SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

MICHAEL EVANS, et al, Plaintiffs/Petitioners, v. EXECUSHIELD, INC., et al, Defendants/Respondents.	No. 21CV002240 **ORDER DENYING MOTION FOR CLASS CERTIFICATION WITHOUT PREJUDICE; OTHER RELATED ORDERS**

Plaintiffs' motion for class certification came on for hearing on 2/18/25, in Department 21 of this Court, the Honorable S. Raj Chatterjee presiding. Counsel appeared on behalf of Plaintiffs and on behalf of Defendant. After consideration of the points and authorities and the evidence, as well as the oral argument of counsel, IT IS ORDERED: The motion of plaintiffs for class certification is DENIED WITHOUT PREJUDICE. Related Orders are set forth below.

I. BACKGROUND

This is a wage and hour putative class and PAGA action regarding employees who worked as security guards for the defendant. Plaintiff filed a motion for class certification on May 31, 2024. The motion in part sought to certify a "Rounding Subclass" for "All members of the Class whose clock-in and clock-out times were rounded from their actual clock-in and clock-out times." The first issue raised in the Opposition was that the plaintiffs "do not assert a

'rounding' claim, nor do they identify any such class in their First Amended Class Action Complaint." (Opp. at 5.) They argued that "Denial of class certification for an unplead claim and class is appropriate." (Id.)

The plaintiffs filed their Reply Brief on November 4, 2024. Their lead argument asserted that the Court should certify their rounding claim even though it was not stated in the complaint. The Reply Brief stated:

> While the rounding claim was not explicitly stated in the First Amended Complaint ("FAC"), its certification is not precluded. Courts have routinely held that class certification can be granted for claims that are reasonably related to those in the complaint, especially when they arise from the same set of facts and legal theories. In *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (2004), the California Supreme Court stated that "courts are not obligated to deny certification where the complaint omits facts that would support class treatment." Furthermore, in *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1537 (2008), the California Court of Appeal held that "the court may consider new claims, constructively adding them to the complaint, so long as their addition does not create prejudice."

(Reply Brief at 2:7-15.) Plaintiff's Reply Brief was signed by attorney Christina Le of the Clarkson Law Firm. Also named on the Reply Brief as counsel for the plaintiffs are attorneys Glenn Danas and Katelyn Leeviraphan of the Clarkson Law Firm, Peter Hart and Ashlie Fox of the Law Offices of Peter M. Hart, and Robert Wasserman and Jenny Baysinger of Mayall Hurley P.C.[1]

The legal proposition that a court may "constructively" add new claims to a complaint for class certification and thus certify claims not pled was news. It turns out that the quotations in *Sav-On* and *Ghazaryan* and the asserted holding in *Ghazaryan* that counsel represented to be California law simply do not exist. The Court conducted a Westlaw search for the quoted language in those cases but found none in any California or federal case.

[1] Ms. Le of the Clarkson Law Firm also signed the moving papers seeking class certification, which also named same attorneys. (See Plaintiffs' Notice of Motion and Motion for Class Certification; Memorandum of Points and Authorities In Support Thereof filed on May 31, 2024.)

Before the hearing on 2/18/25, the Court issued a tentative decision that stated: "The court ORDERS counsel for plaintiff to appear and to be prepared to direct the Court to the relevant pages in *Sav-On* and *Ghazaryan,* or to the origin of the phrases if they came from a treatise or some other source."

At the hearing on 2/18/25, Ms. Le appeared for the plaintiffs and acknowledged that the two cases did not include the two direct quotations or stand for the propositions asserted. Counsel stated that she used a "tool" (which the Court understood to mean an electronic program that most likely employed some form of artificial intelligence) to help prepare the Reply Brief. She stated that a "law clerk" brought to her attention that *Save-On* and *Ghazaryan* did not support the assertions in a draft of the Reply Brief and that she agreed with the "law clerk." She stated that she intended to remove those matters from the Reply Brief before it was filed, but for reasons she did not explain, that did not happen. Counsel apparently did not read the brief before she signed and filed it. After the Reply Brief was filed, Ms. Le took no corrective action to fix the misrepresentations before the Court brought the problem to counsel's attention.

There are six other attorneys representing the plaintiffs named on the Reply Brief. Between the filing date of November 4, 2024, and the hearing date of February 18, 2025—over two months—none of the other six attorneys named on the Reply Brief brought the problem to the Court's attention, nor did they take any corrective action.

II. DISCUSSION

Counsel's misrepresentations of law to the Court is a serious problem. "It is the duty of an attorney to do all of the following: … never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." Bus & Prof Code 6068(d). Similarly, Rules of Professional Conduct 3.3(a)(1) states: "A lawyer shall not: (1) knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." "Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense."

(*Paine v. State Bar of Cal*. (1939) 14 Cal.2d 150, 154.) Further, counsel must sign documents filed with the court. The signing represents that "The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." (CCP 128.7(b)(2).) Section 128.7 is modeled after Rule 11 of the Federal Rules of Civil Procedure. The filing of papers "without taking the necessary care in their preparation" is an "abuse of the judicial system" that is subject to Rule 11 sanction. (*Cooter & Gell v. Hartmarx Corp.* (1990) 496 U.S. 384, 398).

A growing, and distressing, body of law addresses whether and how judges respond when counsel not only misconstrues or misinterprets case law that does exist but cites fake cases and legal propositions. *Mata v. Avianca, Inc.* (S.D. New York. 2023) 678 F.Supp.3d 443, concerns an attorney presenting fake opinions to the court by using ChatGPT. *Mata*, 678 F.3d at 448, states:

> Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.

Mata, 678 F.3d at 459-461, sanctioned counsel under Rule 11 for making a frivolous argument. The court ordered counsel to (1) provide a copy of the order to their clients, (2) send a copy of the order to each judge falsely identified as the author of a fake opinion, (3) pay a penalty of $5,000 to the Court.

Park v. Kim concerns an attorney presenting fake opinions to the court. *Park* states: "At the very least, the duties imposed by Rule 11 require that attorneys read, and thereby confirm the existence and validity of, the legal authorities on which they rely. Indeed, we can think of no

other way to ensure that the arguments made based on those authorities are 'warranted by existing law,' [citation], or otherwise 'legally tenable.'" ((2nd Cir. 2025) 91 F.4th 610, 615.) The Court referred the attorney to the Court's Grievance Panel and ordered the attorney to provide a copy of the order to their client, translated if necessary.

United States v. Hayes (E.D. Cal., 2025) 2025 WL 235531 at *11, concerns an attorney presenting fake opinions to the court. *Hayes* states: "Unlike other cases where counsel and litigants have admitted, sometimes reluctantly, that the fictitious citations and quotations were created by generative AI, Mr. Francisco states that he 'did not use and ha[s] never used AI (artificial intelligence) to draft any of my motions.' … The Court finds this response inadequate and not credible." The court collected cases on sanctions by other courts regarding similar misconduct. (*Id.*, * 14.) The court concluded that "moderate penalties are insufficient" and ordered that counsel pay sanctions of $1,500 to the Court, to serve a copy of the order on the District of Columbia Bar and the State Bar of California, and to serve a copy of this order on all the district judges and magistrate judges in the district. (*Hayes*, 2025 WL 235531 at *14.)

J.G. v. New York City Department of Education (S.D.N.Y. 2024) 719 F.Supp.3d 293, 307-308, concerns counsel presenting artificial intelligence generated "facts" as evidence. Counsel submitted evidence on hourly rates that was generated by the artificial intelligence tool Chat GPT-4. The Court did not sanction counsel for the use of the evidence, presumably because counsel disclosed that it was generated by artificial intelligence as well as because it was weak evidence and not a fake citation. The Court found the evidence "utterly and unusually unpersuasive" and states: "Barring a paradigm shift in the reliability of this tool, the Cuddy Law Firm is well advised to excise references to ChatGPT from future fee applications."

Self-represented litigants have also presented fake opinions to courts. (*See Kruse v. Karlen* (Missouri Ct. App. 2024) 692 S.W.3d 43, 48-53 [finding that only two out of the twenty-four case citations are genuine, dismissing the appeal, and ordering $10,000 in sanctions to other side]; *Al-Hamim v. Star Hearthstone, LLC* (Colorado Ct App 2024) 2024 WL 5230126 at *6,

[party acknowledged use of AI, apologized, and accepted responsibility for including hallucinations in brief; court dismissing appeal but not issuing monetary sanctions.])

In this Court's view, artificial intelligence assisted software can assist counsel in research and in preparing drafts of documents like any other "tool." But, counsel who sign and submit legal documents must *own* and take *full responsibility* for the final product and must ensure that they discharge their obligations under the Rules of Professional Conduct, the Business & Professions Code, the Code of Civil Procedure, and otherwise.

Here, the most pressing issue is class certification as counsel who submitted material misrepresentations to the Court is requesting that the Court appoint that counsel to represent unnamed class members who did not choose them.

A. MOTION FOR CLASS CERTIFICATION

In this motion for class certification, counsel seek an order "appointing Glenn A. Danas, Christina M. Le, and Katelyn M. Leeviraphan of the Clarkson Law Firm, P.C.; Peter M. Hart and Ashlie E. Fox of the Law Offices of Peter M. Hart; and Robert J. Wasserman and Jenny D. Baysinger of Mayall Hurley, P.C., as class counsel."

To certify this class and to grant the motion, the Court must find that the named plaintiffs have retained competent counsel to represent the class. (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) Under California law, "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) Under federal law, a court considering appointment of class counsel "must consider … counsel's knowledge of the applicable law" and the court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." (FRCP 23(g)(1)(A)(iii) and 23(g)(1)(B).) (See generally 1 Rubenstein, Newberg and Rubenstein on Class Actions (6th ed. 2022) § 3:80 et seq.)

FRCP 23(g) states the court "must consider "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action," and "counsel's

knowledge of the applicable law" and "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." (See generally Newberg and Rubenstein on Class Actions § 3:72.) "A court's experience with a particular counsel … may be relevant to its determination of the counsel's adequacy to represent a proposed class." (*Gomez v. St. Vincent Health, Inc.* (7th Cir. 2011) 649 F.3d 583, 593.) The court may consider the quality of the briefing. *Carson v. Giant Food, Inc.* (D. Md. 2002) 187 F.Supp.2d 462, 471, denied class certification stating: "Ms. Myles' frequent typographical errors, citation errors and clear misstatements of the law in memoranda and during oral argument prove that the interests of the putative class members will not be adequately served by her representation." (See generally, Newberg and Rubenstein on Class Actions § 3:76 fn 3 and 4 [collecting cases].)

The nature of a class action makes the competency of counsel more significant than in regular litigation. "California trial court judges … are charged with 'acting in a fiduciary capacity as guardian of the rights of absentee class members.'" (*Fierro v. Landry's Restaurant Inc.* (2019) 32 Cal.App.5th 276, 293.) In regular litigation, parties may retain counsel of their choice, and they alone suffer the consequences of retaining less than competent counsel. On a motion for class certification, however, the court must make a finding that counsel is competent to represent the class and then appoint counsel to represent unnamed class members without any voluntary assent by them.

Here, the Court does not find that Plaintiffs' counsel are adequate to represent the putative class and declines to appoint them to represent unnamed class members who have not voluntarily retained them. This case does not involve a good faith interpretation of a decision, but a wholesale fabrication of quotations and a holding on a material issue. Counsel's conduct violates, among other things, the Rules of Professional Responsibility, the Business & Professions Code, and the Code of Civil Procedure cited above.

Plaintiffs' counsel knew that the legal representations based on *Sav-On* and *Ghazaryan* were wrong. But she signed and filed the brief anyway. She either did not read the brief before

she signed and filed it, or worse, she read it, knew that it contained material misrepresentations, and filed it anyway. Just as disconcerting is that she took no corrective action after the brief was filed. That means that she did not read the brief after she filed it, or she read it after it was filed and intentionally allowed the misrepresentations to continue.

Six other lawyers representing the plaintiffs—two at the Clarkson Firm and four at other firms—are named on the moving papers and the Reply Brief, and they also seek to be appointed as class counsel. But none of those lawyers corrected the misrepresentations before the brief was filed, nor did they take any corrective action after the brief was filed to fix the mistake. This omission is disconcerting because *Save-On,* a widely cited Supreme Court decision, and *Ghazaryan* were being cited for odd, unusual, and audacious legal propositions—that a court can constructively add claims to a complaint for class certification purposes and thus certify a class for claims not alleged in the complaint. The nature of the argument would presumably have motivated at least one lawyer in one of the three law firms representing the plaintiffs to check the law on the issue before the brief was filed, particularly given that they claim that they specialize in class action litigation.[1] Over two months elapsed between when Plaintiffs filed the Reply Brief on 11/4/24 and when the Court issued the tentative ruling before the hearing on 2/18/25. It appears that during that period no lawyer at any of the three law firms read the brief critically and checked the assertions of law in the brief because none of them took any corrective action.

[1] Clarkson Law Firm, P.C., states in the Danas Dec. that the law firm "is actively and continuously practicing in employment litigation, representing employees in both individual and class actions in both state and federal courts throughout California" and "is qualified to handle this litigation because its attorneys are experienced in litigating Labor Code violations in both individual, class action, and representative action cases." (Danas Dec., para 2, 3.) Law Offices of Peter Hart states in the Hart Dec. that "Since 2004, I have focused primarily on wage and hour cases, particularly on class actions" and "have been appointed as class counsel in more than two-dozen cases in California" (Hart Dec, para 4, 5) Mayall Hurley P.C. states in the Wasserman Dec. that it has been approved as class counsel in approximately 50 identified cases. (Wasserman Dec, para 5.) The Court takes judicial notice of its own files (Evid Code 452(d)) and notes that in other cases Mayall Hurley has asserted that "Representing employees in class and representative actions … requires specialized skill." (Magee v. Thyssenkrupp Materials, Alameda No. RG19027231 [Wasserman Dec filed 11/3/20]; Fernando v Burroughs, Inc., Alameda No. RG18906875 [Wasserman Dec filed 9/30/19].

Further, no one else in the Clarkson Law Firm took any steps to catch this problem before the brief was filed or took any corrective actions afterwards. That raises concerns regarding lack of training, oversight, and controls at a firm seeking to be appointed as class counsel to prevent this type of misrepresentation. For example, having a seasoned lawyer review a brief before filing could and should have caught this problem. The audacious nature of the proposition for which *Save-On* and *Ghazaryan* were cited should have clued any seasoned lawyer that the representation should be checked or at least that Ms. Le should be questioned about it. And, a standard cite-checking procedure routinely done by a legal assistant would have immediately caught the problem that the quoted language simply did not exist.

The Court, and the class, must be able to rely on counsel's representations. Counsel's conduct here calls into question both whether the Court can rely on the veracity of their representations going forward and the quality of their work and representations looking backwards, including their work in preparation for class certification. The Court simply lacks the confidence to do so. The Court understands that lawyers are human, and all humans make mistakes. All lawyers deserve second chances, and the Court hopes that counsel here will take appropriate corrective measures going forward. But appointing counsel here to represent the class is problematic. The Court has a fiduciary-like obligation towards those unnamed class members to determine that counsel is competent before appointing them to represent those class members who have no choice in the matter. While sanctioning counsel is one thing (addressed below), appointing counsel to represent unnamed class members is an affirmative step by the Court that creates issues going forward. For example, if the Court appoints these attorneys to represent the class and similar problems occur in the future that damage the class's interest, the Court will have a difficult time justifying its decision to an unhappy class member. Under the totality of these circumstances, the Court cannot appoint plaintiffs' counsel to represent the class.

The Court Orders as follows:

1. The Court DENIES the motion for class certification without prejudice on the basis that Plaintiffs did not retain competent counsel. Plaintiffs have not demonstrated that any of the three law firms is competent to represent the class.

If named plaintiffs Michael Evans and Marcel McGee want to continue prosecuting the case as a putative class action, then they must retain new counsel and must file a substitution of attorney on or before July 1, 2025, and the case may thereafter proceed as a putative class action. A new motion for class certification must be filed afresh. If the named plaintiffs want to dismiss their class allegations and prosecute the case as an individual action, then they must file a motion to dismiss the class allegations under CRC 3.700 on or before 7/1/25. If plaintiffs fail to file a substitution of counsel or a motion to dismiss class claims, the defendant may thereafter file a motion to dismiss the class claims.

If the case proceeds as a putative class action, and if the plaintiffs file a motion for approval of class settlement or if plaintiff prevails at trial and seeks an award of fees, then the Court will not award fees to counsel that were not competent to represent the class. Plaintiffs are Ordered to conspicuously inform the court about any agreement regarding the allocation of fees among counsel. (CRC 3.769(b).)

2. Plaintiffs' counsel—meaning Glenn Danas, Christine Le, and Katelyn Leeviraphan of the Clarkson Law Firm, Peter Hart and Ashlie Fox of the Law Offices of Peter M. Hart, and Robert Wasserman and Jenny Baysinger of Mayall Hurley P.C.—are Ordered to do the following:

(A) Provide a copy of this Order to the Plaintiffs;[1]

[1] (*See* Rule Prof Conduct 1.4(a)(3) [duty to keep client reasonably informed about significant developments].)

(B) Within 30 days, file and serve a copy of this Order in all other actions currently pending in the Alameda County Superior Court in any department in which any one of Plaintiffs' counsel is an attorney of record; and

(C) Review all papers filed in the Alameda County Superior Court in any currently pending action in which Plaintiffs' counsel used the same "tool" that resulted in the misrepresentations here and to file corrected pleadings if necessary by May 1, 2025.

B. SANCTIONS

The case law on attorneys presenting fake citations to the court is generally in the context of a motion for sanctions. Under California law on discovery sanctions, "sanctions should be tailored to serve that remedial purpose, should not put the moving party in a better position …, and should be proportionate to the offending party's misconduct.' (*Kwan Software Engineering, Inc. v. Hennings* (2020) 58 Cal.App.5th 57, 74.) Under federal law on sanctions for presenting fake citations to the court, *Hayes*, 2025 WL 235531, at *14, states "The Court is also mindful that "any sanction imposed must be proportionate to the offense and commensurate with principles of restraint and dignity inherent in judicial power." Sanctions for presenting fake citations to the court include (1) penalties payable to the court in the range of $1,000 - $5,000, (2) sending a copy of the order to the client, (3) sending a copy of the order to each judge falsely identified as the author of a fake opinion, (4) sending a copy of the order to all the district judges and magistrate judges in the district, and (5) sending a copy of the order to the relevant bar association. (*Hayes*, 2025 WL 235531, at *14.)

The Court will not issue any sanctions here in addition to the Orders set forth above. There has already been a significant professional and monetary consequence. Attorney Christina Le "is no longer with Clarkson Law Firm, P.C." (Notice dated 2/24/25.) The three law firms of Clarkson Law Firm, P.C., Law Offices of Peter Hart, and Mayall Hurley P.C. will not get an award of fees from this Court for any of the work they performed in this case. The precautionary measures Ordered above will alert other departments of the need to be cognizant of this issue.

The Court will not direct attorney Christina Le or the Clarkson Firm to serve the State Bar with this order given that Ms. Le took responsibility and acknowledged the mistake. (Compare *United States v. Hayes* (E.D. Cal. 2025) 2025 WL 235531, at *10-14 ["The Court ultimately finds that Mr. Francisco made knowing and willful misrepresentations with the intent to mislead the Court … and demonstrates bad faith"].)

IT IS HEREBY ORDERED

Dated: March 10, 2025

S. Raj Chatterjee
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA	Reserved for Clerk's File Stamp **FILED** Superior Court of California County of Alameda 03/10/2025 Chad Finke, Executive Officer / Clerk of the Court By: Nicole Hall Deputy N. Hall
COURTHOUSE ADDRESS: Rene C. Davidson Courthouse 1225 Fallon Street, Oakland, CA 94612	
PLAINTIFF/PETITIONER: Michael Evans, as an individual and on behalf of others similarly situated et al	
DEFENDANT/RESPONDENT: EXECUSHIELD, INC	
CERTIFICATE OF ELECTRONIC SERVICE CODE OF CIVIL PROCEDURE 1010.6	CASE NUMBER: 21CV002240

I, the below named Executive Officer/Clerk of Court of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served one copy of the ORDER DENYING MOTION FOR CLASS CERTIFICATION WITHOUT PREJUDICE; OTHER RELATED ORDERS entered herein upon each party or counsel of record in the above entitled action, by electronically serving the document(s) from my place of business, in accordance with standard court practices.

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Dated: 03/10/2025

By: Nicole Hall

N. Hall, Deputy Clerk

CERTIFICATE OF ELECTRONIC SERVICE
CODE OF CIVIL PROCEDURE 1010.6