why there would be joint and several liability. This does not make every issue in the case a necessary part of proving the promissory note claim. Many of the other claims and cross-claims were not actually necessary to prevailing on the note claims, but it is difficult, indeed impracticable, to parse each activity into those that were necessary only to the promissory note issue or only to the partnership issue.

After September 14, 2021, when the Statement of Decision resolved the promissory note issue, the matters became separable again.

The Court finds that the promissory note claims and the other claims are "inextricably intertwined" and therefore cannot practicably be separated, with the exception of (1) the reductions made in Groth's supplemental submission, (2) the hours spent before the promissory note was first pled in June, 2013, and (3) time after the September 14, 2021, Statement of Decision on the promissory note issue. Thus, the Court awards $508,115.50, minus $78,347.50 (143.45 hours at $550 per hour) and minus $101,310 (184.2 hours at $550 per hour), equaling $328,458.

Costs are awarded in the amount of $34,425.66. In addition, the Court also awards $395 in costs to BCCI (based on the judgment of 10/6/23), and costs to Groth Holdings of $1,842, (again based on the

10/26/23 judgment).

18. 9:00 AM CASE NUMBER: MSC20-02193
CASE NAME: R S TUCKEY VS R L TUCKEY
HEARING ON DEMURRER TO: 3RD AMENDED COMPLAINT
FILED BY: TUCKEY, ROBERT L
TENTATIVE RULING:

Before the Court is Defendants Robert L. Tuckey and Gina Tuckey's ("Defendants") demurrer to Plaintiff's Third Amended Complaint ("TAC"). The TAC sets forth seven causes of action: (1) Quiet Title; (2) Fraudulent Misrepresentation and Request for Constructive Trust (Civ. Code § 2224); (3) Adverse Possession; (4) Fraud (Promise without intent to perform); (5) Breach of Contract (Damages); (6) Breach of Contract (Rescission); (7) Trespass to Property and Chattel.

The hearing on the demurrer is **continued until July 24, 2025,** at 9:00 a.m. in Department 39 to allow the Parties time to conduct the required meet and confer as discussed below.

Initial Consideration

A party has 30 days to file a demurrer in response to a complaint against them. (Cal. Code Civ. Proc. § 430.40 (a).) If the parties are having difficulty finding time to engage in the required meet and confer, the demurring party may obtain a single 30-day extension of that time by filing an appropriate declaration. (Cal. Code Civ. Proc. § 430.41 (a)(2).) "Any further extensions shall be obtained by court order upon a showing of good cause." (*Ibid.*)

The TAC was filed on October 2, ***2023***. As such, any demurrer or declaration seeking an automatic extension of time was due by November 1, ***2023***. The docket does not show any declaration in support of the automatic extension of time. Accordingly, the instant demurrer is ***506 days overdue***.

Meet and Confer Requirements

Before filing a demurrer, the "demurring party shall meet and confer in person, by telephone or by video conference with the party who filed the pleading that is subject to the demurrer…." (Cal. Code Civ. Proc. § 430.41(a) (emphasis added.) The meet and confer "shall" occur at least 5 days before the responsive pleading is due. (*Id.* at subd. (a)(2).) As part of the meet and confer, the "party who filed the complaint [i.e. Plaintiff] … ***shall provide*** legal support for its position that the pleading is legally sufficient or, in the alternative, how the complaint, cross-complaint, or answer could be amended to cure any legal insufficiency." (Cal. Code Civ. Proc. § 430.41(a)(1) emphasis added.)

The demurring party shall file and serve a declaration stating that either:

> "(A) The means by which the demurring party met and conferred with the party who filed the pleading subject to the demurrer, and that the parties did not reach an agreement resolving the objections raised in the demurrer. [or]
> (B)That the party who filed the pleading subject to demurrer failed to respond to the meet and confer request of the demurring party or otherwise failed to meet and confer in good faith." (Cal. Code Civ. Proc. § 430.41(a)(3).)

Defendants' counsel provides a declaration indicating that Plaintiff's counsel failed to meet and confer in good faith. Defendants' counsel indicates that he informed Plaintiff's counsel "several times" since the filing of the TAC in October 2023 that he would be filing another demurrer based on statute of limitations grounds. He gives no timeframe for when these discussions occurred. Nor does he indicate how these communications took place – e.g. via letter, email, or telephone. He indicates Plaintiff's counsel granted him "an open extension of time" to respond to the TAC.

At the February 19, 2025, CMC the Court ordered Defendants to file a responsive pleading by March 21, 2025. Thus, any meet and confer would have needed to take place by March 16, 2025. Defendants' counsel's 'detailed email spelling out the legal bases for the demurrer,' was sent on March 17 – a day after the meet and confer was required to have taken place. Plaintiff's counsel never responded – nor did he respond to 'several' other attempted communications from Defendants' counsel regarding this issue as well as apparent settlement discussions.

There is an almost 18-month gap between when the TAC was filed and Defendants' counsel's untimely email to discuss the demurrer. There is no indication the parties substantively discussed the demurrer through verbal communication during that time. The untimely email to discuss the demurrer is insufficient to meet Defendant's obligation to meet and confer before filing the demurrer.

Given the extreme delay in the filing of the TAC and the parties' failure to properly meet and confer in a timely manner, the Court is going to continue the hearing on this matter to allow the parties time to properly meet and confer. Especially considering the statements by Defendants' counsel that Plaintiff's counsel agreed to send a settlement proposal. While the meet and confer under section 430.41 is only required to include discussions of the demurrer, it would be prudent for the parties to include discussion relating to settlement of this long-standing litigation.

Conclusion

The hearing on Defendants' demurrer is **continued to July 24, 2025**, at 9:00 a.m. in Department 39. The parties are ordered to meet and confer in person or via telephone or video conference no later than close of business on July 10, 2025. Defendants' counsel must file a declaration that shows he and Plaintiff's attorney engaged in the required substantive meet and confer process by 4:00 p.m. on Friday, July 11, 2025. The declaration shall indicate if the parties (1) came to an agreement as to any of the causes of action – thereby limiting the issues the Court is to rule upon, or (2) could not agree and the Court should rule each of the issues raised in the demurrer. Alternatively, a notice of settlement indicating the matter is to be taken off calendar will suffice.

19. 9:00 AM CASE NUMBER: MSC21-00653
CASE NAME: WANG BROTHERS VS EAST BAY MUD
HEARING ON SUMMARY MOTION ADJUDICATION OF INVERSE CONDEMNATION CAUSE OF ACTION
FILED BY: EAST BAY MUNICIPAL UTILITY DISTRICT
TENTATIVE RULING:

Defendant East Bay Municipal Utility District [Defendant] brings this Motion for Summary Adjudication of Plaintiff's Third Cause of Action for Inverse Condemnation [Motion]. The Motion is opposed by Plaintiff Wang Brothers Investments, LLC [Plaintiff].

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

Background

This case arises from water damage that occurred on January 18, 2020, due to a break at a water main [Main] located near the commercial buildings at 3033, 3065, and 3095 Richmond Parkway in Richmond [Property]. (Defendant's Compendium of Evidence and Dec. P. Messrobian, at Ex. 1 [Complaint], ¶¶ 2, 5; Defendant's Separate Statement and Plaintiff's Response and Additional Material Facts [SS], # 3, 5, 7.) The Property is owned and managed by Plaintiff. (Complaint, ¶¶ 2, 5; SS, # 1-2, 8.)

Plaintiff's Complaint pleads claims for Negligence, Trespass, and Inverse Condemnation, seeking damages in the amount of $750,000 plus costs of suit arising from flooding from the break of the Main located the Property. (Complaint, ¶ 1, A.)

Defendant contends that the Main served only Plaintiff's Property and Plaintiff was the sole customer. Based thereon, Defendant argues that Plaintiff cannot show the Main was "for public use" to meet an element necessary for a claim of inverse condemnation, citing, among other authority, *Foley Investments LP v. Alisal Water Corp.* (2021) 72 Cal.App.5th 535.

Plaintiff responds that "Based on the positioning of the fire hydrants on the Properties, they could appropriately and legally be used as water sources by a fire department to fight fires in the adjacent residential area and the vegetation area." (SS, # 26.) Based thereon, Plaintiff contends that the Main was for public use.

Standard

Summary Adjudication

"It is well established that the pleadings determine the scope of relevant issues on a summary judgment motion." (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74.) The party moving for summary judgment carries both the burden of persuasion and the burden of production of evidence. (Evid. Code, § 500; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

"The initial burden is always on the moving party to make a prima facie showing that there are no triable issues of material fact." (*Scalf v. D. B. Log Homes, Inc*. (2005) 128 Cal.App.4th 1510, 1519.) "A party cannot succeed without disproving even those claims on which the opponent would have the burden of proof at trial." (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1065.)

In moving for summary adjudication, a defendant must demonstrate that it is more likely than not that a cause of action has no merit. A defendant meets his burden of proof if he shows that one or more elements of the cause of action cannot be established, or that there is a complete defense to the cause of action. (*Aguilar*, *supra*, 25 Cal.4th at 849, 855; Code Civ. Proc., § 437c, subd. (o)(2).) Once the defendant meets that burden, the burden shifts to the Plaintiffs to show by preponderance of the evidence that a triable issue of one or more material facts exists. (*Aguilar*, *supra,* 25 Cal.4th at 852.)

The Plaintiffs must set forth specific facts. (*Ibid*.)

"In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom ..., in the light most favorable to the opposing party." (*Id.* at 843, internal citations and quotes omitted.) The court must grant the motion if all the papers show that there is no triable issue as to any material fact such that the moving party is entitled to a judgment as a matter of law. (*Ibid*., citing Cal. Code Civ. Proc. §437c(c).)

Inverse Condemnation

"Private property may be taken or damaged for a public use … only when just compensation … has first been paid to … the owner." (Cal. Const., art. 1, § 19, emphasis added.) Public use is defined as "a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government." (*Cantu v. Pacific Gas and Electric Company* (1987) 189 Cal.App.3d 160, 164.) "Public entities are not strictly or otherwise automatically liable for any conceivable damage bearing some kind of connection, however remote, to a public improvement." (*City of Oroville v. Sup. Ct.* (2019) 7 Cal.5th 1091, 1098.) "Whether the installation of the [utilities improvement] is a public use is a question of law." Cantu, supra, 189 Cal.App.3d at 163.)

In *Foley Investments LP v. Alisal Water Corp.* (2021) 72 Cal.App.5th 535, the trial court found that the subject water main did not serve a public use, determining that the water main was installed for the benefit of the apartment complex and did not provide service to the public at large.

Foley is on point to this case. To fully evaluate this claim, the court looks at each of the facts used by the court in *Foley* to determine the water main did not serve a public use. The evidence was presented in testimony by engineering experts and the president of the defendant water service [Alco], which was regulated by the Public Utilities Commission. (*Foley*, *supra*, 72 Cal.App.5th at 539-40.) The key facts are:

- The fire marshal required the property developer to install two fire hydrants on the property.
- The developer and Alco entered into a private contract, the "main extension contract," for installation of the main.
- The developer designed the subject water main with input from Alco.
- But for the developer's needs, Alco would not have installed the subject main.
- Alco's usual practice was to provide water service only to the boundary line.
- Developer granted Alco easements over the property to install the subject water main.
- The main did not service other areas or facilitate flow through the entire distribution system.
- The subject main serviced fire hydrants that benefited only the plaintiff's property, as they were within the subject gated complex and would not be used for fire at neighboring properties.

- The subject property had only one customer - the owner of the buildings that were damaged.

(*Id*., at 539-541.) The court in Foley discusses fire protection immunity, but this argument is not made by Defendant. The issue here is whether the Main and the fire hydrants serviced by the Main benefit only the Property. (Motion Memorandum of Points & Authorities [MPA], at 8:8-18.)

Analysis

Defendant argues that the Main is only for private use based on the following facts:

- Plaintiff owns the Property. (SS, #1.)
- Plaintiff is the only customer at the Property. (SS, #2.)
- The Main was installed in an easement on the Property granted by a prior owner. (SS, #5.)
- The break occurred in a District-owned Main at the Property called Extension 47255. (SS, # 4.)
- Extension 47255 serves the Property, including four fire hydrants thereon. (SS, # 7.)
- Extension 47255 was designed and constructed to serve the Property. (SS, # 9.)

Defendant presents the declaration of its expert and counsel, along with accompanying documentation as evidence to support the above statements. Plaintiff does not object to Defendant's evidence.

Based on these facts, Defendant contends: (a) if Extension 47255 were taken out of service, the only customer impacted would be Plaintiff and the only parcel affected would be the Property, and (b) due to the placement of the valves on the system, Defendant would not operate Extension 47255 to serve any customer other than a customer on the Property. Plaintiff disputes these contentions.

Defendant does not address two key factors from the *Foley* ruling. First, Defendant does not show that the Main was installed pursuant to a private contract with the water district or that the developer participated in the design and location of the fire hydrants, as in *Foley*. Second, Defendant does not show that the fire hydrants on the Property are only for the benefit of the Property.

While Plaintiff does not particularly address the first point, it presents evidence and argument that the fire hydrants on the Property are positioned so that they can be used for the neighboring properties.

In *Foley*, the court found that the water main serviced fire hydrants that were solely for the benefit of the subject property since the hydrants were on the interior of a gated community. Here, the evidence presented by Defendant demonstrates that the fire hydrants are located on the perimeter of the Property, adjacent to the neighboring parcels, which include buildings as well as vegetation. (Defendant's Compendium of Evidence and Dec. P. Messrobian at Ex. 3 [Dec. R. McMullin], ¶ 5, Ex. B; Ex. 4 [Assessor's Map]; Ex. 5 [Property Detail Printout]; Ex. 7 [Depo. Vivian Zhu Zhu], 56:7-8, 57:12-14, Ex. A.)

Based on the location of the fire hydrants, Plaintiff argues the Main is for public use. This simple argument, based on common sense and the plotted locations of the hydrants, addresses one of the key factors noted by the court in *Foley*. Defendant does not and cannot show that the fire hydrants are in the interior of the Property or within a gated residential community, as in *Foley*. Defendant does not otherwise show that the location of the fire hydrants are designed serve only the Property.

Thus, the facts of this case differ from those relied upon by the court in *Foley* to find that the Main was not for public use. Further, it is reasonable to find that the fire hydrants on the Property may be used for fighting fires on the adjacent parcels based upon their location on the perimeter of the Property and their proximity to the neighboring lots.

Accordingly, Defendant has not met its burden on summary adjudication to demonstrate that the Main was for private use only as a matter of law pursuant to the holding in *Foley*.

Objections

The Court need only rule on those objections to evidence that are material to the disposition of the motion for summary adjudication. (See CCP § 437c(q).) Defendant made various objections to the evidence submitted by Plaintiffs. However, the court relies on the evidence presented by Defendant for its findings and rulings herein. As such, the court does not address Defendant's objections to Plaintiff's evidence as it is not material to the disposition of this Motion.

20. 9:00 AM CASE NUMBER: MSC21-02483
CASE NAME: GOLLABA VS. EBMUD
HEARING ON SUMMARY MOTION
FILED BY: PHILLIPS, JOHN B
TENTATIVE RULING:

Notice of withdrawal filed. Hearing vacated.

21. 9:00 AM CASE NUMBER: MSC22-00329
CASE NAME: MARTINEZ VS LIMON LOCUST
***HEARING ON MOTION IN RE: FINAL APPROVAL AND FAIRNESS HEARING**
FILED BY:
TENTATIVE RULING:

No moving papers submitted. Counsel to appear to advise Court of status.

22. 9:00 AM CASE NUMBER: MSC22-00543
CASE NAME: PEET'S COFFEE VS CAFE CAMPOS ALTOS
HEARING ON SUMMARY MOTION ADJUDICATION
FILED BY: PEET'S COFFEE & TEA, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY
TENTATIVE RULING:

Before the Court is Plaintiff Peet's Coffee & Tea, LLC's Motion for Summary Adjudication ("MSA"). Peet's moves for an order granting summary adjudication as to its first cause of action for breach of

contract and its second cause of action for breach of the covenant of good faith and fair dealing.

Peet's unopposed Request for Judicial Notice is **granted**. (Cal. Evid. Code § 452 (d).) Our Coffee's unopposed Request for Judicial Notice is **granted**. (Cal. Evid. Code § 452 (d).)

Peet's MSA is **granted** as to both the first and second causes of action for breach of contract and breach of the covenant of good faith and fair dealing, respectively.

Factual Background

Peet's is an Emeryville-based specialty coffee roaster and retailer with numerous stores throughout the United States. Defendant Café Campos Altos E.E. dba Our Coffees, Inc. ("Our Coffee") is a U.S.-based Brazilian coffee distributor/importer. (SSUMF 1.)

At issue here are four written Purchasing Contracts entered into by Peet's and Our Coffee for the sale and delivery of coffee to Peet's. (SSUMF 1.) (SSUMF 3-10.) The first, dated July 12, 2019, required Our Coffee to deliver 11,520 bags of coffee. (SSMUF 3.) Our Coffee failed to deliver 2,560 of those bags. (SSUMF 4.)

The second, dated December 5, 2019, required Our Coffee to deliver 6,080 bags of coffee. (SSMUF 5.) Our Coffee did not deliver 960 of those bags. (SSUMF 6.)

The third, dated October 30, 2020, required Our Coffee to deliver 11,520 bags of coffee. (SSMUF 7.) Our Coffee did not deliver any of those bags of coffee – *i.e.* failed to deliver all 11,520 bags. (SSUMF 8.)

The fourth, dated December 4, 2020, required Our Coffee to deliver 6,080 bags of coffee. (SSMUF 9.) Our Coffee did not deliver 3,840 of those bags. (SSUMF 10.)

In total, Our Coffee failed to deliver 18,880 bags of coffee under the above Purchase Contracts. Peet's repeatedly warned Our Coffee that Peet's would need to purchase replacement coffee on the open market if Our Coffee did not deliver the coffee it was contractually obligated to deliver. (SSUMF 16.) When Our Coffee failed to deliver, Peet's was required to purchase replacement coffee on the open market. Peet's spent over $1,143,007 making such purchases. (SSUMF 17.) This amount constitutes the difference between the price Peet's negotiated with Our Coffee and the amount Peet's was required to spend on the open market to replace the coffee that was not delivered. (Maloney Decl. ¶ 30.)

During the time that Our Coffee was not providing Peet's with the coffee it contracted for, Our Coffee was selling and delivering its coffee to other coffee roasters/business. (SSUMF 11, 14.) Our Coffee also attempted to raise Peet's price for coffee above the rate set forth in the Purchase Contracts before agreeing to deliver the coffee. (SSUMF 12.)

Standard

Summary adjudication is proper if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc. § 437c(c).) A plaintiff "has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action." (*Id.* at subd. (p)(1).) "Once the plaintiff or cross-complainant has met that

burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid.*)

"In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences, in the light most favorable to the opposing party." (*Aguilar, supra,* 25 Cal.4th at p. 843 (internal citations and quotations omitted); see also, Code of Civ. Proc. §437c(c).) "All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 757 quoting *Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

Procedural Issues

Timeliness of Opposition

Peet's filed its MSA on March 24, 2025, and the Court set the hearing for the July 10, 2025. On April 21, 2025, Peet's sought and obtained an *ex parte* order resetting the hearing date to June 26, 2025. Based upon that hearing date, Our Coffee's opposition was due on or before June 6, 2025 – *i.e.* 20 days before the hearing. (Cal. Code Civ. Proc. § 437c (b)(2).) Our Coffee filed its Opposition papers on June 10, 2025 – four days beyond the deadline – without explanation or request for additional time.

A "trial court has broad discretion to accept or reject late-filed papers." (*Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 262.) While Peet's did not have the full time normally allotted to prepare and file a substantive reply, it was able to do so. As such, the Court will exercise its discretion and accept Our Coffee's late filed opposition.

Opposition Declaration of Nathalia Azzi

Defendant filed the Declaration of Nathalia Azzi in support of its opposition to the MSA. The Declaration, as noted by Peet's, was not signed under penalty of perjury under the laws of the State of California.

California Code of Civil Procedure section 2015.5 "defines a 'declaration' as a writing that is signed, dated, and certified as true under penalty of perjury." (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 606.) A declaration that is "not signed under penalty of perjury under the laws of the State of California as required by section 2015.5 … [has] no evidentiary values" and shall not be considered. (*ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 217.) As the declaration is not signed under penalty of perjury, it has no evidentiary value.

On June 18, 2025, two days after Peet's filed its Reply papers, Defendant's counsel filed a "Declaration in Support of Request to Accept Amended Declaration" of Ms. Azzi. Counsel indicated that he inadvertently omitted the standard and required language indicating that Ms. Azzi's Declaration was made "under penalty of perjury under the laws of the State of California." (Tormey Decl. ¶ 3.) As Peet's substantively addressed Ms. Azzi's Declaration – beyond just the failure to be signed under penalty of perjury – the Court will accept the newly filed Declaration.

Electronic Bookmarks

"[E]lectronic exhibits ***must include*** electronic bookmarks with links to the first page of each exhibit

and with bookmark titles that identify the exhibit number or letter and briefly describe the exhibit." (Cal. R. Ct. 3.1110 (f)(4) emphasis added.)

Ms. Azzi's Declaration includes ten exhibits, yet there are no electronic bookmarks. Nor does the Defendant's Request for Judicial Notice contain bookmarks. While Peet's declarations in support does contain bookmarks, the RJN does not.

Depositions as Exhibits

When a deposition is used as an exhibit, the "relevant portion of any testimony in the deposition ***must be marked*** in a manner that calls attention to the testimony." (Cal. R. Ct. 3.1116 (c) emphasis added.) Normally, this is done by either highlighting or bracketing the lines being cited in the Memorandum and/or Separate Statement. Peet's attaches relevant pages of Ms. Azzi's deposition testimony but fails to highlight or bracket any of the testimony "in a manner that calls attention to the testimony."

Page Numbers

None of Our Coffee's Opposition papers contain page numbers in violation of Cal. R. Ct. 2.109.

The Parties are reminded to comply with all Rules of Court when filing papers with the Court.

Analysis

Breach of Contract

"To prevail on a breach of contract cause of action, [plaintiff] must establish (1) a contract; (2) its performance or excuse for nonperformance; (3) breach; and (4) damages." (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 447.)

As outlined above, it is undisputed that the parties entered into four separate Purchase Contracts. (SSUMF 3, 5, 7, 9.) It is also undisputed that Our Coffee failed to deliver all the bags of coffee that it contracted to provide to Peet's under these Contracts. (SSUMF 4, 6, 8, 10.) In total, Our Coffee does not dispute that it failed to deliver 18,880 bags of coffee to Peet's under the Purchase Contracts. (SSUMF 17.) The failure to deliver constitutes a material breach of the Purchase Contracts. Our Coffee does not dispute that Peet's was required to spend $1,143,007 to purchase coffee in the open market to cover the amount of coffee that Our Coffee contracted to deliver, but did not deliver. (SSUMF 17.)

Based on the above, Peet's has met its initial burden to prove each element of the breach of contract claim entitling it to judgment on that cause of action. As such, the burden shifts to Our Coffee to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.

In opposing a motion for summary judgment/adjudication, the opposing party shall include a separate statement that sets forth "plainly and concisely" any other material facts the opposing party contends are disputed. (CCP 437c (b)(3).) Our Coffee's separate statement does not contain any additional facts, but instead only addresses the facts set forth by Peet's. As such, Our Coffee concedes that there are no additional material facts at issue.

When responding to a separate statement, the "response must unequivocally state whether that fact is 'disputed' or 'undisputed.' (Cal. R. Ct. 3.1350 (f)(2).) "An opposing party that contends that a fact is disputed must state … the nature of the dispute and describe the evidence that supports the position

that the fact is controverted." (*Ibid.*) "Citation to the evidence in support of the position that a fact is controverted must include reference to the exhibit, title, page, and line number." (*Ibid.*)

As to this cause of action, there are only 2 material facts which Our Coffee purports to dispute. (SSUMF 2 and 15.) The only evidence cited in support of Our Coffee's position is the declaration of Nathalia Azzi, the Chief Operating Officer and only employee of Our Coffee.

Fact number 2 states: "The written Contracts, drafted by Our Coffees, were never modified. Our Coffees understood that it was required to comply with the terms of the Contracts." Our Coffees disputes this fact, stating in response: "The written contracts were modified by course of performance of both parties with respect to a contract with a third-party payer," citing Ms. Azzi's declaration at paragraphs 8-10.

Ms. Azzi's declaration indicates that for many years, Peets would pay invoices to Our Coffee within 2 months. (Azzi Decl. ¶ 8.) As some point in 2017 Peet's indicated that payment procedures would be changing with the use of a third-party payer called Prime Revenue. (*Ibid.*) She indicates "Peets presented me with an agreement with the third-party payer called Prime Revenue, wherein Prime, acting under Peets control, would pay invoices within 10 days." (*Ibid.*) She attaches an advertisement from Peet's explaining how it would work. (*Id.* Ex. C.)

As the Purchase Contracts included payment terms "N 360 days from delivery," the above arguably could be considered a modification to those payment terms. Our Coffee, however, does not actually indicate that it agreed to participate in the Prime Revenue billing procedure. Our Coffee does not present any signed agreement confirming acceptance of the Prime Revenue contract, nor does Ms. Azzi's declaration indicate that Our Coffee actually agreed to participate in the program.

Even if it were the case that Our Coffee agreed to participate, that would not change the analysis regarding Peet's' breach of contract claim. Peet's undisputed facts show that Our Coffee failed to deliver thousands of bags of coffee. Since the coffee was not delivered, the payment terms do not come into consideration. Thus, even if Our Coffee's 'dispute' of this material fact is accepted, it does not indicate that there is a triable issue of one or more material facts as to the cause of action for breach of contract.

Fact number 15 states: "Peet's had never refused or not 'released' any of the coffee delivered by Our Coffee." Our Coffee disputes this fact, stating in response: "Peets held __ containers of coffee for __ months without releasing in contravention to prior performance," citing Ms. Azzi's declaration at paragraphs 12-13. Ms. Azzi indicates that Our Coffee had 18 containers of coffee sitting in the warehouse in December 2020 "waiting for Peets to release them so we could get paid." (¶ 12.) She declares that the coffee was "sitting idle in the warehouse for 3 months without being released." (*Ibid.*)

Peet's argues that Ms. Azzi's declaration contradicts here earlier deposition testimony. Ms Azzi was deposed as the Person Most Knowledgeable (PMK) for Defendant Our Coffee. Regarding when Peet's would release coffee, she testified as follows:

> Q. So do you have any estimate again in your course of dealing with Peet's how long it would take for Peet's to release the coffee?
> A. I don't remember, but it was always on the agreed dates. It's been a while, so my

apologies, but I don't remember now.

****

Q. Did you ever submit a request to Peet's to reimburse Our Coffees for any of those storage or warehousing costs?
A. No, because they were never late in the release of coffee. During the four years I dealt with them they were never late. It was just a precaution on our side to make the coffee available earlier than the release date." (Azzi Depo. at 102:1-6; 103:9-16.)

Our Coffee cannot create a triable issue of material fact by contradicting its own earlier deposition testimony. (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613 ["Admissions or concessions made during the course of discovery govern and control over contrary declarations lodged at a hearing on a motion for summary judgment."] citing *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20-22 among other authorities.)

Even if Ms. Azzi's statements are considered, they only show that there was coffee available to deliver to Peet's during the times at issue. Given that Our Coffee does not dispute that it did not deliver all the coffee required under the Purchase Contracts, this supports rather than detracts from Peet's' arguments.

Based on the above, Defendant Our Coffee has failed to meet its burden to show there is a triable issue of material fact relating to Peet's breach of contract cause of action.

Affirmative Defenses

To the extent that Our Coffee attempts to rely upon its affirmative defenses to show there is a triable issue of material fact, Our Coffee fails to provide any evidence to support any of its affirmative defenses. If a plaintiff has met its initial burden, the burden shifts to the defendant to show "that a triable issue of one or more material facts exists as to the … defense thereto [and] … shall set forth the specific facts showing that a triable issue of material fact exists as to the … defense thereto." (Cal. Code Civ. Proc. §437c (p)(1).)

"The burden on a defendant moving for summary judgment based upon the assertion of an affirmative defense is heavier than the burden to show one or more elements of the plaintiff's cause of action cannot be established." (*Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289.) The defendant has the initial burden to show that undisputed facts support each element of the affirmative defense. (*Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 858.)

Our Coffee has failed to present any admissible evidence to support its affirmative defenses. For example, Our Coffee argues that the Purchase Contracts are not final, integrated agreements, and as such extrinsic evidence is admissible to explain the Contracts. (Opp. at III B-C. NOTE – Our Coffee's Opposition does not contain page numbers in violation of Cal. R. Ct. 2.109.) Our Coffee provides no real arguments or evidence to support its claim that the contracts are not complete and integrated. It merely cites to California Code of Civil Procedure section 1856, subdivision (b), and argues that the Purchase Contracts "are not intended to be complete agreements because much is missing – a force majeure clause for example or a clause indicating the agreement is the complete agreement of the parties." (Opp. at III C.)

"In considering whether a writing is integrated, the court must consider the writing itself, including

whether the written agreement appears to be complete on its face; whether the agreement contains an integration clause; whether the alleged parol understanding on the subject matter at issue might naturally be made as a separate agreement; and the circumstances at the time of the writing." (*Ibid.*) "On the issue of contract integration, 'the court must consider not only whether the written instrument contains an integration clause, but also examine the collateral agreement itself to determine whether it was intended to be a part of the bargain.'" (*Ibid.*)

While the Purchase Contracts do not contain an integration clause, under "California law, the presence [or absence] of an integration clause is not conclusive but is a factor which 'may help resolve' that issue." (*Kanno v. Marwit Capital Partners II, L.P.* (2017) 18 Cal.App.5th 987, 1001.) The Purchase Contracts contain all of the necessary terms for a sale contract: price, quantity, quality, delivery location and dates, and payment terms. While Our Coffee argues that they are not integrated, it does not explain what the 'collateral agreement' is that it believes should be added to the terms of the Purchase Contracts.

Our Coffee makes vague arguments that the 'actions of the parties control' and Peet's performance under the Purchase Contracts varied from the terms set therein. Our Coffee, however, provides no admissible evidence to support these contentions.

As noted above, Our Coffee does not include any additional facts in its response to Peet's' Separate Statement. "Opposition separate statements must cite to facts and evidence for the evidence to be considered by the court." (*Bacoka v. Best Buy Stores, L.P.* (2021) 71 Cal.App.5th 126, 131 fn. 1 citing *Madden v. Del Taco, Inc.* (2007) 150 Cal.App.4th 294, 300.) In opposing a motion for summary judgment, the opposing party "must submit a separate statement setting forth the specific facts showing that a triable issue of material fact exists. [citations] Without a separate statement of undisputed facts with reference to supporting evidence in the from of affidavits or declarations, it is impossible for the [party] to demonstrate the existence of disputed facts." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 1007, 116.)

Our Coffee's arguments with relation to an implied Force Majeure clause likewise fail. Even when faced with a force majeure provision, "the 'mere increase in expense does not excuse the performance unless there exists 'extreme and unreasonable difficulty, expense, injury, or loss involved.'" (*West Pueblo Partners, LLC v. Stone Brewing Co., LLC* (2023) 90 Cal.App.5th 1179, 1188 quoting *Butler v. Nepple* (1960) 54 Cal.2d 589, 599.) A force majeure event "must have still caused a party's timely performance under the contract to 'bec[o]me impossible or unreasonably expensive.'" (*Ibid.*)

Our Coffee's arguments regarding a force majeure fail for at least two reasons. First, it fails to provide admissible evidence to show that an event that qualifies as a force majeure which impacted it occurred during the relevant times. It argues that it is "well-know that international shipping was in shambles during the pandemic and containers for Brazilian coffee were no exception," and that a "simple Internet search will generate dozens of articles on those difficulties." References to "Internet search[es]" is not admissible evidence establishing how the pandemic impacted Our Coffee specifically.

Second, Our Coffee presents no evidence that the effects of the pandemic made their obligation to provide coffee to Peet's "impossible or unreasonably expensive." Ms. Azzi's declaration appears to

indicate the opposite, when she indicates that Our Coffee "always maintained enough coffee in the warehouse to satisfy our commitments to Peets Coffee." (¶ 3.)

Breach of the Implied Covenant of Good Faith and Fair Dealing

"[I]n California every contract contains an implied covenant of good faith and fair dealing that 'neither party will do anything which will injure the right of the other to receive the benefits of the agreement.' [Citations, internal omitted.]" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1120 [quoting *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400].)

"The covenant is read into contracts and functions 'as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transfressing the express covenants) frustrates the other party's rights to the benefit of the contract.'" (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244 quoting *Racine & Laramie, Ltd. v. Dept. of Parks & Recereation* (1992) 11 Cal.App.4th 1026, 1031-32.)

"It is universally recognized the scope of conduct prohibited by the covenant of good faith is circumscribed by the purpose and express terms of the contract." (*Moore v. Wells Fargo Bank, N.A.*, (2019) 39 Cal.App.5th 280, 291 quoting *Carmen Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371.) "Violation of an express provision is not, however, required." (*Ibid.*) "Nor is it necessary that the party's conduct be dishonest." (*Ibid.*) "A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable." (*Ibid.*)

"The issue of whether the implied covenant of good faith and fair dealing has been breached is ordinarily 'a question of fact unless only one inference [can] be drawn from the evidence." (*Id.* at 292 quoting *Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509.)

In Spring 2021, Our Coffee diverted some of the coffee that could be used to fulfill Peet's orders to another coffee roaster for a higher price. (SSUMF 11.) In June 2021, Our Coffee attempted to raise Peet's price for the coffee already under contract. (SSUMF 12.) Also in June 2021, Our Coffee refused to commit to deliver the remaining contracted-for coffee to Peet's, despite repeated requests from Peet's. (SSUMF 13.)

The only reasonable inference that can be drawn from the above undisputed facts is that the conduct of Our Coffee was "objectively unreasonable." The fact that it had coffee in its warehouse which could have been used to fulfill its obligations to Peet's, but instead Our Coffee made a conscious decision to sell it to another coffee roaster highlights Our Coffee's breach of the implied covenant.

Our Coffee does not directly respond to Peet's arguments and law pertaining to the breach of the implied covenant. It is accepted the failure to challenge a contention in a brief results in the concession of that argument. (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 566 ["By failing to argue the contrary, plaintiffs concede this issue"]; *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 529 ["failure to address the threshold question ... effectively concedes that issue and renders its remaining arguments moot"]; *Glendale Redevelopment Agency v. Parks* (1993) 18 Cal.App.4th 1409, 1424 [issue is impliedly conceded

by failing to address it].)

To the extent Our Coffee is relying upon the same arguments it made relating to the breach of contract cause of action, those arguments fail for the same reasons discussed above.

Conclusion

Based on the above, Peet's MSA is **granted** with respect to the first cause of action for breach of contract and the second cause of action for breach of the implied covenant of good faith and fair dealing.