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Attorneys for Plaintiff, the Class, and Aggrieved Employees

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO**

EUGENE CHIESA, as an individual and on
behalf of all others similarly situated,

Plaintiff,

vs.

AIRGAS USA, LLC a Delaware limited
liability company; and DOES 1 through
50, inclusive,

Defendants.

Case No.: 34-2022-00325292

(Assigned to the Hon. Lauri Damrell, Dept. 28)

**SECOND AMENDED CONSOLIDATED
CLASS AND REPRESENTATIVE ACTION
COMPLAINT FOR:**

- (1) VIOLATION OF LABOR CODE §§ 201-203;**
- (2) VIOLATION OF LABOR CODE § 226;
AND**
- (3) VIOLATION OF LABOR CODE § 2698,
*ET SEQ.***

DEMAND OVER \$25,000.00

1 Plaintiff Eugene Chiesa (“Plaintiff”) hereby submits this Second Amended Consolidated
2 Class and Representative Action Complaint (“Complaint”) against Defendant Airgas USA, LLC
3 (“Defendant”) and Does 1 through 50 (collectively, “Defendants”), as an individual and on
4 behalf of all other similarly situated current and former employees of Defendant, for damages
5 and/or penalties under the California Labor Code as follows:

6 **INTRODUCTION**

7 1. This Complaint is within the Court’s jurisdiction under California Labor Code
8 §§ 201, 202, 203, 226, 246, and 2698, *et seq.*, and the California Industrial Welfare
9 Commission’s (“IWC”) Wage Orders.

10 2. This Complaint challenges systemic illegal employment practices resulting in
11 violations of the California Labor Code against employees of Defendants.

12 3. Plaintiff is informed and believes, and based thereon alleges, that Defendants,
13 jointly and severally, have acted intentionally and with deliberate indifference and conscious
14 disregard to the rights of all employees by failing to include non-discretionary remuneration,
15 including, but not limited to, shift premiums, into the regular rate of pay for sick pay wages, and
16 failing to accurately identify the accurate rates of pay and gross/net wages earned.

17 4. Plaintiff is informed and believes, and based thereon alleges, that Defendants
18 have engaged in, among other things a system of willful violations of the California Labor Code
19 and the applicable IWC Wage Orders by creating and maintaining policies, practices and
20 customs that knowingly deny employees the above stated rights and benefits.

21 **JURISDICTION AND VENUE**

22 5. The Court has jurisdiction over the violations of the California Labor Code
23 §§ 201, 202, 203, 226, 246, and 2698, *et seq.*

24 6. Venue is proper in Sacramento County because Plaintiff worked in Defendant’s
25 Sacramento location.

26 **PARTIES**

27 7. Plaintiff was employed by Defendants as a truck driver from July 10, 2007, until
28 August 8, 2022. Plaintiff worked as an hourly non-exempt employee.

1 8. Plaintiff was and is the victim of the policies, practices, and customs of Defendant
2 complained of in this action in ways that have deprived him of the rights guaranteed by
3 California Labor Code §§ 201, 202, 203, 226, 246, and 2698, *et seq.*

4 9. Plaintiff is informed and believes, and based thereon alleges, that Airgas USA,
5 LLC is a Delaware limited liability company that supplies gases, welding equipment and
6 supplies, and safety products in the State of California, including in Sacramento County,
7 California.

8 10. Plaintiff is informed and believes, and based thereon alleges, that at all times
9 herein mentioned Does 1 through 50, are and were corporations, business entities, individuals,
10 and partnerships, licensed to do business and actually doing business in the State of California.
11 As such and based upon all the facts and circumstances incident to Defendants' business,
12 Defendants are subject to the California Labor Code.

13 11. Plaintiff does not know the true names or capacities, whether individual, partner,
14 or corporate, of the defendants sued herein as Does 1 through 50, inclusive, and for that reason,
15 said defendants are sued under such fictitious names, and Plaintiff prays for leave to amend this
16 complaint when the true names and capacities are known. Plaintiff is informed and believes and
17 based thereon alleges that each of said fictitious defendants was responsible in some way for the
18 matters alleged herein and proximately caused Plaintiff and members of the general public and
19 class to be subject to the illegal employment practices, wrongs, and injuries complained of
20 herein.

21 12. At all times herein mentioned, each defendant participated in the doing of the acts
22 hereinafter alleged to have been done by the named Defendant; and furthermore, Defendants,
23 and each of them, were the agents, servants, and employees of each of the other defendants, as
24 well as the agents of all Defendants, and at all times herein mentioned, were acting within the
25 course and scope of said agency and employment.

26 13. Plaintiff is informed and believes, and based thereon alleges, that at all times
27 material hereto, each of the Defendants named herein was the agent, employee, alter ego and/or
28 joint venturer of, or working in concert with each of the other co-Defendants and was acting

1 within the course and scope of such agency, employment, joint venture, or concerted activity. To
2 the extent said acts, conduct, and omissions were perpetrated by certain Defendants, each of the
3 remaining Defendants confirmed and ratified said acts, conduct, and omissions of the acting
4 Defendants.

5 14. At all times herein mentioned, Defendants, and each of them, were members of,
6 and engaged in, a joint venture, partnership, and common enterprise, and were acting within the
7 course and scope of, and in pursuance of, said joint venture, partnership, and common enterprise.

8 15. At all times herein mentioned, the acts and omissions of various Defendants, and
9 each of them, concurred and contributed to the various acts and omissions of each and all of the
10 other Defendants in proximately causing the injuries and damages as herein alleged. At all times
11 herein mentioned, Defendants, and each of them, ratified each and every act or omission
12 complained of herein. At all times herein mentioned, Defendants, and each of them, aided and
13 abetted the acts and omissions of each and all of the other Defendants in proximately causing the
14 damages as herein alleged.

15 **CLASS ACTION ALLEGATIONS**

16 16. **Definition:** The named individual Plaintiff seeks class certification, pursuant to
17 California Code of Civil Procedure § 382. Plaintiff proposes the following class: all non-exempt
18 employees of Defendant in the State of California who were paid sick pay wages and non-
19 discretionary remuneration, including but not limited to, shift premiums during the same
20 workweek and whose employment ended at any time between August 17, 2019, through the
21 present (the “Class”).

22 17. **Numerosity:** The members of the Class are so numerous that joinder of all
23 members would be impractical, if not impossible. The identity of the members of the Class is
24 readily ascertainable by review of Defendants’ records, including payroll records. Plaintiff is
25 informed and believes, and based thereon alleges, that Defendants failed to calculate the proper
26 rate of pay for sick pay in violation of Labor Code § 246. Defendants failed to pay employees
27 sick pay at the correct regular rate of pay that included all non-discretionary remuneration, in
28 violation of Labor Code §§ 201, 202, 203, and 246 and failed to provide accurate itemized wage

1 statements, in violation of Labor Code § 226.

2 18. **Adequacy of Representation:** The named Plaintiff is fully prepared to take all
3 necessary steps to represent fairly and adequately the interests of the Class defined above.
4 Plaintiff's attorneys are ready, willing, and able to fully and adequately represent the Class and
5 the individual Plaintiff. Plaintiff's attorneys have prosecuted and settled wage-and-hour class
6 actions in the past and currently have a number of wage-and-hour class actions pending in
7 California state and federal courts.

8 19. Defendants uniformly administered a corporate policy and practice of failing to
9 pay employees sick pay at the correct regular rate of pay that included all non-discretionary
10 remuneration, in violation of Labor Code §§ 201, 202, 203, and 246 and failing to provide
11 accurate itemized wage statements, in violation of Labor Code § 226.

12 20. **Common Question of Law and Fact:** There are predominant common questions
13 of law and fact and a community of interest amongst Plaintiff and the claims of the Class
14 concerning Defendants' policy and practice of failing to pay employees sick pay at the correct
15 regular rate of pay that included all non-discretionary remuneration and pay those wages upon
16 separation of employment, in violation of Labor Code §§ 201, 202, 203, and 246 and failing to
17 provide accurate itemized wage statements, in violation of Labor Code § 226.

18 21. **Typicality:** The claims of Plaintiff are typical of the claims of all members of the
19 Class in that Plaintiff suffered the harm alleged in this Complaint in a similar and typical manner
20 as the Class Members. As with other California employees, Plaintiff did not receive sick pay
21 wages at the correct regular rate of pay, in violation of Labor Code § 246. Rather, Defendants
22 paid Plaintiff sick pay at a rate lower than Plaintiff's regular rate of pay. Plaintiff is no longer
23 employed by Defendants. To date, Plaintiff has yet to receive all sick pay wages owed to him.
24 Thus, Defendants are liable for waiting time penalties under Labor Code § 203. Therefore,
25 Plaintiff is a member of the Class and has suffered the alleged violations of Labor Code §§ 201-
26 203 and 246. Plaintiff also received wage statements during his employment that stated the
27 incorrect rate of pay for sick pay wages for these reasons, and thus Defendants also violated
28 Labor Code § 226.

1 22. The California Labor Code section upon which Plaintiff bases these claims is
2 broadly remedial in nature. These laws and labor standards serve an important public interest in
3 establishing minimum working conditions and standards in California. These laws and labor
4 standards protect the average working employee from exploitation by employers who may seek
5 to take advantage of superior economic and bargaining power in setting onerous terms and
6 conditions of employment.

7 23. The nature of this action and the format of laws available to Plaintiff and
8 members of the Class identified herein make the class action format a particularly efficient and
9 appropriate procedure to redress the wrongs alleged herein. If each employee were required to
10 file an individual lawsuit, the corporate Defendants would necessarily gain an unconscionable
11 advantage since it would be able to exploit and overwhelm the limited resources of each
12 individual plaintiff with their vastly superior financial and legal resources. Requiring each Class
13 Member to pursue an individual remedy would also discourage the assertion of lawful claims by
14 employees who would be disinclined to file an action against their former and/or current
15 employer for real and justifiable fear of retaliation and permanent damage to their careers at
16 subsequent employment.

17 24. The prosecution of separate actions by the individual Class Members, even if
18 possible, would create a substantial risk of (a) inconsistent or varying adjudications with respect
19 to individual Class Members against the Defendants and which would establish potentially
20 incompatible standards of conduct for the Defendants, and/or (b) adjudications with respect to
21 individual Class Members which would, as a practical matter, be dispositive of the interest of the
22 other Class Members not parties to the adjudications or which would substantially impair or
23 impede the ability of the Class Members to protect their interests. Further, the claims of the
24 individual members of the Class are not sufficiently large to warrant vigorous individual
25 prosecution considering all of the concomitant costs and expenses.

26 25. Such a pattern, practice, and uniform administration of corporate policy regarding
27 illegal payroll practices described herein is unlawful and creates an entitlement to recovery by
28 Plaintiff and the Class identified herein, in a civil action, for applicable penalties, reasonable

attorneys' fees, and costs of suit according to the mandate of California Labor Code § 218.5 and Code of Civil Procedure § 1021.5.

26. Proof of a common business practice or factual pattern, which the named Plaintiff experienced and is representative of, will establish the right of each of the members of the Plaintiff Class to recovery on the causes of action alleged herein.

FIRST CAUSE OF ACTION

VIOLATION OF LABOR CODE §§ 201-203

(BY PLAINTIFF AND THE CLASS AGAINST ALL DEFENDANTS)

27. Plaintiff re-alleges and incorporates by reference all paragraphs above, as though fully set forth herein.

28. Labor Code § 203 provides that if an employer willfully fails to pay wages owed in accordance with Labor Code §§ 201 and 202, then the wages of the employee shall continue as a penalty from the due date, and at the same rate until paid, but the wages shall not continue for more than thirty (30) days.

29. Labor Code § 201 provides if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately.

30. Labor Code § 202 provides that an employee is entitled to receive all unpaid wages no later than 72 hours after an employee quits his or her employment, unless the employee has given seventy-two (72) hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.

31. Labor Code § 246 provides that an employee is entitled to receive sick time pay. The employer shall calculate paid sick leave by using one of two calculations: (1) "Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek;" or (2) "Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment."

32. Whenever Defendants paid Plaintiff and the Class sick pay wages pursuant to

1 California Labor Code § 246, Defendants did so at the incorrect rate of pay. Defendants paid
2 Plaintiff and the Class at a lower rate or pay than the regular rate of pay, as required by Labor
3 Code § 246. This resulted in the employees being underpaid for sick time, and in violation of
4 California Labor Code §§ 201, 202, and 203, and other derivative Labor Code violations,
5 because Defendants did not pay, or timely pay, Plaintiff and the Class Members all owing and
6 unpaid wages for work performed by them during their employment and at the end of their
7 employment.

8 33. Defendants willfully failed to pay Plaintiff and the Class all their wages due, as
9 alleged hereinabove and hereinafter, upon the termination of their employment within the times
10 prescribed by Labor Code §§ 201 and 202 and are therefore subject to a waiting time penalty.
11 Plaintiff and the Class are entitled to recover from Defendants the statutory penalty for each day
12 they were not paid at their regular hourly rate of pay, up to a thirty (30) day maximum pursuant
13 to California Labor Code § 203.

14 **SECOND CAUSE OF ACTION**

15 **VIOLATION OF LABOR CODE § 226**

16 **(BY PLAINTIFF AND THE CLASS AGAINST ALL DEFENDANTS)**

17 34. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as
18 though fully set forth herein.

19 35. Defendant failed in its affirmative obligation to provide accurate itemized wage
20 statements, in violation of Labor Code § 226.

21 36. Plaintiff and the Class were paid hourly. As such, the wage statements should
22 have reflected all applicable hourly rates in effect during the pay period and gross and net wages
23 earned. However, the wage statements provided to Plaintiff and the Class failed to identify such
24 information.

25 37. Plaintiff and Class Members earned non-discretionary remuneration. During
26 workweeks when the employees earned non-discretionary pay and sick pay wages, the sick pay
27 wages were paid at the base hourly rate of pay. As such, the corresponding wage statements
28 issued to Plaintiff and the Class identified incorrect hourly rates of pay and wages earned during

1 the pay period. In addition, the wage statements issued to Plaintiff and Class Members failed to
2 identify the correct gross and net wages earned and accurate hourly rates of pay.

3 38. Such a pattern, practice, and uniform administration of corporate policy as
4 described herein is unlawful and creates an entitlement to recovery by Plaintiff and the Class, in
5 a civil action, for all damages or penalties pursuant to Labor Code § 226, including interest
6 thereon, attorneys' fees, and costs of suit according to the mandate of California Labor Code §
7 226.

8 **THIRD CAUSE OF ACTION**

9 **VIOLATION OF LABOR CODE § 2698, *ET SEQ.***

10 **(BY PLAINTIFF, ON BEHALF OF THE STATE OF CALIFORNIA AND AGGRIEVED**
11 **EMPLOYEES, AGAINST ALL DEFENDANTS)**

12 39. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as
13 though fully set forth herein.

14 40. Plaintiff brings this cause of action as a proxy for the State of California and in
15 this capacity, seeks penalties on behalf of all Aggrieved Employees from August 15, 2021,
16 through the present, for Defendant's violations of Labor Code §§ 201-203, 226, and 246, and the
17 applicable IWC Wage Order, arising from Defendant's policy and practice of: (a) failing to pay
18 sick pay at the regular rate of pay; (b) failing to provide accurate, itemized wage statements.

19 41. Plaintiff and Aggrieved Employees earned sick pay and non-discretionary
20 incentive wages, including shift premiums, during the same workweek. However, the non-
21 discretionary incentive wages were not factored into the regular rate of pay for purposes of
22 paying sick pay, as required by Labor Code § 246. As a matter of policy and practice, Defendant
23 paid sick pay at a rate lower than the regular rate of pay. This resulted in the underpayment of
24 sick pay wages to Plaintiff and Aggrieved Employees and resulted in derivative violations of
25 Labor Code §§ 201, 202, and 203 because Defendant did not pay, or timely pay, Plaintiff and
26 Aggrieved Employees all owing and unpaid wages for work performed by them during their
27 employment and at the end of their employment.

28 42. As a result of the sick pay underpayment, the wage statements issued to Plaintiff

1 and Aggrieved Employees failed to identify the correct gross wages earned, net wages earned,
2 and accurate rates of pay, in violation of Labor Code § 226(a).

3 43. On or about August 15, 2022, Plaintiff sent written notice to the California Labor
4 & Workforce Development Agency (“LWDA”) of Defendant’s violations of Labor Code §§ 201-
5 203, 226, and 246, and the applicable IWC Wage Order, pursuant to Labor Code § 2698, *et seq.*,
6 the Private Attorneys General Act (“PAGA”). To date, the LWDA has not responded to
7 Plaintiff’s written notice.

8 44. As such, pursuant to Labor Code § 2699(a), Plaintiff seeks recovery of any and all
9 applicable civil penalties for Defendant’s violation of Labor Code §§ 201-203, 226, and 246, and
10 the applicable IWC Wage Order for the time period described above, on behalf of himself and
11 other Aggrieved Employees.

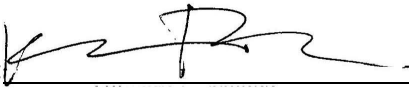
12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiff prays for judgment for himself and all others on whose behalf
14 this suit is brought against Defendants, jointly and severally, as follows:

- 15 1. For an order certifying the proposed Class;
 - 16 2. For an order appointing Plaintiff as the representative of the Class as described
17 herein;
 - 18 3. For an order appointing Counsel for Plaintiff as Class counsel;
 - 19 4. Upon the First Cause of Action, for penalties pursuant to California Labor Code
20 §§ 201-203, and for costs and attorneys’ fees;
 - 21 5. Upon the Second Cause of Action, for penalties pursuant to California Labor
22 Code § 226, and for costs and attorneys’ fees;
 - 23 6. On the Third Cause of Action, for civil penalties and/or damages pursuant to
24 California Labor Code §§ 226.3 and 2698, *et seq.*, and for interest, costs and attorneys’ fees;
 - 25 7. On all causes of action for attorneys’ fees and costs as provided by California
26 Labor Code §§ 218.5, 226.3, and 2698, *et seq.*, and Code of Civil Procedure § 1021.5; and
 - 27 8. For such other and further relief the Court may deem just and proper.
- 28

1 DATED: September 19, 2023

DIVERSITY LAW GROUP, P.C.

2
3 By: 

Larry W. Lee

4 Max W. Gavron

Mai Tulyathan

5 Attorneys for Plaintiff, the Class, and Aggrieved
6 Employees

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

Gordon D. Schaber Superior Court, Department 28

JUDICIAL OFFICER: HONORABLE LAURI A. DAMRELL

Courtroom Clerk: V. Aleman

CSR: NONE

Court Attendant: C. Carrillo

34-2022-00325292-CU-OE-GDS

September 1, 2023

9:00 AM

**Eugene Chiesa, as an individual and on behalf of all
others similarly situated vs. Airgas USA, LLC a
Delaware limited liability company**

MINUTES

APPEARANCES:

No Appearances

**NATURE OF PROCEEDINGS: Hearing on Motion to Strike; Hearing on Demurrer; Case
Management Conference - Complex**

There being no request for oral argument the Court affirmed the tentative ruling.

TENTATIVE RULING:

Defendant Airgas USA, LLC (“Defendant”) demurs to Plaintiff Eugene Chiesa’s (“Plaintiff”) class action complaint and concurrently moves to strike portions of Plaintiff’s complaint. In the interests of judicial economy and efficiency, the Court combines its rulings on these motions into this single Tentative Ruling.

Moving counsel’s Notices of Motion do not provide notice of the Court’s tentative ruling system, as required by Local Rule 1.06. Moving counsel is directed to contact opposing counsel and advise them of Local Rule 1.06, the Court’s tentative ruling procedure, and the manner to request a hearing.

MEET AND CONFER

Code of Civil Procedure (“CCP”) section 430.41(a) provides, “[b]efore filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer. If an amended complaint, cross-complaint, or answer is filed, the responding party shall meet and confer again with the party who filed the amended pleading before filing a demurrer to the amended pleading.”

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Moving counsel declares that the Parties' counsel met and conferred regarding the basis for Defendant's demurrer and motion to strike. (Goldwater Decl., ¶ 2.) During this meeting and subsequent email exchanges, Plaintiff declined to amend his complaint, necessitating the instant filings. (*Ibid.*)

JUDICIAL NOTICE

Plaintiff's Request for Judicial Notice of certain Superior Court orders is GRANTED but the Court's notice is limited to existence of the order. While the existence of Superior Court decisions may be judicially noticed (Evid. Code, § 452(d)), their contents are not appropriate to consider as "[t]rial courts make no binding precedents." (*Fenske v. Bd. of Admin.* (1980) 103 Cal.App.3d 590, 596; *Santa Ana Hosp. Med. Ctr. v. Belshe* (1997) 56 Cal.App.4th 819, 830-31; *Bolanos v. Superior Court* (2008) 169 Cal.App.4th 744, 761.)

BACKGROUND

This is a class and representative Private Attorneys General Act ("PAGA") action. On May 23, 2023, Plaintiff filed his First Amended Consolidated Class and Representative Action Complaint ("FAC") alleging the following causes of action: (1) violation of Labor Code §§ 201-204, (2) violation of Labor Code § 226, and (3) violation of Labor Code § 2698, et seq. Specifically, Plaintiff alleges that Defendant failed to pay non-exempt employees sick pay at the correct regular rate of pay, in violation of Labor Code §§ 201-204 and 246. (FAC at ¶¶ 21, 27-34.) More specifically, Plaintiff alleges that he and other non-exempt employees were paid sick pay based on hourly rates that were lower than their regular hourly rates of pay for regular hours worked. (*Id.*) As a result of said policy and practice, Plaintiff alleges that Plaintiff and other employees were effectively underpaid sick pay wages, and Defendant failed to timely pay all wages owed, in violation of Labor Code §§ 201-204. (*Id.*) In addition, Plaintiff brings derivative wage statement claims. (*Id.* at ¶¶ 35-39.)

Pursuant to Code of Civil Procedure ("CCP") section 430, Defendant demurs to the First and Second Causes of Action of Plaintiff's FAC on the grounds that they do not state facts sufficient to constitute a cause of action, arguing that statutorily mandated sick leave is not "wages" and, therefore, an alleged failure to pay sick leave at the regular rate of pay cannot support any of Plaintiff's claims. (Demurrer Notice.) Similarly, pursuant to CCP section 435, Defendant moves to strike certain portions of the FAC as legally "invalid because there is no binding precedent holding sick leave is wages and therefore any alleged violation of Sections 203 or 226 premised on a failure to pay sick pay cannot be willful or knowing and intentional and an alleged violation of Labor Code [section] 204, which is invalid because that code provision governs only the timing of wage payments, not an underpayment of the kind Plaintiff is alleging here." (Motion to Strike Notice.)

LEGAL STANDARD

Demurrer

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A defendant may demur to a complaint where the complaint or any cause of action therein "does not state facts sufficient to constitute a cause of action." (CCP § 430.10(e).) A demurrer may only challenge defects on the face of the complaint or from matters that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994.) Consideration of extrinsic facts asserted in the memorandum supporting the demurrer is improper. (*Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.) However, the face of the complaint includes facts contained in exhibits attached to the complaint. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

A demurrer may be sustained only if the complaint lacks any sufficient allegations to entitle the plaintiff to relief. (*Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778.) "Less particularity is required in pleading matters of which the defendant has superior knowledge; e.g., allegations as to D's knowledge or notice or intent." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2022) ¶ 6:121.5, citing *Foster v. Sexton*, 61 Cal.App.5th 998, 1028.) The complaint will be upheld "so long as it gives notice of the issues sufficient to enable preparation of a defense." (*Doe v. City of Los Angeles* ("Doe") (2007) 42 Cal.4th 531, 549-550.) "Plaintiff need only plead facts showing that he may be entitled to some relief..., we are not concerned with plaintiff's possible inability or difficulty in proving the allegations of the complaint." (*Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 696-97.) "[Courts] are required to construe the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded." (*Picton v. Anderson Union High School Dist.* (1996) 50 Cal.App.4th 726, 733, citation omitted.) A demurrer admits the truth of all material facts properly pled and the sole issue raised by a general demurrer is whether the facts pled state a valid cause of action – not whether they are true. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

Applicable substantive law does not change merely because the case is a class action. (*Washington Mut. Bank, FA v. Superior Court* (2001) 24 Cal.4th 906, 914.) Indeed, it is "settled that courts are authorized to weed out legally meritless class action suits prior to certification by demurrer or pretrial motion." (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 211 (citing *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 440.)

Motion to Strike

A party can move to strike any portions of a complaint that are legally deficient or contrary to the law. (Code Civ. Proc. §§ 435, 436.) A motion to strike is proper when a portion of a cause of action has a clear substantive defect, such as a violation of the applicable statute of limitations, seeking punitive damages without basis, when the face of the complaint fails to state facts showing a primary right of the plaintiff and primary duty of, or wrong committed by, the defendant. (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1683.) Similarly, a motion to strike is appropriate where the complaint alleges a "purported claim of right which is legally invalid" (*Id.*, at p. 1682-1683.) However, a motion to strike may not be used as a procedural line item veto for the civil defendant. (*Id.*, at p. 1683.) The use of the motion to strike should be cautious and sparing.

Motions to strike are disfavored. Courts considering such motions must presume the allegations

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

contained therein are true and must consider those allegations in context. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) "Matter that is essential to a cause of action should not be struck and it is error to do so." (*Quiroz v. Seventh Avenue Ctr.* (2006) 140 Cal.App.4th 1256, 1281.)

ANALYSIS

Demurrer

Defendant argues that Plaintiff's claims, which are premised on the underpayment of "wages," must fail because sick leave is not "wages." (Demurrer, p. 5:11-12.) Defendant argues that Labor Code section 200 defines the term "wages" as "all amounts for labor performed," with labor defined as "labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment." (*Id.*, p. 7:24-28, citing Labor Code § 200.) Defendant further argues that sick leave mandated by Labor Code section 246 is not an amount for labor performed, but instead is "an entitlement related to time employees do not perform labor because they are ill." (*Id.*, p. 8:1-3.)

Beginning with the statutory language, the Court is not persuaded that wages is as narrowly defined as Defendant suggests or that the language used evidences the Legislature's intent not to treat sick leave as wages in all circumstances. As the Court in *Naranjo v. Spectrum Sec. Servs., Inc.* (2022) 13 Cal.5th 93, 114 ("*Naranjo*") noted, "the Legislature has frequently used the words 'pay' or 'compensation' in the Labor Code as synonyms for 'wages.'" (*Naranjo, supra*, 13 Cal.5th at p. 114, citing *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1104, fn. 6 [listing examples] ("*Murphy*") and *Ferra v. Loews Hollywood Hotel, LLC, supra*, 11 Cal.5th 858, 873-874 ["pay" and "compensation" used "interchangeably" in § 226.7].) Labor Code section 245.5, subdivision (e) defines "Paid sick days" as "time that is compensated at the same wages as the employee normally earns during regular work hours." (Labor Code § 245.5(e).) While Defendant is correct that Labor Code section 246 expressly provides that sick leave does not vest and is not paid upon termination (Labor Code § 246(g)), section 246 entitles an employee to their regular rate of pay for sick leave taken and states that an "employer shall provide payment for sick leave taken by an employee no later than the payday for the next regular payroll period after the sick leave was taken" (Labor Code § 246(l)(1) and (n)).

While there is no binding authority on this issue, several California courts have addressed it in dicta and provide additional guidance. Plaintiff cites contrary discussion in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 ("*Murphy*"), which held that premium pay for noncompliant meal and rest periods does count as "wages" under the Labor Code:

The Labor Code defines "wages" as "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (§ 200, subd. (a).) ***Courts have recognized that "wages" also include those benefits to which an employee is entitled as a part of his or her***

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compensation, including money, room, board, clothing, vacation pay, and sick pay. A “penalty,” on the other hand, is that “which an individual is allowed to recover against a wrong-doer, as a satisfaction for the wrong or injury suffered, and without reference to the actual damage sustained” ... Section 226.7, subdivision (b) requires that employees be paid “one additional hour of pay” for each workday that they are required to work through a meal or rest period. “Pay” is defined as “money [given] in return for goods or services rendered.” (American Heritage Dict. (4th ed. 2000) p. 1291.) This definition is in keeping with the Labor Code definition of “wages.”

(*Murphy, supra*, 40 Cal.4th 1094, 1103-1104, emphasis added, citations omitted.) This statement in *Murphy* is dictum, but dictum from the Supreme Court is still persuasive. The California Supreme Court reiterated this position in *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610 (“*Schachter*”): “A wage is defined as ‘all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.’ [Citation.] We construe the term ‘wages’ broadly to ‘include not only the periodic monetary earnings of the employee but also the other benefits to which he is entitled as a part of his compensation.’ [Citation.] ‘Courts have recognized that ‘wages’ also include those benefits to which an employee is entitled as a part of his or her compensation, including money, room, board, clothing, vacation pay, and sick pay. (E.g., *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 780 [183 Cal. Rptr. 846, 647 P.2d 122]; *Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1091 [64 Cal. Rptr. 2d 457].)’ [Citation.]” (*Schachter, supra*, 47 Cal. 4th at p. 618, citations omitted.) These expansive definitions are consistent with the Supreme Court’s instruction that “statutes governing conditions of employment are to be construed broadly in favor of protecting employees.” (*Murphy, supra*, 40 Cal.4th at p. 1103.)

The Court also notes that federal courts in California have held that paid sick leave is “wages” under Labor Code section 200. (See *Flores v. Dart Container Corp.* (E.D.Cal. May 27, 2020) 2020 U.S.Dist.LEXIS 93524, at *5-7 [dispute involving accurate payment of sick leave and finding that § 246 entitles plaintiff to a “regular rate of pay” for sick leave taken which constitutes wages]; *Powell v. Walmart Inc.* (S.D.Cal. Feb. 2, 2021) 2021 U.S.Dist.LEXIS 20777, at *6-8 [citing Labor Code § 246 to calculate sick pay; “Willful failure to pay wages of an employee who is discharged or quits can result in a penalty and gives rise to a private cause of action. Cal. Lab. Code § 203.”].) While not binding, the Court finds these cases persuasive.

Defendant, on the other hand, maintains that the California Supreme Court’s decision in *Naranjo* “reinforces that only payments that compensate for work performed are ‘wages.’” (Demurrer, p. 8:7-9.) Defendant argues that unlike meal and rest break premiums, which generally compensate for work performed when the employee should have been relieved of duty, sick leave is a statutory entitlement that compensates for time when an employee is refraining from performing labor. (*Id.*, p. 8:12-18.) Defendant also cites *McPherson v. EF Intercultural Foundation, Inc.* (2020) 47 Cal.App.5th 243 (“*McPherson*”), which addresses the payment of unused vacation time “as wages” under Labor Code section 227.3. The decision in *McPherson* explained that in

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Suastez, the California Supreme Court held that that “vacation pay ‘is, in effect, additional wages for services performed.’” (*McPherson*, *supra*, 47 Cal.App.5th at pp. 259-260.) Defendant specifically emphasizes that the court’s decision in *McPherson* distinguished sick leave from vacation leave:

[P]aid sick leave is conditional; paid vacation is not. Sick leave does not vest until the qualifying event—the employee’s illness—occurs. An employee’s right to paid time off, in contrast, has no preconditions; it vests as the employee labors. (See *Paton v. Advanced Micro Devices, Inc.* (2011) 197 Cal.App.4th 1505, 1519 [129 Cal. Rptr. 3d 784] [unlike paid vacation, other types of paid leave, such as sick leave, bereavement leave, or paid holidays vest upon the occurrence of an event or condition or are limited to use for a specific purpose].) Moreover, ***because paid sick leave is not considered a form of “wages,” employers are not required to pay employees their unused sick leave on termination—accrued or not.*** (§ 246, subd. (g)(1).)

(*McPherson*, *supra*, 47 Cal.App.5th at p. 262, fn. 15, emphasis added.)

The Court does not find Defendant’s argument distinguishing paid sick leave from vacation time persuasive. Defendant is correct that vacation pay is treated as wages, with the Legislature stating that “whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages.” (Labor Code § 227.3.) Defendant is also correct that Labor Code section 246 expressly provides that sick leave does not vest and is not paid upon termination. (Labor Code § 246(g).) If Plaintiff’s claims were based on a failure to pay accrued, unused sick leave, the Court might agree with Defendant. However, that is not the issue here. Plaintiff plainly alleges that Defendant failed to properly pay accrued, ***used*** sick leave. That distinction matters. When an employee uses accrued sick leave, “[a]n employer shall provide payment for sick leave taken by an employee no later than the payday for the next regular payroll period after the sick leave was taken.” (Labor Code § 246(n).) Because of this critical distinction, Defendant’s reliance on *McPherson* is misplaced. Consistent with the principles outlined in *Suastez*, *Murphy*, and *Schachter*, the Court is persuaded that this payment is a benefit to which an employee is entitled as part of their compensation and therefore payment for used sick leave constitutes wages. (See *Schachter*, *supra*, 47 Cal. 4th at p. 618.)

Finally, Defendant argues that, even if sick leave constitutes wages, Plaintiff’s Second Cause of Action must fail because Labor Code section 226 requires a “knowing and intentional” violation, and a violation cannot be knowing and intentional where the penalties are based on an unsettled issue of law. (Demurrer, pp. 10:19-11:14.) This argument lacks merit. As discussed above, several authorities support the conclusion that accrued, used sick leave (as opposed to accrued, unused sick leave) constitutes wages.

Defendant’s citation to *Magadia v. Wal-Mart Associates, Inc.* (N.D. Cal 2019) 384 F.Supp.3d 1058, 1083 (which was vacated, reversed in part and remanded by *Magadia v. Wal-Mart Assocs.*

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(9th Cir. Cal., May 28, 2021) 999 F.3d 668, 2021 U.S. App. LEXIS 16070), is unavailing for at least two reasons. First, this decision arose from a bench trial on the merits, not a pleading challenge. Second, *Magadia* concerned an alleged violation of section 226 based on “statements of final pay,” not wage statements that plainly must contain accurate information pursuant to section 226(a). Similarly, *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 8, cited by Defendant on reply, arose in the context of a trial de novo from the Labor Commissioner’s order. (Reply MTS, p. 22-25.) Defendant has failed to demonstrate that the issue presented here was so unsettled that it provides a good faith defense to Plaintiff’s allegations as a matter of law at this early stage. Even an objectively reasonable defense will not result in a finding of good faith where other evidence suggests bad faith. (See *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1204 [“[s]o long as no other evidence suggests the employer acted in bad faith, presentation of a good faith defense, based in law or fact, will negate a finding of willfulness”]; *Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 868 [“A good faith dispute can exist even if the employer’s proffered defense is ‘ultimately unsuccessful,’ but not if the defense is also ‘unsupported by any evidence, [is] unreasonable, or [is] presented in bad faith.’ (Cal. Code Regs., tit. 8, § 13520, subd. (a).)”]; *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, 1332 [“the existence of a bona fide legal dispute will not necessarily result in a finding of good faith when other evidence indicates the defendant knew it was not paying all wages due”].) However, nothing in the Court’s ruling today would preclude Defendant from appropriately raising this factual and legal issue later, such as at the summary judgment stage or trial.

"[Courts] are required to construe the complaint liberally to determine whether a cause of action has been stated, given the assumed truth of the facts pleaded." (*Picton v. Anderson Union High School Dist.* (1996) 50 Cal. App. 4th 726, 733.) “Plaintiff need only plead facts showing that he may be entitled to some relief..., we are not concerned with plaintiff’s possible inability or difficulty in proving the allegations of the complaint.” (*Highlanders, Inc. v. Olsan* (1978) 77 Cal.App.3d 690, 696-97.) Plaintiff alleges that because Defendant underpaid sick wages, the wage statements issued failed to identify the accurate hourly rates of pay, gross wages earned, and net wages earned. (FAC, ¶¶ 36-38.) And Plaintiff alleges that Defendant engaged in a “system of willful violations of the California Labor Code [...] by creating and maintaining policies, practices and customs that knowingly deny employees the above stated rights and benefits.” (*Id.*, ¶ 4.) These allegations are sufficient at the pleading stage.

Having concluded that payment for used sick leave constitutes wages, the Court finds that Plaintiff has stated facts sufficient to allege a cause of action for underpayment of sick pay under a cognizable legal theory in his First Cause of Action and a derivative cause of action for penalties in his Second Cause of Action. Accordingly, Defendant’s demurrer to Plaintiff’s First and Second Causes of Action are **OVERRULED**.

Motion to Strike

Defendant argues that Plaintiff’s FAC contains multiple improper allegations that should be stricken, including references to Labor Code sections 203, 204, and 226 because underpaid sick leave does not constitute wages, the law is unsettled and therefore any alleged violation with regard to underpaid sick leave cannot be knowing and intentional, and Plaintiff’s claim does not

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concern the timely payment of wages. To the extent Defendant's motion to strike is premised on the arguments addressed above that underpaid sick leave does not constitute wages and the alleged violations cannot be knowing and intentional, Defendant's motion to strike is DENIED.

Regarding Labor Code section 204, Defendant argues that pursuant to *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889 ("*See's Candy*"), section 204 regulates the timing of wage payments, not shortfalls in such payments. (*See's Candy, supra*, 210 Cal.App.4th at 904-905.) Accordingly, Plaintiff cannot plead a viable section 204 claim because his allegations rely exclusively on the fact Plaintiff was allegedly underpaid sick time. (MTS, p. 9:22-27; Reply, p. 6:16-26.) Plaintiff did not refute this in opposition or argue that his allegations relate to the frequency of payments. Therefore, the Court GRANTS Defendant's motion to strike the references to section 204, with leave to amend.

The Court declines to address Plaintiff's arguments regarding the interpretation of Labor Code sections 210, 218, and 233 (see Opp. MTS, 9:3-10:21), as those provisions are not referenced in Plaintiff's FAC.

Disposition

For the reasons stated above, Defendant's Demurrer to Plaintiff's First and Second Causes of Action is OVERRULED. Defendant's Motion to Strike is GRANTED in part and DENIED in part, with leave to amend.

Plaintiff may file a Second Amended Complaint ("SAC") no later than September 22, 2023. The response shall be filed and served within 30 days thereafter, 35 days if the SAC is served by mail. (Although not required by any rule of court, Plaintiff is required to attach a copy of the instant minute order to the SAC to facilitate filing of the pleading.)

This minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or other notice is required.

To request oral argument on this matter, you must call Department 28 at (916) 874-6695 by 4:00 p.m. the court day before this hearing and notify the opposing party/counsel of oral argument. If no call is made, the tentative ruling becomes the order of the court. (Local Rule 1.06.)

Parties requesting services of a court reporter will need to arrange for private court reporter services at their own expense, pursuant to Government Code §68086 and California Rules of Court, Rule 2.956. Requirements for requesting a court reporter are listed in the Policy for Official Reporter Pro Tempore available on the Sacramento Superior Court website at <https://www.saccourt.ca.gov/court-reporters/docs/crtrp-6a.pdf>. Parties may contact Court-Approved Official Reporters Pro Tempore by utilizing the list of Court Approved Official Reporters Pro Tempore available at <https://www.saccourt.ca.gov/court-reporters/docs/crtrp-13.Pdf>

If you are not using a reporter from the Court's Approved Official Reporter Pro Tempore list, a Stipulation and Appointment of Official Reporter Pro Tempore (CV/E-206) must be signed by

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each party, the private court reporter, and the Judge. **The signed form must be filed with the clerk prior to the hearing.**

If a litigant has been granted a fee waiver and requests a court reporter, the party must submit a Request for Court Reporter by a Party with a Fee Waiver (CV/E-211). The form must be filed with the clerk at least 10 days prior to the hearing or at the time the hearing is scheduled if less than 10 days away. Once approved, the clerk will forward the form to the Court Reporter's Office and an official reporter will be provided.

If oral argument is requested, the Parties are encouraged to appear via Zoom with the links below:

To join by Zoom link - <https://saccourt-ca-gov.zoomgov.com/my/sscdept28>

To join by phone dial (833) 568-8864 ID 16039062174

Counsel for Defendant is directed to notice all parties of this order.

Please note that the Complex Civil Case Department now provides information to assist you in managing your complex case on the Court website at

<https://www.saccourt.ca.gov/civil/complex-civil-cases.aspx>. The Court strongly encourages parties to review this website regularly to stay abreast of the most recent complex civil case procedures. Please refer to the website before directly contacting the Court Clerk for information.

TENTATIVE RULING:

The Court has read and considered the Joint Case Management Statement filed by the parties and now issues the following tentative ruling: NO APPEARANCE REQUIRED. The Court continues the CMC to give the parties the opportunity to meet and confer regarding next steps in the litigation in light of the Court's ruling on the Motion to Strike and the Demurrer.

On the Court's own motion, the Case Management Conference - Complex scheduled for 09/01/2023 is continued to 10/19/2023 at 01:30 PM in Department 28 at Gordon D. Schaber Superior Court.

The parties shall file and email to the department a Joint Case Management Statement no later than 15 calendar days prior to the next CMC.

To request oral argument on this matter, you must call Department 28 at (916) 874-6695 by 4:00 p.m., the court day before this hearing and notification of oral argument must be made to the opposing party/counsel. If no call is made, the tentative ruling becomes the order of the court. (Local Rule 1.06.) Parties requesting services of a court reporter will need to arrange for private court reporter services at their own expense, pursuant to Government code §68086 and California Rules of Court, Rule 2.956.

Requirements for requesting a court reporter are listed in the *Policy for Official Reporter Pro*

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Tempore available on the Sacramento Superior Court website at <https://www.saccourt.ca.gov/court-reporters/docs/crtrp-6a.pdf>. Parties may contact Court-Approved Official Reporters Pro Tempore by utilizing the list of Court Approved Official Reporters Pro Tempore available at <https://www.saccourt.ca.gov/court-reporters/docs/crtrp-13.Pdf>

A **Stipulation and Appointment of Official Reporter Pro Tempore** (CV/E-206) is required to be signed by each party, the private court reporter, and the Judge prior to the hearing, if not using a reporter from the Court's Approved Official Reporter Pro Tempore list, Once the form is signed it must be filed with the clerk.

If a litigant has been granted a fee waiver and requests a court reporter, the party must submit a **Request for Court Reporter by a Party with a Fee Waiver** (CV/E-211) and it must be filed with the clerk at least 10 days prior to the hearing or at the time the proceeding is scheduled if less than 10 days away. Once approved, the clerk will be forward the form to the Court Reporter's Office and an official reporter will be provided.

Please check your tentative ruling prior to the next Court date at www.saccourt.ca.gov prior to the above referenced hearing date.

Ιφ οραλ αργυμεντ ισ ρεθυεστεδ, της παρτιεσ αρε ενχουραγεδ το αττενδ πια Ζοομ ωιτη της λινκσ βελωω:

To join by Zoom link - <https://saccourt-ca-gov.zoomgov.com/my/sscdept28>

To join by phone dial (833) 568-8864 ID 16039062174

Please note that the Complex Civil Case Department now provides information to assist you in managing your complex case on the Court website at <https://www.saccourt.ca.gov/civil/complex-civil-cases.aspx>. The Court strongly encourages parties to review this website regularly to stay abreast of the most recent complex civil case procedures. Please refer to the website before directly contacting the Court Clerk for information.

/s/ V. Aleman

V. Aleman, Deputy Clerk

By:

Minutes of: 09/01/2023

Entered on: 09/05/2023

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PROOF OF SERVICE

(Code of Civil Procedure Sections 1013a, 2015.5)

STATE OF CALIFORNIA]
]ss.
COUNTY OF LOS ANGELES]

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite 1250, Los Angeles, California 90071.

On September 19, 2023, I served the following document(s) described as: **SECOND AMENDED CONSOLIDATED CLASS AND REPRESENTATIVE ACTION COMPLAINT** on the interested parties in this action as follows:

Cheryl D. Orr Caroline L. Guensberg Marden, Kristin Lauro, Trena Faegre Drinker Biddle & Reath LLP Four Embarcadero Center, 27 th Floor San Francisco, California 94111	VIA ELECTRONIC MAIL <i>Attorneys for Defendant Airgas USA, LLC</i> Cheryl.orr@faegredrinker.com Caroline.guensberg@faegredrinker.com kristin.marden@faegredrinker.com trena.lauro@faegredrinker.com
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 X BY ELECTRONIC MAIL: by personally sending a true and correct copy of the above-described document(s) to the party(ies) listed above or on the attached mailing list from the e-mail server diversitylaw.com, to the electronic transmission address of the recipient(s) indicated above or on the attached mailing list. I certify that said electronic transmission was completed and that all pages were received by the party(ies) identified herein or on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 19, 2023, at Los Angeles, California.



Erika Mejia