The Honorable Tiffany M. Cartwright

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICK LARSEN, individually and on behalf of all others similarly situated,

Plaintiff,

v.

PTT, LLC (d/b/a HIGH 5 GAMES, LLC), a Delaware limited liability company, and HIGH 5 ENTERTAINMENT, LLC, a New Jersey limited liability company,

Defendants.

NO. 3:18-cv-05275-TMC

PLAINTIFF'S TRIAL BRIEF

Plaintiff Rick Larsen, individually and on behalf of the Damages Class, submits this trial brief setting forth the key facts, controlling law, and evidentiary issues pertinent to the upcoming damages trial. Plaintiff reserves the right to revise his trial presentation as the needs of the case develop and considering Defendant's evidence and arguments at trial.

INTRODUCTION

The upcoming damages trial in this case presents the culmination of High 5 LLC ("High 5")'s years-long plot to avoid the consequences of operating its illegal slot machines, and the Class's long-awaited opportunity to force High 5 to compensate for the harm its social casinos have caused. Specifically, this case arises from High 5's development and operation of virtual

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slot machines High 5 Casino and High 5 Vegas, which are illegal gambling games under Washington law. In the six years since the Ninth Circuit's landmark ruling in *Kater v. Churchill Downs*, 886 F.3d 784 (9th Cir. 2018)—which held that social casinos are illegal gambling games in Washington—individuals who have lost money on social casino games have been pursuing justice against social casino operators. In this case, Plaintiff Rick Larsen, individually and on behalf of a certified class of individuals in Washington, seeks to hold High 5 accountable for its operation of these illegal games, and to recover damages for the money that High 5 illegally took from them.

On June 11, 2024, this Court entered summary judgment against High 5, determining that High 5 is liable to Plaintiff and the Class for money damages for its violations of Washington's Recovery of Money Lost at Gambling Act and Consumer Protection Act. Accordingly, the material aspects of High 5's social casino applications have already been determined by this Court to be illegal and are not in dispute, and liability is established as a matter of law. All that remains is for this Court and the jury to determine how much the Damages Class is entitled to recover in actual and statutory damages, including treble damages.

SUMMARY OF FACTS AND LEGAL CONTENTIONS

I. Material Facts

High 5 develops and licenses software used in physical gambling machines operated in casinos and for online gambling. Beginning in 2012, High 5 decided to enter the "social gaming" market, and it became a developer of "social casino" applications. "Social casino" games are electronic social gaming applications that emulate video slot machines used for gambling in physical casinos.

High 5's social casino apps are designed to look like virtual representations of real-life slot machines. High 5 developed multiple social casino applications, including High 5 Casino and High 5 Vegas. High 5 Casino and High 5 Vegas have similar user interfaces and game design. The games are designed to mimic the look, sounds, and feel of a real slot machines

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located in traditional casinos. High 5 Vegas even provides the ambient background noise of a Las Vegas casino. Players play on virtual representations of slot machines and select the number of lines they would like to "play" and the number of virtual coins to bet on each spin of the machine.

Just like with a slot machine on a casino floor, there is no skill or strategy involved in these games; the outcomes are random, and the odds governing the outcome of any given spin made through High 5's casinos never change. Using virtual chips, the players in these games make wagers, hit a button to spin a slot machine, watch as the virtual reels turn, and await the results. Just like a physical slot machine, users have no control over the outcome of a spin. If a user "wins" on a spin, he or she is awarded with more virtual chips, which can then be used to make additional bets on additional spins. If the user loses, they can keep spinning as long as they have enough virtual chips to satisfy a selected bet.

Both High 5 Casino and High 5 Vegas are free to download. But that is not to say money is not a factor in gameplay. First-time players of either application are given an initial allotment of virtual chips, which are used to bet on and spin High 5's virtual slot machines. Both games require a "minimum bet" of coins before a player can "spin" the virtual slot machines. Players that run out of coins or have less than the amount required for a minimum bet cannot play the game until they replenish their supply of virtual coins. As players continue to play, they are offered the option to purchase virtual chips. Chip packages are offered at various price points and can be purchased using real money. Purchased chips can be used to make additional bets on additional spins. However, if a player's rate of play exceeds the virtual chips they have at any given time—e.g., if they use up all of their virtual chips, or simply want to place a bet that "costs" more than what they have stashed away—he or she must either stop playing and await free chips, place a lower bet, or purchase additional chips.

Both High 5 Casino and High 5 Vegas can be downloaded and played on individual's mobile device (like an iPad or smartphone) or on a web browser through a "Platform." These

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Platforms included Facebook, Google, Apple, and Amazon. The Platforms host the games and process virtual coin purchases. High 5 earns revenue from the sale of virtual chips to users of High 5 Casino and High 5 Vegas. When players buy coins through High 5 Casino or High 5 Vegas, their money is collected by the platform hosting their app—including Apple, Google, Meta, or Amazon. Each of these Platforms take some percentage of the price as a platform fee and remit the rest to High 5.

At least until October 1, 2022, both High 5 Casino and High 5 Vegas were admittedly offered to customers in Washington State. In October 2022, High 5 transferred all ownership, operations, and revenue streams of its social casino applications to a subsidiary, High 5 Entertainment LLC. The relevant class period for purposes of this trial is 2014 to October 1, 2022, the date on which High 5 Entertainment, LLC purports to have taken control of the operation of the at issue casinos.

The harm from the operation of these games has been devastating. The evidence contained in High 5's internal documents shows that High 5 continued with predatory business practices in the face of warnings that it was targeting vulnerable, self-identified gambling addicts and extracting their life savings. In gut-wrenching internal messages at High 5, High 5 callously ignores pleas from customers claiming to be in dire financial situations as a result of High 5's games, as well as pleas to stop preying on their addictions. In response, High 5's internal messages reveal a company laser-focused on draining these individuals' bank accounts, with no regard for the human toll of its conduct. Indeed, despite the concerning messages High 5 received, the company continued to both track and target high spenders, whom they referred to as "whales." The evidence presented at trial will show that dozens of class members individually spent over $10,000 on these casinos, and a handful spent in excess of $100,000.

As part of this litigation, Plaintiff served subpoenas on Amazon, Apple, Google, and Meta (formerly known as Facebook) for each of those entities' data recording purchases of virtual coins in High 5 Casino and High 5 Vegas between 2014 and 2023. Plaintiff will present

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the data produced by the Platforms as evidence at trial. The platform providers produced transaction data showing a total of $17,758,695.79 in virtual coin purchases made in High 5 Casino and High 5 Vegas by players based in Washington between April 1, 2014, and October 1, 2022.

II. Recovery of Money Lost at Gambling Act

Washington's Recovery of Money Lost at Gambling Act ("RMLGA") authorizes recovery for losses from "illegal gambling games," establishing that "[a]ll persons losing money or anything of value" in any such game may recover "the amount of the money or the value of the thing so lost." RCW 4.24.070. Thus, under the RMLGA, a plaintiff must establish:

(1) he lost "money or anything of value,"

(2) at an "illegal gambling game."

Id.; *see also Kater*, 886 F.3d at 789.

In Washington, "gambling" is defined by statute as:

(1) "staking or risking something of value,"

(2) "upon the outcome of a contest of chance or a future contingent event not under the person's control or influence,"

(3) "upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome."

Kater, 886 F.3d at 784 (quoting RCW 9.46.0237 with alterations).

Because all online gambling is illegal in Washington, any activity that meets the definition in RCW 9.46.0237 and takes place online is illegal gambling in Washington. *Kater*, 886 F.3d at 786. In *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018), the Ninth Circuit "determined . . . that virtual casino coins 'are a "thing of value" pursuant to Washington's definition of gambling.'" Dkt. 408 at 8 (quoting *Kater*, 886 F.3d at 787). Because virtual coins "permit a user to play the casino games inside the virtual [casino,] . . . . [t]hey are a credit that allows a user to place another wager or re-spin a slot machine" and

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therefore "extend the privilege of playing." *Kater*, 886 F.3d at 787. Therefore, social casino games violate Washington law, and consumers who purchase virtual chips within social casino applications are eligible to recover their money under the Recovery of Money Lost at Gambling Act ("RMLGA"), RCW 4.24.070.

Based upon the *Kater* decision, as well as the extensive factual record developed over the course of this case and presented to the Court at summary judgment, the Court determined High 5 is liable under the RMLGA as a matter of law. *See* Dkt. 408. Specifically, the Court held that High 5's virtual coins in High 5 Casino and High 5 Vegas "function identically to the coins at issue in *Kater*" and are "things of value." Dkt. 408 at 9. Moreover, this Court determined that "since the virtual coins are wagered to spin the virtual slot games in High 5 Casino and High 5 Vegas, the applications are illegal gambling games because the coins are things of value being staked on 'a contest of chance not under the wagerer's control,' . . . with the player's understanding that they may win more of the same virtual coins with a successful spin." *Id.* at 10. In determining liability, the Court expressly rejected High 5's arguments that the games are not illegal gambling because High 5 occasionally provides players with free coins, the games do not allow the player to win real money, and the slot machines do not aways pay out coins on a given spin. *Id.* at 11–14.

As a result, the Court already held "that High 5 is liable as a matter of law for damages pursuant to the RMLGA—for the cumulative value of coins purchased by the Damages Class." *Id.* at 10. The Class is entitled to an award of some amount of damages, because the Court already determined the "Damages Class lost money purchasing nonreturnable and nonredeemable virtual coins that can only be unlawfully gambled away in High 5's applications." *Id.* at 15. All that remains to be determined at trial is for the jury to determine what that number is by determining "the cumulative value of coins purchased by the Damages Class." *Id.* at 10.

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III. Consumer Protection Act

To prevail on a claim under the Washington Consumer Protection Act ("CPA"), the plaintiff must prove an:

(1) unfair or deceptive act or practice;

(2) occurring in trade or commerce;

(3) public interest impact;

(4) injury to plaintiff in his or her business or property; [and]

(5) causation.

Klem v. Washington Mut. Bank, 176 Wash.2d 771, 782, 295 P.3d 1179, 1185 (2013) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531, 533 (1986)). A plaintiff who proves all five elements is entitled to recover actual damages, additional statutory "damages up to an amount not to exceed three times the actual damages," and attorneys' fees and costs. "Damages, for purposes of the Consumer Protection Act, must be broadly construed so that the beneficial purpose of the Act may be served." *Gamble v. State Farm Mut. Auto. Ins. Co.*, C19-5956 MJP, 2022 WL 92985, at *7 (W.D. Wash. Jan. 10, 2022) (quoting *St. Paul Fire & Marine Ins. Co. v. Updegrave*, 33 Wn. App. 653, 658 (1983)).

The Court already determined at summary judgment that High 5's social casino operations violate the CPA. Specifically, as to the first element, the Court concluded that High 5's operation of social casinos violates the public policy established by Washington's gambling statute (RCW 9.46.010), and constitutes an unfair act affecting the public interest. Dkt. 408 at 15–16. As to the second element, the Court concluded that "High 5's social casino operations occur in trade or commerce because they involve the sale of virtual coins to people in Washington." *Id.* at 16. As to the third element, the Court concluded that "[t]he 'social welfare of the people' was harmed when members of the Damages Class lost money purchasing nonreturnable and nonredeemable virtual coins that can only be unlawfully gambled away in High 5's applications. And High 5 unfairly makes this money from Washington

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consumers by evading the 'strict regulation and control' of the gambling statutes." *Id.* As to the fourth element, the Court concluded that the money the Damages Class lost purchasing virtual coins from High 5 constitutes "injury to business or property" and was causally linked to High 5's unfair conduct. *Id.* at 16. And finally, as to the fifth element, the Court concluded that a causal link exists because, but for High 5's illegal social casino operations, Plaintiff and the Class would not have lost money purchasing their virtual coins. *Id.*

Having established as a matter of law that the Class was injured within the meaning of both the RMLGA and the CPA, since the data show Washington users losing money through the purchase of virtual chips, all that remains to be determined at trial is the exact amount of the damages to which Plaintiff and the Class are entitled. Following a jury trial, the Court will be asked to determine whether the Class is additionally entitled to statutory treble damages.

DAMAGES

Because Plaintiff "has prevailed on his claims under the RMLGA and the CPA as a matter of law," this Court had determined that "the Damages Class members are entitled to actual damages." Dkt. 408 at 19. "Under the RMLGA, the Class members are entitled to recover 'the amount of the money or the value of the thing so lost' on the 'illegal gambling game.'" *Id.* (quoting RCW 4.24.070). "Under the CPA, they are entitled to recover 'the actual damages sustained.'" *Id.* (quoting RCW 19.86.090).

For its CPA and RMLGA claims, Plaintiff need not prove damages for each individual class member separately, but instead may prove the aggregate damages suffered by the Class. On this point, this Court already determined, "(1) the aggregate damages should be measured by the cumulative value of coins purchased by the Damages Class, and (2) the individual allocations can be handled after trial through a claims procedure after the aggregate amount is proved." *Id.* at 19–20. At trial, Plaintiff will bear the burden of proof to show the Class's aggregate damages by a preponderance of the evidence.

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At trial, Plaintiff will present evidence of the total sum of money the Class spent on virtual coin purchases in High 5 Casino and High 5 Vegas during the relevant class period. Namely, Plaintiff will present spend data provided by each of the Platforms. Plaintiff served each Platform with a subpoena that asked for records of purchases made by Washington-based users in High 5 Casino and High 5 Vegas, and the Platforms produced data from their records, maintained in their ordinary course of business, showing those transactions. In response, High 5 had provided no competent evidence of its own regarding Washington-based transactions (claiming for years that it has no way of determining which state transactions originate from). Thus, the Platform data that Plaintiff will present at trial (including all data from Apple, Google, and Amazon, and the data from Meta for the April 2014–October 2022 period) is uncontroverted. To assist the trier of fact with digesting the voluminous data from the Platforms, Plaintiff will introduce testimony from Shawn Davis, who has reviewed the Platform data and will offer straightforward summaries and calculations of the data based on simple, arithmetical calculations through his personal experience in making those calculations in Microsoft Excel, comma separated value spreadsheets, and SQL databases. *See* Fed. R. Evid. 1006.

As the Platform data will show, the majority of the purchases made during the Class period came from a small number of users, comprising a minority of the overall Class. To support this evidence and explain the figures in the Platform data to the jury, Plaintiff will also introduce evidence that these figures are consistent with both High 5's business practices and their overall company financials. Specifically, High 5 profits substantially off of "whales," a term used in casino parlance and internally at High 5 to refer to high spenders. This evidence is relevant to establishing the amount of aggregate damages and will provide credibility and context to the figures displayed in Platform data.

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TREBLE DAMAGES

In addition to actual damages, Plaintiff and the Class seek treble damages under the CPA. RCW 19.86.090 ("The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars."). "Treble damages are based upon the actual damages awarded in the underlying case." *Anderson v. State Farm Fire & Cas. Co.*, 3:20-CV-05119-DGE, 2024 WL 3598505, at *1 (W.D. Wash. July 31, 2024). "The purposes behind the CPA's treble damage provision include:

(1) financial rehabilitation of the injured consumer;

(2) encouraging private citizens to bring actions benefiting the public;

(3) deterrence; and

(4) punishment.

Gamble v. State Farm Mut. Auto. Ins. Co., C19-5956 MJP, 2022 WL 92985, at *7 (W.D. Wash. Jan. 10, 2022) (citing *Sing v. John L. Scott, Inc.*, 83 Wn. App. 55, 71, 920 P.2d 589 (1996), rev'd on other grounds, 134 Wn.2d 24 (1997)).

A treble damages award is not limited to Mr. Larsen's actual damages, it is available for the actual damages suffered by each member of the Class. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 346, 54 P.3d 665, 686 (2002). Moreover, trebling is appropriate on each separate transaction to purchase coins by a Class member, as each transaction was on its own an illegal gambling transaction, and therefore, a standalone violation of the CPA resulting in its own damages. *See In re Bryce*, 491 B.R. 157, 186 (W.D. Wash. Bankr. 2013); *Macho v. First Nat. Ins. Co. of Am.*, Case No. 3:17-cv-05562-RJB, 2017 WL 3712906, at *2 (W.D. Wash. Aug. 29, 2017).

Whether to award treble damages is a question for the Court to determine in its discretion. *Thorley v. Nowlin*, 29 Wn. App. 2d 610, 641, 542 P.3d 137, 153 (2024) ("The statute nowhere mentions a right to a jury. The statute mentions that the court, not a jury, may

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award treble damages."); RCW 19.86.090 (providing that "*the court* may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages" (emphasis added)). However, it is Plaintiff's position that—absent a stipulated agreement between the parties—due process requires the opportunity to present all evidence bearing on the question of treble damages at trial. *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 336–37, 54 P.3d 665, 681 (2002) (explaining that in the ordinary course and consistent with due process, the treble damages would be determined by the court a "at a subsequent hearing," by "consider[ing] the evidence adduced at trial and hear[ing] argument from the parties before making its discretionary decision on treble damages"); *Gamble v. State Farm Mut. Auto. Ins. Co.*, C19-5956 MJP, 2022 WL 92985, at *7 (W.D. Wash. Jan. 10, 2022) (awarding treble damages under the CPA on the basis that "[t]he jury was presented with substantial evidence about State Farm's unreasonable and improper claims handling"). As at minimum, the parties would be entitled to an evidentiary hearing on the evidence Plaintiff intends to present on treble damages, and accordingly, logic an expedience provide that Plaintiff should be able present such evidence at the upcoming trial, where the relevant live witnesses and parties will already be present.

OTHER ISSUES

I. Defendants May Not Introduce Evidence Regarding Settled Issues of Liability

Despite the dispositive and binding opinion from the Ninth Circuit in *Kater*, and despite this Court's summary judgment order determining liability, High 5 has shown a willingness through this case to raise frivolous arguments that *Kater* was wrongly decided and to otherwise relitigate this Court's decision that High 5's social casino games are illegal gambling games. *See* Dkt. 454 at 27–31. Based on the undisputed evidence of High 5 Vegas and High 5 Casino's gameplay functions, this Court already determined that the virtual coins in High 5 Casino and High 5 Vegas are "things of value," and the applications are "illegal gambling games." Dkt. 408 at 11–14. In granting summary judgment on liability, the Court rejected High 5's

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arguments regarding the availability of free coins or the inability to exchange coins for cash, ultimately determining those facts had no bearing on High 5's liability. Dkt. 408 at 9 (virtual coins in High 5 Casino and High 5 Vegas "function identically to the coins at issue in *Kater*"), 11–14 (rejecting arguments based on the availability of free coins and inability to exchange coins for cash). Nevertheless, High 5 appears poised, based on its proposed exhibits and deposition designations, to attempt to introduce evidence and testimony regarding the availability of free coins and other such challenges to liability. Indeed, in the proposed Pretrial Order, High 5 states that it intends to "present the defense that its violation of the RMLGA (and thus the CPA) occurred in good faith under a reasonable belief that it was not improper." *See* Proposed Pretrial Order at 1–2 (citing *Young v. Whidbey Is. Bd. of Realtors*, 638 P.2d 1235, 1239–40 (Wash. 1982)). Defendant's "good faith" violation is irrelevant to the question of the damage it caused. As *Young* confirms, "good faith" is relevant—if at all—*only* on the question of whether Plaintiff's and the Class's damages should be trebled. Plaintiff will object at trial to any attempt by High 5 to introduce testimony and evidence related to High 5's challenges to the liability determination as not relevant to the question of damages and as likely to confuse the jury. *See* Fed. R. Evid. 401, 402, 403.

II. Bifurcated Claims

In October 2022, Anthony Singer and his wife, Lisa, the two individuals running High 5 Games, LLC ("High 5 Games") secretly spun off a new company, High 5 Entertainment, LLC ("High 5 Entertainment"), over which they have control. They transferred High 5 Casino and High 5 Vegas, from High 5 Games to High 5 Entertainment, along with most of the assets held by High 5 Games. Yet they made sure that the liability for coin purchases made in these social casinos prior to October 1, 2022—the vast majority of coin the purchases at issue in this litigation—remained with High 5 Games. Following discovery into the details of this transfer, the Court granted Plaintiff leave to amend his complaint to add alter ego allegations and a

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Uniform Voidable Transfer Act claim. Dkt. 515. The Court bifurcated these issues from the upcoming damages trial. *Id.*

In light of the bifurcation order, Plaintiff does not intend to present any evidence at trial related to the asset transfer between High 5 Games and High 5 Entertainment or the alter ego claims, but reserves all rights should Defendants open the door at trial. Indeed, for example, should High 5 purport to argue that a damages award would bankrupt the company, or impede its ongoing operations, Plaintiff should be permitted to rebut such allegations by introducing testimony and evidence regarding High 5's asset transfer to its subsidiary and its subsidiary's continued operations and revenues. High 5 has also included several exhibits on its proposed exhibit list that post-date October 1, 2022—Plaintiff understands those exhibits to be irrelevant in light of the Court's bifurcation order, and thus reserves all objections to those exhibits on that basis, as well.

III. No Party Has Designated Experts for Trial

As indicated in the parties' Joint Proposed Pretrial Order, no party has identified any expert witnesses to testify at trial. This is hardly surprising, because as this Court recognized in its order denying High 5's motion to exclude Shawn Davis from providing expert testimony as moot, Dkt. 514 at 18, Plaintiff disclosed Mr. Davis as an expert at the conclusion of supplemental discovery into High 5 Entertainment and its relationship to the games at issue. Likewise, High 5 Entertainment disclosed its lone expert Kevin Faulkner solely as a rebuttal expert to Mr. Davis during this period. As a result of this Court's summary judgment order dismissing claims against High 5 Entertainment without prejudice, as well as its order bifurcating Plaintiff's alter ego and fraudulent transfer act claims, the expert testimony is no longer relevant to the remaining claims at trial. During a meet and confer on December 23, 2024, regarding motions in limine, High 5 confirmed it did not intend to call High 5 Entertainment's rebuttal expert Kevin Faulker at trial. Thus, no party has identified any expert witnesses for trial, on the issue of the reliability of IP address data or on any other expert topic,

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and there is no basis for the introduction such evidence at trial. Plaintiff will object at trial to any attempt by High 5 to introduce undisclosed or unidentified expert testimony.[1]

IV. Sean Wilson (Kipinä)

On January 6, 2025, High 5 disclosed to Plaintiff that it may attempt to call former Plaintiff Sean Wilson (now Sean Kipinä) as a witness at trial. As presented to the Court in January of 2023, Mr. Kipinä got married and moved to Finland. Recognizing that "[t]here are now 4,000 miles and ten time zones between him and class counsel," the court granted Mr. Kipinä's motion to substitute Plaintiff Rick Larsen as the named plaintiff and class representative and allowed Mr. Kipinä to be dismissed from the case. Dkt. 216. Mr. Kipinä is no longer a party in this case, and any effort to introduce testimony from him or evidence related to him would not be relevant to any issues in the upcoming damages trial and would be very likely to confuse and mislead the jury. *See Bahamas Surgery Ctr., LLC v. Kimberly-Clark Corp.*, CV148390DMGPLAX, 2018 WL 11426855, at *24 (C.D. Cal. Mar. 30, 2018) ("Based on considerations of potential for confusion, misleading the jury, and undue delay under Fed. R. Evid. 403, it simply made no sense to introduce evidence of these six former plaintiffs . . . ."), vacated on other grounds, 820 Fed. Appx. 563, 566 (9th Cir. 2020); Fed. R. Evid. 401, 402, 403. Now that Mr. Kipinä is no longer a party, his testimony is also hearsay that does not meet the definition of statements by a party opponent. *See, e.g.*, *Kowalski v. Anova Food, LLC*, 2015 WL 1117993, at *1 (D. Haw. Feb. 12, 2015) ("Any statement made by former defendant Anova Food, Inc. or a representative of Anova Food, Inc. is not admissible as an admission of a party opponent against Defendant Anova Food, LLC. Anova Food, Inc. is no longer a party to this suit and its prior statements may not be used as admissions against

[1] High 5 has indicated that it intends to offer the May 24, 2024 Expert Report of Shawn Davis—the same testimony that it moved to exclude from trial—at trial in this case. While Plaintiff has no objection to that report, given that it offered the testimony in the first place, Plaintiff understands that the Court deemed this evidence irrelevant (without prejudice) in light of its Order Granting High 5's Motion for Summary Judgment as to transactions post-dating October 1, 2022. *See* Dkt. 514. Plaintiff awaits High 5's explanation as to how it intends to use this evidence at trial, if at all.

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Defendant Anova Food, LLC."). Plaintiff intends to object at trial to any attempt to call Mr. Kipinä or introduce evidence or deposition testimony related specially to Mr. Kipinä.

V. Attorneys' Fees and Costs

"The award of attorneys' fees is a matter of law for the judge, not the jury." *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991). In this case, the matter of attorneys' fees will be dealt with in post-trial motions practice to the Court. Accordingly, the availability of attorneys' fees in this case, under either the CPA or pursuant to the standards under Rule 23, is not relevant to any issue before the jury. *See Redwood Christian Sch. v. Cnty. of Alameda*, C01-4282 SC, 2007 WL 214317, at *2 (N.D. Cal. Jan. 26, 2007) (excluding evidence of attorneys' fees and costs at trial because such "evidence is irrelevant and would be unfairly prejudicial at trial."). Plaintiff will object at trial to the extent High 5 attempts to elicit testimony or argument regarding the availability of attorneys' fees or compensation that could flow to Plaintiff's counsel. *See* Fed. R. Evid. 401, 402, 403.

CONCLUSION

High 5 has delayed its day of reckoning for over six years from the time the Complaint was filed. The Class looks forward to their day in court. We will endeavor to make the upcoming trial as streamlined as possible for the Court.

Respectfully submitted,
RICK LARSEN, individually and on behalf of all others similarly situated,

DATED this 13th day of January, 2025.

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