SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Theodore C. Zayner Presiding

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

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LAW AND MOTION TENTATIVE RULINGS
DATE: JANUARY 31, 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	23CV415981	Kobayashi v. Dfinity USA Research LLC, et al.	See Line 1 for tentative ruling.
LINE 2	23CV415981	Kobayashi v. Dfinity USA Research LLC, et al.	See Line 1 for tentative ruling.
LINE 3	22CV407445	Nava v. Performance First Building Services, Inc. (Class Action/PAGA)	See Line 3 for tentative ruling.
LINE 4	23CV417936	Dauphinais v. Medely, Inc. (Class Action)	See Line 4 for tentative ruling.
LINE 5	23CV420358	Dauphinais v. Medely, Inc. (PAGA)	See Line 5 for tentative ruling.
LINE 6			
LINE 7			
LINE 8			
LINE 9			
LINE 10			
LINE 11			

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LAW AND MOTION TENTATIVE RULINGS

LINE 12			
LINE 13			

Calendar Lines 1 – 2

Case Name: Kobayashi v. Dfinity USA Research LLC, et al.
Case No.: 23CV415981

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on January 31, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

This action primarily arises from defendant Dominic Williams' ("Williams") alleged breaches of fiduciary duty and tortious interference with plaintiff Satoshi Kobayashi's ("Plaintiff") rights concerning his investment in a blockchain project known as the Internet Computer Protocol ("ICP"), which is operated by defendant Dfinity USA Research LLC ("Dfinity USA"). On May 8, 2023, Plaintiff filed a Complaint against Williams and Dfinity USA (collectively, "Defendants"), setting forth causes of action for: (1) Tortious Interference with Contract; (2) Tortious Interference with Prospective Economic Advantage; (3) Breach of Fiduciary Duty; (4) Conversion; (5) Trespass to Chattels; and (6) Unfair Competition.

On July 24, 2023, the court entered an Order Deeming Case Complex.

On July 31, 2023, Dfinity USA filed a motion for an order dismissing the Complaint for improper forum or, in the alternative, staying or dismissing the action on the basis of forum non conveniens. The motion to dismiss is set for hearing on January 31, 2024.

On September 6, 2023, Williams filed a motion to quash service of the summons and complaint, on the grounds that service was defective.

On September 26, 2023, Dfinity USA file a motion for an order staying discovery.

Plaintiff filed an opposition to the motion to stay discovery on November 15, 2023. Plaintiff filed an opposition to the motion to dismiss and an opposition to the motion to quash on November 17, 2023.

On December 5, 2023, the parties participated in an Informal Discovery Conference ("IDC") regarding Dfinity USA's motion to stay discovery.

On December 19, 2023, the court entered an Order Granting Defendant Dfinity USA Research LLC's Motion to Stay Discovery, which stayed discovery until the court issues a ruling on the pending motion to dismiss and motion to quash.

Now before the court are: (1) Dfinity USA's motion for an order dismissing the Complaint for improper forum or, in the alternative, staying or dismissing the action on the basis of forum non conveniens; and (2) Williams' motion to quash service of the summons and complaint. Plaintiff opposes the motions.

II. MOTION TO DISMISS

A. Requests for Judicial Notice

1. Dfinity USA's Request

In connection with its moving papers, Dfinity USA asks the court to take judicial notice of: the Swiss Civil Code; the Swiss Code of Obligations; the Swiss Federal Act on Private International Law; the Swiss Civil Procedure Code; entity details for Dfinity USA available on the website for the Delaware Department of State; and a Statement of Information filed by Dfinity USA available on the website for the California Secretary of State.

The Swiss statutes are proper subjects of judicial notice pursuant to Evidence Code section 452, subdivision (f) as the law of a foreign nation. (See *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 123 Cal.App.3d 840, 852 [taking judicial notice of German laws], superseded on other grounds *Am. Home Assurance Co. v. Societe Commerciale Toutelectric* (2002) 104 Cal.App.4th 406, 409.)

The business entity details and corporate records are generally proper subjects of judicial notice pursuant to Evidence Code section 452, subdivision (h). (See *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1286-1287 (*Gamet*) [taking judicial notice of the Secretary of State's domestic corporation certificate of filing and suspension]; see also *Pedus Bldg. Servs. v. Allen* (2002) 96 Cal.App.4th 152, 156, fn. 2 (*Pedus*) [taking judicial notice of official records of the California Secretary of State]; *O'Gara Coach Co., LLC v. Ra* (2019) 30 Cal.App.5th 1115, 1121, fn. 2 (*O'Gara*) [taking judicial notice of documents filed with the Secretary of State].)

Accordingly, Dfinity USA's request for judicial notice is GRANTED.

2. Plaintiff's Request

In connection with his opposition, Plaintiff asks the court to take judicial notice of; documents filed in *Sacha Williams v. Dominic Williams* (Santa Clara County Superior Court, Case No. 21CV384865); documents filed in *Daniel Valenti v. Dfinity USA Research LLC, et al.* (United States District Court, Northern District of California, Case No. 3:21-cv-06118-JD); documents filed in *Daniel Ocampo v. Dfinity USA Research LLC, et al.* (San Mateo County Superior Court, Case No. 21-CIV-03843); documents filed in *Dfinity USA Research LLC v. Eric Bravick* (Santa Clara County Superior Court, Case No. 22CV398321); a Statement of Information filed by Dfinity USA available on the website for the California Secretary of State; and an Application to Register a Foreign Limited Liability Company filed by Dfinity USA available on the website for the California Secretary of State.

The existence of court records filed in other cases are generally proper subjects of judicial notice pursuant to Evidence Code section 452, subdivision (d). (See *People v. Woodell* (1998) 17 Cal.4th 448, 455 (*Woodell*) [Evid. Code, § 452, subd. (d) permits the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

The corporate records are generally proper subjects of judicial notice pursuant to Evidence Code section 452, subdivision (h). (See *Gamet, supra*, 91 Cal.App.4th at pp. 1286-1287 [taking judicial notice of the Secretary of State's domestic corporation certificate of filing and suspension]; see also *Pedus, supra,* 96 Cal.App.4th at p. 156, fn. 2 [taking judicial notice of official records of the California Secretary of State]; *O'Gara, supra,* 30 Cal.App.5th at p. 1121, fn. 2 [taking judicial notice of documents filed with the Secretary of State].)

Accordingly, Plaintiff's request for judicial notice is GRANTED.

B. Evidentiary Objections

The parties submit numerous evidentiary objections in connection with the opposition and reply papers. The court declines to rule on the objections because they are not material to the disposition of the motion.

C. Improper Forum

Dfinity USA initially argues the court should dismiss Plaintiff's action for improper forum. Dfinity USA contends that Plaintiff entered into a contract with Dfinity Foundation when he invested in the ICP, which consisted of Seed Donation Terns and a Donation Contract. Dfinity USA asserts the Seed Donation Terms contain a mandatory forum selection provision that governs the claims alleged in this action and requires that the claims be brought in Switzerland. The mandatory forum selection provision states:

> Any dispute arising out of or in connection with the creation of the DFN and the development and execution of the DFINITY Network shall be finally settled by the ordinary courts of the registered domicile of the defendant.

(Declaration of Joshua Drake in Support of Defendant Dfinity USA Research LLC's Motion to Dismiss for Improper Forum or, in the Alternative, to Dismiss or Stay the Action for Forum Non Conveniens ("Drake Dec."), Ex. C, ¶ 10.)

"A forum selection clause is valid in the absence of the resisting party meeting a heavy burden of proving enforcement of the clause would be unreasonable under the circumstances of the case." (*Bancomer v. Superior Court* (1996) 44 Cal.App.4th 1450, 1457 (*Bancomer*); *Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1493 (*Lu*).)

Plaintiff argues the enforcement of the forum selection clause would be unreasonable because Dfinity USA is not a party to the Seed Donation Terns and, therefore, unable to claim the benefits of the clause under theories it was either a third party beneficiary or "closely related to the contractual relationship" between the parties to the agreement (i.e., Plaintiff and Dfinity Foundation). (*Lu, supra*, 11 Cal. App. 4th at p. 1494.)

> "Civil Code section 1559 provides: 'A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.' A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that third party and such intent appears on the terms of the contract. [Citation.] However, it is well settled that Civil Code section 1559 excludes enforcement of a contract by persons who are only incidentally or remotely benefited by it. [Citations.] ' "A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him…." ' [Citations.] … [P] The fact that the third party is only incidentally named in the contract or that the contract, if carried out to its terms, would inure to the third party's benefit is insufficient to entitle him or her to demand enforcement. [Citation.] Whether a third party is an intended beneficiary or merely an incidental beneficiary to the contract involves construction of the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered. [Citation.]"

(*Bancomer, supra,* 44 Cal.App.4th at p. 1458.)

Dfinity USA does not cite any language in the Seed Donation Terms, which recited the rights and responsibilities of and between Plaintiff and Dfinity Foundation, demonstrating that it is an intended beneficiary. A review of the Seed Donation Terms and the circumstances under which it was negotiated and signed fails to demonstrate that Plaintiff and Dfinity Foundation intended Dfininty USA to benefit from their transaction. In fact, Dfinity USA points out that it did not exist at the time Plaintiff and Dfinity Foundation entered into the subject contract. Thus, Dfinity USA has no standing as a third party beneficiary to enforce the forum selection clause.

Next, for Dfinity USA to demonstrate that it was " 'so closely related to the contractual relationship' that it is entitled to enforce the forum selection clause, it must show by specific conduct or express agreement that (1) it agreed to be bound by the terms of the [subject contract], (2) the contracting parties intended the [the defendant] to benefit from the [subject contract], or (3) there was sufficient evidence of a defined and intertwining business relationship with a contracting party." (*Bancomer, supra*, 44 Cal.App.4th at p. 1461.)

Here, Dfinity USA does not argue, or present evidence establishing, that it agreed to be bound by the Seed Donation Terms or that the contracting parties (i.e., Plaintiff and Dfinity Foundation) intended it to benefit from the Seed Donation Terms. Instead, Dfininty USA argues that there is a defined and intertwining business relationship with Dfinity Foundation. However, Dfininty USA is not alleged to have participated in the fraudulent representations which induced Plaintiff to enter into the Seed Donation Terms, and is not alleged to be an alter ego of Dfinity Foundation. (See *Lu, supra,* 11 Cal.App.4th at pp. 1493-1494 [holding that the alleged conduct of Dryclean Franchise and Dryclean U.S.A. was closely related to the contractual relationship because they are alleged to have participated in the fraudulent representations which induced plaintiffs to enter into the subject agreement and the plaintiffs alleged Dryclean Franchise and Dryclean U.S.A. were the alter ego of Dryclean California, which did sign the agreement containing the forum selection clause].) Moreover, there is no evidence that Dfinity USA consented to be bound by the Seed Donation Terms. (See *Manetti-Farrow, Inc. v. Gucci America, Inc*. (9th Cir. 1988) 858 F.2d 509, 511-514 [holding that

alleged conduct of the non-parties was so closely related to the contractual relationship that the forum selection clause applies to all defendants where the nonsignatory defendant ratified the terms of the subject agreement].)

Even if the court assumes for the sake of argument that Dfininty USA has standing to enforce the Seed Donation Terms, the mandatory forum selection clause does not provide that Plaintiff's claims against Dfinity USA must be brought in Switzerland. The provision states that disputes "shall be finally settled by the ordinary courts of the registered domicile of the defendant." (Drake Dec., Ex. C, ¶ 10.) Here, the defendant at issue is Dfinity USA. Dfinity USA does not dispute that it filed documents with the California Secretary of State registering as a foreign limited liability company and stating that its principal business address is located in California. (Request for Judicial Notice in Support of Plaintiff's Opposition to […] Defendant Dfinity USA Research LLC's Motion to Dismiss, Exs. J & K.) Dfinity USA itself presents evidence that has offices in San Francisco, California. Consequently, under the Seed Donation Terms, Plaintiff's action against Dfinity USA may be brought in California. (See *Preciado v. Freightliner Custom Chassis Corp*. (2023) 87 Cal.App.5th 964, 976 [a corporation's domicile are its state of incorporation and its principal place of business].)

For these reasons, Dfininty USA's motion to dismiss for improper forum is not well-taken.

D. Forum Non Conveniens

In the alternative, Dfinity USA argues that the court should dismiss or stay this action on the ground that Santa Clara County is an inconvenient forum because (i) this is an entirely foreign dispute, filed by a plaintiff who is a foreign national and not a California resident, against a UK national residing in Switzerland (i.e., Williams), and concerning Plaintiff's contract with a Swiss foundation (i.e., Dfinity Foundation) (and with nothing to do with the US); (ii) traditional forum non conveniens considerations mandate dismissal, or a stay, because Switzerland provides a suitable alternative forum to resolve Plaintiff's claims and the private and public interest factors weigh heavily in favor of litigating Plaintiff's claims in Switzerland.

> "Forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere." [Citation.] In determining whether to grant a motion based on forum non conveniens, the trial court must first determine whether a suitable alternate forum exists. [Citation.] A forum is suitable if another court

> has jurisdiction, and there is no statute of limitations bar to the action. [Citation.] […]
>
> If a suitable forum exists, "the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation. [Citations.]" [Citation.] The defendant, as the moving party, bears the burden of proof. [Citation.]

(*Roman v. Liberty University, Inc.* (2008) 162 Cal.App.4th 670, 681-682.)

As Plaintiff persuasively argues, Dfinity USA fails to establish in its moving papers that Switzerland is a suitable alternate forum to hear Plaintiff's claims against it. While Dfinity USA argues that Switzerland is adequate to hear Plaintiff's claims against Williams and Dfinity Foundation, Dfininty USA does not present any argument, legal authority, or evidence demonstrating that Switzerland has jurisdiction over Dfininty USA and Plaintiff's claims against Dfinity USA. (Memorandum of Points and Authorities in Support of Defendant Dfinity USA Research LLC's Motion to Dismiss for Improper Forum or, in the Alternative, to Dismiss of Stay the Action for Forum Non Conveniens, p. 17:18-27.) Dfinity USA does not cure this defect in reply; rather, Dfinity USA merely argues that Plaintiff's claims against it lack merit.

Consequently, Dfinity USA has not met its burden to show that Switzerland is a suitable alternative forum for Plaintiff's claims against Dfinity USA.

E. Conclusion

Accordingly, Dfinity USA's motion to dismiss for improper forum or, in the alternative, stay or dismiss the action on the basis of forum non conveniens is DENIED.

III. MOTION TO QUASH

A. Requests for Judicial Notice

1. Plaintiff's Request

In connection with his opposition, Plaintiff asks the court to take judicial notice of; documents filed in *Sacha Williams v. Dominic Williams* (Santa Clara County Superior Court,

Case No. 21CV384865); documents filed in *Daniel Valenti v. Dfinity USA Research LLC, et al.* (United States District Court, Northern District of California, Case No. 3:21-cv-06118-JD); documents filed in *Daniel Ocampo v. Dfinity USA Research LLC, et al.* (San Mateo County Superior Court, Case No. 21-CIV-03843); documents filed in *Dfinity USA Research LLC v. Eric Bravick* (Santa Clara County Superior Court, Case No. 22CV398321); a Statement of Information filed by Dfinity USA available on the website for the California Secretary of State; and an Application to Register a Foreign Limited Liability Company filed by Dfinity USA available on the website for the California Secretary of State.

The existence of court records filed in other cases are generally proper subjects of judicial notice pursuant to Evidence Code section 452, subdivision (d). (See *Woodell, supra,* 17 Cal.4th at p. 455 [Evid. Code, § 452, subd. (d) permits the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

The corporate records are generally proper subjects of judicial notice pursuant to Evidence Code section 452, subdivision (h). (See *Gamet, supra*, 91 Cal.App.4th at pp. 1286-1287 [taking judicial notice of the Secretary of State's domestic corporation certificate of filing and suspension]; see also *Pedus, supra,* 96 Cal.App.4th at p. 156, fn. 2 [taking judicial notice of official records of the California Secretary of State]; *O'Gara, supra,* 30 Cal.App.5th at p. 1121, fn. 2 [taking judicial notice of documents filed with the Secretary of State].)

Accordingly, Plaintiff's request for judicial notice is GRANTED.

2. Williams' Request

In connection with his reply papers, Williams asks the court to take judicial notice of the Affidavit of Dominic Williams in Support of Motion to Dismiss filed on November 29, 2023, in *Eftychios Theodorakis v. Dfinity Stifung, et al.* (United States District Court, Northern District of California, Case No. 3:23-cv-02280-AMO).

The existence of the affidavit is generally a proper subject of judicial notice pursuant to Evidence Code section 452, subdivision (d) as the affidavit is a court record relevant to the

issues raised by the pending motion. (See *Woodell, supra,* 17 Cal.4th at p. 455 [Evid. Code, § 452, subd. (d) permits the trial court to "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

Accordingly, Williams' request for judicial notice is GRANTED.

B. Evidentiary Objections

The parties submit numerous evidentiary objections in connection with the opposition and reply papers. The court declines to rule on the objections because they are not material to the disposition of the motion.

C. Request for Default

As a threshold matter, Plaintiff argues the court has no jurisdiction to hear the instant motion because a request for entry of default was filed on September 5, 2023, and is currently pending.

First, it is unknown whether the request for default is in proper order and will therefore be entered. Second, while there is authority supporting the proposition that an entry of default would be effective as of the date of the request for entry of default was filed (see *Goddard v. Pollack* (1974) 37 Cal.App.3d 137, 141-142), defaults are routinely set aside. Here, the request for entry of default could very well be set aside if entered in the first instance given the circumstances presented. And the fact remains that no default has been entered yet.

Therefore, in the interest of justice, the court finds that the pending request for entry of default does not deprive it of jurisdiction to hear the motion.

D. Discussion

Williams asserts that that he is a UK national residing in Switzerland, who must be served under the Hague Convention. Williams argues that Plaintiff's attempt to serve him on July 6, 2023, by delivering documents to Dfinity Foundation, was defective as the service did not comply with the Hague Convention. Williams urges that Switzerland's internal law regarding service on individuals provides that the relevant documents must be served on the

addressee, his or her domestic or household employee, or a person of at least 16 years of age living in the same household. Williams notes that the Proof of Service of Summons filed by Plaintiff on September 5, 2023, indicates that the documents were delivered to Dfinity Foundation's headquarters in Switzerland and left with Mathias Björkqvist ("Björkqvist"). Williams contends that Björkqvist is a software engineer employed by Dfinity Foundation and is not authorized to accept service for Williams.

In opposition, Plaintiff notes that he submitted a request to serve Williams with the summons and complaint in this action to the Swiss Central Authority on June 21, 2023. Plaintiff contends that the Swiss Central Authority's return of a completed certificate of service is prima facie evidence that the Authority's service on Williams was made in compliance with Swiss law, and there is no need for the court to look behind the certificate of service. Plaintiff further argues that he has properly served Williams through his attorneys.

Service of the summons and complaint in compliance with the Code of Civil Procedure is deemed jurisdictional and, absent such service, no jurisdiction is acquired by the court in the particular action. (*Renoir v. Redstar Corp*. (2004) 123 Cal.App.4th 1145, 1150.) When the service of summons is defective, the appropriate remedy is to file a motion to quash on the basis of lack of jurisdiction. (Code Civ. Proc., § 418.10, subd. (a)(1).) "[O]nce a defendant files a motion to quash the burden is on the plaintiff to prove by a preponderance of the evidence the validity of the service and the court's jurisdiction over the defendant." (*Boliah v. Superior Court* (1999) 74 Cal.App.4th 984, 991; *Dill v. Berquist Construction Co*. (1994) 24 Cal.App.4th 1426, 1439-1440 (*Dill*); *Summers v. McClanahan* (2006) 140 Cal.App.4th 403, 413.) Jurisdictional facts must be proved by competent evidence at the hearing on the motion to quash. (*Ziller Electronics Lab Gmbh v. Superior Court* (1988) 206 Cal.App.3d 1222, 1233.)

> The Hague Service Convention is a multilateral treaty formulated in 1964 by the Tenth Session of the Hague Conference of Private International Law. The 1964 version was intended to provide a simpler way to serve process abroad, to assure defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad. [Citation.]
>
> The scope of the Hague Service Convention is extremely broad. Article 1 of the convention provides: "The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad. [P] This Convention shall not apply where the address of the person to be served with the document is not known." [Citation.]

> The United States Supreme Court has interpreted this language as mandatory. "By virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies." [Citations.]
>
> In analyzing the various articles of the convention, the Supreme Court found it did not specifically define "service of process" and concluded the forum's internal law regarding service governed the question whether there is occasion for service abroad. This analysis, in turn, would determine whether compliance with the convention was required to validly serve a foreign national. [Citation.]

(*Kott v. Superior Court* (1996) 45 Cal.App.4th 1126, 1133 (*Kott*).)

> The Hague Service Convention states each signatory nation shall designate a central authority through which service of process may be effected. [Citation.] That authority receives documents and serves them in accordance with either the internal law of the receiving state or a compatible method requested by the sender. The authority then provides the sender with a certificate of service. [Citation.] A state may allow other methods of service within its boundaries. [Citations.] It may also object to the use of a particular method of transmission. [Citation.]

(*Kott, supra,* 45 Cal.App.4th at p. 1134.)

Both the United States and Switzerland are signatories to the Hague Service Convention. Accordingly, service through the Hague Service Convention provides the exclusive means of service on a Swiss resident if there is occasion to transmit judicial documents abroad. (*Kott, supra,* 45 Cal.App.4th at p. 1136 ["Failure to comply with the Hague Service Convention procedures voids the service even though it was made in compliance with California law. [Citation.] This is true even in cases where the defendant had actual notice of the lawsuit."].)

Here, it is undisputed that the Swiss Central Authority returned a completed certificate of service, certifying that Williams was served with the summons and complaint in this action "in accordance with the provisions of sub-paragraph a) of the first paragraph of Article 5 of the Convention." Subparagraph a) of Article 5 reflects that service was accomplished "by a method prescribed by [Swiss] internal law for the service of documents in domestic actions upon persons who are within its territory." This certification is prima facie evidence that the service of the summons and complaint was valid. (*Floveyor Internat., Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 795-796 (*Floveyor*) ["[U]nder the terms of the Hague Convention and in accordance with California law, the Senior Master of the Supreme Court of England and Wales may receive the summons and cross-complaint and cause it to be served in the manner

provided by the laws of Great Britain and certify to that fact on the form provided for that purpose by the Convention. That is what happened here, and therefore, Shick's filing of the executed certificate created a prima facie showing that service of the summons and cross-complaint was valid."]; *Northrup King Co. v. Compania Productora Semillas Algodoneras Selectas, S.A.* (8th Cir. 1995) 51 F.3d 1383, 1389 (*Northrup*) ["The Spanish Central Authority's return of a completed certificate of service is prima facie evidence that the Authority's service on COPSA was made in compliance with the Convention."].)

Here, Williams fails to rebut the presumption of proper service created by Plaintiff's evidence. (See *Floveyor, supra,* 59 Cal.App.4th at p. 795 [the filing of a certificate from a Central Authority with the proof of service of summons created a rebuttable presumption that service was valid].) Williams contends that the Central Authority's service did not comply with Swiss law because Björkqvist is not his household employee. However, even Williams' expert, Simon Ntah, acknowledges that who should be deemed an "employee" is not defined by the Swiss Civil Procedure Code and there is no case law or scholarly writing discussing the scope of the term. In light of the foregoing, the court declines to look behind the certificate to adjudicate the issues of Swiss procedural law that the parties have raised through their submission of conflicting expert statements on the issue. (See *Northrup, supra,* 51 F.3d at p. 1390 ["The Convention requires that the Central Authority serve the documents by a method specified by its own law or by the sender that complies with local law and reserves to the Central Authority the right to object to documents if they do not comply with the Convention. By not objecting to the documents and by certifying service the Central Authority indicated that the documents complied with the Convention and that it had served them in compliance with the Convention, i.e., that it had made service as Spanish law required. We decline to look behind the certificate of service to adjudicate the issues of Spanish procedural law that the parties have raised through their submission of conflicting expert statements on the issue."].)

Accordingly, Williams' motion to quash 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 2

Case Name: Kobayashi v. Dfinity USA Research LLC, et al.
Case No.: 23CV415981

- oo0oo -

Calendar Line 3

Case Name: Nava v. Performance First Building Services, Inc. (Class Action/PAGA)
Case No.: 22CV407445

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on January 31, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

II. INTRODUCTION

This action arises out of alleged wage and hour violations by defendant Performance First Building Services, Inc. ("Defendant"). On October 26, 2023, plaintiff Maura Munoz Nava ("Plaintiff") filed the operative First Amended Class Action Complaint ("FAC") against Defendant, which sets forth the following causes of action: (1) Failure to Provide Required Meal Periods; (2) Failure to Provide Required Rest Breaks; (3) Failure to Pay Overtime Wages; (4) Failure to Pay Minimum Wages; (5) Failure to Pay Timely Wages; (6) Failure to Pay All Wages Due to Discharged and Quitting Employees; (7) Failure to Furnish Accurate Itemized Wage Statements; (8) Failure to Maintain Required Records; (9) Failure to Provide Supplemental COVID-19 Sick Leave; (10) Failure to Reimburse for Business Expenses; (11) Unfair Business Practices; (12) Failure to Pay Wages Under the Fair Labor Standards Act ("FLSA"); and (13) Penalties Under the Labor Code Private Attorneys General Act.

The parties have reached a settlement.

Plaintiff now moves for preliminary approval of the settlement. The motion is unopposed.

II. LEGAL STANDARD

Generally, "questions whether a 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*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

> 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, citing *Dunk, supra,* 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the 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 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*., quoting *Dunk, supra,* 48 Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, 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, citing *Dunk, supra,* 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

A. Provisions of the Settlement

> The case has been settled on behalf of the following class:
> All nonexempt hourly employees who worked at any time for Defendant in the state of California from November 14, 2018 through November 19, 2023.

(Declaration of Scott E. Wheeler in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement Filed on Behalf of Plaintiff ("Wheeler Dec."), Ex. A ("Settlement Agreement"), ¶ 2.) The class also includes a subset of PAGA Aggrieved Employees who are defined as "all hourly, non-exempt employees employed by Defendant in California at any time during the PAGA Period." (Settlement Agreement, ¶ 23.) The PAGA Period is August 24, 2021 through November 19, 2023. (Settlement Agreement, ¶ 24.)

According to the terms of settlement, Defendant will pay a non-reversionary gross settlement amount of $300,000. (Settlement Agreement, ¶ 17.) The gross settlement amount includes attorney fees not to exceed $100,000 (1/3 of the gross settlement amount), litigation costs not to exceed $14,500, a PAGA allocation of $20,000 (75 percent to be paid to the LWDA and 25 percent to be paid to PAGA Aggrieved Employees), service award up to $6,000 for the class representative, and settlement administration costs not to exceed $12,000. (Settlement Agreement, ¶¶ 4, 9, 19, 39, 59.) The net settlement amount will be distributed to class members pro rata basis. (Settlement Agreement, ¶¶ 27, 59.) Checks that remain uncashed 180 days from mailing will be void and the funds from those checks will be distributed to the State of California Controller's Unclaimed Property division. (Settlement Agreement, ¶ 59.)

In exchange for the settlement, class members agree to release Defendant, and related persons, from

> any and all claims, debts, liabilities, demands, obligations, guarantees, costs, expenses, attorneys' fees, damages, action or causes of action, as alleged in the Operative Complaint for: (1) failure to provide meal periods pursuant to Labor Code Sections 226.7, 510, 512, 1194, 1197 and Industrial Welfare Order 5-2001, Section 11; (2) failure to provide rest periods pursuant to Labor Code Section 226.7, 512 and Industrial Welfare Order 5-2001, Section 12; (3) failure to pay overtime wages pursuant to Labor Code Sections 510, 1194, 1198, Industrial Welfare Order 5-2001, Section 3; (4) failure to pay minimum wages pursuant to Labor Code Section 1194, 1197 and Industrial Welfare Order 5-2001, Section 4; (5) failure to pay timely wages in violation of Labor Code Sections 204 and 210; (6) failure to pay all wages owed and due at termination of employment in violation of Labor Code Sections 201, 202 and 203; (7) failure to maintain required records in violation of Labor Code section 226 and Industrial Welfare Order 5-2001, Section 7; (8) failure to provide accurate itemized wage statements in violation of Labor Code section 226 and Industrial Welfare Order 5-2001, Section 7; (9) failure to provide for supplemental COVID-19 sick leave pursuant to Labor Code Sections 246, 248.1 and 248.6; (10) failure to provide suitable resting facilities pursuant to Industrial Welfare Order 5-2001, Section 13(B); (11) failure to reimburse employees for necessary work-related expenses in violation of Labor Code section 2802; (12) violation of the California Unfair Competition Law in violation of Business and Professions Code Section 17200; (13) failure to pay minimum wage and overtime under the Fair Labor Standards Act, and (14) and violation of the California Private Attorneys' General Act ("PAGA"), Labor Code Sections 2698, 2699 and 2699.5, predicated on the violations of the California Labor Code and IWC Wage Order 5-2001 as alleged or which could have been alleged under the facts pleaded in the Operative Complaint and the LWDA Notice dated August 26, 2022.

(Settlement Agreement, ¶¶ 33, 35, 36, 54.)

PAGA Aggrieved Employees agree to release Defendant, and related persons, from

> claims for penalties as alleged in and based on the facts asserted in the August 26, 2022 PAGA Notice and alleged within the Operative Complaint. In particular, the released PAGA claims include the underlying purported violations for: (1) failure to provide meal periods pursuant to Labor Code Sections 226.7, 510, 512, 1194, 1197 and Industrial Welfare Order 5-2001, Section 11; (2) failure to provide rest periods pursuant to Labor Code Section 226.7, 512 and Industrial Welfare Order 5-2001, Section 12; (3) failure to pay overtime wages pursuant to Labor Code Sections 510, 1194, 1198, Industrial Welfare Order 5- 2001, Section 3; (4) failure to pay minimum wages pursuant to Labor Code Section 1194, 1197 and Industrial Welfare Order 5-2001, Section 4; (5) failure to pay timely wages in violation of Labor Code Sections 204 and 210; (6) failure to pay all wages owed and due at termination of employment in violation of Labor Code Sections 201, 202 and 203; (7) failure to maintain required records in violation of Labor Code section 226 and Industrial Welfare Order 5-2001, Section 7; (8) failure to provide accurate itemized wage statements in violation of Labor Code section 226 and Industrial Welfare Order 5-2001, Section 7; (9) failure to provide for supplemental COVID-19 sick leave pursuant to Labor Code Sections 246, 248.1 and 248.6; (10) failure to provide suitable resting facilities pursuant to Industrial Welfare Order 5-2001, Section 13(B) and (11) failure to reimburse employees for necessary work-related expenses in violation of Labor Code section 2802; as alleged or which could have been alleged under the facts pleaded in the Operative Complaint and the LWDA Notice dated August 26, 2022

(Settlement Agreement, ¶¶ 34, 35, 36, 55.). Plaintiff also agrees to a general release. (Settlement Agreement, ¶¶ 32, 53.)

B. Settlement of the FLSA Claim

As set forth above, the FAC includes, and the settlement agreement releases, a cause of action for violations of the FLSA.

As explained in *Haro v. City of Rosemead* (2009) 174 Cal.App.4th 1067 (*Haro*), the FLSA "govern[s] minimum wages and maximum hours." (*Id.* at p. 1070.) Notably, the FLSA establishes an "opt-in" procedure for collective actions under its authority, which is essentially the opposite of the "opt-out" procedure typically employed in class actions. The "opt-in" procedure requires that aggrieved employees "give[] [their] consent in writing" to become a party to an FLSA action, which consent must be "filed in the court in which such action is brought." (29 U.S.C. § 216(b); *Haro, supra*, 174 Cal.App.4th at p. 1071.) As held by *Haro*, "[a]n FLSA action has to be litigated according to rules that are specifically applicable to these actions" and may not be prosecuted as a class action. (*Haro, supra*, 174 Cal.App.4th at p. 1077.) Here, the settlement purports to release class members' FLSA claims, but does not establish a procedure that would satisfy the requirement of a written consent filed with the court.

The settlement agreement itself is silent as to how the court is to determine which class members have opted in to the FLSA portion of the settlement. The class notice states that upon cashing their settlement checks, class members will be deemed to have opted into the settlement of the claims under the FLSA alleged in the action. (Settlement Agreement, Ex. 1.)

While some unpublished federal decisions have approved "hybrid" class action and FLSA settlements similar to this one, these settlements also have not complied with the statutory requirement of written consents that are filed with the court, and many other courts have disapproved this practice. (See *Haralson v. U.S. Aviation Services Corp*. (N.D. Cal. 2019) 383 F.Supp.3d 959, 968 (*Haralso*n) ["[m]any courts … have rejected this opt-in by settlement check proposal"]; see also *Beltran v. Olam Spices & Vegetables, Inc.* (E.D.Cal. Mar. 23, 2021, No. 1:18-cv-01676-) 2021 U.S.Dist.LEXIS 55013, at *8; *Anderson v. Safe Streets USA, LLC* (E.D.Cal. Dec. 20, 2022, No. 2:18-cv-00323-KJM-JDP) 2022 U.S.Dist.LEXIS 229149, at *20-21 ["[U]nder the current settlement agreement, class members opt into the collective action and release their FLSA claims when they cash, deposit or endorse their settlement check. … Such an opt-in procedure is prohibited under the FLSA."].)

Plaintiff cites *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 539 (*Amaro*) for the proposition that the settlement adequately complies with the opt-in requirement and lawfully releases claims under the FLSA. However, *Amaro* did not determine that a hybrid settlement, similar to the one at issue here, complied with the FLSA's opt-in requirement. Rather, the reviewing court in *Amaro* held that the opt-in requirement did not apply to that case because the plaintiff did not allege any claims under the FLSA. (*Amaro, supra*, 69 Cal.App.5th at p. 540 ["Though the settling parties' reliance on *Rangel* is misplaced, we are persuaded the FLSA's opt-in requirement does not apply for other reasons. First, nothing in the text of the FLSA requires that the opt-in requirement be applied here. The statute provides that '[n]o employee shall be a *party plaintiff* to [an FLSA] action unless he gives his consent in writing to become such a party … .' (29 U.S.C. § 216(b), italics added.) This is not an FLSA action. Amaro did not assert an FLSA claim for other employees to join. And nothing in the statute suggests it applies to a class settlement of state law claims that also releases potential FLSA claims based on the same allegations."].) Here, Plaintiff has alleged a

claim under the FLSA, i.e., the twelfth cause of action. Consequently, Plaintiff is required to comply with the opt-in requirement.

As also discussed in federal cases, "hybrid" settlements raise a number of additional issues that are wholly unaddressed by the parties here.

First, the motion for preliminary approval "does not explicitly request certification of an FLSA collective action, even though [the structure of the settlement] clearly contemplates the existence of a collective action …." (*Thompson v. Costco Wholesale Corp.* (S.D.Cal. Feb. 22, 2017, No. 14-cv-2778-CAB-WVG) 2017 U.S.Dist.LEXIS 24964, at *19 (*Thompson*).) In the court's view, this step is a prerequisite to approval of a hybrid settlement. Moreover, the settlement requires class members to release the FLSA claim to benefit from the settlement of their state law claims. (*Id*. at *19–20.) The parties' failure to allow putative class members to participate in one but not the other form of action "counsels against the court's granting of preliminary approval." (*Maciel v. Bar 20 Dairy, LLC* (E.D.Cal. Oct. 22, 2018, No. 1:17-cv-00902-DAD-SKO) 2018 U.S.Dist.LEXIS 181956, at *27 (*Maciel*), citing *Millan v. Cascade Water Services, Inc.* (E.D. Cal. 2015) 310 F.R.D. 593, 602.)

Finally, courts considering settlements in hybrid FLSA and class actions "consistently require class notice forms to explain: (1) the hybrid nature of the action; and (2) the claims involved in the action; (3) the options that are available to [class] members in connection with the settlement, including how to participate or not participate in the … class action and the FLSA collective action aspects of the settlement; and (4) the consequences of opting-in to the FLSA collective action, opting-out of the … class action, or doing nothing." (*Maciel, supra*, 2018 U.S.Dist.LEXIS 181956 at *20-21, quoting *Thompson, supra*, 2017 WL 697895, at *19.) Here, the notice does not adequately address these issues. (Settlement Agreement, Ex. 1.)

If the settlement here were solely for the California wage and hour claims, it is possible that the court would be able to preliminarily approve it with some revisions. The inclusion of FLSA claims, however, renders this settlement improper. And while the court might conceivably approve an appropriately structured hybrid FLSA/class action settlement, here, significant changes to the settlement would be required for the court to approve it.

Accordingly, the motion for preliminary approval of class action settlement is DENIED WITHOUT PREJUDICE.

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

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Calendar Line 4

Case Name: Dauphinais v. Medely, Inc. (Class Action)
Case No.: 23CV417936

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on January 31, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

III. INTRODUCTION

This is a class action against defendant Medely, Inc. ("Defendant") arising out its alleged failure to furnish accurate wage statements including the start date of employees' pay periods in violation of Labor Code section 226. The Class Action Complaint, filed by plaintiff Anne Elizabeth Dauphinais ("Plaintiff") on June 23, 2023, sets forth a single cause of action for violation of Labor Code section 226.

Now before the court is Defendant's motion to compel Plaintiff to arbitrate her individual claim and dismiss her class claims. Plaintiff filed an opposition to the motion.

II. REQUEST FOR JUDICIAL NOTICE

In connection with its moving papers, Defendant asks the court to take judicial notice of a minute order entered on January 10, 2023, in the unrelated case of *Melvin George v. Medely, Inc.* (Los Angeles County Superior Court, Case No. 22STCV21718).

Unpublished California opinions "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Ct., rule 8.1115(a); see also *Schachter v. Citigroup, Inc*. (2005) 126 Cal.App.4th 726, 738 [trial court ruling has no precedential value]; *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 448, fn. 4 ["in the absence of some additional showing—such as the conditions for claim or issue preclusion—the actions of other judges are simply irrelevant"].) The court admonishes Defendant not to cite unpublished California trial court orders in the future.

Accordingly, Defendants' request for judicial notice is DENIED.

III. LEGAL STANDARD

"The FAA [Federal Arbitration Act], which includes both procedural and substantive provisions, governs [arbitration] agreements involving interstate commerce." (*Avila v.*

Southern California Specialty Care, Inc. (2018) 20 Cal.App.5th 835, 840.) Here, there is no dispute that the FAA applies, as the arbitration agreement itself states. However, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid*.)

The California Arbitration Act provides that a court must grant a petition to compel arbitration "if it determines that an agreement to arbitrate … exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement," among other exceptions. (Code Civ. Proc., § 1281.2.)

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co*. (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp*. (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of the evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal, supra*, 14 Cal.4th at p. 413.) "In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

IV. DISCUSSION

Defendant moves for an order compelling arbitration of Plaintiff's individual claim on the grounds that Plaintiff agreement to its Terms of Service ("TOS"), which contains an arbitration agreement, when she created her online account with Defendant in July 2021, and on 14 occasions thereafter when she obtained work on Defendant's platform. Defendant states that the arbitration agreement contains a delegation clause clearly and unmistakably delegating the question of arbitrability to the arbitrator, such that the court's only role here is to determine whether the agreement was formed. Defendant asserts that Plaintiff agreed to the delegation clause set forth in the arbitration agreement as she affirmatively clicked buttons indicating that she agreed to the TOS.

As a threshold matter, the court has a limited role in deciding arbitrability in an FAA case containing a valid delegation clause. Where there is a delegation clause providing that the arbitrator will decide arbitrability, the court examines not whether the agreement to arbitrate is enforceable, but rather, only whether the agreement to arbitrate arbitrability is enforceable. (*Brennan v. Opus Bank* (9th Cir. 2015) 796 F.3d 1125, 1130.) In such circumstances, the court's role is to decide whether there is a "clear and unmistakable" agreement between the parties to arbitrate arbitrability. (*Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co*. (9th Cir. 2017) 862 F.3d 981, 985; accord, *Momot v. Mastro* (9th Cir. 2011) 652 F.3d 982, 987; *Mohamed v. Uber Technologies, Inc*. (9th Cir. 2016) 848 F.3d 1201, 1208-1209.)

Here, the arbitration agreement in the TOS provides that the "arbitrator, and not any federal, state or local court or agency shall have exclusive authority to resolve any dispute related to the interpretation, applicability, enforceability or formation of this Arbitration Agreement including any claim that all or any part of this Arbitration Agreement is void or voidable." (Declaration of Waleed Nasr in Support of Defendant Medely, Inc.'s Notice of Motion and Memorandum of Points and Authorities in Support of Defendant's Motion to Compel Arbitration, Ex. D, ¶ 17.3.)

In opposition, Plaintiff agrees with Defendant that this provision alone is clear and unmistakable evidence of the parties' intent to arbitrate gateway issues. In fact, Plaintiff asks that the gateway issue of arbitrability be sent to an arbitrator. Given that Plaintiff agrees that the issue of arbitrability should be sent to an arbitrator, it appears that Plaintiff also concedes that she agreed to the delegation provision.

Accordingly, Defendant's motion to compel arbitration GRANTED as follows: This action is stayed pending the arbitrator's determination of whether Plaintiff's individual claim is arbitrable. If found to be arbitrable, Plaintiff's individual claim must be arbitrated and class claims shall be dismissed.

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

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Calendar Line 5

Case Name: Dauphinais v. Medely, Inc. (Class Action)
Case No.: 23CV420358

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on January 31, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

IV. INTRODUCTION

This is a representative action against defendant Medely, Inc. ("Defendant") arising out its alleged failure to furnish accurate wage statements including the start date of employees' pay periods in violation of Labor Code section 226. The Representative Action Complaint, filed by plaintiff Anne Elizabeth Dauphinais ("Plaintiff") on August 4, 2023, sets forth a single cause of action for violation of Labor Code section 2698, et seq. ("PAGA).

Now before the court is Defendant's motion to compel Plaintiff to arbitrate her individual PAGA claim and stay her representative PAGA claim. Plaintiff filed an opposition to the motion.

II. REQUEST FOR JUDICIAL NOTICE

In connection with its moving papers, Defendant asks the court to take judicial notice of a minute order entered on January 10, 2023, in the unrelated case of *Melvin George v. Medely, Inc.* (Los Angeles County Superior Court, Case No. 22STCV21718).

Unpublished California opinions "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Ct., rule 8.1115(a); see also *Schachter v. Citigroup, Inc*. (2005) 126 Cal.App.4th 726, 738 [trial court ruling has no precedential value]; *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 448, fn. 4 ["in the absence of some additional showing—such as the conditions for claim or issue preclusion—the actions of other judges are simply irrelevant"].) The court admonishes Defendant not to cite unpublished California trial court orders in the future.

Accordingly, Defendants' request for judicial notice is DENIED.

III. LEGAL STANDARD

"The FAA [Federal Arbitration Act], which includes both procedural and substantive provisions, governs [arbitration] agreements involving interstate commerce." (*Avila v. Southern California Specialty Care, Inc*. (2018) 20 Cal.App.5th 835, 840.) Here, there is no dispute that the FAA applies, as the arbitration agreement itself states. However, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid*.)

The California Arbitration Act provides that a court must grant a petition to compel arbitration "if it determines that an agreement to arbitrate … exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement," among other exceptions. (Code Civ. Proc., § 1281.2.)

The moving party must prove by a preponderance of evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (See *Cruise v. Kroger Co*. (2015) 233 Cal.App.4th 390, 396 [under both federal and state law, "the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate"]; *Rosenthal v. Great Western Fin'l Securities Corp*. (1996) 14 Cal.4th 394, 413 (*Rosenthal*) [moving party's burden is a preponderance of the evidence].) The burden then shifts to the resisting party to prove a ground for denial. (*Rosenthal, supra,* 14 Cal.4th at p. 413.) "In determining the rights of parties to enforce an arbitration agreement within the FAA's scope, courts apply state contract law while giving due regard to the federal policy favoring arbitration." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

IV. DISCUSSION

Defendant moves for an order compelling arbitration of Plaintiff's individual PAGA claim on the grounds that Plaintiff agreement to its Terms of Service ("TOS"), which contains an arbitration agreement, when she created her online account with Defendant in July 2021, and on 14 occasions thereafter when she obtained work on Defendant's platform. Defendant states that the arbitration agreement contains a delegation clause clearly and unmistakably delegating the question of arbitrability to the arbitrator, such that the court's only role here is to determine whether the agreement was formed. Defendant asserts that Plaintiff agreed to the

delegation clause set forth in the arbitration agreement as she affirmatively clicked buttons indicating that she agreed to the TOS.

As a threshold matter, the court has a limited role in deciding arbitrability in an FAA case containing a valid delegation clause. Where there is a delegation clause providing that the arbitrator will decide arbitrability, the court examines not whether the agreement to arbitrate is enforceable, but rather, only whether the agreement to arbitrate arbitrability is enforceable. (*Brennan v. Opus Bank* (9th Cir. 2015) 796 F.3d 1125, 1130.) In such circumstances, the court's role is to decide whether there is a "clear and unmistakable" agreement between the parties to arbitrate arbitrability. (*Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co*. (9th Cir. 2017) 862 F.3d 981, 985; accord, *Momot v. Mastro* (9th Cir. 2011) 652 F.3d 982, 987; *Mohamed v. Uber Technologies, Inc*. (9th Cir. 2016) 848 F.3d 1201, 1208-1209.)

Here, the arbitration agreement in the TOS provides that the "arbitrator, and not any federal, state or local court or agency shall have exclusive authority to resolve any dispute related to the interpretation, applicability, enforceability or formation of this Arbitration Agreement including any claim that all or any part of this Arbitration Agreement is void or voidable." (Declaration of Waleed Nasr in Support of Defendant Medely, Inc.'s Notice of Motion and Memorandum of Points and Authorities in Support of Defendant's Motion to Compel Arbitration, Ex. D, ¶ 17.3.)

In opposition, Plaintiff agrees with Defendant that this provision alone is clear and unmistakable evidence of the parties' intent to arbitrate gateway issues. In fact, Plaintiff asks that the gateway issue of arbitrability be sent to an arbitrator. Given that Plaintiff agrees that the issue of arbitrability should be sent to an arbitrator, it appears that Plaintiff also concedes that she agreed to the delegation provision.

Accordingly, Defendant's motion to compel arbitration GRANTED as follows: This action is stayed pending the arbitrator's determination of whether Plaintiff's individual PAGA claim is arbitrable. If found to be arbitrable, Plaintiff's individual PAGA claim must be arbitrated and representative PAGA claim shall be stayed.

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

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