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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ERIC DMUCHOWSKY,
Plaintiff,
v.
SKY CHEFS, INC.,
Defendant.

Case No. [17-cv-05521-JCS](#)

**ORDER REGARDING MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Re: Dkt. No. 50

I. INTRODUCTION

Defendant Sky Chefs, Inc. moves for partial summary judgment on one of Plaintiff Eric Dmuchowsky’s eight claims in this individual wage-and-hour action based on purported misclassification. Sky Chefs argues that Dmuchowsky’s seventh claim, seeking penalties under the California Labor Code for failure to pay wages due at the time of his termination, is barred by a release contained in a class action settlement resolving similar claims. Sky Chefs also sought partial summary judgment limiting the period of purported misclassification, but the parties resolved that issue by stipulation the same day that the motion was filed. The Court held a hearing on November 9, 2018. For the reasons discussed below, Sky Chefs’ motion is GRANTED as to Dmuchowsky’s seventh claim.¹

II. BACKGROUND

A. Allegations and Claim for Failure to Pay Wages Due Upon Separation

Dmuchowsky alleges that Sky Chefs misclassified him as an exempt employee despite the fact that he performed non-exempt work, and that Sky Chefs therefore violated several provisions of the California Labor Code by, for example, failing to pay overtime wages, failing to provide

¹ The parties have consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c).

1 meal and rest breaks, and failing to provide adequate wage statements. *See generally* Compl.
2 (available in the record as Exhibit A to Sky Chefs’ notice of removal, dkt. 1). Sky Chefs’ present
3 motion concerns Dmuchowsky’s seventh claim, which asserts that Sky Chefs violated section 202²
4 of the Labor Code by failing to pay Dmuchowsky all wages earned at the time of his termination,
5 and thus owes Dmuchowsky penalties under section 203 of the Labor Code. *Id.* ¶ 25.

6 Dmuchowsky alleges that Sky Chefs terminated his employment on May 18, 2016, and that
7 although Sky Chefs paid him on that date, it failed to pay “wages due and owing for overtime
8 hours worked, rest breaks and meal periods not given, all earned and unused vacation time, or all
9 reimbursable expenses.” *Id.* ¶ 11.

10 **B. Teruel Settlement**

11 Another former Sky Chefs employee, Patricia Teruel, filed a class action against Sky Chefs
12 in 2014. Def.’s Req. for Judicial Notice in Supp. of Reply (dkt. 63-3) Ex. 1 (complaint in *Teruel*
13 *v. Sky Chefs, Inc.*, No. 114CV268343 (Cal. Super. Ct., Cty. of Santa Clara)). Teruel’s complaint
14 included claims for failure to provide timely payment after termination under sections 201, 202,
15 and 203 of the Labor Code, failure to provide accurate itemized wage statements under section
16 226(a) of the Labor Code, and penalties under the Private Attorneys General Act. *Id.* ¶¶ 28–40.

17 With respect to the first claim, which is at issue here, Teruel alleged as follows:

18 Specifically, upon the last date of her employment, [Sky Chefs] did
19 not pay [Teruel] all wages owed immediately on her last date of
20 employment or within 72 hours thereof. [Teruel] alleges that such
21 timing of the payment of wages by [Sky Chefs] were done on a
22 company-wide basis that applied in the exact same manner to all of
its terminating employees in California as a matter of corporate
policy, practice and procedure, including both voluntary and
involuntarily terminated employees.

23 *Id.* ¶ 31. Teruel further alleged that Sky Chefs’ “willful failure to pay wages due and owing upon
24 separation from employment results in a continued payment of wages up to thirty (30) days from
25 the time the wages were due.” *Id.* ¶ 33.

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28 ² Because Dmuchowsky alleges that he was terminated, this claim would seem to be governed by
section 201 of the Labor Code rather than section 202. The distinction is not relevant to the
outcome of the present motion, no party has raised it, and the Court does not reach the issue.

1 On October 20, 2016, the California Superior Court for the County of Santa Clara
2 preliminarily approved a class settlement that included the following release:

3 “Released Claims” shall mean all claims alleged in the Lawsuit with
4 respect to the Settlement Class only arising during the Class Period,
5 including (1) Failure to Provide Accurate Itemized Statements in
6 Violation of California Labor Code § 226; **(2) Failure to Provide**
7 **Wages When Due in Violation of California Labor Code §§ 201,**
8 **202 and 203;** and (3) Violation of Labor Code §2698 et seq. (the
9 Private Attorney General Act (“PAGA”). Released Claims excludes
10 claims for unemployment insurance, disability, workers’
11 compensation and claims outside of the Class Period. Specifically, the
12 Plaintiff and all members of the settlement class fully and finally
13 release and discharge the Released Parties [i.e., Sky Chefs] from any
14 and **all claims and rights that they may have, whether now known**
15 **or unknown, suspected or unsuspected, as of the date an order is**
16 **entered preliminarily approving the settlement, arising out of**
17 **(1) the alleged late payment of wages due upon separation of**
18 **employment, including all claims alleged in the Complaint for**
19 **violations of sections 201, 202 and 203 of the California Labor**
20 **Code based upon the late payment of wages due upon separation**
21 **of employment and the facts asserted on the Complaint,** including
22 all claims for attorney’s fees, litigation and costs, PAGA penalties,
23 and interest predicated thereon; and (2) the alleged inaccurate final
24 wage statements or alleged manual wage statements, including all
25 claims alleged in the Complaint for violations of section 226 of the
26 California Labor Code and the facts asserted in the Complaint,
27 including all claims for attorney’s fees, litigation costs, PAGA
28 penalties, and interest.

17 Def.’s Req. for Judicial Notice in Supp. of Mot. for Summ. J. (“1st RJN,” dkt. 53) Ex. 2
18 (stipulation of settlement) § 15.1 (emphasis added); *see also id.* Ex. 3 (order granting preliminary
19 approval). The class included all persons whose employment with Sky Chefs ended during the
20 period from July 22, 2011 through August 31, 2016. *Id.* Ex. 1 §§ 1.8, 1.10. The court granted
21 final approval on January 27, 2017. *Id.* Ex. 4.

22 According to Jarrod Salinas, a senior case manager for the firm that administered the
23 settlement, Dmuchowsky “was identified as a putative class member in *Teruel*, received a
24 settlement check, and deposited the settlement check.” Salinas Decl. (dkt. 70) ¶ 6. A copy of an
25 endorsed settlement check made out to Dmuchowsky for \$76.86 is attached to Salinas’s
26 declaration. *Id.* ¶ 6 & Ex. A.

1 **C. The Parties’ Arguments**

2 **1. Sky Chefs’ Motion**

3 Sky Chefs asserts that it is entitled to judgment on Dmuchowsky’s seventh claim, for
4 failure to pay wages due upon termination, because Dmuchowsky waived and is estopped from
5 pursuing that claim as a result of the *Teruel* settlement. Mot. (dkt. 50) at 7–9. Although Sky
6 Chefs’ motion referenced the *Teruel* class action complaint and the declaration of Jarrod Salinas,
7 its request for judicial notice erroneously included a different complaint filed by Patricia Teruel,
8 *see* 1st RJN Ex. 1, and Sky Chefs did not file Salinas’s declaration with its motion.

9 Much of Sky Chefs’ motion is devoted to the separate issue of Dmuchowsky’s claim
10 period, which the parties resolved by stipulation later the same day that the motion was filed. *See*
11 Stipulation (dkt. 55); Order on Stipulation (dkt. 56).

12 **2. Dmuchowsky’s Opposition**

13 Dmuchowsky argues in his opposition brief that Sky Chefs failed to submit any evidence
14 that Dmuchowsky did not opt out of the *Teruel* settlement, or that he received a settlement
15 payment, noting that the declaration of Jarrod Salinas referenced in Sky Chefs’ motion was not
16 filed with the motion. Opp’n (dkt. 59) at 2, 5. Dmuchowsky presents no evidence showing that
17 he opted out of the settlement or that he did not receive payment.

18 Dmuchowsky also argues that even if he is bound by the settlement, it does not cover his
19 claim in this action, because the settlement “was *expressly* limited to ‘**all claims alleged in the**
20 **Lawsuit**’ arising out of the ‘**late payment of wages,**’ **and the facts asserted in the Complaint.**”
21 Opp’n at 5 (excessive emphasis and mismatched internal quotation marks in original).

22 Dmuchowsky notes that Sky Chefs failed to submit the correct *Teruel* complaint with its motion,
23 and argues that the “primary right” at issue in this action is not “late” payment, but failure to
24 provide overtime compensation that would have been paid if Dmuchowsky had not been classified
25 as an exempt employee. *Id.* at 5–6. According to Dmuchowsky, the issue is comparable to that
26 faced by a California appellate court in *Consumer Advocacy Group, Inc. v. ExxonMobil Corp.*,
27 168 Cal. App. 4th 675, 686–88 (2008), where the court held that an earlier settlement did not
28 foreclose a claim because it did not address identical issues based on a “primary right” framework.

1 Opp'n at 5. Dmuchowsky argues that a decision cited by Sky Chefs, *Villacres v. ABM Industries,*
2 *Inc.*, 189 Cal. App. 4th 562, 577 (2010), is inapposite because, unlike here, the earlier settlement
3 in that case included a broader release of all claims that could have brought in the settled action.
4 Opp'n at 4–5.

5 **3. Sky Chefs' Reply**

6 Sky Chefs filed the correct *Teruel* complaint and Salinas's declaration with its reply,
7 acknowledging its error in failing to file them with its motion but noting that it had previously
8 provided both documents to Dmuchowsky's counsel before filing the motion. Reply (dkt. 63) at
9 5–6; Jang Reply Decl. (dkt. 63-1).

10 Sky Chefs argues that the release in the *Teruel* settlement is broader than Dmuchowsky
11 represents it to be, noting that the settlement agreement releases “*all claims* alleged in the
12 Lawsuit,” which the agreement defines as including claims for failure to provide wages when due
13 under Labor Code sections 201 through 203, among other claims. Reply at 2 (quoting 1st RJN Ex.
14 2 § 15.1). Sky Chefs also notes that the phrase of the release concerning the facts asserted in the
15 *Teruel* complaint follows the word “including,” and argues that it therefore should not be taken as
16 a limitation of the otherwise broader scope of the release. *Id.* at 3–4. According to Sky Chefs, the
17 release in the *Consumer Advocacy* case on which Dmuchowsky relies was narrower than here—
18 waiving only claims related to the release of specific chemicals, while the subsequent action
19 concerned a different chemical—and the present case is more analogous to *Shine v. Williams-*
20 *Sonoma, Inc.*, 23 Cal. App. 5th 1070 (2018), where a court held that claims were barred by a broad
21 release in an earlier class action settlement. Reply at 4. Sky Chefs also contends that the “primary
22 right” analysis used in California for questions of res judicata weighs in Sky Chefs' favor, not
23 Dmuchowsky's, because the harm asserted in Dmuchowsky's seventh claim—which Sky Chefs
24 characterizes as “untimely payment of all wages owed upon termination”—is the same as the harm
25 at issue and released in *Teruel*. *Id.* at 4–5.

26 **4. Dmuchowsky's Surreply**

27 In a surreply filed with leave of the Court due to Sky Chefs' belated filing of Salinas's
28 declaration and the correct *Teruel* complaint, Dmuchowsky objects to Salinas's declaration on the

1 basis that Salinas lacks personal knowledge of whether Dmuchowsky, as opposed to some other
2 person, signed and deposited the settlement check. Surreply (dkt. 65) at 1–2 & n.1. Dmuchowsky
3 also contends that there is no evidence that he did not opt out of the settlement. *Id.* at 1–2.
4 Dmuchowsky further argues that the allegations of the *Teruel* complaint are different than those
5 presented here, as Teruel alleged untimely payment of wages rather than failure to pay overtime
6 wages. *Id.* at 3.

7 **III. ANALYSIS**

8 **A. Legal Standard**

9 Summary judgment on a claim or defense is appropriate “if the movant shows that there is
10 no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
11 law.” Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show
12 the absence of a genuine issue of material fact with respect to an essential element of the non-
13 moving party’s claim, or to a defense on which the non-moving party will bear the burden of
14 persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

15 Once the movant has made this showing, the burden then shifts to the party opposing
16 summary judgment to designate “specific facts showing there is a genuine issue for trial.” *Id.*
17 “[T]he inquiry involved in a ruling on a motion for summary judgment . . . implicates the
18 substantive evidentiary standard of proof that would apply at the trial on the merits.” *Anderson v.*
19 *Liberty Lobby Inc.*, 477 U.S. 242, 252 (1986). The non-moving party has the burden of
20 identifying, with reasonable particularity, the evidence that precludes summary judgment. *Keenan*
21 *v. Allan*, 91 F.3d 1275, 1278 (9th Cir. 1996). Thus, it is not the task of the court to scour the
22 record in search of a genuine issue of triable fact. *Id.* at 1229; *see Carmen v. S.F. Unified Sch.*
23 *Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); Fed. R. Civ. P. 56(c)(3).

24 A party need not present evidence to support or oppose a motion for summary judgment in
25 a *form* that would be admissible at trial, but the *contents* of the parties’ evidence must be amenable
26 to presentation in an admissible form. *See Fraser v. Goodale*, 342 F.3d 1032, 1036–37 (9th Cir.
27 2003). Conclusory, speculative testimony in affidavits and arguments in moving papers are
28 insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ’g Co.*,

1 *Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). On summary judgment, the court draws all
2 reasonable factual inferences in favor of the non-movant, *Scott v. Harris*, 550 U.S. 372, 378
3 (2007), but where a rational trier of fact could not find for the non-moving party based on the
4 record as a whole, there is no “genuine issue for trial” and summary judgment is appropriate.
5 *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). In considering Sky Chefs’
6 motion, the Court therefore draws all reasonable inferences in favor of Dmuchowsky.

7 **B. Sky Chefs Is Entitled to Judgment**

8 As a starting point, there is no legitimate dispute that Dmuchowsky is bound by the *Teruel*
9 settlement. The standard of proof in this civil action is the preponderance of the evidence, which
10 “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its
11 nonexistence before [the trier of fact] may find in favor of the party who has the burden.’”
12 *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602,
13 622 (1993) (citation omitted). Here, even if Salinas lacks personal knowledge of whether the
14 signature on the settlement check is in fact Dmuchowsky’s, his declaration and the attached check
15 images constitute evidence that a settlement check from *Teruel* was made out to Dmuchowsky and
16 deposited. With no evidence to the contrary, any rational finder of fact would conclude that it is
17 more likely than not that the person who received and deposited Dmuchowsky’s check was in fact
18 Dmuchowsky. Any rational finder of fact would also conclude, based on the fact that a settlement
19 check was made out to Dmuchowsky and deposited, that it is more likely than not that
20 Dmuchowsky did not opt out of the settlement. Absent a declaration from Dmuchowsky or some
21 other evidence suggesting that he opted out or that he did not receive the check deposited in his
22 name, Dmuchowsky’s arguments on this point are frivolous.³

23 The question, then, is whether the *Teruel* settlement bars the claim at issue in this case. As
24 both parties acknowledge, California courts consider the preclusive effect of a class action
25 settlement through the lens of the doctrine of res judicata. *See, e.g., Villacres*, 189 Cal. App. 4th
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27 ³ Although Dmuchowsky is primarily responsible for injecting this unnecessary issue into the
28 motion, Sky Chefs also likely could have avoided the issue through better presentation of evidence
from the settlement administrator, or through requests for admission.

1 at 577 (“Res judicata applies to a court-approved settlement agreement in a class action dismissed
2 with prejudice.”). “The doctrine is applicable ‘if (1) the decision in the prior proceeding is final
3 and on the merits; (2) the present proceeding is on the *same cause of action* as the prior
4 proceeding; and (3) the parties in the present proceeding or parties in privity with them were
5 parties to the prior proceeding,’” and is applied only where preclusion of a claim would not result
6 in injustice. *Id.* (quoting *Fed’n of Hillside & Canyon Ass’ns v. City of Los Angeles*, 126 Cal. App.
7 4th 1180, 1202 (2004)).

8 The dispute here concerns the second element, whether Dmuchowsky’s claim under
9 sections 202 and 203 of the Labor Code is the same cause of action as the *Teruel* class’s claim
10 under sections 201 through 203, as well as whether Sky Chefs has waived the full scope of its res
11 judicata through the use of a narrower settlement agreement. *Cf. Shine*, 23 Cal. App. 5th at 1078
12 (discussing a similar waiver argument). California courts use the “primary right theory” to define
13 a claim or cause of action. *Consumer Advocacy*, 168 Cal. App. 4th at 686. “As far as its content
14 is concerned, the primary right is simply the plaintiff’s right to be free from the particular injury
15 suffered.” *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 904 (2002) (quoting *Crowley v.*
16 *Katleman*, 8 Cal. 4th 666, 681–82 (1994)). In wage-and-hour cases, at least one California
17 appellate court has construed the primary right at issue as the right “to seek payment of wages
18 due,” and applied res judicata even where different actions involved claims for different types of
19 wages. *Shine*, 23 Cal. App. 5th at 1077 (“The fact that no claim for reporting-time pay was
20 alleged in *Morales* does not alter our determination that the same primary right, to seek payment
21 of wages due, was involved in both *Morales* and this case.”).

22 Here, not only do both Dmuchowsky’s seventh claim and the earlier *Teruel* settlement
23 concern payment of wages due, both concern payment of wages due under the same statute, Labor
24 Code section 203, which requires employers to continue to pay wages for up to thirty days after
25 termination of employment if all wages owed at the time of employment were not paid on a timely
26 basis. The fact that the alleged *reasons* for such delay differ—here, failure to account for overtime
27 pay due to misclassification, while the reason for delay in *Teruel* is not clear from that
28 complaint—does not alter the primary right at issue. *See Shine*, 23 Cal. App. 5th at 1077 (treating

1 claims for failure to pay wages for, e.g., “meal and rest periods, overtime and minimum wages” as
 2 concerning the same primary right as a claim for “reporting-time” pay owed when a shift is
 3 canceled on short notice).

4 Because both this claim and the claims settled in *Teruel* concern the same primary right,
 5 res judicata applies unless Sky Chefs waived the full scope of that defense by entering a narrow
 6 settlement agreement. *See id.* at 1078–82 (considering a waiver argument based on the text of the
 7 earlier settlement agreement’s release); *Villacres*, 189 Cal. App. 4th at 585–86 (same). The
 8 release here is not as broad or clear as in *Shine* and *Villacres*, where earlier settlement agreements
 9 released all claims that were or “could have been asserted” for nonpayment of wages or violation
 10 of the Labor Code. *Shine*, 23 Cal. App. 5th at 1080; *Villacres*, 189 Cal. App. 4th at 585–86.
 11 Instead, the *Teruel* release pertains in relevant part to “all claims alleged in the Lawsuit [including]
 12 Failure to Provide Wages When Due in Violation of California Labor Code §§ 201, 202 and 203,”
 13 and goes on to define the release as governing “all claims and rights . . . arising out of . . . the
 14 alleged late payment of wages due upon separation of employment.” 1st RJN Ex. 2 § 15.1.

15 Dmuchowsky argues that his claim does not fall within that scope because the overtime
 16 wages he contends that he was owed were not paid “late,” but instead were not paid at all. This
 17 argument conflates his first claim for failure to pay overtime wages, which is not in dispute on the
 18 present motion, with his seventh claim, at issue here, for a “waiting time penalty” for failure to pay
 19 wages at the time of separation. *See* Notice of Removal Ex. A (Compl.) ¶¶ 13, 25. Sky Chefs
 20 does not contend that the *Teruel* release bars Dmuchowsky from recovering overtime wages he
 21 was not paid. Instead, the only claim on which Sky Chefs seeks summary judgment is for failure
 22 to pay the waiting time penalty under section 203, which would consist of wages for an additional
 23 thirty days, purportedly owed for failure to pay all wages *when due* after termination. The release
 24 specifically governs claims under sections 201 through 203, and the theory that additional wages
 25 are owed for failure to meet a deadline under section 203 falls within any reasonable reading of
 26 the phrase “late payment of wages due upon separation” in the release. *See* 1st RJN Ex. 2 § 15.1.

27 Dmuchowsky also argues that release is limited by a phrase that follows those addressed
 28 above: “claims alleged in the Complaint for violations of sections 201, 202 and 203 of the

1 California Labor Code based upon the late payment of wages due upon separation of employment
2 and the facts asserted on the Complaint.” *Id.* Dmuchowsky focuses in particular on the end of
3 that phrase—“and the facts asserted on the Complaint”—which he contends excludes his claim
4 here from the release, because Teruel’s complaint included no allegations of failure to pay
5 overtime wages. *See* Opp’n at 5–6; Surreply at 3. Dmuchowsky does not address Sky Chefs’
6 argument that this phrase is illustrative rather than limiting, *see* Reply at 3–4, based on the use of
7 the word “including” to introduce it:

8 Plaintiff and all members of the settlement class fully and finally
9 release and discharge [Sky Chefs] from any and all claims and rights
10 that they may have . . . arising out of (1) the alleged late payment of
11 wages due upon separation of employment, *including* all claims
12 alleged in the Complaint for violations of sections 201, 202 and 203
13 of the California Labor Code based upon the late payment of wages
14 due upon separation of employment and the facts asserted on the
15 Complaint, including all claims for attorney’s fees, litigation and
16 costs, PAGA penalties, and interest predicated thereon.

17 1st RJN Ex. 2 § 15.1 (emphasis added).

18 While the release could certainly be clearer, Sky Chefs has the better argument.
19 Dmuchowsky asks the Court to read the word “including” as equivalent to “meaning” or “limited
20 to.” As a matter of ordinary meaning and as recognized in case law, “the word ‘including’ . . . is
21 ‘ordinarily a term of enlargement rather than limitation.’” *Hassan v. Mercy Am. River Hosp.*, 31
22 Cal. 4th 709, 717 (2003) (citation omitted) (considering this issue in the context of statutory
23 interpretation). Based on a plain reading of the release language, it would make no more sense to
24 limit the release of claims arising out of late payment to “the facts asserted on the Complaint” than
25 it would to construe the release as not encompassing claims for damages but instead only “claims
26 for attorney’s fees, litigation and costs, PAGA penalties, and interest predicated thereon”—a
27 phrase in the same sentence that is similarly introduced with the word “including.” Giving
28 meaning to the word “including,” claims based on the facts of Teruel’s class action complaint are
within the scope of the release, but do not constitute the *extent* of the release. The release
encompasses claims “arising out of . . . the alleged late payment of wages due upon separation of
employment,” 1st RJN Ex. 2 § 15.1, which includes Dmuchowsky’s seventh claim here. Sky
Chefs has not waived its res judicata defense as to that claim.

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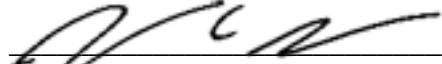
The case on which Dmuchowsky primarily relies, *Consumer Advocacy*, is not analogous and does not alter the outcome. There, an earlier settlement agreement specifically resolved claims pertaining to the “discharge or release of *benzene and/or toluene*.” *Consumer Advocacy*, 168 Cal. App. 4th at 688. The court held that the agreement did not bar a new claim for discharge of lead, even though both claims related to the release of gasoline constituents. *Id.* at 688–89. As discussed above, the release here includes no limitation comparable to the language at issue in *Consumer Advocacy*.

IV. CONCLUSION

For the reasons discussed above, Sky Chefs’ motion for partial summary judgment as to Dmuchowsky’s seventh claim is GRANTED. This order has no effect on Dmuchowsky’s other claims.

IT IS SO ORDERED.

Dated: November 9, 2018



JOSEPH C. SPERO
Chief Magistrate Judge