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. Thank you.

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.

- **Remote appearances are encouraged and, as of August 15, 2022, 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.
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- 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.

DATE: OCTOBER 4, 2023 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	20CV368978	Acosta v. Larson Steel, Inc.	See Line 1 for tentative ruling.
LINE 2	18CV338800	Chambers v. Crown Asset Management, LLC (Class Action)	See Line 2 for tentative ruling.
LINE 3	21CV392334	Balabanoff v. Classic Vacations, LLC, et al. (/Class Action/PAGA)	See Line 3 for tentative ruling.
LINE 4	20CV363709	Griego v. The Tehama Law Group, P.C., et al. (Class Action)	See Line 4 for tentative ruling.
LINE 5	20CV366939	ZL Technologies, Inc. v. Splitbyte Inc., et al. (LEAD CASE; Consolidated With 20CV373027, 20CV373149, 21CV378097, 21CV382329)	See Line 5 for tentative ruling.

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LINE 6	23CV417697	Cheung v. C2 Educational Systems, Inc. (PAGA)	Unopposed application for admission *pro hac vice* is GRANTED. No appearance necessary. Counsel to submit proposed Order.
LINE 7	22CV407762	Ayala, et al. v. Central Coast Agriculture, Inc. (Class Action)	Unopposed application for admission *pro hac vice* is GRANTED. No appearance necessary. Counsel to submit proposed Order.
LINE 8	19CV344971	Alorica Inc. v. Fortinet, Inc.	See Line 8 for tentative ruling.
LINE 9	19CV355879	Guzik Technical Enterprises v. Keysight Technologies, Inc.	See Line 9 for tentative ruling.
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Acosta v. Larson Steel, Inc.
Case No.: 20CV368978

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 4, 2023, 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 various alleged wage and hour violations. The operative First Amended Complaint ("FAC"), filed on September 21, 2020, sets forth causes of action for: (1) Failure to Provide Meal Periods or Compensation in Lieu Thereof; (2) Failure to Provide Rest Periods or Compensation in Lieu Thereof; (3) Failure to Pay Minimum Wages; (4) Failure to Pay Overtime Wages; (5) Failure to Reimburse Work Related Expenses; (6) Failure to Comply with Itemized Employee Wage Statement Provisions; (7) Failure to Pay All Wages Upon Termination; (8) Unfair Business Practices; and (9) California Labor Code Private Attorneys General Act.

The parties have reached a settlement. Plaintiff Luis Manuel Arriola Acosta ("Plaintiff") now moves for preliminary approval of the settlement. The motion is unopposed.

II. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

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

(*Wershba*, *supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba*, *supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid*., quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

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

(*Wershba*, *supra*, 91 Cal.App.4th at p. 245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

A. Provisions of the Settlement

> The case has been settled on behalf of the following class:
> [A]ll non-exempt current and former individuals who worked for [defendant] Larson Steel, Inc. [("Larson Steel")] in California as a field installer at any time between August 6, 2016, through preliminary approval of class settlement.

(Declaration of Elizabeth R. Leitzinger in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("Leitzinger Dec."), Ex. 2 ("Settlement Agreement"), ¶ 1.40.) The class also contains a subset of PAGA members that are defined as "all non-exempt current and former individuals who worked for [Larson Steel] in California as a field installer at any time between July 15, 2019, through preliminary approval of the Class Settlement." (*Id.* at ¶ 1.30.)

According to the terms of settlement, Larson Steel will pay a gross, non-reversionary amount of $850,000. (Settlement Agreement, ¶¶ 1.17, 6.1.) The gross settlement amount includes attorney fees of $283,333.33 (1/3 of the gross settlement amount), litigation costs not

to exceed $40,000, a service award for the class representative not to exceed $10,000, settlement administration costs not to exceed $6,250, and a PAGA allocation of $42,500 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to PAGA members). (*Id*. ¶¶ 1.3, 1.17, 1.37, 7.2.)

The net settlement amount will be distributed to the class members on a pro rata basis based on the number of workweeks worked during the Class Period. (Settlement Agreement, ¶ 1.18, 1.19, 1.22, 7.2.) Similarly, PAGA members will receive a pro rata share of the 25 percent portion of the PAGA payment allocated to them based on the number of workweeks worked during the PAGA Period. (*Ibid*.)

Checks remaining uncashed more than 90 days after mailing will be void and the funds from those checks will be re-distributed on a pro rata basis to the class participants who cashed their checks. (Settlement Agreement, ¶¶ 8.1, 8.5.) Checks remaining uncashed 90 days after the second distribution will be voided and the funds will be distributed to Child Advocates of Silicon Valley. (*Ibid*.) The *cy pres* recipient is approved.

In exchange for the settlement, class members agree to release Larson Steel, defendant Peter Larson, defendant Heidi Larson, and defendant John Larson (collectively, "Defendants"), and related persons and entities, from all claims alleged in, or arising out of facts asserted in, the Complaint from August 6, 2016 through the date of preliminary approval. (Settlement Agreement, ¶¶ 1.33-1.35, 10.1.) PAGA members agree to release Defendants, and related persons and entities, from all PAGA claims alleged in, or arising out of facts asserted in, the Complaint from July 15, 2019, through the date of preliminary approval. (*Id*. at ¶¶ 1.28, 1.29, 10.2.) Plaintiff further agrees to a general release. (*Id*. at ¶ 10.3.)

B. Fairness of the Settlement

Plaintiff asserts that the settlement is fair, reasonable, and adequate, given the strength of his claims, the inherent risks of litigation, including substantial risks relative to class certification and the merits of the claims, and the costs of pursuing litigation. Shortly after Plaintiff initiated the action, Plaintiff conducted informal discovery, which included Plaintiff's personnel file, time records and wage statements, a 26 percent sample production of time records and wage statements for the class, and an anonymous class list containing relevant

class information. (Leitzinger Dec., ¶¶ 10, 38.) Subsequently, the parties attended mediation with Michael J. Loeb, Esq., which was unsuccessful. (*Id*. at ¶ 11.) The parties then commenced formal discovery, including written discovery, party depositions, and the mailing of a *Belaire-West* notice for the disclosure of the putative class members' identities and contact information. (*Id*. at ¶¶ 12-14.) Thereafter, the parties participated in a second mediation session with Michael J. Loeb, Esq., and several weeks later reached a settlement agreement. (*Id*. at ¶¶ 16-18.) Plaintiff estimates that Defendants faced a maximum potential liability of $3,026,210.60 for all claims. (*Id*. at ¶¶ 4, 10, 11, 16, 17, 38-59, 61-75, 78.) Plaintiff provides a detailed breakdown of this amount by claim. (*Ibid.*) Plaintiff asserts that for the approximately 42 class members, the average net recovery is approximately $10,000 per class member.

The settlement represents approximately 28 percent of the maximum potential value of Plaintiff's claims. The proposed settlement amount is within the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc*. (E.D.Ca|. 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].)

Overall, the court finds the settlement is fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

B. Incentive Award, Fees, and Costs

> Plaintiff requests an incentive award of $10,000 for the class representative. 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 submits a declaration generally detailing his participation in the action. However, Plaintiff does not provide an estimate of the time spent in connection with this litigation. Prior to the final approval hearing, the class representative shall file a supplemental declaration specifically detailing his participation in the action and an estimate of the time spent. The court will make a determination at that time.

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 of $283,333.33 (1/3 of the gross settlement fund). Plaintiff's counsel shall submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter 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 settlement administration costs.

C. Conditional Certification of Class

Plaintiff requests that the putative 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.)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc. v. Superior Court, 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 Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiff states there are approximately 42 class members that can be ascertained from Larson Steel'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. In sum, the court finds that the proposed class should be conditionally certified for settlement purposes.

D. 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 generally complies with the requirements for class notice. (Settlement Agreement, Ex. A.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion.

However, section 16 of the class notice states that an objection must be written and filed with the court to be valid and effective. This section must be amended to clarify that individuals may object in writing, but may also object by appearing at the final approval hearing

Additionally, section 20 of the class notice contains language regarding the final approval hearing. That language shall be modified as follows:

> Class members may appear at the final approval hearing in person or remotely using the Microsoft Teams link for Department 19 (Afternoon Session). Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members who wish to appear remotely are encouraged to contact class counsel at least three days before the hearing if possible, so that potential technology or audibility issues can be avoided or minimized.

The amended notice shall be provided to the court for approval prior to mailing.

IV. CONCLUSION

The motion for preliminary approval of the class action settlement is GRANTED, subject to approval of the amended class notice. The final approval hearing is set for February 14, 2024, at 1:30 p.m. in Department 19.

The Case Management Conference on January 17, 2024 is also continued, to February 14, 2024 at 2:30 p.m.

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

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Calendar Line 2

Case Name: Chambers v. Crown Asset Management, LLC (Class Action)
Case No.: 18CV338800

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 4, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

V. INTRODUCTION

This is a putative consumer class action brought pursuant to the California Fair Debt Buying Practices Act, Civil Code sections 1788.50-1788.64 ("CFDBPA"). According to the Class Action Complaint for Statutory Damages ("Complaint"), filed on December 4, 2018, plaintiff Pamela Shereé Chambers ("Plaintiff") seeks statutory damages against defendant Crown Asset Management, LLC ("Defendant") arising from its routine practice of sending initial written communications in smaller than 12-point type. (Complaint, ¶ 1.) The Complaint sets forth a single cause of action under the CFDBPA.

On December 27, 2022, the court granted Plaintiff's motion for class certification.

On January 10, 2023, the court entered a Stipulation Regarding Type Size and Order Thereon, which provides that the collection letter attached as Exhibit 1 to the Complaint provided the notice required by Civil Code section 1788.52, subdivision (d)(1) in 10-point type size.

The parties have reached a settlement. Plaintiff and Defendant jointly move for preliminary approval of the settlement.

II. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings,

> the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

(*Wershba, supra,* 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra,* 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba, supra,* 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid*., quoting *Dunk, supra,* 48 Cal.App.4th at p. 1801 and *Officers, supra,* 688 F.2d at p. 625, internal quotation marks omitted.)

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

(*Wershba, supra,* 91 Cal.App.4th at p. 245, citing *Dunk, supra,* 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

E. Provisions of the Settlement

> The case has been settled on behalf of the following class:
> All persons with addresses in California to whom McCarthy, Burgess & Wolff, Inc., sent, or caused to be sent, an initial written communication in the form of Exhibit "1" [attached to the Complaint] on behalf of [Defendant] in an attempt to collect a charged-off consumer debt originally owed to Synchrony Bank, which was sold or resold to [Defendant] on or after January 1, 2014, which were not returned as undeliverable by the U.S. Post Office during the period December 4, 2017, through the date of class certification.

(Declaration of Fred W. Schwinn in Support of Joint Motion for Preliminary Approval of Class Action Settlement ("Schwinn Dec."), Ex. A ("Settlement Agreement"), ¶ 2.3.)

According to the terms of settlement, Defendant will pay a non-reversionary amount of $158,095 to the class (i.e., no less than $35 to each of the estimated 4,517 class members).

(Settlement Agreement, ¶¶ 4.1, 4.3, 4.4.) In addition to the class fund, Defendant will pay all costs associated with settlement administration, statutory damages in the amount of $1,000 to Plaintiff, a service award not to exceed $3,500 to Plaintiff, and attorney fees and costs not to exceed $250,000. (Settlement Agreement, ¶¶ 4.2, 4.5-4.7.)

The class fund will be distributed to the class members on a pro rata basis. (Settlement Agreement, ¶ 4.3.) Settlement checks will become void 90 days after mailing and funds from uncashed checks will be distributed to the Katherine & George Alexander Community Law Center. (Settlement Agreement, ¶¶ 4.3, 4.4.) The *cy pres* recipient is approved.

In exchange for the settlement, class members agree to release Defendant, and related persons and entities, from all claims alleging a violation of Civil Code section 1788.52, subdivision (d)(1) or similar or related claims or causes of action, arising from or relating to collection letters mailed on behalf of Defendant in the form attached as Exhibit 1 to the Complaint during the class settlement period. (Settlement Agreement, ¶¶ 2.16., 7.1)

B. Fairness of the Settlement

The parties assert that the settlement is fair, reasonable, and adequate, given Defendant's net worth, the strength of Plaintiff's claim, the inherent risks of litigation, and the costs of pursuing litigation. The parties actively litigated this case and conducted substantial formal discovery, and the court heard several dispositive motions. The parties point out that Civil Code section 1788.62, subdivision (b) provides for statutory damages to the class in an amount not to exceed the lesser of $500,000 or 1 percent of the net worth of the debt buyer. However, the parties do not provide any information regarding Defendant's net worth or an estimate of Defendant's maximum potential liability for statutory damages to the class. Rather, Plaintiff's counsel represents that Defendant disclosed financial information to Plaintiff and Plaintiff's counsel believes the settlement is fair given Defendant's net worth. The parties also set forth reasons why the value of the claim should be discounted.

At this time, the court cannot adequately evaluate the settlement because Plaintiff has not provided an estimate of the maximum amount of Defendant's potential liability for the CFDBPA claim. Notably, the value of the claim depends, in part, on Defendant's net worth. Because the parties have not provided the court with any information regarding Defendant's

net worth, the court cannot discern the potential cash value of the claim, determine how much the case was discounted for settlement purposes, or review class counsel's evaluation of the sufficiency of the settlement. (See *Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 130-131.)

Consequently, prior to the continued hearing, Plaintiff's counsel shall submit a declaration which estimates Defendant's maximum potential liability for statutory damages to the class and explains how the estimate was reached given Defendant's net worth.

C. Incentive Award, Fees, and Costs

> Plaintiff requests a service award in the amount of $3,500.
> 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.)

Prior to the final approval hearing, the class representative shall file a declaration specifically detailing her participation in the action and an estimate of time spent. The court will make a determination at that time.

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 of $250,000. Plaintiff's counsel shall submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. Plaintiff's counsel shall also submit evidence of actual costs incurred.

D. Conditional Certification of Class

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.)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc. v. Superior Court, 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 Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Here, the court has already certified the class, named Plaintiff as class representative, and Plaintiff's counsel as class counsel. Thus, the elements of class certification are met for purposes of the settlement.

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 complies with the requirements for class notice. (Settlement Agreement, Ex. 1.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion. The notice is, therefore, approved.

IV. CONCLUSION

Accordingly, the motion for preliminary approval of the class action settlement is CONTINUED to December 13, 2023, at 1:30 p.m. in Department 19. Plaintiff shall file a supplemental declaration containing the requested information regarding the maximum amount of Defendant's potential liability no later than November 20, 2023. No additional filings are permitted.

The Case Management Conference on October 18 is also continued, to December 13, 2023 at 2:30 p.m.

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

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Calendar Line 3

Case Name: Balabanoff v. Classic Vacations, LLC, et al. (/Class Action/PAGA)
Case No.: 21CV392334

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 4, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VI. INTRODUCTION

This is a putative class and representative action arising out of various alleged wage and hour violations. The operative First Amended Complaint ("FAC"), filed on June 14, 2023, sets forth causes of action for: (1) Failure to Pay Minimum Wages; (2) Failure to Pay Wages and Overtime Under Labor Code § 510; (3) Meal-Period Liability Under Labor Code § 226.7; (4) Rest-Period Liability Under Labor Code § 226.7; (5) Failure to Pay Vacation Wages; (6) Failure to Comply with Labor Code §§ 245 and 246; (7) Reimbursement of Necessary Expenditures Under Labor Code § 2802; (8) Failure to Comply with Labor Code § 2751; (9) Violation of Labor Code § 226(a); (10) Failure to Keep Required Payroll Records Under Labor Code §§ 1174 and 1174.5; (11) Penalties Pursuant to Labor Code § 203; (12) Violation of Business and Professions Code § 17200 et seq.; and (13) Penalties Pursuant to Labor Code § 2699 et seq.

The parties have reached a settlement. Plaintiff Sasha Balabanoff ("Plaintiff") now moves for preliminary approval of the settlement. The motion is unopposed.

VII. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

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

(*Wershba*, *supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba*, *supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid*., quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

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

(*Wershba*, *supra*, 91 Cal.App.4th at p. 245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

VIII. DISCUSSION

F. Provisions of the Settlement

> The case has been settled on behalf of the following class:
> [A]ll persons employed by [defendant] Classic Vacations, LLC in California and classified as non-exempt employee who worked for [defendants Classic Vacations, LLC, Classic Custom Vacations (a d/b/a of Classic Vacations, LLC), Expedia, Inc., and Expedia Group, Inc. (collectively, "Defendants")] during the Class Period.

(Declaration of David Yeremian in Support of Motion for Preliminary Approval of Class Action Settlement ("Yeremian Dec."), Ex. A ("Settlement Agreement"), ¶¶ 1.5, 1.16.) The Class Period is defined as the period from September 23, 2017 to January 16, 2023. (*Id.* at ¶ 1.12.) The class also contains a subset of aggrieved employees that are defined as "person[s] employed by Classic Vacations, LLC in California and classified as a non-exempt employee who worked for Defendants during the PAGA Period." (*Id.* at ¶ 1.4.) The PAGA Period is defined as the period from September 23, 2020 to January 16, 2023. (*Id.* at ¶ 1.31.)

According to the terms of settlement, Defendants will pay a gross, non-reversionary amount of $450,000. (Settlement Agreement, ¶¶ 1.22, 3.1.) The gross settlement amount includes attorney fees of $150,000 (1/3 of the gross settlement amount), litigation costs not to exceed $25,000, a service award for the class representative not to exceed $7,500, settlement administration costs not to exceed $8,500, and a PAGA allocation of $20,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to aggrieved employees). (*Id*. ¶¶ 1.3, 1.7, 1.14, 1.22-1.24, 1.27, 1.34, 3.2.)

The net settlement amount will be distributed to the class members on a pro rata basis based on the number of workweeks worked during the Class Period. (Settlement Agreement, ¶¶ 1.28, 1.34, 3.2.) Similarly, PAGA members will receive a pro rata share of the 25 percent portion of the PAGA payment allocated to them based on the number of workweeks worked during the PAGA Period. (*Ibid*.)

Checks remaining uncashed more than 180 days after mailing will be void and the funds from those checks will be transmitted to the California Controller's Unclaimed Property Fund.

The parties' proposal to send funds from uncashed checks to the Controller of the State of California does not comply with Code of Civil Procedure section 384, which mandates that unclaimed or abandoned class member 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." Plaintiff is directed to identify a new *cy pres* in compliance with Code of Civil Procedure section 384 prior to the continued hearing date.

In exchange for the settlement, class members agree to release Defendants", and related persons and entities, from

> (i) failure to pay all regular wages, minimum wages and overtime wages due; (ii) failure to provide meal periods or compensation in lieu thereof; (iii) failure to provide rest periods or compensation in lieu thereof; (iv) failure to provide complete, accurate wage statements; (v) failure to pay wages timely at time of termination or resignation; (vi) failure to pay vacation wages; (vii) failure to pay sick pay; (viii) reimbursement of necessary business expenses; (ix) failure to provide a written contract signed by employer and employee for payment of commissions; (x) failure to maintain accurate records; (xi) failure to keep required payroll records; (xii) unfair business practices that could have been premised on the claims, causes of action or legal theories of relief described

> above or any of the claims, causes of action or legal theories of relief pleaded in the operative complaints, and (xiii) all claims under the California Labor Code Private Attorneys General Act of 2004 or for civil penalties that could have been premised on the claims, causes of action or legal theories described above or any of the claims, causes of action or legal theories of relief pleaded in the operative complaints, including but not limited to, Labor Code §§ 201-204, 210, 226, 226.3, 226.7, 510, 512, 558, 1174, 1194, 1197, 1197.1, 1198, 2802, any applicable California Industrial Welfare Commission Wage Order, PAGA, California Labor Code §§ 2699, et seq., and any remedies for any of the PAGA claims described herein, including civil penalties, declaratory relief, equitable relief, interest, and attorneys' fees and costs (collectively, the "Released Claims"). This release shall apply to claims arising during the Class Period. Except as set forth in Section 5.2 of this Agreement, Participating Class Members do not release any other claims, including claims for vested benefits, wrongful termination, violation of the Fair Employment and Housing Act, unemployment insurance, disability, social security, workers' compensation, or claims based on facts occurring outside the Class Period.

(Settlement Agreement, ¶¶ 1.41, 5.2.)

Aggrieved employees agree to release Defendants, and related persons and entities, from

> all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint, the PAGA Notices, and ascertained in the course of the Action, including but not limited to, all PAGA claims premised upon California Labor Code §§ 201-204, 210, 226, 226.3, 226.7, 227.3, 510, 512, 558, 558.1, 1174, 1174.5, 1182.12, 1185, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2802, any applicable California Industrial Welfare Commission Wage Order, PAGA, California Labor Code §§ 2699, et seq., and any remedies for any of the PAGA claims described herein, including civil penalties, declaratory relief, equitable relief, interest, and attorneys' fees and costs.

(Settlement Agreement, ¶¶ 1.41, 5.3.) Plaintiff further agrees to a general release. (*Id*. at ¶ 5.1.)

B. Fairness of the Settlement

Plaintiff asserts that the settlement is fair, reasonable, and adequate, given the strength of her claims, the inherent risks of litigation, including substantial risks relative to class certification and the merits of the claims, and the costs of pursuing litigation. Plaintiff conducted informal discovery, which included reviewing and analyzing time and pay records, employment handbooks, Plaintiff's personnel files, and relevant policies. (Yeremian Dec., ¶ 12.) Defendants also provided Plaintiff with a sampling of timekeeping records for 33 percent of the class. The parties attended mediation with Todd Smith, Esq., which resulted in the settlement agreement. (*Id*. at ¶ 14.) Plaintiff estimates that Defendants faced a maximum potential liability of $2,925,854.10 for all claims. (*Id*. at ¶¶ 24-52.) Plaintiff provides a detailed breakdown of this amount by claim. (*Ibid.*) Plaintiff asserts that for the approximately

189 class members, the average net recovery is approximately $1,291 per class member. (*Id*. at ¶ 48.)

The settlement represents approximately 15 percent of the maximum potential value of Plaintiff's claims. The proposed settlement amount is within the general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc*. (E.D.Ca|. 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].)

Overall, the court finds the settlement is fair. The settlement provides for some recovery for each class member and eliminates the risk and expense of further litigation.

However, the court notes that there is no evidence in the record showing that the proposed settlement was submitted to the LWDA as required under Labor Code section 2699, subdivision (l)(2). (Lab. Code, § 2699, subd. (l)(2) ["The superior court shall review and approve any settlement of any civil action filed pursuant to this part. The proposed settlement shall be submitted to the agency at the same time that it is submitted to the court."]; *Boddie v. Signature Flight Support Corp.* (N.D.Cal. June 28, 2021, No. 19-cv-03044-DMR) 2021 U.S.Dist.LEXIS 120176, at *14 ["the LWDA must be afforded an opportunity to review a proposed PAGA settlement"].) Prior to the continued hearing, Plaintiff shall file a supplemental declaration addressing whether the proposed settlement was submitted to the LWDA in compliance with Labor Code section 2699, subdivision (l)(2).

G. Incentive Award, Fees, and Costs

> Plaintiff requests an incentive award of $7,500 for the class representative. 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 submits a declaration generally detailing her participation in the action. However, Plaintiff does not provide an estimate of the time spent in connection with this litigation. Prior to the final approval hearing, the class representative shall file a supplemental declaration specifically detailing her participation in the action and an estimate of the time spent. The court will make a determination at that time.

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 of $150,000 (1/3 of the gross settlement fund). Plaintiff's counsel shall submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter 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 settlement administration costs.

H. Conditional Certification of Class

Plaintiff requests that the putative 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.)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc. v. Superior Court, 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 Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

Plaintiff states there are approximately 189 class members that can be ascertained from Defendants' 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. In sum, the court finds that the proposed class should be conditionally certified for settlement purposes.

I. 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 generally complies with the requirements for class notice. (Settlement Agreement, Ex. 1.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion.

However, the second line on page 1 of the class notice should be modified to include the case number and court following the case name.

Next, the first paragraph on page 2 is misleading as it states that class members have two basic options: "Do Nothing"; and "Opt-Out of the Class Settlement." This paragraph must be amended to include information regarding the third option of objecting to the settlement.

Section 3 on page 3 of the class notice currently has a blank space for the parties to input the gross settlement amount. This section must be modified to reflect that the gross settlement amount is $450,000.

Finally, section 8 on page 9 of the class notice contains language regarding the final approval hearing. That language shall be amended to include the following language:

> Class members may appear at the final approval hearing in person or remotely using the Microsoft Teams link for Department 19 (Afternoon Session). Instructions for appearing remotely are provided at https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml and should be reviewed in advance. Class members who wish to appear remotely are encouraged to contact class counsel at least three days before the hearing if possible, so that potential technology or audibility issues can be avoided or minimized.

The amended notice shall be provided to the court for approval prior to mailing.

IX. CONCLUSION

Accordingly, the motion for preliminary approval of the class and PAGA action settlement is CONTINUED to December 13, 2023, at 1:30 p.m. in Department 19. Plaintiff shall file a supplemental declaration, no later than November 20, 2023, identifying a new *cy pres* recipient and addressing whether the proposed settlement was submitted to the LWDA. Plaintiff shall also make the requested changes to the class notice and submit the amended class notice to the court for its approval. No additional filings are permitted.

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

- oo0oo -

Calendar Line 4

Case Name: Griego v. The Tehama Law Group, P.C., et al. (Class Action)
Case No.: 20CV363709

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 4, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

X. INTRODUCTION

This is a putative consumer class action brought pursuant to the California Rosenthal Fair Debt Collection Practices Act ("RFDCPA"). According to the allegations of the First Amended Class Action Complaint for Declaratory Relief, Injunctive Relief, and Damages ("FAC"), filed on April 13, 2020 in federal district court, plaintiff Maria Consuelo Griego ("Plaintiff") seeks statutory damages against defendants The Tehama Law Group, P.C. ("Tehama"), Kes Narbutas ("Narbutas"), Cypress Asset Recovery Services, LLC ("Cypress"), Jeff Fernandez ("Fernandez"), Eric Wilson, Matthew Wright, and Patelco Credit Union ("Patelco").[1] (FAC, ¶¶ 3 & 10-15.) Plaintiff alleges that the defendants had a routine practice of sending initial written communications, like the one sent to Plaintiff, that fail to contain the disclosure required by California Business and Professions Code sections 6077.5, subdivision (g)(4) and 6077.5, subdivision (g)(5), and which falsely represent or imply that a civil lawsuit has been filed to collect a defaulted consumer debt when no such lawsuit has been filed, and that the failure to pay will result in an accusation that the debtor has committed a crime. (*Ibid*.) The defendants also had a routine practice of sending voice messages, which falsely represent or imply that a civil lawsuit had been filed to collect a defaulted consumer debt and that the failure to pay would result in an accusation that the debtor had committed a crime. (*Ibid.*) The FAC sets forth the following causes of action: (1) Rosenthal Fair Debt Collection Practices Act; and (2) Violation of California Unfair Competition Law.

On December 16, 2022, the court entered defaults against Cypress and Fernandez.

On December 22, 2022, Patelco filed a Cross-Complaint against Tehama, Narbutas, Cypress, and Fernandez (aka Eric Wilson, aka Matthew Wright), alleging causes of action for:

[1] Cypress and Fernandez were substituted as Doe 1 and Doe 2, respectively, on January 12, 2021.

(1) Breach of Written Contract; (2) Fraud; (3) Negligence; (4) Tort of Another; (5) Express Contractual Indemnity; (6) Implied Indemnity; (7) Equitable Indemnity; (8) Legal Malpractice; (9) Contribution; (10) Declaratory Relief; and (11) Declaratory Relief.

On December 28, 2022, Plaintiff filed a Notice of Termination or Modification of Stay, advising the bankruptcy stay regarding Tehama was no longer in effect.

On January 31, 2023, Tehama and Narbutas filed a Cross-Complaint against Patelco and Fernandez (aka Eric Wilson, aka Matthew Wright), which sets forth causes of action for: (1) Equitable Indemnity; (2) Apportionment of Fault; and (3) Declaratory Relief.

Patelco and Plaintiff have entered into a settlement.

Now before the court are: (1) the joint motion by Plaintiff and Patelco for preliminary approval of class action settlement; and (2) the motion by Patelco for determination of good faith settlement. The motions are unopposed.

II. MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

A. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

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

(*Wershba, supra,* 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra,* 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba, supra,* 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the

extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid*., quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

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

(*Wershba*, *supra*, 91 Cal.App.4th at p. 245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

B. DISCUSSION

1. Provisions of the Settlement

> The case has been settled on behalf of the following class:
> All persons with addresses in California to whom [Tehama], sent, or caused to be sent, an initial written communication in the form of Exhibit "1" to the Complaint in an attempt to collect a consumer debt owed to [Patelco], which were not returned as undeliverable by the U.S. Post Office during the period from February 11, 2019, through the date of class certification.

(Declaration of Fred W. Schwinn in Support of Joint Motion for Preliminary Approval of Class Action Settlement and Provisional Class Certification ("Schwinn Dec."), Ex. A ("Settlement Agreement"), ¶ 2.3.)

According to the terms of settlement, Patelco will pay a non-reversionary amount of $245,900 to the class (i.e., no less than $100 to each of the estimated 2,459 class members). (Settlement Agreement, ¶¶ 4.1, 4.3, 4.4.) In addition to the class fund, Patelco will pay all costs associated with settlement administration, actual and statutory damages in the amount of $20,000 to Plaintiff, and attorney fees and costs not to exceed $350,000. (Settlement Agreement, ¶¶ 4.2, 4.5-4.7.)

The class fund will be distributed to the class members on a pro rata basis. (Settlement Agreement, ¶ 4.3.) Settlement checks will become void 90 days after mailing and funds from uncashed checks will be distributed to the Katherine & George Alexander Community Law Center. (Settlement Agreement, ¶¶ 4.3, 4.4.) The *cy pres* recipient is approved.

In exchange for the settlement, class members agree to release Patelco, and related persons and entities, from all claims alleging a violation of the California Rosenthal Fair Debt Collection Practices Act, Civil Code sections 1788-1788.33, or similar or related claims or causes of action, arising from or relating to collection letters allegedly mailed on behalf of Patelco in the form attached as Exhibit 1 to the FAC during the class settlement period. (Settlement Agreement, ¶¶ 2.15, 7.1.) Additionally, Plaintiff agrees to voluntarily withdraw from membership with Patelco and not reapply for membership at any time in the future. (Settlement Agreement, ¶ 4.2.)

2. Fairness of the Settlement

The parties assert that the settlement is fair, reasonable, and adequate, given Patelco's net worth, the strength of Plaintiff's claim, the inherent risks of litigation, and the costs of pursuing litigation. The parties actively litigated this case and conducted substantial formal discovery. The court also heard several dispositive motions. Following mediation with the Honorable Wynne Carvill (Ret.), the parties reached a settlement. The parties point out that Civil Code section 1788.17 incorporates the remedies articulated in 15 U.S.C. 1629K, which provide for statutory damages to the class in an amount not to exceed the lesser of $500,000 or 1 percent of the net worth of the debt collector. However, the parties do not provide any information regarding Patelco's net worth or an estimate of Patelco's maximum potential liability for statutory damages to the class. Rather, Plaintiff's counsel represents that Patelco disclosed financial information to Plaintiff and Plaintiff's counsel believes the settlement is fair given Patelco's net worth. The parties also set forth reasons why the value of the claim should be discounted.

At this time, the court cannot adequately evaluate the settlement because Plaintiff has not provided an estimate of the maximum amount of Patelco's potential liability for the RFDCPA claim. Notably, the value of the claim depends, in part, on Patelco's net worth. Because the parties have not provided the court with any information regarding Patelco's net worth, the court cannot discern the potential cash value of the claim, determine how much the case was discounted for settlement purposes, or review class counsel's evaluation of the

sufficiency of the settlement. (See *Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 130-131.)

In addition, the parties do not provide the court any information about the maximum potential value of Plaintiff's claim for violation of Business and Professions Code sections 6077.5, subdivision (g)(4) and 6077.5, subdivision (g)(5).

Consequently, prior to the continued hearing, Plaintiff's counsel shall submit a declaration which estimates Patelco's maximum potential liability for damages to the class for each claim alleged in the FAC, and explain how the estimate for the RFDCPA claim was reached given Patelco's net worth.

3. 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 of $350,000. Plaintiff's counsel shall submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. Plaintiff's counsel shall also submit evidence of actual costs incurred.

4. Conditional Certification of Class

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.)

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

Inc. v. Superior Court, 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 Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

The parties state that there are approximately 2,459 class members, which can be ascertained from Patelco's records. There are common issues because Patelco's potential liability is based on the same facts and legal issues that apply to all class members regarding the collection efforts. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. In sum, the court finds that the proposed class should be conditionally certified.

5. 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 complies with the requirements for class notice. (Settlement Agreement, Ex. 1.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion. The notice is, therefore, approved.

C. CONCLUSION

Accordingly, the motion for preliminary approval of the class action settlement is CONTINUED to December 13, 2023, at 1:30 p.m. in Department 19. Plaintiff shall file a supplemental declaration containing the requested information regarding the maximum amount of Patelco's potential liability no later than November 20, 2023. No additional filings are permitted.

III. MOTION FOR DETERMINATION OF GOOD FAITH SETTLEMENT

A. LEGAL STANDARD

Code of Civil Procedure section 877.6 provides that a party to an action involving two or more alleged joint tortfeasors may seek a determination that a settlement was made in good faith. To promote settlement (*Cal-Jones Properties v. Evans Pacific Corp.* (1989) 216 Cal.App.3d 324, 327), such determination "shall bar any other joint tortfeasor … from any further claims against the settling tortfeasor … for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." (Code Civ. Proc., § 877.6, subd. (c).) The amount paid by the settling defendant reduces the claim against the other defendants. (Code Civ. Proc., § 877, subd. (a).)

In *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488 (*Tech-Bilt*), the Supreme Court set forth factors to be considered in approving a good faith settlement, including:

> a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants.

(*Tech-Bilt, supra*, 38 Cal.3d at p. 499.)

However, "only when the good faith nature of a settlement is disputed" is it "incumbent upon the trial court to consider and weigh the *Tech-Bilt* factors." (*City of Grand Terrace v. Superior Court* (*Boyter*) (1987) 192 Cal.App.3d 1251, 1261 (*City of Grand Terrace*).)

"Where there are multiple defendants, each having potential liability for different areas of damage, an allocation of the settlement amount must be made." (*L.C. Rudd & Son, Inc. v. Superior Court* (*Krystal*) (1997) 52 Cal.App.4th 742, 750.) It is the settling parties' burden to

explain "the evidentiary basis for any allocations and valuations made sufficient to demonstrate that a reasonable allocation was made." (*Ibid.*) Nevertheless,

> the inquiry at the good faith settlement stage is not the same as the inquiry at trial, where complete precision of allocation could presumably be achieved. Since we are dealing with a pretrial settlement, in which the factual findings or determinations made on contested issues of liability or damages are tentative, … we must necessarily apply a broader and more permissive standard for evaluating good faith of a settlement as to such allocation. … [W]hat should be required of the settling parties is that they furnish to the court and to all parties an evidentiary showing of a rational basis for the allocations made and the credits proposed. They must also show that they reached these allocations and credit proposals in an atmosphere of appropriate adverseness so that the presumption may be applied that a reasonable valuation was reached.

(*Regan Roofing v. Superior Court* (*Finkelstein*) (1994) 21 Cal.App.4th 1685, 1704, internal citations omitted.) "[W]here the settling parties have failed to allocate, the trial court must allocate in the manner which is most advantageous to the nonsettling party." (*Dillingham Construction N.A., Inc. v. Nadel Partnership* (1998) 64 Cal.App.4th 264, 287.)

The court may consider affidavits and counteraffidavits, and may receive other evidence at the hearing on the motion in its discretion. (Code Civ. Proc., § 877.6, subd. (b).) "The party asserting the lack of good faith shall have the burden of proof on that issue." (Code Civ. Proc., § 877.6, subd. (d).) Bad faith may be established by "demonstrat[ing] that the settlement is so far 'out of the ballpark' in relation to [the *Tech-Bilt*] factors as to be inconsistent with the equitable objectives of the statute." (*Tech-Bilt, supra,* 38 Cal.3d at pp. 499-500.) "[W]hen no one objects, the barebones motion which sets forth the ground of good faith, accompanied by a declaration which sets forth a brief background of the case is sufficient." (*City of Grand Terrace, supra*, 192 Cal.App.3d at p. 1261.)

B. DISCUSSION

Patelco asserts that its settlement with Plaintiff (which provides for $20,000 to Plaintiff for actual and statutory damages, and $245,900 to be distributed to class members pro rata for statutory damages) is in good faith because it has a complete defense to the FAC. Specifically, Patelco asserts that it did not authorize Tehama (or have Cypress authorize Tehama) to provide legal services or undertake collection activities on its behalf. Patelco states that the case has been intensely litigated, and was settled after the parties engaged in discovery and mediation with the Honorable Wynne Carvill (Ret.). Patelco settled for a release of all of Plaintiff's claims related to this matter. Patelco believes that the settlement with Plaintiff is within the

"ballpark" relative to its potential share of liability because Plaintiff cannot demonstrate that it is liable. Patelco also requests the court dismiss Tehama and Narbutas's Cross-Complaint with prejudice pursuant to California Rules of Court rule 3.1382. (Cal. Rules of Court, Rule 3.1382 ["A motion or application for determination of good faith settlement may include a request to dismiss a pleading or a portion of a pleading. The notice of motion or application for determination of good faith settlement must list each party and pleading or portion of pleading affected by the settlement and the date on which the affected pleading was filed."].)

As explained above in connection with the parties' motion for preliminary approval of settlement, the court requires additional information in order to evaluate the settlement. Consequently, the court will address the merits of Patelco's motion for determination of good faith settlement after it has had an opportunity to review the additional information to be provided by the parties.

C. CONCLUSION

Accordingly, the motion for determination of good faith settlement is CONTINUED to December 13, 2023, at 1:30 p.m. in Department 19.

The Case Management Conference is also continued, from October 4, 2023 to December 13, 2023 at 2:30 p.m.

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: ZL Technologies, Inc. v. Splitbyte Inc., et al. (LEAD CASE; Consolidated With 20CV373027, 20CV373149, 21CV378097, 21CV382329)
Case No.: 20CV366939

The above-entitled actions come on for hearing before the Honorable Theodore C. Zayner on October 4, 2023, at 9:00 a.m. in Department 19. The court now issues its tentative ruling as follows:

XI. INTRODUCTION

This consolidated action involves five related matters:

(1) *ZL Technologies, Inc. v. SplitByte Inc, et al.* (Case No. 20CV366939);

(2) *Arvind Srinivasan v. ZL Technologies, Inc., et al*. (Case No. 20CV373027);

(3) *Arvind Srinivasan v. ZL Technologies, Inc*. (Case No. 20CV373149);

(4) *ZL Technologies, Inc., et al. v. Arvind Srinivasan* (Case No. 21CV378097); and

(5) *Arvind Srinivasan v. ZL Technologies, Inc*. (Case No. 21CV382329).

On June 6, 2023, defendant Arvind Srinivasan ("Srinivasan") filed: (1) a Notice of Discovery Referee's Order of May 1, 2023, Granting in Part Defendants' Motion to Compel Further Deposition of Plaintiff's Witness Chimmy Shioya ("May 1 Order"); and (2) a Notice of Discovery Referee's Order of May 22, 2023, Denying Defendants' Motion to Compel Further Deposition of Plaintiff's Witness Kon Leong ("May 22 Order").

The May 1 Order recites that a hearing was conducted on May 1, 2023, regarding Defendants' Motion to Compel Further Deposition of Plaintiff's Witness Chimmy Shioya and for Sanctions. It states that Code of Civil Procedure section 2025.290, subdivisions (b)(3) and (4) except complex cases and cases arising out of an employment relationship, like this one, from the seven-hour limit on depositions. The order further states that "[a] showing of the need for additional time is made." However, the Referee found that defendant Chimmy Shioya ("Shioya") was a non-party witness, the deposition "was conducted in an uncivil manner," Shioya "was harassed and treated with disrespect," and "[s]ome of the questioning was repetitive and argumentative." The Referee opined that "[w]ith proper focus and no argument with the witness, seven hours should be sufficient time to complete [Shioya's] deposition" and "[t]here was not a sufficient showing that two days are needed to do so." The order also disallowed contention questions and denied the request for sanctions.

The May 22 Order recites that a hearing was conducted on May 17, 2023, regarding Defendants' Motion to Compel Further Deposition of Plaintiff's Witness Kon Leong and for Sanctions. The motion sought five additional days of deposition testimony from defendant Kon Leong ("Leong"), the CEO of plaintiff ZL Technologies, Inc. ("ZL Technologies"), on the grounds that Leong refused to answer questions about key issues in the case. The order notes that Leong was deposed as ZL Technologies' person most knowledgeable ("PMK") for one day and in his individual capacity for two days. The Referee found that Leong was asked and answered questions at his PMK deposition that covered the issues raised in the motion. The Referee determined that there was "an insufficient showing [that] more time is needed to depose this witness as Defendants have failed to identify any subjects not already covered in the three days of depositions of this witness." The Referee also commented that the deposition was a "apex deposition" and "[m]any of the questions asked […] were improperly repetitive and argumentative." Consequently, the order denied the motion and the request for sanctions.

On June 6, 2023, Srinivasan and defendants Splitbyte, Inc., MI17, Inc., and KapiSoft, Inc. (collectively, "Defendants ") filed Objections to the May 1 Order and the May 22, Order. The Objections ask the court to reconsider the Referee's decisions and allow two additional days of deposition testimony from Shioya and five additional days of deposition testimony from Leong. The Objections are supported by the declarations of J. Philip Martin as well as requests for judicial notice.

On June 30, 2023, Shioya filed Objections to Discovery Referee's Order of May 1, 2023 and Opposition to Defendants Objections, supported by the declaration of James Wagstaffe. Shioya asks the court to deny Defendants any additional time to depose her, arguing that her deposition was conducted in a harassing manner. That same day, ZL Technologies and Leong filed a Response to Defendants' Objections to Discovery Referee's Order of May 22, 2023, supported by the declaration of James Wagstaffe.

On July 14, 2023, Defendants filed reply papers.

Defendants' Objections to the May 1 Order and the May 22, Order proceed to hearing on July 26, 2023. The minute order from the hearing states that the matter was taken under submission and a written decision would be mailed to the parties.

On September 7, 2023, the court entered the Order Re: Objections to Referee's Orders of May 1 and 22, 2023, sustaining Defendants' Objections to the May 1 Order and the May 22, Order to the extent the orders refused to allow Defendants additional time to conduct Shioya's and Leong's depositions. The court expressly granted Defendants leave to proceed with the depositions of Shioya and Leong.

Now before the court is the motion by ZL Technologies for summary adjudication of: (1) ZL Technologies' sixth cause of action for breach of contract; (2) Srinivasan's tenth cause of action for reformation; (3) Srinivasan's fifth cause of action for breach of alleged severance contract; and (4) Srinivasan's sixth cause of action for breach of alleged contract for a Chennai office. Srinivasan opposes the motion.

II. DISCUSSION

As an initial matter, Srinivasan argues that ZL Technologies' motion for summary adjudication should be denied to allow Srinivasan additional time to proceed with the depositions of Shioya and Leong. Srinivasan provides a declaration from his counsel, explaining that Srinivasan has been unable to complete the depositions of Shioya and Leong despite diligent efforts to compel further testimony. (Declaration of Daniel Ray Bacon in Support of the Opposition to ZL Technologies, Inc.'s Motion for Summary Adjudication ("Bacon Dec."), ¶¶ 2-4.) In particular, Srinivasan's counsel notes that at the time Srinivasan's opposition to the motion for summary adjudication was due, the court had not issued a final order on Defendants' Objections to the May 1 Order and the May 22. Srinivasan's counsel then identifies several exhibits that ZL Technologies submitted in support of its motion for summary adjudication, which Srinivasan has not had the opportunity to question Shioya and Leong about at deposition. (Bacon Dec., ¶¶ 5, 9.)

Srinivasan's request for additional time to complete discovery is made pursuant to Code of Civil Procedure section 437c, subdivision (h). That statutes states, in pertinent part, that "[i]f it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just."

Where a party requests a denial or a continuance to obtain facts essential to justify opposition to a motion for summary adjudication, the determination whether to grant the request is vested in the discretion of the trial court. (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 643 (*Chavez*).)

> "Notwithstanding the court's discretion in addressing such continuance requests, 'the interests at stake are too high to sanction the denial of a continuance without good reason.' [Citation.] Thus, '[t]o mitigate summary judgment's harshness, the statute's drafters included a provision making continuances—which are normally a matter within the broad discretion of trial courts—virtually mandated " 'upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion.' " ' " [Citation.]
>
> To make the requisite good faith showing, an opposing party's declaration must show (1) the facts to be obtained are essential to opposing the motion, (2) there is reason to believe such facts may exist, and (3) the reasons why additional time is needed to obtain these facts. [Citation.] The reason for this "exacting requirement" [citation] is to prevent "every unprepared party who simply files a declaration stating that unspecified essential facts may exist" [citation] from using the statute "as a device to get an automatic continuance" [citation]. "The party seeking the continuance must justify the need, by detailing both the particular essential facts that may exist and the specific reasons why they cannot then be presented." [Citation.]

(*Chavez, supra*, 238 Cal.App.4th at p. 643, citations omitted.)

Here, the declaration by Srinivasan's attorney addresses the diligent efforts made to obtain further deposition testimony from Shioya and Leong, as well as the fact that the deposition testimony available to Srinivasan, at the time his opposition was due, did not address several of the exhibits submitted in support of ZL Technologies' motion for summary adjudication. However, Srinivasan's counsel did not describe the specific facts Shioya and Leong might provide about the exhibits, nor explain why those facts might be essential. Thus, the court cannot say the declaration satisfies the section 437c, subdivision (h) requirements.

Nonetheless, "[e]ven absent a sufficient declaration, 'the court must determine whether the party requesting the continuance has nonetheless established good cause therefor.' [Citation.]" (*Chavez, supra*, 238 Cal.App.4th at p. 643, citations omitted.) Under the facts presented here, the court finds that there is good cause for a continuance to allow Srinivasan to complete the depositions of Shioya and Leong.

"First, the purpose of the declarations required by section 437c, subdivision (h) is to inform the court of outstanding discovery necessary to resist the summary judgment motion. [Citation.]" (*Chavez, supra*, 238 Cal.App.4th at p. 643, citations omitted.) Here, the declaration from Srinivasan's

counsel and the summary adjudication papers together are sufficient to notify the court of the need for Shioya's and Leong's testimony. It is apparent from the summary adjudication briefing that Shioya and Leong likely possess unique knowledge regarding the primary disputes at issue, such as the formation of the Loan Agreement and the alleged severance agreement. That the purpose of the requisite declaration was otherwise satisfied weighs in favor of granting a continuance despite the absence of an adequate declaration. (See *Chavez, supra,* 238 Cal.App.4th at pp. 643-644.)

"Second, in deciding whether to continue a summary judgment to permit additional discovery courts consider various factors, including (1) how long the case has been pending; (2) how long the requesting party had to oppose the motion; (3) whether the continuance motion could have been made earlier; (4) the proximity of the trial date or the 30-day discovery cutoff before trial; (5) any prior continuances for the same reason; and (6) the question whether the evidence sought is truly essential to the motion. [Citation.]" (*Chavez, supra,* 238 Cal.App.4th at p. 644.) Most of these factors favor a continuance here. Although this consolidated action has been pending for approximately three years, no trial is set and the court recently issued its formal order granting Srinivasan leave to complete Shioya's and Leong's depositions. Srinivasan diligently sought the testimony at issue and promptly requested additional time to adequately oppose the instant motion. And, most importantly, the subject testimony is plainly essential to Srinivasan's opposition.

Accordingly, the court grants Srinivasan's request for additional time to complete Shioya's and Leong's depositions. Rather than deny the pending motion for summary adjudication, the court orders the motion CONTINUED to January 10, 2024, at 1:30 p.m. in Department 19. Srinivasan shall file any amended opposition to the motion for summary adjudication (including any additional evidence obtained from Shioya's and Leong's further depositions) no later than November 29, 2023. ZL Technologies shall file any response to the amended opposition no later than December 13, 2023. No additional filings are permitted.

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

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Calendar Line 6

Case Name: Cheung v. C2 Educational Systems, Inc. (PAGA)
Case No.: 23CV417697

Unopposed application for admission *pro hac vice* is GRANTED. No appearance necessary. Counsel to submit proposed Order.

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Calendar Line 7

Case Name: Ayala, et al. v. Central Coast Agriculture, Inc. (Class Action)
Case No.: 22CV407762

Unopposed application for admission *pro hac vice* is GRANTED. No appearance necessary. Counsel to submit proposed Order.

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Calendar Line 8

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

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 4, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XII. INTRODUCTION

Plaintiff Alorica Inc. ("Plaintiff") brings this action for breach of contract and fraud against defendant Fortinet, Inc. ("Defendant"). Plaintiff alleges that, following extensive negotiations and discussions, it purchased thousands of products from Defendant in an amount exceeding $10,000,000 between September 2017 and September 2018. (Second Amended Complaint ("SAC"), ¶¶ 4-15.) The products included the Fortinet FortiGate models FG-201E, FG-500E, FG-600D, FG-l500D, FG-3200D, and FG-3960E; Fortinet FortiSwitch models FSW-248D, FSW-248D-FPOE, FSW-248E-FPOE, FSW-448D, FSW-448D-FPOE, and FSW-1024D; and network management software including FortiManager, FortiAnalyzer, and FortiAuthenticator. (SAC, ¶ 15.) Plaintiff also purchased enhanced support and extended services from Defendant to ensure that any problems that arose would be promptly resolved. (*Id.* at ¶ 16.) Plaintiff alleges that Defendant made numerous misrepresentations regarding the capabilities, functionality, and point of development of its software and hardware, which induced Plaintiff to purchase Defendant's products and services. (*Id.* at ¶¶ 18, 33, 36-38, 54, 56, 60, & 62.)

Shortly after Plaintiff and Defendant began deploying and implementing the products in Plaintiff's facilities in January 2018, Plaintiff encountered problems with Defendant's software and hardware that Defendant failed to fix. (SAC, ¶¶ 17-34 & 39.) Plaintiff alleges that Defendant breached warranties in the Fortinet End User License Agreement by failing to provide hardware free from material defects in workmanship and failing to provide software that substantially conformed to Defendant's functional specifications. (*Id.* at ¶¶ 45-49.) Plaintiff also alleges that Defendant made various misrepresentations that induced it to continue to deploy Defendant's products and services. (*Id.* at ¶¶ 54, 56, 60, & 62.) Plaintiff

further alleges that when Defendant was able to develop a fix for a problem, it promised to include the fixes in FortiOS v. 6.0, the next version of the FortiOS software to be released. (*Id.* at ¶¶ 34, 54, & 60.) However, when Defendant released FortiOS v. 6.0 in March 2018, it did not include many of the fixes thereby stranding Plaintiff on its own heavily patched, customized version of FortiOS v. 5.6. (*Id.* at ¶ 35.) As a result of Defendant's conduct, Plaintiff allegedly sustained damages, such as the costs of and lost revenue from many network outages caused by Defendant's defective equipment and financial penalties incurred because Plaintiff is subject to service level commitments that require its agents to handle and resolve calls within a certain period of time. (*Id.* at ¶¶ 43, 52, 58, & 64.)

The operative SAC, filed on November 8, 2021, sets forth causes of action for: (1) Breach of Warranty; (2) Negligent Misrepresentation; and (3) Intentional Misrepresentation.

Now before the court is the motion by Plaintiff to seal portions of Defendant's Motion to Reopen Discovery for the Limited Purpose of Issuance of a Third-Party Subpoena.

II. LEGAL STANDARD

"The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist 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.)

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), (5).) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*Providian, supra*, 96 Cal.App.4th at p. 309.)

III. DISCUSSION

Plaintiff seeks to seal Exhibits 2-4, 8-13, and 21-22 to the Declaration of Lindsay Cooper in Support of Fortinet's Motion to Reopen Discovery, and portions of Defendant's memorandum of points and authorities that reference those exhibits. The materials at issue contain Plaintiff's confidential financial and business information. (Declaration of Arjun Sivakumar, ¶ 4.) This information is not publicly available, and its disclosure could prejudice Plaintiff. (*Ibid.*) Additionally, the materials have been designated as "confidential" under the parties' protective order. (*Ibid*.) The proposed sealing appears to be narrowly tailored to the confidential information.

The court therefore finds that Plaintiff has established an overriding interest that justifies sealing these materials, and the other factors set forth in rule 2.550 are satisfied. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 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.

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

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Calendar Line 9

Case Name: Guzik Technical Enterprises v. Keysight Technologies, Inc.
Case No.: 19CV355879

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 4, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XIII. INTRODUCTION

This case arises out of defendant Keysight Technologies' ("Defendant") alleged tortious scheme to defraud and steal valuable business opportunities from plaintiff Guzik Technical Enterprises ("Plaintiff"). Plaintiff's original Complaint, filed on September 30, 2019, set forth the following causes of action: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Intentional Misrepresentation; (4) Promise Without Intent to Perform; (5) Fraudulent Omission; (6) Breach of Fiduciary Duty; (7) Quasi-Contract Based on Unjust Enrichment; (8) Violation of California Bus. & Prof. Code § 17200; (9) Intentional Interference with Prospective Economic Advantage; (10) Trade Secret Misappropriation – Cal Civ. Code, § 3426, et seq.; (11) Violation of the Cartwright Act – Cal. Bus. & Prof. Code, § 16700, et seq.; and (12) Promissory Estoppel.

On August 3, 2020, Plaintiff served Defendant with its original Trade Secret Disclosure, which identified nine trade secrets.

Defendant demurred to the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, and twelfth causes of action on the grounds that they did not state facts sufficient to constitute a cause of action. On September 24, 2020, the court overruled the demurrer as to the first cause of action and sustained the demurrer with leave to amend as to all other causes of action.

The First Amended Complaint ("FAC"), filed on October 14, 2020, set forth the following causes of action: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Fraud – Intentional Misrepresentation; (4) Fraud – Promise Without Intent to Perform; (5) Breach of Fiduciary Duty; (6) Fraud – Fraudulent Omission; (7) Trade Secret Misappropriation – Cal Civ. Code, § 3426, et seq.; (8) Violation of the

Cartwright Act – Cal. Bus. & Prof. Code, § 16700, et seq.; (9) Promissory Estoppel; (10) Violation of California Bus. & Prof. Code, § 17200, et seq.; (11) Intentional Interference with Prospective Economic Advantage; and (12) Quasi-Contract Based on Unjust Enrichment.

On January 31, 2021, Plaintiff served Defendant with its First Amended Trade Secret Disclosure, which identified eighth trade secrets (some of which have numerous sub-parts).

Defendant demurred to the first, second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, and twelfth causes of action in the FAC on the grounds that they did not state facts sufficient to constitute a cause of action. On February 19, 2021, the court overruled the demurrer as to the first, second, third, fourth, fifth, sixth, ninth, tenth, and twelfth causes of action, and sustained the demurrer with leave to amend as to the eighth, and eleventh causes of action.

The Second Amended Complaint ("SAC"), filed on March 11, 2021, set forth the following causes of action: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Fraud – Intentional Misrepresentation; (4) Fraud – Promise Without Intent to Perform; (5) Breach of Fiduciary Duty; (6) Fraud – Fraudulent Omission; (7) Trade Secret Misappropriation – Cal Civ. Code, § 3426, et seq.; (8) Violation of the Cartwright Act – Cal. Bus. & Prof. Code, § 16700, et seq.; (9) Promissory Estoppel; (10) Violation of California Bus. & Prof. Code, § 17200, et seq.; (11) Intentional Interference with Prospective Economic Advantage; and (12) Quasi-Contract Based on Unjust Enrichment.

On June 17, 2021, the court entered the Order Re: Statement of Decision Granting Guzik Technical Enterprises' Motion to Compel Trade Secret Discovery, overruling Defendant's objections to Plaintiff's First Amended Trade Secret Disclosure.

Defendant demurred to the eighth and eleventh causes of action in the SAC on the grounds that they did not state facts sufficient to constitute a cause of action. On June 24, 2021, the court overruled the demurrer as to the eighth cause of action and sustained the demurrer without leave to amend as to the eleventh cause of action.

On June 13, 2023, the court entered the Stipulation and Order Regarding Amended Pleadings, granting the parties leave to amend their pleadings.

On June 14, 2023, Plaintiff filed the operative Third Amended Complaint ("TAC"), which sets forth the following causes of action: (1) Breach of Contract; (2) Breach of the Implied Covenant of Good Faith and Fair Dealing; (3) Fraud – Intentional Misrepresentation; (4) Fraud – Promise Without Intent to Perform; (5) Breach of Fiduciary Duty; (6) Fraud – Fraudulent Omission; (7) Trade Secret Misappropriation – Cal Civ. Code, § 3426, et seq.; (8) Violation of the Cartwright Act – Cal. Bus. & Prof. Code, § 16700, et seq.; (9) Promissory Estoppel; (10) Violation of California Bus. & Prof. Code, § 17200, et seq.; (11) Intentional Interference with Prospective Economic Advantage; and (12) Quasi-Contract Based on Unjust Enrichment.

On June 15, 2023, Plaintiff served Defendant with a Second Amended Trade Secret Disclosure, which purports to add three new trade secrets (Nos. 9-11) and twelve exhibits (Nos. 28-40).

The parties participated in an Informal Discovery Conference on July 17, 2023, in an attempt to resolve their disagreement regarding whether Plaintiff can unilaterally amend the First Amended Trade Secret Disclosure. The parties were unable to resolve their dispute.

Now before the court is Plaintiff's motion for an order deeming Plaintiff's Second Amended Trade Secret Disclosure operative in this matter or, alternatively, an order granting Plaintiff leave to amend its trade secret disclosure so that the Second Amended Trade Secret Disclosure can become operative. Defendant opposes the motion.

XIV. LEGAL STANDARD

As a threshold matter, the parties disagree regarding the applicable legal standard. Plaintiff contends it is entitled to unilaterally amend its trade secret disclosure without leave of court or showing good cause for the amendment. Conversely, Defendant asserts that Plaintiff is required to seek leave of court and demonstrate good cause to amend its trade secret disclosure.[2]

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

The parties do not identify, and the court is not aware of, any published California opinion that directly addresses the legal standard applicable when a party seeks to amend its trade secret disclosure.

Nonetheless, the court finds the Fourth District Court of Appeal's comments in *Perlan Therapeutics, Inc. v. Superior Cour*t (2009) 178 Cal.App.4th 1333 (*Perlan*) instructive. In *Perlan*, the reviewing court held:

> *Perlan is not entitled to include broad, "catch-all" language as a tactic to preserve an unrestricted, unilateral right to subsequently amend its trade secret statement.* If Perlan does not know what its own trade secrets are, it has no basis for suggesting defendants misappropriated them. Nor is Perlan entitled to hide its trade secrets in "plain sight" by including surplusage and voluminous attachments in its trade secret statement.
>
> *If, through discovery, Perlan uncovers information suggesting defendants misappropriated additional trade secrets, it may have good cause to amend its trade secret statement under appropriate circumstances*. (See *Neothermia Corp. v. Rubicor Medical, Inc.* (N.D.Cal. 2004) 345 F.Supp.2d 1042, 1045 [applying prior version of § 2019.210 and indicating plaintiffs would be required to show good cause to amend trade secret statement]; Graves & Range, *supra*, 5 Nw. J. Tech. & Intell. Prop. at p. 99 ["One can envision circumstances where amendment [of the trade secret statement] would be proper, such as where a plaintiff learns that a defendant has misappropriated trade secrets beyond those first believed to be at issue."]; but see *Pixion, Inc. v. Placeware Inc*. (N.D.Cal. 2005) 421 F.Supp.2d 1233, 1242 [refusing to allow plaintiff to amend § 2019.210 disclosure to defeat motion for summary judgment].)

(*Perlan Therapeutics, supra*, 178 Cal.App.4th at pp. 1350-1351, italics added.) This discussion in *Perlan* strongly suggests that a party does not possess a unilateral right to amend its trade secret statement, but must demonstrate good cause for the proposed amendment.

Notably, *Neothermia Corp. v. Rubicor Med., Inc.* (N.D.Cal. 2004) 345 F.Supp.2d 1042 (*Neothermia*)—which *Perlan* cites with approval—explains why the good cause requirement furthers the purposes of Code of Civil Procedure section 2019.210. The court in *Neothermia* stated:

> Neothermia should not have free rein to amend its trade secret identification without limits. The purposes of § 2019(d)—in particular, the goals of preventing a plaintiff from using discovery as a means to obtain a defendant's trade secrets and enabling a "defendant[] to form complete and well-reasoned defenses, ensuring that [it] need not wait until the eve of trial to effectively defend against charges of trade secret misappropriation," [citation]—would easily be frustrated were Neothermia given complete freedom to amend its disclosure under § 2019(d) as the case evolves. Accordingly, the Court cautions

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On the other hand, some of the opinions cited by Defendant are unpublished federal cases. These opinions may be cited as persuasive authority notwithstanding California Rules of Court, rule 8.1115 because that rule only applies only to opinions originating in California. (*Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 990; *Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1077 ["Opinions from other jurisdictions can be cited without regard to their publication status."]; *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal.App.4th 238, 251, fn. 6; *Apple Inc. v. Superior Court* (2017) 18 Cal.App.5th 222, 247, fn. 11.)

> Neothermia that, should it seek to amend its trade secret identification in the future, it shall have to demonstrate good cause for the amendment.

(*Neothermia, supra,* 345 F.Supp.2d at pp. 1044-1045.)

In light of these authorities, the court agrees with Defendant that Plaintiff must demonstrate good cause before amending its trade secret disclosure. Such a requirement is warranted to prevent a "shifting sands" approach to trade secrets allegations and discovery.

The legal authority cited by Plaintiff—*Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34 (*Vacco*)—does not compel a contrary conclusion. As is relevant here, the defendants in *Vacco* complained that the plaintiffs "failed to properly identify the trade secrets which they sought to protect as required by Code of Civil Procedure section 2019, subdivision (d), prior to commencing discovery." (*Vacco, supra,* 5 Cal.App.4th at p. 51, fn. 16.) The reviewing court noted that the plaintiffs filed a notice identifying trade secrets for which they sought protection and, after discovery commenced, the notice was amended several times. (*Ibid.*) Without any further explanation or analysis the court concluded, "We find no error in this procedure and the trial court did not abuse its discretion in denying defendants' motion in limine which sought to limit plaintiffs to the trade secrets described in their original notice." (*Vacco, supra,* Cal.App.4th at p. 51, fn. 16.) *Vacco* does not conflict with *Neothermia* and *Perlan*; rather, it stands for the proposition that a party is not precluded from amending its trade secret disclosure under Code of Civil Procedure section 2019.210. (Accord *Neothermia, supra,* 345 F.Supp.2d at p. 1044 ["§ 2019(d) contains no express provision that prevents a party from amending its trade secret identification thereunder. […] To read § 2019(d) as to ban a plaintiff from amending its disclosures or responses would raise serious questions under the Erie doctrine."].) Notably, *Vacco* did not purport to address whether the party seeking to amend must demonstrate good cause for the amendment. For these reasons, *Vacco* does not alter the court's analysis of this issue.

XV. DISCUSSION

Plaintiff argues that it has good cause to amend its trade secret disclosure because it only recently learned that Defendant misappropriated and used more trade secrets for its competing digitizer. Plaintiff asserts that the documents alerting it to Defendant's use of the additional trade secrets were produced by Defendant in March 2023, and were mostly in

German. Specifically, Plaintiff contends that upon reviewing documents in Defendant's final TAR production on March 3, 2023, Plaintiff learned for the first time that Defendant sent trade secret information related to Plaintiff's Dagwood and Project Bomber digitizers to Defendant's German team, who also used those trade secrets when developing Defendant's Impala. Plaintiff states that as soon as it was able to translate and analyze the documents in Defendant's final TAR production, it diligently worked to amend its trade secret disclosure as quickly as possible. Plaintiff also insists that Defendant will suffer no prejudice by the amendment because trial is set for March 18, 2023, and discovery is ongoing.

In opposition, Defendant argues that Plaintiff does not have good cause to amend its trade secret disclosure because Plaintiff was not diligent in seeking amendment. Specifically, Defendant contends that Plaintiff's own document production shows that it was aware of the existence of Dagwood as early as 2015. Defendant states that it also produced documents discussing Dagwood and Project Bomber as early as August 1, 2022. Defendant further notes that all of the documents attached to the Second Amended Trade Secret Disclosure are documents that Plaintiff had in its possession prior to Defendant's document productions. Additionally, Defendant asserts Plaintiff was not diligent because Plaintiff did not obtain, examine, and take apart an Impala unit in order to identify the components thereof and determine whether Impala uses any purported Plaintiff trade secrets. Next, Defendant contends the fact that documents were designated "Highly Confidential," contained highly technical material, and were written in German does not explain Plaintiff's delay in amending its trade secret disclosure. Defendant insists Plaintiff could have enlisted one of its employees to assess the documents under the terms of the parties' protective order or retained an expert to assist with its analysis prior to May 2023. Defendant also concludes that translation issues cannot justify Plaintiff's delay in amending the trade secret disclosure because none of the documents Plaintiff submitted with its motion are in German. Defendant further asserts that any delay was of Plaintiff's own making because Plaintiff rejected Defendant's offer to produce documents earlier. Moreover, Defendant urges that the proposed amendment would be futile because Defendant developed the alleged trade secrets independently. Finally, Defendant argues that the proposed amendment would be highly prejudicial to it because it has taken several

depositions relating to Dagwood and Project Bomber, and it would be required to conduct another expensive and time-consuming search in order to produce documents related to those products.

Here, Plaintiff presents evidence supporting its assertion that it first learned Defendant sent trade secret information related to Plaintiff's Dagwood and Project Bomber digitizers to Defendant's German team (who allegedly used those trade secrets when developing Defendant's Impala) when Plaintiff reviewed emails produced by Defendant in March 2023. (Declaration of Benjamin M. Wigley in Support of Plaintiff Guzik Technical Enterprise's Motion for Leave to Amend Trade Secret Disclosure, ¶¶ 5-8, 11; Declaration of Edmond Yip in Support of Plaintiff Guzik Technical Enterprise's Motion for Leave to Amend Trade Secret Disclosure, ¶¶ 4-5.)

Defendant's argument that Plaintiff was aware of the existence of Dagwood and Project Bomber prior to March 2023 does not show a lack of diligence. The material fact is that Plaintiff was not aware that Defendant allegedly used the Dagwood and Project Bomber trade secrets to develop its competing Impala digitizer until it reviewed Defendant's final TAR production on March 3, 2023.

Similarly, the fact that Plaintiff attached its own documents to the Second Amended Trade Secret Disclosure does not undermine Plaintiff's position because the disclosure merely identifies Plaintiff's alleged trade secrets and how the trade secret information was sent to Keysight. The court is not aware of any requirement that Plaintiff must include in its Second Amended Trade Secret Designation other documents showing that Defendant used the alleged trade secrets to develop Impala.

Next, Defendant's contention that Plaintiff should have examined an Impala unit in order to determine whether Defendant used Plaintiff's alleged Dagwood and Project Bomber trade secrets is unpersuasive. Defendant has not demonstrated that Plaintiff reasonably could have obtained an Impala unit to conduct such an examination. Furthermore, Defendant has not cited any authority demonstrating that due diligence required Plaintiff tear down an Impala unit to discover the alleged misappropriation of its Dagwood and Project Bomber trade secrets.

Additionally, the relatively brief delay between Defendant's final TAR production on March 3, 2023, and Plaintiff's service of the Second Amended Trade Secret Designation is justified. As Plaintiff points out, Defendant's final TAR production contained hundreds of thousands of pages of documents, containing highly technical information that was designated "Highly Confidential" under the parties protective order. It was not unreasonable for Plaintiff to take approximately three months to review and analyze the documents before amending its trade secret designation.

Finally, the court agrees that any prejudice to Defendant is minimal as discovery is ongoing and trial is still several months away. As Plaintiff points out, the parties have already produced some documents and deposed some witnesses regarding the alleged Dagwood an Project Bomber trade secrets. The court believes that any supplemental discovery can be accomplished prior to trial.

For these reasons, the court finds that there is good cause for the proposed amendment to Plaintiff's trade secret designation.

Accordingly, Plaintiff's motion is GRANTED to the extent it requests an order granting Plaintiff leave to amend its trade secret disclosure so that the Second Amended Trade Secret Disclosure can become operative.

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

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