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

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LAW AND MOTION TENTATIVE RULINGS
DATE: JUNE 26, 2024 TIME: 1:30 P.M.
PREVAILING PARTY SHALL PREPARE THE ORDER
UNLESS OTHERWISE STATED (SEE RULE OF COURT 3.1312)

LINE #	CASE #	CASE TITLE	RULING
LINE 1	21CV391973	Maboudi v. The Neiman Marcus Group, LLC (PAGA)	See Line 1 for tentative ruling.
LINE 2	22CV398811	Kovacevic v. Pure Wafer, Inc. (Class Action)	Withdrawn by moving party.
LINE 3	22CV401779	Kovacevic v. Pure Wafer, Inc. (PAGA)	Withdrawn by moving party.
LINE 4	21CV383976	Goodman v. Boba Guys, Inc. (Class Action)	See Line 4 for tentative ruling.
LINE 5	21CV384527	O'Brien, et al. v. Cerida Investment Corp., et al. (PAGA) [Lead Case; Consolidated with 21CV384529 (Class Action)]	See Line 5 for tentative ruling.
LINE 6	22CV402965	Legarde v. Spectra360, Inc. (PAGA)	See Line 6 for tentative ruling.
LINE 7	19CV344971	Alorica Inc. v. Fortinet, Inc.	See Line 7 for tentative ruling.

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LAW AND MOTION TENTATIVE RULINGS

LINE 8	19CV344971	Alorica Inc. v. Fortinet, Inc.	See Line 7 for tentative ruling.
LINE 9			
LINE 10			
LINE 11			
LINE 12			
LINE 13			

Calendar Line 1

Case Name: Maboudi v. The Neiman Marcus Group, LLC (PAGA)
Case No.: 21CV391973

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on June 26, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

On December 15, 2021, plaintiff Parastoo Maboudi ("Maboudi") filed a Representative Action Complaint against The Neiman Marcus Group LLC ("Defendant"), which set forth a single cause of action for Civil Penalties Pursuant to Private Attorneys General Act ("PAGA"), Labor Code section 2698, et seq. On January 16, 2024, plaintiffs Maboudi and Francesco Masiello (collectively, "Plaintiffs") filed the operative First Amended Representative Action Complaint ("FAC"), which set forth a set forth a single cause of action for Civil Penalties Pursuant to PAGA.

According to allegations of the FAC, Plaintiffs bring this action in their representative capacity on behalf of the State of California and all of Defendant's current and former non-exempt and/or salespersons and/or commission-based California employees "between October 8, 2020 and the present." (FAC, ¶ 9.) Defendants failed to provide Plaintiffs and aggrieved employees legally compliant meal and rest periods, failed to provide accurate compensation for missed meal and rest periods, failed to pay for all time worked, failed to compensate for off-the-clock work, failed to pay overtime at the regular rate, and failed to pay sick pay at the regular rate, failed to issue accurate itemized wage statements. (FAC, ¶ 25.) In addition, for the aggrieved employees who were paid on a commission-based compensation plan, Defendant failed to provide compensation for rest periods, overtime, and shift differential compensation. (FAC, ¶¶ 29, 46, 49.)

Now before the court is Plaintiffs' motion for approval of the PAGA settlement. The motion is unopposed.

II. LEGAL STANDARD

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

A superior court must review and approve any PAGA settlement. (Lab. Code, § 2699, subd. (l)(2).) The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) The proposed settlement must be submitted to the LWDA at the same time it is submitted to the court. (*Ibid*.)

As discussed by one court:

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

(*Patel v. Nike Retail Services, Inc.* (N.D. Cal. 2019) 2019 WL 2029061 at *2.)

As part of this analysis, courts have evaluated proposed PAGA settlements under the relevant factors from *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. (*Patel v. Nike Retail Services, Inc., supra*, 2019 WL 2029061 at *2.) "Of the *Hanlon* factors, the following are relevant to evaluating [a] PAGA settlement: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel. (*Ibid*.)

"[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *13.) The settlement must be reasonable in light of the potential verdict value. (See *O'Connor v. Uber Technologies, Inc.* (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc*. (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8-9.)

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III. DISCUSSION

A. Provisions of the Settlement

The proposed settlement has been made with regard to "Aggrieved Employees," defined as, "all persons who were employed in an hourly-paid, non-exempt role by Defendant at any time from October 8, 2020 through October 30, 2023." (Declaration of Jean-Claude Lapuyade, Esq. in Support of Plaintiffs' Motion to Approve PAGA Action Settlement ("Lapuyade Dec."), Ex. 1 ("Settlement Agreement"), ¶ 1.) The term "Defendant" is defined in the settlement agreement as The Neiman Marcus Group LLC. (Settlement Agreement, p. 1:6-7.) The "Settlement Period" is defined as the period of time from October 8, 2020 through October 30, 2023. (Settlement Agreement, ¶ 2.)

Pursuant to the terms of the settlement, Defendant will pay a total maximum sum of $1,750,000. (Settlement Agreement, ¶¶ 3, 6.) This amount includes attorney fees of not more than $583,333.33 (1/3 of the maximum settlement amount), litigation costs not to exceed $35,000, and settlement administration costs not to exceed $13,500. (Settlement Agreement, ¶¶ 30(a)-30(c).) Of the remaining net settlement amount, 75 percent will be paid to the LWDA and 25 percent will be paid to aggrieved employees based on the pro rata number of pay periods worked by each aggrieved employee during the Settlement Period. (Settlement

Agreement, ¶¶ 30(d), 33.) Funds from checks that are not cashed within 180 days from the date of mailing will be sent to the California Controller's Unclaimed Property Fund. (Settlement Agreement, ¶ 38.)

In exchange for the settlement, the aggrieved employees agree to release The Neiman Marcus Group LLC and "Released Parties" from:

> any claim for civil penalties under the PAGA and all other related remedies available under the PAGA for all allegations, claims, debts, rights, demands, charges, complaints, actions, causes of action, guarantees, interest, costs, expenses, attorneys' fees, damages, obligations or liabilities of any kind recoverable under the PAGA, contingent or accrued, that are, were or reasonably could have been alleged or asserted based upon the facts and/or theories alleged in the Lawsuit (including the First Amended Complaint to be filed as a condition of this settlement), and/or in any notice provided pursuant to PAGA by Maboudi or Masiello to the LWDA and Defendant (including, without limitation, in Maboudi's October 8, 2021 PAGA notice letter and Masiello's May 24, 2023 PAGA notice letter, respectively), arising out of, based on or related to any violation of Labor Code §§ 201, 201.3, 202, 203, 204, 210, 218.5, 218.6, 226, 226.2, 226.3, 246, 510, 512, 558, 1174, 1174.5, 1194, 1197, 1197.1, 1197.14, 1198, 1199, 2802 and 2804 that occurred, arose or accrued at any time during the Settlement Period.

(Settlement Agreement, ¶ 12, 46.) The term "Released Parties" is defined as:

> The Neiman Marcus Group LLC "and each of its affiliates, parent companies, subsidiaries, and including but not limited [to] shareholders, officers, officials, partners, directors, members, owners, servants, exempt, managerial or supervisory employees, employers, agents, contractors, attorneys, insurers, predecessors, representatives, accountants, executors, personal representatives, successors and assigns, past, present, and future, and each and all of their respective officers, partners, directors, members, owners, servants, agents, shareholders, employees, employers, agents, contractors, representatives, executors, personal representatives, accountants, insurers, attorneys, and any employee benefit plans of any nature and the respective trustees, administrators, sponsors, fiduciaries, successors, agents and employees of all such plans, predecessors, successors and assigns, past, present, and future, and all persons acting under, by, through, or in concert with any of them.

(Settlement Agreement, ¶ 13.) Though it is not made clear, it appears that plaintiff Maboudi also agreed to a general release of her individual claims covered in a separate settlement agreement. (Settlement Agreement, ¶ 6.) If plaintiff Maboudi has entered into a separate settlement agreement, the court asks Plaintiffs' counsel to inform the court, as discussed further below.

B. Fairness of the Settlment

Plaintiffs contend the PAGA settlement is fair and reasonable. (Lapuyade Dec., ¶ 18; Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Approval of PAGA Action Settlement ("MPA"), p. 7:10.) In their moving papers, Plaintiffs indicate that the settlement resolves PAGA claims on behalf of approximately 2,663 aggrieved employees who collectively worked approximately 88,000 pay periods during the Settlement Period. (MPA, p. 4:24-26.) The parties participated in a full-day mediation with Jeffrey Ross on August 1, 2023. (Lapuyade Dec., ¶ 14.) Prior to the mediation, Defendant provided Plaintiffs with data and documents including the total number of aggrieved employees and pay periods, the written wage and hour policies, employee handbooks, and time and payroll records for aggrieved employees. (*Ibid.*)

Plaintiffs estimate that Defendant's maximum potential liability for the PAGA claim is $7,229,478.15. (Lapuyade Dec., ¶ 18.) Plaintiffs provide an explanation for how they arrived at this figure, beginning with their contention that Defendant pay sales associates and other employees via a compensation structure that pays them either an hourly wage or their commission, whichever is greater. (Lapuyade Dec., ¶ 19.) Plaintiffs assert that under such a pay structure, the employer must separately compensate employees for non-selling time. (Lapuyade Dec., ¶ 20.)

Plaintiffs maintain that courts have considerable discretion to reduce penalty awards under PAGA and therefore, the actual amount that could be awarded may well be significantly lower. (Lapuyade Dec., ¶¶ 22, 23.) Plaintiffs identify several factors as justification for the discounted valuation, including Defendant's argument "that Plaintiffs cannot demonstrate the ability to pursue a statewide representative action on behalf of the Aggrieved Employees that worked pursuant to this compensation structure." (Lapuyade Dec., ¶ 24.) Counsel notes that "the group of Aggrieved Employees is comprised of individuals who worked at ten separate locations throughout California, and Defendant does not believe that Plaintiffs can demonstrate the ability pursue this claim on behalf of employees at nine of the California location at which Plaintiffs did not work." (*IbIid.*) Defendant believes that determining which employees were paid either their hourly rate or their commission for each pay period would create an

individualized inquiry not well-suited for a PAGA action. (Lapuyade Dec., ¶ 24.) Defendant maintains that it does not use a commission-only plan to compensate its employees. (Lapuyade Dec., ¶ 25.)

Defendant also assert that many of the FAC's claims, including those relating to meal period violations, rest period violations, overtime and sick pay, and waiting period violations, are lacking in value because of the difficulty in showing that Defendant acted willfully. (Lapuyade Dec., ¶¶ 30.) Plaintiffs also discounted the claim based on off-the-clock work because of defenses raised by Defendant, including its position that it is the employees' responsibility to alert Defendant regarding off-the-clock work. (Lapuyade Dec., ¶ 34.)

While the settlement amount appears to be fair, the court would like Plaintiffs to address several issues in greater detail. First, the definition of the PAGA Period in the FAC and the definition of the Settlement Period in the Settlement Agreement have different end dates. The FAC defines the PAGA Period as "between October 8, 2020 to the present." (FAC, ¶ 9.) The Settlement Agreement defines the "Settlement Period" as "the inclusive time period from October 8, 2020 through October 30, 2023. (Settlement Agreement, ¶ 2.) Plaintiffs do not provide an explanation for this discrepancy or why October 30, 2023 is used as the end date for the Settlement Period in the Settlement Agreement. Prior to the continued hearing, Plaintiffs shall file a supplemental declaration explaining why it is fair for the Settlement Period to end on October 30, 2023.

Second, it is unclear to the court how Plaintiffs arrived at their estimated maximum exposure amount of $1,750,000. For instance, throughout their moving papers, Plaintiffs provide different figures for the approximate number of Aggrieved Employees. Plaintiffs' counsel indicates that there are "over 1,000 Aggrieved Employees working in different types of jobs," and also references "1,389 former employees." (Lapuyade Dec., ¶¶ 32, 41.) In their moving papers, Plaintiffs assert that there are "approximately, 2,663 'Aggrieved Employees.'" (MPA, p. 1:5.) The supporting documentation provided by the settlement administrator indicates that there are 2,350 Aggrieved Employees. (Lapuyade Dec., Ex 7, Declaration of Sean Hartranft in Support of Plaintiff's Motion to Approve PAGA Action Settlement ("Hartranft Dec."), Ex. B, p. 1.)

Similarly, Plaintiffs' breakdown of the estimated maximum liability exposure references—without explanation—varying numbers of pay periods and workweeks. (Lapuyade Dec., ¶¶ 21 ["28,819 total pay periods"], 26 ["32,763 pay periods"], 29 ["58,248 workweeks"], 33 ["14,460 pay periods"].) The lack of explanation for these figures, coupled with the lack of any reference to discovery in Plaintiffs' moving papers, causes the court to question the factual basis for Plaintiffs' estimate of Defendant's maximum liability exposure. Prior to the continued hearing, Plaintiffs shall file a supplemental declaration explaining in detail how they calculated the maximum number of violations that Defendant committed for each category of PAGA claims, including why the number of pay periods/workweeks varies, and how they arrived at the estimated amount of Defendant's maximum potential exposure.

Third, the Settlement Agreement's definition of "Released Parties" is not exhaustive. The Settlement Agreement provides that "Released Parties" includes the Defendant "and each of its affiliates, parent companies, subsidiaries, and including but not limited [to] shareholders, officers, officials, …." (Settlement Agreement, ¶ 13.) Thus, as currently drafted, the list of persons and entities that are included in the term "Released Parties" is not comprehensive because the definition states that the released parties are "not limited to" the description provided. No other definition is provided for the term "Released Parties." Consequently, the court cannot determine with certainty who is, and is not, a released party under the settlement agreement. The parties are directed to meet and confer to determine whether they can amend the definition of the "Released Parties" to remove the "not limited to" language. Prior to the continued hearing, Plaintiff shall file a supplemental declaration indicating whether the parties were able to reach to address this issue."

Fourth, the Settlement Agreement refers to a separate settlement entered into between one of the Plaintiffs and Defendant with respect to that plaintiff's individual claims. (Settlement Agreement, ¶ 6.) Although Plaintiffs only need court approval for the PAGA settlement, not for an individual settlement, information regarding the terms of any individual settlement will help the court determine whether the PAGA settlement is fair in the context of the overall settlement of the claims in the case. The court notes that the operative complaint does not allege any individual claim on Plaintiffs' behalf, other than the PAGA claim. It is

unclear to the court what individual claims are being resolved by the separate settlement agreement. Furthermore, it is unclear whether Plaintiffs' counsel received payment for attorney fees and costs in connection with the individual settlement agreement and whether any such payment was for work also performed in connection with the PAGA action. Therefore, prior to the continued hearing, Plaintiffs shall provide the individual settlement agreement for Plaintiff Maboudi and any individual settlement agreement for Plaintiff Masiello to the court for an *in camera* review.

Fifth, the court wants to determine whether counsel has already received any payment for work in connection with the aforementioned individual settlement before determining whether the attorney fees requested are reasonable. Therefore, prior to the continued hearing, Plaintiffs' counsel shall submit a supplemental declaration addressing whether payment was received for attorney fees in connection with the individual settlement and whether any such payment covered any fees incurred in connection with the PAGA action.

Sixth, counsel for Plaintiffs asserts that it will provide the court with a final amount of litigation costs at the time of the hearing on this motion. (Lapuyade Dec., ¶ 47, fn. 2.) Plaintiffs' counsel represent that they have collectively incurred $18,929.71 prosecuting this action. (Lapuyade Dec., ¶ 57.) However, the court wants to determine how much of these costs are specific to the individual settlement and whether counsel has already received any payment for work in connection with the aforementioned individual settlement before determining whether the costs requested are reasonable. Therefore, prior to the continued hearing, Plaintiffs' counsel shall submit a supplemental declaration addressing whether payment was received for costs in connection with the individual settlement and whether any such payment covered any costs incurred in connection with the PAGA action. Because there are two law firms involved, the court also asks Plaintiffs' counsel to provide the fee sharing agreement between the two firms.

Accordingly, the motion for approval of PAGA settlement is CONTINUED to August 14, 2024, at 1:30 p.m. in Department 19. Plaintiffs shall file a supplemental declaration no later than July 29, 2024, addressing the court concerns regarding the dates used for the Settlement Period, how specifically Plaintiffs arrived at the estimated total maximum exposure

amount, whether the defect identified concerning the overbreadth of the term "Released Parties" has been cured, the terms of the individual settlement and whether counsel received any payment for fees or costs in connection with the individual settlement. No additional filings are permitted.

Plaintiff shall prepare the order.

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Calendar Line 2

Case Name:
Case No.:

- oo0oo -

Calendar Line 3

Case Name:
Case No.:

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Calendar Line 4

Case Name: Goodman v. Boba Guys, Inc. (Class Action)
Case No.: 21CV383976

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on June 26, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

IV. INTRODUCTION

This is a class and representative action arising out of alleged wage and hour violations. The operative First Amended Class Action Complaint for Damages ("FAC"), filed on October 29, 2021, sets forth the following causes of action: (1) Violation of Labor Code §§ 210, 216, 1194, and 1197 (Unpaid Wages); (2) Violation of Labor Code §§ 204, 510 and 1198 (Failure to Pay Overtime Wages); (3) Violation of Labor Code §§ 226.7 and 512 (Failure to Provide Meal Periods); (4) Violation of Labor Code §§ 226 and 1174 (Failure to Properly Report Pay); (5) Violation of Business & Professions Code §§ 17200, et seq. (Unlawful Business Acts and Practices); (6) Violation of Business & Professions Code §§ 17200, et seq. (Unfair Business Acts and Practices); (7) Violation of Labor Code §§ 2699, et seq. (Representative Action for Civil Penalties).

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

V. 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.)

Similar to its review of class action settlements, the Court must "determine independently whether a PAGA settlement is fair and reasonable," to protect "the interests of the public and the LWDA in the enforcement of state labor laws." (*Moniz v. Adecco USA, Inc.* (2021) 72 Cal.App.5th 56, 76-77.) It must make this assessment "in view of PAGA's purposes to remediate present labor law violations, deter future ones, and to maximize enforcement of state labor laws." (*Id.* at p. 77.)

VI. DISCUSSION

A. Provisions of the Settlement

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

> [A]ll current and former employees who worked for [defendant Boba Guys, Inc. ("Defendant")] as an hourly-paid non-exempt employee, including "Bobaristas", at any time from July 1, 2017 to the date of preliminary approval of this Settlement.

(Declaration of Katherine A. Rabago in Support of Plaintiffs' Motion for Preliminary Approval ("Rabago Dec."), Ex. 2 ("Settlement Agreement"), ¶ 5.) The Class Period is defined as the period from July 1, 2017 to the date the court enters preliminary approval of the settlement. (Settlement Agreement, ¶ 12.)

The settlement also includes a subset PAGA Class of aggrieved employees [hereinafter "PAGA Employees"] who are defined as "all current and former employees who worked for [Defendant] as an hourly paid non-exempt employee, including "Bobaristas", at any time from July 1, 2020 to the date of preliminary approval of settlement." (Settlement Agreement, ¶¶ 4, 30.) The PAGA Period means the period from July 1, 2020 to the date the court enters preliminary approval of the settlement. (Settlement Agreement, ¶ 33.)

According to the terms of the settlement, Defendant will pay a gross settlement amount of $350,000. (Settlement Agreement, ¶ 23, 50.) The gross settlement amount includes attorney fees up to $116,655 (1/3 of the gross settlement amount), litigation costs not to exceed $7,500, a PAGA allocation of $130,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to PAGA Employees as individual PAGA payments), an enhancement award up to $5,000, and settlement administration costs not to exceed $16,995. (Settlement Agreement, ¶¶ 23, 25, 27, 28, 31, 50, 51(a), 51(b), 51(c), 51(e).) The net settlement amount will be distributed to participating class members on pro rata basis according to the number of workweeks they were employed by Defendant. (Settlement Agreement, ¶ 26(a).) Funds from uncashed payments will be deposited with the California Controller's Unclaimed Property Fund. (Settlement Agreement, ¶ 27.)

The parties' proposal to send funds from uncashed checks to the State of California Unclaimed Property Fund does not comply with Code of Civil Procedure section 384, which mandates that unclaimed or abandoned class member funds be given to "nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent." Plaintiffs are directed to provide a new *cy pres* in compliance with Code of Civil Procedure section 384 prior to the continued hearing date.

In exchange for the settlement, the class members agree to release Defendant from all claims that were alleged or reasonably could have been alleged based on the facts stated in the FAC occurring during the Class Period. (Settlement Agreement, ¶¶ 56, 58.) PAGA Employees agree to release Defendant, and related entities and persons, from any and all claims for civil penalties under PAGA arising from any of the factual allegations in the FAC and Plaintiff's PAGA letter arising during the PAGA Period. (Settlement Agreement, ¶ 59.) In addition, Plaintiff also agrees to a comprehensive general release. (Settlement Agreement, ¶ 57.)

B. Fairness of the Settlement

Plaintiff states that the settlement was reached through discovery, analysis, and mediation with Hon. George Hernandez. (Rabago Dec., ¶¶ 10-13.) In anticipation of mediation, the parties propounded discovery and exchanged information relating to Plaintiff's work history and Defendant's employment practices. (Rabago Dec., ¶¶ 10, 12.) From the information provided, Plaintiff determined that there were approximately 1,540 class members who worked a total of 191,758 workweeks. (Rabago Dec., ¶ 13(b), 21, Ex. 2 ("Class Notice"), ¶ 52.) Plaintiff estimates that Defendant's maximum potential exposure for the claims to be $604,199. (Rabago Dec., ¶¶ 13 (a)-(c), 14 (a)-(b).) Plaintiff provides a breakdown of this amount by claim. (*Ibid.*) Plaintiff discounted the value of the claims to avoid double recovery, the possibility that the court could substantially reduce any PAGA penalties, and to reflect the risks of litigation and the strengths and weaknesses of Plaintiff's case. (Rabago Dec., ¶¶ 14(b), 15-20.)

The gross settlement amount represents approximately 58% of the potential maximum recovery. The proposed settlement is above the minimum range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D.Cal., Feb. 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist.LEXIS 30201, at *41-42 [citing cases listing range of five to 25-35 percent of the maximum total exposure].)

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

C. Incentive Award, Fees, and Costs

Plaintiff requests an enhancement award in the amount of $5,000 for the class representative.

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

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

Plaintiff filed a declaration generally describing his participation in the lawsuit. Plaintiff declares that he worked closely with his attorneys, that he spent hours preparing and reviewing information related to this litigation, and that he helped coordinate communication between his attorneys and class members. (Declaration of Niklas Miles Goodman in Support of Plaintiff's Motion for Preliminary Approval, ¶ 8.) However, Plaintiff did not provide an estimate of the time spent in connection with this litigation. Prior to the final approval hearing, the class representative (Plaintiff Goodman) shall file a supplemental declaration specifically detailing her participation in the action and an estimate of the time spent. The court will determine the incentive award at that time.

D. Conditional Certification of Class

Plaintiff requests that the class be conditionally certified for purposes of the settlement. Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." As interpreted by the California Supreme Court, section 382 requires: (1) an ascertainable class;

and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).)

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

As explained by the California Supreme Court,

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

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

Plaintiff states that there are approximately 1,540 class members that can be determined from a review of Defendant's records. There are common questions regarding whether class members were subjected to common practices that violated wage and hour laws. No issue has been raised regarding the typicality or adequacy of Plaintiff as class representative. Therefore, the court finds that the proposed class should be conditionally certified for settlement purposes.

E. Class Notice

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

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

However, the final paragraph on page 1 of the class notice is misleading as it states that class members "have two basic options under the Settlement": (1) "Do Nothing"; and (2) "Opt-Out of the Class Settlement." This portion of the class notice must be modified to reflect that class members have a third option—they may object to the settlement.

Next, page 2 and Section 8 on page 7 must be amended to include the final language regarding the final approval hearing:

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

The amended notice shall be provided to the court for approval prior to the continued hearing date.

VII. CONCLUSION

The motion for preliminary approval of the class and representative action settlement is CONTINUED to August 14, 2024, at 1:30 p.m. in Department 19. No later than July 31, 2024, counsel for Plaintiff shall provide the court with a supplemental declaration identifying a new *cy pres* recipient and including an amended class notice, and Plaintiff Goodman shall file a supplemental declaration stating the amount of time spent on the litigation. 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 5

Case Name: O'Brien, et al. v. Cerida Investment Corp., et al. (PAGA) [Lead Case; Consolidated with 21CV384529 (Class Action)]
Case No.: 21CV384527

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on June 26, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

VIII. INTRODUCTION

This putative class and representative action arises out of various alleged wage and hour violations. Plaintiff Kathleen O'Brien ("O'Brien") filed a Representative Action Complaint against defendants Cerida Investment Corp. and Deloitte Consulting L.P. (collectively, "Defendants") on July 20, 2021, alleging a single cause of action for civil penalties under PAGA ("O'Brien PAGA Action").

That same day, O'Brien filed a Class Action Complaint, alleging causes of action for: (1) Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200, et seq.; (2) Failure to Pay Minimum Wages in Violation of Cal. Lab. Code §§ 1194, 1197 & 1197.1; (3) Failure to Pay Overtime Wages in Violation of Cal. Lab. Code § 510; (4) Failure to Provide Required Meal Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (5) Failure to Provide Required Rest Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (6) Failure to Reimburse Employees for Required Expenses in Violation of Cal. Lab. Code § 2802; (7) Failure to Provide Accurate Itemized Statements in Violation of Cal. Lab. Code § 226; and (8) Failure to Provide Wages When Due in Violation of Cal. Lab. Code §§ 201, 202, and 203 ("O'Brien Class Action").

On August 13, 2021, plaintiff Aurora Galvan ("Galvan") filed a PAGA action against defendant Cerida Investment Corp., alleging wage and hour violations (*Galvan v. Cerida Investment Corp.*, Los Angeles County Superior Court, Case No. 21STCV30165) ("Galvan Action").

On February 23, 2022, plaintiff Cara Lish ("Lish") filed a class action against defendant Cerida Investment Corp., alleging wage and hour violations (*Lish v. Cerida Investment Corp.*,

Sacramento County Superior Court, Case No. 34-2022-00315822-CU-OE-GDS) ("Lish Class Action").

On May 2, 2022, Lish filed a PAGA action against defendant Cerida Investment Corp., alleging wage and hour violations (*Lish v. Cerida Investment Corp.*, Sacramento County Superior Court, Case No. 34-2022-00320177-CU-OE-GDS) ("Lish PAGA Action").

The parties participated in mediation on June 15, 2022, and were able to agree to globally settle all five actions.

On October 21, 2022, the court entered a Joint Stipulation and Order to Consolidate Cases for Settlement Approval and for Leave to File an Amended Comp[l]aint for Settlement Purposes, which (1) consolidated the O'Brien PAGA Action and O'Brien Class Action and (2) granted the plaintiffs leave to file a First Amended Class and Representative Action Complaint in the O'Brien PAGA Action that adds O'Brien's class claims, Galvan and Lish as named plaintiffs, and Galvan's and Lish's claims.

On October 25, 2022, O'Brien, Galvan, and Lish (collectively, "Plaintiffs") filed the operative First Amended Class Action Complaint against Defendants, which sets forth causes of action for: (1) Unfair Competition in Violation of Cal. Bus. & Prof. Code §§ 17200, et seq.; (2) Failure to Pay Minimum Wages in Violation of Cal. Lab. Code §§ 1194, 1197 & 1197.1; (3) Failure to Pay Overtime Wages in Violation of Cal. Lab. Code § 510; (4) Failure to Provide Required Meal Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (5) Failure to Provide Required Rest Periods in Violation of Cal. Lab. Code §§ 226.7 & 512 and the Applicable IWC Wage Order; (6) Failure to Reimburse Employees for Required Expenses in Violation of Cal. Lab. Code § 2802; (7) Failure to Provide Accurate Itemized Statements in Violation of Cal. Lab. Code § 226; (8) Failure to Provide Wages When Due in Violation of Cal. Lab. Code §§ 201, 202, and 203; and (9) Civil Penalties Pursuant to Lab. Code §§ 2699, et seq. for Violations of Lab. Code §§ 201, 202, 203, 204 et seq., 210, 221, 226, 226(a), 226.7, 233, 246, 351, 432, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 1198.5, 2802, CCR, Title 8, § 11040, subd. 5(A)-(B).

Subsequently, Plaintiffs moved preliminary approval of the settlement.

On April 24, 2024, the court continued the hearing on the motion for preliminary approval of settlement to June 26, 2024. In its minute order, the court asked the parties to submit supplemental declarations identifying a new *cy pres* recipient in compliance with Code of Civil Procedure section 384, indicating the estimated time Lish spent on this litigation, and including an amended class notice.

On June 7, 2024, Plaintiffs filed supplemental declarations in support of their motion for preliminary approval of settlement.

IX. 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.)

X. DISCUSSION

A. Provisions of the Settlement

> This consolidated action has been settled on behalf of the following class: all individuals who are or previously were employed by Cerida in California and classified as hourly, nonexempt employees at any time during the Class Period, including those Cerida employees who provided services in California that Cerida had contracted with Deloitte to provide to a third party.

(Declaration of Haig B. Kazandjian in Support of Plaintiffs Motion for Preliminary Approval of Class Action Settlement ("Kazandjian Dec."), Ex. 1 ("Settlement Agreement"), ¶ 1.5.) The Class Period is defined as the period of time from July 20, 2017 through February 28, 2022. (Settlement Agreement, ¶ 1.13.)

The class includes a subset of Aggrieved Employees, who are defined as all individuals who are or previously were employed by Cerida in California and classified as hourly, non-exempt employees at any time during the PAGA Period, including those Cerida employees who provided services in California that Cerida had contracted with Deloitte to provide to a third party. (Settlement Agreement, ¶ 1.4.) The PAGA Period is defined as the period of time from March 18, 2020 through February 28, 2022. (Settlement Agreement, ¶ 1.33.)

According to the terms of the settlement agreement, Cerida will pay a non-reversionary, gross settlement amount of $938,611.69. (Settlement Agreement, ¶¶ 1.22, 3.1.) The gross settlement amount includes attorney fees of $312,870.56 (1/3 of the gross settlement amount), litigation costs not to exceed $35,000, service awards to the class representatives totaling $25,000 ($10,000 to O'Brien, $10,000 to Galvan, and $5,000 to Lish), settlement administration costs not to exceed $20,000, and a PAGA allocation of $20,000 (75 percent of which will be paid to the LWDA and 25 percent of which will be paid to the Aggrieved Employees). (Settlement Agreement, ¶¶ 1.3, 1.7, 1.15, 1.22, 1.24, 1.27, 1.32, 3.2.)

The net settlement amount will be distributed to the class members on a pro rata basis based on the number of workweeks worked during the Class Period. (Settlement Agreement, ¶¶ 1.23, 1.28, 3.2.) Similarly, Aggrieved Employees will receive a pro rata share of the 25

percent portion of the PAGA payment allocated to them based on the number of workweeks worked during the PAGA period. (Settlement Agreement, ¶¶ 1.24, 1.33, 3.2.)

The settlement agreement originally provided that checks remaining uncashed 180 days the date of mailing will be void and the funds from those checks will be distributed to the California Controller's Unclaimed Property Fund. (Settlement Agreement, ¶¶ 5.2-5.4.)

Plaintiffs' counsel has now submitted a supplemental declaration stating that the parties have agreed to Legal Aid at Work as the new *cy pres* recipient. (Supplemental Declaration of Kyle Nordrehaug in Support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement ("Supp. Nordrehaug Dec."), ¶ 2.) The court approves the new *cy pres* recipient.

In exchange for the settlement, class members agree to release Defendants, and related persons and entities, from all class claims pled or which could have been pled based on the factual allegations contained in the operative complaint which occurred during the Class Period. (Settlement Agreement, ¶¶ 1.38, 1.40, 6.2.) Aggrieved Employees agree to release Defendants, and related persons and entities, from all PAGA claims pled or which could have been pled based on the factual allegations contained in the operative complaint and PAGA notices sent by Plaintiffs that occurred during the PAGA period as to the Aggrieved Employees. (Settlement Agreement, ¶¶ 1.39, 1.40, 6.3.) Plaintiffs also agree to release Defendants, and related persons and entities, from all claims that were, or reasonably could have been, alleged based on the facts contained in the operative complaint and all PAGA claims that were, or reasonably could have been, alleged based on facts contained in the operative complaint and Plaintiffs PAGA notice. (Settlement Agreement, ¶¶ 1.40, 6.1.).

B. Fairness of the Settlement

Plaintiffs state that the settlement was reached through discovery, analysis, and mediation with Jeffrey Krivis, Esq. (Kazandjian Dec., ¶¶ 11-12, 27-28.) In anticipation of mediation, Plaintiffs' counsel conducted informal discovery, which included a random sampling of putative class members' time and pay records, employee handbooks, relevant wage and hour policies, information regarding the total amount of putative class members, the total workweeks worked by the putative class members, the total workweeks worked by the putative class members, the numbers, and the average rate of pay for the putative class

members. (*Id*. at ¶¶ 11, 22.) From the information provided, Plaintiffs determined that there were approximately 792 class members who worked 14,596 workweeks. (*Id*. at ¶¶ 15, 23.) Plaintiffs estimate that Defendants' maximum total exposure for all claims is approximately $3,454,109.80. (*Id*. at ¶¶ 28, 29.) Plaintiffs provide a detailed breakdown of this amount by claim. (*Ibid*.) Each class member is expected to receive approximately $663.81. (*Id*. at ¶¶ 16, 38.)

The proposed settlement represents approximately 27.2 percent of the maximum potential value of Plaintiffs' claims. Thus, the proposed settlement amount is within general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc.* (E.D.Ca|. Feb. 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist.LEXIS 30201, at *41-42 [citing cases listing range of 5 to 25-35 percent of the maximum potential exposure].) Defendants maintain that no violations occurred and that its policies are valid. (Kazandjian Dec., ¶ 10.) The PAGA allocation of $20,000 is just over 2% of the gross settlement, putting it at the lower end but still within the reasonable range, especially considering that the estimated total potential value of the PAGA claims is based on stacking the several violations alleged. (*Id*. at ¶¶ 13, 29.)

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

C. Incentive Award, Fees, and Costs

Plaintiffs request service awards in the total amount of $25,000 ($10,000 to O'Brien, $10,000 to Galvan, and $5,000 to Lish).

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

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

O'Brien submits a declaration detailing her participation in the action. Specifically, O'Brien declares that she spent approximately 30-40 hours in connection with this litigation, including discussing the case with class counsel, providing documents to class counsel, answering questions from class counsel, reviewing documents, and discussing the settlement with class counsel. (Declaration of Kathleen O'Brien in Support of Motion for Preliminary Approval of Class Settlement, ¶¶ 6, 11-12.)

Galvan submits a declaration detailing her participation in the action. Specifically, Galvan declares that she spent approximately 25 hours in connection with this litigation, including discussing the case with class counsel, providing documents to class counsel, answering questions from class counsel, reviewing documents, and discussing the settlement with class counsel. (Declaration of Aurora Galvan in Support of Plaintiffs Motion for Preliminary Approval of Class Action Settlement, ¶¶ 2, 4-6.)

With Plaintiffs' moving papers, Lish submitted a declaration detailing her participation in the action. Specifically, Lish declared that she provided significant assistance in connection with this litigation, including by providing factual background, speaking with potential class members, discussing the case with class counsel, providing documents to class counsel, participating in phone calls to discuss litigation and settlement strategy, reviewing documents, and discussing the settlement with class counsel. (Declaration of Plaintiff Cara Lish in Support of Plaintiffs Motion for Preliminary Approval of Class Action Settlement, ¶ 6.) However, Lish did not state the number of hours she worked on the case.

Lish has now submitted a supplemental declaration, in which she declares that she spent approximately 30 hours working on this case. (Supp. Nordrehaug Dec., ¶ 3 & Ex. 1.)

Plaintiffs undertook risk by putting their names on these consolidated cases because doing so might impact their future employment. (See *Covillo v. Specialty's Cafe* (N.D.Cal. 2014) 2014 U.S.Dist.LEXIS 29837, at *29 [incentive awards are particularly appropriate where a plaintiff undertakes a significant reputational risk in bringing an action against an employer].)

However, the amounts requested by Plaintiffs are more than the court typically awards for the amounts of time they spent in connection with this action. In light of the foregoing, the

court finds that a service award for each named plaintiff in the amount of $2,500 is reasonable and it approves a total service award in the amount of $7,500.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co*. (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel state that they will seek attorney fees up to $312,870.56 (1/3 of the gross settlement amount) and litigation costs not to exceed $35,000. Plaintiffs' counsel shall submit lodestar information (including hourly rates and hours worked) prior to the final approval hearing in this matter so the court can compare the lodestar information with the requested fees. Plaintiffs' counsel shall also submit evidence of actual costs incurred as well as evidence of any settlement administration costs.

D. Conditional Certification of Class

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

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

to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

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

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

Plaintiffs state that there are approximately 792 class members that can be determined from a review of Defendants' records. There are common issues regarding wage and hour violations. No issue has been raised regarding the typicality or adequacy of Plaintiffs as class representatives. In sum, the court finds that the proposed class should be conditionally certified.

E. Class Notice

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

The amended class notice generally complies with the requirements for class notice. (Supp. Nordrehaug Dec., ¶ 4 & Ex. 2.) It provides basic information about the settlement, including the settlement terms, and procedures to object or request exclusion. Furthermore, the amended notice contains the additional changes requested by the court. Consequently, the amended notice is approved.

XI. CONCLUSION

The motion for preliminary approval of the class and representative action settlement is GRANTED. The final approval hearing is set for December 11, 2024, at 1:30 p.m. in Department 19.

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

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Calendar Line 6

Case Name: Legarde v. Spectra360, Inc. (PAGA)
Case No.: 22CV402965

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on June 26, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

XII. INTRODUCTION

On September 12, 2022, plaintiff Jeremy Legarde ("Plaintiff") filed a Representative Action Complaint against defendant SPECTRA360, Inc. dba Raso Solutions ("Defendant"), which set forth a single cause of action for Penalties Pursuant to Labor Code § 2699, et seq. for violations of Labor Code §§ 201, 202, 203, 226(a), 226.7, and 2802.

Defendant moved to compel arbitration of Plaintiff's individual PAGA claim and dismiss Plaintiff's representative PAGA claim. Plaintiff opposed the motion.

On May 18, 2023, the court denied Defendant's motion to compel arbitration. Defendant appealed the court's order.

Subsequently, the parties reached a settlement of the PAGA claim.

Defendant asked the Sixth District Court of Appeal to stay the appeal to allow for approval of settlement in the trial court. The appellate court granted Defendant's request on November 7, 2023.

Subsequently Plaintiff moved for approval of the PAGA settlement.

On April 24, 2024, the court continued the motion for approval of PAGA settlement to June 26, 2024. In its minute order, the court asked Plaintiff to file a supplement declaration addressing the fact that the settlement agreement's definition of Aggrieved Employees and the definition of the PAGA Period utilized different end dates. The court also asked Plaintiff to submit a copy of his individual settlement for an *in camera* review. The court further requested Plaintiff provide a supplemental declaration with a breakdown of Defendant's maximum potential exposure based on the underlying Labor Code violations as well as an estimate of the individual settlement payment to be received by aggrieved employees. Plaintiff was also asked to provide an estimate of the time he spent in connection with the PAGA

action. Finally, the court asked Plaintiff's counsel to submit a supplemental declaration addressing whether payment was received for attorney fees in connection with Plaintiff's individual settlement and whether any such payment covered fees incurred in connection with the PAGA action.

On May 23, 2024, Plaintiff filed supplemental declarations in support of his motion.

XIII. LEGAL STANDARD

Under PAGA, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 380.) 75 percent of any penalties recovered go to the Labor and Workforce Development Agency ("LWDA"), leaving the remaining 25 percent for the employees. (*Ibid*.) PAGA is intended "to augment the limited enforcement capability of [LWDA] by empowering employees to enforce the Labor Code as representatives of the Agency." (*Id*. at p. 383.) A judgment in a PAGA action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. (*Id.* at p. 381.)

A superior court must review and approve any PAGA settlement. (Lab. Code, § 2699, subd. (l)(2).) The court's review "ensur[es] that any negotiated resolution is fair to those affected." (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549.) The proposed settlement must be submitted to the LWDA at the same time it is submitted to the court. (*Ibid*.)

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

(*Patel v. Nike Retail Services, Inc.* (N.D. Cal. 2019) 2019 WL 2029061 at *2.)

As part of this analysis, these courts have evaluated proposed PAGA settlements under the relevant factors from *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026. (*Patel v. Nike Retail Services, Inc.*, *supra*, 2019 WL 2029061 at *2.) "Of the *Hanlon* factors, the following are relevant to evaluating [a] PAGA settlement: (1) the strength of the plaintiff's

case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; (5) the presence of government participation; and (6) the expertise and views of counsel. (*Ibid*.)

"[W]hen a PAGA claim is settled, the relief provided … [should] be genuine and meaningful, consistent with the underlying purpose of the statute to benefit the public …." (*Villalobos v. Calandri Sonrise Farm LP* (C.D. Cal., July 22, 2015, No. CV122615PSGJEMX) 2015 WL 12732709, at *13.) The settlement must be reasonable in light of the potential verdict value. (See *O'Connor v. Uber Technologies, Inc*. (N.D. Cal. 2016) 201 F.Supp.3d 1110, 1135 [rejecting settlement of less than one percent of the potential verdict].) But a permissible settlement may be substantially discounted, given that courts often exercise their discretion to award PAGA penalties below the statutory maximum even where a claim succeeds at trial. (See *Viceral v. Mistras Group, Inc*. (N.D. Cal., Oct. 11, 2016, No. 15-CV-02198-EMC) 2016 WL 5907869, at *8–9.)

XIV. DISCUSSION

The proposed settlement has been made with regard to the following aggrieved employees: "all employees who are employed or have been employed as an hourly employee by [Defendant] in the State of California who worked one or more pay periods since July 8, 2021 and continuing to the present." (Declaration of Liane Katzenstein Ly in Support of Motion for Approval of Representative Action Settlement ("Ly Dec."), Ex. 1 ("Settlement Agreement"), ¶ 1.4.) The PAGA Period is defined as the period of time from July 8, 2021 to September 18, 2023. (Settlement Agreement, ¶ 1.19.)

Pursuant to the terms of the settlement, Defendant will pay a non-reversionary, maximum settlement amount of $95,000. (Settlement Agreement, ¶¶ 1.10, 3.1.) This amount includes attorney fees of not more than $31,666.66 (1/3 of the maximum settlement amount), litigation costs not to exceed $8,500, an enhancement award up to $5,000 for Plaintiff, and settlement administration costs not to exceed $3,000. (Settlement Agreement, ¶¶ 1.3, 1.11, 1.14, 1.15, 1.17, 1.22, 3.2.) Of the remaining net settlement amount, 75 percent will be paid to the LWDA and 25 percent will be distributed to aggrieved employees based on the pro rata

number of pay periods worked by each aggrieved employee during the PAGA Period. (Settlement Agreement, ¶¶ 1.11, 1.14, 1.15, 1.22.)

Funds from checks that are not cashed within 180 days from the date of mailing will be sent to the California Controller's Unclaimed Property Fund. (Settlement Agreement, ¶ 4.4.)

In exchange for the settlement, the aggrieved employees agree to release Defendant, and related persons and entities, from "all claims for PAGA penalties that were alleged, or reasonably could have been alleged, based on the PAGA Period facts stated in the Operative Complaint and the PAGA Notice." (Settlement Agreement, ¶¶ 1.25, 1.26, 5.)

Plaintiff also advises the court that the parties entered into a separate, confidential settlement of Plaintiff's individual claims.

Plaintiff contends the PAGA settlement is fair, reasonable, and adequate. In his moving papers, Plaintiff indicated that the settlement resolves PAGA claims on behalf of 53 aggrieved employees who collectively worked 1,139 pay periods during the PAGA Period. (Ly Dec., ¶ 15.) Prior to mediation, Plaintiff's counsel obtained a sampling of time and payroll data from Defendant as well as Plaintiff's personnel records. (*Id.* at ¶ 14.) The parties participated in a full-day mediation with Alan Berkowitz, Esq. on September 18, 2023, and reached a settlement. (*Id.* at ¶ 16.) Plaintiff estimated that Defendant's maximum potential exposure for the PAGA claim is $113,9000. Notably, Plaintiff's counsel did not provide a declaration with the moving papers supporting this calculation. Additionally, Plaintiff's counsel did not provide a breakdown of the maximum potential exposure based on the underlying Labor Code violations or an estimate of the average individual settlement payment to be received by aggrieved employees. Rather, Plaintiff's counsel generally explained that the value of the PAGA claim was discounted due to the strength of Defendant's defenses on the merits and the risk that the court would exercise its discretion to significantly reduce any PAGA penalties available. (Ly Dec., ¶¶ 24-46.)

In its prior order, the court explained that it had concerns regarding the fairness of the settlement. First, as noted above, the aggrieved employees covered by the proposed settlement encompass all employees of Defendant who were employed in California and worked one or more pay periods "since July 8, 2021 and continuing to the present." However, PAGA Period

is defined as the time period from July 8, 2021 to September 18, 2023. Thus, the definition of Aggrieved Employees and the definition of the PAGA Period have different end dates. The court explained that it was unclear why the end dates of the relevant time periods were not the same. Given the different end dates, an individual who worked for Defendant after September 18, 2023, could qualify as an aggrieved employee under the terms of the settlement, but would not be entitled to an individual PAGA payment because they did not work for Defendant during the PAGA Period. This creates confusion regarding settlement administration. The court directed Plaintiff to file a supplemental declaration addressing this issue.

Plaintiff's counsel has now submitted a supplemental declaration that simply confirms the facts set forth in the prior court order, i.e., that the definition of Aggrieved Employees and the definition of the PAGA Period have different end dates. Plaintiff's counsel does not explain why the end dates are different. Plaintiff's counsel states that it is the parties' intention to cap the number of aggrieved employees as of September 18, 2023. (Supplemental Declaration of Liane Katzenstein Ly in Support of Plaintiff's Motion for Approval of Representative Action Settlement ("Supp. Ly Dec."), ¶¶ 3-6.) If that is the case, it is unclear to the court why the definition of aggrieved employees should not also have an end date of September 18, 2023. Such an amendment would remove any confusion as to who is an aggrieved employee under the terms of the settlement entitled to an individual PAGA payment.

The parties are ordered to meet and confer regarding this issue and to discuss whether the end date of the definition of Aggrieved Employees can be amended so that it is the same as the PAGA Period end date. Prior to the continued hearing, Plaintiff's counsel shall file a supplemental declaration regarding the parties' meet and confer efforts, and attaching any amendment to the settlement agreement.

Second, Plaintiff stated that he had entered into a confidential individual settlement agreement. In connection with its prior order, the court directed Plaintiff to provide the individual settlement to the court for an *in camera* review.

Plaintiff's counsel has now submitted a copy of the individual settlement and a supplemental declaration providing additional information about the individual settlement. Plaintiff's counsel states that the individual settlement: releases and resolves all possible claims

Plaintiff could have alleged; includes a 1542 waiver; and releases Plaintiff's individual claims for off-the-clock work, rest period violations, necessary business expenses, wage statement violations, and waiting time penalties. (Supp. Ly Dec., ¶¶ 7-10.) Plaintiff's counsel estimates that Plaintiff is owed more than $7,500 for his individual claims, and states that the individual settlement amount of $5,000 is a compromise on his claims outside of the PAGA action. (*Id.* at ¶¶ 10-11.) The court finds that the additional information provided in the supplemental declaration from Plaintiff's counsel adequately addresses its concerns regarding Plaintiff's individual settlement.

Third, with his moving papers, Plaintiff did not submit a declaration from his counsel setting forth the details regarding his calculations of Defendant's maximum potential liability.

Plaintiff's counsel has now filed a supplemental declaration providing a breakdown of the maximum potential exposure based on the underlying Labor Code violations. Plaintiff's counsel states that the value of the PAGA claim based on Defendant's alleged failure to reimburse necessary business expenses is $113,9000 (i.e., 1,139 pay periods multiplied by $100 per pay period); the value of the rest period claim for every pay period increases the value of the case to $227,800; and the value of the wage statement and waiting time penalty claims for every pay period increases the value to $455,600. (Supp. Ly Dec., ¶¶ 13-15.) Plaintiff's counsel further states that the value of the case would be $911,200 if the court awarded $200 per pay period instead of $100 per pay period. (*Id.* at ¶ 16.) Plaintiff's counsel states that the reimbursement claims is the strongest given that the employees worked remotely, and the settlement amounts to an award of approximately $83.41 per pay period. (*Id.* at ¶¶ 17-18.)

Based on this new information, the gross settlement amount represents approximately 20.8 percent of the potential maximum recovery. The proposed settlement amount is within general range of percentage recoveries that California courts have found to be reasonable. (See *Cavazos v. Salas Concrete, Inc*. (E.D.Ca|. Feb. 18, 2022, No. 1:19-cv-00062-DAD-EPG) 2022 U.S.Dist.LEXIS 30201, at *41-42 [citing cases listing range of 5 to 25-35 percent of the maximum potential exposure].) In light of the foregoing, the court finds that the settlement is generally fair as it provides for some recovery for each class member and eliminates the risk and expense of further litigation.

As part of the settlement, Plaintiff seeks an enhancement award in the amount of $5,000. Although service awards are common in class actions, there is less authority regarding the propriety of service awards in PAGA cases. Nevertheless, a PAGA case is a representative action like a class action and it has been recognized that an individual's willingness to act as a private attorney general may merit a service award. (See *Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 959.)

With his moving papers, Plaintiff submitted a declaration generally detailing his participation in the action. However, Plaintiff did not provide an estimate of the time spent in connection with this action.

Plaintiff has now filed a supplemental declaration specifically estimating that he spent approximately 25-35 hours in connection with the PAGA action, including discussing the case with counsel, providing employment information to counsel, preparing for meditation, and reviewing settlement documents. (Supplemental Declaration of Jeremy Legarde in Support of Motion for Representative Action Settlement, ¶¶ 5-6.)

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

However, the requested incentive award in the amount of $5,000 is excessive. The amount requested is higher than the court typically awards for the amount of Plaintiff time spent in connection with this action (i.e., approximately 25-35 hours). In light of the foregoing, the court finds that a service award in the amount of $2,500 is reasonable and it approves the award in that lesser amount.

Plaintiff's counsel seeks attorney fees of $31,666.66 (1/3 of the maximum settlement amount). Plaintiff's counsel states that the total combined lodestar is $32,482.50 (based on 46.9 hours of work). However, a portion of that amount is based on anticipated hours of work that has not yet been performed. The evidence demonstrating that the actual total combined lodestar is $28,907.50 (based on 41.9 hours of work). (Ly Dec., ¶¶ 60-62, 64-79.) This results in a multiplier of 1.1. The court finds that the fees requested are generally reasonable as a

percentage of the total recovery. Additionally, Plaintiff's counsel has now submitted a supplemental declaration stating that no payment for attorney fees was received in connection with the individual settlement. (Supp. Ly Dec., ¶ 12.) This addresses the court's prior concerns. Consequently, an award of attorney fees in the amount of $31,666.66 is approved.

Plaintiff's counsel also requests litigation costs in the total amount of $6,723.01. (Ly Dec., ¶¶ 20, 83-88.) However, some of this amount includes anticipated costs which are not recoverable. Plaintiff's counsel only presents evidence of incurred costs in the amount of $6,465.26. (Ly Dec., ¶¶ 20, 83-88.) Additionally, Plaintiffs' counsel has now clarified that no payment for these costs was received in connection with Plaintiff's individual settlement. (Supp. Ly Dec., ¶ 12.) Therefore, the litigation costs in the amount of $6,465.26 are approved.

Plaintiff also asks for settlement administration costs in the amount of $3,000. Plaintiff provides a declaration from the settlement administrator demonstrating that costs associated with settlement administration do not exceed $3,500. (Declaration of Sean Hartranft of Apex Class Action Administrators Regarding Settlement Administration, ¶ 7.) Consequently, the court approves settlement administration costs in the lesser amount of $3,000.

Accordingly, the motion for approval of PAGA settlement is CONTINUED to August 7, 2024, at 1:30 p.m. in Department 19. Plaintiff shall file a supplemental declaration regarding the parties' meet and confer efforts regarding a possible amendment of the end date of the definition of Aggrieved Employees no later than July 29, 2024. 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 7

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

The above-entitled action comes on for hearing before the Honorable Theodore C. Zayner on June 26, 2024, at 1:30 p.m. in Department 19. The court now issues its tentative ruling as follows:

I. INTRODUCTION

According to the operative Second Amended Complaint ("SAC"), plaintiff Alorica Inc. ("Plaintiff") is a leading provider of customer service support and maintains contact centers in more than a dozen countries. (SAC, ¶ 4.) Defendant Fortinet, Inc. ("Defendant") is a multinational corporation providing hardware, software, and services for secure computer networking. (*Id.* at ¶ 5.) Between September 2017 and September 2018, Plaintiff purchased hardware, software, and services from Defendant in an amount exceeding $10 million. (*Id.* a ¶¶ 15-16.)

Plaintiff encountered problems soon after putting Defendant's equipment into its network. (SAC, ¶ 18.) Although Defendant worked to correct these issues, it was never able to do so reliably. (*Id.* at ¶¶ 22.) Plaintiff continued to experience problems with Defendant's products and services. (*Id.* at ¶¶ 31(a)-31(g).)

On November 8, 2021, Plaintiff filed the operative SAC, setting forth causes of action for: (1) Breach of Warranty; (2) Negligent Misrepresentation; and (3) Intentional Misrepresentation.

On June 25, 2019, Defendant filed its operative First Amended Cross-Complaint ("FACC") against Plaintiff. According to the FACC, Plaintiff was using and depending on obsolete network equipment as of at least 2016. (FACC, ¶ 9.) Plaintiff's mismanagement of its network caused problems for its business and put its customers at risk. (*Id.* at ¶¶ 10-11.)

In "November/December 2017", Plaintiff began making purchases from Defendant to build its network. (FACC, ¶ 25.) The parties entered into two written agreements during this time: the End User License Agreement and Fortinet's Service Terms & Conditions. (*Id.* at

¶¶ 26, 27.) Defendant alleges Plaintiff failed to properly deploy its products in Plaintiff's networks. (*Id.* at ¶ 28.)

Defendant's efforts could not overcome the problems Plaintiff had created. (FACC, ¶ 31.) Defendant dedicated thousands of hours and incurred millions of dollars in damages and costs because of Plaintiff. (*Id.* at ¶ 32.) During the deployment process, Defendant discovered that Plaintiff made false representations during the parties' initial negotiations and that Plaintiff's approach to the process fell far short of industry standards. (*Id.* at ¶ 33.)

Based on the forgoing allegations, the FACC sets forth the following causes of action: (1) Breach of Contract—Fortinet Service Terms & Conditions; (2) Breach of Contract—End User License Agreement; (3) Fraud/Intentional Misrepresentation; (4) Negligent Misrepresentation; (5) Defamation; (6) Intentional Interference with Prospective Economic Relations; (7) Negligent Interference with Prospective Economic Relations; (8) Unfair Competition; (9) Declaratory Judgment of No Breach of Contract; (10) Declaratory Judgment of No Negligent Misrepresentation; and (11) Declaratory Judgment of Limitation on Damages.

Discovery in this action closed on June 2, 2023, and trial is currently set to begin on September 9, 2024. The parties filed motions *in limine* in September 2023. The court subsequently addressed the parties' respective motions for summary judgment and summary adjudication. At the hearing on April 18, 2024, the court issued rulings on the parties' motions *in limine*, granting Defendant's request to re-open discovery for the limited purpose of taking the deposition of Jonathan Merrell, a former Alorica executive now living abroad in Mexico.

The parties' moving papers indicate that counsel for both parties traveled to Mexico for the attempted deposition of Merrell, that Merrell did not appear, and that a deposition did not take place. Separately, Plaintiff served Defendant with a notice directing several of Defendant's employees to appear at the trial.

Now before the court are the following matters: (1) the motion by Defendant for an order imposing sanctions on Plaintiff for misuse of the discovery process and actions made in bad faith under Code of Civil Procedure, section 128.5; (2) the motion by Plaintiff for an order imposing sanctions on Defendant for expenses incurred by Plaintiff in connection with Defendant's attempted deposition of Jonathan Merrell in Mexico; (3) the motion by Defendant

to quash Plaintiff's notice to appear as directed to three individuals, or alternatively, issue a protective order; and (4) related motions to seal.

II. DEFENDANT'S MOTION FOR SANCTIONS

Defendant contends Plaintiff acted in bad faith to prevent Jonathan Merrell from testifying under oath. (Defendant's Notice of Motion and Motion for Sanctions; Memorandum of Points and Authorities ("Def. Sanctions Mot."), p. 4:2-10.)

Defendant asks the court to keep discovery open until proceedings in Mexico to secure Mr. Merrell's testimony are exhausted, and further asks to the court to impose the following sanctions: (1) an order requiring Plaintiff to meet and confer in good faith to facilitate the deposition of Merrell, including a requirement that Plaintiff stipulate to a Zoom deposition if Mr. Merrell is amenable; (2) an award of attorney fees in the amount of $39,000.00; and (3) an award of costs in the amount of $9,195.79. (*Id.* at p. 4:11-17.) If Defendant is unable to take Mr. Merrell's deposition as a result of Plaintiff's bad faith conduct, Defendant requests the following as nonmonetary sanctions: (1) an order that any out-of-court statements made by Mr. Merrell are deemed admitted at trial (unless those statements are otherwise admissible without Mr. Merrell's testimony); and (2) an adverse-inference instruction regarding Mr. Merrell's testimony. (*Id.* at p. 4:17-21.)

A. Evidentiary Objections

In connection with its opposition, Plaintiff interposes various objections to the evidence submitted by Defendant in support of its motion for sanctions. In connection with its reply, Defendant interposes various objections to the evidence submitted by Plaintiff in opposition to Defendant's motion for sanctions. However, Plaintiff cites and the court is aware of no authority that the court must rule on evidentiary objections made in connection with a discovery motion. Therefore, the court declines to rule on Plaintiff's evidentiary objections.

B. Legal Standard

In the discovery context, the general rule is that sanctions may be imposed only to the extent authorized by statute. (See Code Civ. Proc., § 2023.030 [a court may impose sanctions for discovery abuse "[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title"].) "This means that the statutes

governing the particular discovery methods limit the permissible sanctions to those sanctions provided under the applicable governing statutes." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422 (*New Albertsons*).)

Additionally, the Civil Discovery Act only authorizes nonmonetary sanctions where a party has violated a court order. (See *New Albertsons, supra*, 168 Cal.App.4th at p. 1423, citing Code Civ. Proc., §§ 2030.290, subd. (c), 2030.300, subd. (e), and 2031.310, subd. (e), & 2031.320, subd. (c); see also *Liberty Mutual Fire Ins. Co. v. Lcl Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102 [two facts are generally prerequisite to the imposition of non-monetary discovery sanctions: (1) there must be a failure to comply with a court order, and (2) the failure must be willful].) "The statutory requirement that there must be a failure to obey an order compelling discovery before the court may impose a nonmonetary sanction for misuse of the discovery process provides some assurance that such a potentially severe sanction will be reserved for those circumstances where the party's discovery obligation is clear and the failure to comply with the obligation is clearly apparent." (*New Albertsons*, *supra*, 168 Cal.App.4th at p. 1423.)

The restrictions on the exercise of the court's sanctioning power set forth in the Civil Discovery Act "are binding unless they materially impair the court's ability to ensure the orderly administration of justice." (*New Albertsons*, *supra*, 168 Cal.App.4th at p. 1431; see also *Aghaian v. Minassian* (2021) 64 Cal.App.5th 603, 618-619 ["[a]bsent unusual circumstances, nonmonetary sanctions are warranted only if a party willfully fails to comply with a court order. [Citations.]"].) In those rare circumstances, a court may exercise its inherent equity, supervisory, and administrative powers, and inherent power to control litigation, to impose nonmonetary sanctions as a remedy for litigation misconduct. (See *id.* at pp. 1424 ["Some courts, however, have held that nonmonetary sanctions for misuse of the discovery process may be imposed in certain circumstances not involving the sanctioned party's failure to obey an order compelling discovery."]; see also *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 758 (*Slesinger*).)

For example, courts have imposed nonmonetary sanctions without violation of a court order where the sanctioned party cannot provide discovery it promised it would provide; the

sanctioned party misrepresented the existence or availability of discovery; an order would be futile because did not exist or was destroyed; the sanctioned party repeatedly falsely assured the requesting party that all responsive discovery had been produced; or the sanctioned party engaged in a pattern of willful discovery abuses based in part on disobeying discovery orders. (*New Albertsons*, *supra*, 168 Cal.App.4th at pp. 1424-1431.). However, while "trial courts have inherent authority to impose nonmonetary sanctions that are necessary to remedy misconduct and ensure a fair trial … trial courts may award attorney fees as a sanction for misconduct only when authorized by statute or an agreement of the parties." (*City of Los Angeles v. PricewaterhouseCoopers LLP* (2022) 84 Cal.App.5th 466, 510 (*PricewaterhouseCoopers*), review granted Jan. 25, 2023, S277211.)

C. Discussion

1. Request to Keep Discovery Open

Defendant initially requests an order to keep discovery open until the Mexican proceedings to secure Mr. Merrell's testimony are exhausted. (Def. Sanctions Mot., p. 4:11-12.) On April 18, 2024, the court heard argument regarding Defendant's *ex parte* Motion to Reopen Discovery for the Limited Purpose of Conducting a Deposition of Jonathan Merrell. At the hearing, the parties discussed a deposition or other similar proceeding involving Mr. Merrell scheduled to occur in Mexico on April 23, 2024. The court found good cause under Code of Civil Procedure section 2024.050 and granted the motion. However, the court made clear that the extent of its order was to permit the proceeding on April 23, 2024, to continue under the Civil Discovery Act. The court expressly stated that the motion was not granted as to anything that is unlimited in scope as to time. (See Declaration of Edward J. Naughton in Support of Motion for Sanctions ("Naughton Dec."), Ex. 8, Transcript of Proceedings, April 18, 2024, pp. 16:19-24, 17:5-11.)

Here, Defendant has offered no indication of the status of the Mexican proceedings to secure Mr. Merrell's testimony. It does not appear from the parties' various moving papers that another deposition of Mr. Merrell is scheduled to take place, and the court remains reluctant to reopen discovery without a limitation in scope as to time.

Accordingly, absent a further showing by Defendant as to the status of the proceedings related to Mr. Merrell under the Civil Discovery Act (specifically, Code of Civil Procedure section 2027.010 [taking of oral deposition in foreign nation]), Defendant's request to reopen discovery is DENIED.

2. Request for Order Regarding Future Deposition

Defendant next requests an order requiring Plaintiff to meet and confer in good faith to facilitate the next deposition of Mr. Merrell ordered by Mexican authorities, including a requirement that Plaintiff stipulate to a Zoom deposition if Mr. Merrell amendable. (Def. Sanctions Mot., p. 4:13-15.) As discussed above, it is unclear to the court at this time whether the Mexican authorities will be ordering a further deposition of Mr. Merrell. Moreover, this court has already issued an order to permit that taking of evidence through an oral examination of Mr. Merrell. Defendant has not presented authority or argument establishing that this court may now dictate the terms under which the Mexican authorities will order the taking of testimony from Mr. Merrell. If Defendant establishes good cause to reopen discovery for the purpose of taking Mr. Merrell's deposition on a future date, it may at that time seek further clarifying orders from this court as appropriate.

Accordingly, the request for an order regarding a possible future deposition of Mr. Merrell is DENIED.

3. Request for Attorney Fees and Costs

Defendant requests an award of attorney fees in the amount of $39,000.00 and an award of costs in the amount of $9,195.79. (Def. Sanctions Mot., p. 4:16-17.) Defendant cites Code of Civil Procedure section 128.5 as the statutory basis for its request for monetary sanctions. (*Id.* at pp. 15:3-9, 16:21-23.). Code of Civil Procedure section 128.5 states, in pertinent part: "A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees incurred by another party as result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5, subd. (a).)

However, by its terms, Code of Civil Procedure section 128.5 does not apply in the discovery context: "This section shall not apply to disclosures and discovery request,

responses, objections, and motions." (Code Civ. Proc., § 128.5, subd. (e).) Recognizing this provision, Defendant asserts that its request for monetary relief "relates only to Alorica's failure to inform Fortinet, in bad faith, that its travel to Mexico would be met with previously unidentified roadblocks…." (Def. Sanctions Mot., p. 16:24-26.) The court is not persuaded this is a meaningful distinction, considering that this motion concerns a deposition being sought under the Civil Discovery Act. (See *Dalessandro v. Mitchell* (2019) 43 Cal.App.5th 1088, 1092 (*Dalessandro*) ["section 128.5 has no application to sanctions authorizes under the Civil Discovery Act"].) Further, while Defendant argues that Plaintiff's alleged bad faith tactics are merely "indirectly related to discovery," this contradicts Defendant's position that Plaintiff should be sanctioned for raising unmeritorious and frivolous "objections" to discovery proceedings. (*Id.* at pp. 13:26-14:18, 17:4-6.)

Notably, the Legislature amended Code of Civil Procedure section 128.5 in 2014, adding the language at subdivision (e) specifically stating that the statute "shall not apply to disclosures and discovery requests, objections, and motions." (See Stats. 2014, ch. 425, § 2 (AB 2494).) Under the prior law, monetary sanctions were available where counsel attempted to "take advantage of the absence of … counsel" by purposefully setting depositions and discovery motions while opposing counsel was out of the country on a vacation. (See *Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299, 304-305.)

The authority cited by Defendant does not persuade the court that monetary sanctions are available under Code of Civil Procedure section 128.5—as amended to add subdivision (e)—in a discovery context such as that presented here. While Defendant cites several decisions in support of its monetary sanctions argument, only one of those was decided after the Legislature added subdivision (e) to the statute. (Def. Sanctions Mot., p. 15:3-17:6.) That decision, *Marriage of Sahafzadeh-Taeb & Taeb* (2019) 39 Cal.App.5th 124, is distinguishable because the bad faith tactics at issue did not concern discovery but rather an attorney's repeated affirmative misrepresentations to the trial court concerning her availability and readiness for trial. (*Id.* at pp. 141-143.)

Accordingly, Defendant's request for attorney fees and costs is DENIED.

4. Request for Nonmonetary Sanctions

Lastly, Defendant requests nonmonetary sanctions if it is unable to obtain Mr. Merrell's testimony in advance of trial because of Plaintiff's bad faith conduct. (Def. Sanctions Mot., p. 4:17-21.). Specifically, Defendant seeks: (1) an order that any out-of-court statements made by Mr. Merrell are deemed admitted at trial (unless those statements are otherwise admissible without Mr. Merrell's testimony); and (2) an adverse-inference instruction regarding Mr. Merrell's testimony. (*Id.* at p. 4:17-21.).

As explained above, the Civil Discovery Act only authorizes nonmonetary sanctions where a party has violated a court order. (See *New Albertsons, supra*, 168 Cal.App.4th at p. 1423, citing Code Civ. Proc., §§ 2030.290, subd. (c), 2030.300, subd. (e), and 2031.310, subd. (e), & 2031.320, subd. (c); see also *Liberty Mutual Fire Ins. Co. v. Lcl Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102 [two facts are generally prerequisite to the imposition of non-monetary discovery sanctions: (1) there must be a failure to comply with a court order, and (2) the failure must be willful].) Nevertheless, courts have imposed nonmonetary sanctions without violation of a court order when such sanctions are "necessary to remedy misconduct or ensure a fair trial." (*PricewaterhouseCoopers, supra*, 84 Cal.App.5th at p. 510, citing *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 809; *New Albertsons, supra*, 168 Cal.App.4th at p. 1433.)

Here, Defendant persuasively argues that Mr. Merrell is a critical witness. (Def. Sanctions Mot., pp. 11:3-12:22.) Defendant has presented evidence that Mr. Merrell was Plaintiff's executive responsible for the decision to purchase Defendant's products and overseeing the deployment of Defendant's products. (*Id.* at p. 11:7-9.) Defendant also contends that Mr. Merrell is a custodian of many documents produced in this case. (*Id.* at p. 11:12.) Based on these assertions, Mr. Merrell's testimony would be relevant to Plaintiff's claims that Defendant misrepresented its products and Defendant's claims regarding the state of Plaintiff's network and IT department.

In addition, Defendant contends that Plaintiff encouraged Mr. Merrell to disobey a court order and engaged in a premediated plan to prevent his testimony. (Def. Sanctions Mot., p. 13:11-20.) The court finds some of Defendant's arguments in this regard to be speculative. In opposition, Plaintiff contends that sanctions are not warranted for misuse of the discovery

process. (Plaintiff's Opposition to Defendant's Motion for Sanctions, pp. 8:20-9:24.). Plaintiff asserts that its objections to proceedings going forward were meritorious because they were the reasons cited by the Mexican court for cancelling the proceedings. (*Id.* at pp. 7:1-5, 9:13-17.) Apparently, these objections included that Mr. Merrell's name was missing an "r" on a document and that the court did not specify a punishment for Mr. Merrell's failure to appear. (*Ibid.*)

Troublingly, Plaintiff's version of events as argued in its opposition is contradicted by the Mexican court's minute order regarding as well as the declaration of Plaintiff's own Mexican counsel, Fernando Sedano. (See Defendant's Reply in Support of Motion for Sanctions, pp. 3:8-4:3.). The parties' moving papers establish that Plaintiff has and continues to openly oppose Defendant's efforts to take the deposition of Mr. Merrell, a nonparty to this action. Plaintiff claims to have made objections to the proceedings that could reasonably be characterized as frivolous, and there is reason to question Plaintiff's claim that its objections were meritorious.

Given the undisputed relevance of Mr. Merrell prospective testimony, the court finds that nonmonetary sanctions are appropriate to ensure a fair trial. Defendant's request for an order that any out-of-court statements are deemed admissible is excessively broad, as the court is certainly able to address hearsay objections and possible exceptions in relation to statements offered as evidence at trial as the need may arise. Should Defendant be unable to take Mr. Merrell's deposition, the court will consider Defendant's request for an adverse inference jury instruction regarding Mr. Merrell' testimony, such as that set forth at the bottom of page 17 of Defendant's supporting memorandum. In such a case, the court will revisit its decision regarding Plaintiff's first motion *in limine*.

Accordingly, Defendant's request for nonmonetary sanctions is GRANTED to the extent that the court may consider granting an adverse inference instruction if Defendant is unable to take Mr. Merrell's deposition prior to trial. In all other respects, the request for nonmonetary sanctions is DENIED.

III. PLAINTIFF'S MOTION FOR SANCTIONS

Plaintiff seeks an order imposing sanctions on Defendant for expenses incurred by Plaintiff in connection with Defendant's attempted deposition of Jonathan Merrell in Mexico. (Plaintiff's Notice of Motion and Motion for Sanctions; Memorandum of Points and Authorities ("Pl. Sanctions Mot."), p. 2:4-7.) Plaintiff argues it is entitled to monetary sanctions because the court in Mexico cancelled the proceedings on April 23 due to Defendant's failure to serve a required deposition subpoena. (*Id.* at p. 3:8-20.) Plaintiff further contends that Defendant acted in bad faith by ignoring Plaintiff's objection to the lack a valid subpoena and insisting upon proceeding with the deposition in Mexico. (*Id.* at p. 3:20-26.) Plaintiff seeks a monetary sanction in the amount of $4,334.85 for expenses to appear in Mexico for the deposition; Plaintiff does not seek nonmonetary sanctions. (*Id.* at pp. 2:5-7; 3:16-17; 5:22-23; 7:24-25.)

As discussed above, the general rule is that, in the discovery context, sanctions may be imposed only to the extent authorized by statute. (See Code Civ. Proc., § 2023.030 [a court may impose sanctions for discovery abuse "[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title"].) "This means that the statutes governing the particular discovery methods limit the permissible sanctions to those sanctions provided under the applicable governing statutes." (*New Albertsons, supra*, 168 Cal.App.4th at p. 1422.) The restrictions on the exercise of the court's sanctioning power set forth in the Civil Discovery Act "are binding unless they materially impair the court's ability to ensure the orderly administration of justice." (*Id.* at p. 1431.)

Plaintiff initially contends that it is entitled to monetary sanctions under Code of Civil Procedure section 2025.440, subdivision (a), which states:

> If a deponent does not appear for a deposition because the party giving notice of the deposition failed to serve a required deposition subpoena, the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against that party, or the attorney for that party, or both, in favor of any other party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(Code Civ. Proc., § 2025.440, subd. (a).)

According to Plaintiff, Defendant failed to serve Mr. Merrell with a valid subpoena. (Pl. Sanctions Mot., p. 6:15; see also Naughton Dec.) ¶¶ 9-11.) Plaintiff's counsel asserts the following occurred on April 23, 2024, the date scheduled for the proceedings in Mexico for the purposes of taking Mr. Merrell's testimony: "I was informed that the Order was defective due to, at minimum, the misspelling on Mr. Merrell's name, a failure to specify a penalty for non-appearance, and the failure to arrange for an official, court-approved translator." (Naughton Dec., ¶¶ 16.) However, as discussed previously, this assertion is not corroborated by the declaration of Plaintiff's Mexican counsel and contradicts the minute record that Defendant has provided regarding what took place on April 23.

It remains unclear to the court what Plaintiff contends Defendant should have done differently. The Rogatory Letter that Plaintiff apparently contends was defective appears to have been prepared by the Mexican court, rather than by Defendants. (Naughton Dec., Exs. 13, 14.) As the court understands, the Mexican judiciary prepared the document in question in response to the letter from this court regarding the taking of oral testimony in foreign country under the Civil Discovery Act and in accordance with what is commonly referred to as the Hague Convention. (See Code Civ. Proc., § 2027.010, subd. (e) ["On motion of the party seeking to take an oral deposition in a foreign nation, the court in which the action is pending shall issue a commission, letters rogatory, or a letter of request, if it contends that one is necessary or convenient."].)

According to Plaintiff's certified translation of the document that Plaintiff contends is defective, the document bears the seal and coast of arms of the United Mexican States, Council of the Judiciary, The Judiciary of the State of Jalisco. (Naughton Dec., Exs. 13, 14.) Plaintiff does not contend that Mr. Merrell was not actually served with the notice prepared by the Mexican court, but rather that the document itself is not a valid subpoena for purposes of imposing sanctions under Code of Civil Procedure section 2025.440, subdivision (a). (Pl. Sanctions Mot., p. 6:15.) Similarly, Plaintiff does not contend that Mr. Merrell lacked notice of the April 23 proceedings. Plaintiff's assertion that it was unnecessarily inconvenienced by having to travel to Mexico for a deposition that did not take place is undercut by Defendant's

unrefuted assertion that Plaintiff refused to stipulate to the taking of Mr. Merrell deposition on an informal basis. (See Def. Sanction Mot, p. 10:3-10.)

Here, the sanctions provisions under Code of Civil Procedure section 2025.440, subdivision (a), is not applicable because Plaintiff has not established that Defendant "failed to serve a required deposition subpoena." Furthermore, even if Plaintiff had made such a showing, the court finds that, based on the evidence presented and the circumstances involving the judiciaries of two countries, Defendant here has "acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code Civ. Proc., § 2025.440, subd. (a).)

Plaintiff also contends that Defendant's conduct is sanctionable under Code of Civil Procedure, section 128.5, subdivision (a). (Pl's Sanctions Mot., pp. 6:26-7:25.) However, as explained above, according to its plain terns, Code of Civil Procedure section 128.5 does not apply in the discovery context: "This section shall not apply to disclosures and discovery request, responses, objections, and motions." (Code Civ. Proc., § 128.5, subd. (e); see also *Dalessandro*, *supra*, 43 Cal.App.5th at p. 1092 ["section 128.5 has no application to sanctions authorizes under the Civil Discovery Act"].)

Accordingly, Plaintiff's motion for monetary sanctions is DENIED.

IV. DEFENDANT'S MOTION TO QUASH, OR ALTERNATIVELY, ISSUE A PROTECTIVE ORDER

Defendant seeks an order quashing Plaintiff's Notice to Appear at Trial as directed to Michael Xie, Ken Xie, and Keith Jensen, or alternatively, issuing a protective order to prevent the future service of trial subpoenas on these individuals. (Defendant's Notice of Motion and Motion to Quash []; Memorandum of Points and Authorities ("Def. Quash Mot."), p. 2:4-10.)

A. Evidentiary Objections

In connection with its opposition, Plaintiff interposes various objections to the evidence submitted by Defendant in support of its motion for sanctions. However, Plaintiff offers no authority that the court must rule on evidentiary objections made in connection with this motion. Therefore, the court declines to rule on Plaintiff's evidentiary objections.

B. Legal Standard

The general rule is that counsel may choose to call the agents and employees of the opposing party to provide direct testimony at trial. (See Evid. Code, § 776, subds. (a), (d)(2).) To ensure the attendance of someone "who is an officer, director, or managing agent," of a party, counsel need not serve a subpoena "if written notice requesting the witness to attend … is served upon the attorney of that person." (Code Civ. Proc., § 1987, subd. (b).) The procedure to challenge a notice to appear is the same as that to challenge a subpoena: a motion to quash or modify its terms. (Code Civ. Proc., § 1987.1, subd. (a).)

The court "may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders. (Code Civ. Proc., § 1987.1, subd. (a).) "In addition, the court may make any order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person." (*Ibid.*) The court may grant the motion to quash or modify the notice to appear only if it is "reasonably made." (*Lee v. Swansboro Country Property Owners Ass'n* (2007) 151 Cal.App.4th 575, 583 [motion to quash filed seven days before scheduled debtors' examination was timely and "reasonably made"].)

In the discovery context, depositions of high-level corporate officials have been termed "apex depositions," and courts have recognized that a higher showing is required to justify the burden they impose. "[W]hen a plaintiff seeks to depose a corporate president or other official at the highest level of corporate management, and that official moves for a protective order to prohibit the deposition, the trial court should first determine whether the plaintiff has shown good cause that the official has unique or superior personal knowledge of discoverable information." (*Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1289 (*Liberty Mutual*).) The court should also consider whether the plaintiff has exhausted less intrusive discovery methods. (*Id.* at p. 1287.)

C. Discussion

Defendant initially contends that Plaintiff's notice to appear, as directed at the three executives in question, is an unfair trial surprise because Plaintiff has not previously disclosed these individuals as witnesses. (Def. Quash Mot., p. 4:12-16.) Defendant states that near the

outset of litigation, in June 2019, it served Plaintiff with Form Interrogatory 12.1, requesting that Plaintiff identify all individuals with knowledge of the circumstances and events surrounding its causes of action. (*Id.* at pp. 4:24-5:1.) Though Plaintiff submitted responses to this interrogatory identifying 22 current or former employees of Defendant's, Plaintiff did not include Michael Xie, Ken Xie, and Keith Jensen in the list, and Plaintiff never attempted to take the depositions of these three executives. (*Id.* at p. 5:1-7.)

Defendant further contends that the individuals in question do not have unique, relevant knowledge to offer at trial, and that the subjects of their testimony can be obtained through other testifying witnesses. (Def. Quash Mot., p. 5:16-24.) According to Defendant, this represents a clear attempt by Plaintiff to harass and disrupt Defendant's business activities and leadership. (*Ibid.*, citing *Reddy v. Nuance Commc'ns, Inc.* (N.D. Cal. Aug. 5, 2015) 2015 U.S. Dist. LEXIS 102739, 2015 WL 4648008, at *4.)

In opposition, Plaintiff attempts to distinguish the authority cited by Defendant. (Plaintiff's Opposition to Defendant's Motion to Quash [] (Pl. Quash Opp.), pp. 2:11-3:19.) While Plaintiff devotes much of it opposition to argument relating to the destruction of Defendant's FortiChat data, the court has previously addressed this issue and granted Plaintiff's request for an adverse inference instruction. (See Order Re: Motions to Seal; Discovery Orders, filed August 14, 2023, p. 18:23-25 ["Plaintiff's motion is GRANTED to the extent it requests an adverse inference and instruction to the jury that it may conclude that the evidence maintained in the FortiChat system that Defendant destroyed would have been adverse and harmful to Fortinet."].)

However, Plaintiff offers no persuasive explanation as to why it has not previously identified the three witnesses in question here, despite the fact that discovery in this matter began approximately five years ago. Rather, Plaintiff contends that it should be able to call Defendant's executives because Defendant has identified Plaintiff's Chief Executive Officer ("CEO") as a trial witness. (Pl. Quash Opp., 13:24-25.) But, as Defendant points out in reply, Plaintiff in fact voluntarily included its CEO, Andy Lee, in its own witness list. (Defendant's Reply in Support of Motion to Quash [], p. 9:5-19.) Furthermore, unlike Plaintiff with respect

to the Fortinet executives at tissue here, Defendant has previously sought Mr. Lee deposition and in fact brought a successful motion to compel for that purpose. (*Ibid.*)

The witnesses in question here are high level executives. If Plaintiff was seeking to depose these individuals, it would have to make a showing of "good cause good cause that the official has unique or superior personal knowledge of discoverable information," and the court would have to consider whether Plaintiff has exhausted less intrusive discovery methods. (*Liberty Mutual*, *supra*, 10 Cal.App.4th at p. 1289.) Plaintiff has not met this standard here, and the court sees no reason why Plaintiff's burden should be any less with respect to a notice to appear at trial than it is for a deposition. If anything, Plaintiff's burden should be higher here because it failed to previously identify the persons in question as individuals with knowledge of the circumstances and events surrounding its causes of action

Accordingly, Defendant's motion for a protective order with respect to Plaintiff's attempt to call Michael Xie, Ken Xie, and Keith Jensen at trial is GRANTED.

V. MOTIONS 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 exists to achieve the overriding interest." (Cal. Rules of Court, rule 2.550(d).) Pleadings, in particular, should be open to public inspection "as a general rule," although they may be filed under seal in appropriate circumstances. (*Mercury Interactive Corp. v. Klein* (2007) 158 Cal.App.4th 60, 104, fn. 35.)

"Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn. 3 (*Providian*).) "[A] binding contractual agreement not to disclose" may suffice. (*Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 107.) In addition, confidential matters relating

to the business operations of a party may be sealed where public revelation of the information would interfere with the party's ability to effectively compete in the marketplace. (See *Universal City Studios, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1273, 1285-1286 (*Universal*).)

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

B. Plaintiff's Motion to Seal Portions of Defendant's Motion for Sanctions

Plaintiff seeks to seal portions of Defendant's motion for sanctions. Specifically, Plaintiff asks the court to seal Defendant's Notice of Motion and Motion for Sanctions; Memorandum of Point's and Authorities ("Defendant's Motion for Sanctions") at the following page and line numbers: 5:4-5; 11:7-9; 11:17-18; 11:21-23; 11:26-28; 12:1-2; 12:5-8; 12:15-16; 12:18-19. Plaintiff also asks the court to seal the following Exhibits C, D, E, F, and L attached to Defendant's Motion for Sanctions. The materials at issue contain Plaintiff's confidential commercial, financial, business information about its network and business operations. (Declaration of Arjun Sivakumar, ¶ 4.) This information is not publicly available, and its disclosure could harm Plaintiff. (*Ibid.*) Additionally, the materials have been designated as "confidential" under the parties' stipulated protective order. (*Ibid.*) The proposed sealing appears to be narrowly tailored to the confidential information.

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

Accordingly, Plaintiff's Motion to Seal Portions of Defendant's Motion for Sanctions motion to seal is GRANTED.

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C. Plaintiff's Motion to Seal Portions of Defendant's Motion for Quash

Plaintiff seeks to seal portions of Defendant's evidence offered in support of its motion to quash, or alternatively, issue a protective order. Specifically, Plaintiff asks the court to seal Exhibit C to the Declaration of Connie Sung in Support of Motion to Quash or, Alternatively, Issue a Protective Order Against Trial Subpoenas to Fortinet Executives. The materials at issue consists of discovery responses containing confidential commercial, financial, business information about Plaintiff's network and business operations. (Declaration of Arjun Sivakumar, ¶ 4.) This information is not publicly available, and its disclosure could harm Plaintiff. (*Ibid.*) Additionally, the materials have been designated as "confidential" under the parties' stipulated protective order. (*Ibid.*) The proposed sealing appears to be narrowly tailored to the confidential information.

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

Accordingly, the motion to seal is GRANTED.

D. Defendant's Motion to Seal Portions of Defendant's Reply in Support of Motion to Quash

Defendant seeks to seal portions of its Reply in Support of Motion to Quash, or Alternatively, Issue a Protective Order Against Trial Subpoenas to Fortinet Executives ("Reply"). Specifically, Defendant asks the court to seal the following portions of its Reply: 5:19-21; 5:22; 5:23-6:1; 6:2; 6:3-4; 6:5-8; 6:11; 6:13-20; 6:21-23; 6:25; 6:27-28; 7:13; 7:15-18; 7:19; 7:24-25; 8:1-3; 8:7-8; 8:9-10; 8:11; 8:13-14; 8:25-26; 8:27-9:2; 9:14-16; 9:24-27; 10:4-6;

10:7-9; 10:10; 10:13; 10:15. The materials at issue contain Defendant's confidential technical information and confidential employee information. (Declaration of William O. Cooper, ¶ 2.) This information is not publicly available, and its disclosure could harm Plaintiff. (*Id.* at ¶¶ 2-3) Additionally, the materials have been designated as "confidential" under the parties' stipulated protective order. (*Id.* at ¶ 4.) The proposed sealing appears to be narrowly tailored to the confidential information.

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

Accordingly, Defendant's Motion to Seal Portions of Defendant's Reply in Support of Motion to Quash is GRANTED.

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

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