SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 1, Honorable Sunil R. Kulkarni Presiding

Maggie Castellon, Courtroom Clerk
191 North First Street, San Jose, CA95113
Telephone: 408.882.2110

To contest the ruling, call (408) 808-6856 before 4:00 P.M. or email department1@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 19, 2023 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	19CV347173	Audycki v. Stanford Health Care (Lead Case; Consolidated With Case Nos. 19CV360010, 20CV365879)	See tentative ruling. The Court will prepare the final order.
LINE 2	21CV382973	Velasquez v. Chargepoint, Inc. (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 3	19CV361005	Credit Corp Solutions Inc., Assignee of Webbank v. Guzman	See tentative ruling. The Court will prepare the final order.
LINE 4	20CV367408	Saldivar v. Stanford Federal Credit Union (Class Action)	See tentative ruling. The Court will prepare the final order.
LINE 5	2015-1-CV-285182	California Water Curtailment Cases (JCCP 4838)	See tentative ruling. The Court will prepare the final order.

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LAW AND MOTION TENTATIVE RULINGS

LINE 6			
LINE 7			
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LINE 12			
LINE 13			

Calendar Line 1

Case Name: *Audycki v. Stanford Health Care, et al.*
Case No.: 19CV347173

This is a putative class and Private Attorneys General Act ("PAGA") action. Plaintiffs allege that Defendant Stanford Health Care failed to provide employees with compliant meal and rest breaks, failed to include non-discretionary wages in their pay rates used to calculate sick pay, issued noncompliant wage statements, and committed other wage and hour violations.

Plaintiff Lillian Audycki initiated this class action against Defendant on May 1, 2019 for violation of Labor Code section 226 (Case No. 19CV347173). On December 12, 2019, Plaintiff Tawnya Coogan filed a class action complaint against Defendant for various wage and hour violations, as well as a representative action under PAGA (Case No. 19CV360010). On March 30, 2020, Plaintiff Joseph Ferlatte filed a class action complaint against Defendant for various Labor Code violations and subsequently filed an amended complaint to add a PAGA claim (Case No. 20CV365879).

On August 24, 2020, the Court entered an order pursuant to a stipulation filed by the parties to consolidate the cases. Plaintiffs filed a Consolidated Complaint on August 27, 2020, followed by the operative First Amended Consolidated Class and Representative Action Complaint for Damages ("FAC") on January 25, 2021. After mediation in December 2022, the parties reached a settlement agreement.

Before the Court is Plaintiffs' motion for final approval of settlement, which is unopposed. Based on the reasons discussed below, the Court GRANTS the motion.

I. BACKGROUND

Plaintiff Lillian Audycki began employment with Defendant in September 2014 and continues to work as its non-exempt employee. (FAC, ¶ 7.) Plaintiff Tawnya Coogan worked for Defendant as an hourly, non-union sales associate from approximately June 6, 2016 through March 6, 2019, at the main hospital building in Palo Alto. (*Ibid*.) On September 9, 2019, Joseph Ferlatte began working for Defendant as a kidney transplant social worker in Palo Alto. (Ibid.) He was terminated on March 20, 2020. (*Ibid*.)

According to Plaintiffs, they did not receive off-duty 30-minute meal periods for shifts over 5 hours within the first 5 hours of work, or off-duty 10-minute rest periods for every 3.5 hours worked. (FAC, ¶ 22.) Rather, they had to work through their meal and rest periods. (*Ibid.*) In addition, while employees routinely earned non-discretionary incentive wages such as shift differential wages, sick pay was paid as their base pay rate rather than the regular rate of pay. (*Ibid*.) So Defendant owes waiting time penalties for those whose employment had ended. (*Ibid*.) Plaintiffs were also required to use their personal cell phones in discharging their duties, but were not reimbursed. (*Ibid*.)

Plaintiffs allege that when they were paid shift differential wages, including for night and weekend shifts, the hours worked for shift differentials were redundantly listed in the total hours worked section of their wage statements, so the total hours worked were incorrect. (FAC, ¶ 22.) And because these differentials were not included in their regular rates of pay

used to calculate sick pay, their wage statements also failed to display the correct pay rate in this regard. (*Ibid.*) Similarly, Plaintiffs' wage statements did not accurately reflect all meal and rest period premiums to which they were entitled when denied off-duty meal and rest breaks. (*Ibid.*)

Based on these allegations, Plaintiffs assert putative class claims for: (1) violation of Labor Code section 226 by failing to provide accurate itemized wage statements (all plaintiffs); (2) waiting time penalties under Labor Code sections 201-203 for failing to pay sick pay at the regular rate (plaintiffs Ferlatte and Coogan); (3) violation of Labor Code sections 226.7 and 512 by failing to provide adequate meal periods (all plaintiffs); (4) violation of Labor Code section 226.7 by failing to authorize and permit rest breaks (all plaintiffs); and (5) violation of Labor Code section 2802 by failing to reimburse all expenses (all plaintiffs). The three plaintiffs also bring (6) a representative claim for PAGA penalties and (7) a claim for violation of Business & Professions Code section 17200, et seq.

Plaintiffs now move for an order granting final approval of the Joint Stipulation of Class Action and PAGA Settlement and Release of Claims ("Settlement Agreement"), certifying the class for settlement purposes only, and entering final judgment as to all members of the Settlement Class, the Aggrieved Employees and the State of California.

II. LEGAL STANDARDS FOR SETTLEMENT APPROVAL

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 relevant 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 trial court also must independently confirm that "the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation." (*Kullar, supra*, 168 Cal.App.4th at p. 129.) Of course, before performing its analysis the trial court must be "provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Id.* at pp. 130, 133.)

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) ___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, at *8–9.)

III. SETTLEMENT CLASS

For settlement purposes only, Plaintiffs request the following class be certified:

> (1) all of Defendant's past and present non-exempt California employees who were paid any shift differential wages reflected on wage statements through the Lawson payroll system during the Class Period; (2) all of Defendant's past and present non-exempt non-union California employees who worked at least one shift of 3.5 hours or more for Defendant during the Class Period; and (3) all former non-exempt California employees who were paid non-discretionary incentive wages (including, but not limited to, shift differential wages) and sick

pay in the same workweek from Defendant and whose employment ended, either voluntarily or involuntarily, at any time during the Class Period. The Class Period is May 1, 2018 through April 1, 2023.

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 …."

Section 382 requires the plaintiff to demonstrate by a preponderance of the evidence: (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, 332 (*Sav-On Drug Stores*).) "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.)

In the settlement context, "the court's evaluation of the certification issues is somewhat different from its consideration of certification issues when the class action has not yet settled." (*Luckey v. Superior Court* (2014) 228 Cal.App.4th 81, 93.) As no trial is anticipated in the settlement-only context, the case management issues inherent in the ascertainable class determination need not be confronted, and the court's review is more lenient in this respect. (*Id.* at pp. 93–94.) But considerations designed to protect absentees by blocking unwarranted or overbroad class definitions require heightened scrutiny in the settlement-only class context, since the court will lack the usual opportunity to adjust the class as proceedings unfold. (*Id.* at p. 94.)

At preliminary approval, the Court provisionally certified the above-described class, determining that Plaintiff had demonstrated by a preponderance of the evidence (1) an ascertainable class, (2) a well-defined community of interest among the class members and (3) that a class action provides substantial benefits to both litigants and the Court. Consequently, the Court will certify the class for settlement purposes as requested.

IV. TERMS AND ADMINISTRATION OF SETTLEMENT

The non-revisionary gross settlement amount is $15,000,000. Attorney fees of up to $5,000,000 (one-third of the gross settlement), litigation costs of $29,087.04, and administration costs of $64,500 will be paid from the gross settlement. $500,000 will be allocated to PAGA penalties, 75% of which ($375,000) will be paid to the LWDA. The named Plaintiffs will seek inventive awards of $20,000 each, for a total of $60,000.

The net settlement, estimated at preliminary approval to be approximately $9,350,500, but now totaling $9,471,412.96 due to the decrease in the amount of litigation costs being sought, will be allocated to class members proportionally based on their pay periods during the class and PAGA periods. The average payment received by class members, who number 15,417, will be approximately $598.40. Class members will not be required to submit a claim

to receive their payments. For tax purposes, settlement payments will be allocated 20 percent to wages and 80 percent to penalties and interest, with PAGA payments treated 100 percent as penalties. The employer's share of payroll taxes will be paid in addition to the gross settlement. Funds associated with checks uncashed after 180 days will be paid to Legal Aid at Work.

In exchange for settlement, class members who do not opt out will release all claims, charges, etc. "that were asserted in the Action, or that arise from or could have been asserted based on any of the facts, circumstances, transactions, events, occurrences, acts, disclosures, statements, omissions or failures to act alleged in the Action that have arisen during the Class Period," including specified wage and hour claims. As the Court determined in its order preliminarily approving the settlement, the release is appropriately tailored to the factual allegations at issue. (See *Amaro v. Anaheim Arena Management, LLC* (2021) 69 Cal.App.5th 521, 537.) Further, the PAGA release is appropriately limited to "claims for PAGA civil penalties based on any and all underlying Labor Code violations alleged or referenced in the First Amended Complaint or in the notice letters sent to the LWDA…." Consistent with the statute, aggrieved employees will not be able to opt out of the PAGA portion of the settlement.[1]

In their motion for preliminary approval, Plaintiffs explained that the parties agreed to shorten the class period start date to May 1, 2018 and to exclude the putative "Expense Class," which was much broader than the other classes and less likely to be certified. The parties also agreed that the excluded putative class members—who would not release their claims—would not be prejudiced by the dismissal of their claims, and no notice to these individuals was necessary. The Court held that prior to final approval, Plaintiffs were required to file a request for dismissal of the claims not included in the settlement, along with a declaration pursuant to rule 3.770 of the Rules of Court. Plaintiffs have done so, with the Court entering an order on September 25, 2023 pursuant to a stipulation executed between the parties effectuating such dismissal.

The notice process has now been completed. There were no objections to the settlement and eleven requests for exclusion from the class. Of the 15,428 notice packets sent, 322 were returned to the administrator without a forwarding address. A skip trace performed on the returned notices produced 283 updated addresses, to which the notices were re-mailed. Ultimately, 39 notices remain undeliverable. The administrator estimates that the average payment will be $598.40, with a maximum payment of $1,318 and minimum payment of $25.

At preliminary approval, the Court found that the proposed settlement provides a fair and reasonable compromise to Plaintiffs' claims, and that the PAGA settlement is genuine, meaningful, and fair to those affected. It finds no reason to depart from these findings now, especially considering that there are no objections. The Court finds that the settlement is fair and reasonable for the purposes of final approval.

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[1] The release provides that "with the exception of class and PAGA claims for (1) derivative waiting time penalties (Labor Code §§ 201-203) based on violations of Labor Code § 246, and (2) claims related to inaccurate or non-compliant wage statements under Labor Code § 226," the settlement does not affect the related action of *Andrew Veitch, et al. v. Stanford Health Care* (Super. Ct. Santa Clara County, No. 22CV395001).

V. ATTORNEY FEES, COSTS AND INCENTIVE AWARD

Plaintiffs seek a fee award of $5,000,000, or one-third of the gross settlement, which is not an uncommon contingency fee allocation in a wage and hour class action. This award is facially reasonable under the "common fund" doctrine, which allows a party recovering a fund for the benefit of others to recover attorney fees from the fund itself. Plaintiffs also provide a lodestar figure of $1,966,370, based on 2,388.20 hours spent on the case by counsel and staff with billing rated of $670-950 per hour, resulting in a reasonable multiplier of 2.54. As a cross-check, the lodestar supports the percentage fee requested, particularly given the lack of objections to the attorney fee request. (See *Laffitte v. Robert Half Intern. Inc.* (Cal. 2016) 1 Cal.5th 480, 488, 503-504 [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13].)

Plaintiff also requests $29,087.04 in litigation costs, which appear reasonable based on the summaries provided and are approved. The $64,500 in administrative costs are also approved.

Finally, Plaintiffs request service awards of $20,000 each. To support their requests, they submit declarations describing their efforts on the case. The Court finds that the class representatives are entitled to enhancement awards and the amount requested is reasonable.

VI. ORDER AND JUDGMENT

In accordance with the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

Plaintiffs' motion for final approval is GRANTED. The following class is certified for settlement purposes:

> (1) all of Defendant's past and present non-exempt California employees who were paid any shift differential wages reflected on wage statements through the Lawson payroll system during the Class Period; (2) all of Defendant's past and present non-exempt non-union California employees who worked at least one shift of 3.5 hours or more for Defendant during the Class Period; and (3) all former non-exempt California employees who were paid non-discretionary incentive wages (including, but not limited to, shift differential wages) and sick pay in the same workweek from Defendant and whose employment ended, either voluntarily or involuntarily, at any time during the Class Period.

Excluded from the class are the eleven individuals who submitted timely requests for exclusion.

Judgment shall be entered through the filing of this order and judgment. (Code Civ. Proc., § 668.5.) Plaintiffs and the members of the class shall take from their complaint only the relief set forth in the settlement agreement and this order and judgment. Pursuant to Rule 3.769(h) of the California Rules of Court, the Court retains jurisdiction over the parties to enforce the terms of the settlement agreement and the final order and judgment.

The Court sets a compliance hearing for **June 20, 2024 at 2:30 P.M.** in Department 1. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein; the number and value of any uncashed checks; amounts remitted pursuant to Code of Civil Procedure section 384, subdivision (b); the status of any unresolved issues; and any other matters appropriate to bring to the Court's attention. Counsel shall also submit an amended judgment as described in Code of Civil Procedure section 384, subdivision (b). Counsel may appear at the compliance hearing remotely.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 2

Case Name: *Velasquez v. ChargePoint, Inc.*
Case No.: 21CV382973

This is a putative class action on behalf of employees of Defendant ChargePoint, Inc. alleging failure to pay overtime, failure to compensate employees for missed meal and rest periods, and other wage and hour violations.

Before the Court is Plaintiff Daniella Velasquez's motion for sanctions pursuant to Code of Civil Procedure section 128.7, which is opposed by Defendant. As discussed below, the Court DENIES the motion.

I. BACKGROUND

Plaintiff initiated this action in June 2021, asserting eight causes of action against Defendant. On March 27, 2023, Defendant's counsel e-mailed a letter to Plaintiff's counsel containing the general terms of a settlement offer. On April 3, which was the offer's expiration date, Plaintiff's counsel emailed opposing counsel to request a one-week extension. Later that day, Plaintiff's counsel again emailed Defendant's counsel, requesting that she "Please disregard" the prior request for an extension and stating, "Plaintiff accepts." (*Id*., ¶ 9.)

On April 14, 2023, Defendant's counsel e-mailed a long-form draft settlement agreement to Plaintiff's counsel. Counsel for the parties then exchanged various communications regarding disagreements related to the proposed settlement. Thereafter, Defendant's counsel expressed her intention to move to enforce the settlement agreement, and did in fact do so, filing the motion to enforce and approve settlement on June 1, 2023. Plaintiff opposed the motion and the Court heard oral argument at the June 29 hearing. On July 18, 2023, the Court issued its order denying Defendant's motion.

II. MOTION FOR SANCTIONS

Plaintiff moves for sanctions under Code of Civil Procedure section 128.7 ("Section 128.7") on the ground that Defendant's motion to enforce settlement was frivolous and brought for an improper purpose.

A. Procedural Propriety

As a threshold matter, Defendant asserts that Plaintiff's motion must be denied because it is procedurally improper, with Plaintiff failing to comply with the "safe harbor" provision of Section 128.7.

A motion seeking sanctions under Section 128.7 must be made separately from other motions or requests and describe the specific conduct that purportedly violates subdivision (b) of the statute, which sets forth an attorney's obligations to the Court when, among other things, submitting a motion to the court. (Code Civ. Proc., § 128.7, subd. (c)(1).) In addition, the moving party must comply with the safe harbor provision, which "requires the party seeking sanctions to serve on the opposing party, without filing or presenting it to the court, a notice of

motion specifically describing the sanctionable conduct. Service of the motion initiates a 21-day 'hold' or 'safe harbor' period. [Citation.] During this time, the offending document may be corrected or withdrawn without penalty." (*Li v. Majestic Industry Hills LLC* (2009) 177 Cal.App.4th 585, 590-591.) If the offending document is not withdrawn, the moving party may proceed to file the motion. (*Ibid*.)

Section 128.7, subdivision (c)(1) provides, in pertinent part, "Notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court unless, within 21 days after service of the motion, or any other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."

Here, the motion for sanctions was filed on July 17, 2023. According to Defendant's counsel, Plaintiff initially served the motion on June 23, 2023. As set forth above, the hearing on the motion was June 29 and the Court issued its final ruling denying the motion on July 18. Defendant argues that Plaintiff failed to comply with the safe harbor provision because the 21-day period expired *after* the Court had issued its tentative ruling on June 28. Citing *Moofly Prods., LLC v. Favila* (2018) 24 Cal.App.5th 993, Defendant insists that that where any action by a party against whom Section 128.7 sanctions are being sought at the conclusion of the safe harbor period would have been moot, the motions for sanctions was not properly filed. While the Court does not disagree with Defendant's summation of the holding of *Moofly*, it does disagree with its application of this holding to the facts at bar.

In *Moofly*, the plaintiff filed a motion for relief under Code of Civil Procedure section 473 in an unsuccessful attempt to obtain a reversal of terminating sanctions imposed against it. The defendant opposed the motion, arguing that because the plaintiff had made the same arguments in its opposition to the motion for terminating sanctions, the motion before the court was actually an incorrectly labeled motion for reconsideration pursuant to Code of Civil Procedure section 1008. It further urged that the motion should be denied because it cited no new facts, circumstances, or law to justify such a filing, and also requested that the court issue an order to show cause regarding sanctions. The court denied the motion, issued an order to show cause and set the related hearing. After the plaintiff filed a response in which it sought to withdraw its motion for reconsideration- nearly a month after the Court denied it- and opposed sanctions, the court granted the motion for sanctions.

On appeal, the court reversed the sanctions order after concluding that the trial court failed to comply with the 21-day safe harbor provision provided by Section 128.7.[2] The court explained that the trial court did not provide plaintiff with a sufficient opportunity to withdraw the challenged motion by failing to notify it that it would be subject to sanctions if it did not do so, such that by the time plaintiff sought to withdraw its motion, the attempt was moot because sanctions had already been imposed. Because the entire purpose of the 21-day safe harbor period is to provide a party such as plaintiff with an opportunity to cure potentially

[2] The primary question before the court on appeal in *Moofly* was whether the requirements of Section 128.7 apply when imposing sanctions under subdivision (d) of Code of Civil Procedure section 1008, the statute governing motions for reconsideration, which provides that a court may impose sanctions for violation of the provisions of the statute "as allowed by Section 128.7." After concluding that the answer was "yes," the court analyzed whether the court had met these requirements.

sanctionable conduct, the court reasoned, and the trial court deprived plaintiff of the opportunity to do so, the court could not properly impose 128.7 sanctions against it.

Here, in contrast, Defendant *was* provided with the requisite opportunity. Per Defendant, it was served with Plaintiff's motion for sanctions on June 23, 2023 and the motion was not filed until July 17, 2023, over 21 days later. While the Court issued its final order on the motion to enforce settlement the day after the motion for sanctions was filed, and the motion was filed *after* the parties had submitted all briefing on the motion, the Court had entertained oral argument on its tentative ruling, and the matter had been taken under submission, until the Court issued its final order, *nothing* prevented Defendant from withdrawing it. In other words, any effort by Defendant to withdraw would *not* have been moot at that time, which is in direct contrast to *Moofly*, where the plaintiff was deprived of the opportunity to cure its offensive conduct (i.e., withdraw its motion) *before* the court imposed sanctions. Here, Defendant had all of the time that preceded the June 29 hearing from the initial service of the motion for sanctions on June 23 and all of the days after up until the court issued its order to do so, but did not. Plaintiff has complied with the safe harbor requirement of Section 128.7, and therefore the Court will address the merits of Plaintiff's motion.

B. Merits

The thrust of Plaintiff's motion for sanctions is that Defendant blatantly misrepresented the terms of the purported settlement agreement to the Court in the motion to enforce, particularly with respect to the class claims portion of the action. According to Plaintiff, Defendant claimed in the motion that the parties' understanding of the material terms of the settlement offer were the same, and that the "class claims cannot be dismissed with prejudice as Plaintiff's settlement does not bind the putative class." However, Plaintiff continues, the *written settlement offer* made by Defendant says nothing about class claims, and the only reference to dismissal- which Plaintiff interpreted as having only to do with her individual claims- requires dismissal "*with prejudice*." Plaintiff continues that the draft settlement agreement prepared by Defendant explicitly called for the class claims to be dismissed without prejudice, which is completely contradictory to the representations made by Defendant to the Court in this regard.

As a general matter, Section 128.7, subdivision (b), provides that an attorney who presents a pleading, motion, or similar paper to the court is impliedly certifying that: (1) it is not being presented primarily for an improper purpose (e.g., to harass or cause unnecessary delay or needless increase in the cost of litigation), (2) the claims, defenses, and other legal contentions asserted are warranted by existing law or by a nonfrivolous argument for the extension or change in existing law, (3) any factual contentions have "evidentiary support" or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery, and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on lack of information or belief. Section 128.7 sanctions should be "made with restraint" and are not mandatory even if a claim is frivolous. (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 448.) "When determining whether sanctions should be imposed, the issue is not merely whether the party would prevail on the underlying factual or legal argument. Instead, courts should apply an objective test of reasonableness, including whether 'any reasonable attorney would agree that the claim is totally and completely without merit.'" (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

Plaintiff maintains that Defendant's conduct is sanctionable because it and its counsel violated their duty of candor under California Rules of Professional Conduct, Rule 3.3 and their attempt to enforce the agreement was unfounded in law, frivolous, and designed to be deceitful towards her and class members.

The Court notes that its denial of Defendant's motion to enforce settlement was based on the absence of a "signed writing," which is required to enforce a settlement agreement under Code of Civil Procedure section 664.6 where the alleged agreement occurred outside the presence of the Court. Because of this, the Court did not address whether the parties had actually reached agreement on the materials terms of settlement as submitted by Defendant with the motion for the Court's approval. Given the foregoing, it is Defendant's contention that Plaintiff's assertion that it "misrepresented" the terms of the settlement to the Court is "baseless rhetoric." Defendant continues that Plaintiff's request for sanctions is premised on the notion that it made dismissal of the claims of the absent class members *with prejudice* a material terms of the agreement, when the fact is that its motion to enforce did not seek dismissal of those claims *with prejudice*.

Indeed, in the notice of motion to enforce settlement, Defendant requested an order enforcing the parties' settlement agreement as purportedly accepted by Plaintiff on April 3, 2023 and entering judgment "dismissing Plaintiff's individual claims with prejudice and dismissing the class claims *without prejudice*." What Plaintiff is referring to when she accuses Defendant of misleading the Court is the contents of the proposed long-form settlement agreement her counsel received from Defendant's counsel on April 14, 2023 after, as Defendant argued in the motion to enforce, Plaintiff purportedly accepted Defendant's settlement offer. (See Declaration of Shunt Tatavos-Gharajeh in Support of Motion for Sanctions ("Tatavos-Gharajeh Decl."), ¶ 4, Exhibit 3.) In the March 27, 2023 settlement offer letter that preceded the foregoing and Plaintiff's counsel responded to on April 3, 2023, with the words, "Plaintiff accepts," Defendant stated that it was making a settlement offer to Plaintiff "individually to settle her claims …, in exchange for the execution of a settlement agreement with a general release of all claims …, and a *voluntary dismissal of the lawsuit* with prejudice." (*Id*., ¶ 1, Exhibit 1.) However, in the April 14 draft settlement agreement, Defendant included a provision premising settlement on, among other things, the following:

a. Plaintiff will dismiss with prejudice all of her claims, including her individual claims and the putative class claims, in the *Velasquez Litigation*;
b. Plaintiff will dismiss the *Velasquez Litigation* in its entirety, with prejudice.

(Tatavos-Gharajeh Decl., ¶ 4, Exhibit 3 at § 6, p. 2.)

Plaintiff argues that the foregoing clearly establish that there was no agreement as to the mutual terms of settlement because the settlement offer was only for her *individual* claims and did not contemplate the class claims. This fact, she argues, in concert with the absence of her signature on the purported settlement agreement, a fact that Defendant was plainly aware of, would make it impossible for Defendant to honestly represent to the Court that a binding and enforceable settlement agreement had been reached between the parties. As such, she concludes, sanctions are warranted because the motion to enforce was frivolous. The Court is not so persuaded.

First, regardless of the language contained in the draft long-form settlement agreement, given the language in its notice of motion, Defendant was unequivocally *not* seeking an order dismissing the class claims with prejudice pursuant to the agreement allegedly reached between the parties. As such, the Court does not believe that Defendant made any knowing misrepresentation to the Court regarding an agreement between the parties to dismiss the class claims with prejudice. As to the issue of dismissal of the class claims *without prejudice*, there was arguably ambiguity in the word "lawsuit" in the March 27 settlement offer letter, with Defendant able to make a colorable argument that it was its intention that that term referred to *all* claims Plaintiff asserted, for herself individually and those she purported to bring on behalf of the class given that she was the *only* plaintiff (no others had been named in her amended pleading) and her agreement to dismiss all of her claims would leave the putative class action "headless." Because Plaintiff simply responded to the offer with the unequivocal phrase "Plaintiff accepts," Defendant would have no indication of how Plaintiff understood the term "lawsuit" as compared to it, i.e., that she had a different understanding. To the extent that Defendant had a particular understanding as to what the parties had agreed to, it was entitled to and seemingly had a legitimate, good faith basis to argue that it understood the parties to have reached an agreement to dispose of the *entire* case.

Second, as Defendant notes, because no class has been certified, any putative class member would not be prejudiced by a dismissal of this action, with the settlement only binding Plaintiff herself. So not only did Defendant *not* make any representation to the Court in its motion to enforce that the parties had agreed to dismiss all class claims with prejudice, but even if it had, such a representation would not have resulted in an enforceable settlement term to this effect. The Court could still have concluded that the parties agreed on all other material terms such that an enforceable settlement agreement existed, even excluding the foregoing term.

Third, the Court does not find persuasive Plaintiff's contention that Defendant acted in bad faith when it filed the motion to enforce because knew that there was no "signed writing" pursuant to Section 664.6. The fact that Plaintiff's counsel's typewritten name was not found to meet the requirements of the foregoing statute does not mean Defendant's conduct meets the stringent standard required for imposing sanctions pursuant to Section 128.7, particularly because "our adversary system requires that attorneys and litigants be provided with substantial breathing room to develop and assert factual and legal arguments" such that 128.7 sanctions "should not be routinely or easily awarded even for a claim that is arguably frivolous …." (*Kumar v. Ramsey* (2021) 71 Cal.App.5th 1110, 1121.) A poor argument does not automatically equate to sanctionable conduct.

In sum, the Court concludes that Defendant did not engage in sanctionable conduct (including any violation of the Rules of Professional Conduct) in filing a motion to enforce based on its interpretation of the offer letter and Plaintiff's response to it. Accordingly, Plaintiff's motion for sanctions is DENIED.

III. CONCLUSION

Plaintiff's motion for sanctions pursuant to Section 128.7 is DENIED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely. No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 3

Case Name: *Credit Corp. Solutions, Inc. v. Guzman*
Case No.: 19CV361005

This action was filed by Plaintiff and Cross-Defendant Credit Corp Solutions, Inc. ("CCS") to collect debt alleged to be owed by Defendant and Cross-Complainant Lorie Guzman. Ms. Guzman filed a cross-complaint alleging putative class claims under the California Fair Debt Buying Practices Act, California Civil Code sections 1788.50–1788.64 ("CFDBPA"); the federal Fair Debt Collection Practices Act, 15 U.S.C. sections 1692–1692p ("FDCPA"); and the California Rosenthal Fair Debt Collection Practices Act, California Civil Code sections 1788–1788.33 ("RFDCPA")

Before the Court is Ms. Guzman's renewed motion for class certification, which Cross-Defendant opposes. As discussed below, the Court GRANTS THE MOTION IN PART

I. BACKGROUND

CCS filed this action on December 31, 2019, asserting a single claim for breach of contract arising from Ms. Guzman's alleged failure to fully repay a loan subsequently assigned to CCS. Ms. Guzman answered and filed a cross-complaint alleging putative class claims against CCS and its counsel who filed this action. She alleges that CCS's complaint incorrectly identifies the charge-off creditor, falsely states that CCS has complied with section 1788.52 of the Civil Code, and fails to attach a copy of the contract as required by the CFDBPA. She further alleges that it is Cross-Defendants' routine practice to file and serve collection complaints with these defects.

Cross-Defendants retained new counsel around November 2020, and the parties stipulated to the filing of amended pleadings. In January 2021, CCS filed a Second Amended Complaint ("SAC") and Ms. Guzman filed the operative First Amended Class Action Cross-Complaint for Declaratory Relief and Damages ("FAXC"), which addresses the filing of the SAC.[3] The action was deemed complex and reassigned to this Department later in January 2021.

In September 2022, Ms. Guzman filed a motion for class certification, which was opposed by CCS, seeking to certify the following class:

> All persons with addresses in California against whom Cross-Defendants filed a collection Complaint in the form of Exhibits "1" or "2" to the [FAXC] herein, in an attempt to collect a charged-off consumer debt originally owed to WEBBANK, which was sold or resold to CREDIT CORP SOLUTIONS, INC, on or after January 1, 2014, during the period December 31, 2018, through the date of class certification.

[3] The FAXC also named CCS's Australian parent company, Credit Corp Group Limited ("CCGL"), as a cross-defendant, but CCGL successfully moved to quash for lack of personal jurisdiction.

In an order dated January 3, 2023, the Court denied the motion without prejudice to its renewal upon a better evidentiary record addressing specific issues. Ms. Guzman now moves again for class certification, having made no alterations to the proposed class definition.[4]

II. MOTION FOR CLASS CERTIFICATION

Ms. Guzman again moves to certify the following class:

> All persons with addresses in California against whom Cross-Defendants filed a collection Complaint in the form of Exhibits "1" or "2" to the [FAXC] herein, in an attempt to collect a charged-off consumer debt originally owed to WEBBANK, which was sold or resold to CREDIT CORP SOLUTIONS, INC, on or after January 1, 2014, during the period December 31, 2018, through the date of class certification.

A. Legal Standard

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 Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, internal quotation marks, ellipses, and citations omitted (*Sav-on Drug Stores*).)

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, 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.) The court must examine all the evidence submitted in support of and in opposition to the motion "in light of the plaintiffs' theory of recovery." (*Department of Fish*

[4] CCS's request for judicial notice of the Declaration of Michael Eadie filed in support of CCS's opposition to Plaintiff's Motion for Class Certification, dated October 12, 2022, is GRANTED. (Evid. Code, § 452, subd. (d).)

and Game v. Superior Court (Fish and Game) (2011) 197 Cal.App.4th 1323, 1349.) The evidence is considered "together": there is no burden-shifting as in other contexts. (*Ibid.*)

B. Numerous and Ascertainable Class

A class is ascertainable "when it is defined in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when that identification becomes necessary." (*Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980 (*Noel*).) A class definition satisfying these requirements

> puts members of the class on notice that their rights may be adjudicated in the proceeding, so they must decide whether to intervene, opt out, or do nothing and live with the consequences. This kind of class definition also advances due process by supplying a concrete basis for determining who will and will not be bound by (or benefit from) any judgment.

(*Noel*, *supra*, 7 Cal.5th at p. 980, citation omitted.)

"As a rule, a representative plaintiff in a class action need not introduce evidence establishing how notice of the action will be communicated to individual class members in order to show an ascertainable class." (*Noel*, *supra*, 7 Cal.5th at p. 984.) Still, it has long been held that "[c]lass members are 'ascertainable' where they may be readily identified … by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932, disapproved of on another ground by *Noel*, *supra*, 7 Cal.5th 955; see also *Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 975-976 ["The defined class of all HD Package subscribers is precise, with objective characteristics and transactional parameters, and can be determined by DIRECTV's own account records. No more is needed."].)

In its preceding order denying class certification, the Court agreed that the proposed class is appropriately defined based on objective characteristics and presumably members are numerous and easily identifiable from Cross-Defendants' records. However, it also found, as argued by CCS, that Plaintiff failed to submit sufficient evidence to establish the foregoing, with Ms. Guzman proffering only CCS's response to a production demand identifying 110 individuals that may not have corresponded exactly to the putative class.

In the instant motion, Ms. Guzman maintains that this element of class certification is met based on the evidence she submits that was obtained from the additional discovery conducted subsequent to the Court's denial of her prior motion for class certification concerning the identities of putative class members. According to Plaintiff, in response to her request, Cross-Defendant produced complaints and amended complaints for 110 of the 115 California consumers against whom it filed collection complaints as described in the class definition. Plaintiff's counsel was able to obtain a further four collection complaints through additional research. Of the complaints, only one is not within the proposed class, with the debt at issue originating from a different creditor- Synchrony Bank. There is a record of the consumer being served for 41 of the complaints; 1 where the complaint was purportedly served, though no service date can be found; 31 where there is a record of the consumer *not* being served; and 41 complaints where there is no information on service one way or the other. Plaintiff insists that the foregoing is sufficient to meet the evidentiary concerns previously expressed by the Court.

In its opposition, Cross-Defendant argues that Plaintiff still fails to meet her burden on this element because she has not articulated a "coherent" definition of a class. It urges that the class as defined is too broad because it presumes that there is a class-wide injury from the mere commencement of a collection action but there is none such that individuals who were not served cannot be part of the class. It continues that individuals who *settled* their claims also are not members of the class because CCS and these parties agreed to dismiss these actions. Finally, CCS asserts that Plaintiff has not met her evidentiary burden because despite it having produced over 2,000 documents in response to the discovery requests cited by Plaintiff, Ms. Guzman only submits one actual complaint and one settlement agreement in support of her motion, which do not establish that the purported class consists of 114 members who were harmed by collection actions that were timely brought and violated the CFDPA, FDCPA or RFDCPA.

It is notable that CCS does not take issue with the summation of the 2,000 documents it produced in response to Plaintiff's production demand by Ms. Guzman's counsel in a sworn declaration, and the Court does not believe that Plaintiff need submit *all* of these documents to meet her evidentiary burden here. It would be, as Ms. Guzman argues, burdensome and repetitive, and unnecessary in light of the representations made by her counsel under penalty of perjury concerning the substance of these items. The Court is not evaluating the merits at this juncture, only the ascertainability of the class, and believes that the declarations submitted by Plaintiff's counsel are sufficient to make the necessary evidentiary showing for numerousity and ascertainability.

However, the Court agrees with Cross-Defendant that the class as currently defined by Ms. Guzman is overbroad. Relying on *Naas v. Stolman* (9th Cir. 1997) 130 F.3d 892, Plaintiff insists that "even individuals who were never served with the Complaint are members of the putative class as defined," but *Naas* involved the question of *when* the statute of limitations on an FDCPA claim begins to run and did *not* consider or find that an FDCPA violation occurs solely upon the filing of a complaint. It is otherwise not apparent to the Court how an individual who was never served with a complaint attempting to collect a charged-off consumer debt originally owed to WebBank has an actionable claim against CCS.

But the Court is not persuaded that the class is overbroad in including individuals who reached settlements with CCS and thus no longer have any action pending against them by Cross-Defendant to collect on a charged-off consumer debts. According to Plaintiff, neither of the settlement agreements contain a waiver pursuant to Civil Code section 1542, which provides that "[a] general release does not extend to claims that the creditor or the releasing party does not know or suspect to exist in his favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party." In the absence of such a waiver, these individuals may still have a cognizable injury from being sued by CCS in the first place.

As the Court indicated in its prior order, any issues pertaining to overbreadth can be resolved by modifying the class definition. (See *Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1462 [where there is an ascertainable class, "plaintiffs' rights should not be forfeited because of counsel's choice of words in the complaint or class certification motion"; the court *itself* can and should redefine the class where the evidence shows such a redefined class would be ascertainable].) Consequently, based on the evidence submitted by Plaintiff,

the Court concludes that a numerous, ascertainable class exists by modifying the class definition thusly:

> All persons with addresses in California against whom Cross-Defendants filed *and served* a collection Complaint in the form of Exhibits "1" or "2" to the [FAXC] herein, in an attempt to collect a charged-off consumer debt originally owed to WEBBANK, which was sold or resold to CREDIT CORP SOLUTIONS, INC, on or after January 1, 2014, during the period December 31, 2018, through the date of class certification.

C. Community of Interest

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 Drug Stores*, *supra*, 34 Cal.4th at p. 326.)

1. *Predominant Questions of Law or Fact*

For the first community of interest factor, "[i]n order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916 (*Hicks*).) The court must also give due weight to any evidence of a conflict of interest among the proposed class members. (See *J.P. Morgan & Co., Inc. v. Superior Court* (2003) 113 Cal.App.4th 195, 215.) The ultimate question is 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. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104–1105 (*Lockheed Martin*).) "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks*, *supra*, 89 Cal.App.4th at p. 916.)

In her prior motion for class certification, Ms. Guzman argued that because "the collection complaints filed against and served on the members of the class are each a form complaint, common issues of law predominate." These included "[w]hether Cross-Defendants are debt buyers and/or debt collectors," and:

- whether Cross-Defendants filed and served collection Complaints against Cross-Complainant and the Class in the form of Exhibits "1" or "2" which falsely state that, "[t]he name of the charge-off creditor is WEBBANK," in violation of 15 U.S.C. §§ 16926, 1692600), and California Civil Code § 1788.17;
- whether Cross-Defendants filed and served collection Complaints against Cross-Complainant and the Class in the form of Exhibits "1" or "2" which fail to truthfully state "[t]he name and an address of the charge-off creditor at the time of charge off," as required by California Civil Code § 1788.58(a)(6);
- whether Cross-Defendants filed collection Complaints against Cross-Complainant and the Class in the form of Exhibits "1" or "2", which falsely state that, "Plaintiff has complied with Section 1788.52 of the California Civil Code"; and

- whether Cross-Defendants filed collection Complaints against Cross-Complainant and the Class in the form of Exhibits "1" or "2", which fail to contain an attached "copy of the contract or other document described in subdivision (b) of Section 1788.52" as required by the CFDBPA, California Civil Code § 1788.58(b).

Of these four theories, the Court opined that only the last would seem amenable to resolution by looking only at the "form complaints" filed against putative class members, with the others requiring evidence about the actual charge-off creditor associated with each account and (for the Civil Code section 1788.52 theory), whether Cross-Defendants possess the information required by the statute and otherwise complied with it as to each account. The Court explained that while it saw no reason to doubt that Plaintiff's theories could be resolved on a classwide basis through common proof, Ms. Guzman failed to produce evidence establishing as much. She also failed to proffer evidence that anyone else's account was transferred from WebBank to another charge-off creditor prior to CCS's purchase of the debt, whether the putative class members were "consumers" and whether they previously litigated or settled the claims at issue. While the Court expressed its belief that the foregoing issues were likely also susceptible to common proof, perhaps with "further tightening of the class definition," Ms. Guzman needed to submit evidence to demonstrate that this was the case.[5]

Plaintiff insists that she has done so now, with the above-discussed evidence establishing that there are 114 California consumers against whom CCS filed collection complaints in the form of Exhibits "1" and "2" to her operative Cross-Complaint, all of which contained allegations that "Plaintiff is a debt buyer" and WebBank extended a loan to the consumer "for the use of [the consumer] for personal, family, or household purposes." Her evidence also establishes that the individuals who previously settled their claims are still part of the class because the settlement agreements did not encompass the claims of this action.

In its opposition, Cross-Defendant insists that Ms. Guzman has not established the existence of common issues because she has only offered her "word" that CCS violated the CFDBPA, FDCPA or RFDCPA. But whether CCS *actually* violated the foregoing statutes by filing the collection actions at issue goes to the *merits* of Ms. Guzman's class claims and *not* to whether common issues predominate. It is well-settled that the question of certification is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440; *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 178 [" 'In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [class certification] are met.' "].) "A class certification motion is not a license for a free-floating inquiry into the validity of the complaint's allegations; rather, resolution of disputes over the merits of a case generally must be postponed until after class action has been decided [citation], with the court assuming for purposes of the certification motion that any claims have merit. [Citation.]" (*Brinker*

[5] In reaching this conclusion, the Court highlighted the observation made by the court in *Powers v. Credit Mgmt. Servs.* (8th Cir. 2015) 776 F.3d 567 that there is an "important distinction" between "[r]un-of-the-mill certified FDCPA class actions … involv[ing] standard-form collection letters sent directly to consumers before the filing of collection lawsuits" and actions challenging "standard-form *pleadings* used by a debt collector in collection lawsuits it actually filed." (*Id.* at p. 570, italics original.) In the latter type of case, Plaintiff needed to make a more tailored *evidentiary* showing that the requirements of class certification were met.

Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1023.) Thus, Ms. Guzman need not produce such evidence in order to establish the element of commonality.

CCS continues that the evidentiary failings highlighted by the Court with regards to this issue still prevail here, and urges, citing to *Powers v. Credit Mgmt. Servs., Inc.* (8th Cir. 2015) 776 F.3d 567, that standard pleadings do not meet the commonality requirement because the Court would need to make individualized inquiries to resolve class members' claims. The Court disagrees, and concludes that Plaintiff has meet her evidentiary burden with regards to commonality.

First, as Plaintiff argues, each of the complaints referred to in the class definition (as modified) alleges that "[CCS] is a debt buyer," and a "debt buyer" is defined by the CFDBPA as "a person or entity that is regularly engaged in the business of purchasing charged-off *consumer debt* for collection purposes[.]" (Civ. Code, § 1788.50, subd. (a)(1).) Thus, by alleging as much, CCS necessary judicially admits that the debt being collected in each complaint is a *consumer debt*. This admission is further supported by the allegation in each complaint that WebBank extended a loan to the consumer "for the use of [the consumer] for personal, family, or household purposes," with "consumer debt" being defined under the CFDBPA as "money, property, or their equivalent, due or owing or alleged to be due or owing from a natural person by reason of a consumer credit transaction," and "consumer credit transaction" being defined under the statute, in turn, as "a transaction between that natural person from the other person *primarily for personal, family, or household purposes*." (See Civ. Code, § 1788.2, subds. (e) and (f).)

Even if the foregoing was deemed insufficient, Plaintiff persuasively argues that more recent case law on certifying consumer classes does not require the named plaintiff to immediately put forward evidence that the (likely then-unknown) class members each has a consumer debt, particularly when it would not be especially difficult, as here, to ask potential class members to answer that question. (See, e.g., *Butto v. Collecto Inc.* (E.D.N.Y. 2013) 290 F.R.D. 372, 382; see also *Khoday v. Symantec Corp.* (D.Minn. 2014) 2014 U.S. Dist. LEXIS 43315, *95 ["The Court agrees that this minimal inquiry into the nature of each class member's purchase does not defeat commonality."]; *Hicks v. Client Services, Inc.* (S.D.Fla. 2008) 2008 U.S. Dist. LEXIS 101129, *17 [suggesting proper drafting of a claim form as a method of excluding nonconsumer debts].)

The Court also finds persuasive Plaintiff's argument that the issues concerning the truth of the party identified in the collection complaints as charge-off creditor, its address at that time and the statement affirming compliance with Civil Code section 1788.52 revolve around a single fact- the identity of the charge-off creditor and thus commonality is shown. That is, if it is shown that a complaint falsely states that the charge-off creditor is WebBank, the falsity of the listed address and statement of compliance are necessarily shown. And the Court agrees with Plaintiff that a determination of the identity of the true charge-off creditor would likely be a minimal inquiry in the vein of determining whether class members have a consumer debt and thus should not be a barrier to certification.

As for the issue of injury and standing, with the modification of the class to exclude individuals who were not served with the collection complaint, all remaining class members are in an *identical* posture to Ms. Guzman, who is not required to meet Article III standing in order to pursue her claims under California statutory law and has otherwise pleaded that she

suffered injury as a result of CCS's action. As such, the Court rejects CCS's assertion that resolving the question of injury amongst class members would involve individualized inquiries.

Based on the foregoing, the Court concludes that common issues of law and fact predominate amongst the class as modified.

2. *Adequacy and Typicality*

"Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) The fact that a class representative does not personally incur all of the damages suffered by each different class member does not necessarily preclude the representative from providing adequate representation to the class. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238, disapproved of on another ground by *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260.) Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status. (*Ibid.*)

"Although the questions whether a plaintiff has claims typical of the class and will be able to adequately represent the class members are related, they are not synonymous." (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375 (*Martinez*).) "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." (*Ibid.*, quoting *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.)

a. Typicality

In its opposition to the prior motion for class certification, CCS introduced evidence that fewer than half of the putative class members were actually served with the form complaint that Ms. Guzman challenges, and among those who were served, some of those actions were dismissed without prejudice and others were resolved via settlement agreements. As such, Cross-Defendant argued, unlike Plaintiff, these putative class members may not have suffered injury sufficient to confer Article III standing under the FDCPA. The Court reasoned that even accepting CCS's argument, it appeared that there was *some* subset of the proposed class with claims like were like Plaintiff's. It then advised the parties that if Ms. Guzman were to renew her motion in the future, both sides should address the issue of injury more thoroughly.

The Court believes that Plaintiff has adequately addressed this issue by demonstrating that all class members served with a collection complaint are in an identical posture to her and thus that her claims are typical of the class.

b. Adequacy

"[T]he test for adequacy of representation is merely whether or not plaintiffs have demonstrated a willingness and vigor to prosecute the action, whether they have any disabling conflicts going to the heart of the controversy, and whether they have qualified counsel." (*In*

re Adobe Systems, Inc. Securities Litigation (N.D. Cal. 1991) 139 F.R.D. 150, 156 (*Adobe*).) "The reality of complex cases … is that clients must defer a great amount of discretion to their lawyers." (*Ibid.*) Thus, "[t]he threshold knowledge required of the class representatives is low." (*DuFour v. Be LLC* (N.D. Cal. 2013) 291 F.R.D. 413, 419.) It is adequate that the class representatives "appear familiar with the basic outline of [the] action in that they understand the gravamen of the claims. It is not necessary that they be intimately familiar with every factual and legal issue in the case." (*Adobe, supra,* 139 F.R.D. at p. 156; see also *Espejo v. The Copley Press, Inc.* (2017) 13 Cal.App.5th 329, 354–355 [no evidence plaintiff was inadequate where he "testified that he had read the complaint, and that after he spoke to plaintiffs' counsel about the lawsuit, he decided he wanted to be a part of it"]; *Surowitz v. Hilton Hotels Corp.*(1966) 383 U.S. 363, 372 [rejecting proposition that plaintiff "who is uneducated generally and illiterate in economic matters, could never under any circumstances be a plaintiff in a derivative suit brought in the federal courts to protect her stock interests"].) In addition, a class representative assumes a fiduciary responsibility to absent class members and must understand this responsibility and be willing to honor it. (See *Jones v. Farmers Ins. Exchange* (2013) 221 Cal.App.4th 986, 998 (*Jones*).) Accordingly, "[a] trial court acts properly when it refuses to certify class actions in which the named plaintiff is simply ' "lending his name to a suit controlled entirely by the class attorney." ' " (*Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 579–580 (*Howard Gunty*), quoting Kirkpatrick *v. J.C. Bradford & Co.* (11th Cir.1987) 827 F.2d 718, 727.)[6]

In the preceding motion, the Court rejected CCS's argument that Ms. Guzman's deposition testimony demonstrated that she was an inadequate representative because she lacked knowledge and understanding of her allegations in the FAXC, explaining that her inability to explain every procedural development and legal theory about which she was questioned is not disqualifying. (See *Adobe, supra,* 139 F.R.D. at p. 156.) She otherwise submitted evidence that class-counsel was well-qualified to conduct this litigation, as well as her own declaration wherein she stated that she understood her duties to the class and intended to fill them. Given the foregoing, the Court determined that Ms. Guzman and her counsel were adequate representatives of the class. The Court sees no reason to depart from this conclusion now.

D. Superiority

"[A] class action should not be certified unless substantial benefits accrue both to litigants and the courts. . . ." (*Basurco v. 21st Century Ins.* (2003) 108 Cal.App.4th 110, 120, internal quotation marks omitted.) The question is whether a class action would be superior to individual lawsuits. (*Ibid.*) "Thus, even if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action." (*Id.* at pp. 120–121, internal quotation marks omitted.)

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[6] In the absence of a factually similar California case or other relevant California precedent, California courts look to federal authority for guidance on matters involving class action procedures. (*Duran v. Obesity Research Institute, LLC* (2016) 1 Cal.App.5th 635, 646, fn.6, citing *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1392, fn. 18.)

As the Court explained in its preceding order denying class certification, here, it would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each of the class members. Further, it would be cost prohibitive for each class member to file suit individually, as each member would have the potential for little to no monetary recovery. In its opposition to that motion, CCS insisted that the putative class members stood to recover less in a class action than from asserting cross-claims in the individual collection actions asserted against them as Ms. Guzman had because the relevant statutes tied their recovery to CCS's net worth in a class action but provide for potentially higher statutory damages in an individual action. (See *Powers, supra*, 776 F.3d at p. 572 [noting the need to focus the case on the strongest claims "[b]ecause total damages are capped in an FDCPA class action"; "by alleging that impecunious individual defendants are jointly and severally liable to all members of the largest possible classes, plaintiffs created an issue of class action superiority that cannot be ignored at the certification stage"].)

The Court ultimately concluded that the element of superiority was met based on Plaintiff's argument that putative members were actually *unlikely* to achieve greater recovery in individual actions and the existence of numerous authorities rejecting similar arguments in the FDCPA and RFDCPA context.

Here, Cross-Defendant makes essentially the same arguments and the Court sees no reason to depart from its previous conclusion that a class action would be superior to individual lawsuits. Thus, it again concludes that the element of superiority is met.

III. CONCLUSION

Ms. Guzman's motion for class certification is GRANTED IN PART based on the Court's modification of the class definition. The following class is certified:

> All persons with addresses in California against whom Cross-Defendants filed *and served* a collection Complaint in the form of Exhibits "1" or "2" to the [FAXC] herein, in an attempt to collect a charged-off consumer debt originally owed to WEBBANK, which was sold or resold to CREDIT CORP SOLUTIONS, INC, on or after January 1, 2014, during the period December 31, 2018, through the date of class certification.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

Parties may appear in person or remotely. Remote appearances must be made through Microsoft Teams, unless otherwise arranged with the Court. Please go to https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml to find the appropriate link.

State and local rules prohibit recording of court proceedings without a court order. These rules apply while in court and also while participating or listening in a hearing remotely.

No court order has been issued which would allow recording of any portion of this motion calendar.

The Court does not provide court reporters for proceedings in the complex civil litigation departments. Any party wishing to retain a court reporter to report a hearing may do so in compliance with this Court's October 13, 2020 Policy Regarding Privately Retained Court Reporters. The court reporter can either be in person or appear remotely.

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Calendar Line 4

Case Name: *Saldivar v. Stanford Federal Credit Union*
Case No.: 20CV367408

This is a putative class action against Defendant Stanford Federal Credit Union ("Stanford") alleging various claims for wrongfully charging Plaintiffs Claudine Saldivar and Omar Montes and class members fees relating to their checking accounts.

Before the Court is Stanford's motion to compel arbitration of Mr. Montes' individual claims, which is opposed by Plaintiffs. As discussed below, the Court DENIES Stanford's motion to compel arbitration.

I. BACKGROUND

According to the allegations of the operative First Amended Complaint ("FAC"), Stanford offers its banking customers a checking account which features the use of a debit card. (FAC, ¶ 14.) In connection with the processing of debit transactions, Stanford charges what it calls "Insufficient Funds Fee ACH Debit (Returned), "Insufficient Funds Fee CK," "Insufficient Funds Fee ACH Debit (Paid)" and "Premium Overdraft Fee." (*Id*., ¶ 15.) Overdraft fees and Nonsufficient Funds Fees ("NSF Fees") constitute the primary fee generators for banks and credit unions and are usually punitive to customers given their high cost. (*Id*., ¶¶ 16-17.)

One accounting gimmick used by Stanford and other institutions is an "approve-positive-post-negative" ("APPN") method of calculation, which works as follows: at the moment a debit card transaction is authorized on an account with positive funds to cover it, Stanford immediately reduces the consumer's checking account for the amount of purchase, sets aside funds in a checking account to cover that transaction, and as a result, the consumer's displayed "available balance" reflects that subtracted amount. (FAC, ¶ 21.) Consequently, the consumer's account will always have sufficient available funds to cover these transactions. (*Ibid*.) However, Stanford still assesses $20 overdraft fees on many of these transactions and misrepresents its practices in its account documents. (*Id*., ¶ 22.) Because Stanford places a hold on funds when the debit card is used to make a purchase, those funds are not available for any other use by the accountholder, which means when any *subsequent*, intervening transactions are initiated on a checking account, they are compared against an account balance that has already been reduced to account for any earlier transactions. (*Id*., ¶ 24.) Accordingly, many subsequent transactions incur overdraft fees due to the unavailability of the funds sequestered for those debit card transactions. (*Id*.) Despite keeping these held funds off limits for other transaction, Stanford improperly charges overdraft fees on those APPN transactions, although the APPN transactions always have sufficient available funds to be covered. (*Id*., ¶ 25.)

While Stanford is contractually permitted to charge overdraft fees for transactions that are authorized into a negative account balance, it is not permitted to do so for APPN transactions, i.e., those transactions that occur when sufficient funds exist to cover them. (FAC, ¶¶ 35-36.) Stanford's actual practice is to attempt the same debit card transaction twice to determine if the transaction overdraws the account- both at the time a transaction is

authorized and later at time of settlement. However, at the moment prior to settlement, Stanford releases the hold placed on funds for the transaction for a split second, putting money back in the account, and then re-debits the same transaction a second time. (*Id.*, ¶ 41.) This "secret" step allows Stanford is to charge overdraft fees on transactions that should never have been subject to them because they were authorized into sufficient funds and funds were set aside by Stanford to pay for them. (*Id.*, ¶ 42.)

Based on the foregoing allegations, Plaintiff Claudine Saldivar initiated this action in June 2020 and both her and Mr. Montes filed the operative FAC on July 25, 2023, asserting the following causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) unjust enrichment/restitution; (4) money had and received; and (5) violation of Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq.).

II. MOTION TO COMPEL ARBITRATION

Stanford moves to compel individual arbitration of claims asserted by Plaintiff Omar Montes pursuant to the terms of the Membership Agreement (the "Agreement") and also requests that the Court stay this action as to those claims pending the conclusion of said arbitration.

A. 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.) However, "[t]he procedural aspects of the FAA do not apply in state court absent an express provision in the arbitration agreement." (*Ibid*.) Here, the Agreement expressly provides that "the [FAA] and federal common law applicable to arbitration shall govern [its] interpretation and enforcement," and thus federal procedural and substantive law apply. (See *Rodriguez v. American Technologies, Inc*. (2006) 136 Cal.App.4th 1110, 1122 ["[t]he phrase 'pursuant to the FAA' is broad and unconditional," and unambiguously adopts both the procedural and substantive aspects of the FAA].)

Under the FAA, the Court must grant a motion to compel arbitration if any suit is brought upon "any issue referable to arbitration under an agreement for such arbitration" (9 U.S.C. § 3), subject to "such grounds as exist at law or in equity for the revocation of any contract…" (9 U.S.C. § 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 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.)

> But the FAA's policy favoring arbitration … is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. Or in another formulation: The policy is to make arbitration agreements as enforceable as other contracts, but not more so. Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind.

(*Morgan v. Sundance, Inc*. (2022) ___U.S.___ [142 S.Ct. 1708, 1713] (*Morgan*), internal citations and quotation marks omitted.)

B. Discussion

Stanford maintains that its motion to compel should be granted because there is a valid agreement to arbitrate between itself and Mr. Montes and that agreement encompasses his claims. In opposition, Mr. Montes asserts that the arbitration provision at issue is unenforceable and does not apply to him because he did not assent to the agreement that purportedly contains it.

1. *Existence and Scope of Agreement to Arbitrate*

As alleged in the FAC, Mr. Montes opened a checking account and became a Stanford member on March 12, 2018. In doing so, he agreed to comply with the terms and conditions of the Membership Agreement. (FAC, ¶¶ 5, 33, 97.) That same day, Mr. Montes logged onto Stanford's online banking for the first time and agreed to the terms and conditions of the Online Banking Disclosures (the "Disclosures") then in place. (See Declaration of Paul Jockisch in Support of Motion to Compel Arbitration ("Jockisch Decl."), ¶ 8.) By agreeing to the Disclosures, Plaintiff also agreed to "electronically receive disclosures and notices" from Stanford, and the Disclosures further provided that by so consenting, he agreed to provide Stanford with the information (e.g., current email address) necessary to communicate with him. (*Id*.) The Disclosures also informed Mr. Montes that by using the "Online Banking services … [he] accept[s] these Terms and Conditions" and that "[c]ontinued use of [Stanford's] internet service by you after notice of a change in terms constitutes acceptance of the change." (*Id*., ¶¶ 10.))

As explained by the Disclosures, all monthly account statements, quarterly newsletters and other notices to members are mailed to the valid mailing address each member has on file *unless* the member has opted to receive the foregoing electronically, as Plaintiff did. (Jockisch Decl., ¶¶ 9, 11-12.)

On July 31, 2020, Stanford changed its Membership Agreement by adding an arbitration provision and class action waiver (the "Arbitration Agreement"). (Jockisch Decl., ¶ 13, Exhibit 3.) The arbitration provision- which spans nearly two pages- informs the member what arbitration is and how it works, the arbitration process, the types of disputes it covers, any limitations, and who pays for arbitration. (*Id*.) The Arbitration Agreement specified that "Disputes Covered by Arbitration" consist of:

> Any claim or dispute relating to or arising out of Your Accounts or our relationship will be subject to arbitration, regardless of whether that dispute arose before or after your receipt of this notice … Disputes also include claims relating to the enforceability, validity, scope or interpretation of any of these arbitration provisions. Any questions about whether disputes are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced.
>
> All disputes are subject to arbitration, no matter what legal theory they are based on, or what remedy (damages, or injunctive or declaratory relief) they seek. Disputes include any unresolved claims concerning any services relating to Your Accounts.

(Jockisch Decl., Exhibit 3 at p. 9.)

The Arbitration Agreement further provides that any arbitration must be on an individual basis. (*Id*.)

As articulated above, the first question the Court must answer on this motion is whether, applying California law governing the formation and interpretation of contracts, Stanford and Plaintiff agreed to arbitrate any disputes pertaining to their relationship or his accounts. (See *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 421 [stating that general principles of contract law determine whether parties have entered an agreement to arbitrate].) It is undisputed that Plaintiff became a Stanford member and assented to the Agreement as it existed *before* Stanford purported to add the arbitration provision and class action waiver. The Court must therefore determine whether the arbitration provision became part of the Member Agreement between Stanford and Plaintiff. Under Civil Code section 1698, a written contract may be modified by a written agreement, and under California law, contract formation requires mutual assent. (See, e.g., *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 850.)

Here, Stanford maintains that Plaintiff assented to the addition of the arbitration provision (and class action waiver) by failing to opt-out of the Arbitration Agreement when given the opportunity to do so. According to Stanford, on July 31, 2020, it sent an email to the members who had opted into electronic notice notifying them of "Important changes to [Stanford's] policies, terms and conditions" (the "Notice"), including the Arbitration Agreement. The Notice, which was sent to Plaintiff's email address on file and, per Stanford's records, was delivered to him and opened, provided members with a full-text copy of the Arbitration Agreement. (Jockisch Decl., ¶¶ 14-15, Exhibit 5.) The Notice also advised recipients like Plaintiff that the Arbitration Agreement would become effective on July 1, 2020, he would have until August 31, 2020 to exercise his right to opt out, but if he did not do so, "continued use or maintenance of [his] credit union account [would] act as [his] consent to this new provision." (*Id*., ¶ 17.) Stanford did not receive any writing from Mr. Montes to opt out of the Arbitration Agreement and he continued to use his account. (*Id*., ¶¶ 19-21.) Consequently, Stanford maintains, Plaintiff assented to the terms of the Arbitration Agreement.

Relying heavily on *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, Plaintiff argues that that the Arbitration Agreement is invalid. He continues that it does not apply to him, i.e., he did not assent to it, because he ceased using his Stanford account in 2019. Mr.

Montes' reliance on *Badie* is misplaced because it is factually distinguishable in critical ways from the facts of this case.

In that *Badie*, the plaintiff bank customers challenged the validity of an alternative dispute resolution ("ADR") clause that the bank had attempted to add to the terms of their preexisting account agreement. While the original agreement expressly authorized the bank to change its terms unilaterally, the court concluded, after applying state law principles that govern the formation and interpretation of contracts, that there was *no* mutual assent and thus the ADR clause was unenforceable. (See *Badie*, 67 Cal.App.4th at 789-791 [rejecting the idea that a party "with the unilateral right to modify a contract has carte blanche to make any kind of change whatsoever as long as a specified procedure is followed."] In short, the court declined to hold that a party could impose an arbitration provision without the other party's consent after determining that that was precisely what the defendant bank was attempting to do.

Here, in contrast, Stanford did *not* attempt to unilaterally impose a new arbitration provision on its existing customers in the manner rejected by the court in *Badie*, i.e., based solely on the "changes in terms" provision of the Member Agreement. Nor has Stanford suggested, as the bank in *Badie* did, that Mr. Montes' consent to the change in terms clause of the Member Agreement *years ago* served to "pre-approve" the arbitration provision *now*. Instead, Stanford's position is that Plaintiff *actually assented* to the arbitration provision by, after receiving notification from Stanford that it was making changes to the Member Agreement including that provision, not opting out and continuing to use/maintain his account which, under the Arbitration Agreement, he agreed would act as his consent to those changes.[7] As such, the Court finds persuasive Stanford's contention that it sought to add the arbitration provision pursuant to California contract law and *not* the "changes in terms" provision, i.e., by offering new contractual terms to its customers and obtaining their acceptance/assent to those terms. Consequently, *Badie* does not compel the conclusion that Plaintiff did not assent to the arbitration agreement.

Turning to Plaintiff's argument that he did not assent to the arbitration provision because he ceased using his account in 2019, he explains (and submits a declaration to this effect) that he does not recall receiving notice of it and understood that his account was closed in 2019 based on a conversation he had with a Stanford representative. According to Mr. Montes, he received a phone call from the representative in 2019 regarding a disputed loan debt who led him to believe that his account was closed and he was no longer a member. (Declaration of Omar Montes in Support of Opposition to Motion to Compel ("Montes Decl."), ¶ 5.) According to him, he also discovered that year that his Stanford debit card no longer worked, at which point he shredded the card and began using a different one at a different financial institution. (*Ibid*.) Mr. Montes states that from that point forward he: stopped

[7] Numerous courts have concluded in similar circumstances that the plaintiff must be deemed to have assented to the addition of the arbitration provision at issue. (See, e.g., *Needleman v. Golden 1 Credit Union* (N.D. Cal. 2020) 474 F.Supp.3d 1097, 1105 ["In light of the finding that [plaintiff] did have constructive notice of the document, his failure to opt out of the agreement within the allotted time was sufficient to constitute assent]; *In re Facebook Biometric Info. Priv. Litig.* (N.D. Cal. 2016) 185 F.Supp.3d 1155, 1167 [users deemed to have assented to amended terms by their continued use where users with registered email addresses were provided email notice that the terms were changing with a link to the new terms].)

logging into his Stanford account, except on one occasion he unsuccessfully attempted to do so, did not withdraw from or deposit money in the account, and did not contact Stanford customer service. (*Ibid*.)

The issue with Mr. Montes' argument is that it does not take into account the *entirety* of the conduct that will be deemed to be consent to the Arbitration Agreement as described therein. Consent is not limited to a member's *use* of their account; the Notice specifically states that if a member does not opt out of the Arbitration Agreement, his or her "continued use *or maintenance* of [that] account will act as [his or her] consent to [it]." (Jockisch Decl., Exhibit 4 at p. 2, emphasis added.) Did Mr. Montes continue to "maintain" his account at the time the Notice was sent out and the opt-out period expired? Based on the evidence submitted by Stanford, the Court concludes that the answer is yes.

Whether Plaintiff continued to use and/or maintain an account with Stanford at the time the Notice was sent is a disputed factual issue. On a motion to compel arbitration, the court sits as a trier of fact, weighing all evidence to reach a final determination. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal. 4th 394, 413-414.) Here, Stanford submits evidence which demonstrates that the Notice was sent to Plaintiff's email on file with Stanford on July 31, 2020 and that it was opened. (Jockisch Decl., ¶ 15, Exhibit 15.) It further submits evidence that Mr. Montes never closed his Stanford account and that numerous calls to Mr. Montes were recorded and archived between February 14, 2019 and March 12, 2020. (Jockisch Decl., ¶ 20; Supplemental Declaration of Paul Jockisch Declaration in Support of Reply ("Jockisch Supp. Decl."), ¶ 9.) Per the call logs maintained by Stanford as part of its regular business practices, while most of these calls went to voicemail, with messages left for Mr.Montes, of the substantive calls, there is no mention of the account being closed or that Mr. Montes was no longer a member. (Jockisch Supp. Decl., ¶ 9, Exhibit 2.) Additionally, according to Stanford's records, Plaintiff continued to log into online banking *after* receiving the Notice, including on December 20, 2020. (*Id*., ¶ 10, Exhibit 3.) Plaintiff's account was ultimately charged off, and thus closed, on March 30, 2022. (*Id*., ¶ 11, Exhibit 4.) All of the foregoing establishes that Plaintiff continued to maintain his account with Stanford at the time the Notice was sent out. Consequently, his failure to opt-out must be deemed to be his consent to the Arbitration Agreement.

Despite the foregoing, Plaintiff additionally argues that he cannot be deemed to have assented to the Arbitration Agreement because the opt-out language is ambiguous.[8] This argument is unavailing. The Arbitration Agreement informed Mr. Montes that if he did "not agree to be bound by this [Arbitration Agreement], [he] must send [Stanford] written notice that [he] reject[s] the [Arbitration Agreement] within 30 days of account opening or within 30 days of receiving this notice, whichever is sooner." (Jockisch Decl., Exhibit 3 at p. 10.) Plaintiff insists that his opt-out deadline had passed because he opened his account in 2018, the "sooner" of the two dates, and thus he could not assent because doing otherwise in 2019 was impossible. Such an interpretation is absurd. As Stanford explains, under California law,

[8] Plaintiff primarily relies on *Duling v. Mid-American Credit Union* (Kan. Ct. App. 2022) 521 P.3d 1145, 2022 Kan. App. Unpub. LEXIS 641, in support of this argument. However, not only does this case have no precedential value, but as a general matter, federal and California law requires any ambiguities or doubts be resolved in favor of arbitration. (See *Coast Plaza Drs. Hosp. v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686.) This case appears to ignore this maxim.

"[w]here a contract is susceptible of two interpretations, one of which is reasonable and fair, and the other is unreasonable and unfair, the latter interpretation be rejected and the first accepted." (*Molybdenum Corp. of Am. V. Kasey* (1959) 176 Cal.App.2d 357, 364.) Mr. Montes' interpretation is plainly unreasonable. It is clear that the opt-out deadline means that for members that were new to Stanford in July 2020, they would have 30 days to decide if they wanted to accept or reject the arbitration offer, while existing members such as Plaintiff would have 30 days after receiving the Notice of opt out. The Court also rejects Plaintiff's insistence that the Notice also "muddies terms" of the offer to arbitrate because it states that members will have until August 31, 2020 to opt out. This language appears in a the cover letter to which the actual Arbitration Agreement was attached in the email, and the letter directed members to refer to *full text* of the agreement for instructions on how to opt out. (Jockisch Decl., Exhibit 4 at p. 2.) Importantly, the Arbitration Agreement itself *does not* state that Plaintiff has to opt out by a certain date. Rather, it stated that he has 30 days from receiving the notice to do so-whenever that was.

Based on the foregoing, the Court finds that the Arbitration Agreement between Stanford and Plaintiff exists. The next question to answer is whether it is enforceable. Plaintiff insists that it is not because (1) the purports to apply to accrued claims, violating the implied covenant of good faith and fair dealing and (2) the provision was "deceptively disseminated" after this action was filed without informing putative class members of their rights in the action.

2. *Enforceability of Arbitration Provision*

In making his first argument concerning enforceability, Plaintiff primarily relies on *Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, and *Cobb v. Ironwood Country Club* (2015) 233 Cal.App.4th 960, which he describes as applying the rule in *Avery* outside of employment context and collection cases. In *Avery*, a class action for wage and hour claims, the appellate court affirmed the trial court's denial of the defendant employers' motion to compel arbitration, concluding that the defendants failed to establish that the plaintiff employees agreed to the specific arbitration agreement the employer submitted to the trial court. The court explained:

> An arbitration agreement between an employer and an employee may reserve to the employer the unilateral right to modify the agreement. But the covenant of good faith and fair dealing implied in every contract requires the employer to exercise that right fairly and in good faith so as not to deprive the employee of his or her reasonable expectations under the agreement. Accordingly, an employer may not make unilateral changes to an arbitration agreement that apply retroactively to "accrued or known" claims because doing so would unreasonably interfere with the employee's expectations regarding how the agreement applied to those claims. Similarly, the employer must give the employee reasonable notice regarding changes the employer makes so the employee is aware of his or her rights under the agreement.

(*Avery*, 218 Cal.App.4th at 61, internal citation omitted.)

Cobb, like *Avery*, involved an issue of retroactive application of an arbitration agreement to preexisting claims (including those asserted in litigation pending at the time of the addition of

the arbitration provision) by way of a unilateral modification of the parties' agreement. The appellate court affirmed the trial court's denial of the defendant's motion to compel arbitration, explaining:

> When one party to a contract retains the unilateral right to amend the agreement governing the parties' relationship, its exercise of that right is constrained by the covenant of good faith and fair dealing which precludes amendments that operate retroactively to impair accrued rights.

(*Cobb*, 233 Cal.App.4th at 963.)

Plaintiff contends that the Arbitration Agreement "falls squarely within the rule in *Avery*" and is therefore unenforceable because the implied covenant of good faith and fair dealing prevents application of the Arbitration Agreement to his claims because they accrued *before* it was added to the Membership Agreement on July 31, 2020. The Court disagrees.

Avery and *Cobb* both involved the *unilateral modification* of an arbitration agreement with respect to already-accrued claims and it was this fact, and *not* the nature of the claims as pre-existing/accrued, that implicated the covenant of good faith and fair dealing. As discussed above, this is not a situation where one party unilaterally changed its agreement with another party. Instead, Stanford reasonably notified its customers of the addition of the arbitration provision to the Membership Agreement and the provision clearly provides that it applies to already existing claims. (See Jockisch Decl., Exhibit 3 at p. 9 ["Any claim or dispute relating to or arising out of Your Accounts or our relationship will be subject to arbitration, *regardless of whether that dispute arose before or after your receipt of this notice*."], emphasis added.) Further, members such as Plaintiff were provided with an opportunity to opt out of the Arbitration Agreement, an opportunity that was never provided to the individuals in *Avery* and *Cobb* due to the unilateral nature of the modifications at issue. Because Mr. Montes was provided with both notification of the Arbitration Agreement and the opportunity of opt out of it, *Avery* and *Cobb* are distinguishable and therefore not controlling, and the implied covenant of good faith and fair dealing is not implicated.

Plaintiff lastly contends that the Arbitration Agreement is unenforceable because it was disseminated *after* this action was filed without informing putative class members of their rights in the action. As such, Plaintiff insists, the Arbitration Agreement constitutes an improper communication with putative class members.

Generally, courts have "broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." (*Gulf Oil Co. v. Bernard* (1981) 452 U.S. 89, 100.) This includes control over communications by the defendant with putative class members that would affect their participation in the lawsuit. (See, e.g., *In re Currency Conversion Fee Antitrust Litigation* (S.D.N.Y. 2005) 361 F.Supp.2nd 237.) *In re Currency Conversion* is particularly illuminating given the similarities between the facts of that case and the one at bench. In *In re Conversion Currency*, the plaintiff credit card holders sued various banks for allegedly illegal charges. Several of the banks mailed letters to their cardholders purporting to add an arbitration clause to the cardholder agreements after the litigation had begun, but did not inform the cardholders about the litigation in the notices. After noting the authority possessed by trial courts over a class action defendant's communications with class members, and emphasizing the court's obligation to protect the

interests of those members by preventing misleading communications, the court found that the communications at issue were improper. The court reasoned that the type of communication sent by the banks had the potential for coercion because the cardholders had no other source of information concerning the litigation and depended on the banks for their credit needs. Consequently, the court held that the arbitration clauses were not enforceable.

As Plaintiff maintains, courts have routinely exercised their authority, a la *In re Conversion Currency*, to control class communications by declining to enforce post-litigation arbitration agreements (i.e., added while an action purportedly covered by the agreement is pending) where the agreement might interfere with members' rights. (See, e.g., *O'Connor v. Agilant Sols., Inc.* (S.D.N.Y. 2020) 444 F.Supp.3d 593, 603 [exercising supervisory authority where defendant failed to disclose that "putative plaintiffs would lose their right to participate in this lawsuit" by assenting to arbitration]; *Balasanyan v. Nordstrom, Inc.* (S.D. Cal. 2012) 2012 U.S. Dist. LEXIS 30809, *1-2, 4 [declining to enforce individual arbitration in class action where defendant's implementation of arbitration agreement was an improper class communication]; *Williams v. Securitas Sec. Servs. USA, Inc.* (E.D Pa. 2011) 2011 U.S. Dist. LEXIS 75502, *1 [refusing to enforce arbitration agreement imposed during pendency of putative class action]; *Jimenez v. Menzies Aviation Inc.* (N.D. Cal. 2015) 2015 U.S. Dist. LEXIS 108223, *15-16.)

Here, the Court agrees with Mr. Montes that the communications at issue constitute an improper communication with putative class members because like in *In re Currency Conversion* and the various cases cited above, these communications, i.e., the Notice, had the potential to interfere with the rights of the putative class members in this action. It is entirely possible that Stanford members (i.e., the putative class) who received the Notice and elected not to opt out of the Arbitration Agreement would have made a *different* decision had they been made aware of the instant action and understood that their failure to do so would have waived their ability to participate in it. As such the Court, given its obligation to protect the rights of these individuals, concludes that the Arbitration Agreement is not enforceable.[9] To hold otherwise would reward Stanford's conduct and arguably "create an incentive [for it and others] to engage in misleading behavior." (*Balasanyan, supra,* 2012 U.S. Dist. LEXIS 30809, *3.) Therefore, Stanford's motion to compel arbitration must be denied.

III. CONCLUSION

Stanford's motion to compel arbitration is DENIED.

The Court will prepare the order.

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LAW AND MOTION HEARING PROCEDURES

[9] None of Stanford's arguments to the contrary are well taken, including that any class claim that existed when the Notice was served was (and remains) hypothetical because the class had yet to be certified. That a putative class member might not ultimately become a class member has no bearing on his or her right to be fully informed of the potential consequences of electing not to opt out of an arbitration provision when provided notice of it. Indeed, several of the cases cited above concerned putative class members.

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Calendar Line 5

Case Name: *California Water Curtailment Cases*
Case No.: Judicial Council Coordination Proceeding No. 4838

These coordinated proceedings arise from water curtailment efforts undertaken by defendant/respondent California State Water Resources Control Board (the "Board") in the Sacramento-San Joaquin River and Delta watersheds in response to California's drought.

Before the Court is Defendants and Respondents the Board, Thomas Howard, as its Executive Director, and Michael George as the Delta Watermaster's (State Water Board) motion for reconsideration the Court May 10, 2023 Order Implementing Court of Appeal's 11/16/22 Remittitur ("Order Implementing Remittitur"), which is opposed. As discussed below, the Court DENIES the motion for reconsideration.

I. BACKGROUND

The factual and procedural background of this matter is summarized in more detail in the Court's statement of decision, filed on April 4, 2018. Before the Court was two issues: (1) whether the manner in which the Board issued the curtailment notices violated the Districts' due process rights; and (2) whether the Board issued the curtailment notices in excess of its statutory authority under Water Code section 1052 ("Section 1052"). The Court (Judge Walsh) resolved the jurisdictional issue in the Districts' favor and concluded that the Board violated plaintiff/petitioner Byron-Bethany Irrigation District ("BBID"), Central Delta Water Agency ("CDWA"), South Delta Water Agency ("SDWA"), San Joaquin Tributaries Authority ("SJTA"), South San Joaquin Irrigation District ("SSJID"), Banta Carbona Irrigation District and Patterson Irrigation District ("BCID *et al.*")(collectively, the "Districts" or "Petitioners") due process rights by failing to provide them with predeprivation hearings or any other opportunity to challenge the bases for the notices.

The Board appealed the matter as to the jurisdictional issue, but not the due process issue. On September 12, 2022, the Sixth District Court of Appeal issued its opinion (the "Merits Opinion"), in which it concluded that the Board lacked authority under Section 1052, subdivision (a), to issue the 2015 curtailment notices to the Districts and affirmed this Court's judgment. On November 17, 2022, the Court of Appeal certified the Merits Opinion for publication.

After the statement of decision was issued, the Districts sought attorneys' fees. This Court (Judge Walsh) denied their motions for attorneys' fees. The Districts appealed the decisions. On November 18, 2022, the Court of Appeal issued its opinion ("Fees Opinion") in which it reversed the order and directed this Court to enter a new order: granting the Districts their attorneys' fees under Code of Civil Procedure section 1021.5 ("Section 1021.5") for the court litigation; denying the Districts their attorneys' fees for the administrative proceedings; and partially granting the Board's motions to tax costs. On January 23, 2023, the Court of Appeal issued its remittitur.

The Court (Judge Kulkarni) set a May 4, 2023 case management conference to discuss how to implement the Court of Appeal's direction in the Fees Opinion. The parties submitted their views prior to the CMC and, at the actual conference were able to present their positions

to the Court. The parties disagreed as to whether the issue of the reasonableness of the Districts' claimed attorney fees could be litigated, given the Court of Appeal's directions in the Fees Opinion, with the Districts saying no and the Board saying yes.

On May 10, 2023, the Court issued the Order Implementing Remittitur in which it declined to engage in a reasonableness analysis based on its conclusion that doing so would be a material variance from the Court of Appeal's directions.

The Board now moves for reconsideration of the Order Implementing Remittitur, insisting that this Court erred when it declined to determine whether the Districts' fees were reasonably incurred. The Districts oppose the motion.[10]

II. MOTION FOR RECONSIDERATION

A. Legal Standard and Propriety of Motion

Motions for reconsideration are generally governed by Code of Civil Procedure section 1008 ("Section 1008"), which represents the Legislature's attempt to regulate what the Supreme Court has referred to as "repetitive motions." (See *Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal.App.4th 868, 885.) Section 1008, subdivision (a), "requires that any such motion be (1) filed within 10 days after service upon the party of written notice of entry of the order of which reconsideration is sought, (2) supported by new additional facts, circumstances or law, and (3) accompanied by an affidavit detailing the circumstances of the first motion and the respects in which the new motion differs from it." (*Id*.) The legislative intent was to restrict motions for reconsideration to circumstances where a party offers the court some fact or circumstance not previously considered, and some valid reason for not offering it earlier. (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500; see *Baldwin v. Home Sav. Of America* (1997) 59 Cal.App.4th 1192, 1198.)

Thus, the burden under Section 1008 "is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212-213.)

Parties may *only* move for reconsideration as authorized by Section 1008. Here, it is clear that the Board could not file such a motion given that the Order Implementing Remittitur was issued by the Court on May 10, 2023 and served that same day, and the instant motion was not filed until September 1, 2023.[11] (See the Districts' Request for Judicial Notice, Exhibits I and J.) The Board explains that it is not moving for reconsideration pursuant to Section 1008 because the Fee Remittitur Implementation Order was issued after a CMC and *not* formal motion practice. (See Memo. at p. 9, fn. 2, citing *Sorenson v. Superior Court* (2013) 219

[10] Both sides' requests for judicial notice of various motion papers and orders filed in this action, both at the trial court and appellate court levels, are GRANTED. (Evid. Code, § 452, subd. (d).)

[11] The Order Implementing Remittitur was originally served on May 10, 2023 and later amended and served on May 30, 2023, with the same effective date of May 10, 2023.

Cal.App.4th 409, 420-421.) But as the Districts respond, the parties' Joint Statement submitted to the Court prior to the CMC identified the question of whether to brief reasonableness as a necessary issue to be addressed, presenting the parties' respective positions, and the parties were able to orally expand on these positions at the conference. This is a far cry from the circumstances in *Sorenson*, the case cited by the Board, where the court held that Section 1008 did not limit the plaintiff's ability to challenge orders that were issued by the court in response to an informal (perhaps even oral) request for a copy of the transcript of a particular court proceeding. Thus, the Court believes that the Board's ability to seek reconsideration *is* constrained by Section 1008.

While it true that a court possesses the ability, "on its own motion, to reconsider its prior interim orders so it may correct its own errors" (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107), and also has the inherent power to correct such errors when they are called to the court's attention by way of an *improperly* filed motion (see *Marriage v. Barthold* (2008) 158 Cal.App.4th 1301, 1308) like the Board's here, a motion asking the court to reconsider a ruling on its own motion after the 10-day period is *ineffective* and not only is the court is not obliged to rule on it, but opposing counsel need not respond. (*Le Francois, supra,* 35 Cal.4th at 1108; see also *Farmers Ins. Exch. v. Superior Court* (2013) 29 Cal.App.4th 96, 102.) While the Court does not believe that it is obligated to rule on this motion, it will nevertheless do so in the interests of being thorough.

B. Substantive Merits

In seeking reconsideration of the Order Implementing Remittitur, the Board makes the following arguments: (1) the Court must engage in an analysis to determine if the Districts' claimed fees were reasonably incurred; (2) the Court of Appeal was aware that the Court is the proper court to make the foregoing determination; (3) the Court's interpretation of the Court of Appeal's order on remand deprives the Board of its due process right to oppose Plaintiffs' attorney fee claims; and (4) the Court's construction of the remittitur was inconsistent with governing precedent and making a fee award without a reasonableness analysis would be an abuse of discretion.

In short, the Court is not persuaded that there is any reason to deviate from the conclusions reached in the Order Implementing Remittitur. As explained therein, when an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are *binding* on the trial court and must be followed (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982), with any material variance from such directions unauthorized and void (*People v. Ramirez* (2019) 35 Cal.App.5th 55, 64). The Sixth District specifically directed this Court "on remand to award the Districts under [Code of Civil Procedure] section 1021.5 the attorney fees that they incurred for the court litigation" and suggested that on remand the Court should review the Districts' fee motions and declaration to "allocate fees and costs between the court litigation and the administrative enforcement proceedings." No further instructions were provided, but the Board nevertheless insists that the Court of Appeal "expected" that this Court would engage in a reasonableness analysis given its role as the "finder of facts." But the Court is not comfortable in assigning meaning to the Court of Appeal's silence on this issue (particularly such an "expectation") in the absence of any authority which supports such an act. Notably, as the Districts explain, "[i]f a court of review inadvertently omits to include its instructions to a trial court upon the reversal of a judgment essential elements within the issues necessarily determined on the appeal, the

aggrieved party has his remedy in a petition for rehearing" and "[a] trial court may *not* exceed the specific directions of a court of review in remanding a cause after a reversal of the judgment on appeal and *add thereto conditions which it assumes the reviewing court should have included*." (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 656.) Yet this is essentially what the Board is asking this Court to do here.

The Board already pursued the only remedy available to it by filing a Petition for Rehearing where it requested a rehearing or, in the alternative, modification as to several issues in the Fee Opinion, and asserted, among other things:

- "the Districts must *on remand* demonstrate what fees they believe relate to the claims on which they prevailed, with enough specificity for the [Board] *and the trial court to evaluate the reasonableness of those fees*";
- "the trial court is in the best position to make a determination as to what fees are related *and reasonable* given its familiarity with the case before it";
- "the trial court should have the opportunity [on remand] to assess the adequacy *and reasonableness* of the fee records presented to it";
- the Fee Opinion should "be modified to delete footnote 15 to that it is clear that this Court anticipates the trial court will review de novo the adequacy of the evidentiary support for *and reasonableness* of the fee records presented to it"; and
- that the evidentiary support for the Districts' fee requests was not sufficiently detailed to demonstrate the reasonableness of the fees requested.

(See the Districts' RJN, Exhibit F (Petition for Rehearing], pp. 23-29, emphasis added.)

The Court of Appeal denied the Petition *in its entirety*, thereby rejecting the Board's request to revise its decision to expressly direct this Court to consider the reasonableness of attorneys' fees on remand. (See the Districts' RJN, Exhibit G [Order Denying Petition for Rehearing.) The Board attempts to infer meaning from this denial in the same manner as the Fee Opinion, i.e., ascribe intention to silence, suggesting it is more reasonable to infer that the Court of Appeal "understood that [a reasonableness] inquiry necessarily would occur on remand" and "did not find it a good use of appellate resources to repeat [the] well-established principal [that such an inquiry is a necessary predicate to a fee award] in a formal ruling" on the petition. But the Court is even *more* loathe to ascribe meaning to the Court of Appeal's silence on the issue of it engaging in a reasonableness analysis in light of this denial, where there is simply no indication of what the appellate court did or did not understand what would or should occur on remand. Consequently, it declines to do so.

The Court also rejects the Board's assertion that the Court of Appeal lacked the jurisdiction to make factual determinations concerning the reasonableness of claimed fees because in this context, where the record is complete as to the legal services rendered but where the trial court has made "no findings of fact as to the reasonable value of such services," an appellate court may make such findings. (*Kirk v. Bohlen* (1927) 202 Cal. 511, 512-513.)

Finally, the Court is also not persuaded that refusing to engage in a reasonableness analysis as requested by the Board would deprive it of due process as it already had the opportunity to fully brief and argue the reasonableness of the Districts' fees in the original trial

court briefing and December 18, 2019 hearing. Therefore, given the foregoing, the Court will not modify its Order Implementing Remittitur.

III. CONCLUSION

The Board's motion for reconsideration is DENIED.

The Court will prepare the order.

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