PROPOSED TENTATIVE

On April 20, 2021, plaintiff Aspen Cruz-Bocanegra (plaintiff) filed a first amended class action complaint against defendants Northstar Senior Living , Inc., and Fountain Square of Lompoc, LLC (collectively, defendants), in Case No. 21CV01369, alleging ten (10) causes of action, as follows: 1) violations of Labor Code[1] sections 510 and 1198 [unpaid overtime]; 2) violations of sections 226.7, subdivision (a) and 512, subdivision (a) [unpaid meal period premiums]; 3) violations of section 226.7 [rest period premiums]; 4) violations of sections 1194, 1197, and 1197.1 [unpaid minimum wages]; 5) violations of sections 201 and 202 [final wages not timely paid]; 6) violations of section 204 [wages not timely paid during employment]; 7) violations of section 226, subdivision (a) [noncompliant wage statements]; 8) violations of section 1174, subdivision (d) [failure to keep requisite payroll records]; 9) violations of section 2800 and 2802 [unreimbursed business expenses]; and 10) violations of California Business and Professions Code section 17200, et seq. [UCL violation].) Defendants filed a joint answer on June 21, 2021.

In a separate complaint (Case No. 21CV02046) filed on May 25, 2021, also against defendants, plaintiff advanced civil penalties under the Private Attorneys General Act (section 2698, et seq.) (the PAGA), based on the same violations alleged in Case No. 21CV01369, above. Defendants filed a joint answer on October 20, 2021.

On May 4, 2022, the court signed a joint stipulation from all parties formally consolidating the cases, although plaintiff has not filed a consolidated complaint.

On calendar are defendants' joint summary judgment/adjudication motion as to the first nine causes of action in Case No. 21CV01369, omitting any challenge to the tenth cause of action for a UCL violation. The court will assume this was intentional, as the UCL cause of action appears wholly derivative of the nine causes of action advanced, and if the summary judgment/adjudication is appropriate to the nine it would appropriate to the UCL. Defendants have also filed a summary judgment/adjudication motion as to the PAGA claims (former Case No. 21CV01369). Plaintiff has filed opposition,[2] and defendants have filed a reply. All briefing has been reviewed.

Defendants' arguments are straightforward. They claim each cause of action fails because the undisputed evidence shows 1) plaintiff was paid overtime for all hours recorded (first cause of action); 2) plaintiff admits she received all appropriate meal periods, and thus premiums are not required (second cause of action); 3) plaintiff's rest break cause of action "fails because she never disclosed an inability to take breaks" (third cause of action); 4) plaintiff "admits she was paid the minimum wage for all hours recorded and she did not report off-the clock work" (fourth cause of action); 5) plaintiff received her final paycheck on the date of her termination

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[1] All further statutory references are to the Labor Code unless otherwise indicated.

[2] There are seven (7) pending discovery motions before court. At no point in opposition, however, does plaintiff rely on Code of Civil Procedure section 437c, subdivision (h), which provides that if it appears facts "essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just . . . ." The court therefore does not address this provision's application to the present situation.

(undermining the fifth cause of action); 6) undisputed evidence shows plaintiff was paid in accordance with the statute during her employment (sixth cause of action); 7) plaintiff's wage statements include the total number of hours worked (undermining the seventh cause of action); 8) undisputed evidence shows defendants kept requisite payroll records, as required by statute (eighth cause of action); and 9) undisputed evidence shows that plaintiff did not incur necessary business expenses on defendants' behalf (ninth cause of action). As to the PAGA cause of action, defendant claims the undisputed evidence shows that "the PAGA penalties cause of action is barred by the [relevant] statute of limitations." Plaintiff claims disputed issues of material fact exists as to each cause of action. Plaintiff has submitted an opposition separate statement.

As an initial matter, the court overrules all of plaintiff's "evidentiary" objections advanced in the opposition separate statement, based on the exact same contention repeated ad nauseum – defendant's undisputed issue of material facts is "vague and ambiguous," as claimed in Issue Nos. 1, 2, 5, 7, 11, 12, 15, 16, 20, 22,[3] 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35 of defendants' Separate Statement. Undisputed issues of fact as alleged by a party are not evidence, and are not a judicial admission. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 747.) Evidentiary objections (such as the one advanced here) are inappropriate. Challenges should be made to the efficacy of the statement, not to its admissibility.

The court has reviewed all evidence submitted, and concludes that plaintiff has identified sufficient disputed issues of material fact to overcome summary judgment/adjudication as the first and second causes of action. As to the first cause of action for unpaid overtime, defendants contend that plaintiff has admitted she was paid overtime for all hours recorded, and therefore, she cannot establish a triable issue. As to the second cause of action, defendants insist the cause of action fails because she admitted receiving meal breaks. In support defendants offer Issue No. 1 (as to the first cause of action), which provides as follows: "Plaintiff never had an issue with receiving overtime," Defendants also offer Issue No. 8 (as to the second cause of action), which provides that "Plaintiff did not perform any work during her meal period." During plaintiff's deposition plaintiff admitted that she had no concerns about any issue regarding unpaid overtime pay. Further, as to the second cause of action, plaintiff admitted during her deposition that she "would clock out for 30 minutes, and then I usually went home and ate. I didn't stay there. And then I'd come back."

To create a disputed issue of material fact about overtime pay (the first cause of action), plaintiff admits in her declaration that "I testified that I never saw an issue with my overtime . . . ." She explains, however, that her deposition testimony "was based on what my knowledge was while I was working for Defendants. During my employment with Defendants, I did not understand that shift differentials were supposed to be accounted for in the calculation of my overtime rate of pay, nor was it my understanding that waiting in line to clock in to shifts or the emergency assistance of resident after clocking out constituted work-of-the clock that should have been recorded and compensated." To create a disputed issue of material act as to the second cause of action, plaintiff again admits in her declaration that "I testified that I never had

[3] Defendants misnumbered their issues of undisputed fact, skipping No. 21. The court will follow the numbers utilized by the parties.

to do any work during m meal breaks . . . . At the time of my deposition, I did not understand that carrying a radio, responding to coworker questions or the emergency assistance of resident constituted an interrupted meal break." She goes on in the declaration: "To clarify and explain my deposition testimony, I have since been able to recall that I was the only Med Tech on shift approximately 1 to 2 times per week due to understaffing and therefore I was unable to leave the premises during my meal breaks on those shifts. On those shifts, during my meal breaks, I was required to have my [radio] with me and turned on so that I could respond to questions from coworkers. I did this regularly, for example, I would be contacted through the radio on my meal breaks when staff members needed my approval to administer Tylenol or other medications or if a resident was feeling unwell coworkers would let me know that I needed to assess them after my break and I would respond to them."

It is true that there is a conflict between plaintiff's deposition testimony and plaintiff's declaration submitted in opposition. Pursuant to *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21, as a general rule plaintiff's declaration cannot create a triable issue of fact when contradicted by plaintiff's prior deposition testimony. This rule, however, applies only when there is a clear and unequivocal admission by plaintiff in his deposition, and plaintiff contradicts that admission in a subsequent declaration. *D'Amico* does not apply where there is a reasonable explanation for the discrepancy between the deposition and the declaration. (*Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 658.) That is, courts decline to apply *D'Amico* where "the trier of fact could reasonably conclude that the initial [] response was . . . a simple mistake." (*Mason v. Marriage & Family Center* (1991) 228 Cal.App.3d 537, 546; see also *Ahn v. Kumho Tire U.S.A., Inc*. (2014) 223 Cal.App.4th 133, 146 [the *Mason* court properly refused to disregard the plaintiff's declaration explaining her prior interrogatory response under the *D'Amico* rule, reasoning it was not "free" to disregard the explanation because a trier of fact could find it credible]; see also *Harris v. Thomas Dee Engineering Co., Inc.* (2021) 68 Cal.App.5th 584, 606 [citing *Mason* favorably].) The court under this authority cannot say as a matter of law that plaintiff's explanations offered in her declaration as to the first and second causes of action -- explaining why she testified differently at an earlier deposition -- are unreasonable, and not the product of a "simple mistake." That is, a contradiction between plaintiff's declaration and his earlier deposition testimony as to both of these causes of action does not eliminate the declaration's evidentiary value in creating a disputed issue of material fact under the circumstances. As the trier of fact of could find declarant's explanations about the contradictions believable, summary adjudication as to the first and second causes of action is inappropriate.

In reply, defendants cite to *Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, *Jacobs v. Fire Ins. Exchange* (19950 36 Cal.App.4th 1258, and *Schiff v. Prados* (2001) 92 Cal.App.4th 692, 705, asking the court simply to exclude plaintiff's declaration under *D'Amico.* None of these cases explored the gloss articulated by *Mason*, *AHN*, and progeny, simply

applying the *D'Amico* rule without nuance or uncritical application. In any event, the conflict at issue here is similar in effect to the conflict presented in *Mason*. In *Mason*, plaintiff in her discovery response indicated that the harm occurred in 1977, which would have made the claim untimely. Plaintiff explained in a declaration that her discovery response was simply a mistake, and that the 1977 date referenced the patient-doctor relationship, not the date of the injury, According to the *Mason* court, plaintiff's "explanations for her initial response . . ., viewed in light of the whole record, is credible. . . . Thus, if a trier of fact believes the relations begin in 1983, the trier of fact could reasonably conclude that the initial [discovery response] was, as Mason explained in her declaration, a simple mistake." (*Id.* at p. 546.) The same is true with regard to plaintiff's declaration explanations. If the trier of fact believes plaintiff's evidence that there were problems with overtime, and she actually worked during mealtimes, they could believe her explanations at the deposition amounted to a mistake. *Mason*, rather than *Preach, Jacobs*, and *Schiff*, governs the outcome here.

As to the third cause of action for failure to allow/compensate for rest periods, defendants contend that summary adjudication is appropriate because plaintiff "never disclosed an inability to take rest breaks." In support of this proposition, defendants identify undisputed Issue No. 13, in which defendants contend "Plaintiff is not aware whether her supervisors had any actual or constructive knowledge that she or any other employees missed their break," a contention based exclusively on plaintiff's deposition testimony, in which plaintiff admitted that she never complained about not taking rest breaks. A more complete review of plaintiff's deposition testimony, however, reveals plaintiff also testified that she "was supposed to take rest breaks" only when she had time; and that she only "guessed" whether defendants' knew that employees were not taking their rest breaks. Plaintiff also indicated that she had a "problem with rest breaks," and that she never recalled ever "getting to take a rest break." Finally, plaintiff also testified that defendants were "short staffed. I just – I'm here to help. I'm not really a person to complain about things," and that she was told "to take your rest breaks when you had the time . . . ." Contrary to defendants' contention, there is sufficient disputed evidence in the record (i.e., from plaintiff's deposition testimony) to demonstrate that defendants arguably were on constructive notice of any rest-break violation. Defendants' showing does not preclude this possibility as a matter of law, which is their burden. Summary adjudication is inappropriate also to the third cause of action.

Nothing in defendants reply changes the court's conclusions. Defendant fails to address the import of its own issues of undisputed fact in its Separate Statement -- Issue No. 1 as to the first cause of action for unpaid overtime; Issue No. 8 as to the second cause of action; and Issue No. 13 as the third issue, all identified above. All of these were deemed material by defendants, and as to each there exists disputed issues of material fact, for the reasons noted above. Considerable care must be taken in drafting the moving party's separate statement, and defendant should list only those facts that are truly material to support the issues identified, because the

separate statement effectively *concedes* the materiality of whatever facts are included. It follows that if a triable issue is raised as to ***any*** of the facts listed under an issue statement in the separate statement, as is the case here, the motion as to that particular cause of action must be denied. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 253; see also *Insalaco v. Hope Lutheran Church of West Contra Costa County* (2020) 49 Cal.App.5th 506, 521 [same].) This is situation here.[4]

It follows from the disputed issues of material fact as to the first, second, and third causes of action that there are disputed issues of material fact about whether defendants paid at least minimum wages for all hours worked (the fourth cause of action[5]); whether defendants failed to include all compensated time in plaintiff's final paycheck (the fifth cause of action[6]); whether defendants failed to pay all wages in timely manner (the sixth cause of action[7]); whether defendants failed to provide accurate wage statements for all wages (seventh cause of action[8]); and whether there was an unfair trade practice as to the UCL cause of action (which stems in part from these violations) (the tenth cause of action). As the first three causes of action survive, and as these causes of action derive from them, they also survive challenge as well. Summary adjudication as to these causes of action is also inappropriate.

As for the eighth cause of action for failure to maintain payroll records under section 1174, subdivision (d), federal district courts reviewing California law seem to have repeatedly determined that there is ***no*** private right of action under this provision. (S*uarez v. Bank of Am. Corp.*, No. 18-cv-01202-MEJ, 2018 WL 2431473, at *10 (N.D. Cal. May 30, 2018) [collecting cases]; *Huynh v. Jabil Inc.*, No. 22-cv-07460-WHO, 2023 WL 1802417, at *6 (N.D. Cal. Feb. 7, 2023) [collecting cases]; *Hughes v. United Airlines, Inc.* (N.D. Cal., Jan. 10, 2024, No. 3:22-CV-08967-LB) 2024 WL 115932, at *3;; *Picou v. Tracy Logistics LLC*, 2025 WL 1248729, at *12

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[4] There may be cases in which summary judgment/adjudication is granted on the basis of some but not all of the undisputed material facts. (*Pereda v. Atlos Jiu Jisu* (2022) 85 Cal.App.5th 759, 773.) In *Pereda*, "plaintiff argue[d] that there must be issues of material fact in dispute because plaintiff disputed 54 out of 63 material facts listed in defendants' separate statement." The appellate court rejected that claim, noting that the fact a plaintiff disputes the vast majority of facts does not mean that any of those facts is material to the issue upon which summary judgment was ultimately granted. " Here, we concluded they are not." (*Ibid*.) Specifically, the relevant issue in *Pereda* was defendants' agency relationship with another entity based on ostensible agency; the disputed issues of fact offered by plaintiff had nothing to with that critical issue. Here, defendants offer no argument or analysis that remotely suggests the undisputed issues of fact identified above (Issues Nos. 1, 8, and 13, and listed defendants in their Separate Statement) are not material for each of the three causes of action at issue. *Nazir* and *Insalaco*, rather than *Pereda*, govern.

[5] In other words, if disputed issues of material fact exist to show that defendants did not properly compensate plaintiff for all time worked, including meal and rest time and overtime hours (i.e., off the clock hours), it follows that disputed issues of material fact exist to show that plaintiff was not paid minimum wages for that time.

[6] Again, if defendants failed to compensate for overtime, and notably for off-the-clock-time, they arguably failed to pay for all time that should have been compensated in plaintiff' final paycheck.

[7] In a continuation of the previous footnote, it follows that defendants arguably failed to pay all wages in a timely manner.

[8] Not to belabor the point, but if there was a failure to pay wages as discussed above, there was an arguable failure to provide ***accurate*** wage statements.

(E.D. Cal. Apr. 29, 2025); *see also Cleveland*, 200 F. Supp. 3d at 958-59 [finding correct the defendant's argument that "California Labor Code section 1174 does not contemplate a private right of action"]; *Graves v. DJO, LLC*, 2023 WL 356507, at *13 (S.D. Cal. Mar. 30, 2023) ["there is no private right of action for violation of section 1174(d)"]; *Dawson v. HITCO Carbon Composites, Inc.*, 2017 WL 7806618, at *7 (C.D. Cal. Jan. 20, 2017) ["Plaintiff's § 1174(d) claim fails as a matter of law because it does not provide for a private cause of action"]; most recently, *Moreno v. Castlerock Farming and Transport, Inc.* (E.D. Cal., Oct. 1, 2025, No. 1:12-CV-0556 JLT CDB) 2025 WL 2799487, at *20 [same].)[9]

Plaintiff attempts to counter the clear import of this authority by arguing that a private right of action exists, citing to *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 350, *Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 339-341, and *Carrillo v. Schneider Logistics* (C.D. Cal 2011) 823 F.Supp.2d 1040, 1045. Plaintiff's reliance on *Smith* and Noe are misplaced. Nothing in either case address whether section 1174, subdivision (d) affords a private right of action. It is axiomatic that a case is not authority for a proposition not considered therein or an issue not presented by its own particular facts. (*McConnell v. Advantest America, Inc.* (2023) 92 Cal.App.5th 596, 611.)

In *Carrillo*, the plaintiff filed an ex parte application for a temporary restraining order and preliminary injunction requiring the employer to comply with state and federal recordkeeping requirements, one of which was section 1174, subdivision (d). The court granted plaintiff's request, requiring defendants "to come into compliance with federal and state recordkeeping and disclosure requirement." This is no precedent for establishing a private right of action under section 1174, for when granting relief, the court did not explicitly or implicitly recognize that a private right of action existed under section 1174. (*Perez v. DNC Parks & Resorts at Asilomar, Inc.* (E.D. Cal., Oct. 31, 2019, No. 119CV00484DADSAB) 2019 WL 5618169, at *9.) Indeed, the TRO could have been granted on the basis of the section 1174-derived PAGA claims at issue in that case. (I*bid*.) More recent federal courts have concluded that *Carrillo* simply assumed without comment that section 1174 provides a private right of action. (*Perez v. DNC Parks & Resorts at Asilomar, Inc.*, *supra*, at p. 9 [reading the decision in *Carrillo* together with the substantial case law holding that section 1174 does not create a private right of action, the court concludes that plaintiff's section 1174 must be dismissed with prejudice]; *Lopez v. Wendy's Int'l, Inc.*, No. CV11-00275 MMM JCx, 2012 WL 13014600, at *8 & n.50 (C.D. Cal. June 14, 2012).) This court is persuaded by more recent federal authority that indicates section 1174 does not provide a private right of action, which has at the same time distinguished *Carrillo*. The court grants defendant's summary adjudication motion as to the eighth cause of action.

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[9] By contrast, PAGA does create a private right of action for several portions of Labor Code, including section 1174, subdivision (d). (C*leveland v. Groceryworks.com, LLC* (N.D. Cal. 2016) 200 F.Supp.3d 924, 958.)

As for the ninth cause of action, plaintiff contends that defendants failed to reimburse her and the class for all necessary expenditures incurred by the employees while performing the job. Defendants contend that this cause of action fails "because [plaintiff] did not incur necessary business expenses on Defendant's behalf," and though plaintiff testified she "bought pens and brought them to work, [she] could have requested pens from a supervisor." Defendants again point to plaintiff's deposition testimony, during which plaintiff testified that she did purchase pens and brought them to work because people "always liked to steal pens, so there were all missing . . . ." Plaintiff testified that she was "sure defendants] would have boughten [*sic*] some more. I'm sure they have just little cheap pens. I like to get the fancy ones, so I just bought my own."

Plaintiff in opposition points to plaintiff's deposition testimony, in which she testified that she was allowed to have her cellphone while working as long as its use "was work related." Plaintiff explained that she would use her own cellphone if she had to text a supervisor or the nurse. Plaintiff also testified that there was a landline available to call the supervisor or nurse, but the supervisor (Kenny) "just told us that if we needed anything to text him," meaning if there was just a question, "to text him." Plaintiff indicated that she texted Kenny "quite a few" times in this regard. Plaintiff also testified that she also texted her supervisor "about meds, if I couldn't find a med or, like, a phone number for a doctor." Finally, in her declaration, plaintiff clarifies that there were expenses she paid for – the maintenance of her uniform "as well as the use of my personal cellphone for work-related duties . . . ."

There are sufficient disputed issues of material fact – most notably with regard to plaintiff's use of her cellphone during work – to overcome defendants' summary adjudication motion. While there is evidence to suggest plaintiff did have use of a landline phone, there is also evidence in the record to suggest that she was expected to use her own personal cellphone to contact supervisors and/or nurses for work related events during work periods. The court cannot say as a matter of law that plaintiff cannot advance this cause of action on this evidence. Accordingly, the court denies defendant's summary adjudication motion as to the ninth cause of action.

This gets us to the last of defendants' claims – that the PAGA penalties cause of action is barred by the statute of limitations. Because "the statute of limitations is tied to the PAGA plaintiff's individual claims," a PAGA plaintiff must bring a PAGA action within one year of the last Labor Code violation he or she individually suffered. (*Williams v. Alacrity Solutions Group, LLC* (2025) 110 Cal.App.5th 932, 943.) It appears plaintiff was terminated on November 9, 2019, and she filed the PAGA lawsuit on May 25, 2021. Defendants seem to be arguing plaintiff had until November 9, 2020 to file her LWDA notice, but did not file the letter to the LWDA until March 18, 2021, "which is over four months beyond the November 9, 2020 statute of limitations."

The court rejected defendant's argument in its September 28, 2021, order associated with the earlier demurrer. The court determined that Emergency Rule 9 tolled both the statute of limitations ***and*** the administrative deadline to notify the LWDA between April 6, 2020 and October 1, 2020, given the "symbiotic relationship between the [LWDA] notice and the civil action filing requirements contemplated by the PAGA." This meant that plaintiff had until May 5, 2021 to file the letter with the LWDA, which was accomplished on March 18, 2020. Further, in light of the 65-day tolling deadline contemplated by section 2699.3, subdivision (c)(2)(A)) (allowing the LWDA to respond), the lawsuit was properly filed within the appropriate state of limitations period, making the lawsuit timely. The court noted that there was no published case law addressing this issue, and was open to any future case that case doubt on the court's analysis and /or conclusion.

Defendants point to no new case that undermines this court's previous analysis. Plaintiff, by contrast, references *LaCour v. Marshalls of California, LLC* (2023) 94 Cal.App.5th 1172, claiming it supports the court's previous conclusion.

In *LaCour*, as relevant for our purposes, the appellate court explored whether the PAGA notice and PAGA complaint were timely as a result of Emergency Rule 9. There, plaintiff was terminated in May 2019, filed his PAGA notice with the LWDA on November 4, 2020, and then filed the PAGA complaint on January 4, 2021 (within the 65 days tolling period). Defendant argued that plaintiff had at most 1 year and 65 days to file both the PAGA notice and the complaint from the date of termination, meaning the deadline was August 2020 at the latest. The trial court concluded the complaint was timely. The appellate court agreed, expressly concluding that the tolling period of April 6, 2020 through October 20, 2020, per Emergency Rule 9 "had the effect of extending the deadline to file with the LWDA his notice of a PAGA claim until November 24, 2020," (with the 65-day tolling period) pushing the deadline to file the PAGA action into late January 2021. Because plaintiff filed the LWDA notice on November 4, 2020, and the lawsuit was filed on January 4, 2021, the action was timely. (*Id*. at p. 1185.)

LaCour directly supports this court's earlier decision. The *LaCour* court concluded that Emergency Rule 9 extended the deadline to file the notice with the LWDA and the deadline to file the PAGA action. The same reasons for the timeliness of both the LWDA notice and the lawsuit as identified by *LaCour* are present in this matter. No other grounds are offered by defendants to support summary adjudication. Accordingly, the court denies defendants' summary judgment motion to the PAGA cause of action.[10]

In summary:

[10] Defendants do not address any of these issues in their reply.

The court overrules all evidentiary objections advanced in plaintiff's opposition separate statement, for issues of undisputed evidence contained in the separate statement are not evidence, and thus not subject to evidentiary objections.

The court grants defendants' summary judgment/adjudication motion to the eighth cause of action, as section 1174, subdivision (d), relied upon by plaintiff, does not provide a private right of action.

The court otherwise denies plaintiff's summary judgment/adjudication to the first, second, third, fourth, fifth, sixth, seventh, and ninth causes of action, and thus, by logic, to the tenth cause of action (UCL violation). Disputed issues of material fact exist as to each. The court also denies summary judgment/adjudication motion as to the PAGA causes of action for civil penalties, as this court's earlier analysis addressing the timeliness of the PAGA cause of action is supported by *LaCour v. Marshalls of California, LLC* (2023) 94 Cal.App.5th 1172.

Defendants are directed to offer a proposed order for signature.

The parties are directed to appear in person or by Zoom.