SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2310

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department19@scscourt.org. Please state your case name, case number, the name of the attorney and contact number. It would also be helpful if you could identify the specific portion or portions of the tentative ruling that will be contested. Please also make sure you have notified the other side in a timely fashion that you are contesting the tentative ruling. (See R. Ct. 3.1308(a)(1); Local Rule 8.E.)

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LAW AND MOTION TENTATIVE RULINGS
DATE: OCTOBER 2, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV368379	Milon v. David & Esperanza Chavez Family Limited Partnership DBA Chavez Supermarket (Class Action)	See Line 1 for tentative ruling.
LINE 2	20CV366734	Horta, et al. v. Millennium Transportation, Inc., et al. (Class Action)	See Line 2 for tentative ruling.
LINE 3	22CV403852	Navarro v. Floor and Decor Outlets of America, Inc., et al. (PAGA)	See Line 3 for tentative ruling.
LINE 4	19CV344971	Alorica Inc. v. Fortinet, Inc.	See Line 4 for tentative ruling.
LINE 5	19CV344971	Alorica Inc. v. Fortinet, Inc.	See Line 4 for tentative ruling.
LINE 6			
LINE 7			
LINE 8			
LINE 9			

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LAW AND MOTION TENTATIVE RULINGS

LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Milon v. David & Esperanza Chavez Family Limited Partnership DBA Chavez Supermarket (Class Action)
Case No.: 20CV368379

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 2, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative class action and representative action arising out of alleged wage and hour violations. On July 17, 2020, Plaintiff Yuri Milon ("Milon") commenced this action by filing a Class Action Complaint against Defendant David & Esperanza Family Limited Partnership DBA Chavez Supermarket ("Defendant"), alleging various wage and hour violations (the "*Millon* Action").

On December 1, 2020, Olimpia Meza Pelayo ("Pelayo") commenced a separate action against Defendant in this court, captioned *Oliva Meza Pelayo v. David & Esperanza Family Limited Partnership DBA Chavez Supermarket*, Case No. 20CV373672, setting forth various wage and hours claims as well as a cause of action for civil penalties pursuant to the Private Attorneys General Act ("PAGA") (the "*Pelayo* Action"). On April 19, 2021, Pelayo filed a First Amended Class Action Complaint against Defendant in the *Pelayo* Action.

The Parties in the *Milon* Action and the *Pelayo* Action have reached a settlement that would resolve the claims alleged in both actions. (See Joint Stipulation Granting Plaintiff Leave to File First Amended Complaint; Order Thereon, p. 1:25-27.) On February 23, 2024, the court entered an order on the Parties' stipulation granting Milon leave to file a First Amended Complaint ("FAC"), which was deemed filed as of that date.

The FAC is brought in the name of Plaintiffs Milon, Pelayo, and Emilio Lopez ("Lopez") (collectively, "Plaintiffs") against Defendant and sets forth the following causes of action: (1) violation of Labor Code sections 510 and 1198 (unpaid overtime); (2) violation of Labor Code sections 226.7 and 512, subdivision (a) (unpaid meal period premiums); (3) violation of Labor Code section 226.7 (unpaid rest period premiums); (4) violation of Labor Code section 226.7; (5) violation of Labor Code sections 201 and 202 (final wages not timely

paid); (6) violation of Labor Code section 204 (wages not timely paid during employment); (7) violation of Labor Code section 226, subdivision (a) (non-compliant wage statements); (8) violation of Labor Code section 1174, subdivision (d) (failure to keep requisite payroll records); (9) violation of Labor Code section 227.3 (failure to pay vacation wages); (10) violation of Labor Code sections 2800 and 2802 (unreimbursed business expenses); (11) violation of Business and Professions Code section 17200, *et seq.*; and (12) violation of Labor Code section 2698, *et seq.* (PAGA).

Now before the court is Plaintiffs' motion for preliminary approval of the Parties' settlement. The motion is unopposed.

II. Legal Standard for Settlement Agreements

A. Class Action

Generally, "questions whether a [class action] settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(*Wershba, supra*, 91 Cal.App.4th at pp. 244-245, internal citations and quotations omitted.)

In general, the most important factor is the strength of the plaintiffs' case on the merits, balanced against the amount offered in settlement. (See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130 (*Kullar*).) But the trial court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Wershba, supra*, 91 Cal.App.4th at p. 245.) The trial court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as

a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, citation and internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba, supra,* 91 Cal.App.4th at p. 245, citation omitted.)

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___, 2022 U.S. LEXIS 2940.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76-77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson v. U.S. Aviation Servs. Corp*. (N.D. Cal. 2019) 383 F. Supp. 3d 959, 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that

courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-cv-02198-EMC) 2016 WL 5907869, 2016 U.S. Dist. LEXIS 140759, at *20-24.)

III. Discussion

A. Provisions of the Settlement

This case has been settled on behalf of the following class:

> [A]ll current and former non-exempt employees of Defendant employed in California during the Class Period ["the time period from July 17, 2016 through July 25, 2023, or, if applicable, the Alternate End Date pursuant to Paragraph 55"].

(Declaration of Yasmin Hosseini ("Hosseini Dec."), Ex. 1 ("Agreement"), ¶¶ 7, 9.) The settlement also includes a subset class of "PAGA Members," defined as:

> [A]ll current and former non-exempt employees of Defendant employed in the State of California during the PAGA Period ["the time period from August 19, 2019 through July 25, 2023, or, if applicable, the Alternate End Date pursuant to paragraph 55"].

(Agreement, ¶¶ 28-29.) Paragraph 55 is an escalator clause providing that, if it is determined that the actual total number of workweeks exceeds Defendant's estimated figure by more than five percent, Defendant has the option to either (a) increase the gross settlement amount proportionately; or (b) alter the end date of the Class Period and PAGA Period to the date that the five percent threshold was reached (the "Alternate End Date"). (*Id.* at ¶ 55.)

Under the terms of the Agreement, Defendant will pay a gross settlement amount of $3,500,000, subject to the provisions of Paragraph 55. (Agreement, ¶ 19.) This amount includes attorney fees of up to 35% of the gross settlement amount (currently estimated to be $1,225,000), litigation costs of up to $32,000, settlement administration costs of up to $25,000, a total of $36,000 in enhancement awards to Plaintiffs ($12,000 each), and a PAGA allocation of $350,000. (*Id.* at ¶¶ 19, 54(a)-(e).) The court approves ILYM Group, Inc. as settlement administrator. (*Id.* at ¶ 36.)

The net settlement amount will be distributed to participating class members on a pro-rata basis according to the number of workweeks worked during the Class Period. (Agreement, ¶ 54(f).) Similarly, individual PAGA payments will be distributed to PAGA Members on a pro-

rata basis according to the number of workweeks worked during the PAGA Period. (*Id.* at ¶ 54(e).)

The Agreement provides that funds from checks remaining uncashed more than 180 days after mailing will be transmitted to the Controller of the State of California to be held pursuant to the Unclaimed Property Law. (Agreement, ¶ 65.) The Parties' proposal to send funds from uncashed checks issued to class member to the State of California Unclaimed Property Fund does not comply with Code of Civil Procedure section 384, which mandates that unclaimed or abandoned class members funds be given to "nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent."

The court is disinclined to grant preliminary approval of a settlement that does not comply with Code of Civil Procedure section 384. Therefore, the court requests that the Parties meet and confer with the objective of executing a written agreement designating a *cy pres* recipient.

In exchange for the settlement, the class members agree to release Defendant, and related entities and persons, from all claims that arise during the Class Period that were asserted or that could have been asserted based on the facts or allegations in the FAC. (Agreement, ¶¶ 33, 38, 51.) PAGA Members agree to release Defendant, and related entities and persons, from all claims for PAGA civil penalties that were asserted or that could have been asserted based on the facts or allegations in the FAC and the LWDA notice. (*Id* at ¶¶ 33, 39, 53.) Plaintiffs also agree to a comprehensive general release. (*Id.* at ¶ 52.) The release provisions are appropriately tailored to the factual allegations of the operative pleading. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 538.)

B. Fairness of the Settlement

Plaintiffs assert that the Agreement represents a fair, reasonable, and adequate resolution of their claims against Defendant. (Hosseini Dec., ¶ 11.) Plaintiffs' counsel litigated the case for over three years and was preparing for class certification and trial. (*Ibid.*) The

Parties engaged in extensive settlement discussions and participated in a full-day mediation with Jeffrey A. Ross, Esq. (*Ibid.*)

Prior to reaching the settlement, Plaintiffs' counsel investigated Plaintiffs' claims and conducted both formal and informal discovery. (Hosseini Dec., ¶ 12.) Plaintiff Milon responded to discovery propounded by Defendant. (*Ibid*.) Plaintiffs' counsel reviewed and analyzed data and documents, including a detailed sampling of Class Members' time and pay data, various employee handbooks and timekeeping training manuals, new hire paperwork and meal period waivers. (*Ibid.*)

Plaintiffs state that the Parties reached a settlement based on a large volume of facts, evidence, and investigation. (Plaintiffs' Notice of Motion and Motion; Memorandum of Points and Authorities, p. 12:6-7.) Plaintiffs state that the settlement was calculated using the information and data uncovered during litigation, case investigation, and the informal exchange of information. (*Id.* at p. 12:13-14.) They explain that the settlement considers the potential risks and rewards in the matter at issue. (*Id.* at p. 12:15-16.)

Nevertheless, Plaintiffs' written submissions in support of the motion for preliminary approval do not offer any estimate of the value of their claims, either separately or as whole. While the gross settlement amount of $3.5 million is substantial, the Agreement purports to settle the claims of approximately 3,139 individuals over a period of seven years. (See Hosseini Dec., ¶¶ 9, 14; Agreement, ¶ 9.) Without further explanation regarding the valuation of the claims asserted in the FAC, the court has no way of accurately assessing whether the proposed settlement is in fact fair, reasonable, and adequate. The court also observes that the PAGA allocation of $350,000 is on the low side at just 1% of the gross settlement amount. While this percentage recovery could feasibly be reasonable, Plaintiffs offer no substantive explanation regarding the potential maximum value of the PAGA claim and the rationale for any discounts applied to arrive at the amount allocated.

Accordingly, the motion for preliminary approval is CONTINUED. Prior to the continued hearing, Plaintiffs' counsel shall file a supplemental declaration providing a more detailed explanation regarding the settlement amount, including, for example, an estimate of

Defendant's total maximum exposure, a breakdown of that amount by claim, and the rationale used to arrive at the settlement amount.

C. Enhancement Award, Attorney Fees and Costs

Plaintiffs request enhancement awards in the total amount of $36,000 (i.e., $12,000 each).

> The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, internal punctuation and citations omitted.)

The three Plaintiffs have each submitted declarations generally describing their participation in this action, which has included communication with counsel, searching for documents, and reviewing the pleadings and proposed settlement. Plaintiffs Milon, Pelayo, and Lopez also provide estimates of the number of hours they have spent participating in this litigation: 25, 24, and 21 hours, respectively.

The named Plaintiffs have each spent time in connection with this litigation and took risk by attaching their names to this case because it could impact their current or future employment. (See *Covillo v. Specialty's Café* (N.D. Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff takes a significant "reputational risk" in bringing an action against an employer].)

Here, enhancement awards are justified. Nevertheless, the amounts requested, in relation to the times spent on the litigation, are higher than the court normally awards. The court will assess the reasonableness of the enhancement awards at the continued hearing.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los*

Angeles Cellular Telephone Co. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel will seek attorney fees of up to 35% of the maximum settlement amount (currently estimated to be $1,225,000), and litigation costs not to exceed $32,000. Prior to any final approval hearing, Plaintiffs' counsel shall submit lodestar information (including hourly rate and hours worked), evidence of actual costs incurred, and evidence of settlement administration costs.

D. Conditional Certification of Class

Plaintiffs request that the class be conditionally certified for purposes of the settlement. Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." As interpreted by the California Supreme Court, section 382 requires: (1) an ascertainable class; and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Sav-On*, *supra*, 34 Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

As explained by the California Supreme Court,

> The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. A trial court ruling on a certification motion determines whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.

(*Sav-On, supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiffs state there are approximately 3,139 class members who can be identified from a review of Defendant's records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiffs as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

The content of a class notice is subject to court approval. "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court." (Cal. Rules of Court, rule 3.769(f).) "The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (*Ibid.*) In determining the manner of the notice, the court must consider: "(1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do not receive notice; and (7) The res judicata effect on class members." (Cal. Rules of Court, rule 3.766(e).)

Here, the notice describes the lawsuit, explains the settlement, and instruct class member that they may opt out of the settlement or object. (Agreement, Ex. A.) The settlement amounts, including attorney fees and payment to the named plaintiff, are stated. However, while Section 7 of the notice informs class members that they may file a written objection to the settlement, it must be amended to also inform class members that they may appear at the final fairness hearing to make an oral objection without filing a written objection. The address of the court as listed in Section 8 of the notice must be corrected; Department 19 is located in the Old Courthouse at 161 North First Street, San Jose, CA 95113. The court also requests that Section 8 of the notice be amended to include the following language regarding the final approval hearing:

> Class members may appear at the final approval hearing in person or remotely using the Microsoft Teams link for Department 19 (Afternoon Session), and should review the remote appearance instructions beforehand: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

> Class members who wish to appear remotely are encouraged to contact class counsel at least three days before the hearing, if possible, so that potential technology or audibility issues can be avoided or minimized.

Further, as discussed above, Plaintiffs shall provide a *cy pres* recipient in compliance with Code of Civil Procedure section 384, and the class notice must be amended to indicate this change.

IV. Conclusion

The motion for preliminary approval of the class and representative action settlement is CONTINUED to November 20, 2024 at 1:30 p.m. in Department 19.

At least ten court days prior to the continued hearing, Plaintiffs shall file a supplemental declaration identifying a *cy pres* recipient and providing a more detailed explanation regarding the maximum value of their claims and the rationale used to arrive at the settlement amount.

Plaintiffs shall prepare the order.

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Calendar Line 2

Case Name: Horta, et al. v. Millennium Transportation, Inc., et al. (Class Action)
Case No.: 20CV366734

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 2, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative class and representative action arising from alleged wage and hour violations. On May 29, 2020, Plaintiffs Nohemi Horta ("Horta") and Samara Perez ("Perez") (collectively, "Plaintiffs") filed a Class Action Complaint alleging various wage and hour causes of action as well as a claim for civil penalties under the Private Attorneys General Act (Labor Code, § 2698, *et seq.* ("PAGA")) against the following Defendants: Millenium Transportation Inc.; Millenium Transportation Group, Inc.; Millenium Distribution Services, Inc.; Millenium Transportation & Logistics, Inc.; and Reuban Bedi.

On January 12, 2022, Plaintiffs dismissed all claims in this action against Defendants Millenium Transportation Group, Inc. and Millenium Transportation & Logistics, Inc. Defendants Millenium Transportation, Inc., Millenium Distribution Services, Inc., and Reuban Bedi (collectively, "Defendants") filed answers to Plaintiffs' Complaint on February 23, 2021.

On March 4, 2022, the court (Hon. Lucas) entered an order on the Parties' stipulation to submit Plaintiffs' individual claims to arbitration and to stay Plaintiffs' PAGA claims pending resolution of Plaintiffs' individual causes of action in arbitration. (See March 3, 2022 Stipulation and Order ("Stipulation & Order"), p. 2:15-24.) Specifically, the Stipulation & Order provides as follows:

1. All individual causes of action asserted by Plaintiffs in this litigation will be resolved by arbitration in accordance with the Arbitration Agreements each signed;
2. Plaintiffs will submit a Demand for Arbitration to either JAMS or AAA within thirty (30) days after the Court serves an order approving this Stipulation;
3. Plaintiffs' class allegations are hereby dismissed without prejudice;
4. All proceedings in this Court shall be stayed to allow the completion of binding arbitration; and

5. The Court shall retain jurisdiction to confirm the arbitration award, if any, and enter judgment, if any, for the purposes of enforcement.

(*Id.* at ¶¶ 1-5.)

Now before the court is Plaintiffs' Motion for Sanctions and Relief from Stay based on Defendants alleged breach of the written agreement to arbitrate and failure to pay the arbitration fees. (Notice of Motion and Motion, p. 2:3-6.) Defendants oppose the motion. As discussed below, the motion is GRANTED IN PART.

II. Legal Standard

Plaintiffs' motion is based upon Title 9 of the Code of Civil Procedure (sections 1280-1299.9)[1] which "represents a comprehensive statutory scheme governing private arbitration in this state. [Citations]." (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 830.)

> The statues set forth procedures for the enforcement of agreements to arbitrate, establish rules for the conduct of arbitration proceedings except as the parties otherwise agree, describe the circumstances in which arbitrators' awards may be judicially vacated, corrected, confirmed, and enforced, and specify where, when, and how court proceedings relating to arbitration matters shall occur.

(*Ibid.*, internal citations omitted.)

> Code of Civil Procedure section 1281.97 and 1281.98 provide that if a company or business that drafts an arbitration agreement does not pay its share of required arbitration fees or costs within 30 days after they are due, the company or business is in 'material breach' of the arbitration agreement. (Code Civ. Proc., §§ 1281.97, subd. (a)(1), 1281.98, subd. (a)(1).) In the case of a material breach, an employee or consumer can, among other things, withdraw his or her claim from arbitration and proceed in court.

(*De Leon v. Juanita's Food* (2022) 85 Cal.App.5th 740, 745 (*De Leon*).)

"Subdivision (b) of section 1281.98 allows the employee or consumer to 'unilaterally elect' any of several options 'if the drafting party materially breached the arbitration agreement and is in default' subdivision (a)." (*DeLeon, supra,* 85 Cal.App.5th at p. 751.) Under one option, the employee or consumer may " '[w]ithdraw the claim from arbitration and proceed in a court of appropriate jurisdiction' (§ 1281.98, subd. (b)(1).)" (*Ibid.*)

If the employee or consumer chooses to withdraw the claim from arbitration and proceed in court, "he or she 'may bring a motion, or separate action, to recover all attorney's fees and costs associated with the abandoned arbitration proceeding' (§1281.98, subd. (c)(1)),

[1] Further statutory references are to the Code of Civil Procedure unless otherwise stated.

and the 'court shall impose sanction on the drafting party' in accordance with section 1281.99 (§1281.98, subd. (c)(2))." (*De Leon, supra*, 85 Cal.App.5th at p. 751.)

III. Discussion

Plaintiffs assert that they properly filed separate arbitration demands with the American Arbitration Association ("AAA") and that Defendants failed pay their arbitration deposits or provide initial disclosures. (Plaintiffs' Memorandum of Points and Authorities ("MPA"), p. 2:8-21.) Plaintiffs contend Defendants have used arbitration as a delay tactic in these proceedings and seek terminating sanctions, or alternatively, reasonable attorney fees and costs. (*Ibid.*)

In opposition, Defendants initially contend that the Federal Arbitration Act ("FAA") preempts section 1281.98, and that the imposition of monetary sanctions would be unjust. (Defendants' Opposition ("Opp."), pp. 1:23, 2:18.) Defendants further argue that they terminated the arbitration process because the Plaintiffs' claims were assigned to two different arbitrators, because one of those arbitrators employed abusive billing practices, and because Defendants have insufficient funds to pay the arbitration fees. (*Id.* at p. 3:1-6.)

Defendants do not appear to oppose Plaintiffs' request to dissolve the stay, and because the arbitrations have been terminated, it is appropriate to lift the stay at this time.

A. Preemption

According to Defendants, Plaintiffs' motion should be denied because both Plaintiffs agreed to arbitration pursuant to the FAA. (Opp., p. 2:1-2.) Defendants contend that the FAA preempts section 1281.98 because that section conflicts with the FAA's mandate to place arbitration contracts on equal footing with any other contract. (*Id.* at p. 2:4-18.) Defendant cites several federal decisions in support of its position, including *Burgos v. Citibank, N.A.* (N.D. Cal. 2024) 2024 U.S.Dist LEXIS 146779 and *Beleya v. GreenSky, Inc.* (N.D. Cal. 2022) 637 F.Supp.3d 745, 755-759 [finding that the FAA preempts section 1281.97 while noting that all courts to have considered the issue previously found the opposite]; compare *Gallo v. Wood Ranch USA, Inc.* (2022) 81 Cal.App.5th 621, 635-646 (*Gallo*) [rejecting preemption analysis].)

As Defendants point out, the issue is of FAA preemption of Section 1281.98 is currently on review before the California Supreme Court in *Hohenshelt v. Superior Court*, review granted June 12, 2024, S284498. (Opp., p. 2:17 and fn.1.) In reply, Plaintiffs argue that

Defendants cannot cite any binding California authority supporting their position that the FAA preempts section 1281.98. (Reply, p. 2:2-13.)

The appellate court in *Hohenshelt v. Superior Court* (2024) 99 Cal.App.5th 1319, 1325, observed that "[t]he question of whether section 1281.98, as well as section 1281.97 and 1281.99, are preempted by the FAA was addressed and answered in *Gallo* and followed thereafter by other courts. [Citations.]."") More recently, the appellate court in *Keeton v. Tesla, Inc.* (2024) 103 Cal.App.5th 26, 35-36, stated that "[w]hile our high court has yet to decide whether the FAA preempts section 1281.98, the Second District concluded in *Gallo* that an almost identical statute—section 1281.97—was not preempted by the FAA. (*Gallo*, *supra*, 81 Cal.App.5th at pp. 629-630.)"

In *Williams v. West Coast Hospitals, Inc.* (2022) 86 Cal.App.5th 1054, 1063, fn.1, the Sixth District Court of Appeal acknowledged the split in authority regarding the issue of federal preemption but had no occasion to address the merits of this issue because it was not raised on appeal. In the absence of binding California authority to contrary, this court declines Defendants' invitation to find that the FAA preempts section 1281.98. Therefore, the court rejects Defendants' preemption argument.

B. Material Breach of Agreement to Arbitrate

Plaintiffs contend that the relief the seek is justified because Defendants are in material breach of their agreement to arbitrate, pursuant to section 1281.98, subdivisions (a)(1) and (a)(2). (MPA, p. 5:10-24.) Those provisions state:

> **(a)**
>
> > **(1)** In an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration provider, that the drafting party pay certain fees and costs during the pendency of an arbitration proceeding, **if the fees or costs required to continue the arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement**, is in default of the arbitration, and waives its right to compel the employee or consumer to proceed with that arbitration as a result of the material breach.
> >
> > **(2)** The arbitration provider shall provide an invoice for any fees and costs required for the arbitration proceeding to continue to all of the parties to the arbitration. The invoice shall be provided in its entirety, shall state the full amount owed and the date that payment is due, and shall be sent to all

> parties by the same means on the same day. To avoid delay, absent an express provision in the arbitration agreement stating the number of days in which the parties to the arbitration must pay any required fees or costs, the arbitration provider shall issue all invoices to the parties as due upon receipt. Any extension of time for the due date shall be agreed upon by all parties. Once the invoice has been paid, the arbitration provider shall provide to all parties a document that reflects the date on which the invoice was paid.

(§1281.98, subds. (a)(1) & (a)(2), emphasis added.)

Here, on March 4, 2022, the court entered an order on the Parties' stipulation for Plaintiffs to submit a demand for arbitration to either JAMS or AAA within thirty days. Plaintiffs contend that proceeded with individual arbitration proceedings with AAA. (Declaration Alexander S. Rusnak, ¶¶ 15 ("Rusnak Dec.").) The arbitration agreements provide that the "Company shall pay for the arbitration costs and arbitrator's fees." (*Id.* at ¶ 14, Exs. A-B, p. 1 [last line].)

Plaintiffs assert that they proceeded with individual arbitration separately by respectively selecting arbitrators and attending initial Arbitration Management Conferences or Preliminary Hearings. (Rusnak Dec., ¶¶ 15-16.) In both arbitrations, the Parties were to meet and confer regarding preliminary discovery issues and hearing dates and were ordered to participate in the initial disclosure of relevant information. (*Id.* at ¶¶ 17-18.) Plaintiffs prepared their initial disclosures for their arbitration proceedings. (*Id.* at ¶ 21.)

Regarding the Horta arbitration, Defendants were provided with an invoice to pay the incurred costs and fees on August 21, 2023, with the amount due upon receipt. (Rusnak Dec., ¶ 19.) On September 20, 2023, Plaintiff Horta timely submitted her initial disclosures. (*Id.* at ¶ 22.) On September 21, 2023, AAA sent Plaintiff Horta a notice informing her that Defendants had not yet paid the invoice and inquiring as to how to proceed. (*Id.* at ¶ 25, Ex. C.) Plaintiff Horta informed AAA and Defendants that she was withdrawing her arbitration demand and will be proceeding in court pursuant to section 1281.98. (*Id.* at ¶ 26.) On September 29, 2023, AAA served notice that they have closed Plaintiff Horta's arbitration proceeding. (*Id.* at ¶ 27, Ex. D.)

Regarding the Sanchez arbitration, Defendants were provided with an invoice to pay the incurred costs and fees on August 29, 2023, with the amount due upon receipt. (Rusnak Dec., ¶ 20.) On September 29, 2023, AAA sent Plaintiff Sanchez a notice informing her that

Defendants had not yet paid the invoice and inquiring as to how to proceed. (*Id.* at ¶ 29, Ex. E.) Plaintiff Sanchez informed AAA and Defendants that she was withdrawing her arbitration demand and will be proceeding in court pursuant to section 1281.98. (*Id.* at ¶ 26.) On October 2, 2023, AAA served notice that they have closed Plaintiff Sanchez's arbitration proceeding. (*Id.* at ¶ 30, Ex. F.)

Based on the preceding facts, Plaintiffs contend that Defendants have materially breached the terms of the arbitration agreement as a matter of law. (MPA, p. 6:20-26.) Plaintiffs assert that they need make no further showing to establish that Defendants are in material breach of the arbitration agreement. (*Ibid.*, citing *De Leon, supra*, 85 Cal.App.5th at p. 753 ["Under the plain language of the statute, then, the triggering event is nothing more than the nonpayment of fees within the 30-day period—the statute specifies no other required findings, such as whether the nonpayment was deliberate or inadvertent, or whether the delay prejudiced the nondrafting party." (quoting and citing *Espinoza v. Superior Court* (2022) 83 Cal.App.5th 761, 776)].)

In opposition, as mentioned previously, Defendants assert that they terminated the arbitration process because the Plaintiffs' claims were assigned to two different arbitrators, because one of those arbitrators employed abusive billing practices, and because Defendants have insufficient funds to pay the arbitration fees. (Opp., p. 3:1-6.) Defendants state that they expected AAA to assign one arbitrator to oversee both cases because both Plaintiffs allege the same causes of action. (*Id.* at p. 3:6-9.)

Defendants state that they received an invoice of $5,000 for the Horta arbitration on August 21, 2023, and they received an invoice of $13,500 for the Sanchez arbitration on August 29, 2023. (Opp., p. 3:9-22, see also Declaration of Steven Benjamin, ¶¶ 4, 8 and Exs. A-B ("Benjamin Dec.").) On August 31, 2023, Defendants' counsel wrote to AAA expressing his opinion that $13,500 was more than should have incurred at that time and insisting upon seeing the arbitrator's billing records. (*Id.* at pp. 3:23-4:2.) On September 5, 2023, AAA provided Defendants with a line item billing statement showing $8,500 in billing charges. (*Id.* at pp. 4:3-5:1.) Defendants disputes these charges and contends AAA's billing on the Sanchez arbitration is excessive and abusive. (*Id.* at pp. 4:4-5, 5:3-4.)

Defendants acknowledge that they did not timely pay the invoices for the Horta and Sanchez arbitration proceedings with AAA, stating that they did not have the ability to pay the fees and dispute the amounts later. (Benjamin Dec., p. 5:5-8.) Defendants argue that section 1281.98 does not contemplate the problem of unreasonable arbitration fees and contend that they should be excused from sanctions because "AAA does not have a license to print money at Defendant's expense." (*Id.* at p. 5:11-14.) Defendants add that "[a]ny experienced arbitrator would not require so many hours to review a simple wage and hour claim." (*Ibid.*)

Defendants' argument lack merit. They offer no authority in support of their position that they should be excused from the requirements of section 1281.98 because they disagreed with the amount of the arbitrator's fees and chose to pay nothing. As Plaintiffs argue in their Reply, the arbitration agreements at issue call for arbitration on an individual basis, and Defendants never requested that the individual arbitrations be consolidated. (Reply, pp. 3:14-4:7.) Defendants simply did not pay the invoice for the Horta arbitration and raised no issue with the amount. Defendants did not pay any part of the invoiced amount for the Sanchez arbitration, even after receiving the requested information about the billing.

Accordingly, the court finds that Plaintiffs have established that Defendants are in material breach of the arbitration agreements by failing to pay the amounts due within 30 days after the due date. (§1281.98, subd. (a)(1); see also *De Leon*, *supra*, 85 Cal.App.5th at p. 753 [The "statute's language establishes a bright-line rule that a drafting party's failure to pay outstanding arbitration fees within 30 days after the due date results in its material breach of the arbitration agreement."].)

C. Sanctions

Plaintiffs request "terminating sanctions or in the alternative discovery sanctions prohibiting Defendants from conducting discovery and monetary sanctions in the amount of $24,421 for attorneys' fees and costs incurred in the arbitration proceeding Plaintiffs' motion." (Notice of Motion and Motion, p. 2:7-9.) Section 1281.99 sets forth the monetary and nonmonetary sanctions available when a party is in material breach of an arbitration agreement, and provides as follows in full:

> **(a)** The court shall impose a monetary sanction against a drafting party that materially breaches an arbitration agreement pursuant to subdivision (a) of

> Section 1281.97 or subdivision (a) of Section 1281.98, by ordering the drafting party to pay the reasonable expenses, including attorney's fees and costs, incurred by the employee or consumer as a result of the material breach.
>
> **(b)** In addition to the monetary sanction described in subdivision (a), the court may order any of the following sanctions against a drafting party that materially breaches an arbitration agreement pursuant to subdivision (a) of Section 1281.97 or subdivision (a) of Section 1281.98, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.
>
> **(1)** An evidence sanction by an order prohibiting the drafting party from conducting discovery in the civil action.
>
> **(2)** A terminating sanction by one of the following orders:
>
> **(A)** An order striking out the pleadings or parts of the pleadings of the drafting party.
>
> **(B)** An order rendering a judgment by default against the drafting party.
>
> **(3)** A contempt sanction by an order treating the drafting party an in contempt of court.

Here, Plaintiffs seek both monetary and nonmonetary sanctions.

i. Monetary Sanctions

Section 1281.99, subdivision (a), provides that the court "shall" impose a monetary sanction of reasonable expenses against a drafting party found to be in material breach under the relevant provisions. Plaintiffs' counsel seeks monetary sanctions in the amount of $24,421 based on attorney fees of $10,281 for Mr. Margain (approximately 11.5 hours at $895 per hour), attorney fees of $14,080 for Mr. Rusak (approximately 25.6 hours at $550 per hour), and $60.00 in costs associated with filing the instant motion. (MPA, p. 8:7-14; Declaration of Tomas E. Margain, ¶¶ 19-20; Rusak Dec., ¶¶ 33-34.)

The court finds the amount requested to be excessive, and therefore awards half of the requested attorney fees ($12,180) and costs of $60, for a total of $12,240 in monetary sanctions. Accordingly, Plaintiffs' request for monetary sanctions is GRANTED in the amount of $12,240.

ii. Nonmonetary Sanctions

Plaintiff contends that terminating sanctions are appropriate in light Defendants' "blatant disregard for their obligation to pay the fees for forum they unilaterally chose whose fees they agreed to pay… ." (MPA, p. 7:12-20.) Plaintiffs' moving papers do not set forth what

kind of terminating sanctions they seek (i.e., striking out the pleadings or parts thereof or judgment by default). Moreover, the court finds that under the circumstances of this case, the imposition of terminating sanctions would be unjust.

Plaintiffs also seek an order prohibiting Defendant from conducting discovery. (Notice of Motion and Motion, p. 2:7-8.) Plaintiffs argue that such an evidence sanction is warranted because Defendants provide no notice regarding their refusal to disclose the relevant information in the arbitration proceedings, and because Defendants took advantage of the anticipated lack of consequences for failing to comply with the order the mutually exchange information. The court is not persuaded that evidence sanctions are appropriate, especially considering that Plaintiffs can propound discovery and bring a motion or motions to compel, in necessary, in this action.

Accordingly, Plaintiffs' requests for nonmonetary sanctions are DENIED.

IV. Conclusion

Plaintiffs' motion is GRANTED IN PART and DENIED IN PART. The motion is GRANTED in that the court lifts the stay on proceedings in this court and grants an award of monetary sanctions to Plaintiffs in the amount of $12,240. Defendants shall pay this amount to Plaintiffs within 30 days of the filing of this order. In all other respects, the motion is DENIED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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Calendar Line 3

Case Name: Navarro v. Floor and Decor Outlets of America, Inc., et al. (PAGA)
Case No.: 22CV403852

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 2, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a representative action arising from alleged wage and hour violations. On September 30, 2022, Plaintiff Rafael Navarro ("Plaintiff") filed a Complaint against Defendants Floor and Decor Outlets of America, Inc. and Floor & Decor Holdings, Inc. (collectively, "Defendant"), setting forth a single cause of action for civil penalties for violations of Labor Code section 2698, *et seq.* (the Private Attorneys General Act ("PAGA").

On April 6, 2023, Defendant moved to compel arbitration and to dismiss Plaintiff's representative PAGA claims. At the hearing on May 17, 2023, the court the denied the motion, finding that the arbitration agreement states that claims under PAGA are not arbitrable. (March 17, 2023 Minute Order, pp. 2, 4.)

The Parties have reached a settlement. (See Joint Stipulation Re Filing of First Amended Complaint for Settlement Purposes; Order Granting Plaintiff Leave to File a First Amended Complaint, p. 2:6-14.) On September 12, 2024, the court entered an order on the Parties' stipulation, granting Plaintiff leave to file an amended complaint to conform the pleadings with the scope of the settlement and the claims to be released. (*Ibid.*) The following day, Plaintiff filed the operative First Amended Complaint, setting forth a single cause of action for civil penalties for violations of Labor Code section 2698, *et seq.* (the Private Attorneys General Act ("PAGA").

Now before the court is Plaintiff's unopposed motion for approval of PAGA settlement.

II. Legal Standard

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other

grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___ [2022 U.S. LEXIS 2940].) Seventy-five percent of any penalties recovered go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining 25 percent for the employees. (*Ibid*.) PAGA is intended "to augment the limited enforcement capability of [the LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id*. at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

A superior court must review and approve any PAGA settlement. (Lab. Code, § 2699, subd. (l)(2).) The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) The proposed settlement must be submitted to the LWDA at the same time it is submitted to the court. (*Ibid*.)

> As discussed by one court:
> PAGA does not establish a clear standard for evaluating PAGA settlements. …
> [¶]
> Accordingly, certain courts have been willing to approve PAGA settlements only if (1) the statutory requirements set forth by PAGA have been satisfied, and (2) the settlement agreement is fair, reasonable, and adequate in view of PAGA's public policy goals.

(*Patel v. Nike Retail Services, Inc.* (N.D. Cal. 2019) 2019 WL 2029061, 2019 U.S. Dist. LEXIS 77988 (*Patel*), at *5.)

As part of this analysis, these courts have evaluated proposed PAGA settlements under the relevant factors from *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. (*Patel, supra,* 2019 U.S. Dist. LEXIS 77988 at *5-6.) "Of the *Hanlon* factors, the following are relevant to evaluating [a] PAGA settlement: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel." (*Ibid*.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76–77.) It must make this assessment "in view of PAGA's purposes

to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77; see also *Haralson, supra*, 383 F. Supp. 3d at p. 971 ["when a PAGA claim is settled, the relief provided for under the PAGA [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …."], quoting LWDA guidance discussed in *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110 (*O'Connor*).)

"[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*O'Connor, supra* at p. 1133.) The settlement must be reasonable in light of the potential verdict value. (*Id.* at 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc*. (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, 2016 U.S. Dist. LEXIS 140759 at *8-9.)

III. Discussion

A. Provisions of the Settlement

This case has been settled on behalf of "PAGA Settlement Members," defined as:

> [A]ll individuals employed in California by Defendant Floor and Decor Outlets of America, Inc. [hereafter, "Defendant"], as non-exempt employees at any time during the PAGA Period [July 26, 2021 to the earlier of March 5, 2024 or the date of approval of this Settlement].

(Declaration of Raul Perez ("Perez Dec."), Ex. 1 ("Agreement"), p. 3:1-5.)

According to the terms of the settlement, Defendant will pay a gross settlement amount of $1,200,000. (Agreement, p. 5:2-4.) This amount includes attorney fees of up to one-third of the gross settlement amount ($399,600), litigation costs up to $25,000, a service award to Plaintiff of up to $10,000, and settlement administration costs of up to $20,000. (*Id.* at pp. 4:4-11, 6:5-7:2.) The net remaining amount will be allocated to a "PAGA Fund," 75% of which be sent to the LWDA and 25% of which will be allocated among the PAGA Settlement Members based on his or her proportionate share of the pay periods worked during the PAGA Period. (*Id.* at p. 7:3-10.)

The gross settlement amount is based upon Defendant's data regarding the number of pertinent pay periods. (Agreement, pp. 7:21-8:1.) If it is determined that the pay periods worked by PAGA Settlement Members during the PAGA Period is 10% more than the figure used to calculate the gross settlement amount, then the gross settlement amount will be increased proportionately, or in the alternative, Defendant may elect to end the PAGA Period on the date the number pay period reaches the number used in calculating the gross settlement amount. (*Ibid.*)

In exchange for the settlement, PAGA Settlement Members will be deemed to have released Defendant, and related entities and persons, from "Released Claims," defined as follows:

> [A]ny and all claims, whether known or unknown, to recover civil penalties pursuant to PAGA for any alleged violations of California Labor Code sections, including 201, 202, 203, 204, 206.5, 210, 221, 226(a), 226.7, 227.3, 246, 510, 512(a), 516, 558(a)(1)(2), 1174(d), 1182.12, 1194, 1197, 1197.1, 1198, and 2802, 2810.5, and 2698 *et seq.*, and the applicable IWC Wage Order for the PAGA Period.

(Agreement, pp. 3:15-21, 10:17-22.)

The scope of this release is overly broad. It encompasses claims that are untethered to the factual allegations in the complaint. Courts must ensure that releases "do not extend to claims that beyond the scope of the allegations in the complaint." (*Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 538.) "Releases must be appropriately tethered to the complaint's factual allegations. For example, [a release] covering 'potential claims reasonably arising out of … the same set of operative facts' pleaded in the complaint is sufficiently tailored." (*Ibid.*)

Accordingly, the Parties shall meet and confer regarding whether they can amend the release to conform with *Amaro*. To the extent possible, the Parties are encouraged to submit a stipulation on this issue to the court prior to the upcoming hearing. Otherwise, the motion will be CONTINUED.

B. Fairness of the Settlement

Plaintiff contends that the proposed settlement is fair, reasonable, and adequate in light of all known facts and circumstances. (Perez Dec., ¶¶ 5, 10.) Following an informal exchange

of documents and data, the Parties participated in a mediation with Daniel Turner, Esq. (*Id.* at ¶ 3.) Plaintiff's counsel performed a thorough investigation into the claims. (*Id.* at ¶ 9.) Plaintiff's counsel determined that approximately 3,500 PAGA Settlement Members worked a total of 80,00 pay periods during the PAGA Period. (*Id.* at ¶ 11.)

According to Plaintiff's analysis, Defendant's estimated total maximum exposure as to all of Plaintiff's claims is $31,192,000. (Perez Dec., ¶¶ 11-26.) Plaintiff provides a breakdown of this amount by claim. (*Ibid.*) Plaintiff also sets forth factors supporting a reduction in penalties based on the anticipated trial result, weight of the evidence, the clarity of controlling law, and the anticipated defenses. (*Id.* at ¶¶ 27-53.) Plaintiff provides a detailed analysis of these factors as applied to his different claims. (*Ibid.*) Based upon these factors, Plaintiff asserts that Defendant's estimated realistic total exposure is $3,900,000, and Plaintiff provides a breakdown of this amount by claim. (*Id.* at ¶¶ 54-55.)

The gross settlement amount of $1,200,000 represents approximately 3.85% of Defendant's estimated maximum exposure and 30.8% of Defendant's estimated realistic exposure. This percentage recovery, when based on Defendant's estimated maximum exposure, is below the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D. Cal., Feb 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist. LEXIS 30201, at *41-42 [citing cases approving settlements in the range of 5 to 35 percent of the maximum potential exposure].)

Nevertheless, the court finds that Plaintiff has offered a sufficient explanation for the reduction in penalties. The percentage recovery, when based on Defendant's estimated realistic exposure, is at the high end of the general range of percentage recoveries that courts have found to be reasonable. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation. Based on the circumstances of the case, including the strength of Plaintiffs' case and the likelihood of obtaining recovery from Defendant, the court finds the terms of the settlement to be fair.

C. Service Award, Attorney Fees and Costs

As part of the settlement, Plaintiff seeks a service award (or "general release payment") in the amount of $10,000. Although service awards are common in class actions, there is less

authority regarding the propriety of service awards in PAGA cases. Nevertheless, a PAGA case is a representative action like a class action, and courts have recognized that an individual's willingness to act as a private attorney general may merit a service award. (See *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 959.)

Plaintiff has submitted a declaration detailing his participation in the action. He states that he has spent between 25 and 35 hours on this case, including discussing the case with counsel, reviewing the complaint, gathering facts and documents for counsel, and reviewing settlement documents. (Declaration of Rafael Navarro, ¶¶ 4-13.) Plaintiff has agreed to a comprehensive general release, negotiated in exchange for general release payment of $10,000.

The amount requested, in relation to the time on the litigation, is more than the court typically awards in similar situations. However, the court acknowledges that Plaintiff agreed to a broader release in exchange for the service award and took risk in attaching his name to this action. Accordingly, the court approves a service award in the amount of $7,500.

The Agreement provides for the recovery of attorney fees of up to $399,600 (one-third of the gross settlement amount). Plaintiff's counsel provides evidence demonstrating $257,392.50 incurred in attorney fees, based on 391.5 hours billed at rates ranging from $475 to $950 per hour. (Perez Dec., ¶ 66.) The court finds the requested fees to be reasonable, and the fees are approved in the in incurred amount of $257,392.50.

The Agreement provides for the recovery of litigation costs of up to $25,000. Plaintiff's counsel provides evidence of costs incurred in the amount of $21,073.18. (Perez Dec., ¶ 70.) The court finds costs in the incurred amount of $21,073.18 to be reasonable and approves that amount.

Finally, the Agreement provides for the recovery of settlement administration costs of up to $20,000. Plaintiff submits the settlement administrator's bid indicating a discounted flat rate of $18,750. (Perez Dec., ¶ 71, Ex. 4.) Therefore, the court approves settlement administration costs in the amount of $18,750.

IV. Conclusion

Accordingly, the motion for approval of PAGA settlement is CONTINUED to November 6, 2024 at 1:30 p.m. in Department 19, unless the Parties are able to resolve the

release issue prior to the upcoming hearing. As discussed above, the Parties shall meet and confer regarding whether they can amend the release to conform with *Amaro*. At least ten court days prior to the hearing, Plaintiff shall file a supplemental declaration indicating whether the Parties were able to reach an agreement to amend the release provision.

Plaintiff shall prepare the order.

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Calendar Lines 4 – 5

Case Name: Alorica Inc. v. Fortinet, Inc.
Case No.: 19CV344971

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 2, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This action arises from plaintiff Alorica Inc.'s ("Plaintiff" or "Alorica") agreement to purchase computer networking products and services from defendant Fortinet, Inc. ("Defendant" or "Fortinet"). On November 8, 2021, Plaintiff filed its operative Second Amended Complaint. Defendant filed its operative First Amended Cross-Complaint on June 25, 2019. The factual and procedural background is set forth in detail in the court's prior orders (including the Order Re: Motions for Sanctions; Motion to Quash; Motions to Seal, signed and filed on July 8, 2024, and the Order Re: Motion for Summary Judgment and/or Adjudication; Motions to Strike; Motions to Seal, signed and filed on January 12, 2024).

A jury trial began on September 9, 2024 and is presently ongoing. Prior to the trial, Plaintiff filed a Motion to Reopen Discovery on June 26, 2024. Defendant opposed the motion and filed a related motion to seal. On August 19, the court entered an order denying Plaintiff's Motion to Reopen Discovery and granted Defendant's motion to seal. On August 19, 2024, Defendant filed a Motion to Seal Portions of Alorica's Reply in Support of Motion to Reopen Discovery.

On August 21, 2024, Plaintiff filed a Motion to Enforce Scheduling Order along with a related *Ex parte* Application to Shorten Time. The motion sought an order compelling Defendant to produce a particular witness, or alternatively, issue an adverse jury instruction. Defendant filed a timely opposition along with a related motion to seal Plaintiff's Motion to Enforce Scheduling Order.

On August 23, the court denied Plaintiff's motion for *Ex parte* relief, stating that witness issues could be addressed at the Pretrial Conference or at the time of trial. Having reviewed the briefing and having heard the arguments of counsel at the pre-trial conference, the

court denied Plaintiff's Motion to Enforce Scheduling Order on September 18, 2024. Accordingly, Plaintiff's Motion to Enforce Scheduling Order is no longer before the court.

Now before the court are: (1) Defendant's August 19, 2024 Motion to Seal Portions of Alorica's Reply in Support of Motion to Reopen Discovery; and (2) Defendant's August 30, 2024 Motion to Seal Portions of Alorica's Motion to Enforce Scheduling Order. As discussed below, the court GRANTS the two motions to seal.

II. Legal Standard

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exists to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).) Pleadings, in particular, should be open to public inspection "as a general rule," although they may be filed under seal in appropriate circumstances. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 104, fn. 35.)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3 (*Providian*).) "[A] binding contractual agreement not to disclose" may suffice. (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 107.) In addition, confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285-1286 (*Universal*).)

Where some material within a document warrants sealing, but other material does not, the document should be edited or redacted, if possible, to accommodate both the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (d)(5).) In such a case, the moving party should take a line-by-line

approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*Providian, supra*, 96 Cal.App.4th at p. 309.)

III. Discussion

A. Motion to Seal Alorica's Reply Re: Motion to Reopen Discovery

Fortinet moves to seal the publicly redacted portions of Alorica's Reply in Support of Motion to Reopen Discovery, filed conditionally under seal on August 7, 2024. Specifically, Fortinet moves to seal redactions at the following page and line numbers: 2:16-17; 2:18-19; 4:5-9; 4:9-11; 4:12-13; 4:13-14; 4:15-19; 4:19-21; 4:22-25; 4:26-27; 4:28-5:3; 5:4; 5:5-7; 5:10-12; 5:13; 5:17-18; 5:19-20; 5:20-24; 5 (fn. 2); 6:1; 6:27-7:1; 7:11-15; 7:16-17; 7:18-23. (Notice of Motion and Motion, pp. 2:2-4:15.)

Fortinet asserts that there is a substantial probability that its overriding interest will be prejudiced if the designated portions of Alorica's Reply are not sealed. (Declaration of Scott Atkinson in Support of Motion to Seal [], ¶ 3.) The materials at issue contain Fortinet's confidential and proprietary financial business information, technical information, employee information, and third-party confidential business and technical information. (*Id.* at ¶¶ 3-4.) This information is not publicly available, and its disclosure could harm Fortinet and invade the privacy rights of third parties. (*Ibid.*)

The proposed sealing appears to be narrowly tailored to the confidential information. Therefore, the court finds that Defendant has established an overriding interest that justifies sealing these materials, and the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra*, 110 Cal.App.4th 1273 at p.1286 [information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party].)

B. Motion to Seal Alorica's Motion to Enforce Scheduling Order

Fortinet moves to seal the publicly redacted portions of Alorica's Motion to Enforce Scheduling Order, filed conditionally under seal on August 21, 2024. Specifically, Fortinet

moves to seal redactions at the following page and line numbers: 4:23-5:3; 10:6-12:7; 13:24-26; and Exhibit 10 to the Sivakumar Declaration. (Notice of Motion and Motion, pp. 2:2-22.)

Fortinet asserts that there is a substantial probability that its overriding interest will be prejudiced if the designated portions of Alorica's Reply are not sealed. (Declaration of Scott Atkinson in Support of Motion to Seal [], ¶ 3.) The materials at issue contain Fortinet's confidential and proprietary financial business information, technical information, employee information, and third-party confidential business and technical information. (*Id.* at ¶¶ 3-4.) This information is not publicly available, and its disclosure could harm Fortinet and invade the privacy rights of third parties. (*Ibid.*)

The proposed sealing appears to be narrowly tailored to the confidential information. Therefore, the court finds that Defendant has established an overriding interest that justifies sealing these materials, and the other factors set forth in rule 2.550 are satisfied. (See *Universal, supra*, 110 Cal.App.4th 1273 at p.1286 [information involving confidential matters relating to a party's business operations can be sealed if public revelation of these matters would interfere with its ability to effectively compete in the marketplace and, if made available to the public, there is a substantial probability that their revelation would prejudice the foregoing legitimate interests of the party].)

IV. Conclusion

The motions to seal are GRANTED.

The prevailing party shall prepare the order in accordance with California Rules of Court, rule 3.1312.

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