SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 12/01/2022

1. 9:00 AM CASE NUMBER: C22-00783
CASE NAME: ANTHONY BRADSHAW VS. DICK'S SPORTING GOODS, INC.
***HEARING ON MOTION IN RE: COMPEL ARBITRATION AND STAY ACTION PENDING DECISION**
FILED BY: DICK'S SPORTING GOODS, INC.
****TENTATIVE RULING:****

Before the Court is a motion by defendant Dick's Sporting Goods, Inc. to compel arbitration and for related relief. For the reasons set forth, the motion is **granted in part** and **denied in part.** The motion to compel arbitration of Plaintiffs' individual PAGA claims, as described below, is **granted**, and Plaintiffs' individual PAGA claims are ordered to arbitration. The motion to stay action pending the decision on the motion is **denied as moot**. The Court **denies** the motion to the extent it seeks dismissal of the action and **grants** the motion to the extent it seeks a stay of the action as to Plaintiffs' representative PAGA claims, as described below. This action shall be stayed through May 15, 2022. The case management conference set for 8:30 a.m. on December 19, 2022 is hereby vacated. A new case management conference is set for **8:30 a.m. on April 28, 2023**. The parties shall include with their case management conference statements a report on the status of the arbitration and any other developments relevant to whether the stay should be terminated or extended.

Background

Plaintiffs Anthony Bradshaw and Olivia Sawyer allege they worked for defendant Dick's as hourly, non-exempt employees at retail stores located in Northern and Southern California, respectively. (First Amended Complaint ("FAC") ¶¶ 7, 8.) They allege causes of action as aggrieved employees on behalf of themselves and other aggrieved employees of Dick's pursuant to the Private Attorney General Act, Labor Code section 2698 *et seq.* ("PAGA") for various violations of the Labor Code and the Industrial Wage Order 7-2001, section 14(A) and section 14(B), and for civil penalties based on those violations under PAGA. They contend Dick's did not provide employees with suitable seating for the positions in which they and other aggrieved employees were engaged. (FAC ¶¶ 19, 20, 22, 23, 40-42, 47-51.)

Plaintiffs also allege that they were required by Dick's to sign a "Mutual Agreement to Arbitrate Claims" when they were hired or during their employment. (FAC ¶ 9.) Dick's filed a motion to compel arbitration of Plaintiffs' individual PAGA claims, to stay the action pending determination of the motion, and to dismiss or stay the action as to Plaintiffs' representative claims based on the United States Supreme Court's decision in in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S. Ct. 1906, *reh. den.* (August 22, 2022) ___U.S.___, 2022 U.S. LEXIS 3346 at *1 ("*Viking*").

Defendant's motion is supported by the Nonna Neft Declaration which includes a copy of the Mutual Agreement to Arbitrate Claims ("Arbitration Agreement"). (Neft Decl. Exh. B.) The declaration details the process by which each of the Plaintiffs signed the Arbitration Agreement and by which records of their acceptance of the Arbitration Agreement is maintained by Dick's as part of the employment application process. (Neft Decl. ¶¶ 3, 5, 6, 8-16, and Exhs. B [Arb. Agmt.], D [Bradshaw signature

record], and E [Sawyer signature record].)

Procedure and Burden of Proof on Motion to Compel Arbitration

Whether the arbitration agreement is governed by the Federal Arbitration Act, 9 U.S.C. section 1, *et seq.* ("FAA") or by the California Arbitration Act, Code of Civil Procedure section 1280 *et seq* ("CAA")., the threshold issue of whether a valid and enforceable agreement to arbitrate exists is determined under California law and procedures. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 ("*Rosenthal*"); Code Civ. Proc. §§ 1281, 1281.2, 1290.2.) Once the existence of an arbitration agreement is established, the burden is on the party opposing arbitration to prove a defense to its enforcement. (*Alvarez v. Altamed Health Services Corp.* (2021) 60 Cal.App.5th 572, 580.) If a written arbitration agreement exists, it will be enforced unless there are grounds for its revocation. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 125 ("*OTO*"); Code Civ. Proc. § 1281.)

Analysis

A. Legal Framework: The *Iskanian* Prohibition on Arbitration of PAGA Claims Generally and the *Viking* Decision

Under PAGA, the plaintiff is in effect deputized by the Labor and Workforce Development Agency ("LWDA") to pursue claims for civil penalties for violations of the Labor Code as an agent of the LWDA if, after notice, the LWDA does not elect to pursue the violations itself. According to the Court in *Viking*, a PAGA action is a representative action in two senses: the plaintiff employee on behalf of the LWDA can pursue claims for violations that the employee has personally suffered, including civil penalties (described by the Court as "individual PAGA claims"), and the employee can also pursue claims for Labor Code violations and civil penalties based on violations other "aggrieved employees" have suffered even though the plaintiff employee has not suffered those violations (described by the Court as "representative PAGA claims"). (*Viking, supra,* 142 S. Ct. at 1915-1916 [citing *Kim v. Reins International California Inc.* (2020) 9 Cal.5th 73, 87 ("*Kim*")].)

In *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348 ("*Iskanian*"), the California Supreme Court held "an employee's right to bring a PAGA action is unwaivable" as contrary to California public policy. (*Iskanian, supra,* 59 Cal.4th at 383-384 ["where . . . an employment agreement compels the waiver of representative claims under PAGA, it is contrary to public policy and unenforceable as a matter of state law." (Emphasis added.)].) The Court in *Viking* interpreted *Iskanian* as creating two rules: "*Iskanian*'s principal rule prohibits waivers of 'representative' PAGA claims in the first sense. That is, it prevents parties from waiving representative standing to bring PAGA claims in a judicial or arbitral forum. But *Iskanian* also adopted a secondary rule that invalidates agreements to separately arbitrate or litigate 'individual PAGA claims for Labor Code violations that an employee suffered,' on the theory that resolving victim-specific claims in separate arbitrations does not serve the deterrent purpose of PAGA. [Citations omitted.]" (*Viking, supra,* 142 S. Ct. at 1916-1917.)

The Court in *Viking* held the secondary rule of *Iskanian* that makes unenforceable an agreement to separately arbitrate or litigate "individual PAGA claims" is preempted by the FAA, such that an

agreement to arbitrate individual PAGA claims is enforceable. (*Id.* at 1924 ["[T]he FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate."].) The PAGA waiver in the arbitration agreement in *Viking* "if construed as a wholesale waiver of PAGA claims" was invalid under the primary rule of *Iskanian*, but because the agreement included a severability provision that allowed "any portion" of the waiver that remained valid to be enforced, the Court held that "Viking was entitled to enforce the agreement insofar as it mandated arbitration of Moriana's individual PAGA claim." (*Viking, supra,* 142 S. Ct. at 1924-1925 [the portion of the waiver that would allow individual PAGA claims to be decided in arbitration "must still be "enforced in arbitration.' "].)

B. Existence of An Enforceable Arbitration Agreement, Scope of Claims Subject to Arbitration, and Application of the *Viking* Decision

Plaintiffs do not dispute the existence of the Arbitration Agreement and that it was signed by each of them. They also do not dispute the Arbitration Agreement is governed by the FAA by its terms, and based on the nature of Dick's business, which involves interstate commerce. (*See Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 119 [FAA applied to employment agreement by local salesperson and national retailer]; *Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995) 513 U.S. 265, 273-274 [broadly construing "involving interstate commerce" to mean "affecting" interstate commerce, and holding the FAA governed an arbitration agreement between a homeowner and local pest control company where the treatment products and repair materials were shipped from out of state]; Neft Decl. ¶¶ 2 [stores in 47 states and four distribution centers across the country for delivery across state lines to California] and 9, and Exh. B {Arb. Agmt. § 13, stating agreement is governed by the FAA].)

Plaintiffs also do not dispute the Arbitration Agreement is generally enforceable, except with respect to any prohibition on Plaintiffs' bringing PAGA or representative claims generally. The Arbitration Agreement provides that "all disputes, claims or controversies arising out of, or in any related to" Plaintiffs' employment with Dick's "must be resolved by final and binding arbitration between the Parties." (Neft Decl. Exh. B [Arb. Agmt. § 1].) The claims described in Section 1 are defined as "Covered Claims." (Neft Decl. Exh. B [Arb. Agmt. § 1].)

The Arbitration Agreement excludes certain claims from mandatory arbitration, including specifically "claims under the California Private Attorneys General Act, **to the extent they are not lawfully subject to private arbitration**." (Neft Decl. Exh. B [[Arb. Agmt. § 3(e) (emphasis added)].) Section 10 of the Arbitration Agreement expressly addresses representative actions:

> No Representative Actions. **Except to the extent this provision is unenforceable under applicable law**, THE PARTIES AGREE THAT EACH MAY FILE CLAIMS AGIANST THE OTHER ONLY IN THEIR INDIVIDUAL CAPACITIES, AND MAY NOT FILE CLAIMS AS A REPRESENTATIVE PLAINTIFF AND/OR PARTICIPATE IN ANY REPRESENTATIVE ACTION AGAINST THE OTHER.

(Neft Decl. Exh. B [Arb. Agmt. § 10 (emphasis added)].) There is also a severability provision which provides:

> If any provision(s) of this Agreement is determined to be illegal, invalid or unenforceable, the provision(s) shall be minimally reformed or amended to be lawful, valid and/or enforceable. If such reformation or amendment is not possible or permitted under the law, the invalid, illegal or unenforceable provision shall be deemed severable, and will not affect the balance of this Agreement, which will remain in full force and effect; provided, however, that under no circumstances may the Agreement be modified to allow for class, collective or representative arbitration.

(Neft Decl. Exh. B [Arb. Agmt. § 12].) The primary *Iskanian* rule remains after *Viking.* That rule makes a general waiver of the right to bring PAGA claims by a plaintiff in a representative capacity unenforceable as against public policy. As a result, the general waiver of the right to bring representative claims under PAGA in Section 10 of the Arbitration Agreement (Neft Decl. Exh. B [Arb. Agmt. § 10]) is unenforceable under *Iskanian*, a rule that is not preempted under the FAA according to *Viking*. Plaintiffs can bring representative PAGA claims.

Section 3 of the Arbitration Agreement only excludes from arbitration Plaintiffs' PAGA claims "to the extent they are not lawfully subject to private arbitration." (Neft Decl. Exh. B [Arb. Agmt. § 3(e)].) *Viking* makes Plaintiffs' individual PAGA claims subject to private arbitration, and the claims are within the scope of the general "Covered Disputes" subject to arbitration under Section 1 of the Arbitration Agreement. (Neft Decl. Exh. B [Arb. Agmt. § 1].)

Plaintiffs' Opposition does not dispute that their individual PAGA claims may be compelled to arbitration under the terms of the Arbitration Agreement and the *Viking* decision. The only dispute raised in the Opposition is whether Plaintiffs' representative PAGA claims should be dismissed or stayed.

C. *Viking* and the Arbitration Agreement Provide for the Representative PAGA Claims to Proceed in Court, and the Representative PAGA Claims Shall Be Stayed

Under the *Viking* decision and the terms of the Arbitration Agreement, the parties have not agreed to arbitrate representative PAGA claims. (Neft Decl. Exh. B [Arb. Agmt. §§ 3(e), 10 ["the arbitrator will have no authority to hear or preside over disputes on a representative basis."], and 12 ['under no circumstances may the Agreement be modified to allow for class, collective or representative arbitration."].) Further, the waiver of the right to bring representative PAGA claims remains unenforceable under California law under the *Iskanian* decision, and the Arbitration Agreement by its terms excepts from arbitration PAGA claims "to the extent they are not lawfully subject to arbitration." (Neft Decl. Exh. B [Arb. Agmt. §§ 3(e) and 10 ["any representative claims that are found not subject to this Agreement to arbitrate must be resolved in court"].) The representative PAGA

claims are to proceed in Court.

Dick's asks the Court to dismiss the representative PAGA claims. The Court instead finds staying the action as to Plaintiffs' representative PAGA claims is the appropriate course.

First, here the parties agreed explicitly that representative claims not subject to arbitration would be stayed. (Neft Decl. Exh. B [Arb. Agmt. § 10 ["The Parties agree that any representative claims that are found not subject to this Agreement to arbitrate must be resolved in court, **and are stayed pending the outcome of the arbitration of any other claims**." (Emphasis added.)].) Second, as the concurring opinions by Justices Sotomayor and Barrett point out, the Court's statements in Part IV of the *Viking* decision may not be an accurate reflection of California law, California courts "have the last word" on California law in that regard, and the comments in Part IV were "not necessary to the result." (*Viking, supra,* 142 S. Ct. at 1925-1926.) The Court respectfully disagrees with the *Viking* Court's statements regarding California law and the employee's standing to pursue representative PAGA claims in light of, among other decisions, the California Supreme Court decision in *Kim, supra,* 9 Cal.5th 73. In *Kim*, the California Supreme Court expressly held that an employee retains standing to assert representative PAGA claims of other aggrieved employees even after the plaintiff employee's individual claims for Labor Code violations are fully settled and resolved. (*Id.* at 85-89.) *Kim* states that the employee has standing under PAGA if "*one or more* of the alleged violations was committed" against him and that "PAGA standing is not inextricably linked to the plaintiff's own injury." (*Id.* at 85.)

To the extent there is doubt regarding PAGA standing by a plaintiff whose individual PAGA claims are ordered to arbitration despite *Kim*'s interpretation of PAGA standing, the Court is also aware that the issue will likely be resolved in the relatively near future in *Adolph v. Uber Technologies* currently pending before the California Supreme Court. The California Supreme Court docket reflects that as of November 8, 2022, the case has been fully briefed. The Court finds good cause to stay the action to the extent it embraces Plaintiff's representative PAGA claims under the circumstances.

2. 9:00 AM CASE NUMBER: C22-00949
CASE NAME: AISSA KHALES VS. EAST BAY FOODS, INC.
HEARING IN RE: APPLICATION OF MARK POTASHNICK FOR APPROVAL TO APPEAR PRO HAC VICE
FILED BY: KHALES, AISSA
TENTATIVE RULING:

Plaintiff must submit proof of payment of the $50 fee to the State Bar required by CRC 9.40(e). Upon receipt of that proof, the motion will be granted.

3. 9:00 AM CASE NUMBER: C22-01819
CASE NAME: JAYSON WALTERS VS. RINA AMINOV
***HEARING ON MOTION IN RE: PRELIMINARY INJUNCTION RELIEF BASED ON THE INFORMATION LISTED FILED BY PLAINTIFF**
FILED BY:
****TENTATIVE RULING:****

Before the Court is Jayson Walters' Motion for Preliminary Injunction Relief ("Motion"). For the following reasons, the Motion is **denied**.

Background

Plaintiff filed his Complaint on September 6, 2022. On September 29, 2022, Defendant filed a motion to quash service of summons and complaint for failure to properly serve. On October 21, 2022, Plaintiff filed the instant motion for preliminary injunction. On November 10, 2022, the Court granted Defendant's unopposed Motion to Quash.

Procedure

When a temporary restraining order ("TRO") is not requested, the moving party may give notice of their request for a preliminary injunction by serving either a notice of motion or an order to show cause ("OSC"). (Cal. R. Ct. 3.1150(a).) "An OSC must be used when … the party against whom the preliminary injunction is sought has not appeared in the action." (*Ibid.*) "If the responding party has not appeared, the OSC must be served in the same manner as a summons and complaint." (*Ibid.*)

The OSC must describe the injunction to be sought at the hearing. (*Ibid.*) In addition, a proposed OSC must "contain blank spaces for the time and manner of service on responding parties, the date on which the proof of service must be delivered to the court hearing the OSC, a briefing schedule, and, if applicable, the expiration date of the TRO." (*Ibid.*)

Defendant has not appeared in this matter. As indicated above, Defendant's motion to quash service of summons and complaint was granted on November 10, 2022. If a party files a motion to quash, that party "will *not* be deemed to have 'generally appeared' in the action, but instead will be deemed to have 'specially appeared' and not waived the party's jurisdictional challenge.'" (*Borsuk v. Appellate Division of Superior Court* (2015) 242 Cal.App.4th 607, 615 quoting *Air Machine Com SRL v. Superior Court* (2010) 186 Cal.App.4th 414, 426.)

There is no indication Defendant has been properly served since that time. Even if Defendant has been properly served since then, she has not appeared in the matter. As such, Plaintiff is required to use the OSC procedure – including proper service of the OSC papers. Plaintiff has failed to follow any of the necessary and proper procedures for obtaining a preliminary injunction.

Standard

Generally, the ruling on an application for preliminary injunction rests in the sound discretion of the trial court. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1450.) In deciding whether to

issue a preliminary injunction, a court must weigh two "interrelated" factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction. (*Butt v. State of California* (1992) 4 Cal. 4th 668, 677-678.) The burden is on the moving party to show all elements necessary to support issuance of a preliminary injunction. (*O'Connell v. Sup.Ct. (Valenzuela)* (2006) 141 Cal.App.4th 1452, 1481.)

Thus, a "plaintiff seeking a preliminary injunction bears the burden of presenting facts which show a reasonable probability that he will succeed on the merits." (*Citizens for Better Streets v. Board of Supervisors* (2004) 117 Cal.App.4th 1, 6.) In order to meet this burden, the party moving for the preliminary injunction must establish facts with affidavits or a verified complaint. (See e.g. CCP § 527(a).) An "injunction may issue *only* upon a satisfactory showing of sufficient facts *under oath*." (*Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 148.) "The requirement that good cause, *under oath*, must be shown in support of an injunction, is jurisdictional." (*Ibid.*)

The Complaint in this matter is not verified and Plaintiff presents no affidavits, declarations, or other admissible evidence to show that he is likely to prevail on the merits. Nor is there any description of what, exactly, Plaintiff is seeking by way of this preliminary injunction.

Given the above, Plaintiff's request for a preliminary injunction is **denied**.

4. 9:00 AM CASE NUMBER: C22-01841
CASE NAME: ANTHONY SERVICE VS. VOLKSWAGEN GROUP OF AMERICA, INC
***HEARING ON MOTION IN RE: PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**
FILED BY: SERVICE, ANTHONY
****TENTATIVE RULING:****

John Hajny, Ricardo Villalobos, Anthony Service, and Jeremy Adams move for preliminary approval of their settlement with Volkswagen Group of America, Audi of America, LLC, and Sanctus, LLC d/b/a Shift Digital, of their putative class action. The action arises out of a data breach. (Complaint at ¶ 2.)

A. Litigation Background

This particular case arises out of a nationwide class action complaint originally filed in the United States District Court for the District of New Jersey, titled *Villalobos v. Volkswagen Group of America, In*c., No. 2:21-cv-13049-JMV-JBC (D.N.J.) on June 28, 2021, by Plaintiff Ricardo Villalobos. (Byrd Decl. at ¶ 7.) On August 9, 2021, Plaintiff Villalobos filed a First Amended Class Action Complaint, adding Plaintiff Jeremy Adams. (Id.) On July 8, 2021, Plaintiff John Hajny filed his Class Action Complaint in the same court, titled *Hajny v. Volkswagen Group of America*, Inc., No. 2:21-cv-13442-JMV-JBC (D.N.J.). (*Id*.) On September 14, 2021, the court consolidated the Villalobos and Hajny actions, and the plaintiffs in those actions filed a Consolidated Class Action Complaint on October 14, 2021, which added a fourth Plaintiff, Anthony Service, under the consolidated caption, "In re: Volkswagen Group of America, Inc. Data Breach Litigation" (the "Consolidated Action"). (*Id*.)

On November 29, 2021, upon the Parties' stipulation, the *In Re: Volkswagen* Action was

transferred to the Northern District of California, so that it could be consolidated with an earlier filed case, *Wynne v. Audi of America* (N.D. Cal.) No. 4:21-cv-08518-DMR. (Simpson Decl. at ¶ 4, Ex. 1.) Before the consolidation could occur, however, Wynne moved to remand, which was ultimately denied. (Byrd Decl. at ¶ 10.)

The Hon. Wayne R. Andersen (Ret.) presided over the settlement negotiations between Class Plaintiffs, Defendants, and proposed intervenor Wynne. (Andersen Decl. at ¶ 1.) Counsel for Class Plaintiffs, Defendants, and Wynne attended and participated in settlement discussions at an in-person mediation session on May 16, 2022, in Chicago, IL. (*Id*. at ¶ 9.) Wynne's counsel chose to depart this session in the early evening, while settlement discussions were still ongoing. (*Id*. at ¶ 11.) Counsel for proposed intervenor recalls these settlement discussions differently, but does not dispute that he was present at the mediation. (Righetti Decl. at ¶ 8.)

On August 10, 2022, Plaintiffs and Defendants informed Judge Ryu that they had signed a term sheet and, to avoid potential unnecessary disputes, planned to seek judicial approval of the settlement in state court. (Simpson Decl. at ¶ 6.) The instant class action complaint (the *Service* action) was filed on August 30, 2022, in this Court.

On September 15, Plaintiffs moved for preliminary approval of the Settlement Agreement, and the Court set a preliminary approval hearing for October 20. On October 13, one week before the preliminary approval hearing, Wynne filed an *ex parte* application for leave to intervene in this action. Although the *ex parte* application was denied, the Court permitted Wynne to file her motion to intervene, set it for hearing on November 17, 2022, and continued the hearing on the preliminary approval motion to December 1, 2022. On November 17, the motion to intervene was denied.

As to the substance of the matter, Volkswagen collects personal information from customers and potential customers. "Personal Information" (PI) includes names, addresses, phone numbers and information about vehicles purchased. For customers who applied for loans through Volkswagen, "*Sensitive* Personal Information" (SPI) was collected, which includes driver's license numbers, Social Security numbers, and other bank account, credit card, and tax numbers. PI was collected for about 3.1 million people. SPI was collected from about 90,000. Volkswagen kept the data, and shared it with third parties, including Shift Digital. Plaintiffs claim that Shift Digital "left that unredacted data exposed for nearly two years." Allegedly, some of the data was stolen and some posted for sale on the web, which can result in it being used for a variety of fraudulent purposes. In March of 2021, Volkswagen learned of the problem, and began notifying consumers and law enforcement officials. The above-referenced litigation ensued.

B. Terms of the settlement

The settlement would approve a settlement class, which would consist of "[A]ll persons residing in the United States to whom VWGoA and/or Audi sent notice that their SPI and/or PI may have been exposed as a result of the Incident." Within the class, there would be three subclasses: Tier 1 (California Residents whose sensitive personal information was exposed and who would receive $350); Tier 2 (non-California residents whose sensitive personal information was exposed and who would receive $80); and Tier 3 (nationwide class members whose personal information [not "sensitive" personal information] was exposed and who would receive $20). Tier 1 and 2 members

who document actual losses greater than the payment amount will receive the higher amount (up to $5,000). These cash payment amounts are not guaranteed, however. If the amount of valid claims within any Tier exceeds the amount available, the payments will be reduced pro rata. Money from the Tier 3 fund can be used to pay Tier 1 and 2 members if their funds would otherwise be reduced. The class has about 3,177,240 members; Tier 1 has about 19,593 members, Tier 2 has about 70,591 members, and Tier 3 has about 3,087,056 members.

Class members will release all claims arising from the incident, which occurred between August 17, 2019 and June 15, 2021. Thus, there is no "class period."

A settlement fund of $3,500,000 would be created, which would provide for cash payments or (for Tier 1 and tier 2 members) reimbursement of out-of-pocket losses for class members who submit valid claims. $500,000 would be allocated to notice and administrative costs; $20,000 to representative incentive awards for the four plaintiffs ($5,000 each); $1,050,000 in attorney's fees (30% of the gross settlement amount), and up to $50,000 in litigation costs. The funds would be paid to the administrator within thirty days after order directing notice to the class. The gross settlement amount would be divided among the three subclasses: Tier 1 California SPI subclass ($2,000,000), Tier 2 Nationwide SPI subclass ($800,000), and Tier 3 Nationwide PI subclass ($700,000). The net funding available is $1,880,000, just over half of the gross amount. The amount available to each tier is less: Tier 1: $1,074,285, Tier 2: $429,714, and Tier 3: $376,000.

Detailed criteria are provided concerning the nature of the reimbursable out-of-pocket expenses and the necessary documentation.

Defendant Shift Digital also would make various improvements to its existing security systems and practices, for three years.

C. Legal Standards

The primary determination to be made is whether the proposed settlement is "fair, reasonable, and adequate," under *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801, including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction … to the proposed settlement." (See also *Amaro v. Anaheim Arena Mgmt., LLC, supra,* 69 Cal.App.5th 521.)

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

America (2006) 141 Cal.App.4th 48, 63.)

D. Attorney fees, costs, representative payments, and administrative costs

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.

The requested representative payment of $5,000 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.

Similarly, litigation costs and settlement administrative costs will be considered at final approval.

E. Discussion and Conclusion

Plaintiffs have adequately discussed the strengths and weaknesses of the case, including both the merits and whether a class would be certified. California class members also have a claim under the California Consumer Privacy Act, which creates a statutory damages remedy, with specific minimum damages of $100. This statute, however, took effect on January 1, 2020, while the data in question was "exposed" from August 17, 2019 to June 15, 2021. As between defendants, Volkswagen might shift liability to Shift Digital (but since the settlement includes Shift Digital, that would not appear to be a significant problem). Counsel estimate the maximum damages available to the Tier 1 subclass at about $14.6 million, simply by multiplying the $750 maximum statutory damages per subclass member. No estimate of potential actual damages is provided. Nor is an estimate provided of the likely value of the Tier 2 and Tier 3 subclasses. It stands to reason, however, that the Tier 2 subclass members, who do not have a claim under California law, and the Tier 3 subclass members, who did not have "sensitive" information disclosed have a less valuable claim than Tier 1 subclass members. Plaintiffs have not addressed, however, whether any of the non-California class members have state law claims in their state of residence that have some value.

The Court has made some effort to determine the amount likely to be available to claimants. Using the net funds available, and dividing by the number of class members, Tier 1 provides $54.83 per class member (1,074,285/19,593), Tier 2 provides $6.08 (429,714/70,597), and Tier 2 provides $0.12 (376,000/3,087,000). Of course, not all class members will apply. Plaintiffs estimate the claims rate by using figures from 9 other cases. (The Court has no idea how these cases were chosen, but for

discussion purposes assumes they are representative.) In those cases, the rate averaged 2.54%, but ranged from 0.7% to 5.3%. Assuming 2.54% applied, this would allow each claimant of Tier 1 $2,158, Tier 2 $239.60, and Tier 3 $4.72. If 5% applied this would allow each member of Tier 1 $1,096.60, Tier 2 $121.72, and Tier 3 $2.40. While there is significant uncertainty here, the arithmetic suggests that if the claims rate is typical of the other cases used as an index, the funding would be more than enough for the Tier 1 members to get their $350 payment, more than enough for the Tier 2 members to get their $80 payment, but not enough for the Tier 3 members to get their $20 payment. This, however, addresses only the class members seeking the flat payment. Plaintiffs have not provided any information (based on other settlements) indicating the number of reimbursement claims, their amounts, and their success rate.

What is the experience with processing claims requiring this level of detail, and how is it likely to affect the actual payments made to class members in each of the three tiers?

As to Tier 3, why is the settlement structured such that it appears likely that they will not receive the "minimum" $20 payment?

With respect to non-California plaintiffs, have the parties accounted for the value of claims in their respective states (which appear to be released under Paragraph 3.29 of the settlement)?

There is no provision in the settlement for disbursement of unclaimed residue, if there is any. It appears to the Court that this is because the settlement provides that if this occurred, applicants would receive an additional payment distributed pro rata for expense claims or cash payments. But this applies only *if* they previously had been reduced due to lack of funds. (Par. 4.4.) If all cash payment claims are paid, and all valid expense claims are fully paid, what would happen to the funds?

The proposed administrator, Epiq systems, appears to be qualified. The cost estimate of $500,000 is much higher than a typical class action settlement, but the class size is large, and the claims processing here will be much more extensive. Counsel obtained three bids. It is not clear whether this is an estimate or a cap. It should be clarified.

In order to assure that the settlement is sufficiently fair, reasonable, and adequate to justify preliminary approval, the Court requests that counsel address the issues identified above.

Accordingly, **a hearing is required**.

If the motion is granted, counsel will be 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.

5. 9:00 AM CASE NUMBER: MSC18-02499
CASE NAME: BROWN VS SYNCTRUCK
***HEARING ON MOTION IN RE: CLASS, REP AND COLLECTIVE SETTLEMENT ACTION**
FILED BY: BROWN, VANECIA
****TENTATIVE RULING:****

Plaintiffs Vanecia Brown, Courtney Gordon, Nicloe O'Neal, Roy Huskey III, and Sabrina Dennis move for preliminary approval of their class action and PAGA settlement with defendants Amazon Logistics, Inc., and Amazon.com Services LLC. Defendant Synctruck, Inc. is not a party to the proposed settlement. Amazon contracted with Synctruck to provide delivery services in California and Utah. The Plaintiffs are drivers employed by Synctruck, and allegedly by Amazon as a joint employer.

A. Background and Settlement Terms

The original complaint was filed by Brown and Gordon on December 10, 2018, 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, and failure to pay all wages due on separation. On February 14, 202, O'Neal filed a matter in Sacramento County, making similar allegations, but adding claims for failure to provide signed documents, failed to maintain accurate records, and failure to provide paid sick days. On September 16, 2020, Huskey and Dennis filed a complaint in United States District Court for the Eastern District of California making similar allegations, but including claims under the Fair Labor Standards Act. Eventually, the parties agreed to a First Amended Complaint consolidating all three actions and including claims under PAGA. The two other matters are still pending, but would be dismissed with prejudice immediately after the Effective Date of this settlement.

The settlement would create a gross settlement fund of $2,750,000. The class representative payment to the plaintiffs would be $10,000 each, totaling $50,000. Attorney's fees would be $916,667 (one-third of the settlement). Litigation costs would not exceed $25,000. The settlement administrator's costs (Simpluris) are estimated at $27,300. PAGA penalties would be $60,000, resulting in a payment of $45,000 to the LWDA. The net amount paid directly to the class members would be about $1,671,033. The fund is non-reversionary, except with respect to the Utah class members, who are not releasing any claims, unless they cash their check. Based on the estimated class size, the average net payment for each class member is approximately $613 for the California members and $211 for the Utah members.

The entire settlement amount will be deposited with the settlement administrator within 10 days after final approval of the settlement.

The proposed settlement would certify a class of all former drivers in California (2,558). The California class consists of delivery drivers employed by Synctruck who provided services as delivery

drivers pursuant to a contract between Defendant Synctruck and Amazon to deliver goods to Amazon customers in the State of California from June 1, 2016 through and including March 7, 2021. It also would create "PAGA Settlement Group Members" for purposes of the PAGA claim only, which are paid regardless of whether the employee requests exclusion. The settlement also defines "Utah Collective Action members, consisting of employees of Synctruck, defined similarly to California Class members, but in Utah, and during a different time period.

The class members will not be required to file a claim. Class members may object or opt out of the settlement. Funds would be apportioned to class members based on the number of workweeks worked during the class period, except that each class member who does not opt-out will receive at least $50. Counsel have determined that the Utah claims are significantly weaker than the California claims, based on differences between the laws of the two states. Accordingly, when the number or workweeks are calculated, one "share" is allocated per week to each Utah collective action member, but six shares per week are allocated to each California class member.

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 deposited in the State Unclaimed Property Fund in the name of the class member (for California class members). For Utah class members, the funds from voided checks will be returned to Amazon (because the Utah collective action members are not releasing any claims, unless they cash their check).

The settlement contains release language covering "all claims and causes of action, alleged or which could have reasonably been alleged based on the allegations in the SAC," including a number of specified claims. 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 discovery was undertaken, resulting in the production of substantial documents. The matter settled after arms-length negotiations, which included a session with an experienced mediator in November of 2022. Although the matter did not settle at mediation, an agreement was reached over the following months.

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 "maximum realistic damage" figure, if they prevailed on all claims, of about $31 million, plus about $2.2 million in PAGA penalties. The proposed settlement is about 10% of this amount. The expressed total may reflect a theoretical maximum, but it has little if any relationship to the actual value of the case in settlement. In this case, Amazon not only contends it complied with the law, it asserts that it is not the employer of the class members. Finally, about 90% of the California class members signed arbitration agreements, the enforceability of which has not been established.

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 payments, and administrative costs

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

D. Discussion and Conclusion

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

6. 9:00 AM CASE NUMBER: MSC18-02499
CASE NAME: BROWN VS SYNCTRUCK
***HEARING ON MOTION IN RE: DGFS**
FILED BY: AMAZON LOGISTICS, INC
****TENTATIVE RULING:****

The moving papers establish sufficient grounds and there is no opposition. (See *City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1261 ["[W]hen no one objects, the barebones motion which sets forth the ground of good faith, accompanied by a declaration which sets forth a brief background of the case is sufficient."].) The only wrinkle here is that the settlement in question is not binding until the Court grants final approval. (See Line 5.) Accordingly, the motion is granted, contingent on approval of the settlement with the class.

The Court notes that on November 28, 2022, Synctruck LLC filed a "Motion to Contest Amazon's Application for Determination of Good Faith Settlement." The appropriate way to contest the motion is to file opposition or objections, not to file a "motion to contest." Even if the Court decided to treat the motion as an opposition to the motion for good faith determination, the opposition was untimely

and need not be considered. Synctruck's motion was accepted by the Clerk and will be assigned a hearing date. Synctruck, however, will need to decide whether to pursue the motion, or to file a motion to set aside the Court's ruling on this motion.

7. 9:00 AM CASE NUMBER: MSC19-00462
CASE NAME: HYNDS VS VICI INCORPORATED
HEARING IN RE: FINAL APPROVAL OF CLASS ACTION & PAGA SETTLEMENT
FILED BY:
TENTATIVE RULING:

Plaintiffs Christine Hynds and Emma Conroy move for final approval of their class action and PAGA settlement with defendant Vici Incorporated. The Court granted preliminary approval on July 2, 2022.

A. Background and Settlement Terms

The original complaint was filed on March 13, 2019, raising claims under PAGA and a class action on behalf of non-exempt employees alleging that defendant violated the Labor Code in various ways, including unpaid overtime, rest period and meal break violations, and unreimbursed business expenses.

The settlement would create a gross settlement fund of $1,520,000. The class representative payment to plaintiffs would be $5,000 each. Counsel's attorney's fees would be $532,000 (35%). Litigation costs would not exceed $55,000. The settlement administrator (ILYM Group) would cap its costs at $16,000. PAGA penalties would be $75,000, resulting in a payment of $56,250 to the LWDA. The fund is non-reversionary. Based on the estimated class size of 874 people and net payment amount of $832,000, the average payment for each class member is approximately $951.

The proposed settlement would certify a class of "all current and former hourly-paid, non-exempt employees of Defendant who were employed by Defendant in the State of California at any time from March 13, 2015, until the date of preliminary approval of the settlement or May 18, 2022, whichever date occurs earlier."

The class members will not be required to file a claim. Class members may object or opt out of the settlement. (Class members cannot opt out of the PAGA portion of the settlement.) Funds would be apportioned to class members based on the number of individual workweeks worked by the individual employee during the relevant time period. Some employees entered into separate settlements releasing their individual claims, and any workweeks covered by these "Prior Release Payments" will be excluded from the calculation. The payments to class members are allocated 20% as wages, 35% penalties, 40% interest, and 5% "other damages."

Various prescribed follow-up steps will be taken with respect to mail that is returned as undeliverable. Uncashed checks would be cancelled and the amounts would be would be provided to

the State Controller's Unclaimed Property Fund.

The settlement contains release language. "Released Claims" are defined in Paragraph 29 to include any claims that "are allegedly or reasonably could have been asserted against the Release Parties based on the facts and claims asserted in the operative complaint in the Actions including the following claims", which include eleven specific types of claims. All of the specified types of claims appear to have been alleged based on the facts of the original complaint, except "failure to provide adequate seating under the applicable Industrial Welfare Commission Wage Orders."

Formal discovery was undertaken prior to mediation. The parties attended a mediation session with an experienced mediator. The mediation initially did not succeed, and the matter proceeded through extensive pre-trial litigation. At a subsequent mediation session with a different mediator, a resolution was reached.

Counsel also has provided a summary of a quantitative analysis of the case, and how the settlement compares to the potential value of the case. The maximum liability for damages was estimated at about $8 million, but this needs to be adjusted for various evidence and risk based contingencies. Many issues has arisen in the litigation, including the validity of a number of settlements with putative class members, and whether the rest and mail break claims were suitable for class certification. Problems of proof existed concerning break claims and off-the clock work claims. Similar problems exist for reimbursement claims based on use of personal cell phones for work purposes. Claims for non-duplicative PAGA penalties are estimated by counsel at a theoretical maximum of about $877,000, but are difficult to evaluate for a number of reasons: they derive from other violations, and the total amount may be reduced in the discretion of the court.

The LWDA was notified of the settlement.

Since the date of preliminary approval, notice has been given to the class. The settlement administrator mailed 985 notice packages. 89 notices were returned as undeliverable, and follow-up generated 72 new addresses, which were remailed. The administrator has received no objections and no requests for exclusion.

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."

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 payment, and administrative costs

Plaintiffs seek 35% of the total settlement amount as fees, relying on the "common fund" theory. Even a proper common fund-based fee award, however, should be reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Id*., at 505.) Following typical practice, however, consideration of the fee award was deferred to the motion for final approval. Counsel now provides an estimate lodestar fee of $804,562.50. This is based on a total of 1,205.40 hours, with hourly rates of $600 for Protection Law Group and $755 for Lawyers for Justice. This results in an implied multiplier of 0.66. No adjustment of the fee is necessary.

Litigation costs of $39,682.95 are reasonable and are approved.

Administrative costs of $16,000 are reasonable and are approved.

Each plaintiff requests a representative payment of $5,000. Criteria for evaluation of such requests are discussed in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-807. Each plaintiff submits a declaration attesting to their time and effort spent on the matter, as well as the risk they took by becoming a plaintiff. Neither suggests that they had any other claim of value that is released in the settlement. The relatively modest amount is approved.

D. Discussion and Conclusion

In granting preliminary approval, the Court indicated that, in connection with final approval, plaintiffs should provide further discussion of the value of the seating claims. Plaintiffs have provided such a discussion, indicating that the claim had little value, based on store closures during the

pandemic, and on the existence of duties that required cashiers to undertake other activities (e.g., restocking, "fishing" for customers, assisting other departments) that are not compatible with being seated. The explanation is sufficient.

The Court finds that the settlement is fair, reasonable, and adequate. The motion for approval is granted. Counsel are directed to prepare an order reflecting this tentative ruling, the other findings in the previously submitted proposed order, and a judgment. The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented. The date is to be selected in consultation with the Department clerk. 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.

8. 9:00 AM CASE NUMBER: MSC21-01249
CASE NAME: LIMON VS. JACK DOHENY COMPANIES
***HEARING ON MOTION IN RE: APPROVAL OF PAGA SETTLEMENT**
FILED BY:
****TENTATIVE RULING:****

Background:

The Court previously held a hearing on this motion on November 10, 2022, preceded by a tentative ruling that raised several concerns about the motion and the settlement. The Court provided the parties until November 18, 2022, to make a supplemental submission, and set this hearing. The tentative ruling will not be repeated here. Only the issues raised by the Court previously will be discussed.

Responses to the Court's Inquiries:

1. "There is no estimate of the number of aggrieved employees involved."

   The parties advise that there are eleven aggrieved employees.

2. "There is no assessment of the strengths and weaknesses of the case."

   Counsel for plaintiff has provided a somewhat general, but sufficient evaluation of the case.

3. "There is no provision for follow up on any checks returned as undeliverable."

Counsel advise that they believe the defendant has accurate and current addresses for the employees in question. Plaintiff's counsel now states that the parties now agree that the checks will remain valid and negotiable for 120 days. (Zambrano Dec., Par. 16.) Defendant commits that if any checks are returned as undeliverable, "defendant will diligently search for any updates" to those employees' addresses. This would be sufficient, in combination with the Court's requirement for a

compliance hearing (see below) to address this concern. It is not sufficient at this point, however, because the parties have not provided a revised settlement or addendum to the settlement incorporating these new obligations, which are not contained in the stipulation submitted to the Court on September 19, 2022.

4. "Any uncashed checks revert to defendants (in contrast with provision to the Controller's unclaimed property fund or a cy pres recipient)."

In response, the parties state that the uncashed checks will still revert to defendant, but that for a period of 125 days after the expiration of the checks, if any aggrieved employee requests a check, they will reissue said check. Under the limited circumstances of this case, and in combination with the Court's requirement for a compliance hearing (see below), this would be sufficient. Again, however, the parties have not submitted a revised settlement or addendum incorporating these terms.

5. "There is no evidence that the LWDA was notified of the settlement."

The plaintiff notified the LWDA on November 17, 2022.

6. "There is no provision for a compliance report or hearing in order to establish that the settlement has been properly implemented."

The parties have not made any provision for a compliance report. In the Court's view, such a report is needed in order for the Court to fulfill its duty to see that the settlement is implemented. It is not particularly burdensome. Accordingly, any settlement must provide for a compliance hearing, set on a date obtained in consultation with the Department clerk, at a time sufficient to expect that the settlement will have been completely implemented. Defendant is to withhold 10% of plaintiff's attorney's fees until such a hearing is held, with a written declaration submitted by defendant showing implementation, and the Court has found compliance with the agreement.

7. "The settlement provides for a dismissal with prejudice, rather than a judgment incorporating its terms. (In a class action, a judgment is required by CRC 3.769(h). While that requirement does not apply here, the same concerns that underly the class action requirement apply here, thus the Court ordinarily requires a judgment.) Even if a dismissal were to be accepted, it would be necessary to provide that the court retains jurisdiction to enforce the settlement, which apparently has not been done."

Given that the settlement agreement is part of the record, and the order approving the settlement will specifically provide that the court retains jurisdiction to enforce the settlement under Code of Civil Procedure section 664.6, a judgment incorporating the terms of the settlement will not be required. The proposed order submitted by the parties for this hearing, however, does not include such a provision.

8. "Plaintiff settled his individual claim at the same time in a confidential settlement. In a

class action, where the plaintiff seeks to dismiss the case, CRC 3.770 requires that a declaration be submitted to the Court setting forth any consideration received for the dismissal. While this does not directly apply to a PAGA-only claim, the Court ordinarily requires a similar declaration, because it is important to establish that the plaintiff has not in effect traded PAGA penalties for individual payments. Plaintiff specifically contends that his "individual claim is greater than the PAGA settlement amount because it is substantiated by analysis of Plaintiff's recorded hours," and sets forth specific numbers of violations. But Plaintiff provides no information concerning the other aggrieved employees and the value of their PAGA claims."

The parties did not submit an application under Rule of Court 2.550 to file documents under seal, nor did they publicly disclose the amount of the settlement. The court still considers this information essentially to enable to determine whether plaintiff has in effect allocated to himself an unreasonable share of defendant's potential liability, and cannot find that the settlement is "fair, reasonable, and adequate," and approve it until that information is provided.

9. "Plaintiff has not provided an estimate of the lodestar fee, and accordingly the Court cannot determine whether the proposed fee of one-third of the recovery is reasonable in this case."

Plaintiff has now provided a lodestar fee estimate of $8,337.50, based on 11.5 hours of time at $725 per hour. This is sufficient to enable the Court to conclude that there is no need for an adjustment.

Conclusion:

Subject to the submission of a revised agreement or addendum to the existing agreement containing the new provisions as represented by counsel, the parties have adequately addressed the Court's concerns about the settlement, with the exception of item 6 (compliance hearing) and item 8 (submission to the court of the amount of payment to plaintiff).

Hearing required. The parties should be prepared to advise the Court, when they will submit a revised agreement or addendum, and whether they intend to make the necessary changes, or when they will decide whether they will make further changes, and schedule any further submissions. If the parties ultimately conclude that they will not make further changes to the settlement, the motion for approval will be denied.

9. 9:00 AM CASE NUMBER: MSN19-2096
CASE NAME: U.S. BANK NA SUCCESSOR TO BANK OF AMERICA, NA. SUCCESSOR IN INTEREST TO LASALLE BANK NA TRUSTEE ON B VS. SIMONE BRAXTON
***HEARING ON MOTION IN RE: JUDGMENT ON THE PLEADINGS**
FILED BY: U.S. BANK NA SUCCESSOR TO BANK OF AMERICA, NA. SUCCESSOR IN INTEREST TO LASALLE BANK NA TRUSTEE ON B
****TENTATIVE RULING:****

Before the Court is Cross-Defendant U.S. Bank, N.A., Successor to Bank of America, N.A., Successor in Interest to La Salle Bank, N.A. as Trustee, on Behalf of the Holders of WaMu Mortgage Passthrough Certificates, Series 2600-AR14 ("Cross-Defendant" or "U.S. Bank")'s motion for judgment on the pleadings ("MJOP"). The MJOP relates to Cross-Complainant Simone Braxton ("Cross-Complainant" or "Braxton")'s Cross-Complaint for (I) declaratory relief and cancellation of instruments, (II) prohibitive injunction, (III) mandatory injunction, (V) disgorgement, (alternative count VII) interference in contractual relations, and (IX) gross negligence [numbering original to the Cross-Complaint].

Cross-Defendant moves pursuant to Code of Civil Procedure ("CCP") § 438(c)(1) on several grounds.

For the following reasons, the MJOP is granted, without leave to amend.

Request for Judicial Notice

Plaintiff's unopposed Request for Judicial Notice is granted. (Evid. Code §§ 452, 453.) The Court notes that certified copies of recorded documents are self-authenticating. (Evid. Code §§ 1530, 1600; see also *Fontenot v. Wells Fargo Bank, N.A*. (2011) 198 Cal.App.4th 256, 264-65, disapproved on another point by *Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919.) Additionally, the return of a registered process server is admissible under Evid. Code § 647. (See also *Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419.)

Legal Standard

The standard for granting a motion for judgment on the pleadings is essentially the same as that applicable to a general demurrer. (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1064.) As a consequence, it may be granted if, from the pleadings, together with matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law. (Code Civ. Proc. § 438(d); *Saltarelli & Steponovich v. Douglas* (1995) 40 Cal.App.4th 1, 5; Weil & Brown, Civ. Pro. Before Trial (The Rutter Group 2010) p. 7:292.) As such, a motion for judgment on the pleadings involves the same type of procedures that apply to a general demurrer. (*Richardson-Tunnell v. School Ins. Program for Employees* (2007) 157 Cal.App.4th 1056, 1061; *Burnett*, *supra*, 123 Cal.App.4th at p. 1064.) In considering a motion for judgment on the pleadings, courts consider whether the factual allegations, assumed true, are sufficient to constitute a cause of action. (*Fire Ins. Exchange v. Sup. Ct*. (2004) 116 Cal.App.4th 446, 452-453.) Also, like a demurrer, a motion for judgment on the pleadings does not lie as to only part of a cause of action. (*Id.* at p. 452; Weil & Brown, Cal. Practice Guide: Civ. Pro. Before

Trial (The Rutter Group 2008) p. 7:295.)

Analysis

Cross-Defendants argue that *res judicata* precludes the Cross-Complainants' claims because they were adjudicated on the merits in a prior 2018 federal lawsuit. Cross-Defendants' MJOP refers generally to the principles of res judicata. However, there are two separate types of *res judicata*: claim preclusion and issue preclusion. "Claim preclusion, the primary aspect of *res judicata*, acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties. [Citation.] Issue preclusion, the secondary aspect historically called collateral estoppel, describes the bar on relitigating issues that were argued and decided in the first suit." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*) [internal quotation marks omitted].)

Claim preclusion

"Claim preclusion 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." (*DKN Holdings*, *supra*, 61 Cal.4th at p. 824.) "As applied to questions of preclusion, privity requires the sharing of 'an identity or community of interest,' with 'adequate representation' of that interest in the first suit, and circumstances such that the nonparty 'should reasonably have expected to be bound' by the first suit. [Citation.] A nonparty alleged to be in privity must have an interest so similar to the party's interest that the party acted as the nonparty's 'virtual representative' in the first action." (*Id*. at p. 826.)

A cause of action is delimited by the "primary right" theory, in which a plaintiff's primary right is determined by the harm suffered, regardless of the number of legal theories asserted. (*Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294, 1301; *Wulfjen v. Dolton* (1944) 24 Cal.2d 891, 894.) The primary right theory is a theory of code pleading that has long been followed in California and provides that a cause of action is comprised of a "primary right" of the plaintiff, a corresponding "primary duty" of the defendant, and a wrongful act by the defendant constituting a breach of that duty. (*Lincoln Property Company v. The Travelers Indemnity Company* (2006) 137 Cal.App.4th 905, 912.) The primary right is simply the plaintiff's right to be free from the particular injury suffered. (*Ibid*.) It must therefore be distinguished from the legal theory on which liability for that injury is premised, even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. (*Ibid*.) The primary right must also be distinguished from the remedy sought. The violation of one primary right constitutes a single cause of action, although it may entitle the injured party to various remedies. (*Ibid*.) In sum, there is only a single cause of action for the invasion of one primary right, even if multiple theories of recovery are asserted. (*Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn*. (1998) 60 Cal.App.4th 1053, 1067.)

(1) the same cause of action

The Cross-Defendant compares the Cross-Complaint in this action to the Proposed Second Amended Complaint in the Northern District of California case *Simone R. Braxton v. Select Portfolio Servicing, Inc*., Case No. 4:18-cv-03271-JSW. (RJN Ex. 22.) The Cross-Complaint in this action alleges causes of

action for (I) declaratory relief and cancellation of instruments, (II) prohibitive injunction, (III) mandatory injunction, (V) disgorgement, (alternative count VII) interference in contractual relations, and (IX) gross negligence [numbering original to the Cross-Complaint]. The Proposed Second Amended Complaint in the federal action alleged causes of action for (1) foreclosure fraud; (2) fraud on the court; (3) securities fraud; and (4) unfair business practices. The Court notes that the Proposed Second Amended Complaint was proffered to the Northern District of California through a motion for leave to file a second amended complaint, which was denied. (RJN Ex. 23.)

While there is not complete identity of causes of action, the gravamen of both complaints is the same: that the loan documents are void and that Defendants (including U.S. Bank) are not the beneficial owners of the Deed of Trust, and thus could not legally foreclose on the Property. (Compare Cross-Complaint at ¶ 3 ["none of the Cross-Defendants had any right, title or interest in the subject purported debt, note or mortgage"] with Proposed Second Amended Complaint at ¶ 1 ["Braxton contends that her threatened eviction is based upon fraudulent loan documents which are void under federal and state law."]; also compare Cross-Complaint at ¶ 61 ["Further, with the extinguishment of the loan account receivable caused by what Cross-Defendants refer to as 'securitization' and the intentional splitting of the money invested by purchasers of certificates, as aforesaid, Cross-Defendants created the existence or illusion of a void which they filled with themselves as Securitization Players and Foreclosure Players." with Proposed Second Amended Complaint at ¶ 40 ["The Defendants, each and all, ensarled [sic] Braxton who thought she was making a refinancing loan on her residential real property from a bank so name, when in fact her home was being knowingly and intentionally converted into a series of stock certificates, as it were, to be sold to investors in the secondary mortgage market without her knowledge or permission."].)

Both the Cross-Complaint and the Proposed Second Amended Complaint are premised on the same primary right and the same alleged injury to Cross-Complainant.

Cross-Complainant's opposition argument is difficult to parse. Some assertions, such as the contention that *res judicata* and the statute of limitations "are not appropriate as alleged grounds for granting a motion for judgment on the pleadings" (Opp. at 2:24-27) are manifestly incorrect. If the elements of *res judicata* are met, there is no bar to applying its principles on a motion for judgment on the pleadings. (See, e.g., *Atwell v. City of Rohnert Park* (2018) 27 Cal.App.5th 692 [affirming trial court's grant of judgment on the pleadings against petition barred by r*es judicata*].) Cross-Complainant appears to rely on authority that on a motion for judgment on the pleadings the court cannot consider any matter outside the complaint; however, this does not preclude the Court from considering such matters as are judicially noticeable. (See CCP § 438(d).) Here, the pleadings and orders from federal court case no. 4:18-cv-03271-JSW are capable of judicial notice and can be considered by the Court in deciding the MJOP. They demonstrate that the same primary right was at issue in both this case and the action in the Northern District of California.

(2) <u>between the same parties</u>

Both the Cross-Complaint here and the Proposed Second Amended Complaint in the Northern District are between U.S. Bank and Braxton.

(3) <u>after a final judgment on the merits</u>

The court in the federal action denied Braxton's motion for leave to file her proposed second amended complaint on several grounds. (RJN Ex. 23 at pp.7:20-10:10.) The federal court's analysis considered Braxton's "theory of liability … that Chase and the SPS Defendants … made fraudulent representations claiming that they are 'beneficial owners' of the Deed of Trust and had the power to foreclosure on the Property when that was not the case." (*Id*. at p. 7:20-22.) Ultimately, the federal court concluded that Plaintiff's allegations were "not sufficient to support the allegations that Plaintiff's loan, Deed of Trust, and subsequent assignments of those documents are void. The Court also has considered the remaining allegations, and it concludes that Plaintiff has not alleged facts that could give rise to the conclusion that any of the documents at issue are void, rather than voidable." (*Id*. at p. 10:14-18.)

California law does not generally afford *res judicata* effect to an interlocutory ruling denying a party's motion to amend. (See *Cent. Bank v. Transamerica Title Ins. Co*. (1978) 85 Cal.App.3d 859, 870 disapproved on other grounds by *Lambert v. Commonwealth Land Title Ins. Co*. (1991) 53 Cal.3d 1072 [concluding that a trial court's order denying a motion for leave to amend was not "final judgment" for res judicata purposes].) "[T]he court can permit renewal of a motion even though it has been previously denied on its merits; and, unlike the final determination of an action or proceedings by judgment, the decision on an ordinary motion is not res judicata and the court has jurisdiction to reconsider it." (*Phillips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 770.)

However, in this case the federal court denied the motion for leave to file a second amended complaint and dismissed the case. Judgment was entered on March 14, 2019. It has the requisite finality to invoke the preclusive bar of *res judicata*. As a consequence, all the requirements of claim preclusion are met.

Judicial Estoppel

Even if all the requirements of claim preclusion were not met, Braxton's complaint is also barred by the operation of judicial estoppel.

Under *Hamilton v. Greenwich Investors XXVI, LLC*, the result of a failure to disclose any litigation likely to arise in a nonbankruptcy context triggers application of the doctrine of equitable estoppel, operating against a subsequent attempt to prosecute the actions. ((2011) 195 Cal.App.4th 1602, 1610.) The *Hamilton* court adopted the rule of *Oneida Motor Frieght*, a Third Circuit case which applied doctrines of equitable and judicial estoppel to find that a debtor's failure to disclose a lender liability claim in chapter 11 bankruptcy proceedings precluded the debtor from later litigating the claim. (*Id.* [citing *Oneida Motor Freight, Inc. v. United Jersey Bank* (3d Cir. 1998) 848 F.2d 414].) In *Hamilton*, the appellate court affirmed that the plaintiff borrower's fraud and breach of contract claims against the defendant lender were barred under the doctrine of equitable and judicial estoppel, because he failed to disclose the existence of the claims against the lender in the bankruptcy proceedings. (*Hamilton*, *supra*, at p.1610.) The court adopted the *Oneida Motor Freight* rule because it reasoned that similar to *Oneida Motor Freight*, the defendant bank was one of the plaintiff's principal creditors in the bankruptcy proceedings and the events the complaint was based on occurred before his bankruptcy proceedings. (*Id*. at p. 1614.) As a consequence, the *Hamilton* court distinguished cases such as *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.* (3d Cir. 1996)

81 F.3d 355, *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995 and *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110 where judicial estoppel was not applied. (*Id.* at p. 1610.) Those cases either did not involve lender liability, or the bankruptcy court did not confirm a plan of reorganization. (*Ibid.*)

The Complaint falls squarely within the *Oneida Motor Freight* rule as adopted by *Hamilton*. Here, as with *Hamilton*, Braxton took inconsistent positions and failed to disclose the claims against the Defendant in her previous Chapter 13 bankruptcy proceedings. Here, Braxton filed bankruptcy petitions in 2009, 2010, 2016, and 2018. She did not identify any claims pertaining to her Loan, the Loan Documents, or the already pending foreclosure action. (See RJN Exs. 8, 10, 15, 17.) Also similarly, the instant lawsuit was filed subsequent to Plaintiff's Chapter 13 bankruptcy proceedings. Furthermore, both in *Hamilton* and here the lawsuit against the lender was filed after the bankruptcy court confirmed the Chapter 13 plan. Consequently, Braxton's claims are barred.

Because the Court concludes that Braxton's Cross-Complaint is barred by the operation of claim preclusion and principles of judicial estoppel, it need not reach the additional statute of limitations grounds.

The motion is granted, without leave to amend.

10. 9:00 AM CASE NUMBER: MSN19-2096
CASE NAME: U.S. BANK NA SUCCESSOR TO BANK OF AMERICA, NA. SUCCESSOR IN INTEREST TO LASALLE BANK NA TRUSTEE ON B VS. SIMONE BRAXTON
HEARING ON MOTION FOR SUMMARY JUDGMENT FILED BY PLAINTIFFS
FILED BY:
TENTATIVE RULING:

Before the Court is a motion for summary judgment (the "Motion") filed by Plaintiff U.S. Bank NA, successor to Bank of America, NA, successor in interest to LaSalle Bank NA, as trustee, on behalf of the holders of the WaMu Mortgage Pass-Through Certificates, Series 2006-AR14 ("Plaintiff" or "U.S. Bank"). Plaintiff moves for summary judgment against Defendant Simone Braxton ("Defendant" or "Braxton"). The Motion relates to U.S. Bank's underlying complaint for unlawful detainer and not Braxton's Cross-Complaint. That pleading is challenged in a motion for judgment on the pleadings, discussed at Line 9, above.

This hearing on the Motion was previously continued from July 11, 2022 pursuant to Code of Civil Procedure § 437c(h) for Defendant to conduct additional discovery. Defendant filed an additional opposition on November 10, 2022.

For the following reasons, the Motion is granted.

Evidentiary Objections

No evidentiary objections were made.

Defendant Braxton did object to the "Statement of Material Facts" on the grounds that the requirements of CCP § 437c(b)(1) were not met. (11/10/2022 "Request for Denial of the Summary Judgment Motion.") However, this subdivision does not apply to summary proceeding for obtaining

possession of real property, including unlawful detainer actions. Notwithstanding the reclassification of this case as unlimited, nothing in Rule 3.1350 of the California Rules of Court suggests that compliance with § 437c(b)(1) is required in an unlawful detainer summary judgment motion. The instant motion, which is for judgment on the underlying action for unlawful detainer and not for judgment against Braxton's Cross-Complaint, is such a motion.

Even if section 437c(b)(1) applied to the instant Motion, failure to comply is a discretionary (not mandatory) basis on which to deny the motion. (See *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 118.) The Court declines to deny the motion pursuant to CCP § 437c(b)(1); the Statement of Material Facts is generally in compliance with the applicable rules. Furthermore, Defendant has not identified how any alleged deficiency in the Statement of Material Facts impaired her ability to marshal evidence to show that material facts were in dispute. The objection is overruled.

Request for Judicial Notice

Plaintiff's unopposed Request for Judicial Notice is granted. (Evid. Code §§ 452, 453.) The Court notes that certified copies of recorded documents are self-authenticating. (Evid. Code §§ 1530, 1600; see also *Fontenot v. Wells Fargo Bank, N.A*. (2011) 198 Cal.App.4th 256, 264-65, disapproved on another point by *Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919.) Additionally, the return of a registered process server is admissible under Evid. Code § 647. (See also *Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419.)

Standard

Code of Civil Procedure ("CCP") §§ 437c(c) provides, in relevant part:

> The motion for summary judgment shall be granted 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.

Section 437c(p)(1) provides:

> A plaintiff or cross-complainant 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. 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. The defendant or cross-defendant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

The party moving for summary judgment has the burden of persuasion to show there is no triable issue of material fact and thus it is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) Only if the moving party successfully meets this burden does the burden shift to the opposing party to make its own prima facie showing of the existence of a triable issue of material fact. (*Ibid*.; see also *Chern v. Bank of America* (1976) 15 Cal.3d 866, 873.) The

scope of the defendant's initial burden is defined by the pleadings. (See *580 Folsom Assocs. v. Prometheus Dev. Co*. (1990) 223 Cal. App. 3d 1, 18.)

Brief Factual and Procedural Background

This is a post-foreclosure unlawful detainer action. Plaintiff filed the original Complaint in this action for unlawful detainer following foreclosure sale pursuant to CCP § 1161a on October 28, 2019. The original complaint alleges that Plaintiff acquired the property pursuant to a foreclosure sale duly held pursuant to the power under the Deed of Trust executed by Defendant(s) or their predecessors. (Complaint at ¶ 8.) Defendant was served with a three-day notice to vacate via posting and mailing on January 25, 2019 by a registered process server. (Complaint Ex. C.)

On January 6, 2020 this Court granted Plaintiff's motion for summary judgment and denied reconsideration of that order on February 6, 2020. The Court of Appeal issued an alternative writ on May 13, 2021 and this Court vacated the January 6, 2020 judgment and order on June 8, 2021. The case was reclassified as a regular unlimited civil case on June 22, 2021 in an unreported minute order.

Defendant filed a Cross-Complaint on February 24, 2022 for (I) declaratory relief and cancellation of instruments, (II) prohibitive injunction, (III) mandatory injunction, (V) disgorgement, (alternative count VII) interference in contractual relations, and (IX) gross negligence [numbering original to the Cross-Complaint].

Analysis

"Unlawful detainer actions are governed by Code of Civil Procedure section 1161 and related provisions. An unlawful detainer action is a summary proceeding, the primary purpose of which is to obtain the possession of real property in the situations specified by statute. [Citation.] An unlawful detainer action is founded upon unlawful occupation and the principal relief sought is early possession of the property; damages and rent are incidental thereto and are recoverable only because the statute so provides." (*Kruger v. Reyes* (2014) 232 Cal.App.4th Supp. 10, 16 [internal quotations and citation omitted].)

Although the instant case has been reclassified as a regular unlimited civil case, U.S. Bank's sole cause of action is for unlawful detainer pursuant to CCP § 1161a(b)(3). U.S. Bank moves for summary judgment on this claim on the grounds that there are no triable issues of fact as to the elements of its unlawful detainer action based on CCP § 1161a(b)(3) (i.e., action for possession after non-judicial foreclosure sale): (1) Defendant was served with a three-day notice to vacate in accordance with CCP § 1162 (DeLeon Decl. Exs. 1, 2); (2) the Property was sold in accordance with § 2924 of the Civil Code under a power of sale contained in a deed of trust and title has been duly perfected (RJN Ex. B); and (3) Defendant has remained in possession of the property and did not vacate the property after the expiration of the notice to quit and continues to remain in possession of the property. (CCP §1161a(b)(3).)

U.S. Bank has met its initial burden on summary judgment. In Opposition, Defendant Braxton argues that (1) although she does not dispute that a process server brought an alleged "notice to vacate" to

her home, she disputes that she was ever served with a summons and complaint; and (2) that U.S. Bank never acquired title to the property. She does not dispute that (3) she continues to reside in the property. (See Opposition to Statement of Material Facts.)

In her supplemental opposition filed November 10, 2022, Defendant Braxton argues that U.S. Bank has not met its initial burden. Defendant relies in part on her evidentiary objection to the Statement of Material facts, which the Court has overruled. Defendants' opposition misstates the burden on summary judgment; U.S. Bank has met its initial burden.

Defendant has not overcome the presumption of proper service of the notice to vacate (see Bus. & Prof. Code §§ 22350 et seq.; Evid. Code § 647), nor has she overcome the presumption that the foreclosure sale was conducted regularly and fairly (see Civ. Code § 2924 through § 2924k; *Royal Thrift and Loan Co. v. County Escrow, Inc*. (2004) 123 Cal.App.4th 24, 32). Defendant's only evidence in opposition is an unsigned declaration where she contends she was not served with the summons and complaint in case no. RS19-0082; she does not dispute that she was served with a three-day notice to vacate. This is insufficient to create a triable issue of material fact with respect to any of the essential elements of unlawful detainer. Moreover, Braxton waived this argument when she generally appeared in the action. (See CCP § 410.50(a) ["A general appearance by a party is equivalent to personal service of summons on such party."].)

Plaintiff is entitled to summary judgment on its cause of action for unlawful detainer. The MSJ is granted.

11. 9:00 AM CASE NUMBER: MSN21-0462
CASE NAME: SAVE MOUNT DIABLO VS CITY OF PITTSBURG
***FURTHER CASE MANAGEMENT CONFERENCE**
FILED BY:
****TENTATIVE RULING:****

Parties to appear.

12. 9:00 AM CASE NUMBER: MSN21-0462
CASE NAME: SAVE MOUNT DIABLO VS CITY OF PITTSBURG
***HEARING ON MOTION TO COMPEL FURTHER DISCOVERY RESPONSES RE DONOR INFORMATION**
FILED BY: CITY OF PITTSBURG
****TENTATIVE RULING:****

After Save Mt. Diablo obtained a writ of mandate in this case, it filed a motion for attorney's fees. Respondent propounded substantial discovery to SMD, seeking to obtain information it contends is relevant to whether SMD can make one of the showings required by Code of Civil Procedure section 1021.5(b), i.e., whether "the necessity and financial burden of private

enforcement…are such as to make the award appropriate[.]" To meet this test, a party must show that "the cost of the claimant's legal victory transcends his [or her] personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the [claimant] out of proportion to his [or her] individual stake in the matter." (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal. 3d 917, 941.)

A. General Authorities on the Issue

This requires the court to compare "the litigant's private interests with the anticipated costs of suit." (*California Licensed Foresters Assn. v. State Bd. of Forestry* (1994) 30 Cal.App.4th, 562, 570. See also *Conservatorship of Whitley* (2010) 50 Cal. 4th 1206, 1215 [court should approximate "the estimated value of the case at the time the vital litigation decisions were being made[.]")

A number of courts have found disqualifying pecuniary benefit in the context of land-use approvals that had a substantial effect on the use of real property, without any specific showing of the actual amount of the benefit. (*Norberg v. Cal. Coastal Comm'n* (2013) 221 Cal. App. 4th 535, 545 [coastal commission permit challenge enabled property owner to build improvements that enhanced the value of his property; no actual determination of the amount of financial benefit]; *Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal.App.4th 1312, 1321 [remand to determine petitioner's pecuniary benefit from stopping project in CEQA action].)

As the moving party (in the attorney's fees motion) SMD bears the burden of proof on this issue. (*Jobe v. City of Orange* (2001) 88 Cal. App. 4th 412, 419 [award "requires that the claimant show that the cost of its legal victory transcended its personal interest"]; Evidence Code § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."])

B. Specific Authority on the Scope of Discovery

The case dealing most directly with the situation presented here is *Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 Cal.App.4th 235, 254. In that case, a nonprofit organization successfully challenged a development, and sought private attorney general fees. Real Party interest in that case opposed the motion, arguing, with some factual support, that the litigation expenses actually had been borne by individuals who owned property in the vicinity of the proposed development, the value of which would be reduced if the project proceeded. Indeed, the plaintiff had a litigation fund, which enabled contributors to make charitable contributions, yet have them earmarked for the litigation in question, rather than the general use of the nonprofit. (*Id*., at 244.) (This case was one of a group of cases partly disapproved in *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557, to the extent that they required "a party seeking discovery of private information to always establish a compelling interest or compelling need, without regard to the other considerations" of privacy. The Court accordingly does not follow *Save Open Space* to the extent it so holds.)

The court ultimately applied a balancing test, based upon which it approved discovery identifing the amount of the fund, the amount of the contributions, and the number of contributors, without names. It allowed, however, that if some donors were substantial, names could be required, or disclosure might be allowed with a confidentiality agreement. Ultimately, the court concluded that where "the party opposing a section 1021.5 attorney fee award has produced evidence suggesting that a public interest organization is litigating an action primarily for the benefit of nonlitigants, the court should, in order to resolve the issue, allow the opposing party to conduct limited discovery." (*Id*. At 250.) In deciding how much to limit discovery, the court is required to balance the interest in resolving the issue with the privacy interests of the party opposing the discovery. The court allowed substantial discovery (some by in camera review) of the contributions to the plaintiff's *litigation fund*.

C. Specific Discovery Requests

After the City served its discovery requests, the parties met and conferred, and attended an Informal Discovery Conference with the Court. SMD provided some discovery responses, and the City dropped others, but they are left with the current dispute.

Special Interrogatory No. 5 seeks the identity of all persons who have made a financial contribution of at least $10,000. Petitioner's annual reports indicate that one anonymous donor made a donation of $10,000 to $249,000 in the 2018-2019 fiscal year, and SMD received one donation of over $250,000 during 2017 and the 2021-2022 fiscal year. Other anonymous donations of $10,000 to $99,999 have been received since 2011. Special Interrogatory No.6 seeks the identification of documents that substantiate the identities of those contributors. Request For Production No. 3 seeks the documents identified in response to the previously-mentioned Interrogatory.

D. Specific Discovery and Information Provided

SMD has provided a significant of information requested that is relevant to the issue here. It provided annual reports, state and federal tax forms, and audits. It identified its income sources, property owned or operated by plaintiff, its Executive Director, Land Conservation Director, or current board members (or their spouses) that is within three miles of the project site; plus any business interests related to the project. (Tax forms, i.e., the federal form 995 are already public information.) SMD also states, by declaration, that it has no "litigation fund" for this case or any other. It does show that there are a small number of substantial donors who contribute relatively large amounts of money to SMD. As noted above, one anonymous donor made a donation of $10,000 to $249,000 in the 2018-2019 fiscal year. SMD received one donation of over $250,000 during 2017 and the 2021-2022 fiscal year. Other anonymous donations of $10,000 to $99,999 have been received since 2011. The largest single donation in the 2021-22, however, is less than 3.2 percent of total donations for that year, thus there is no one dominant donor. (Clement Dec., Par. 4.) Even the largest donations are relatively small compared to the fees expended in the litigation (with over $800,000 requested).

E. Balancing the Competing Interests

Even if the Court gave relatively low weight to the donors' privacy interests, the City has failed to establish sufficient relevance of the information to outweigh that interest. The information that was provided showed nothing to support the City's theory. There is no litigation fund (which appears to be a critical fact in *Save Open Space*). None of the officers or directors have property affected by the project. If the existing discovery responses showed that there have been a few large donors to a litigation fund, large enough to pay for all or a substantial part of the litigation, at the time when the decision to litigate was being made, it might then be relevant to disclose the identities of those donors, in order to determine whether they own property affected by the suit. But the discovery to date fails to show any such circumstance.

The City's motion is denied.

13. 9:00 AM CASE NUMBER: MSP12-00578
CASE NAME: IN RE GEORGIA R. TAYLOR TRUST DATED 03/22/00
***HEARING ON MOTION IN RE: ATTORNEY FEES & COSTS**
FILED BY:
TENTATIVE RULING:

I.

FEES FOR ATTORNEY CAROLYN CAIN

Debra requests approval of fees incurred by her attorney, Carolyn Cain, in the amount of $79,405.25, and costs of $4,175.49. Net of compensation already paid, Debra seeks an order that the Temporary Trustee of the Trust pay to Ms. Cain a total of $51,173.74. [1]

The Motion advances several grounds to justify an award of fees for services rendered to her

[1] The court very nearly denied this Motion in its entirety. As stated above, the court was under the apparently mistaken understanding that no fee declarations had been filed in support of the Motion at all, as stated in the court's tentative ruling that became the order of the court on October 27, 2022. Evidently, the fee Declaration of Carolyn Cain was filed on August 30, 2022, nine days *before* the Motion was filed on September 8, 2022. In addition, there was no way to determine on their face that the Motion and Declaration were connected. The caption on the Declaration states that it is "In Support of Petition for Approval of Attorneys' Fees and Costs", while the Motion is entitled "Motion for Attorney's Fees and Costs". To make matters more confusing, the Motion does not pray for approval of a specific amount of fees which would allow the court to connect the Motion to the Declaration. The *only* document that indicates that the August 30 Declaration and September 8 Motion documents are connected is the Notice of Hearing, which was filed *twelve days after the Motion*, on September 20. Proceeding in this manner is unacceptable and counsel is admonished that this practice must stop or the court will summarily deny any relief requested.

by Ms. Cain as her counsel, including but not limited to Probate Code sections 16243, 16247, and the common fund theory under Estate of Stauffer (1959) 53 Cal.2d 124, and similar cases. Regardless of the justification that Debra uses, the court always has discretion in the exercise of its supervisory role over the administration of trusts to determine the reasonableness of fee requests. Donahue v. Donahue (2010) 182 Cal. App. 4th 259, 268-270.

There are two facts that are front-and-center to the court's determination of the amount of fees that are to be approved. The first is that Debra was suspended as trustee of the Trust and has remain suspended since February 20, 2019. There is currently no petition pending to seek the permanent appointment of a trustee to complete the administration.

The second fact that is particularly relevant to the court's determination of the amount of fees to be approved is the fact that Debra was *actually surcharged* for breaching the Trust in connection with the amounts spent for improvements to Trust real property, as reflected in Debra's Second Account. Clearly, the fact that Debra was surcharged means that at least a part of the litigation undertaken by Debra's counsel was, in fact, *unsuccessful*, contrary to the representation made in the papers. See, e.g., Cain Decl., p.1:23-24 ("Declarant [Ms. Cain] has performed litigation services successfully defending the trust administration…"). It is certainly true that *some* of the litigation was successful and that *some* of the fees incurred by Debra in connection with that litigation should be paid by the Trust. However, Debra's actions as trustee do warrant a reduction of her fee request, as set forth herein. The court declines to rehear those issues, which were previously decided.

In addition, the court is mindful of comments made by accounting referee Bette Epstein in connection with her "Referee's Report and Recommendations" (regarding Debra's Initial and Second Accounts), filed on December 3, 2018, that this case was overlitigated. See December 3, 2018, Referee's Report and Recommendations, pp.2:17-3:16. The court finds that this observation was true and continues to be true through the filing of the instant Motion for fees.

Furthermore, the Motion and associated Cain Declaration are confusing. The Objection filed by the Conservator highlights this confusion. The Conservator's Objection reports that the matter of

the approval of Debra's attorney fees for the period covering Debra's Third Account (March 1, 2018, through February 28, 2019) was already addressed by this court and Referee Bette Epstein in connection with Debra's Petition for Approval of Third Account. The instant Motion seeks fees for a period that overlaps the Third Account period. The Referee's Report for the Third Account, filed on October 25, 2021, recites that the referee sought information from Ms. Cain, among others, substantiating the fees that were paid during that accounting period, but none was provided. In light of the absence of any support for the fees that were paid during the Third Account period, this court *denied* approval of those fees by order entered on July 11, 2022. Curiously, neither Debra nor her counsel point this out to the court.

Most disturbing is the following statement by Ms. Cain in her declaration: "Declarant [Ms. Cain] has not received payment for her administration and litigation services since 2018, four years ago." Cain Decl., p.6:6-7. This is not a true statement. In fact, Debra's Third Account (filed on April 26, 2019) shows that Ms. Cain received a fee payment in the amount of $36,156.00 on February 4, 2019. Whether or to what extent this statement is sloppy drafting or something more intentional is not material at this point. However, this statement and the generally confusing nature of the Motion justifies a substantial reduction of the fees that are awarded.

Because of this overlap, and the failure of Debra to challenge the court's order approving the Third Account and denying approval of fees, the Court will only consider approving fees that appear to have been clearly incurred after the period of the Third Account, or February 28, 2019.

Now, therefore, the court approves the following fees and fee categories, subject to a further downward reduction as set forth below (the following references are to the Declaration of Carolyn Cain, filed August 30, 2022, pp.7:13-8:16):

Category	**Total Requested**	**Total Approve**
1. Communications with Client, Debra Instone during the period 7/30/2018, through 8/23/2022 **[SEE COMMENT 1 BELOW]**	$7,850.00	$3,925.

2.	Communications and Settlement Discussions with Counsel and Client in a Continuing Effort to Resolve All of the Pending Petitions Before the Court (billed at $250.00 per hour when Co-Counsel Craig Judson worked on the settlement efforts too) **[SEE COMMENT 2 BELOW]**	$11,179.50	$5,589.75
3.	Prepare and Attend Review Hearings for the period through 4/17/2019 **[SEE COMMENT 3 BELOW]**	$2,400.00	$0.00
4.	Prepare and Attend Review Hearings Including Scheduling Court Reporters for the period 5/19/2019, through 6/15/2022 (billed at 1/2 Declarant's hourly rate) **[SEE COMMENT 4 BELOW]**	$5,400.25	$4,000.00
5.	Prepare for and Court Appearance and Post-Hearing Settlement Discussions with Counsel on 12/12/2019 (billed at 1/2 Declarant's hourly rate)	$280.00	$280.00
6.	Objection to Dess Benedetto's Fee Petition **[SEE COMMENT 6 BELOW]**	$955.00	$0.00
7.	Objection to Pat McVey-Ritsick's Petition for Conservator's Fees and Costs **[SEE COMMENT 7 BELOW]**	$3,056.00	$0.00
8.	Declaration Regarding the Summary of Issues Regarding the Georgia Taylor Trust That Was Ordered by the Court	$1,007.50	$1,007.50
9.	Objection to Korn Law Group Fee Petition - Draft the Notice of Entry of Order and Proof of Service by Mail of the Order filed on 7/11/2022 Denying the Fee Petition	$80.00	$80.00
10.	Petition for Approval of Initial Accounting and Assignment to the Accounting Referee (1/2 billed to the Initial Accounting and 1/2 billed to the Second Accounting) for the period 7/30/2018, through 1/20/2020 **[SEE COMMENT 10 BELOW]**	$5,429.00	$2,714.50
11.	Petition for Approval of Initial Accounting After the Court Approved the Second Accounting and Reassigned the Initial Accounting to the Referee, the period 7/14/2022, through 8/18/2022	$3,752.00	$3,752.00
12.	Ex Parte Petition to Set Aside Order Adopting the Referee's Recommendation In Violation of Debra Instone's Due Process Rights and Objection to Referee's Report including Legal Research and Resulting in an Order Setting Aside the Order Adopting the Referee's Report and Modification of the Referee's Report. See the Orders filed on 12/20/2018 and 7/11/2022 **[SEE COMMENT 12 BELOW]**	$29,776.00	$0.00

13. Draft an Order After Hearing Suspending Debra Instone as Successor Trustee (Without Prejudice) and Transition of the Trust to the Temporary Trustee and Communications with His Counsel.	$4,335.00	$4,335.00
14. Draft a Summary of Issues in Compliance with the Court's Order	$2,060.00	$2,060.00
15. Legal Research to Prepare for and Attend the Court Hearing to Argue the Issue of the Alleged Conflict of Interest in Response to the Court's Notice of Hearing (Attorney Craig Judson did not attend this hearing because he was on a long planned family vacation) **[SEE COMMENT 15 BELOW]**	$1,845.00	$0.00
TOTALS:	**$79,405.25**	**$27,743.75**

In connection with these approvals, the court has the following specific comments regarding its awards:

1. It appears that the fees requested for this category overlap with the fees that were paid during the period of the Third Account, but not approved by the court. As it is impossible determine from the current record what fees were previously paid during the Third Account, the court reduces this fee by 50%.

2. It appears that the fees requested for this category overlap with the fees that were paid during the period of the Third Account, but not approved by the court. As it is impossible determine from the current record what fees were previously paid during the Third Account, the court reduces this fee by 50%.

3. All of the fees requested in this category were incurred prior to the end of the Third Account and were presumably paid during that period, and there is no other evidence in this record to demonstrate otherwise. Therefore, fees for these services are denied.

4. The description of services rendered includes “Scheduling Court Reporters.” It is unreasonable for the Trust to pay an attorney’s rate for services that an employee could (and should) do for at a far lower rate, or no fee at all. The fee awarded is reduced accordingly.

6. Dess Benedetto is the court-appointed counsel for Diana Taylor. Ms. Benedetto’s fee petition was litigated in connection with the matter of the *Conservatorship of Diana Taylor* (Contra

Costa County case no. MSP12-01162). There is no authority presented by Debra that suggests that fees could be paid from the Georgia Taylor Trust (of which Diana's Special Needs Trust, not Diana, is a one-third beneficiary) for objecting to a fee petition in an entirely different, though admittedly related, proceeding. Therefore, fees for these services are denied.

7. The court denied Pat McVey-Ritsick's Petition for Conservator Fees and Costs *without prejudice* on July 11, 2022. The reasons why the court denied this petition were entirely independent of the grounds raised in objection by Debra, so the fact that Debra may have objected did not actually "benefit" the beneficiaries at all. Furthermore, many of the arguments raised in the objection to the Conservator's petition, particularly those concerning a *res judicata* defense, were nearly frivolous. The non-litigating beneficiaries of this Trust should not have to pay for services that, in the end, did not impact the court's decision at all. For these reasons, fees for these services are denied.

10. It appears that the fees requested for this category overlap with the fees that were paid during the period of the Third Account, but not approved by the court. As it is impossible determine from the current record what fees were previously paid during the Third Account, the court reduces this fee by 50%.

12. All of the services set forth in this category were provided no later than December 20, 2018, the date that the court entered its order vacating its original Order regarding the recommendations of the Referee. There is no indication in the record that these fees were not paid during the Third Accounting period, and the court assumes that they were, in fact, paid.

In addition, even if the court were to consider awarding a fee for this service, the amount requested is wildly excessive. The issue that led to the court's withdrawal of its initial order approving the Referee's Recommendations as the order of the court was very simple in that the order was clearly filed prematurely before parties had an opportunity to file objections. Attorney Cain claims that she spent a total of nearly 75 hours on this Application over the course of at most 15 days (the original Order was filed on December 3, 2018, and the referenced Ex Parte Application was filed on December 18, 2018). That breaks down to just under 5 hours per day, every day, including two full weekends, working only on this application. This is entirely unreasonable. For someone with Ms. Cain's experience, this relatively simple issue should have taken 10 hours *at most*.

Therefore, these fees are also denied.

15. As for this category, the court has not yet finally determined whether Debra will be reinstated as permanent trustee of the Trust or whether the temporary trustee will be appointed permanently. Until such time as the court makes its final determination, fees for this category of services are denied *without prejudice*.

Additional reduction: As has been repeated throughout these proceedings, the Trust estate is relatively small. Consistent with the fee awards made by the Referee in connection with Debra's previous accounting, the court will reduce the fee award by 10%. Therefore, the court awards fees payable to Carolyn Cain in the amount of $24,969.38.

Costs: Consistent with the above, the court will only approve reasonable costs that were paid *after* the Third Account period (February 28, 2019). Therefore, payment of costs is approved in the amount of $3,191.49.

II.

FEES FOR ATTORNEY CRAIG JUDSON

In his Declaration filed on November 10, 2022, attorney Craig Judson seeks approval and payment of fees in the amount of $31,370.00 and reimbursement of costs in the amount of $106.80. In contrast to Ms. Cain's declaration, Mr. Judson's fee declaration is clear, concise, relatively non-argumentative and provides invoices to support his fees, which is not required, but certainly appreciated. Furthermore, Mr. Judson's Declaration or the fees that he requests does not overlap Debra's Third Account as Ms. Cain's do. Notwithstanding, Mr. Judson's fees are not free from even minimal scrutiny.

The bulk of Mr. Judson's fees are settlement-related. However, there are three billing entries that cause the court concern that services were rendered for the benefit of the SNT as opposed to the Georgia Taylor Trust. The billing entries dated February 10, 13 and 14, 2022 (Judson Decl., Exh. A) for a total of $2,440.00 appear to include review of the Petition to Remove Debra as trustee *of the SNT*. The court finds it reasonable to reduce these fees by half, to $1,220.00, leaving a total fee request of

$30,150.00.

Additional reduction: As has been repeated throughout these proceedings, the Trust estate is relatively small. Consistent with the fee awards made by the Referee in connection with Debra's previous accounting, the court will reduce the fee award by 10%. Therefore, the court awards fees payable to Craig Judson in the amount of $27,135.00.

Costs: Payment of costs is approved in the amount of $106.80**.**

III.

CONCLUSION

Therefore, the Motion is GRANTED IN PART AND DENIED IN PART. Attorney fees for services rendered by Carolyn Cain are APPROVED in the amount of $24,969.38. Costs incurred in connection with these proceedings are APPROVED in the amount of $3,191.49. Pearson Miller, Temporary Trustee of the Georgia R. Taylor Trust, is hereby ordered to pay to Carolyn Cain the total amount of $28,160.87.

In addition, attorney fees for services rendered by Craig Judson are APPROVED in the amount of $27,135.00. Costs incurred in connection with these proceedings are APPROVED in the amount of $106.80. Pearson Miller, Temporary Trustee of the Georgia R. Taylor Trust, is hereby ordered to pay to Craig Judson the total amount of $27,241.80.

14. 9:00 AM CASE NUMBER: MSP19-01630
CASE NAME: THE DIANA MARIE TAYLOR SPECIAL NEEDS TRUST
***HEARING ON MOTION IN RE: ATTORNEY FEES & COSTS**
FILED BY:
****TENTATIVE RULING:****

I.

GENERAL PRINCIPLES

The SNT provides that the trustee is entitled to reasonable compensation. In addition, trustees and their attorneys are generally entitled to "reasonable" compensation for services

rendered under California law. Prob. Code §§ 15681, 16423, 16247. In a proceeding to determine an award of fees, the court always has discretion in the exercise of its supervisory role over the administration of trusts to determine the reasonableness of fee requests. Donahue v. Donahue (2010) 182 Cal. App. 4th 259, 268-270.

II.

TRUSTEE'S FEES

Debra requests an order authorizing her to pay herself $13,250.00, for trustee's fees for the period from May 20, 2015, through September 7, 2022. This fee request is troubling for a number of different reasons. First and foremost, it appears that the primary ground for seeking payment of fees from the SNT is "to offset the Trustee's fees owed by me as a result of the Order filed on July 11, 2022, in the related Georgia R. Taylor Turst adopting Referee Bette Epstein's Recommendation filed on December 3, 2018….requiring me to repay $25,580.95 in Trustee's Fees to surcharge repairs to the Trust residence." Instone Decl., p.4:3-6. Debra then spends a total of 10 paragraphs of her Declaration (¶¶ 12-21) revisiting the merits of a surcharge against her in the matter of the Georgia R. Taylor Trust dated 3/22/2000 (Contra Costa case no. MSP12-00578). These arguments are entirely inappropriate as they constitute an impermissible Motion for Reconsideration in violation of Code of Civil Procedure section 1008. If Debra wished for the court to reconsider its ruling, she was required to follow the procedures in Section 1008 (i.e., filed no more than 10 days after Notice of Entry served and based on new or different facts, circumstances or law). Absent such compliance, the court lacks subject matter jurisdiction to revisit the merits of this issue. Code of Civ. Proc. § 1008(e).

Second, it is troubling that Debra chose to wait seven years to seek compensation for services rendered. It appears that Debra did not intend to seek trustee's fees for services rendered as trustee of the SNT until she was surcharged as trustee of the Georgia Taylor Trust. As stated by Debra: "Given my substantial service benefitting the Trust and the increase in value of the Trust residence, repayment of $25,580.95 in fees and payment of only $12,264.78 for Trustee's Fees for the six-year period of 2012 through 2018 is inequitable, *and requires that I ask for Trustee's Fees payable from the*

SNT as an offset. [Bold omitted. Italics added.]"

Third, Diana's Declaration in support of her Motion is barely sufficient to fulfill the requirements of Local Rule Guidelines Attachment 2 governing fee petitions.[2] The purpose of submitting a fee declaration along with a request for approval of fees is so that the court and the trust beneficiaries can determine whether the fee request is reasonable. Without sufficient detail in the fee declaration, it is difficult, if not impossible, to determine reasonableness. In this case, excluding the arguments concerning the surcharge in connection with the Georgia Taylor Trust, Debra essentially claims fees for two types of services: (1) general administration; and (2) litigation in defense of the Petition to Remove Trustee, filed by court-appointed counsel for SNT beneficiary, Diana Taylor. With regard to general administration services, Debra states that she is not required to seek court approval of her accountings. Instone Decl., ¶ 4. She also does not include her accountings in support of her fee request, which she is free to do. However, in the absence of those accountings, it is difficult to know exactly what Debra did for the last seven years of this administration. Paragraph 5 of her Declaration, which is the only paragraph that provides any description of her regular fiduciary services, is general and does not provide even an estimate of the amount of time that she spent in providing services.

With regard to litigation in defense of the Petition to Remove Trustee, Debra does not give any description whatsoever of what precisely she did in defense of this petition. It is difficult to imagine what Debra could have done in connection with the demurrer to the petition as the only dispositive issue was purely legal (standing). Debra is not a lawyer – her counsel is the one who would be primarily responsible for forming the arguments, researching the issues and fulfilling whatever procedural requirements were necessary to successfully prosecute the demurrer. Absent compelling facts to suggest otherwise, Debra lacks the requisite skills to successfully argue that the Petition for Removal lacked merit.

Finally, in opposition to the Motion, the Conservator urges the court to reduce fees awarded

[2] The court notes that Local Rule Guideline Attachment 2(h) provides that "The Court will ordinarily approve a minimum annual fiduciary fee of up to $1,500.00 for non-professional fiduciaries." As the language suggests, this rule is not absolute, and the court retains its discretion to adjust fees as appropriate.

to Debra because the SNT has insufficient assets to pay her fees. This is the single most important factor governing the amount of fees to be awarded to Debra. The court finds that the SNT has insufficient assets with which to pay the fee request in full, if the court were inclined to do so. The court's first priority is to ensure that Diana has sufficient funds in the SNT to adequately provide her with funds to provide support beyond her public benefit entitlements. Therefore, even though the court may find some of the services provided by were consistent with her fiduciary duties, the funds actually available for payment require a substantial reduction in fees for all parties who have requested approval of fees in all proceedings before the court.

Therefore, consistent with the prior fee approvals made from the SNT by this court that reduced fees to 20% of the requested amount, and also for the reasons set forth above, the court hereby approves fees payable to Debra from the SNT in the amount of $2,650.00.

III.

ATTORNEY'S FEES

The Motion also requests approval of attorney's fees to Debra's counsel, Carolyn Cain, Esq., in the amount of $23,099.33 and reimbursement of costs in the amount of $436.00. Paragraph 4 of the Declaration of Carolyn Cain in support of the Motion sets forth the services provided by Ms. Cain, the hourly rates and total amounts billed. As the court has done in connection with all other fee requests to be paid by the SNT, the court will reduce this fee award to 20% of the amount requested in light of small balance of assets remaining in the SNT. Therefore, the court hereby approves fees payable to Ms. Cain in the amount of $4,619.87.

Finally, the request for reimbursement of costs in the amount of $436.00 is GRANTED.

15. 9:30 AM CASE NUMBER: MSN15-2146
CASE NAME: KUYKENDALL VS TINER
HEARING ON ORDER OF EXAMINATION IN RE: THIRD PERSON BRENDA LOUISE TINER
FILED BY: KUYKENDALL, MATT
TENTATIVE RULING:

Parties to appear in person.