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Attorneys for Plaintiff
HARRIET GATCHALIAN

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

HARRIET GATCHALIAN, on behalf of herself and all others similarly situated,

Plaintiff,

v.

ATLANTIC RECOVERY SOLUTIONS, LLC, a New York limited liability company; ZACHARIAH YAHIA AGA, individually and in his official capacity; DNF ASSOCIATES, LLC, a Delaware limited liability company; and DOES 1 through 10, inclusive,

Defendants.

Case No. 3:22-cv-04108-JSC

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR ATTORNEY'S FEES AND COSTS BY CLASS COUNSEL

Hearing Date:	March 14, 2024
Hearing Time:	9:00 a.m.
Hearing Judge:	Jacqueline Scott Corley
Hearing Courtroom:	8, 19th Floor
Hearing Location:	450 Golden Gate Avenue San Francisco, California

COME NOW Class Counsel of Consumer Law Center, Inc., and hereby submit this Reply Memorandum of Points and Authorities in Support of Motion for Attorney's Fees and Costs by Class Counsel.

I. INTRODUCTION

Notwithstanding the fact that Class Counsel's estimated fees were stated during the preliminary approval process, and provided to the Class members as part of the Notice of settlement, Defendants now ask the Court to reduce Class Counsel's (discounted) requested fees and costs **by 45%**, based on a self-serving framing of the litigation. Despite Defendants' spin, it is indisputable that Class Counsel secured full relief for the Class. As the Court noted in granting preliminary approval:

> A class recovery of $51,975.00 far exceeds 1% of Defendants' combined net worth, (see Dkt. No. 53), which is the maximum recovery of statutory damages pursuant to 15 U.S.C. § 1692k(a)(2). Considering the risks and costs of continued litigation and availability of a complete defense, this amount supports preliminary approval.

Class Counsel's conservative estimate of their fees turned out to be nearly $10,000 less than the actual amount of fees incurred – an amount which has increased even more because of Defendants' Opposition herein. Though accusations of churning are *de rigueur* in fee litigation, the Court can easily conclude that it makes no sense for a consumer plaintiff's counsel to do unnecessary work in these contingent fee-reversing cases. When making determinations, the Court should consider the source of purported authority very carefully. Unreported federal district court orders are not binding precedent, no matter how convenient the Lexis database makes it to find and cite these orders. Moreover, hewing to Defendants' cherry-picked orders creates a race to the bottom, antithetical to the Legislative intent that fee awards be fully compensable. This is because where one judge buys into the debt collector's gamesmanship and gives an outlier fee award, that award will be seized upon by the debt collector bar in every subsequent fee motion filed by a consumer's counsel. This is why in 2024, Defendants are still citing *Bidwal* and *Brady*, two **individual** consumer actions from **2019**.

The Debt Collector/Debt Buyer Litigation Model

Debt collector defendants' favorite argument in mandatory "fee-reversing" consumer litigation is that the litigation is being driven by the consumer counsel's desire for attorney fees. This does not

make sense for at least three reasons. First, as noted in the moving papers, Congress chose a 'private attorney general' approach to assure enforcement of the FDCPA and RFDCPA. Without the benefit of receiving reasonable attorney's fees, private litigants would be otherwise dissuaded from vindicating their rights by bringing suit because of economic burdens.

Second, the FDCPA and RFDCPA each have a class statutory award capped at the lesser of 1% of the Defendants' net worth or $500,000. Absent large actual damages awards, anything more than minimal time spent litigating a FDCPA/RFDCPA matter will cause the attorney fee award to dwarf the statutory penalty recovered by the consumers. As the Second Circuit has observed in the context of civil rights litigation, "the purpose of fee-shifting statutes: assuring that civil rights claims of modest cash value can attract competent counsel. The whole purpose of fee-shifting statutes is to generate attorneys' fees that are *disproportionate* to the plaintiff's recovery." *Millea v. Metro-North R.R. Co.* (2d Cir. 2011) 658 F.3d 154, 169 (emphasis in original).

Third, and most importantly, in every FDCPA/RFDCPA case, the consumer's counsel must submit his or her fees to the Court's scrutiny for reasonableness – if and only if the consumer prevails. This, however, gives debt collectors a long-term incentive for vigorously contesting fee motions in consumer protection cases, especially where, as here, the requested fees are already below lodestar. This way debt collectors can provide a disincentive for consumer attorneys to take these cases on a contingent basis, which would give greater license to flout the law and abuse consumers.

Defense Counsel's Inherent Conflict With Their Clients

Defense counsel in consumer protection cases are generally paid hourly, win or lose, by the defendant (or more likely, the defendant's insurer). Moreover, defense counsel's fees are not subject to scrutiny or potential reduction by the Court. **Consumer counsel is not the party with an incentive to churn the file in a fee-reversing consumer protection case.** Defense counsel's business model only

works if counsel can successfully continue to bill the file and get paid every month, but simultaneously make it appear to the defendant's insurance adjuster, and eventually the Court, that it is consumer counsel who is unnecessarily prolonging the litigation. Consumer counsel's economic incentive is to resolve cases early and move on to other cases – thereby taking less risk of non-success over many small cases instead of a taking a large risk of non-success in fewer cases. The Ninth Circuit recognized the economic reality of this business model in *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008), and *Costa v. Comm'r of SSA*, 690 F.3d 1132, 1136 (9th Cir. 2012).

If defense counsel can foment outrage and "anchor" the Court to an artificially low number, they might conceivably get the Court to reduce the requested fees by more than their client paid to contest the fee motion. Of course, that would be great news for Defendants, but defense counsel gets paid either way for selling the dream. Three main arguments run through Defendants' Opposition:

a. Despite all the evidence provided, Class Counsel's hourly rates are unreasonable;

b. Despite agreeing to settle the case, the Court should not award fees for certain work because Defendants deemed it unnecessary or performed at an inflated rate; and

c. The Court should apply a proportionality standard to determine the reasonable attorney fees.

As further discussed below, none of these arguments has any merit.

II. POINTS AND AUTHORITIES

A. Class Counsel's Requested Hourly Rates are Reasonable

This case is a class action. Defendants have largely chosen to ignore the litany of class cases submitted by Class Counsel wherein the court awarded counsel's requested rates, to focus on outlier decisions in two **individual** FDCPA cases – *Brady* and *Bidwal* (which *Brady* followed). As noted above, neither *Brady* nor *Bidwal* is binding precedent. To the extent this Court finds those unreported federal district court cases persuasive, surely the Court must also give weight to *Le v. Sunlan Corp.*

(N.D. Cal. Jan. 27, 2014) 2014 U.S. Dist. LEXIS 9862 at *14-15, and *Braden v. BH Fin. Servs.* (N.D. Cal. Mar. 4, 2014) 2014 U.S. Dist. LEXIS 28153 at * 19-20. These two 2014 FDCPA consumer-protection cases were brought before the California Northern District court by Class Counsel herein. In *Le* and *Braden*, Judge Charles R. Breyer awarded attorney fees *against* the consumer at a rate of **$610 per hour** to two FDCPA defense attorneys **with 12 and 13 years experience**, respectively. In both *Le* and *Braden*, FDCPA defense counsel were awarded a $610 per hour rate for prevailing on an anti-SLAPP motion in an individual FDCPA case – neither case progressed beyond the pleading stage to the merits. By Judge Breyer's 2014 standard, the rates requested by Class Counsel in 2024 for the successful class action herein are *severely* below market.

Defendants' repeated complaints that the case was "straightforward" and not "novel" or "difficult" is inapposite. See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 587 (2010) (describing FDCPA as a "comprehensive and complex federal statute"). Even if this Court considers FDCPA cases less challenging than the most arcane practice areas, the seminal Ninth Circuit case of *Camacho v. Bridgeport Fin., Inc.* (9th Cir. 2008) 523 F.3d 973, has explicitly rejected the line of reasoning that prevailing market rates in FDCPA/RFDCPA cases are to be determined **only** by comparison to FDCPA and RFDCPA cases:

> Camacho also argues that the district court erred by relying solely on FDCPA cases in determining the prevailing market rate. Camacho is correct that "[i]n order to encourage able counsel to undertake FDCPA cases, as congress intended, it is necessary that counsel be awarded fees commensurate with those which they could obtain ***by taking other types of cases***."

Camacho, 523 F.3d at 981, citing *Tolentino v. Friedman*, 46 F.3d 645, 652 (7th Cir. 1995) (emphasis added). "Paying counsel in FDCPA cases at rates lower than those they can obtain in the marketplace is inconsistent with the congressional desire to enforce the FDCPA through private actions, and therefore misapplies the law." *Tolentino*, 46 F.3d at 652-653.

Trial court discretion regarding hourly rates is not unlimited – while it is true that the Court has discretion regarding determining hourly rates, Defendants' position appears to be that the Court should only consider Class Counsel's experience, which is not the law. The Court may not ignore Class Counsel's evidence in favor of pat assertions from Defendants. *Graciano v Robinson Ford Sales, Inc.*, 144 Cal.App.4th 140, 155 (Cal. App. 4th Dist. 2006).

Current rates are the standard – Defendants are attempting to anchor Class Counsel's rates to older *individual* decisions. However, current rates are the standard, in part to account for delay in payment. The alternative method would require the Court to calculate and add interest for each time entry from the time service was rendered. See *Robles v. Employment Development Dept.*, 38 Cal.App.5th 191, 205 (Cal. App. 4th Dist. 2019); and *Graham v. DaimlerChrysler*, 34 Cal.4th 553, 583 (Cal. 2004).

Class action settlement fee awards are probative – whether or not a fee motion as part of approval of a class action settlement is opposed, the court has an independent duty to assess whether rates are reasonable. In class actions, court approval of fee settlements is required. See Fed. R. Civ. P. 23(e). The trial court has the power and the duty to set fees independently of any agreement between the parties. *Garabedian v. Los Angeles Cellular Tel. Co.*, 118 Cal.App.4th 123, 128 (Cal. App. 4th Dist. 2004) (citing federal authorities).

Class Counsel's rates need not have been paid by their clients – the standard is not if a client actually paid that hourly rate to the attorney, but if the requested rate is within range of rates charged for similar services. *Syers Props. III v. Rankin*, 226 Cal.App.4th 691, 702 (Cal. App. 1st Dist. 2014) (amount awarded properly based on market-value rates, not discounted rates insurance carrier may have paid); *U.S. v. City & County of San Francisco*, 748 F.Supp. 1416, 1431, (N.D.Cal. 1990) aff'd in part and rev'd in part sub nom *Davis v. City & County of San Francisco*, 976 F.2d 1536, 1545 (9th Cir.

1992), modified on other grounds 984 F.2d 345 (9th Cir. 1993) (public interest attorneys entitled to same rates "as corporate attorneys of equal caliber"; lower rates charged clients not the limit).

Class Counsel did not misrepresent the *Pishdad* fee award – on June 16, 2021, the Honorable Socrates Manoukian granted attorney fees requested in full to Fred W. Schwinn on a Motion to Quash Deposition Subpoenas and for Protective Order. In that Motion, Mr. Schwinn had requested fees at the rate of $700 per hour. See Supplemental Declaration of Raeon R. Roulston ¶¶3-4 and Exhibits "B" and "C" attached thereto. Defendants' Exhibit "E" refers to a different Order by Judge Manoukian, entered on September 28, 2021, where for reasons unknown to Class Counsel, he awarded attorney fees at a different hourly rate in the same case.

B. Class Counsel's Hours Expended Are Reasonable

Given the structure of the FDCPA and RFDCPA, attorney's fees cannot be construed as a special or discretionary remedy; rather, the statutes *mandate* an award of attorney's fees to fulfill the legislative intent that the Act be enforced by debtors acting as private attorneys-general. Defendants agreed to pay reasonable attorney fees and costs to Class Counsel, but now argue for a sharp reduction, based on Defendants' skewed characterization of the litigation, and speculation regarding time entries. However, all of the time incurred was reasonable to obtaining the settlement for the Class.

1. Haircut vs. Reduction

Defendants seek to reduce Class Counsel's (discounted) requested fees and costs **by 45%**. This is no small ask, and may not be summarily done by the Court. "If opposing counsel cannot come up with specific reasons for reducing the fee request that the district court finds persuasive, it should normally grant the award in full, or with no more than a haircut." *Moreno v. City of Sacramento*, 534 F.3d 1106, 1116 (9th Cir. 2008). *Costa v. Comm'r of SSA*, *supra*, reinforced *Moreno*:

> In *Moreno v. City of Sacramento*, we held that a California district court abused its discretion when it awarded fees for a significantly lower number of hours than the

> prevailing plaintiffs had requested and failed to provide adequate explanation for those cuts. 534 F.3d. at 1112-13. We said in Moreno that "lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees" because "[t]he payoff is too uncertain." *Id.* at 1112. As a result, courts should generally defer to the "winning lawyer's professional judgment as to how much time he was required to spend on the case." *Id.* The court added that a district court can impose a reduction of up to 10 percent—a "haircut"—based purely on the exercise of its discretion and without more specific explanation. Id. But where the district court had cut the number of hours by twenty to twenty-five percent it was required to provide more specific explanation than its view that "the amount of time plaintiff's counsel spent was 'excessive.'" *Id.* at 1112-13. Finally, we recognized that sometimes "the vicissitudes of the litigation process" will require lawyers to duplicate tasks. *Id.* at 1113. "Findings of duplicative work should not become a shortcut for reducing an award without identifying just why the requested fee was excessive and by how much." *Id.*

Costa v. Comm'r of SSA, 690 F.3d at 1135-1136.

2. Specific Time Entries

Now that the parties' settlement has been preliminarily approved, there is no reason to discuss the merits of the litigation, other than to try to smear Class Counsel. Defendants complain about some time entries seemingly just to complain. Defendants seem upset that Class Counsel did not litigate according to Defendants' preferred timeline and strategy. However, the standard for a fee award is "reasonable," and not "the absolute cheapest possible, and not a penny more." "Attorneys are not fungible. Some, shortly out of law school, may command in the marketplace charges for their time that others do not command after a lifetime of pedestrian practice." *Cunningham v. City of McKeesport*, 753 F.2d 262, 268 (3d Cir. 1985).

Because liability was seemingly apparent,[1] and the litigation was concluded so speedily, Defendants have few significant time entries to complain about. Defendants complain about the time spent drafting or reviewing certain discovery documents, describing such tasks as "paralegal" tasks. The documents in question are Initial Disclosures, Interrogatories, Document Production Requests, and Requests for Admission. While a first draft of these documents could in theory be done by a paralegal,

[1] Defendants withdrew their Motion to Dismiss after meeting and conferring with Class Counsel.

it is fairly certain that such drafting would take far longer than when done by the attorney, erasing much if not all of the savings from the paralegal billing at a lower rate. Moreover, the attorney would still need to review, edit, and finalize these documents before service on the opponent. The time spent drafting documents, at least for Class Counsel, is more than merely the time spent *typing* it. To use one example from September 25, 2022, it is perfectly reasonable for an attorney to bill 3 hours of time to generate written discovery consisting of 19 Interrogatories, 53 document production requests, and 17 requests for admission.

The reality is that, for competent counsel, pleadings and discovery cannot simply be a matter of copying and pasting from previous documents and just changing the names. Rather, each document is drafted separately and reviewed carefully to apply to the facts and circumstances of the current case. To the extent Class Counsel has developed a platform document from which to start the process of preparing certain documents in this case, any time saved by that process demonstrates efficiency, ***and the resulting cost savings are passed on to Defendants***. If Class Counsel were required to destroy their documents at the end of each case, and start from scratch in drafting pleadings and discovery, the time sought to be compensated in this case would necessarily be ***much*** greater. Similarly, it is disingenuous for Defendants to baldly assert that 12.9 hours on discovery dispute letters is excessive, without informing the Court that the resulting output was three distinct letters which were each 10 pages, single spaced. Moreover, such meeting and conferring resulted from Defendants' near total abdication of their obligations to respond in good faith to Plaintiff's discovery requests. Class Counsel has utilized proper judgment in the time spent on the tasks in this case.

The party challenging fees as "excessive" must point to the specific items challenged "**with a sufficient argument and citations to the evidence.**" *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.*, 163 Cal.App.4th 550, 564 (Cal. App. 2d Dist. 2008) (emphasis added).

"General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice." *Id.*

> It is well established that the value of legal services performed in a case is a matter in which the trial court has its own expertise. The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case. … The court therefore found that the amount of hours claimed by [plaintiff's] counsel was reasonable in light of the length and difficulty of the … litigation.

Bernardi v. County of Monterey, 167 Cal.App.4th 1379, 1395-1396 (Cal. App. 6th Dist. 2008).

The Court should not punish Class Counsel for a swift and resounding victory, even if the Court might think a few things could have been done differently. "By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker." *Moreno*, 534 F.3d at 1112.

C. Miscellaneous Arguments

There is no proportionality standard – as covered in section III(C) of the moving papers, in consumer cases such as this with capped damages awards, attorney fees are determined by the lodestar method and need not bear a proportional relationship to the damages award. As such, Defendants' attempts to compare the fees requested to the (maximum) damages obtained is a red herring.

Recovery under the FDCPA/RFDCPA is not limited to taxable costs – Defendants' attempt to limit recoverable costs to taxable costs contravenes the standard. "Even though not normally taxable as costs, out-of-pocket expenses incurred by an attorney which would normally be charged to a fee paying client are recoverable as attorney's fees." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1216 n. 7 (9th Cir.1986), citing *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 30 (D.C. Cir. 1984).

"Fees on Fees" – as noted in the moving papers, "… an award of attorneys' fees is not a gift. It is just compensation for expenses actually incurred in vindicating a public right." *Sundance v. Municipal Court*, 192 Cal.App.3d 268, 273 (Cal. App. 2d Dist. 1987). This means that the lodestar fees

requested by Class Counsel should not be seen as an opening bid in a Mediation, for Defendants to casually seek to undercut to eventually arrive at a midpoint. Moreover, to the extent Class Counsel is (inadvertently) seeking a "discounted" lodestar, the Court should be aware that the said lodestar has only increased because Class Counsel was required to review Defendants' Opposition and draft this Reply. Class Counsel has spent an additional 6.8 hours on these tasks,[2] but necessarily will not recover directly for them, as the requested fees were already below lodestar at the time of the Motion. Class Counsel respectfully requests that these additional hours of time, plus the time required for the final approval hearing and compliance, be considered in the Court's decision. Even an approximately 10% haircut on actual lodestar should result in the Court awarding the $123,500 requested.

III. CONCLUSION

For all the reasons set forth above and in the moving papers, Class Counsel request that the Court award Class Counsel attorney fees, costs, and expenses in the amount of $123,500, and GATCHALIAN a service award of $2,000.

Dated: February 29, 2024

CONSUMER LAW CENTER, INC.

By: _____

☐ Fred W. Schwinn (SBN 225575)
☒ Raeon R. Roulston (SBN 255622)
☐ Matthew C. Salmonsen (SBN 302854)
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[2] Supplemental Declaration of Raeon R. Roulston ¶5.

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HARRIET GATCHALIAN

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

HARRIET GATCHALIAN, on behalf of herself and all others similarly situated,

Plaintiff,

v.

ATLANTIC RECOVERY SOLUTIONS, LLC, a New York limited liability company; ZACHARIAH YAHIA AGA, individually and in his official capacity; DNF ASSOCIATES, LLC, a Delaware limited liability company; and DOES 1 through 10, inclusive,

Defendants.

Case No. 3:22-cv-04108-JSC

SUPPLEMENTAL DECLARATION OF RAEON R. ROULSTON IN SUPPORT OF MOTION FOR ATTORNEY FEES AND COSTS BY CLASS COUNSEL

[Fed. R. Civ. P. 23]

Hearing Date:	March 14, 2024
Hearing Time:	9:00 a.m.
Hearing Judge:	Jacqueline Scott Corley
Hearing Courtroom:	8, 19th Floor
Hearing Location:	450 Golden Gate Avenue San Francisco, California

I, Raeon R. Roulston, declare under penalty of perjury, under the laws of the United States, 28 U.S.C. § 1746, that the following statements are true:

1. I am an attorney at law duly licensed to practice before all the courts of the State of California and am an attorney at the law firm Consumer Law Center, Inc., attorneys of record for Plaintiff and Class Representative, HARRIET GATCHALIAN.

2. I have personal knowledge of the following facts, and if called as a witness, I could and would competently testify thereto.

3. On June 16, 2021, the Honorable Socrates Manoukian entered an Order Granting Motion to Quash Deposition Subpoenas and for Protective Order and for Monetary Sanctions Against LVNV Funding, LLC, and Christopher D. Mandarich in the litigation captioned *LVNV Funding LLC v. Aslan Pishdad*, Santa Clara County No. 18CV337001. The said Order granted the attorney fees requested by Fred W. Schwinn of this office in full. A true and correct copy of the June 16, 2021, Order is attached hereto as Exhibit "B."

4. In the underlying Motion, Mr. Schwinn sought attorney fees at the rate of $700 per hour. A true and correct copy of the February 16, 2021, Declaration of Fred W. Schwinn in Support of Motion to Quash Deposition Subpoenas and for Protective Order and for Monetary Sanctions Against LVNV Funding, LLC, and Christopher D. Mandarich, wherein Mr. Schwinn requests attorney fees at $700 is attached hereto as Exhibit "C."

5. I have spent an additional 6.8 hours in this matter reviewing Defendants' Opposition and drafting the Reply Memorandum. At my requested hourly rate of $650, these hours represent additional attorney fees in the amount of $4,420 ($650 hourly rate x 6.8 hours expended).

Executed at San Jose, California on February 29, 2024.

Raeon R. Roulston (SBN 255622)

Fred W. Schwinn (SBN 225575)
Raeon R. Roulston (SBN 255622)
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Attorneys for Defendant/Cross-Complainant
ASLAN PISHDAD

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

EXHIBIT B

LVNV FUNDING, LLC,

Plaintiff,

v.

ASLAN PISHDAD,

Defendant.

AND RELATED CROSS-ACTION.

Case No. 18CV337001
(Unlimited Civil Case)

ORDER GRANTING MOTION TO QUASH DEPOSITION SUBPOENAS AND FOR PROTECTIVE ORDER AND FOR MONETARY SANCTIONS AGAINST LVNV FUNDING, LLC, AND CHRISTOPHER D. MANDARICH

On April 27, 2021, the Honorable Socrates P. Manoukian, in Department 20 of the Superior Court of California, Santa Clara County, adopted the uncontested tentative ruling in this matter on Defendant/Cross-Complainant, ASLAN PISHDAD's, Motion to Quash Deposition Subpoenas and for Protective Order and for Monetary Sanctions Against LVNV Funding, LLC, and Christopher D. Mandarich as follows:

Defendant/Cross-Complainant seeks a protective order and order quashing deposition subpoenas served by Plaintiff/Cross-Defendant. Moving party contends that the deposition subpoenas were not properly served/untimely served on the would-be deponents. The motion appears to be unopposed. The motion is GRANTED. The deposition subpoenas for third persons Changiz Pishdad and Vida Soleimannejad are QUASHED. The request for monetary sanctions is GRANTED (in the amount

requested of $7,861.52). Sanctions are payable by Plaintiff/Cross-Defendant to defendant/cross-complainant within 20 days of the date of the filing and service of the order confirming the foregoing.

Counsel for Defendant/Cross-Complainant to prepare the formal order.

IT IS SO ORDERED.

Dated this 16th day of June, 2021.

Signed: 6/15/2021 08:37 PM

The Honorable Socrates P. Manoukian
Judge of the Superior Court

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Attorneys for Defendant/Cross-Complainant
ASLAN PISHDAD

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

EXHIBIT C

LVNV FUNDING, LLC,

Plaintiff,

v.

ASLAN PISHDAD,

Defendant.

ASLAN PISHDAD,

Cross-Complainant,

v.

LVNV FUNDING, LLC, a Delaware limited liability company; MANDARICH LAW GROUP, LLP, a California limited liability partnership; and ROES 1 through 10, inclusive,

Cross-Defendants.

Case No. 18CV337001
(Unlimited Civil Case)

DECLARATION OF FRED W. SCHWINN IN SUPPORT OF MOTION TO QUASH DEPOSITION SUBPOENAS AND FOR PROTECTIVE ORDER AND FOR MONETARY SANCTIONS AGAINST LVNV FUNDING, LLC, AND CHRISTOPHER D. MANDARICH

[Code of Civ. Proc. §§ 1987.1 and 2025.420]

Hearing Date:	TBD
Hearing Time:	9:00 a.m.
Hearing Dept.:	20
Hearing Judge:	Socrates P. Manoukian
Hearing Location:	161 North First Street San Jose, California
Complaint Filed:	October 24, 2018
Cross-Action Filed:	September 9, 2020
Trial Date:	Not Set

I, Fred W. Schwinn, declare as follows:

1. I am an attorney at law duly licensed to practice before all the courts of the State of California and am a shareholder in the law firm Consumer Law Center, Inc., attorneys of record for

Defendant/Cross-Complainant, ASLAN PISHDAD.

2. I have personal knowledge of the following facts, and if called as a witness, I could and would competently testify thereto.

DEPOSITION SUBPOENAS

3. On February 2, 2021, I received via email from ASLAN PISHDAD a copy of the Deposition Subpoena for Personal Appearance for his father, CHANGIZ PISHDAD (Exhibit "A"), and a copy of the Deposition Subpoena for Personal Appearance for his mother, VIDA SOLEIMANNEJAD (Exhibit "B"). Prior to receiving copies of these documents from my client, ASLAN PISHDAD, I had not seen them nor was I informed by Plaintiff's counsel, CHRISTOPHER D. MANDARICH, that he intended to take these depositions, as required by Code Civil Procedure § 2025.240(a).

4. After discussing the facts and circumstances surrounding the "service" of the deposition subpoenas, I drafted and sent a written objection, pursuant to Code Civil Procedure § 2025.241(a), and letter to Plaintiff's counsel, CHRISTOPHER D. MANDARICH, via email on February 5, 2021. A true and correct of my meet and confer letter to Plaintiff's counsel, CHRISTOPHER D. MANDARICH, is provided herewith as Exhibit "C" and incorporated herein by this reference.

5. Thereafter, on February 8, 2021, I received an email from Plaintiff's counsel, CHRISTOPHER D. MANDARICH, which contained 3 attachments, a response to my meet and confer letter (Exhibit "D"), and courtesy copies of Defendants' Notice of Taking the Deposition of Witness Changiz Pishdad (Exhibit "E") scheduled on February 16, 2021, and Defendants' Notice of Taking the Deposition of Witness Vida Soleimannejad (Exhibit "F") scheduled on February 17, 2021. The Proof of Service attached to each of the deposition notices state that they were served on my office by mail from Chicago, Illinois, on February 8, 2021. Therefore, Plaintiff's counsel, CHRISTOPHER D.

MANDARICH, violated Code Civil Procedure § 2025.270(a) by failing to serve the deposition notices "at least 10 days" before the scheduled depositions. A true and correct of Exhibits "D," "E," and "F" are provided herewith and incorporated herein by this reference.

6. Thereafter, on February 9, 2021, I attended a 1 hour and 45 minute Zoom video conference with Plaintiff's counsel, CHRISTOPHER D. MANDARICH, wherein he repeatedly restated his position first articulated in his February 8, 2021, letter that his "contention is Plaintiff's counter claim was made after the statute of limitations has expired. We believe that Changiz Pishdad and Vida Soleimannejad have relevant information regarding these issues. Indeed, your client has filed a declaration referencing his parents."

7. In response, I repeatedly explained to Mr. Mandarich that a Cross-Complaint alleging statutory violations contained in the Complaint itself can NEVER be time-barred under California law, because of the tolling doctrine;[1] and that his efforts to *discover* irrelevant facts that would support such a non-cognizable statute of limitations defense were actually intended to harass and abuse CHANGIZ PISHDAD and VIDA SOLEIMANNEJAD in an effort to dissuade their son, ASLAN PISHDAD, from pursuing his statutory collection abuse claims. Mr. Mandarich refused to concede that a statute of limitations defense was not available under these circumstances and repeatedly advanced

[1] I even read the following case law quotes and citations to Mr. Mandarich:

- "if the right of action relied on was alive at the commencement of the suit the statute does not run against it, when, as in this case, the full statutory period has expired thereafter during the pendency of the action and before the claim is pleaded as a cross-complaint." *Whittier v. Visscher*, 189 Cal. 450, 456 (Cal. 1922).
- "The statute of limitations is not available to plaintiff as to defendants' counterclaim if the period has not run on it at the time of commencement of plaintiff's action even though it has run when the counterclaim is pleaded." *Jones v. Mortimer*, 28 Cal. 2d 627, 633 (Cal. 1946).
- A "defendant's cross-complaint against the plaintiff, irrespective of whether it is related to the matters asserted in the complaint, is entitled to the benefit of the tolling doctrine." *ZF Micro Devices, Inc. v. TAT Capital Partners, Ltd.*, 5 Cal. App. 5th 69, 92 (Cal. App. 6th Dist. 2016).

policy arguments regarding his perceived unfairness of being held to account in 2021 for violations of California law committed in 2018.

8. During the Zoom video conference with Plaintiff's counsel, CHRISTOPHER D. MANDARICH, Mr. Mandarich also told me that the depositions would "not last long" and that the only subjects of his questioning would be (1) the facts and circumstances surrounding the original service of the collection Complaint as alleged in the Proof of Service of Summons filed in this action on December 6, 2018, and (2) the truthfulness of the statements made in the Declaration of Aslan Pishdad in Support of Motion to Set Aside Default and Vacate Default Judgment filed herein on June 3, 2020, regarding his lack of knowledge about this lawsuit before March 14, 2020. Mr. Mandarich insisted that CHANGIZ PISHDAD and VIDA SOLEIMANNEJAD would have knowledge regarding ASLAN PISHDAD's place of residence on the alleged date of service (December 1, 2018), contemporaneous conversations between them regarding the alleged service of the Summons and Complaint, and subsequent conversations (*e.g.*, "I subsequently asked my parents about this matter and they deny receiving any legal documents intended for me. Therefore, I do not believe that the alleged service is truthful."). Mr. Mandarich further stated, as he did in his February 8, 2021, letter that "we are willing to withdraw the deposition subpoenas if Plaintiff stipulates that he had notice of the lawsuit in 2018." I told Mr. Mandarich that I would not stipulate to facts which are not true and which contradict ASLAN PISHDAD's sworn declaration.

9. In response, I repeatedly explained to Mr. Mandarich that the Motion to Set Aside the Default was granted by the Court on July 23, 2020, as unopposed, the entry of default had already been set aside, and that the Cross-Complaint for Declaratory Relief and Damages in this case made no claim based on the failure of service. Therefore, the depositions were not intended to lead to the discovery of evidence relevant to a claim or defense in the case, but were instead intended solely to

harass and abuse CHANGIZ PISHDAD and VIDA SOLEIMANNEJAD in an effort to dissuade their son, ASLAN PISHDAD, from pursuing his statutory collection abuse claims. I also asked Mr. Mandarich what he thought he could possibly learn from deposing ASLAN PISHDAD's 84 year old, non-English speaking, maternal grandmother, TALAT BAKHATARI, but he had no response. Mr. Mandarich denied that he intended to harass or abuse anyone and simply stated that he believed that ASLAN PISHDAD knew about this lawsuit in 2018 because he was present at his parents' house on the date of service or that his parents telephoned him immediately after receiving the Summons and Complaint and informed him about the lawsuit documents. As a result, Mr. Mandarich argued that the claims alleged in the Cross-Complaint were thus barred by the one-year statute of limitations. I again told Mr. Mandarich that none of that mattered because he could not overcome the tolling doctrine and the Cross-Complaint's relation back to the date this action was filed on October 24, 2018, notwithstanding the fact that the Cross-Complaint was filed on September 9, 2020. And again, Mr. Mandarich refused to concede or to withdraw the Deposition Subpoenas.

10. Finally, during the Zoom video conference I told Plaintiff's counsel, CHRISTOPHER D. MANDARICH, that CHANGIZ PISHDAD and VIDA SOLEIMANNEJAD were not personally served with the Deposition Subpoenas and would not appear for the depositions. I also told Mr. Mandarich that I would file a Motion to Quash and for a Protective Order on or before the first scheduled deposition wherein I would seek monetary sanctions against him personally and his client. Mr. Mandarich stated that he would contact his client, LVNV FUNDING, LLC, and that he would let me know by noon on Wednesday, February 10, 2021, whether or not he would withdraw the Deposition Subpoenas.

11. Thereafter, on February 10, 2021, I had an email exchange with Plaintiff's counsel, CHRISTOPHER D. MANDARICH, wherein he attempted to leverage a global settlement in

this case. Only after I informed Mr. Mandarich that "I am not going to engage in ANY further settlement negotiations while you attempt to use the depositions as leverage" did he respond, "I am comfortable moving forward despite your assertions about my intent. … I will start working on my responses to your motion to quash and your protective order. Your arguments are not a mystery."

12. Therefore, I have adequately met and conferred in good faith with Plaintiff's counsel, CHRISTOPHER D. MANDARICH, before bringing this motion.

MONETARY SANCTIONS

13. Plaintiff's counsel, CHRISTOPHER D. MANDARICH, has: (1) issued Deposition Subpoenas without notice, (2) failed to properly serve said Deposition Subpoenas, (3) failed to timely serve deposition notices 10-days before the scheduled depositions, and (4) refused to withdraw the Deposition Subpoenas when confronted with these notice deficiencies. Moreover, there is a clear showing that Mr. Mandarich's efforts to *discover* irrelevant facts that would support a non-cognizable statute of limitations defense were actually intended to harass and abuse CHANGIZ PISHDAD and VIDA SOLEIMANNEJAD in an effort to dissuade their son, ASLAN PISHDAD, from pursuing his statutory collection abuse claims. As a result of Mr. Mandarich's actions set forth above, the party I represent has incurred and will incur reasonable costs and attorney's fees in connection with this motion and the hearing thereon.

14. The hourly billing rate for attorney time expended by me is $700.00. I have expended 3.5 hours reviewing the depositions subpoenas and meeting and conferring with Plaintiff's counsel, CHRISTOPHER D. MANDARICH. I have also expended 5.5 hours in preparing this motion and related documents. These hours do not include the time I will be required to expend in preparing a reply in support of this motion and to attend the hearing. At present, I anticipate that I will expend approximately 2.0 hours for these additional tasks. The party I represent has also incurred court filing

fees in the amount of $60.00, electronic filing fees in the amount of $7.52, and will incur $94.00 for the CourtCall appearance fee in bringing this motion to enforce his statutory rights. Accordingly, while more precise proof of my attorney fees and expenses will be set forth in my reply in support of this motion, I request sanctions in the amount of $7,861.52 in this matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 15th day of February, 2021, at San Jose, California.

Fred W. Schwinn (SBN 225575)