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.

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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 25, 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	22CV404069	Smith v. LinkedIn Corporation (Class Action)	See Line 1 for tentative ruling.
LINE 2	22CV397281	Laplante v. The Floor Store, Inc. (Class Action/PAGA)	See Line 2 for tentative ruling.
LINE 3	16CV300096	Velocity Investments, LLC v. Canul	See Line 3 for tentative ruling.
LINE 4	16CV300096	Velocity Investments, LLC v. Canul	See Line 3 for tentative ruling.
LINE 5	18CV338986	Velocity Investments LLC v. Pascual	See Line 5 for tentative ruling.
LINE 6	18CV338986	Velocity Investments LLC v. Pascual	See Line 5 for tentative ruling.
LINE 7			
LINE 8			
LINE 9			
LINE 10			

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LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Smith v. LinkedIn Corporation (Class Action)
Case No.: 22CV404069

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 25, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

Plaintiff Makenzie Smith ("Plaintiff") brings this putative class action against defendant LinkedIn Corporation ("Defendant") for allegedly engaging in an illegal "automatic renewal" scheme with respect to its paid subscription plans for LinkedIn-branded products and services that are available exclusively to consumers who enroll in Defendant's auto-renewal programs through its website. According to the allegations of the operative First Amended Complaint ("FAC"), filed on June 30, 2022, Defendant enrolls consumers in programs that automatically renew from month-to-month or year-to-year and result in monthly or annual charges to the consumer's credit card, debit card, or third-party payment account. (FAC, ¶¶ 1-2.) In doing so, Defendant fails to provide the requisite disclosures and authorizations required to be made to California consumers under California's Automatic Renewal Law ("ARL"), Business and Professions Code sections 17600, et seq. (*Id.* at ¶ 2.) Defendant routinely violates the ARL by: (1) failing to present the automatic renewal offer terms in a clear and conspicuous manner and in visual proximity to the request for consent to the offer before the subscription or purchasing agreement is fulfilled, in violation of section 177602, subdivision (a)(1); (2) charging consumers' Payment Method without first obtaining their affirmative consent to the agreement containing the automatic renewal offer terms, in violation of section 17602, subdivision (a)(2); (3) failing to provide an acknowledgment that includes the automatic renewal offers terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer, in violation of sections 17602, subdivisions (a)(3) and (b); and (4) utilizing an acknowledgment that fails to disclose a toll-free telephone number or describe another cost-effective, timely, and easy-to-use mechanism for cancellation, in violation of section 17602, subdivision (b). (*Id.* at ¶ 6.)

On September 7, 2021, Plaintiff signed up for a free trial of Defendant's monthly LinkedIn Premium Career subscription from Defendant's website. (FAC, ¶¶ 10, 69-70.) During the enrollment process, but before consenting to Defendant's subscription offering, Plaintiff provided her payment information to Defendant. (*Ibid.*) At the time she enrolled in the program, Defendant did not disclose to Plaintiff all required automatic renewal offer terms associated with the subscription program or obtain her affirmative consent to those terms. (*Ibid.*) For example, at the time of enrollment, Plaintiff was not aware that, upon the expiration of her free trial, Defendant would automatically convert her free trial into a paid, automatically renewing subscription. (*Ibid.*)

Additionally, the email receipt for Plaintiff purchase of a subscription ("Acknowledgment Email") failed to provide Plaintiff with the complete automatic renewal terms that applied to Defendant's offer, a description of Defendant's full cancellation policy, or information regarding how to cancel the subscription in a manner capable of being retained by Plaintiff. (FAC, ¶¶ 10, 72-73.) Consequently, Plaintiff was not made aware of the fact that her subscription would automatically convert to a paid subscription after the initial free trial period or that it would continue to renew on a recurring basis thereafter and result in continuous monthly charges until she took action to cancel her subscription. (*Ibid.*) Moreover, Plaintiff was not adequately informed of the complete cancellation policy associated with her subscription, the recurring price to be charged after the trial and upon each subsequent automatic renewal, that the amount of the charge would change, or the amount to which the charge will change, or the length of the renewal term or when the first charge would occur. (*Ibid.*)

On October 7, 2021, Defendant automatically renewed Plaintiff's subscription and charged her payment method in the amount of $32.09, which includes $29.99 for the full standard monthly rate then-associated with the LinkedIn Premium Career Subscription and $2,10 for sales tax. (FAC, ¶¶ 10, 74.) Thereafter, Defendant continued to automatically renew Plaintiff's subscription on a recurring basis, charging her payment method four additional times, for a total of five unauthorized charges in the total amount of $192.55 between September 2021 and July 2022. (*Ibid.*)

After discovering the unauthorized charges, Plaintiff attempted to cancel her subscription on numerous occasions and through various methods, but struggled to successfully terminate the subscription agreement due to Defendant's confusing cancellation policy. (FAC, ¶¶ 11, 82-83, 94.) Had Defendant complied with the ARL, Plaintiff would have been able to read and review the automatic renewal terms offer on the Checkout Page prior to purchase and/or in the Acknowledgment Email prior to renewal, and she would have not enrolled in the subscription at all or on the same terms, or she would have canceled her subscription earlier. (*Ibid.*)

Based on the foregoing allegations, the FAC sets forth the following causes of action: (1) Unfair Competition; (2) Conversion; (3) False Advertising; (4) Violation of California's Consumers Legal Remedies Act; (5) Unjust Enrichment/Restitution; (6) Negligent Misrepresentation; and (7) Fraud.

On March 17, 2023, the parties filed a Joint Case Management Conference Statement ("Joint CMC Statement") advising the court that they had "agreed to present the central legal issue to this case to the Court as quickly as possible by means of an early dispositive emotion [(*sic*)] […]." The portion of the Joint CMC Statement containing Defendant's statement of factual and legal issues also stated,

> This case ultimately boils down to a discrete legal question […]: do LinkedIn's disclosures, acknowledgment emails, and cancellation policies violate the ARL? The Court can answer that question early, and the answer will determine the course of this litigation. The Parties are in agreement that a decision for this Court on an early dispositive motion on this central legal issue will facilitate the most efficient resolution of this case.

In addition, section 9 of the Joint CMC Statement set forth a briefing schedule for the early dispositive motion.

On April 4, 2023, the court entered a Stipulation and Order Setting Briefing Schedule for Defendant LinkedIn's Motion for Summary Adjudication reflecting that Defendant intended to file a motion for summary adjudication as to the legal sufficiency of the Checkout Pages and Acknowledgment Emails. Under the terms of the order, Defendant was required to produce all documents upon which it intended to rely by July 17, 2023; Defendant would file

its motion by July 31, 2023; Plaintiff would file her opposition by August 30, 2023; and Defendant would file its reply by September 29, 2023.

On August 28, 2023, the court entered a Stipulation and Order to Extend Briefing Schedule on Defendant's Motion for Summary Judgment or, in the Alternative, Summary Adjudication, which granted the parties a 14-day extension of the deadlines relating to the filing of the opposition and reply papers.

Now before the court is Defendant's motion for summary judgment or, alternatively, summary adjudication. The motion is opposed.

II. REQUEST FOR JUDICIAL NOTICE

In connection with her opposition, Plaintiff asks the court to take judicial notice of three consent decrees entered in ARL cases brought by state public enforcement agencies. Presumably, Plaintiff seeks judicial notice of the subject court records pursuant to Evidence Code section 452, subdivision (d).

Although courts may generally take judicial notice of records of any court of this state under Evidence Code section 452, subdivision (d) (Evid. Code, § 452, subd. (d)(1)), a precondition to judicial notice is that the matter to be noticed must be relevant to the material issue before the court (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People ex rel. Lockyer v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2 [the court may properly take judicial notice of court records if those records are deemed to be necessary and relevant to the disposition of the motion]).

As Defendant persuasively argues, the consent decrees at issue here are not proper subjects of judicial notice because they are irrelevant to the issues raised by the pending motion. The fact that the consent decrees were entered in unrelated cases contain certain terms does not establish that any particular action is required under the ARL.

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

III. EVIDENTIARY OBJECTIONS

In connection with her opposition, Plaintiff submits objections to portions of the Declaration of Ora Levit in Support of Defendant LinkedIn Corporation's Motion for Summary Adjudication ("Levit Declaration").

The court finds that Plaintiff's objections to Exhibit 2 to the Levit Declaration, and the portions of the Levit Declaration discussing the contents of that exhibit, on the ground of hearsay are well-taken. Exhibit 2 is a computer printout of Plaintiff's Premium subscription history through July 2022, offered for the truth of the matters asserted therein. Moreover, the Levit Declaration does not set forth sufficient facts to satisfy the requirements for either the official or business records exceptions to the hearsay rule as it does not adequately address whether: the subscription history was made in the regular course of a business; the subscription history was made at or near the time of the act, condition, or event; the mode of the subscription history's preparation; or the sources of information for and method and time of preparation of the subscription history. (See Evid. Code, § 1271.) Although Defendant contends the subscription history is merely a printout of computer-generated data, and therefore does not constitute hearsay, the Levit Declaration does not set forth any facts demonstrating that the subscription history only contains "automatically computer-generated information," as opposed to "computer-stored information." (See *People v. Rodriguez* (2017) 16 Cal.App.5th 355, 377-378 [distinguishing between data that is automatically generated by a computer, which is not hearsay, and documents or information entered into a court by human operators].) Consequently, Plaintiff's objections to Exhibit 2 to the Levit Declaration, and the portions of the Levit Declaration discussing the contents of that exhibit, on the ground of hearsay are sustained.

Plaintiff's remaining objections lack merit and are overruled.

IV. LEGAL STANDARD

The pleadings limit the issues presented for summary judgment or adjudication and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73.)

A motion for summary judgment must dispose of the entire action. (Code Civ. Proc., § 437c, subd. (a); *All Towing Services LLC v. City of Oran*ge (2013) 220 Cal.App.4th 946, 954 (*All Towing*) ["Summary judgment is proper only if it disposes of the entire lawsuit."].)

"Summary judgment is properly granted when no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. [Citation.] Once the defendant has met that burden, the burden shifts to the plaintiff 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Madden v. Summit View, In*c. (2008) 165 Cal.App.4th 1267, 1272 (*Madde*n).)

"Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. ([Code Civ. Proc.,] § 437c, subd. (f).) … Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.' " (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

For purposes of establishing their respective burdens, the parties involved in a motion for summary judgment or adjudication must present admissible evidence. (*Saporta v. Barbagelata* (1963) 220 Cal.App.2d 463, 468.) Additionally, in ruling on the motion, a court cannot weigh said evidence or deny the motion on the ground that any particular evidence lacks credibility. (See *Melorich Builders v. Superior Court* (1984) 160 Cal.App.3d 931, 935; see also *Lerner v. Superior Court* (1977) 70 Cal.App.3d 656, 660.) As summary judgment or adjudication "is a drastic remedy eliminating trial," the court must liberally construe evidence in support of the party opposing the motion and resolve all doubts concerning the evidence in favor of that party. (See *Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389; see also *Hepp v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 717-718.)

V. PROCEDURAL ISSUES WITH MOTION FOR SUMMARY ADJUDICATION

As an initial matter, Plaintiff argues Defendant failed to comply with the procedural requirements for bringing a motion for summary adjudication set forth in Code of Civil Procedure section 437c, subdivision (f)(1) and California Rules of Court, rule 3.1350.

> A motion for summary adjudication tenders only those issues or causes of action specified in the notice of motion, and may only be granted as to the matters thus specified. The movant must "state[] specifically in the notice of motion and … repeat[], verbatim, in the separate statement of undisputed material facts," "the specific cause of action, affirmative defense, claims for damages, or issues of duty" as to which summary adjudication is sought. (Cal. Rules of Court, former rule 342(b); see now Cal. Rules of Court, rule 3.1350(b).) The motion must be denied if the movant fails to establish an entitlement to summary adjudication of the matters thus specified; the court cannot summarily adjudicate other issues or claims, even if a basis to do so appears from the papers. (See *Gonzales v. Superior Court* (1987) 189 Cal. App. 3d 1542, 1546 [235 Cal. Rptr. 106] [" 'If a party desires adjudication of particular issues or subissues, that party must make its intentions clear in the motion… .' [Citation.] There is a sound reason for this rule: '… the opposing party may have decided to raise only one triable issue of fact in order to defeat the motion, without intending to concede the other issues. It would be unfair to grant a summary adjudication order unless the opposing party was on notice that an issue-by-issue adjudication might be ordered if summary judgment was denied' "].)

(*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 743-744.)

Here, Defendant's notice of motion states, in relevant part, that Defendant "move[s] for an order granting summary judgment or summary adjudication of [Plaintiff's] claims based on LinkedIn's alleged violation of the [ARL] because there is no triable issue as to any material fact regarding the sufficiency of LinkedIn's automatic renewal disclosures […]." (Defendant LinkedIn Corporation's Notice of Motion and Motion for Summary Judgment or, in the Alternative, Summary Adjudication, p. 1:11-15.)

As Plaintiff persuasively argues, the notice of motion does not specifically state the specific causes of action or issues as to which summary adjudication is sought. The oblique reference to "claims based on LinkedIn's alleged violation of the [ARL]" is unhelpful and lacks the requisite specificity.[1] In addition, Defendant's separate statement does not separately identify specific causes of action or issues as to which summary adjudication is sought, or identify the material facts that pertain to each cause of action or particular issue as to which summary adjudication is sought. As a result of these procedural defects, Defendant has not provided a clear guide to the court or Plaintiff to what it wishes to have summarily adjudicated, whether a cause of action or particular issue.

The court also notes that to the extent Defendant intended to move for summary adjudication of the legal issue of whether its alleged conduct violated the ARL, its motion does not comply with Code of Civil Procedure section 437c, subdivision (t) as the parties did not file

[1] Notably, a violation of the ARL is not a necessary element of many of Plaintiff's causes of action.

a joint stipulation stating the issue to be adjudicated; the parties did not file a declaration from each stipulating party that the motion will further the interest of judicial economy by decreasing trial time or significantly increasing the likelihood of settlement; and the motion does not contain the requisite statement in the notice of motion[2] and it is not signed by counsel for all parties. (See Code Civ. Proc., § 437c, subd. (t)(1)-(4).)

Accordingly, Defendant's motion for summary adjudication is DENIED.

VI. MOTION FOR SUMMARY JUDGMENT

Defendant argues that it is entitled to summary judgment of the FAC on the grounds that its alleged conduct did not violate the ARL.

However, the court has sustained Plaintiff's objections to Exhibit 2 to the Levit Declaration, and the portions of the Levit Declaration discussing the contents of that exhibit, on the ground of hearsay. Consequently, the court cannot consider the evidence that supports Defendant's Undisputed Material Facts ("UMF") Nos. 12-18, 21-27, and 29-32. Because Defendant has not presented admissible evidence supporting those UMF, it fails to demonstrate that there is no triable issue of material fact with respect to the FAC and the court need not reach the merits of Defendant's arguments.

Accordingly, Defendant's motion for summary judgment is DENIED.

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

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[2] A motion under section 437c, subdivision (t) must include a statement in the notice of motion that reads substantially similar to the following: "This motion is made pursuant to subdivision (t) of Section 437c of the Code of Civil Procedure. The parties to this motion stipulate that the court shall hear this motion and that the resolution of this motion will further the interest of judicial economy by decreasing trial time or significantly increasing the likelihood of settlement."

Calendar Line 2

Case Name: Laplante v. The Floor Store, Inc. (Class Action/PAGA)
Case No.: 22CV397281

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 25, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

II. INTRODUCTION

This is a putative class and Private Attorneys General Act ("PAGA") action arising out various alleged wage and hour violations. The operative First Amended Class and PAGA Action Complaint ("FAC"), filed on January 17, 2023, sets forth the following causes of action: (1) Failure to Pay All Minimum Wages; (2) Failure to Pay All Overtime Wages; (3) Failure to Provide Rest Periods and Pay Missed Rest Period Premiums; (4) Failure to Provide Meal Periods and Pay Missed Meal Period Premiums; (5) Failure to Maintain Accurate Employment Records; (6) Failure to Pay Wages Timely During Employment; (7) Failure to Pay All Wages Earned and Unpaid at Separation; (8) Failure to Furnish Accurate Itemized Wage Statements; (9) Violations of California's Unfair Competition Law (Bus. & Prof. Code, §§ 17200-17210); and (10) Civil Penalties Under the Private Attorneys General Act (Labor Code § 2699 et seq.).

The parties have reached a settlement. On May 10, 2023 the court granted preliminary approval of the settlement subject to the court's approval of the amended class notice and Share Form. The court approved the amended notice and Share Form on June 12, 2023.

Plaintiff Pamela LaPlante ("Plaintiff") now moves for final approval of the settlement. The motion is unopposed.

III. 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.)

IV. DISCUSSION

> The action has been settled on behalf of the following class:
> [A]ll individuals who are or were employed by [defendant The Floor Store, Inc. ("Defendant")] as salespersons, and/or design consultants, or similar positions, in California during the Class Period.

The Class Period is defined as the period from April 25, 2018, through the date of preliminary approval of the settlement. The class includes a subset of PAGA aggrieved employees, who are defined as "all individuals who are or were employed by [Defendant] as salespersons, and/or design consultants, or similar positions, in California during the PAGA Period." The PAGA Period is defined as the period from April 25, 2021, through the date of preliminary approval of the settlement.

As discussed in connection with preliminary approval, Defendant will pay a gross, non-reversionary amount of $1,000,000. The gross settlement amount includes attorney fees not to exceed $333,333.33 (1/3 of the gross settlement amount), litigation costs up to $15,000, an incentive award not to exceed $7,500, settlement administration costs (estimated to be no more than $10,000), and a PAGA Payment of $100,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be distributed to PAGA aggrieved employees).

The net settlement amount will be distributed to class members pro rata based on the number of workweeks worked during the class period.

The settlement agreement provides that funds from checks that remained uncashed 180 days after issuance will be sent to the California State Controller for deposit in the Unclaimed Property Fund.

In its May 10, 2023 minute order granting preliminary approval of the settlement, the court informed the parties that their proposal to send funds to the Unclaimed Property Fund did not comply with Code of Civil Procedure section 384. The court directed Plaintiff to provide a new *cy pres* in compliance with Code of Civil Procedure section 384 prior to the final approval hearing. Plaintiff has not done so. Consequently, prior to the continued hearing, Plaintiff's counsel shall file a supplemental declaration identifying a new *cy pres* recipient.

The settlement agreement further provides that in exchange for the settlement, class members who do not opt out will release Defendant, and related persons and entities, from claims arising out of or related to the allegations set forth in the FAC and/or the notice sent to the LWDA, which arose during the Class Period. Plaintiff also agrees to a general release of claims.

On July 10, 2023, the settlement administrator mailed notice packets to 114 class members. (Declaration of Nicole Bench of ILYM Group, Inc. Regarding Notice and Settlement Administration ("Bench Dec."), ¶ 8.) Ultimately, three notice packets were undeliverable. (*Id.* at ¶ 11.) As of October 2, 2023, there were no objections and no requests for exclusion. (*Id*. at ¶¶ 12-13.)

The estimated average gross payment for the class is $4,755.96 and the estimated highest gross payment for the class is $15,412.62. The court previously found the proposed settlement is fair and the court continues to make that finding for purposes of final approval.

Plaintiff requests a service award in the amount of $7,500. In connection with preliminary approval, Plaintiff submitted a declaration generally detailing her participation in the case. However, she did not provide an estimate of the time spent in connection with the action. In its May 10, 2023 minute order granting preliminary approval of the settlement, the court ordered Plaintiff to file a declaration more specifically detailing how she participated in the action and an estimate of the time spent.

Plaintiff has submitted a declaration in connection with her motion for final approval of settlement that generally describes her participation in this action. (Declaration of Pamela LaPlante in Support of Plaintiff's Motion for Final Approval of Class Action Settlement, ¶¶ 7-11 [stating that Plaintiff regularly discussed the case with class counsel, provided documents to class counsel, and reviewed documents].) But Plaintiff still has not provided the court with an estimate of the time spent in connection with this litigation. Without this additional information, Plaintiff has not adequately supported her request for a service award in the amount of $7,500. Prior to the continued hearing on this matter, Plaintiff shall file a supplemental declaration specifically stating the time she spent in connection with this action.

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 seeks attorney fees in the amount of $333,333.33 (1/3 of the gross settlement amount). In its May 10, 2023 minute order granting preliminary approval of the settlement, the court ordered Plaintiff's counsel to submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the court could compare the lodestar information with the requested fees. However, Plaintiff's counsel has not provided any lodestar information in connection with the motion for final approval of settlement. Prior to the continued hearing, Plaintiff's counsel shall file a supplemental declaration containing 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 also requests litigation costs in the amount of $10,021.88 and submits evidence of incurred costs in that amount. (Declaration of Jonathan Melmed in Support of Plaintiff's Motion for Final Approval of Class Action Settlement, ¶ 17 & Ex. 2.) Consequently, the court approves the litigation costs in the amount of $10,021.88. The settlement administration costs of $7,000 are also approved. (Bench Dec., ¶ 17.)

Accordingly, the motion for final approval of the class and representative action settlement is CONTINUED to January 17, 2024, at 1:30 p.m. in Department 19. Plaintiff's counsel shall file supplemental declarations with the requested information no later than December 29, 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 3

Case Name: Velocity Investments, LLC v. Canul
Case No.: 16CV300096

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 25, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

V. INTRODUCTION

According to the allegations of the Complaint, filed on September 20, 2016, plaintiff and cross-defendant Velocity Investments, LLC ("Velocity") is the owner of debt owed by defendant and cross-complainant Maria Canul ("Canul"). (Complaint, ¶¶ 4-5.) In the Complaint, Velocity alleges that the charge-off creditor was LendingClub Corporation, Velocity complied with Civil Code section 1788.52, and the document titled "Truth in Lending Disclosure" attached to the Complaint satisfies Civil Code section 1788.52, subdivision (b). (*Ibid.*) The Complaint sets forth common counts for: (1) Open Book Account; and (2) Money Lent.

On February 19, 2019, Canul filed a putative class action Cross-Complaint against Velocity, alleging a single cause of action for violation of the California Fair Debt Buying Practices Act ("CFDBPA").

On January 29, 2021, Canul filed an amendment to the Cross-Complaint substituting Velocity Portfolio Group, Inc. ("VPGI") for Roe 1.

Canul then filed a First Amended Cross-Complaint ("FACC") against Velocity and VPGI (collectively, "Cross-Defendants") on November 4, 2021, which alleges a single cause of action for violation of the CFDBPA. According to the allegations of the FACC, Cross-Defendants engage in a routine practice of filing and serving collection complaints which do not comply with Civil Code sections 1788.52, subdivision (b) and 1788.58, subdivisions (a)(6), (a)(9), and (b). Specifically, the Complaint filed against Canul failed to: (1) truthfully state the name and address of the charge-off creditor (as it identified LendingClub Corporation as the charge-off creditor instead of LC Trust I); and (2) attach a copy of the contract or other document described in 1788.52, subdivision (b). (FACC, ¶¶ 13-33, 57-62.)

On August 31, 2022, the court certified the class.

Now before the court are the following matters: (1) Cross-Defendants' motion to seal Exhibits W and X attached to Plaintiff's Notice of Documents Lodged Conditionally Under Seal filed on July 21, 2023; (2) Cross-Defendants' motion for summary judgment of the FACC; and (3) Canul's motion for summary judgment of the FACC or, alternatively, summary adjudication of Cross-Defendants' first and second affirmative defenses to the FACC. All three motions are opposed.[3]

VI. MOTION TO SEAL

A. LEGAL STANDARD

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

[3] The court notes that Canul's opposition to Cross-Defendant's motion for summary judgment exceeds the 20-page limit set forth by California Rules of Court, rule 3.1113(d). Consequently, the opposition must be considered in the same manner as a late-filed paper. (Cal. Rules of Court, Rule 3.1113(g).) Given the foregoing, the court exercises its discretion to consider only the first 20 pages of the opposition.

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.)

B. DISCUSSION

Cross-Defendants ask the court to seal Exhibits W and X attached to Plaintiff's Notice of Documents Lodged Conditionally Under Seal filed on July 21, 2023. Cross-Defendants state that the subject documents were produced during discovery and marked confidential pursuant to the parties' protective order in this case. Cross-Defendants submit a declaration from their counsel, who declares that the documents constitute "business policies and other proprietary documents of Velocity," are "created by Velocity for Velocity's use within its business and are not publicly available," and "contain detailed rules, instructions, and guidelines." (Declaration of Justin M. Penn in Support of Cross-Defendants' Motion to Seal, ¶ 4.)

Canul opposes the motion to seal, arguing that Cross-Defendants failed to make a fact specific showing that an overriding interest exists that supports the sealing and that Cross-Defendants would be substantially harmed if the documents are not sealed.

The court agrees that the declaration submitted by Cross-Defendants' counsel does not set forth sufficient facts to justify sealing the subject documents. As Canul persuasively argues, the declaration submitted by Cross-Defendants' counsel is conclusory—it does not establish that he is a custodian of records for Cross-Defendants or that he has personal knowledge of Cross-Defendants' business practices regarding the subject documents. Furthermore, the declaration does not provide that there is a substantial probability that Cross-Defendants will be prejudiced absent sealing, or set forth any facts demonstrating that there is a substantial probability of prejudice from the public disclosure of the documents. (See *Universal, supra,* 110 Cal.App.4th at p. 1283 ["the party seeking closure or sealing must prove prejudice to that interest is substantially probable"].)

Accordingly, Cross-Defendants' motion to seal is DENIED.

III. CROSS-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. REQUEST FOR JUDICIAL NOTICE

1. Cross-Defendants' Request

In connection with their moving papers, Cross-Defendants ask the court to take judicial notice of the Complaint and FACC filed in this action. In connection with their reply, Cross-Defendants ask the court to take judicial notice of this court's order granting a motion for judgment on the pleadings in a separate case, *David Chai v. Velocity Investments, LLC, et al,* (Santa Clara County Superior Court, Case No. 20CV373916) ("*Chai* Action").

The Complaint and FACC are proper subjects of judicial notice under Evidence Code section 452, subdivision (d) as they are court records relevant to issues raised in the pending motions. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *People v. Woodell* (1998) 17 Cal.4th 448, 455 (*Woodell*) [courts may "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

Conversely, the order in the *Chai* Action is not a proper subject of judicial notice. Unpublished California opinions "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Ct., rule 8.1115(a); see also *Schachter v. Citigroup, Inc*. (2005) 126 Cal.App.4th 726, 738 [trial court ruling has no precedential value].) The court admonishes Cross-Defendants not to cite unpublished California trial court orders as persuasive authority in the future.

Accordingly, Cross-Defendants' request for judicial notice is GRANTED IN PART and DENIED IN PART. The request is GRANTED as to the Complaint and FACC. The request is DENIED as to the order entered in the *Chai* Action.

2. Canul's Request

In connection with her opposition, Canul asks the court to take judicial notice of: the Complaint; the Declaration of Fred W. Schwinn in Support of Cross-Complainant's Motion for Summary Judgment, or in the Alternative, Motion for Summary Adjudication; the Appendix of Evidence in Support of Cross-Complainant's Motion for Summary Judgment, or in the Alternative, Motion for Summary Adjudication, Exhibits A-N; and the Appendix of Evidence in Support of Cross-Complainant's Motion for Summary Judgment, or in the Alternative Motion for Summary Adjudication, Exhibits O-X.

These items are generally proper subjects of judicial notice under Evidence Code section 452, subdivision (d) as they are court records relevant to issues raised in the pending motions; however, the court only takes judicial notice of the existence of the subject documents. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *Woodell, supra,* 17 Cal.4th at p. 455 [courts may "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

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

B. EVIDENTIARY OBJECTIONS

In connection with their reply, Cross-Defendants object to potions of Canul's declaration submitted in support of her opposition to the instant motion.

Cross-Defendants' objections do not comply with California Rules of Court, rule 3.1354. Rather than submit two separate documents as required by the rule—one setting forth the objections and another setting forth a proposed order—Cross-Defendants submitted a single packet of objections, signed by counsel, with blanks for the court to indicate its rulings and lines for the court to sign on. (See Cal. Rules of Ct., rule 3.1354(b) [a party must provide written objections that comply with one of the formats described in the rule] (c) [a party must provide a proposed order that complies with one of the formats described in the rule].) This hybrid document does not comply with California Rule of Court, rule 3.1354.

Because Cross-Defendants' evidentiary objections do not comply with the California Rules of Court, the court is not required to rule on the objections. (See *Vineyard Spring Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; see also *Hodjat v. State Farm Mut. Auto. Ins. Co.* (2012) 211 Cal.App.4th 1, 8-9 [the trial court is not required to rule on objections that do not comply with California Rules of Court, rule 3.1354 and is not required to give objecting party a second chance at filing properly formatted papers]; *Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1118 [the trial court acted within its discretion when it overruled evidentiary objections for failing to meet the requirements of the California Rules of Court for the format of evidentiary objections].)

Accordingly, the court declines to rule on Cross-Defendants' evidentiary objections.

C. LEGAL STANDARD

A motion for summary judgment must dispose of the entire action. (Code Civ. Proc., § 437c, subd. (a); *All Towing Services LLC v. City of Orange* (2013) 220 Cal.App.4th 946, 954 ["Summary judgment is proper only if it disposes of the entire lawsuit."].) The pleadings limit the issues presented for summary judgment and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; see also *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].)

"Summary judgment is properly granted when no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. [Citation.]" (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1272 (*Madden*).) To satisfy this burden, the defendant must present evidence which either conclusively negates an element of the plaintiff's cause of action, or which shows the plaintiff

does not possess, and cannot reasonably obtain, needed evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

"Once the defendant has met that burden, the burden shifts to the plaintiff 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Madden, supra,* 165 Cal.App.4th at p. 1272.)

For purposes of establishing their respective burdens, the parties involved in a motion for summary judgment must present admissible evidence. (*Saporta v. Barbagelata* (1963) 220 Cal.App.2d 463, 468.) Additionally, in ruling on the motion, a court cannot weigh said evidence or deny summary judgment on the ground that any particular evidence lacks credibility. (See *Melorich Builders v. Superior Court* (1984) 160 Cal.App.3d 931, 935; see also *Lerner v. Superior Court* (1977) 70 Cal.App.3d 656, 660.) As summary judgment "is a drastic remedy eliminating trial," the court must liberally construe evidence in support of the party opposing summary judgment and resolve all doubts concerning the evidence in favor of that party. (See *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 389; see also *Hepp v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 717-718.)

D. DISCUSSION

Cross-Defendants initially argue they are entitled to summary judgment of the FACC because the undisputed material facts establish that Canul lacks standing to bring the action.[4] Cross-Defendants assert that Canul only has standing to bring the lawsuit if she is beneficially interested in the controversy, i.e., she has suffered an injury in fact, citing *Limon v. Circle K Stores Inc.* (2022) 84 Cal.App.5th 671 (*Limon*). Cross-Defendants contend Canul has not sustained an injury in fact because the undisputed material facts show that Canul stipulated that she is not seeking any emotional distress or out-of-pocket damages and Canul waived any claim to actual damages.

[4] Cross-Defendants also argue that they are entitled to summary judgment of the FACC because the undisputed material facts establish that the alleged violations were not material.

In opposition, Canul argues that the court should not follow *Limon* as it was wrongly decided and is factually distinguishable from the instant case. Canul further asserts that she is beneficially interested in the controversy because she sustained actual damages in the form of attorney fees and costs incurred as the result of the filing of the Complaint. Canul contends that it has never been her position that she has no actual damages, rather she merely waived her right to recover those damages. Canul also contends that she has suffered an informational injury because she did not receive information that she was statutorily entitled to.

In reply, Cross-Defendants argue that by waiving her claim for actual damages Canul relinquished her right to assert the existence actual damages, citing *Sherer v. Laguna Beach* (1936) 13 Cal.App.2d 396 (*Sherer*). Cross-Defendants also urge the court to disregard Canul's evidence regarding her purported actual damages because she refused to produce such evidence during discovery. Cross-Defendants point out that they propounded formal discovery requests seeking the evidence Canul now relies upon, and even attempted to question Canul regarding her attorney fees at her deposition. However, Canul repeatedly asserted objections to the discovery as irrelevant on the basis that she was not seeking actual damages. Cross-Defendants contend that this type of gamesmanship represents an abuse of the discovery process and Canul should not be allowed to reverse her position at this time. Cross-Defendants further assert that even if the court considers Canul's evidence regarding attorney fees and costs, the evidence does not demonstrate that Canul sustained actual damages because the fees and costs were not proximately caused by the alleged violations (i.e., the misidentification of the charge-off creditor and the failure to include a copy of the contract or other document described in 1788.52, subdivision (b)). Cross-Defendants argue there was nothing about the form of the complaint that caused Canul to retain counsel; rather, she retained counsel due to the existence of the unpaid debt and the mere filing of the complaint.

As a threshold matter, the court agrees with Cross-Defendants that Canul must be beneficially interested in the controversy, i.e., have suffered an injury in fact, in order to have standing to bring her claim under the CFDBPA.

Code of Civil Procedure, section 367 states that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." A "real party in

interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law." (*Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605.) "In general, California law does not give a party personal standing to assert rights or interests belonging solely to others." (*Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, 936.)

The Code of Civil Procedure also provides for writ of mandate relief, "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law[,]" so long as the writ is issued "upon the verified petition of the party beneficially interested." (Code Civ. Proc., § 1086.) To be beneficially interested, a party must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 362.) This standard "is equivalent to the federal 'injury in fact' test, which requires a party to prove by a preponderance of the evidence that it has suffered 'an invasion of a legally protected interest that is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.' [Citation.]" (*Ibid*.)

In *Limon*, the appellate court concluded that the beneficial interest requirement for standing is not limited to the mandamus actions set forth in Code of Civil Procedure, section 1086. (*Limon, supra*, 84 Cal.App.5th at pp. 699-700.) "There are a number of California cases that indicate the 'beneficial interest' requirement applies generally to questions of standing except, of course, in cases involving public standing or where the statute at issue otherwise confers standing on a plaintiff." (*Id*. at p. 699.) The *Limon* court discussed the exceptions and concluded that, ""as a general matter, to have standing to pursue a claim for damages in the courts of California, a plaintiff must be beneficially interested in the claims he is pursuing." (*Id*. at p. 700.)

Thus, unless the CFDBPA provision at issue here provides for public standing or otherwise confers standing upon Canul, she must show that she is beneficially interested (i.e., that she has suffered an injury in fact) to have standing. (*Limon, supra*, 84 Cal.App.4th at p.700.) Therefore, the court examines the statutory language at issue to determine if it confers standing without a showing of injury in fact.

> California courts have set forth rules for construing the meaning of a statute. Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, court must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. [Citations.]

(*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 (*Concerned Communities*); see also *Jackpot Harvesting Co., Inc. v. Superior Court* (2018) 26 Cal.App.5th 125, 140 (*Jackpot*).)

> California courts follow an approach to determine legislative intent that involves up to three steps. The first step is our examination of the actual language of the statute. We do so because the statutory language is generally the most reliable indicator of legislative intent. In this first step, we scrutinize words themselves, giving them their usual and ordinary meanings and construing them in context. And we will apply common sense to the language at hand and interpret the statute to make it workable and reasonable. In doing so, if we find the statutory language to be clear, its plain meaning should be followed. Thus, if there is no ambiguity, we presume the Legislature meant what it said, and the plain meaning of the language governs.

(*Jackpot, supra*, 26 Cal.App.5th at pp. 140-141, internal quotation marks and citations omitted.)

Canul's claim for violation of the CFDBPA is predicated on allegations that Cross-Defendants failed to: (1) truthfully state the name and address of the charge-off creditor (as it identified LendingClub Corporation as the charge-off creditor instead of LC Trust I); and (2) attach a copy of the contract or other document described in 1788.52, subdivision (b). (FACC, ¶¶ 13-33, 57-62.) Canul alleges that as a result of Cross-Defendants' wrongful conduct, she is entitled to recover statutory damages under Civil Code section 1788.62. (FACC, ¶¶ 65-66.)

> As is relevant here, Civil Code section 1788.62 states:
> (a) In the case of an action brought by an individual or individuals, a debt buyer that violates any provision of this title with respect to any person shall be liable to that person in an amount equal to the sum of the following:
>
> > (1) Any actual damages sustained by that person as a result of the violation, including, but not limited to, the amount of any judgment obtained by the debt buyer as a result of a time-barred suit to collect debt from that person.
> >
> > (2) Statutory damages in an amount as the court may allow, which shall not be less than one hundred dollars ($100) nor greater than one thousand dollars ($1,000).

> (b) In the case of a class action, a debt buyer that violates any provision of this title shall be liable for any statutory damages for each named plaintiff as provided in paragraph (2) of subdivision (a). If the court finds that the debt buyer engaged in a pattern and practice of violating any provision of this title, the court may award additional damages to the class in an amount not exceed the lesser of five hundred thousand dollars ($500,000) or 1 percent of the net worth of the debt buyer.

(Civ. Code,§ 1788.62, subds. (a)-(c).)

Here, Civil Code section 1788.62 characterizes the relief available as "damages." More specifically, it states the offending party is liable for the sum of "actual damages" and "statutory damages" incurred by the plaintiff. (Civ. Code,§ 1788.62, subds. (a) & (b).)

Although the term "damages" is not defined in the CFDBPA, the Fifth District Court of Appeal in *Limon* interpreted a provision in the FCRA containing similar language. (*Limon, supra,* 84 Cal.App.5th at pp. 700-703.) There, the provision of the FCRA at issue (15 U.S.C. § 1681n) also characterized the relief in terms of "damages." (*Id*. at pp. 00-701 ["Specifically, section 1681n provides, in part: 'Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of-[ ] (l)(A) any actual damages sustained by the consumer as result of the failure or damages of not less than $100 and not more than $1,000 ...' "].)

The *Limon* court then reviewed dictionary definitions and California case law, finding that "the term damages connotes compensation for an injury[.]" (*Limon, supra,* 84 Cal.App.5th at p. 702.) " 'Damages are intended to be compensatory, to make one whole. [Citation.] Accordingly, there must be an injury to compensate.' " (*Ibid*.) The court also noted that the Legislature elsewhere used the term "penalties" to describe other potential relief available under the FCRA, citing section 1681s. The court explained that where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning. (*Id.* at pp. 700-701.) The *Limon* court concluded that "the statutory damages provision is intended to compensate a plaintiff for injury" and is designed to provide redress for plaintiffs " 'who have suffered concrete harm but may find it difficult to prove actual damages.' [Citations.]" (*Id*. at pp. 702-703.)

In this case, the plain language of Civil Code section 1788.62 provides for relief in terms of damages, not penalties. As Cross-Defendants note, if the Legislature had intended for the statutory damages provision of the CFDBPA to function as a penalty, it would have so stated. In the related California Fair Debt Collection Practices Act, which was passed before the CFDBPA, the remedies statute expressly provides that, in addition to actual damages, a debt collector is liable "for a *penalty* in such amount as the court may allow, which shall not be less than one hundred dollars ($100) nor greater than one thousand dollars ($1,000)." (Civ. Code, § 1788.30, subd. (b), italics added.) Thus, for the same reasons discussed in *Limon* as described above, the court concludes that a plaintiff must allege an injury in fact to have standing to pursue relief under Civil Code section 1788.62.

Moreover, the court finds that Cross-Defendants meet their initial burden to present evidence showing that Canul has not sustained an injury in fact. Cross-Defendants' undisputed material facts demonstrate that Canul stipulated that she is not seeking any emotional distress or out-of-pocket damages and Canul waived any claim to actual damages. (Separate Statement of Undisputed Material Facts and Supporting Evidence in Support of Cross-Defendants' Motion for Summary Judgment […], UMF Nos. 8-12.)

Cross-Defendants' supporting evidence shows that, at Canul's deposition, Cross-Defendants' counsel asked Canul if she incurred attorney fees or costs in connection with the underlying Complaint. (Compendium of Documentary Evidence in Support of Cross-Defendants' Motion for Summary Judgment […] ("Compendium"), Ex. D, pp. 54-55; Declaration of Justin M. Penn in Support of Cross-Defendants' Reply […] ("Penn Reply Dec."), Ex. B, pp. 23-24.) Canul's counsel objected to the line of questioning and instructed Canul not to answer. (*Ibid.*) Following some discussion off the record, Canul's counsel then stated that Canul was not seeking any emotional distress or out-of-pocket pecuniary damages. (*Ibid.*) Additionally, Form Interrogatory No. 9.1 asked Canul to identify any damages that she attributed to the incident. (Compendium, Ex. E.) In response, Canul identified only statutory damages and expressly stated that she waived any claim to actual damages. (*Ibid.*) Similarly, Special Interrogatory No. 3 asked Canul to identify the factual basis for Canul's claim for actual damages, including what are the actual damages incurred, the amount of the actual

damages, and who they were calculated. (Compendium, Ex. F.) In response, Canul did not identify and factual basis to support her claim that she sustained actual damages, but states the she waived any claim to actual damages. (*Ibid.*) Lastly, Request for Production of Documents No. 2 asked Canul to produce any agreement with her attorneys applicable to the lawsuit (such as a retainer or fee sharing agreement). (Penn Reply Dec.), Ex. A.) As is relevant here, Canul objected to the request and refused to produce the responsive documents on the grounds that the discovery sought was irrelevant. (*Ibid.*)

In opposition, Canul fails to raise a triable issue of material fact. Canul contends that it has never been her position that she has no actual damages; rather, she merely waived her right to recover those damages. This contention is belied by the record. As explained above, in addition to expressly waiving her claim for actual damages, Canul also refused to produce the retainer agreement with her counsel (which she now relies upon to oppose the instant motion) in response to Request for Production of Documents No. 2 on the ground that the discovery sought was irrelevant to the action. Canul could not in good faith object to Request for Production of Documents No. 2 as irrelevant if it was, in fact, her position that she sustained actual damages in the form of attorney fees and costs and, therefore, had standing to bring her claim under the CFDBPA.

Moreover, Cross-Defendants cite case law which provides that "[d]amages once suffered and waived *must be held to be waived for all purposes* and cannot be recovered under another guise, name or form." (*Sherer v. Laguna Beach* (1936) 13 Cal.App.2d 396, 404, italics added.) Here, it is undisputed that Canul expressly waived her actual damages. Thus, those damages must be held to be waived for all purposes.

Furthermore, even if the court were to consider Canul's evidence regarding her attorney fees and costs, Cross-Defendants persuasively argue that Canul does not establish that the fees and costs were incurred as a result of Cross-Defendants' alleged violations of the CFDBPA. As explained above, Canul alleges that Cross-Defendants violated the CFDBPA by filing a complaint that misidentified the charge-off creditor and failed to include a copy of the contract or other document described in 1788.52, subdivision (b). However, there is nothing in the record showing that the alleged defects in the Complaint caused Canul to retain counsel. In

fact, the record demonstrates that Canul retained counsel simply because she was concerned and wanted to learn more about the Complaint.

Finally, Canul's asserted informational injury is insufficient to confer standing. As the court in *Limon* held, "under California law, … an informational injury that causes no adverse effect is insufficient to confer standing upon a private litigant to sue" when the litigant is required to show a beneficial interest in the litigation. (*Limon, supra,* 84 Cal.App.5th at p. 707.) The court is bound to follow *Limon* on this issue and must disregard Canul's argument that *Limon* was wrongly decided. (See *People v. Superior Court* (1996) 50 Cal.App.4th 1202, 1211 [explaining that under the doctrine of *stare decisis,* courts must accept he law declared by courts of superior jurisdiction].)

Accordingly, Cross-Defendants' motion for summary judgment of the FACC is GRANTED.[5]

IV. CANUL'S MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, SUMMARY ADJUDICATION

Canul moves for summary judgment of the FACC or, alternatively, summary adjudication of Cross-Defendants' first and second affirmative defenses to the FACC.

The court's ruling above granting Cross-Defendants' motion for summary judgment of the FACC renders Canul's motion moot.

Accordingly, Canul's motion summary judgment or, alternatively, summary adjudication is deemed MOOT.

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

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[5] Because Cross-Defendants' argument regarding the issue of standing is dispositive of the instant motion, the court need not address Cross-Defendants' additional argument regarding materiality.

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Calendar Line 5

Case Name: Velocity Investments, LLC v. Canul
Case No.: 16CV300096

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on October 25, 2023, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VII. INTRODUCTION

According to the allegations of the Complaint, filed on December 10, 2018, plaintiff and cross-defendant Velocity Investments, LLC ("Velocity") is the owner of debt owed by defendant and cross-complainant Eva Pascual ("Pascual"). (Complaint, ¶¶ 4-5.) The Complaint sets forth common counts for: (1) Open Book Account; and (2) Money Lent.

On February 19, 2019, Pascual filed a putative class action Cross-Complaint against Velocity, alleging a single cause of action for California Fair Debt Buying Practices Act ("CFDBPA").

On January 29, 2021, Pascual filed an amendment to the Cross-Complaint substituting Velocity Portfolio Group, Inc. ("VPGI") for Roe 1.

Pascual then filed a First Amended Cross-Complaint ("FACC") against Velocity and VPGI (collectively, "Cross-Defendants") on November 4, 2021, which alleges a single cause of action for violation of the CFDBPA. According to the allegations of the FACC, Cross-Defendants engage in a routine practice of filing and serving collection complaints which do not comply with Civil Code sections 1788.52, subdivision (b) and 1788.58, subdivisions (a)(6), (a)(9), and (b). Specifically, the Complaint filed against Pascual failed to: (1) truthfully state the name and address of the charge-off creditor (as it identified Prosper Funding, LLC as the charge-off creditor instead of EW-PRL Trust); and (2) attach a copy of the contract or other document described in 1788.52, subdivision (b). (FACC, ¶¶ 13-33, 57-62.)

On August 31, 2022, the court certified the class.

Now before the court are the following matters: (1) Cross-Defendants' motion to seal Exhibit X attached to Plaintiff's Notice of Documents Lodged Conditionally Under Seal filed on July 21, 2023; (2) Cross-Defendants' motion for summary judgment of the FACC; and

(3) Pascual's motion for summary judgment of the FACC or, alternatively, summary adjudication of Cross-Defendants' first and second affirmative defenses to the FACC. All three motions are opposed.[6]

VIII. MOTION TO SEAL

A. LEGAL STANDARD

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

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

[6] The court notes that Pascual's opposition to Cross-Defendant's motion for summary judgment exceeds the 20-page limit set forth by California Rules of Court, rule 3.1113(d). Consequently, the opposition must be considered in the same manner as a late-filed paper. (Cal. Rules of Court, Rule 3.1113(g).) Given the foregoing, the court exercises its discretion to consider only the first 20 pages of the opposition.

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

B. DISCUSSION

Cross-Defendants ask the court to seal Exhibit X attached to Plaintiff's Notice of Documents Lodged Conditionally Under Seal filed on July 21, 2023. Cross-Defendants state that the subject document was produced during discovery and marked confidential pursuant to the parties' protective order in this case. Cross-Defendants submit a declaration from their counsel, who declares that the document constitutes "business policies and other proprietary documents of Velocity," was "created by Velocity for Velocity's use within its business and are not publicly available," and "contain detailed rules, instructions, and guidelines." (Declaration of Justin M. Penn in Support of Cross-Defendants' Motion to Seal, ¶ 4.)

Pascual opposes the motion to seal, arguing that Cross-Defendants failed to make a fact specific showing that an overriding interest exists that supports the sealing and that Cross-Defendants would be substantially harmed if the document is not sealed.

The court agrees that the declaration submitted by Cross-Defendants' counsel does not set forth sufficient facts to justify sealing the subject document. As Pascual persuasively argues, the declaration submitted by Cross-Defendants' counsel is conclusory—it does not establish that he is a custodian of records for Cross-Defendants or that he has personal knowledge of Cross-Defendants' business practices regarding the subject document. Furthermore, the declaration does not provide that there is a substantial probability that Cross-Defendants will be prejudiced absent sealing, or set forth any facts demonstrating that there is a substantial probability of prejudice from the public disclosure of the document. (See *Universal, supra,* 110 Cal.App.4th at p. 1283 ["the party seeking closure or sealing must prove prejudice to that interest is substantially probable"].)

Accordingly, Cross-Defendants' motion to seal is DENIED.

III. CROSS-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. REQUEST FOR JUDICIAL NOTICE

1. Cross-Defendants' Request

In connection with their moving papers, Cross-Defendants ask the court to take judicial notice of the Complaint and FACC filed in this action. In connection with their reply, Cross-Defendants ask the court to take judicial notice of this court's order granting a motion for judgment on the pleadings in a separate case, *David Chai v. Velocity Investments, LLC, et al,* (Santa Clara County Superior Court, Case No. 20CV373916) ("*Chai* Action").

The Complaint and FACC are proper subjects of judicial notice under Evidence Code section 452, subdivision (d) as they are court records relevant to issues raised in the pending motions. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *People v. Woodell* (1998) 17 Cal.4th 448, 455 (*Woodell*) [courts may "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

Conversely, the order in the *Chai* Action is not a proper subject of judicial notice. Unpublished California opinions "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Ct., rule 8.1115(a); see also *Schachter v. Citigroup, Inc*. (2005) 126 Cal.App.4th 726, 738 [trial court ruling has no precedential value].) The court admonishes Cross-Defendants not to cite unpublished California trial court orders as persuasive authority in the future.

Accordingly, Cross-Defendants' request for judicial notice is GRANTED IN PART and DENIED IN PART. The request is GRANTED as to the Complaint and FACC. The request is DENIED as to the order entered in the *Chai* Action.

2. Pascual's Request

In connection with her opposition, Pascual asks the court to take judicial notice of: the Complaint; the Declaration of Fred W. Schwinn in Support of Cross-Complainant's Motion for Summary Judgment, or in the Alternative, Motion for Summary Adjudication; the Appendix of Evidence in Support of Cross-Complainant's Motion for Summary Judgment, or in the Alternative, Motion for Summary Adjudication, Exhibits A-I; the Appendix of Evidence in

Support of Cross-Complainant's Motion for Summary Judgment, or in the Alternative Motion for Summary Adjudication, Exhibits J-O; and the Appendix of Evidence in Support of Cross-Complainant's Motion for Summary Judgment, or in the Alternative Motion for Summary Adjudication, Exhibits P-V.

These items are generally proper subjects of judicial notice under Evidence Code section 452, subdivision (d) as they are court records relevant to issues raised in the pending motions; however, the court only takes judicial notice of the existence of the subject documents. (See Evid. Code, § 452, subd. (d) [permitting judicial notice of court records]; see also *Woodell, supra,* 17 Cal.4th at p. 455 [courts may "take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments—but [the court] cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact."].)

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

B. EVIDENTIARY OBJECTIONS

In connection with their reply, Cross-Defendants object to potions of Pascual's declaration submitted in support of her opposition to the instant motion.

Cross-Defendants' objections do not comply with California Rules of Court, rule 3.1354. Rather than submit two separate documents as required by the rule—one setting forth the objections and another setting forth a proposed order—Cross-Defendants submitted a single packet of objections, signed by counsel, with blanks for the court to indicate its rulings and lines for the court to sign on. (See Cal. Rules of Ct., rule 3.1354(b) [a party must provide written objections that comply with one of the formats described in the rule] (c) [a party must provide a proposed order that complies with one of the formats described in the rule].) This hybrid document does not comply with California Rule of Court, rule 3.1354.

Because Cross-Defendants' evidentiary objections do not comply with the California Rules of Court, the court is not required to rule on the objections. (See *Vineyard Spring Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format]; see also *Hodjat v. State Farm Mut. Auto.*

Ins. Co. (2012) 211 Cal.App.4th 1, 8-9 [the trial court is not required to rule on objections that do not comply with California Rules of Court, rule 3.1354 and is not required to give objecting party a second chance at filing properly formatted papers]; *Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1118 [the trial court acted within its discretion when it overruled evidentiary objections for failing to meet the requirements of the California Rules of Court for the format of evidentiary objections].)

Accordingly, the court declines to rule on Cross-Defendants' evidentiary objections.

C. LEGAL STANDARD

A motion for summary judgment must dispose of the entire action. (Code Civ. Proc., § 437c, subd. (a); *All Towing Services LLC v. City of Orange* (2013) 220 Cal.App.4th 946, 954 ["Summary judgment is proper only if it disposes of the entire lawsuit."].) The pleadings limit the issues presented for summary judgment and such a motion may not be granted or denied based on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98; see also *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins.* (2010) 181 Cal.App.4th 60, 73 ["the pleadings determine the scope of relevant issues on a summary judgment motion"].)

"Summary judgment is properly granted when no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] A defendant moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. [Citation.]" (*Madden v. Summit View, Inc.* (2008) 165 Cal.App.4th 1267, 1272 (*Madden*).) To satisfy this burden, the defendant must present evidence which either conclusively negates an element of the plaintiff's cause of action, or which shows the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855.)

"Once the defendant has met that burden, the burden shifts to the plaintiff 'to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would

allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Madden, supra,* 165 Cal.App.4th at p. 1272.)

For purposes of establishing their respective burdens, the parties involved in a motion for summary judgment must present admissible evidence. (*Saporta v. Barbagelata* (1963) 220 Cal.App.2d 463, 468.) Additionally, in ruling on the motion, a court cannot weigh said evidence or deny summary judgment on the ground that any particular evidence lacks credibility. (See *Melorich Builders v. Superior Court* (1984) 160 Cal.App.3d 931, 935; see also *Lerner v. Superior Court* (1977) 70 Cal.App.3d 656, 660.) As summary judgment "is a drastic remedy eliminating trial," the court must liberally construe evidence in support of the party opposing summary judgment and resolve all doubts concerning the evidence in favor of that party. (See *Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 389; see also *Hepp v. Lockheed-California Co.* (1978) 86 Cal.App.3d 714, 717-718.)

D. DISCUSSION

Cross-Defendants initially argue they are entitled to summary judgment of the FACC because the undisputed material facts establish that Pascual lacks standing to bring the action.[7] Cross-Defendants assert that Pascual only has standing to bring the lawsuit if she is beneficially interested in the controversy, i.e., she has suffered an injury in fact, citing *Limon v. Circle K Stores Inc*. (2022) 84 Cal.App.5th 671 (*Limon*). Cross-Defendants contend Pascual has not sustained an injury in fact because the undisputed material facts show that Pascual stipulated that she is not seeking any emotional distress or out-of-pocket damages and Pascual waived any claim to actual damages.

In opposition, Pascual argues that the court should not follow *Limon* as it was wrongly decided and is factually distinguishable from the instant case. Pascual further asserts that she is beneficially interested in the controversy because she sustained actual damages in the form of attorney fees and costs incurred as the result of the filing of the Complaint. Pascual contends that it has never been her position that she has no actual damages, rather she merely

[7] Cross-Defendants also argue that they are entitled to summary judgment of the FACC because the undisputed material facts establish that the alleged violations were not material.

waived her right to recover those damages. Pascual also contends that she has suffered an informational injury because she did not receive information that she was statutorily entitled to.

In reply, Cross-Defendants argue that by waiving her claim for actual damages Pascual relinquished her right to assert the existence actual damages, citing *Sherer v. Laguna Beach* (1936) 13 Cal.App.2d 396 (*Sherer*). Cross-Defendants also urge the court to disregard Pascual's evidence regarding her purported actual damages because she refused to produce such evidence during discovery. Cross-Defendants point out that they propounded formal discovery requests seeking the evidence Pascual now relies upon, and even attempted to question Pascual regarding her attorney fees at her deposition. However, Pascual repeatedly asserted objections to the discovery as irrelevant on the basis that she was not seeking actual damages. Cross-Defendants contend that this type of gamesmanship represents an abuse of the discovery process and Pascual should not be allowed to reverse her position at this time. Cross-Defendants further assert that even if the court considers Pascual's evidence regarding attorney fees and costs, the evidence does not demonstrate that Pascual sustained actual damages because the fees and costs were not proximately caused by the alleged violations (i.e., the misidentification of the charge-off creditor and the failure to include a copy of the contract or other document described in 1788.52, subdivision (b)). Cross-Defendants argue there was nothing about the form of the complaint that caused Pascual to retain counsel; rather, she retained counsel due to the existence of the unpaid debt and the mere filing of the complaint.

As a threshold matter, the court agrees with Cross-Defendants that Pascual must be beneficially interested in the controversy, i.e., have suffered an injury in fact, in order to have standing to bring her claim under the CFDBPA.

Code of Civil Procedure, section 367 states that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." A "real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law." (*Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605.) "In general, California law does not give a party personal standing to assert rights or interests belonging solely to others." (*Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, 936.)

The Code of Civil Procedure also provides for writ of mandate relief, "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law[,]" so long as the writ is issued "upon the verified petition of the party beneficially interested." (Code Civ. Proc., § 1086.) To be beneficially interested, a party must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 362.) This standard "is equivalent to the federal 'injury in fact' test, which requires a party to prove by a preponderance of the evidence that it has suffered 'an invasion of a legally protected interest that is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.' [Citation.]" (*Ibid.*)

In *Limon*, the appellate court concluded that the beneficial interest requirement for standing is not limited to the mandamus actions set forth in Code of Civil Procedure, section 1086. (*Limon, supra*, 84 Cal.App.5th at pp. 699-700.) "There are a number of California cases that indicate the 'beneficial interest' requirement applies generally to questions of standing except, of course, in cases involving public standing or where the statute at issue otherwise confers standing on a plaintiff." (*Id*. at p. 699.) The *Limon* court discussed the exceptions and concluded that, ""as a general matter, to have standing to pursue a claim for damages in the courts of California, a plaintiff must be beneficially interested in the claims he is pursuing." (*Id*. at p. 700.)

Thus, unless the CFDBPA provision at issue here provides for public standing or otherwise confers standing upon Pascual, she must show that she is beneficially interested (i.e., that she has suffered an injury in fact) to have standing. (*Limon, supra*, 84 Cal.App.4th at p.700.) Therefore, the court examines the statutory language at issue to determine if it confers standing without a showing of injury in fact.

> California courts have set forth rules for construing the meaning of a statute. Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, court must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy. [Citations.]

(*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737 (*Concerned Communities*); see also *Jackpot Harvesting Co., Inc. v. Superior Court* (2018) 26 Cal.App.5th 125, 140 (*Jackpot*).)

> California courts follow an approach to determine legislative intent that involves up to three steps. The first step is our examination of the actual language of the statute. We do so because the statutory language is generally the most reliable indicator of legislative intent. In this first step, we scrutinize words themselves, giving them their usual and ordinary meanings and construing them in context. And we will apply common sense to the language at hand and interpret the statute to make it workable and reasonable. In doing so, if we find the statutory language to be clear, its plain meaning should be followed. Thus, if there is no ambiguity, we presume the Legislature meant what it said, and the plain meaning of the language governs.

(*Jackpot, supra,* 26 Cal.App.5th at pp. 140-141, internal quotation marks and citations omitted.)

Pascual's claim for violation of the CFDBPA is predicated on allegations that Cross-Defendants failed to: (1) truthfully state the name and address of the charge-off creditor (as it identified Prosper Funding, LLC as the charge-off creditor instead of EW-PRL Trust); and (2) attach a copy of the contract or other document described in 1788.52, subdivision (b). (FACC, ¶¶ 13-33, 57-62.) Pascual alleges that as a result of Cross-Defendants' wrongful conduct, she is entitled to recover statutory damages under Civil Code section 1788.62. (FACC, ¶¶ 65-66.)

> As is relevant here, Civil Code section 1788.62 states:
> (a) In the case of an action brought by an individual or individuals, a debt buyer that violates any provision of this title with respect to any person shall be liable to that person in an amount equal to the sum of the following:
>
> > (1) Any actual damages sustained by that person as a result of the violation, including, but not limited to, the amount of any judgment obtained by the debt buyer as a result of a time-barred suit to collect debt from that person.
> >
> > (2) Statutory damages in an amount as the court may allow, which shall not be less than one hundred dollars ($100) nor greater than one thousand dollars ($1,000).
>
> (b) In the case of a class action, a debt buyer that violates any provision of this title shall be liable for any statutory damages for each named plaintiff as provided in paragraph (2) of subdivision (a). If the court finds that the debt buyer engaged in a pattern and practice of violating any provision of this title, the court may award additional damages to the class in an amount not exceed the lesser of five hundred thousand dollars ($500,000) or 1 percent of the net worth of the debt buyer.

(Civ. Code,§ 1788.62, subds. (a)-(c).)

Here, Civil Code section 1788.62 characterizes the relief available as "damages." More specifically, it states the offending party is liable for the sum of "actual damages" and "statutory damages" incurred by the plaintiff. (Civ. Code,§ 1788.62, subds. (a) & (b).)

Although the term "damages" is not defined in the CFDBPA, the Fifth District Court of Appeal in *Limon* interpreted a provision in the FCRA containing similar language. (*Limon, supra,* 84 Cal.App.5th at pp. 700-703.) There, the provision of the FCRA at issue (15 U.S.C. § 1681n) also characterized the relief in terms of "damages." (*Id*. at pp. 00-701 ["Specifically, section 1681n provides, in part: 'Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of-[ ] (l)(A) any actual damages sustained by the consumer as result of the failure or damages of not less than $100 and not more than $1,000 ...' "].)

The *Limon* court then reviewed dictionary definitions and California case law, finding that "the term damages connotes compensation for an injury[.]" (*Limon, supra,* 84 Cal.App.5th at p. 702.) " 'Damages are intended to be compensatory, to make one whole. [Citation.] Accordingly, there must be an injury to compensate.' " (*Ibid*.) The court also noted that the Legislature elsewhere used the term "penalties" to describe other potential relief available under the FCRA, citing section 1681s. The court explained that where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning. (*Id.* at pp. 700-701.) The *Limon* court concluded that "the statutory damages provision is intended to compensate a plaintiff for injury" and is designed to provide redress for plaintiffs " 'who have suffered concrete harm but may find it difficult to prove actual damages.' [Citations.]" (*Id*. at pp. 702-703.)

In this case, the plain language of Civil Code section 1788.62 provides for relief in terms of damages, not penalties. As Cross-Defendants note, if the Legislature had intended for the statutory damages provision of the CFDBPA to function as a penalty, it would have so stated. In the related California Fair Debt Collection Practices Act, which was passed before the CFDBPA, the remedies statute expressly provides that, in addition to actual damages, a

debt collector is liable "for a *penalty* in such amount as the court may allow, which shall not be less than one hundred dollars ($100) nor greater than one thousand dollars ($1,000)." (Civ. Code, § 1788.30, subd. (b), italics added.) Thus, for the same reasons discussed in *Limon* as described above, the court concludes that a plaintiff must allege an injury in fact to have standing to pursue relief under Civil Code section 1788.62.

Moreover, the court finds that Cross-Defendants meet their initial burden to present evidence showing that Pascual has not sustained an injury in fact. Cross-Defendants' undisputed material facts demonstrate that Pascual stipulated that she is not seeking any emotional distress or out-of-pocket damages and Pascual waived any claim to actual damages. (Separate Statement of Undisputed Material Facts and Supporting Evidence in Support of Cross-Defendants' Motion for Summary Judgment […], UMF Nos. 8-12.)

Cross-Defendants' supporting evidence shows that, at Pascual's deposition, Cross-Defendants' counsel asked Pascual if she incurred attorney fees or costs in connection with the underlying Complaint. (Declaration of Justin M. Penn in Support of Cross-Defendants' Reply […] ("Penn Reply Dec."), Ex. B, pp. 16-17.) Pascual's counsel objected to the line of questioning and instructed Pascual not to answer. (*Ibid.*) Later on, Cross-Defendants' counsel asked Pascual to "stipulate that you don't have—that there's no emotional distress or actual damages in this case." (Compendium of Documentary Evidence in Support of Cross-Defendants' Motion for Summary Judgment […] ("Compendium"), Ex. D, p. 31.) Pascual's counsel then replied, "So stipulated." (*Ibid.*) Pascual's counsel also stated that "these are statutory damages cases." (*Ibid.*) Additionally, Form Interrogatory No. 9.1 asked Pascual to identify any damages that she attributed to the incident. (Compendium, Ex. E.) In response, Pascual identified only statutory damages and expressly stated that she waived any claim to actual damages. (*Ibid.*) Similarly, Special Interrogatory No. 3 asked Pascual to identify the factual basis for Pascual's claim for actual damages, including what are the actual damages incurred, the amount of the actual damages, and who they were calculated. (Compendium, Ex. F.) In response, Pascual did not identify and factual basis to support her claim that she sustained actual damages, but states the she waived any claim to actual damages. (*Ibid.*) Lastly, Request for Production of Documents No. 2 asked Pascual to produce any agreement

with her attorneys applicable to the lawsuit (such as a retainer or fee sharing agreement). (Penn Reply Dec., Ex. A.) As is relevant here, Pascual objected to the request and refused to produce the responsive documents on the grounds that the discovery sought was irrelevant. (*Ibid.*)

In opposition, Pascual fails to raise a triable issue of material fact. Pascual contends that it has never been her position that she has no actual damages; rather, she merely waived her right to recover those damages. This contention is belied by the record. As explained above, in addition to expressly waiving her claim for actual damages, Pascual's counsel stipulated on the record at her deposition that there were no actual damages in the case. Pascual also refused to produce the retainer agreement with her counsel (which she now relies upon to oppose the instant motion) in response to Request for Production of Documents No. 2 on the ground that the discovery sought was irrelevant to the action. Pascual could not in good faith object to Request for Production of Documents No. 2 as irrelevant if it was, in fact, her position that she sustained actual damages in the form of attorney fees and costs and, therefore, had standing to bring her claim under the CFDBPA.

Moreover, Cross-Defendants cite case law which provides that "[d]amages once suffered and waived *must be held to be waived for all purposes* and cannot be recovered under another guise, name or form." (*Sherer v. Laguna Beach* (1936) 13 Cal.App.2d 396, 404, italics added.) Here, it is undisputed that Pascual expressly waived her actual damages. Thus, those damages must be held to be waived for all purposes.

Furthermore, even if the court were to consider Pascual's evidence regarding her attorney fees and costs, Cross-Defendants persuasively argue that Pascual l does not establish that the fees and costs were incurred as a result of Cross-Defendants' alleged violations of the CFDBPA. As explained above, Pascual alleges that Cross-Defendants violated the CFDBPA by filing a complaint that misidentified the charge-off creditor and failed to include a copy of the contract or other document described in 1788.52, subdivision (b). However, there is nothing in the record showing that the alleged defects in the Complaint caused Pascual to retain counsel. In fact, the record demonstrates that Pascual retained counsel simply because she was concerned and wanted to learn more about the Complaint.

Finally, Pascual's asserted informational injury is insufficient to confer standing. As the court in *Limon* held, "under California law, … an informational injury that causes no adverse effect is insufficient to confer standing upon a private litigant to sue" when the litigant is required to show a beneficial interest in the litigation. (*Limon, supra,* 84 Cal.App.5th at p. 707.) The court is bound to follow *Limon* on this issue and must disregard Pascual's argument that *Limon* was wrongly decided. (See *People v. Superior Court* (1996) 50 Cal.App.4th 1202, 1211 [explaining that under the doctrine of *stare decisis*, courts must accept he law declared by courts of superior jurisdiction].)

Accordingly, Cross-Defendants' motion for summary judgment of the FACC is GRANTED.[8]

IV. PASCUAL'S MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, SUMMARY ADJUDICATION

Pascual moves for summary judgment of the FACC or, alternatively, summary adjudication of Cross-Defendants' first and second affirmative defenses to the FACC.

The court's ruling above granting Cross-Defendants' motion for summary judgment of the FACC renders Pascual's motion moot.

Accordingly, Pascual's motion summary judgment or, alternatively, summary adjudication is deemed MOOT.

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

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[8] Because Cross-Defendants' argument regarding the issue of standing is dispositive of the instant motion, the court need not address Cross-Defendants' additional argument regarding materiality.

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