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ANTIGUA CANTINA AND GRILL, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

ANTIGUA CANTINA & GRILL, INC., a dissolved California corporation, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

MARKSTEIN BEVERAGE CO. OF SACRAMENTO, a California Corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No.: 34-2020-00286915-CU-BC-GDS

DECLARATION OF ROBERT S. GREEN IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND PROVIDING FOR NOTICE

Date: November 12, 2021
Time: 11:00 a.m.
Dept.: 37
Judge: Hon. Kevin R. Culhane
Hearing to be Conducted via Zoom
https://saccourt.zoom.us/my/dept37a

[Complaint Filed: 10/9/2020]

I, ROBERT S. GREEN, declare and state as follows:

1. I am an attorney duly licensed to practice law in all courts of the State of California and am a partner in the law firm of Green & Noblin, P.C., counsel for Plaintiff and the Class in this action. I have personal knowledge of the matters set forth herein, and if called upon to testify, would be competent to do so.

2. Attached as **Exhibit 1** is the firm resume of Green & Noblin, P.C

3. Attached as **Exhibit 2** is the firm resume of Matthew E. Hess, Attorney at Law.

4. Counsel for Plaintiff in this action also represent plaintiffs asserting identical claims against other distributors of wine, beer and liquor in California, including a case entitled, *Wiseman Park, LLC v. Southern Wine Spirits of America, Inc.,* Case No BC548599, pending in the Los Angeles Superior Court. The case against Southern Wine has been to the California Court of Appeal twice. *See, e.g., Wiseman Park, LLC v. Southern Glazer's Wine & Spirits, LLC* (2017) 16 Cal.App.5th 110. There, the Second Appellate District held that the Department of Alcoholic Beverage Control does not have exclusive jurisdiction over cases such as this, and that a retailer who has been overcharged can bring a civil suit for damages and restitution. In subsequent proceedings the Superior Court denied Southern Wine's motion for summary judgment and certified a class of California retailers who purchased liquor from Southern Wine. The claims against Markstein are modeled on the claims asserted against Southern Wine for identical contractual provisions which purport to allow Markstein to charge twice the statutorily mandated charge for payments made after 42 days.

5. Attached as **Exhibit 3** is *Wiseman Park, LLC v. Southern Wine and Spirits of America, Inc.*, Case No. BC548599, (slip op. dated June 7, 2021)(granting litigated motion for class certification on claims identical to those alleged here).

6. Plaintiff filed its complaint in this action on October 9, 2020. In December 2020, Markstein filed its demurrer challenging Plaintiff's standing to bring the asserted claims and challenging each of the claims for relief. In March 2021, the Court sustained the demurrer to Plaintiff's declaratory relief claim for relief and overruled the demurrer as to Plaintiff's standing and as to the other claims for relief.

7. After the court denied Markstein's demurrer and after Markstein determined that the dollar amount of late charges challenged by this action is a modest amount, the parties entered into settlement negotiations through their counsel. The terms of settlement were negotiated from April 2021 through September 9, 2021, when the Settlement Agreement was executed.

8. Markstein has determined that there are approximately 8,000 retailers who meet the class definition, of which slightly less than 900 paid the Carrying Charge and will be entitled to refunds under the settlement -- a total of around $12,000.

9. Plaintiff believes that the Settlement provides a fair resolution of this action. Ultimately, Markstein agreed to refund directly to each retailer the amount of Carrying Charge paid during the class period, and also to write-off assessed but unpaid amounts and to revise its contracts to remove the disputed provision. Except for the possibility of a small amount of prejudgment interest, the settlement provides the remedies that Plaintiff sought to achieve through this litigation.

10. In reaching a negotiated settlement, Plaintiffs were cognizant of risks faced at trial and any subsequent appeals. Some distributors of liquor are continuing to argue in other similar cases that Plaintiff's interpretation of the statute is incorrect. Additionally, all litigation and appeals present some risk no matter how strong a case appears to be. When weighed against the extent of the recovery in this case, the settlement provides the best possible outcome for the class. Plaintiff and Plaintiff's counsel highly recommend that this court grant preliminary approval of the settlement.

11. Regarding the notice program, Plaintiff's counsel worked with defense counsel and Angeion Group to develop the most effective and efficient notice campaign possible in the circumstances. Because the retailers in the Plaintiff class were licensed by the California Department of Alcoholic Beverage Control ("ABC"), the addresses in Markstein's records are quite accurate, although there would be some changes that occur as time goes by. To resolve address changes, Angeion will conduct address searches for updates before sending out notice. The postcard notice provides all of the necessary information for class members to assess their

position in the case and to find the website with significantly more detailed information. Moreover, no claims process is required because Markstein will determine from its accounting records which class members paid more than 1% per month in late charges and provide refund checks to be delivered to those class members.

12. Angeion Group, the proposed claims administrator is a national firm in the business of administering class settlements. In connection with the *Southern Wine* case discussed above, I requested that three firms provide bids for conduction a pre-certification notice program ordered by the Court. Angeion provided the low bid among the three, then completed the notice program in a timely and efficient manner for less than its original bid. Counsel for Markstein agreed to and did work with Angeion in creating the notice program developed for this case and Angeion is ready and able to complete the notice program and distribute the funds to be repaid by Markstein. Plaintiff recommends the approval of Angeion as the claims administrator in this case.

13. Plaintiff is providing notice that it will seek a service award of up to $1,000. The amount is within reason given that Plaintiff prosecuted the rights of a class of approximately 8,000 retailers and changed a practice alleged to be illegal. Plaintiff also had to reopen its bankruptcy case and file new asset schedules in order to have standing to prosecute the claims that resulted in this settlement. Plaintiff is also providing notice that it will seek up to $75,000 in attorneys' fees. Given the course of the litigation, and the successful recovery, and these modest requests, Plaintiff's requests are reasonable. Plaintiffs' counsel were highly successful, ultimately bringing recovery and changes in practice to a statewide class. As such, the noticed amount is within reason.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 30, 2021, at Larkspur, California.

/s/ Robert S. Green
Robert S. Green

EXHIBIT 1

GREEN & NOBLIN, P.C.

FIRM RESUME

Litigation Approach

The Firm's business strategy is to aggressively develop and pursue opportunities in the field of class action litigation. The Firm's principals have many years of experience prosecuting class action claims relating to antitrust violations, consumer protection, truth in lending practices, financial services, securities offerings, accounting malpractice, breach of fiduciary duties of corporate officers and directors, and products liability.

The aggressive, result-oriented approach to client representation applied by the Firm and its principals has been demonstrated in the following litigation:

- *Wiseman Park v. Southern Wine & Spirits*, Superior Court of Los Angeles County Case No. BC548599. The Firm is co-counsel in this class action alleging violation of California's regulations regarding late fees in the sale of liquor to retailers. The Firm was instrumental in obtaining a ruling of first impression from the California Court of Appeals favoring plaintiffs' position. *Wiseman Park, LLC v. Southern Glazer's Wine & Spirits, LLC*, 16 Cal.App.5th 132 (2017).

- *In re Lithium Ion Batteries Antitrust Litigation,* Case No. 13-md-2420 YGR. The Firm was selected by the Court to serve on the Steering Committee for indirect purchasers' counsel following a litigated selection process. These cases ultimately settled for in excess of $50 million.

- *In re Domestic Drywall Antitrust Litigation,* Case No. 13-md-2437. The Firm was appointed Co-Lead Counsel for indirect purchasers in this multi-district litigation pending in Philadelphia. These cases settled for approximately $17 million.

- *John Doe v. SuccessfulMatch.com*, Case No. 1-22-CV-21120, Superior Court of Santa Clara County. Robert Green served as the Lead Trial Counsel in this class action asserting claims under California's UCL and CLRA statutes. In October 2014, a jury awarded the plaintiffs approximately $1.5 million in compensatory damages and $15 million in punitive damages. The Court entered judgment on the verdict and added injunctive and declaratory relief. The case later settled as part of a nationwide class in which class members received over 100% of their asserted damages.

- *Rutledge v. Hewlett-Packard,* Case No. 1-03-CV-817837, Superior Court of Santa Clara County. The firm served as Lead Counsel of this nationwide consumer class action stemming from the failure of certain HP laptop computers. We were successful in two appeals, resulting in published cases favoring plaintiffs in consumer class actions, *Hewlett-Packard Co. v. Superior Court,* 167 Cal. App. 4th 87 (2008), and *Rutledge v. Hewlett-Packard Co.,* 238 Cal. App. 4th 1164 (2015). In 2018, the Court approved a settlement of $6.5 million.

- *In re TFT-LCD (Flat Panel) Antitrust Litigation*, Case No. 07-mdl-1827 SI. The Firm served a critical role developing the evidence that lead to a $1.1 billion settlement in this indirect purchaser antitrust class action settled earlier this year. Members of the Firm were involved in all phases of the litigation over a five-year period, including research and drafting of our initial complaint and later motions and pleadings, managing document review and deposition preparation teams, and identifying and organizing exhibits and other evidence for trial.

- *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation,* 02-mdl-1486 PJH. The Firm worked extensively on this indirect purchaser antitrust action, both in San Francisco Superior Court in a coordinated action, and in the federal antitrust action. Principals of the Firm were active in conducting depositions, such as Dell and Nanya executives among others, along with conducting legal and factual research, drafting significant pleadings and running document review teams. The case settled for in excess of $300 million.

- *In re Static Random Access Memory (SRAM) Antitrust Litigation,* Case No. 07-mdl-1819 CW. The Firm participated in all phases of this direct purchaser class action from researching and drafting complaints up through and including final trial preparations. The case settled for approximately $75 million just days before trial.

- *In re Chase Bank USA, N.A. "Check Loan Litigation.* The Firm served on the Executive Committee running this national MDL proceeding in which JPMorgan Chase & Co., the nation's largest issuer of credit cards, agreed to settle for $100 million. The case is a class action lawsuit charging that the bank acted improperly when it more than doubled the minimum monthly payment requirement for over 1 million customers who entered into balance transfer loans with "fixed" interest rates. The Court approved the final settlement on November 19, 2012. The Firm was active in prosecuting the action, from origination, through motions, fact discovery, expert discovery, summary judgment and trial preparation. *See In re: Chase Bank, USA, N.A. "Check Loan" Contract Litigation*, 274 F.R.D. 286 (N.D. Cal. 2011).

- *Hellum v. Breyer (Prosper Marketplace, Inc.) Unregistered Securities Litigation.* Green & Noblin served as counsel for the class in this action asserting the sale of unregistered securities. The action settled for $10 million in 2014. The court certified a class of approximately 50,000 purchasers of loan notes from Prosper Marketplace, Inc. and denied summary judgment. At the time of settlement, we were preparing for an imminent trial. The Firm's work resulted in a ruling by the Court of Appeal clarifying the pleading requirements for controlling officers and directors under both California and federal securities laws. *See, Hellum v. Breyer*, 194 Cal.App.4th 1300 (2011).

- *In re Cathode Ray Tube (CRT) Antitrust Litigation*, MDL No. 1917, Case No. 07-5944 SC. The Firm served on document review and deposition preparation teams for this indirect purchaser class action case in the Northern District of California. The case settled for over $500 million.

- *In re Textainer Partnership Securities Litigation*. Robert Green served as Lead Trial Counsel in these consolidated cases. The cases settled for $10 million after Plaintiffs obtained a ruling in their favor at the conclusion of Phase 1 of the trial in San Francisco Superior Court. The Plaintiffs asserted breach of fiduciary duty claims in connection with a sale of assets transaction that resulted in the dissolution of six limited partnerships.

- *McKesson Inc. Derivative Litigation.* McKesson-HBOC, Inc. lost $9 billion in stock market capitalization in one day during April 1999 after announcing that prior financial statements would be restated due to accounting errors. Rather than pursuing the individuals and companies who participated in the conduct that led to the accounting restatements, the company sued its own shareholders in a case that was promptly dismissed by the Ninth Circuit U.S. Court of Appeals. As co-counsel for plaintiff shareholders seeking to recover money on behalf of the corporation from the wrongdoers, the Firm obtained an important decision from the Delaware Supreme Court expanding the rights of shareholders to obtain and inspect corporate documents where there is a proper purpose for investigating potential wrongdoing. *See Saito v. McKesson HBOC, Inc.*, 806 A.2d 113 (Del. Supr. 2002). A substantial settlement on behalf of the Company was approved by the Delaware Chancery Court on February 12, 2006.

- *In re Providian Credit Card Cases*. Robert Green was appointed co-lead counsel in this national class action brought on behalf of Providian credit card customers who were improperly charged late fees, higher interest rates on balance transfers, and fees for add-on products, including Credit Protection, PricePro, Drive Pro, HealthPro, and credit line increases. The San Francisco Superior Court approved a settlement for $105 million, which covered restitution to Providian customers, "in-kind" payments to customers, and the costs and expenses of the litigation.

Attorneys

Robert S. Green litigates cases of national import across a spectrum of subjects. In antitrust litigation, Mr. Green was named to the Steering Committee of the Lithium Ion Batteries Indirect Purchaser Litigation, and served on important discovery and trial preparation roles in the SRAM, DRAM, and LCD-TFT Thin Film Transistor class actions. In credit card class actions, Mr. Green was one of the Lead Counsel in the Chase Bank “Check Loans” Litigation which settled for $100 million in 2012 and in the Providian Credit Card Cases that settled for $75 million in 2001. Mr. Green successfully argued the Ninth Circuit Appeal in *DeMando v. Capital One Bank*. In securities litigation, Mr. Green has been named Lead Counsel by state and federal courts from California to New York, participated in or served as lead counsel in three trials, two of which lasted six months, and obtained settlements of $35.75 million for Securities Act claims in the STEC Securities Litigation, $10 million for unregistered securities claims in the Prosper Marketplace Litigation, and $10 million for limited partner claims in the Textainer Limited Partners Securities Litigation. In consumer and defective product cases, Mr. Green was a key

member of the trial team in a three month trial against Ford Motor Company in connection with Ford Explorer/Firestone Tire Rollover Litigation that resulted in a substantial settlement at the conclusion of the trial. Mr. Green also successfully prosecuted defective computer claims against HP and Toshiba, defective software claims against Sony, defective dashboard electronics claims against Audi and internet fraud claims against Webloyalty.com.

Mr. Green is AV Preeminent Peer Review Rated by Martindale-Hubbell and was named a finalist for Consumer Attorney of the Year in 2013 by the Consumer Attorneys of California in connection with his work on the Chase Bank "Check Loans" Litigation. Mr. Green is recognized as one of the "Super Lawyers" of Northern California. Mr. Green graduated with honors from the University of the Pacific, McGeorge School of Law in 1984. He received his Masters of Business Administration degree from California State University-Sacramento in 1989 and his undergraduate degree with distinction from Oregon State University in 1981. Mr. Green is an active member of the National Association of Consumer Attorneys (NACA). Mr. Green is an Editorial Advisor for the Consumer Financial Services Law Report and is on the Partners' Council for the National Consumer Law Center. Mr. Green also served on the Board of Marin AIDS Interfaith Network. Publications by Mr. Green include Developments in Credit Card Litigation, published by the Review of Banking and Financial Services; and Litigating Credit Card Cases, published by the Consumer Advocate. Mr. Green is licensed to practice in California.

James Robert Noblin has practiced complex business litigation since 1984, focusing primarily on antitrust and unfair competition cases. Mr. Rob Noblin graduated from Harvard Law School *cum laude* in 1983. He received his undergraduate degree *summa cum laude* from the University of Southern California in 1980. After graduating from law school, Mr. Noblin was a law clerk for the Honorable William A. Norris of the United States Court of Appeals for the Ninth Circuit from 1983 - 1984.

Mr. Noblin has tried over 10 cases to a jury as either the lead or a principal trial lawyer, including the six-week trial resulting in a verdict of over $ 70 million that was upheld in *Image Tech. Services, Inc. v. Eastman Kodak Co.,* 125 F.3d 1195 (9th Cir. 1997). His other representative cases include: *In re Domestic Drywall Antitrust Litig*., 163 F. Supp. 3d 175 (E.D. Pa. 2016), *Fun v. Leapfrog Enters.,* No. CV 09-916-GHK (VBXx), 2010 U.S. Dist. LEXIS 146641 (C.D. Cal. Sep. 10, 2010), *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008) *ABC Int'l Traders, Inc. v. Matsushita Elec. Corp.*, 14 Cal. 4th 1247 (1997); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000) *Brill Media Co., LLC v. TCW Group, Inc.*, 132 Cal. App. 4th 324 (2005); *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208 (9th Cir. 2009); *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051 (9th Cir. 1999) *Consol. Credit Agency v. Equifax, Inc.*, CV-03-1229 CAS(CWX), 2005 WL 6218038 (C.D. Cal. Jan. 26, 2005); *Hanson v. Morgan Stanley Smith Barney, LLC*, 762 F. Supp. 2d 1201 (C.D. Cal. 2011); and *Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc*., 148 Cal. App. 4th 1130 (2007).

He also contributed to Chapter 20, *California Antitrust and Unfair Competition Law, Revised Edition*, published by the California State Bar Antitrust and Unfair Competition Section and has published articles on antitrust topics, including *United States v. AMR Corp. and Judicial Hostility Toward Predatory Pricing Cases,* Antitrust Report (Jan. 2002); *The Tumult in State*

Antitrust Law: Cel-Tech and the California Example in Little FTC Act Cases, Antitrust Report (June 1999); and *The Confluence of Muddied Waters: Antitrust Consequential Damages and the Interplay of Proximate Cause, Antitrust Injury, Standing and Disaggregation*, 13 St. John's Journal of Legal Commentary 145 (1998).

Evan Sumer is an associate at Green & Noblin P.C. He enjoys representing plaintiffs on complex commercial litigation cases. As a former fintech entrepreneur and business executive, Mr. Sumer's areas of interest in law include consumer privacy, securities, and consumer privacy violations by businesses.

Mr. Sumer holds a JD from UC Davis School of Law and an MBA from McCombs School of Business at the University of Texas at Austin. He earned his Bachelor of Science degree in Mechanical Engineering from UC Berkeley.

EXHIBIT 2

EXPERIENCE OF MATTHEW E. HESS

Licensed to practice law in Illinois in 1999, and California since 2001.

Education

Bachelor of Science degree from the University of Illinois at Urbana-Champaign in 1993. I paid my own way through college and worked 60-70 hours per week while taking a full load of academic courses.

Juris Doctor degree from New York University School of Law in 1998.

Complex Commercial Litigation Experience

I have specialized in complex business litigation for my entire career. Litigation matters handled include antitrust (conspiracies in restraint of trade, monopolization, and violations of the Robinson-Patman Act); copyright infringement; corporate governance disputes in both California and the Delaware Court of Chancery; violations of the Uniform Voidable Transfers Act; Chapter 7 and 11 bankruptcies; violations of the Truth in Lending Act, the Real Estate Settlement Practices Act, and the Fair and Accurate Credit Transactions Act; non-dischargeability proceedings in Bankruptcy Court; assignments for the benefit of creditors; anti-SLAPP motions; and many others.

Tried six cases to verdict and prevailed in five of them.

Handled numerous appeals and writ petitions. Reported appellate decisions include: *YourNetDating, Inc. v. Mitchell*, 88 F.Supp.2d 870 (N.D.Ill. 2000); *People's Choice Wireless, Inc. v. Verizon Wireless* (2005) 131 Cal.App.4th 656; *Newcal Industries, Inc. v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008); *Kirk v. First American Title Insurance Co.* (2010) 183 Cal.App.4th 776; Cole v. Asurion Corp. 267 F.R.D. 322 (C.D.Cal. 2010); and *Wiseman Park, LLC v. Southern Glazer's Wine & Spirits, LLC* (2017) 16 Cal.App.5th 110.

Representative Clients

Handled legal matters for various celebrities including Michael Jackson, Mark Wahlberg, Donald J. Trump, The Doors, Axl Rose, The Game, Kurupt, E-40, Daz Dillinger, Tila Tequila and Jermaine Jackson. Performed legal services for a number of corporations and government agencies, among them Kraft Foods, Sempra Energy, Bally Fitness, and the Maryland Department of Insurance.

Class Action Experience

While at the Kick Law Firm, A.P.C., my firm was appointed as class counsel in the case of *Cole v. Asurion Corp.* 267 F.R.D. 322 (C.D.Cal. 2010), a complex false advertising class action with damages in excess of $100 million. I was the lead attorney for the Kick Law Firm on this case and handled all of the pre-certification discovery and drafted the class certification

motion. Shortly after the *Cole* class was certified, the United States Supreme Court issued its opinion in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which effectively sounded the death knell for the *Cole* case, due to the presence of an arbitration clause in the insurance policy purchased by most of the class members.

Handled a number of class actions on the defense side, including *Potikyan v. Cristcat Calabasas, Inc.*, No. CV-136237 (C.D. Cal.), as well as several Usury Law class actions brought against the Bally Fitness chain of health clubs, among them *Pulcini v. Bally Total Fitness Corp.*, Circuit Court of Cook County, Illinois No. 1–03–3501.

EXHIBIT 3

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WISEMAN PARK, LLC, a dissolved California limited liability company, individually and on behalf of all others similarly situated,

Plaintiff,

v.

SOUTHERN WINE AND SPIRITS OF AMERICA, INC., a Florida corporation qualified to do business in California; and DOES 1 through 100, inclusive,

Defendants.

LASC Case No: BC548599

COURT'S RULING AND ORDER RE: PLAINTIFF WISEMAN PARK, LLC'S MOTION FOR CLASS CERTIFICATION

Hearing Date: May 20, 2021

I.

BACKGROUND

Plaintiff Wiseman Park, LLC, a retailer of alcoholic beverages and a dissolved California limited liability company,[1] has brought this putative class action against Defendant Southern

[1] Plaintiff brings this action pursuant to Corporations Code §17707.06(a), which permits a dissolved limited liability company to, *inter alia*, "Prosecut[e]…actions…in order to collect and discharge obligations…" due to it. Complaint, ¶11.

Wine and Spirits of America ("SW&S"), a wholesaler of alcoholic beverages. Plaintiff alleges that Defendant charges its customers 2% per month on unpaid balances that are 43 or more days past due, which is double the 1% amount permitted by Business & Professions Code §25509(a).[2] Plaintiff alleges that to avoid the ceiling established by B&P Code §25509, Defendant SW&S charges its customers both the 1% per month finance charge mandated by §25509(a), plus an additional 1% per month that SW&S refers to as a "carrying charge."[3]

Plaintiff alleges this 1% Carrying Charge that exceeds the 1% ceiling of §25509(a) is unlawful.[4] It is a calculated attempt to exceed the maximum finance charge set by the California Legislature, Plaintiff alleges.[5] The 1% ceiling established by §25509(a) is part of California's comprehensive system of "Tied-House" restrictions, the alleged purpose of which is to prohibit retailers of alcoholic beverages from being economically dominated by large wholesale distributors such as SW&S.[6] The purpose of the "tied-house" restrictions is to "ensure that wholesalers do not economically dominate retailers."[7]

Based on these allegations and the other allegations more fully set forth in the Complaint, Plaintiff alleges claims for declaratory relief, breach of contract, money had and received, open book account, and violations of Business & Professions Code §§17200, et seq.

Defendant demurred to the Complaint in 2015. The Court sustained the demurrer, without leave to amend, by way of its July 8, 2015 Ruling and Order. The Court reasoned that the

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[2] Complaint, ¶2.

[3] Complaint, ¶3.

[4] Complaint, ¶4.

[5] Complaint, ¶5.

[6] Complaint, ¶6.

[7] Complaint, ¶8.

California Department of Alcoholic Beverage Control ("ABC") had exclusive jurisdiction to adjudicate the claims at issue in the case. The Court analyzed provisions of the California Constitution and B&P Code §25509. The Court stated that it was apparent that the California legislature had intended to give the Department exclusive power to license the manufacture, importation, and sale of alcoholic beverages in California.[8] The Court also referenced *People v. Schlimbach* (2011) 193 Cal.App.4th 1132, 1146 (stating that "it is undisputed that the California Constitution gives the ABC *exclusive jurisdiction* to license and *regulate* the 'manufacture, importation, and *sale* of alcohol").[9]

The Court concluded that the Complaint's allegations would interfere with the State's exclusive jurisdiction to regulate the sale of alcoholic beverage (reasoning that "[t]he 1% per month finance charge, as well as the additional 1% Carrying Charge imposed by Defendant, are both necessarily part and parcel of the sale of alcoholic beverages").[10] Thus, the Court stated that "because the allegations of the Complaint directly implicate the sale of alcohol, and since the Department has exclusive jurisdiction in this area, the Complaint cannot go forward in this Court."[11] The Court sustained the demurrer, without leave to amend.

Plaintiff appealed, and the Court of Appeal reversed. The Court held that the California Constitutional provision authorizing the licensing and regulation of manufacturers, distributors, and retailers of alcoholic beverages does not require that contract disputes between holders of licenses issued by the Department of Alcoholic Beverage Control be resolved in proceedings conducted before the Department. *Wiseman Park, LLC v. Southern Glazer's Wine & Spirits, LLC*

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[8] Court's July 8, 2015 Ruling and Order at 8:14-17.

[9] Court's July 8, 2015 Ruling and Order at 8:18-20.

[10] Court's July 8, 2015 Ruling and Order at 9:6-8.

[11] Court's July 8, 2015 Ruling and Order at 9:18-20.

(2017) 16 Cal.App.5th 110. The Court further held that the ABC Act also does not require such disputes be resolved before the Department. According to the Court of Appeal, there was "no provision in a 1932 initiative or any of its subsequent iterations that either states or suggests a limitation on where or how commercial disputes between licenses were or are to be resolved." *Wiseman Park,* 16 Cal.App.5th at 121.

The Court further stated that "neither any section of the ABC Act, nor any regulation adopted thereunder, creates or limits the right of a licensee to sue another licensee in court for breach of contract." *Id.* at 123. In making that finding, the Court stated that the plain meaning of §23090.5 "limits its application to review of matters first adjudicated in administrative proceedings before the Department. It does not concern in any way the allocation of jurisdiction in the first instance." *Wiseman Park* at 125.

Similarly, the Court of Appeal determined that, with respect to the UCL claim, "[a] viable claim for unfair competition may be based on a violation of a statute, even when the power to enforce a particular statute may also be entrusted by the Legislature to a state agency; particularly so when the grant of jurisdiction to the agency is not exclusive…" *Wiseman Park* at 129.

The Court of Appeal stated that "[b]ecause the trial court concluded the Department had exclusive jurisdiction over the issues raised in appellant's complaint, it did not address appellant's contention concerning the proper construction of section 25509. That issue is critical to appellant's causes of action. On remand, the trial court will have the opportunity to make a determination on this issue." *Wiseman Park* at 132.

Following remand, Defendant Southern Wine & Spirits moved for an order granting summary judgment or, alternatively, summary adjudication "on the issue that Plaintiff cannot prevail because California Business and Professions Code Section 25509 does not prevent

imposition of additional amounts for purchases on credit."[12]

The Court, on April 11, 2019 (Judge Lisa Hart Cole) denied Defendant's motion in full. The Court examined §25509, and applied the rules governing statutory construction set forth in *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233. The Court found that the plain meaning of the statute "only permits a 1% charge for unpaid balances reaching the 43rd day from the date of delivery (with an additional 1% charge for each 30 days thereafter)."[13] The Court, in any event, determined that the legislative history required a finding that §25509(a) only permitted a 1% charge for unpaid balances reaching the 43rd day from the date of delivery.[14] Finally, the Court stated that the third step in the *Halbert* analysis (i.e., applying reason, practicality, and common sense) "mandates a finding that §25509(a) authorizes only a 1% charge for unpaid balances reaching the 43rd day from the date of delivery."[15]

Plaintiff Wiseman Park now moves for an order certifying the following class:

> All California retailers of alcoholic beverages who either (1) paid a 1% carrying charge on invoices 43 or more days old, in addition to the 1% charge required by Bus. & Prof. C § 25509(a), to SGWS at any time during the four years prior to the filing of this complaint through the present, or (2) are parties to a written or implied-in-fact contract with SGWS that provides for a carrying charge.

For the reasons discussed *infra,* the motion for class certification is granted.

II.

REQUEST FOR JUDICIAL NOTICE

Defendant requests judicial notice of the Certificate of Cancellation filed March 7, 2012

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[12] Defendant's Notice of Motion and Motion at 1:10-12.

[13] Court's April 19, 2019 Ruling and Order at 12:23-24.

[14] *Id.* at 16:19-22.

[15] *Id.* at 17:8-10.

for Wiseman Park, LLC with the California Secretary of State. The request is granted pursuant to Evidence Code §§452(c) and (h). *See Mongols Nation Motorcycle Club, Inc. v. City of Lancaster* (2012) 208 Cal.App.4th 124, 132, fn.7.

III.

MOTION FOR CLASS CERTIFICATION

1. General standards governing motions for class certification

CCP § 382 allows the Court to certify a class action "when the question is one of a common interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court..." Additionally, "[t]here must be questions of law or fact common to the class that are substantially similar and predominate over the questions affecting the individual members; the claims of the representatives must be typical of the claims or defenses of the class; and the class representatives must be able to fairly and adequately protect the interests of the class." *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App. 4th 224, 237-238.

Stated differently, there are two broad requirements for a class action: 1) an ascertainable class; and 2) a well-defined community of interest. *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal. App. 4th 908, 913. *See also Brinker Rest. Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1021 (a plaintiff seeking certification "must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives").

In determining whether the class is ascertainable, courts consider the size of the class, the class definition, and the means to identify class members. *Reyes v. San Diego County Board of Supervisors* (1987) 89 Cal. App. 3d 1263, 1274. The community of interest factor is established by showing: (1) predominant common 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. *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 435.

Further, under California law, a class action is not "superior" where there are numerous and substantial questions affecting each class member's right to recover, following determination of liability to the class as a whole. *City of San Jose v. Superior Court (Lands Unlimited)* (1974) 12 Cal.3d 447, 459.

California follows the procedures set forth under Federal Rules of Civil Procedure 23 for class actions, whenever California authority is lacking. *City of San Jose v. Superior Court, supra*, 12 Cal. 3d at 453.

The potentially mandatory and discretionary factors applicable to class certification include:

- Whether there is an ascertainable class (mandatory);
- whether there is a well-defined community of interest as to common questions of law or fact that predominate (mandatory);
- whether the class is so numerous that joinder of all members is impractical;
- whether the claims of the representative plaintiff are typical of the class;
- whether substantial benefits accrue to the litigants and courts;
- whether the proposed class is manageable;
- whether the person representing the class is able to fairly and adequately protect the interests of the class; and
- whether a class action is superior (including whether individual plaintiffs would bring claims for small sums).

E.g., *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1014; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435; *Prince v. CLS Transp., Inc.* (2004) 118 Cal.App.4th 1320, 1324; *In re Cipro Cases I and II* (2004) 121 Cal.App.4th 402, 409; California Practice Guide, Civil Procedure Before Trial, ¶¶14:11-14:50 (The Rutter Group 2020).

The burden of proof on a motion for class certification is on the party seeking certification. *Washington Mutual Bank, N.A. v. Superior Court (Briseno)* (2001) 24 Cal. 4th 906, 922; *Soderstedt v. CBIZ S. California, LLC* (2011) 197 Cal.App.4th 133, 154. This usually

requires demonstration of predominance of common issues of law and fact, and manageability of the proposed class. *Lockheed Martin Corp. v. Sup.Ct. (Carrillo)* (2003) 29 Cal.4th 1096, 1103-1104; California Practice Guide, Civil Procedure Before Trial, ¶14:99.2 (The Rutter Group 2020). In making the determination as to whether the requirements for a class action have been met, the court may consider not only the parties' pleadings but also extrinsic evidence, including declarations and discovery responses. California Practice Guide, Civil Procedure Before Trial, ¶14:99 (The Rutter Group 2020).

California courts consider "pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices in order to evaluate whether common behavior towards similarly situated plaintiffs makes class certification appropriate." *Sav-On Drug Stores*, *supra*, 34 Cal.4th at 333. The burden is on the party seeking class certification to establish each of the class prerequisites through substantial evidence. *Id.* at 327. *See also Brinker, supra,* 53 Cal.4th at 1051. "The Court must examine together *all* of the evidence presented by the moving and opposing parties 'under the prism of plaintiff's theory of recovery.'" California Practice Guide, Civil Procedure Before Trial, ¶14:99 (The Rutter Group 2020) (citing *Department of Fish & Game v. Sup. Ct. (Adams)* (2011) 197 Cal.App.4th 1323, 1349).

Importantly, in weighing the evidence, the Court does not evaluate whether the claims asserted are legally or factually meritorious. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440. "However, it may be necessary to examine the merits during a certification motion. A court may properly scrutinize 'a proposed class cause of action to determine whether, assuming its merit, it is suitable for resolution on a classwide basis. Indeed, issues affecting the merits of a case may be enmeshed with class action requirements, such as whether substantially similar questions are common to the class and predominate over individual questions or whether the

claims or defenses of the representative plaintiffs are typical of class claims or defenses.'" California Practice Guide, Civil Procedure Before Trial, ¶14:100.1 (The Rutter Group 2020) (citing *Miller v. Bank of America, N.A.* (2013) 213 Cal.App.4th 1, 11 (internal quotes omitted); *Harrold v. Levi Strauss & Co.* (2015) 236 Cal.App.4th 1259, 1268; *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, 351).

Plaintiff Wiseman Park, LLC moves for certification of a class of "[a]ll California retailers of alcoholic beverages who either (1) paid a 1% carrying charge on invoices 43 or more days old, in addition to the 1% charge required by Bus. & Prof. C § 25509(a), to SGWS at any time during the four years prior to the filing of this complaint through the present, or (2) are parties to a written or implied-in-fact contract with SGWS that provides for a carrying charge."

The central issue with respect to the instant motion is whether Plaintiff is an adequate class representative and/or whether Plaintiff has claims typical of those of the class. Defendant, in the opposition, does not address any of the other elements of class certification, such as ascertainability, numerosity, predominance, or superiority. These elements will still be addressed by the Court, recognizing that the motion will hinge on adequacy and typicality.

2. Ascertainability/Numerosity

"Ascertainability requires a class definition that is 'precise, objective and *presently* ascertainable.' Otherwise, it is not possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating." California Practice Guide, Civil Procedure Before Trial, ¶14:23 (The Rutter Group 2020) (citing *Global Minerals & Metals Corp. v. Sup.Ct. (National Metals, Inc.)* (2003) 113 Cal.App.4th 836, 858 (emphasis added)). The class should be defined in terms of objective characteristics and common transactional facts that will enable identification of the class members when such identification becomes necessary. *Hicks v. Kaufman & Broad Home Corp., supra,* 89 Cal.App.4th at 915.

The goal is to use terminology that will convey sufficient meaning "to enable persons hearing it to determine whether they are members of the class plaintiffs wish to represent." *Global Minerals & Metals Corp. v. Sup.Ct.* (*National Metals, Inc.), supra,* 113 Cal.App.4th at 858. Importantly, a class may be ascertainable *even if the definition includes ultimate facts or conclusions of law. Hicks, supra,* 89 Cal.App.4th at 915-916. Due process only requires an objectively determinable class definition. This objective standard allows putative class members to self-identify and decide if they wish 'to intervene, opt out, or do nothing and live with the consequences,' and also provides a 'concrete basis' to determine who is and who is not bound by a judgment." California Practice Guide, Civil Procedure Before Trial, ¶14:23 (The Rutter Group 2020) (citing *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955, 980; see also *Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290, 1301 (representative plaintiff "need not identify, much less locate, individual class members to establish the existence of an ascertainable class" (cited with approval by *Noel v. Thrifty Payless, Inc.*, 7 Cal.5th at 974)).

Further, no set number is required as a matter of law for the maintenance of a class action. *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030. California case law indicates that as few as ten (10) or twenty-eight (28) members satisfies numerosity. *Bowles v. Superior Court* (1955) 44 Cal.2d 574; *Hebbard,* 28 Cal.App.3d at 1030.

Plaintiff Wiseman has demonstrated numerosity. Plaintiff states that during the *Belaire-West* phase of the case, the third-party administrator sent an opt-out notice to 400 unique SGWS customers who paid the carrying charge at the center of this case.[16] Numerosity is therefore easily established.

[16] See Declaration of Matthew Hess, ¶24 and Exh. 17 (indicating that the administrator assembled a list of the first 400 class members who were sent a *Belaire* notice; the notice, Hess states, was actually mailed on February 12, 2021).

Ascertainability is also satisfied. Persons hearing the class definition would know whether they paid the additional 1% carrying charge and/or whether they were parties to a contract which required the additional 1% carrying charge (i.e., they are able to self-identify from the class definition). The definition is objectively determinable. Importantly, per *Noel v. Thrifty Payless, supra,* these class members need not be identified or located at this time to render the class definition ascertainable. Further, given the fact that 400 class members were located (with potential additional class members), the class is ascertainable. Also, the evidence before the Court shows that Defendant SGWS's computerized accounting system, Sapphire, maintains records of the name, billing address, and liquor license number of all of its retail customers (said records go back to 2003).[17]

For these reasons, the Court determines that both numerosity and ascertainability are satisfied. Defendant does not contest either numerosity or ascertainability as bases for the motion.

3. Commonality

a. General standards on the "commonality" element

In deciding whether the common questions "predominate," the courts must identify the common and individual issues; consider the manageability of those issues; and, taking into account the available management tools, weigh the common issues against the individual issues to determine which of them predominate. California Practice Guide, Civil Procedure Before Trial, ¶14:16 (The Rutter Group 2020) (referencing *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1432-1433).

Additionally, a class action is not inappropriate simply because each member of the class

[17] Rodriguez Dep., pp. 38:6-39:13, at PE Exh 20; *Id.* at 22:4-15, 56:6-13, 1413:4-23.

may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages. *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 815-816. However, a class action "will not be permitted...where there are diverse factual issues to be resolved, even though there may be many common questions of law." *Brown v. Regents of Univ. of Calif.* (1984) 151 Cal. App. 3d 982, 988-89. "[E]ach member must not be required to individually litigate numerous and substantial questions to determine his right to recover following the class judgment." *City of San Jose, supra,* at 460.

In *Arenas v. El Torito, Inc.* (2010) 183 Cal.App.4th 723, the Court of Appeal observed:

> The focus in a class certification dispute is not entirely on the merits but on the procedural issue of what types of questions are likely to arise in the litigation—common or individual. (*Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at pp. 326–327; *Lockheed Martin Corp. v. Superior Court, supra*, 29 Cal.4th at pp. 1106–1107; *Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at pp. 439–440.) Thus, the existence of *some* common issues of law and fact *does not dispose of the class certification issue*. (*Lockheed Martin Corp. v. Superior Court, supra*, 29 Cal.4th at pp. 1108–1109; *Washington Mutual Bank v. Superior Court, supra*, 24 Cal.4th at pp. 913–914; *Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 809 [50 Cal.Rptr.2d 736].) Rather, in order to justify class certification, the Supreme Court held, "[T]he proponent of certification must show … that questions of law or fact common to the class predominate over the questions affecting the individual members …." *Arenas v. El Torito, Inc.*, 183 Cal.App.4th at 732 (emphasis added).

The court in *Jaimez v. Daiohs USA, Inc.* (2009) 181 Cal.App.4th 1286, 1298 recognized that that "'the trial court must evaluate whether *the theory of recovery* advanced by the plaintiff is likely to prove amenable to class treatment ….'" (citing *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1531) (emphasis added).

"Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility does not mean individual fact questions predominate.' [Citation.]" *Medrazo v. Honda of North Hollywood, supra,* 166 Cal.App.4th at 99-100. Common issues are predominant when such issues would be primary to each individual action. *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644,447-48.

Critically, the *Brinker* court, in addressing the commonality element, stated in pertinent part:

> [W]hether common or individual questions predominate will often depend upon resolution of issues closely tied to the merits. (*Coopers & Lybrand v. Livesay, supra*, 437 U.S. at p. 469, fn. 12; *Linder v. Thrifty Oil Co., supra*, 23 Cal.4th at p. 443.) To assess predominance, a court "must examine the issues framed by the pleadings and the law applicable to the causes of action alleged." (*Hicks v. Kaufman & Broad Home Corp., supra*, 89 Cal.App.4th at p. 916.) It must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence. (See *Sav-On Drug Stores, Inc. v. Superior Court, supra*, 34 Cal.4th at p. 334.) In turn, whether an element may be established collectively or only individually, plaintiff by plaintiff, *can turn on the precise nature of the element and require resolution of disputed legal or factual issues affecting the merits*. For example, whether reliance or a breach of duty can be demonstrated collectively or poses insuperable problems of individualized proof may be determinable only after closer inspection of the nature of the reliance required or duty owed and, in some instances, *resolution of legal or factual disputes going directly to the merits. Brinker, supra,* 53 Cal.4th at 1024.

In sum, "[p]resented with a class certification motion, a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate. To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them. Out of respect for the problems arising from one-way intervention, however, a court generally should eschew resolution of such issues unless necessary. [Citation.]" *Brinker,* 53 Cal.4th at 1025.

b. Discussion of commonality

As discussed in the "background" section, this case has a relatively lengthy history. This Court's order sustaining Defendant's demurrer to the complaint without leave to amend (based on the Court's view that the California Department of Alcoholic Beverage Control, or ABC, had exclusive jurisdiction to hear the controversy) was reversed.

Subsequently, as stated above, this Court denied Defendant's motion for summary judgment and alternative motion for summary adjudication. The Court, on April 11, 2019 (Judge

Lisa Hart Cole) denied Defendant's motion in full. The Court examined §25509, and applied the rules governing statutory construction set forth in *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233. The Court found that the plain meaning of the statute "only permits a 1% charge for unpaid balances reaching the 43rd day from the date of delivery (with an additional 1% charge for each 30 days thereafter)."[18]

It is apparent that the litigation presents a common, overriding issue: whether Defendant's additional 1% "carrying charge" on past due invoices complies with Business & Professions Code §25509(a). Trish Rodriguez, Defendant's PMK, testified that all of the purchases made by every customer of Defendant, and all of the payments made by customers, are kept track in the Sapphire system.[19] Further, Rodriguez testified that when a customer makes a purchase, the Sapphire system generated an invoice. Sapphire keeps track of the invoice and the number of days it has been due.[20]

Critically, Ms. Rodriguez also testified that when a customer invoice reaches the 43rd day from the day of delivery, the Sapphire system automatically adds a 2% charge to the invoice.[21] The written credit agreement Defendant enters into with its customers shows that the 2% charge on past-due invoices is divided into the following: 1) the 1% statutory charge required by §25509(a) and 2) a 1% carrying charge.[22]

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[18] Court's April 19, 2019 Ruling and Order at 12:23-24.

[19] Rodriguez Dep., pp. 45:4-47:5, at PE Exh. 19.

[20] *Id.* at 79:1-80:17.

[21] Rodriguez Dep., p. 50:15-60:4, at PE Exh. 19.

[22] See Plaintiff's Exhs. 6 (Plaintiff's Application and Credit Agreement with Defendant SW&S), dated April 12, 2007; blank copy of Application and Credit Agreement, identifying the 1% carrying charge at point 3, page 1 of the agreement, blank copy of Application and Credit Agreement, also attaching Defendant's New Account Requirements, New Account Requirements sheet, along with the Application and Credit Agreement, and blank Application and Credit Agreement, also attaching e-check automated payments account approval form, electronic proof of delivery form, and authorization to purchase form.

Ms. Rodriguez testified that Sapphire, when an invoice reaches 43 days from the date of delivery, adds a single entry of a 2 percent charge (referred to collectively by Defendant's employees as the "service charge") to the invoice (and not two separate 1% charges).[23] In other words, when asked, Ms. Rodriguez testified that the Sapphire system is not set up to add the two charges to the customer invoice separately; they are always charged these 1% charges together.[24]

Plaintiff has also introduced evidence of Sapphire's invoice system. As Ms. Rodriguez testified in deposition, where an invoice has been unpaid for 43 days and a service charge is added to the account, the service charge (coded "F" on the invoice) is given its own document number. The Sapphire system cross-references the invoice number (coded "I") with the finance charge ("F") corresponding to the invoice.[25] Further, payments of service charges are coded "P", along with the check number and balance on the invoice.[26] Defendant uses two codes for write-offs of service charges (the "SCA" and "SCS" code, for service charge adjustment and service charge sales adjustment).[27]

This evidence shows that Defendant has a uniform practice of imposing the 2% charge on all invoices 43 days past-due (inclusive of the 1% carrying charge). Plaintiff's theory of recovery is that the carrying charge is unlawful, and is the central basis for each of the claims. This practice predominates among all putative class members. While the damages allegedly due each putative class member from the carrying charge necessarily will differ, this is not a basis to deny

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[23] Rodriguez Dep., p. 50:7-51:4, PE Exh. 19.

[24] Rodriguez Dep., pp. 51:14-25, at PE Exh. 19.

[25] Rodriguez Dep., p. 85:17- 23, at PE Exh. 19.

[26] Rodriguez Dep., p. 152:1-14, at PE Exh. 19.

[27] Rodriguez Dep., pp. 148:7-151:10 at PE Exh. 19.

certification. The Court would be able to determine, on a class basis (as to each of the causes of action alleged in the operative complaint), the legality of the carrying charge. This lends itself to a finding that common issues of law and fact predominate.

4. Adequacy of Representation

"The primary criterion in determining adequacy of representation is whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class." *Simons v. Horowitz* (1984) 151 Cal. App. 3d 834, 846. Additionally, the class representative must "raise claims reasonably expected to be raised by the members of the class." *City of San Jose, supra,* 12 Cal. 3d at 464. The fiduciary duty must be undertaken free of demonstrable conflicts of interest with other class members. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997). The "adequacy of representation" requirement has not been precisely differentiated from the typicality requirement. *Caro v. Procter & Gamble, supra*, 18 Cal. App. 4th at 670. Other cases have stated that "adequacy of representation" depends on whether plaintiff's attorney is qualified to conduct the proposed litigation and plaintiff's interests are not antagonistic to the interests of the class. *McGhee v. Bank of America* (1976) 60 Cal. App. 3d 442, 450.

The overriding and determinative issue presented on the motion is whether Plaintiff is an adequate class representative. In order to answer this question, the Court must examine the history of Plaintiff Wiseman Park as a Limited Liability Company ("LLC") as it relates to the filing of the instant case, and the applicable law governing the termination of LLCs in California.

The current version of California Corporations Code §17707.06 provides as follows:

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> (a) A limited liability company that has filed a certificate of cancellation nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it in order to collect and discharge obligations, disposing of and conveying its property, and collecting and dividing its assets. A limited liability company shall not continue business except so far as necessary for its winding up.
>
> (b) No action or proceeding to which a limited liability company is a party abates by the filing of a certificate of cancellation for the limited liability company or by reason of proceedings for its winding up and dissolution.
>
> (c) Any assets inadvertently or otherwise omitted from the winding up continue in the canceled limited liability company for the benefit of the persons entitled to those assets upon cancellation and on realization shall be distributed accordingly.
>
> (d) After cancellation of the limited liability company, the limited liability company is bound by both of the following:
>
> (1) The act of a person authorized to wind up the affairs of the limited liability company, if the act is appropriate for winding up the activities of the limited liability company.
>
> (2) The act of a person authorized to act on behalf of the limited liability company, if the act would have bound the limited liability company before cancellation, if the other party to the transaction did not have notice of the cancellation.

The current version of §17707.06, effective January 1, 2016, was amended in 2015 to cover limited liability companies that *had filed a certificate of cancellation*. Prior to the amendment, however, §17707.06 covered only a limited liability company that was *dissolved*. See former Cal. Corp. Code §17707.06(a) (Stats.2012, c.419 (S.B.323), §20, operative Jan. 1, 2014).

Exhibit 1 to Defendant's request for judicial notice is the Certificate of Cancellation filed March 7, 2012 for Wiseman Park, LLC with the California Secretary of State. The Certificate of Cancellation indicates that Wiseman Park, LLC was cancelled on that date. The document is signed by Paul Oberman and Judith Parker, on February 22, 2012. The document, at point #4, states that "[t]he dissolution was made by a vote of all of the members," with the "yes" box

checked.[28] Immediately above box #4, the Certificate of Cancellation states:

> DISSOLUTION (Domestic limited liability companies ONLY: Check the "YES" or "NO" box, as applicable. Note: If the "NO" box is checked, a Certificate of Dissolution (FORM LLC-3) pursuant to Corporations Code section 17356(a) must be filed prior to or together with this Certificate of Cancellation.)[29]

From this, it is apparent that the March 7, 2012 filing was, in fact, a Certificate of *Cancellation*, and not a Certificate of *Dissolution*. The instant litigation was filed June 13, 2014 – over two years after the Certificate of Cancellation was filed with the Secretary of State. Thus, at the time the instant litigation was filed, Plaintiff was a cancelled corporation, and not a dissolved corporation.

The question is, what effect did the March 7, 2012 Certificate of Cancellation have on Plaintiff Wiseman Park, LLC, and thus, on this case? Further, what effect, if any, did the January 1, 2016 revision to Corporations Code §17706.06 have on Wiseman Park, LLC's status?

In *DD Hair Lounge, LLC v. State Farm General Ins. Co.* (2018) 20 Cal.App.5th 1238, the Court of Appeal addressed the retroactive effect of the 2016 amendment to Corporations Code §17706.06. The Court of Appeal noted that previously, the Revised Act provided that upon filing a certificate of cancellation, an LLC's "powers, rights and privileges shall cease." *DD Hair Lounge,* 20 Cal.App.5th at 1241 (citing Stats. 2012, ch. 419, §20). As the Court of Appeal recognized, though, effective January 1, 2016, §17706.06 was amended to provide that an LLC could file a certificate of cancellation, yet retain its powers of "prosecuting and defending actions by or against it in order to collect and discharge obligations." *Id.* (citing Stats. 2015, ch. 775, §15; §17706.06(a)).

The *DD Hair* court presented the question it faced as "whether the 2016 amendment to

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[28] See Defendant's RJN, Exh. 1.

[29] Defendant's RJN, Exh. 1.

section 17706.06 applied to a certificate of cancellation filed by plaintiff [DD Hair] in 2014." *DD Hair, supra,* 20 Cal.App.5th at 1241. The Court concluded that, as purely a question of statutory construction," the amendment did apply to a certificate of cancellation. *Id.* However, the Court also noted that "DD Hair concealed the certificate of cancellation and then unsuccessfully challenged its authenticity, prolonging the proceedings into 2016 when the changes to section 17707.06 took effect." *Id.* The Court stated that "[h]ad DD Hair been forthcoming, the case *would have been dismissed under the prior law*. It would now be *unfair to reward DD Hair's delay* by allowing it to take advantage of the 2016 law[.]" *Id.* (Emphasis added.) Accordingly, the Court of Appeal affirmed the trial court's judgment dismissing DD Hair's complaint.

In its decision, the *DD Hair* court addressed the statutory history of §17706.06. The Court stated:

> As of January 1, 2014, the Revised Act replaced the Beverly-Killea Limited Liability Company Act then in effect. (Stats. 2012, ch. 419, §§ 19-20; *Western Surety Co. v. La Cumbre Office Partners, LLC* (2017) 8 Cal.App.5th 125, 131, 213 Cal.Rptr.3d 460.) Under the Revised Act, an LLC can follow a two-step process when it elects to end its existence. First, the LLC can file a certificate of dissolution. (§ 17707.08, subd. (a).) As initially enacted, section 17707.06, former subdivision (a) provided a *dissolved* LLC "nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it in order to collect and discharge obligations, disposing of and conveying its property, and collecting and dividing its assets. A limited liability company shall not continue business except so far as necessary for its winding up." (Stats. 2012, ch. 419, § 20.) At the second step, the LLC can file a certificate of cancellation once its affairs are wound up. (§ 17707.08, subd. (b)(1).) Section 17707.08, subdivision (c) provides that, upon filing the certificate of *cancellation*, "a limited liability company shall be canceled and its powers, rights, and privileges shall cease."
>
> Alternatively, the LLC can skip the dissolution step entirely and proceed directly to cancellation with the agreement of all members, which DD Hair did here. (Stats. 2012, ch. 419, § 20; § 17707.08, former subd. (a)(3).)

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> Assembly Bill No. 506 (2015-2016 Reg. Sess.) amended the Revised Act effective January 1, 2016. (Stats. 2015, ch. 775.) Assembly Bill No. 506 did not change this basic process of ending an LLC, but it changed section 17707.06 to provide that when an LLC files a certificate of *cancellation*, rather than a certificate of *dissolution*, it "nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it in order to collect and discharge obligations, disposing of and conveying its property, and collecting and dividing its assets. A limited liability company shall not continue business except so far as necessary for its winding up." (§ 17707.06, subd. (a).) *DD Hair, supra,* 20 Cal.App.5th at 1243.

With respect to the amendment to §17706.06, the *DD Hair* court stated:

> Assembly Bill No. 506 (2015-2016 Reg. Sess.) amended the Revised Act effective January 1, 2016. (Stats. 2015, ch. 775.) Assembly Bill No. 506 did not change this basic process of ending an LLC, but it changed section 17707.06 to provide that when an LLC files a certificate of *cancellation*, rather than a certificate of *dissolution*, it "nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it in order to collect and discharge obligations, disposing of and conveying its property, and collecting and dividing its assets. A limited liability company shall not continue business except so far as necessary for its winding up." *DD Hair*, 20 Cal.App.5th at 1243 (citing Corp. Code § 17707.06, subd. (a)).

In terms of prospective application, the *DD Hair* court noted:

> Statutes ordinarily are interpreted as operating prospectively in the absence of a clear indication of a contrary legislative intent. [Citations.] In construing statutes, there is a presumption against retroactive application unless the Legislature plainly has directed otherwise by means of express language of retroactivity or...other sources [that] provide a clear and unavoidable implication that the Legislature intended retroactive application. Ambiguous statutory language will not suffice to dispel the presumption against retroactivity; rather, a statute that is ambiguous with respect to retroactive application is construed ... to be unambiguously prospective. *DD Hair,* 20 Cal.App.5th at 1245 (internal citations and quotation marks omitted).

Ultimately, the *DD Hair* court declined to apply §17706.06 "to reinvigorate DD Hair's right to pursue this case." *DD Hair* at 1245. The Court stated that DD Hair's principal "concealed the November 2014 certificate of cancellation for almost a year before State Farm discovered it in September 2015. Then she claimed the certificate was forged, forcing the trial court to hold an evidentiary hearing, which prolonged the proceedings into 2016, after the change to section 17706.06 became effective." *Id.* The Court found not credible the principal's claim that she did not sign the certificate of cancellation, and stated that "[h]ad she been

forthright, *DD Hair's case would have been swiftly dismissed and judgment entered based on the Revised Act then in effect*." *Id.* at 1245-1246 (emphasis added). The Court commented that "[the principal's] delays and denials *positioned DD Hair to raise the argument that the newly revised section 177076.06 preserved its rights*." *Id.* (Emphasis added.)

Here, there does not appear to be any evidence before the Court that Plaintiff Wiseman Parks counsel consciously acted in bad faith or otherwise had unclean hands. To that end, Counsel Hess has submitted a supplemental declaration in support of the reply. Wiseman Park maintains it has always conducted itself honestly, and "has never tried to mislead anyone or conceal anything."[30] Wiseman Park acknowledges that while the complaint alleged that Wiseman Park was a "dissolved" LLC rather than a "cancelled" LLC, "this was an innocent misunderstanding."

Turning to the Supplemental Hess Declaration, counsel states that he has specialized in commercial litigation for his entire career. Whenever he takes on a new case, Hess states it is his practice to always inquire into the corporate status of all business entities that are parties to the lawsuit.[31] He says he does this because he is aware that if a corporation or a limited liability company has been suspended, it cannot file (or continue to prosecute) a civil suit.[32]

Hess notes there are two main ways in which a corporation's capacity to do business can be suspended or revoked. The first is for failure to file statements of information or pay the $25 annual fee to the Secretary of State.[33] This kind of suspension, Hess states, is easy to cure.[34] The

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[30] Plaintiff's Reply at 2:7-8.

[31] Hess Supp. Decl., ¶9.

[32] Hess Supp. Decl., ¶10.

[33] Hess Supp. Decl., ¶12.

[34] *Id.*

corporation can simply file the past-due annual reports and pay the arrearages.[35] The Secretary of State will then reinstate the corporation to good standing.[36] Hess further notes that a corporation's capacity to do business may also be suspended or revoked by the Franchise Tax Board for failure to pay taxes.[37] This sort of suspension is much more serious, and much harder to cure, according to Hess, and if the corporation cannot pay the past due taxes, the suspension may be impossible to cure.[38]

Hess says that on a few occasions he has encountered dissolved corporations that have voluntarily gone out of business by filing a certificate of dissolution with the Secretary of State.[39] He says that at some point earlier in his career, he thoroughly researched the issue of whether a dissolved corporation has capacity to sue, and concluded that it does, under Corporations Code §2010(a).[40] Specifically, Corporations Code § 2010(a) states: "a corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof."[41]

While he was conducting the pre-filing investigation in this case, Hess says he

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[35] *Id.*

[36] *Id.*

[37] Hess Supp. Decl., ¶13.

[38] *Id.*

[39] Hess Supp. Decl., ¶14.

[40] *Id.*

[41] *Id.*

specifically asked about the legal status of Plaintiff Wiseman Park LLC.[42] He says he asked whether it had just stopped filing reports or paying fees, or if it had taken the affirmative step of filing a form with the Secretary of State formally closing down the business.[43] He says that when he made these inquiries, he was trying to determine whether Wiseman Park had capacity to sue.[44] More specifically, he was trying to determine whether Wiseman Park had voluntarily gone out of business, or whether it had been suspended by the Secretary of State or the FTB.[45]

Hess says that when he was told that Wiseman Park had filed a document with the Secretary of State formally shutting down the company, he went to the Secretary of State's web site to confirm this.[46] He says he saw that Wiseman Park LLC's corporate status was listed as "cancelled."[47] Hess does not recall whether it was possible to view a copy of Wiseman Park' actual Certificate of Cancellation on the Secretary of State's web site in late 2013 or early 2014.[48] He says that he does not think that feature was available yet, but it is possible that there was a link to a PDF version of the actual certificate.[49] Hess says he did not have his attorney service purchase a copy, not thinking this was necessary, once he learned that Wiseman Park had voluntarily ceased to do business as opposed to having been involuntarily suspended. [50]

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[42] Hess Supp. Decl., ¶16.

[43] *Id.*

[44] Hess Supp. Decl., ¶17.

[45] *Id.*

[46] Hess Supp. Decl., ¶18.

[47] *Id.*

[48] Hess Supp. Decl., ¶19.

[49] *Id.*

[50] Hess Supp. Decl., ¶20.

However, Hess says he did know that the Certificate of Cancellation was a public record. And he assumed that after he filed this case, SGWS would perform the same inquiry that he was performing to see whether Wiseman Park had capacity to sue.[51] Hess says that he never tried to "conceal" the fact that Wiseman Park had filed a certificate of cancellation, and he has never challenged its authenticity.[52]

Hess says he has specialized in litigation for his entire career.[53] Like most lawyers, he says he has handled a few transactional matters.[54] However, Hess says he is not a transactional lawyer and only knows the basics.[55] He does not believe he has ever handled the dissolution of a corporation or an LLC.[56] In 2014, when he filed this case, Hess says he did not have much experience with limited liability companies.[57]

When he filed this case in 2014, Hess's understanding was that corporations and LLCs were quite similar, and that the main difference is that LLCs are treated as partnerships for tax purposes.[58]

Hess says he knew that the documents used to form and dissolve corporations and LLC's have different names.[59] For example, the document that one files with the California Secretary of

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[51] Hess Supp. Decl., ¶21.

[52] *Id.*

[53] Hess Supp. Decl., ¶22.

[54] *Id.*

[55] Hess Supp. Decl., ¶22.

[56] Hess Supp. Decl., ¶23.

[57] Hess Supp. Decl., ¶24.

[58] Hess Supp. Decl., ¶25.

[59] Hess Supp. Decl., ¶26.

State to form a corporation is known as the Articles of Incorporation. The document one that one files to form an LLC is known as the Articles of Organization. While these two forms have different names, Hess says they are basically identical – both require the person forming the entity to state its name, address, registered agent, etc. The forms even look alike.[60]

Similarly, Hess says he was aware that the owners of a corporation are known as "stockholders," and that a corporation is governed by "directors."[61] LLC's, on the other hand, are owned by "members" and governed by one or more "managers."[62] But to Hess's mind, a "member" and a "shareholder" are largely the same thing.[63] The terminology used to refer to each sort of ownership interest is different, and Hess is "sure there are some minor substantive differences," but the basic idea is the same in each case.[64]

As stated at ¶ 14 above, at one point Hess says he did conduct fairly extensive research into whether a dissolved corporation has capacity to sue and determined, pursuant to Corporations Code § 2010(a), that it does have capacity to do so.[65] During that research, Hess learned that the document one files with the Secretary of State to dissolve a corporation is called a "Certificate of Dissolution."[66] Hess says he was aware that the document one files to wind up an LLC is called a "Certificate of Cancellation."[67]

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[60] *Id.*

[61] Hess Supp. Decl., ¶27.

[62] *Id.*

[63] *Id.*

[64] Hess Supp. Decl., ¶27.

[65] Hess Supp. Decl., ¶28.

[66] Hess Supp. Decl., ¶28.

[67] Hess Supp. Decl., ¶29.

When he saw the entry on the Secretary of State's web site which said that Wiseman Park LLC had been "cancelled," Hess understood this to be the functional equivalent of "dissolution," just like "Articles of Incorporation" are essentially the same thing as "Articles of Organization," a "member" is the functional equivalent of a "shareholder," etc.[68] Since he was dealing with an LLC, rather than a corporation, Hess says he decided to be extra careful and research whether a dissolved LLC has capacity to sue.[69] A review of the Limited Liability Company Act led Hess to Corporations Code § 17707.06(a), which in 2014 stated as follows: "(a) A limited liability company that is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it in order to collect and discharge obligations, disposing of and conveying its property, and collecting and dividing its assets. A limited liability company shall not continue business except so far as necessary for its winding up."[70]

Hess argues Corporations Code §§ 2010(a) (governing actions by dissolved corporations) and § 17707.6(a) (governing actions by dissolved limited liability companies) are in every material respect identical.[71] While he was reviewing the Corporations Code while searching for §17707.6, Hess also saw that the Limited Liability Company act uses the term "dissolution" on numerous occasions.[72]

For example, Article 7 of the LLC act is known as "Dissolution and Winding Up." Corp.

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[68] Hess Supp. Decl., ¶30.

[69] Hess Supp. Decl., ¶31.

[70] *Id.*

[71] Hess Supp. Decl., ¶32.

[72] Hess Supp. Decl., ¶33.

Code § 17707.03 governs "Judicial Dissolution"; Corp. Code § 17707.01 is entitled "Events Causing Dissolution and Winding Up," and § 17707.07 is entitled "Causes of Action Against Dissolved Limited Liability Company; Liabilities at Law."[73] For all of these reasons, Hess represents that he honestly believed that "dissolution" and "cancellation" were the same thing. Indeed, the LLC act uses the term "dissolution" frequently.[74] Further, he says he was aware that winding up a corporation is a one-step process that consists of filing a Certificate of Dissolution.[75] He thought a Certificate of Cancellation of an LLC was the same thing as a corporate Certificate of Dissolution; only the terminology was different.[76]

Hess says he was not aware that the process of winding up an LLC is generally a two-step process: first, one files a Certificate of Dissolution.[77] Then, once the winding-up process is complete, one files a Certificate of Cancellation.[78] He says he may have been able to ascertain this if he had read the entire text of the Limited Liability Company act very closely, but as stated above, the LLC act uses the term "dissolution" frequently, and Corp. Code §§ 17707.06(a) is an almost verbatim copy of § 2010(a), so as soon as he found Corporations Code § 17707.06(a), he believed that his research was complete.[79]

Therefore, Hess says that when he filed the Complaint in this case, he referred to Wiseman Park LLC as a "dissolved" limited liability company, and referenced former

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[73] Hess Supp. Decl., ¶33.

[74] Hess Supp. Decl., ¶34.

[75] Hess Supp. Decl., ¶35.

[76] *Id.*

[77] Hess Supp. Decl., ¶36.

[78] *Id.*

[79] Hess Supp. Decl., ¶36.

Corporations Code § 17706.6(a), which states that a "dissolved" LLC has capacity to prosecute actions.[80] This, Plaintiff says, was an honest mistake.[81]

Hess says he first learned that the "cancellation" and "dissolution" are two different terms, in the context of an LLC, in August 2020, when the issue was raised in a case quite similar to this one, *Antigua Cantina & Grill, Inc. v. Young's Market Company, LLC*, Superior Court of Orange County Case No. 30-2020-01139792-CU-BC-CXC.[82] The *Antigua Cantina* case alleges that another major liquor wholesaler – Young's Market Company – also charges 2% per month on invoices on the 43rd day after delivery. One of the plaintiffs in the *Antigua Cantina* case was a dissolved LLC, and Young's Market Company alleged that this deprived it of capacity to sue.[83] In September 2020, while he was researching the opposition to Young's Market Company's demurrer, Hess remembered that Wiseman Park is also a "cancelled" LLC. He then obtained a copy of Wiseman Park's Certificate of Cancellation from the Secretary of State's web site.[84]

After this issue came up in the *Antigua* case, Hess says that he researched the issue and concluded that pursuant to *DD Hair Lounge, LLC v. State Farm Gen. Ins. Co.* (2018) 20 Cal.App.5th 1238, 1245 (2018) 20 Cal.App.5th 1238, that Antigua Cantina & Grill LLC has capacity.[85] However, out of an abundance of caution, Hess says he also served Best Buy

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[80] Hess Supp. Decl., ¶37.

[81] Hess Supp. Decl., ¶38.

[82] Hess Supp. Decl., ¶39.

[83] *Id.*

[84] Hess Supp. Decl., ¶40.

[85] Hess Supp. Decl., ¶41.

discovery on SGWS in this case to find one or more alternate class representatives.[86] On October 12, 2020 Hess says the parties began meeting and conferring with SGWS on matters such as developing a mutually acceptable Belaire opt-out notice, etc.[87]

The opinions in the Supplemental Hess Declaration demonstrate that counsel was not acting with any ill motive in filing the case on behalf of Wiseman Park as a cancelled corporation. While Hess's understanding was legally incorrect with respect to dissolved vs. cancelled corporations generally, and how those entities operate, he essentially takes responsibility for what he deems an honest mistake in that perception. In light of that statement, there does not appear to have been any intentional concealment on Mr. Hess's part to hide the status of Wiseman Park as a cancelled LLC.

The fact remains that Wiseman Park was, for all intents and purposes, a cancelled corporation for the two years prior to the lawsuit being filed. However, given the amendment to Corporations Code §17707.06 in 2016 (reviving certain claims of cancelled corporations), the Court finds that Wiseman Park can continue as a class representative. The Court views the situation in *DD Hair Lounge* as distinguishable from what happened in this case. In *DD Hair Lounge,* and as discussed above, the plaintiff in that case had *concealed* the certificate of cancellation and then unsuccessfully challenged its authenticity. No similar conduct occurred here. Under the circumstances, the Court determines the amended version of §17707.06 controls.

Further, the Court wishes to emphasize that the Court of Appeal in this case appears to have recognized the status of Wiseman Park and that it filed a certificate of cancellation. To that end, the Court of Appeal specifically referenced the amended version of §17707.6(a) in

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[86] Hess Supp. Decl., ¶42.

[87] *Id.*

discussing Wiseman Park's status at the outset of the case. *See Wiseman Park, LLC v. Southern Glazer's Wine & Spirits, LLC* (2017) 16 Cal.App.5th 110, 114, fn.4. The Court of Appeal issued a published decision in its ruling reversing this Court's order on the demurrer. As such, it could not have been the Court of Appeal's intent to allow this Court to make a finding of Plaintiff's inadequacy under the revised version of §17707.06. While the Court has carefully considered Defendant's argument that Plaintiff is inadequate under §17707.06 (as well as Defendant's argument at the motion hearing that the Court of Appeal was required to assume for purposes of its ruling that Plaintiff was a dissolved, and not a cancelled, LLC), the Court reaches a contrary conclusion.

Even if the Court were inclined to find that Wiseman Park, LLC was an inadequate class representative, the Court would permit counsel the opportunity to substitute in one or more new class representatives. "If the named representatives are no longer adequate class representatives because they lack standing, the proper procedure is to grant leave to amend the complaint to redefine the class or add a new class representative, not to decertify the class." Cal. Judges Benchbook Civ. Proc. Before Trial § 11.35 (2021) (citing *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 328; *Jaimez v DAIOHS USA, Inc., supra,* 181 Cal.App.4th at 1308 (abuse of discretion *not* to grant timely motion for leave to amend)).

"It is not an abuse of discretion, however, for a judge to deny leave to search for another class representative when the judge concludes that allowing the plaintiff to locate a new class representative 'would be futile.'" Cal. Judges Benchbook Civ. Proc. Before Trial § 11.35 (2021) (citing *Payton v CSI Elec. Contractors, Inc.* (2018) 27 Cal.App.5th 832, 847, 851 (predominance of individual issues made any amendment futile)). "An absolute rule requiring the substitution of a new class representative after a ruling that the named plaintiff is inadequate is inconsistent with the general principle that a judge has discretion in deciding

whether to permit an amended complaint." Cal. Judges Benchbook Civ. Proc. Before Trial § 11.35 (2021) (referencing *Payton, supra,* 27 Cal.App.5th at 848). The general principles that govern the amendment of a complaint apply to a judge's decision whether to permit an amendment naming a new class representative. 27 Cal.App.5th at 848. For example, a judge may consider the length of time the action has been pending. 27 Cal.App.5th at 849–851 (one of the grounds on which judge denied plaintiff's request to find a new class representative was fact that action had been pending for 4 years).

Mr. Hess, as of the date of his supplemental declaration in support of the reply, says he has identified three class members who have expressed a willingness to serve as class representatives.[88] He says he was scheduled to meet with them in person, in northern California, the week of May 10.[89] Thus, even if the Court were to find Wiseman Park inadequate (a finding the Court does not make here), the Court would still have permitted it to attempt to substitute in one or more new class representatives.

Class counsel is otherwise adequate. Mr. Hess, in his initial declaration, sets forth his qualifications and experience at ¶¶28-36, and outlines the types of class actions he has previously handled. Also, Mr. Green of Green & Noblin has attached a copy of his firm's resume, and notes that the partners of the firm have over 30 years of experience representing plaintiffs in class action litigation in California and nationwide.[90]

For all of these reasons, the Court finds the class representative, Wiseman Park, LLC, is adequate.

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[88] Hess Supp. Decl., ¶45.

[89] *Id.*

[90] Green Decl., ¶3.

5. Typicality

The purported class representative's claim must be "typical" but not necessarily identical to the claims of other class members. It is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. *Classen v. Weller* (1983) 145 Cal.App.3d 27, 45. Thus, it is not necessary that the class representative have personally incurred *all* of the damages suffered by each of the other class members. *Wershba v. Apple Computer, Inc., supra,* 91 Cal.App.4th at 228.

"Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Seastrom v. Neways, Inc.* (2007) 149 Cal.App.4th 1496, 1502.

Here, given the fact typicality is not precisely differentiated from adequacy, and given the finding that Plaintiff Wiseman Park, LLC's status does not prevent it from serving as class representative, its claim is typical of the class claims.

6. Superiority and Trial Plan

In deciding whether a class action would be "superior" to individual lawsuits, the Court will usually consider:

> 1) The interest of each member in controlling his or her own case personally;
>
> 2) The difficulties, if any, that are likely to be encountered in managing a class action;
>
> 3) The nature and extent of any litigation by individual class members already in progress involving the same controversy; and
>
> 4) the desirability of consolidating all claims in a single action before a single court.

California Practice Guide, Civil Procedure Before Trial, ¶14:16 (The Rutter Group 2020) (citing

FRCivPro 23(b)(3)); *see also Basurco v. 21st Century Ins. Co.* (2003) 108 Cal.App.4th 110, 120; *Newell v. State Farm Gen. Ins. Co.* (2004) 118 Cal.App.4th 1098, 1101; *Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 1333; *Johnson v. GlaxoSmith-Kline, Inc.* (2008) 166 Cal.App.4th 1497, 1510; *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1537.

Further, under California law, a class action is not "superior" where there are numerous and substantial questions affecting each class member's right to recover, following determination of liability to the class as a whole. *City of San Jose v. Superior Ct., supra,* 12 Cal.3d 447, 459.

Here, there is not a significant interest of each member of the class in controlling his or her own case personally. The costs of litigating each class member's case individually against SW&S would certainly heavily outweigh any individual recovery (and, as Wiseman Park represents in the motion, it paid just $16.44 in carrying charges during the class period). There does not appear to be any other litigation by class members against SW&S challenging the 1% carrying charge as to the class defined in this case. It would be desirable to consolidate all of these claims in a single action, given the common nature of the carrying charge (and given its application to all members of the class by SW&S).

Element 2 of the superiority analysis addresses whether there are difficulties that are likely to be encountered in managing this case as a class action. Element 2 requires the Court to examine whether there has been a trial plan presented that would address such difficulties.

In *Duran v. U.S. Bank National Association, supra,* 59 Cal.4th 1, the California Supreme Court noted as follows:

> If statistical evidence will comprise part of the proof on class action claims, the court should consider *at the certification stage* whether a trial plan has been developed to address its use. A trial plan describing the statistical proof a party anticipates will weigh in favor of granting class certification if it shows how individual issues can be managed at trial. Rather than accepting assurances that a statistical plan will eventually be developed, trial courts would be well advised to obtain such a plan before deciding to certify a class action.

Duran v. U.S. Bank Nat. Assn., 59 Cal. 4th at 31-32 (emphasis in original). Under *Duran,* "[i]n wage and hour cases where a party seeks class certification based on allegations that the employer consistently imposed a uniform policy or de facto practice on class members, the party *must still demonstrate* that the illegal effects of this conduct can be proven *efficiently and manageably* within a class setting." *Id.* at 29 (emphasis added). "Trial courts must pay careful attention to manageability when deciding whether to certify a class action. In considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting the proposed class. If the court makes a reasoned, informed decision about manageability at the certification stage, the litigants can plan accordingly and the court will have less need to intervene later to control the proceedings." *Id.*

The term "trial plan" may imply an ambition that exceeds the reality of such things. In practice, trial plans tend to be relatively informal documents, essentially a short description of the party's vision of how the case will unfold. Trial plans are provisional and often evolve during the litigation. 2 Rubenstein, Conte & Newberg, Newberg on Class Actions § 4:79 (5th ed. 2020).

Subsequent to the hearing on the motion, Plaintiff Wiseman Park t submitted a proposed trial plan under separate cover. Plaintiff states that at trial, it anticipates offering what it labels: (1) the judicial admissions in SGWS's summary judgment motion; and (2) the deposition testimony of SGWS's C.C.P. § 2025.230 designees, Trish Rodriguez and Mike Casas, and move that they be admitted into evidence.[91] As to classwide damages, Plaintiff anticipates serving Defendant SW&S with interrogatories calling for it to state the following information: 1. The name and address of each class member; 2. The amount of carrying charges actually paid by

[91] Plaintiff's Trial Plan at 2:21-23.

each class member during the class period; 3. The amount of carrying charges assessed against, but not yet paid by, each class member during the class period; 4. The total amount of carrying charges paid by all class members during the class period; and 5. The total amount of carrying charges assessed against, but not yet paid by, all class members during the class period.[92] According to Plaintiff, no further evidence should be necessary to prove damages; nor should any expert testimony be required.[93]

The Court has reviewed the trial plan and finds that, at the certification stage, it is adequate. To the extent that the trial plan proves to be inadequate, this may serve as a basis for Defendant later moving for decertification.

IV.

RULING AND ORDER

For the foregoing reasons, the motion for class certification is granted, on an opt-out basis.

The Court sets a further status conference in this matter for July 26, 2021 at 2 p.m. The parties shall submit a joint statement on a going-forward plan, including a proposed class notice consistent with CRC 3.766, by Wednesday, July 21, 2021.

Dated: June 7, 2021

KENNETH R. FREEMAN

Kenneth Freeman
Judge of the Superior Court

[92] Plaintiff's Trial Plan at 3:11-19.

[93] Plaintiff's Trial Plan at 3:26-27.

PROOF OF SERVICE

I, Ryan J. Sullivan, hereby declare as follows:

I am employed by Green & Noblin, P.C., 2200 Larkspur Landing Circle, Suite 101, Larkspur, CA 94939. I am over the age of eighteen years and am not a party to this action. On September 30, 2021, I served the within document(s):

DECLARATION OF ROBERT S. GREEN IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND PROVIDING FOR NOTICE

☒ by electronic transmission of a PDF attachment of the above listed document(s) via my e-mail address to the email address(es) set forth below on this date.

☐ by placing the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Larkspur, California addressed as set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by depositing the document(s) listed above in a sealed envelope with delivery fees provided for a FedEx pick up box or office designated for overnight delivery, and addressed as set forth below.

Michael W. Scarborough
Helen Eckert
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
Four Embarcadero Center, 17th Floor
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heckert@sheppardmullin.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, executed on September 30, 2021, at Larkspur, California.

/s/ Ryan J. Sullivan
Ryan J. Sullivan