SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 19, Honorable Theodore C. Zayner Presiding

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

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

Court Reporters are not provided. Please consult our Court's website, www.scscourt.org, for the rules, policies, and required forms for appointment by stipulation of privately-retained court reporters.

- **Parties can appear either in person or remotely.** All 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.
- If any party wants a Court Reporter, the appropriate form must be submitted. The Reporter can appear in person or remotely.
- Members of the public who wish to observe can do so through Microsoft Teams (using the link discussed above) or in person. Please make sure to turn your camera off and mute yourself if you are observing the proceedings remotely.
- As a reminder, state and local Court Rules prohibit recording of court proceedings without a Court order. This prohibition applies while in the courtroom and while on Microsoft Teams.

LAW AND MOTION TENTATIVE RULINGS
DATE: SEPTEMBER 4, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV361490	Chai v. National Enterprise Systems, Inc. (Class Action)	See Line 1 for tentative ruling.
LINE 2	20CV363729	Fleming v. Oliphant Financial, LLC	See Line 2 for tentative ruling.
LINE 3	17CV310844	Espinoza v. Warehouse Demo Services, Inc. (Class Action)	See Line 3 for tentative ruling.
LINE 4	22CV405260	Palma-Hernandez v. JC Hamburgers, Inc., et al. (Class Action/PAGA)	See Line 4 for tentative ruling.
LINE 5	23CV409955	Ramos v. Taqueria Milagro, Inc. (PAGA)	See Line 5 for tentative ruling.
LINE 6	19CV357372	Velocity Investments, LLC v. Jayawardena	See Line 6 for tentative ruling.
LINE 7	19CV357372	Velocity Investments, LLC v. Jayawardena	See Line 6 for tentative ruling.
LINE 8	23CV412292	Spalinger v. El Camino Hospital (Class Action)	See Line 8 for tentative ruling.

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- If any party wants a Court Reporter, the appropriate form must be submitted. The Reporter can appear in person or remotely.
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LAW AND MOTION TENTATIVE RULINGS

LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Chai v. National Enterprise Systems, Inc. (Class Action)
Case No.: 20CV361490

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 4, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative consumer class action arising out of alleged unlawful debt collection practices. Plaintiff David Chai ("Plaintiff") initiated this action on January 9, 2020 by filing a class action complaint against National Enterprises Systems, Inc. ("Defendant"), seeking statutory damages pursuant to the California Rosenthal Fair Debt Collection Practices Act, California Civil Code sections 1788-1788.33. (Complaint, ¶¶ 25-26.) Specifically, Plaintiff alleges that Defendant engaged in a routine practice of sending first written communications that do not include the required notice. (*Ibid.*, citing Civ. Code § 1788.14, subdivision (d)(2).[1])

On April 12, 2021, Defendant moved to compel arbitration, and on June 24, 2021, the court (Hon. Lucas) entered an order denying the motion. Defendant appealed, and the Sixth District Court of Appeal affirmed this court's order denying Defendant's motion to compel arbitration.

The parties have reached a settlement, the motion for preliminary approval of the settlement is now before the court. As discussed below, the court GRANTS the motion, with one caveat.

II. Legal Standard

[1] Civil Code section 1788, subdivision (d)(2), provides as follows:

No debt collector shall collect or attempt to collect a consumer debt by means of the following practices: [¶] … **(d)** Sending a written communication to a debtor in an attempt to collect a time-barred debt without providing the debtor with one of the following written notices: [¶] … **(2)** If the debt is past the date for obsolescence set forth in Section 605(a) of the federal Fair Credit Reporting Act (15 U.S.C. Sec. 1681c), the following notice shall be included in the first written communication provided to the debtor after the date for obsolescence: [¶] "The law limits how long you can be sued on a debt. Because of the age of your debt, we will not sue you for it, and we will not report it to any credit reporting agency."

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

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

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

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

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

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

III. Discussion

A. Provisions of the Settlement

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

> [A]ll persons with addresses in California to whom Defendant sent, or caused to be sent, an initial written communication in the form of Exhibit "1" [attached to

> Plaintiff's Class Action Complaint for Statutory Damages] on behalf of USI Solutions, Inc., in an attempt to collect a consumer debt originally owed to Citibank, N.A., which were not returned as undeliverable by the U.S. Post Office during the period January 9, 2019, through the date of class certification, where such consumer debt is alleged to have been time-barred an obsolete at the time Defendant sent the initial written communication.

(Declaration of Fred W. Schwinn [] ("Schwin Dec."), Ex. A ("Agreement"), ¶ 2.3.)

According to the terms of the settlement, Defendant "will pay a class fund of $56,672 as a *pro rata* distribution to the Class Members pursuant to California Civil Code § 1788.17. Specifically, Defendant agrees to pay no less than $22.26 to each member of the Class."[2] (Agreement, ¶ 4.1.) "Defendant shall pay Plaintiff $1,000 in statutory damages, pursuant to Civil Code § 1788.17." (*Id.* at ¶ 4.2.) Settlement payment checks remaining uncashed 90 days after mailing will be void and the funds from those checks will be distributed to the Katharine & George Alexandar Community Law Center in San Jose, California, as *cy pres* recipient. (*Id.* at ¶¶ 4.3-4.4.) Defendant will pay a service award to Plaintiff in the amount of $2,500. (*Id.* at ¶ 4.5.) Defendant shall pay for all costs associated with class notice and class administration. (*Id.* at ¶ 4.6.)

The Agreement contains the following attorney fees and costs provision:

> Defendant will pay attorneys' fees and costs to Class Counsel pursuant to California Civil Code § 1788.17, as approved by the Court. Class Counsel will seek an award of attorney fees and costs in an amount not to exceed $150,000, and Defendant will not oppose such a request. Any application for approval of such reasonable attorneys' fees and costs will be made separately, upon noticed motion, and determined at the Final Fairness Hearing, or at the Court's discretion.

(*Id.* at ¶ 4.7.)

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

---

[2] Civil Code section 1788.17 provides as follows in full:

Notwithstanding any other provision of this title, every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code. However, subsection (11) of Section 1692e and Section 1692g shall not apply to any person specified in paragraphs (A) and (B) of subsection (6) of Section 1692a of Title 15 of the United States Code or that person's principal. The references to federal codes in this section refer to those codes as they read January 1, 2001.

> [A]ll claims alleging violation of California Civil Code § 1788.14(d)(2) or similar or related claims or causes of action under state or federal law, arising from or relating to collection letters mailed by or on behalf of Defendant in the form attached as Exhibit "1" to Plaintiff's Class Action Complaint filed herein, which were mailed within the Class Settlement Period.

(*Id.* at ¶¶ 2.16, 7.1.) "This release includes 'unknown claims' which encompass any and all claims alleging violation of California Civil Code § 1788.14(d)(1), or similar or related claims or causes of action under state or federal law, arising from or relating to collection letters mailed on behalf of Defendant in the attached as Exhibit "1" to Plaintiff's Complaint herein[.]" (*Id.* at ¶ 7.1.) The scope of the release is appropriately tied to the factual allegations in the complaint. (See *Amaro Arena Management, LLC* (2021) 69 Cal.App.5th 521, 538.)

B. Fairness of the Settlement

According to Plaintiff's counsel, this settlement follows counsel's research of Plaintiff's potential causes of action and issuing and responding to written discovery. (Schwinn Dec., ¶ 21.) Plaintiff had to overcome Defendant's motion to compel individual arbitration and defend the denial on appeal. (*Ibid.*) Plaintiff also successfully brought a discovery motion, conducted confirmatory discovery on the class list, and negotiated the class settlement papers. (*Ibid.*)

Plaintiff's counsel asserts that the recovery of $56,672 for the class is fair and reasonable in light of Defendant's net worth. (Schwinn Dec., ¶ 22.) The settlement avoids the risk of further litigation, including the amount of damages a jury would award even if Plaintiff and the class were able to prevail at trial. (*Ibid.*)

"The Rosenthal Act was enacted 'to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts.' (§ 1788.1, subd. (b).)" (*Davidson v. Seterus, Inc.* (2018) 21 Cal.App.5th 283, 295.) It "was enacted in 1977, the same year that its federal counterpart, the [Fair Debt Collection Practices Act, or] FDCPA, was enacted." (*Ibid.*) "In addition to its other requirements and prohibitions," under a section enacted in 1999, "the Rosenthal Act generally requires debt collectors to comply with the provisions of the FDCPA. (§ 1788.17.)" (*Ibid.*) This section also incorporates the remedies of the FDCPA, including by "ma[king] class remedies available under the Rosenthal Act." (*Afewerki v. Anaya Law Group* (9th Cir. 2017) 868 F.3d 771, 778, citing section 1788.17.)

Specifically, section 1788.17 of the FDCPA provides that "every debt collector collecting or attempting to collect a consumer debt … shall be subject to the remedies in Section 1692k of, Title 15 of the United States Code."

That section provides as follows, in pertinent part:

> **(a) Amount of damages.** Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this title [15 USCS §§ 1692 et seq.] with respect to any person is liable to such person in an amount equal to the sum of—
>
> **(1)** any actual damage sustained by such person as a result of such failure;
>
> **(2)**
>
> **(A)** in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
>
> **(B)** in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and
>
> **(3)** in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. …

(15 USCS § 1692k.)

The parties contend that the class recovery here is a fair, reasonable, and adequate result because of the risk that class members could recover nothing. (Joint Motion for Preliminary Approval of Class Action Settlement ("Mot."), p. 15:12-18.) The parties also point out that class members may opt-out or object to the proposed settlement. (*Ibid.*) They contend that the proposed recovery of approximately $22.26 per class member compares favorably to other statutory awards in the context of consumer protection statutes, including FDCPA actions. (*Id.* at pp. 15:19-17:2.) The parties emphasize that they arrived at the proposed settlement's terms after four years of litigation, detailed investigation into the applicable facts and law, and adversarial negotiations. (*Id.* at p. 17:3-14.)

The court has reviewed the parties' written submissions in support of the proposed settlement. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation. Based on the circumstances of the case, including the strength of Plaintiffs' case and the likelihood of obtaining recovery from Defendant, the court finds the terms of the settlement to be fair, with one caveat.

Plaintiff seeks a service award in the amount of $2,500. Considering that Plaintiff is already receiving $1,000 in statutory damages, which is nearly 45 times more than the average class member, the court does not believe that an additional incentive award is appropriate. The $2,500 allocated to this award should be redistributed to the class. Assuming that the parties are amendable to this change—which will increase the payment to class members to about $23.25—the court is prepared to find that the settlement is fair and reasonable to the class.

C. Attorney Fees and Costs

The court has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel will seek attorney fees and costs in an amount not to exceed $150,000. The lodestar method is a recognized method for calculating attorney fees in civil class actions. (*Wershba, supra,* 91 Cal.App.4th at p. 254 ["Court recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method."].) Prior to the final approval hearing, Plaintiffs' counsel shall submit lodestar information (including hourly rate(s) and hours worked) and evidence of actual costs incurred.

D. Conditional Certification of Class

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

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class. (*Sav-On, supra,* 34

Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

As explained by the California Supreme Court,

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

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

Plaintiff states there are approximately 2,545 class members to whom Defendant sent materially identical debt collection letters within the class period. (Mot., pp. 20:19-21:9.) There are common questions regarding whether class members were subjected to common practices. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

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

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement or object. The settlement amounts, including the attorney fees, payment to the named plaintiff, and minimum payment of $22.26 to class members, are stated. Class members are given 60 days to request exclusion from the class or submit a written objection. The notice directs class members that they may appear at the final fairness hearing to make an oral objection without filing a written objection and provides instructions for attending the hearing remotely.

The form of notice is generally adequate, but the minimum payment to class members should be updated per the court's direction above. The notice must also be modified to refer class members to the full release language.

Turning to the procedure, the parties have selected Class-settlement.com as the settlement administrator. The administrator will mail the notice packet within 35 days of preliminary approval, after updating class members' addresses using the National Change of Address Database. Any returned notice will be promptly re-mailed to any forwarding address provided. These notice procedures are appropriate and are approved.

IV. Conclusion

The motion for preliminary approval is GRANTED, subject to the parties' agreement to redistribute the $2,500 proposed service award to the class. The final approval hearing shall take place on April 2, 2025 at 1:30 p.m. in Department 19.

Prior to the final approval hearing, Plaintiff's counsel shall submit lodestar information (including hourly rate(s) and hours worked) and evidence of actual costs incurred, and Plaintiff shall provide a declaration describing his experience with the case and view of the settlement. Plaintiff shall also lodge any individual settlement agreement he may have executed with Defendant for the court's review.

Plaintiff shall prepare the order.

- oo0oo -

Calendar Line 2

Case Name: Fleming v. Oliphant Financial, LLC
Case No.: 20CV363729

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 4, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative consumer class action arising out of alleged unlawful debt-buying practices. Plaintiff Bruno Fleming ("Plaintiff") initiated this action on February 13, 2020 by filing a class action complaint against Oliphant Financial, LLC ("Defendant"), seeking statutory damages pursuant to the California Fair Debt Buying Practices Act, Civil Code sections 1788.50-1788.64 ("FDBPA"). Specifically, Plaintiff alleges that Defendant's first written communication provided the required by Civil Code section 1788.52, subdivision (d)(1), in smaller than 12-point type.[3]

On November 13, 2020, Defendant moved to compel arbitration, and on April 28, 2021, the court (Hon. Lucas) entered an order denying the motion. Defendant appealed, and the Sixth District Court of Appeal issued a reported decision (*Fleming v. Oliphant Financial, LLC* (2023) 88 Cal.App.5th 13) affirming this court's order denying Defendant's motion to compel arbitration.

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[3] Civil Code section 1788.52, subdivision (d)(1) provides:

A debt buyer shall include with its first written communication with the debtor in no smaller than 12-point type, a separate prominent notice that provides:

> "You may request records showing the following: (1) that [insert name of debt buyer] has the right to seek collection of the debt; (2) the debt balance, including an explanation of any interest charges and additional fees; (3) the date of default or the date of the last payment; (4) the name of the charge-off creditor and the account number associated with the debt; (5) the name and last known address of the debtor as it appeared in the charge-off creditor's or debt buyer's records prior to the sale of the debt, as appropriate; and (6) the names of all persons or entities that have purchased the debt. You may also request from us a copy of the contract or other document evidencing your agreement to the debt.
>
> "A request for these records may be addressed to: [insert debt buyer's active mailing address and email address, if applicable]."

The parties have reached a settlement, the motion for preliminary approval is now before the court. As discussed below, the court GRANTS the motion, with one caveat.

II. Legal Standard

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

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

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

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

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

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

III. Discussion

A. Provisions of the Settlement

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

> [A]ll person with addresses in California to whom FBCS, Inc., sent, or caused to be sent an initial written communication in the form of Exhibit 1 [attached to Plaintiff's Class Action Complaint for Statutory Damages] on behalf of Oliphant Financial, LLC, in an attempt to collect a charged-off consumer debt originally owed to Barclays Bank Delaware which was sole or resold to Oliphant Financial, LLC, on or after January 1, 2014, which were not returned as undeliverable by the U.S. Post Office, during the period February 13, 2019, through the date of class certification.

(Declaration of Fred W. Schwinn ("Schwinn Dec."), Ex. A ("Agreement"), ¶ 2.3.)

According to the terms of the settlement, Defendant "will pay a class fund of $9,087 as a *pro rata* distribution to the Class Members pursuant to California Civil Code § 1788.62(b). Specifically, Defendant agrees to pay no less than $12.50 to each member of the Class." (Agreement, ¶ 4.1.) "Defendant shall pay Plaintiff $1,000 in statutory damages, pursuant to Civil Code §§ 1788.62(a)(2) and 1788.62(b)." (*Id.* at ¶ 4.2.) Settlement payment checks remaining uncashed 90 days after mailing will be void and the funds from those checks will be distributed to the Katharine & George Alexandar Community Law Center in San Jose, California, as *cy pres* recipient. (*Id.* at ¶¶ 4.3-4.4.) Defendant will pay a service award to Plaintiff in an amount not to exceed $2,000, as authorized by the court. (*Id.* at ¶ 4.5.) Defendant will pay for all costs associated with Class Notice and class administration. (*Id.* at ¶ 4.6.)

The Agreement contains the following attorney fees and costs provision:

> Defendant will pay attorneys' fees and costs to Class Counsel pursuant to California Civil Code § 1788.62(c), as approved by the Court. Class Counsel will seek an award of attorney fees and costs in an amount not to exceed $55,000, and Defendant will not oppose such a request. Any application for approval of such reasonable attorneys' fees and costs will be made separately, upon noticed motion, and determined at the Final Fairness Hearing, or at the Court's discretion.

(*Id.* at ¶ 4.7.)

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

> [A]ll claims alleging violation of California Civil Code § 1788.52(d)(1) or similar or related claims or causes of action under state or federal law, arising from or relating to collection letters mailed by or on behalf of Defendant in the

> form attached as Exhibit "1" to Plaintiff's Class Action Complaint filed herein, which were mailed within the Class Settlement Period.

(*Id.* at ¶¶ 2.16, 7.1.) "This release includes "unknown claims" which encompass any and all claims alleging violation of California Civil Code § 1788.52(d)(1), or similar or related claims or causes of action under state or federal law, arising from or relating to collection letters mailed on behalf of Defendant in the attached as Exhibit "1" to Plaintiff's Complaint herein[.]" (*Id.* at ¶ 7.1.) The scope of the release is appropriately tied to the factual allegations in the complaint. (See *Amaro Arena Management, LLC* (2021) 69 Cal.App.5th 521, 538.)

B. Fairness of the Settlement

According to Plaintiff's counsel, this settlement emerged as the result of counsel's research of Plaintiff's potential causes of action and propounding written discovery. (Schwinn Dec., ¶ 21.) Plaintiff had to overcome Defendant's motion to compel individual arbitration and defend the denial on appeal. (*Ibid.*) Plaintiff also conducted confirmatory discovery on the class list and negotiated the class settlement papers. (*Ibid.*)

Plaintiff's counsel asserts that the recovery of $9,087.50 for the class is fair and reasonable in light of Defendant's net worth. (Schwinn Dec., ¶ 22.) The settlement avoids the risk of further litigation, including the amount of damages a jury would award even if Plaintiff and the class were able to prevail at trial. (*Ibid.*)

Civil Code section 1788.62 sets forth a debt buyer's damages liability under the FDBPA and, provides as follows:

> **(a)** In the case of an action brought by an individual or individuals, a debt buyer that violates any provision of this title with respect to any person shall be liable to that person in an amount equal to the sum of the following:
>
> > **(1)** Any actual damages sustained by that person as a result of the violation, including, but not limited to, the amount of any judgment obtained by the debt buyer as a result of a time-barred suit to collect a debt from that person.
> >
> > **(2)** Statutory damages in an amount as the court may allow, which shall not be less than one hundred dollars ($100) nor greater than one thousand dollars ($1,000).
>
> **(b)** In the case of a class action, a debt buyer that violates any provision of this title shall be liable for any statutory damages for each named plaintiff as provided in paragraph (2) of subdivision (a). If the court finds that the debt buyer engaged in a pattern and practice of violating any provision of this title, the court may award additional damages to the class in an amount not to exceed

> the lesser of five hundred thousand dollars ($500,000) or 1 percent of the net worth of the debt buyer.
>
> **(c)**
>
> > **(1)** In the case of any successful action to enforce liability under this section, the court shall award costs of the action, together with reasonable attorney's fees as determined by the court.
> >
> > **(2)** Reasonable attorney's fees may be awarded to a prevailing debt buyer upon a finding by the court that the plaintiff's prosecution of the action was not in good faith.
>
> **(d)** In determining the amount of liability under subdivision (b), the court shall consider, among other relevant factors, the frequency and persistence of noncompliance by the debt buyer, the nature of the noncompliance, the resources of the debt buyer, and the number of persons adversely affected.

(Civil Code, § 1788.62, subds. (a)-(d).)

The parties contend that the class recovery here is a fair, reasonable, and adequate result because of the risk that class members could recover nothing. (Joint Motion for Preliminary Approval of Class Action Settlement ("Mot."), p. 14:3-21.) The parties also point out that class members may opt-out or object to the proposed settlement. (*Ibid.*) They contend that the proposed recovery of approximately $12.50 per class member compares favorably to other statutory awards in the context of consumer protection statutes, such as actions brought under the Fair Debt Collection Practices Act (Civil Code sections 1788-1788.33). (*Id.* at pp. 14:22-16:6.) The parties emphasize that they arrived at the proposed settlement's terms after four years of litigation, detailed investigation into the applicable facts and law, and adversarial negotiations. (*Id.* at p. 16:7-18.)

The court has reviewed the parties' written submissions in support of the proposed settlement. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation. Based on the circumstances of the case, including the strength of Plaintiffs' case and the likelihood of obtaining recovery from Defendant, the court finds the terms of the settlement to be fair – with one caveat.

Plaintiff seeks a service award in the amount of $2,000. Considering that Plaintiff is already receiving $1,000 in statutory damages, which is 80 times more than the average class member, the court does not believe that an additional incentive award is appropriate. The $2,000 allocated to this award should be redistributed to the class. Assuming that the parties

are amendable to this change—which will increase the payment to class members to about $15.25—the court is prepared to find that the settlement is fair and reasonable to the class.

C. Attorney Fees and Costs

The court has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel will seek attorney fees and costs in an amount not to exceed $55,000. The lodestar method is a recognized method for calculating attorney fees in civil class actions. (*Wershba*, *supra*, 91 Cal.App.4th at p. 254 ["Court recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method."].) Prior to the final approval hearing, Plaintiff's counsel shall submit lodestar information (including hourly rate and hours worked) and evidence of actual costs incurred.

D. Conditional Certification of Class

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

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

burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

As explained by the California Supreme Court,

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

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

Plaintiff states there are approximately 727 class members, who can be identified from a review of Defendant's records and to whom Defendant sent substantial similar debt collection notices. (Mot, p. 18:10-15.) There are common questions regarding whether class members were subjected to common practices. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

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

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement or object. The settlement amounts, including the attorney fees, payment to the named plaintiff, and minimum payment of $12.50 to class members, are stated. Class members are given 60 days to request exclusion from the class or

submit a written objection. The notice directs class members that they may appear at the final fairness hearing to make an oral objection without filing a written objection and provides instructions for attending the hearing remotely.

The form of notice is generally adequate, but the minimum payment to class members should be updated per the court's direction above. The notice must also be modified to refer class members to the full release language.

Turning to the procedure, the parties have selected Class-settlement.com as the settlement administrator. The administrator will mail the notice packet within 35 days of preliminary approval, after updating class members' addresses using the National Change of Address Database. Any returned notice will be promptly re-mailed to any forwarding address provided. These notice procedures are appropriate and are approved.

IV. Conclusion

The motion for preliminary approval is GRANTED, subject to the parties' agreement to redistribute the $2,000 proposed service award to the class and amend the class notice as instructed herein. The final approval hearing shall take place on April 2, 2025 at 1:30 p.m. in Department 19.

Prior to the final approval hearing, Plaintiff's counsel shall submit lodestar information (including hourly rate and hours worked) and evidence of actual costs incurred, and Plaintiff shall provide a declaration describing his experience with the case and view of the settlement. Plaintiff shall also lodge any individual settlement agreement he may have executed with Defendant for the court's review.

Plaintiff shall prepare the order.

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Calendar Line 3

Case Name: Espinoza v. Warehouse Demo Services, Inc. (Class Action)
Case No.: 17CV310844

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 4, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative class and representative action arising out of alleged wage and hour violations committed by Warehouse Demo Services, Inc. ("WDS") and Club Demonstration Services, Inc. ("CDS") (collectively, "Defendants"). As relevant here, Plaintiffs Georgina Espinoza and Yesenia Quintero (collectively, "Plaintiffs") filed the Second Amended Class Action Complaint ("SAC") on July 11, 2024, setting forth causes of action for: (1) Failure to Pay Minimum Wages Pursuant to Labor Code, § 1182.12, 1194, 1194.2, 1197; (2) Failure to Pay Wages and/or Overtime Under Labor Code, §§ 510, 1194, and 1199; (3) Failure to Provide Meal Breaks Pursuant to Labor Code, §§ 226.7 and 512; (4) Failure to Provide Rest Breaks Pursuant to Labor Code, § 226.7; (5) Failure to Pay Reporting Time Pay; (6) Penalties Pursuant to Labor Code, § 203; (7) Violation of Business & Professions Code, § 17200; (8) Penalties Pursuant to Labor Code, § 2699, *et seq.*

The parties have reached a settlement, and Plaintiff has moved for preliminary approval of the settlement.[4] The motion is unopposed. At the initial hearing on July 10, 2024, the court continued the motion to September 4, 2024. In its minute order, the court granted the request for leave to file the Second Amended Complaint and requested the parties to meet and confer regarding the identification of a *cy pres* recipient and revisions to the class notice. Thereafter, Plaintiffs filed the SAC, adding Yesenia Quintero as a Plaintiff and consolidating the Plaintiffs' claims.

On July 19, 2024, Plaintiffs' counsel filed a supplemental declaration identifying the *cy pres* recipient as Bet Tzedek Legal Services and containing an amended class notice. As

[4] This settlement follows Plaintiff's successful appeal of the court's order granting the defense's motion for summary judgment based on the outside salesperson exemption.

discussed below, the court has reviewed the supplemental papers and now GRANTS the motion for preliminary approval.

II. Legal Standard for Settlement Agreements

A. Class Action

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

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

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

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

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

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

B. PAGA

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

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

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-cv-02198-EMC) 2016 WL 5907869, 2016 U.S. Dist. LEXIS 140759, at *20-24.)

III. Discussion

A. Provisions of the Settlement

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

> [A]ll current and former non-exempt employees of Defendants who are working or worked as "demonstrator," "sales advisors," "breaker," "shift supervisor,"

> "lead demonstrator," "lead sales advisor," "coordinator," "event specialist," or equivalent title at Costco Warehouse locations in the State of California during the Class Period."

(Declaration of Ari J. Stiller ("Stiller Dec."), Ex. 1 ("Agreement"), ¶ 1.5.) The Class Period is from April 28, 2015 through November 3, 2023 for WDS employees and from March 18, 2017 through November 3, 2023 for CDS employees. (Agreement, ¶ 1.12.) The Agreement defines "Defendants" as Warehouse Demo Services, Inc. ("WDS") and Club Demonstration Services, Inc. ("CDS"). (*Id*. at ¶ 1.16.)

The settlement agreement also settles PAGA claims on behalf of Aggrieved Employees, defined as:

> [A]ll current and former non-exempt employees of Defendants who are working or worked as "demonstrator," "sales advisors," "breaker," "shift supervisor," "lead demonstrator," "lead sales advisor," "coordinator," "event specialist," or equivalent title at Costco Warehouse locations in the State of California During the PAGA Period."

(Agreement, ¶ 1.4.) The PAGA Period is from May 23, 2016 through November 3, 2023 for WDS employees, and March 18, 2020 through November 3, 2023 for CDS employees. (Agreement, ¶ 1.29.)

According to the terms of the settlement, Defendants will pay a gross settlement amount of $10,200,000. (Agreement, ¶¶ 1.21, 3.1.) The gross settlement amount includes attorney fees up to $3,400,000 (1/3 of the gross settlement amount), litigation costs not to exceed $80,000, a PAGA allocation of $100,000 (75 percent (i.e., $75,000) to be paid to the LWDA and the remaining 25 percent (i.e., $25,000) to be paid to Aggrieved Employees), enhancement awards up to a total amount of $32,500 (with $15,000 allocated to plaintiff Georgina Espinoza, $7,500 allocated to plaintiff Yesenia Quintero, and $5,000 each allocated to alternate class representatives Carla Funk and Maryury Becerra), and settlement administration costs not to exceed $75,000. (Agreement, ¶¶ 3.2, 3.2.1-3.2.4.) The court approves Phoenix Class Action Administration Solutions as administrator and actual costs not to exceed $75,000. (See Declaration of Kevin Lee, ¶ 15, Ex. B.)

The remaining net settlement amount will be distributed to participating class members on a pro rata basis based on the number of workweeks worked during the Class Period. (Agreement, ¶ 3.2.4.) Similarly, Aggrieved Employees will receive a pro rata share of the

$25,000 portion of the PAGA allocation, based on the number of pay periods worked during the PAGA period. (Agreement, ¶ 1.23.)

Funds from checks that remain uncashed after the void date shall be transmitted to the California Controller's Unclaimed Property Fund, or if required by the court, to a *cy pres* charitable entity agreed upon by the parties and approved by the court. (Agreement, ¶ 4.4.3.) In its tentative decision and minute order regarding July 10, 2024 hearing, the court requested the Plaintiffs to identify a *cy pres* recipient in compliance with Code of Civil Procedure section 384, which mandates that unclaimed or abandoned class members funds be given to "nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent."

Following the July 10 hearing, the parties met and conferred and chose Bet Tzedek Legal Services as the designated *cy pres* recipient. (Supplement Declaration of Ari J. Stiller ("Stiller Supp. Dec."), ¶ 3.) Bet Tzedek Legal Services is a non-profit legal services program established in 1974 that provides free legal services to low-income California residents. (*Id.* at ¶ 4.) The court approves Bet Tzedek as the designated *cy pres* recipient and agrees with Plaintiffs' counsel that this designation does not require any changes to the settlement agreement because the agreement provides for uncashed check funds to be sent to the state controller's office or to an agreed-upon *cy pres* recipient if required by the court. (*Id.* at ¶ 5.)

In exchange for the settlement, the class members agree to release Defendant, and related entities and persons, from all claims that were, or reasonably could have been, alleged based on the facts pleaded in the operative complaint occurring during the Class Period. (Agreement, ¶ 5.2.) Aggrieved Employees agree to release Defendant, and related entities and persons, from all claims for PAGA civil penalties that were alleged based on facts pleaded in the operative complaint and the LWDA notice. (Agreement, ¶ 5.2.) Plaintiffs also agree to comprehensive general release. (Agreement, ¶ 5.1.)

B. Fairness of the Settlement

Plaintiffs state that the settlement was reached through discovery, analysis, and mediation with Lynn Frank of Frank and Feder Mediators. (Stiller Dec., ¶¶ 24-29.) Throughout the history of this action, Plaintiffs have engaged in significant formal discovery, including special interrogatories, requests for productions of documents, and several PMK depositions. (Stiller Dec., ¶¶ 8-14, 20.) Plaintiffs have also obtained additional informal discovery, including updated employee timekeeping records, applicable policies, counts of current and former employees, workweeks and pay periods in the Class Period and PAGA Period, and available arbitration agreements for putative class members. (Stiller Dec., ¶¶ 20, 25.)

From the information provided, Plaintiffs determined that the proposed class contains approximately 18,520 members. (Stiller Dec., ¶¶ 30-33.) Plaintiffs estimate that Defendants' maximum potential liability for all the claims is approximately $122,098,797 (i.e., $76,786,097 for the class claims and $45,312,700 for the PAGA claim). (Stiller Dec., ¶¶ 117-126.) Plaintiffs provide a breakdown of this amount by claim. (*Ibid.*) Plaintiffs discounted the value of the claims given the Defendants' defenses, the possibility that the court could substantially reduce any PAGA penalties, and the risks and costs associated with class certification. (*Ibid.*) The average net recovery per class member is $356.85.

The gross settlement amount represents approximately 8.4% of the potential maximum recovery. The proposed settlement amount is within the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavasos v. Salas Concrete, Inc.* (E.D. Cal., Feb 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist. LEXIS 30201, at *41-42 [citing cases listing range of 5 to 25-35 percent of the maximum potential exposure].) The court observes that, while the PAGA allocation is on the low side (representing approximately one percent of the gross settlement amount), Plaintiff's counsel has sufficiently explained the rationale for discounting the value of the PAGA claims. (Stiller Dec. ¶¶ 103-107.)

Therefore, the court finds the terms of the settlement to be fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

C. Incentive Award, Fees and Costs

Plaintiffs request enhancement awards in the amount of $22,500, with $15,000 to be allocated to plaintiff Georgina Espinoza and $7,500 to plaintiff Yesenia Quintero. (Agreement, ¶ 3.2.1.) The settlement agreement further states that Plaintiffs' counsel may also apply for a service award of up to $5,000 each for class members Carla Funk and Maryury Becerra, each of whom are subject to the general release applicable to the Plaintiffs and class representatives. (Agreement, ¶¶ 3.2.1, 5.1.) Plaintiffs' counsel has requested these additional service awards to Ms. Funk and Ms. Becerra, bringing the total amount of enhancement awards requested to $32,500. (Stiller Dec., ¶¶ 140-143.)

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

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks, brackets, ellipses, and citations omitted.)

In support of the request for incentive awards, the court has received declarations from Plaintiff Georgina Espinoza, Plaintiff Yesenia Quintero, Carla Funk, and Maryury Becerra. Based on the court's review of these declarations, each has spent time in connection with this litigation and undertaken risk by becoming involved with this case because it might impact their future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].).

Nevertheless, the amounts requested are higher than the court typically awards in such situations. Further, Yesenia Quintero's declaration provides an estimate of the amount of time she had spent in connection with this case, but the other declarations do not contain a similar time estimate. Accordingly, prior to the final approval hearing, Georgina Espinoza, Carla Funk, and Maryury Becerra shall file supplemental declarations including an estimate of

the number of hours spent in connection with this litigation. The court will consider the amount of the incentive awards at final approval.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel will seek attorney fees up to $3,400,000 (1/3 of the gross settlement amount) and litigation costs not to exceed $80,000. Plaintiffs' counsel shall submit lodestar information (including hourly rate and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. Plaintiffs' counsel shall also submit evidence of actual costs incurred as well as evidence of any settlement administration costs.

D. Conditional Certification of Class

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

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

As explained by the California Supreme Court,

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

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

Plaintiff states there are approximately 18,520 class members, who can be identified from a review of Defendant's records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

The content of a class notice is subject to court approval. "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court." (Cal. Rules of Court, rule 3.769(f).)

In its prior tentative decision, the court stated the notice presented generally complies with requirements, although revisions were necessary. The court instructed the parties to revise the first paragraph of page two of the notice to clarify that recipients can object to the settlement, in addition to their options of doing nothing or opting out. The court also requested that the designated *cy pres* recipient (as discussed above) be included in the notice, as well as specific language regarding the final approval hearing.

Plaintiffs' counsel has provided a class notice revised in accordance with the court's instructions. (Stiller Supp. Dec., Exhibit A.) Counsel also provided proof that it sent the supplemental revised materials to the LWDA, who confirmed receipt. (*Id.* at ¶ 10, Ex. C.)

Accordingly, the court approves the revised class notice.

IV. Conclusion

The motion for preliminary approval is GRANTED. The final approval hearing is scheduled for March 5, 2025 at 1:30 p.m. in Department 19.

Prior to the final approval hearing, Georgina Espinoza, Carla Funk, and Maryury Becerra shall file supplemental declarations including an estimate of the number of hours spent in connection with this litigation, and Plaintiffs' counsel shall submit lodestar information (including hourly rate and hours worked) and evidence of actual costs incurred as well as evidence of any settlement administration costs.

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

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Calendar Line 4

Case Name: Palma-Hernandez v. JC Hamburgers, Inc., et al. (Class Action/PAGA)
Case No.: 22CV405260

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 4, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

Plaintiff Suyapa Liliana Palma-Hernandez ("Plaintiff") brings this wage and hour action against defendant JC Hamburgers, Inc., a California corporation d/b/a McDonald's, and Daniel Borba, an individual (collectively, "Defendants"). On October 24, 2022, Plaintiff filed the operative Class Action and Representative Action Complaint ("Complaint"), setting forth the following causes of action: (1) Failure to Provide Meal Periods and/or Pay Meal Period Premiums (Labor Code, §§ 226.7, 512); (2) Failure to Authorize and Permit Rest Breaks and/or Pay Rest Break Premiums (Labor Code, § 226.7); (3) Failure to Provide Complete and Accurate Wage Statements (Labor Code, § 226); (4) Failure to Timely Pay Final Wages (Labor Code, §§ 201-203); (5) Failure to Reimburse Necessary Business Expenses (Labor Code, § 2802); (6) Unfair Competition Law ("UCL") Violations (Business & Professions Code, §§ 17200-17204); (7) Penalties Pursuant to the Private Attorneys General Act ("PAGA") (Labor Code, §§ 2698-2699.5.)

The parties have reached a settlement, Plaintiff has moved for preliminary approval, and the motion is unopposed. At the initial hearing on July 17, 2024, the court continued the motion to September 4, 2024. The court stated in its minute order that, while the basic terms of the proposed settlement are fair, some issues required further attention. Specifically, the court instructed Plaintiff to provide a designated *cy pres* recipient in compliance with Code of Civil Procedure section 384 and to revise the class notice.

On July 30, 2024, Plaintiffs' counsel filed a supplemental declaration containing the settlement agreement and class notice, as amended in accordance with the court's instructions. As discussed below, the court GRANTS the motion for preliminary approval.

II. Legal Standard for Settlement Agreements

A. Class Action

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

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

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

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

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

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

B. PAGA

Labor Code section 2699, subdivision (l)(2) provides that "[t]he superior court shall review and approve any settlement of any civil action filed pursuant to" PAGA. The court's

review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) Seventy-five percent of any penalties recovered under PAGA go to the Labor and Workforce Development Agency (LWDA), leaving the remaining twenty-five percent for the aggrieved employees. (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___, 2022 U.S. LEXIS 2940.)

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

The settlement must be reasonable in light of the potential verdict value. (See *O'Connor, supra,* 201 F.Supp.3d at p. 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc.* (N.D. Cal., Oct. 11, 2016, No. 15-cv-02198-EMC) 2016 WL 5907869, 2016 U.S. Dist. LEXIS 140759, at *20-24.)

III. Discussion

A. Provisions of the Settlement

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

> Plaintiff and all other individuals who are or were employed by Defendants as non-exempt hourly-paid employees, who worked at least one shift in California during the Class Period.

(Supplemental Declaration of Hengameh S. Safaei in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement ("Safaei Supp. Dec."), Amended Settlement

Agreement at Ex. 1 ("Agreement"), ¶ 1.6.) The Class Period is defined as the period from October 24, 2018 through June 30, 2024, or the date of Preliminary Approval of the Settlement, whichever is sooner. (Agreement, ¶ 1.12.) The settlement defines the term "Defendants" as JC Hamburgers, Inc. d/b/a McDonald's and Daniel Borba. (Agreement, ¶ 1.17.)

The settlement also includes a subset PAGA Class of aggrieved employees (hereinafter, "Aggrieved Employees") who are defined as "Plaintiff and all other individuals who are or were employed by Defendants as non-exempt hourly-paid employees, who worked at least one shift in California from September 29, 2021 through June 30, 2024, or the date of Preliminary Approval of the Settlement, whichever is sooner." (Agreement, ¶ 1.5.)

According to the terms of the settlement, Defendants will pay a gross settlement amount of $900,000. (Agreement, ¶ 1.24, 3.1.) The settlement agreement provides that the gross settlement amount may be increased proportionately if the actual number of pay periods is determined to be incorrect by more than 15 percent. (Agreement, ¶ 4.1.) The gross settlement amount includes attorney fees of up to one-third of the gross settlement amount (currently estimated to be $300,000), litigation costs not to exceed $25,000, a PAGA allocation of $75,000 (75 percent of which will be paid to the Labor and Workforce Development Agency ("LWDA") and 25 percent of which will be paid to PAGA Employees as individual PAGA payments), a service award up to $7,500, and settlement administration costs not to exceed $10,450. (Agreement, ¶¶ 1.24, 3.2, 3.2.1-3.2.3, 3.2.5.)

The net settlement amount will be distributed to participating class members on a pro rata basis according to the number of workweeks they were employed by Defendants. (Agreement, ¶ 3.2.4.) Similarly, the portion of the PAGA allocation for individual PAGA payments will be distributed on a pro rata basis based on the number of pay periods worked. (Agreement, ¶ 3.2.5.1.)

As amended, the Agreement provides that funds from checks remaining uncashed 180 days after mailing will be transmitted to Legal Aid at Work, Workers' Rights Clinic. (Agreement, ¶¶ 4.3.1, 4.3.3; see also Safaei Supp. Dec. at ¶ 3.) The court approves Legal Aid at Work, Workers' Rights Clinic as the designated *cy pres* recipient, and this modification of the

Agreement resolves the court's prior concern regarding compliance with Code of Civil Procedure section 384.

In exchange for the settlement, the class members agree to release Defendants from all claims that were alleged, or reasonably could have alleged, based on the facts pleaded in the Complaint occurring during the Class Period. (Agreement, ¶¶ 1.40, 1.42, 6.2.) PAGA Employees agree to release Defendants, and related entities and persons, from all claims for PAGA civil penalties that were alleged, or reasonably could have been alleged, based on facts pleaded in the Complaint and/or the notice Plaintiff sent to the LWDA. (*Id.* at ¶¶ 1.41., 1.42, 6.3.)

B. Fairness of the Settlement

Plaintiff states that the settlement was reached through discovery, analysis, and mediation with Chris Barnes, Esq. (Declaration of Hengameh S. Safaei in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement ("Safaei Dec."), ¶¶ 8, 13-14, 22-23.) In anticipation of mediation, the parties conducted significant investigation of the facts through informal discovery, including Defendants' production of a random 20 percent of class member's time and pay records, average rates of pay during the Class Period, and related documents and information. (Safaei Dec., ¶ 13.) Plaintiff conducted a detailed review of the payroll records, time records, and other information provided by Defendants. (*Ibid.*) Defendants estimate that there are approximately 474 Class Members who worked approximately 11,389 workweeks within the Class Period. (Agreement ¶ 4.1.)

Plaintiff estimates that Defendants' maximum potential liability for all the claims is approximately $2,229,242. (Safaei Dec., ¶ 26.) Plaintiff provides a breakdown for this amount by claim. (*Ibid.*) Plaintiffs discounted the value of the claims given Defendants' defenses, the possibility that the court could substantially reduce any PAGA penalties, and the risks and costs associated with class certification. (Safaei Dec., ¶¶ 27-36.) The average net payment to class members will be $1,016.98.

The gross settlement amount represents approximately 40 percent of the potential maximum recovery. The proposed settlement amount is within the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavasos v. Salas Concrete*,

Inc. (E.D. Cal., Feb 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist. LEXIS 30201, at *41-42 [citing cases listing range of 5 to 25-35 percent of the maximum potential exposure].)

Therefore, the court finds the terms of the settlement to be fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

C. Incentive Award, Fees, and Costs

Plaintiff requests an enhancement award of $7,500. (Settlement Agreement, ¶ 3.2.1.)

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

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks, brackets, ellipses, and citations omitted.)

Plaintiff has submitted a declaration detailing her participation in this matter. (Declaration of Suyapa Liliana Palma-Hernandez [], ¶ 4.) Plaintiff states she has provided detailed factual accounts to her attorneys, gathered employed-related documents, reviewed documents prepared by her attorneys, and participated in numerous communications with her attorneys. (*Ibid*.) Plaintiff estimates that she has spent 25 hours of her time on this matter. (*Ibid*.)

In addition to the time Plaintiff has spent on this ligation, she also undertook risk by attaching her name to this case because it might impact her future employment. (See *Covillo v. Specialty's Café* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant "reputational risk" in bringing an action against an employer].).

Based on the foregoing, the court finds that a service award to Plaintiff is appropriate. Nevertheless, the court notes that the amount sought for the enhancement award is higher than

the court typically awards in these types of cases. Consequently, the court approves a service award to Plaintiff in the amount of $2,500.

The settlement calls for a payment of $10,450 to the settlement administrator, identified as ILYM Group, Inc. ("ILYM Group"). (Agreement, ¶¶ 1.2, 3.2.3.) ILYM Group has provided a declaration indicating the administration costs will not exceed $10,450. (Declaration of Lisa Mullins of ILYM Group, Inc., ¶ 4, Ex. C.) The court approves ILYM Group as settlement administrator and administration costs not to exceed $10,450.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel will seek attorney fees up to one-third of the gross settlement amount (currently estimated to be $300,000), and litigation costs not to exceed $25,000. (Agreement, ¶ 3.2.2.) Prior to the final approval hearing in this matter, Plaintiff's counsel shall submit lodestar information (including hourly rate and hours worked) so the court can compare the lodestar information with the requested fees. Plaintiff's counsel shall also submit evidence of actual costs incurred as well as evidence of actual settlement administration costs.

D. Conditional Certification of Class

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

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class. (*Sav-On, supra*, 34

Cal.4th at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

As explained by the California Supreme Court,

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

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

Plaintiff states there are approximately 474 class members, who can be identified from a review of Defendant's records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

The content of a class notice is subject to court approval. "If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court." (Cal. Rules of Court, rule 3.769(f).)

In its prior tentative decision, the court stated the notice presented generally complies with requirements, although revisions were necessary. Specifically, the court requested that the designated *cy pres* recipient (as discussed above) be included in the notice, as well as specific language regarding the final approval hearing. Plaintiffs' counsel has since provided a class notice revised in accordance with the court's instructions. (Safaei Supp. Dec., ¶ 3; Agreement, Ex. A ("Notice").) The revised class notice indicates that funds from uncashed settlement checks will be sent to Legal Aid at Work, Workers'

Accordingly, the court approves the revised class notice.

IV. Conclusion

The motion for preliminary approval is GRANTED. The final approval hearing is scheduled for November 27, 2024 at 1:30 p.m. in Department 19.

Prior to the final approval hearing, Plaintiff's counsel shall submit lodestar information (including hourly rate and hours worked) and evidence of actual costs incurred as well as evidence of any settlement administration costs.

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

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Calendar Line 5

Case Name: Ramos v. Taqueria Milagro, Inc. (PAGA)
Case No.: 23CV409955

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 4, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

Plaintiff Luis Ramos ("Plaintiff") brings this representative wage and hour action against Defendant Taqueria Milagro, Inc. ("Defendant"). On January 17, 2023, Plaintiff filed the operative Complaint, setting forth a sole cause of action for violation of the Private Attorneys General Act (Labor Code section 2698, *et seq.* ["PAGA"]). Plaintiff alleges that Defendant failed to provide compliant meal and rest periods, failed to pay minimum wages and overtime pay, and committed other wage and hour violations.

Before the court is Plaintiff's unopposed motion for approval of a settlement. As discussed below, the court GRANTS the motion.

II. Legal Standard for Approving a PAGA Settlement

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380, overruled on other grounds by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S.___ [2022 U.S. LEXIS 2940].) Seventy-five percent of any penalties recovered go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining 25 percent for the employees. (*Ibid*.) PAGA is intended "to augment the limited enforcement capability of [the LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id*. at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

A superior court must review and approve any PAGA settlement. (Lab. Code, § 2699, subd. (l)(2).) The court's review "ensur[es] that any negotiated resolution is fair to those

affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) The proposed settlement must be submitted to the LWDA at the same time it is submitted to the court. (*Ibid*.)

As discussed by one court:

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

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

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

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

"[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*O'Connor, supra* at p. 1133.) The settlement must be reasonable in light of the potential

verdict value. (*Id.* at 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc*. (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, 2016 U.S. Dist. LEXIS 140759 at *8-9.)

III. Discussion

A. Provisions of the Settlement

Plaintiff moves for approval of a proposed settlement made on behalf of:

> [A]ll non-exempt employees who worked for Defendant in California from November 11, 2021, through the date that the Court grants approval of the settlement.

(Declaration of Scott Ernest Wheeler ("Wheeler Dec."), Ex. B (Settlement Agreement and Release of PAGA Claim ("Agreement"), ¶ B.2.)

According to the terms of the settlement, Defendant will pay a gross settlement amount of $70,000. (Agreement, ¶ B.11.) This amount will be increased on a pro rata basis if the number of compensable workweeks is determined to be more than represented by Defendant at the time the parties entered into the Agreement. (*Id.* at ¶ C.2.) This amount includes an enhancement payment to Plaintiff of up to $6,000, attorney fees not to exceed $24,000, litigation costs not to exceed $15,000, and settlement administration costs of $2,645. (*Id*. at ¶¶ C.8-C.9.) The court approves Phoenix Settlement Administrators as settlement administrator. (*Id.* at ¶ B.21.)

Of the remaining net settlement amount, 75 percent will be paid to the LWDA, and 25 percent will be distributed to aggrieved employees based on the pro rata number of pay periods worked by each aggrieved employee during the PAGA Period. (Agreement, ¶¶ C.4-C.5.) Funds from checks that are not cashed within 180 days from the date of mailing will be transmitted to Legal Aid at Work. (*Id.* at ¶ F.5.) The court approves Legal Aid at Work as the designated *cy pres* recipient.

In exchange for the settlement, the aggrieved employees agree to release Defendant, and related persons and entities, from all claims that were or reasonably could have been alleged in the complaint based on the facts and matter contained in the complaint and/or the

LWDA letter, occurring during the PAGA Period. (Agreement, ¶¶ B.18, B.19, E.6.) Plaintiff also agrees to a comprehensive general release. (*Id.* at ¶ E.8.)

B. Fairness of the Settlement

Plaintiff contends that the PAGA settlement is fair and reasonable. (Wheeler Dec., ¶¶ 14, 32; Plaintiff's Memorandum of Points and Authorities, pp. 10-12.) Prior to participating in mediation, Plaintiff conducted a thorough investigation including formal and informal discovery. (Wheeler Dec., ¶ 12.) Defendant produced relevant policy documents, wage statements for PAGA Employees, and a sampling of electronic time and payroll records. (*Ibid.*) On January 22, 2024, the parties participated in mediation with Nikki Tolt, Esq. (*Id.* at p. 6.) The negotiations, including those continuing after mediation, were adversarial and resulted in the proposed settlement several months later. (*Id.* at ¶¶ 6-7.)

Plaintiff states that Defendant's total maximum potential exposure for PAGA penalties is $255,900. (Wheeler Dec., ¶ 20.) Plaintiff provides a breakdown of this amount by claim. (*Id.* at ¶¶ 20 -22.) In reaching the settlement amount, Plaintiff considered several factors to assess the realistic value of the PAGA claims. (*Id.* at ¶¶ 23-32.) These factors included the likelihood of proving that Defendant committed the alleged violations knowingly or intentionally and the likelihood that a court would substantially reduce the PAGA penalties. (*Ibid.*) Plaintiff's counsel believes that the maximum PAGA penalties realistically recoverable is approximately $95,000. (*Id.* at ¶ 32.) As Plaintiff points out, the $70,000 gross settlement amount represents approximately 27.4% of Defendant's estimated maximum exposure for PAGA penalties. (*Ibid.*)

The court has reviewed the written materials provided by Plaintiff and finds that Plaintiff has sufficiently explained the rationale for the settlement amount. Therefore, the court finds the terms of the settlement to be fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

C. Incentive Award, Fees and Costs

As part of the settlement, Plaintiff seeks a service award in the amount of $6,000. Although service awards are common in class actions, there is less authority regarding the propriety of service awards in PAGA cases. Nevertheless, a PAGA case is a representative

action like a class action, and courts have recognized that an individual's willingness to act as a private attorney general may merit a service award. (See *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 959.)

Plaintiff has submitted a declaration detailing his participation in the action. He states that he has spent approximately 32.5 hours on this case, including discussing the case with counsel, reviewing the complaint, gathering facts and documents for counsel, preparing for mediation, and reviewing settlement documents. (Declaration of Luis Ramos, ¶ 6.) Plaintiff acted as a representative for the aggrieved employees and has agreed to a broader release. Plaintiff's counsel also emphasizes that Plaintiff placed himself at risk because he could have been personally liable for Defendant's costs and attorney fees. (Wheeler Dec., ¶ 65.)

For the foregoing reasons, the court approves a service award in the requested amount of $6,000 to Plaintiff.

Plaintiff's counsel seeks attorney fees of $24,000. (Wheeler Dec., ¶ 48.) Counsel states that the attorney fees will be distributed 50% to the Law Office Scott Ernest Wheeler and 50% to the Wand Law Firm, P.C., and that Plaintiff has approved the fee agreement in writing. (*Id.* at ¶ 43.) The court notes that although Counsel asserts that the $24,000 amount is 33.33% of the gross settlement amount of $70,000, it appears to be slightly over 34%. Nevertheless, the Wheeler law office presents evidence of attorney fees incurred in this action in the amount of $33,737.50, based on 32.5 hours at $925 per hour, and 9.8 hours at $375 per hour. (Wheeler Dec., ¶¶ 55-56, Ex. E.) The Wand law office presents evidence of attorney fees incurred in this action in the amount of $15,280, based on 19.1 hours at $800 per hour. (Declaration of Aubry Wand ("Wand Dec."), ¶¶ 23, 30, Ex. A.)

Thus, Plaintiff's counsel provides evidence demonstrating a lodestar of $49,017.50. This results in a negative multiplier. The court finds the requested fees to be reasonable as a percentage of the total recovery, and the fees are approved in the amount of $24,000.

Plaintiff's counsel also requests litigation costs in the total amount of $6,325.81, and the Wheeler law office provides evidence of costs incurred in that amount. (Wheeler Dec., ¶ 61.) The Wand office is not seeking reimbursement of costs in this matter. (Wand Dec., ¶

33.) The Agreement provides for actual costs up to a maximum of $15,000. Therefore, the court approves costs in the actual amount incurred of $6,325.81.

Plaintiff also asks for settlement administration costs in the amount of $2,645. (Agreement, ¶¶ 20-21, Wheeler Dec. ¶ 10.) Plaintiff provides a declaration from the settlement administrator indicating how its fee was calculated and indicating its quoted will-not-exceed amount of $2,645. (Declaration of Jodey Lawrence, ¶ 16., Ex. B.) Therefore, the court approves settlement administration costs in the amount of $2,645.

IV. Conclusion

Accordingly, the motion for approval of PAGA settlement is GRANTED.

A Case Management Conference is scheduled for March 12, 2025 at 2:30 p.m. in Department 19 for the purpose of addressing compliance with the settlement.

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

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Calendar Lines 6 – 7

Case Name: Velocity Investments, LLC v. Jayawardena
Case No.: 19CV357372

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 4, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

According to the allegations of the Complaint filed on October 24, 2019, plaintiff and cross-defendant Velocity Investments, LLC ("Velocity") is the owner of debt owed by defendant and cross-complainant Sanjay Jayawardena ("Jayawardena"). (Complaint, ¶¶ 3, 14-17.) The Complaint sets forth causes of action for breach of contract and open book account.

On November 2, 2021, Jayawardena filed the operative First Amended Cross-Complaint ("FACC"), setting forth causes of action for: (1) California Fair Debt Buying Practices Act ("CFDPA") (against Velocity); (2) Fair Debt Collection Practices Act (against all cross-defendants); and (3) Rosenthal Fair Debt Collection Practices Act (against all cross-defendants).

According to FACC's allegations, Jayawardena is alleged to have incurred a financial obligation in the form of a consumer credit account issued by WebBank on or about October 16, 2017. (FACC, ¶ 14.) Jayawardena denies it owes any debt to Velocity. (*Ibid.*) The alleged debt is evidenced by an electronic promissory note created and maintained by non-party LendingClub Corporation ("LendingClub") or one of its affiliates. (*Id.* at ¶ 15.) The alleged debt and electronic promissory note were transferred by WebBank to LendingClub within two days after October 16, 2017. (*Id.* at ¶ 16.) The electronic promissory note was then transferred to an investor, ACL Consumer Loan Trust III ("ACL"), and LendingClub acted as ACL's agent. (*Id.* at ¶ 17.)

LendingClub, acting as agent for ACL, received that last payment on the alleged debt or about January 9, 2018. (FACC, ¶ 18.) Sometime after that date, ACL removed the alleged debt from its books as an asset and treated it as a loss or expense. (*Id.* at ¶ 19.) On or about May 31, 2018, the alleged debt was allegedly sold or resold to Velocity for collection purposes,

however, control of the electronic promissory note was never transferred to Velocity. (*Id.* at ¶ 20.) Because the alleged debt was sold or resold after January 1, 2014, Velocity's collection of the alleged debt is subject to the CFDPA. (*Id.* at ¶ 21.)

On March 14, 2024, Jayawardena and LendingClub attended an Informal Discovery Conference ("IDC") regarding the deposition of LendingClub's Person Most Knowledgeable ("PMK"). (April 19, 2024 Order Setting Briefing Schedule and Hearing Schedule for Discovery Motions, pp. 1:23-2:2.) Generally, the dispute involves whether or not LendingClub must make available for a deposition a subsequent PMK. (*Id.* at p. 2:2-3.)

Before the court are (1) nonparty LendingClub's motion for protective order; (2) defendant and cross-complainant Jayawardena's motion to compel further deposition testimony; and (3) LendingClub's related motion to seal.

II. LendingClub's Motion for Protective Order

Nonparty LendingClub moves for a protective order prohibiting defendant and cross-complainant Jayawardena from taking a second deposition of LendingClub's PMK. (LendingClub's Notice of Motion and Motion for Protective Order; Memorandum of Points and Authorities ("LendingClub's MPA"), p. 1:1-7.) LendingClub contends that unless a protective order is issued, it will suffer unwarranted annoyance, embarrassment, oppression, undue burden, and expense because the request for further deposition testimony is unreasonably cumulative and duplicative of documents, declarations, and testimony that LendingClub has already provided in response to Jayawardena's discovery requests. (*Id.* at p. 1:8-13.)

In opposition, Jayawardena argues that LendingClub has failed to establish good cause for the protective order it seeks. (Jayawardena's Memorandum of Points and Authorities in Opposition to LendingClub's Motion for Protective Order ("Jayawardena's Opp."), p. 2:12-18.)

A. Legal Standard

"Before, during, or after a deposition, any party, any deponent, or any other affected natural person or organization may promptly move for a protective order." (Code Civ. Proc., § 2024.420, subd. (a).) "The court, for good cause shown, may make any order that justice

requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (Code Civ. Proc., § 2025.420, subd. (b).) "Code of Civil Procedure section 2025.420, subdivision (b), provides a *nonexclusive* list of permissible directions that may be included in a protective order." (*Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 316 (*Nativi*).)

"The issuance and formulation of protective orders are to a large extent discretionary." (*Nativi*, *supra*, 223 Cal.App.4th at p. 316, internal punctuation and citations omitted.) "[T]he burden is on the party seeking the protective order to show good cause for whatever order is sought." (*Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 255.)

B. Discussion

According to LendingClub, its records and prior deposition testimony demonstrate that Velocity owns the loan in question, and Jayawardena has never asserted that some other creditor owns the loan or is otherwise trying to collect from him. (LendingClub's MPA, p. 4:10-12.) LendingClub describes Jayawardena's discovery efforts against it to this point. (*Id.* at pp. 4:22-5:17.) LendingClub produced documents in response to Jayawardena's subpoena in January 2021. (*Id.* at p. 4:24-26.) LendingClub has provided two declarations from Clarke Roberts (then Senior Vice President, Electronic Trading and Services), confirming that the data and documents produced in response to the subpoena comprised the relevant business records in LendingClub's possession, custody or control that reflect the transfers of ownership of the loan. (*Id.* at pp. 4:25-28, 5:11-15.)

Jayawardena deposed Mr. Roberts on August 10, 2023. (LendingClub's MPA, p. 5:24.) LendingClub asserts that Mr. Roberts was knowledgeable about the origination, ownership and transfer of the loan, as well as the underlying data comprising LendingClub's register for the loan. (*Id.* at p. 5:25-27.) Mr. Roberts testified during his deposition that LendingClub provided the complete "note registrar" as an exhibit to his declaration. (*Id.* at pp. 5:27-6:1.) According to LendingClub, Jayawardena's counsel focused his questioning on an incomplete copy of the "note register" that did not include data reflecting the final transfer of the loan to Velocity. (*Id.* at p. 6:1-3.) LendingClub maintains that Mr. Roberts clearly and repeatedly testified that the

data reflected in the exhibit attached to both of his declarations comprise the complete "note register." (*Id.* at p. 6:3-5.)

LendingClub contends that, by producing Mr. Roberts for deposition, it met its duty to produce the most qualified current employee. (LendingClub's MPA, pp. 9:22-10:18, citing *Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390 (*Maldonado*).) In opposition, Jayawardena contends that LendingClub failed and refused to make available a witness with sufficient knowledge regarding the topics identified in its deposition subpoena. (Jayawardena's Opp., pp. 2:23-3:11.)

If a notice of deposition or subpoena served on an entity describes the matters on which questions will be asked "with reasonable particularity," then the entity is under a duty to designate and produce the officers, directors, managing agents or employees "most qualified" to testify on its behalf. (Code Civ. Proc., §§ 2025.230; 2020.310, subd. (e).) The person or persons designated by the entity must testify "to the extent of any information known or reasonably available to the deponent." (Code Civ. Proc., § 2025.230.)

"Certainly, no single person is expected to be familiar with the total contents of a corporation's files. When a request for documents is made, however, the witness or someone in authority is expected to make an inquiry of everyone who might be holding responsive documents or everyone who knows where such documents might be held." (*Maldonado*, *supra*, 94 Cal.App.4th at p. 1396.)

> The primary purpose of Code of Civil Procedure, section 2025.230 is not to aid corporate entities. Rather, it is intended to simplify discovery for the party seeking information from a corporation. As one treatise explains, the purpose of this provision is to eliminate the problem of trying to find out who in the corporate hierarchy has the information the examiner is seeking. E.g., in a product liability suit, who in the engineering department designed the defective part? The authors of the treatise explain that under former law, the entity was required only to designate one or more officers or employees to testify on its behalf. This permitted considerable "buck-passing" and "I don't know" answers at deposition. Under the current law, if the subject matter of the questioning is clearly stated, the burden is on the entity, not the examiner, to produce the right witnesses. And, if the particular officer or employee designated lacks personal knowledge of all the information sought, he or she is supposed to find out from those who do.

(*LAOSD Asbestos Cases* (2023) 87 Cal.App.5th 939, 948-949, internal punctuation and citations omitted.) Thus, an entity's burden to produce the right witness or witnesses is triggered when "the subject matter of the questioning is clearly stated" in the deposition notice. (*Ibid.*) In other words, the deposition notice must "describe with reasonable particularity the matters on which examination is requested," before the entity deponent must designate the person or persons most qualified to testify as to such matters. (Code Civ. Proc., § 2025.230.)

LendingClub argues that Mr. Roberts is the person most qualified on the relevant topics of the subpoena. (LendingClub's MPA, p. 10:5-6.) LendingClub admits that Mr. Roberts could not answer all of the questions asked of him at his deposition but asserts that he generally only failed to answer when questions called for answers that "(1) required knowledge of state and/or federal law; (2) involved business practices unrelated to the Loan at issue; or (3) were exceptionally specific." (*Id.* at p. 10:8-14.) LendingClub asserts that it met the standard described in *Maldonado* because it produced Mr. Roberts as the most qualified person, and he had access to all of LendingClub's records relevant to the subpoena. (*Id.* at p. 10:5-18.)

In opposition, Jayawardena emphasizes that Mr. Roberts only testified as to his knowledge regarding three of the 13 topics identified in the deposition subpoena. (Jayawardena's Opp., pp. 2:21-3:10.) Jayawardena asserts he is justified in seeking further deposition testimony from LendingClub because LendingClub has not explained its refusal to present a witness to testify regarding ten of the 13 topics identified. (*Id.* at pp. 3:19-4:2.)

However, as LendingClub argues, the analysis here is affected by the fact that LendingClub is not a party to this action. (LendingClub MPA, p. 10:19-11:4.) Discovery is generally permitted "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.010.) Everything that is ***relevant*** to the subject matter is presumed to be discoverable. (*Ibid.*, emphasis added.) The Discovery Act further declares that "the court shall limit the scope of discovery" if it determines that the burden, expense, or intrusiveness of that discovery "clearly outweighs the likelihood that the

information sought will lead to the discovery of admissible evidence." (Code Civ. Pro. § 2017.020(a); *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 383-385.)

Courts generally impose less burdensome discovery demands upon those who are not parties to the litigation. (*Monarch Healthcare v. Superior Court* (2000) 78 Cal.App.4th 1282, 1289-1290 ["The distinction between parties and nonparties reflects the notion that, by engaging in litigation, the parties should be subject to the full panoply of discovery devices, *while nonparty witnesses should be somewhat protected from the burdensome demands of litigation*."].) "As between parties to litigation and nonparties, the burden should be placed on the latter only if the former does not possess the material sought to be discovered. An exception to this may exist where a showing is made that the material obtained from the party is unreliable and may be subject to impeachment by material in possession of the nonparty." (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 225 (*Calcor*).)

The appellate court in *Calcor* stated that "[g]eneralized demands, insupportable by evidence showing at least the potential evidentiary value of the information sought, are not permitted." (*Calcor, supra*, 53 Cal.App.4th at p. 218.) There, the plaintiff served a subpoena on nonparty Calcor's custodian of records, "to, in effect, produce all materials in its possession relating to gun mounts, going back nearly ten years." (*Id.* at p. 219.) "Calcor filed a motion for protective order contending the subpoena was unreasonably burdensome and overly broad for service on a nonparty, sought confidential and proprietary information and was not limited to materials relevant to the subject matter of the suit between [plaintiff and defendant]." (*Id.* at p. 220.)

The appellate court in *Calcor* agreed that the demand was overly broad and burdensome. (*Calcor, supra*, 53 Cal.App.4th at p. 221.) The court observed that, facially, the detailed descriptions of categories combined with lengthy definitions and instructions "would seem to satisfy a requirement of 'particularity[.]'" (*Id.* at p. 22.) Nevertheless, the court stated the discovery request was more akin to a "blanket demand" that "might as well be condensed into a single sentence: Produce everything in your possession which in any way relates to gun mounts." (*Ibid.*) The *Calcor* court found that the plaintiff had not met its burden of showing that the demand was reasonably calculated to lead to the discovery of admissible evidence, and

that the plaintiff's demand impermissibly shifted the burden of the discovery to a nonparty. (*Id.* at pp. 223-225.)

Here, although not a party to this action, LendingClub has responded to multiple discovery requests from Jayawardena, including producing Mr. Roberts for a deposition. From the court's review of the deposition transcript, it appears that LendingClub objected to most (ten out of 13) of the topics identified in the deposition subpoena but produced Mr. Roberts to testify as to three of those topics.

Jayawardena acknowledges that under *Calcor* there is a limit to discovery upon nonparties. (Jayawardena's Opp., p. 5:8-18.) Jayawardena attempts to distinguish *Calcor* by asserting that "in *Calcor* subpoenas at issue were extremely broad and burdensome, and the third parties' own actions were not central to the case." (*Ibid*.)

Jayawardena argues that further deposition testimony from LendingClub is required in this case because LendingClub's "own actions" are of "central relevance to this collection action and cross-action for unfair debt collection practices." (Jayawardena's Opp., p. 5:8-15.) However, this position is belied by the fact that Jayawardena has not brought a valid claim against LendingClub making them a party to this action. Moreover, the breadth of the thirteen topics of deposition testimony identified in the deposition subpoena, along with the accompanying instructions and definitions, are similar to the disputed request in *Calcor* in that they amount to an unreasonably overbroad "blanket demand" upon on a nonparty.

Having reviewed the parties' written submissions, the court finds good cause here to issue a protective order. Imposing further discovery demands upon LendingClub in the manner presently requested by Jayawardena would be burdensome and harassing. The motion for a protective order is GRANTED.

III. Jayawardena's Motion to Compel Further Deposition Testimony

Defendant and cross-complainant Jayawardena moves for an order compelling further testimony and document production responsive to his Second Amended Deposition Subpoena for Personal Appearance and Production of Documents and Things ("Deposition Subpoena"). (Jayawardena's Memorandum of Points and Authorities in Support of Motion to Compel Further Deposition Testimony and Document Production [] (Jayawardena's MPA), pp. 1:26-

2:3.) Jayawardena contends that LendingClub produced a witness who was not qualified to testify about the topics contained in the Deposition Subpoena and LendingClub failed to make a responsive document production. (*Id.* at p. 3:3-6.) As discussed previously, Jayawardena asserts that he will require a witness knowledgeable about the ten topics that LendingClub objected to with respect to the deposition of Mr. Roberts.

In opposition, LendingClub contends that it has fully complied with its discovery obligations in this action, and that Jayawardena has failed to meet and confer in good faith and failed to demonstrate good cause for the discovery sought. (LendingClub's Opposition to Motion to Compel ("LendingClub's Opp."), pp. 6:9-10, 7:2-5.)

A. Legal Standard

"If a deponent fails to answer any question or to product any document, electronically stored information, or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking discovery may move the court for any order compelling that answer or production." (Code Civ. Proc., § 2025.480, subd. (a).) "If the court determines that the answer or production sought is subject to discovery, it shall order that the answer be given or the production be made on the resumption of the deposition." (Code Civ. Proc., § 2025.480, subd. (i).)

B. Discussion

Here, as explained above in connection with LendingClub's motion for a protective order, the court finds that the deposition testimony and production sought is not subject to discovery. Although Jayawardena contends that LendingClub's actions are of central relevance to this collection action and cross-action for alleged unfair debt collection practices, he has brought no valid claim against LendingClub, who remains a nonparty. Based on the parties' submissions, the court is not persuaded that the details of LendingClub's internal workings, especially those with no connection to the subject debt, are subject to discovery in this action.

Jayawardena has not made a showing that the relevant material that it has already obtained is unreliable and subject to impeachment, such that the burden of discovery should be placed on a nonparty. (See *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 225 ["As between parties to litigation and nonparties, the burden should be

placed on the latter only if the former does not possess the material sought to be discovered. An exception to this may exist where a showing is made that the material obtained from the party is unreliable and may be subject to impeachment by material in possession of the nonparty." (*Calcor, supra*, 53 Cal.App.4th at p. 225.) Jayawardena alleges, on information and belief, that control of the electronic promissory note was never transferred to Velocity. (FACC, ¶ 20.) But, absent some factual showing that the evidence available is unreliable, this allegation is not sufficient to shift the burden of discovery to LendingClub. As LendingClub persuasively argues, the burden of presenting evidence to prove the right to enforcement of the loan, or lack thereof, should lie with the parties. (LendingClub's Opp., p. 12:5-18.)

Accordingly, the motion to compel is DENIED.

LendingClub requests sanctions in connection with its opposition. However, the court finds that Jayawardena acted with substantial justification in bringing the motion based upon a colorable claim, despite not prevailing. Accordingly, the request for sanctions is DENIED.

IV. Motion to Seal

Non-party LendingClub moves to seal portion of documents submitted in support of its motion for protective order.

A. Legal Standard

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

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn.

3 (*Providian*).) "[A] binding contractual agreement not to disclose" may suffice. (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 107.) In addition, confidential matters relating to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285-1286 (*Universal*).)

Where some material within a document warrants sealing, but other material does not, the document should be edited or redacted, if possible, to accommodate both the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, rule 2.550(d)(4), (d)(5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*Providian, supra,* 96 Cal.App.4th at p. 309.)

B. Discussion

LendingClub moves to seal portions of documents submitted in connection with its motion for protective order: (1) LendingClub's MPA; (2) Exhibit 2 to the Declaration of Marcos Sasso in Support of Nonparty LendingClub Corporation's Motion for Protective Order ("Sasso MPO Declaration") and its Exhibit A; (3) Exhibit 3 to the Sasso MPO Declaration and its Exhibit A; and (4) Exhibit 5 to the Sasso MPO Declaration. (Motion to Seal, p. 1:13.) The motion is made on the grounds that the documents are confidential pursuant to the terms of a stipulated protective order and subject to protection under California Rules of Court 2.550. (*Id.* at p. 1:14-17.)

LendingClub references the Stipulated Protective Order as to LendingClub Corporation ("Stipulated Protective Order") entered as an order in this action on November 3, 2021. Under the order, LendingClub may designate as "Confidential Information" any document it considers in good faith to contain information involving trade secrets or confidential business or financial information. (Stipulated Protective Order, ¶ 1.)

LendingClub asserts that the materials at issue contain its confidential, commercially sensitive, and proprietary business data. (Motion to Seal, p. 3:11-27; Declaration of Marcos Sasso in Support of Nonparty LendingClub's Unopposed Motion to Seal, ¶¶ 10-11.) Defendant

Jayawardena filed a limited opposition to the motion to seal, stating he has no objection to the sealing of the document identified by LendingClub for the purposes of its Motion for Protective Order only, without waiving his right to challenge the confidential designation prior to trial. (Defendant Jayawardena's Limited Opposition to LendingClub's Motion to Seal Certain Records, pp. 1:25-2:1.)

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

Accordingly, the motion to seal is GRANTED.

V. Conclusion

The motion for protective order is GRANTED. The motion to compel is DENIED. The request for sanctions is DENIED. The motion to seal is GRANTED.

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

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Calendar Line 7

Case Name: Velocity Investments, LLC v. Jayawardena
Case No.: 19CV357372

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Calendar Line 8

Case Name: Spalinger v. El Camino Hospital (Class Action)
Case No.: 23CV412292

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on September 4, 2024 at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. Introduction

This is a putative class action brought by Plaintiff Indigo Spalinger ("Plaintiff") against Defendant El Camino Hospital ("Defendant"). On February 28, 2023, Plaintiff initiated this action by filing a Class Action Complaint against Defendant, based on alleged violations of patients' privacy. Now before the court is the motion to be relieved as counsel brought by Plaintiff's attorney, Brittany S. Scott ("Counsel"). The motion is unopposed.

II. Legal Standard

Motions to be relieved as counsel are technical and governed by rule 3.162 of California Rules of Court ("Rule 3.1362"). Notice and motion must be directed to the client on Judicial Council Form MC-051. No memorandum is required. (Rule 3.1362(a) & (b).) Counsel must provide a declaration on Judicial Council Form MC-052 stating "in general terms and without compromising the confidentiality of the attorney-client relationship why a motion under Code of Civil Procedure section 284(2) is brought instead of filing a consent under Code of Civil Procedure section 284(1)."[5] (Rule 3.1362(c).)

The notice of motion and motion, the declaration, and the proposed order must be served on the client and all parties "by personal service, electronic service, or mail." (Rule 3.1362(d).) The proposed order "must specify all hearing dates scheduled in the action or proceeding, including the date of trial, if known." (Rule 3.1362(e).)

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III. Discussion

[5] Code of Civil Procedure section 284 provides, in its entirety: The attorney in an action or special proceeding may be changed at any time before or after judgment of final determination, as follows: [¶] 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; [¶] 2. Upon the order of the court, upon the application of either client or attorney, after notice one to the other.

Here, Counsel states that she and her colleagues have made repeated attempts by various means to communicate with Plaintiff regarding the case status, without success. Counsel has made such attempts by phone, text message, email, U.S. mail, and FedEx Overnight. Despite such attempts, it appears that Counsel has not heard from Plaintiff since May of this year. Counsel's declaration states that Plaintiff has been personally served with copies of the motion papers. A separate proof of service confirms that Plaintiff was personally served with copies of the motion papers on August 4, 2024 at 7:18 p.m. in Sunnyvale, California.

The proposed order indicates the next hearing in this matter as scheduled for October 2, 2024. The court observes that, since Counsel's preparation of that proposed order, the court has entered an order on the parties' stipulation to continue the hearing on the demurrer to November 6, 2024 at 1:30 p.m, thereby extending Plaintiff's deadline to oppose the demurrer to September 6, 2024.

In sum, following Plaintiff's failure to communicate, Counsel has made a code-compliant motion to be relieved as counsel and obtained an order extending the due date for Plaintiff's opposition to the pending demurrer.

IV. Conclusion

Accordingly, the motion to be relieved as counsel is GRANTED. The order shall be amended to reflect the next hearing date as November 6, 2024 for the hearing on Defendant's demurrer.

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

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